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YOUR MONTHLY COMPANION ON TAX & ALLIED SUBJECTS

October- 2015 Vol . IV | No. 1

Genuineness of Transactions

Burden of PROOF

Direct Taxes

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International Taxation

Other Contents

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Interactive Meeting with CA Suresh Prabhu, Hon'ble Railway Minister, organised by ICAI on 1st October, 2015 at BKC, Mumbai

CA Avinash Lalwani, President along with CA Hitesh R. Shah, Vice President and Mr. Ashok Manghnani, Hon. Jt. Secretary offering the flower bouquet to Shri Suresh Prabhu, Hon'ble Union Minister of Railways, Government of India at the felicitation function held on 1st October, 2015 at WIRC Bandra

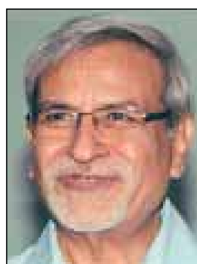
INTERNATIONAL TAXATION COMMITTEE

Half Day Seminar on TDS under Section 195 on Payment to Non-Residents held on 12th September, 2015 at Dahanukar Hall, Fort, Mumbai.

CA Hitesh R. Shah, Vice President delivering opening remarks to the delegates. Seen from L to R : CA Ganesh Rajgopalan, Convenor, CA Sushil Lakhani, Speaker, CA Naresh Ajwani, Chairman and Mr. Ujwal Thakrar, Course Co-ordinator.

CA Naresh Ajwani welcoming the faculties. Seen from L to R : CA Ganesh Rajgopalan, Convenor, CA Hitesh R. Shah, Vice President, CA Sushil Lakhani, Speaker and Mr. Ujwal Thakrar, Course Co-ordinator.

CA Sushil Lakhani addressing the delegates.



CA Kishor Karia chairing the Panel Discussion on Practical Case Studies and Issues.

Panellists

CA Gautam Nayak

CA Vishal Gada

Section of delegates

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Editorial

At the outset, let me congratulate the President of the Chamber of Tax Consultants as well as his team which has secured an extension of the due date for filing returns in those cases where statutory audit is mandatory from 30th September to 31st October, 2015. It would have been ideal if such administrative decisions were taken without wasting precious time of the judiciary, especially when it is already under strain of mounting pendency. The entire fiasco created by issuing notification of extension of due date only to those assessees who are in the territorial jurisdiction of Punjab and Haryana High Court and Gujarat High Court shows that the North Block may not find rule of least resistance as a viable option for creating better understanding between the assessees and tax gatherers. However, there is a silver lining to this entire episode, the Revenue Secretary, next day, tweeted and expressed regret for causing inconvenience to the professionals. I wish this atmosphere of courtesy and cordiality continues, which will induce confidence among the assessees and creates an atmosphere for better compliance.

Special Story in the present issue of the Chamber's Journal is on Genuineness of Transactions and Burden of Proof. Way back in 2002, we had brought out Special Story on similar topic. While writing the editorial for that issue, the then editor and my good friend Chetan Karia had in detail analysed the origin of hawala. Even today also, it makes an interesting read, especially for a person who wants to know why certain transactions are classified as hawala transactions.

In this Special Story, we have tried to analyse the concept of leading evidence under various sections of the Income-tax Act, 1961. The eminent authors have devoted lot of time and energy on the nitty gritty of the statutory provisions and law. Hence, I will restrain myself from saying anything further. I hope that in the ensuing season of assessment proceedings, this Special Story will come in handy to the readers.

I thank all the professionals who have taken time out of their busy schedules to contribute towards the October issue of the Chamber's Journal.

K. GOPAL
Editor

From the President

Dear Readers,

I have completed 3 months as a President doing my best to bond with my Chamber team members.

The current issue is carrying a theme of "Genuineness of Transactions/Burden of Proof". **I must compliment Advocate Paras S. Savla and CA Vinod Jain for creating a synopsis that provides excellent coverage on the subject. I am sure it will be used as reference material by our members for a very long time.**

The Chamber has made representation for extension of Date of Filing of Return and Tax Audit Report to CBDT, MOF to be extended to 30th November, 2015.However, this year was different from the previous years in the sense everybody was awaiting extension of due date of filing of Income Tax Return and TAR. Though the Chamber had filed a representation to extend the due date of Filing Returns and Audit Report. Even then there was no hearing and reply from CBDT. The Law and Representation Committee under the Chairmanship of Mr.Vipul B Joshi and CA Mahendra Sanghavi has filed writ at Mumbai Court. Dr. K. Shivaram, Advocate Rahul Hakani and other team members of KSA Legal had represented Chamber at Mumbai High Court. Our Chairman Advocate Vipul Joshi has also represented Chamber as Council for Writ. My heartiest congratulations to Law and Representation Committee and KSA Legal to get Mumbai High Court order of extension of date for filing of Return. For the benefit of readers last paragraph of judgment delivered on 30-9-2015 at 7.30 p.m. by Judge M.S. SANKLECHA AND Judge G. KULKARNI is as follows:-

"It may be noted that despite sufficient time being available, the Respondent – Revenue has chosen not to file any affidavit in reply. It is in this view of the matter, we are at this stage unable to consider all the aspects of the matter which may arise in the present case. However, taking into account the fact that the decision of the Gujarat High Court and Punjab and Haryana High Court have been accepted by the CBDT issuing orders under section 119 of the Act but very unfairly in of an all India Statute restriction its benefit to only two States and one Union Territory. This itself warrants an extension of due date to the same date as is available for the assessment in Gujarat, Punjab and Haryana to avoid any discrimination to the assessment elsewhere. Moreover, we find ourselves in agreement with the reasons given by the Gujarat High Court in all Gujarat Federation of Tax Consultants (supra) as also the decision of the Punjab and Haryana High Court in Vishal Garg (supra). We, therefore, pass the following order :-

(i) The Respondent No. 2 i. e. CBDT is directed to forthwith issue the order/notification under section 119 of the Income-tax Act and extend the due date for E-filing of the Income Tax Returns in respect of the assessees who are required to file return of income by 30th September, 2015 to 31st October, 2015,

(ii) It is made clear that at this stage we have not opined on any other issue except to the extent of the aforesaid directions. It is made clear that this order will not affect any other obligation that may arise under the Act."

Full Judgment is available on CTC website, After the Order of Mumbai High Court, Extension of date extension has come from CBDT as on 1-10-2015, Practically, extension remains on paper and is hardly of any use.

During September 2015, Chairman of various committees organised many successful seminars, lectures, meetings, Study Circle Meetings and ISG.

The student and IT Connect Committee has organised a lecture meeting on E-filing under Tax audit and Tally as an audit tool. I must congratulate CA Parimal Parikh and his team for organising a successful event at Dadar Club. The response was very good. There were more than 112 participants in that session. It was attended by students and as per the feedback collected by me, the delegates have demanded to repeat such events in the suburbs. I must acknowledge CA Haresh Chedda our past Council Member for helping in booking the venue.

The International Taxation Committee had organised a half Day seminar on TDS under section 195 on payment to Non-Residents. The issue was section 195(6) was amended by Finance Act, 2015 to provide for information to the Income-Tax department – whether tax is deductible or not. The amendment is expected to increase the burden of compliances substantially. The Government is expected to come out with the rules soon. The speaker, panellists and the Chairman of the panel discussion dealt with the subjects in-depth. The programme went very well. My heartiest congratulations to the Chairman and his team for organising a successful seminar.

The Government had come out with Voluntary Compliance Scheme under the Black Money Law. The scheme got over on 30th September, 2015. The Government has received over 600 declarations with undisclosed assets over ` 4,000 crores. The Law and Representation Committee had made the representation and sought clarifications on the Black Money Law. The Government has replied to the issues on which clarifications were sought. These are available on the Income-tax department's website. One of the most important clarifications was on the immunity available. As per the law, it appears that immunity under the 5 specified laws is limited. It has been clarified by the Government that that the immunity to persons who made Voluntary Declarations is exhaustive and complete for the 5 specified laws. The Chamber is thankful to the Government for the issuing these clarifications. I thank the Chairman of Law and Representation Committee for his efforts.

The Membership and Public Relations Committee had organised Half day event at Vapi on the subject was Important issues under Tax Audit and Recent amendments and issues in TDS u/s. 195 including CA Certificate F. No.15CB. My appreciation to Chairman CA Hemant Parab and his team for organising 3 outstation programmes. Our vision is cover areas beyond Mumbai is appreciated by Membership Committee. I hope our continuous efforts will bring more and more members to the CTC family. The response was that the programme was fair.

Delhi Chapter under Chairmanship of Advocate R. P. Garg is doing very well. On 12-9-2015, Chapter had organised a Half day program on Black Money .The response was good. On the day of seminar I visited Delhi and conducted a committee meeting after the event. Team, Delhi Chapter is now doing well. All the office bearers, advisors and past Chairman are putting in their best efforts to increase the programme visibility in Delhi.

Various Committees have already announced different programmes for month of October and November, the details of the same is given as follows :–

(1) Membership Committee is organising (1) Free Eye Check up camp (2) Half Day seminar at Jalgaon and (3) Half day Seminar at Dhule

(2) Corporate Committee is organising Seminar on Internal Financial Controls

(3) Allied Laws Committee is organising Seminar on Charitable Trust

(4) RRC Committee has announced Direct Tax RRC at Lavasa.

(5) Keeping in mind the larger interest of Chamber we have postponed our IDT Committee Full day seminar on Applicability of VAT and Service Tax on IPR and IPR Related Transactions. I know that shifting of seminar to another date is very difficult. I know Chairman CA Rajiv Luthia and team had difficult time but in larger interest of Chambers we shall appreciate for agreeing committee to postpone this event at a future date. IDT Committee will shortly announce RRC subject and speakers. The contract with hotel is now finalised. It will be held at Ambivali.

(6) As promised by Chairman CA Ketan Vajani, Direct Tax Committee will come plan and schedule the seminars next month onwards.

(7) Under the able leadership of CA Haresh Kenia, Journal Committee is working very nicely. The plan for next three months is ready with the Committee.

(8) Study Circle and Study Group Committee under the Chairmanship of CA Ashok Sharma is doing well.

(9) Research & Publications Committee has planned to release the book on ICDS.

Ministry of Finance by press release dated 30-9-2015 notification dated 29-9-2015-S.O. No. 2663(E) simplified the procedure for Self Declaration in Form No. 15G or 15H to reduce the cost of compliance and ease the Compliance Burden for the Taxpayer and the Tax Deductor. The procedure of the Forms by the deductor is also simplified. In my opinion it is a very good initiative by MOF.

To implement GST Government has made available the draft Business Processes of GST report of Government portal and invited comments from Stakeholders and Public at large. I have advised Law and Representation Committee with hold of Indirect Tax Committee to make representation for the benefit of society at large.

For the readers' benefit I want to share of One article from Book On Managing People:–

On 29-9-2015 RBI has cut bank interest rates by half a percentage point, to 6.75%. What prompted it? The decision of the Federal Reserve was not to raise interest rates in America earlier this month created room for the RBI to sneak in a big rate cut now. But growing concern about the world economy was the main spur. It was noted that global growth has weakened, particularly in other emerging-market economies, since its last monetary-policy meeting at the beginning of August. Global trade is shrinking by some measures. China's stock market crash and the slight devaluation of the yuan has unnerved the financial markets. Capital is flowing out of emerging markets has been already hurt by falling commodity prices and slow trade. India's economy is holding up fairly well in the circumstances (it helps that it is a commodity importer with few strong ties to China). A pick-up in industries, such as clothing, furniture and cars suggests that India's bounce-back from a rocky period in 2013 is being led largely by consumer spending. But the recovery "is still far from robust", says the RBI. India cannot evade the global misery. A more persistent drag to growth from weak exports is now likely. Does that mean rates go lower? Not right away. The RBI says its immediate focus is on working with government to push State-owned banks to pass on lower borrowing costs to consumers and companies..

Nation has celebrated 146th Birthday of Our Father of Nation Gandhiji. Gandhi has written that "There are seven things that will destroy us:– Wealth without work; Pleasure without conscience; Knowledge without character; Religion without sacrifice; Politics without principle; Science without humanity; Business without ethics." We shall try to implement in our life.

Emotional Intelligence – The ability to manage ourselves and our relationships effectively – consists of four fundamental capabilities:– self-awareness, self management, social awareness and social skill. Each capability, in turn is composed of specific sets of competencies. Below is a list of capabilities and their corresponding traits.

Self-awareness

- Emotional self-awareness: The ability to read and understand your emotions as well as recognise their impact on work performance, relationship and the like
- Accurate self-assessment: A realistic evaluation of your strengths and limitations
- Self-confidence: A strong and positive sense of self-worth

Self-management

- Self-control: The ability to keep disruptive emotions and impulses under control.
- Trustworthiness : A consistent display of honesty and integrity
- Conscientiousness: The ability to manage yourself and your responsibilities
- Adaptability: Skill at adjusting to changing situations and overcoming obstacles
- Achievement orientation: The drive to meet an internal standard of excellence
- Initiative: A readiness to seize opportunities

Social-awareness

- Empathy: Skill at sensing other people's emotions, understanding their perspective and taking an active interest in their concerns
- Organisational awareness: The ability to read the current of organisational life, build decision networks and navigate politics.
- Service orientation: The ability to recognise and meet customers

Social Skill

- Visionary leadership: The ability to take charge and inspire with a compelling vision
- Influence: The ability to wield a range of persuasive tactics
- Developing others: The propensity of bolster the abilities of others through feedback and guidance
- Communications: Skill at listing and at sending clear, convincing, and well-tuned messages
- Change Catalyst: Proficiency in initiating new ideas and leading people in a new direction
- Conflict management: The ability to de-escalate disagreements and orchestrate resolutions
- Building bonds: Proficiency at cultivating and maintaining a web of relationships
- Teamwork and collaboration: Competence at promoting co-operation and building teams

Good team building :- If you are holding a higher post in organisation then Seniors can suggest their views to persons/colleagues/subordinates but it cannot be imposed or compelled to implement.

Having freed ourselves from busy month of September let us welcome October with open arms and keep sometime at hand to enjoy festivals of Navratri, Sharad Poornima, Dusshera and Diwali. My best wishes to all readers and their family members for the upcoming festivals.

AVINASH LALWANI

President

Chairman's Communication

Dear Readers,

Entire tax paying community & tax professionals had sleepless nights since there was no sign from CBDT for extension of the due date of filing return of income along with the tax audit report, in spite of repeated representation made by various professional bodies including Chamber. Only after writ petition filed in various High Courts, the Gujarat HC & Punjab & Haryana HC passed orders directing the CBDT to notify an extension of time up to 31st October, 2015. Initially, the CBDT came out with the extension notification applicable only to the State of Gujarat & State of Punjab & Haryana, however after Bombay HC order, CBDT came out with press release on 1st October, 2015 extending the time limit for filing Tax Audit Reports and Return of income till 31-10-2015. Even though this might have given some relief to professionals and assessees, however, I believe, the majority of tax professionals would not have waited for the announcement of extension of time and must have completed their audits and filing of returns well within the due date of 30th September.

The initial burden of proving the claims made in the return of income is of the taxpayer, however, this initial burden shifts on the Revenue if it makes allegations against the assessee and in such situation, it is for the Revenue to first discharge its burden of proving the correctness of the allegations and once the same is done, the onus once again shifts back to the assessee. All these sound very complex and at times, in reality it may be difficult to understand on whom the burden is and how to discharge the same. Therefore, it is very essential to understand as to how the onus needs to be discharged and as to when the burden shifts from one party to another and what sort of evidences/claims need to place on record to discharge the onus cast upon the assessee. The party must present evidence supporting their case, and the party must show the merits of the claim. The party who desires to move the Court must prove facts and is subject to two exceptions. One, he is not required to prove such facts as are especially within the knowledge of the other party and he is not required to prove the allegations in respect of which there is any presumption of law or of fact.

There are various deeming provisions in the Income-tax Act which cast burden on the taxpayers to establish the genuineness of transactions, failing which the same will be charged to tax. The Courts of law have also held that these deeming provisions would be treated as charging sections in so far as those deeming provisions are applicable. In issue regarding *bona fide* and genuine transaction on one hand and sham/bogus transactions on the other, the burden of proof would be on the party alleging it to be sham. Similarly, burden of establishing *mala fide* is very heavy on the person who alleges it. In view of this aspect, certain principles of law such as burden of proof, onus, quality of evidences, etc. assume greater significance. Therefore, it is very much pertinent to go through relevant factors essential for establishing the genuineness of the transactions *vis-à-vis* the Income Tax Law and Evidence Law. There are various issues involved on the subject which tempted chamber to bring out special story on this subject.

I thank the authors of this special story for giving their articles well within the time frame. I am thankful to the authors of the articles S/Shri Aseem Chawla, Anuj Mathur, Thangadurai V. P. Reepal Tralshawala, Vipul Joshi, Dharan Gandhi, Jagdish Punjabi, Nishit Gandhi, Paras S. Savla, Ajay Singh, Rahul Hakani, Jiger Saiya & Abhay Kumar. I am also thankful to Shri Paras S. Savla & Vinod Jain for designing the structure of this special story. I am sure the readers shall be immensely benefited by the same.

After completing hectic September targets, it's time to enjoy festive spirits of Dandiya Rass and I wish all the professionals and members a very Happy Dussehra.

CA. HARESH KENIA
Chairman – Journal Committee

Aseem Chawla, Anuj Mathur &
Thangadurai V.P., *Advocates*

General Concepts : Genuineness of Transactions

Introduction

The dispute on the aspect of the genuineness of transactions did begin to gain significance since the inception of commercial laws. With the advent of revenue laws, it had become an ever evolving concept. The legislature and judiciary have consistently expanded its scope and ambit so as to counteract the tax evasive practice adopted by unscrupulous taxpayers.

In so far as the Indian taxing statute is concerned, it is worthwhile to mention here that the erstwhile Indian taxing statute i.e., Income-tax Act, 1922 (hereinafter referred to as 'the 1922 Act') did not have any specific provisions to charge the evaded income as income of the taxpayers, though the importance of the same was acknowledged by the courts of law[1].

However, the prevailing income tax legislation i.e., Income-tax Act, 1961 ('the Act'), had enshrined six provisions, i.e. Section 68 to 69D, under the chapter 'aggregation of income'. The said provisions cast a deeming fiction on the taxpayers to establish the genuineness of transactions, failing which the same will be charged to tax. The courts of law have also held that these sections would be treated as charging section in so far as those particular sums are concerned[2].

Due to the aforesaid aspects, certain principles of evidence law such as burden of proof, onus, quality of evidences, etc., assume greater significance. Here, it may be mentioned that the provisions of the Evidence Act, 1872 ('IEA') do not apply to income tax law in a strict sense, as held by the Hon'ble Apex Court in the case of (*Dhakeshwari Cotton Mills [1954] 26 ITR 775).*

However, the Hon'ble Supreme Court in a subsequent decision of *Chuharmal vs CIT [1988] 172 ITR 250* had observed that while the rigours of evidence law may not be applicable to income tax cases, nevertheless, the assessing officers are not prevented from applying such rules, in proceedings before them. Hence, the importance of the principles of evidence law cannot be undermined while examining the genuineness of transactions, during the course of income tax proceedings.

With this backdrop, it may be pertinent to delve into relevant factors essential for establishing the genuineness of the transactions *vis-à-vis* the Income tax law and Evidence law.

---

1. *Mahabir Prasad Munna Lal vs. CIT* (1947) 15 ITR 393; *G.M. Madappa vs. CIT* (1948) 16 ITR 385; *Lal Mohan Krishan Lal Paul vs. CIT* (1944) 12 ITR 441
2. *Bhogilal Virchand vs. CIT* (1981) 127 ITR 591 and *CIT vs. Hari Prasad Chaudary* (1984) 147 ITR 791

I. Burden of Proof

The question of burden of proof assumes greater importance in the early stage of a case, where the question is which party ought to prove the existence of certain facts. In general parlance, the burden of proof lies upon the party which has made a claim or which has requested the action of the Court.

In so far as income tax cases are concerned, the initial burden generally lies upon the revenue authorities to prove any wrong doing on the part of the taxpayer.

However, under the specific provisions of Sections 68 to 69D of the Act, the taxpayer ought to establish the 'nature and source thereof' of the transaction, and thus, the initial burden is on the taxpayers to establish the genuineness of the transaction[3]. Therefore, it would be appropriate to state that the legislature has cast a presumption upon the taxpayer by incorporating the terms 'nature and source thereof the transactions' into the aforesaid provisions of the Act. The said presumption is said to be satisfied when the taxpayer discharged its initial onus placed upon him.

II. Discharge and Shifting of Onus

There is a distinction between the expressions 'burden of proof' and 'onus'. It has been held[4] that burden of proof lies upon a person who has to prove the fact and it will never shift. In contradistinction, onus of proof shifts and such shifting of onus is a continuous process in the evaluation of evidence.

In terms of the IEA, the burden of proof always lies on the person who makes a claim. However, once a party leads evidence to support its claim, the 'onus' shall shift to the other party to contest such evidence or claim.

As regards income tax assessments, the rule of thumb is a presumption of good faith. In other words, during the course of assessment proceedings, it is presumed that the taxpayer has acted in a *bona fide* manner, unless proven to be the contrary by the revenue authorities.

Needless to mention, where revenue authorities do lead evidence to support their contention, the onus does shifts upon the taxpayer to counter such contention.

That said, one must be mindful that the rule of thumb does not apply where the special provisions of Sections 68 to 69D of the Act are pressed into service. In such cases, a presumption against the taxpayers is raised, which can be rebutted by explaining the 'nature and source' of the transactions it had entered into, to the satisfaction of the assessing officer, failing which, the assessing officer may add such amounts to the income of the taxpayer.

In various judicial pronouncements[5], it has been held that the onus is upon the taxpayer to establish the three main ingredients, namely, identity of parties, creditworthiness of such parties and lastly, the genuineness of the said transaction. Having established these aforesaid ingredients, the onus shifts from taxpayer to the revenue to disprove the same.

Therefore, it is necessary for the taxpayer to prove prima facie establish the identity, creditworthiness and genuineness of the transaction entered in his books of account. Only after the taxpayer adduces evidence to establish the aforesaid, the initial onus is said to be discharged.

Here, one may note that in a plethora of decisions[6], it has been held that merely by establishing the identity of the party shall not

3. *Kale Khan Mohammad Hanif vs. CIT* (1963) 50 ITR 1, *Govindarajulu Mudaliar (A) vs. CIT* (1958) 34 ITR 807 and *CIT vs. Devi Prasad Vishwanath Prasad* (1969) 72 ITR 194
4. *A. Raghavamma vs. A. Chenchamma* AIR 1964 AC 136
5. *Nemi Chand Kothari vs. CIT* (2003) 261 ITR 254 (Gau.)
6. *Shankar Industries vs. CIT* (1978) 114 ITR 689, *C.Kant & Co. vs. CIT* (1980) 126 ITR 63, *Prakash Textile Agency vs. CIT* (1980) 121 ITR 890

be sufficient to discharge the onus. Rather, the burden with respect to all three ingredients ought to be discharged by the taxpayer. The judiciary has even held[7] that mere filing of confirmatory letters cannot be regarded as sufficient discharge of onus on the part of the taxpayer.

However, once the taxpayer discharges the initial burden of proof, it will not, thereafter, be for the taxpayer to further explain as to how, and in what circumstances, the third party obtained the money and how or why he came to transact with the taxpayer. The burden will only shift to the revenue authorities to show why the taxpayer's case cannot be accepted and why it must be held that the entry, though purporting to be in the name of a third party, still represent the income of the taxpayer from a suppressed source. The Hon'ble High Court in a number of cases[8] has held that in order to arrive at such a conclusion, the revenue authorities has to be in possession of sufficient and adequate material.

It is worthwhile here to cite the decisions of the Hon'ble Delhi High Court in the cases of *MOD Creations Pvt. Ltd. vs. ITO (2013) 354 ITR 282* and *CIT vs. Kinetic Capital Finance Ltd. (2013) 354 ITR 296,* wherein, it was held that it is not obligatory on the part of the taxpayer to explain the source of income, such as genuineness of transaction entered into between the creditors and sub-creditors.

At this juncture, one may note that the Hon'ble Supreme Court, in the case of *CIT vs. Lovely Exports (P.) Ltd. 216 CTR 195,* while adjudicating the addition of unexplained share capital, has held that the taxpayer is not required to explain the source of the money in the hands of the share applicant.

However, an exception was carved out to the aforesaid rule of inessentiality to explaining the source of income, especially for share application money. Such exception was enacted by way of an amendment to Section 68 by the Finance Act, 2012, to neutralize the aforesaid judgment of the Hon'ble Supreme Court in the case of *CIT vs. Lovely Exports (P.) Ltd (supra).*

Another important aspect that deserves mention is that the taxpayer cannot be compelled to prove the negative[9]. For instance, if the taxpayer denies the existence of certain income, the burden of proof lies upon the revenue authorities to demonstrate that such income has been earned by the taxpayer.

III. Evidence: Direct and Indirect

To establish the genuineness of the transactions, identity of parties and creditworthiness of such parties, the taxpayers must furnish various evidences to the satisfaction of the tax department. The extent to which the taxpayer is bound to furnish evidence and the quality of those evidences has also attained significance. Therefore, it is pertinent to examine the concept of 'evidence' as well.

At the outset, it would be relevant to highlight the definition of 'Evidence' as per Section 3 of the IEA, which is usefully reproduced as under:

"Evidence—Evidence means and includes:

(1) All statements which the Court permits or requires to be made before it in relation to matters of fact under inquiry, such statements are called oral evidence.

(2) All documents including electronic records produced for the inspection of the Courts; such documents are called documentary evidence."

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7. *Bharti P. Ltd. vs. CIT* (1978) 111 ITR 951, *CIT vs. W.J. Walker & Co.* (1979) 117 ITR 690, *CIT vs. United Commercial & Industrial Co. (P) Ltd.* (1991) 187 ITR 596
8. *Orient Trading Co. Ltd. vs. CIT* (1963) 49 ITR 723, *Sarogi Credit Corporation vs. CIT* (1976) 103 ITR 344, *Sundarmal Bagaria vs. CIT* (1979) 10 CTR 349
9. *CIT vs. Daulat Ram Rawatmull* (1973) 87 ITR 349

Also, under Section 5 of the Evidence Act, 1872, evidence may be given in a proceeding with regard to the existence or non-existence of the facts in issue, as well as of such other facts as are declared to be relevant by the Act.

At the outset, it would be imperative to understand the expressions 'fact in issue' and 'relevant fact'. The expression 'fact in issue' which is defined in Section 3 of the IEA, refers to those facts which a party to litigation must prove in order to succeed. 'Relevant facts' are facts which though, not fact in issue, but which tend, either directly or indirectly, to prove or disprove a fact.

Where evidence relates directly to the existence or non-existence of a fact in issue, the evidence is regarded as direct evidence. In other words, if direct evidence is admitted, it would not require any mental process on the part of the Court to establish a fact in issue.

In contradistinction, indirect evidence is evidence that gives rise to a logical inference that such a fact does exist. Accordingly, whilst indirect evidence (otherwise known as circumstantial evidence) does not directly prove a fact in issue, a logical inference may be arrived to prove the same. Such evidence does have probative force.

Whilst the rigours of evidence law do not strictly apply to income tax proceedings, Courts have held[10] that even indirect evidence or circumstantial evidence is admissible during income tax proceedings. However, it may be mentioned that hearsay evidence is not admissible under Income tax law.

IV. Summons: Duty of Assessing Officer

Whilst the presumption has been set against the taxpayers in terms of Sections 68 to 69D of the Act, one must bear in mind that the objective of incorporating these provisions is to tax only the illegitimate income, rather than the legitimate income of the taxpayer.

Therefore, it is only apt to state that it is also the duty of the tax department to assist the taxpayer in establishing the genuineness of the transaction by conducting independent enquiries.

Section 131 of the Act is an important tool in the kitty of tax officers to conduct independent enquiries to examine the veracity of the claims of taxpayers. In situations where the assessing officer doubts the genuineness of a transaction or document produced by the taxpayer, the assessing officer may conduct an enquiry with parties related to such transaction / documentation and require them to produce necessary information to corroborate the claims of the taxpayer. Moreover, such income tax authorities may examine witnesses on oath and obtain their statements.

The powers of income tax officers under this provision are co-terminus with that of a civil court under the Code of Civil Procedure, 1908. Whilst income tax authorities are entrusted with wide powers under this provision, nevertheless, income tax officers, being quasi-judicial authorities, ought to act in a judicious and fair manner, while using such powers.

Therefore, while evaluating evidence adduced pursuant to an enquiry under Section 131 of the Act, the income tax officers must proceed cautiously and should not jump to any conclusions. It is a settled principle of law that application of mind is sine *qua non* in such proceedings, and that due care and attention must be exercised[11].

Here, one may refer to the judgment of the Hon'ble Delhi High Court in the case of *CIT vs. Gangeshwari Metal (P) Ltd. (2014) 361 ITR 10,* wherein, it has been held that the Assessing Officer cannot 'sit back with folded hands' till the taxpayer exhausts all the evidence or

10. *CIT vs. Jaikumar Bakilwal* 366 ITR 217 (Raj.)

11. *New Central Jute Mills Co Ltd. vs. Dwijendralal Brahmachari* [1973] 90 ITR 467 (Cal)

material in his possession and then comes forward to merely reject the same on the basis of presumptions. In case of clear lack of enquiry on the part of the Assessing Officer, no addition can be made under the Act.

Moreover, the assessing officers are also expected to respect the principles of natural justice as enunciated by the judiciary from time-to-time. Therefore, it is the duty of the assessing officers to afford an opportunity to the taxpayer to rebut the material and evidence collected by him.

It would be apt to add here that where the tax officer cannot record a statement behind the back of the taxpayer, without providing an opportunity to the taxpayer to cross-examine such witness. Such lapses have been held[12] to be a gross breach of the principles of natural justice.

Furthermore, while invoking the provisions of Section 131 of the Act, income tax officers must not be biased or presumptious against the taxpayer, while evidence and statements must be weighed upon their own merits. Here, one may usefully refer to the decision of the Allahabad High Court in the case of *Sheo Narain Duli Chand vs. CIT [1969] 72 ITR 766,* wherein, it was held that the claim of a taxpayer cannot be rejected on the suspicion that the witness came forth only to oblige the taxpayer. Such presumptions, in the absence of strong indicators, are fallacious and cannot be raised.

It is a common occurrence that the various witnesses called upon fail to attend the office of the assessing officer or produce the requisite details. It was held by the Hon'ble Supreme Court in the case of *Anis Ahmad and Sons vs. CIT(A) [2008] 297 ITR 441* that mere absence of witness could not lead to an adverse inference against the taxpayer.

V. Obligation (Right) of taxpayers for specific requests to the Assessing Officer

It may be mentioned that the taxpayers are also entitled to make specific requests to the income tax authorities to conduct an independent enquiry under Section 131 or Section 133(6) of the Act before making additions to his income. In other words, the taxpayers may make specific requests to the Assessing Officer for summoning parties or calling for information under the extant provisions of the Act.

In such a scenario, the Assessing Officer is duty bound to act upon the specific requests made by the taxpayer. Where an assessing officer passes an order without acceding to the request of the taxpayer to enforce attendance of witnesses etc., such orders have been held[13] to be unsustainable in law.

VI. Powers of the Assessing Officer as per the Civil Procedure Code

In order to facilitate income tax officers in gathering relevant evidences and making enquiries for the purpose of ascertaining income of a taxpayer in a given assessment year, the legislature has extended certain powers to the assessing officer, which are otherwise available to a Court under the Code of Civil Procedure, 1908.

The said powers, which are enshrined under Section 131, are as under:

a) Power to discover and inspect;

b) Power to enforce the attendance of any person, including any officer of a banking company and examine him on oath;

c) Power to compel the production of books of account and other documents; and

d) Power to issue commissions.

12. *Prakash Chand Nahta vs. CIT* [2008] 301 ITR 134 (MP)
13. *EMC (Works) Pvt Ltd vs. ITO* [1963] 49 ITR 650 (All); *Continental Seeds & Chemical Limited vs. ACIT* [2003] 1 SOT 393 (Del)

In terms of Order XI of the Code of Civil Procedure, 1908, every party to the suit is entitled to discover by interrogation of the opposite parties and inspect the documents furnished by the opposite parties.

It is generally presumed that the evidences gathered by the Officer, by exercising the power enshrined under Sections 131(1) to 131(c) of the Act, belongs to the taxpayer and the income thereof will be added to his total income as undisclosed income or otherwise. Thus, the onus shifts to the taxpayer to prove beyond doubt that such income should not form part of his total income.

The power to issue commission is generally employed by a Court when a witness may be unable to attend the court due to certain reasons, for instance, his residence being beyond the local limits of the court's jurisdiction[14]. In such cases, the Court may relax the rules of attendance and may issue a commission to a Court in the jurisdiction of the place where the person proposed to be examined does reside.

Similarly, income tax authorities may issue commissions to effectuate a local investigation. For instance, the assessing officer may issue commissions to the Valuation Officer, where the cost of construction of an asset is subject matter of doubt.

VII. Cross Examination and Principles of Natural Justice

It cannot be emphasised enough that all revenue authorities are quasi judicial authorities and therefore, have to pay strict regard to the rules of natural justice. The legal maxim 'audi alteram partem' which in its literal sense, means that no man can be condemned unheard, is a time tested principle of law and has been unequivocally upheld[15] by the judiciary.

Accordingly, it is the duty of Income tax authorities to place on record, all the evidence and material gathered against the taxpayer and allow adequate opportunity to the taxpayer to rebut the same.

Here, the important point to bear in mind is that the assessing officer is not debarred from relying on private sources of information, which he may not disclose to the taxpayer at all. However, the principles of natural justice shall be pressed into service, where such officer proposes to use such evidences against the taxpayer. In such cases, the officer is duty bound to communicate to the taxpayer, the substance of such evidence, and thereafter, afford sufficient opportunity to the taxpayer rebut it.

Strict adherence to the rules of natural justice are essential to avoid undue reliance being placed by assessing officers over information obtained from third parties, the veracity of which, has not been established.

Applying the principles of natural justice, Courts have held[16] that assessment conducted based on the result of private enquiries conducted at the back of the taxpayer was set aside because the evidence gathered was not placed on record before the taxpayer. Therefore, where tax officers propose to rely upon evidence in a manner adverse to the taxpayer, the taxpayer must insist the officers to provide a copy thereof, to facilitate him to examine and assail such evidence.

Similarly, the right of cross-examination also finds its genesis in the principles of natural justice. The right of cross-examination may be pressed into service where an income tax officer proposes to rely upon a statement of a witness, which is contrary to the arguments or contentions of the taxpayer.

Furthermore, where the assessing officer fails to adhere to such rules, it is regarded as a serious flaw which makes the resultant order a nullity, as held in the recent decision of the Hon'ble Apex Court in *Andaman Timber Industries vs. CCE [2015] 62 taxmann.com.*

At this juncture, it may be highlighted that statements of witness are regarded as an

14. Rule 4, Order 26, Code of Civil Procedure, 1908
15. *Swadeshi Cotton Mills vs. UOI* [1981] 68 AIR 818 (SC); *Sahara India (Firm) vs. CIT* [2008] 300 ITR 403 (SC)
16. Dhakeshwari Cotton Mills (supra); *Kishinchand Chellaram vs. CIT* [1980] 125 ITR 713 (SC)

admissible piece of evidence. Nevertheless, such statements, at best, only raise a rebuttable presumption against the taxpayer and by no stretch of imagination, be regarded as a conclusive proof of a fact.

Therefore, it follows as a natural corollary that the taxpayer must be afforded an opportunity to rebut such presumption, by allowing him to cross-examine the persons / witnesses, from whom, such statements have been obtained.

In view thereof, if an assessing officer relies upon unconfronted statements of third parties, or where, due opportunity has not been given to the taxpayer to examine such statements or cross examine such witnesses, additions made by relying upon such statements are unsustainable[17].

VIII. Rejection of Books of account under Section 145 of the Act

Under the provisions of Section 145 of the Act, an assessing officer is empowered to reject the books of account of the taxpayer, under the following situations:

a) When he is satisfied with regard to the correctness and completeness of the accounts; or

b) Where the method of accounting (i.e., cash or mercantile) has not been regularly followed by the taxpayer; or

c) Where the income has not been computed in accordance with the 'Income Computation and Disclosure Standards'.

Practically speaking, this provision is invoked for a variety of reasons, such as significant variance in profitability ratios, absence of key documents such as stock registers, vouchers etc. The aspect of rejection of books of accounts depends upon case-to-case and involves a certain degree of subjectivity and discretion.

The said provision may also be pressed into service when the enquiries made by the tax officer yields doubt in his mind regarding the genuineness of documentation or transactions, having a bearing on the accounts of the taxpayer.

A classic case of rejection of accounts based on the credibility of documents is where the taxpayer has depicted purchases from parties, which the assessing officer found to be bogus. Even unexplained cash credits have been held[18] to justify the rejection of books of account in certain cases.

However, it should be kept in mind that the books of account of the taxpayer should not rejected merely because that it casts a pall of doubt or suspicion in the minds of the assessing officer. Furthermore, insignificant mistakes with the accounts do not necessarily bring the case within the ambit of this provision and therefore, do not warrant rejection of accounts, as held by the Hon'ble Supreme Court in the case of *CIT vs. Padamchand Ramgopal [1970] 76 ITR 719 (SC).*

In Summary

The importance of genuineness of transactions has been unequivocally acknowledged[19] and emphasised by various courts of law even before the enactment of the existing Act, which had incorporated specific provisions. Also, with the growing ingenuity of taxpayers to evade taxes by indulging in dubious means (for instance, the practice of bogus share application money), the law governing such transactions (such as Section 68) have also evolved to counteract such malpractices.

Nevertheless, one must bear in mind that the age old concepts such as burden of proof, onus, evidence etc., do play a pivotal role in income tax proceedings and therefore, their importance can never be undermined.

17. Land Development corporation [2009] 316 ITR 328 (Kar); Supertech Diamond Tools (P) Ltd [2012] 44Taxmann.com 460 (Raj); CIT vs. Pawan Kumar [2009] 316 ITR 324 (P&H)
18. *Abdul Khadar Pvt vs. CIT* [1960] 38 ITR 341 (Mad)
19. *Mahabir Prasad Munna Lal vs. CIT* (1947) 15 ITR 393; *G.M. Madappa vs. CIT* (1948) 16 ITR 385; *Lal Mohan Krishan Lal Paul vs. CIT* (1944) 12 ITR 441

CA Reepal Tralshawala

Bogus Purchases

Introduction

The issue of bogus purchases is quite old, however this particular issue has emerged as one of the hot topics in the recent past mass scale unearthing of fictitious dealers. Advancement of Technology has its own implications and has led to more transparency. However, many a times, the advantage derived from technology advancement may lead to disadvantage for few people. The issue of bogus purchases in large scale is the result of technology advancement whereby the VAT authorities are able to easily gather the information of the dealers who have not paid VAT (thereby terming them as 'Suspicious Dealers') and the dealers claiming set off in respect of the VAT not paid by other dealers (thereby not giving credit of set off of VAT so claimed and recovering the VAT from such dealers with interest and penalty). So far this sounds quite simple, equitable and logical – from the point of view of VAT authorities. However, come to the Income Tax provisions and loads of issues and complexities start arising and there is no one straight rule or formula to overcome the complexity and the fate of each assessee in this situation would only depend upon the facts of his case.

Implications under VAT law and stand taken therein

As far as VAT law is concerned, as stated above, the VAT authorities are basically and primarily concerned with the collection of VAT and therefore if VAT is not paid by a particular dealer and set off/credit is availed of in respect of the same VAT by another dealer, then the VAT authorities have power under the MVAT Act to recover the VAT from the dealer claiming set off. The relevant provision in this regard i.e. section 48(5) of the MVAT Act is reproduced hereunder:

"For the removal of doubt it is hereby declared that, in no case the amount of set off or refund on any purchase of goods shall exceed the amount of tax in respect of the same goods, actually paid, if any, under this Act or any earlier law, into the Government treasury except to the extent where purchase tax is payable by the claimant dealer on the purchase of the said goods effected by him:

***Provided** that, where tax levied or leviable under this Act or any earlier law is deferred or is deferable under any Package Scheme of Incentives implemented by the State Government, then the tax shall be deemed to have been received in the Government Treasury for the purposes of this sub-section."*

The VAT authorities realised that there were thousands of dealers who were not paying VAT whereas set off/credits were taken by other dealers in respect of VAT paid to such dealers. In view of this, the VAT authorities in their website published the list of all the dealers who were not paying VAT (although they were liable to) and termed them as 'Suspicious Dealers'.

Not only this, the VAT authorities summoned many of these dealers and their statements were recorded which revealed that they were not carrying out any actual transactions and were merely issuing accommodation bills. In many cases, it was also found that the actual operations were conducted by some other person (identity not known) who used to pay monthly compensation for using the name and bank accounts of these so called dealers.

However, even the list published was not sacrosanct and names of dealers are added and at the same time even deleted by the VAT authorities. Thus, the dealer who was earlier notified as suspicious dealer; was removed from the list once the VAT was paid by such dealer. Hence, the list includes even genuine dealers who failed to make payment of VAT for whatever reasons. In any case, the VAT authorities were only concerned with the collection of VAT and hence, notices were issued to all such dealers who had claimed set off/ credits in respect of VAT payments on purchases made from suspicious dealers. Thus, the VAT department not only collected VAT but also charged interest and in many cases, also levied penalty.

The VAT department forwarded all the documents and evidences in their possession to the income tax department to take further action in the cases of assessees having made purchases or otherwise from such suspicious dealers.

Having collected VAT from dealers who had claimed set off/credits, can this automatically lead to admission/confirmation of bogus purchases? The answer to this is a big NO for the reason that VAT is collected in terms of the provisions of section 48(5) of MVAT Act since the other party did not make the payment of VAT. Secondly, by merely making payment of VAT as per MVAT provisions, the purchases made could not be automatically treated as bogus. Hence, whatever stand that the VAT department may take or may have taken, that by itself does not lead to any conclusion as far as the income tax assessment proceedings are concerned.

Bogus Purchases – Various facets of this term

The term 'bogus purchases' in itself suggests that no purchases whatsoever have been made since the word 'bogus' presupposes fake; not genuine. However, in reality, all the cases where purchase made from the respective purchaser, if not proved, is considered and termed as bogus purchases – irrespective of the situations such as – purchase party not traceable; purchase party not confirming purchases; party confirms purchases but no supporting evidences to prove transaction; transactions look fishy on the face of it; purchase actually made but bill of other party; etc… Thus, all these situations are considered by the revenue under one roof i.e. bogus purchases. As stated earlier, since there is no thumb rule prescribed for treatment to be given to cases of bogus purchases, the revenue makes additions/ disallowances in the manner that deems fit to their respective wards/jurisdiction and that too in all cases irrespective of whether the facts of a particular case warrant such addition or disallowance. This leads us to the manner in which the additions are made by the revenue.

Manner of additions

Initially, when this issue of bogus purchases was unearthed by VAT department on large scale and information sent to the income tax department as also list of such suspicious dealers published by the VAT authorities; in almost all the cases of income tax assessments wherein assessee had made purchases from such suspicious dealers as per list published by VAT authorities, the entire purchases made from such parties were disallowed and added back to the total income. This was the stand taken by the department in almost all cases for the first year, however, in subsequent years the department started taking different stand in the matter of bogus purchases. The manner of additions changed completely and the following type of

additions were seen made in different cases of assessee—

a) Entire disallowance of purchases made from suspicious parties;

b) *Ad hoc* estimated percentage of profit on the quantum of purchases made from such suspicious parties;

c) Additions applying peak theory;

d) Rejection of book results and estimating GP on overall sales;

e) Additions u/s. 69C or u/s. 40A(3) and even u/s. 68 in some cases;

Thus, the manner of making additions in respect of issue of bogus purchases changed completely and this different type of additions/ disallowances are made taking into consideration the facts of the case of each assessee and also considering the documentary evidences furnished in the course of assessment in support of the purchase made from suspicious dealer. Further, the manner of additions/disallowances made were greatly impacted by the nature of business activity carried out by the assessee i.e. whether the assessee is trader or manufacturer or otherwise. This leads us to further discussion on the impact and manner of additions made based upon the nature of business activity carried out.

Impact of additions depending upon the nature of business activity carried out and also considering the method of accounting adopted and entries in books of account

A. Trader

A trader's case is considered to be the far most-better case than others provided that the trader is able to prove the quantitative details of purchases and sales. Since there cannot be sales without purchases, and if the goods are sold or even shown as part of stock-in-trade, then both these is not possible if the goods were not purchased. Hence, in such situation, the income tax department cannot deny the fact of purchase of goods else even the sales would have to be ignored to this extent. Thus, unless the department is able to prove conclusively that such trader has purchased goods from grey market in cash and not from the party whose bills is placed on record, the only recourse that would be left with the department is to either check for the inflation in purchase price to make disallowance accordingly or estimate GP on such purchases (depending upon the facts of the case as also considering the percentage of VAT charged in respect of such goods). There are now many decisions in case of trader wherein only GP addition is sustained. Few of these decisions are:

CIT vs. Sathyanarayan P. Rathi 351 ITR 150 (Guj.)

CIT vs. Bholenath Poly Fab P. Ltd. 355 ITR 290 (Guj.)

CIT vs. Simit P. Sheth 356 ITR 451 (Guj.)

B. Manufacturer

In case of a manufacturer, unless the manufacturer is maintaining complete quantitative details of raw materials input, consumption, finished goods output, scrap, etc., it would be very difficult to prove for the manufacturer that the goods had actually been purchased from such suspicious dealers. This is for the reason that in contrast to a trader, the manufacturer may not be able to prove one to one nexus or correlation of goods purchased and utilised in the manufacturing activity. Hence, in cases of manufacturers, if from the quantitative details, it cannot be conclusively proved that the goods were actually purchased, then the only recourse left would be to prove from the facts of the case that the yield is comparative to the earlier years or industry norms OR without purchase of goods (or the quantity of goods purchased), no finished goods could have been manufactured / produced.

C. Construction Industry

This is the most difficult industry for an assessee to prove conclusively that goods have been actually purchased from the suspicious dealer and that the same goods are used in the construction. Normally, in construction industry, the goods purchased are cement, steel, bricks, sand, etc. and these raw materials are such that they cannot be correlated with the construction work carried out. Further, it is a normal phenomenon in this industry that no stock records and or consumption records are maintained. In such situation, the only recourse left with the assessee to prove its case is –

a) Comparison of gross profit/net profit with earlier years and or industry norms and if entire purchase disallowance, the resultant gross profit/net profit become absurd;

b) If purchase of say, steel or cement from such suspicious dealers is of huge magnitude, then can also prove that without purchase of the quantity from such dealers, the construction itself could not have been done and for this, architect certificate can also be useful.

In cases of contractors or builders, if the facts are not supporting the case in any manner, then the method of accounting employed may work to the advantage of the assessee. For example, if the assessee is following project completion method of accounting, then during the relevant year, if the project is still in progress, then the disallowance could lead to only reduction in WIP carried forward since the final outcome/ addition would be effected in the year of completion of the project. If the assessee is following WIP method of accounting whereby the assessee is estimating gross profit on the total amount of expenses incurred during the year, then for the relevant year in which purchases are found to be made from suspicious dealers, the expenses would get reduced to the extent of such purchases thereby reducing the carryover of the WIP (the department may take the derived gross profit as the basis for adopting estimate percentage of profit).

D. Infrastructure projects / Government contracts for civil work

This is no different as such from the construction industry since the same difficulty would be faced by the assessee here also. The only added advantage here is that the R.A. bills issued are regularly scrutinized by the Government officer who also verify and examine the quantity of every item mentioned in the R.A. bills and certify the same as to its correctness. Thus, if the overall quantity mentioned in the R.A. bills could be correlated with the quantity purchased and recorded in the regular books of account, then the facts of such assessee would be much more-better than other cases of assessee falling in this category.

E. Gem & Jewellery industry

This is a different industry altogether in itself. It is not only difficult but perhaps impossible to identify the rough diamonds purchased and correlate each of them with the finished product i.e. cut and polished diamonds. Here the most important factor would be maintenance of the quantity register, consumption register and finished goods register, thereby proving the nexus of the raw material purchased, sent for cutting and polishing and receiving back and thereafter, selling the same from the finished goods register. Though, this task is very tedious and needs to be maintained meticulously and many assessees in this industry do maintain such records. Thus, if the identification and nexus could be proved, then it may be better case.

F. Purchase of capital asset/goods purchased capitalized

As far as purchase of capital asset is concerned from suspicious dealer, the only issue that should arise is depreciation claimed against such capital asset, which has been capitalised in the regular books of account, so that the disallowance could be restricted only to the extent of depreciation claimed. However,

before jumping straightway for disallowing depreciation, it needs to be appreciated as to what capital asset is purchased and its utility and importance in the entire organisation. For example for manufacturing a particular item, the assessee may require several machineries and one of such machineries is purchased from suspicious dealer. Now if this can be proved by way of flow chart or otherwise that without machinery so purchased from suspicious dealer, the finished product cannot be manufactured, then it could be proved that there is actual purchase of machinery.

