

INDIRECT TAXES COMMITTEE

**Half Day Workshop on “Indirect Tax Provisions of Finance Bill - 2016”
jointly with WIRC of ICAI held on 12th March, 2016 at M. C. Ghia Hall, Fort**



CA Avinash Lalwani, President, CTC delivering opening speech. Seen from L to R : S/Shri CA Rajiv Luthia, Chairman, Indirect Taxes Committee, CTC, Vipin Jain, Advocate, Faculty, CA A. R. Krishnan, Faculty, Ms. Shruti Shah, Chairperson, WIRC of ICAI and CA Atul Mehta, Convenor, Indirect Taxes Committee, CTC.

CA Rajiv Luthia, Chairman, Indirect Taxes Committee, CTC welcoming the faculty and delegates. Seen from L to R : S/Shri CA Avinash Lalwani, President, CTC, Mr. Vipin Jain, Advocate, Faculty, Ms. Shruti Shah, Chairperson, WIRC of ICAI and CA Atul Mehta, Convenor, Indirect Taxes Committee, CTC.



CA Avinash Lalwani, President, CTC inaugurating the workshop by lighting the lamp. Seen from L to R: S/Shri CA Akhil Kedia & CA Narendra Soni, Convenors of Indirect Taxes Committee, CTC, Vipin Jain, Advocate, Faculty, CA Rajiv Luthia, Chairman, Indirect Taxes Committee, CTC and Ms. Shruti Shah, Chairperson, WIRC of ICAI.



Dignitaries at the inaugural session. Seen from L to R: S/Shri CA Omprakash D. Bihani, Member, CA Vikram Mehta, Vice Chairman, CA Akhil Kedia, Convenor, and CA Rajiv Luthia, Chairman of Indirect Taxes Committee, CTC, CA Avinash Lalwani, President, CTC, Vipin Jain, Advocate, Faculty, Ms. Shruti Shah, Chairperson, WIRC of ICAI, CA Atul Mehta & CA Narendra Soni, Convenors of Indirect Taxes Committee, CTC.



Mr. Vipin Jain, Advocate addressing the delegates.



CA A. R. Krishnan addressing the delegates.



Section of delegates.

C N T E N T S



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Editorial

As I am penning this editorial, the situation in the drought hit region of the State of Maharashtra is going from bad to worse. Since last several years, year after year our country, let us expand the geographical scope by saying South Asian subcontinent, is facing natural calamities one after another. In the year 2013, it was deluge which caused Himalayan floods at Kedarnath, floods in Jammu & Kashmir in the year 2014, earthquake in Nepal in the year 2015 and now this severe drought.

We as a Society should ask ourselves whether we are facing this as a result of our uncharitable conduct towards the nature? The Society which has inherited a great tradition of co-existence with nature and using natural resources without exploiting the same are facing one calamity after another, why? Is it not the right time to introspect and question ourselves whether we have gone wrong in aping the western model of development in last 100 years? Whether the disposable culture is causing stress in the Society, family and relationships? All these questions cannot be addressed through governance only or by governments. We as individual members of the Society have to become sensitive to our surroundings, nature and the Society. When an individual's duty towards the Society takes precedence over his personal rights and any effort or work done honestly and sincerely to benefit the nation, society and environment is charity.

Charity is a noble act and to do charity in organised manner to address the above problems makes the non-governmental organisations and non-profit organisations very important. These institutions play a pivotal role in spreading awareness and making the common man conscious of his role in preserving the environment. Though the Government pretends to be omnipotent and omniscient, but they are not. To do charity is noble but to manage charitable organisation in our country amongst a maze of statutes is neither easy nor charity. On the contrary, it is not possible to maintain charitable organisation without professional help. Considering these aspects, the Journal Committee of the Chamber of Tax Consultants is bringing out a Special Story on Charitable Trusts and Association – Law and Procedures in the present issue of Chamber's Journal. We want to bring a Special Story on taxation and other issues pertaining to charitable organisations in our future issues of the Chamber's Journal. I sincerely hope that this Special Story will be of assistance to the members.

I thank all the eminent professionals for contributing to the Special Story of this issue. I thank CA Vipin Batavia in providing active support for this issue right from the stage of its inception. I thank all the contributors of this issue for sparing their valuable time for the sake of Chamber's Journal.

K. Gopal
Editor



From the President

Dear Readers,

Greetings and Best Wishes for New Financial Year 2016-17.

“As soon as we react, we become slaves. A man blames me and I immediately react in the form of anger. A little vibration which he created made me slave. So we have to demonstrate our freedom”.

— Swami Vivekananda

I would like to start by sharing a Short Story of Beth Fryer – “JUST BE THERE”.

Once, many years ago, my mom was diagnosed with breast cancer and was scheduled for a mastectomy. That morning, I attended a college class in which the husband of a good friend was also a student. Most mornings we said hello to one another and that was about it. He would sit with his guy friends and I usually sat alone. When he entered class that morning, he came and sat next to me. He never mentioned my mom, never talked about the situation at all. He just sat next to me and chatted a bit. That was the day I learned that sometimes the kindest act is just to be there.....and I always remember this as one of the most touching acts of kindness I have ever received.

Current issue is on “Charitable Trust and Association”. I must compliment CA Vipin Batavia for creating a synopsis to provide excellent coverage to the Current subject of Charitable Trust and Association. I am sure it will be very useful to our members as a reference material while dealing with matters.

Committees’ updates

Union Budget 2016 – In the month of March, the Chamber had organised 6 events i.e., 1 Seminar and 3 Joint meetings and 2 workshops. (1) Delhi Chapter under Chairmanship of Advocate R.P. Garg on 3-3-2016 conducted a half day seminar (jointly with IFA) on the Budget – Registered Delegates 88. (2) Direct and Indirect Taxes Committee jointly under the Chairmanship of CA Ketan Vajani and CA Rajiv Luthia had organised - (a) 3-4-2016 – Public Meeting on Union Budget – jointly with Ghatkopar SC of WIRC and others (b) 5-3-2016 – Public Meeting on Direct and Indirect Taxes Provisions of Finance Bill, 2016 – Jointly with Maharashtra Chamber. (3) Corporate Committee under the Chairmanship of CA Paras Savla on 9-3-2016 organised a Public meeting on Impact of Budget Proposal on Capital Market and Industry (4) Indirect Taxes Committee, under the Chairmanship of CA Rajiv Luthia on 12-3-2016 organised a half day workshop (jointly with WIRC of ICAI) on Indirect tax provisions of Finance Bill, 2016 – Registered Delegates 129. (5) Direct Taxes Committee under Chairmanship of CA Ketan Vajani on 12-3-2016 organised a half day workshop (jointly with WIRC of ICAI) on direct tax provisions of Finance Bill, 2016 – Registered Delegates 121.

All the events on the Budget went very well and there was also a new beginning with an association with the Maharashtra Chamber. The event on 3-3-2016 got the highest attendance as compared to past years. At Delhi, CBDT Persons, (1) Rani Singh (2) V. Anandrajan have addressed issues related to the Budget 2016. My sincere compliments to all the Chairmen Paras Savla, R. P. Garg, Ketan Vajani, Rajiv Luthiya and their committee members for organising such good events for members and public at large.

Direct Taxes committee under the Chairmanship of CA Ketan Vajani had organised ISG Meeting on 8-3-2016 On Recent Judgments under direct tax. The speaker was Advocate Mandar Vaidya. It specifically dealt on analysis of the recent judgment in relation to the Union Budget 2016 Provisions. The Meeting went very well.

International Taxation Committee under the Chairmanship of CA Naresh Ajwani organised four events (1) 10-3-2016 – ISG on Finance Bill, 2016 Amendment Impacting Cross Border Transactions and Non-Resident – There were six speakers in this unique round Table Discussion which was held at CTC Conference hall. It was a very well designed ISG. (2) 16-3-2016 – FEMA Study Circle on Recent FEMA Updates. The Speaker was D.T. Khilnani, Advocate, a famous writer on FEMA. The Meeting went very well. (3) 18-3-2016 – Advance FEMA Conference – jointly with BCAS. It was superbly designed by CA Naresh Ajwani (CTC) and CA Gautam Nayak. The first half was dealt by RBI Officials. Executive Director Mr. B. P. Kanungo gave the keynote address. He explained the policy behind FEMA rules and how RBI/Government consider the issues. It is a constant endeavour to simplify the rules. It was followed by question-answer session. The second half was dealt by CA Shabbir Motorwala and Kumar Saurabh Singh, Advocate. They dealt with the subject and brought out the issues very well. We had to close the registration on 196. My sincere appreciation to both the chairmen of CTC, CA Naresh Ajwani and BCAS CA Gautam Nayak and their team. It is a regular joint event. A sangam of RBI and Professionals helps delegates to solve day-to-day problems faced by people. (4) On 4-4-2016 (Original date 28-3-2016) a Transfer Pricing Study Circle was organised with speaker CA Mehul K. Shah. A good discussion was held on the subject.

The Study Circle & Study Group Committee under the Chairmanship of CA Ashok Sharma has been organising fruitful meetings for members. You will find regular members attending from so many years. A young professional should come forward to learn analysis from recent case laws. During the month he had organised : (1) 14-3-2016 – Study Circle Meeting on Finance Bill, 2016, Direct tax provision. The Speaker was CA Praful Poladia. (2) 25-3-2016 – Study Group Meeting on Recent Judgments under Direct Tax. The Speaker was Advocate Ajay Singh. Both the meetings went very well.

Allied Laws Committee under chairmanship of CA Kamal Dhanuka had organised – 15-3-2016 – Study Circle meeting on Consumer Protection under the Competition Law. The Speaker was Mr. Surendra U. Kanstiya. It was organised on World Consumer Rights Day. The subject with case studies had given immense benefits to delegates who attended. I must appreciate his efforts and commitment towards committee activities.

Student and IT Connect Committee under the chairmanship of CA Parimal Parikh had organised two events – (1) 18-3-2016 – IT Connect Committee – Public Lecture Meeting on Protect Yourself from Cyber Frauds. The Speaker was Dr. Anupam Saraf. The discussion was held in respect of debit /credit card frauds and identity thefts. A very offbeat topic for tax professionals. In my view, it really helped delegates to know how to save ourselves to become a victim of cyber frauds. My sincere appreciation to Vice Chairman CA Dinesh Tejwani, Convenor CA Maitri Cheeda and

CA Mitesh Katira and Committee member Uday Shah (2) 21-3-2016 Student Committee – Lecture Meeting “On Statutory Audit of Bank Branches and Practical Issue” by CA Vipul Choksi Attendance was 70, Monthly Lecture meeting for students and members are showing great result, My dream to bring Young generation to Chamber is achieved. My heartiest congratulations to entire team of Student Committee Vice Chairman CA Aalok Mehta, Convenor CA Ashok Mehta and Bhavik R. Shah for coming forward for Student Committee events.

Membership and Public Relations Committee under the chairmanship of CA Hemant Parab had organised on 18-3-2016, a Public Lecture meeting on The Challenge of Change. The Speaker was Pujya Adarshjeevan Swami from BAPS Swaminarayan Mandir, Dadar. The speech’s conclusion was “Bhagwan ko mano” and “Bhagwan ka Mano” which Means (1) Rely on God and (2) Follow Rules by God and Vedas. In my view, by holding continuous meetings under SAS, a Dream of giving knowledge other than Law and Accounts of Our Past Presidents Advocate V. H. Patil and CA Bhavesh Vora are getting achieved. My sincere thanks to the entire team of Membership and Public Relations Committee.

Law and Representation Committee under the Chairmanship of Advocate Vipul Joshi had organised a Committee meeting on 16-3-2016. The Committee is preparing a Post Budget Memorandum for Union Budget 2016. Readers are requested to send suggestions for Union Budget 2016 to CTC office addressing to Chairman L&R Committee.

Research and Publication Committee under the chairmanship of Advocate Rahul Hakani has come out with the first e-book on Union Budget 2016. Rahul is doing wonders. An e-publication within 120 hours was targeted by his team and it has come out within 72 hours. The number of pages in the e-book are 215, Advisor 2, Editor 11 & Authors 39. I must appreciate the support of Advisor Dr. K. Shivaram and Past President Kishor Vanjara for this book. My sincere appreciation to Chairman Rahul Hakani Advocate, Vice Chairman Paras Savla Advocate and his entire team. of Research and Publication team members for amazing job and wonderful result. Till today his committee has come out with 2 successful publications. This e-book is available of free at Chamber's site, please visit www.office@ctconline.org – publication column.

The Chamber has organised Fourth Dastur Essay Competition for the Students pursuing Law and Accountancy in curriculum. Closed registration on 185 number, out of 185 registered students, 86 essays were received from different parts of country. In current year, response is highest for registration (185) as well as for Receipt (86) as compared to past years. My heartiest congratulations to Chairman CA Parimal Parikh, Vice Chairman CA Alok Mehta, Committee Member CA Kishor Joshi, Hon. Secretary of CTC, Advocate Ajay Singh and CTC staff for getting highest registration and Receipt of Essays during the year 2015-16.

April is month when vacation starts. Probably school exams would have been over and reader’s mood for vacation is setting in. My best wishes for summer vacation to all of you. Let me wish Good Luck to all the students appearing for IPCC and Final CA Exams which starting in May 2016.

For good team building, I would like to share three short stories of Suxy Kassem.

Happy Ending

An old man lived in the village. Everyone believed that he was among one of the most negative people in the world. The whole village was tired of him as he was always gloomy and constantly complaining. As time passed, he was becoming more and more vituperative with his poisonous

words. People started avoiding him as they believed that his negative mood was contagious. He seemed to be happy if he was the reason for someone's unhappiness. But one day, on his eightieth birthday, an incredible thing happened. Instantly, everyone heard the rumour that old man is happy today, that he is not complaining about anything and that he is smiling. The whole village gathered together. The villagers asked him, "What happened to you?" "Nothing special." he answered. Since the last eighty years, I have been chasing happiness which was dependent on others. And now I have finally understood that happiness comes from inside and I have learnt to enjoy life as it comes. I am happy now.

Mutual Benefit

There was one lonely tree growing among the hot sands of a dead desert. The sun mercilessly burnt its bark. But the tree kept on living in spite of this. One day, a hawk flew over the desert. The hawk saw the tree and sat on its branches. He looked around the desert and said, "You are a strange tree. Why do you keep on living among these dead hot sands? Who needs you?" "You", the tree answered. "Me?" the hawk was surprised. "I don't need you". "But if it wasn't for me", the tree said "you would have had to sit on the hot sand instead of on my branches. If not me, someone, seeing you sitting on the tree alone, would say nobody needs you too and would ask you what you live for." The hawk thought about it and had to agree with the tree.

Global Citizen – Unity is the Key

To become a true global citizen, one must abandon all notions of "otherness" and instead embrace "togetherness". The world is no longer white, black and brown. Through love, tribes have been intermixing colours to reveal a new rainbow world and as more time passes this racial and cultural blending will make it harder for humans to side with one race, nation or religion over another. Therefore, practical wisdom should be used to abandon any cultural, social, religious, tribal and national beliefs of alterity altogether. This is the only way mankind will truly evolve. Segregation is a word of the past. Unity is the key of a peaceful future.

I will end my communication with sharing the thoughts of Gian Kumar; the mind's capacity is limitless. If it remains in duality under ego, it is in the lower state of consciousness and in the highest state it merges with the witnessing self as supreme reality-in the form of God. This is the journey of existence in which we have to balance the physical through proper health, ego through attaining desires in righteousness, social through oneness and spiritual through meditation in mindfulness. It is all about being aware from one moment to the next.

As Swami Vivekananda said, "The moment I stand in reverence before every human being and see God in him – that moment I am free from bondage....."

I request Members and Readers to renew their membership and subscription for the year **2016-17**. **Renewal Notice** is already printed in the Newsletter or you can contact CTC office accounts dept.

I also request you to like the Chamber page on Social Media-Face book - "<https://m.facebook.com/ctcconnect>" so we can reach you faster. Help us serve better to society including all of you.

Jai Hind.

With personal regards,

Place : Mumbai
Date : 11th April, 2016


Avinash Lalwani
President



Chairman's Communication

Dear Readers,

The CBDT notifies the ITR forms well within the time as per the promises made before Delhi High Court last year. New ITR forms seek details of all movable & immovable assets in case where total income of an Individual/HUF exceeds ` 50 lakh. There will be challenges for the tax-payers to value their assets like jewellery, vehicles etc.

There is a growing awareness among the public about the potential role of Non-Profit organisation in development. It is necessary to critically analyse a legal and fiscal framework which allows voluntary Non-Profit organisation to come into existence without restraint and in a manner that is easy and inexpensive, to operate free of undue interferences and to have direct and indirect access to fund tax benefits. Charity is on the concurrent list of subjects where both the Centre and the States are competent to legislate. Accordingly, some of the laws are Central and are applicable to all over India, while others are enacted by individual States. The Registration of Society Act, 1860, the Income-tax Act, The Foreign Contribution Regulation Act (FCRA), Section 8 Companies as per Companies Act, 2013 are Central Acts. A variation of Indian Trusts Act, 1882, which applies only to Private Trusts, is in force in different States. Maharashtra and Gujarat have offices of the Charities Commissioners, created under Bombay Public Trust Act to oversee charities in these States. Tamil Nadu has department of religious and charitable endowments and other States have some similar organisation for charitable trust. There is a need to critically look at the exciting institutional framework, which administers charity law in India.

The special story for this month is on Charitable Trust – Law and Procedures and its an attempt to analyse the various institutional framework which better meet the aspiration of the non-profit sector. The topic is planned to be covered in two issues. The second part will cover the Taxation and FCRA procedures and issues relating to charitable trust. I am thankful to our past president CA Vipin Batavia for designing the structure of the special story. I thank the authors of this special story for giving their articles on time.

CA Haresh Kenia
Chairman – Journal Committee



CA Arvind Dalal



Concept of NPO and its way forward

1. What is NPO?

Non-Profit making organisation as against organisation which is making profit in performing its activities. It is not a charitable trust or institution and does not have charitable objects as per its constitution as defined in Income-tax Act. Thus, NPO is different from charitable trust. An NPO carries out its activities without making any profit. Thus, if it makes profit in the course of its activities, it cannot be called NPO. But NPO is prohibited from making profit by its constitution.

Then why an NPO should be formed? Most useful comparison can be made with charitable trust; (1) NPO will be performing its function without making any profit, charitable trust will be operating without any profit, but it can function while making reasonable surplus, without the surplus being its main object e.g. in case of *Surat Art Silk Cloth Manufacturers Association (1980) 121 ITR 1 (SC)* it was held that if it has made reasonable surplus, it does not cease to be charitable e.g. Supreme Court observed in case of *Surat Art Silk* that it need not function without any surplus

whatsoever as in that case, it will have to close down.

Considering the meaning of expression “activity for profit”, it held that it is not enough that as a matter of fact an activity results in profit; it must be carried on with the object of earning profit. If so, the purpose, though an object of general public utility, would cease to be charitable purpose, but where predominant object of activity is to carry out charitable purpose, and not to earn profit, it would not lose its character of charitable purpose, merely because some profit arises from activity. Illustrating this test, the Court held that if the Gandhi Peace Foundation, with object of general public utility publishes a monthly journal for carrying out its object and charges a small price, leaving a little profit, it would not change predominant object of charitable nature, but if pricing journal is on the same basis as a commercial organisation, leaving a large margin of profit, it can be held the activity is carried on for profit and is non-charitable.

2. In case of NPO, it will function without any profit, whereas in case of charitable trust it can earn reasonable profit as detailed in (1) above.
3. In case of charitable trust, they can make investment from its surplus funds and can have further income, an NPO cannot make investments as it can have no surplus funds from its operation.

Thus, essentially NPO functions without any profit, a charitable trust can have surplus from its activities.

The law governing NPO will have to provide that it can function within the four corners of not making any profit whereas the law governing charitable trust does not lay down any such blanket ban, permitting it to have reasonable profit or surplus, which can be invested or used for charitable objects.

Further, whereas a charitable trust can have corpus and receives further amount towards corpus, which can be invested and its income used for its object of charity or corpus can be used for capital expenditure, e.g., building for school or hospital, there is no concept of corpus in case of NPO.

The charitable trust will have to register u/s. 12A of I. T. Act, subject to it fulfilling conditions regarding charitable objects, in order to get exemption u/ss. 11, 12, the NPO can also be registered as an entity under Registration Act to get exemption from Income Tax.

What should be preferred between the two types of entities, an NPO or a charitable trust? If an organization is performing its function as a non-profit making organization, it can be an NPO, it can be registered u/s. 12A as charitable trust to have many provisions like investments as prescribed, accumulated surplus subject to certain conditions and deal with Trustees as per conditions laid down in section 11(2) and (3). Thus a trust has wider canvas to function compared to NPO.

Further an NPO can lose its status by functioning for profit, a charitable trust can forfeit its exemption by breach of several defaults under sections 11, 12 & 13.

Thus, concept of NPO is analysed as per paras (1), (2) and (3).



We are responsible for what we are, and whatever we wish ourselves to be, we have the power to make ourselves. If what we are now has been the result of our own past actions, it certainly follows that whatever we wish to be in future can be produced by our present actions; so we have to know how to act.

— *Swami Vivekananda*



CA Vipin Batavia



Formation of Charitable Trust

Introduction

It is the primary duty of the Government to provide needy people of our country the basic necessities of the life like Food, Shelter, Education, Medical facility, Social Security etc. But for various reasons the Government is not able to provide these basic needs to the poor masses of our country. It is their right to have it but, nevertheless; this short-coming is to some extent fulfilled by the voluntary organizations formed as Non-Government Organisations (NGOs) to run hospitals and medical centres, educational institutions, old age homes, mandals, associations etc.

Therefore for those who want to do charity and help others, it is necessary that they work in organized manner and within legal framework of the applicable laws. It is advisable that they form a charitable and/or religious trust to carry out their noble objectives of helping poor and needy people.

A public charitable or religious trust/institution or combination of both or NGO or NPO (Not for Profit Organisation), by whatever named called, can be formed by different modes as under:-

1. Charitable Trust

Registered with Charity Commissioner (C.C.) under Maharashtra Public Trust Act, 1950 (MPT Act) or under similar law of the relevant State of India.

A charitable trust being settled by a settler by transferring his property, movable or immovable or both, under an instrument of the trust known as trust deed and on the basis of that trust deed the trust is registered with Charity Commissioner under MPT Act by completing required procedure.

A charitable trust can be settled under a will. A will may contain either full instrument of trust or may not contain full instrument of the trust. In case where a trust is created under a will and not having full required instrument of trust, which is necessary for the functioning and management of the trust then in such a case an application for registration is required to be made with the C.C. and C.C. if satisfied will register the trust and formulate a scheme as per the provisions of law as applicable in that State in conformity with the will of the testator. The framing of such a scheme becomes a trust deed of the trust and accordingly the trust will function and managed.

2. Association/Trust

An association/trust may be registered under Societies Registration Act, 1860 coupled with, and compulsorily under MPT Act with the Charity Commissioner. It is necessary to file both the applications together. An association or institution, where there is no settler, in that case seven or more persons come together to form a charitable organisation and subscribe to Memorandum of Association and Rules and

Regulations. Accordingly it is to be registered under Society's Registration Act with the Charity Commissioner and along with that, in the process, it is to be registered as a Charitable Trust under MPT Act as well. The Charity Commissioner in such cases Acts in dual capacity as a Registrar of Society as well as a Charity Commissioner. In this case there will be two registration certificates.