Implications of purchases made from suspicious dealers under various provisions

It is worthwhile to understand the addition/ disallowance that could be made under various provisions of the Income-tax Act in respect of purchases made from suspicious dealers. Each of the provision of Income-tax Act that could be triggered is discussed hereunder—

a) **Section 37:** As per the provisions of sec. 37(1) of the Act, any expenditure that is incurred wholly and exclusively for the purposes of business shall be allowed. Therefore, it is for the assessee to prove that the expenses is incurred wholly and exclusively for the purpose of business and if the same could not be proved with supporting evidences, in that case, disallowance could be made. Since there is no separate provision under the Income-tax Act allowing deduction of purchases, the allowance or disallowance of the same, as the case may be, would fall u/s. 37(1) of the Act. Hence, if the purchases could not be proved to be genuine or made for the purposes of business, in that case, the disallowance u/s. 37(1) of the Act could be made.

b) **Section 40A(3):** As per the provisions of section 40A(3) of the Act, any expenses incurred in excess of ` 20,000/- otherwise than by cross payee cheque drawn on a bank or account payee bank draft, entire amount of such expenses could be disallowed u/s. 40A(3) of the Act, subject to certain exceptions stated in proviso thereto as well as Rule 6D of the Income Tax Rules. This provision could get triggered if the Assessing Officer (AO) is able to prove conclusively that the purchases though shown in books of account as made by payment of account payee cheque but in reality the purchases were made from the grey market in cash. However, this fact needs to be conclusively proved and not based on any assumptions or presumptions. Merely because the assessee is not able to produce the suspicious dealer or give confirmation, etc., the same could not be treated as sufficient evidence to support the case of AO that purchases were made in cash from grey market.

c) **Section 41:** As per this provision, a remission or cessation of trading liability could be brought to tax. In respect of issue of bogus purchases, this provision may be applied by AO in cases where the purchases are made from suspicious dealers and also allowed in the year of purchase, however, the payment or part payment to the said dealer remains outstanding in the regular books of account. In that case, the genuineness of the creditor may not be proved and therefore, the AO may make addition under this section. Although there are many contradicting decisions on this issue as to whether the AO can *suo motu* make addition u/s. 41(1) in respect of outstanding creditors, however, as far as AO is concerned, he would make addition u/s. 41(1) if he is not in a position to disallow the purchases in the year in which the same is debited in the profit and loss account either by reopening or otherwise.

d) **Section 68:** As per this provision, addition could be made if any credit appearing in the books of account remain unexplained. This provision would normally apply in case where the sales are found to be bogus, so that the same (credit appearing in books of account remaining unexplained) could be taxed u/s. 68 of the Act as income from other sources and not as regular business income. However, many a times it is observed that the creditor not being proved is also added u/s. 68 of the Act, which addition does not appear to be correct for the reason that the creditor has arisen as a result of purchases/expenses debited in the books of account and if the same is not genuine, then the disallowance could be made of such purchase or expenses AND secondly, section 68 of the Act could be applied only in the year in which the credit arises, which obviously would be the year in which the purchases or expenses are made. Thus, both the disallowance of purchase and addition of creditor cannot be made simultaneously and hence, the creditor balance appearing in the books of account may not fall within the provisions of sec. 68 of the Act.

e) **Section 69:** As per this provision, if any unexplained investment is found to have been made in a financial year, the addition could be made u/s. 69 of the Income tax Act. In respect of suspicious purchases, this issue may arise where either the assessee himself accepts that the purchases are actually made but from grey market or that the AO conclusively proves the same. In such cases, the initial investment for purchases made in cash from grey market could be added u/s. 69 of the Act (if not added u/s. 40A(3) of the Act for whatever reasons).

f) **Section 69C:** As per this provision, if the assessee offers no explanation about the source of expenses incurred, then AO may take recourse of this section and make the disallowance. In most of the cases of suspicious dealers, it is observed that the payments to these parties are made by account payee cheques and many a times even their names appear in the bank statements. Therefore, the source of expenses incurred is from the regular bank account forming part of regular books of account and thus, could not be treated as unexplained expenditure u/s. 69C of the Act. Since the provision emphasis on giving the explanation in respect of the source of expenditure incurred and once the source is established or not questioned, taking recourse to provision of section 69C of the Act appears to be incorrect.

g) **Section 43B:** As per this provision, any tax, cess, duty, etc. is payable and the same is not paid before the due date of filing return of income, the amount claimed as expenses could be disallowed, however, the same would be allowed in the year of actual payment. In respect of suspicious dealers, and as stated above, the VAT authorities have recovered the amount of VAT from the assessee since the suspicious dealer failed to pay VAT thereby not allowing credit/set off of VAT paid to such suspicious dealers. The question that arises here is whether the payment of VAT by the assessee along with interest and penalty could be allowed as deduction in the year of payment. As per the provisions of sec. 43B of the Act, the deduction is allowed in the year in which the liability is actually paid, the payment of VAT (whether under protest or otherwise) ought to be allowed in the year of its payment and even the interest charged could be claimed as deduction. However, as far as penalty is concerned, the same may not be allowed as deduction.

h) **Peak theory:** There is no such provision in the Income-tax Act for making addition on peak theory however this particular concept is evolved due to acceptance of such addition by the judiciary. The additions based on peak theory may be advantageous or disadvantageous to the assessee and would depend upon the facts of each case. In cases of assessee where rotation cycle is very less i.e. purchases are shown to be made without making regular payments, then in such cases, even applying peak theory addition would result in huge addition since the maximum creditors (suspicious dealers) outstanding would be the minimum addition applying peak theory. Reference may be made to decision of *Vijay Proteins Ltd. vs. ACIT (1996) 58 ITD 428 (Ahd).*

i) **Set off of addition in subsequent years:** If the purchases are in entirety treated and considered as not genuine, there is no question of granting any set off of addition made in year one *vis-à-vis* subsequent year additions. However, if the purchases are held to be genuine, but the party is not identifiable and the addition is made applying peak theory basis, in that case, set off could be availed in respect of the additions made in year one *vis-à-vis* subsequent years and depending upon the facts of the case. Thus, in general, there would be no question of granting any set off however in cases of peak theory addition the same could definitely be claimed.

j) **Deductions u/s. 10 / 80-IA, 80-IB, etc.:** The question that arises is whether the deduction is available under any of the provisions of sections 10, 10A, 80-IA, 80-IB, etc., in respect of addition/disallowance made out of purchases. Normally, any disallowance made out of expenses debited to the profit and loss account would increase the business profits and thereby if any such deduction u/ss. 10, 10A, 80IA, etc. is eligible to the assessee, the same ought to increase with the increase in business profits. Thus, irrespective of whether the addition/disallowance is on account of suspicious dealer i.e. bogus purchase or otherwise, it is the net profit of the business that would get increased and on such increased net profit, the deduction needs to be re-computed. However, it is observed in number of cases, that the department (in cases where the assessee is eligible for any of the deductions) treats such disallowance as income from other sources thereby rejecting the claim of the assessee. Further, if the addition is made under the deeming provisions such as sec. 68, 69, 69C, etc., then it is for the assessee to prove that the source of such deemed income is from the undertaking eligible for deduction and therefore in such cases, deductions may not be allowed even if claimed, since the additions are made in respect of unexplained sources.

k) **Section 271(1)(c):** Penalty for concealment of particulars of income or furnishing inaccurate particulars of income would be levied depending upon the facts of the case. In cases where the assessee offers such additions or disallowances to buy peace and avoid litigation, then only this reasoning or explanation, one may not be able to get out of the rigours of penal provisions in view of the decision of Supreme Court in *CIT vs. MAK Data Ltd. 358 ITR 593 (SC).* If the addition made is contested and finally decided against the assessee, still, the levy of penalty u/s. 271(1)(c) of the Act is not automatic and one can fight the penalty proceedings depending upon the facts of the case. Again if the addition is made by estimating gross profit, and even if such additions are accepted by the assessee, penalty u/s. 271(1)(c) of the Act could

be successfully agitated on the ground that no penalty could be levied on mere estimation of income – useful reference in this regard can be made to decisions such as *CIT vs. Ample Properties Ltd. [2011] 335 ITR 460 (Mad); CIT vs. Sangur Vanaspati Mills Ltd. [2008] 303 ITR 53 (P&H) [SLP rejected (2009) 308 ITR (St.) 18]; Harigopal Singh vs. CIT (2002) 258 ITR 85 (P&H); CIT vs. Kailash Crockery House (1999) 235 ITR 544 (Pat.).*

l) **Prosecution:** U/s. 277A of the Income-tax Act, an assessee can be prosecuted for falsification of books of accounts or other documents, whereby the assessee wilfully and with intent to evade tax, interest, or penalty, makes false entry or statement in the books of account. Thus, the effect of bogus purchases being proved or even admitted by the assesse could lead to prosecution u/s. 277A of the Act, the punishment for which is rigorous imprisonment for minimum 3 months to maximum 2 years and with fine. Other sections that could be also applied are – sec. 276C (wilful attempt to evade tax, etc.); sec. 277 (false statement in verification, etc.).

Supporting documents/evidences to prove genuineness

In order to prove genuineness of the purchases, few of the important evidences and documents are listed herein below (as can be gathered or in possession of assessee), which as far as possible be placed on record of the AO at the time of scrutiny proceedings itself—

i) Copy of purchase bills with delivery challan revealing the mode of transport along with truck No. etc. so as to prove the movement of goods and delivery thereof;

ii) Copy of stock register showing entry of goods received along with the quantity;

iii) Inward register maintained at the factory gate reflecting name of party from whom goods purchased, quantity of goods purchased, rate at which purchased, etc.;

iv) Outward register showing the goods purchased send for consumption i.e. for manufacturing of finished goods, etc.;

v) Ledger account of the party with full details;

vi) Relevant abstract of bank statement showing payment made by account payee cheque and name of said party duly reflected in bank statement;

vii) certificate from bank stating clearly as to in whose name and account the cheque issued is cleared;

viii) Confirmation of purchase party, if this is possible and if taken at the time of finalization of accounts after year end;

ix) Chart showing nexus of purchase and sales with quantity details;

x) Purchase party audited balance sheet and other records;

xi) Purchase party VAT return statements;

xii) Bank statement of purchase party clearly identifying the payment made duly cleared in his account and no cash withdrawn immediately or near thereafter of same amount or similar amount;

xiii) Export invoices with other documentary evidences, if the goods purchased are exported;

xiv) Comparative price analysis for comparing purchase price of suspicious dealer vis-à-vis other purchases made during the same time from other dealers;

xv) Scrutiny assessment order of suspicious dealer wherein business activities and profit accepted by department;

xvi) confirmation of brokers, if purchases made through brokers; etc.

Checklist of documents and other records, etc. to be asked from AO

The AO may be in possession of evidences or otherwise so as to support his case of addition/ disallowance in respect of purchases made from suspicious dealers. It is advisable that the assessee, in writing, places on record before the AO in the course of assessment proceedings asking the AO to furnish the following (as applicable to facts of case of assessee)—

i) statement / affidavit of suspicious dealer (in most cases, AO does not possess the same, however, relies upon the same as recorded by VAT authorities);

ii) cross-examination of the suspicious dealer since witness of department;

iii) any other evidence in possession of AO with respect to the suspicious dealer;

iv) evidences collected in course of search/ survey action taken against the suspicious dealer;

v) statement recorded of any other party in connection with the transaction undertaken with suspicious dealer;

vi) if search/survey action conducted on assessee, then –

   a) copies of statement recorded of employees, etc. and also to cross-examine them;

   b) evidences collected in course of such proceedings;

   c) evidences found as stored in pen drive, hard disks, etc.

vii) letter in writing to AO for issuing summons to suspicious parties or any other party in connection with the transaction;

viii) If summons returned, proof of the same as received from post office, which gives reasons for return of notice;

ix) If notice sent by affixture, then proof of such affixture and confirmation from AO as to how and in whose presence the notice was affixed;

x) If retraction by any person, then copy of such retracted statement/letter, etc.

Issues of reopening of assessment in brief

In most of the cases of reopening of assessment in respect of issue of bogus purchases, the reopening is carried out on the basis of the information received from DGIT (Inv.). However, what information is given is not revealed to the assessee. In any case, the first and foremost point to be kept in mind on receipt of reopening notice u/s. 148 of the Act is to file letter in response to the notice issued u/s. 148 of the Act stating therein that the return filed originally (if filed) to be treated as filed in response to notice u/s. 148. If no return filed earlier then return need to be filed in response to notice u/s. 148. In the same letter, it is advisable to ask for the copy of reasons recorded for reopening of the assessment, in order to validly challenge the reopening of the assessment.

The Hon'ble Supreme Court in *GKN Driveshafts (India) Ltd. vs. DCIT [2003] 259 ITR 19 (SC)* has laid down the entire procedure for AO and assessee to be followed once notice for reopening is issued. It is held that when a notice under section 148 of the Income-tax Act, 1961, is issued, the proper course of action is to file the return and, if he so desires, to seek reasons for issuing the notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the assessee, if he objects to the reopening of the assessment, must file his objections and thereafter, the AO needs to dispose the said objections. These directions of the Supreme Court did not lay down any

time limit within which the aforesaid procedure needed to be complied with since many a times, the reasons are itself furnished at the fag end of assessment and hence, the importance of the procedure laid down by the Supreme Court gets jeopardised. After considering all these aspects, the Gujarat High Court in *Sahakari Khand Udyog Mandal Ltd. vs. ACIT [2014] 46 taxmann.com 69 (Guj)* laid down the following directions—

*"(1) Once the Assessing Officer serves to an assessee **a notice of reopening of assessment under section 148 of the Income-tax Act, 1961, and within the time** permitted in such notice, the assessee files his return **of income in response to such notice, the Assessing** Officer shall supply the reasons recorded by him for issuing such notice within 30 days of the filing of the **return by the assessee without waiting for the assessee to demand such reasons.***

(2) Once the assessee receives such reasons, he would be expected to raise his objections, if he so desires, within 60 days of receipt of such reasons.

*(3) If objections are received by the Assessing Officer from the assessee within the time permitted hereinabove, the Assessing Officer would dispose of **the objections, as far as possible, within four months** of date of receipt of the objections filed by the assessee.*

*(4) This is being done in order to ensure that sufficient time is available with the Assessing Officer **to frame the assessment after carrying out proper scrutiny. The requirement and the time frame for supplying the reasons without being demanded by the assessee would be applicable only if the assessee** files his return of income within the period permitted **in the notice for reopening. Likewise the time frame** for the Assessing Officer to dispose of the objections **would apply only if the assessee raises objections within the time provided hereinabove. This, however, would not mean that if in either case, the assessee misses the time limit, the procedure provided by the Supreme Court in the case of GKN Driveshafts (India) Ltd. (supra) would not apply. It only means that the time frame provided hereinabove would not apply in such cases.***

*(5) In the communication supplying the reasons recorded by the Assessing Officer, he shall intimate to **the assessee that he is expected to raise the objections within 60 days of receipt of the reasons and shall reproduce the directions contained in sub-paras 1 to 4 hereinabove giving reference to this judgment of the High Court."***

The most crucial aspect in reopening of the assessment is the reasons recorded for such reopening. This is for the reason that if the reopening is held to proper and valid, then the fate of addition/disallowance would remain the same as in cases of regular scrutiny assessment. As stated earlier, in most of the cases, the reasons for reopening of the assessment is the information received from DGIT (Inv.) and/or Sales Tax authorities and thereafter the name of the suspicious parties are listed with amounts stating that these parties have admitted of issuing only accommodation bills and not genuine or actual goods are sold. Thus, the reopening notice is issued basically by relying upon the information/direction supplied by the third party i.e. DGIT (Inv.) or Sales tax authorities. However, the provisions of section 147 read with section 148 of the Act are very clear i.e. the reasons for reopening of the assessment must be of AO himself and not of third party. In most of the cases of reopening, the AO is merely acting on the information given by DGIT (Inv.) and/or sales tax authorities without first himself examining and/or verifying the facts and satisfying himself as to whether it is a fit case for reopening. Thus, reopening of assessment merely on the basis of some information received from third party is held to be not valid in number of cases such as – *Signature Hotels P. Ltd. vs. ITO 338 ITR 51 (Del.); CIT vs. SFIL Stock Broking Ltd. 325 ITR 285 (Del.); Sayaji Ind. Ltd. vs. JCIT 336 ITR 360 (Guj) – (after 4 years – not valid); Sarthak Securities (P) Ltd. 329 ITR 110 (Del.): CIT vs. Atul Jain 212 CTR 42 (Del.); CIT vs. Kamdhenu Steel & Alloys Ltd. [2012] 206 Taxman 254 (Del.).*

Although there are contrary decisions in this regard, however, the fate of case would depend

upon the exact reasons that are recorded and not merely decisions.

Similarly, if the notice for reopening of the assessment is issued on the basis of Audit objections, even then the same are held to be invalid in large number of cases for the reason that the reason to believe that any income has escaped assessment should be of AO and not third party. Some of the important decisions in this regards are – *Cadila Healthcare Ltd. v. ACIT [2013] 355 ITR 393 (Guj.); Vodafone West Ltd. vs. ACIT [2013] 354 ITR 562 (Guj.); Jagat Jayantilal Parikh vs. DCIT 355 ITR 400 (Guj.); IL&FS Investment Managers Ltd. vs. ITO [2008] 298 ITR 32 (Bom)*

The AO must have reason to believe that any income has escaped assessment and not merely reason to suspect. If the reasons recorded merely show suspicious of the AO, the same would be considered as not valid reasons. Reference in this regard may be made to decisions such as – *Dass Friends Builder P. Ltd. vs. DCIT (2006) 280 ITR 77 (All); DCIT vs. Rainee Singh 125 TTJ 816 (Del.); A.A. Estate P. Ltd. vs. ACIT (Mum.),* order dated 5-2-2014.

Importance of asking for copy of reasons recorded is also for the reason that reasons recorded before the issue of notice u/s.148 of the Act is only to be considered and not anything thereafter added/supplemented. In the decisions such as, – *Northern Exim (P.) Ltd. vs. DCIT [2012] 208 Taxman 175 (Mag.)(Del.); CIT vs. Living Media India Ltd. 359 ITR 106 (Del.),* it has been held that reasons to be tested which is recorded prior to issue of notice u/s.148 – subsequent reasons or further reasons recorded not relevant for testing jurisdiction u/s. 147 of the Act.

One more criteria laid down by courts is that there has to be some new tangible material with the AO to validly reopen the assessment and form a belief that income has escaped assessment. This requirement exists irrespective of whether the earlier assessment was completed u/s. 143(1) or 143(3) of the Act. Few important decisions in this regard are – *CIT vs. Kelvinator of India Ltd. 320 ITR 561 (SC); CIT vs. Orient Craft Ltd. (Del.) 354 ITR 536 (Del.); Mohan Gupta HUF vs. CIT (Del.) 366 ITR 115 (Del.)*

Further, reopening on mere change of opinion is held to be not valid. If in original assessment the transaction of purchase with the said suspicious party is verified and accepted, then merely on the basis of suspicion and list published by VAT authorities, the assessment, if reopened, can be challenged on the ground of change of opinion. Reference can be made to decisions laying down important principles in respect of non-validity of reopening of assessment on mere change of opinion – *CIT vs. Kelvinator of India Ltd. 320 ITR 561 (SC); Ritu Investment P. Ltd. vs. DCIT 345 ITR 214 (Del.); Artech Infosystem (P) Ltd. vs. CIT [2012] 206 Taxman 432 (Del.); CIT vs. Usha International Ltd. [2012] 348 ITR 485 (Del.)(FB)*

As per the proviso to section 147 of the Act, in case where the original assessment order is completed u/s.143(3) of the Act and 4 years are completed from the end of the relevant assessment year, in that case, reopening of the assessment is held to be not valid if there is no failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment of that assessment year. Thus, in cases where original assessments were scrutinised u/s. 143(3) of the Act and the purchases accepted therein as genuine and all the material facts were disclosed by the assessee, then the AO ought to have some further new tangible material in his possession to show that there was failure on part of assessee to disclose material facts, else, the reopening would be held to be not valid. Reference in this connection may be made to decisions such as – *NYK Line (India) Ltd. vs. DCIT [2012] 346 ITR 355 (Bom); Kimplas Trenton Fittings Ltd. vs. ACIT [2011] 340 ITR 299 (Bom.); CIT vs. Amitabh Bachchan [2012] 349 ITR 76 (Bom.)*

Revision u/s. 263

A revision u/s. 263 of the Act can be carried out if the CIT finds that the assessment order passed is erroneous in so far as it is prejudicial to the interest of the revenue. There is substantial amendment in section 263 of the Act by Finance Act, 2015 w.e.f 1-6-2015, however, not giving any consideration to the same for the time being, even in cases earlier to 1-6-2015, if the assessment order or the record of the scrutiny assessment do not reveal that the AO has examined the purchases, etc. and the assessment order merely accepts the returned order, in that case, revision carried out u/s.263 of the Act may be sustained by higher authorities leading to addition / disallowance of purchases made from suspicious dealers. In this context, decision of Mumbai ITAT in *M/s. Shoreline Hotel P. Ltd. vs. CIT, ITA No. 964/M/2015, AY 2011-12,* Bench 'E', order dated 19-6-2015 may be referred to wherein even though the AO had considered the issue of bogus purchases at length in the assessment order, the jurisdiction of the CIT was upheld.

Recent decisions

As of now there are many decisions of Mumbai ITAT on this issue of purchases made from suspicious dealers, however, most of the decisions are rendered in the context of assessee being trader and not otherwise. In any case, these decisions have large implications since the additions / disallowance are made in large number of cases in similar manner and thus can be relied upon to support the case of assessee. The decisions are as under-

a) *ACIT vs. Tristar Jewellery Exports P. Ltd., ITA No.7593/Mum/2011, AY 2006-07, Bench 'E', order dated 31-7-2015;*

b) *DCIT vs. Rajeev G. Kalathil [2014] 51 taxmann.com 514 (Mum);*

c) *Shri Ganpatraj A. Sanghavi vs. ACIT, ITA No.2826/Mum/2013, AY 2009-10, Bench 'G', order dated 5-11-2014*

d) *Ramesh Kumar & Co. vs. ACIT, ITA No.2959/ Mum/2014, Bench 'D', AY 2010-11, order dated 28-11-2014*

e) *ITO vs. Deepak Popatlal Gada, ITA No.5920/ Mum/2013, AY 2010-11, Bench 'D', order dated 31-3-2015*

Other relevant decisions in this regard are-

f) *CIT vs. Nikunj Eximp Enterprises (P.) Ltd. [2013] 216 Taxman 171 (Mag)(Bom)*

g) *Babulal C. Borana vs. ITO [2006] 282 ITR 251 (Bom)*

h) *163 ITR 249 (Guj.) CIT vs. M.K. Brothers*

i) *252 ITR 476 (Guj.) DCIT vs. Adinath Industries*

j) *Balaji Textiles vs. DCIT 49 ITD 177 (Mum)*

k) *ITO vs. Arora Alloys Ltd. (2012) 12 ITR (Trib.) 263 (Chd.)*

l) *Tolaram B. Sharma vs. ITO, ITA Nos.2239 & 2291/Ahd/2004, Bench 'A', AY 2001-02. Order dated 25-1-2008*

m) *ITO vs. Permanand 107 TTJ 395 (Jodh.)*

Remedies / other alternatives available

The other alternative / remedy available with the assessee is to file application to Settlement Commission upon fulfillment of certain conditions. The assessee can make true and correct disclosure of his income before the Settlement Commission and thereby get immunity from penalty and prosecution. Now, as of date, even cases of reassessment proceedings are allowed for making application before Settlement Commission.

Tailpiece

With the recent decisions (mostly) coming in favor of the assessee, there is a sigh of relief however, this is just the beginning. There are no decisions as yet where addition / disallowance are made after proper investigation by the AO. Also there may hardly be any decision in cases of manufacturer, builders, etc. and hence, it would be interesting to note as to what view the judiciary would take in all such cases.

This is very vast topic and I have tried to cover as much as possible in the given allotted space.

Vipul B. Joshi & Dharan Gandhi, *Advocates*

Cash Credits – Burden of Proof vis-à-vis Section 68

The scope of this article is very wide. In fact, section 68 itself is based on burden of proof and shifting of the burden. Consequently, one needs to analyse all facets of this section to give full justice to this topic. This, in turn, entails in-depth discussion of the entire section. However, due to obvious limitation of length of this article, an attempt is made to have broad overview of some important aspects of section 68, so far as relevant for the purpose of this article. It should be appreciated that, ultimately, it depends upon facts of each case; involvement of some key basic principles notwithstanding.

Section 68 was first introduced in the 1961 Act. There was no corresponding provision in 1922 Act; even though, under the erstwhile Act, many courts have held that the credit appearing in the books of the assessee should be taxed if no satisfactory explanation is offered by the assessee regarding the nature and source of the credit.

Basic ingredients of section 68 are as under:

a. Any sum credited

b. Credited in the books maintained by the assessee

c. Assessee offers no explanation about the nature and source thereof or explanation offered is not satisfactory in the opinion of the AO

If all the above conditions are satisfied cumulatively, then such sum may be charged to tax as income of the previous year.

Ongoing through the above, one thing which flashes out is that section 68 is a deeming charging provision wherein a credit is being deemed as income irrespective of the fact whether the same is income or not. Reference may be made to the judgment of Hon'ble Bombay High Court in case of *Dilip Kumar Roy vs. CIT (94 ITR 1),* wherein under the 1922 Act, the Hon'ble Court has held that the burden is on the Revenue to prove that the receipt falls within the scope of income. This, onus on the Revenue has been done away with, as section 68 deems receipts to be income of the assessee. Further, initial burden of proof is laid down on the assessee to explain the nature and source of credit to the Assessing Officer ('AO') to avoid getting the same taxed as income. Once the initial burden has been discharged, then the onus shifts on the Department, which then has to justify that the case falls within the parameters of section 68 in view of the fact that the explanation was not satisfactory in so far as it was not true and *bona fide*. In the present article we are dealing with the aspect of burden of proof vis-a-vis section 68.

To begin with we shall deal with each of the ingredients of the section separately.

i. Any credits

If one looks at the marginal note of the section it states 'Cash credits'. Though the marginal notes so specifies, the section deals with all types of credits including non-cash credit *[VISP (P) Ltd. vs. CIT – 265 ITR 202(MP)]*. Thus, the AO may also add bogus liabilities appearing in the books without any corresponding receipts, which interpretation may not go along with the spirit of the section.

The section does not specify any particular credits in the books of accounts which can be engulfed within the provision of section 68. It refers to any sum credited in the books of account. Thus, the sum may be of a revenue character or capital character. If it is revenue in nature, then the same is to be taxed under the normal provisions of Chapter IV of the Act; However, this cannot stop AO to tax the same u/s. 68 as unexplained credit especially after introduction of section 115BBE, wherein such credit is taxed @ 30% and that too without allowing any deductions.

Since, the sum of revenue character can be taxed under normal provision also, therefore, section 68 is widely understood as a tool to tax capital receipts.

In so far as capital receipts are concerned, section 68 has wide coverage to include all credits within its domain; however, the opening balance cannot be treated as amount credited in the books and therefore cannot be added u/s 68. Section 68 takes into its realm, commercial loan as well as non-commercial loan *[C Kant & Co. vs. CIT – 126 ITR 63 (Cal)]*. Further, it includes credit in the name of third party as well as in the name of assessee *[Dharamavat Provision Stores vs. CIT - 139 ITR 700(Bom]*. Some of the examples of cash credits are loans, gifts, share capital, share premium, share application money, partner's capital etc. Few of such credit are dealt with in the latter part of this article.

ii. Books maintained by the assessee

The word 'Books' has been defined u/s. 2(12A) of the Act to include ledgers, day-books, cash books, account-books and other books, whether kept in the written form or as print-outs of data stored in a floppy, disc, tape or any other form of electro-magnetic data storage device. Thus, books has been defined in an inclusive manner.

Firstly, books in which credit appears should be of the assessee only. Thus, any credit in the books of one person cannot be assessed in the hands of other person u/s. 68 *[Shanta Devi vs. CIT – 171 ITR 532 (P&H), Anand Ram Raitani vs. Raitani – 223 ITR 544 (Gau)]*.

Pass book supplied by the Bank cannot be said to be the book of the assessee *[CIT vs. Bhaichand H Gandhi – 141 ITR 67 (Bom)]*. The Hon'ble Madras High Court in case of *CIT vs. Taj Borewell (291 ITR 232)* has held that the Profit and Loss Account and Balance Sheet cannot be said to be books of account of the assessee. On the facts of that case, the Court has given the finding that *"object of a P&L a/c is to ascertain the income of a business and by offsetting the expenses of earning that income, to ascertain the net increase (profit) or decrease (loss) in the traders' "net worth" for the period while Balance sheet lists the assets and liabilities and equity accounts of the company. It is prepared 'as on' a particular day and the accounts reflect the balances that existed at the close of business on that day."* It should be noted that in this case, the assessee had not maintained any books of accounts but had only prepared profit & loss account and balance sheet for submission before the Assessing Officer.

Going by the definition of the books as given by section 2(12A) of the Act, loose sheet found during search could not be treated as books for the purpose of section 68 and also any entry in such sheet cannot be treated a credit entry. However, if any rough cash

book is found during search, then it can be considered as book. *[Haji Nassir Hussain vs. ITO – 271 ITR(AT) 14 (Del)].* Reference in this regard can also be made to the decision of Bombay High Court decision in the case of *Sheraton Apparels vs. ACIT (256 ITR 20),* though rendered in the context of section 271 (1) (c) of the Act.

Further, presumption u/s. 132(4A) of the Act, regarding the correctness of the books cannot obliterate the onus on the assessee to prove the nature and source of credit in the books *[Pushkar Narain Sarraf vs. CIT – 183 ITR 388 (All)].*

iii. Satisfactory explanation of the source and nature – Burden of proof

Where a sum is credited in the books of the assessee, an explanation should flow from the assessee as to its nature and source. Section 68 itself lays down that the assessee must explain the nature and source of the credits. Even under the erstwhile Act, when there was no specific section to deal with unexplained cash credit, the Courts have held that onus is on the assessee to prove the genuineness of the credits *[Sreelekha Banerjee vs. CIT – 49 ITR 112 (SC), Kalekhan Mohammad Hanif vs. CIT – 50 ITR 1 (SC)].* The root of the said burden goes to section 106 of the Indian Evidence Act, 1908 which states that *'when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him'.* Though the latter section is not applicable to the Income tax proceedings, however the logic emanating from the said section applies in the Income tax proceedings also.

What does one mean by explaining nature and source of a credit? In terms of series of judgments on this aspect, in order to discharge such onus, assessee is required to prove the following:

I. Identity of the creditor

II. Capacity of the creditor to advance money and

III. Genuineness of the transaction

In order to prove the above three factors cumulatively, the assessee can rely upon the following documents/ statements:

a. PAN of the creditor,

b. Return of Income for the concerned year of the creditor,

c. Balance Sheet, Profit and Loss account of the creditor,

d. Bank passbook showing receipts and corresponding payment of the creditor,

e. Confirmation or affidavit of the creditor,

f. Proof of receipt through Banking channel,

g. The assessee can also produce the party before the AO for giving a statement on oath.

Assessee, has to provide evidences to prove the aforesaid, mere bold statement is not enough – *Vijay Kumar Talwar vs. CIT – 330 ITR 1 (SC).* The mere furnishing of particulars *[CIT vs. Precision Finance Pvt. Ltd. 208 ITR 465 (Cal), ITO vs. Diza Holdings – 255 ITR 573 (Ker)]* or mere fact of payment by account payee cheque *[CIT vs. P. Mohankala 291 ITR 278 (SC)]* or mere identification of donor/ creditor *[(Yash Pal Goel vs. ITO 310 ITR 75(P&H), Mangilal Jain vs. ITO – 315 ITR 105(Mad)]* or mere submission of confirmation letter from creditor *[CIT vs. K.M. Mahim – 213 ITR 820(Ker)]* may not be considered as sufficient to pass on the onus to department, although these facts may in combination with other facts can help in shifting the burden. Further, the assessee cannot be asked to perform any impossible act – *LIC vs. CIT – 219 ITR 410(SC).*

The assessee can also offer alternate explanation and if any of the explanation is found to be genuine then no addition can be made *[ACIT vs. Ghai Limestone Co. – 144 ITR 140 (MP), Dhansiram Agarwala vs. CIT – 217 ITR 4(CIT)].*

After assessee has *prima facie* established the identity, creditworthiness and genuineness the onus shifts on the Department. Where the assessee had given the names and addresses of the alleged creditors and their index number were in the file of the Revenue, still revenue apart from issuing notice u/s. 131 did not pursue the matter further; in such scenario, the ITAT held that the assessee had discharged the burden, which conclusion was upheld by the Apex Court in case of *CIT vs. Orrisa Corporation P. Ltd (159 ITR 78).*

The AO cannot brush aside the evidences submitted by the assessee based on conjectures and surmises *[CIT vs. Suresh Kumar Kakkar – 324 ITR 231 (Del)].* While the AO cannot reject, without inquiry, materials furnished by the assessee, there is no rule of law which prevents him from making addition, simply because certain evidences have been furnished, especially if the AO is able to impeach such evidences *[CIT vs. Nova Promoters and Finlease – 342 ITR 169 (Del)].*

Further, unsatisfactory explanation may propel the AO to bring the credit to tax as unexplained credits, however, the taxability is not automatic as a result of unsatisfactory explanation *[CIT vs. Noorjehan (P.K.) 237 ITR 570(SC)].* The AO has to apply his mind on the evidences submitted by the assessee and has to decide whether the onus has been discharged by the assessee or not. Needless to say, that an opportunity of hearing must be given to the assessee before making any addition.

Whether there is any requirement to explain source of source?

The Hon'ble Madras High Court in case of *Hastimal (S) vs. CIT (49 ITR 273),* has held that the assessee should not be placed upon the rack and called upon to explain not merely the origin and source of a capital contribution but the origin of origin and source of source as well. Since, the Act has only put initial burden on the assessee, therefore there may be limit to responsibility expected of an assessee with reference to the facts of the case. In one of the case, it was held that mere fact that the third party making the credit was the wife of the assessee's partner, will not *ipso facto* make the assessee firm come into the knowledge of the source of the deposit in the hands of third party – *Tolaram Daga vs. CIT – 59 ITR 632 (Assam).*

Also, there are plethora of judgments wherein it has been held that the assessee should not be asked to explain the source of source – *264 ITR 254 (Gau), 330 ITR 298(Del), 263 CTR 612(All).*

However, with the insertion of first proviso to section 68, the Government has placed an additional onus of explaining the source of source, but only in certain restricted cases as discussed in the latter part of this article.

Peak credit theory

One of the common defence available to an assessee in respect of cash credits is peak credit theory. Under peak credit theory, where there are credit as well as debit entries in the same account, one can argue that the credit entry following the earlier debit entry should be referred to the latter and only the excess should be added *[CIT vs. Fertilisers Traders 98 DTR 0323 (All)].*

Such a plea can also be extended to the credits appearing in different accounts, if the assessee is able to substantiate that all the unaccounted money belongs to the assessee, in which case all the credits should be arranged in chronological order to arrive at the unexplained cash credit. This theory is based upon the facts of each case.

Peak credit theory has been accepted in many cases like *CIT vs. Ishwardass Mutha 270 ITR 597(Raj), CIT vs. Tirupati Construction Co. – 230 Taxman 198 (Guj.), Jyoti Kumari vs. ACIT – 344 ITR 60 (Kar.)*

However, in *Bhaiyalal Shyam Behari vs. CIT (276 ITR 38 – All),* the Hon'ble High Court, rejected the alternate plea of the assessee on the ground that the assessee has to own all the cash credit entries in the books of account and only thereafter he can raise the question of peak credit. Further, the Court also rejected the application of peak credit theory in respect of credits appearing in different person's name. The said judgment was later considered by the same court in case of *CIT vs. Vijay Agriculture Industries (294 ITR 610),* wherein it was held that credit should be given separately in respect of each depositor.

Thus, the application of peak credit theory is fact specific and if the nexus between the credits and debits is shown beyond doubt then peak credit theory could be applied. However, this theory may not hold water if the withdrawals are not available for reintroduction *[Sind Medical Stores vs. CIT 117 DTR 497 (Raj)].*

Telescoping

When there are two separate addition one being suppression of profits and other being on account of cash credit, then the assessee can take a plea that one should be telescoped into other. The principle of telescoping has being accepted in many case *[CIT vs. S. Nelliappan (66 ITR 722 –SC), CIT vs. Guruswamy Nadar & Sons (149 ITR 127- Mad), Kuppuswamy Mudaliar vs. CIT (51 ITR 757 – Mad)* and *CIT vs. Tyaryamal Balchand (165 ITR 453-Raj), CIT vs. Singhal Industrial Corporation (303 ITR 225)].* However, the acceptance of plea of telescoping depends upon the facts of each case and the burden of proof lies on the assessee to explain the application of such plea in the facts of the case *[Devi Prasad Vishawanath - 72 ITR 194 (SC), CIT vs. Manick & Sons 74 ITR 1 (SC)* and in case of *Kale Khan Mohammad Hanif 50 ITR 1 (SC)].* In one of the case, the Hon'ble Kerala High Court *(CIT vs. K. N. Satyapalan (247 ITR 105)* rejected the theory of telescoping on the ground that there was no link between the intangible addition in the past assessment year and the cash credit in the current year.

Thus, the assessee must substantiate the necessity of telescoping, however, such a stand that the cash credit arose out of the past intangible additions can make the assessee liable for penalty especially in view of Explanation 2 to section 271(1)(c).

Preponderance of probability

From the above discussion, one can decipher that AO may not hesitate in making the addition, but at the appellate level what matters is the weight of explanation offered by the assessee i.e. preponderance of probability. Where it appears, based on the facts that assessee's explanation is probable, the onus shifts to the Department. The ultimate inference in such cases is to be drawn from the facts and the preponderant probability of such explanation. Hon'ble Supreme Court in case of *Sumati Dayal vs. CIT (214 ITR 801)* has held that 'for considering whether the apparent is real, matter has to be considered by applying the test of human probabilities'.

Now let us analyse certain specific items.

a. Share Capital, Share application money and Share premium–

Share application money, share premium and share capital ('share capital') appearing in the books of the company are examples of credit entries and responsibility to prove the genuineness of such credit is at par with other credits.

If we analyse the judgments in chronological order – firstly the Hon'ble Delhi High Court in case of *CIT vs. Stellar Investment Ltd. (192 ITR 287)* held that amount of share capital can never be regarded as undisclosed income

of the company and the right way was to attack the persons who had provided the money. However, the Hon'ble Delhi High Court in Full Bench judgment *(Sophia Finance Ltd. – 205 ITR 98),* overruled the judgment in Stellars case and held that share capital can be assessed as undisclosed income in the hands of the company. Later, the Hon'ble Supreme Court in 251 ITR 263, upheld the action of the High Court in case of Stellar wherein the refused to interfere with the finding of facts. The said decision of the Apex Court was without considering the Full Bench judgment.

However, the Hon'ble Calcutta High Court, in case of *CIT vs. Ruby Traders and Exporters Ltd. (263 ITR 300),* distinguished the judgment of Hon'ble Supreme Court in case of Stellar Investment on the ground that in the said case the Supreme Court did not lay down any ratio and only leave was dismissed. Accordingly, in this judgement it was held that section 68 applies to share capital receipts also. Further, many other courts accepted the principle that the share capital can be brought to tax u/s. 68 [Please see *299 ITR 268 (Del) - CIT vs. Divine Leasing and Finance Pvt. Ltd.]*

In so far as the burden of proof is concerned, the Hon'ble Supreme Court in case of *CIT vs. Lovely Exports P. Ltd. (216 CTR 195),* has held that *'if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law.'* Following the said judgment, many High Courts have held that where the identity has been established and PAN has been furnished, no addition can be made u/s. 68 – *[287 ITR 135 (Del), 196 Taxman 441 (Del), 325 ITR 25 (P&H), 330 ITR 298 (Del)]* However, recently the Hon'ble Delhi High Court in case of *Nipun Builders and Developers P. Ltd. (350 ITR 407)* and in case of *Tulip Engineering Pvt. Ltd. (92 CCH 60)* have deviated from the ratio laid down by the Apex Court in case of Lovely Export.

This issue has now become a very contentious issue, since the Department has issued many notices in past few years questioning the source of share capital. These notices issues u/s. 148 is pending before the High Courts.

Position after 31-3-2012

By Finance Act, 2012, the responsibility on the assessee to prove the nature and source of the share capital has increased with the insertion of the proviso. The proviso is prospective in nature since it has increased the responsibility of the assessee which can never be retrospective in nature and also when the Finance Act, 2012 itself says that the same is effective from AY 2013 -14. The contrary decision in this regard does not lay down correct law. The proviso, which is applicable only in case of company in which public is not substantially interested, requires not only such company to explain the nature and source but also requires the shareholders or the person in whose name the credit appears being a resident, to satisfactorily explain the nature and source of such sum so credited. Thus, by inserting the said Proviso, the assessee company shall now be required to explain the source of source as well.

The Explanatory Memorandum to the Finance Bill, 2012 had specified the following reason for the proposed amendment:

"In the case of closely held companies, investments are made by known persons. Therefore, a higher onus is required to be placed on such companies besides the general onus to establish identity and credit worthiness of creditor and genuineness of transaction. This additional onus, needs to be placed on such companies to also prove the source of money in the hands of such shareholder or persons making payment towards issue of shares before such sum is accepted as genuine credit."

Said proviso is however, not applicable in case of investor being Venture capital fund or venture capital company referred to in section 10(23FB).

b. Partner's capital

Partner's capital account has also been looked upon suspiciously by the Department. In such type of credit, since the credit is in the books of the firm, the burden to prove cash credit is on the firm. There has been a dispute whether the addition should be made in the hands of the firm or the partner. There is no hard and fast rule that the additions have to be made in the hands of the partner or the firm. It depends upon the facts of the case. However, it cannot be income of both partners as well as the firm *[CIT vs. Precision Metal Work – 156 ITR 693 (Del.)* – contrary view has been taken by Allahabad High Court in case of *Jagmohan Ram Ram Chandra – 274 ITR 405]*

If the AO is able to establish that the money belonged to the Firm, then the additions should be made only in the hands of the firm u/s. 68. However, in absence of any material to indicate that the cash belongs to the Firm, the addition cannot be made in the hands of the firm, but only in the hands of the partner *[India Rice Mills vs. CIT – 218 ITR 508 (All), Surendra Mohan Sheth vs. CIT – 221 ITR 239(All)]*.Further, additions if any made in the hands of the partner, has to be made u/s. 69 of the Act.

If the firm explains the source, it cannot be asked to explain the source of source and if the AO doubts the genuineness of the source of the partner then he can assess such sum in the hands of the partner – *[CIT vs. Taj Borewell – 291 ITR 232 (Mad.)]*.

c. Gift

Amount received as gift i.e. amount received without consideration, also is one of the items which is constantly under scanner. Gift has been commonly used as a means to convert undisclosed income into a useable form of money. Gift being a capital receipt was out of income tax ambit, but for section 68, until in 2004, section 56(2)(v) was inserted in the statute. Thus, section 68 was used by the Department as the tool to tax gifts when the nature and source of the same was unexplained. However, now with section 56(2)(vii) in picture, there is no scope of giving or accepting any explanation since if any amount or property is received by an assessee (individual or HUF) and which fulfils the threshold specified in the section, it automatically is to be taxed. However, there are certain exceptions carved out from the said section like receipt from relatives etc., in which case the Department can still invoke section 68 on the ground of unsatisfactory explanation.

Hon'ble Supreme Court in case of *CIT vs. P. Mohanakala (291 ITR 278)* has held that receipt of income viz. gift from NRI itself constitutes a *prima facie* evidence since the assessee failed to rebut the same, the AO was correct in adding the same based on surrounding circumstances. The Court in this case also held that no proper, reasonable and acceptable explanation amounts to no explanation. The authors are of the view that the judgment in the above referred case should be viewed in respect of the peculiar facts of the said case. Where the assessee claims to have received gift from the donors who were strangers and having meagre means and where the cheque was issued on the same day on which the cash was deposited, it was held that the gift were unexplained – *Ishrawati Devi vs. ITO – 298 ITR (AT) 313 (All).*

As everyone's aware, analysis of section 68 is itself a mammoth task. However due to paucity of space, only broad overview of section 68 is given. Further, though the fundamental judgments may be relevant, however much depends upon the facts of the specific case, and the applicability of the judgments to the facts of one's case.

CA Jagdish T. Punjabi

Onus of Proof vis-a-vis certain clauses of Section 56

Income-tax is a tax on income. Income which is to be taxed must be real income. However, legislature with a view to curb unaccounted money has introduced certain provisions whereby notional income is brought to tax. One such instance is section 56(2)(vii). This section provides that when an individual or hindu undivided family receives from any person any sum of money or immovable property or property (as defined in the said clause) and such property is received without consideration or the fair market value of the property received is less than the consideration then the fair market value of the property or the difference between the fair market value and the consideration, as the case may be, is to be taxed as income of the recipient.

Section 2(24) of the Income-tax Act, 1961 ("the Act") which defines the term "income" has been amended to include any sum of money or value of property referred to in clause (vii) or clause (viia) of sub-section (2) of section 56. Section 2(24) has also been amended to cover a situation referred to in clause (viib) of sub-section (2) of section 56.

S. 56(2)(vii) applies when an individual or HUF, in any previous year, receives from any person or persons, on or after 1-10-2009 :

Property received	Amount liable to tax
Any sum of money, without consideration, aggregate value of which exceeds ` 50,000.	Whole of the aggregate value of money received.
Any immovable property, without consideration, the stamp duty value of which exceeds ` 50,000.	Stamp duty value of immovable property
Any property other than immovable property, -	
* Without consideration, the aggregate FMV of which exceeds ` 50,000;  * For a consideration which is less than the aggregate FMV of the property by an amount exceeding ` 50,000.	Whole of the aggregate of FMV (as per prescribed method) of movable property. Aggregate FMV (as per prescribed method) of movable property in excess of the consideration.

Second Proviso to S. 56(2)(vii) specifies the situations to which this clause does not apply. As per the second proviso, this clause shall not apply to any sum of money or any property received–

(a) From any relative; or

(b) On the occasion of the marriage of the individual; or

(c) Under a will or by way of inheritance; or

(d) In contemplation of death of the payer or donor, as the case may be; or

(e) From any local authority as defined in the Explanation to clause (20) of section 10; or

(f) From any fund or foundation or university or other educational institution or hospital or other medical institution or any trust or institution referred to in clause (23C) of section 10; or

(g) From any trust or institution registered under section 12AA.

Explanation to Section 56(2)(vii) defines the terms 'assessable', 'fair market value', 'jewellery', 'property', 'relative' and 'stamp duty value'.

It is not that all properties received without consideration or for inadequate consideration become taxable. The term 'property' has been exhaustively defined in the Explanation.

The Section applies to all individuals irrespective of their age, citizenship or residential status. However, in view of the provisions of Section 5 a non-resident shall be liable to pay tax only on amounts or property received in India.

The two provisos to sub-clause (b) deal with a situation where the date of agreement fixing the amount of consideration for transfer of immovable property is not the same as the date of registration.

Section 56(2)(viia) applies to a firm or a company not being a company in which the public are substantially interested (closely held company) which receives shares of a closely held company without consideration, the aggregate fair market value of which exceeds ` 50,000 or for a consideration which is less than the aggregate fair market value of the property by an amount exceeding ` 50,000.

Section 56(2)(viib) provides that when a closely held company issues shares at a premium and the consideration received on issue of shares is in excess of the fair market value of the shares then the difference between the aggregate consideration received and fair market value of the shares is taxed as income of the company under clause (viib) of sub-section (2) of section 56.

Thus, section 2(24) read with sections 56(2)(vii), 56(2)(viia) and 56(2)(viib) create a fiction by which certain capital receipts are charged to tax.

The scope of this article is to examine on whom does the onus of proof lies in connection with various issues which may arise from the provisions of section 56(2).

At the outset it would be relevant to note the following general principles as regards onus of proof –

(i) In civil cases, the initial burden is a *prima facie* one in that where the explanation is *prima facie* credible the burden will shift to the other party. What decides the issue is preponderance of probability. In criminal cases, the requirement is that the evidence led by the prosecution should be beyond reasonable doubt, which means that there should be a higher degree of probability, but at the same time, it does not mean "prove beyond a shadow of doubt" even as pointed out by Lord Denning in *Miller vs. Minister of Pensions*. The Court may classify the burden as

between initial burden and the burden which may shift. In civil cases, the initial burden generally rests with the plaintiff, who files the case. He is expected to make out a *prima facie* case. But in criminal cases, the initial presumption is that the accused is innocent.

(ii) Where the statute places the burden of proof in income-tax cases on the taxpayer, it is to be understood, that it is only the initial burden.

(iii) The burden is on the revenue authorities to show that a receipt constitutes income and that the income is liable to tax under the statute, but the onus of showing that a particular class of income is exempt from taxation lies on the assessee *[Mustafa vs. CIT 16 ITR 330 (PC); Bacha Guzdar vs. CIT 27 ITR 1; CIT vs. Venkataswamy 29 ITR 529 (SC); CIT vs. Ramakrishna 35 ITR 312 (SC); Parimisetti vs. CIT 57 ITR 532 (SC)]*

(iv) The onus to prove that the apparent is not the real is on the party who claims it to be so *[CIT vs. Daulat Ram Rawatmull 87 ITR 349 (SC); CIT vs. Durga Prasad More 82 ITR 540 (SC)].*

(v) Onus is always on a person who asserts a proposition or fact which is not self evident. It is often said that the onus is sometimes on the side of one contending party, sometimes on the side of the other, or, as it often is expressed, that in certain circumstances, the onus shifts.

(vi) In *Udhavdas Kewalram vs. CIT [66 ITR 462(SC)],* the Supreme Court has held that it is for the tax authorities to prove that a particular receipt is taxable. It was pointed out that in deciding whether an item of receipt is taxable as income, the tribunal may consider the evidence in the light of the statements made by the assessee, his conduct and the probabilities, but in arriving at its conclusion there must be a fair and reasonably full review of the evidence. The burden has also been held to be on the revenue to prove that income accrued or arose in a particular place. *[CIT vs. Mathias 7 ITR 48 (PC); Phoosa Lal Mansingka vs. CIT 32 ITR 96 (All.)]*

Some of the situations arising in the context of section 56 where either the assessee or the Assessing Officer may be required to discharge the onus of proof are as follows —

1. **Sum of money/immovable property/ property is received by an individual from his relative** – Any sum of money received by an individual from his relative without consideration is not covered by s. 56(2)(vii). Therefore, an assessee who has received a sum of money from his relative would not include such a sum in his total income. In this fact pattern, two issues could arise in the course of assessment proceedings –

(i) The assessee will have to establish that the person from whom the sum of money has been received is a relative of the assessee. The onus will be on the assessee to establish the relationship between the donor and the assessee. This could be done by producing various documents like ration card, birth certificate, marriage certificate, etc. If required, the assessee can even consider furnishing an affidavit to this effect. Once the basic documents have been furnished the burden will then shift to the Assessing Officer to establish that the statement made by the assessee is not correct.

(ii) The Assessing Officer may ask the assessee to prove the creditworthiness of the relative from whom the sum of money has been received. In view of the proposition that the onus is on the person who asserts a proposition or fact which is not self-evident, the onus would be on the assessee to prove the

creditworthiness of the relative from whom sum of money has been received. He may also be required to establish the genuineness of the transaction. Upon the assessee having discharged the primary onus by furnishing the name, address, PAN, balance sheet and the bank account details, the onus will shift to the Assessing Officer. Assuming that the Assessing Officer comes to a conclusion that the relative did not have the capacity to give the sum to the assessee the Assessing Officer may consider taxing this amount under section 68 of the Act.

2. **In a situation where the assessee has received a sum of money without consideration from a person who is not his relative and has offered the sum so received as his income** under the head `Income from Other Sources' in view of the provisions of section 56(2)(vii), the Assessing Officer may, in the course of assessment proceedings, ask the assessee to establish the creditworthiness of the person from whom the sum has been received. Assuming that the assessee is not in a position to do that or that it is evident that the person from whom the sum has been received by the assessee is not a person of sufficient means, a question would arise as to whether the Assessing Officer can, in such a case, add the amount under section 68 instead of under section 56. In view of the provisions of section 115BBE since the rate of tax applicable to amounts chargeable under section 68 is 30% and also, since there could be some element of doubt whether the current years losses under the head `Profits and gains of business or profession', if any, can be set off against amounts chargeable under section 68 of the Act, the Assessing Officer may charge this amount to tax under section 68 of the Act. In such a situation, the assessee may rely upon the decision of the Delhi High Court in the case of *DIT (Exemptions) vs. Keshav Social and Charitable Foundation [(2005) 278 ITR 152]* and contend that section 68 will have no application when the amount is offered as income because the very purport of section 68 is to place the burden of proof on the assessee, where such cash credits are not offered as income, so as to draw the inference that it is income. Where it is treated as income by the assessee, who offers such amount as income, the question of invoking section 68 should not arise.

3. **An individual receives shares of a closely held company in consideration for services rendered and the fair market value of the shares received is disproportionate to the value of services rendered.** In such a situation a question would arise as to whether the onus is on the assessee or the Assessing Officer to prove that the difference between fair market value of the shares received and the value of services rendered (if not already offered for taxation under the head Business Income) is taxable u/s. 56(2)(vii). It appears that since it is the Assessing Officer who is contending that the amount under consideration is taxable the onus will be on the Assessing Officer to establish that the shares have been received for a consideration which is less than the fair market value of the shares received.

4. **In a case where assessee purchases shares of a closely held company for a consideration which is less than the fair market value of the shares computed in accordance with Rule 11UA** and in the course of assessment proceedings, the Assessing Officer issues a show cause to the assessee asking him to explain why the difference between the fair market value of the shares computed in accordance with Rule 11UA and the amount of consideration should not be charged to tax under section 56(2)(vii) of the Act. Rule 11UA provides for computing the fair market value of the shares based on the audited balance sheet as on the valuation date which has been audited by the statutory auditor of the company or where the balance

sheet as on valuation date is not drawn up then the fair market value is to be determined based on the balance sheet drawn up as on a date immediately preceding the valuation date which has been approved and adopted in the annual general meeting of the shareholders of the company. If the balance sheet of the company, whose shares are received by the assessee, on the valuation date is not drawn up the Assessing Officer may compute the value by considering the figures as per last audited balance sheet which was approved and adopted by the shareholders. The assessee may object to this on the ground that since the last balance sheet date there has been a major fire and a significant portion of the assets were destroyed. In this case the onus will be on the assessee to prove that the value of the shares, in the facts of this case, should not be computed by following Rule 11UA. The contention on behalf of the assessee could be that Rule 11UA does not envisage all possible situations. In such circumstances, it appears that the Court would consider the fact that it is only real income which needs to be charged to tax and a Rule which leads to an absurd value of the shares cannot be followed and assessee be asked to pay tax on the basis of such absurd value. The Court may read down the Rule.

5. Fair market value of shares has to be determined in accordance with the prescribed rules. Rule 11UA has been prescribed for this purpose. Rule 11UA provides an option that the fair market value of the shares can be valued as per Break-up Value method or it may be determined by a merchant banker or accountant as per discounted free cash flow method. In a case **where the fair market value has been determined as per discounted free cash flow method,** the Assessing Officer in the course of assessment proceedings may call for the valuation report. The Assessing Officer may call for the supporting on the basis of which the fair market value has been determined. Since the Assessing Officer is now of the opinion that the estimates are unrealistic the onus will be on the Assessing Officer to substantiate his case. He may do so by referring the case to the valuation to the valuation officer under section 142A of the Act. He will not be entitled to make adjustments to the valuation report and determine the value himself since the Assessing Officer is not an expert in valuation.

6. In a case where the **assessee has computed the fair market value of the shares** received without consideration in accordance with Rule 11UA **by following the break-up value method, the Assessing Officer feels that the real value of the shares should be much higher** since the assets were acquired by the company about 75 years ago and since then the value of real estate has appreciated several times and therefore, the fair market value determined by the assessee by following break-up value method is not correct. He states that he has discharged his onus by giving instances of the price of real estate belonging to the company and has compared it with the book value thereof. The addition so made by the Assessing Officer is not likely to be sustained by the court since the Act itself provides that the fair market value has to be computed in accordance with the prescribed Rules and break-up value method is one of the recognized methods of valuation.

These are some of the issues where the question of onus may arise in connection with the provisions of section 56(2).

> Do not figure out big plans at first, but, begin slowly, feel your ground and proceed up and up.
>
> — *Swami Vivekananda*

Vipul B. Joshi & Nishit M. Gandhi, *Advocates*

Burden of Proof vis-à-vis Section 41 and Section 269SS / 269T

Let us start the discussion on a lighter note. American Senator Mr. Barry Goldwater once said that *"The income tax created more criminals than any other single act of government"*. While one may not completely agree with Mr. Goldwater, but considering the complexities involved in the Income–tax Act, 1961 ["the Act" for short], one is not sure if what he said applies even also to the Indian context. In this special issue of the journal on "Genuineness of Transactions / Burden of Proof" this article deals with certain aspects relating to burden of proof under section 41 & sections 269SS & 269T of the Act. This article, we believe, will be useful to various stake holders while determining the application and discharge of onus of proof in relation to section 41 and section 269SS & 269T of the Act. Since the concept of *"Onus of Proof"* is discussed in detail in the other articles of this issue, we are restricting our discussion only to the applicability of this concept to the above sections. It is however relevant to remember here the well known maxim *"Affirmanti non neganti incumbit probation"* meaning burden of proof lies upon him who affirms, not upon him who denies. As a general rule, the above maxim is applied in determining on whom lies the onus of proof. We have divided the article in two parts, one dealing with section 41 and the other dealing with sections 269SS / 269T and related sections.

ONUS OF PROOF AND SECTION 41

1. Brief Overview

Section 41 of the Act provides for taxability of certain items as profits of the business in specific situations like remission or cessation of a trading liability, etc. Though, section 41 also provides for taxability of certain sum in other eventualities, like sale of depreciable assets, sale of scientific research assets, recovery of bad debt allowed in earlier year, etc., in majority of the cases, section 41 is invoked with reference to sub-section 1 only, that is, remission or cessation of a trading liability. Therefore, the discussion of this article is confined to section 41(1), also because the topic of 'burden of proof' is more relevant for this sub-section only.

2. Analysis of Section 41(1) of the Act

In the context of understanding the issue of burden of proof, ingredients of section 41(1) can be dissected as under:

(i) In an assessment for any earlier year in case of an assessee, an allowance / deduction was made in respect of loss, expenditure or trading liability incurred by the assessee.

(ii) During the previous year, such assessee or his successor in business, has obtained:

(a) Any amount in respect of such loss or expenditure, whether in cash or any other manner whatsoever; or

(b) Some benefit in respect of such trading liability by way of remission or cessation thereof.

(iii) In such cases, the amount so received or the value of such benefit so received, as the case may be, is taxable as business income for the previous year.

(iv) Such taxability is irrespective of whether the business or the profession with respect of which the allowance or deduction was made in the earlier year, was in existence in the previous year or not.

3. Burden of Proof

Before dealing with onus of proof vis–a–vis the above analysis, it may be appropriate to deal with some fundamental legal position.

(i) The person on whom the burden of proof lies, the nature thereof and the manner in which such burden needs to be discharged depend upon, apart from the specific language of the provision, whether the provision is a charging provision or a machinery provision. If it is the former, the burden is very high on the part of the Department and is required to be discharged strictly, the burden is not as heavy in case of the latter situation. While the issue whether section 41(1) is a charging provision or a machinery provision may be debatable, it has been held that since section 41(1) creates a legal fiction, the same has to be strictly construed. In other words, primary onus is on the Revenue and the provision of this section can be invoked only within four corners of this section and also the conditions precedent need to be shown to be in existence by the Revenue.

This is also on the logic that section 41(1) has been incorporated in the Act with a definite purpose to bring to tax those items which may not be chargeable to tax otherwise. While some of the instances sought to be covered by section 41 may otherwise also be exigible to tax u/s. 28, most of the instances may not. For example, simple waiver / remission of a trade liability by the creditor. Perhaps that is the reason why a specific clause (v) has been added to section 2 (24) - defining the term "income" - so as to specifically include 'any sum chargeable to income – tax ….. under section 41' in the definition of the term "income". It is a well settled law that it is always for the Revenue to prove that an item of receipt is income, it falls under the taxing provision and is therefore liable to tax under the Act[1].

(ii) With this, let us analyse the burden / onus of proof in the context of the above dissection of section 41(1). The very starting point of invoking section 41 is an allowance or deduction having been made in assessment for any earlier year. The question that arises is as to on whom the onus lies in this regard. The Hon'ble Delhi High Court has categorically held in the case of ***Steel & General Mills Co. Ltd. vs. CIT***[2] that the burden is on the Department to prove that an allowance or deduction has been made in an earlier assessment and in respect of which the Assessee has received any benefit so as to bring it to tax u/s 41. Apart from this, there is a plethora of judgements[3] which hold that once the Department fails to prove that a deduction was allowed in the earlier

1 *Janki Ram Bahadur Ram vs. CIT – [1965] 57 ITR 21 (SC)*

2 *Steel & General Mills Co. Ltd. vs. CIT – (1974) 96 ITR 438 (delhi)*

3 *Tirunelveli Motor Bus Service vs. CIT – [(1970) 78 ITR 55 (SC)], CIT vs. Lal Textile Finishing Mills (P.) Ltd. – [(1989) 180 ITR 45 (P&H)], Narayan Chettiar Industries vs. ITO – [(2005) 277 ITR 426 (Mad)], CIT vs. Mohan Meakin Ltd. – [(2012) 205 Taxman 43 (Del)]*

years, no addition can be made to the income of the assessee u/s. 41 of the Act. Another aspect of the matter is that the amount sought to be taxed must be that in respect of which a deduction is claimed against the taxable income. That means, merely if an expenditure is provided for in the accounts but for which no deduction is claimed or allowed under the Act, it cannot be taxed u/s 41 of the Act[4].

This issue can also be well understood by some specific instances. There must be an actual allowance made in an earlier year. Such allowance cannot be a matter of inference. There should be a clear finding of fact about such allowance, based on some evidence on record. For example, if assessment of the assessee is based on best judgment by estimating his income in an ad hoc manner, that may not be sufficient to prove that a particular item of expenditure debited to Profit & Loss Account was allowed as an allowance, in absence of ability of the Department to identify such particular expenditure having allowed as a deduction[4a].

(iii) The second condition is obtaining certain benefit / advantage by the assessee. This can be divided into two parts:

(a) Obtaining amount, whether in cash or any other manner whatsoever, in respect of such loss or expenditure.

(b) Obtaining some benefit by way of remission or cessation of such trading liability.

A. As far as (a) is concerned, actual receiving of the amount is a condition precedent, which is to be proved by the Revenue. Such obtaining should not be conditional or uncertain but should be final and irreversible. At the same time, the words "in any manner whatsoever" are wide and may include, in a given case, adjustment entry / credit note.

B. In so far as (b) is concerned, here also, it is the primary onus of the department to prove that some benefit, with respect to a trade liability, was obtained by the assessee during the previous year and, that too, as a matter of fact, by way of ***remission or cessation*** only and in no other matter. Now, the terms remission and cessation have now achieved definite judicial connotations. While the former connotes a positive action on the part of the creditor, the latter may occur on account of external factors. Nonetheless, in either case, the primary onus is on the Department to prove so by recording of finding of facts, supported by cogent evidence. Such remission or cessation cannot be a matter of presumption / assumption / suspicion, except perhaps in extreme cases. However, attention is drawn to the decision of Calcutta High Court in the case of ***Kesoram Industries and Cotton Mills Ltd. vs. CIT***[5] wherein it was held that whether the liability has been fully discharged or not lies in the special knowledge of the assessee and hence the onus is on him to prove that the liability still subsists and that there is no cessation or remission of the same so as to bring the amount to tax u/s. 41.

4 *Judgements supra and CIT vs. Jain Co-operative Bank Ltd. – [I.T.A. Nos. 314 & 315 / 2012 Delhi High Court]*

4a *Tirunelveli Motor Bus Service vs. CIT – [(1970) 78 ITR 55 (SC)]*

5 *Kesoram Industries and Cotton Mills Ltd. vs. CIT – (1992) 196 ITR 845 (Cal.)*

The issue of onus of burden in this regard can be appreciated by some of the specific instances and the legal position emerging therefrom by majority of judgments, some stray contrary judgments notwithstanding:

(a) Time barring liability

It is a regular practice of the Department to seek to tax the amount of unclaimed creditors after efflux of the limitation period barring any civil suits against the assessee by the creditors. In such a situation, the Department treats the said amount of unclaimed creditors as a liability having been ceased by lapse of the limitation period. It has been held that just because the debt is time barred there is no presumption that only because of that there occurred remission or cessation of such liability, specially when the debtor continues to acknowledge such debt, say, for example, by continue to show his liability in his books of accounts as payable.

(b) Unilateral entry passed by the debtor

There were cases which held that mere unilateral act by a debtor cannot, by itself, bring about cessation of the liability, as long as there existed a valid and enforceable debt to be discharged by the debtor. However, to nullify this line of judicial decisions that Explanation was introduced by Finance (No. 2) Act, 1996 with effect from 1-4-1997 [Now Explanation 1], so as to specifically provide that such unilateral act by the debtor would be regarded as remission or cessation of the liability. Corollary to the above, by applying converse logic, it is always possible to contend that as long as the debtor does not write back such liability in his accounts – and thereby acknowledges his liability to pay – there can be no remission or cessation of such liability. In fact there are various judgements[6], in the context of winding up under the Companies Act, wherein the courts have held that even entry in books of account of respondent showing that an amount was outstanding to creditor (the petitioner) should be taken as acknowledgement of debt.

(c) Efflux of time

A trend is growing in which section 41 is invoked by the Department simply on the ground that the liability has remained undischarged for a very long time. There are certain judgments upholding such action. However, in majority of the cases, such action of the department has not been approved.

6 *NITI International Ltd. vs. Shree Sagarmatha Distributors (P.) Ltd. Co. Petition no. 149 of 2005, YES Bank Ltd. v/s International Electron Devices Ltd. Co. Petition no. 608 of 2012*

(d) <u>The creditor not responding / not traceable</u>

The issue become little complex in such an eventuality. If the Department doubts genuineness of the credit entry on account of the concerned and creditor having not found / traceable or not responding to the summons issued, then the Department can, at the most and if at all, make suitable addition in the year of such credit first appearing. However, this may not be sufficient, by itself, to invoke section 41 (1); section 41 (1) presupposes existence of a valid, genuine and subsisting trade liability. However, an issue may arise if this fact, either solo or coupled with the fact of efflux of time, is pressed into service by the Department to discharge its primary burden of showing that there occurred remission or cessation of such liability. While in extreme cases, the assessee may find his position venerable on account of certain decisions, still, all is not lost and the assessee can give spirited fight and may also succeed – on the first principle governing section 41(1).

(e) <u>Subsequent events</u>

The assessee may support his case by relying upon subsequent events, for example, by showing that such liabilities were discharged, fully or partly, subsequently. The assessee may also procure confirmation from the creditor and rely upon the same in appellate proceeding, of course supported by proper application for admission of additional evidence.

(iv) This issue can be well concluded by referring an interesting case[7] before the Hon'ble Gujarat High Court wherein the Court dismissed an appeal filed by the Department holding that even if the creditors as reflected in the books by the Assessee were not traceable inspite of enquiries made by the Assessing Officer no additions could be made u/s 41(1). The Hon'ble High Court held as follows:

"…Section 41(1) of the Act … would apply in a case where there has been remission or cessation of liability during the year under consideration subject to the conditions contained in the statute being fulfilled. Additionally, such cessation or remission has to be during the previous year relevant to the assessment year under consideration. In the present case, both elements are missing. There was nothing on record to suggest there was remission or cessation of liability that too during the previous year relevant to the assessment year 2007-08 which was the year under consideration. <u>It is undoubtedly a curious case. Even the liability itself seems under serious doubt. The Assessing Officer undertook the exercise to verify the records of the so called creditors. Many of them were not found at all in the given address. Some of them stated that they had no dealing with the assessee. In one or two cases, the response was that they had no dealing with the assessee nor did they know him.</u> Of course, these inquiries were made ex parte and in that view of the matter, the assessee would be allowed

7 *CIT vs. Bhogilal Ramjibhai Atara - TaxAppeal No. 588 of 2013 Gujarat High Court*

> *to contest such findings. Nevertheless, even if such facts were established through bi-parte inquiries, the liability as it stands perhaps holds that there was no cessation or remission of liability and that therefore, the amount in question cannot be added back as a deemed income under section 41(1) of the Act. **This is one of the strange cases where even if the debt itself is found to be non-genuine from the very inception, at least in terms of section 41(1) of the Act there is no cure for it.** Be that as it may, insofar as the orders of the Revenue authorities are concerned, the Tribunal not having made any error, this Tax Appeal is dismissed".*

While coming to this conclusion, the Hon'ble High Court relied on various decisions[8].

2. Onus of proof *vis-à-vis* section 269SS & 269T

Before we start our discussion on the applicability of the concept of onus of proof under the above sections, it is worthwhile to understand the purpose and scope of sections 269SS & 269T. Penalty has been provided for contravention of these sections in sections 271D & 271E of the Act. Such penalty is discretionary and could be avoided if a reasonable cause is shown to the Assessing Officer as per section 273B. Constitutional validity of Section 269SS has been upheld by the Hon'ble Supreme Court in the case of Assistant *Director of Inspection v/s Kum. A.B. Shanthi*[9]. The Hon'ble Supreme Court held that said section was enacted so as to curtail the practice of the assessees indulging in cash transactions and thereby manipulating their accounts and income leading to tax evasion. The said sections, as stated by the Hon'ble Supreme Court, are introduced with a view to curb the rampant circulation of black money in the country. Genuine and Bona fide transactions are however saved by virtue of section 273B.

In this background let us analyse as to how the said sections namely 269SS & 269T are triggered and under what circumstances can an assessee be penalized u/ss. 271D / 271E for the contravention of these sections. It is worth mentioning here that sections 269SS / 269T are mutually exclusive from section 68 and once an item is taxed by the Assessing Officer as undisclosed money u/s 68, he cannot again resort to section 269SS and penalise the assessee u/s 271D[10]. Sections 269SS / 269T are primarily aimed at transactions carried out in cash. It therefore follows that non-cash transactions are not covered by these sections. For example transactions through book entries may not be covered within the ambit of section 269SS[11]. A contrary view to this proposition is taken by the Hon'ble Bombay High Court in the case of *CIT vs. Triumph International Finance (I) Ltd.*[12]. Likewise, the provisions of section 269SS / 269T apply only to a loan or a deposit or an advance for the purchase of immovable property[13] accepted or repaid otherwise than the modes prescribed in the respective sections. Accordingly advances (except as mentioned above) are not attracted under the above sections and therefore not liable for penalty. It is also pertinent to note here that the terms 'advance' 'loan' and 'deposit' are distinct and separate[14]. The Legislature has in its wisdom included only the terms loan and deposit within the ambit of

8 *CIT vs. Miraa Processors (P) Ltd. (2012) 208 Taxman 93 (Guj.), CIT vs. Nitin S. Garg, (2012) 208 Taxman 16 (Guj.) & CIT vs. G.K. Patel & Co. (2013) 212 Taxman 384 (Guj).*

9 *Assistant Director of Inspection vs. Kum. A.B. Shanthi – (2002) 255 ITR 258 (SC)*

10 *CIT vs. R. P. Singh and Co. Pvt. Ltd. – (2012) 340 ITR 217 (Del)*

11 *CIT vs. Noida Toll Bridge Co. Ltd. – (2006) 262 ITR 260 (Del), CIT vs. Worldwide Township Projects Ltd – (2014) 106 DTR (Del) 139, CIT vs. Govind Kumar – (2002) 253 ITR 103 (Raj).*

12 *CIT vs. Triumph International Finance (I) Ltd. – (2012) 345 ITR 270 (Bom.)*

13 Effective from 01.06.2015

14 *Pennwalt (India) Ltd. vs. Registrar of Companies - 62 Company Cases 112 (Bom.), Durga Prasad Mandelia v/s Registrar of Companies - 61 Company Cases 480 (Bom.).* Also the term 'deposit' is consciously absent in section 2(22)(e) thereby manifesting the intention of the legislature to tax only loan or deposit u/s 269SS / 269T

sections 269SS / 269T. The term 'advance' is consciously excluded in order to facilitate the smooth functioning of the businesses across the country. For example, it has been held in a number of cases that where the advances are made for purchase of goods[15] no penalty could be imposed u/ss. 271D / 271E.

Let us now discuss the onus of proof that lies on the assessee under sections 269SS / 269T of the Act. At the outset it may be mentioned that though the onus is on the Department to prove that the assessee has contravened the provisions of sections 269SS / 269T by making or repaying any loans or deposits, it is for the assessee to prove that the sum received / repaid either does not fall under the items covered by the said sections or that its case falls under the exceptions provided u/ss. 269SS / 269T or there is a reasonable and genuine cause for not complying with the provisions of section 269SS / 269T. As per section 273B the penalty u/ss. 271D / 271E is discretionary as discussed earlier. However, the said penalty could be avoided only if a reasonable cause is shown by the assessee. The onus therefore is much heavier on the assessee so as to satisfy the Assessing Officer as to the "reasonability" of the cause for seeking immunity from penalty. It is pertinent to note that even the Hon'ble Supreme Court in the case of *Director of Inspection vs. Kum. A.B. Shanthi (supra)* has taken note of this and categorically held that the hardships caused by sections 271D / 271E could be mitigated by section 273B of the Act. Section 273B starts with a non-obstante clause and therefore overrides the other sections. The expression "reasonable cause" is not defined in the Act and rightly so, for what may be reasonable in one fact situation may not be in another. The following observations of the Hon'ble Delhi High Court in the case of *Azadi Bachao Andolan vs. UOI*[16] are relevant in the context of the meaning of the term reasonable cause: *"…What would constitute reasonable cause cannot be laid down with precision. …Reasonable cause, as applied to human action, is that which would constrain a person of average intelligence and ordinary prudence. The expression 'reasonable' is not susceptible to a clear and precise definition; for an attempt to give a specific meaning to the word 'reasonable' is trying to count what is not number and measure what is not space. It can be described as rational according to the dictates of reason and is not excessive or immoderate. The word 'reasonable' has in law the prima facie meaning of reasonable with regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know - Re. A Solicitor [1945] KB 368. Reasonable cause can be reasonably said to be a cause which prevents a man of average intelli- gence and ordinary prudence, acting under normal circumstances, without negligence or inaction or want of bona fides…".* From the above it is amply clear that there cannot be a precise definition of what constitutes a reasonable cause so as to avoid penalty u/s 271D / 271E. In the case of *CIT vs. Saini Medical Store*[17] the Hon'ble Punjab and Haryana High Court held that bona fide belief coupled with no intention to evade taxes is a reasonable cause u/s 273B so as to prevent the rigours of penalty u/s 271E of the Act. Similarly in the case of *CIT vs. Natvarlal Purshottamdas Parekh*[18] the Hon'ble Gujarat High Court has held that non-compliance with section 269SS relying on the opinion of tax consultants that the amounts paid to and received from family members is not covered under section 269SS was a reasonable cause and therefore penalty could not be levied. There are a host of other decisions by various High Courts on the aspect of what is a reasonable cause so as to avoid penalty u/ss 271D / 271E. The conclusion that could be generally drawn from all these is that in case of non-compliance due to bona-fide reasons or reasons beyond the

15 *CIT vs. Kharaitilal & Co. – (2004) 270 ITR 445 (P&H), CIT vs. Kailashchandra Deepak Kumar – (2006) 317 ITR 351*

16 *Azadi Bachao Andolan vs. UOI – (2001) 252 ITR 471 (Del)*

17 *CIT vs. Saini Medical Store – (2005) 277 ITR 420 (P&H)*

18 *CIT vs. Natvarlal Purshottamdas Parekh – (2008) 303 ITR 5 (Guj)*

control of the assessee coupled with no intention to evade taxes is not liable for penalty and could be excused u/s 273B. In fact in the case of *Triumph International* (supra), the Hon'ble Bombay High Court went on to hold that though the Assessee contravened the provisions of section 269SS / 269T, penalty could not levied since the transaction carried out by the Assessee were bona-fide. The Hon'ble High Court held as follows: *"24. …Neither the genuineness of the receipt of loan/deposit nor the transaction of repayment of loan by way of adjustment through book entries carried out in the ordinary course of business has been doubted in the regular assessment. There is nothing on record to suggest that the amounts advanced by Investment Trust of India to the assessee represented the unaccounted money of the Investment Trust of India or the assessee. The fact that the assessee company belongs to the Ketan Parekh Group which is involved in the securities scam cannot be a ground for sustaining penalty imposed under Section 271E of the Act if reasonable cause is shown by the assessee for failing to comply with the provisions of Section 269T. It is not in dispute that settling the claims by making journal entries in the respective books is also one of the recognized modes of repaying loan/deposit. Therefore, in the facts of the present case, in our opinion, though the assessee has violated the provisions of Section 269T, the assessee has shown reasonable cause and, therefore, the decision of the Tribunal to delete the penalty imposed under Section 271E of the Act deserves acceptance.*

25. … in the absence of any finding recorded in the assessment order or in the penalty order to the effect that the repayment of loan/deposit was not a bonafide transaction and was made with a view to evade tax, we hold that the cause shown by the assessee was a reasonable cause and, therefore, in view of Section 273B of the Act, no penalty under Section 271E could be imposed for contravening the provisions of Section 269T of the Act.". It is therefore evident that even in cases covered by sections 269SS / 269T it does not necessarily follow that penalty would be levied. It is however pertinent to remember that in order to avoid penalty, the onus lies on the assessee to prove that there was a reasonable cause. However, practically speaking the real difficulty for the assessee is the subjective exercise of discretion by the Assessing Officer during the proceedings before him and for which the ultimate remedy is only appeal and at times long drawn litigation. In this context it is worth recollecting the following observations of the Hon'ble Supreme Court on exercise of discretion in the case of *Hindustan Tin Works Private Limited vs. Employees of Hindustan Tin Works Private Limited*[19]: *"…the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the Rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular…"*.

With this we conclude our article with the hope and belief that the above directions of the Hon'ble Supreme Court are followed in letter and spirit by the Authorities under the Act for it is aptly said *"Salus populi suprema lex", that is, "the welfare of the people is the supreme law".*

19 *Hindustan Tin Works Private Limited vs. Employees of Hindustan Tin Works Private Limited – [(1979) 2 SCC 80]*

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Burden of Proving Investments, money, bullion, properties and valuation u/s. 50C

1. Introduction

Among the many ardent attempts of the Government to curb tax evasion, sections 69 to 69C are quite prominent. While section 68 deals with unexplained cash credits, sections 69 to 69B deal with taxing of unexplained investments, money, bullion, jewellery or other valuable articles. These deeming fictions seek to bring to tax these investments/capital assets as income of the assessee.

A pertinent question that arises that this stage is since sections 69, 69A, 69B, 69D are not charging provisions, under which head of income the above unexplained investments would be taxed? According to *[Vodafone India Services Pvt. Ltd. vs. ADIT (2014) 368 ITR 1 (Bom. HC)]* the charge to tax must be specifically found in the Act and the substantive charging provisions are found in sections 4, 5, 15, 22, 28, 45 and 56. Hence, an addition under section 69 would necessarily have to fall under one of the charging provisions. However, in *[Fakir Mohamed Haji Hasan vs. CIT (2001) 247 ITR 290 (Guj. HC)]* it was held that sections 69, 69A, 69B and 69C would form a separate head of income and would be treated separately. With insertion of Section 115BBE, applicable from A.Y. 2013-14, the above may not hold water. Section 115BE now specifically levies tax on such unexplained items deemed as income at the flat rate of 30 per cent (plus surcharge and cess, as applicable), irrespective of the slab of income. Moreover, no deduction is available for any expenditure or allowance while computing such deemed income. Hence, benefit of basic exemption limit may also not be available with the assessee.

Each of these sections are dissected in the ensuing paragraphs.

2. Section 69: Unexplained investments

As per section 69, where the assessee has made investments which are not recorded in the books of account maintained by him for any source of income, and the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not satisfactory in the opinion of the AO, the value of the investments may be deemed to be the income of the assessee of the corresponding financial year.

To simplify, for applying section 69, the following conditions are required to be satisfied:

- Assessee had made investments in the previous year
- Such investments are not recorded in the books of accounts maintained by him

– No explanation regarding the source and nature of investment is provided by the assessee or the assessee provides unsatisfactory explanation

The result, if the above conditions are satisfied, is that the AO has the discretion to treat the value of investments as the income of the assessee.

2.1 Making of investments – Onus on Revenue

It is necessary that the investment should be made during the previous year in which the addition is sought to be made. The phraseology used in section 69 goes to show that before the provisions of section 69 can be invoked, the condition precedent as to an investment having been factually made must be conclusively established on evidence *[J.S. Parkar vs. V.B. Palekar & Ors. (1974) 94 ITR 616 (Bom HC)].* The revenue has to bring on record that the investments were in fact made by the assessee *[CIT vs. Daya Chand Jain Vaidya (1975) 98 ITR 280 (All. HC)].* The burden of proof of investment lies on the AO to prove that the investments were made and owned by the assessee. Where the Assessing Officer made addition on account of excess stock based on statement given to Bank, the court held that the onus cannot be discharged by merely referring to the statement given by the assessee to a third party in connection with a transaction which was not directly to the assessment and making the sole foundation for a finding that the assessee has deliberately suppressed his income *[CIT vs. N. Swamy (2000) 241 ITR 363 (Mad HC)].*

2.2 Investment not recorded in books of account

For addition u/s. 69, the investments that were found to be made by the assessee should not be recorded in the books of account, if any, maintained by the assessee. Such books may be maintained by the assessee for any source of income. If they are recorded in the books, but at a lower value, then section 69B would be triggered and consequently an addition would be made under that section and not section 69.

2.3 Explanation on source and nature – Onus on assessee

Once such investments are found, the AO has to necessarily give an opportunity of hearing to the assessee to provide reasonable explanation as to the source and nature of such investments. The onus is on the assessee to prove the nature and source of the investments. If the explanation is satisfactory, then no addition can be made by the AO. If an explanation given is rejected arbitrarily, then the court will interfere. Where it is contended that, what is apparent is not real, the burden to establish is on the person who alleges this.

The assessee has to prove the nature and source of the investment. The wordings 'explanation about the nature and source' are also used in section 68. But unlike section 68, where the assessee needs to prove the identity, creditworthiness of the creditor and the genuineness of transaction; same principles may not strictly apply to section 69. Section requires to prove the source of investment as the factum of investment is already accepted by the Assessing Officer. Further, proving source of investment seems logical, however one may ponder as why the section mandates to prove 'nature of investment'; it's the Assessing Officer who alleges investments. 'Nature of investments' is to cover various scenarios, wherein the Assessing Officer may change the colour of the transaction/investments; for example, he may treat an investment as benami investment. To deal with such situations, the assessee needs to prove the nature of investments as they are and not as interpreted by the Assessing Officer. The Punjab and

Haryana High Court in case of *Nirpal Singh vs. CIT (2013) 359 ITR 398* held that where the books of account are not rejected additions on the basis of valuation report of DVO cannot be made

2.4 Jewellery found during search – Onus on Assessee

The CBDT directed that during search, in the case of a person not assessed to wealth-tax, gold jewellery and ornaments to the extent of 500 gms. per married lady, 250 gms. per unmarried lady and 100 gms. per male member of the family, need not be seized. [See Instruction No. 1916 (F.No. 286/63/93-IT(INV.II), dated 11-5-1994]. Various courts have granted the benefit as per the instruction. *[CIT vs. Satya Narain Patni [2014] 366 ITR 325 (Raj)/ CIT vs. Ratanlal Vyaparilal Jain (2011) 339 ITR 351 (Guj) (HC) / Smt. Pati Devi vs. ITO & Anr. (1999) 240 ITR 727 (Kar)/ CIT vs Ghanshyam Das Johri 41 taxmann.com 295 (All)(HC), CIT vs. Kailash Chand Sharma 198 CTR 201 (Raj)(HC)]*

To the contrary Madras high court in case of *V.G.P. Ravidas vs ACIT (2015) 370 ITR 364* held that, clause (iii) of Board Instruction, dated 11-5-1994 which enables AO to exclude a larger quantity of jewellery and ornaments from seizure, will be applicable only if there are circumstances to come to conclusion that status of family and custom and practices of the community require holding of such jewellery. On the facts since assessee had not offered any such explanation, Board Circular was not applicable and excess jewellery was rightly included as unexplained investment.

2.5 Addition u/s 69 – Discretion of AO

The statute has used the word "may" which gives the AO discretion to treat unexplained investments as income *[CIT vs. Smt. P. K. Noorjahan (1999) 237 ITR 570 (SC)]*. The unsatisfactoriness of the explanation does not and need not, automatically, result in deeming the value of investment to be the income of the assessee.

For the purpose of making an addition, the AO, *vide* section 142A, may make a reference to a Valuation Officer to estimate the value of the investment where it is not apparent e.g. valuation of property/jewellry, etc. However, reference to Valuation Officer can be made only if AO finds that the valuation is not shown correctly.

Where the books of account were not rejected and there was no finding that cost of construction was incorrect, the reference to Valuation Officer itself was held to be not valid and the report of the Valuation Officer cannot form basis for addition u/s. 69 as per *[M. Selvaraj vs. ITO (2002) 258 ITR (AT) 82 (Mad HC)].*

Further Rule 11UA has limited application to section 56 and hence not strictly applicable to section 69.

As per the statute, the investment should not be recorded in the books and no explanation should be given, or explanation is unsatisfactory. The conditions are cumulative. Consider a situation that no books of account are maintained by the assessee and the assessee does not offer any explanation to its source and nature. In this case, the first limb of the condition will not be satisfied since the assessee does not maintain any books of account.

Further, consider a situation that a person is was not aware that such an investment was made in his name. In *Shahul Hameed (H) vs. ACIT (2002) 258 ITR 266 (Mad HC)* the investment in the name of the assessee's wife was treated as undisclosed income of the assessee since upon search in the residential premises of the assessee, it was found that a house property was purchased in the name of his wife and the

wife had no source of income, and she was ignorant of the purchase of the property in her name.

If one was to strictly read the section then the entire machinery would fail and no addition can be made by the AO u/s. 69. Hence in such situations one will have to interpret the "and" in the section as "or" and consequently, an addition can be made by the AO. The section reads ".... ...not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation....". Thus the word 'and' will have to read as 'or', in situations where the term 'if any' is applicable.

2.6 Peak Credit and Telescoping

The theory of peak credit and telescoping will be applicable for addition u/s 69.

Where the funds found in the possession of the assessee and withdrawals made for personal expenses were not independent funds, but recycled through bank transactions by repeated cash transaction of deposits, withdrawals, re-deposits and re-withdrawals made out of the same stock of case resulting in a huge turnover, each and every item of deposit and withdrawal could not be treated as an independent item of undisclosed income and added severally. The unexplained items can be accounted against the cash turnover generated against unauthorized activities carried on by the assessee in the block period. In *Dr. M. Somashekhar vs. ACIT (2010) 5 ITR (Trib) 129 (Bang)* the additions were limited to the peak in respect of other explained cash and withdrawals.

It is settled that there can be no double taxation of the same income. Telescoping is based on this principle that even an estimated income, which the assessee had not admitted in an earlier year, can be availed by him for explaining investment in a later year. However, this theory has to be applied with caution because it is available only in such cases where such addition could be available for investment in a later year, so that, if there is intervening unrecorded expenditure such amount would not be available for telescoping. This has been held in *S. Kuppuswami Mudaliar vs. CIT (1964) 51 ITR 757 (Mad. HC).*

Care should be taken while applying principles of telescoping as Explanation 2 of 271 would be directly applicable to such cases.

It may be noted that sub-section (2) of section 115BBE, which states that no deduction for any expenditure or allowance would be allowed for incomes referred u/s. 68, 69, 69A, 69B, 69C or 69D. Principles of peak credit and telescoping are yet to be tested with reference to section 115BE.

3. Section 69A: Unexplained money, etc.

Marginal note to the section refers as 'Unexplained moneys and other assets'. To curb the practice of converting black money into gold ornaments or gold vessels and later claiming that these were ancestral property, section 69A was introduced.

As per section 69A, in any financial year if the assessee is found to be the owner of any money, bullion, jewellry or other valuable article and such money, bullion, jewellry or other valuable article is not recorded in the books of account, maintained for any source of income, and the assessee offers no explanation about the nature and source of acquisition of such money, bullion, jewellry or other valuable article, or the explanation offered is not satisfactory in the opinion of the AO, then the money, value of the bullion, jewellry or other valuable article may be deemed to be the income of the assessee for such financial year.

Thus, if an,

- Assessee is found to be owner of any money, bullion, jewellery or other valuable article
- Such money, bullion, jewellery or other valuable articles are not recorded in the books of account
- Assessee offers no explanation as to nature and source of acquisition of such money, bullion, jewellery or other valuable article

Then, the AO can treat the value of the money, bullion, jewellery or other valuable articles as the income of the assessee.

3.1 Owner of money, bullion, jewellery or other valuable article – Onus on Revenue

For making an assessment u/s 69A for undisclosed income the assessee must not only be a person who is in possession of the undisclosed income, but he should also be the owner of the same *[Chuharmal vs. CIT (1988) 172 ITR 250 (SC); CIT vs. K.T.M.S. Mohammad (1997) 228 ITR 113 (Mad HC)].* This clearly shows that the mere fact that, on search, certain articles were found in the possession of a person cannot be said to attract the provisions of this section unless it is established that the person in whose possession articles were found is the owner thereof.

However, it is settled that possession is evidence of ownership and the strength of the presumption of ownership arising from the fact of possession depends on the nature of the property involved. The presumption is strongest in case of cash found in possession of a person. In such a situation, unless any cogent explanation is given by the person to show that someone else is the owner, it is reasonable to assume that the cash belonged to such person. Additionally, Section 110 of the Evidence Act, 1872, will tilt the scales in favour of the Revenue which states that possession is *prima facie* proof of ownership.

However, in *CIT vs. Ravi Kumar (2007) 294 ITR 78 (P&H HC),* the High Court held that if the assessee was only in possession of loose slips and not of any valuable articles then no assessment u/s. 69A can be made. The loose slips could neither prove the possession nor the ownership of any valuable article mentioned in the slip.

3.2 Not recorded in books of Accounts

Similar to section 69, the money, bullion, etc. found should not be recorded in the books of accounts maintained by the assessee for any source of income maintained.

3.3 Explanation as to source and nature – Onus on assessee

The assessee found with any money, bullion, jewellry or other valuable articles is burdened with the onus to give an explanation relating to the nature and source of acquisition of the money, bullion, etc. If he disputes the liability to tax it is for him to show that the receipt was not income or that, if it were, it was exempt from taxation under the provisions of the Act. In the absence of any such proof, the Revenue would be entitled to treat it as taxable income *[Govardhandas Hargovandas vs. CIT (1980) 126 ITR 560 (Bom HC)].* Thus, it becomes absolutely necessary to prove that the source of such money, bullion, etc.

3.4 Addition u/s 69A – Discretion of AO

Similar to section 69, an addition u/s. 69A is at the discretion of the AO. In *CIT vs. N. Sowbhagmull Mahavirchand (1983) 142 ITR 747 (Mad. HC)* it was held that section 69A does not compel either the AO or any of the appellate authorities to choose between the two alternatives to either assess the value of unexplained investments in whole or not to assess any portion of the value of

investments at all. It is open to the AO and appellate authorities to determine how much of the value of unexplained investments can be really regarded as representing the undisclosed income of the assessee and this, naturally, will depend on the facts of each case.

4. Section 69B: Amount of investments, etc., not fully disclosed in books of account

As per section 69B, if any assessee has made investment or is found to be the owner of any bullion, jewellery or other valuable articles, and the AO finds that the amount expended:

- On making such investment, or
- In acquiring such bullion, jewellry or other valuable articles,

exceeds the amount recorded in the books of account maintained by the assessee, and the assessee offers no explanation about such excess amount or the explanation offered by him is not satisfactory in the opinion of the AO, the excess amount may be deemed to be the income of the assessee of the relevant financial year.

4.1 Onus to prove higher consideration – Burden on AO

For section 69B, the market value is immaterial. The important question is whether the assessee has concealed any part of the consideration and whether the assessee has received a higher price than recorded in the instrument of transfer. The burden is on the Department to prove that the real investment exceeded the investment shown in account books of the assessee *[Smt. Amar Kumari Surana vs. CIT (1997) 226 ITR 344 (Raj HC)]*. Merely on the basis of the fair market value no addition can be made. The Gujarat High Court in *CIT vs. Golden Finance (2014) 220 Taxmann 162 (Mag.) (Guj.)(HC)* deleted the addition solely made on the basis of statement of the partner during survey. Similar to sections 69 and 69A, the addition is made at the discretion of the AO.

4.2 Telescoping

The benefit of telescoping would be allowed to even the additions made by the AO. Similar to section 68, as per section 69B, set off of additions for investment u/s. 69B will be allowed against the additions for business receipts for the same year.

4.3 Application of section 50C

Where the AO had made addition on basis of additional stamp duty paid by the assessee for the purchase of property invoking section 50C, in *Harley Street Pharmaceuticals Ltd. vs. ITO (2010) 6 ITR (Trib.) 182 (Ahm)* it was held that 50C was applicable only to the seller for computation of capital gains. Application of section 50C for the computation of unexplained investments under section 69B is not permissible, where there is nothing on record, which suggested that the assessee paid more than the recorded sale transaction. However, now, one will have to consider the application of section 56(2)(vii).

4.4 Reference to Valuation Officer

The AO may refer the valuation aspect to a Valuation Officer u/s 142A. However, a necessary precursor is satisfaction of the AO as to the understatement of investment. There can be no inference of any unexplained source of income merely with reference to the opinion of the Valuation Officer in the absence of any evidence regarding such additional outlay *[CIT vs. Bajrang Lal Bansal (2011) 335 ITR 572 (Del. HC)]*. The Gujarat High Court in case of *CIT vs. Vijaykumar D. Gupta (2014) 365 ITR 353* held that the Assessing Officer having made a reference to the Valuation Officer without rejecting the books of account, the addition under section 69B was not justified.

5. Section 69D: Amount borrowed or repaid on hundi

Section 69D is invoked when an amount is borrowed on hundi otherwise than by way of account payee cheque or an amount borrowed by way of hundi is repaid otherwise than by account payee cheque.

The proviso to the section enjoins that where at the time of borrowing of hundi, this section is invoked to rope in any amount borrowed on the hundi, the person shall not be assessed again under the section at the time of the repayment of such amount. This proviso is intended to prevent double taxation of the same amount at the time of borrowal and at the stage of repayment.

There is no definition of hundi in the IT Act, 1961 or Negotiable Instruments Act. According to section 2(2) of The Indian Stamp Act, 1899, "'Bill of exchange' means a bill of exchange as defined by the Negotiable Instruments Act, 1881, and includes also a hundi, and any other document entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money". A hundi is a bill of exchange written in the vernacular language and in vogue among the business community in India.

Section 69D has introduced an element, which is foreign to the indigenous practice of using hundi as an instrument evidencing the transaction and as a practice evolved during its long history to avoid cash, which was always unsafe when handled in large amounts. Section 69D requires payment by account payee cheque drawn on a bank.

It may be noted that section was introduced by Taxation laws (Amendment) Act, 1975 when other methods like internet banking, etc, were not prevalent. The section is not amended to incorporate latest methods as compared to sections 269SS and 269T.

6. Section 50C: Special provision for full value of consideration in certain cases

One of the measures introduced by the Finance minister to curb black money was introduction of section 50C in IT Act *vide* Finance Act, 2002, w.e.f. 1-4-2003. According to the provisions of section 50C, if the value of a capital asset, being land building or both, as per the stamp valuation authority is higher than the consideration received or accrued on transfer by an assessee, then such higher value will be assumed to be the full value of consideration for such transfer.

6.1 Consideration

There has to be consideration and if consideration is not there then provisions of section 50C are not applicable. Hence, the transfer of land, building or both by gift deed will not be governed by section 50C.

6.2 Capital Asset

The definition of capital asset as per section 2(14) of the Act would be applicable in this case. Considering the definition, it can be concluded that for builders, land and building meant for sale are stock-in-trade and hence, it will be out of purview of section 50C. Secondly section 50C is for computation of capital gain whereas land and building sold by builder which is his stock in trade is business income and hence, 50C would not be applicable to sale of land building or both which are in the form of stock-in-trade. Even to an agricultural land situated in specified area which does not form part of the definition of capital asset, the provisions of section 50C are not applicable as it is not capital asset at all and hence, question of computation of capital gain does not arise on such agricultural land.

To curb this, the Finance Ministry introduced a section 43CA with effect from 1st April, 2014. This section is on similar lines of Section 5OC

6.3 Transfer

This would be as defined under Section 2(47) of the Act. The word 'assessable' was introduced by amending Section 50C with effect from 1-10-2009. The insertion of words "or assessable" is neither a clarification nor an explanation to the already existing provision and it is only an inclusion of new class of transactions namely the transfers of properties without or before registration.

Before introducing the said amendment, only the transfers of properties where the value adopted or assessed by the stamp valuation authority were subjected to Section 50C application. However after introduction of the words "or assessable" after the words "adopted or assessed", such transfers where the value assessable by the stamp valuation authority are also brought into the ambit of Section 50C. Thus such introduction of new set of class of transfer would certainly have the prospective application only and not otherwise. Hence the transfer admittedly made earlier to such amendment cannot be brought under Section 50C.

6.4 Onus and Overall Effect of Section 50C

The normal tenet, thus, is that where stamp duty valuation is higher than the stated consideration on transfer, the same is to be adopted for the purpose of computing capital gains. The exception is that in case the assessee can demonstrate that the fair market valuation is less than the stamp duty valuation, the fair market value is to be adopted. The safeguard is that the assessee's challenge to the stamp duty valuation before the tax authorities cannot put the assessee to any disadvantage. In effect, thus, when stamp duty valuation of a property is higher than stated value of sale consideration, only the onus to prove the fair market value has been shifted on to the assessee. As long as an assessee can reasonably discharge this onus, even under the scheme of section 50C, the consideration stated by him cannot be disturbed.

The value adopted or assessed or assessable by the stamp valuation authority may not be disputed by any reference, or appeal before any stamp authority. In such cases the assessee needs to make a claim that the fair market value of the asset on the date of transfer is lower than the stamp duty value of the asset as on date of transfer. Only after the claim, the onus shifts to the department, wherein the AO is bound to make a reference to the Valuation Officer. If no claim is made the AO is not bound to make a reference to the Valuation Officer. The fact that in the return of income the assessee computed capital gains by adopting the consideration as per document of transfer to be full value of consideration(and not as per the stamp duty valuation), could be regarded as a claim made. The Calcutta High Court in case of *Sunil Kumar Agarwal vs. CIT (2015) 272 CTR 332* held that if the stamp duty valuation is higher than the consideration received, the AO must refer the valuation to the DVO even if there is no request by the assessee.

Section 50C does not strictly apply to additions u/ss. 69, 69A or 69B which contemplate additions made on the value of the investments, etc. However, in situations where AO alleges to make addition u/s 69, 69A or 69B, the assessee needs to raise specific contention about the valuation aspect, and ask the AO to refer it to the Valuation officer. Even request to the Valuation Officer should be made to grant an opportunity of hearing before deciding the value of the property.