3. As a company

Registered as a company u/s. 8 (Earlier u/s. 25 of Companies Act 1956) of the Companies Act -2013. Such company is formed with the intention to apply its profits, if any or other income for promoting its objects with no payment of dividend. Such company is known as non-profit company. It can be formed with or without share capital. All requirements for the formation of such a company is as per the Pvt. Ltd. company.

4. Non-trading corporation

A non-trading corporation can be registered under The Maharashtra Non-Trading Corporation Act, 1959. The registering authority for the non trading corporation is Registrar of Firms. The provisions for registration and functioning of the non trading corporation are somewhat similar to the provisions of Companies Act.

5. Waqf

A Charitable Trust registered under Waqf Act, 1995.

6. Gurudwara

Registered under Gurudwara Registration Act-1925.

The selection of the appropriate mode of registration will depend upon the purpose, objects and the intention of settler/author, for which the charitable trust is to be formed. There are certain restrictions provided to trusts registered under MPT Act which are not there in the Section 8 Company for example certain grants by State Govt. and others prefers registration under MPT Act. Another example is

that the NRI or Non Citizen cannot become trustee even prior permission is required for alienation of property and accepting loans under MPT Act but there are no such restrictions under the MPT act but there is no restriction under Section 8 Company. These are some of the examples and there are many more such reasons required to be considered before deciding the proper mode of the formation of a charitable trust. Therefore it requires a careful discussion with the settler before deciding proper mode.

There is a Bombay High court judgment issued way back in seventies that a trust formed under companies act is by passing the BPT Act therefore they should registered themselves with the Charity Commissioner before going to Income tax registration.

2. Types of instruments of trust

- a) Trust deed, where a trust is declared involves i.e., by settling property under trust.
- b) A will, where a trust is declared under a will;
- c) A memorandum of association along with rules and regulations, when the association/institution is being formed as a society under the Societies Registration Act, 1860.
- d) A Memorandum and Articles of Association where the association / institution is desired to be formed as a company

3. What is a trust?

A "Trust" is an obligation annexed to the ownership of property & arising out of a confidence reposed in and accepted by the owner or declared and accepted by him, for the benefit of others, or of another and the owner. A trust will have following characteristics.

- Settler/Author
- Trustee
- Beneficiaries

- Lawful Purpose
- Subject matter of trust i.e. Trust Property.
- Instrument of Trust

4. Requisites for creation of a trust

- i) There should be a founder / settler / author of the trust. There can be more than one founder/settler/author.
- ii) There should be person called trustee / trustees.
- iii) The settler and the persons accepting the trusteeship should be competent to contract.
- iv) There should be property of the trust which is settled by settler.
- v) The settler should be legal owner of the property which is being settled.
- vi) There should be a person capable to enforce that obligation.
- vii) The public charitable trust is to be settled for the benefit of general public at large i.e. the beneficiaries who cannot be ascertained.
- viii) The intention of the author or founder should be clear as to create a charitable trust.
- ix) There should be specific purpose & objects of the trust.
- x) Transfer of the property to the trustees.

5. Conditions for creation of a trust

- i) The settler has to give up ownership and all beneficial interests in the property.
- ii) The property should be clearly described and is identifiable.
- iii) The objects and the purpose for creation of trust should be clearly indicated.
- iv) Formal deed or any other writing not required – intention to create a trust may be shown through words. However, it is advisable to have a written trust deed for all practical purposes.
- v) The settler and the trustee must be a person who are competent to contract.

- vi) The trust property must be properly and legally transferable to the beneficiary for their benefit. It must not be a merely beneficial interest.

6. Who can form a Charitable or Religious Trust

As per section 7 of the Indian Trusts Act, a trust can be formed –

- a) By every person competent to contract, and
- b) By or on behalf of a minor, with the permission of a principal civil court of original jurisdiction.

But subject to in each case, to the law for the time being in force, as to the circumstances and extent in and to which the Author of the Trust may dispose of the trust property.

A person competent to contract is defined in section 11 of the Indian Contract Act as a person who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject. Thus, generally speaking, any person competent to contract and competent to deal with property can form a trust. Besides individuals, a body of individuals or an artificial person such as an association of persons, an institution, a limited company, a Hindu undivided family through its Karta, can also form a trust.

However, no trust can be created by an insane / lunatic person, neither under a will nor by a non-testamentary document.

7. Capacity to create a trust

As a general rule, any person, who has power of disposition over a property, can create a trust by transferring such property to the trustees.

According to section 7 of the Transfer of Property Act, 1882, a person who is competent to contract and entitled to transfer the property or authorized to dispose of transferable property which is not his own property, either wholly or in part and either absolutely or conditionally, is considered having 'power of disposition of property'.

Thus, two basic requirements are there for being capable of forming a trust –

- a) Power of disposition over property; and
- b) Competence to contract.

8. Competent to contract

A person is competent to contract if he is of the age of majority according to law to which he is subject and is of sound mind and is not disqualified from contracting by any law to which is subject (Sec. 11, Indian Contract Act, 1872)

According to Indian Majority Act, every person domiciled in India attains majority at the age of 18 years. However, a minor under the guardianship of a court of wards attains majority at the age of 21 years.

A person is said to be of sound mind for the purpose of making a contract, if at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

9. Author or settler of trust

The author or settler of trust is one of the essential elements in the formation of a trust. The person who settles certain property upon trust for the benefit of the beneficiary is known as the author or settler of the trust. As per section 3 of the Indian Trusts Act, the person who reposes or declares the confidence in another person (trustee), in some property for the benefits of beneficiary, is called the 'author' or 'settler' of the trust.

Where a trust is created under a will, the testator (The person who is executing the will is called 'testator') is the author of such trust.

The author is the creator of the trust; he gives birth to the trust. It is the author who parts with his property and transfers it to the trustee with a direction that the property be held upon trust and applied to the benefit of such persons or to such purposes, as the author intends.

10. Trustee

- i) As per section 3 of the Indian Trusts Act, a 'trustee' is a person who accepts the confidence reposed by the author, which

gives rise to an obligation annexed to the ownership property. No trust can come into existence unless the author transfers the trust property to the trustee (Sec. 6, Indian Trusts Act). Thus, a 'trustee' is the person in whom the trust property is vested and who promises to exercise control over it for the beneficial enjoyment of another.

The 'trustee' is one who while holding legal ownership and/or possession of, or dominion over, the subject-matter of the trust, is bound to allow the beneficial enjoyment or usufruct of the property to be reaped by another, called the *cestui que* trust or beneficiary. Thus, the word 'trustee' has been used in this section to mean a person in whom the trust property is vested.

In common parlance, however, the word "trustee" is used in a very wide sense so as to include any person who stands in a fiduciary relationship with another, such as the Manager or Mahant or Shebait of a religious endowment or the mutawalli of a Muslim wakf, strictly speaking they are not 'trustees'. All persons appointed as managers of a trust are also not trustees, though mostly trustees are entrusted with the management of the trust properties.

ii) Trustee *de son tort*

A person who is not appointed as trustee and who has no legal authority to act as such, but who assumes the management of trust property with notice of trust, is called trustee *de son tort*. Such a person is liable to account for such property as a trustee and he cannot escape his liability by saying that he is not a trustee. For instance, a person who assumes the control and management of the estate of an insane person, and receives its income and profit, he makes himself by construction a trustee *de son tort* (*Raja Pearey Mohan vs. Manohar AIR 1924 Cal. 160; Beharilal vs. Shiv Narain AIR 1924 A11. 884.*)

iii) *De facto* trustee

A person, who intermeddles with and assumes charge of trust-property without any authority of law, is called *de facto* trustee. Such a person has no authority to act as such, no locus standing to continue to be in *de facto* management.

iv) Number of trustees

There is no bar, neither under the general law nor under the Indian Trusts Act, as to the number of trustees. The author may appoint or the trust deed may prescribe any number of trustees.

The author also has power to lay down the minimum and/or maximum number of trustees that would hold office at a given point of time. The author may appoint only one trustee and authorise him to appoint the other trustees of his choice. The author may lay down the scheme of succession to the office of trustee, their appointment, retirement and removal under certain circumstances.

v) Appointment of a trustee

Trustees are normally appointed by the author of the trust, since it is the author who declares or reposes confidence in the trustee in respect of the trust property. The author appoints the first trustees normally in the instrument of trust itself or in the will, as the case may be. The author lays down the scheme of succession to the office of trustees, their retirement and removal, appointment of new trustees, etc.

The author may himself be the sole trustee. He may also be one of the several trustees, in which case the names and identity of other persons who have accepted to act as such should be clearly mentioned in the trust deed.

In case a trust is created under a will, the trustees should also be appointed therein. The executors of the will can also be appointed as trustees.

vi) What happens when no trustees appointed.

A trust shall not fail where no trustee have been appointed.

Whosoever holds the trust property at the time of declaration of trust, shall hold it in trust for the beneficiaries. Where the trustees disclaim the trust or refuse to act in trust, or desire to be discharged of trust obligations, the court has power to appoint new trustees (Sec. 73 of Indian Trust Act).

In case of a public trust, where no trustee has been appointed, the property shall vest either in the owner himself or the person holding the property in the capacity of a trustee.

11. Acceptance of trust & mode of acceptance

A trust comes into existence when the confidence reposed by the author is accepted by the trustee. A trustee may accept a trust by words e.g. by joining the trust deed or by making an express declaration to that effect, or by acts indicating with reasonable certainty such acceptance (Sec. 10, Indian Trusts Act.)

Acceptance of trust may be inferred by construction from the conduct of the trustee. Where a trustee with notice of trust has indulged in passive acquiescence for some years, he will be presumed to have accepted it, in the absence of any contrary evidence. Acceptance by acquiescence will be implied where a trustee brings an action concerning trust-property in his name, or where he deals with the trust-property in his name, or where he advertises for the sale of that property or gives notice to the tenants for collecting rent, as an owner of that property.

12. Disclaimer of Trust

No person who has been appointed as a trustee is bound to accept the trust. He has a right to disclaim the trust, before he has acted as a trustee. But, once he has acted as a trustee, it shall not be possible to disclaim it.

Where an intended trustee has exercised disclaimer, the trust property shall not vest in

him. Where only one of the co-trustees disclaims the trust, the trust property shall vest in the other co-trustees.

13. Lawful purpose

A trust is to be created for any lawful purpose. The purpose of a trust is lawful unless it is (a) forbidden by law, or (b) is of such a nature that, if permitted, it would defeat the provisions of any law, or (c) is fraudulent, or (d) involves or implies injury to the person or property of another, or (e) the Court regards it as immoral or opposed to public policy.

Every trust of which the purpose is unlawful is void. And where a trust is created for two purposes, of which one is lawful and the other unlawful, and the two purposes, cannot be separated, the whole trust is void.

Explanation – In this section, the expression “law” includes, where the trust property is immovable and situate in a foreign country, the law of such country.

Illustrations

- a) A bequeaths property to B in trust to employ it in carrying on a smuggling business, and out of the profits thereof to support A’s children. The trust is void.
- b) A, while during insolvent circumstances but just before he is declared insolvent transfers his property to B in trust for A during his life, and after his death for B. A is declared an insolvent, the trust for A is invalid as against his creditors.

14. Who can be a beneficiary

In a public trust the beneficiaries are a body of uncertain or fluctuating individuals and may consist of a class of the public or the general public at large which is unascertainable. A public trust is a perpetual in nature therefore there must be clarity about the beneficiaries. If the beneficiaries are some certain persons then it becomes a private trust.

15. Subject matter of trust

Any property capable of being transferred can be a subject matter of a trust.

Section 8 of the Indian Trust Act, however, provides that mere beneficial interest under a subsisting trust cannot be made the subject matter of another trust.

If properties are dedicated to temples and mosques or gifts are made with specific direction to any religious or charitable trusts they become and form part of the capital of the trust.

In the case of *J. K. Trust vs. CIT (1957) 32 ITR 535 (S. C.)*, the Supreme Court had held that the word “property” under the Trusts Act is of the widest important and a business undertaking will undoubtedly be a property so that a running business can be made a subject matter of trust. This view has been followed in the case of in *CIT vs. P. Krishna Warriar (1964) 53 ITR 176*.

16. Essential points for a valid Charitable or Religious Trust

There are four essential elements of a valid charitable or religious trust –

- i) **Charitable or Religious Object** : The object or purpose of the trust must be a valid religious or charitable purpose according to law ;
- ii) **Capacity to create Trust** : The founder or settler should be capable of creating a trust and dedicating his property to that trust;
- iii) **Certainty of Object and Dedication thereto**: The settler should indicate precisely the object of the trust and the property in respect of which it is made. The property should be dedicated to the trust and the owner must divest himself of the ownership of that property.
- iv) **Concurrence with the law** : The trust or its objects must not be opposed to the provisions of any law for the time being in force.





CA Gautam Shah



Drafting of Trust Deed and MOA and Rules and Regulations

Valid Trust Deed/Memorandum of Association (MOA) and Rules and Regulations (RR)

Before we dwell upon Valid Trust Deed and MOA-RR, we should first understand the meaning of Charitable Trust. The word charity is defined as under:

The word "charity" entered the English language through the Old French word "charité" which was derived from the Latin word "caritas". Originally in Latin the word caritas meant preciousness, dearness, high price. From this, in Christian theology, caritas became the standard Latin translation for the Greek word agape, meaning an unlimited loving-kindness to all others, such as the love of God. Agape was not primarily about good works and giving to the poor, although in English the word 'charity' has steadily acquired this as its primary meaning, wherein it was first used in Old French at least since the year 1200 A.D.

The SC has observed "The very concept of charity denotes altruistic thought and action. Its object must necessarily to benefit others rather than oneself. Its essence is selflessness." (*Sole Trustee, Loka Shikshana Trust vs. Commissioner of Income Tax, Mysore (1975) 101 ITR 0234*).

Trust is defined in section 3 of the Trust Act, 1882 as "an obligation annexed to the ownership

of property and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another or of another and the owner." In simple words it is a transfer of property by the owner to another for the benefit of a third person along with or without himself or a declaration by the owner, to hold the property not for himself but another.

MPT Act S. 2(13) – Public Trust means an express or constructive trust for either a public, religious or charitable purpose or both and includes a temple, a math, a wakf, church, synagogue, agiary or other place of public religious worship, a dharmada or any other religious or charitable endowment and a society formed either for a religious or charitable purpose or for both and registered under the Societies Registration Act, 1860

Means & includes

The words "means" & "includes" Definition is exhaustive as well as inclusive The word "means" restricts the meaning of the words "public trust to express or constructive trust for either public, religious or charitable purpose. The word "includes" is a word of extension and, therefore a temple, a math etc. are specified in the definition of public trust with the specific object of including them within the definition.

How a trust is created

A trust is created and comes into existence in three ways:

1. Trust by an act of person
2. By operation or fiction of law
3. By way of will

The following are the basic ingredients of a valid trust

- i. There must be an author or settler of the trust. The author or the settler refers to the person who sets aside certain property for the benefit of the beneficiaries
- ii. There must be a trustee. The trustees are the persons who shall manage the said property for the benefit of the beneficiaries as per the Trust Deed. The author himself may or may not become a trustee.
- iii. There must be a beneficiary or beneficiaries.
- iv. There must be clearly delineated trust property.
- v. The object of the Trust must be specific.
- vi. There must be a declaration of trust or trust deed.

Memorandum of Association and Rules and Regulations

Purpose for which a society can be formed,

- Any seven or more persons associated for any literary, scientific or charitable purpose, or for any such purpose, as is described in section 20 of The Societies Registration Act, 1860, which means it includes Charitable societies, the military orphan funds or societies established at the several presidencies of India, societies established for the promotion of science, literature, or the fine arts for instruction, the diffusion of useful knowledge, the diffusion of political education, the

foundation or maintenance of libraries or reading rooms for general use among the members or open to the public, or public museums and galleries of paintings and other works of art, collections of natural history, mechanical and philosophical inventions, instruments, or designs. Also it will include any society registered under the Public Societies Registration Act for any public or religious purpose and operating in the Hyderabad area of the State of Bombay at the commencement of the Societies Registration (Bombay Extension and Amendment) Act, 1958.

Following points to be considered while forming a Society

- The Emblems Act, 1950 prohibits the use of any name, emblems, official seal etc. as specified in the Act without previous permission of competent authority. It also prohibits the use of the name of national heroes and other names etc. mentioned in the Act. The Societies intending to seek registration are advised to consult this Act also before proposing the name etc. for registration.
- If the proposed name is identical with that by which any other society has been registered or resembles such name which is likely to deceive the public or the member of society, such name may be avoided. Names of all the registered Societies have been put on the website of Industries Department [industries.delhi.govt.nic.in] to enable the public and prospective applicants to check the availability of names.

Procedures for registering a Society under the Societies Registration Act, 1860.

- The name of the Society,
- The object of the Society,
- The names, addresses and occupations of the governors, council, directors,

committee, or other governing body to whom, by the rules of the society, the management of its affairs is entrusted, minimum 7 (seven) person is required.

- A copy of rules and regulations of the society, certified to be a correct copy by not less than three of the members of the governing body, shall be filed with the Memorandum of Association.
- Affidavit sworn by the Office bearers namely, either President or Secretary which shall be notarised and
- Proof of address of the office.

Legal requirement of the Trust Deed / Memorandum of Association and Rules and Regulations

The legal requirements for a Trust deed and MOA-RR are as under:

- a. Settler and Promoter members.
- b. Charitable purpose should be either religious or charitable. Both are not permitted.
- c. No profit motive.
- d. Should not be for the benefit of any specific caste, colour, community and creed.
- e. Not for the benefit of any trustees, Committee members and or their relatives as defined under the Act.
- f. Intention must be to do public charitable activities for people at large who are in need and by doing so the society will be benefited as a whole.
- g. It should be irrevocable. There is a saying “that once a trust always a trust”.
- h. The procedure for appointment of new trustees must be clearly specified.

- i. The minimum and maximum number of trustees must be specified.
- j. It must have a Winding up procedure, which must state clearly that in the event, if the Trustees desire to wind up the Trust then it must be amalgamated with an existing trust who has somewhat similar objects.
- k. A Trust can be created only by person capable of contracting, that is a minor cannot be a trustee nor a lunatic or a person with an unsound mind or a person convicted or person who has left India and will not return back.
- l. The Trust must be applicable in India only.
- m. The Trust must have a property either movable or immovable which must be transferred to the Trust and the Trustees should be capable of holding the same.

Who can be settler/trustee/members

Section 3 of the Indian Trust Act, 1882 defines, “the person who reposes or declares the confidence is called the author of the Trust”. The Supreme Court judgment in case of *Commissioner of Income Tax vs. Kamla Town Trust (1996) 217 ITR 0699*, it was held that, “Settler is one party to the trust who settles his property in Trust for the benefit of others who become beneficiaries and the legal ownership of the property is transferred to the trustees.”

Any person can be a settler. Even a Non Resident Indian can be a settler. The important criteria is that the settler must be capable of entering into the contract. The same is also applicable for Trustees and Members.

Settler or an Author is one who settles or creates the trust with his property for the benefit of others wherein the legal ownership is transferred to the trustees.

Trustee as defined u/s. 2(18) under the Maharashtra Public Trust Act, 1950 means a person in whom either alone or in association with other person, the trust property is vested and includes a manager.

A trustee must be capable of taking or holding the property of which the trust is declared; he should be competent to deal with the estate as required by the trust or as directed by the beneficiaries and should not be under any disability by nature or by law. In addition, it is desirable that he should be capable of applying judgment and have knowledge of administration and management, and that he should be amenable to the jurisdiction of the court which administers the trust.

Charitable objects (No profit motive)

Charitable objects are those which are for the benefit of people at large. The Charitable objects are Education, Medical, Relief of Poverty, Yoga and Advancement of any other objects for the benefit of people at large and which is without any profit motive.

Charitable purpose as defined u/s. 9 of Maharashtra Public Trust Act, 1950 is as under:

- A Charitable purpose includes –
 - i. Relief of poverty or distress;
 - ii. Education;
 - iii. Medical relief;
 - iv. Provision for facilities for recreation or other leisure time occupation (including assistance for such provision), if the facilities are provided in the interest of social welfare and public benefit, and
 - v. The advancement of any other object of general public utility, but does

not include a purpose which relate exclusively to religious teaching or worship.

The definition of purpose is very important in order to determine as to whether a particular trust is a public trust or a private trust.

Minimum and maximum number of Trustees/Members

Charitable Trust : The minimum number of Trustees is 2 (Two) and maximum no upper limit. It is suggested that you should have minimum 3 (Three) trustees as in the event of death or resignation of one of the trustees the trust continues with other two trustees.

For Societies: The minimum number of members required is 7 (Seven) and maximum no upper limit. It is suggested that you should have minimum 3 (Three) trustees as in the event of death or resignation of one of the trustees the trust continues with other two trustees.

Section 8 Companies: The minimum number of members is 2 (Two) and maximum no upper limit. It is suggested that you should have minimum 3 (Three) trustees as in the event of death or resignation of one of the trustees the trust continues with other two trustees.

Minimum required clauses

- ▶ Parties – Settlers and Trustees;
- ▶ Settlers Declaration:
- ▶ Corpus:
- ▶ Name & Address:
- ▶ Aims & Objects:
 - Main Objects
 - Secondary Objects

- Other Common Objects
 - Utilisation of the Trust Fund
- ▶ Maintenance of the book of account of the Trust
 - ▶ Bank Accounts
 - ▶ Investment of the Trust
 - ▶ Power of Trustees
 - ▶ Appointment of Secretaries, Treasurers, Supervisors, Teachers, Clerks and Other Workers, Employees and Servants
 - ▶ Appointment of an agent to transact a Business or an agent to transact a business on trustees personal behalf
 - ▶ Alteration, amendments & modifications of all the clauses in this trust deed
 - ▶ Liabilities of the Trustees
 - ▶ Appointment of a New Trustee
 - ▶ Quorum
 - ▶ Chairperson of the Trust
 - ▶ Duties of the Chairman
 - ▶ Indemnity
 - ▶ Saving Clause
 - ▶ Amalgamation Clause
 - ▶ Winding Clause
2. Benefit for the private group or to the relatives of the Trustees or members or to the Trustees / members.
 3. The objects should not be applicable out of India.
 4. Remuneration to the Trustees / members.
 5. There should not be any clause which would make the Trust revocable.

What care is to be taken for drafting Trust Deed / Memorandum of Association and Rules and Regulations:

1. Avoid cut paste policy.
2. Drafting of any document is an art, hence must be executed with lot of care and as per the requirement of the author or the settler.
3. Trust deed must be very lucid, simple and exhaustive, in short covering all the major important ingredients which will make a valid Trust deed.
4. Objects must be charitable and must be clearly defined.
5. As far as possible do not encourage or advise, Charitable Trust as a tax planning tool.
6. Must clearly mention that the trust is irrevocable.
7. Must clearly mention that no trustees/ members or their relatives are given any benefit from the trust.
8. Winding up procedure must be clearly defined.
9. No investments must be in the name of the Trustees/ members.
10. Bank account should be in the name of the Trust / Society only.

What nature of clauses should not be there ?