Stamp duty is generally paid by the purchaser of the property. However, in view of the provisions of section 50C, the vendor is effected with the stamp duty valuation as against purchaser. However, post October, 2009 even purchaser would be liable to tax on property received which is below the stamp duty value. It may also happen that the difference is taxed both in the hands of seller as well as in the hands of purchaser.

To prove their onus the parties may take 2-3 independent valuation reports to justify their claim with respect to the valuation. It may further happen that the parties may apply for adjudication under the stamp duty laws, before the stamp authorities, and may file appeal against the adjudication order. The Mumbai Tribunal in *Seksaria Industries Pvt. Ltd. vs. ITO (2014) 36 ITR 409 (Mum.) (Trib.)* have observed that the only exception provided is that firstly the assessee should claim before AO that such value adopted or assessed by the Stamp Valuation Authority exceed fair market value and secondly the assessee should not have disputed such valuation adopted in any appeal or revision and no reference is made before any other authority, court or High Court challenging the value adopted by the Stamp Valuation Authority. It thus held that reference to DVO cannot be made if assessee has challenged the valuation by the stamp authorities and even if the said challenge is dismissed on ground that as purchaser paid the duty, assessee had no locus standi to challenge stamp valuation.

6.5 Issues

6.5.1 Applicability of Section 50C of the Act on transfer of leasehold rights

The Mumbai Tribunal in the case of *Atul Puranik [2011] 132 ITD 499 and Kolkata Tribunal* in the case of *Tejinder Singh [2012] 50 SOT 391* held that Section 50C of the Act is not applicable to the transfer of leasehold rights in land because the Section extends only to a capital asset being 'land or building or both'.

In line with the above decisions, recently the Pune Tribunal in the case of *Kancast P Ltd [2015] 68 SOT 110* held that only capital assets being land or building or both are covered within the scope of Section 50C of the Act and not all kinds of capital assets.

However the Lucknow Tribunal in the case of *ITO vs. Shri Hari Om Gupta (ITA No 222/ LKW/2013)* held that the leasehold rights is also a capital asset and therefore the provisions of Section 50C of the Act are applicable to transfer of leasehold rights for 99 years.

6.5.2 Applicability to depreciable assets

The special bench in case of *ITO vs. United Marine Academy (2011) 130 ITD 113 (SB) (Mum.)(Trib.)* held that, the two deeming fictions i.e. section 50 as well as section 50C, operate in different fields and there is no conflict between them. As section 50C was inserted to prevent assessee's indulging in under-valuation, there is no logic why it should not be applied to a depreciable building.

6.5.3 Transfer of Development Rights

In the case of *Arif Akhatar Hussain vs. ITO [2011] 45 SOT 257 (Mum),* it was held that the transfer of development rights are not covered within the ambit of section 50C. Similar view was held in the case of *ITO vs. Prem Ratan Gupta (ITA No. 5803/Mum/2009).*

7. Conclusion

Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. Shifting of onus is the process of transferring the obligation to affirmatively prove a fact in controversy or an issue brought during a lawsuit from one party in a legal controversy to the other party. This article covers only the tip of the ice berg on unexplained investments and other aspects however much depends on facts of the case and subsequent legal interpretation.

Ajay Singh, *Advocate*

Burden of Proof vs. Search, Seizure, Survey & Reassessment

Assessment as it is understood is a process of determination of any liability under the provision of the tax laws (sec. 2(8)).

It is a well-settled principle of law that assessment proceedings are quasi-judicial proceedings. The AO must proceed in a judicial manner and come to a judicial conclusion upon properly ascertaining facts. Discretion should be judicious. It should not be arbitrary exercise of power.

Burden of Proof and Onus of Proof – Meaning–Distinction

Burden of proof lies on the person who has to prove a fact and it never shifts, but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. *Narayan Bhagwantrao Gosavi Balajiwale vs. Gopal Vinayak Gosavi AIR 1960 SC 100.*

The onus to prove that the apparent is not the real is on the party who claims it to be so. If no evidence is given by the party on whom the burden is cast, the issue must be found against him. Thus onus is always on a person who asserts a proposition or fact which is not self-evident. Science has not yet invented any instrument to test the reliability of a evidence placed before a court or Tribunal. Therefore, the Courts and Tribunal have to judge the evidence before them by applying the test of human probabilities. Human minds may differ as to the reliability of a piece of evidence. But in that sphere the decision of the final fact finding authority is made conclusive by law. *CIT vs. Durga Prasad More (1971) 82 ITR 540 (SC).*

In the case of *Chuharmal vs. CIT (1988) 172 ITR 250 (SC)* the Hon'ble Court has highlighted the fact that the principle of evidence law are not to be ignored by the authorities, but at the same time human probability has to be the guiding principle, since the Assessing Officer is not fettered by technical rules of evidence.

An essential distinction between burden of proof and onus of proof is that the burden of proof never shifts, but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence.

The true test of onus in the case of "shifting" has been thus put by Lord HANWORTH MR :

"It appears to me that there can only be sufficient evidence to shift the onus from one side to the other if the evidence is sufficient *prima facie* to establish the case of the party on whom the onus lies. It is not merely a question of weighting feathers on the one side or the other, and of saying that if there were two feathers on one side and one on the other that would be sufficient to shift the onus. What is

meant is, that in the first instance the party on whom the onus lies must prove his case sufficiently to justify a judgment in his favour if there is no other evidence. *[Stoney vs. Eastbourne R.D. Council, (1927) 1 Chs. 367, 397]*

Evidence Act

As we have to deal with a topic which is predominantly a subject of Evidence Act, therefore brief discussion on certain provisions of Evidence Act is necessary to understand the jurisprudence of the subject/topic.

The law of Evidence is *lex fori*. Evidence is one of those matters which are governed by the law of the country in which the proceedings take place (*lex fori*). The *lex fori* determines all questions relating to the admission or rejection of evidence. The law of evidence is the *lex fori* which governs the Courts. Whether a witness is competent or not; whether a certain matter requires to be proved by writing or not; whether certain evidence proves a certain fact or not, that is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced and where the Court sits to enforce it. *(Bain vs. W & F Rail Co, 1850 3 HL Cas 1).*

It is only for a limited purpose that a proceeding before the Income Tax Authorities is declared to be deemed to be a judicial proceeding. In all other matters the proceedings before them are not judicial proceeding and they are not debarred from relying on private source of information. Income tax authorities are not strictly bound by rules of evidence *CIT vs. East Coast Commercial Co Ld, (AIR 1967 SC 768).*

The term Evidence is defined under the Evidence Act;

a. **Evidence : Evidence means and includes –**

1. All statement which the Court permits or requires to be made before it by witnesses, in relation to matters to fact under inquiry; such statements are called oral evidence;

2. All documents including electronic records produced for the inspection of Court;

Such documents are called documentary evidence

Sec. 101 defines " Burden of proof" — Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

This section is based on the rule, i.e. *incumbit probatio qui dicit, non qui negat* — the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for a negative is usually incapable of proof. "It is an ancient rule founded on consideration of good sense and should not be departed from without strong reasons;" *[per Lord Maugham in Constantine Line vs. I. S. Corpn, (1941) 2 All ER 165, 179].* This rule is derived from the Roman law, and is supportable not only upon the ground of fairness, but also upon that of the greater practical difficulty which is involved in proving a negative than in proving an affirmative.

The rule that the burden rests on the person who makes the affirmative allegation is not always a true test. There are many exceptions to the proposition. The burden is also on the person who has a negative assertion to make, e.g. a promisee alleging non-performance of contract. The burden of proof does not depend upon the form of the proposition but the burden of proving a claim or defence is on the party who asserts it.

When any fact is especially within the knowledge of any person, the burden of proving it is on him.

Onus is always on a person who asserts a proposition or fact which is not self-evident. To assert that a man who is alive was born requires no proof. The onus, is not on the person making the assertion, because it is self-evident that he had been born. But to assert that he had been born on a certain date, if the date is material, requires proof; the onus is on the person making the assertion. A person who asserts the existence of a fact must prove that a fact exists.

Where the issue was whether the document in question was genuine or sham or bogus, the party who alleged it to be bogus had to prove nothing till the party relying upon the document established its genuineness. *Subhra Mukherjee vs. Bharat Coking Coal Ltd., AIR 2000 SC 1203.*

Similarly the burden of proving that the assessee has so attempted to evade tax is on the revenue which may be discharged by the revenue by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee has attempted to evade tax lawfully payable by it.

In matter of classification of goods to determine the liability of tax applicable, the burden of proof is on the taxing authority to demonstrate that a particular class of goods or item in question is taxable in the manner claimed by them and mere assertion in that regard is of no avail. *[Garware Nylones Ltd. (1996) 10 SCC 413; Voltas Ltd vs. State of Gujarat (2015) 12 STD 658.]*

The ordinary rule is that the apparent state of affairs is real unless the contrary is proved. The burden of proving that a transaction is sham or that the person in whose name a property stands is a benamidar is on those who assert it.

CIT vs. Daulat Ram Rawatmull (1973) 87 ITR 349 (SC)

Late D. Ramaswamy Reddiar vs. CIT (1998) 234 ITR 148 (Mad.)

The shifting of onus can be better understood on reading of the Delhi Tribunal decision in case of *ACIT vs. KishanLal Jewels (P.) Ltd. [2012] 147 TTJ308(Del.)(Trib.)* wherein the tribunal observed that the assessee had furnished necessary information regarding the transactions with certain parties like purchase bills issued against goods purchased, sales-tax registration numbers of the parties, PANs, their confirmations and Bank statements showing the debit of the amount paid through account payee cheques to them in the account of assessee and credited in the Bank Account of sellers, thus the assessee had discharged its primary onus, thereafter the onus shifted on the department to rebut the same. Addition under section 69C was held to be not justified.

Sec. 102. Provides for "On whom burden of proof lies" — The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

The section embodies a test for ascertaining on which side the burden of proof lies. It means that when the burden of proof lies on a party, that party must fail if he does not discharge the burden by giving evidence.

Where the defendant admitted his signature on the voucher, the burden of proving that the voucher was signed in blank and/or that amount was towards profits is on the defendant.

When a citizen lays challenge to a restriction / prohibition on the exercise of a fundamental right under Article 19(1)(g), the onus of proving its reasonability to the satisfaction of the Court is upon the State or the authority concerned.

Where an assessee states that he has no income from a certain source and officers of the income-tax department disbelieve him, it is for them to prove that he has such income and not for him to prove the contrary.

Any assessment based on the inability of the assessee to prove his negative statement and on general assumption only is bad and should be cancelled *[In re Bishnupriya, 50 C 907; A 1924 C 337; see Naidu vs. I-T Officer, A 1956 N 157].* It is not that no burden ever lies on the income-tax department. When an assessee denies receipt from a certain source and makes out a *prima facie* case, the burden is on the department to disprove or avoid it.

Where property stands in the name of the assessee's wife, it is for the department to prove that she is a benamidar *[Savaram vs. Commr of I-T, A 1945 P 79; R. Rajagopal Reddy vs. Padmi Chandarshekar (1995) 213 ITR 340 (SC) ; Madura Knitting Co. vs. CIT (1956) 30 ITR 764, 788 (Mad); Kalwa Devadattam vs. Union of India (1963) 49 ITR 165, 175 (SC).]*

It is for the Revenue in the first instance to establish that particular receipt is income liable to tax but burden shifts on to assessee when sufficient evidence either direct or circumstantial is disclosed by Revenue *[Commr IT vs. Best & Co. , AIR 1966 SC 1325].*

S. 106. provides for "Burden of providing fact especially within knowledge" — When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

When any fact is especially within the knowledge of any person, the burden of proving it is on him.

Issues

1. **Statement given on oath u/s. 132(4) of the Act: Evidentiary Value of a Statement recorded u/s. 132(4) at an assessee's premises subjected to search**

Statement u/s. 132(4) is recorded on oath and its evidentiary value is high and it can be used in any proceedings under the Act. The Statement recorded during the course of search proceeding is only oral reply which is not backed by any supporting material. No addition can be made merely on the basis of admission made in statement recorded u/s. 132(4) without considering the surrounding circumstances and evidence to uphold the addition and the assessee cannot be bound by the original declaration made in the statement. The Hon'ble Andhra Pradesh High Court in *CIT vs. Shri Ramdas Motor Transport 238 ITR 177* have observed at page 183 that the provision embedded in sub-section(4) of section 132 is obviously based on the well-established rule of evidence that mere confessional statement without there being any document proof shall not be used in evidence against the person who made such statement.

However one should remember that statements must be availed as an opportunity to:

(a) Explain disclosed assets to avoid seizure;

(b) Avail benefits of immunity from penalty

In the Budget speech of Finance Minister for 2003-2004, in clause (i) of para 151 [260 ITR (St.) 29], it is stated that no confession shall be obtained through search and seizure operations. Thereafter, the CBDT has brought out the CBDT's circular No. 286/2/2003-IT (Inv.), dt. 10th March, 2003 which reads as under:-

"Instances have come to the notice of the Board where assessees have claimed that they have been forced to confess the undisclosed income during the course of the search and seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assessees while filing returns of income. In these circumstances, confessions during the course of search and seizure and survey operations do not serve any useful purpose."

The aforesaid position was reaffirmed *vide* Circular No. F. No. 286/98/2013-IT (Inv.II) 18th December, 2014. The instruction would be binding on the department in cases of pending assessments. It is held in *CIT vs.*

Indian Express (Madurai) Pvt. Ltd. 140 ITR 705, 724 that the Income-tax Appellate Tribunal is an extension of assessment proceedings, hence, the instruction could be said to be binding even where the appeals are pending at the ITAT.

In view of the above legal position where no incriminating material having been found during search and the assessment is made solely on the basis of statement recorded under Sec. 132 (4) it has been held that such additions are not valid :- *CIT vs. Nareshkumar Agarwal (2015) 122 DTR (AP. H. C) 339; CIT vs. Chandrakumar J. Kochar (2015) 230 Taxmann 78 (Gujarat H. C)*

The Hon'ble Supreme Court in *Shri Krishna vs. Kurukshetra University AIR 1976 SC 376* have laid down the ratio, after considering Section 18 of the Evidence Act, 1872, that any admission made in ignorance of legal rights or under duress cannot bind the maker of the admission.

The Hon'ble Rajasthan High Court in the case of *CIT vs. Ashok Kumar Soni 291 ITR 172* held that admission in statement during search proceedings is not conclusive proof for making an addition . Besides Hon'ble Supreme Court in the case of *Pullangode Rubber Produce Co. vs. State of Kerala 91 ITR 18* has also held that such statement can be explained in the light of correct facts.

In *Kailashben Manharlal Choksi vs. CIT [2008] 14 DTR 257 (Guj.),* it has been held that statement recorded at odd hours cannot be considered to be a voluntary statement and if it is subsequently retracted and necessary evidence contrary to such admission is led, the admission will not be binding.

[Also see *CIT vs. Om Prakash K. Jain (2009) 213 Taxation 708 (Bom); Vinod Solanki vs. UOI (2009) (233) ELT 157 (SC)]* .

In the case of *Jyotichand Bhaichand Saraf & Sons (P) Ltd. vs. Dy. CIT (2013) 86 DTR 289 / 154 TTJ 226 (Pune)(Trib.)* the Tribunal has held that the admission under section 132(4) was made under the mistaken belief of law instead of the correct legal position. The revenue cannot make the addition merely on the basis of statement without any evidence found in the course of the search action or post search enquiries to the effect that the assessee has undisclosed income.

In the case of *ITO vs. Permanand [2007] 107 TTJ 395(Jd)(Trib.)* it was held that AO cannot make addition on the basis of observations made by the Sales Tax department without conducting independent enquiries.

On perusal of the above judicial rulings will reveal that burden will be on revenue to justify the addition/disallowance made in assessment on basis of some material and not merely on basis of the statement recorded. However the assessee has to prove what has been stated in the statement was made under the mistaken belief of law instead of the correct legal positionor factual position. In the case of *Aishwarya Rai vs. Dy. CIT 104 ITD 166 (TM) (Mum.)* it was held that a statement under section 132(4) is not the last word, and it can be retracted/clarified subsequently. Thus the burden of proof to clarify the factual aspects will be on assessee, the assessee has to lead the evidence to prove that what was recorded in the statement was incorrect.

2. Retraction of statement under section 132(4)

During the course of search proceedings, statements are recorded u/s. 132(4) of the I.T. Act. Due to various reasons, it is often found that the assessees confess or agree for certain undisclosed income, which is thereafter retracted. However, the assessments are based on the statements recorded without considering the retraction.

Effect of retraction of statement of confession

a. Evidence in the form of confession can be dislodged (by making retraction) only by cogent evidence.

b. Initial burden to show that confession was voluntary and not obtained by resorting to coercive means is on the Department.

c. Retraction of Confession is completely factual and differs from case to case. It should be as early as possible after confession. It should be supported by proper explanation preferably by way of an affidavit. If assessee is alleging use of force or undue influence while recording the statement, the burden is on assessee to prove the same.

d. It should be made in an affidavit and backed by corroborative evidences justifying the retraction. The contents of affidavit are proved to be correct unless proved otherwise. *[Mehta Parikh & Co. vs. CIT (1956) 30 ITR 181 (SC) (187)]*

e. Statement given u/s. 132(4) is on oath and u/s 133A is not on oath and therefore it is difficult to retract the disclosure made in the statement u/s. 132(4) as compared to the disclosure made in the statement made u/s. 133A.

f. In the absence of any corroborative evidence, Assessing Officer cannot make addition on properly retracted statement.

g. Retraction must be made at the earliest available opportunity.

Retraction of statement after four years was held to be after thought

Ravindra Kumar Verma vs. CIT (2013) 214 Taxmann 117 (Mag.)(All.) (HC); Vasant Thakoor vs. ACIT (2013) 27 ITR 254 (Mum.) (Trib.)

It may be noted that merely by making retraction assessee cannot get away from his confession. The department has a right to disprove the retraction by cogent material. In the case of *Urmila & Co. Ltd. vs. Dy. CIT (2013) 60 SOT 1 (URO)(Mum.)(Trib.)* the Tribunal held that since disclosure in statement was found to be correct and complete in all respects and also explained purpose for which bogus bills were raised, retraction of disclosure could not be accepted. Additions made on the basis of disclosure was confirmed. (AY. 2008-09).

It may also be noted that survey does not empower any ITO to examine any person on oath, statement recorded under section 133A has no evidentiary value thus addition cannot be made merely on the basis of such statement [S. 69]

In the case of *CIT vs. S. Khader Khan Son (2013) 352 ITR 480 (SC)* the Tribunal deleted the addition made by the Assessing Officer on the basis of statement recorded during the survey proceedings. In an appeal before the High Court, the High Court by passing a detailed order and referring the circular of Board dated 10th March, 2003 had held that merely on the basis of statement recorded in the Course of survey, which was retracted subsequently addition cannot be made. High Court explained the difference between section 132(4) and section 133A. High Court held that statement obtained under section 133A would not automatically bind upon the assessee and confirmed the order of Tribunal. On appeal by the Department to the Apex Court, the Court held that in view of the concurrent findings of fact, the civil appeal of department was dismissed.

Thus it can be concluded that if the assessee did not adhere to the surrender made during the course of survey, it was for the Assessing Officer to bring on record cogent material and other evidence to support the addition rather than rely on the statements simpliciter. *CIT vs. Ashok Kumar Jain (2014) 369 ITR 145 (Raj.)(HC)*

WRONG CONFESSION MADE BY A COUNSEL BEFORE THE COURT CANNOT BIND THE PARTIES

1. *WOI & Anr vs. S.C. Parashar (2006) 3 SCC 167*

2. *P. Nallammal & Anr. vs. State represented by Inspector of Police. (1999) 6 SCC 559*

As regards the legal issues are concerned, assuming the assessee agrees for addition, the same is not binding on him – *Gauri Sahai Ghisa Ram vs. CIT 120 ITR 338 (All.) – Rani Anand Kunwar vs. CIT 8 ITR 126 (Oudh).* This is for the reason that there is no concession on law.

3. Entry in the Books of Accounts/loose papers hard disk etc:

Book

The term "Book" ordinarily means a collection of sheets of paper or other material, blank, written, or printed, fastened or bound together so as to form a material whole. Loose sheets or scraps of paper cannot be termed as "book" as they can be easily detached and replaced. The Hon'ble Supreme Court in *CBI vs. V.C. Shukla (1998) 3 SCC 410* in the Jain Hawala Diaries case, held that as per section 34 of the Evidence Act, 1872, the loose sheet of papers could not be considered as 'book' and hence entries made therein are inadmissible as evidence and could not be relied upon. In the case of Addl. *CIT vs. Miss Lata Mangeshkar [1974] 97 ITR 696 (Bom.)* it was held that Revenue has got a tendency to make an addition on the basis of entries appearing in the books of a third party or a statement recorded from a third party or loose paper seized from a third party. In all such cases, it is imperative to afford an opportunity to the assessee to cross-examine the said third party.

The Finance Act, 2001, w.e.f. 1-6-2001 inserted definition of 'books or books of account' in sec. 2(12A) to include ledgers, day-books, cash books, account-books, and other books, whether kept in the written form or as print-outs of data stored in a floppy, disc, tape or any other form of electro-magnetic data storage device. Therefore, after the specific definition of books/ books of account in the Income-tax Act, one has to interpret as to whether what would be a dumb document while scrutinizing various seized papers.

It is a settled proposition, as held by various judicial decisions, that rigours of the rules of evidence contained in the Evidence Act are not strictly applicable to Income-tax proceedings. However, the principles contained in the Evidence Act, incorporated from rules of natural justice forming part of the common law, would naturally be applicable to Income-tax proceedings.

Taxability of amount on the basis of entry in the books of account or loose paper must be in accordance with law and supported by corroborated evidence or material.

i) The *Hon'ble Delhi Tribunal in S.K. Gupta vs. Dy. CIT 63 TTJ 532* has held that additions made merely on the basis of loose sheet and torn papers is not justified and the revenue has to bring some corroborative evidence to show that the loose papers and sheet actually show some transactions and that the assessee has earned income out of it which is undisclosed from the department. It further held that the revenue could tax only those receipts, which must have been proved to be income in the hands of the assessee/recipient. There¬fore, before assessing any receipt as taxable income, the onus is on the revenue to prove that the receipt is income of the assessee/recipient and this can be proved or established only on the basis of some material or evidence.

ii) The Hon'ble Bombay High Court in *CIT vs. Mogul Lines Ltd. 46 ITR 590, 600* has held that as far as the evidentiary value of the entries in the books of account are concerned, the matter of taxability cannot be decided on the basis of entries which the assessee may choose to make in his accounts but has to be decided in accordance with the Law.

iii) The Hon'ble Supreme Court in *CIT vs. India Discount Co. Ltd. 75 ITR 191, 195* has held that a receipt which in law cannot be regarded as income cannot become so merely because the assessee erroneously credited the same to its profit and loss account.

iv) A mere entry on a loose sheet found from the possession of a third person and a statement given by another third person in connection with search assessment proceedings of still another third person without the copy of the statement being furnished to the assessee and thereby not allowing the assessee an opportunity to rebut the contentions made in the statement and an opportunity to cross-examine the witness coupled with the fact-situation that the statement too was quite vague and general in nature was unjustified, unwarranted and had to be deleted. *T. S. Venkatesan vs. ACIT [2000] 74 ITD 298 (Cal.)*

v) No addition towards undisclosed income could be made on the basis of a dumb document. As per section 34 of Evidence Act 1872, loose papers or notings can not be considered as evidence. Content of document can be explained only by the person who has written. *S.M. Agarwal 294 ITR 444 (Del.); Jagdamba Rice Mills vs. Asstt. CIT 67 TTJ 838 (Chd); S.P. Goyal vs. ACIT 82 ITD 85 (Mum.) (TM).*

vi) Laptops seized from auditor : It is open to the department to copy the data relating to the specified three entities of the assessee group from the two laptops which were seized from the procession of auditor of firm.

DIT (Inv.) vs. S. R. Batliboi & Co. & Ors. (2009) 31 DTR 187 / 227 CTR 238 / (2010) 186 Taxmann 350 (SC).

vii) On the basis of admission of third person and jointly signed by assessee addition was held to be justified.

Held, the loose papers had clearly indicated the amount given by B by way of loan. Based on facts, there was no perversity in the conclusion of the Tribunal. The amount had to be added to the income of the assessee.

Bhanuvijaysingh M. Vaghela (Decd.) vs. ITO (2013) 353 ITR 146 (Guj.)(HC)

4. Implication of Sec. 132(4A)

The sub-section provides for certain presumptions in case of seizure of books of accounts or other documents, money, jewellery or other valuable articles from possession of the assessee i.e. it shall be presumed that the said aricle or books etc belongs to the person in whose possession or control they were found in the course of search. A similar presumption is also enacted as to the truth of the contents of the books of account so found. The presumption raised by sub-sec. (4A) are rebuttable presumptions. In the case of P R Metrani (2001) 251 ITR 244 (Kar) approved by Supreme Court it has been held that presumption is absolute for the purpose of sec. 132(5) and rebuttable for purpose of other provisions of the Act. The Supreme Court has held in *Prem Dass vs. ITO 236 ITR 683 (SC)* that the presumption under this sub-section would not establish the ingredients of the criminal offence contemplated by sections 276C and 277.

Under the Evidence Act, there are three types of presumptions. They are; (i) may presume; (ii) shall presume; (iii) conclusive proof.

A presumption is an inference of fact drawn from known or proved facts.

As may be seen from the sub section (4A) the words used are "may be presumed", which are less onerous, as the presumption may or may not be invoked.

Some case laws

i) Where addition was based on two loose papers found during the course of

search simply because name of assessee was mentioned on the paper addition could not be made in hands of assessee. Secondly presumption u/s. 132(4A) was available only in respect of person from whom paper was seized. It could not be applied against third party and no addition could be made on basis of such evidence found with third party. *Pradeep A. Runwal vs. TRO (2014) 149 ITD 548 (Pune)(Trib.)*

ii) No incriminating evidence or document has been recorded against assessee during search. Therefore, addition made against assessee in respect of document found in premises of third person required to be deleted. *Mani and Money Ltd. vs. Dy. CIT (2014) 149 ITD 426 (Chennai)(Trib.)*

iii. No addition could be made merely on the basis of statement of third party without opportunity of cross-examination. Presumption in respect of document found in third party premises section 132(4A) not applicable. *P.R. Metrani vs. CIT 287 ITR 209 (SC)*

iv. In the course of search a diary was found which contained the noting of higher value of value purchase of property than shown in the books of account. The author of the diary was son of the partner, who stated that he has written the diary as per instruction of his partner. On the basis of diary addition was made in the block assessment. The addition was deleted by the Tribunal. On appeal the Court held that the presumption under section 132(4A) is applicable hence, addition is justified in block assessment as the author of diary was son of the partner. *CIT vs. Ambika Appalam Depot (2012) 340 ITR 497 (Mad.)(HC)*

v. The assessee's business was to charter and operate flight for transportation of goods. Consequent to a search, block assessment was made against the assessee in which, on the basis of the documents seized, certain sums were added under section 68 of the I.T. Act, 1961. Held, dismissing the appeals, that if the revenue was of the opinion that the expenses claimed towards green boxes was inadmissible or was excessive, or not genuine, in order to reject the entries in the books of account and other documents of the assessee seized during the search, it ought to have relied on other materials. Having once drawn the presumption that the contents of the documents of the assessee taken into possession during the search were true, the revenue could not, consistently with that presumption, have proceeded to require the assessee to produce materials in support of the expenditure entries. Such an inconsistent approach in respect of the contents of the same book was founded only on suspicion that they were not genuine. However, suspicion cannot replace proof. Moreover, the full effect of the presumption should be given effect, whenever the statute directs a particular non-existent state of affairs to be assumed. Therefore, in the absence of any materials in the form of documents, the revenue could not have denied the benefit of any expenses which would otherwise have ensured to the assessee, as an allowable deduction under section 37(1). *CIT vs. Indeo Airways P. Ltd. (2012) 349 ITR 85 (Delhi)(HC)*

5. S. 292C : Presumption as to assets, books of account, etc.

This section deems that when any material is found in the premises of the person searched, it may be presumed that material belongs to that person, that the contents of such material is true and that the handwriting in that document is of that person. This section only shifts the burden of proof on the searched person to show that

the document did not pertain to him or that the contents of the document are not true or that the handwriting is not his.

In the case of *Hiren Vasantlal Shah vs. ACIT (2013) 255 CTR 272 (Guj.)(HC)* on basis of material recovered during search, lower authorities had drawn presumption in terms of section 292C. The impugned addition was confirmed by the High Court.

The Presumption not available in respect of person other than person from whose possession books or assets seized . In the case of *Mahashian Di Hatti Ltd. vs. Dy. CIT (2013) 21 ITR 731 (Delhi)(Trib.)* the paper in question did not show the name of any person from whose account the money had come for investment in school building. There was no indication on the pages that amount had come from the account of the assessee-company. Therefore, it was held that no addition could be made in the hands of the assessee-company. Since the school was owned by M trust the addition could be made if at all, in the hands of the trust and not in the hands of the assessee.

Section 292C grants no discretionary power to presume or not to presume correctness of documents. Onus of rebutting is on party claiming otherwise. Contents of documents unless disproved by cogent evidence held true.

In the case of *Vivek Kumar Kathotia vs. Dy. CIT (2013) 142 ITD 394 (Kol.)(Trib.)* the Tribunal held in favour of the assessee that unless the contrary is proved, what is stated in seized documents has to be presumed true.

6. Reassessment

Section 147 and section 148 of the Act contains the perquisite conditions to be fulfilled for invoking the jurisdiction to reopen the assessment. The general principle is that once an assessment is completed it becomes final. Section 147 empowers the Assessing Officer to reopen an assessment if the conditions prescribed therein are satisfied . The principal condition that income chargeable to tax has escaped assessment has to be satisfied by the Assessing Officer. In absence of evidence to prove existence of ITO’s belief that income has escaped assessment, will invalidate reassessment - The reasons must specifically indicate as to which material fact was not disclosed by the assessee in the course of its original assessment. The burden of prove is on the officer who is recording the reasons for reopening. Having a reason to believe that income had escaped assessment, is not sufficient to reopen assessments beyond the four year period. Reason must be based on the relevant material on record at the time of recording reasons. The initial burden is on the officer to prove the income has escaped assessment which is rebuttable by assessee on receipt of the reason recorded by filing his objection on reopening.

The Apex Court in the case of *Calcutta Discount Co. Ltd. (1961) 41 ITR 191 (SC)* analysed the phrase "reason to believe" and observed that "It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn.”

It is not for somebody else to tell the assessing authority what inferences, whether of facts or law, should be drawn.

The power to reopen an assessment is conditional on the formation of a reason to believe that income chargeable to tax has escaped assessment. The power is not akin to a review. The existence of tangible material is necessary to ensure against an arbitrary exercise of power. *Aventis Pharma Ltd. vs. ACIT (2010) 323 ITR 570 (Bom.).*

Rahul Hakani, *Advocate*

Burden of proof – Penalty [Explanation 1 to S.271(1)(c) and Prosecution (S. 278E)]

A. PENALTY

REASON FOR INSERTION OF EXPLANATION 1 TO SECTION 271(1)(C)

For ready reference the provisions of Section 271(1)(c) and Explanation 1 are reproduced below:—

"271. Failure to furnish returns, comply with notices, concealment of income, etc.—(1) If the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner in the course of any proceedings under this Act, is satisfied that any person —

** ** **

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income,

** ** **

Explanation 1.—Where in respect of any facts material to the computation of the total income of any person under this Act,—

(A) Such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Deputy Commissioner (Appeals) or the Commissioner (Appeals) to be false, or

(B) Such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is *bona fide* and that all the facts relating to the same and material to the computation of his total income have been disclosed by him,

then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed."

According to Law Lexicon, the word "Conceal" means –

"to hide or keep secret. The word 'conceal' is con + celare which implies to hide. It means to hide or withdraw from observation; to cover or keep from sight; to prevent the discovery of; to withhold knowledge of. The offence of concealment is, thus, a direct attempt to hide an item of income or a portion thereof from the knowledge of the income tax authorities."

In Webster's Dictionary, 'Inaccurate" has been defined as ; "not accurate, not exact or correct; not according to truth; erroneous; as an inaccurate statement, copy or transcript".

Thus both the words **concealment and furnishing inaccurate particulars** indicate *prima facie* the intention of an assessee to hide his income or particulars thereof from the department. Consequently these words cast a burden on the department to prove the guilty mind as well as concealment. This legal position

was confirmed by the Apex court in *CIT vs. Anwar Ali (1970) 76 ITR 696 (SC), Jain Brothers vs. UOI (1970) 77 ITR 107 (SC), Hindustan Steel Ltd vs. CIT (1972) 83 ITR 26 (SC)* and *CIT vs. KhodayEswaras and sons (1972) 83 ITR 369 (SC).* To get over this difficulty, Explanation 1 was introduced in this section. This explanation shifts the burden of proof from A.O. to the assessee. Instead of the A.O. being under an obligation to establish the *mala fides* of the assessee, the burden is on the assesee to establish his *bona fides* and innocence. This explanation provides a rule of evidence for raising a rebuttable presumption in favour of the revenue. Thus, this explanation states that the assessee could be deemed to have concealed the income in the situations wherein the assessee fails to give an explanation or a case wherein he offers an explanation which is found to be false or a case wherein his explanation is not *bona fide* and he is not able to substantiate the same.

After insertion of Explanation 1 to sec. 271(1)(c), the law on concealment penalty has become stiffer, since the explanation as it stands now is a complete code having following features:

(1) Every difference between reported and assessed income needs an explanation.

(2) If no explanation is offered, penalty may be justified.

(3) If explanation is offered, but is found to be false, penalty will be justified.

(4) If explanation is offered and it is not found to be false, penalty may not be leviable, if–

 a) Such explanation is *bona fide*

 b) The assessee had made available to the A.O. all the facts and materials necessary for computation of income.

The Delhi High Court in *New Holland Tractors India (P) ltd vs. CIT (2014) 49 taxmann.com 573 (Delhi)* has also reiterated the meaning and scope of the terms Concealment and furnishing inaccurate particulars of income as under :

"The word 'conceal' inherently and *per se* refers to an element of *mens rea*, albeit the expression "furnishing of inaccurate particulars" is much wider in scope. The word 'conceal' implies intention to hide an item of income or a portion thereof. It amounts to suppression of truth or a factum so as to cause injury to the other. (See *CIT vs. A. Subramania Pillai [1997] 226 ITR 403 (Mad).* The word 'conceal' means to hide or to keep secret. As held in Law Lexicon, the said word is derived from the latin word 'concelare' which implies 'con' & 'celare' to hide. It means to hide or withdraw from observation; to cover or keep from sight; to prevent discovery of; to withhold knowledge of. The word 'inaccurate' in Webster's Dictionary has been defined as 'not accurate; not exact or correct; not according to truth; erroneous; as inaccurate statement, copy or transcript'. The word 'particular' means detail or details of a claim or separate items of an account [see *CIT vs. Reliance Petroproducts (P.) Ltd. [2010] 322 ITR 158/189 Taxman 322 (SC)].*Thus the words "furnished inaccurate particulars" is broader and would refer to inaccuracy which would cause under-declaration or escapement of income. It may refer to particulars which should have been furnished or were required to be furnished or recorded in the books of accounts etc. [See C*IT vs. Raj Trading Co. (1996) 217 ITR 208/86 Taxman 282 (Raj.)].* Inaccuracy or wrong furnishing of income would be covered by the said expression, though there are decisions that *ad hoc* addition *per se* without other or corroborating circumstances may not reflect "furnished inaccurate particulars". Lastly, at times and it is fairly common, the charge of concealment and "furnishing of inaccurate particulars" may overlap."

ANALYSIS OF CLAUSE (A) AND CLAUSE (B) OF EXPLANATION 1 TO S.271(1)(C)

As per clause (A) to Explanation 1 to section 271(1)(c), penalty is to be imposed if

an assessee fails to offer an explanation or offers an explanation which is found by the Assessing Officer to be false. Clause (B) to Explanation 1 provides that where the assessee offered an explanation, but the same remained unsubstantiated, penalty should not be imposed if the explanation is *bona fide* and all facts relating to the same and material to the computation of his total income have been disclosed. Explanation 1 is an important adjunct and supplement to section 271(1)(c) of the Act. It not only enacts and gives deeming effect when an addition or disallowance is made in the assessment/quantum proceedings, but also carves out an exception in clause (B) as to when penalty should not be levied. Onus under clause (B) to Explanation 1 is on the assessee.

Thus as per clause (A) where no explanation is offered or the explanation is found to be false, then in view of the conduct of the assessee, penalty has to be imposed in terms of clause (A) to Explanation 1 to Section 271(1)(c). Falsity in the context of the provision would refer to a wrong and untruthful assertion of a fact. It would cover cases where the assessee has lied and not spoken the truth of a fact known to him. It would not cover cases involving wrong interpretation of a legal position/provision or when the fact as asserted was not factually wrong and, therefore not false, but due to legal consequences, addition or disallowance stands made.

Clause (B) of Explanation 1, applies when an assessee offer an explanation but it has not been able to substantiate it. The question to be considered will be whether explanation offered by the assessee was *bona fide* and all facts relating to the same and material to computation of total income had been disclosed. Thus the primary issue which arises for consideration is whether the conduct of the assessee was *bona fide*. Test of *bona fide* has to be applied keeping in mind the position as it existed, when the return of income was filed.

HOW TO DISCHARGE THE BURDEN CAST ON THE ASSESSEE BY EXPLANATION 1 TO SECTION 271(1)(C)

Before analyzing how an assessee can discharge burden cast on him by Explanation 1 to Section 271(1)(c) it is important to keep in mind the fundamental legal proposition that Assessment proceedings are not conclusive. Assessment proceedings and penalty proceedings are separate and distinct. Findings in Assessment proceedings don't operate as res judicata in penalty proceedings. For this proposition reliance is placed on the decision in *CIT vs. Dharamchand L. Shah (1993) 204 ITR 462 (Bom).* In *Vijay Power Generators Ltd vs. ITO (2008)6 DTR 64 (Del)* it is held that "It is well settled that the findings rendered in the assessment proceedings though they constitute good evidence do not constitute conclusive evidence in penalty proceedings. During penalty proceedings, there has to be reappraisal of the very same material on the basis of which the addition was made and if further material is adduced by the assessee in the course of the penalty proceedings, it is all the more necessary that such further material should also be examined in an attempt to ascertain whether the assessee concealed his income or furnished inaccurate particulars thereof."

Thus, under penalty proceedings assessee can discharge his burden by relying on the same material on the basis of which assessment is made by contending that all necessary disclosures were made and that on the basis of material disclosed there cannot be a case of concealment of income or furnishing inaccurate particulars of income. Further if there is any material or additional evidence which was not produced during assessment proceedings same can be produced in penalty proceedings as both assessment and penalty proceedings are distinct and separate.

WHETHER MENS REA (CULPABALE MENTAL STATE) IS AN ESSENTIAL ELEMENT FOR LEVYING PENALTY U/S 271(1)(C) READ WITH EXPLANATION 1.

As pointed out above the meaning of "Concealment" and "furnishing inaccurate particulars" contain an element of culpable mental state. The Apex Court in *Dilip N. Shroff v. CIT [(2007) 291 ITR 519]* held therein that in order to attract the penalty under Section 271(1)(c), *mens rea* was necessary, as according to the Court, the word "inaccurate" signified a deliberate act or omission on behalf of the assessee. It went on to hold that clause (iii) of Section 271(1) provided for a discretionary jurisdiction upon the assessing authority, inasmuch as the amount of penalty could not be less than the amount of tax sought to be evaded by reason of such concealment of particulars of income, but it may not exceed three times thereof. It was further held that the assessee must be found to have failed to prove that his explanation is not only not *bona fide* but all the facts relating to the same and material to the computation of his income were not disclosed by him. It was then held that the explanation must be preceded by a finding as to how and in what manner, the assessee had furnished the particulars of his income. The Court ultimately went on to hold that the element of mens rea was essential. However, subsequently it was on the point of mens rea that the judgment in *Dilip N. Shroff vs. CIT [supra]* was upset by the decision in *Union of India vs. Dharamendra Textile Processors (2008) 306 ITR 277* after quoting from Section 271 extensively and also considering Section 271(1)(c), the Court came to the conclusion that since section 271(1)(c) indicated the element of strict liability on the assessee for the concealment or for giving inaccurate particulars while filing return, there was no necessity of *mens rea*. The Court went on to hold that the objective behind enactment of Section 271(1)(c) read with the Explanations indicated with the said section was for providing remedy for loss of revenue and such a penalty was a civil liability and, therefore, wilful concealment is not an essential ingredient for attracting civil liability as was the case in the matter of prosecution under Section 276-C of the Act.

However, it must be pointed out that in *Union of India vs. Dharamendra Textile Processors (supra)* no fault was found with the reasoning in the decision in *Dilip N. Shroff vs. CIT (supra)* where the Court explained the meaning of the terms "conceal" and "inaccurate". It was only the ultimate inference in *Dilip N. Shroff v. CIT (Supra)* to the effect that *mens rea* was an essential ingredient for the penalty under Section 271(1)(c) that the decision in *Dilip N. Shroff v. CIT (Supra)* was overruled.

In *CIT vs. M/s Sidhartha Enterprises (2009) 184 Taxman 460 (P & H)(HC)* it was held that the judgment in Dharmendra Textile cannot be read as laying down that in every case where particulars of income are inaccurate, penalty must follow. Even so, the concept of penalty has not undergone change by virtue of the said judgment. Penalty is imposed only when there is some element of deliberate default and not a mere mistake. In view of the finding that the furnishing of inaccurate particulars was simply a mistake and not a deliberate attempt to evade tax, penalty was not leviable.

WHETHER LEVY OF PENALTY U/S 271(1)(C) READ WITH EXPLANATION 1 IS AUTOMATIC

After the decision of Apex court in *UOI vs. Dharmendra Textiles* (Supra) it was understood by the revenue authorities that penalty proceedings are automatic and that penalty is to be levied the moment addition is made or confirmed. This erroneous understanding was set at naught by the Apex Court in Union of India vs Rajasthan Spinning & Weaving Mill (2009) 180 Taxmann 609(SC) wherein it is held as under:

"At this stage, we need to examine the recent decision of this Court in Dharamendra Textile

(supra). In almost every case relating to penalty, the decision is referred to on behalf of the Revenue as if it laid down that in every case of non-payment or short payment of duty the penalty clause would automatically get attracted and the authority had no discretion in the matter. One of us (Aftab Alam, J.) was a party to the decision in Dharmendra Textile and we see no reason to understand or read that decision in that manner."

Hence, penalty u/s. 271(1)(c) is not automatic but discretionary. The Assessing Officer must exercise the discretion judicially.

CAN PENALTY U/S 271(1)(C) READ WITH EXPLANATION 1 BE LEVIED ON AN INCORRECT LEGAL CLAIM/ DEBATABLE ISSUE

The Delhi High court in New Holland Tractors (Supra) has held that penalty u/s. 271(1)(c) read with Explanation 1 clause (B) cannot be levied where a legal or a debatable claim is rejected. The relevant portion of the decision is extracted as under:

"The Act, i.e. the Income-tax Act, is a complex legislation involving intricate and often debatable legal positions. The legal issue involved may relate to principles of accountancy. Invariably, on questions of interpretation, the assessees do adopt a legal position which they perceived as most beneficial or suitable. This would not be construed as lack of *bona fides* as long as the legal position so adopted is not *per se* contrary to the language of the statute or an undebatable legal position not capable of a different connotation and understanding. When two legal interpretations were plausible and there was a genuine or credible plea, penalty for concealment/furnishing of inaccurate particulars, should not and cannot be imposed. If the view taken by the assessee required consideration and was reasonably arguable, he should not be penalized for taking the position. The tax statutes are convoluted and complex and there can be manifold opinions on interpretation and understanding of a provision or the tax treatment. In such cases, even when the interpretation placed by the Revenue is accepted, penalty should not be imposed if the contention of the assessee was plausible and *bona fide*. Of course full facts should be disclosed. While applying the test of *bona fide*, we have to also keep in mind that even best of legal minds can have difference of opinion. It is not uncommon to have dissenting opinion on the question of law, in the courts."

On the aforesaid aspect, it would be relevant to refer to the following observations of the Supreme Court in the case of Reliance Petroproducts (P.) Ltd., (supra):-

"11. The learned counsel argued that "submitting an incorrect claim in law for the expenditure on interest would amount to giving inaccurate particulars of such income". We do not think that such can be the interpretation of the words concerned. The words are plain and simple. In order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars."

Thus penalty u/s. 271(1)(c) cannot be levied on an incorrect legal claim.

WHETHER PENALTY U/S 271(1)(C) READ WITH EXPLANATION 1 CAN BE LEVIED ON AGREED ADDITION.

There may be cases where assessee agrees to an addition during assessment proceedings, or during search or does not prefer an appeal. An issue arises whether in such situation penalty u/s 271(1)(c) would be automatic particularly in view of deeming fiction u/s Explanation1 to Section 271(1)(c). In *Sir Shadilal Sugar and General Mills Ltd. vs. CIT (1987) 168 ITR 705 (SC)* it was held as under:

"We find that the assessee admitted that these were the incomes of the assessee but that was

not an admission that there was deliberate concealment. From agreeing to additions, it does not follow that the amount agreed to be added was concealed income. There may be a hundred and one reasons for such admission"

The apex court in the case of *K. P. Madhusudan vs. CIT (2001) 251 ITR 99* has held that decision in Shadilal's case (Supra) is no more good law after insertion of Explanation 1. After the decision in the case of K. P. Madhusudan, it is noticed that just because the assessee has agreed for the addition, the penalties are levied u/s. 271(1)(c). It is to be stated that the above decision in the case of K. P. Madhusudan is not to be interpreted as meaning that in an agreed addition, penalty would automatically follow. It simply holds that under the Explanation 1, the assessee should show that his failure to return correct income was not due to fraud or neglect. No separate enquiry is necessary for imposing penalty but the assessee is at liberty to show his *bona fides* in the penalty proceedings and if he does, no penalty can be imposed. This decision of Supreme Court has been considered and analysed in the following decisions.

i. *ITO vs. Smt. Devibai Parmani [84 ITD 342]*

ii. *Dy. Director of Income Tax vs. Chirag Metal Rolling Mills Ltd. [305 ITR 29 (MP)]*

iii. *CIT vs. P. Govindswamy [263 ITR 509 However*

In fact, in *CIT vs. Suresh Chandra Mittal (2000) 241 ITR 124 (M.P.)* after considering Explanation 1 – Upheld decision of the Tribunal in which the Tribunal held as under:

"The assessee had no chance of carrying through his explanation and the Assessing Officer too did not record any finding as to the acceptability or otherwise of the explanation of the assessee. Under these circumstances the proviso to Explanation 1 to section 271 is not attracted. The Revenue did not at all discharge the burden to prove that there was concealment of income by the assessee. It simply rested its conclusion on the act of voluntary surrender by the assessee, which obviously was done in good faith and to buy peace."

The above decision is upheld by the Supreme Court in *CIT vs. Suresh Chandra Mittal (2001) 251 ITR 9 (SC)*. Thus it can be fairly concluded that once assessee gives a bonafide explanation for agreeing to addition then the burden shifts on the revenue to prove concealment. This position is further fortified by the Apex Court in *MAK Data P Ltd vs. CIT (2013) 358 ITR 593 (SC)* wherein it is held as under :

"The AO, in our view, shall not be carried away by the plea of the assessee like "voluntary disclosure", "buy peace", "avoid litigation", "amicable settlement", etc. to explain away its conduct. The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income. Explanation to Section 271(1) raises a presumption of concealment, when a difference is noticed by the AO, between reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the explanation, has been discharged by him, the onus shifts on the Revenue to show that the amount in question constituted the income and not otherwise."

It may also be noted where declaration is made during survey and the due date of return has not expired and declared amount is offered for tax then there can be no penalty u/s 271(1)(c) read with Explanation 1. Reliance is placed on the following decisions:

i) *Shri Dilip M. Shah Mumbai vs. ACIT ITA 4413/Bom/98 A.Y. 1994-95 dt. 25-1-1999.*

ii) *CIT vs. SAS Pharmaceuticals (2011) 335 ITR 259 (Del.)(HC).*

iii) *ACIT vs. Crescent Property Developers ITA No. 2770/M/2012, Dt. 19-6-2014.*

B. PROSECUTION

INTRODUCTION

A perusal of various provisions dealing with Offences and Prosecution under the Income-tax Act shows the usage of word "wilfully". The term wilfully means deliberately. The term deliberately manifests the state of mind i.e. for punishing an accused for the offence charged of, there must exist a state of mind which is a culpable state of mind. It is well-known that one of the vital aspects to be proved in criminal cases wherein the punishment is imprisonment is existence of guilty mind on the part of the accused. It is popularly known as mens rea which is a latin term. Thus under the criminal jurisprudence an act alone does not amount to a crime, unless it is accompanied by a guilty mind, as laid down by the maxim, '*Actus Non FacitReum Nisi Mens Sit Rea*', i.e. there must be a guilty mind behind an act for the completion of a crime. The same requirement of *mens rea* also pervades the chapter on prosecution under the Income Tax Act. The accepted rule of evidence is that the onus to prove that the accused has *mens rea* is on the prosecution. This legal position prevails under the Indian Penal Code and Code of Criminal Procedure which deals with criminal offences and procedures thereof. However under the Income-tax act the legislature has shifted the onus of proving culpable mental state from the prosecution to the accused. This has been done by enacting section 278E.

Section 278E of the Act deals with Presumption as to culpable mental state. According to sub-section (1) of the said section, in any prosecution for any offence under the Income Tax Act which requires a culpable mental state on the part of the accused, the Court shall presume the existence of such mental state. In other words the burden to prove that there exist no culpable mental state or *mens rea* is on the accused. Thus, section 278E also provides that it shall be for the defence of the accused to prove the fact that he had no such mental state with respect to the act charged as an offence. As per the Explanation appended to the said sub-section (1) culpable mental state includes intention, motive or knowledge of a fact or belief in, or reason to believe a fact. Sub-section (2) requires the accused to prove the absence of 'mens rea' beyond reasonable doubt ie the section further provides that the mere proof by a preponderance of probability would not be sufficient. Thus following important principles emerge on analysis of Section 278E :

1. Culpable mental state is necessary to be proved in prosecution cases under the Income-tax Act.
2. There is a presumption of existence of the fact of culpable mental state on the part of the accused.
3. The presumption is a rebuttable presumption.
4. The degree of proving absence of culpable mental state is beyond reasonable doubt.

REASON FOR ENACTING S. 278E

The Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986 inserted Section 278E with effect from 10th September, 1986. The scope and effect of this provision has been explained by the Board in Circular No 469, dated 23-9-1986 reported in (1986) 161 ITR (St) 66. The relevant portion is extracted hereunder:

"(e) By inserting a new s. 278E, it has been provided that in any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. The Explanation provides that "culpable mental state" includes intention, motive or knowledge of a fact or belief in, or reason to believe a fact. Further, that a fact is said to be proved only when the Court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability. By this amendment, a Court has to presume

the existence of a criminal mental state on the part of the accused in any prosecution requiring such a mental state. However, this presumption can be rebutted by the accused to prove that there was no intention, motive or knowledge of a fact or belief in or reason to believe a fact in respect of the act charged as an offence in that prosecution. As regards the degree or proving the absence of a culpable mental state, it has been provided that a fact is said to be proved only when the Court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability. This provision is based on the provisions contained in several other enactments dealing with economic offences such as s. 138A of the Customs Act, 1962, s. 9C of the Central Excise and Salt Act, 1944, s. 98B of the Gold (Control) Act, 1968, and s. 59 of the Foreign Exchange Regulation Act, 1973."

Thus introduction of section 278E is seen as a stern step by the Government to enforce the law in a more stringent manner in view of the serious nature of fiscal offences, consistent with the objectives of the long term fiscal policy..

The Constitutional validity of the said section became the subject matter of challenge before the Hon'ble Madras High Court in case of *Selvi J. Jayalaitha vs. Union of India (2007) 288 ITR 225(Mad) 408).* The Hon'ble Court, upheld the constitutionality of the said section, by holding that *mens rea* is *sine qua non* for prosecution even after the introduction of section 278E; and that only the onus of proof of culpable mental state has been shifted to accused from Department. On appeal, Hon'ble Apex Court held that in every prosecution case, the Court shall always presume culpable mental state and it is for the accused to prove the contrary and that too beyond reasonable doubt *[Sasi Enterprises vs. ACIT, 361 ITR 163 (SC)].*

ANALYSIS OF SECTION 278E

It is important to note that the legal presumption contained in section 278E is limited to the existence of *mens rea* alone and it does not absolve the prosecution of its responsibility to prove the facts which *prima facie* establish the charge before cognisance of an offence is taken. The Apex Court in *State of Maharashtra vs. Wasudeo Ramchandra Kaidalwar (1981) 3 SCC 199* has dissected burden of proof into two parts namely legal burden ie the burden of establishing the guilt and evidential burden ie the burden of leading evidence. The fact that evidential burden is transferred to the accused doesnot absolve the requirement of mens rea. Thus where evasion is proved, the intention to evade need not be proved by the prosecution. Thus *prima facie* case of evasion should be made out against the accused by the Department. For instance in *K. Subramanyam vs. ITO [(1993) 199 ITR 723 (Mad)]* it was held that before prosecuting a person under the provisions of section 276C read with section 278 B of the Act, prosecution must prove that the person was in charge of and responsible to the firm or company.

Another important impact of this section on the accused assessee is that the trial courts would be very slow in allowing discharge applications filed by the accused under section 245 of the Criminal Procedure Code and would normally relegate the accused to a full trial. Similarly the High Courts would not normally interfere under section 482 of the Criminal Procedure Code in matters of quashing the process or in an appeal against decision of trial court rejecting discharge application. Further, in view of the provision of section 278E, which presumes culpable mental state on the part of the accused, many courts have refused to quash the complaints or prosecution made against the accused at the threshold by holding that in a prosecution of an offence under the Act, it is for the accused to prove his defence which he can do by cross examining the prosecution witnesses or by leading defence evidence which is possible only during the trial. References can be made to decisions of *Selvi J. Jayalalitha vs. ACIT (2007) 290 ITR 55 (Mad), N. K. Jain vs. UOI 254 ITR 388 (Del.) and Jiyajeerao Cotton Mills Ltd. & Ors. vs. ACIT; 197 ITR 639 (Cal.).*

EFFECT OF FINDING IN ASSESSMENT / PENALTY PROCEEDINGS

The Hon'ble Andhra Pradesh High Court in the case of, *ITO vs. Siddique (K.A.) [(1997) 227 ITR 677 (AP)]* held that a criminal court has to give due regard to the result of any proceedings under the Act having a bearing on the question in issue and in suitable cases it may drop the proceedings in the light of an order passed under the Act. Although the criminal court has to judge the case independently on the evidence placed before it, the finding of facts recorded by the ultimate income-tax authority is conclusive and binding on the criminal court. Further the Hon'ble Madras High Court in the case of, *Mohammed I. Unjawala vs. CIT [(1995) 213 ITR 190 (Mad)]* held that Criminal Court is bound to accept the findings of Tribunal on questions of fact more so when such findings are in favour of assessee.

An issue arises as to whether prosecution proceedings will come to an end if penalty is deleted. The Apex court in *K. C. Builders & Anr. vs. ACIT [(2004) 265 ITR 562 (SC)]* held that once the penalty levied under section 271(1)(c) of the Act has been cancelled/deleted on the ground that there was no concealment of income, the quashing of prosecution was automatic. Following the decision of the Apex Court in the case of K.C. Builder (supra) the Hon'ble Bombay High Court in the case of, *Indian Plywood Manufacturing Co. Ltd. vs. Dave (PS) [(2007) 291 ITR 430 (Bom)]* held that where penalty imposed on assessee under section 271(1)(c) was set aside by Commissioner (Appeals) holding that no case for concealment of income was made out, criminal proceedings initiated against assessee under sections 276C and 277 and pending before Metropolitan Magistrate were also liable to be quashed.

However as pointed out, it is to be noted that where the assessee is held to have committed a default and is penalised that would not be binding on a Court trying for an offence. The Court will have to make an independent enquiry and arrive at an independent conclusion. The fact that the accused has been penalised will be one of the relevant evidences. However, in *Mahadeva Naidu Sons vs. CIT – [(2002) 255 ITR 208 (Mad.)]* it is held that if the assessee is acquitted in a prosecution proceedings, penalty proceedings need not be quashed/terminated as the degree of evidence required in penalty proceedings is less than what is required in prosecution proceedings.

CONCLUSION

Certainly two views exist on the effects of Section 278E. As per one view the legal presumption is justified on the ground that the assessee is in full possession of the facts relating to his affairs. Thus, it is they who are in a position to prove the non-existence of a culpable mental state. As per another view this provision is unreasonable, illogical and too harsh. It requires the assessee to do an impractical and almost impossible thing. It is contrary to the general principles of law and the criminal jurisprudence. To prove the absence of '*mens rea*' is still more difficult being a negative factor. As such it is much more difficult to prove the absence of 'mens rea'. Further, the section requires such a proof to be beyond reasonable doubt. Such a burden on the accused is highly unjust being practically impossible. It is also illogical. According to me one must not lose sight of the fact that there are lot of statutes which have given away the requirement of mens rea whereas section 278E retains the requirement of *mens rea* and only shifts the onus from prosecution to the accused. The Constitution Bench of the apex court in the case of *Joshi vs. Ajit Mills (1977) 4 SCC 110: 40 STC 497* has held that the classic view that 'no mens rea, no crime' has long been eroded and several laws in India and abroad have created severe punishments even where the offences have been defined to exclude mens rea. Hence section 278E by retaining the ingredient of *mens rea* may not be regarded as very harsh.

CA Jiger Saiya & CA Abhay Kumar

Burden of Proof in Transfer Pricing Provisions

Introduction

As has been highlighted in other articles, the question of burden of proof and production of evidence assumes great importance under the Income-tax Act, 1961 (the Act) on account of the fact that there are no specific provisions to this effect under the Act. Also, the provisions of the Evidence Act do not directly apply to the proceedings under the Act as they are not in the nature of civil proceedings. It is in this situation that we try and understand the burden of proof under the Transfer Pricing provisions.

Initial burden of Proof in Transfer Pricing

Section 92(1) of the Act requires that the income of a taxpayer arising from an international transaction be computed having regard to the arm's length price. Further, Section 92D of the Act casts an obligation on any person who enters into international or specified domestic transactions to maintain certain documents as specified under Rule 10D of the Income-tax Rules, 1962 (the Rules). The Act, by providing the list of documents under Rule 10D, facilitates the taxpayer to carry out his duty of proving that the international transactions or specified domestic transactions have been entered into at arm's length. Section 92(1) of the Act read with Rule 10D of the Rules brings to light the fact that the initial onus to prove the arm's length characteristics of an international transaction or specified domestic transaction lies with the taxpayer.

Under section 92E of the Act, the taxpayer is further obligated to get the Accountant's Report in Form 3CEB and file the same with the income tax department on or before the due date of filing return of income. Further, section 92CA(2) provides an opportunity for the taxpayer to furnish the details before the assessing officer to support the computation of arm's length price.

Besides the above, Section 271AA provides for penalty of 2% of value of each international transaction/specified domestic transaction, in case of failure to keep and maintain information and documents; or failure to report international transactions or maintaining or furnishing incorrect information/documents in respect of such transactions. Section 271G provides for levy of penalty for a failure to furnish documents as prescribed under Rule 10D within 30 days or within such time period as extended by the transfer pricing officer. Further, Explanation 7 to Section 271(1)(c) of the Act provides that in case where a transfer pricing adjustment is made, the taxpayer is deemed to have concealed particulars of income or furnished inaccurate particulars to such extent. However, it is further provided that if the taxpayer can demonstrate

due diligence and good faith then it cannot be presumed that the taxpayer has concealed the income or furnished inaccurate particulars in respect of transfer pricing addition made by the revenue authorities. As can be seen from the above, penal provisions for not complying with the transfer pricing provisions, viz, Section 271G, Section 271AA also reinforce the principle that the initial burden of proving the arm's length characteristic of international transactions (and specified domestic transactions) lies with the taxpayer. Further, Explanation 7 to section 271(1)(c) presumes default of taxpayer and hence the burden of proof is on the taxpayer to prove otherwise.

Determination of arm's length price of international transactions/specified domestic transactions require understanding of the industry in which the taxpayer and its associated enterprise (AE) are operating. It further requires understanding of the value chain, functional analysis of taxpayer *vis-à-vis* associated enterprise (AE) and economic analysis of transaction in question (including comparability analysis and benchmarking). The reason for placing the initial burden of proof on the taxpayer is that taxpayer is generally in a better position to understand and analyse the industry in which it is operating and perform an economic and comparability analysis. Being a party to the transactions with its AEs, the taxpayer is in full knowledge of its business and also has the knowledge about the business of the AEs. The Special Bench of Bangalore Tribunal in *Aztec Services & Technologies Services Limited*[1] observed that evidence of situation has to be called from a person possessing special means to know that situation. The Tribunal went on to conclude that the burden of proof to establish ALP and to furnish relevant information should be placed on the taxpayer.

Shifting of Burden of Proof from taxpayer to Assessing Officer

Once the Assessing Officer forms an opinion that the taxpayer's determination of arm's length price is not in accordance with specific transfer pricing provisions, he may then proceed to determine the ALP in accordance with the specific transfer pricing provision, after giving an opportunity of being heard to the taxpayer by issuing a show cause notice. On a plain reading of the provisions of section 92C(3) of the Act, the Assessing Officer has to merely form an opinion and not necessarily substantiate his findings before issuing a show cause notice. Since the initial burden to prove the ALP lies on the taxpayer, the taxpayer is required to prove that the transactions entered by it with its AEs are at arm's length. However, if the taxpayer presents reasonable arguments and provides sufficient evidence that the transactions with its AEs were at arm's length, then the burden of proving that the transactions were not arm's length shifts to the Assessing Officer. In order to prove that the taxpayer's pricing of transactions with its AEs were not at arm's length, the Assessing Officer will have to follow the statutory provisions to determine the ALP. The Assessing Officer cannot merely reject the transfer pricing document maintained by the taxpayer without assigning reasons. The Mumbai Tribunal in its ruling in the case of Indo *American Jewellery*[2] has upheld the principle of shifting the burden of proof to tax authorities once the taxpayers presents sufficient evidence to support its computation of ALP.

Further, under the penal provisions of section 271(1)(c) read with Explanation 7 thereto, once the taxpayer proves his *bona fides* and that he exercised due diligence and good faith while determining transfer price for a transaction with associated enterprise, the burden of proof shifts to the Assessing Officer to prove otherwise before levying any penalty.

1 *Aztec Services & Technologies Services Limited vs. Asstt. CIT [2007] 107 ITD 141 (Bang SB)*

2 *Deputy Commissioner of Income Tax v. Indo American Jewellery Ltd., [I.T.A. No 6194/Mum/2008 (Mum)*

International Position Regarding Burden of Proof

Most of the countries' transfer regulations require taxpayers to prepare and maintain transfer pricing documents to justify/determine the arm's length price of transactions with AEs. Except for the requirement of maintaining documentation, countries differ in respect of position on burden on proving the ALP of the transactions with its AEs.

United Kingdom

Similar to India, transfer pricing regulation in the UK also provide that burden of proving the ALP initially lies with the taxpayer but can be shifted to the revenue authorities by maintaining adequate documentation supporting the determination of ALP.

United States of America

Corporate tax system in USA is based on self-assessment. The taxpayer has to bear the burden of proof that the determination of ALP by the revenue is arbitrary, capricious, and unreasonable and also that the ALP determined by the taxpayer is correct. Further the revenue authorities are also required to explain to the taxpayer as to how that the transfer pricing adjustment was made.

China

In China, the burden of proof that a related party transaction was conducted at arm's length rests with the taxpayer.

Australia

The burden of proof to prove that the transactions with the AEs are at arm's length lies with the taxpayer.

Japan

The tax authorities bear the burden of proof for the allegation that the transfer pricing method applied by the tax authorities does not accord with one of the methods provided for under Japanese tax law.

Italy

The burden of proof lies with the tax authorities. However, the taxpayer is required to prove that there arose no liability for any additional tax.

France

The burden of proof lies with the tax authorities. However, the tax payer is required to furnish information/documentation to demonstrate their transfer pricing policies.

Closing Remarks

While the provisions regarding burden of proof vary across countries, a Multinational Enterprise would be well advised to review its position in both the jurisdictions concerning the transaction. From a practical standpoint, the Multinational Enterprise ought to focus on maintaining meticulous, accurate, robust and timely documentation which inturn shall address most of duties of the taxpayer, thereby assisting him in discharging the burden of proof.

No need for looking behind. FORWARD! We want infinite energy, infinite zeal, infinite courage, and infinite patience, then only will great things achieved.

— *Swami Vivekananda*

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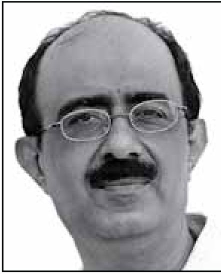


CA Dinesh Kumar Tejwani & Mr. Subir Biswas

DIGITAL INDIA SERIES
Mobile Wallets : The Digital way of payments

***Note:** Digital India is an initiative of the Government of India to ensure that government services are made available to citizens electronically by improving online infrastructure and by increasing internet connectivity. It was launched on 1 July 2015 by the Hon'ble Prime Minister. Digital India has three core components. These include:*

• The creation of digital infrastructure • Delivering services digitally • Digital literacy

A two-way platform will be created where both the service providers and the consumers stand to benefit.

Some of the facilities which will be provided through this initiative are Digital Locker, e-eduction, e-health, e-sign and national scholarship portal. As the part of Digital India, Indian government planned to launch Botnet cleaning centres. Digital India also aims to transform ease of doing business in the country We are starting this new column to spread digital literacy.

Recently State Bank of India; country's largest bank launched mobile wallet SBI Buddy with much fanfare. PayTM, a prominent mobile wallet launched in 2014 today claims to have over 10 crore active wallets. If you have not used a mobile wallet, you must be wondering at these news items. In this article, we try to simplify for you different aspects of mobile wallet, and how it is likely to impact banking and payment scenarios in India.

What is mobile wallet

Mobile wallet as we know it today, is the digital equivalent to the physical wallet in which we carry money. It is an online platform which allows a user to store money in it, just like a bank account.

This is how you create and operate a mobile wallet

- Open account with a mobile wallet provider
- Transfer money to the wallet using debit/ credit card, net banking or via cash
- Spend it online or offline. Transfer money to another wallet

How it is different from internet banking

- You need to have a bank account with internet transactions facility, in order to use internet banking. Mobile wallets, in some cases, can be used even by a person not having a bank account.
- Paying through mobile wallet is very simple and convenient. Most of the wallet payments function on Single PIN checkout. Example while making payment from MobiKwik wallet account, you get One Time Password, you just enter it to complete your payment transaction. In internet banking, one needs to go through multiple screens and steps to complete the transaction. In the process, long Card Number, expiry date etc. has to be input.

Advantages

- Physical wallet in your pocket can be snatched, misplaced or pick pocketed, your mobile wallet cannot be
- No need to worry for change even if you have to make payment of ` 654.79
- More convenient in making payments, usually by a keying in One Time Password or PIN
- Those who do not have a credit card or a debit card can go to their nearest wallet recharge kiosk and get their wallets loaded against cash. (subject to limits imposed by RBI)

Different types of wallets and its uses

- **Closed** : Issued by a company to be used exclusively for buying goods or services from that company. Example : IRCTC's e-wallet can be used only to book train tickets on Indian Railways.
- **Open** : Issued by banks or jointly with banks. These wallets can be used to buy goods and services online, pay for goods and services at physical locations to merchants that accept card payments, transfer money to others and withdraw cash from ATM or from authorised kiosks. Example : mPesa issued by Vodafone with ICICI bank. PayZapp issued by HDFC Bank.
- **Semi-Closed** : Issued by a company to be used for buying goods and services online and offline at clearly identified merchant locations and transfer funds to others. Example : MobiKwik can be used for online transactions at several e-commerce sites with which it has agreement. It can also be used to pay for coffee at CCD outlets

	Open	**Closed**	**Semi-Closed**
Buy goods and Pay for services online	Yes	No	Yes
Buy goods and services only from the Issuer of wallet	No	Yes	No
Withdraw Cash	Yes	No	No
Pay for goods or services at Point of Sale	Yes	No	Yes
Transfer funds	Yes	No	Yes
RBI Permission	Required	Just inform RBI	Just inform RBI
Who can launch	Bank or Jointly with a Bank	Any Company	Any Company
Example	mPesa, PayZapp	FlipKart, IRCTC, Ola Cabs	PayTM, MobiKwik

The features listed above are those permitted to each category of mobile wallet. A company may not launch all features in a wallet.

Disadvantages/Concerns

- One needs to be tech savvy to be able to use mobile wallet
- Limited number of merchants accepting mobile wallets. However this number is growing fast
- Unused money lying in wallets and multiplicity of wallets
- Concern that key financial information can be misused if the smartphone is stolen

Target market

Anyone having a smartphone can be a potential wallet user. This makes it a very huge market in India. While tech savvy young persons are prime users, even people in rural area with aspirations of transacting digitally are potential target market.

Governance

Reserve Bank has issued Policy Guidelines on Issuance and Operation of Pre-paid Payment

Instruments in India on July 1, 2014 which prescribe, *inter alia,* eligibility, capital requirement, KYC requirements, deployment of money collected etc.

The guidelines are applicable to mobile wallets issued by banks and companies in India. These wallets can only be used for transactions in India. For foreign transactions there are foreign currency pre-paid forex cards issued by banks and these do not constitute mobile wallets

Reserve Bank of India, as the regulator of the payment system in India has been very liberal in issuing licences. The RBI has over the past 2-3 years has allowed key changes such as increasing the limit of how much money a user can park in the wallet, allowing wallet to wallet money transfers, and direct fund transfer to bank accounts. The Government is also keen that the country moves quickly to a digitally driven cashless society with all its attendant benefits such as audit trails and reduction in unaccounted money. However not much has been heard from the tax department of the Government and the compliance requirements for this mode of payment.

Tax and accounting

For all practical purposes, mobile wallet payments are like any other type of payments e.g. RTGS, credit card payments. Hence tax and accounting treatment for wallet transactions will not be any different.

The future

Mobile wallet will play a significant role in day-to-day life as with consistent increase in use of smartphones and people's reliance on digital lifestyle to make things convenient and fast.

According to a Strategy Analytics research report, India will overtake USA to become world's second largest smartphone market by 2017. Number of smartphones sold in India will grow from 118 million units in 2015 to 174 million units in 2017. (Ref : Global Smartphone Sales Forecast by Operating System for 88 Countries: 2007 to 2020. Strategy Analytics June 2015).

Ideally a mobile wallet should be able to replicate all the functionality of a real physical wallet. Today mobile wallets really replace prepaid cash cards, but in the future it should replace all types of credit cards and debit cards so that users can choose the payment method best suited for a specific transaction. Mobile wallets should therefore be able to securely store and organise the personal financial information in the smartphones

In course of time mobile wallets will emerge from a pure payment facilitator to a tool useful for customer engagement. With increase in scope several industries such as Financial Institutions, Merchants, Technology providers and Mobile companies are therefore interested in Mobile wallets and more may follow

Currently banks are the main players in the nation's payment system and this is not likely to change anytime soon. There are two distinct trends in the country which impact Banks. One is the increasing penetration of smartphones in the country, which in a relatively short time has reached remote parts of the country. Second is the big push by the Government towards financial Inclusion which makes it easy for every individual to have a bank account.

Compared to other potential players banks have an inherent strength because of their well-established core transaction processing system. A large customer base and a strong information security system built over the years are the other competitive advantage which banks enjoy. This results in high level of customer trust in the banking system for handling payments/receipts and documentation associated with the transaction which are essential for tax and accounting purpose.

The challenge faced by bankers is to deliver Banking services to every individual at a very affordable price. Because traditional branch banking has limited reach it cannot meet this challenge efficiently. So banks need to look at technology solutions to fill the gap and Mobile Wallets is one such development which appears to be very promising in the payment space.

CA R. D. Kamat

HOT SPOT
Auditor reporting on Internal Financial Controls

Company law revamp

If one were to sum up the basic theme on which the company law has been revamped, it could be: "Minimum Government - maximum governance". Crafted against the backdrop of the Satyam episode, the new law introduced two concepts which have a significant bearing on the performance of audit engagements in India. These are the reporting requirements related to i) Fraud and ii) Internal Financial Controls. It is interesting to note however, that there has been a significant dilution in implementation of both these concepts from what the profession was initially apprehensive about. This article dwells on the subject of Internal Financial Controls ("IFC") considering that the guidance note on audit of Internal Financial Controls has been brought out by the Institute of Chartered Accountants of India just a few days back ("GN"). The trigger to the issue is section 143(3)(i) which requires the auditor to report on *"whether the company has adequate internal financial controls system in place and the operating effectiveness of such controls."*

It is appropriate to understand the context at this juncture. As a fallout of Enron debacle, the Sarbanes Oxley Act passed in the United States brought in the concept of certification of "Internal Controls over Financial Reporting (ICFR)" by the management and by the auditors of US listed companies. The Securities and Exchange Commission (counterpart of SEBI in India) adopted rules for implementation of ICFR and Public Companies Accounting Oversight Board (PCAOB) - a killer whale that terrifies the auditors of the SEC listed companies much more than their managements (and of which, NFRA was envisaged to be the counterpart in India) – prescribed a detailed standard as to how audit of ICFR should be performed in conjunction with the audit of Financial Statements. In 2006 the Japanese legislature followed suit and introduced the requirements of internal controls over financial reporting (J–Sox).

A glimpse at the India scenario

Let us leave out the global prescriptions for a moment and look at the SEBI regulations which over a decade back brought in Clause 49 to the equity listing agreement which was perhaps the first time that Indians woke up to the "COSO framework". COSO did not come into existence as a result of Enron but has its origin over a decade earlier than that. Public memory being short – and even shorter in the United States – much of that was forgotten until Enron happened. To the credit of the US regulators, the structure and rigour they provided to the concept and

the process of ICFR is admirable even if an overkill. Such structure and rigour has been absent in the Indian process and as a result, while chartered accountants and company secretaries have been certifying compliance with conditions of corporate governance (which include compliance with clause 49) the state of affairs as regards implementation of Internal Financial Controls and Enterprise Risk Management is barring some exceptions, far from satisfactory.

Section 134 of the 2013 Act requires the Boards of listed companies to assume responsibility of laying down (obviously through management oversight process) IFC and ensuring that such controls are operating effectively. The explanation to the section states that the term 'Internal Financial Controls' means the policies and procedures adopted by the company for ensuring the orderly and efficient conduct of its business including adherence to companies policies, the safeguarding of its assets, the prevention and detection of fraud/errors, the accuracy and completeness of the accounting records and the timely preparation of reliable financial information. In substance, this is not different from what is envisaged in the COSO framework. Further, Schedule IV to the Act places specific responsibility on the independent directors for effectiveness of Internal Financial Controls and Section 177 requires the audit committee to evaluate internal financial controls and risk management systems in the company. It is pertinent to note that Schedule IV and Sec 177 apply to listed companies and such other class of companies as the Central Government may prescribe. Obvious intent here is to cover 'Public Interest Entities'.

The Companies Auditors Report Order (CARO) did refer to "Internal Control System commensurate with the size of the Company and nature of its business" in relation to purchase of inventory and fixed assets and sale of goods and services. This was to provide a limited 'propriety aspect' to audit since the Auditing Standards then had not matured and were not mandatory in India. While the COSO framework had taken shape in the US by early nineties, it was not generally known in India and no precise guidance around mapping of Controls Objectives and Control Activities across the three components – Operational Efficiency, Regulatory/Compliances and Financial Reporting – was prescribed. Also, the clarity about 'process' and 'control' or for that matter, control versus 'over ride of control' (a la "..the managing director himself approves xyz") has been almost non-existent with many managements and their auditors.

Nightmare or Opportunity for auditors?

A very important aspect that caused a lot of apprehension amongst auditors initially is that the IFC as referred above is significantly wider and deeper in scope than ICFR requirements in US/Japan. The ICAI guidance note does refer to this aspect and concludes that from the auditor's perspective, the ambit of IFC should be restricted to ICFR. In stating so, the ICAI draws upon Rule 8(5) of the Companies Accounts Rules, 2014 which requires the Boards of all companies to "state the details in respect of adequacy of Internal Financial Controls with reference to the financial statements". Looking back, this aspect was indeed brought before the standing committee reviewing the Companies Bill 2011 which for the first time carried such requirement in clause 143. It was suggested before the committee that:

a) The additional requirement relating to reporting on Internal Financial Controls be explicitly limited to those controls which may impact financial statements and

b) An assessment be made about the benefit of imposing such duties with respect to private limited companies or small

companies since it may not lead to the desired results while it would, in almost all cases, increase the quantum of work to be performed by the auditors.

In response, the Ministry commented that the term Internal Financial Controls basically refers to controls relating to efficient conduct of its business, safeguarding of its assets, prevention and detection of fraud/error and accuracy of accounting records; in view of which, the Ministry stated, there may not be a necessity of any change in the clause. In retrospect, while the suggestion was apt, it lacked precision in articulation and the response had appropriate mix of ambiguity and lack of knowledge expected from bureaucrats – and borne out by the drafting of Rules under Companies Act 2013.

Auditing Standards have for long laid down that assessment of internal controls on financial reporting is a part of the audit planning and performance. The extent of substantive checking and the type of tests will depend upon such assessment. However, from the perspective of utility, the auditor reporting of ICFR should boil down to two questions (at least as regards interim reporting, if not annual financials):

a) If there was no external audit would the board have the same level of comfort in approving and releasing the financial statements to the stakeholders?

b) Would the stakeholders have the same level of assurance as they expect from audited financial statements?

What purpose is served by any external review of the interim financial results if the management and the auditors assess and certify the robustness of ICFR every year? As a corollary, when audit of financial statements is mandatory, to what extent does external certification of IFC serve the governance needs if the ambit is only restricted to ICFR?

Learning from the west and east

Post 2002 the accounting profession in US lapped at the SOX 404 (ICFR attestation) opportunity to bill for additional man-hours in fees as if to say "Oh Enron was not a lapse ..that happened because 404 was not applicable then". What all this is actually worth may be a billion dollar question. Europe has been more balanced and not gone that far. Let us look east. Two massive accounting frauds surfaced in Japan – Olympus a few years back and Toshiba a few months back – note that J Sox was implemented much earlier. And yes.. Satyam was certified to have 'robust ICFR'! in terms of SOX 404. If no massive fraud has been uncovered in the US post SOX, one should thank PCAOB. As auditors of SEC listed entities have experienced by now (hence the reference to 'killer whale' earlier in this article), it is not merely the regulations, but the quality and rigour of enforcement machinery that makes the difference.

If the entire dance and drama of ICFR is only to eliminate or minimise errors in financial statements, it is not worth. None of Enron, Satyam, Olympus or Toshiba was a result of error or even 'fraud on the management'. The malaise in each of these cases was one – 'fraud by the management'. This may be committed even without misappropriation of Company's assets; window dressing of financials with skewed estimates to keep away impairment for instance, falls in this category. In smaller entities where 'management estimates are made and certified by the 'big boss' what controls are intended? ICFR attestation with reference to small entities (though listed) has been a subject of significant deliberations with PCAOB. Either because of lack of understanding or overzealousness, the Company law in India mandates the entire attestation process even to private limited companies even when section 134 which casts responsibility on Boards to have robust controls in place does not apply to private companies!

Five significant changes may be necessary to prevent the measure becoming a farce in futility. These are touched upon below.

a) The report on IFC should be addressed to "those charged with governance" the auditing standards well recognise this – normally the audit committee. Limit the application to entities which can be labelled as public interest entities in the true sense considering exposure of external stakeholders. Better to start with a deep process and widen it later if required rather than laying thin and serving no purpose.

b) When Consolidated Financial Statements (CFS) are required to be presented, the IFC attestation should be with reference to CFS – not the stand-alone financials. A top-down approach is likely to capture 'stand-alone' issues but IFC of all components at stand-alone level taken together will not address consolidation related issues. In India today we already have companies which are assessed by markets based on CFS – not stand-alone.

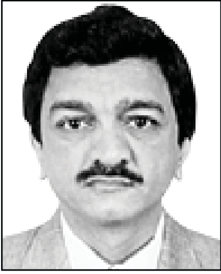
c) Assessment of and reporting on controls should relate to the period of intended reliance (with comments about subsequent mitigation where relevant). This may be a departure from the SOX stipulation but a logical one as the interim financials released to the stakeholders should also be a product of a robust process. Significant adjustments made as a result of audit must be considered in the evaluation of controls.

d) The report should cover not only material weaknesses but also control deficiencies unless assessed as insignificant. This will to a large extent help tackle the tendency to push things 'under the carpet' using undefined (or improperly defined) materiality. If we are starting now, we should aspire to have something more effective and meaningful than SOX 404.

e) Mandate a qualitative assessment across several attributes rather than a single opinion as to whether the controls are effective. Pass or fail certification process tends to be driven by the managements' arguments as regards materiality, alternate controls, effectiveness of judgments etc. As regards the attributes or 'consider points' for qualitative assessment, the answer is largely provided in the COSO revised framework. A process of bench-marking against the seventeen considerations in COSO 2013 with an overall assessment should keep those charged with governance on their toes.

To sum up, external stakeholders need assurance on the financials in their hands. Do not obscure that with the process. The ICFR process should further the oversight role of those charged with governance. The directors should be accountable for not putting the house in order if the report brings out control deficiencies and the auditors being responsible for a deficient report.

> Purity, patience and perseverance overcome all obstacles. All great things must of necessity be slow.
>
> — *Swami Vivekananda*



B.V. Jhaveri, *Advocate*

DIRECT TAXES
Supreme Court

Important principles relating to valuation of property subject to the Land Ceiling Act explained in the context of the Wealth Tax Act

Shri S. N. Wadiyar (Dead) Through LR vs. Commissioner of Wealth Tax

[Civil Appeal Nos. 6873-6881 of 2005, dated 21st September, 2015]

The Supreme Court had to consider whether for the purposes of Wealth Tax Act, the market value of the vacant land belonging to the assessee should be taken at the price which is the maximum compensation payable to the assessee under the Urban Land Ceiling Act, 1962?

The factual position is as follows:

(i) The Assessment Years in respect of which question was to be determined were 1977-78 to 1986-87.

(ii) Ceiling Act had come into force w.e.f. 17-2-1976 and was in operation during the aforesaid Assessment Years.

(iii) The Competent Authority under the Ceiling Act had passed orders to the effect that as per section 11(6) of the Ceiling Act, the maximum compensation that could be received by the assessee was ` 2 lakhs. In accordance with section 30 of the Ceiling Act, the declaration dates back to 17-2-1976 on which date the Ceiling Act was promulgated in Karnataka.

(iv) The order of the Competent Authority was challenged by the assessee by filing appeal before the Karnataka Appellate Tribunal. This appeal was, however, dismissed on 15-7-1998.

Against that order, writ petition was filed wherein provisions of the Ceiling Act were also challenged. Because of the pendency of these proceedings or due to some other reason, notification under section 10(1) of the Ceiling Act was not passed.

(v) In the year 1999, Ceiling Act was repealed. At that stage, the writ petition filed by the assessee was still pending. The effect of this Repealing Act was that the property in question remained with the assessee and was not taken over by the Government.

The Supreme Court held as under:

(i) It is clear that the valuation of the asset in question has to be in the manner provided under section 7 of the Act. Such a valuation has to be on the valuation date which has reference to the last day of the previous year as defined under section 3 of the Income-tax Act if an assessment was to be made under that Act for that year. In other words, it is 31st March immediately preceding the assessment year. The

valuation arrived at as on that date of the asset is the valuation on which wealth tax is assessable. It is clear from the reading of section 7 of the Act that the Assessing Officer has to keep hypothetical situation in mind, namely, if the asset in question is to be sold in the open market, what price it would fetch. Assessing Officer has to form an opinion about the estimation of such a price that is likely to be received if the property were to be sold. There is no actual sale and only a hypothetical situation of a sale is to be contemplated by the Assessing Officer.

(ii) Thus, the Tax Officer has to form an opinion about the estimated price if the asset were to be sold in the assumed market and the estimated price would be the one which an assumed willing purchaser would pay for it. On these reckoning, the asset has to be valued in the ordinary way.

(iii) The High Court has accepted, and rightly so, that since the Property in question came within the mischief of the Ceiling Act it would have depressing effect insofar as the price which the assumed willing purchaser would pay for such property. However, the question is as to what price the willing purchaser would offer in such a scenario?

(iv) The combined effect of the aforesaid provisions, in the context of instant appeals, is that the vacant land in excess of ceiling limit was not acquired by the State Government as notification under section 10(1) of the Ceiling Act had not been issued. However, the process had started as the assessee had filed statement in the prescribed form as per the provisions of section 6(1) of the Ceiling Act and the Competent Authority had also prepared a draft statement under section 8 which was duly served upon the assessee. Fact remains that so long as the Act was operative, by virtue of section 3 the assessee was not entitled to hold any vacant land in excess of the ceiling limit. Order was also passed to the effect that the maximum compensation payable was ` 2 lakhs. Let us keep these factors in mind and on that basis apply the provisions of section 7 of the Wealth Tax Act.

(v) One has to assume that the property in question is saleable in the open market and estimate the price which the assumed willing purchaser would pay for such a property. When the asset is under the clutches of the Ceiling Act and in respect of the said asset/vacant land, the Competent Authority under the Ceiling Act had already determined the maximum compensation of ` 2 lakhs, how much price such a property would fetch if sold in the open market? We have to keep in mind what a reasonably assumed buyer would pay for such a property if he were to buy the same. Such a property which is going to be taken over by the Government and is awaiting notification under section 10 of the Act for this purpose, would not fetch more than ` 2 lakhs as the assumed buyer knows that the moment this property is taken over by the Government, he will receive the compensation of ` 2 lakhs only. We are not oblivious of those categories of buyers who may buy "disputed properties" by taking risks with the hope that legal proceedings may ultimately be decided in favour of the assessee and in such an eventuality they are going to get much higher value. However, as stated above, hypothetical presumptions of such sales are to be discarded as we have to keep in mind the conduct of a reasonable person and "ordinary way" of the presumptuous sale. When such a presumed buyer is not going to offer more than ` 2 lakhs, obvious answer is that the estimated price which such asset would fetch if sold in the open

market on the valuation date(s) would not be more than ` 2 lakhs. Having said so, one aspect needs to be pointed out, which was missed by the Commissioner (Appeals) and the Tribunal as well while deciding the case in favour of the assessee. The compensation of ` 2 lakhs is in respect of only the "excess land" which is covered by sections 3 and 4 of the Ceiling Act. The total vacant land for the purpose of Wealth Tax Act is not only excess land but other part of the land which would have remained with the assessee in any case. Therefore, the valuation of the excess land, which is the subject matter of Ceiling Act, would be ` 2 lakhs. To that market value of the remaining land will have to be added for the purpose of arriving at the valuation for payment of Wealth Tax. *Ahmed G. H. Ariff vs. Commissioner of Wealth Tax 76 ITR 471* and *Commissioner of Wealth Tax vs. Prince Muffkham Jah Bahadur Chamlijan 247 ITR 351* referred).

S.32 : The "functional" test has to be applied to determine whether an asset is "plant". Even a pond designed for rearing prawns can be "plant"

ACIT vs. M/s. Victory Aqua Farm Ltd.

[Civil Appeal Nos. 4429 and 4430 of 2006 & 5099-5100 of 2009, dated 4th September, 2015]

Applying the 'functional test', since the ponds were specially designed for rearing/breeding of the prawns, they have to be treated as tools of the business of the assessee and the depreciation was admissible on these ponds.

In *CIT vs. Anand Theatres (244 ITR 192, SC),* while interpreting the word 'plant' for the purpose of sec. 32 of the Income-tax Act, 1961 observed as under:

"There is well-established distinction, in general terms, between the premises in which the business is carried on and the plant with which the business is carried on. The premises are not plant. It is proper to consider the function of the item in dispute. If it functions as part of the premises it is not plant. The fact that the building in which a business is carried on is, by its construction particularly well-suited to the business, or indeed was specially built for that business, does not make it plant. Its suitability is simply the reason why the business is carried on there. But it remains the place in which the business is carried on and is not something with which the business is carried on, except in some rare cases where it plays an essential part in the operations which take place. Hotel premises are not considered to be an apparatus or tool for running the hotel business but are merely a shelter or home or setting in which business is carried on. The same would be the position with regard to a theatre in which cinema business is carried on. Therefore, even the functional test is not satisfied."

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DIRECT TAXES
High Court

REPORTED

1. Sections 4; 43(6) – Capital or revenue receipt – Contract to manufacture items – Investment made in machinery – Contract cancelled – Compensation paid – Capital receipt – But the receipt had to go to reduce to the WDV – A.Y. 1998-99

Elegant Chemicals Enterprises (P) Ltd. vs. ACIT (2015) 124 DTR (AP) 214

The assessee entered into a contract to manufacture certain products for P&G, which required an investment of machinery. After installation of the machinery and test runs were conducted, P&G cancelled the contract for which it paid the assessee some compensation, the assessee held the said receipt as capital receipt. The High Court held that the receipt is a capital receipt, but the said amount should go to reduce the WDV of the machinery added to the block of assets under the contract.

2. Section 271(1)(c) – Sale of depreciable asset – By error claimed as long term capital gains – All facts had been disclosed – Penalty not levy able

Anoopgarh Kraya Vikraya Sahakari Samiti Ltd. vs. ACIT (2015) 124 DTR (Raj.) 165

The assessee had disclosed that it had sold a dal mill for a consideration on which it had been claiming depreciation and also disclosing written down value on the date of sale, and claimed long term capital gains. Penalty was levied. On appeal to the High Court, it held that it is not in dispute that the assessee disclosed all details about its income including all the facts with reagards to the sale consideration, claim of depreciation, written down value, etc., it only committed an error in the present set of facts that it by error claimed long-term capital, penalty not leviable.

3. Section 80-O – Services rendered from India – All conditions statisfied – Only report was handed in India – Report not intended to be use in India – Deduction allowable – A.Y. 1994-95

CIT vs. Peters & Prasad Association (2015) 124 DTR (AP) 45

The assessee entere into a contract to provide services and the payment was to be made in foreign currency, that is the assessee is rendering service in India, but the beneficiary thereof is from outside India. Just because the report was handed over in India, the assessee does lose the benefit of the deduction u/s. 80-O. It was also not the case of the department that the intention of the use of the report was to be used in India. It is only if there is finding that the survey report submitted to a foreign agency was in fact used or given effect to in India, that the assessee become

ineligible for deduction u/s. 80-O. Deduction in the instant case is allowable u/s. 80-O.

4. Sections 147; 148 – Proviso to section 147 – No reassessment after expiry of four years – A.Y. 2007-08

Consultating Engineering Services (India) Pvt. Ltd. vs. DCIT & Anr. (2015) 94 CCH 0023 Del HC

Original assessment in respect of the petitioner's income was completed u/s. 143(3). AO subsequently issued notice u/s. 148 on grounds that assessee had failed to disclose the true particulars of its income on this issue and the same was not dwelt upon by the AO during the original assessment proceedings. AO had also held that he had reasons to believe that taxable income on the concerned issues had escaped assessment and thus was a fit case for issuance of notice u/s. 148. AO had made certain additions on account of extra depreciation claimed on computer peripherals. On Writ Petition in High Court, the Court allowed Writ Petition and held that, AO had merely re-examined the records which were already available and has arrived at a different conclusion in stating that the interest expenses ought to have been capitalised. It does not amount to any failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. It was not indicated by AO that what particulars were not disclosed by the assessee. All the relevant accounts and records were available for consideration and the AO had considered the entire material and he gave a detailed assessment order. It cannot be inferred from facts on record that the petitioner had not made a full and true disclosure of the material particulars necessary for assessment. AO had not even indicated the extent of the alleged escapement of income. Allegations of the AO in the purported reasons that the assessee had failed to disclose full and true particulars of his income was without any basis. Consequently, in view of the provisions of the first proviso of section 147 of the said Act, the revenue cannot be permitted to reopen the assessment as the necessary pre-condition for doing so in a case which was beyond four years from the end of the relevant assessment year had not been fulfilled. Impugned notice u/s. 148 and additions was set aside.

5. Sections 17; 142(1); 143(1), 260A – Salary, "perquisite" and "profits in lieu of salary" defined – A.Y. 2008-09

Commissioner of Income Tax vs. Pritam Das Narang (2015) 94 CCH 0014 Del HC

Assessee filed return of income declaring total income and also claimed a refund. Return was processed u/s. 143(1) thereby determining a refund of ` 860. Assessee's case was subsequently selected for scrutiny and a notice was issued by the ACIT which was followed by notices u/s. 142(1). AO rejected assessee's explanation on the ground that u/s. 17(3)(iii), the receipt by the assessee of a sum from any person prior to his joining with such person was taxable. AO viewed that the condition of a pre-existing relationship of employer and employee was done away with by the use of the words "by any assessee from any person" introduced by the Finance Act, 2001 with effect from 1st April, 2002. AO concluded that the payment was taxable under the head 'Salary'. Addition of ` 1.95 crores was made to the returned income and penalty proceedings were also directed to be initiated. CIT(A) deleted the addition concluding that the receipt by assessee was *bona fide*. ITAT dismissed Revenue's appeal on grounds that assessee had been compensated for denial of opportunity to be employed by the prospective employer and therefore, the amount paid could not be said to be in lieu of the salary and a benefit of employment. On appeal in High Court the court held, that section 17(3)(iii)(A) pre-supposes the existence of an employment, i.e., a relationship of employee and employer between assessee and the person who makes the payment of "any amount" in terms of s 17(3)(iii). Likewise, s. 17(3)(iii)(B) also pre-supposes

the existence of the relationship of employer and employee between the person who makes the payment of the amount and the assessee. It envisages the amount being received by assessee "after cessation of his employment". Therefore, the words in s. 17(3)(iii) cannot be read disjunctively to overlook the essential facet of the provision, viz., the existence of 'employment' i.e. a relationship of employer and employee between the person who makes the payment of the amount and the assessee. High Court accordingly concurred with the concurrent view of the CIT(A) and the ITAT that this was a case where there was no commencement of the employment and that the offer by ACEE to assessee was withdrawn even prior to the commencement of such employment. Amount received by assessee was a capital receipt and could not be taxed under the head 'Profits in lieu of salary'. Other plea of the Revenue that the said amount should be taxed under some other head of income, including 'Income from other sources', was also unsustainable. Revenue's appeal was dismissed.

6. Section 2(14) – Capital asset – Addition on account of long term capital gain – Agricultural land – A.Y. 2006-07

Commissioner of Income Tax vs. Shri Vijay Singh Kadan (2015) 94 CCH 0011 Delhi

During the course of the assessment proceedings, AO noted that assessee had sold a property admeasuring 5.9625 acres. Assessee had claimed that the capital gain from the sale of the said land was not taxable because the land was agricultural land which did not fall within the definition of capital asset u/s. 2(14). AO held that as per section 2(14)(iii)(b), the agricultural land sold by the assessee was a capital asset. AO accordingly made an addition to the income of the assessee as long term capital gains. CIT(A) had affirmed the order of the AO that the land sold by the assessee was a capital asset. ITAT concluded that the land had to be within the distance of 8 kms. from the outer limit of the Gurgaon municipality and not from the outer limit of the village Ghata in which the land was located. Based upon certificate produced by the assessee from the former Additional Director General, CPWD said that the distance of the land from the outer limit of the Gurgaon Municipality was 10.4 kms, accordingly the ITAT had held that the land owned by the assessee did not fall within clause (a) or (b) of section 2(14)(iii). On appeal in HC, HC held, that for the purposes of section 2(14)(iii)(b), the distance had to be measured from the agricultural land in question to the outer limit of the municipality by road and not by the straight line or the aerial route. The distance has to be measured from the land in question itself and not from the village in which the land is situated. Revenue's appeal was dismissed.

7. Section 14A – Expenditure incurred for earning income which does not form part of the total income – No disallowance in absence of satisfaction based concrete material

CIT vs. Abhishek Industries Ltd. {2015} 231 Taxman 85 (P & H.)

Section 14A of the Act requires the Assessing Officer to record satisfaction that interest bearing funds had been used to earn tax free income. The satisfaction to be recorded must be based upon credible and relevant evidence. The onus, therefore, to prove that interest bearing funds were used, heavily lies on the revenue. If the AO was able to refer to relevant material while recording satisfaction that borrowed funds were used to earn interest free income, only then the Assessing Officer may legitimately disallow such a claim. The assessee denied having used borrowed funds to make investments. In this case, the AO could not, by recording general observations, particularly where the assessee had denied using interest bearing funds, proceed to infer that interest bearing income had been used to earn exempted income. Section 14A of the Act,

being in the nature of an exception, had to be construed strictly and only where the Assessing Officer records satisfaction, on the basis of clear and cogent material, disallowance u/s. 14A of the Act, could be made.

UNREPORTED

8. Article 226; Sec. 119 – delay in notifying ITR forms – CBDT bound to give additional time to file return – CBDT directed to extend time for all returns due on 30-9-2015 to 31-10-2015.

The Chamber of Tax Consultants and Others vs. Union of India and Others WP(L) No. 2764 of 2015 [Bombay High Court]

The Petitioner being an association of tax practitioners filed a Write Petition to extend the due date of filing of returns which were due on 30-9-2015, as the ITR form which generally are notified on 1st of April of every assessment year, was notified with a delay of 120 days, this was causing hardship to most of the assessees to collect and collate all the information required for filing of returns. The High Court after considering the judgments in the cases of Gujarat and Punjab and Haryana High Courts on the same issue, where they have allowed extension to file returns by 30-10-2015, and also where the CBDT had granted a similar extension of time for the assessees whose returns were due on 31-7-2015, an extension was granted to 7-9-2015, the Hon'ble High Court directed the CBDT to issue a notification u/s. 119 to extend the due date for filing E-Filing of the income tax returns in respect of the assessees who are required to file return of income by 30-12-2015 to 31-10-2015.

9. Section 54F – Exemption from capital gains on acquisition of residential house – Part-ownership of a residential house does not disentitle an assessee from claiming the exemption u/s. 54F- {A.Y. 2007-08}

CIT vs. Kapil Nagpal ITA/609/2014 (Delhi High Court) dated 11th September 2015.