1. Business or Commercial objects clause.

MODEL TRUST DEED

DEED OF TRUST

THIS INDENTURE is made on this ____ day of _____, Two thousand and Fifteen between _____, aged about __ years, adult individual, residing at _____ (hereinafter called "the Settler") of the One part; and (1) _____, aged about __ years, adult individual, residing at _____ (2) _____ aged about ____ years, adult individual, residing at _____ (3) _____ aged about ____ year adult individual, residing at _____

all Indian Inhabitants (Hereinafter called the "Trustees") (Which expression shall unless inconsistent with or repugnant to the subject or context thereof include the survivor of them for the time being of these presents and the executors or executor or administrators or administrator of the last survivor of them) of the Other Part;

WHEREAS:

- (i) The Settlers are possessed of and otherwise well and sufficiently entitled to the sum of ` _____/-
- (ii) The Settlers and Trustees have agreed to become the first Trustees of these presents as testified by their being parties to and executing these present.
- (iii) The said sum of ` _____/- (_____ only) has in anticipation of these presents been already transferred, paid and handed over to the Trustees before the execution of these presents.

NOW THIS DECLARATION WITNESSETH AS FOLLOWS:-

1. SETTLOR'S DECLARATION

For effecting the said desire and in consideration of the premises the Settler/s doth hereby declare that they have prior to the execution of these presents paid, assigned handed over and transferred and they doth hereby confirm such payments, assignment handing over and transfer unto the Trustees of all that the said sums of ` _____/- (_____ only) AND all the estate right title and interest property and claim and demand whatsoever at law and in equity of the Settler/s of and in and to the said moneys and every part thereof TO HAVE AND TO HOLD RECEIVE AND TAKE all and singular the said moneys unto the Trustees forever upon the Trusts and with and subject to the powers, provisions, agreements and declarations hereinafter appearing and contained of and concerning the same.

2. CORPUS

The Trustees do hereby declare that they the Trustees shall hold and stand possessed of the said moneys (which are hereinafter for brevity's sake referred to as 'the Trust Fund') which expression shall also include cash and any other property and investments of any kind whatsoever into which the same or any part thereof might be converted, invested or varied from time to time or such as may be acquired by the Trustees or come to their hands by virtue of these presents or by operation of law or otherwise, howsoever in relation to these presents upon the trusts and with and subject to the powers, provisions, agreements and declarations hereinafter declared and contained of and concerning the same.

3. NAME & ADDRESS

4. OBJECT CLAUSE

Without prejudice to the generality of the foregoing objects or purposes but subject as aforesaid, it is declared that the Trustees shall apply the net income of the Trust, towards any one or more of the objects or purposes, expressed hereinbelow, (which according to taxation law be public charitable objects or purposes) to the exclusion of the other or others of them in such proportion and manner in all respects as the Trustees may in their absolute discretion think proper.

In case of any donation made to the Trust for any specific purpose or purposes mentioned herein, the Trustees would be entitled to appropriate and apply the said donation to the charitable purpose for which it would be made.

- (a) EDUCATIONAL OBJECTS
- (b) MEDICAL OBJECTS
- (c) RELIEF OF THE POOR
- (d) OTHER OBJECTS OF GENERAL PUBLIC UTILITY

5. NUMBER OF TRUSTEES

The number of Trustees shall never be less than 2 (Two) and more than 7 (Seven) at any time.

6. APPOINTMENT OF A NEW TRUSTEE

The new trustee will be appointed by a simple majority of continuing Trustees, if and when required.

7. POWER OF TRUSTEES

- a. It shall be lawful for the Trustees to pull down, renovate, rebuild, alter, adopt, improve and to develop or repair any immovable properties comprised in the Trust Fund or the income thereof as they think fit. The trustees shall also be entitled to enter into any agreements or covenants with the owners of or persons interested in any other properties and whether restrictive or otherwise and whether for the benefit of properties comprised in the Trust Fund or such other properties as they may in their absolute discretion think fit from time to time. The Trustees shall have the power to insure any premises comprised in the Trust Fund against loss by fire, lighting or civil commotion or other risks or losses as the Trustees may think proper from time to time but no liability shall attach on the Trustees or any of them by reason of any property remaining uninsured in any way. The Trustees shall also have the power after paying all rents, rates, taxes and other outgoings and to set aside out of the balance thereof from time to time such sums of moneys as the Trustees consider proper to meet the expenses of heavy repairs or by way of depreciation or sinking fund and to utilise the same and the income thereof for heavy repairs or for rebuilding or for reinstating immovable properties or erecting new buildings and in the meantime to invest the same in securities authorised by these presents. It shall also be lawful for the Trustees to permit any immovable property forming part of the Trust Fund to be held used and enjoyed for the purpose of museums, exhibitions, lectures, soirees, meetings etc., or for the purpose of any Scheme of Charity or other purpose of these presents. The Trustees may also allow the same or any part thereof to be occupied by such institutions and individuals under any such scheme free from payment of rent or on such terms as the Trustees may think fit.

- b. It shall be lawful for the Trustees at such time or times as they may in their absolute discretion think fit to sell by public auction or private contract or exchange or transfer or assign or grant lease or sub-lease for any term however long or otherwise dispose of all or any part of the Trust Fund including the immovable properties comprised therein and on such terms and conditions relating to title or otherwise in all respects as they may think proper and to buy rescind or vary any contract for sale, exchange, transfer, assignment, lease or other disposition and to resell the same or enter into a fresh contract for exchange, transfer, assignment, lease or other disposition without being answerable for any loss occasioned thereby any for such purpose to execute all necessary conveyances, deeds or exchange, other assurances and to pass, give and execute all necessary receipts releases and discharges for the consideration moneys or otherwise relating to the documents and assurances. All moneys arising from any such transfer or other assurances shall be deemed to be a part of the Trust Fund and shall be applicable accordingly.
- c. Subject to the provisions of this deed, the receipt of any one of the Trustees for the rent or other income of the Trust Fund or for any documents of title relating to any properties or securities comprised in the Trust Fund and the receipt of any two of the Trustees for any other moneys paid of subject to the provisions of clauses of this deed and on receipt of any two of the Trustees for any other income of the Trust Fund or for any documents of title relating to any properties or securities, papers or other documents shall be sufficient and shall effectually discharge the person or persons paying or giving or transferring the same from being bound to see to the application or being answerable for the loss misapplication or non-application thereof SUBJECT as aforesaid and to the above provisions the receipt of any two of the Trustees for and other moneys paid given or transferred to them shall effectually discharge the person or persons paying or giving or transferring the same from being bound to see the application or being answerable for the loss misapplication or non-application thereof.
- d. The Trustees or Trustee of these presents for the time being may reimburse herself or themselves and pay and discharge out of the funds or moneys in their hands all expenses incurred in or about the execution of the Trusts or the powers of these presents.
- e. The Trustees are at liberty to spend either the income or any part of the corpus of the Trust Funds for making payment under any one or more heads specified in clause 4 hereof, and shall be entitled to accumulate the unpaid income, if any, of the Trust funds at compound interest by investing the same and the resulting income thereof, if any, of the investments hereby authorised and may apply the accumulations of any preceding year or years in or towards any one or more of the objects specified in clause 4 hereof in the same manner as such accumulations might have been applied, as if they had accrued from the Trust Funds in the current year.
- f. It is hereby specifically agreed and declared that the trustees shall have power to borrow as loans and advances from such person or persons and on such terms as they mutually agree for the purpose of making any investments including the investment in the immovable properties and the trustees may agree to return or repay such loans and advances on such basis as they may deem it necessary.

8. LIABILITIES OF THE TRUSTEE/S

The Trustees shall respectfully be chargeable only for such moneys-stocks, securities as they shall respectively actually receive notwithstanding their respectively signing any receipt for the sake of

conformity and shall be answerable and accountable only for their own acts, receipts, neglects or defaults and not for those of each other nor for any banker, broker, auctioneer or other person with whom or into whose hands any Trust moneys or securities be deposited or come or for insufficiency in title or deficiency in value of any investments nor for any other loss unless the same shall happen through their own wilful default respectively and the Trustees may reimburse themselves or pay and discharge out of the Trust Funds and all expenses incurred by them and not herein before expressly provided for or directed to come out of the said income.

9. REMOVAL OF THE TRUSTEE/S

In case any of the Trustees for the time being of these presents shall become insolvent or shall be convicted for any criminal offence involving moral turpitude, then and in every such case it shall be lawful for the other Trustees to give notice to the Trustee so becoming insolvent or being convicted of any criminal offence involving moral turpitude at his/her last known place or places of abode in India intimating him or her that he or she is liable to be removed as Trustee of these presents and thereupon such Trustee shall cease to be a Trustee and the said TRUST FUND shall become vested in the surviving or continuing Trustees jointly with any new Trustee or Trustees who may be appointed under the provision in that behalf hereinafter contained or otherwise.

10. MAINTENANCE OF THE BOOKS OF ACCOUNT OF THE TRUST

The Board of Trustees shall keep, or cause to be kept, proper books of account of the receipts and payments, income and expenditure of the trust and the trust properties. The accounting year of the Trust shall be financial year ending 31st March every year. The accounts shall be audited by a qualified Chartered Accountant. The Trustee/s shall keep or cause to be kept a minute book of their proceedings.

11. BANK ACCOUNTS

The Trustees shall be entitled from time to time to open and maintain a Bank Account in the name of the Trust at such bank or banks as they may from time to time decides and may at any time pay or cause to be paid any moneys forming part of the Trust Fund or the Income to the credit of any such account or accounts and either by way of fixed deposit or current account or any other account. The operation of the bank account will be mutually agreed upon by the Trustees.

12. INVESTMENT OF THE TRUST FUND:

Subject to the provisions here-in-above the Trustees shall invest the Trust Fund in such a manner and in such assets as may be allowed by law including Bombay Public Trust Act, 1950 and Income-tax Act, 1961.

13. APPOINTMENT OF SECRETARIES, TREASURERS, SUPERVISORS, TEACHERS, CLERKS AND OTHER WORKERS, EMPLOYEES AND SERVANTS

The majority of the Trustees may from time to time appoint one or more secretaries, treasurers, supervisors, teachers, clerks and other workers and employees and servants on such terms as the Trustees may deem expedient and fix their remuneration. The Trustees shall also have power to maintain provident funds, gratuity funds, pensions and others for any employee and make rules and regulations regarding the payment thereof.

14. APPOINTMENT OF AN AGENT TO TRANSACT BUSINESS ON TRUSTEE'S PERSONAL BEHALF

The Trustees shall have the power at their uncontrolled discretion instead of acting personally to employ and pay any agent (including any Banks) to transact any business or to do any act whatsoever in relating to the Trust of these presents including the receipt and payment of moneys without being liable for loss and shall be entitled to be allowed and paid all charges and expenses incurred thereby.

15. DONATION

The Trustees may at any time invite and receive or without such invitation receive any voluntary grant or grants, contribution/s in cash or kind from all class of Trustees or any person/s or from institutions or Trustees or from any Member/s of the public or from Government, legacy or otherwise for all or any of the charitable objects mentioned above

16. NOTICE OF THE MEETING

Notice of every meeting of the Trustees shall be delivered or sent through the post, by courier or by e-mail to each Trustee at his address at least seven clear days before the date of the meeting, provided that in event of the Trustees framing regulations prescribing some other mode of giving notice, the notice shall be in accordance with such regulations.

17. MEETING OF BOARD OF TRUSTEES

The Trustees shall hold Board meetings at least four times in a financial year and also whenever necessary.

18. QUORUM

2/3rd of the Trustees shall form quorum of all the meetings held. In all cases of differences of opinion amongst the Trustees as to whether any particular act should be done or omitted to be done in the execution of the Trusts hereof or as the powers and authorities herein contained or as to the true intent and meaning of any of the clauses or in accordance with the opinion of the Settlor/s.

19. AMENDMENT OF TRUST DEED

The Trustees may with the permission of Charity Commissioner or another Competent authority in law, make amendments in the Trust deed by execution of such deeds or deed-polls, as may be expedient, so as to bring the provisions of the law for the time being in force, from time to time, relating to public charitable Trusts including compliance with any legitimate directions or requisitions of any authorities or officers which may be deemed expedient for carrying out the objectives of the Trust, PROVIDED ALWAYS that no changes shall be made by the Trustees which may result in the Trust ceasing to be a public Charitable Trust. The Amendment in the Trust Deed must also take into consideration the applicability of the relevant Income Tax provisions and after the trust deed is amended a certified copy must be submitted to the Income Tax department.

20. INDEMNITY:

Trustee/s shall not be personally liable for any action *bona fide* undertaken in exercise of their powers and duties as Trustee and they shall stand indemnified for any loss or damages to which they may be subject to this exercise.

21. SAVING CLAUSE

If any of the foregoing clauses relating to the powers, functions and other matters governing the Trust, is likely to be contrary or inconsistent with any provisions of law related to public Trusts or public charitable institutions entitled to exemptions or concessions under any tax laws, such powers will be treated as not forming part of these presents, so as to conform to the requirements of such laws.

22. WINDING UP

The Trust is irrevocable. But in the event of any circumstances in which it is decided to determine the Trust, the Trust liability after meeting all the liabilities shall be given and transferred to some other institution engaged in similar objects and functioning without profit and commercial motive and eligible for necessary exemption under the Income-tax Act, 1961.

23. AMALGAMATION CLAUSE

The Trustees may amalgamate this Trust and its properties with any Trust or institutions wholly or any of them, similar to these of this Trust provided they pass an unanimous resolution to that effect and sanction (if necessary) of the appropriate authority as may be required.

24. This Trust deed has been prepared, as per the rules and regulations laid down by the Maharashtra Public Trust Act, 1950 and the Income-tax Act, 1961.

Specimen format of Memorandum of Association and Rules and Regulations of Charitable Society

MEMORANDUM OF ASSOCIATION OF ----- CHARITABLE SOCIETY

1. Name of the Society

The name of the society shall be.....

2. Registered Office

Registered office of the society shall remain in the (Mention the state) and at present it is at the following address:

3. Aims and Objects

The aims and objects for which the society is established are as under:

- (a) Education
- (b) General Objects

4. Governing Body

The names, addresses, occupation and designation of the present members of the governing body to whom the management of the society is entrusted as required under the Societies Registration Act, 1860, is as follows:

S.No.	Name (full in capital)	Addresses	Occupation	Designation in the society
-------	---------------------------	-----------	------------	-------------------------------

- 1.
- 2. and so on

5. Desirous person

We the undersigned are desirous of forming a society namely “.....” under the Societies Registration Act, 1860 in pursuance of this Memorandum of Association of the Society.

S.No.	Name (full in capital)	Addresses	Occupation	Designation in the society
-------	---------------------------	-----------	------------	----------------------------

1

2

3 and so on.....

All the incomes, earnings, movable, immovable properties of the Society shall be utilized and applied towards the promotion of its aims and objects only as set forth in the Memorandum of Association and no profit on there of shall be paid or transferred directly or indirectly by way of dividends, bonus, profits or in any manner whatsoever to the present or past members of the Society or to any person claiming through anyone or more of the present or the past members. No member of the Society shall have any personal claim on any movable or immovable properties of the Society or make any profits, whatsoever, by virtue of his membership.

Attested the signatures from No. 1 to 7 (or more) Signatures of Two witnesses other than the members of the society with Addresses

Signature of the Attesting Officer (1) with Official Seal

Certified that this is the true (2) and correct copy of the Memorandum

Signatures of any three members of the Governing Body

President

Secretary

Treasurer

RULES AND REGULATIONS OF ----- CHARITABLE SOCIETY

1. NAME OF THE ASSOCIATION:

2. ADDRESS OF THE ASSOCIATION:

3. MEMBERSHIP:

a. The association membership fee shall be follows:-

i. Life Membership ` -----

ii. Annual Membership ` -----

iii. Monthly subscription ` -----

b. The admission fee for each member shall be ` ----- only.

c. Any person who has attained above the age of 18 years will be allowed to become a member of the association. All the members of the association is eligible to vote and contest to the Managing Committee in the General Body Meeting.

- d. If the subscription of the member is in arrears for more than three months without satisfactory explanation to the General Secretary, his/her name will be removed and the Executive Committee may reconsider his/her application for re-admission subject to all the arrears including the admission fee being paid. The termination of membership maybe on death, the member acting against the objects of the association, unsound mind and other reasons stated by Executive Committee.

4. INFORMATION REQUIRED BY THE MEMBERS

Any member of the Association may apply to the General Secretary for any information as may be required or any matter of the subjects or rules and regulations of the association.

5. GENERAL BODY AND OTHER MEETINGS

- a. The report of the Management of the previous years and the audited accounts for the present period and proceedings year shall be discussed and submitted for confirmation.
- b. A general body meeting of the association will be held annually during the month of -----.
- c. An Executive committee consisting of Members shall be elected in the general body meeting once in a year.
- d. An authorised officer bearer may call for a general body meeting for which 21 days notice shall be given to the members.
- e. The executive committee shall generally meet once a month for which notice of 7 days shall be given to the members by the General Secretary,
- f. Voting shall be conducted by show of hands or Secret Ballot.
- g. 21 days clear notice for the Annual General Body meeting and 21 days notice for a Special General Body Meeting shall be given.
- h. A special General Body Meeting shall be conveyed as per the provisions of the Societies Registration Act, 1860.

6. QUORUM

The quorum of the General body meeting shall be 1/3rd of the total membership of the Association.

7. ACCOUNTS

- a. Official year: - The official year of the Association shall be from 1st April to 31st March every year.
- b. The assets and liabilities and the balance sheet of the Association shall be laid before the Annual General Body Meeting for confirmation.
- c. Such a balance sheet and the List of Committee Members shall be filed with the Registrar of Societies as per the provisions of the Societies Registration Act, 1860.

8. AUDITOR

An auditor shall be appointed annually and the remuneration shall be fixed by the members in the Annual General Body meeting.

9. EXECUTIVE COMMITTEE

- a. To ensure and promote the primary aim and objectives of the academy.
- b. To publish Annual report/accounts.
- c. To operate funds and manage the property of the Association and to present the duly audited accounts at Annual General Body Meeting.
- d. To form regional centres wherever deemed fit/feasible.
- e. In the event of any office bearer laying down office for whatever reasons, the Managing Committee can co-opt any member consider suitable for the office for the remaining period of the tenure or till elections are held.
- f. To ensure that all monetary transactions are through objectives of the Association.
- g. May decide to expel a member of Managing Committee or a member of the association in case anyone is convicted or any criminal offence, or prove insanity or any member's action in contravention to the bye-laws.
- h. Managing Committee shall have power to appeal and raise funds and fulfil all formalities incumbent upon it.
- i. To accept from Government, Non-Government, Local bodies, organisations and individuals Grants, donations, Subscriptions or any property movable/immovable for furtherance of the objectives of the Association.
- j. At any meeting of the Executive Committee each member present will have one vote except the President who shall have in addition a casting vote. Voting may be by raising of hands or secret ballot.
- k. Executive Committee may appoint Committee, Sub-Committee with such powers as deemed fit by this body for the purpose that is commensurate with the objectives of the society. The Committee, Sub-Committee may co-opt persons who are members of the Association.
- l. Executive Committee may invite to their meetings not more than two specialists/experts who may be non-members of the Association whose presence with the deliberations is considered useful.
- m. Executive Committee shall arrange for the publication in any manner, documents as may be considered fit in the furtherance of its objectives.
- n. To retain, appoint, promote, dismiss any employees for managing and functioning of the Association and to regulate their terms and conditions of employment including remuneration.
- o. To make the rules and bye-laws and get approval.

10. Any vacancy that may arise in the Executive Committee may be filled in by the remaining committee members.
11. Any member of the Executive Committee being absent for three successive meetings without proper cause shall cease to be a member of the Executive Committee. However he/she is eligible to be re-elected.
12. The Executive Committee is to meet every month or earlier if there is any business to consider and General Secretary shall convene such meetings with 1/3rd quorum.
13. PROVISION:-

Provided that no amendments to the Memorandum of Association, rules and regulations of the association shall be made which may prove to be repugnant to the provisions of the Income-tax Act, 1961 as amended from time to time. Further any amendment carried out shall be forthwith reported to the Commissioner of Income Tax.

14. The Executive Committee in its meeting shall consider all the questions affecting business that may be of interest to the members of the Association and they shall inform and circulate any information which may be of use to the members.
15. There shall be maintenance of accounts of the Association. The accounts shall be duly audited by a Chartered Accountant. Every year the accounts shall be closed by 31st March every year.
16. The funds of the association shall be invested in the modes specified under the provisions of the Income-tax Act, 1961 as amended from time to time.
17. DISSOLUTION

In the event of dissolution or winding up of the Society the assets remaining as on the date of dissolution shall under no circumstances be distributed among the members of the Managing Committee/Governing Body but the same shall be transferred to another Charitable Society/ Association whose objects are similar to those of this Society and which enjoys recognition u/s 80G of the Income-tax Act, 1961 as amended from time to time.

18. The Association formed shall be irrevocable.
19. The benefits of the Association shall be open to all irrespective of the caste, creed or religion.
20. The funds and the income of the Association shall be solely utilised for the achievement of its objectives and no portion of its shall be utilised for payments to the members by way of profit, interest and dividends.
21. Alteration of amendment of the Memorandum of Association shall be made as per the provisions of the Societies Registration Act, 1860.
22. Change of Name, Rules and Regulations shall be made as per the provisions of the Societies Registration Act, 1860.
23. The working hours of the Association shall be from:-
Morning: 10.00 A.M. to Evening: 7.00 P.M.

24. For matters which have not been specified provided for therein above, the provisions of the Societies Registration Act, 1860 and the rules made there under shall apply.

25. EXECUTIVE POWERS OF THE COMMITTEE:

The administration and management of the Association shall vest in the Executive Committee consisting of 7 members including President, General Secretary of the association.

PRESIDENT

- a. He/She shall be in overall charge of the Association and the General Body meetings. All the policies and programmes shall be formulated and implemented only through him/her.
- b. He/She shall operate bank account jointly with the General Secretary.

GENERAL SECRETARY

- a. He/She shall call for all meetings of the General Body meeting as and when deemed necessary and the General Body meetings and the Special Body meeting as per the rules with the previous approval of the President and maintain the minutes book and record of all the proceedings of the meetings.
- b. He/She shall be the correspondent of the Association and shall be in-charge of the office with all the record of the Association.
- c. He/She shall be the custodian of all articles and belonging both movable and immovable of the Association.
- d. He/She shall operate bank account jointly with the President.

S.No.	Name (full in capital)	Addresses	Occupation	Designation in the society
1				
2				
3				
4				

Signatures of any three members of the Governing Body

President

Secretary

Treasurer



Take courage and work on. Patience and steady work – this is the only way.

— Swami Vivekananda



Nitin Kadam, *Advocate* & CA Vipin Batavia



The Maharashtra Public Trusts Act, 1950

The Maharashtra Public Trust Act- 1950 (MPT act) has been enacted for supervision, control, and guidance over public trust and trustees and to safeguard the interest of the beneficiaries and the public money.

1. Important Definitions

There are many definitions are prescribed in MPT act but we are covering certain important definitions in verbatim which will help the reader to understand certain provisions.

- i) "Hindu" includes Jain, Buddhist and Sikh.
- ii) "Instrument of trust" means the Trust deed and includes any scheme framed by a competent authority or any MOA and Rules and Regulations of a society .
- iii) Public Trust - means an express or constructive trust for either a public religious or charitable purpose or both and includes Temple, Math, Wakf, Church, Synagogue, Agiary place of public religious worship, Dharmada or any other endowment. AND a Society Registered under Societies Registration Act, 1860.
- iv) "Person having interest" includes –
 - a. in the case of a temple-all people who have right to worship.
 - b. in the case of a math, a disciple of

the math or a person of the religious persuasion to which the math belongs,

- c. in the case of wakf,
- d. in the case of a society any member of such society, and
- e. in the case of any other public trust, any trustee or beneficiary;
- v) "Public securities" means –
 - a) Securities of the Central Govt. or any State Govt.
 - b) Stocks, Debentures or Shares in railway or other companies, the interest or Dividend on which has been guaranteed by Central or any State Gov.
 - c) Debentures or other securities for money issued by or on behalf of any local authority in exercise of powers conferred by an Act of Central or State legislature.
 - d) A security expressly authorised by an order of State Govt. in this behalf.

Few Important Judgments on definitions

- i) Right to Information : Sec. 2(h) of the RTI Act.

The High Court held that the Public Charitable Trust is a Public Authority within the meaning of the Law. [*Shikshan Prakashan Mandal & Anr vs. The State Information Officer 2013 (1) AII MR 318 : 2012 BCI 349 : 2013 (1) Mh.L.J. 897.*]

The character of Public Trust can not taken away by the fact that control of its administration is vested in particular group of people. [*Mulla Gulam Ali Safiyabai Trust vs. Deelipkumar & Co., 2003 (11) SCC 772*]

- ii) "Court" – Whether office of Asst. Charity Comm, Dy. Charity Comm and Charity Commissioner are Courts.

- vii) Public or private Trust;

It was held by the High Court that these are Authorities constituted under the Act for the purpose of performing quasi-judicial functions. The definition of the Court given under S.2(4) of MPT Act where the above referred offices are not included. Hence, they are not Courts within the definition of the Act. [*Vithoba Balaji Ghodke vs. Balkrishan G. Bhalerao, AIR 1965 Bom. L.R. 31: 1957 Mh.L.J. 224*]

Supreme court in this case has given the test to be applied whether temple is public or private. [*Pratapsinghji vs. Dy C. C. , AIR 1987 SC 2064*]

- iii) Duties and powers of Mahant and Mathadipati.

- viii) Leelavati Hospital Case : Administration of Public Charitable Trust : Forgery, Misappropriation of Trust Funds : Non-registration of FIR.

Supreme court in this case has prescribed guidelines and explained the duties and powers of Mahant and Mathadhipati. [*Commissioner H.R.E. vs. L.T. Swamiar, AIR 1954 SC 282*]

The police were duty bound to register the FIR and to proceed with the investigation. The serious allegations of fabrication of record, criminal breach of Trust, fraud, criminal conspiracy etc. by no stretch of imagination can be passed off as a civil dispute. [*Mrs. Charu Kishor Mehta vs. State of Maharashtra & Anr, 2011 (1) AIR BOM R 518 : 2011 AII MR 173 (Cri) : 2011 (1) BOM .C.R. 758 (Cri) : 2011 (1) Mh.L.J. 508 (Cri)*]

- iv) Test to Determine Math or Temple

In this case the court has given the test to determined whether the organization is Math or temple. [*Charity Comm. Bombay vs. Administrator of Shringeri Math, AIR 1969 SC 566: 71 Bom.L.R. 678 SC*]

2. What is Charitable Purposes

I) Charitable purpose includes

- v) Hindu Religion and Charitable Purposes

Charitable purposes are defined in section 9 of the MPT Act. Whether a purpose is religious or not has to be decided from the religion to which the party belongs. [*Saraswathi Ammal vs. Raj Gopal Ammal, AIR 1953 SC 491*]

1. Relief of poverty or distress,
2. Education,
3. Medical relief,

(3A) Provision for facilities for recreation or other leisure time occupation, if the facilities are provided in the interest of social welfare and public benefit, and)

4. The advancement of any other object of general public utility, but does not include a purpose which relates :-

- vi) Administration of Trust Controlled by Group of Persons :

Exclusively to religious teaching or worship.

The aforesaid definition of charitable purpose is some what similar to Income tax act except certain more activities are added in I.T. act from time to time.

The requirements of the facilities are provided in the interest of social welfare shall not be treated as satisfied,

- a) Unless the facilities are provided for improving the condition of the public,
- b) Either those persons have need of such facilities as aforesaid by reason of their youth, age, infirmity or disablement, poverty, or social and economic circumstances, or available for public at large.

Few important judgments on Charitable objects

- i) Political purpose not a Charitable purpose :

Trust to advance political purpose : Invalid [The Bombay High Court in *Subbas Chandra Bose vs. Gordhandas P. Patel*, AIR 1940 Bom 76.]

- ii) Object of General Public Utility

- a) The expression ‘object of general public utility’ is not restricted to objects beneficial to the whole of mankind. An object beneficial to a section of the public is an object of general public utility. It is sufficient to the intention is to benefit a section of the public as distinguished for specified individual. [*CIT vs. Andhra Chamber of Commerce*, (1965) 1 SC -565.]

- b) The Supreme Court held that the Ahmedabad Rana Caste constituted a section of a public and there was no element of personal nature among the members. [*Ahmedabad Rana Caste Association vs. CIT*, AIR 1972 SC 273: (1971) 82 ITR 704]

- iii) Where the dominant purpose of a trust is charitable and the other incidental or ancillary object is non charitable, the trust would be valid as Charitable trust. [*CIT vs. East India Industries*, AIR 1967 SC 1281]

3. Registration of Public Trust

It shall be the duty of the trustee of a public trust to make an application for the registration of the public trust within 3 months from the creation of the Trust.

The date of the creation of the trust is the date on which the trust deed is executed and not the date on which the trust is registered.

The application is to be made in form Schedule – II, duly Notarised and affixed Court fee stamp of ` 100/- and accompanied with copy of Trust Deed, Affidavit by the applicant, Consent letters of the trustees, Address proof and NOC for the use of the address, List of Trustees and their photo identity.

The ACC (includes Dy. CC) may order for the public Notice . The notice period is 30 days.

After the expiry of the notice period if no objection from the public is received then ACC makes inquiry under section 19 and after satisfaction passes an order for registration and if any objection is received then the objection is to be cleared first before registration. then he will decide whether to grant or make the entry in Schedule –I maintained u/s 17.

In case if the trust is having immovable property a memorandum of particulars of the property is to be filed in form schedule II-A along with appx value or cost , property documents and all concern papers.

Few important judgments on registration

- i) Registration of Trust – The trust cannot be deemed to be registered on the date of application but registration takes effect on the passing of the order. [*Chhatrapati Charitable Devasthan Trust vs. Parisa Appa*

Bhosale, 1979 Mah. L. J. 163 : AIR 1979 Bom. 218]

- ii) Section 18 of the Act provides for registration of public trusts and makes it the duty of the trustees of a public trust to which the Act applies to make an application for the registration of the public trust. [*Charity Commissioner vs. Administrator Shrinrgiri Math, (1969) 71 Bom. LR 678 : (1969) 1SCRW 993 : 1969 Mh. L.J. 588 : AIR 1969 SC 566 : (1969) 1 SCJ 906 (SC) : Keki Pastonji vs. Rodabai, (1971) 74 Bom LR 198 (FB)*].
- iii) The Bombay High Court held that Shrinegiri Math which is a primary and main institution situated in Mysore territory, is not liable to be registered under this Act, although some portion of the properties (three properties) are situated at Nashik within the jurisdiction of Asst. Charity Commissioner, Poona. [*Abhinava Vidya Tirth vs. Charity Commissioner, 65 Bom. LR 457 : AIR 1967 Bom. 194*].
- iv) Math once found to be private cannot subsequently become public unless there is clear dedication of math for public. [*Hari Bhanu Maharaj of Baroda vs. Charity Commissioner, 1987 MAh. L.R. 106 (SC)*]
- v) Property of Public Trust :
Once the finding has become final : Agitating against the same not proper. [*Trustees of Hareshwar Mahadev Trust vs. Shri Javantsinghji, Audichya Brahman Boarding Vidyarthi Bhavan, 1998 (1) GLR 434 : 1998 (1) GLH 127 : 1998 (1) GCD 384 (Guj.)*].

the ACC shall make an inquiry in the prescribed manner for the purpose of ascertaining:

- i) whether a trust exists and whether such trust is a public trust,
- ii) whether any property is the property of such trust,
- iii) whether the whole or any substantial portion of the subject matter of the trust is situate within his jurisdiction,
- iv) the names and addresses of the trustees and manager of such trust,
- v) the mode of succession to the office of the trustee of such trust, and minimum and maximum number of the trustees,
- vi) the origin, nature and object of such trust,
- vii) the amount of gross average annual income and expenditure of such trust, and any other particulars as may be prescribed under subsection 5 of section 18.

Few important judgements on Registration

- i) Whether a trust exists and such trust is a public trust, be decided as a preliminary issue. [*Charity Commissioner Circular No. 65 dt. 27-2-1954*]
- ii) Burden of Proof
The onus proving the public character of temple would rest on the parties alleging that the trust properties held for the public purpose.
[*Ramasarandas vs. Jairamdas, AIR 1943 Pat 135*]
- iii) Beneficial Interest and Public trust : Distinction

4. Inquiry Procedure for Registration of Public Trust

On the receipt of an application by the trustee or an application made by any person having interest in a public trust or on his own motion,

Public interest is vested in case of an Public Trust in an uncertain, fluctuating body of persons and the trust has status of permanency. If the section of public or caste is uncertain or fluctuating that does

not mean that trust is not a public trust. *[Deokinanadan vs. Murlidhar, AIR 1957 SC 133]*

iv) Issuance of Public Notice

When property is not public trust, the Bombay High Court held that public notice once issued no necessity of individual notice to the parties. *[Lady Soonoo Jamsedji vs. Jamsedji Ebulji Dastoor, 1996 (4) All MR 556.]*

v) Dispute regarding Title of Trust Property.

The question of title to the Trust Property is outside the scope of inquiry by A C C. *[Shree Hanuman Mandir, Alibag, Public Trust through its Trustees & Ors vs. Satishchandra Bhalchandra Gurjar & Ors, 2013 (2) AIR BOM R 1186 : 2013 (3) Mh.L.J. 83.]*

5. Entries in Register

The entries recorded in the registers maintained by the office of the C.C. are final and conclusive and it can be used as proof in the proceedings.

6. Filling of Change report (CR)

Sec. 22 – This section casts a duty on the trustee to report a change in the entries made in schedule I, within 90 days from the date of occurrence of the change maintained as per section 21. If there is a delay then application for delay condonation is required to be filed along with change report. Change report is required to be submitted in prescribed format Schedule – III by affixing 100 stamps and notarized.

Few important judgements on CR

i) In-fight amongst Trustees :

Where a question is required to be decided or dealt with by an Officer or Authority under the MPT Act and in respect on which his determination has been made final and conclusive, the procedure envisaged on an Originating Summons would be subject to the bar created by Sec.

80. *[Lilavati Hospital Trust – Charu K. Mehta vs. Lilavati Kiritlal Mehta Medical Trust & Ors, 2013 (3) All MR 206 (DB) : 2013 (1) Bom.C.R. 23 (DB) : 2012 (114) Bom.L.R. 3925 (DB) : 2013 (3) Mh.L.J. 269 (DB)]*

ii) Misappropriation of Funds : Removal of Trustees : Change Report

The Application was filed by an permanent Trustee u/s. 41-D seeking removal of some of the Trustees for misappropriation of funds of the Trust. Where Application u/s. 41-D is restricted to some of the Trustees and against whom serious charges are framed, then it is not open to the Joint Charity Commissioner to restrain the remaining Trustees from functioning as Trustees without giving an opportunity of hearing to those Trustees. The Order restraining all Trustees from functioning as Trustees passed contrary to prior the provisions of natural justice. *[Lilavati Hospital Trust - Vijay K. Mehta & Anr vs. Chahru K. Mehta & Ors, 2008 (7) Bom.L.R. 2344.]*

iii) Filling of change report, late, condonation of delay :

The period of filing the change report within a time period of 90 days is not merely directive but mandatory. Through there is no specific provision for condonation of delay in the MPT Act and Rules the High Court held that Authorities before whom such change report is filed can consider the issue of condonation of delay in the interest of the trust. *[V. J. Vahane vs. Kamlesh G. Kanoje, 1997 (2) Mh.L.J. 158: (1998) 100 (1) Bom. L.R. 486.]*

iv) Resignation of Trustees : Whether Charity Commissioner is empowered to accept resignation he is not empowered to accept the resignation of trustees. It is only the Managing Committee or Board of Trustees can accept such resignation. *[Gajanan N. Patil vs. Chagan D. Patil, 1984 (2) Bom. C.R. 87.]*

- v) Election of Trustees : Delay of 20 years in filing Change Report
- The delay was condoned without there being any evidence. The Orders set aside and the enquiry remitted back to the Assistant Charity Commissioner. [*Rajkumar s/o. Pundlikrao Zape & Ors vs. Shantaram Amrutrao Waghmare & Ors, 2008 (4) AII MR 747 (NB) : 2008 (3) AIR BOM R 801 (NB) : 2008 (3) Mh.L.J. 209 (NB).*]
- vi) Non-registered Trust :
- Section is not applicable since it is not registered under the Act 1950. [*Mrs. Jankibai P. Brijlal Seksaria vs. Kasinath R. Kelkar, AIR 1972 Bom. 199: 73 Bom. LR 729*]
- vii) Change in the Constitution of the Trust :
- The change in the Constitution of the Trust takes place on the date of adoption of Resolution. However, whether the Trustee ceased to be a Trust is to be determined by the Civil Court after taking into consideration all aspect of the issue. [*Vijay Raghuram Shetty vs. Baun Foundation Trust & Ors, 2011 Mh.L.J. 711.*]
- 7. Budget, Accounts and Audit**
- a) Trustees of certain trusts to submit budget to Charity Commissioner . Budget is to be filed in Sch-VII-A for the next year before the end of February.The budget is to be filed, by February end for the next year ,if annual income exceeds ` 5,000/- in case of public religious trust and ` 10,000/- in case of other trust.
- b) Maintenance of accounts.
- 1) Every trustee of a public trust shall keep regular accounts.
 - 2) Such accounts shall be kept in such form as may be approved by the Charity Commissioner and shall contain such particulars as may be prescribed.
- c) Balancing and auditing of accounts.
- 1) The accounts kept under section 32 shall be balanced each year on the Thirty first day of March .
 - 2) The accounts shall be audited annually by a C.A. or by such persons as the State Government may authorize and no such person is in any way interested in, or connected with, the public trust within 6 months from the close of the accounting year.
 - 3) Every auditor shall have access to the accounts and to all books, vouchers, other documents and records in the possession.
 - 4) Notwithstanding anything contained in the preceding subsections—
 - i) The Charity Commissioner may direct a special audit of the accounts of any public Trust
 - ii) State Government may, by general or special order, exempt any public trust or class of trusts from audit.
- d) Auditor's duty to prepare Balance sheet and to report irregularities, etc.
- It shall be the duty of every auditor auditing the accounts of a public trust to prepare a balance sheet and income and expenditure account and to forward it along with a copy of his report to the trustee and to the office of the Charity Commissioner.
- The auditor shall in his report specify all cases of irregular, illegal or improper expenditure, or failure or omission to recover moneys or other property belonging to the public trust or of loss or waste of money or other property thereof and state whether such expenditure, failure, omission, loss or waste was caused in

consequence of breach of trust, or misapplication or any other misconduct on the part of the trustees, or any other person.

8. Power, duties, restrictions on trustees and investments of public trust money

Where the trust property consist of money and cannot be applied immediately for the object of the trust the trustees shall bound to invest in the authorised mode.

The trust cannot give loan out of the trust fund unless it is for the objects of the trust duly mentioned in the trust deed for example educational loan given without interest.

Authorised Modes :

- a) Scheduled Bank as defined by Reserve Bank of India Act, 1934.
- b) Postal Saving Bank
- c) Co-operative bank approved by the State Government and
- d) Public Securities
 - 1) The CC may by General or Special order permit the trustees of public trust are classes of such trust to invest money in any other manner. Investments in Mutual Funds are declared under this clause.
 - 2) The trustees shall be bound to invest money in approved securities notwithstanding any direction contained in the instrument of trust. Investment in purchase of immovable property for the furtherance of the object of the trust is permitted but money invested in purchase of property to earned income is not an investment authorised hence permission from CC is necessary.

3) One of the CC circular provides that investment made pursuant to such order should not exceed 50% of total investments.

4) When trustees have violated the conditions of permitted investments they are liable for compound interest for the money loss.

9. Prior sanction to be obtained before alienation of any immovable property belonging to public trust

Notwithstanding anything contained in the instrument of trust : –

- (a) No sale, exchange or gift of any immovable property, and
- (b) No lease for a period exceeding ten years in the case of agricultural

land or for a period exceeding three years in the case of non agricultural land or a building belonging to a public trust, shall not be valid without the previous sanction of the Charity Commissioner.

The registrar of assurance will not registered such documents without the permission from CC.

Before making application the trust has to follow the prescribed procedure and there after the application is to be made for permission. Which requires Valuation , calling of bids, proper meetings to decide the buyer and execute agreement for sale. Reasonable earnest money deposit can be taken from the prospective buyer. The most important is to prove the compiling necessity for sale of the property.

Few important judgements on Alienation of Property

- 1) Property of Charitable Trust : Alienation or disposal.

- Permission was granted earlier but it was remained incomplete. Then the trustees made agreements with the petitioner with the high rate. ACC rejected the first application due to flip-flop. The court directed to ACC to decide to whom the property to be sold. The S. C. considered all the aspects and upholds the order of the High Court. [*Bhaskar Laxman Jadhav & Ors vs. Karamveer Kakasaheb Wagh Education Society & Ors*, 2013 AIR (SC) 523 : 2013 AIR (SCW) 34 : 2012 (12) Scale 87 : 2013 (2) AIR (Bom) R 117 (SC) 2013 (1) Bom.C.R. 508 (SC)]
- 2) Scope of Powers of CC for Grant of Sanction :
Alienation of Public Trust Property : Acceptance of Advance Money cannot be passed provisions of Prior Sanction. [*Suburban Education Society & Anr. vs. Charity Commissioner of Maharashtra State & Ors.*, 2004 (2) AII MR 575, 2004 (2) Mh.L.J. 792].
 - 3) Development of Trust Property : Development Agreement : No Post facto sanction. There is no power in the Charity Commissioner to accord sanction after the transaction and validate it by the so called ex-post-facto sanction. [*Central Hindu Military Social Education Society vs. Joint Charity Commissioner, Nashik & Anr*, 2009 (1) AIR BOM R 422 : 2009 (3) AII MR 242 : 2009 (2) Bom.C.R. 499.]
 - 4) Existence of compelling necessities :
The Building of the Trust are very old and considering the age of the Buildings a substantial amount is required to be spent for maintaining those. The Trust Property not fetching any positive income. Finding of the C C about compiling necessity upheld. [*Siddhivinayak Construction Pvt. Ltd. & Anr vs. Vikas Motiram Desai & Ors.*, 2012 (4) AIR BOM R 769 : 2012 (4) AII MR 70 : 2012 (114) Bom.L.R. 1461 : 2012 (4) Mh.L.J. 913.]
 - 5) Power of Charity Commissioner : Alienation of Trust Property : Rule 24 of The BPT Rules, 1950.
The Joint Charity Commissioner was justified in refusing to grant sanction u/s 36(1) on the ground that the Trust has failed to establish the genuine need. [*Tema Public Charitable Trust vs. JCC & Ors*. 2010 (112) Bom. L. R. 3283 (AB).]
 - 6) The CC may revoked sanction given on the ground that such sanction was obtained by fraud or misrepresentation or concealment of material at vitiating sanction granted. The sanction granted merges into the sale deed executed. [*1991 1 Bom CR 1 Mrs. Fatambai vs. State of Maharashtra following 1989 Mh. LJ 269 (DB).*]
 - 7) Sanction by Civil Court
Where a trust deed does not authorize trustees to alienate. Civil Court has no jurisdiction to grant sanction for the sale of the Trust Property. [*Charity Commissioner, State of Maharashtra Bombay vs. Shantidevi & ors*. 1989 Mah LJ 1048]
 - 8) Trustees empowered to sell the trust property under instrument, yet prior permission mandatory. [*Charity Commissioner, Mah. V. Shantilal Chaganlal Foundation Trust, Lalchand C. Jain*, 1989 Mh.L.J. 1048: 1990 (42) Bom. L.R. 102]
 - 9) Appeal against Order of CC for refusal to grant approval of alienation.
There is no specific provision in the Act for preferring Appeal against the order. [*Chandrabhan C. Gour vs. Dr. Shrawnkumar K. Gour*, AIR 1980 Bom. 48].
 - 10) Sale of Transferable Development Rights (TDR)
Benefit arising from the land is immovable property. TDR is a benefit arising out of land, the same would be immovable

property and an Agreement for use of TDR can be specifically enforced. The Order of the Charity Commissioner that no permission u/s 36 is required as TDR is a movable property cannot be sustained. [*Sadoday Builders Private Ltd. & Anr vs. Joint Charity Commissioner, Nagpur & Ors, 2011 (6) Bm.C.R. 42 (NB) : 2011 (2) BCJ 353 (NB)*]

10. Prior permission before raising loan or borrowing money on behalf of the public trust

No trustee shall borrow moneys (whether by way of mortgage or otherwise) for the purpose of or on behalf of the trust of which he is a trustee, except with the previous permission of the Charity Commissioner.

There is no provision in the Act for post facto permission to be granted for borrowings. No trustee shall borrow money for his own use from any property of the public trust of which he is a trustee.

11. Register of moveable and immovable properties

A public trust shall prepare and maintain a register of all moveable and immovable properties (not being property of a trifling value) of such trust in such form or forms giving all such information as may be prescribed by the Charity Commissioner.

12. Power of inspection and supervision

The C C and ACC or any outhorised person ,to enter on and inspect or cause to be entered on and inspected any property belonging to a public trust.

13. Power of CC to issue directions for proper administration of the trust

The Charity Commissioner has power to issue directions to any trustee of a public trust or

any person connected therewith for proper management of the trust and it shall be the duty of every trustee or of such person to comply with the directions of the C C.

14) Power of Charity Commissioner and State Government to issue directions in respect of hospitals, etc. to earmark certain beds etc. for poor patients to be treated free of charge or at concessional rates.

15. Temporary permission for collecting funds

The Charity Commissioner has power to give temporary permission for collecting funds from public for specific programs like Ganpati Mahotsav, Navratri etc...

16. Suspension, Removal and Dismissal of Trustees

The Charity Commissioner may, either on application of a trustee or any person interested in the trust, or on receipt of a report under section 41B or suo motu may suspend, remove or dismiss any trustee of a public trust, if he,-

- a) Makes persistent default in the submission of accounts report or return;
- b) Willfully disobeys any lawful orders issued by the Charity Commissioner under the provisions of this Act or rules made thereunder by the State Government;
- c) Continuously neglects his duty or commits any mal-feasance or misfeasance, or breach of trust in respect of the trust;
- d) Misappropriates or deals improperly with the properties of the trust of which he is a trustee; or
- e) Accepts any position in relation to the trust which is inconsistent with his position as a trustee;
- f) If convicted of an offence involving moral turpitude.

The Charity Commissioner may, after hearing the parties and making such enquiry as he may deem fit, by order appoint any persons as a trustee or may also remove or discharge any trustee for any of the reasons specified in subsection (1). Pending disposal of the charges framed against the trustees the C.C. may place the trustee under suspension.

A trustee, aggrieved by an order of C.C. may, within 90 days from the date of communication of order apply to the court against such order. An appeal may be filed to the High Court against the decision of the Court.

17. Power to act for protection of Charities

The CC has power to grant injunction to prevent loss to the trust property being in danger or being wasted, damaged or improperly alienated by any trustee or any other person or that the trustee or such persons threaten or intend to remove or dispose of that property.