The assessee claimed deduction under section 54F amounting to ` 62,47,576 against the long term capital gains of ` 63,96,328 arising from the sale of certain shares by investing an amount of ` 63 lakhs in the purchase of residential building by an agreement to sell dated 22nd July, 2006. The assessee was also having a residential house property at Gadaipur, Mehrauli, value of which was shown as ` 60,000. The Learned AO observed that the assessee had already two house properties (i) at Gadaipur, value of which was at ` 60,000 and one at Village Fatehpur Beri purchased on 22nd July, 2006 from M/s. M.K. Developers P. Limited for ` 63 lakhs; the purchase of the property at Gadaipur on 10th April, 2007 was within two years from the date of transfer from the long term capital assets, i.e. shares of VPPL on 8th November, 2006; that the assessee had therefore violated the conditions for claiming exemption under section 54F of the Act and therefore, the assessee was not entitled for the benefit of section 54F. The explanation offered by the assessee was the assessee had one house at Village Fatehpur Beri which he had purchased on 22nd July, 2006 and only 15% share in the house property at Gadaipur and owner of 15% share would not disentitle the assessee from claiming the benefit u/s. 54F since the disentitlement would get attached only if the assessee was full owner of more than one residential house.. The learned AO rejected the contention. The CIT(A) and the Tribunal allowed the exemption to the assessee. HELD that since the entire property (the second house) was not an exclusive residential property, the harshness of the proviso to section 54F cannot be applied unless and until there are materials to show that the assessee is the exclusive owner of the residential property.

Jitendra Singh & Sameer Dalal
Advocates

DIRECT TAXES
Tribunal

REPORTED

1. Salary – Taxability – Section 15 of the Income-tax Act, 1961 – What is taxable under section 15 is 'salary due' and not 'salary accrued'. A.Y.: 2008-09

Vrajeshwari B. Parikh vs. ITO [2015] 61 taxmann.com 235 (Ahd. - Trib.)

The assessee is an Associate Professor in the Government Medical College at Gujarat. As a result of the Fifth Pay Commission Report being implemented by Government of salary was done afresh in 1998. The assessee had received three increments Gujarat, fixation in excess due to an error. When this error was detected by the auditor, the assessee refunded the excess salary received, during the period April 1998 to November 2006, which worked out to ` 2,13,132/-. The assessee in her return of income disclosed net salary income of ` 2,43,689/- as against actual salary received by her at ` 4,56,821/-. The same net salary was disclosed in Form No.16 issued by the employer as well. However, the A.O. while finalising the assessment rejected the stand of the assessee and made an addition of ` 2,13,132/- being excess salary refunded by the assessee. On appeal, the First Appellate Authority upheld the action of the A.O.

The assessee being aggrieved filed an appeal before the Hon'ble Ahmedabad Appellate Tribunal. Hon'ble Appellate Tribunal allowed the appeal of the assessee and held that the salary is not to be taxed on the basis of "accrual" since, in its conscious choice of words, legislature has chosen the taxability on due basis or payment basis – whichever is earlier.

2. Appellate Tribunal – Stay – Section 254, read with section 276C, of the Income-tax Act, 1961 – Where revenue authorities had not launched prosecution against assessee in any criminal court – Stay application filed by assessee for keeping in abeyance launching of said prosecution proceedings could be entertained. A.Y. 2008-09

Jindal Steel & Power Ltd. vs. Asstt. CIT – (2015) 169 TTJ 704 (Del.)

The assessee's appeals in respect of order passed under section 263 of the Act as well as order passed under section 143(3) of the Act pursuant to said order under section 263 of the Act were pending for disposal before Tribunal. Further, appeal was also pending before Tribunal against levy of penalty under section 271(1)(c) of the Act.In meantime, Assessing Officer issued show cause notice to assessee for initiating prosecution

proceedings under section 276C(1) of the Act in respect of additions made in assessment.

Assessee filed stay application for keeping in abeyance launching of prosecution proceedings. Allowing the stay application Tribunal, held that as the outcome of appeals before the Tribunal would have a direct bearing on question whether prosecution had to be launched or not, and since the revenue had not launched prosecution against assessee in any criminal court the Tribunal had jurisdiction to stay the proceedings in view of proviso to section 254(2A) of the Act.

UNREPORTED

3. Penalty – Section 271(1)(c) of the Income-tax Act, 1961 – In the return of income assessee claimed certain brought forward Minimum Alternate Tax (MAT) credit – Thereafter, assessment of earlier year was framed reducing brought forward MAT credit – Assessing Officer levied penalty under section 271(1)(c) for claiming wrong/excess amount MAT credit – Held the word 'income' in 271(1)(c) of the Act, contemplate income on which taxes are to be computed and paid – Particulars of MAT credit furnished in return of income cannot, be said to be particulars of 'income' for purpose of levying penalty under section 271(1)(c) of the Act.

Penalty – Section 271(1)(c) of the Act – Penalty under section 271(1)(c) of the Act could not be levied on account of disallowance made of expenses incurred for earning exempt income invoking section 14A of the Act as both figures of expenses as well as income in its profit and loss account were filed along with return of income. A.Y. 2010–11

Aarge Drugs (P.) Ltd. vs. Dy. CIT – [ITA No. 781 / Chd / 2014; Order dated 23-7-2015; Chandigarh Tribunal]

The assessee filed its return of income claiming brought forward MAT credit of certain amount. Thereafter, assessments of earlier years were concluded reducing brought forward MAT credit. The A.O. levied penalty under section 271(1)(c) as according to him the assessee had deliberately carried forward excess MAT credit and the claim of wrong amount of tax credit clearly fell within the purview of the provisions of section 271(1)(c). While levying the penalty the A.O. observed that if, the assessee was not aware of the assessed income of earlier years at the time of filing its return for the assessment year, it ought to have revised its return before the time limit provided under section 139(4), which was not by the Assessee. Further, penalty was also levied by the A.O. penalty for disallowance made by him under section 14A of the Act as the disallowance under section 14A of the Act is a statutory disallowance and ought to have been made by the assessee while computing its income. The Commissioner (Appeals) confirmed the penalty levied by the A.O. on both the counts.

On appeal the Tribunal deleting the penalty held that, penalty under section 271(1)(c) of the Act is levied for concealing or furnishing inaccurate particulars of income. Income contemplated under section 271(1)(c) of the Act, is the income on which taxes are to be computed and paid. Taxes paid or payable are, not income for the purposes of section 271(1)(c) of the Act. Thus, particulars of MAT credit furnished in the return of income cannot, therefore, be said to be particulars of 'income' for the purpose of levying penalty under section 271(1)(c) of the Act. Further, the Tribunal observed that the act of furnishing inaccurate particulars of income or concealing particulars of income is to be seen in relation to the point of time when the return is filed. The Tribunal noted that, on the date of filing return of income the figures of brought forward MAT credit of earlier assessment years were as per returned income, which was correct, as no assessment for those years was framed till

then. It was only thereafter, that the assessments for earlier assessment years were concluded. Therefore, vis-a-vis the return filed no inaccurate particulars were furnished.

As regard penalty levied for disallowance made under section 14A of the Act, the Tribunal deleting the penalty held that assessee had disclosed figures of expenses as well as income in its profit and loss account filed along with return of income thus, there is no question of concealing or furnishing inaccurate particulars of income.

4. Penalty – Section 271(1)(c) of the Income-tax Act, 1961 – Revised return – Where assessee *suo motu* revised his return declaring additional income and paid taxes thereon before any detection of concealment by revenue authorities – Penalty under section 271(1)(c) not leviable. A.Y. 2010-11

Harpreet Singh vs. ITO – [ITA No. 210 / Chd. / 2015; Order dated 31-7-2015; Chandigarh Tribunal]

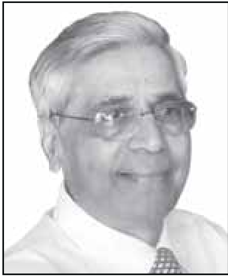
The assessee filed his return for the year on 31-3-2011 beyond the time limit provided under section 139(1) of the Act, declaring rental income and income from other sources. Thereafter, on 26-4-2011 the assessee filed revised return voluntarily declared additional income. Till 26-4-2011, there was no detection of concealed income was made by the Revenue Authorities. Subsequently, the case was selected for scrutiny assessment. The Assessing Officer framed the assessment under section 143(3) of the Act, wherein the additional income disclosed was added to the total income of the assessee. Thereafter, the A.O. initiated and levied penalty under section 271(1)(c) of the Act. The Commissioner (Appeals) confirmed the penalty levied by the A.O.

On appeal the Tribunal held that though the return submitted on 26-4-2011 cannot be considered as revised return filed under section 139(5) of the Act, at the same time, it is not the case where the rental income not shown in the original return was detected by the Revenue Authorities. The assessee offered the rental income on 26-4-2011 and paid the taxes thereon before any detection of concealment by the Revenue Authorities. No notice or query was raised regarding the rental income offered by the assessee for taxation on or before 26-4-2011. Therefore, it cannot be said that the assessee either concealed the income or furnished the inaccurate particulars of income, therefore, penalty under section 271(1)(c) of the Act is not leviable.

5. Search and seizure assessment – Section 153D of the Income-ax Act, 1961 – Approval granted by Additional CIT to the draft assessment order in a casual and mechanical manner and without application of mind renders the assessment order void. A.Y. 2007–08

Shreelekha Damani vs. DCIT – [ITA No. 4061/Mum/ 2012 Order dated: 19-8-2015; Mumbai Tribunal]

A search and seizure action under section 132 of the Act was carried out on Simplex Group of Companies and its Associates. The Office/ residential premises of the company and its Directors/connected persons were also covered. Simplex Group is engaged in the business of Realty, paper, Textile and Finance. On the basis of the incriminating documents/books of account found during the course of search and seizure operation, assessment of the assessee was made under section 143(3) of the Act r.w. section 153A of the Act with the prior approval of the Additional Commissioner of Income Tax, Central Range-7, Mumbai. The assessee filed additional Grounds of Appeal before the Hon'ble Mumbai Appellate Tribunal challenging the validity of approval granted by the Additional Commissioner of Income Tax. The Appellate Tribunal after considering the facts of the case allowed the additional ground raised before it and annulled the assessment by holding that Approval to the assessment order granted by the Addl. CIT in a casual and mechanical manner and without application of mind renders the assessment order void.



CA Sunil K. Jain

DIRECT TAXES

Statutes, Circulars & Notifications

NOTIFICATIONS

Finance Act, 2015 – Notified date on which provisions of section 132 of said Act to come into force

In exercise of powers conferred by section 131 of the Finance Act, 2015 (20 of 2015), the Central Government announced the 29th day of September, 2015 as the date on which the provisions of section 132 of the said Act shall come into force.

(Notification No. SO 2363 [F.No. 1/9/SM/2015], dated 28-8-2015)

Section 119 of the Income-tax Act, 1961 – Income-tax Authorities – Instructions to subordinate authorities – Extension of due date for e-filing returns of income from 31-8-2015 to 7-9-2015 for all taxpayers for Assessment Year 2015-16

CBDT received representations that across the country, taxpayers had faced hardships in E-Filing Returns of Income on the last date i.e. 31st August, 2015 due to slowing down of certain e-services. Therefore, after considering the matter, CBDT in exercise of powers conferred under section 119 of the Income-tax Act, 1961, extended the 'due-date' for E-Filing Returns of Income from 31st August, 2015 to 7th September, 2015 in respect of all the taxpayers who were required to E-File their returns by 31st August, 2015.

(Order [F.No. 225/154/2015/ITA.II], dated 2-9-2015)

Section 285BA of the Income-tax Act, 1961, read with rule 114G of the Income-tax Rules, 1962 – Furnish statement of financial transaction or reportable account – Obligation to – Procedure for registration and submission of report as per clause (k) of section 285BA(1) – Withdrawal of Notification No. 3/2015, dated 25-8-2015

In exercise of the powers delegated by CBDT under sub-rules (9)(a) and 9(b) of rule 114G of the Income Tax Rules, 1962, the Principal Director General of Income-tax (Systems) laid down the procedures, data structure and standards for ensuring secure capture and transmission of data, evolving and implementing appropriate security, archival and retrieval policies. (a) The reporting financial institution is required to get registered with the Income-tax Department by logging in to the e-filing website with the log in ID used for the purpose of filing the Income-tax Return of the reporting financial institution. Once registered, the reporting entity

will have an option to deregister. (b) Once the reporting financial institution gets registered successfully, it is required to submit the Form 61B or Nil statement. (c) If the designated director chooses the option "Form 61B" then form shall be submitted using a Digital Signature Certificate of the designated director. In case nil statement is to be submitted, the option to submit nil statement is required to be selected. The designated director will then be required to submit a declaration with respect to pre-existing accounts using a Digital Signature Certificate.

(Notification No. 4/2015 - dated 4-9-2015)

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

The Central Government declared that any income arising to M/s Thales Systemes Aeroportes SAS, having its office at S.A. au capital de 81 007 176 Euros RCS Paris B 712 042, by way of royalty or fees for technical services received in pursuance of the agreement *vide* General Contract No. Air HQ/96102/2/ASR-DA, dated the 29th July, 2011 entered into between Thales Systemes Aeroportes ("Thales") and M/s. Dassault Aviation and the Government of India for undertaking retrofitting of fifty-one defence aircrafts connected with security of India, shall not be included in computing the total income of a previous year of the said company under the said Act.

(Notification No. 74/2015 [200/18/2014-ITA-I], dated 22-9-2015)

CIRCULARS

Reporting requirement under Foreign Account Tax Compliance Act (FATCA) and Common Reporting Standards (CRS)

CBDT is in the process of issuing a detailed guidance note detailing the reporting requirements. The Financial Institution, as defined in the Income Tax Rules, by going through the Rules should determine whether they are Reporting Financial Institution or not and whether they are falling within one of exemptions (Non-Reporting Financial Institutions (NRFI) as per Rule 114F(5)) provided in the Rule. All the regulated entities should take action appropriately for the implementation of due diligence and reporting requirements as laid down in the Rules and ensure compliance in a manner that lends itself to credible audit ability including audit of the IT system which should be suitably upgraded to not only maintain the information required under the Rules but also to record and store the due diligence procedures. In due course, the detailed guidelines for carrying out audit of IT system for ascertaining the degree and level of compliance with due diligence procedures as laid down in the Rules will be issued.

(Circular DBR.AML.BC.No. 36/14.01.001/2015-16, dated 28-8-2015)

Section 119 of the Income-tax Act, 1961 – Income-tax Authorities – Instructions to subordinate authorities – Extension of due date for filing returns of income from 31-8-2015 to 7-9-2015 in cases of assessees in State of Gujarat

On consideration of reports of dislocation of general life caused due to recent disturbances in the State of Gujarat, the Central Board of Direct Taxes, in exercise of powers conferred under section 119 of the Income-tax Act, 1961, extended the 'due-date' for filing Returns of Income from 31st August, 2015 to 7th September, 2015, in cases of Income-tax assessees in the State of Gujarat, who were liable to file their Income tax returns by 31st August, 2015.

(Order [F.No. 225/154/2015/ITA.II], dated 31-8-2015)

Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 – Clarifications on Tax Compliance for Undislosed Foreign Income and Assets

The CBDT received queries from the public about the tax compliance provisions under Chapter VI of the The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015. In this regard, the Board provided clarifications to 27 queries in the mentioned circular.

(Circular No. 15 of 2015 [F. No. 142/18/2015-TPL], dated 3-9-2015)

Guidelines for Compounding of Offences under Income-tax Act, 1961/ Wealth-tax Act, 1957 in cases of persons holding undisclosed foreign bank accounts/assets

Doubts have been expressed by the field formation as to whether offences relating to undisclosed foreign bank accounts/assets could be compounded as per the guidelines of the Board dated 23-12-2014. Therefore, CBDT clarified that there is no provision for compounding of offences under the newly enacted Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015.

(Letter [F. No. 285/90/2013 IT (Inv. V)/212], dated 4-9-2015)

Section 14 of the Wealth-tax Act, 1957 – Return of Wealth – Clarification on extension of due date of filing return of Wealth for A.Y. 2015-16

In view of CBDT order F.No. 225/154/2015/ ITA-II dated 2-9-2015 issued under section 119 of the Income-tax Act, extending the due date for e-filing returns of income from 31st August, 2015 to 7th September, 2015 in respect of all taxpayers who were required to e-file their returns of income by 31st August, 2015, the 'due date' for filing return of wealth by such assessees for assessment year 2015-16 was also extended from 31st August 2015 to 7th September 2015.

(Letter [F.No. 328/08/2015-WT], dated 4-9-2015)

Constitution of a Committee to Study Feasibility of Recommendations of TARC in respect of group assessment and system of Peer Review before assessment

Board constituted a Committee for examining feasibility of recommendations of Tax Administration Reform Commission ('TARC') in respect of group assessment in 'other cases' and peer review before assessment. The composition of the Committee is as mentioned in the notification. The Committee may co-opt other members, as it deems fit to have proper representation, co-ordination and feedback from field formations. The Committee shall submit its report to Member (IT), CBDT by 15th October, 2015.

(Office Memorandum [F.No. 225/246/2014/ITA.II], dated 10-9-2015)

Introduction of Gold Monetisation Schemes

The Gold Monetisation Schemes provide different options to the people to monetise the gold, by modifying the already existing two schemes, namely, the Gold Deposit Scheme and the Gold Metal Loan Scheme, in light of past experience and fresh developments and feedback. Thus, the Gold Monetisation Schemes comprise of the 'Revamped Gold Deposit Scheme' and the 'Revamped Gold Metal Loan' scheme, linked together. The objective of introducing the modifications in the schemes is to make the existing schemes more effective and to broaden the ambit of the existing schemes from merely mobilising the gold held by households and institutions in the country to putting this gold into productive use. The long-

term objective which is sought through this arrangement is to reduce the country's reliance on the import of gold to meet the domestic demand.

(Office Memorandum [F. No. 20/6/2015-FT], dated 15-9-2015)

Introduction of Sovereign Gold Bonds Scheme

The introduction of the 'Sovereign Gold Bonds Scheme' (SGB) has been approved. Sovereign Gold Bonds will be issued on payment of rupees and denominated in grams of gold. The main idea is to reduce the demand for physical gold and to shift part of the estimated 300 tons of physical bars and coins purchased every year for Investment into 'demat' gold bonds. Bonds will be issued on behalf of the Government of India by RBI and Issuing agency will need to pay distribution costs and a sales commission to the intermediate channels, to be reimbursed by Government. The bond would be restricted for sale to resident Indian entities. The cap on bonds that may be bought by an entity would be, not more than 500 grams per person per year.

(Office Memorandum [F. No.20/10/2014-FT], dated 15-9-2015)

PRESS RELEASES

Section 115JB of the Income-tax Act, 1961 – Special provision for payment of tax by certain companies – Government accepts recommendations of justice A.P. Shah Committee to clarify inapplicablity of MAT to FIIs/FPIs

The Government accepted the recommendation of the Committee chaired by Justice A. P. Shah to clarify the inapplicability of MAT to FIIs/ FPIs and has decided that an appropriate amendment to the Income-tax Act will be carried out. Through the amendment the Government proposes to clarify that MAT provisions will not be applicable to FIIs/FPIs not having a place of business/ permanent establishment in India, for the period prior to 1-4-2015.

(Press Release, dated 1-9-2015)

Section 143 of the Income-tax Act, 1961 – Assessment – General – Extension of due date for filing of e-returns for Assessment Year 2015-16 for all taxpayers

The Government had received representations that taxpayers had faced difficulties in E-filing of returns across the country due to slowing down of certain e-services on 31st August, 2015. Considering these representations, Central Board Direct Taxes extended the 'due-date' for E-filing returns of income from 31st August, 2015 to 7th September, 2015 in respect of all taxpayers who were required to E-file their returns of income by 31st August, 2015.

(Press Release, dated 2-9-2015)

Black Money (Undisclosed Foreign Income and Assets) and imposition of Tax Act, 2015 – Persons holding undisclosed foreign assets are advised to file their declaration well in time under compliance window of said Act

Persons holding undisclosed foreign assets were required to file their declarations in time well before the 30th September, 2015 as provided under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (the Act). The information contained in the declaration will be kept confidential as section 138 of the Income-tax Act is applicable to the declarations. The process of filing declaration is simple and the declaration can be filed online also. Failure to declare an undisclosed foreign asset will entail severe consequences under the Act, including higher penalty, prosecution, and may also result in forfeiture of assets under the Prevention of Money Laundering Act.

(Press Release, dated 21-9-2015)

Section 115JB of the Income-tax Act, 1961 – Minimum Alternative Tax – Government decided to amend income-tax Act, 1961 so that with retrospective effect from 1-4-2001, provisions of section 115JB shall not be applicable to a foreign company if that foreign company is a resident of a country having DTAA with India and such foreign company does not have a permanent establishment within definition of that term in relevant DTAA

After due consideration of the various aspects of the matter, the Government of India decided that with effect from 1-4-2001, the provisions of section 115JB shall not be applicable to a foreign company if the foreign company is a resident of a country having DTAA with India and such foreign company does not have a permanent establishment within the definition of the term in the relevant DTAA, or the foreign company is a resident of a country which does not have a DTAA with India and such foreign company is not required to seek registration under section 592 of the Companies Act, 1956 or section 380 of the Companies Act, 2013.

(Press Release, dated 24-9-2015)

Regularisation of assets held abroad by person resident in India under FEMA, 1999

In connection with the declarations made by persons resident in India under the provisions of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (Black Money Act), it was clarified that (a) no proceedings shall lie under the Foreign Exchange Management Act, 1999 (FEMA) against the declarant with respect to an asset held abroad for which taxes and penalties under the provisions of Black Money Act have been paid; (b) no permission under FEMA will be required to dispose of the asset so declared and bring back the proceeds to India through banking channels within 180 days from the date of declaration and (c) in case the declarant wishes to hold the asset so declared, she/he may apply to the Reserve Bank of India within 180 days from the date of declaration if such permission is necessary as on date of application.

(Press Release 2015-2016/754, dated 24-9-2015)

Departmental clarifications on Black Money Act

Various issues related to the Black Money (Undisclosed Foreign Income and Assets) and Imposition of the Tax Act, 2015 have been raised by various stakeholders since issue of Circular No. 15 of 2015. The concerns raised along with the comments are as mentioned in the press release.

(Press Release, dated 30-9-2015)

Extension of date for filing of income tax returns and tax audit reports to 31st October, 2015 – regarding: The issue of extension of last date for e-filing returns of income and audit reports u/s. 44AB due by 30th September, 2015 has been the subject matter of litigation in various High Courts across the country. While some High Courts have ruled in favour of the extension of due date, some others have ruled otherwise. In order to avoid discrimination between taxpayers residing in different jurisdictions and to be fair to all, and also in view of paucity of time to approach the Hon'ble Supreme Court by way of Special Leave Petition, the Government has decided that across the country, all the returns of income and audit reports u/s. 44AB which were due for e-filing by 30th September, 2015, may now be filed by 31st October, 2015. Necessary order u/s. 119 of the Income-tax Act, 1961 has been issued by CBDT in this regard.

(CBDT Press release dated 1-10-2015)

INSTRUCTIONS

Guidelines for grant of rewards to informants leading to recovery of irrecoverable taxes, 2015

In supersession of the guidelines for Grant of Reward to Informants, 2007, the guidelines called the 'Guidelines for Grant of Rewards to Informants leading to Recovery of Irrecoverable Taxes 2015' will regulate the grant of reward to informants leading to recovery of taxes of tax defaulters whose names have been published in the public domain under section 287 of the Income-tax Act, 1961.

(Instruction No. 7/2015 [F.No. 385/21/2015-IT (B)], dated 26-8-2015)

Section 143 of the Income-tax Act, 1961 – Assessment – General – Compulsory manual selection of cases for scrutiny during Financial Year 2015-16

In supersession of earlier instructions on the above subject, the Board laid down the procedure and criteria for manual selection of returns/cases for scrutiny during the financial year 2015-16: (a) Cases involving addition in an earlier assessment year in excess of ` 10 lakhs (b) Cases involving addition in an earlier assessment year on the issue of transfer pricing in excess of ` 10 crore or more (c) All assessments pertaining to survey under section 133A of the Income-tax Act, 1961 excluding those cases where books of account, documents etc. were not impounded and returned income (excluding any disclosure made during the survey) is not less than returned income of preceding assessment year; (d) Assessments in search and seizure cases to be made under section(s) 158B, 158BC, 158BD, 153A & 153C read with section 143(3) of the Act and also for the returns filed for the assessment year relevant to the previous year in which authorisation for search and seizure was executed u/s. 132 or 132A of the Act; (e) Returns filed in response to notice under section 148 of the Act. (f) Cases where registration u/s. 12AA of the IT Act has not been granted or has been cancelled by the CIT/DIT concerned yet the assessee has been found to be claiming tax-exemption under section 11 of the Act; (g) Cases where the approval already granted u/s. 10(23C)/35(1)(ii)/35(1)(iii)/10(46) of the Act has been withdrawn by the Competent Authority, yet the assessee has been found claiming tax-exemption/benefit under the aforesaid provisions. (h) Cases in respect of which specific and verifiable information pointing out tax-evasion is given by Government Departments/Authorities.

(Instruction No. 8/2015 [F. No. 225/201/2015/ITA. II], dated 31-8-2015)

Section 92CA of the income-tax act, 1961 – Transfer Pricing – Reference to Transfer Pricing Officer (TPO) in specified domestic transaction cases

Clarifications were sought from the Board as to which authority will function as Transfer Pricing Officer ('TPO') for the purposes of determining Arm's Length Price ('ALP') in respect of Specified Domestic Transactions ('SDTs') as per the provisions of section 92CA of the Income-tax Act, 1961('Act'). The Board has clarified that such cases involving SDTs shall continue to be handled by the TPOs working under the Commissioner (Transfer Pricing).

(Instruction No. 11/2015 [F.No. 225/187/2014-ITA-II], dated 16-9-2015)

Section 237 of the Income-tax Act, 1961 – Refunds – Custody of Refund Vouchers

The safeguards to be followed in issuance of manual refunds as laid out in AST Instruction No.136 include that all manual refunds up to ` 1 lakh are to be issued with the approval of Range Head, and in cases involving refund amount of more than ` 1 lakh, with the approval of Pr.CIT/CIT. In view of the same, the CBDT directed that Refund Vouchers should be kept in the custody of respective Range Heads only, who shall be responsible for the safe custody and proper use of the Refund Vouchers

(Instruction No. 12/2015 [F.No. 312/101/2015-OT], dated 17-9-2015)

CA Tarunkumar Singhal & Sunil Moti Lala, *Advocate*

INTERNATIONAL TAXATION
Case Law Update

Tribunal Decisions

India-UK DTAA – Taxability of revenue earned from distribution of news & financial information products – Whether taxable in India – Held : Not taxable in India in the absence of a dependent agent PE & service PE – In favour of the assessee

Reuters Limited vs. DCIT – [TS-511-ITAT-2015(Mum.)]

Facts

i) The assessee is a resident of the U.K. It is engaged in the business of providing worldwide news and financial information products. The assessee produces, compiles and distributes news and financial information products through the 'Reuters Global Network' with a vast global communication network. Such network consist of data storage facilities situated in three locations i.e. London, New York and Singapore, which are linked by satellite and terrestrial lines.

ii) The assessee uses the network to receive and transmit information and provide access to the compiled news and edited financial information to distributors in various countries. In India, the assessee provides Reuters products to its Indian subsidiary named as Reuters India Private Limited (RIPL) under certain specified agreements. In turn, the RIPL distributes Reuters products to the Indian subscribers independently in its own name.

iii) The assessee entered into three kinds of contractual agreements with RIPL i.e. licence agreement, product distribution agreement and distributor agreement. Under the distributor agreement, RIPL has been appointed as the distributor to sell designated Reuter products to subscribers in India using the Reuters Global Network.

iv) Under the aforesaid agreement, the assessee provides RIPL, connection to the Reuters Global Network whereby products are made available to the RIPL, which are then distributed by RIPL to various subscribers in India independently.

v) During the relevant year the assessee had deputed Mr. Simon Cameron Moore, as the NBC of Mumbai for gathering, writing and distributing the news and overall coverage of news.

vi) In terms of the distributor agreement, the assessee had received distribution fees which were claimed to be not taxable in India in the absence of a PE.

vii) The Assessing Officer (AO) held that the revenue earned by the assessee was taxable as Fees for Technical Services (FTS) under Article

13 of the tax treaty. It was further held that RIPL constituted to be a dependent agent PE in India under Article 5(5) of the tax treaty and therefore, income was taxable under section 44D of the Income-tax Act, 1961 (the Act) on gross basis.

viii) The Dispute Resolution Panel (DRP) held that the assessee had a PE in India in the form of RIPL, as it was dedicated for the business of the assessee. Further, Mr. Simon Moore was deployed in India as NBC during the relevant period, for rendering service to RIPL on the assessee's behalf and such services will constitute a service PE in India.

ix) Accordingly, the AO passed the order in pursuance of the directors of the DRP. The AO taxed the entire distribution fee on a gross basis at 20% under section 44D read with section 115A of the Act.

Decision

On appeal, the Tribunal held in favour of the assessee as under:

A) Re: Agency PE

i) On referring to Articles 5(4) and 5(5) of the tax treaty, it indicates that an agent is deemed to be a PE, if he is not independent and habitually exercises an authority to conclude contracts on behalf of the enterprise or if he has no such authority, but habitually maintains a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise or he habitually secures orders solely or almost wholly for the enterprise. If any of these conditions mentioned in Article 5(4) of the tax treaty is not fulfilled, the agent cannot constitute a PE for the foreign enterprise.

ii) On referring to the relevant terms of the distribution agreement, it indicates that nowhere has it been specified or that there is any mandate that RIPL was habitually exercising its authority to negotiate and to conclude the contracts on behalf of the assessee in the territory of India, which is binding or can bind the assessee. It envisages simply delivering of assessee's services for a price which can be further distributed by RIPL for earning of its own revenue.

iii) There was no clause in the agreement that RIPL would act as an agent on behalf of the assessee *qua* the distribution to subscribers. In fact, RIPL has an independent contract with the subscribers, which was evident from the contract agreement between RIPL and third party subscribers in India.

iv) Similarly, when RIPL was supplying news and material to the assessee, the same is again on a principal to principal basis. The second condition as mentioned in Article 5(4) of the tax treaty, also was not fulfilled, because RIPL was not habitually maintaining stock of any goods and merchandise for which it can be held that it was regularly delivering goods on behalf of assessee. Lastly, it was not habitually securing the orders wholly and almost wholly for assessee.

v) RIPL was earning substantial income from its own dealing with third party customers which was evident from the contract entered into by the third parties and also from the income shown from 'subscription fee' by RIPL from third party customers.

vi) Nothing was evident from the distribution agreement or financial accounts that RIPL was acting as an agent of the assessee. The character of an agent under Article 5(4) of the tax treaty which can be said to be dependent is that the commercial activities of the agent for the enterprise are subject to instructions or comprehensive control and it does not bear the entrepreneur risk

vii) The main thrust of an agent being a PE under the tax treaty is whether the agent has an authority to conclude contracts in the name of the enterprise. Thus, the qualified character of the agency is the authorisation to act on behalf of somebody else so much so as to conclude the contracts. In the present case, there were no such terms which were borne out from the distribution agreement that RIPL was only

acting on behalf of assessee or is any kind of a dependent agent. RIPL was a completely an independent entity and the relationship between the assessee and RIPL was on a principal-to-principal basis

viii) Even under Article 5(5) of the tax treaty, the foremost condition is that the activities of such an agent are devoted wholly or almost wholly on behalf of the enterprise. In the present case, the activities of RIPL cannot be said to be devoted wholly or almost wholly on behalf of the assessee as it had entered into contracts with subscribers in India on an independent and a principal-to-principal basis for earning and generating its revenues.

ix) In fact revenue from third party subscribers was far excess than the transaction with the assessee. In the present case, it was not the case that RIPL was completely or wholly doing an activity for assessee and earning income wholly from assessee only. Thus, the conditions laid down in Article 5(5) of the tax treaty were not fulfilled.

B) Re: Service PE

i) On reference to provisions of Article 5(2)(k) of the tax treaty, it is clear that an enterprise shall be deemed to have a PE in India of it furnishes managerial or other services except services which are taxable as 'royalty' or 'fees for technical services', through employees or other personnel, provided the duration of activities within the contracting state exceeds the prescribed period. The main thrust of Article 5(2)(k) of the tax treaty is furnishing of services through employees or other personnel in another contracting state.

ii) The NBC was a very senior and experienced reporter or correspondent who was responsible for collecting and analysing the news and holds a room. He was mainly responsible for co-ordinating the efforts of the reporting staff to investigate and cover stories for dissemination of news to print and media outlets. He has been assigned to India by the assessee as a 'Text Correspondent' to perform functions of a Bureau Chief. In this case, his functions and duties had nothing to do with, in so far as the distribution agreement is concerned.

iii) There was no furnishing of services by the NBC to the RIPL which had lead to earning of a distribution fees to the assessee. The NBC has nothing to do for providing of assessee's services to the distributor Thus, it cannot be held that the NBC constitutes a service PE in India for the assessee under Article 5(2)(k) of the tax treaty as he had not furnished any services in India on which the assessee had earned the distribution fee.

Accordingly, it was held that neither under Article 5(2)(k) nor under Article 5(4) read with 5(5) of the tax treaty, the assessee had a PE in India and, therefore, the distribution fee received by the assessee cannot be held to be taxable in India.

Disallowance u/s. 40(a)(i) – Nil TDS certificate obtained from AO u/s 195(2) – Held : No disallowance under section 40(a)(i) of the Income-tax Act if the assessee has not deducted tax at source based on 'nil' withholding certificate obtained from the AO

DCIT vs. Carl Zeiss India (P) Ltd. - [TS-463-ITAT-2015(Bang.)]

Facts

i) The assessee, a company incorporated in Singapore, is a 100 per cent subsidiary of Carl Zeiss, AG Germany. The Carl Zeiss group manufactures and sells optical products. It was engaged mainly as a front office of the assessee in India facilitates the sale of the group's products in India, apart from providing it sales support in India.

ii) During the year under consideration, the assessee had made payment for reimbursement of the expenditure in respect of the services

rendered by the head office through three senior management officials. The payment was made under the cost sharing arrangements and claimed as reimbursement to the head office.

iii) The assessee had obtained a nil withholding tax certificate from the AO before remitting the amount to its head office.

iv) During the assessment proceedings, the Assessing Officer (AO) noted that the assessee had claimed INR 11.25 million under the head office cost of senior management.

v) The AO held that the services provided by the head office through three senior management officials fall within the category of Fee for Technical Services (FTS) under section 9(1)(vii) of the Act as well as the India-Singapore tax treaty. It was held that since the assessee did not deduct tax at source, the said payment was disallowed under section 40(a)(i) of the Act and added to the total income.

vi) The AO also made the disallowance in respect of the expenditure on account of advertisement and sales promotion. The expenditure on account of printing, reimbursement, sales promotion, stall charges were covered under section 194C of the Act, and the expenditure on account of training charges were covered under section 194J of the Act.

vii) The Commissioner of Income-tax (Appeals) [CIT(A)]:

a) Deleted the addition made by the AO in respect of one senior management personnel;

b) Confirmed the addition made by the AO in respect of other personnel holding that the payment was in the nature of FTS; and

c) Held that the AO failed to establish the fact that payments made by the Indian branch towards advertisement and sales promotion expenditure, qualified as payments covered under sections 194C/194J of the Act and therefore, the provisions of withholding tax were not attracted to such payments. Accordingly, the CIT(A) had deleted the disallowance made by the AO.

Decision

The Tribunal held in favour of the assessee as under :–

A) *Re: Reimbursement of Head Office expenditure*

i) The assessee had remitted the amount to the non-resident after obtaining a certificate from the AO under section 195(2) of the Act. The AO while granting the certificate under section 195(2) had duly recorded the fact that the payment in question is in respect of availing the services of Carl Zeiss Pte. Ltd., Singapore under the agreement for providing certain managerial and human resources to the Indian branch.

ii) The AO noted that the payment was in connection with salaries and other cost of managerial and HR officials charged to the Indian branch which includes the cost of the MD, Chief Officer, HR & Quality and web administrator for IT application specialists. Thus, after considering the submissions of the assessee that the services provided by the non-resident from Singapore does not fall within the definition of FTS under Article 12 of the India-Singapore tax treaty, the AO issued a 'nil' withholding certificate for making remittance.

iii) The provisions of section 40(a)(i) of the Act can be invoked only when there is a failure on the part of the assessee to comply with the provisions of Chapter XVIIB of the Act. The payment in question was to a non-resident company and therefore, the provisions for deductions of tax as provided under section 195 of the Act are relevant.

iv) The assessee had already made an application under section 195(2) of the Act for seeking permission from the authority concerned to remit the said payment to the non-resident without a deduction of tax at source as nil and allowed the assessee to remit the said amount without deduction of tax at source.

v) Once the assessee had complied with the provisions of Section 195 of the Act and had obtained a certificate from the AO in accordance with the requirement of Section 195(2) then, the assessee cannot be penalized by invoking the provisions of Section 40(a)(i) of the Act during assessment.

vi) Accordingly, without going into the issue of the nature of payment – whether FTS of not, it was held that once the assessee had complied with the provisions of section 195(2) of the Act, no disallowance can be made under section 40(a)(i) of the Act with respect to the said amount paid to the non-resident.

B) Advertisement and sales promotion expenditure

After going through the details, the Tribunal held that the advertisement and sales promotion expenditure did not fall within the scope of section 194C or 194J of the Act. Accordingly, the decision of the CIT(A) was upheld by the Tribunal.

[Note: In this regard, the reader may also refer to Mangalore Refinery and Petrochemicals Ltd vs. CIT [2008] 113 ITD 85 (Mum.)]

India-UK DTAA – Payment for capturing and delivering of live coverage of cricket matches – Whether taxable as FTS or royalty – Held : Not taxable in India either as FTS or as Royalty.

IMG Media Limited vs. DDIT - (TS-483-ITAT-2015(Mum.))

Facts

i) The assessee is incorporated in the UK and a tax resident of the same. The assessee is a world leader in the field of multimedia coverage of sports events, including cricket.

ii) The assessee and the BCCI had entered into an agreement for capturing and delivering of the live audio and visual coverage of cricket matches conducted under the brand name Indian Premier League (IPL).

iii) The assessee contended that it had a service Permanent Establishment (PE) in India and income attributable to the Indian operations was computed under the Transactional Net Margin Method (TNMM). However, AO held that the amount received by the assessee was in the nature of FTS as well as royalty and accordingly assessed the entire amount of gross receipts.

iv) The Dispute Resolution Panel (DRP) held that the concept of a 'service PE' does not have an application, once it is held that the gross receipts are taxable as FTS or as royalty. The DRP held that the amount received by the assessee was in the nature of FTS under the Income-tax Act, 1961 (the Act) and the tax treaty.

Decision

On appeal, the Tribunal held in favour of the assessee as under:

A) Re: Taxability as Fees for Technical Services

i) The Tribunal observed that the assessee possesses the required expertise in live audio-visual coverage of matches and hence, the BCCI has engaged the assessee to produce and deliver live audio-visual coverage of the IPL Cricket Matches conducted by it.

ii) The job of the assessee shall come to an end once the feed is produced and delivered to the licensed broadcasters in the form of digitalised signals. As per the agreement, the BCCI shall supply the equipment like cameras, microphones, etc. of the required quality to the assessee.

iii) Article 13(4)(c) of the tax treaty uses the expression 'make available'. Though the said expression has not been explained in the context of the India-U.K. tax treaty, the assessee claimed that the principle or concept of 'make available' explained in the India-USA protocol should also be applied in respect of the India-U.K. treaty also.

iv) The assessee produces the feed (programme content) of live coverage of audio-video visuals of the cricket matches by using its technical expertise. After that, it delivers the feed in the form of digitalised signals to the licensees (broadcasters). There was no dispute that the licensees receive the feed on behalf of the BCCI.

v) What was delivered by the assessee was a final product in the form of programme content produced by it by using its technical expertise. The assessee did not deliver or make available any technology/knowhow to the BCCI.

vi) Production of 'programme content' by using technical expertise is altogether different from provision of technology itself. In the earlier case, the recipient would receive only the product and he could use it according to his convenience, whereas in the latter case, the recipient would get the technology/knowhow and hence he would be able to use the technology/knowhow on his own in order to produce any other programme content of a similar nature.

vii) In the latter case, the technology/knowhow would be 'made available' to the recipient, in which case the payment given would fall under the category of FTS. However, in the former case, there is no question of making available any technology/knowhow and hence such payment is to be considered as payment for production of 'programme content or live feed' and not for supply of technology.

viii) The object of the production of live feed was to offer quality coverage of the live cricket matches to the viewers. The assessee's job was restricted to the production of live coverage and the job of broadcasting the same was undertaken by the BCCI. The BCCI, in turn, had given licence to certain companies to undertake the job of broadcasting of the live coverage on behalf of BCCI.

ix) Since the assessee was supplying the live coverage in the form of digitalised signals, it had to ensure that the broadcasters also do have the compatible technology and equipment so that the live coverage can be broadcasted without compromising on the quality. The same was sought to be achieved by synchronising the quality of technical equipment between the assessee and the broadcasters (licensees). Such kind of synchronisation of technology would ensure a seamless function and complete co-ordination between the assessee and the broadcasters.

x) Thus, there is a difference between the technology involved in the production of live coverage feed and the technology necessary to broadcast the same in the required quality. Hence, in order to ensure and maintain the quality of live coverage feed, it becomes necessary on the part of the assessee to specify or oversee the technology available with the broadcasters.

xi) The specification of the technical requirements does not mean that the assessee had supplied the technology involved in the production of live coverage feed to the broadcasters. If that be the case, the broadcasters should be in a position to use the technology in order to produce the live feed on their own.

xii) In the present case, the tax department had not established that the broadcasters (who are acting on behalf of the BCCI) or the BCCI itself had acquired the technical expertise from the assessee which would enable them to produce the live coverage feeds on their own after the conclusion of IPL cricket matches. Consequently, the essential condition of the 'make available' clause fails and hence the amount received by the assessee cannot be considered as FTS under Article 13(4)(c) of the tax treaty.

xiii) The DRP had observed that the live coverage of cricket matches involved instant and continuous production and broadcasting of live matches. Further, the broadcasters were able to split the programme content in order to insert advertisements. All these aspects, would not bring the payment under the category of FTS. It only shows the technical expertise of the assessee to produce flexible programme content to provide enhanced viewing quality of live matches.

xiv) The decision in the case of Nimbus Sport International Pte Ltd. [2012] 18 taxmann.com 105 (Del.) was distinguishable on facts of the present

case, since the said decision was covered by the India-Singapore tax treaty and the principle or concept of 'make available' had not been examined by the Tribunal.

xv) Since the amount received by the assessee was not FTS under Article 13(4)(c) of the tax treaty, it was not necessary to examine its taxation under section 9(1)(vii) of the Act.

B) Re: Taxability as royalty

i) The job of the assessee ends upon production of the 'programme content'. According to the assessee, the programme content shall become the property of the BCCI. In the present case, the tax department had not brought any material on record to show that the assessee had kept the ownership rights over the programme content.

ii) The assessee had received the money for producing live coverage of cricket matches. The equipment required for the said purpose may be brought by the assessee itself or it may be provided by the BCCI.

iii) Under commercial terms, if the assessee was required to bring the equipment, then the consideration payable for the production of live coverage of cricket matches should go up. Thus, it was a simple case of a commercial agreement entered between the parties with regard to the modalities to be followed and the same was not a determining factor to decide about the nature of payment received by the assessee.

iv) A careful perusal of the definition of 'royalties' under the tax treaty indicates that the payment, in order to constitute as royalty, should have been made 'for the use of, or the right to use any copyright, etc'. However, in the instant case, the payment was made by BCCI to the assessee for producing the programme content consisting of live coverage of cricket matches. There was nothing on record which indicates that the assessee had retained the ownership of the program content.

v) The Tribunal relied on the decision of the Delhi High Court in the case of *CIT vs. Delhi Race Club [2015] 273 CTR 503 (Del.)* where it has been held that live television coverage of any event is a communication of visual images to the public and would fall within the definition of the word 'broadcast' in section 2(dd) of the Copyright Act. However, section 13 does not contemplate broadcast as a work in which 'copyright' subsists, as the said section contemplates 'copyright' to subsist in literary, dramatic, musical and artistic work, cinematograph films and sound recording. Accordingly, broadcast or live coverage does not have a 'copyright'.

vi) The Tribunal observed that though the said decision of the Delhi High Court was rendered in the context of the provisions of section 194J of the Act; yet the section imports the definition of the term 'royalty' from Explanation 2 to section 9(1)(vi) of the Act. Under the definition given in the said provision, 'royalty' means a consideration for the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property.

vii) In the instant case, the BCCI becomes the owner of the programme content produced by the assessee. The job of the assessee ends upon the production of the programme content and the broadcasting was carried out by some other entity to which a licence was given by the BCCI. Hence, the question of a transfer of all or any right does not arise in the facts and circumstances of the instant case.

viii) Accordingly, the payment received by the assessee cannot be considered as 'royalty' under the tax treaty. Though, it was not necessary to examine the applicability of provisions of section 9(1)(vi) of the Act, yet the facts discussed above would show that the payment received by the assessee cannot fall within the purview of Section 9(1)(vi) of the Act also.

[Note: On a similar point, the reader may also refer to the favourable decision of the Mumbai Tribunal in the case of *ADIT vs. Neo Sports Broadcast Private Ltd. vs. [2011] 133 ITD 468 (Mum)].*

CA Rajkamal Shah & CA Naresh Sheth

INDIRECT TAXES

Service Tax – Statute Update

Clarification Regarding Binding Nature of Circulars and Instructions

Consequent upon the constitution of Special Bench on 28-2-2015 to expediently decide appeals in Indirect Tax and pursuant to large number of judgments delivered by Hon'ble Supreme Court on various aspects of Indirect Tax, CBEC has come out with clarification regarding binding nature of circulars and instructions issued by it. The board clarified as under:

- Board circulars contrary to the judgments of Hon'ble Supreme Court become non-est in law and should not be followed by officers.
- Officers should make reference of such circulars to the board so that further action of rescinding these circulars can be expeditiously taken up.
- Board, *suo motu*, may initiate action of rescinding such circulars.
- All pending cases on issues, including those In the call book, decided after date of judgment should conform to the law laid down by Hon'ble Supreme Court or High Court irrespective of whether the circular has been rescinded or not.
- Above directions would also apply to judgment of the Hon'ble High Court where board has decided no appeal would file on merit.
- However, where appeal has been filed by Revenue against High Court orders, pending adjudication should be transferred to call book and such appeal should be kept alive.

[Circular No.1006/13/2015-CX dated 21-9-2015]

Streamlining the Process of Adjudication

Hon'ble High Court of Mumbai in the writ of Lanvin Synthetics Pvt. Ltd. and another vs. Union of India (W.P. No 1536 of 2014) quashed the show cause notice dated 13.03.1997 as no adjudication was done for 17 years by department for want of records. Hon'ble High Court in its order at para 12 has observed:

"If law postulates early end to such proceedings and there is no period of limitation prescribed, does not mean that the proceedings initiated could be concluded at the sweet will and fancies of the department"

Perturbed by these adverse observations by High Court, CBEC has viewed the matter seriously and issued the instructions to all Chief Commissioners and Director General. The Gist of such instructions is as under:

- Attention was drawn to CBEC letter F No. 257/17/2015-CX.8A dated 11-3-2015 wherein need for passing adjudication order within prescribed time was emphasised.
- All adjudicating authorities are directed to pass adjudication orders within the time limit as prescribed to avoid repetition of such instances in future.
- Commissioners are advised to explore the possibility of scanning and digitisation of all papers connected with adjudication and litigation matters.

[F.No.280/45/2015-CX.8A dated 17-9-2015]

Clarification on GTA service

The CBEC has clarified that from 1-7-2012 under the rules of interpretation (bundled service) as provided u/s. 66F, the abatement of 70% would be available on gross amount charged for provision main service of goods transport by road alongwith any ancillary services such as loading/unloading, packing/unpacking, transhipment, temporary storage etc. Such ancillary service may be provided by GTA itself or by a sub-contractor as a part of composite service. The said abatement would be available on fulfillment of the following conditions:

1. GTA issues a consignment note, by whatever name called;
2. The invoice issued by GTA includes the value of ancillary services provided in the course of transportation of goods by road;
3. The ancillary services are not provided as independent activities but are the means for successful provision of the principal service, i.e. transportation of goods by road; and,

It is further clarified that where GTA undertakes to reach / deliver goods at destination within stipulated time, the same should be considered as "services of GTA in relation to transportation of goods" for the purpose of abatement under Notification No. 26/2012-ST so long as (a) entire transportation of goods is by road, and (b) GTA issues a consignment note, by whatever name called.

(Circular No. 186/5/2015 dated October 5, 2015)

Invitation

Our beloved Past Presidents

SHRI K. K. RAMANI, ADVOCATE, SHRI P. C. JOSHI, ADVOCATE &
CA NARAYAN VARMA

Has completed 50 Years of the professional journey with unparallel milestones and charting glorious path, a journey that immensely enriched the tax profession in general and the CTC in particular.

To commensurate this glorious journey, we have organised a function to felicitate as a mark of our respect and gratitude towards them.

President & Managing Council Members invites you to join us to this felicitation function and grace the occasion.

Day & Date : Friday, 23rd October, 2015

Time : 6.00 p.m. to 6.30 p.m. (Fellowship and High Tea) 6.30 p.m. to 8.00 p.m. (Felicitation)

Venue : 4th Floor, Walchand Hirachand Hall, IMC, Churchgate, Mumbai – 400 020.

CA Bharat Shemlani

INDIRECT TAXES

Service Tax – Case Law Update

1. Services

Prospecting mineral oil Service

1.1 Greatship (India) Ltd. vs. CST, Mumbai-I 2015 (39) STR 754 (Bom.)

The High Court in this case held that, services provided by vessels for prospecting mineral oil, consumed by seabed of Continental Shelf of India, came into tax net only after Notification No. 14/2010-ST came into effect. It is further held that, Notification No. 21/2009-ST amending Notification No. 1/2002-ST, was only intended to make service tax provisions applicable to installations, structures and vessels in CS and EEZ, and not by installations, structures and vessels.