18. Power of C. C. to appoint, suspend, remove or discharge trustees and to vest property to new trustees

(1) Any person interested in a public trust may apply to the Charity Commissioner for the appointment of a new trustee, where there is no trustee for such trust or the trust cannot be administered until the vacancy is filled; or for the suspension, removal or discharge of a trustee, when a trustee of such trust :

- a) disclaims or dies.
- b) is for a continuous period of six months absent from India without the leave from the Charity Commissioner or the Deputy or Assistant Charity Commissioner.
- c) leaves India for the purpose of residing abroad;
- d) is declared as insolvent;

- e) desires to be discharged from the trust.;
- f) refuses to act as a trustee;
- g) becomes in the opinion of the Charity Commissioner unfit or physically incapable to act.
- h) in any of the cases mentioned in Chapter III, is not available to administer the trust; or
- i) is convicted of an offence punishable under this act or an offence involving moral turpitude.

C. C. may after hearing the parties and making such inquiry as he may deem fit, by order appoint any person as a trustee or may also remove or discharge any trustee.

19. Suit by or against or relating to public trusts or trustees or others

Where it is alleged that there is a breach of a public trust, negligence, misapplication or misconduct on the part of a trustee or trustees, where direction of the court is deemed necessary, recovery of possession of trust property where the direction of the court is deemed necessary for the administration of any public trust or for any declaration or injunction in favor of or against a public trust or trustee or trustees or beneficiaries thereof the C.C. after making such enquiry as he thinks necessary as provided in section 51 may institute a suit whether contentious or not in the Court within the local limits of whose jurisdiction the whole or part of the subjectmatter of the trust is situate, to obtain degree for any such reliefs mentioned in the section.

20. Power of Charity Commissioner to frame; amalgamate or modify Schemes

Where Charity Commissioner has reason to believe that in the interest of the proper

management or administration of a public trust a scheme should be settled where two or more persons having interest in public trust can apply for the framing of a scheme. And in the same way in the interest of the public trust and for proper management and administration two or more trusts can be amalgamated.

Modification of Scheme

The court has power to modify the scheme but cannot frame entirely new scheme. [*Minoo Rustomji Shroff & Ors. vs. CC & Ors., 2005 (3) AII MR 532 : 2005 (3) Bom. L. R. 534 : 2005 (4) Bom. C. R. 570.*]

There is a separate article to be written by another author on the subject of reconstruction (Amalgamation / Merger) of entities carrying on charitable activity.

21. Consent of CC for institution of suit

If the person having an interest in any public trust intend to file a suit of the nature specified in section 50, they shall apply to the Charity Commissioner in writing for his consent.

Important Judgements

- 1) For filing suit by public trust, prior permission of CC is mandatory [*Baliram vs. Shri Dnyaneshwar Madhurdwait Sampradayik Mndla, 1974 Mh. L. J. Note 31*]
- 2) Suit by Trustees for possession against trespasser

Penalty Payable

Section	Subject	Fine which may be imposed
(1)	(2)	(3)
Section 18, sub-section (1) and (4)	Duty of trustee to make an application to Deputy or Assistant Charity Commissioner for registration of public trust within time.	10,000
Section 18, sub section (7)	Duty of trustee to send memoranda of movable property to certain officers and authorities within time.	10,000

No prior permission of CC under section 51 is necessary.

[*Amerchand T. Gupta vs. Vasant D. Patil, 1992(1) Mh. L. J. 275*]

3) Administration of trust

Seeking direction from court for proper administration, suit without C.C. permission not maintainable.

[*Navyug CHSL & Anr. vs. Vile Parle Kelvani Mandal & Anr., 2005 (3) Bom. C. R. 579.*]

22. Public Trusts Administration Fund

Every public trust not exempt having gross annual income exceeding ` 25,000/-, calculated for the purpose of contribution under schedule IX, has to pay contribution to Public Trust Administration Fund at rates notified by State Government from time-to-time. For 21 years, the rate notified has been 2%.

There is stay has been granted by Hon'ble Bombay High Court, by interim order, for paying the contribution by CA Number 1 of 2009 and PIL Numbers 40, 1780 and 1864 of 2007, order dtd. 25-9-2009.

23. Offences and Penalties

Whoever contravenes any provision of any of the sections mentioned in the first column of the following table shall, on conviction, for each such offence be punished with fine which may extend to the amount mentioned in that behalf in the third column of the said table.

Section	Subject	Fine which may be imposed
(1)	(2)	(3)
Section 22	Failure to report a change	10,000
Section 22B	Failure to make an application within the time provided for	10,000
Section 22C	Failure to send memoranda within the time provided for	10,000
Section 29	Duty of an executor to apply for the registration of a public trust within the time provided for.	10,000
Section 32	Duty to keep regular accounts.	10,000
Section 35	Failure or omission to invest money in public securities.	10,000
Section 59	Failure to pay contribution under section 58 by a trustee (other than the Charity Commissioner) or by a person charging or collecting dharmada.	10,000

24. Punishment for contravention of provisions for prior permission for alienation of property

Whoever alienates or attempts to alienate any immovable property of the trust without the previous sanction of the Charity Commissioner in contravention of the provision of section 36 shall, on conviction, be punished with simple imprisonment, which may extend to ` 25,000/-, or with both,

25. Punishment for contravention of provisions for not maintaining prescribed registrar by a medical centre

Whoever fails without reasonable cause to comply with this provisions shall, on conviction, be punished with simple imprisonment, which may extend to three months or with fine which may extend to ` 20,000/-, or with both.

26. Other offences

Whoever contravenes any of the provisions of this Act or the Rules for which no specific penalty has been provided by this Act or fails without reasonable cause to comply with any order passed or direction issued under any of the provisions of this Act shall on conviction, be punished with a fine which may extend to ` 10,000/.

27. Compounding of offence

The officer not below the rank of ACC under whose direction the complaint has been lodged may, either before or after the institution of proceedings for any offence punishable under this Act, on receipt of composition amount, which he deems fit, having regard to the nature of the default, past and present conduct of the accused and other relevant factors, may authorize compounding of offence.

Provided that, the composition amount shall not exceed one fourth of the maximum amount of fine provided under the respective sections.





CA R. V. Shah



Management of Trust and Association

I. Basic principles

Non-profit trusts and associations are increasingly gaining importance as it supports the development work, much more efficiently and costs effectively than the Government itself. Therefore, this topic assumes much more important.

Various laws are applicable to the trusts and associations some of which are as under.

1. Society Registration Act, 1860;
2. Indian Trust Act, 1882;
3. Companies Act, 2013;
4. Foreign Contribution (Regulation) Act, 2010;
5. Charitable Endowments Act, 1890 and
6. Various other laws.

II. General

In order to incorporate an NGO, any person competent to contract, be an individual, a body of individuals or an artificial person or an association of persons or an institution or a limited company or a Hindu Undivided Family (HUF) through its karta, may associate to form an organisation.

a) FORMATION AS A SOCIETY

A society can be described as an organisation/ association of person united together by mutual consent. The association should act jointly for some common purpose. The Societies Registration Act, 1860 deals with registration and related aspects of

welfare, literacy, scientific and charitable societies. The objects of the Act are to make provisions for informing the legal conditions of societies established for the promotion of literature, science or the fine arts or for the diffusion of useful knowledge, the diffusion of political education or for charitable purpose.

Any seven or more persons associated for any literacy, scientific or charitable purpose or for any such purpose as described in section 20 of the act may, by subscribing their names to a Memorandum of Association and filing of the same in the registrar of Joint Stock Companies form, themselves into a society under this Act. Every society registered under the Act may sue or be sued in the name of the president, chairman or principal secretary or trustees as shall be determined by the rules and regulations of the society, and in default of such determination, in the name of such person as shall be appointed by the governing body for the occasion.

b) FORMATION AS A TRUST

Trust is an obligation annexed to the ownership of the property and arising out of a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another and the owner. In order to be valid, a trust shall have been declared by a non-testamentary instrument in writing signed by the author of the trust and the trustees or by the will of the author of the trust.

A public trust is one, which is constituted for the benefit of either public at large or a considerable portion thereof answers such description. All charitable trusts are public trust as a matter of fact so much so that public trusts and charitable trusts may even be said synonymous. A public trust can be created *inter-vivos* or by a will.

c) FORMATION AS A COMPANY: STATUTORY PROVISIONS

Non-governmental Organisation may be incorporated as a company registered under section 8 of the Companies Act, 2013, for carrying out religious, charitable and promotional activities. Section 8 empowers the Central Government to dispense with "Limited" in name of the charitable or other company subject to the provisions. The power under section 8 has been delegated to the Regional Directors. Accordingly the application for grant of permission under this section shall be made to concern Regional Directors (offices situated at Mumbai, Chennai, Kolkata and Kanpur) in conformity with the procedure laid down in the Companies Regulations, 2013.

d) FORMATION AS ANY OTHER ORGANISATION/ASSOCIATION/ INSTITUTION

Formation of an NGO can take place in the form of any other organisation or association. Such organisation or association may be registered under the provisions of the Income-tax Act.

III. Investment of Trust Property

Section 35 of the Bombay Public Trust Act, 1950 deals with Investments of Public Trust Money. It is the primary duty of the trustee to preserve the property or the corpus, the income of which is to be used for all times. The corpus & moneys of the Trust, should be invested in the safest possible manner.

The object of the Section 35 is to provide that where a trust property consists of money and cannot be applied immediately or at an early date to the purposes of the public trusts, the

trustees shall be bound to invest the money in the approved securities.

The list of approved securities are as under:

- (i) Money deposit with any scheduled Bank
- (ii) Postal Saving Bank
- (iii) Co-operative Banks approved by the State Government.
- (iv) Public Securities as defined in Section 2(12)
- (v) First Mortgage, provided the value of the property exceeds by one half the mortgage money and the property is not lease hold for a term of a year and lastly.
- (vi) Any other manner by general or special order permitted by the Charity Commissioner

This section does not make investment, contrary to this provision void but punishable u/s. 66.

A Trustee must duly & promptly invest all capital trust money coming to his hands and all income which cannot be immediately applied for the purpose of the trust' and he is liable for any loss which may result from its being improperly invested or being left uninvested for an unreasonable length of time.

The Trustee shall bound to invest money in approved securities, notwithstanding any direction contained in the instrument of the Trust. The money invested in the purchase of a house or building, to earn income, is not an investment authorised by this section. Hence, permission of Charity Commissioner is necessary for such an Investment.

IV. Operation of Bank Account

The provision is contained in the trust deed for operation of Bank Account. Generally two or more Trustees, either can open the Bank Account in the name of the Trustees or in the name of the Trust. The bank account can be opened with the bank and necessary resolution of the trust authorising the trustees to operate the bank account should be given.

The resolution should also contain that all the cheques or other orders drawn on behalf of the trust and to accept and act upon the instructions relating to the account or accounts kept in the name of the trust or trustees relating to any transactions of Trust with the Bank, provided the Cheques, Orders or instructions are signed by two trustees or for the time being of the trust.

Any change in the operation of the Bank Account should also be intimated by proper resolution of the Trust signed by the Chairman of the Trust to be sent to the bank for implementation of the said resolution.

If the loan is obtained from a bank, then permission has to be obtained from the Charity Commissioner for borrowing and passing the necessary resolution for borrowing from the bank.

V. Budget and Accounts

a) BUDGET

Section 31A provides submission of a budget to the Charity Commissioner. As per Rule 16A, the budget to be submitted u/s. 31A by all the trustee of a Public Trust, which has annual income exceeding ` 5000/- in the case of a Trust for the public religious purpose and ` 10,000/- in other cases and shall be filed in the form of Schedule VII-A. The budget is to be prepared at least one month before the commencement of each accounting year.

Along with the budget, a true copy of the resolution passed by the board of trustees, sanctioning the budget should be submitted to the Charity Commissioner. The budget must relate to the proposed disbursement to the object of the trust indicating the total amount received for the scheme and the year during which the total amount to be spread out.

b) MAINTENANCE OF ACCOUNTS (STATUTORY BOOKS)

No formats has been prescribed for annual accounts of a Charitable entity under any law or statute.

- i) Section 32 provides maintenance of accounts of the Public Trusts. Every trustee of a public trust shall keep regular accounts. Such accounts shall be kept in such form as may be approved by the Charity Commissioner and shall contain such particular as may be prescribed. This section emphasis a duty upon every trustee of a Public Trust to keep regular accounts.
- ii) The duty of a trustee to keep accounts shall consists of
 - (a) All receipts
 - (b) Movable and Immovable Properties
 - (c) All encumbrances created on Trust property
 - (d) All payments
 - (e) And Alienations made on behalf of the trust.

Every trustee should get the accounts audited annually within six months from the close of the accounting year.

Accounts shall be maintained as provided in Rule 17 of the Bombay Public Trust Rules and the limit of audit for authorised Auditors and Chartered Accountants is also provided in Rule 17. The Trustees cannot make it an excuse that the audit is not completed within six months. In such a case, a Deputy or Asst. Charity Commissioner has a power to extend a time for sufficient reason.

The accounts should contain all such particulars as in the opinion of the Charity Commissioner, will facilitate the preparation of Balance Sheet & Income & Expenditure Account in the form of Schedules VIII & IX and the preparation of statement of Income chargeable to contribution in the form of Schedule IXC of Rule 17 of the Bombay Public Trust Rules, 1950. Provided that where the trustees of the Public Trust are entitled to file a statements in the form of Schedules IXA & IXB by virtue of any exemption granted and clause (b) of sub-section (4) of Section 33, the accounts may contain particulars which shall facilitate the preparation of statements in the aforesaid form of Schedules IXA & IXB.

c) FORMAT OF ANNUAL ACCOUNTS

- (i) Format of Annual Accounts has been given in schedule III of the Companies Act, 2013. This is applicable to companies registered under Section 8 of that Act and
- (ii) Under the Bombay Public Trust Act, 1950 and Rules made thereunder, the format Balance Sheet, in Schedule VIII read with Rule 17(I) Income and Expenditure Account in schedule X read with Rule 17(I) statement of Income liable for contribution in Schedule IXC read with Rule 32.

d) AUDITING OF ACCOUNTS

Provision for Auditing of Accounts is contained down in section 33 of the Bombay Public Trust Act, 1950.

- (i) The accounts kept under section 32 of the Bombay Public Trust Act, 1950 shall be balanced each year on 31st day of March or such other day, as may be fixed by the Charity Commissioner.
- (ii) The accounts shall be audited by person who is a Chartered Accountant or by such other persons as the State Government subject to any condition may authorised in his behalf provided that, no such person is anyway interested in or connected with the public trust.
- (iii) Every Auditor shall have access to the accounts and all books, vouchers in the possession of or under the control of the Trustee and it shall be the duty of the Trustee to make them available for the use of the auditor.
- (iv) The Charity Commissioner may also direct a Special Audit of the accounts of any Public Trust to such special audit. The Charity Commissioner may direct the payment of such fees as may be prescribed for such special audit and the State Government may by general or special order, exempt any public trust or class of trust from the provisions of section

33(2) subject to such conditions as may be specified in such order.

- (v) Section 34 provides that it shall be the duty of every auditor auditing the accounts of the public trust under section 33, to prepare a Balance Sheet & Income & Expenditure Account and to forward a copy of the same along with the copy of his report to the trustee and to the Deputy Charity Commissioner or Asst. Charity Commissioner, if the Charity Commissioner requires him to do so.

It shall be the duty of the trustee of a public trust to file a copy of Balance Sheet and Income Expenditure forwarded by the auditor before the Deputy or Asst. Charity Commissioner if the Charity Commissioner requires him to do so.

The auditor shall in his report specify all cases of irregular, illegal or improper expenditure or failure or omissions to recover money or other property belonging to the public trust or of loss or waste of money or other property thereof and state whether such expenditure, failure, omission, loss or waste was caused in consequence of a breach of trust or misapplication or any other misconduct on the part of the trustee or any other person.

The duties of an auditor are based on professional ethics. Failure of duty would make auditor jointly and severely liable with those who are responsible for mismanagement, even though the auditor may not be guilty of any dishonesty.

The auditor must remember any dereliction of duty of his part will hinder him to liable for penal action.

VI. Applicability of Accounting Standards to Trusts and Institutions

a) RELEVANCE OF ACCOUNTING STANDARDS

Accounting Standards (AS) are issued by the Institute of Chartered Accountants of India (ICAI). These Standards are designed to apply to the general purpose. Financial Statements and other

financial reporting which are subject to the at least function of the members of ICAI. Accounting Standards will not apply to trust/association which are established for charitable or religious purposes. It will apply to enterprises carrying on Commercial, Individual or Business matter.

The 'Technical Guide' makes it clear that in view of the nature of activities carried on by the charitable entities some Accounting Standards may be not relevant to them, unless events for transactions of nature covered by such standards takes place.

Accounting Standards applicable to Charitable Entities:

Accounting Standards, which may apply while preparing financial statements are as below :

- (i) (AS) 1, Disclosure of Accounting Policies
- (ii) (AS) 2, Valuation of Inventories
- (iii) (AS) 6, Depreciation Accounting
- (iv) (AS) 9 Revenue Recognition
- (v) (AS) 10 Accounting of Fixed Assets
- (vi) (AS) 11 Effects of changes in foreign exchange rates
- (vii) (AS) 12 Accounting for Government Grants
- (viii) (AS) 13 Accounting for Investments
- (ix) (AS) 18 Related Party Disclosures
- (x) (AS) 26 Intangible Assets
- (xi) (AS) 28 Impairment of Assets
- (xii) (AS) 29 Provisions, Contingent Liabilities and Contingent Assets.

b) GUIDANCE NOTES ON ACCOUNTING IN CASE OF SCHOOLS

As diverse accounting practices are followed by schools, a need arises regarding recommendation of adequate accounting policies which may be applied on a uniform basis by almost all schools, i.e. why ICAI has issued Guidance Note with the objective to recommend;

- (i) application of sound accounting principles pertaining to recognition, measurement and disclosure of various items of income & expenses, assets and liabilities in the financial statements of schools keeping in

view the peculiarities of the activities of the school and

- (ii) formats of financial statements keeping in view not-for-profit being the objective of the school. Guidance Note is applicable to all governmental schools, whether government aided or not, whether established by a trust or a society or any other form of organisation. This Guidance Note is applicable not only to educational activities of the schools but also to other activities which are incidental to the educational activities such as provision of hostel facilities, canteen facility, transportation, books & stationery etc;
- (iii) a school is considered as the reporting entity and therefore, it has to keep separate books of account and has to prepare separate financial statements. Thus, if a society or a trust runs two schools simultaneously, then each school should maintain its separate books of account and prepare its separate financial statements. However, these does not preclude the society or trust from preparing the financial statement of the society or a trust as a whole including therein income expenses, assets & liabilities pertaining to the schools established by it, as per the requirements of any statutes or a regulator or otherwise.

c) NEED OF ACCOUNTING BY HOSPITALS

Accounting of funds of non-profit medical institution is as necessary as accounting of business and corporate entities. Fund based accounting is also followed by not-for-profit hospitals, medical institutions and such other entities. Further, it may be noted that hospitals and medical institutions are clarified as profit-seeking and not-for-profit entities. General Hospitals are non-profits entities.

However, not-for-profit hospitals provides for different types of financial reports.

The accounting for hospitals & medical institutions, fund theory of accounting is used and accrual basis of accounting is followed.

VII. Determination of Trust

- (i) Section 50 of the Bombay Public Trust Act for all purposes substitutes Section 92 of the Code of Civil Procedure and excludes applicability of Section 92 of the Code to the Public Trusts. The Court can order for winding of any Trust and for applying the funds for other charitable purposes considering the circumstances and the facts of each case. If the trust is running in deficit and the object of the trust cannot be carried out for want of funds, the court may order for winding up the trust and apply the funds for other charitable purposes or order to handover the funds of the trust to similar objects and thereby deregistering the original trust.
- (ii) The Court is invested with a power to order for amalgamation of two or more trusts by framing a common scheme. Similar power is also given to the Charity Commissioner u/s. 50 A(2) of the Bombay Public Trust Act, 1950.
- (iii) If the society needs to be dissolved, it shall be dissolved as per provisions laid down sections 13 and 14 of the "SOCIETIES REGISTRATION ACT, 1860".

VIII. General Managements

Generally, it is the trustees who have to manage the affairs of the trust or administer of the trust properties. The powers for the purpose therefore, specifically vests in them. However, if the trust deed so empowers, they may constitute committees by inducting outside experts therein, without voting powers being extended to them.

The Trustees shall exercise all such powers and do all such acts, deeds, matters and things, as are required to be exercised or done to manage and administer the affairs of the Trust and the trust properties.

The Trustees may from time to time delegate any of its powers to a committee or committees which may be formed by consisting of such of them as

they may think fit and the Trustees may from time to time revoke, dissolve and discharge any such committee or committees, either wholly or in part or either as to persons or purposes but every such committee so formed shall in exercise of the powers so delegated conform to any regulations that may from time to time be framed by the Trustees.

IX. Prudence

- (i) A trustee is bound to deal with the trust property as carefully as a man of ordinary prudence would deal with such property as if it were his own; but beyond this is not bound to adopt further precautions.

The degree of prudence which the trustee actively uses in the arrangement of his own but beyond this he is not bound to adopt further precautions.

- (ii) A trustee is bound to maintain and defend the trust property and take all the necessary steps for the preservation of the same and the protection of the title thereto.
- (iii) Where there are more beneficiary than one, the trustee has to be impartial, must not execute the trust for the advantage of one at the expense of another.
- (iv) A trustee must give clear and accurate accounts of the trust property and act as all reasonable times by furnishing with full and accurate information as to the amount and state of the trust property.
- (v) Where the trust property consist of money, which cannot applied immediately or at an early date to the purpose of the trust, the trustee has subject to however to the direction contained in the instrument of the trust, to invest the money in the security as specified u/s. 20 of the Indian Trust Act
- (vi) The trustees must while performing their duties, exercise common skills, common prudence and common caution and must

protect the trust property and interest of all beneficiaries impartially, honesty and good faith.

movable property, he should make complete and detailed inventory thereof and invest the trust fund in accordance with law.

vii) Every trustee must see that the property of the trust is preserved. If the trust owns immovable property, its title deeds should be preserved and the property should be issued against fire. He should keep the property in repairs.

(vii) The money which immediately not required should be kept in a Schedule Bank or Postal Saving Bank. He should not authorize the withdrawal of the trust funds blanked in his or joint names by the co trustee alone.

X. Prevention of Fraud and Misappropriation

(i) A trustee should do all acts which are reasonable and proper for the realisation, protection or benefit of the trust property. It is the duty of trustee to acquaint himself, as soon as possible with the nature and circumstances of the trust property, the terms of the trust and the contents of the documents handed over to him relating to the trust.

(viii) He may employ servants, but he must carefully supervise their work. It is the duty of the trustee to realize debts owing to the trust with all convenient speed.

(ii) A trustee having accepted a trust, must be active and take effective steps for the protection of the trust property. A trustee has to carry out scrupulously the terms of the trust. It is essential that a trustee should see that the directions in the instruments of the trust are properly given effect to.

(ix) If money is not released within reasonable time enforce payments by means of legal proceedings.

(iii) The trustee has to utilise the funds on the objects - directed by the instrument.

(x) He should see that the Debts does not become time barred.

(iv) Trustees should be honest and their accounts should be clear. He must render the proper accounts to the Charity Commissioner and see that the accounts are properly audited. They should manage the trust property and keep proper accounts.

(xi) Liability of all the trustees one joint and several. When there is a disagreement, it is better to resign than to continue and take no part and interest in the management of the trust. If the trustee finds the other trustee or trustees are committing breaches of trust, or are causing a loss to the trust, it is his duty to take steps to get the other trustee or trustees to be removed. If he fails in his duty, he has to suffer sometimes, for no fault of his.

(v) If the trust owns immovable property, its title deeds should be preserved and the property should be adequately insured against fire, theft, etc.

(xii) A trustee must not delegate his duties or powers to a stranger because; trusteeship is an office of person confidence.

(vi) He should keep the trust property in repairs and in good condition. If the trust own

(xiii) He may employ and pay an agent to transact any business or to do any act required to be done in execution of the trust.

All the above precautions will help in prevention of fraud and misappropriation of funds of the trust to avoid enquiry u/s. 39 and offence under section 66 and criminal breach of trust u/s. 405 of the Indian Penal Code.





Ganesh Chauhan, *Advocate*



Societies Registration Act, 1860

There is always confusion in the public about two laws of similar names. That is Society Registration Act 1860 (Central Act) and The State Co-operative Society Act. Both are different and its functions are also different.

The Society Registration Act 1860 applies to the charitable activities i.e. Educational, Cultural, Sports, Scientific research, religious, Spiritual and administered by Charity Commissioner in the State of Maharashtra. Whereas Co-operative Society Act applies to the housing (both residential and commercial) Societies, co-operative establishments viz. Co-operative banks, credit societies etc. and administered by Commissioner of Cooperation. In Maharashtra Societies Act is administered by the Charity Commissioner. He acts in the dual capacity as a Registrar of societies and as a charity commissioner. Further States have power to notify changes to the The Societies Registration Act and also to make rules.

1. Formation

Any seven or more individuals can get associated for any of the specified objects for the formation of the Charitable Society. They may subscribe their names and age, address, occupation, Nationality to Memorandum of Association and Rules and Regulation . Application for registration should accompany following documents

- a. Providing proof of identity and address of subscribers, and
- b. Office address proof i.e. Latest Light bill of premises along with No Objection from the owner.
- c. Copy of resolution authorities any one person to make registration

In the State of Maharashtra every society is mandatorily also required to get itself registered under Maharashtra Public Trust Act 1950 too.

2. Objects

The Objects of the society may relate to the promotion of literature, arts, sciences or religion, any charitable purpose including the care of orphans or of aged, sick, helpless or indigent persons, the alleviation of the suffering of animals, the diffusion of knowledge ,the dissemination of social ,political or economic education, the establishment and maintained of libraries or reading rooms for the members or for the public ,collection and preservation of manuscripts, paintings, sculptures, works of art antiquities, natural history specimens, mechanical and scientific instruments and design any other objects as may be notified by the State Government as being beneficial to the public or to a section of the public.

3. Society Membership and disqualification

Whoever desires to become a member of society he shall pay the membership fees and make application under.

The member who has not paid membership fees for the period of more than three months, shall be will barred from participating in any activity of Society and shall not be entitle to vote.

4. Memorandum of Association (MOA)

MOA shall contain amongst the following clauses.

- (a) Name of Association
- (b) Location of the registered office of the association,
- (c) Objects of the Association.
- (d) Names of the First members of the Society, along with age, address, Occupation, and Nationality.
- (e) Signature on Memorandum of Association and Rules and Regulation of the minimum three members of society.

5. Rules and Regulation

The Rules and Regulation may contain following important points :

- a) Composition of the Governing body and the manner of election or appointment and resignation or removal and the term of office of the members of the Governing Body. Depending upon the activities of the Society, Governing Body may consists of the President, Vice –President, Secretary, Joint Secretary, Treasurer, Joint treasurer, and others members .
- b) The admission of membership and subscription fees of Life Member, Ordinary member, etc.

- c) Resignation of member and removal/ expulsion of member.
- d) To maintenance of the registrar and records about members an property of society, receipts books, donation books, and facilities for inspection thereof by the members.
- e) The safe custody of the property of the society, including in particular the manner of keeping or investing any moneys of the society.
- f) The procedure for holding meetings of the society, quorum, the method of voting, the period of notice for meetings and manner of voting. (it is advisable to hold election atleast once in Five years).
- g) Any other matter relating to the objects or affairs of the society.

6. Registration

Post receipt of registration application, concern officer shall scrutinise it and shall put forth before the Registrar. Registrar on being satisfied the all the compliance pertaining to Memorandum and Rules and regulation are complied with and upon payments of Registration fees Rs 50/- as the State government may from time to time direct, shall register the society.

7. Suit by or against societies

Every registered society may sue or be sued in the name of President/Chairman / Secretary / trustee who are appointed by the rules and regulation or in the name of such other person as may be appointed by the governing body.

8. Civil Suit no to abate

Civil suit filed shall not abate of discontinue on account of death of such person or such person ceases to be member of governing body. But it shall continue in the name of his successor.

9. Decree of the civil court execution against the society

Decree of the civil court shall be enforced against the properties of society and not against the body of such individual member of governing body or officer.

10. Civil Suit filed against the Member of Society

Any member can be sued who is in arrears of subscription or possess / detain Society's against the rules of the society. He can also be sued causing any damage or destroying any of the trust property.

11. Change Of Name of Society or its objects

Name and objects of society can be modified and amended on complying stringent procedure.

No such proposal shall have any effect unless.

- a) It shall have been delivered or sent by registered post to the members of each of the societies at least ten days before the date of the meeting at which it will be considered and it is agreed by the at least 3/5th members or their representative (Proxy) and it is again approved by the members at another meeting which is held after one month where in it is approved by least 3/5th members present in the meeting.
- b) Change report is required to be filed before concern registering authority

12. Books of accounts and Audit

Every society shall keep at its registered office proper books of account in which shall be entered accurately.

- a) All sums of money received and the source thereof and all sums of money expended by the society and the object or purpose for which such sums are expended.
- b) The assets and liabilities of the society.
- c) Every society shall have its accounts audited once a year by a duly qualified auditor and a balance sheet prepared by him. The auditor shall also submit a report showing the exact state of the financial affairs of the society. Three copies of the balance-sheet and the auditor's report shall be certified by the auditors.

13. Dissolution of the Society

A society may be dissolved if 3/5th of the members passes a resolution for such dissolution at general meetings convened for the purpose. The Governing body shall take steps for the disposal and settlement of the property of the society and its claims and liabilities as it may think fit subject to the regulation of the society. In case of any dispute amongst the governing body or the members of society with respect to adjustment of its affairs, matter could be referred to principle Court of original civil jurisdiction of the district. In case any Government is the member or contributor to any society, such society cannot be dissolved without the consent of the Government of the State of registration

DRAFT

MEMORANDUM OF ASSOCIATION

OF

“ ___ (name of the society) ___ “

- 1. Name of the Society : “ _____ “
- 2. Office Address : _____.

3. Objects of Society

(To be changed as per the requirements)

- 1) To help the public in owning benefits of the facilities like development of society and for their betterment.
- 2) To participate in providing the facilities for development of people and help the people below the poverty line to get benefits mentioned under the act of property removal.
- 3) To prepare plan for helping the financial poor people and striving for getting those plans conditioned by government and to give maximum benefit of those plans to those needy.
- 4) To create unity, brotherhood etc. Amongst the General Public.
- 5) To run and organise social & sports activities and programmes, Cultural function and programmes for the benefit of poor and needy.
- 6) To work for the welfare of the General Public through various programmes, lectures, seminars, demonstration and other activities.
- 7) To promote the educational, social and economic welfare of general public in every manner and by all lawful means.
- 8) To advance, preserve and promote the spiritual, social cultural and moral principles and their values.
- 9) Education, Health, Social & Implement its Programmes
- 10) To work for empowerment of women.
- 11) To work for welfare of students of schools and colleges and fight for rights of students fraternity.
- 12) To promote, give, impart, spread and advance education in all its branches including academic, technical, vocational and professional, amongst poor, needy, destitute and orphan children.
- 13) To build, establish, construct, manage, administer, support, assist, primary, pre-primary, secondary, higher secondary, schools, colleges, technical and vocational institutes, hostel.
- 14) The association shall establish programs for performing Art, handicraft workshops and social activities.
- 15) To conduct / perform various programme of knowledge in field of sports, education, social, cultural events, art, drama and other educational competitions etc. In schools & colleges.
- 16) First aid in medical and surgical emergencies. To conduct first aid classes, grant of medical help to the poor and deserving person during epidemic, famine, flood, earthquake or any unforeseen calamity or war or warlike operation, riots, civil commotion and similar occurrences, or any other time of need.
- 17) Referral to the primary health centre of emergencies and cases requiring hospitalization.
- 18) To give educational help to the poor and deserving students.

(PRESIDENT)

(SECRETARY)

(TREASURER)

- 19) To give medical help to the poor people's & arrange medical camps / seminars / workshops.
 - 20) To provide relief to the people who are affected by Natural Calamities.
 - 21) To do such other things which are incidental conducive to attainment of above objects.
 - 22) To work for the welfare and development of the General Public through various programs, lectures, demonstration and other activities.
4. The following are the members, their addresses and designation, age, occupation and nationality who are the member of the Governing Body of above association. And they are entrusted the work and management of the Foundation as per Rules & regulations of the Foundation.

Sr. No.	Name	Age	Occupation	Address	Designation	Nationality

5. We the following signatories the members of the above Foundation jointly and severally declare that we wish to form a association and register the same under the Societies Registration Act, 1860, and for that object we met today i.e. on _____ and formed the above Association for registration.

Sr. No.	Name	Signature

DRAFT
RULES AND REGULATIONS
OF

"-----Name of the society-----"

1. DEFINITION :

- I) The word "Society" wherever mentioned means "_____"
 - II) Education- means all kind and all fields of the education and learning
 - III) Medical – means all kind and field of medical treatments, medical help and need.
 - IV) Social – means the activities which are for general public at large and for the society as a whole.
 - V) Charitable Purpose – means all the charitable purposes as defined under Maharashtra Public Trust Act – 1950 and under Income Tax Act -1961
- (Other definitions may be added as per requirements)

(PRESIDENT)

(SECRETARY)

(TREASURER)

2. JURISDICTION :

The jurisdiction of the Association shall be all over Mumbai / Maharashtra / India.

3. FINANCIAL YEAR :

The financial year of the association shall be 1st April to 31st March of every year.

4. MEMBERSHIP :

5. TYPES OF MEMBERS :

6. CEASING T BE A MEMBERS :

A person shall ipso-facto to cease to be a member and shall be removed as such by the Managing Committee.

- a) On his/her death.
- b) On his/her resignation of Membership.
- c) On his/her convicted of criminal offence.
- d) If he/she fails to pay his subscription for more than six months.
- e) If he/she breaks the Rules and Regulations of the Society.

7. MANAGING COMMITTEE:

The Management and administration of the said Association shall be carried out on and managed by the Managing Committee which may pay all legal expenses incurred in promoting and registration of the said Association, are mentioned herein these Rules and Regulation and specifically required to be exercised by the Committee in General Body Meeting.

The Managing Committee shall be constituted of the following members

President	- 1
Secretary	- 1
Treasurer	- 1
Member	- 4

(More office bearers can be added)

There shall be Maximum xxx and Minimum 7 Members in the Managing Committee.

The Managing Committee so constituted as aforesaid shall elect from amongst them the Office-bearers. Any retiring member of the Managing Committee shall be eligible for re-election. The Managing Committee however, may fill up the casual vacancies. Any person appointed by the Managing Committee shall hold office for the remaining period only.

8. POWER OF THE MANAGING COMMITTEE :

The Managing Committee shall work and have full powers and authority to do all acts, matter, things and deals which may be necessary or expedient for the purpose of and in particulars of the following :-

- A) To look after, manage, supervise and control the management of the said Association and its properties.

(PRESIDENT)

(SECRETARY)

(TREASURER)

- B) To admit or reject new member and accept resignation of the members.
- C) To have an audited statement of accounts prepared every year for submission to the Registrar of Societies & Income Tax and any other authority as may be required as the Law for the time being in force, if any.
- D) All clauses herein are intended to secure exemption from Income Tax on the Income of contributions and donations to the Trust and any clause or portion of this Deed of Trust which in inconsistent with or repugnant to the sections of the Income Tax Act, 1961 as amended, submitted or modified from time to time, shall be deemed to be deleted or modified with effect from the date on which the sections to which the clause or part of a clause is repugnant or inconsistent comes into force.
- E) To accept donations in cash or in kind on such condition and without condition.
- F) To make an appeal to the people for general donation as per the decision of the General Body.
- G) To appoint such committee with such powers as the Managing Committee may think fit and proper, for such purpose. And/or to dismiss the same when the purpose is full-filled.
- H) Generally, to do all such other acts, things as are incidental or conducive to the attainment of the above powers and duties or anyone or more of them and the aims and objects specified in the Memorandum of Association.

9. MEETING OF THE MANAGING COMMITTEE :

Members of the Managing Committee shall meet ordinarily once in a 3 month or more if necessary to conduct the affairs of the said Association. Minimum seven days notice of the meeting in writing / by hand delivery should be given to the members of the Managing Committee.

10. REQUISITION MEETING OF THE MANAGING COMMITTEE :

The requisition meeting of the Managing Committee may be convened upon a requisition made in writing by President and/or any 3/5th members of the Managing Committee Members. Such requisition shall specify the subject of the meeting proposed to be called and must be signed by all the requisitionists and shall be delivered at the office of the Association

On receipt of the requisition the Managing Committee shall forthwith proceed to convene the meeting. If, Managing Committee fails to do so, then the President and/or the requisitionists themselves may convene such meeting within 10 days from the delivery of such requisition. Quorum for the requisition meeting shall be 3/5th members present in the meeting of the managing Committee.

11. QUORUM FOR THE MANAGING COMMITTEE:

xxx members present in the meeting shall form a quorum of the managing Committee. If meeting is adjourned for want of quorum shall be held an hour later at the same place and members present shall form the quorum. But, no business other than that is specified in the Notice be transacted in such meeting.

(PRESIDENT)

(SECRETARY)

(TREASURER)

12. **MINUTES TO BE KEPT :**

Managing Committee shall have to maintain minute book which shall appear:

A clear report of the proceeding of such meeting.

A copy of each notice convening the meeting of Managing Committee and General Body and of each circular in which the decision has been arrived at by the Managing Committee. Minutes shall be read over the next meeting of the managing Committee and when confirmed shall be signed by the President of such meeting.

13. **OFFICE BEARERS AND THEIR DUTIES:**

A) **PRESIDENT:** The President of the Association, shall preside over the meeting and regulate all the meetings of the Managing Committee. The president shall in addition to his right of voting as a member have a casting vote in case of a tie.

B) **SECRETARY:** The Secretary shall accept application for membership and submit to the Managing Committee and he will maintain Membership Register up-to-date. He shall maintain minute book and attend daily routine correspondence. The Gen. Secretary shall maintain all other necessary books.

C) **TREASURER:** The Treasurer shall ordinarily receive all payments made to the society and pass the necessary receipts and shall account books.

D) **MANAGING COMMITTEE MEMBERS :** He shall attend all the Committee Meeting and shall actively participate in deliberation as agenda. He shall assist, advise, suggest, guide and co-ordinate with other members of the Committee for proper discharge of their duties jointly and severally. He shall be bound to offer any service to the betterment and uplift of the Association.

14. **GENERAL BODY MEETING :**

The General Body Meeting of the Association shall be held in once in a year within 90 days immediately after 31st March of every year at such place, time and date as Managing Committee shall determine.

15. **EXTRA ORDINARY GENERAL BODY MEETING :**

An Extra Ordinary General Body Meeting may be covered by the Managing Committee of its own motion, or upon a requisition made in writing by President and/or and 3/5th members of the Association. Such requisition shall specify the subject of the meeting proposed to be called and must be signed by all the requisitionists and shall be delivered at the office of the Association.

16. **NOTICE OF THE GENERAL BODY/EXTRA GENERAL BODY MEETING:**

Fifteen clear days notice specifying the place, date, time with agenda shall be given to the each and every member of the Association, by hand delivery to their registered address or by Registered Post A.D. But the accidental omission to give or not/receipt of such notice by any member shall not be invalid at the proceeding of any General Body Meeting.

(PRESIDENT)

(SECRETARY)

(TREASURER)

17. BUSINESS OF THE ANNUAL GENERAL BODY MEETING:

The business of the Annual General Body Meeting shall be:-

- a) To confirm the minute of the previous Annual General Body Meeting.
- b) To adopt the previous years and audited statement of documents.
- c) To elect the Managing Committee for the next terms, if the terms is over.
- d) To admit new members as per decision taken by the Managing Committee.
- e) To appoint Advocate / Legal Advisor, Chartered Accountant and fix their remuneration's.
- f) To consider any other matter, due notice of which has been given five days prior to the General Body Meeting.

18) QUORUM OF THE GENERAL BODY MEETING :

The quorum for the General Body Meeting shall be xxx of the members of the Association on record. Any adjourned meeting for want of quorum shall be held half an hour later at the same place and the members present shall be transacted at such meeting.

19) ELECTION :

The election shall take place after every xxx years in the General Body Meeting by Show of Hands / secret ballot / depending of the presence of the quorum.

20) SOURCE OF INCOME :

Association shall raise their funds by way of subscription, contribution, membership fees, grants, bank interests, donation in cash or in kind.

21) BANK ACCOUNT :

The Managing Committee shall open Bank Accounts / Accounts in any Scheduled Bank / Nationalized Bank in the name of the Association and shall be operated jointly by at least two-office bearers out of President, Secretary and Treasurer.

22) SUB COMMITTEE / COMMITTEES :

The Managing Committee shall have power to appoint subcommittee or Committees as and when necessary and which the President of the Association shall preside over these subcommittee or committees.

23) BOOKS OF ACCOUNTS :

The Managing Committee shall direct the treasurer to keep the accounts, up-to-date, and/ or the help of the specifically appointed for the purpose and shall be audited by a qualified Chartered Accountant regularly.

24) EXPENSES ON THE OBJECT :

The funds of the Association should be used for the fulfilment of the objects of the Association as specified in the MOA.

25) PROVISION REGARDING SALE AND PURCHASE OF IMMOVABLE PROPERTY :

Association can sell its property in the name of the Association as decided by General Body Meeting with prior permission of the Charity Commissioner.

(PRESIDENT)

(SECRETARY)

(TREASURER)

26) PROVISION REGARDING LOANS AND DEPOSIT :

Managing Committee shall have power to keeps Association Deposit in a Scheduled Bank or Nationalized Bank and also it shall have power to raise interest free loans from any Individual Body or Institution for the requirement of the Association by taking permission of the Charity Commissioner.

27) MEMBERSHIP REGISTER TO BE KEPT :

A Membership up-to-date register of members who are members within the meaning of Section 15 of the Societies registration Act, 1860 will be maintained in the form of Schedule VI to the Societies Registration (Maharashtra) Rules, 1971 vide Rule 15 thereof.

This Membership Register shall be produced at the time of General Body Meeting for the verification of the General body.

28) CUSTODY OF THE DOCUMENTS :

Any important papers connected to the Association shall be kept at the registered office and/ or any other suitable place as per the decision of the Association.

29) PROVISION FOR AMENDMENTS IN RULES AND REGULATIONS

This change shall be take place by 3/5th majority of General Body Meeting.

30) PROVISION FOR CHANGE IN NAME AND OBJECTS OF THE SOCIETY :

The change shall take place according to Section of 12 and 12-A of the Societies Registration Act, 1860.

31) DISSOLUTION :

In the event of dissolution of the Trust, the entire Trust funds shall be realized and first be used for payment of liabilities of the trust. The assets left in any, shall be disbursed to other Trust or Association having similar objectives after obtaining previous approval of Commissioner of Income Tax and in no event it shall be distributed in any manner, to any of the Board of Trustees or their relatives or related concerns. The society can be dissolved in accordance with Section 13 and 14 of the Societies Registration Act, 1860.

CERTIFICATE

Certified to be true copy of the Rules & Regulation of the Association viz “ _____
_____ ”

Place:

Date:

(PRESIDENT)

(SECRETARY)

(TREASURER)





CS Kaushik Jhaveri

Formation of Companies with Charitable Objects etc. under section 8 of Companies Act, 2013

The Companies Act has always recognised the need to provide limited liability cover to commercial organisations formed to enable the members to share the profits of commercial transactions. The need to give such protective cover to non-profit making organisations is all the more

Section 8 Company is a company registered for charitable or not-for-profit purposes under the Companies Act, 2013 ('Act'). It is similar to a Trust or Society; except that a Section 8 Company is registered under the Central Government's "**Ministry of Corporate Affairs (MCA)**"; whereas the Trusts and Societies are registered under **State Government regulations**, wherever State Government has such Act in place. This Section is akin to Section 25 of the erstwhile Companies Act, 1956.

Further, the key feature of a Section 8 Company is that name of the Company can

be incorporated **without using the word "Limited" or "Private Limited"** as the case may be. Further as per the provisions, the names of the proposed Section 8 Company may include words such as Foundation, Federation, Forum, Association, Chambers, Confederation, Council etc.

OBJECT OF SECTION 8

The Objects of Section 8 companies are prescribed under Section 8(1) is as below:

- Promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other objects;
- Intends to apply its profits, if any, or other income in promoting its objects; and
- Intends to prohibit the payment of any dividend to its members.

Distinctions between Section 25 and Section 8 companies:

Sr. No.	Section 25	Section 8
1.	Selected Restrictive provisions	Liberalised provisions
2.	Promotion of commerce, art, science, religion, charity	Promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment

Sr. No.	Section 25	Section 8
3.	Required to obtain the previous approval of Central Government to alter the object clause of its memorandum	Required previous approval for alteration of any provisions of the memorandum and articles of association
4.	Authority is provided to Central Government only to revoke the licence in case of contravention of the provisions of the Act or conditions of licence	Authority is provided to Central Government only to revoke the license in case of contravention of the provisions of the act or conditions of licence along with further actions that the Central Government can take on revocation of licence – ordering winding up of the company/amalgamate it with another company having similar objects
5.	No penal actions were provided for the violations	Various penal consequences are provided for violations
6.	No expressed provision for amalgamation	Section 8(10) – Provides that a company registered under this Section shall amalgamate only with another company registered under this section and having similar objects

EXEMPTIONS TO COMPANIES REGISTERED U/S 8 OF THE COMPANIES ACT, 2013

(MCA notification dated 5th June, 2015)

- a. The Company Secretary or Secretary in relation to Section 8 Company need not be a Company Secretary as defined in the Company Secretaries Act, 1980.
- b. No requirement to have minimum capital.
- c. The date, time and place of Annual General Meeting can be predetermined by the board, if the shareholders have given directions to the board to this effect in the general meeting.
- d. General Meetings of a Company can be called by giving 14 clear days notice as against 21 days.
- e. The provisions relating to minutes of proceedings of general meetings, Board meetings etc. shall not apply except that in case the AOA of such Company contains a provision that minutes have to be confirmed by circulation, then in that case, the minutes have to be recorded within 30 days.
- f. Requirement to have at least 4 meetings in a year and to hold board meeting within 120 days of previous board meeting is dispensed with. It is sufficient if the companies conduct at least one board meeting within every six calendar months.
- g. Quorum requirement for Board Meetings is either 8 directors or 1/4th of total strength whichever is lower subject to minimum of 2 directors.
- h. No requirement of appointment of independent directors, the requirement of Audit Committee to have majority as independent directors is also removed.