It is also held that, Explanatory Act is generally passed to supply omission or clear up doubts as to meaning of previous Act and in absence of expressions like "it is declared"/"it is clarified for removal of doubts" etc. indicating that meaning of Act is declaratory, it would not be so construed when pre-amended provision was clear and unambiguous.

Business Support Service

1.2 Reliance Infratel Ltd. vs. CST, Mumbai-II 2015 (39) STR 829 (Tri.-Mumbai)

The assessee in this case has given a loan by way of inter corporate deposit to subsidiary. The department alleged that, advance is towards consideration for services liable to service tax. The Tribunal held that, Master Service Agreement is not leading to conclusion that amount received is in nature of advances for services to be rendered, hence not liable to service tax.

Business Auxiliary Service

1.3 Janta Sahakari Bank Ltd. vs. CCE, Pune-III 2015 (39) STR 856 (Tri.-Mumbai)

The appellant in this case was engaged in disbursement of salaries to Govt. teachers on direction of Zilla Parishad. The Tribunal held that such activity is not related to sale or purchase of goods or services and therefore not covered under BAS. Further, said amount received cannot be termed as amount received as commission agent.

Works Contract Service

1.4 CCE&C, Kerala vs. Larsen & Toubro Ltd. 2015 (39) STR 913 (SC)

The Supreme Court in this case held as under:

- Section 65(105) of FA, 1994 had levied service tax only on contracts *simpliciter* and not composite indivisible works contracts. There was no charging section specifically levying service tax only on works contract and measure of tax with service element derived from gross amount charged for works contract less value of property in

goods transferred in execution of works contract. The *G. D. Builders case 2013 (32) STR 673 (Del.)* overruled as being contrary to settled legal position that where assessment machinery provisions are absent, law is vague and it is arbitrary to assess to tax subject. Clauses (g), (zzd), (zzh) and (zzq) of section 65(105) were not sufficient for levying Service Tax on indivisible composite works contract.

- The Parliament can only tax service element and States can only tax transfer of property in goods. These two elements have to be completely segregated and if some element of transfer of property in goods remains when Service Tax is levied, it would be unconstitutional.
- Section 65(105) refers only to service contracts *simpliciter* and not to composite works contracts. It defines 'taxable service' as 'any service provided' and all its sub clauses refer to service contracts *simpliciter* without any other element in them. Also under section 67, value of taxable service is gross amount charged by service provider, without deduction of value of property in goods transferred in execution of works contract.
- Taxation powers of Centre and States are mutually exclusive and there is no concurrent power of taxation, and entries to be found only in List I and II. Hence if taxing statute transgress into prohibited exclusive field, it is liable to be struck down.
- In absence of assessment machinery provisions, law is vague and it is arbitrary to assess to tax subject.

2. Interest/Penalties/Others

2.1 Geojit BNP Paribas Financial Services Ltd. vs. CCEC&ST, Kochi 2015 (39) STR 706 (Ker.)

The department in this case rejected refund claim of service tax paid mistakenly on export of services on the ground of limitation. The High Court held that, payment of service tax by the assessee purely on account of mistake of facts in understanding law and there being no validity or legal authority for collection of such amounts hence provisions of section 11B are not attracted.

2.2 CCE, Jaipur-I vs. Chotelal Virendra Kumar 2015 (39) STR 721 (Raj.)

The Tribunal in this case could not dispose of appeal within 365 days of passing stay order, hence extended the stay. The department challenged the extension of stay being violative provisions of section 35C(2A) of CEA, 1944. The High Court held that, with thousands of appeals pending before a few number of Benches, Tribunal takes three years or more for hearing appeals. In view of huge pendency of appeal and omission of section 35C(2A) from statute in 2014, no inference called for in Tribunals order of extension of stay.

2.3 Ajaykumar Gupta vs. CESTAT 2015 (39) STR 736 (P&H)

The High Court in this case held that, once the service tax was leviable under section 68 at the point when invoice was raised and the liability was only to deposit the tax under section 73A(2) which was done after delay, the case would not attract any penalty under sections 76 and 78.

2.4 Oil & Natural Gas Corporation Ltd. vs. Swapan Kumar Paul 2015 (39) STR 789 (Tripura)

The High Court in this case held that, service provider as an assessee may have right to claim tax from customer and nothing in law says service provider cannot quote a rate which is inclusive of service tax. The Contractor quoted a rate knowing fully that he would have to bear service tax liability, after having paid service tax cannot turn around and claim that such liability should be paid by final customer/consumer. There is nothing in law which prevents parties to a contract from mutually modifying terms of contract.

2.5 Narasimha Mills Pvt. Ltd. vs. CCE (Appeals), Coimbatore 2015 (39) STR 795 (Mad.)

The High Court in this case held that, Service Tax Voluntary Compliance Encouragement Scheme (STVCES) is not an independent code. It is being part and parcel of Finance Act, 1994, all provisions of Act including those relating to appeals, applicable unless specifically excluded.

2.6 Premier Garment Processing vs. CESTAT Chennai 2015 (39) STR 812 (Mad.)

The High Court in this case held that, communication by speed post is not covered as mode of service under CEA, 1944 prior to amendment w.e.f. 10-5-2013 and therefore such service is not binding on appellant. The proof of service is mandatory for reckoning the period of limitation.

2.7 Sun-Area Real Estate Pvt. Ltd. vs. CST, Mumbai-I 2015 (39) STR 897 (Tri.-Mumbai)

The appellant in this case claimed refund of service tax on export of services on the basis of foreign remittance in INR. The Tribunal held that, FIRC issued specifically certify payment is not received in non-convertible rupees, which establish that payment in CFE. Manner of receipt of foreign exchange is provided in Notification under FEMA Act, which is applicable in present case, hence conditions provided under rule 3(ii) of ESR, 2005 have been complied with. It is further held that, issue of admissibility of input services such as security and air travel services has not been raised in SCN therefore denial of refund claim on the said ground is unsustainable.

2.8 Sai Wardha Power Co. Ltd. vs. UOI 2015 (39) STR 952 (Bom.)

The department in this case refused to issue authorisation in Form A-2 for availing exemption to SEZ on the ground of possible evasion. The High Court held that, the petitioner obtained due approval from Approval Committee of SEZ for list of services for which exemption claimed. The Notification has provided ample safeguards to avoid any evasion of tax hence denial of exemption is not justified.

2.9 CCCE&ST, Hyderabad-IV vs. Hyundai Motor India Engg. (P) Ltd. 2015 (39) STR 984 (AP)

The High Court in this case upheld the Tribunal decision holding that, the relevant date for calculating the time limit for grant of refund would be the date of receipt of consideration and not the date when the services were provided.

2.10 Technocrate Tranformers vs. CCE, Kanpur 2015 (39) STR 996 (Tri.-Del.)

The appellant in this case entered into composite agreement for repair of damaged transformers which also included replacement of items like oil and other transformer items. The Tribunal held that, invoice clearly indicating value of labour charges and value of oil and other supply items and also payment of VAT has been made on such items hence demand computed on value of such items is unsustainable.

3. CENVAT Credit

3.1 Mundra Ports & SEZ Ltd. vs. CCE&C 2015 (39) STR 726 (Guj.)

The Tribunal in this case allowed CENVAT credit of duty paid on cement and steel used in construction of new jetties and other commercial building. It is further held that amendment to Explanation 2 of Rule 2(k) w.e.f. 7-7-2009 was not clarificatory in nature as whenever, Legislature wants to clarify the provision it clearly mention intention in the notification itself and seeks to clarify the existing provision. The Larger Bench view in *Vandana Global Ltd. 2010 (253) ELT 440 (Tri.-LB)* that intention of Legislature behind the amendment was to clarify is based on conjectures and surmises.

3.2 CCE, Chandigarh-II vs. Federal Mogul Goetze (India) Ltd. 2015 (39) STR 735 (P&H)

The High Court in this case held that, service of transportation of employees from their residence

to factory premises is an input service under CCR, 2004. Further, pendency of Revenue appeal in the Supreme Court does not bar the Court to examine the issue.

3.3 Ketan Motors Ltd. vs. CCE, Nagpur 2015 (39) STR 858 (Tri.-Mumbai)

The department in this case denied credit availed by centralised office on the basis of documents pertaining to unregistered branch office. The Tribunal held that, centralised registration granted subsequently and input service received at branch office utilised for providing output service, hence disallowance is unsustainable. Further, disallowance of CENVAT credit in respect of invoice for Telephone service though raised in Directors name but address of office mentioned therein, disallowance was uncalled for.

3.4 Rajshanti Metals Pvt. Ltd. vs. CCE, Rajkot 2015 (39) STR 875 (Tri.-Ahmd.)

The appellant in this case claimed CENVAT credit of service tax paid in respect of windmill farm located at distance of about 100 kms from manufacturing unit. The Tribunal held that, neither the power generated at windmill farm unit can be termed as an intermediate product for their unit at Jamnagar nor it is termed as captive consumption of electricity for manufacture of final product. The appellant is having adjustment of electricity in the form of credit with a State Govt. Company. In view of the same credit is not admissible.

3.5 Serco Global Services Pvt. Ltd. vs. CCE, Delhi-III 2015 (39) STR 892 (Tri.-Del.)

The department in this case rejected refund claim pertaining to period 16-5-2008 to June, 2008 for non mentioning closing balance of CENVAT credit in ST-3 returns. The Tribunal held that, refund to be granted on the basis of CENVAT credit available in CENVAT account and not on the basis of closing balance of CENVAT credit shown in ST-3 returns. Revised returns shows correct balance and same cannot be discarded as non-est.

3.6 Synise Technologies Ltd. vs. CCE, Pune 2015 (39) STR 903 (Tri.-Mumbai)

The appellant in this case claimed CENVAT credit of service tax paid on common services received for providing output services as well as in trading activities. The Tribunal held that, CENVAT credit is admissible in accordance with rule 3 of CCR, 2004 and trading not being an output service, credit cannot be allowed on input services used for trading. It is further held that, non-disclosure of availment of input service credit in relation to trading activity in ST-3 returns amounts to suppression of facts and therefore, extended period of limitation correctly invoked.

3.7 Bansal Classes vs. CCE&ST, Jaipur-I 2015 (39) STR 967 (Raj.)

The High Court in this case held that, services of catering, photography and mandap keeper used in celebrations after passing out of students and repair of vehicle and other travelling expenses are not relatable to output service i.e. commercial training and coaching service, hence credit rightly denied by the Tribunal. Further the issue of limitation not having been argued before Tribunal, not required to be taken up for decision.

3.8 Gateway Terminals (I) Pvt. Ltd. vs. CCE, Raigad 2015 (39) STR 1027 (Tri.-Mumbai.)

The Tribunal in this case allowed CENVAT credit on following input services.

- Outdoor Catering Service for Canteen is essential to run business;
- Garden Maintenance Service is essential in terms of consent to operate, as directed by State Pollution Control Board;
- Event Management service is also essential being incurred at opening ceremony or ceremonial occasions;
- Brokerage Service being incurred admittedly for finding residential accommodation for assesee's employees is essential for ensuring availability of staff to carry on its business.

Janak C. Pandya, Company Secretary

CORPORATE LAWS
Company Law Update

[2015] 192 Comp Cas 152 (Mad.)
[In the Madras High Court]
Michelin India P. Ltd., Re
Michelin India Tamil Nadu Tyres P. Ltd., In re

The amalgamation is principally an internal arrangement of the company for mutual benefit in enlarging its capital base and that the transferor company is united with the transferee. The court has *vide* powers under section 391 to sanction a Scheme containing all alterations required in the structure of the company for the purpose of carrying out the Scheme, including change of name as part of the Scheme.

Brief facts

The petition has been filed under sections 391 to 394 of the Companies Act, 1956. As per the Scheme of Amalgamation ("Scheme"), Michelin India P. Ltd. ("Transferor") was to amalgamate with Michelin India Tamil Nadu P. Ltd. ("Transferee"). As per the Scheme, the entire undertaking of the Transferor would stand transferred to the Transferee on the appointed date, i,e April 1, 2014. Pursuant to the Scheme, the Transferee was to issue equity shares to the shareholders of the Transferor Co. One of the matters for the Scheme was that upon amalgamation, the name of the Transferee shall be deemed to have been changed to 'Michelin India P. Ltd.' which is the current name of the Transferor.

The respective companies having complied with procedural aspects and obtaining consent of the shareholders and creditors, the Court dispensed with the convening, holding and conducting of the meeting of the equity shareholders. The Scheme was also referred to the Regional Director ("RD"). The RD in its report objected to one of the proposals of the Scheme as to the deemed change of name of the Transferee. The RD referred the General Circular No. 45/2011 dated July 8, 2011 of the Ministry of Corporate Affairs on Name Availability Guidelines, 2011. As per said Circular, a proposed name is considered to be undesirable if it is identical with or too nearly resembling with name of the company in existence. Thus, as per the RD, the Transferee shall follow the procedures and rules laid down for such change of name as provided in section 21 of the Companies Act, 1956 and section 13 of the Companies Act, 2013.

The following arguments were made by the Petitioners:

1. That after sanctioning of the Scheme, the question of existence of the Transferor does not arise as only the Transferee will be in existence. Reliance was placed on the unreported judgment of this Hon'ble Court in C.P. Nos. 54 to 56 of 2014 on the Order dated March 17, 2014.

2. Section 391 of the Companies Act gives *vide* powers to the Court to approve the

Scheme and that for doing so, if there are any other things for effectuation which require a special procedure to be followed, then the Court has powers to sanction it. The Judgment of this Hon'ble Court in *C.P Nos. 7 and 8 of 2012 [2013] 176 Comp Cas 345 (Mad.) Eye Foundation Ltd. vs. Lasik Centre (India) P. Ltd.* referred the judgments of the Bombay High Court in *PMP Auto Industries Ltd. [1994] 80 Comp Cas 289 (Bom.)* and *Karnataka High Court in Mysore Cements Ltd. [2009] 150 Comp Cas 623 (Karn).*

3. The judgment of the Gujarat High Court in *Mekaster Valves and Engineering Services P. Ltd. [2009] 149 Comp Cas 593 (Guj.,* as per which under section 391 of the Companies Act, the Court has *vide* powers as mentioned below:
   a. Section 391 is a complete code under which the Court can sanction a scheme containing all the alteration except the reduction of share capital, which requires a special procedure.
   b. The Court must attach the importance to the wishes of the members.
   c. It should be satisfied that the (i) Statutory provisions are complied with, (ii) Class affected by the Scheme has been properly represented, and (iii) Arrangement is such that a man in business would reasonably approve.
4. The Judgment of the Apex Court reported in *[2005] 128 Comp Cas 968 (SC); AIR 2005 SC 3345 in Bhagwati Developers vs. Peerless General Finance and Investment Co.,* was also referred wherein the Court referred to the SEBI Guidelines and circulars and circular of the Department of Company Affairs on issuance of bonus sharers out of revaluation reserve. The Court concluded that the above circulars are not having any mandatory effect and they are merely advisory in nature. Based on the above, the Petitioner submitted that even the Circular referred by the RD in the present situation does not have any mandatory effect and only has advisory character.

Judgment and reasoning

The Court approved the Scheme and rejected the RD's objection. The Court analysed the provisions of section 13 of the Companies Act, 2013 which is the amended provision of section 21 of the Companies Act, 1956. As per the analysis, the Court viewed that amalgamation is principally an internal arrangement of the company for a mutual benefit in enlarging its capital base. Under the Scheme, upon conversion, a company does not cease to exist to bring any new company but the transferor company is united with the transferee company. The Court also pursued the report of the Official Liquidator and the report of the Chartered Accountants. As per these reports, the affairs of the transferor company have not been conducted in a manner prejudicial to the interest of its members. The said reports also state that they have not come across any misfeasance by the directors attracting the provisions of sections 542 and 543 of the Companies Act.

ERRATA

In Chamber Journal of September, 2015 – The Article on 'Stamp Duty on Instruments relating to Immovable Property" was contributed by Shri Gyanendra Kumar, Advocate. He was assisted by Shri Kunal Arora & Kamalika Bhattacharjee in contributing this Article - Shri Gyanandra Kumar is a partner with Cyril Amarchand Mangaldas heading the Real Estate Practice at New Delhi Office.

CA Mayur Nayak, CA Natwar Thakrar &
CA Pankaj Bhuta

OTHER LAWS
FEMA Update

In this article, we have discussed recent amendments to FEMA through Notifications, Circulars, Press Notes, Press Releases and Clarifications issued by RBI and DIPP:

1. Trade Credit Policy – Rupee (INR) Denominated trade credit

Schedule III to the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000 notified *vide* Notification No. FEMA 3/2000-RB dated May 03, 2000 read with Regulation 6(3) of the said Regulations, deals with raising of trade credit (buyers' credit/suppliers' credit) from overseas supplier, bank and financial institution for import of capital and non-capital goods into India.

In order to provide greater flexibility for structuring of trade credit arrangements, RBI has now allowed resident importers to raise trade credit in Rupees (INR) within the following framework after entering into a loan agreement with the overseas lender:

i. Trade credit can be raised for import of all items (except gold) permissible under the extant Foreign Trade Policy;

ii. Trade credit period for import of non-capital goods can be up to one year from the date of shipment or up to the operating cycle whichever is lower;

iii. Trade credit period for import of capital goods can be up to five years from the date of shipment;

iv. No roll-over / extension can be permitted by the AD Category - I bank beyond the permissible period;

v. AD Category - I banks can permit trade credit up to USD 20 mn equivalent per import transaction;

vi. AD Category - I banks are permitted to give guarantee, Letter of Undertaking or Letter of Comfort in respect of trade credit for a maximum period of three years from the date of shipment;

vii. The all-in-cost of such Rupee (INR) denominated trade credit should be commensurate with prevailing market conditions;

viii. All other guidelines for trade credit will be applicable for such Rupee (INR) denominated trade credits.

Further, overseas lenders of Rupee (INR) denominated trade credits have been permitted to hedge their exposure in Rupees through permitted derivative products in the on shore market with an AD Category - I bank in India. RBI will issue the necessary guidelines for the same separately.

(A.P. (DIR Series) Circular No. 13 dated 10th September, 2015)

(Comment: This is a step in the right direction to increase global transactions in Indian Rupees. This move will also mitigate forex risk for the resident importers. Allowing all-in-cost to be commensurate with prevailing market conditions and to hedge the INR exposure in the onshore market is a practical move by RBI.)

2. Opening of foreign currency accounts in India by ship-manning / crew-management agencies

Earlier, RBI *vide* A. P. (DIR Series) Circular No. 48 dated April 30, 2007 granted general permission to ship-manning / crew management agencies that are rendering services to shipping/ airline companies incorporated outside India, to open, hold and maintain non-interest bearing foreign currency account with an AD Category – I bank in India for meeting the local expenses in India of such shipping or airline company.

In order to ensure compliance of the guidelines, the RBI circular has reproduced the guidelines while allowing additional credits by way of freight or passage fare collections in India, in addition to other permissible credits.

(A.P. (DIR Series) Circular No. 15 dated 24th September, 2015)

(Comment: This is welcome clarification/ relaxation by RBI for better compliance of the guidelines by foreign ship/crew management companies operating in India.)

3. Processing and settlement of import and export related payments facilitated by Online Payment Gateway Service Providers

Hitherto, AD Category-I banks have been permitted to offer the facility to repatriate export related remittances by entering into standing arrangements with Online Payment Gateway Service Providers (OPGSPs) in respect of export of goods and services.

To facilitate e-commerce, RBI has now decided to permit AD Category-l banks to offer similar facility of payment for imports by entering into standing arrangements with the OPGSPs. The circular provides revised consolidated guidelines on such imports and exports.

(A.P. (DIR Series) Circular No. 16 dated 24th September, 2015)

(Comments: Through earlier RBI circulars, several online payment gateways like PayPal and Plimus, were permitted to facilitate the sale of goods and services by Indian exporters which helped several small services providers like software programmers, etc. to receive payments from overseas. Hitherto, importers *however, continued to face difficulty for making* ***payments abroad and forcing them to opt in for costlier options to make payments abroad. As a much welcome move, RBI has now permitted importers to make payments up to USD $ 2,000 by availing the services of such OPGSPs. This circular will bring considerable relief to such small importers)***

4. External Commercial Borrowings (ECB) Policy – Issuance of Rupee denominated bonds overseas

RBI has put in place a framework for issuance of Rupee denominated bonds overseas within the overarching ECB policy. The broad outlines of the framework are as follows:

i. **Eligible borrowers:** Any corporate or body corporate as well as Real Estate Investment Trusts (REITs) and Infrastructure Investment Trusts (InvITs).

ii. **Recognised investors:** Any investor from a Financial Action Task Force (FATF) compliant jurisdiction.

iii. **Maturity:** Minimum maturity period of 5 years.

iv. **All-in-cost:** All in cost should be commensurate with prevailing market conditions.

v. **Amount:** As per extant ECB policy.

vi. **End-uses:** No end-use restrictions except for a negative list.

The detailed guidelines for issuance of Rupee denominated bonds overseas are as follows:

Sr. No.	ECB parameter	Framework
1.	Eligibility of borrowers	Any corporate or body corporate is eligible to issue Rupee denominated bonds overseas. Real Estate Investment Trusts (REITs) and Infrastructure Investment Trusts (InvITs) coming under the regulatory jurisdiction of the Securities and Exchange Board of India are also eligible.
2.	Type of instrument	Only plain vanilla bonds issued in a Financial Action Task Force (FATF) compliant financial centres; either placed privately or listed on exchanges as per host country regulations.
3.	Recognised investors	Any investor from a FATF compliant jurisdiction. Banks incorporated in India will not have access to these bonds in any manner whatsoever. Indian banks, however, can act as arranger and underwriter. In case of underwriting, holding of Indian banks cannot be more than 5 per cent of the issue size after 6 months of issue. Further, such holding shall be subject to applicable prudential norms.
4.	Maturity	Minimum maturity period of 5 years. The call and put option, if any, shall not be exercisable prior to completion of minimum maturity.
5.	All-in-cost	The all-in-cost of such borrowings should be commensurate with prevailing market conditions. This will be subject to review based on the experience gained.
6.	End-uses	The proceeds can be used for all purposes except for the following: i. Real estate activities other than for development of integrated township / affordable housing projects; ii. Investing in capital market and using the proceeds for equity investment domestically; iii. Activities prohibited as per the foreign direct investment (FDI) guidelines; iv. On-lending to other entities for any of the above objectives; and v. Purchase of land.
7.	Amount	Under the automatic route the amount will be equivalent of USD 750 million per annum. Cases beyond this limit will require prior approval of the Reserve Bank.

Sr. No.	ECB parameter	Framework
8.	Conversion rate	The foreign currency – Rupee conversion will be at the market rate on the date of settlement for the purpose of transactions undertaken for issue and servicing of the bonds.
9.	Hedging	The overseas investors will be eligible to hedge their exposure in Rupee through permitted derivative products with AD Category - I banks in India. The investors can also access the domestic market through branches / subsidiaries of Indian banks abroad or branches of foreign bank with Indian presence on a back to back basis.
10.	Leverage	The leverage ratio for the borrowing by financial institutions will be as per the prudential norms, if any, prescribed by the sectoral regulator concerned

All other provisions of extant ECB guidelines regarding reporting requirements, parking of bond proceeds, security / guarantee for the borrowings, conversion into equity, corporates under investigation, etc., not appearing in the table above will be applicable for borrowing by issuance of Rupee denominated bonds overseas. The reporting requirements shall include obtaining Loan Registration Number (LRN) through submission of Form 83 where type of ECB is to be specifically mentioned as borrowing through issuance of Rupee denominated bonds overseas.

(A.P. (DIR Series) Circular No. 17 dated 29th September, 2015)

(Comments: RBI has facilitated issuance of Rupee denominated bonds overseas under the ECB guidelines. Some of the favourable highlights of issuance of such Rupee denominated bonds overseas are expanding the list of eligible borrowers/recognised investors, all-in-cost to be commensurate with prevailing market conditions, removing end-use restrictions (subject to negative list) and to hedge the INR exposure. This is a welcome move by RBI to increase the depth of the bond market in India while offering cheaper alternative to Indian corporate for almost all end uses except prohibited sectors. However, the response from non-resident investors may still be subdued as investors may not want to take a risk of the rupee depreciating, unless the forward premiums come down. However, there are many investors who have repatriable rupee resources and for them this will be a wonderful investment opportunity. This also creates a new lifeline *for Indian companies by creating a diversified* ***investor base. This move will also attract more foreign investors to the country's infrastructure space.)***

5. Regularisation of assets held abroad by a person resident in India under Foreign Exchange Management Act, 1999

GOI has enacted The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (Black Money Act) on May 26, 2015 to address the issue of undisclosed assets held abroad. It provides for separate taxation of income and assets acquired abroad from income not disclosed but chargeable to tax in India.

To deal with assets held abroad by persons resident in India in violation of FEMA for which declarations have been made and taxes and penalties have been paid under the provisions of the Black Money Act, RBI has issued the Foreign

Exchange Management (Regularisation of assets held abroad by a person resident in India) Regulations, 2015 notified through Notification No. FEMA 348/2015-RB dated September 25, 2015 *vide* G.S.R. No. 738 (E) dated September 25, 2015.

The notification clarifies the following:

i. No proceedings shall lie under FEMA against the declarant with respect to an asset held abroad for which taxes and penalties under the provisions of Black Money Act have been paid.

ii. No permission under FEMA will be required to dispose of the asset so declared and bring back the proceeds to India through banking channels within 180 days from the date of declaration.

iii. In case the declarant wishes to hold the asset so declared, she/ he may apply to RBI within 180 days from the date of declaration if such permission is necessary as on date of application. Such applications will be dealt by RBI as per extant regulations. In case such permission is not granted, the asset will have to be disposed of within 180 days from the date of receipt of the communication from RBI conveying refusal of permission or within such extended period as may be permitted by RBI and proceeds brought back to India immediately through the banking channel.

(A.P. (DIR Series) Circular No. 18 dated 29th September, 2015)

(Comments: These clarifications would help the declarants not only to regularise their offences committed in the past but also those which are continuing in nature. Prior to such clarification, declarants were not comfortable making disclosures of their money or assets lying abroad)

6. Review of the existing Foreign Direct Investment policy on Partly Paid Shares and Warrants

GOI has reviewed the provisions of the extant FDI Policy whereby it has allowed partly paid and warrants as eligible capital instruments for the purposes of FDI policy.

Accordingly, the following amendments have been made in the Consolidated FDI Policy of 2015, effective 12th May, 2015:

(i) Para 2.1.5 is amended to read as below :

"'Capital' means equity shares; fully, compulsory & mandatory convertible preference shares; fully, compulsory and mandatory convertible debentures and warrants.

Note: The equity shares issued in accordance with the provisions of the Companies Act, as applicable, shall include equity shares that have been partly paid. Preference shares and convertible debentures shall be required to be fully paid, and should be mandatorily and fully convertible. Further, 'warrant' includes Share Warrant issued by an Indian Company in accordance to the provision of Companies Act, as applicable."

(ii) Insertion of a new para after para 3.3.3 of Consolidated FDI Policy Circular of 2015:

3.3.3 bis: Acquisition of Warrants and Partly Paid Shares – An Indian Company may issue warrants and Partly paid shares to a person resident outside India subject to terms and conditions as stipulated by the Reserve Bank of India in this behalf, from time to time.

(DIPP Press Note No. 9 (2015 series) dated 15th September, 2015)

(Comments: Consolidated FDI Policy mentioned since a long time that policy for partly paid shares and warrants was under consideration. RBI vide A.P. (DIR Series) Circular No. 3 dated 14th July, 2014, had permitted FDI in Partly Paid Shares and Warrants (subject to conditions). However, prior to Press Note No.

9 (2015 series) issued by DIPP there remained a disconnect between the Consolidated FDI Policy and FEMA Guidelines. The ambiguity has now been done away with and much needed clarity is available to companies for raising FDI)

7. Clarification on FDI Policy on Facility Sharing Arrangements between Group Companies

Question: GOI received certain references whether entering into facility sharing arrangements through leasing/sub-leasing arrangements within group companies for the larger purposes of business activities would be construed to mean 'real estate' business within the provisions of Consolidated FDI Policy Circular of 2015.

Clarification: Facility sharing agreements between group companies through leasing/ sub-leasing arrangements for the larger interest of business will not be treated as 'real estate business' within the provisions of the Consolidated FDI Policy Circular of 2015, provided such arrangements as at arm's length price in accordance with relevant provisions of Income-tax Act, 1961, and annual lease rent earned by the lessor company does not exceed 5% of its total revenue.

(DIPP Clarification on FDI Policy dated 15th September, 2015)

(Comments: This is a welcome and much awaited clarification. Many a times there are more than one group companies operating simultaneously in India and the need was felt to accommodate them at one place rather than buying or leasing separate premises. This *clarification would help many such companies.* ***This move is a right step in the direction of ease of doing business in India)***

8. Draft framework on External Commercial Borrowings (ECB)

RBI is set to revise the ECB framework to retain more qualitative parameters for the normal (foreign currency denominated) ECB and to provide more liberal dispensation for long-term borrowings in foreign currency. As in Rupee denominated ECB, the currency risk lies with the lender / investor, the framework provides for minimal control for these borrowings.

The RBI has placed the draft framework on its website for public comments/feedback. The comments/ feedback on the draft framework may be e-mailed to or sent by post to the Principal Chief General Manager, Foreign Exchange Department, Reserve Bank of India, Central Office, 11th Floor, Shahid Bhagat Singh Marg, Mumbai-400 001 on or before October 11, 2015

The detailed draft framework is as follows:

ECB parameter	Revised framework for normal ECB	Framework for long-term borrowings	Framework for Rupee denominated borrowings
	(I)	(II)	(III)
Eligible borrowers	As existing All entities permitted as per existing guidelines, which include among others, i. Companies in infrastructure sector, manufacturing sector and select services sectors registered under the Companies Act, 1956/2013. Units of Special Economic Zones (SEZs);	Same as in column (I)	Same as in column (I) Addition

ECB parameter	Revised framework for normal ECB	Framework for long-term borrowings	Framework for Rupee denominated borrowings
	(I)	(II)	(III)
	ii. NBFCs-AFCs and NBFCs-IFCs, complying with the regulatory framework of the RBI; iii. SIDBI; iv. Companies engaged in miscellaneous services viz. research and development (R&D), training (other than educational institutes) and companies supporting infrastructure (but not providing logistics services, consultancy services and doing trading business); v. Entities engaged in micro finance activities. 2. Existing carve outs like ECB for airlines companies, ECB for affordable housing will continue. Same will be the case for entities like Exim Bank of India, National Housing Bank, etc. to raise ECB.		Real Estate Investment Trusts (REiTs) and Infrastructure Investment Trusts (InviTs) will also be eligible under column III
Types of borrowing	No change Borrowing through i. Bank loans; ii. Securitised instruments a. Floating rate notes / fixed rate bonds; b. Non-convertible, optionally convertible or partially convertible preference shares; iii. FCCB; iv. FCEB, etc. will continue.	As in column (I)	As in column (I)
Recognised lenders / investors	As existing i. International banks; ii. International capital markets; iii. Multilateral financial institutions (such as IFC, ADB, etc.) / regional financial institutions and Government owned development financial institutions;	As in column (I)	As in column (I)

ECB parameter	Revised framework for normal ECB	Framework for long-term borrowings	Framework for Rupee denominated borrowings
	(I)	(II)	(III)
	iv. Export credit agencies; v. Suppliers of equipment; vi. Foreign equity holders. Addition: vii. Overseas regulated financial entities; viii. Pension funds; ix. Insurance funds; x. SWFs and similar long-term investors. 2. The lenders for the entities engaged in micro finance activities will accordingly get expanded.		
Exclusions / Restrictions	As existing Banks including co-operative banks / other Financial Institutions (FIs), individuals and non-corporates will not be eligible to raise ECB. Change Participation of Indian banks as ECB lenders will be subject to prudential norms issued by the Reserve Bank.	As in column (I)	As in column (I)
Maturity	Change Minimum average maturity of: i. 3 years for ECB up to USD 50 mn or equivalent; ii. 5 years for ECB more than USD 50 mn or equivalent.	Minimum average maturity (for loans) / minimum maturity (for bonds) of 10 years	As in column (I)
All-in-cost	Change 50 bps less than the existing provisions and will be subject to periodic review	50 bps higher than what is permitted under column (I)	To be commensurate with the prevailing market conditions
End-uses	As existing i. Capital expenditure, modernisation / expansion, import of capital goods, etc. ii. Working capital / repayment of Rupee loans with conditions, as hitherto.	All purposes excluding the following: i. Real estate activities other than development	As in column (II)

ECB parameter	Revised framework for normal ECB	Framework for long-term borrowings	Framework for Rupee denominated borrowings
	(I)	(II)	(III)
	Addition iii. To repay trade credit taken for period up to 3 years for capital expenditure; iv. For payment towards capital goods already shipped / imported but not paid; v. Purchase of second hand domestic capital goods / plant / machinery; vi. On-lending to infra-Special Purpose Vehicles; vii. Overseas direct investment in Joint Venture/ Wholly Owned Subsidiaries by Core Investment Companies coming under the regulatory framework of RBI; viii. For on-lending to infrastructure sector and for import and / or domestic purchase of equipment for the purpose of giving the same on hire purchase, as loans against hypothecation or leasing to infrastructure sector by all NBFCs (subject to minimum 75% hedging).	of integrated township / affordable housing projects; ii. Investing in capital market and using the proceeds for equity investment domestically; iii. Activities prohibited as per FDI guidelines; iv. On-lending to other entities with any of the above objectives; v. Purchase of land	
Individual limits	As existing Annual limits for automatic route. Prior approval of RBI beyond these limits.	As in column (I)	As in column (I)
Hedging	As existing No mandatory hedging for entities where no hedging requirements have been presently prescribed.	As in column (I)	Overseas investors will be allowed to hedge their exposure in onshore markets. Back to back hedging will also be allowed.
Leverage ratio	No change Existing provisions of ECB policy will continue for FIs and Foreign Equity Holders.	As in column (I)	As in column (I)
Reporting requirement	No change Existing provisions of ECB policy will continue.	As in column (I)	As in column (I)

ECB parameter	Revised framework for normal ECB	**Framework** for long-term borrowings	**Framework for Rupee denominated** borrowings
	(I)	**(II)**	**(III)**
Parking of proceeds	No change Existing provisions of ECB policy will continue.	As in column (I)	As in column (I)
Security / guarantee	No change Existing provisions of ECB policy will continue.	As in column (I)	As in column (I)
Conversion into equity	No change Existing provisions of ECB policy will continue.	As in column (I)	As in column (I)
Corporates under investigation	No change Existing provisions of ECB policy will continue.	As in column (I)	As in column (I)
Prepayment	As existing Existing provisions for prepayment will continue to be applicable. Addition Part-prepayment of ECB including part-prepayment through fresh ECB will also be permitted subject to conditions.	As in column (I)	As in column (I)
Refinancing	Change Refinancing of existing ECB with a fresh ECB with higher all-in-cost (but within the ceiling) will now be permitted.	As in column (I)	As in column (I)
Tax treatment	As per Income-ax Act	As in column (I)	As in column (I)

(Press Release No. 2015-2016/740 dated 23rd September, 2015)

(Comments: The basic objective of the extant External Commercial Borrowings (ECB) policy is to supplement domestic capital for creation of capital assets in the country, limited by considerations for capital account management. With the above objective in view, the ECB regime has been progressively liberalised over the years, allowing different entities to raise ECB. Within the overarching stance of calibrated approach to the capital account liberalisation, an attempt has now been made to replace the ECB policy with a more rational and liberal framework, keeping in view** the evolving domestic as well as global macroeconomic and financial conditions, challenges faced* ***in external sector management and the experience gained so far in administering the ECB policy)

Ajay Singh, *Advocate &* CA Namrata Bhandarkar

BEST OF THE REST

1. Precedent – Appellate Tribunal – Right to distinguish decision of Co-ordinate Bench on facts

The grievance of the petitioner company was that Mumbai Tribunal should have applied the decision passed by the Mumbai Tribunal (Co-ordinate Bench) in the case of Smokin Joe's and Diageo India in relation to right to use the trade mark or transfer of trademark applied to the facts of the case of Petitioner company and thus should have been granted relief based on identical facts. The Mumbai Tribunal rejected the appeal of the petitioner company with one or two line observations that the facts and circumstances of the petitioner's case are not identical but distinguishable.

It was observed by the Hon'ble Bombay High Court that the Tribunal did not act perversely or committed an error apparent on the face of record in rejecting the petitioner's appeals. May be the Tribunal could have rendered a detailed finding and conclusion. However, upon perusal of the order passed by the Tribunal it was found that the Tribunal has referred to the facts. It has also adverted to the contention of the parties. It also referred to its own conclusions rendered in the case of Smokin' Joe's and Diageo India. However, it concludes that the facts and circumstances in the present case are not identical to the case dealt with by it. The Tribunal did not err in holding that the cases which have been dealt with by it including the Supreme Court in the case of *Bharat Sanchar Nigam Ltd. vs. UOI [2006] 3 VST 95 (SC)* are on distinct facts.

In this case, Bombay High Court further observed that strictly it is not necessary to deal with the judgments on the rule of precedents and proprietary of disregarding Co-ordinate Bench decisions. There cannot be any dispute or quarrel about its principle but its application would depend on the given facts and circumstances. When a Co-ordinate Bench decision can be distinguished and such distinction is founded on facts and circumstances which are peculiar to the other case, that course is equally permissible in law. It was further held that the Tribunal cannot be faulted for not applying and following rule of consistency or judicial discipline.

Tata Sons Limited and Another vs. State of Maharashtra and Another [2015] 80 VST 173 (Bom.)

2. Appeal – Rectification of mistake – Scope of – Issue raised in the rectification application before Tribunal not disputed by department – No error in order passed by CESTAT dismissing the said applicant – Section 35C(2) of Central Excise Act, 1944

CESTAT had dismissed the rectification application of the department. Appeal was preferred against the order passed by CESTAT against the rejection of rectification application.

The Hon'ble Supreme Court affirmed the order passed by the Tribunal holding that issue raised in the rectification application was not argued at the time of hearing of the main case and the same was not disputed by the Counsel of the Department. Thus there was no error in order passed by CESTAT dismissing the said application.

Commissioner of Central Excise, Jaipur vs. Hindustan Zinc Ltd [2015] 318 E.L.T. 614 (SC)

3. Oral Gift – Validity of oral gift – Delivery of possession is essential ingredient – Holding gift to be valid on basis of concept of symbolic delivery of possession – Not proper – Mohemmadan Law

One Jahar Ali filed a suit stating that one Gulbhan Bibi owned and possessed land in the District of Dhubri. She and her husband Akbar Ali had brought up the plaintiffs as daughter and son from their childhood and after they had attained majority, the couple gave each of them in marriage. The plaintiffs had looked after them as parents till their death living in the same mess and house. Akbar Ali pre-deceased Gulbhan Bibi. It was pleaded that land was gifted to them by Gulbhan in equal shares and delivery of possession was also given to them. The defendant was not an heir of late Gulbhan Bibi and thus, not entitled to any share of the land and that he was only "Adhiar" i.e., Tenant in the suit land. The plaintiffs has filed a petition and the said petition was rejected on an objection being lodged against the defendant.

Accordingly, suit was filed for a decree declaring right, title and interest of the plaintiffs over the suit land on the basis of the gift and for correction of the records by cancelling the mutation in the name of the defendant if any and for *khas* possession by evicting the defendant and for a decree of compensation for illegal occupation upon the suit land.

Trial Court concluded that plaintiffs had failed to prove the oral gift and accordingly held that plaintiffs have no right, title and interest over the suit land.

Only one palintiff preferred an appeal against the judgment of the Trial Court. The Appellate Court allowed the appeal by holding that the gift made was valid under Mohemmadan Law by holding that apart, the delivery of possession of gift may be actual or constructive when physical delivery of possession is not possible such possession as the property admits may be delivered. The donor and donee resided in a joint mess and in such case symbolic delivery of possession of property is sufficient to make the gift a valid one.

On further appeal, Hon'ble Gauhati High Court observed that the Appellate Court pre-supposed that as the donor and the donee resided in a joint mess, symbolic delivery of possession of property is sufficient to make a gift a valid one. It is to be noted that the principle will apply to the gift of the immovable property in which the donor and donee are both residing at the time of the gift. Even assuming that the donor and donee were residing together, the property in which they were residing together is not the subject-matter of gift and therefore, the aforesaid principle will not come into play. When the oral gift was made or when the alleged delivery of possession was made was neither pleaded nor deposed. There is no evidence that there was any request to the defendant to attorn to the donee or that delivery of the title deed was delivered to the donee.

It was further observed that the Trial Court, marshalling the evidence on record, had correctly assessed that plaintiffs were never delivered possession of the suit land. Thus, one of the essentials of an oral gift, i.e., possession on which the impugned judgment of the Appellate Court is based is not applicable in the facts and circumstances of the case. Thus, the Hon'ble High Court set aside the order passed by the lower Appellate Court and allowed the appeal.

Sukur Ali vs. Jarina Bibi AIR 2015 Gauhati 114

4. Stamp Duty paid by challan – Sale deed presented for registration after Limitation Period – No restriction on usage of challan – Refusal to register

sale deed on ground of challan showing deposit of stamp duty and registration fee as to being more than limitation period not proper – Stamp Act (2 of 1899), Ss. 10, 50(2).

The issue in this case was whether sale deed could be registered after a year of depositing Stamp duty and Registration Fee that was paid by challan?

The Writ Petition was filed by petitioners under Article 226 of the Constitution of India praying for a direction in the nature of mandamus commanding the respondent authorities of the Registration Department to register the sale deed presented by the petitioner dated 30-5-2014 which was denied on the grounds that the challan showing deposit of stamp duty as well as registration fee is more than one year old. Whereas the challan is dated 14-5-2013, the sale deed was presented for registration on 30-5-2014 and hence in view of the statutory provisions underlying S. 50(2) of the Indian Stamp Act, 1899 the challan had lost its validity.

According to the petitioners, all necessary legal formalities were fulfilled by depositing stamp duty and registration fee through challan. Also no infirmity was found in the valuation of document. They also contended that the Department itself had issued an advisory clarifying the legal position that there would be no validity period for a challan.

A counter affidavit had been filed on behalf of the department enclosing a letter of the Inspector General of Registration (IGR), Patna, Bihar addressed to the Sub-Registrar, Patna bearing memo No. 3418 dated 11-8-2014 whereby a direction was issued that the validity of challan would be only for one year and cannot be used for registration of an instrument after expiry of one year. According to the IGR the stipulations made in the earlier guidelines of the department dated 2-4-2012 was examined in the light of the audit objection of the Accountant General and thereafter it was decided that such of the challans showing deposit of stamp duty and registration fee beyond a year cannot be utilised after expiry of one year. It was thus the stand of the respondents that since admittedly the challan submitted by the petitioners is presented after a lapse of a year, it was not fit for registration.

Later on, when the learned Principal Additional Advocate General had filed a supplementary counter affidavit on behalf of the respondents in which it was stated that the department having realised its mistake had decided to amend letter bearing Memo No. 3418 dt. 11-8-2014 of the IGR and directive had been issued to the Sub-Registrar , Patna *vide* Letter No. 1805 dt. 17-4-2015 to register the document of the petitioners which had since been registered resulting in writ petition being rendered infructuous.

Although the relief prayed for had been granted to the petitioners but since the issue involved concerns the people at large the Court still adjudicated on the issue despite noticing the developments.

The Hon'ble High Court at the outset observed that, the letter bearing Memo No. 3418 dated 11-8-2014 issued by the IGR is not an independent exercise of mind but a mechanical reaction to the audit objection raised by the office of the Accountant General. The statutory authority has not even bothered to satisfy itself that such directives were in the teeth of the statutory provisions governing the issue of challan as found in Ss. 10 and 10A of 'the Act' and that the provisions governing the stamp paper as found in S. 50(2) of the Act would not *ipso facto* apply to a challan in absence of any legislative intent.

Whereas there is a specific limitation regarding usage of a stamp paper, there is no such restriction on usage of challan and the department correctly appreciating the statutory provisions had issued the earlier directive dated 2-4-2012. The department perhaps having realised the legal infirmity in the letter bearing Memo No. 3418 dated 11-8-2014 decided to amend the same but once this Court has noticed the transgression by the IGR any continuation of the said letter would be prolonging an illegality and in consequence the letter bearing Memo No. 3418 dated 11-8-2014 of the IGR is quashed and set aside.

The Writ Petition was allowed and the interlocutory application was disposed of by the Hon'ble Patna High Court.

Kumari Shivani Rai and Another vs. State of Bihar and Others. AIR 2015 Patna 133

5. (A) Transborder or international transactions – Banker's duty to honour Letter of Credit (LC) – It's a fiduciary responsibility of the Bank that issued LC – Strict compliance with terms of LC – It's LC issuer Bank's duty to ensure that goods are released to the buyer only on remittance of price of shipment as secured through Letter of Credit.

(B) Admission made before Foreign Courts – Its maintainability in India – Admission of Liability in a foreign court, on facts, taken as admission in Indian Courts – Civil Procedure Code, 1908

The appellant Banker has issued LC on behalf of Importer Dhaka (Bangladesh) and in favour of Exporter in Calcutta (India). Appellant had certified photocopies of shipping documents without prior information to exporter or the Negotiating Banks and also contended that importer has managed to clear entire consignment by producing forged NOC and endorsement on reverse of said documents.

Appellant's act of releasing certified shipping documents without securing price of consignment enabled the importer to get the goods cleared without authority. In transborder or international transaction, trade depends on faith reposed in banking institutions to secure price of exported goods. Exporter legally and reliably expects that consignment shall be released to buyer only on the transmission of price of shipment through the LC. Therefore heavy and fiduciary responsibility rests on the banks opening LC, to ensure that payment is secured unless documentation is defective. Strict liability is cast on the banks issuing LC to ensure that exports consignments are released to importer only on remittance of price of shipment through LC. It is only when irretrievable injury is bound to result and plainly evident that severe/ egregious fraud is caused to the beneficiary of LC that a reason to insulate party before it against a liability and that too, comes only through prompt intervention of Court of Law. It is a jural opinion and unanimous to the effect that the banker issuing LC cannot disregard, delay or dilute its responsibility to make payment strictly as per the terms of the LC. LC has a effect of creating bargain between banker and vendor of goods, making the banker liable to the vendor (seller) to pay the price of goods.

Later the suit was filed by importer in Dhaka against the appellant banker and Exporter's banker restraining them to release any payment relating to subject consignment exported to him from Calcutta. However, appellant banker had admitted its liability to honour the said LC in a "Dhaka's Suit" in consonance with the law related to LC in a suit filed "in India" contending that shipping documents were not acceptable to importer.

A written statement filed by the appellant banker in Dhaka litigation, discloses that it was "under obligation to reimburse the payments to the suppliers corresponding Bank". On the basis of this admission of facts filed in a written statement in a Foreign Court, it was in clear violation of the Bankers fiduciary responsibility an opener of LC. Further, this admission of fact is clear and its in consonance with the law pertaining to legal obligation concerning Letter of Credit, obliges it to remit payments contemplated and stated therein.

Therefore it was held that the appellants had correctly made the statement pertaining to its liability in "Dhaka Suit (Foreign Court)" which can be legitimately be taken as an admission in the Calcutta Suit (Indian Court).

National Bank Ltd. vs. Ghanshyamdas Agarwal & Others Civil (2015) 4 SCC 228.

CA Rajaram Ajgaonkar

ECONOMY AND FINANCE

INCREASE IN GLOBAL RISKS

The month of September was as volatile as was expected for the global markets. A FED meeting was scheduled during the month wherein the decision of interest rate hike was expected to be taken. Fortunately, no hike was announced by the FED chairperson. If the rate would have been hiked, it could have resulted in an increase of fund flow to the US markets from all over the world at the cost of outflows of funds from many emerging markets and even from certain developed economies. Such a movement of money would have affected many economies, especially due to change in exchange rates of currencies and also due to possibility of reduction of investment growth in many developing countries. The negative side of the event is that the uncertainty around the issue remains intact. Currently, there are talks gaining momentum that the FED will start the rate hike before the end of the current calendar year and therefore, the insecurity continues to loom large. Though the volatility in the world markets due to this issue has subsided for the time being, it may keep emerging again and again over the next few months.

Fortunately, the Chinese Government was able to stabilize the stock market in the country, which had suddenly become very volatile over the last few months due to the bubble like situation. Though the markets have negative bias, they have become steady for the past few weeks, which has, in turn, improved the sentiments in the region. However, the problem of slowing growth persists in the Chinese economy and it is not very likely that China can return back to double digit growth rate in the near future, to which it was used to a few years back. The current indications are that the Chinese economy will continue to slow down, cooling the stock markets in the country. Good performance of the Chinese economy is quite important for the world economy to grow. It is the second largest economy in the world and it is export oriented. China imports lots of commodities and ships out lots of finished goods, which constitutes a significant part of the world trade. Slowdown in China, may affect the world trade and also the commodity markets. It may also hamper the transport and logistics industry across the world.

Risk has suddenly emerged from Germany, which was very much unexpected. Germany is known for its technology and manufacturing excellence. It is reputed for its ethics. The German supplies are considered as best quality in the class and very much patronized by quality conscious consumers, even though they are generally expensive. This faith has suddenly shaken due to the admission of irregularity by one of the renowned automakers of the country in their supplies of vehicles in the US markets. The situation has not only created risk for the car maker and its reputation but it has created high repercussions for all car manufacturers across the world. It has shaken up confidence of the

consumers as well as the authorities regarding the compliance of standards. The event is an eye opener for many Government authorities and they are likely to be stricter regarding compliance of norms, which will have effect on costs. The trade may suffer and so the consumers. The wound is quite deep and may take some time to heal and restore normalcy.