- i. No requirement of constitution of nomination and remuneration committee.
- j. Exemption pertaining to directors specified herein below separately.

and Rule 20 (License for existing companies) of the Companies (Incorporation) Rules, 2014 are specifically relate to/applicable to Section 8 Companies.

MOA of Section 8 **Company registration** (previously called section 25 company) has been prescribed in form INC-13 by the **Companies Act 2013 read with rule 19, sub rule 2 of the Companies (Incorporation) Rules, 2014**. The said INC-13 contains 12 clauses. The brief of the clauses are asunder:

Drafting of Memorandum and Articles of Association

Memorandum of Association

Provisions of Rule 19 (Licence under section 8 for new companies with charitable objects etc.)

Sr. No.	Clause No.	Particulars
1.	1st Clause	Name Clause
2.	2nd Clause	Registered Office Clause
3.	3rd Clause	Main Object i.e. only object having charitable purpose Provided that the Company shall not support with its funds, or endeavour to impose on, or procure to be observed by its members or others, any regulation or restriction, which, as an object of the company, would make it a trade union
4.	4th Clause	That object of the company extend to _____
5.	5th Clause	Restricted diversion of section 8 Company income or property to any of its member or its related party in any form. It has also been clarified that profit of such company can only be utilised for its charitable object. Prudent Remuneration allowed to its member only when he actually provides services to the company
6.	6th Clause	MOA cannot be altered unless alteration has been previously approved by the Registrar of Company
7.	7th Clause	Liability Clause
8.	8th Clause	Capital/Guarantee Clause
9.	9th Clause	Required to maintain certain record and books for expenditure income assets etc. and once in an every year accounts shall be examined by auditor about correctness of balance sheet and income & expenditure.
10.	10th Clause	Dissolution of the Company
11.	11th Clause	Can be amalgamated only with Section 8 Company having similar object
12.	12th Clause	Details of Subscribers

**** Signing of MOA & AOA:** – The MOA & AOA should be signed by Subscribers (Section 7 (1)(a)), who shall add their photo, name, address, occupation in presence of at least 1 witness:

One person who will act as witness and will sign in the witness column shall need to mention:

“I hereby witnessed that subscribers signed in my presence on Date, at Place. Further I have verified their identity details (Through ID) for their identification satisfy myself of their identification particular as filled in”

Below this witness must mention:

- Name
- Address
- Description
- Signature

Articles of Association

Articles of Association contains the internal regulations of the Company so care should be taken while drafting it. The model articles are given under Schedule I. Based on the nature of the proposed Section 8 following one of the models can be adopted:

- a. Table F – Articles of Association of a Company Limited by Shares
- b. Table G – Articles of Association of a Company Limited by Guarantee and Having a Share Capital
- c. Table H – Articles of Association of a Company Limited by Guarantee

Section 5 of the Companies Act, 2013 provides that the articles may contain provisions for entrenchment to the effect that specified provisions of the articles may be altered only if conditions or procedures as that are more restrictive than those applicable in the case of a special resolution, are met or complied with.

Due of entrenchment provisions, amendment to articles can be difficult.

It may be noted that any amendment of articles requires consent of members by way of a special resolution, be it a private company or a public company [under section 14(1)]. However, in case of a private company intending to alter its articles to provide for aforesaid entrenchment provision, it shall obtain consent of all of its members.

The entrenchment provisions can only be relating to matters requiring consent of members by way of special resolution.

In case the company inserts such a clause in the articles, either on formation or by way of amendment, the company shall give notice to the Registrar of Companies informing the same within thirty days from the date of formation or amendment of the articles.

Example: Most changes to the articles can be approved by passing a special resolution, which requires a 75% majority vote of the members. If Companies wishes to further restrict changes to certain provisions beyond this percentage – for example, the unanimous agreement (100%) of all members –the Company will have to include provision for entrenchment in the articles.

The MOA & AOA should not *ultra vires* the law (Section 6).

BOARD OF DIRECTORS

The Ministry of Corporate Affairs *vide* its Notification dated 5th June, 2015 granted following exemptions to Section 8 Companies relating to Board of Directors and appointment thereof:

1. Minimum and Maximum Number of Directors: (Section 149(1) and first proviso)

Every Company shall have a Board of Directors consisting of individuals as directors and shall have –

- (a) a minimum number of directors in the case of public company, two directors in case of a private company, and one director in the case of a One Person Company; and
- (b) a maximum of fifteen directors:

Provided that a company may appoint more than fifteen directors after passing a special resolution.

Section 149(1) and the first proviso to Section 149(1) shall not apply to Section 8 Company, *vide* MCA notification dt. 5th June, 2015.

There is also no restriction/prohibition on appointment of Foreign Individual/NRIs as director on the Board of Section 8 Company subject to fulfilment of other conditions.

2. Independent Directors

The provisions relating to requirement of having Independent Directors, their appointment, and manner of appointment etc. are not applicable to Section 8 Companies.

3. Right of Persons other than Retiring Directors to Stand for directorship

If the Articles of the company provide for the election of directors by ballot, then the provisions of Section 160 will not be applicable. In case, the company's Articles do not provide for election of directors by ballot, Section 160 will continue to apply.

4. Number of Directorships

A person being a director in 20 (maximum number of companies in which one can be director) companies can also still be appointed as a director in a Section 8 Company.

5. Disclosure of Interest by Directors

Director of Section 8 Company shall disclose the nature of his concern or interest at a board meeting if the related party transaction exceeds ₹ 1 lakh and he shall not participate in such a meeting.

6. Powers to be exercised only at board meeting

Based on the exemption, the Board can pass a circular resolution only instead of passing at meeting of the Board in respect of matters which is otherwise passed at meeting of the board viz. to borrow monies, to invest the funds of the company to grant loans or give guarantee or provide security in respect of loans.

Restrictions on Board members

Loan to director

Section 185 of the Companies Act, 2013 prohibits the company to provide any loan to directors.

Remuneration to Director

As per the Companies Act, 2013 nothing in this clause shall prevent the payment by the company in good faith of prudent remuneration to any of its officers or servants (not being members) or to any other person (not being member), in return for any services actually rendered to the company.

However nothing shall prevent the payment by the company in good faith of prudent remuneration to any of its members in return for any services (not being services of a kind which are required to be rendered by a member), actually rendered to the company.

PROCEDURE FOR REGISTRATION OF SECTION 8 COMPANY

Following two types of Section 8 Companies can be incorporated:

- a. Company having share Capital
- b. Company limited by Guarantee and not having share capital

Pre-requisite:

- Minimum two promoters are required for registration of Section 8 Company.
- Obtaining Digital Signature Certificate (DSC) for proposed Directors not having Directors Identification Number (DIN)
- Obtaining DIN from Ministry of Corporate Affairs by filing Form DIR-3, if not having DIN

Form INC 1: Application for Name availability

Form INC 12: Application for concerned ROC for the License

Post approval of name from the Central Government, Form INC 12 to be filed for obtaining Licence from the concerned Registrar of Companies.

Following are the attachment to Form INC 12

- Draft Memorandum of Association of the proposed company in Form INC 13

- Draft Articles of Association of the proposed company
- Declaration by Practising Chartered Accountant/Practising Company Secretary/Practising Cost Accountant in Form INC 14*
- Declaration from each person making application in Form INC 15*
- Estimated Income and Expenditure for next 3 years
- Statement of Assets and Liabilities
- Form INC 9 of the first directors
- Form INC 10 of the subscriber
- Grounds of making an application
- List of Proposed Promoters and Directors
- Statement of work proposed

* Declaration to be on ` 100 Stamp Paper (in the State of Maharashtra) and also notarised

Form INC 7, INC 22 and DIR 12: Post Licence formalities

Form INC 7 : following documents to be attached:

- Memorandum of Association
- Articles of Association
- Form INC 9 of Promoters
- Form INC 10 of Promoters
- Form INC 8 of the Professional Engaged in Incorporation

- Copy of Licence received from ROC
- Proof of Residential Address of Promoters

Form INC 22: Following documents to be attached:

- Proof of Registered Office
- Utility Bills (not older than two months) as Proof of Registered Office
- A proof that the Company is permitted to use the address as the registered office of the Company if the same is owned by any other entity/ Person (not taken on lease by company)

Form DIR 12: Following documents to be attached:

- Form INC 9 of First Directors
- Form DIR 2
- Form MBP 1

Post Scrutiny of the submitted forms and documents the Corporate Identification Number (CIN) will be issued by the concerned Registrar of Companies.

Section 8 (4) (ii) of the Companies Act, 2013 provides that a company registered under this section may convert itself into company of any kind (normal company) subject to certain compliances.

Further Section 8 (5) of the Companies Act, 2013 provides that a limited company registered under this act or under any previous company law has been formed with

any of the objects specified in clause (a) of sub-section (1) and with the restrictions and prohibitions as mentioned respectively in clauses (b) and (c) of that sub-section, it may, by license, allow the company to be registered under this section subject to such conditions as the Central Government deems fit.

PENALTY

Section 8(11) provides that if a company makes any default in complying with any of the requirements laid down in this section, the Company shall, without prejudice to any other action under the provisions of this section, be punishable with fine and which shall not be less than ` 10 lakh which may extend to ` 1 crore and the directors and every officer of the company, who is in default shall be punishable with imprisonment for a term which may extend to 3 years or with fine which shall not be less than ` 25,000/- but which may extend to ` 25 lakh or with both.

When it is proved that the affairs of the company were conducted fraudulently, every officer in default shall be liable for action under Section 447 which provides punishment for fraud. The punishment may be imprisonment for a term which shall not be less than 6 months but which may extend to 10 years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to 3 times the amount involved in the fraud. Where the fraud in question involves public interest, the term of imprisonment shall not be less than 3 years.





CA Rajkamal Shah

Service Tax on Voluntary Organisations (NGO)

After introduction of Negative List based taxation under service tax from 1-7-2012, the applicability of service tax to voluntary/non-profit organisations (NGOs) has become a contentious issue. This is because of introduction of all encompassing definition of 'service'¹ under the law. The definition attempt to cover all kinds of any activity carried out by a person for another for a consideration under its ambit. However, the definition itself excludes certain kind of activities like transfer of title in goods or immovable property, transfer, delivery or supply of goods which is deemed to be 'sale' within the meaning of Article 366(29A) of the Constitution, transaction in money or actionable claim or provision of service by an employee to the employer in the course of or in relation to his employment, fees taken by a court or Tribunal in accordance with the law, etc. The negative list provided u/s. 66D list out certain activities which is not covered as 'service'. Further, exemptions are granted to certain activities under Mega Exemption Notification No. 25/2012 – ST and certain other notifications like exemptions to exporters, SEZ etc.

On the first reading, the definition of 'service' seems to cover all activities under its ambit. The exemption² to charitable activities provided by an entity registered under Income-tax Act gives the impression that such activities are otherwise

covered under the definition. However, it is a settled position in the law that provision from an exemption itself cannot presume tax liability.

Voluntary / non-profit organisations is the term commonly used for an organisation that is neither a part of a government nor a commercial "for – profit business" usually set up by ordinary citizens, industrialists, businessmen, etc. Such organizations may be funded by governments, foundations, businesses or private persons. Some of the examples are Infosys Foundation, Gates Foundation, Ford Foundation, Aziz Premji Foundation, Sir Ratan Tata Trust, autonomous organizations by Government of India like CAPART (Council for Advancement of Peoples Action and Rural Technology), CRY (Child Welfare and You), various NGOs founded by State Governments etc.. Funds are contributed by the founders and supplemented by individuals, business houses etc. Such NGOs have their own defined objectives but many of them are having common objectives too, like charities, social welfare schemes, capacity building women empowerment, health care, family planning, HIV awareness, poverty alleviation etc.

Voluntary / non-profit organisations / NGOs do provide services. Some of the services are specifically exempted and in some cases no specific exclusion or exemption is provided from

1. S. 65B(44) of the Finance Act, 1994 as amended from 1-7-2012

2. Cl. 4 r.w. definition of 'charitable activities' as provided in sub-clause (k) of Notification No. 25/2012 – ST

service tax. Examples of charitable organisations are Rotary Clubs, Lions Clubs, Giants International, charitable hospitals like Bombay Hospital, temples, mosques, gurudwaras, public charitable trusts, social service centres like CRY, Rehab centres, institutions of destitute women, orphanage homes etc. Normally, these organisations run by voluntary contributions (donations), though charges are recovered full or in part for specific purposes like hospitalization charges, school or college fees, etc. The other receipts like renting of hall, open spaces, etc. may also be collected for services rendered. Attempt is made in this article to list out services normally provided by the NGOs and discuss service tax implication on such voluntary or non profit motive organisations For brevity's sake we will call them "charitable organisations".

Services by voluntary organisations for which no consideration received would not be covered under service tax in view of specific definition requiring consideration as necessary condition. The voluntary organisations engaged in poverty alleviation, education and health care of poor and needy etc. may not receive any consideration from the receiver of service. However, question may arise if a donor donates certain amount to charitable organisations for conducting any activity, can it be said that there is a *quid-pro-quo* between the donation and such activity and therefore such donation may be regarded as consideration. The argument, though cannot be ruled out, appears to be far-fetched. This is because the charitable trust conduct such activity in pursuance of its own objective, for example, feeding the poor or public health care, etc. Any person contributing some amount for the cause of the charitable trust cannot be said to be a consideration to carry out the activity of feeding the poor by such charitable trusts, as the donation is purely voluntary. Further, such organisations cannot be said to have provided a service to the contributor or donor. The same principle would apply to other philanthropic activities by charitable organisations.

The services of voluntary organisations as such are not covered in the list of in negative list except the following services rendered by any person:

- i) services in relation to funeral, crematorium or mortuary services including transportation of deceased.

Service provided by educational institutions

- ii) services by way of—
 - School education and education up to higher secondary school or equivalent;
 - Education as a part of a curriculum for obtaining a qualification recognised by any law for the time being in force;
 - Education as a part of an approved vocational education course

Exemption is also granted to the services provided by an educational institution to its students, faculties and staff by Entry 9 of the Mega Exemption notification³. Further, exemption is provided to any person for provision of service to an educational institution, by way of transportation of students, faculty and staff, catering, including any mid-day meals scheme sponsored by the Government, security or cleaning or house-keeping services performed in such educational institution services relating to admission to, or conduct of examination by such institution.

The educational institutions are those which are providing educational services such as pre-school education and education up to higher secondary school or equivalent or education as a part of a curriculum for obtaining a qualification recognised by any law for the time being in force or education as a part of an approved vocational education course.

3. Notification No. 25/2012- ST

Health Care Services

Exemption is provided to health care services by a clinical establishment or an authorised medical practitioner or para-medics. "Health care services" means any service by way of diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognised system of medicines in India and includes services by way of transportation of the patient to and from a clinical establishment, but does not include hair transplant or cosmetic or plastic surgery, except when undertaken to restore or to reconstruct anatomy or functions of body affected due to congenital defects, developmental abnormalities, injury or trauma. A "clinical establishment" means a hospital, nursing home, clinic, sanatorium or any other institution by, whatever name called, that offers services or facilities requiring diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognised system of medicines in India, or a place established as an independent entity or a part of an establishment to carry out diagnostic or investigative services of diseases. In terms of Clinical Establishment Act, Allopathy, Yoga, Naturopathy, Ayurveda, Homoeopathy, Sidha, Unani or any other system of medicine recognised by Central Government is covered in this. Services by cord blood banks by way of preservation of stem cells or any other service related to such preservation is exempted from 17-2-2014. Services provided by way of transportation of a patient in an ambulance by any person is also exempted.

Service of safe disposal of medical and clinical waste treatment facility to a chemical establishment is also exempt from 11-7-2014. Further, all services by a veterinary clinic for health care of animals or birds have been exempted.

Services by charitable trusts

Entities registered u/s. 12AA of the Income-tax Act is exempted from service tax on specified services by charitable institutions without any limit. It may be noted that the registration u/s.

12AA of the Income-tax Act is the only condition and the exemption can be availed from the date of registration. The 'charitable activities' are defined to mean public health by way of care or counselling of terminally ill persons (including persons with severe physical, mental disability, HIV, AIDS, or person addicted to narcotics drugs or alcohol), public awareness, family planning, prevention of HIV, advancement of religion or spirituality or yoga, advancement of educational programmes or skill development for homeless children, prisoners, physically or mentally abused or traumatised persons, persons over the age of 65 years residing in rural area and preservation of environment including watershed, forest and wildlife.

It may be noted that up to 31-3-2013 exemption was also available in relation to advancement of any other object of general public utility up to ₹ 25 lakh. However, the said exemption is withdrawn from 1-4-2013.

Religious institution

Service by any person by way of renting of precincts of a religious place meant for general public or conduct of any religious ceremony is exempt under Entry 5 of the mega exemption. A 'religious place' is defined to be a place which is primarily meant for conduct of prayers or worship to a religion, mediation or spirituality. The term, 'general public' means the body of people at large sufficiently defined by some common quality of public or of impersonal nature.

Conduct of religious ceremonies is also exempted under Mega Exemption Notification. Religious ceremonies are life-cycle rituals including special religious poojas conducted in terms of religious texts by a person so authorised by such religious texts. Occasions like birth, marriage and death involve elaborate religious ceremonies. Thus, services by the priest of a temple and the like is also exempted.

Renting of precincts of a religious place is exempt. However the term, precincts is not defined in the Act. The New Oxford English Dictionary defines, 'precincts' as follows:

“the area within the boundaries (real or imaginary) of a building or place, the grounds, the interior, esp. an enclosed or clearly defined area around a cathedral, college, etc. Also, the surrounding or environs of a place”.

Thus, renting of any surrounding area belonging to religious place is exempt under service tax.

Services by a specified organisation in respect of a religious pilgrimage facilitated by the Ministry of External Affairs of the Government of India, under bilateral arrangement is also exempt from 20th August, 2014.

Service by way of public convenience

Under Entry 38 of Mega Exemption Notification service provided by any person by way of public convenience such as provision of facilities of bathroom, washroom, lavatories, urinal or toilets are specifically exempted. Thus, exempted is granted to entities such as Sulabh Shauchalays is exempt.

Services by public library

Services by public library by way of lending of books, publications or any other knowledge enhancing content or material is also exempt.

General exemption to service by non-profit organisations to its members

Entry 28 of the Mega Exemption Notification provides for exemption to service by an unincorporated body or non-profit entity registered under any law for the time being in force, to its own members by way of reimbursement of charges or share of contribution for the purpose of carrying out any activity which is exempt from levy of service tax. This is a limited and conditional exemption covering clubs or associations, co-operative societies etc., who provide otherwise exempt service to its members for some consideration. Service to persons other than members not exempted. Service provided by trade union is specifically exempted.

Taxability of voluntary organizations like Rotary Clubs, Lions Club, Giant International etc.

In these organisations normally the objects are like,

- To serve the people to eradicate poverty and thus pave way for upliftment of downtrodden regardless of caste, creed or colour;
- To promote peace, harmony and goodwill through fellowship and spirit of co-operation all over the world;
- To promote and advance the cause of service to humanity for the welfare, upliftment and betterment of the community;
- To encourage the spirit of service to community by inculcating in members high ideals in civic, cultural and ethical values;
- To promote the principles of good government and good citizenship;
- To provide a forum for the open discussion of all matters of public interest;
- To define priority areas of service and develop ways and means for groups to undertake action-oriented programme;
- To lay down the minimum obligations and duties of members and groups to bring about greater involvement towards attainment of the objects;
- To co-ordinate and generally direct and supervise the activities and administration of the organisation throughout the world;
- To promote harmony and mutual understanding amongst various groups and federations;

These organisations normally charge membership fees from members. However, the fees are for recovering administrative costs and may be partly used in pursuing the objectives of the organisation. The members conduct certain activities like fund raising programmes and utilise the funds for the objective of the trust. They are also engaged in distribution of aids, health care etc. Generally, no charge is recovered from the beneficiaries. The members also do not derive any direct or specific benefit

from the membership of the organisation. Thus, such activities does not appear to be covered under service tax. Even when somebody donates any sum for furtherance of any of the activity of the trust, the same cannot be said to be covered under service tax as it would not fit into the definition of service as discussed earlier. However, in case someone sponsor a programme and donate any sum, the same may necessitate payment under the reverse charge mechanism if the sponsor is individual or HUF, subject to other conditions like display of logo etc. of sponsors being satisfied.

It is not out of place to mention about certain decisions of the High Courts that on mutuality basis, no service can be said to be provided by an association to its members as the relationship of service provider and service receiver does not exist⁴. These decisions are in relation to Club or Association Service as existed prior to 1-7-2012 on mutuality concept and the challenge by the department is pending in the Hon'ble Supreme Court. In view of the author, though the decisions are not directly applicable under negative list based taxation, the ratio still applies. Further, the case of NGO is better placed than the Club or Association kind of service, as the members are not receiver of service in any case.

In case of charitable health care institutions like Bombay Hospital where some amount is recovered towards costs as to hospitalisation, medicines etc. it seems that the conditions specified under the exemption notification needs to be satisfied.

In relation to religious organisations like temple, mosques, gurudwaras, the religious ceremonies are exempt. Similarly, the donations collected for conducting such ceremony would also be exempt as there is no direct relationship between the donation and the ceremony. The persons conducting such ceremonies like priests are also exempt. However, when a person stays in Dharamshala, Musaffirkhana etc., by paying

certain amount for carrying out rituals, direct relationship between the ritual and provision of accommodation needs to be established to enforce the levy. One also needs to look into Entry No. 18 of the Mega Exemption Notification wherein exemption provided by a club, inn or campsite etc. for residential or lodging purpose having declared tariff below ` 1000/- per day for a unit of accommodation.

Social service centres like rehab centres, old age homes, orphanage, homes for destitute women where some amount is recovered towards accommodation, the same needs to be examined from exemption Entry No. 18 of Mega exemption Notification. However, donations etc. received may not be covered under service tax.

It needs to be noted that many of the entities discussed above are registered under S. 12AA of Income-tax Act and therefore they are eligible to claim exemption for the specified services.

Conclusion

On the basis of forgoing discussion, it can be said that the voluntary organisations like charitable trusts, NGOs, Rotary Clubs etc., may not be liable to service tax. However, in case some fees / charges are received from the receivers of services, there may be issue of service tax and the exemptions provided in the law should be of help.

In a country like India where social security is not guaranteed by the Government and large section of people live below the poverty line in slums and on roads bereft of sanitation and health care, it is utmost necessary that the social service sector that is not driven by profit consideration must be exempted from the levy of taxes which otherwise may lead to discouragement to such activity. Further, any indirect tax burden may be harsh and ultimately percolate down to the needy and downtrodden.



4. Ranchi Club (Jharkhand HC)
Sports Club of Gujarat (Gujarat HC)
Tahnee Heights Co-operative Housing Society Ltd. & Others (Mum. Trib.)
Federation of Indian Chambers of Commerce & Industry (CESTAT New Delhi)



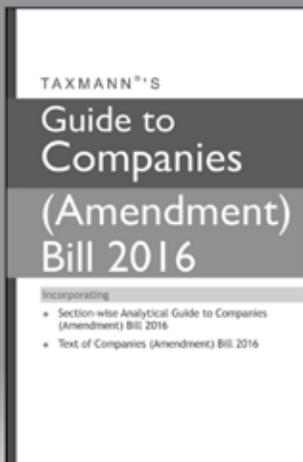
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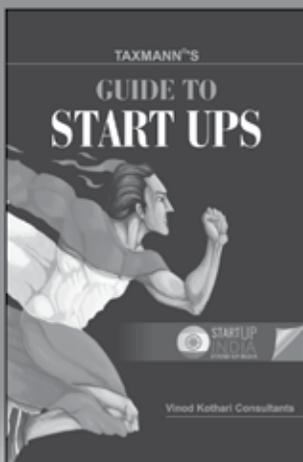
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Saurabh Arora*

DIGITAL INDIA SERIES

Technology Spearheading Future of Healthcare Delivery in India

After firmly clocking the aim of financial inclusion through the Digital India programme, the Government is now focusing on digitising healthcare to provide quality medical care to all in the country.