The markets have become so vulnerable to economically sensitive news that they have started over reacting. The commodity crisis emerging over the last few months suddenly created a heavy sell off in the stock of a major British company dealing in commodities. The sell off was so sharp that the prices of the stock tanked by more than 20% in a session thereby creating bearish repercussions across the global stock markets. Fortunately, the stock bounced back and the negative sentiments were trimmed but the event contributed to the volatility in the markets. It further increased the uncertainty in the minds of the global investors.

The silver lining for the world is continuous improvement in the US economy, irrespective of the hiccups emerging from various parts of the world. The recovery of the US looks sustainable for some more time and that can provide a major respite to world trade and commerce inspite of many emerging markets losing their growth momentum. This can sustain positivity in Europe and keep the Chinese exports ticking, which will in a way protect the lowering of growth in the respective economies. How long the standalone success of the US can continue may be a debatable issue. After the Subprime crisis in the US and emergence of recession in many economies in the world, over the years, growth has gradually started perking up in many countries. Considering the trade cycle history, there is a possibility of emergence of recession in some economies in the next couple of years. The anticipation is that this time it may not be as severe and as encompassing as it was in 2008.

The investors cannot afford to lose sight of the risk of a recession, which is quite real but unpredictable in respect of the timings of its emergence. Last time, for coming out of recession, many countries have printed huge quantum of currency. They have thrown liquidity in their markets for generating demand. A derivative of Keynesian economics is being followed to remain in growth. The demand is considered as a major driver of economic force and availability of supply is taken for granted on the back of huge capacities built by certain economies led by China. However, in absence of growth of population in developed countries and poor per capita income in the under developed and the developing countries; increase of consumption is not easy. Over capacity has created cut throat competition in many industries and that is a risk to sustainability of growth. A lot of things have to fall in place to avert the emergence of next recession.

Though many investors are optimistic, there is a feeling that clouds of risks have already started gathering over the world economy. The situation in China is getting more vulnerable. Europe is not able to raise its sail. Japan continues to stagnate. Brazil, Russia and South Africa have started losing the traction. Religious fundamentalism could not be controlled to the required levels. These situations have resulted in an increase in risk across the markets. The regulators are getting aggressive and the ease of doing business is going down. The cost of compliance is on the rise. However, the inflation is quite low in the major economies, which indicates that there is a squeeze of profit in the overall chain of supplies. This squeeze will result in a lesser economic value for investors, which can restrict the growth of the world and so the returns on investment. The investors need to be aware of the phenomenon and should take considered decisions, avoiding over commitment.

The Indian economy continues to struggle for its targeted growth. The delay in FED rate hike has given some respite and a more than expected rate cut of 0.50% by the Reserve Bank of India (RBI) has created substantial positive sentiment for the businesses in the country. One of the major reasons for faltering of the targeted growth was high interest rate in the economy, which

could not be reduced due to high inflation rate prevailing then. Over the last couple of years, the RBI has made sustained efforts through monetary policy to control the inflation and it has achieved a fair amount of success. Now it has given a stimulus to the Indian industry by reducing the Repo Rate by 0.5% as against the expectation of 0.25%, which can give a fillip to investment activity as well as consumption. Over a period, the interest rate is expected to ease further, which can support the economic growth. The Indian economy remains in a sweet spot as compared to many other countries in the world due to its sustainable high growth rate and its positive demographic as well as political environment. However, many concerns remain, which are holding back investors from investing wholeheartedly in the country. Infrastructure as well as ease of doing business have to be convincingly improved for attracting more investments. It has to be appreciated that the investors cannot keep on doing business in any country, where there is a fear of being caught on the wrong side of law due to bonafide mistakes or uncertainties in the words of statute as well as clarifications issued thereon by the executive authorities.

The Indian stock markets continue to remain volatile and did not gain much on an overall basis during the month. It is likely that the volatility will continue, atleast till the FED rate hike ultimately materializes. The reduction in interest rate by the RBI is a very positive move but as it is already factored in stock prices. Its impact can be only felt gradually. Though there is talk about the strengthening of the manufacturing sector, the improvement is not very visible. The situation may not change suddenly and therefore, the investors have already started toning down their expectations. Envious growth is possible but the environment is not conducive for its achievement. As an overall result, the stock markets are likely to remain range bound in India in the month of October. The quarterly results from companies will flow in that month and also during the first half of the next month. No surprises on an overall basis are expected, though the individual companies may display some unanticipated quarterly results. The stock markets may also remain range bound in the months to come unless some shocks from some vulnerable economies shake the world markets. The movement in the global stock markets will continue to have effects on the Indian economy as well as share prices. The investors need to remain vigilant and should not over commit or over leverage.

The property markets continue to suffer due to lack of demand as a result of high prices. The prices are stagnating but are not coming down. Considering the funding pattern of the industry, they may come down only marginally unless the Government intervenes. The reduction in interest rate by RBI may have some positive impact on the demand for housing and especially the low end housing as the EMIs of the borrowers are getting reduced. However, for overall improvement in the market, further reduction in the interest rates is essential. High economic growth will be another catalyst for this sector, which in turn will increase the demand for commercial real estate, which was lack luster since last number of years. Though the investors are not very optimistic, probably the time has arrived to have a relook at the property market with a long term perspective.

The rate cut has resulted in reduction of bond yields. Fixed deposit rates will move south ward and investment in deposits will become less and less lucrative as the months pass. It may be advisable for investors, who have predominantly a debt appetite, to get locked in for longer maturity fixed deposits or debt instruments as the interest rate will progressively go southwards.

The risks for investments are gradually increasing. The expected rate of returns is coming down but if the inflation tames, it will be a positive sign for the investors in India. The event of FED interest rate hike is likely to cause some hiccups and outflow of funds from the Indian stock markets. Hence, investors should remain vigilant while making investments. Investors in stock markets should be ready to live with a 5 to 10 percent fall in stock prices over the period of next six months. Overall, reasonable returns can be expected over a medium term.

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OUR CONFERENCE

Our 20th Jubilee Conference will be held in Mumbai (India) from 3rd - 5th December 2015 at the ITC Maratha Hotel, Mumbai, India. The conference theme is **"BEPS AND BEYOND BEPS : IMPACT AND NEXT STEPS".** Specific speaker topics include:

The G20 Agenda - Base Erosion and Profit Shifting: What Heads of Government decided in November 2015? - Tax and Good Governance: Making the Link between Tax Evasion and Avoidance and Aggressive Tax Planning - Minimizing and Resolving International Tax Disputes post BEPS - Transparency and Exchange of Information : Will they suffice to curb Tax Avoidance - Treaty Abuse and Anti-avoidance Rules under BEPS - Permanent Establishment Issues under BEPS - Impact of BEPS on Developing Countries and on UN Model Treaty - Overview of BEPS Project and its Fifteen Action Points - Hybrid Mismatches and CFC Rules - Measures limiting Base Erosion under BEPS - Harmful Tax Competition - BEPS Compliance and Multilateral Instruments: Will they work?

Our first speaker will be **Porus Kaka** from India, President of International Fiscal Association - Worldwide. Our international speakers include **Professor Jeffrey Owens** (ex head of OECD, Paris) now Director of the Global Tax Policy Center at WU, Vienna; **Professor Richard Vann**, Challis Professor, University of Sydney, Australia; **Professor Kees van Raad**, Professor, International Tax Center Leiden and Of Counsel Loyens & Loeff; **Professor Michael Lang**, Professor & Head of the Institute for Austrian and International Tax Law, WU, Vienna; **Ms. Liselott Kana**, Head of International Revenue Administration, Chile. Our Indian speakers include **Akhilesh Ranjan**, India's competent authority; **Professor Parthasarathi Shome**, former Minister of State - Finance; **Mohan Parasaran**, former Solicitor General of India.

We have also invited **Mrs. Anita Kapur**, Chairperson - CBDT, and **Mr. D. S. Saksena**, Principal Commissioner of Income Tax (Mumbai), India to attend and address us at the conference. **Mr. S. K. Sahai,** Principal Commissioner of Income Tax (Delhi), India and **Mr. Dinesh Verma**, Principal Commissioner of Income Tax (Bengaluru), India, have been invited to participate in the Conference. Like last year, we have planned a special address by the former **Chief Justice Sarosh Kapadia** on **Tax Disputes and their Resolution under BEPS**.

Besides around 20 full speakers, this year we have provided for several thought provoking panel discussions with around 60 panel speakers from India and abroad. The topics include:

Looking Back and Looking Forward: Celebration or Chaos under BEPS in next 20 Years - Role of Tax Administrators in the post BEPS World - Impact of BEPS on Indian Tax Policy, Practice and Compliance - Impact of BEPS on Developed Economies - Impact of BEPS on Emerging and Developing Economies - Impact of BEPS on Multinational Corporations - New BEPS Obligations for Multinational Enterprises - Is Place of Effective Management (POEM) Suitable for Determining Corporate Tax Residence - Framework for new GST Tax in India - Tax Challenges of Digital Economy under BEPS - Transfer Pricing under BEPS - Bilateral Taxing Rights under Model Tax Treaties and BEPS - BEPS Project : Will it Succeed in achieving its Objectives?

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) No. 2764 of 2015

The Chamber of Tax Consultants & Others .. Petitioners.

v/s.

Union of India & Others .. Respondents.

Dr. K. Shivram, Sr. Advocate with Mr. Rahul Hakani, Mr. V. B. Joshi, Mr. Rahul Sarda and Ms. Neelam Jadhav, for the Petitioners.

Mr. Suresh Kumar, for the Respondents.

CORAM: M. S. SANKLECHA, &

G. S. KULKARNI, JJ.

DATE : 30th SEPTEMBER, 2015.

P.C:

RULE.

2 At the very outset, it was impressed upon us that the last date for filing return of income in ITR Form Nos. 3, 4, 5, 6 and 7 is today i.e. 30th September, 2015. It is in the aforesaid circumstances that the Petitioners prayed for grant of interim/ adinterim reliefs, extending the date for filing returns of income in the ITR Form Nos. 3, 4, 5, 6, and 7 to 31st October, 2015. This on the ground that on similar grievances such a prayer has been finally allowed by orders of the Punjab & Haryana Court dated 29th September, 2015 (Vishal Garg v/s. Union of India) and Gujarat High Court in by its order dated 29th September, 2015 in Special Civil Application No. 15075 of 2015 (All Gujarat Federation of Income Tax Consultants v/s. Central Board of Direct Taxes).

3 Our attention was also specifically drawn to the fact that for the present, the Central Board of Direct Taxes (CBDT) have accepted the decision of the Gujarat High Court and the Punjab and Haryana High Court referred to herein above. In as much as on 30th September, 2015, the following two orders under Section 119 of the Income Tax Act, 1961 (the Act) have issued:

Ist Order:—

"The Central Board of Direct Taxes, in compliance to the order of Hon'ble Punjab and Haryana High Court dated 28-9-2015 in case of *Vishal Gard & Ors., v/s. Union of India* & Anr; CWP 19770-205 and in exercise of powers conferred under section 119 of the Income Tax Act, 1961 (the Act), hereby orders that the returns of income due to be Efiled by 30th September, 2015 may be filed by 31st October, 2015 in cases of Income-Tax Assesees of the State(s) of Punjab and Haryana and Union Territory of Chandigarh.

2 This order shall be subject to the outcome of any further appeal/SLP which the CBDT may file against the said judgment.

IInd Order::—

"The Central Board of Direct Taxes, in compliance to the order of Hon'ble Gujarat High Court dated 29-9-2015 in case of (All Gujarat Federation of Tax Consultants v/s. CBDT; Special Civil Application No. 15075 of 2015) and in exercise of powers conferred under section 119 of the Income Tax act, 1961 (the Act), hereby orders that the returns of income due to be Efiled by 30th September, 2015 may be filed by 31st October, 2015 in cases of Income Tax assesees of the State of Gujarat.

2 This order shall be subject to the outcome of any further appeal/SLP which the CBDT may file against the said judgment."

4 As it is clear from the above orders, the benefit of the decision rendered by Gujarat High Court and Punjab and Haryana High Court have been restricted only in respect of assessee's within the States of Punjab and Haryana, Union Territory of Chandigarh and the state of Gujarat. In the circumstances, we heard the Petitioner's prayer for interim reliefs.

5 Before proceeding further, it may be pointed out that this Petition first listed on board on 23rd September, 2015, at that time, the Petition was adjourned to 28th September, 2015 at 3.00 p.m. on the joint request of the parties. This was to enable Mr. Suresh Kumar, learned Counsel appearing for the Revenue to take instructions in the matter.

6 On 28th September, 2015, when the matter reached hearing, our attention was drawn to the decision of the Punjab and Haryana High Court in (Vishal Garg (supra)) wherein Punjab and Haryana High Court had granted extension of time for E-filing return up to 31st October, 2015 and directed the CBDT to issue appropriate instructions/directions under Section 119 the Act.

7 Mr. Suresh Kumar, learned Counsel appearing for the Revenue had invited our attention to the decision of the Delhi High Court in ***Avinash Gupta v/s. Union of India in Writ Petition (C) No. 9032 of 2015*** rendered on 21st September, 2015 where the Court refused to extend the time for E-filing of return of income in exercise of its extra ordinary jurisdiction under Article 226 of the Constitution of India. To a similar effect is the decision of the Rajasthan High Court cited by Mr. Suresh Kumar, being ***Writ Petition (PIL) No. 11037 of 2015 in M/s. Rajasthan Tax Consultants Association v/s. Union of India*** wherein also the Court refused to exercise its extra ordinary jurisdiction and extend the time to file return of income from the stipulated date of 30th September, 2015.

8 In view of the conflicting views of different High Courts, the Petition was kept today in the expectation that the CBDT would take a decision of either challenging the orders passed by Punjab and Haryana High Court before the Apex Court or accepting the same and applied all over India. Today, as pointed out herein above, the CBDT has issued two separate orders under Section 119 of the Act, accepting the order of the Punjab and Haryana High Court and Gujarat High Court and extended the time to file up to 31st October, 2015 only in respect of assessees in the above two States and in the Union Territory of Chandigarh.

9 Dr. Shivram, learned Sr. Advocate appearing for the Petitioner invited our attention today to the decision of Gujarat High Court in All Gujarat Federation of Tax Consultants (supra) which has extended the due date till 31st October, 2015. This has been accepted by the CBDT having extended the filing of E Form of the ITR returns from 30th September, 2015 to 31st October, 2015 by issuing an order under Section 119 of the Act as pointed out above.

10 The grievances raised in this Petition are more or less similar to the one raised before the Gujarat High Court and the Punjab and Haryana High Court. It is that the CBDT / Central Government had failed in its obligation to notify ITR Forms, in particular, Form Nos. 3, 4, 5, 6 and 7 on 1st April, 2015 all of which have the due date of being filed with the Income Tax Department before 30th September, 2015.

11 It is expected of the State that it would notify the required ITR Forms on 1st April of the subject Assessment year. This enables the assessee to gather the necessary details as required by the ITR Forms and submit the same while E-filing their return of income. This delay causes prejudice to the assessees who have to E-file their returns of income with shortage of time is likely to result in filing of inaccurate returns. Thus, the plea of extension of time to file the return of income in Form Nos. 3, 4, 5, 6 and 7 from 30th September, 2015 to 31st October, 2015.

12 In view of the delay in having notified the ITR Form Nos. 3, 4, 5, 6 and 7, various assessee had in individual capacity made representations that the time to file E-returns in Form Nos. 3, 4, 5, 6 and 7 be extended in view of prejudice as pointed out above. The Petitioners had also filed a representation dated 25th August, 2015 *inter alia* raising various issues warranting extension of time. However, the CBDT by a press note dated 9th September, 2015 rejected the representation and informed the trade that the last date of 30th September, 2015 to Efile the return of income would not be extended. This decision of the CBDT does not deal with all the issues raised by the Petitioners.

13 Thereafter, the Petitioner No. 1 made another representation on 19th September, 2015 to the CBDT, seeking extension of time to E-file return of income to be filed in ITR Form Nos. 3, 4, 5, 6 and 7 from 30th September, 2015 to 31st October, 2015. The same was not responded to by the CBDT. Thus, this Petition. The Revenue has not yet filed any reply. Therefore, we are at this stage not finally disposing of the Petition but after admitting it are considering interim relief, if any, to be granted.

14 We have heard the Counsel for the Petitioner and the Revenue. We find that with effect from Assessment Year 2013-14, it is mandatory to E-file Return of Income. It is not open to an assessee to file return of income in hard copy. Thus, in the absence of the form and facility being available, it was impossible for any assessee to file its return of income. It is not dispute before us that the CBDT notified the ITR Forms Nos. 3, 4, 5, 6 and 7 only on 29th July, 2015 and the Forms were made available for filing on the web site of the department only with effect from 7th August, 2015. Thus, if the forms were notified as expected on 1st April of the year, then the assessee concerned would have had 183 days time available to collect the necessary information so as to enable them to Efile their return of income, giving all particulars expected of them. However, in view of the delay in notifying the forms, the available time for the assessees to fill up the forms was restricted to 55 to 61 days, depending upon the dates when the forms are notified. Thus, in view of short time available, assessees were finding it difficult to comply with all the requirements sought in the notified forms. Besides, non-filing of return of income before the prescribed date would result in great prejudice to the assessees as any claim for set off of loss would not be allowed to be carried forward will deprive them of deduction under Section 43B of the Act and also deduction under Chapter VIA of the Act. Besides, if there is any omission/ mistake in the filing of the return of income, if filed beyond the due date, it would also deprive the assessee an opportunity to file revised return of income.

15 The present situation has arisen only in view of the delay on the part of CBDT in discharging its obligations of making available the ITR Form Nos. 3, 4, 5, 6, and 7 in due time. Thus, the need to extend the due date. One more feature which was emphasised was that in case of ITR Forms 1, 2,

2A and 4S being non-audit cases, necessary forms were notified only on 22nd June, 2015 instead of 1st April, 2015 i.e. a delay of 83 days. The normal date of filing of return in such cases would be 31st July, 2015. However, the CBDT extended the same to 7th September, 2015 by an order dated 2nd September, 2015 under Section 119 of the Act. This on the ground that the delay in notifying the forms would cause great hardship to the tax payers. We are unable to appreciate how a delay of 83 days in making the ITR Form Nos. 1, 2, 2A and 4S in case of non-audit will cause great prejudice and delay of 120 days in making ITR Form Nos. 3, 4, 5, 6 and 7 does not cause any prejudice. The Gujarat High Court noted that the Scheme of the Act indicates that ordinarily a period of 180 days is available to the assessee to file income tax return in case of E-filing of return of income in Form Nos. 3, 4, 5, 6 and 7. Any curtailment of this period on account of non-availability of the necessary utility for filing a return online, does certainly cause prejudice to the assessee wholly on account of the delay on the part of the CBDT to notify the ITR Forms.

16 Mr. Suresh Kumar, learned Counsel appearing for the Revenue places reliance upon the decision of the Delhi High Court in the case of Avinash Gupra (supra) and Rajasthan High Court in the case of Rajasthan Tax Consultants (supra) and submitted that the first decision on this issue was rendered by the Delhi High Court in Avinash Gupta (supra) on 21st September, 2015 wherein it has refused to entertain a Petitioner seeking extension of the due date provided under the Act to E-file return in ITR Form Nos. 3, 4, 5, 6 and 7. It is submitted that in view of the above, the subsequent decision ought not to have been rendered, taking a view contrary to that taken by the Delhi High Court. In our opinion, Mr. Suresh Kumar is not right in this contention as these orders are relied up by him would loose their significance in view of the CBDT itself accepting the contrary view of the Punjab and Haryana High Court and the Gujarat High Court. Besides, each Court is entitled to take its own view [see *CIT vs. Thane Electricity Supply Ltd.*, *206 ITR 727 (Bom.)*]

17 Mr. Suresh Kumar, also placed reliance upon the order dated 29th September, 2015 passed by the CBDT under Section 119 of the Act consequent to the order of the Karnataka High Court directing it to deal with the representation filed by the Karnataka State Chartered Accountants Association, to contend that this Court should not interfere with the executive action of not extending the date of 30th September, 2015 to E-file the returns. As pointed out above, the view of the Gujarat High Court as also the view of the Punjab and Haryana High Court of extending the due date to 31st October, 2015 has been accepted by the CBDT as evidenced by having issued an order on 30th September, 2015 under Section 119 of the Act by extending the time in respect of assessee's in the State of Punjab and Haryana High Court and Gujarat High Court. We also notice that the order dated 29th September, 2015 under Section 119 of the Act dealt with the representation of the Karnataka State Chartered Accountants Association (supra) consequent to the directions of the Karnataka High Court was prior to the CBDT's order passed today, i.e. 30th September, 2015. Consequently, the order passed on the representation of Karnataka State Chartered Accountants Association (supra) would stand diluted even if not entirely wiped out, consequent to the subsequent orders passed today under Section 119 of the Act by the CBDT. The order dated 29th September, 2015 accepted the fact that the due date in case of non-audited case covered by the ITR Form Nos. 1, 2, 2A and 4S, the due date for E-filing should extend from 31st July, 2015 to 7th September, 2015. Mr. Suresh Kumar, learned Counsel appearing for the Revenue in the absence of instructions sought to contend that there was sufficient time of the Chartered Accountants in filing returns for Assessment Years 201516 having due date of 30th September, 2015. This, however Yet does not explain the reasons why a delay of 83 days in notifying the ITR Form Nos. 1, 2, 2A and 4S would justify the extending time while a delay of 120 days in notifying the ITR Form Nos. 3, 4, 5, 6 and 7 does not warrant extension of time.

18 It may be pointed out that even the Delhi High court in the case of Avinash Gupta (supra) while not entertaining the Petition, seeking extension of due date did observe in paragraph 22 as under:—

> ***"22:– Notwithstanding having held so. I am of the view that there is some merit if not legal then otherwise, in the grievances of the Petitioner. The counsel for the respondents appearing on advance notice is unable to give the reasons for the forms etc. being not available at the beginning of the assessment year on 1st April of every year and the same thereby causing inconvenience to the*** *practitioners of the subject. There is sufficient time available to the Government, after the Finance Act of the financial year, to finalize the forms and if no change is intended therein, to notify of the* ***same immediately. There appears to be no justification for delay beyond the assessment year in prescribing the said forms. Accordingly, though not granting any reliefs to the petitioner for the current assessment year, the respondents are directed to, with effect from the next assessment year, at*** *least ensure that the forms etc. which are to be prescribed for the Audit Report and for filing the ITR* ***are available as on 1st April of the assessment year unless there is a valid reason therefor and which should be recorded in writing by the respondents themselves, without waiting for any representations to be made. The respondents, while doing so, to also take a decision whether owing thereto any extension of the due date is required to be prescribed and accordingly notify the public."***

From the aforesaid observations of the Delhi High Court, it is clear that it was also of the view that the CBDT should make available the necessary ITR Forms on 1st April of the subject Assessment Year for the benefit of the assessees. However, in case, there is any delay, the same should be recorded in writing and also consider whether in view of the delay, an extension of time in filing return is warranted.

19 It may be noted that despite sufficient time being available, the Respondent Revenue has chosen not to file any affidavit in reply. It is in this view of the matter, we are at this stage unable to consider all the aspect of the matter which may arise in the present case. However, taking into account the fact that the decision of the Gujarat High Court and Punjab and Haryana High Court have been accepted by the CBDT issuing orders under Section 119 of the Act but very unfairly in case of an all India Statute restricting its benefit to only two States and one Union Territory. This itself warrants an extension of due date to the same date as is available for the assessees in Gujarat, Punjab and Haryana to avoid any discrimination to the assessees elsewhere. Moreover, we find ourselves in agreement with the reasons given by the Gujarat High Court in All Gujarat Federation of Tax Consultants (supra) as also the decision of the Punjab and Haryana High Court in Vishal Garg (supra). We, therefore, pass the following order:—

(i) The Respondent No. 2 i.e. CBDT is directed to forthwith issue the order/ notification under Section 119 of the Income Tax Act and extend the due date for E-filing of the Income Tax Returns in respect of the assessees who are required to file return of income by 30th September, 2015 to 31st October, 2015;

(ii) It is made clear that at this stage we have not opined on any other issue except to the extent of the aforesaid directions. It is made clear that this order will not affect any other obligation that may arise under the Act.

(G. S. KULKARNI, J.) **(M. S. SANKLECHA, J.)**

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

The Chamber News

Important events and happenings that took place between 8th September, 2015 and 8th October, 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 15th September, 2015.

Life Membership

1	Mr. Joshi Nilesh Jayantilal	Advocate	Mumbai
2	Mr. Gupta Poneet Balraj	CA	Mumbai
3	Mr. Sinha Sachin Ram Chandra Prasad (Tr. from Ord. to Life)	CA	New Delhi
4	Mr. Turakhia Mahendra Dipachand (Tr. from Ord. to Life)	CA	Mumbai
5	Mr. Bohra Vikram Deepchand	CA	Mumbai
6	Mr. Padmanabha N.	CA	Bangalore
7	Mr. Thar Nimesh Rajendra	CA	Mumbai
8	Mr. Shetty Gopalkrishna Devappa	Advocate	Mumbai
9	Ms. Nagda Dipti Jayesh (Tr. from Ord.to Life)	Advocate	Mumbai
10	Mr. Bafna Dhanesh Kundanmal	CA	Mumbai
11	Ms. Dodhia Vandana Vershi	CA	Mumbai
12	Mr. Kakkad Gunjan Hitesh	CA	Mumbai
13	Mr. Ajjarapu Vamsi Rajesh (Tr. from Ord. to Life)	CA	Andhra Pradesh
14	Mr. Saboo Kamlesh Ramprasad	CA	Thane

Ordinary Membership

1	Ms. Mehta Shraddha Shashikant	CA	Mumbai
2	Mr. Katira Kalpesh Dinesh	CA	Mumbai
3	Mr. Beria Sarad Mahesh	CA	Thane

4	Mr. Naredi Pradeep Kumar	CA	Pune
5	Mr. Khandekar Madhukar Prabhakar	CA	Mumbai
6	Mr. Goriwala Kantilal Kunvarji	CA	Gujarat
7	Mr. Karia Darshit Lalit	CA	Mumbai
8	Mr. Gandhi Maulik Hitesh	CA	Mumbai
9	Mr. Sanghavi Dhaval Sharad	CA	Mumbai
10	Mr. Negandhi Ritesh Chittaranjan	Advocate	Mumbai
11	Mr. Gole Shashikant Parshuram	STP	Mumbai
12	Mr. Rajde Dhiren Parmanand	B.Com	Mumbai
13	Mr. Wahi Vinod Sagar A. L.	Advocate	Delhi
14	Mr. Achkal Mushtaq Ayyub	CA	Solapur
15	Mr. Agashe Ajay Shashikant	CA	Thane
16	Mr. Veera Heetesh Kalyanji	CA	Mumbai
17	Mr. Madrecha Adarsh Ashok	CA	Thane
18	Mr. Savla Hardik Hemchand	CA	Mumbai
19	Ms. Desai Hirali Bharat	CA	Mumbai
20	Mr. Talwar Mandeep Udham	CA	Mumbai
21	Mr. Bathiya Anand Shailesh	CA	Mumbai
22	Mr. Gopal Mundra	CA	Mumbai
23	Ms. Agarwal Richa Brijmohan	CA	Mumbai
24	Mr. Gandhi Jayesh Manharlal	CA	Mumbai
25	Ms. Hakani Niyati Kirit	Advocate	Mumbai
26	Mr. Sheth Chirag Nitin	CA	Mumbai
27	Mr. Tambde Dinesh Mahadeo	Advocate	Mumbai
28	Mr. Israni Shivkumar Dhalumal	Advocate	Mumbai
29	Mr. Kinare Mangesh Pandurang	CA	Thane
30	Mr. Utangale Girish Dattatraya	Advocate	Mumbai

Student Membership

1	Mr. Rathi Sudhanshu Dushyant	CS (Appear)	New Delhi
2	Ms. Modi Dipali Pankajbhai	CA (Appear)	Gujarat
3	Ms. Bhavi Shweta Shivashananppa	CA (Appear)	Mumbai
4	Mr. Rawal Ronak Harish	CA (Appear)	Mumbai
5	Mr. Doshi Kevin Rajesh	CA (Appear)	Mumbai
6	Ms. Ghonasgi Surabhi Prajakta	ICAI (Appear)	Mumbai
7	Mr. Chavda Jesal Chandresh	CA (Appear)	Mumbai
8	Mr. Divecha Vaibhav Gaurang	CA (Appear)	Mumbai

II. Past Programmes

Sr. No.	Programme Name / Committee/Venue	Dates / Subjects	Chairman / Speakers
1.	**ALLIED LAWS COMMITTEE**		
	Allied Laws Study Circle Meetings (Only for ALC SC Members) Venue: 2nd Floor, Kilachand Hall, IMC, Mumbai	**9th September, 2015** Subject : Provisions of RTI	Chairman: CA Narayan Varma, Past President Group Leader Mr. Bhaskar Prabhu, Convenor, Mahiti Adhikar Manch
2.	**INTERNATIONAL TAXATION COMMITTEE**		
A.	**Half Day Seminar on TDS Under Section 195 on Payment to Non-Residents** Venue : Dahanukar Hall, Maharashtra Chamber of Commerce, Industry & Agriculture Oricon House, 6th Flr, 12, K. Dubhash Marg, Fort, Mumbai.	**12th September, 2015** Subject : 1. Issues under Section 195 with reference to amendments in Section 195(6) 2. Panel discussion on practical case studies and issues	CA Sushil Lakhani Chairman : CA Kishor Karia Panellists : CA Gautam Nayak and CA Vishal Gada
B.	**Transfer Pricing Study Circle Meeting** (For TP SC Members only) Venue: 2nd Floor, Kilachand Hall, IMC.	**16th September, 2015** Subject: Recent Case Laws on Transfer Pricing and Impact of BEPS Transfer Pricing Action points for Indian Companies.	CA Karishma Phatarphekar CA Anuradha Rathod
C.	**Intensive study group on International Taxation Meeting** (For ISG on Int. Taxation Only) Venue: CTC Conference Room, 3, Rewa Chambers, Gr. Flr., 31, New Marine Lines, Mumbai – 400 020.	**8th October, 2015** Subject: Fees for Technical Services – Reference to specific treaties	CA Rajesh L. Shah CA Shreyas Shah
3.	**MEMBERSHIP & PUBLIC RELATIONS COMMITTEE**		
A.	**Self Awareness Series** Venue: CTC Conference Room, 3 Rewa Chamber, Ground Floor, 31, New Marine Lines, Mumbai – 20.	**11th September, 2015** Subject : Effective Communication & Personality Development	Mr. Rohan Mehta

Sr. No.	Programme Name / Committee/Venue	Dates / Subjects	Chairman / Speakers
B.	**Half Day Seminar at Vapi** Jointly with Vapi Branch of WIRC of ICAI Venue : Vapi Branch of WIRC of ICAI, Vapi	**12th September, 2015** Subject : 1) Important Issues under Tax Audit 2) Recent amendments and issues in TDS u/s. 195 including CA certificate F.No. 15CB	 CA Paresh Vakharia CA Natwar Thakrar
C.	**Free Eye Check up for Members, their Family Members and Staff Members** Venue : CTC Conference Room	**7th October, 2015** Session : Lawrence & Mayo's Precision – Eye Test Camp	Mr. Agnelo Rodrigues
4.	**STUDY CIRCLE & STUDY GROUP COMMITTEE**		
A.	**Study Group Meeting** Venue : Babubhai Chinai Committee Room, IMC.	**8th September, 2015** Subject: Recent Judgments under Direct Taxes	CA Kishor B. Karia
B.	**Study Circle Meeting** Venue : Babubhai Chinai Committee Room, IMC.	**11th September, 2015** Subject : Black Money Law with Special Reference to Voluntary Compliance Window	CA Praful Poladia
5.	**STUDENT AND IT CONNECT COMMITTEE**		
A.	**Lecture Meeting on e-filing under Tax Audit and Tally as Audit Tool** Venue : Dadar Club, Ground Floor, Banquet, Lane 3, Lokmanya Tilak Colony, Dadar (E), Mumbai.	**10th September, 2015** Subject : 1) E-filing under Tax Audit 2) Tally as Audit Tool	 CA Avinash Ravani CA Ashwin Dedhia
B.	**Multiply Your Network with Social Media** Venue : 2nd Floor, Kilachand Hall, IMC, Churchgate, Mumbai – 400 020.	**8th October, 2015** Subject : 1) To get the basics right about Face Book, Twitter and LinkedIn and to clear the air over prevalent myths about the social networks.	Mr. Manoj Kotak, BDM, Image online Pvt. Ltd.

Sr. No.	Programme Name / Committee/Venue	Dates / Subjects	Chairman / Speakers
		2) To deep dive on LinkedIn as powerful tool for professionals	Mr. Sameer Lodha, Digital Strategy & Mft. Consultant
6	**DELHI CHAPTER**		
	Half day Seminar on 'Black Money Law & Voluntary Compliance Window' and 'Recent developments & issues under Income tax	**12th September 2015** Subject : 1) Black Money Act & Voluntary Compliance Window	Dr. Girish Ahuja
	for builder/ developer/ land owner / flat purchaser / seller Venue : India International Centre, Lecture Room I, Annexe Building, Dr. K.K. Birla Lane, Max Mueller Marg, Lodhi Estate, New Delhi – 110 003	2) Taxation of Builders and Developers; Issues under Income tax from the perspective of land owner / flat purchaser / seller (including sections 43CA, 50C, 194-IA, 56(2), 54, 54F etc.)	Dr. Ravi Gupta Panel Discussion/ Question Answer format Dr. Girish Ahuja Dr. Ravi Gupta Mr. R. P. Garg Mr. C. S. Mathur

III. FUTURE PROGRAMMES

Sr. No.	Programme Name / Committee/Venue	Day & Date	
1.	**ALLIED LAWS COMMITTEE**		
A.	**Allied Laws Study Circle Meetings** (Only for ALC SC Members) Venue: 2nd Flr, Kilachand Hall, IMC, Mumbai. (For both meetings)	**15th October, 2015** Subject : Opportunity to Professional in Insurance Sector	Mr. G.L.N. Sharma Managing Director, Hannover Re Consulting Services
B.		**4th November, 2015** Subject : Issues under Nomination	Mr. Nirav Jani, Advocate
C.	**Full Day Seminar on Charitable Trusts** Jointly with Bombay Chartered Accountants Society Venue: 4th Floor, Walchand Hirachand Hall, IMC, Churchgate	**7th November, 2015** Subject : 1) a. Keynote Address b. Presentation on Important Procedural aspects for Trustees and Professionals. c. Guest of Honour d. Way Forward to Charities	 Charity Commissioner (MH)* Dy. Charity Commissioner / Asst. Charity Commissioner* Commissioner of Income Tax (Exemption)* Prominent Senior Faculty

Sr. No.	Programme Name / Committee/Venue	Day & Date	
		2) Important Provisions of Maharashtra Public Trusts Act, 1950 and Drafting of Trust Deed	CA Vipin Batavia
		3) Formation of Trust under MPT Act, Society Reg. Act and under Companies Act. Drafting of MOA & Rules and Regulations	CA Paras Savla Eminent Faculty
		4) Issues on Registration with IT Dep u/ss. 12A / 80G and approval u/s. 10(23C) including recent amendment's	CA Rajesh Kadakia Shailesh Haribhakti (*) Subject to final confirmation
		5) Taxation on Charitable Trusts	
		6) Foreign Contribution Regulation Act & CSR Provisions	
2.	**CORPORATE MEMBERS COMMITTEE**		
	Seminar on Internal Financial Controls – Views of an Expert Panel of Designers, Implementers and Reviewers of IFC Venue : M. C. Ghia Hall, K. Dubhash Marg, Kala Ghoda, Fort, Mumbai.	**9th October, 2015** Subject : 1) Keynote Address 2) Panel Discussion including an Open Forum	CA K. Raghunathan Chairman of Aurobindo Pharma Ltd. Panellists : CA Mahesh Tahiliyani, Group CFO, Shapoorji Pallonji & Co. Ltd. CA Nagesh Pinge, Chief Internal Auditor at Tata Motors Limited CA Sai Ram, Partner Deloitte CA Rohit Mathur, Partner, Ernst & Young LLP 3) Panel Moderator : CA Ashutosh Pednekar

Sr. No.	Programme Name / Committee/Venue	Day & Date	
3.	**DIRECT TAXES COMMITTEE**		
	Intensive Study Group (Direct Tax) Meeting (For ISG DT Members only) Venue : CTC Conference Room,	12th October, 2015 Subject : Recent Important Decisions under Direct Taxes	Mr. Mandar Vaidya, Advocate
4.	**INDIRECT TAXES COMMITTEE**		
A.	**Indirect Taxes Study Circle Meetings** (Only for IDT SC Members) Venue: 2nd Floor, Babubhai Chinai Committee Room, IMC. (For Both Meetings)	**13th October, 2015** Subject : Service Tax Investigations, Audit & Scrutiny	Chairman : CA Rajiv Luthia Group Leader: CA Shrikant Shenoy
B.		24th November, 2015 Subject : VAT Issues in Works Contract and Interstate Works Contract.	Chairperson : Ms. Sujata Rangnekar, Advocate Group Leader : CA Kiran Garkar
C.	**Seminar on Applicability of VAT and Service Tax on IPR and IPR Related Transactions (Viz., Trademark, Copyrights, Franchise, etc.)** Venue : Terrace Hall, West End Hotel, New Marine Lines, Mumbai.	**12th December, 2015** Subject : 1) Study of Applicability of Service Tax VAT on IPR and IPR related transaction. 2) Brains' Trust Session	CA Parind Mehta & CA Divyesh Lapsiwala Trustees : Mr. V. Sridharan, Senior Advocate & Mr. C. B. Thakar, Advocate
D.	**4th Residential Refresher Course on Service Tax** Venue : Aamby Valley	**29th January, 2016 to 31st January, 2016**	All other details of the papers, the eminent speakers and its related price will be announced shortly.
5.	**INTERNATIONAL TAXATION COMMITTEE**		
A.	**FEMA STUDY CIRCLE MEETING** (For FEMA Study Circle Members only) Venue: CTC Conference Room, 3, Rewa Chambers, Gr. Flr., 31, New Marine Lines, Mumbai - 400 020.	**19th October, 2015** Foreign Exchange Regulations in relation to Overseas Investments by Indian Residents	CA Ronak Gangar and CA Kartik Badiani

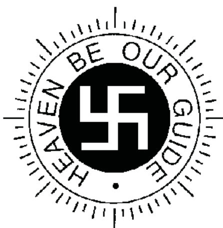
Sr. No.	Programme Name / Committee/Venue	Day & Date	
6.	**LAW & REPRESENTATION COMMITTEE**		
A.	**Request for Suggestions on Pre-Budget Memorandum**	Like every year, this year also The Chamber intends to make exhaustive Pre-Budget representation	Members are requested to send their suggestions by e-mail to office@ctconline.org
B.	**Writ Petition filed by The Chamber** The Chamber of Tax Consultants had filed the Writ Petition no OS WLP/2764/2015 on 22nd September, 2015 for Extension of filing of Return of Income for the year 2015-16. The petition was heard by Hon. Judges Shri M. S. Sanklecha and Shri G. S. Kulkarni. The Hon'ble court was pleased to allow our writ petition and directed the CBDT to extend the due date for filing the return to 31-10-2015.	The matter was represented by Dr. K. Shivaram, Sr. Advocate before the Bombay High Court	The Copy of the Order is available on our website www.ctconline.org and also printed in the Chamber Journal. For the month of October, 2015.
7.	**MEMBERSHIP & PUBLIC RELATIONS COMMITTEE**		
A.	**Half Day Seminar at Jalgaon** Jointly with Jalgaon Branch of WIRC of ICAI & Jalgaon District Tax Practitioners Association Venue: Jalgaon Branch of WIRC of ICAI, 10, Gajanan Colony, Near LIC Colony, Ring Road, Jalgaon – 425 001.	**10th October, 2015** Subject: 1. Important Issues in Business deduction under Sections 29 to 44 DD 2. Set off & Carry Forward of Losses 3. Brain Trust Session	 Mr. Rahul Hakani, Advocate CA Ashok Sharma Trustees: CA Ashok Sharma Mr. Rahul Hakani, Advocate

Sr. No.	Programme Name / Committee/Venue	Day & Date	
B.	**Self Awareness Series** (Only for SAS Members) Venue : CTC Conference Room, 3 Rewa Chamber, Ground Floor, 31, New Marine Lines, Mumbai 20.	**14th October, 2015** Subject : Experience Stress free life through Yoga and Meditation	Mr. Peter D'Souza
C.	**Full Day Seminar on Dhule** Venue : IMA Hall, Opp. Cumine Club, Dhule	**11th October, 2015** Subject :	
		1) a) Tax Planning for medical Professionals b) Financial and Tax Saving Planning for Medical Professional	CA Hitesh R. Shah
		2) Income Tax Planning for Builders and Developers	Eminent Faculty
		3) Buying and Selling of Immovable Properties and Drafting of Documents relating to Builders & Developers	Mr. Pravin Veera, Advocate
		4) Important issues in Business Deduction under Section 29 to 44 DD	Shri Rahul Hakani, Advocate
8.	**RESIDENTIAL REFRESHER COURSE & SKILL DEVELOPMENT COMMITTEE**		
	39th Residential Refresher Course Venue: Mercure Lavasa, Accor Group of Hotels, Lavasa & Lavasa International Convention Centre, Lavasa. (www.mercurelavasa.com, www.licc.in)	**18th February, 2016 to 21st February, 2016** Subject : 1. Go Live with Luminaries	Mr. Arvind Sonde, Advocate will Go Live with Mr. Y. P. Trivedi, Senior Advocate, Past President & Mr. S. E. Dastur, Senior Advocate & Past President

Sr. No.	Programme Name / Committee/Venue	Day & Date	
		2. Group Discussion	
		I. Select Case Studies – Moot Court Approach – Session to be conducted and concluding remarks	Mr. Hiro Rai, Advocate
		II. Unearned Income u/ss. 56(2)(vii), (viia), (viib) r.w.s Explanation to Section 68 and its related Valuation Principles.	CA Jagdish Punjabi
		III. Tax and Stamp Duty issues of Contemporary Business Forms – Joint Ventures, SPVS, Redevelopment Entities, Private Trusts and Unincorporated Entities	CA Anup Shah
		3. Presentation on The Critical Analysis and Issues in ICDS vis-à-vis Accounting Standards and Income Tax Act.	CA Yogesh Thar
		4. Brains' Trust : Direct Tax	CA Rajan Vora & Mr. Vipul Joshi, Advocate
9.	**STUDY CIRCLE & STUDY GROUP COMMITTEE**		
A.	**Study Group Meeting** (Only for SG Members) Venue: Babubhai Chinai Committee Room, IMC.	**21st October, 2015** Subject : Recent Judgments under Direct Taxes	CA Sanjay R. Parikh
B.	**Study Circle Meeting** (Only for SC members) Venue : Babubhai Chinai Committee Room, IMC.	**16th October, 2015** Subject : Recent issue in Taxation of Share Capital / Share Premium with reference to section 68 & 56(2)	CA Bhupendra Shah
C.	**Study Circle on International Taxation Meeting** (Only for SC on Int. Taxation Members)	**26th October, 2015** Subject: Non Discrimination under International Tax Law	CA Harshal Bhuta
10.	**DELHI CHAPTER**		

<table>
<tr><th>Sr. No.</th><th>Programme Name / Committee/Venue</th><th colspan="2">Day & Date</th><th></th></tr>
<tr><td></td><td>Full day Seminar on ‘Transfer Pricing – Recent Developments & Controversies, Royalty, Intra-group services, Cost Contribution Arrangement, Assessments, Domestic TP and Form 3CEB/Audit’
Venue : India International Centre, Lecture Room-I, Annexe Building, Dr. K. K. Birla Lane, Max Mueller Marg, Lodhi Estate, New Delhi – 110 003.</td><td colspan="2">10th October, 2015
Subject :
1) Key note address on developments & controversies on TP related Matters
2) Royalty and Intra-Group Services
3) Cost Contribution Arrangement
4) Transfer Pricing assessment related controversies
5) Transfer Pricing Study, Form 3CEB, Domestic Transfer Pricing</td><td>Mr. Vinod Wahi, Advocate, Former Member of Company Law Board / Retired CCIT-1, Delhi
Mr. Sandeep Puri, Partner, PwC.
Mr. Kapil Bhatnagar, Director – Transfer Pricing, PwC
Mr. Nishant Saini, Partner, KPMG
Mr. Gaurav Garg, MD, JGarg</td></tr>
<tr><td>11</td><td colspan="4">OTHER</td></tr>
<tr><td></td><td>Important Announcement – Taxcon 2015
Venue: Khimji Kunverji Vikamsey Auditorium, ICAI Towers, Gr. Floor, G Block, Next to Standard Chartered Bank, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051.</td><td colspan="2">27th & 28th November, 2015
The Theme :
Conflicts and Convergence in Tax Laws</td><td>The Faculty will be eminent personalities from the field of tax profession, industry and Government, other details will follow.</td></tr>
<tr><td>12.</td><td>Our beloved Past Presidents, Shri K. K. Ramani, Advocate, Shri P. C. Joshi, Advocate & CA Narayan Varma
Has completed 50 years of the professional journey with unparallel milestones and charting glorious path, a journey that immensely enriched the tax profession in general and the CTC in particular.
Venue : 4th Floor, Walchand Hirachand Hall, IMC.</td><td colspan="2">23rd October, 2015
To commensurate the glorious journey, we have organised a function to felicitation function and grace the occasion.</td><td>Invitation
President & Managing Council Members invites you to join us to this felicitation function and grace the occasion.</td></tr>
<tr><td>13.</td><td colspan="4">PUBLICATIONS FOR SALE</td></tr>
<tr><td>A.</td><td colspan="2">Transfer Pricing</td><td>` 1250/-</td><td>Edition 2014</td></tr>
<tr><td>B.</td><td colspan="2">Study Material of 9th Residential Conference on International Taxation held at Goa</td><td>` 600/-</td><td>Edition 2015</td></tr>
</table>

For Further details of the future events, kindly visit our website www.ctconline.org.



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.

CTC – DELHI CHAPTER

Half day Seminar on 'Black Money Law & Voluntary Compliance Window' and 'Recent Developments & Issues under Income tax for Builder/Developer/ Land owner / Flat purchaser / Seller' held on 12th September, 2015 at New Delhi.

Mr. R. P. Garg, Chairman welcoming the delegates. Seen from L to R: CA C. S. Mathur, CA Avinash Lalwani, President and Dr. Girish Ahuja, Speaker.

Dr. Girish Ahuja addressing the delegates.

Dr. Ravi Gupta addressing the delegates.

Panel discussion. Seen from L to R : CA Vijay Gupta, Hon. Jt. Secretary, Delhi Chapter, CA Suhit Aggarwal, Vice Chairman, Delhi Chapter, CA Avinash Lalwani, President, Dr. Girish Ahuja, Panellist, Dr. Ravi Gupta, Panellist and V. P. Verma, Advisor.

INTERNATIONAL TAXATION COMMITTEE

Transfer Pricing Study Circle on the subject "Recent Case Laws on Transfer Pricing and Impact of BEPS Transfer Pricing Action Points for Indian Companies" held on 16th September, 2015 at IMC.

CA Karishma Phatarphekar addressing the members

CA Anuradha Rathod addressing the members

Half Day Seminar at VAPI jointly with VAPI Branch of WIRC of ICAI held on 12th September, 2015 at Vapi Branch of WIRC of ICAI, Vapi.

CA Ashok Manghnani, Hon. Jt. Secretary and CA Hemant Parab, Chairman, Membership & Public Relations Committee, CTC inaugurating the seminar by lighting the lamp. Seen from L to R : CA Natwar Thakrar, Faculty, M. D. Prajapati, Chairman of Vapi Branch of WIRC of ICAI and CA Paresh Vakharia, Faculty

CA Paresh Vakharia addressing the delegates on the subject "Important issues under Tax Audit".

CA Natwar Thakrar addressing the delegates on the subject "Recent amendments and issues in TDS u/s. 195 including CA certificate F. No. 15CB".

STUDENT & IT CONNECT COMMITTEE

Lecture Meeting on E-Filing under Tax Audit and Tally as Audit Tool held on 10th September, 2015 at Dadar Club, Mumbai.

CA Avinash Lalwani, President delivering opening remarks to the delegates. Seen from L to R: CA Aalok Mehta, Vice Chairman, CA Parimal Parikh, Chairman and CA Avinash Ravani, Speaker.

CA Avinash Ravani addressing on the subject "E-Filing under Tax Audit".

CA Ashwin Dedhia addressing on the subject "Tally as Audit Tool".

CA Parimal Parikh, Chairman welcoming the faculties. Seen from L to R: CA Aalok Mehta, Vice Chairman, CA Avinash Ravani, Speaker and CA Avinash Lalwani, President.

Section of members

STUDY CIRCLE & STUDY GROUP COMMITTEE

Study Circle Meeting on the subject "Black Money Law with Special Reference to Voluntary Compliance Window" held on 11th September, 2015 at IMC.

CA Praful Poladia addressing the members.

MEMBERSHIP & PUBLIC RELATIONS COMMITTEE

Self Awareness Series on the subject "Effective Communication & Personality Development" held on 11th September, 2015 at Dadar Club, Mumbai.

Mr. Rohan Mehra addressing the members.

ALLIED LAWS COMMITTEE

Allied Laws Study Circle Meeting on the subject "Provisions of RTI" held on 9th September, 2015 at Kilachand Conference Room, IMC.

CA Narayan Varma, Past President Chairing the session

Mr. Bhaskar Prabhu addressing the members

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