While launching the Digital India campaign, Prime Minister Narendra Modi vehemently spoke of his vision to create a digital India where people from every nook and cranny had access to quality healthcare.

The Government's concerted effort in the form of its e-health initiative is aimed at providing cost-effective and timely healthcare services to its citizens, especially to those who are devoid of that in the remotest parts of the country. Through e-health backed by unique health ID or Aadhar number, the Government is looking to make OPD appointment booking, accessibility to health records, pan-India exchange of patient information and medicine supply, among others, easy through the online mode.

While the Government is taking steps to improve the situation of healthcare for the population through policy initiatives, there are several start-ups that are doing their bit to solve problems that the country is grappling with on the

healthcare front by using technology, which has been the cornerstone for the success of many sectors.

In India, technology has changed the face of umpteen sectors. Take the example of e-commerce which has through innovation changed user behaviour drastically from shopping offline to doing so online.

The role of technology can be phenomenal in improving healthcare delivery in the country in multiple ways:

- To digitise patient records
- Finding a doctor and booking appointment
- Online pharmacy
- Most importantly, to connect people with doctors online to let them communicate with each other, from anywhere and anytime
- Data mining and its analysis to help come up with customisable solutions for different demographics, age groups and genders.

*Saurabh is the Founder & CEO, Lybrate, India's first and largest online doctor consultation platform

Fixing core problem of doctor shortage

In the Indian scenario, access to quality healthcare had been a formidable challenge for long. The hard hitting reality of doctor shortage in the country makes doctors inaccessible for the needy, and at the same time puts a lot of burden on medical experts and healthcare infrastructure. This had been a pressing and persistent problem for decades now with a disheartening doctor-patient ratio of 1:1700 in the country.

Technology has certainly made the process of finding a doctor and booking an appointment simpler, but its best use is displayed in the way it has made communication between people and doctors possible, beating down the barriers of time and distance.

Doctors, by being online, can reach out to patients from anywhere in the country, anytime, increasing their accessibility to million others. This was hitherto beyond imagination. For users, it reduces the need to travel for minor issues or follow-on care, thereby solving the issue of congestion in hospitals and clinics.

As top healthcare experts put it, around 70% doctor visits are not required and they can be dealt with online. Patients who visit doctors for follow-ups or to show lab or test reports can consult them online, saving much of their time as also money they spend on travel. By resorting to technology to let communication happen between patients and doctors, a huge burden is being taken off the latter, providing them more time to see patients who need to see them physically.

Bridging the urban-rural divide in healthcare

In the last two decades, India has seen massive economic, social and technological growth. While the effects of these have been greatly visible in urban settings, a major portion of the rural population have still been gaping at the benefits from far off and struggling to enjoy them in the same breath as their urban peers. Though

multiple public-private partnerships have done some notable work to reduce this urban-rural divide, there is yet a lot more to achieve.

An area where technology can particularly play a revolutionary role is in providing access to quality healthcare to those in rural areas. Plucking the opportunities of internet penetration and adoption of smartphones by rural population, quality healthcare can be made available to those residing in far corners where accessibility to doctors is a huge issue. A country marred by doctor shortage, rural India is always on the receiving end as healthcare professionals chose to practice in either big metros or towns.

Healthcare communication platform can solve this lingering problem by allowing communication between doctors and patients. A partnership with the Government can make it happen far more easily by connecting the service to primary health centres (PHCs). The Government-appointed ASHA workers can be enabled with a tablet or smartphone device who can not only help out people with online doctor consultation, but also provide critical health information to people, especially expecting mothers and aged people. Language is a key factor here for scripting the success story.

Data collation to devise unique solutions

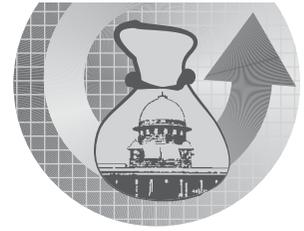
Internet is gradually penetrating to interior parts of the country and can help hugely in a) data collation; b) uninterrupted flow of information and c) devising customisable technological solutions.

The structure mentioned above is of utmost importance, for India is a diverse land with varied ecological and geographical conditions. So, one solution that has a revolutionary impact at one place, might well be a failure at another. For this reason, local solution needs to be carved out for local problems, and when there is information at hand relating to epidemiological data of human beings, coming up with

[Contd.. on page 87]



B.V. Jhaveri, *Advocate*



DIRECT TAXES Supreme Court

S. 80-IB(4): Subsidies (such as transport subsidy, interest subsidy and power subsidy) paid to the assessee with the object of reducing the cost of production constitutes "profits derived from the business of the industrial undertaking" and is eligible for deduction u/s. 80-IB. Liberty India 317 ITR 218 (SC) is distinguishable on facts

CIT vs. Meghalaya Steels Ltd. [Civil Appeal No. 7622 of 2014, dated 9th March, 2016]

The assessee claimed deduction under Section 80-IB of the Income-tax Act on the profits and gains of business of the industrial undertaking. The assessee included the following subsidies in the profits and gains, namely, transport subsidy, interest subsidy and power subsidy. The Assessing Officer held that the amounts received by the assessee as subsidies were revenue receipts and did not qualify for deduction under Section 80-IB(4) of the Act and, accordingly, the assessee's claim for deduction on account of the three subsidies aforementioned were disallowed. This was upheld by the CIT(A) though reversed by the ITAT. The High Court also upheld the claim of the assessee (see *CIT vs. Meghalaya Steels Ltd. [2013] 356 ITR 235*). The Supreme Court dismissing the appeals of the Department held as under:

(i) A series of decisions have made a distinction between "profit attributable to" and "profit derived from" a business. In one of the early judgments,

namely, *Cambay Electric Supply Industrial Company Limited vs. Commissioner of Income Tax, Gujarat II, (1978) 2 SCC 644*, this Court had to construe Section 80-E of the Income-tax Act, which referred to profits and gains attributable to the business of generation or distribution of electricity. This Court held that it cannot be disputed that the expression "attributable to" is certainly wider in import than the expression "derived from".

(ii) In *Liberty India vs. Commissioner of Income Tax [317 ITR 218 (SC)]*, what this Court was concerned with was an export incentive, which is very far removed from reimbursement of an element of cost. A DEPB drawback scheme is not related to the business of an industrial undertaking for manufacturing or selling its products. DEPB entitlement arises only when the undertaking goes on to export the said product, that is after it manufactures or produces the same. Pithily put, if there is no export, there is no DEPB entitlement, and therefore its relation to manufacture of a product and/or sale within India is not proximate or direct but is one step removed. Also, the object behind DEPB entitlement, as has been held by this Court, is to neutralise the incidence of customs duty payment on the import content of the export product which is provided for by credit to customs duty against the export product. In such a scenario, it cannot be said that such duty exemption scheme is derived from profits and gains made by the industrial undertaking or business itself.

(iii) As regards *CIT vs. Dharampal Premchand Ltd. 317 ITR 353 (Del.)* from which an SLP preferred in

the Supreme Court was dismissed, this judgment also concerned itself with Section 80-IB of the Act, in which it was held that refund of excise duty should not be excluded in arriving at the profit derived from business for the purpose of claiming deduction under Section 80-IB of the Act.

(iv) As regards the contention that as the subsidies that are received by the assessee would be income from other sources referable to Section 56 of the Income-tax Act, any deduction that is to be made, can only be made from income from other sources and not from profits and gains of business, which is a separate and distinct head as recognised by Section 14 of the Income-tax Act. It is not correct that assistance by way of subsidies which are reimbursed on the incurring of costs relating to a business, are under the head "income from other sources", which is a residuary head of income that can be availed only if income does not fall under any of the other four heads of income. Section 28(iii)(b) specifically states that income from cash assistance, by whatever name called, received or receivable by any person against exports under any scheme of the Government of India, will be income chargeable to income tax under the head "profits and gains of business or profession". If cash assistance received or receivable against exports schemes are included as being income under the head "profits and gains of business or profession", it is obvious that subsidies which go to reimbursement of cost in the production of goods of a particular business would also have to be included under the head "profits and gains of business or profession", and not under the head "income from other sources".

(Liberty India vs. Commissioner of Income-tax reported in 2009 (9) SCC 328, Supriya Gill vs. CIT (2010) 193 Taxman 12 (Himachal Pradesh), CIT vs. Sterling Foods, 237 ITR 579 (1999), Jai Bhagwan Oil and Flour Mills vs. Union of India and Others (2009) 14 SCC 63; Sahney Steel and Press Works Ltd. vs. Commissioner of Income Tax, A.P. – I, Hyderabad, (1997) 7 SCC 764; CIT vs. Cement Manufacturing Company Limited, and CIT vs. Dharampal Premchand Ltd., 317 ITR 353 referred).

Ss. 9(1)(vii) / 40(a)(ia) / 194J: “Technical Services” & “Managerial and Consultancy Service” denotes services that cater to special & exclusive needs of the consumer/user. A "facility", even if termed as a service, which is available to all users, does not come within the ambit of “technical services” in Explanation 2 of s. 9(1)(vii)

CIT vs. M/s. Kotak Securities Ltd. Civil Appeal No. 3141 of 2016 [Arising out of S.L.P.(C) No. 19907 of 2012, dated 29th March, 2016]

"Technical Services" like "Managerial and Consultancy Service" would denote seeking of services to cater to the special needs of the consumer/user as may be felt necessary and the making of the same available by the service provider.

It is the above feature that would distinguish/identify a service provided from a facility offered. While the former is special and exclusive to the seeker of the service, the latter, even if termed as a service, is available to all and would therefore stand out in distinction to the former.

The service made available by the Bombay Stock Exchange [BSE Online Trading (BOLT) System] for which the charges are paid by members of BSE are available to all members of the stock exchange in respect of every transaction that is entered into. There is nothing special, exclusive or customised service that is rendered by the Stock Exchange.

There is no exclusivity to the services rendered by the Stock Exchange and each and every member has to necessarily avail of such services in the normal course of trading in securities in the Stock Exchange. Such services, therefore, would undoubtedly be appropriate to be termed as facilities provided by the Stock Exchange on payment and does not amount to "technical services" provided by the Stock Exchange, not being services specifically sought for by the user or the consumer. It is the aforesaid latter feature of a service rendered which is the essential hallmark of the expression "technical services" as appearing in Explanation 2 to section 9(1)(vii) of the Act.





Ashok Patil, *Advocate*



DIRECT TAXES High Court

1. Sections 40(a)(i), 172, 195 – payment of demurrage charges – Indian company to non-resident shipping company – not liable to TDS u/s. 195

CIT vs. Dempo & Co. 284 CTR 1 (Bom.) (FB)

Payment of demurrage charges to non-resident shipping company, the responsibility of deducting TDS u/s. 195 is on any person making the payment to a non-resident. Shipping business of non-residents is an aspect u/s. 172 under chapter XV which deals with liability in special cases profits of non-residents, then section 172 is referable to 44B, both provisions open with *non obstante* clause, Section 44B denotes as to how the amounts paid to or payable would include demurrage charges or handling charges or any other amount of similar nature, sub-sections of Section 172 read together and harmoniously reveal as to how tax should be levied, computed and recovered. Therefore there is no warrant in applying the provisions of chapter XVII for collection and recovery of tax and its deduction at source *vide* Section 195. The High Court therefore held that the amount paid as demurrage charges by an Indian Company to a non-

resident shipping company are not liable to TDS u/s. 195 and therefore no disallowance can be made u/s. 40(a)(i).

2. Section 37 – payment of compensation to port trust for encroachment of land – allowable as revenue expenditure

Mundial Export Import Finance (P) Ltd. vs. CIT 284 CTR 87 (Cal.)

The assessee had acquired on lease from the Port Trust. It had encroached upon the adjacent land which also belonged to the Port Trust. The assessee had made a proposal to take the encroached land also on long term lease. The Port Trust demanded a compensation for the use of encroached-upon land as a precondition, before the long term lease could be considered. The assessee paid the compensation and claimed the same as revenue expenditure, the same was disallowed by AO, being capital expenditure. The High Court held that payment was for compensation for encroached land by the assessee which was an expenditure incurred wholly and exclusively for the purposes of the business and therefore allowable as deduction u/s. 37(1) and the explanation to Section 37(1) was not applicable.

3. Sections 147, 148 – Filing of objections – rejection of objections in the reassessment order – non-speaking and composite order is liable to be set aside

JVS Export vs. Deputy Commissioner of Income Tax (2016) 130 DTR (Mad.) 411

In the instant case the notice u/s. 148 was issued on the assessee, and in response to the same filed a letter stating that the original return filed maybe considered in response to the notice u/s. 148. The assessee also filed a letter with the AO asking for the reasons for reopening the assessment. The assessee filed objections against the reasons provided by the AO. The AO did not pass any order rejecting the objections, the AO passed a composite order rejecting the objections raised by the assessee in the reassessment order. The Hon'ble High Court held that the AO has passed a composite and non-speaking order, which was not permissible, and therefore the reopening was not sustainable.

4. Sections 4, 56 – Interest from fixed deposits during pre-commencement period – capital receipt – AY 2009-10

Principal Commissioner of Income Tax vs. Facor Power Ltd. (2016) 130 DTR (Del.) 281

In the instant case the assessee was setting up a power project, and the assessee had

taken additional share capital for acquiring various capital assets for setting up of power plant. The money that was not required immediately, was kept in fixed deposits. The AO assessed the income as income from other sources. The High Court in the instant case held that the money placed in the fixed deposit was inextricably linked with the setting up of the power plant, and therefore the interest generated from such funds would be in the nature of capital receipt and not a revenue receipt.

5. Sec 201(1); 206C(1) – ship breaking – products sold from the activity of ship breaking is not sale of scrap – provisions of section 206C not attracted

CIT vs. Priya Blue Ind. P. Ltd. [2016] 381 ITR 210 (Guj)

The Assessee is in the business of ship breaking. During the assessment proceedings the AO noticed that the assessee had made sales of scrap such as old and used plates, furniture, etc. from the shipbreaking activity had not collected tax as per the provisions of section 206, and held the assessee in default u/s. 201. The Hon'ble High Court held that, such items constitute finished products which constitute sizeable part of production of ship breakers, and such items cannot be termed as scrap, and the assessee is not liable to collect tax on the sale of such items.

☐

If you can think that infinite power, infinite knowledge and indomitable energy lie within you, and if you can bring out that power, you also can become like me.

— Swami Vivekananda



Jitendra Singh & Sameer Dalal
Advocates

DIRECT TAXES Tribunal

REPORTED

1. Depreciation – Section 32 of the Income-tax Act, 1961 – Assessee claimed depreciation on trademark not registered in its name – claim of depreciation is not contingent upon its registration – depreciation allowable. A.Y.: 2007-08

Trio Elevators Company (India) Ltd. vs. ACIT [2016] 67 taxmann.com 348 (Ahmedabad-Trib.)

The assessee, pursuant to slump sale agreement dated 31-8-2007 with Alps Technologies Pvt. Ltd., purchased the business of selling, installation, commissioning and repairs and maintenance of elevators, with all its assets and liabilities, benefits and obligations, employees and customers, as a going concern. One of the assets which was transferred to the assessee as such was trademark which was assigned a value of ` 2,00,00,000/- in this agreement. The assessee claimed depreciation of ` 50 lakh on the asset so acquired. The Ld. A.O. disallowed the depreciation claimed by the assessee on the ground that it is not yet registered owner of the trademark. The Ld. A.O. further observed that as the assessee is not a registered owner of the trademark, it is not entitled to the use of the trademark, nor can the assessee bar any

other person from using the same trademark. He further noted that in terms of Section 28(1) of the Trade Marks Act, 1999 it is only on its registration that the proprietor of the trademark gets the exclusive right to use the trademark and to obtain relief in respect of infringement of the trademark. On appeal, the First Appellate Authority upheld the disallowance made by the Ld. A.O.

The assessee being aggrieved by the order passed Ld. CIT(A) preferred an appeal before the Hon'ble Ahmedabad Appellate Tribunal. The Appellate Tribunal was pleased to allow the claim of the assessee by observing that admissibility of depreciation on trademark is not contingent upon its registration in name of assessee in as much as description of intangible asset in Part B of depreciation schedule describes same merely as 'know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature'.

UNREPORTED

2. Business expenditure – Section 37 of the Income-tax Act, 1961 – payment made to holding company towards ESOP – disallowance of such payment holding that the discount on issue

of ESOP is contingent expenditure – unjustified A.Y.: 2010-11

DCIT vs. Kotak Securities Ltd – [I.T.A. No.: 2096 / Mum / 2014; Order dated 11-3-2016; Mumbai Tribunal]

The assessee is a subsidiary of Kotak Mahindra Bank Ltd. ('KMBL' for short). KMBL had formulated ESOP in accordance with SEBI guidelines, 1999. As per the scheme the employees of the assessee were granted option to acquire the equity shares of KMBL at a discount to the prevailing market price. The assessee made payment to KMBL in respect of its share of discount and debited such payment to Profit & Loss Account on the ground that the payment was nothing but compensation paid to the employees. However, the Ld. A.O. while finalising the assessment order rejected the claim of the assessee by observing that ESOP discounts were incurred in relation to the issue of shares to the employees and the same are not relatable to profits and gains arising or accruing from business/trade. Hence, the expenditure is not allowable under Section 37 of the Act. On appeal the First Appellate Authority allowed the claim of the assessee relying on the decision of *Biocon Ltd. vs. DCIT [2014] 144 ITD 21 (Bangalore-Trib.) (SB)*.

The department being aggrieved by the above order passed by Ld. CIT(A) preferred an appeal before the Mumbai Appellate Tribunal. Hon'ble Appellate Tribunal dismissed the appeal of the department and upheld that order of the Ld. CIT(A) relying on the decision of Bangalore Appellate Tribunal in the case of *Biocon Ltd.* (supra) wherein it has been held that conceptually the discount on issue of ESOP is an allowable deduction in computing taxable income. The discount is nothing but a part of remuneration packages and it is neither a short receipt of capital not a capital expenditure. The discount on issue of ESOP is not a contingent expenditure and the expenditure is allowable in the hands of the assessee since the amount is already paid.

3. Concealment penalty – Section 271(1)(c) of the Income-tax Act, 1961 – levy of concealment penalty on the rejection of set-off of business loss under Section 79 of the Act on the ground that there was a change in shareholding pattern – unjustified. A.Y.: 2008-09

Just Lifestyle P. Ltd. vs. DCIT – [I.T.A. No.: 3871 / Mum / 2014; Order dated 16-3-2016; Mumbai Tribunal]

The assessee filed its return after claiming set-off of brought forward losses of earlier years amounting to ₹ 1,65,21,117/-. The Ld. A.O. rejected the claim of set off of the losses by invoking provisions of Section 79 on the ground that there was a change in majority shareholding pattern and provisions of Section 79 were violated. The assessment order passed by Ld. A.O. is also upheld by Ld. CIT(A) and Appellate Tribunal. The Ld. A.O. also levied concealment penalty on the above disallowance. On appeal the First Appellate Authority upheld the action of the Ld. A.O. in levying concealment penalty under Section 271(1)(c) of the Act.

The assessee being aggrieved by the order passed by Ld. CIT(A) preferred an appeal before the Mumbai Appellate Tribunal. The Appellate Tribunal was pleased to allow the appeal and deleted the penalty levied under Section 271(1)(c) of the Act by observing that there were basis to have a *bona fide* belief that majority control still remained with the same group. The provisions of Section 79 are complex and highly technical. Though, technically speaking there was violation of Section 79, but it is not a case of concealment of income or filing of inaccurate particulars on the part of the assessee. The benefit of set-off of losses was claimed by the assessee in the return as per its understanding of section 79. The claim was refused by the AO because of his understanding of Section 79. The appellate authorities upheld the stand of the AO. But, that itself would not attract levy of penalty, as was

also held in the similar facts by Hon'ble Delhi Bench of the Tribunal in the case of *Century Metal Recycling (Pvt.) Ltd. vs. DCIT 53 taxmann. com 309 (Delhi-Trib.)* wherein it was observed that where disallowance of carry forward of long term losses was made on technical ground and not on account of concealment of particulars of income, penalty under Section 271(1)(c) would not be levied. We find that making of disallowance and levy of penalty are two different events under the Income-tax Law, and happening of one event does not automatically lead to the other.

4. Concealment penalty – Section 271(1)(c) of the Income tax Act, 1961 – set-off of speculation loss against salary income – bona fide mistake – levy of concealment penalty unjustified. A.Y.: 2004-05

Ravi M. Arabatti vs. ITO – [I.T.A. No.: 8814 / Mum / 2011; Order dated 4-3-2016; Mumbai Tribunal]

The assessee before the Appellate Tribunal is an individual and salaried employee. During the year under consideration he has incurred speculation loss which has been set-off against the salary income. The Ld. A.O. while finalizing the assessment rejected the claim of the assessee. The Ld. A.O. also levied concealment penalty under Section 271(1)(C) of the Act. On appeal the Ld. CIT(A) upheld the action of the Ld. A.O.

The assessee being aggrieved by the above order passed by Ld. CIT(A) preferred an appeal before the Mumbai Appellate Tribunal. The Appellate Tribunal was pleased to allow the appeal of the assessee by observing that the assessee had disclosed entire income from salary, income from other sources and income from business. However, the Ld. A.O. treated income from share business as speculation loss on the basis of material furnished by the assessee himself. The Ld. A.O. has not gathered any material from outside sources. As such it cannot be held that assessee has concealed particulars of income or furnished inaccurate particulars.



[Contd.. from page 80]

affordable solutions in terms of healthcare infrastructure, medicines, healthcare delivery become easier with the help of technology.

The devices such as computers and mobile phones must be uncomplicated for rural people to use and support vernacular languages. This is what service providers in the domains of healthcare need to be sensitive about to be able to allow rural population to make best use of their offerings.

Portable healthcare equipment and automating process

Any equipment that is bulky and cumbersome is not the future of healthcare as they hamper scalability and make healthcare outcomes expensive. Technology is helping to simplify equipment and machinery to make them cost-effective for people. For instance, a machine that is portable is easier to be moved from one place to another to cover more population and

make larger groups benefit from it. When large population is involved, the cost can be slashed to make it a win-win situation for both companies and the people.

Also, technology enables automating processes and machine learning, allowing more precision to come into the systems to detect disease, manufacture cost-effective medicine or generating customisable solutions. This leads to faster results by way of documentation, medical record keeping, quicker and precise analysis of data.

Technology has shown its efficacy in healthcare. The need is to propagate the benefits. Gradually, we are moving towards the future of healthcare which is spearheaded by technology itself. Meaningful alliances between Government and technology disruptors will speed up the whole process and take healthcare delivery to a new level, for the good of the entire Indian population.





CA Sunil K. Jain



DIRECT TAXES

Statutes, Circulars & Notifications

NOTIFICATIONS

SECTION 10(46) OF THE INCOME-TAX ACT, 1961 – EXEMPTIONS – STATUTORY BODY/AUTHORITY/BOARD/COMMISSION – NOTIFIED BODY OR AUTHORITY

As per clause (46) of section 10 of the Income-tax Act the Central Government notified, the Madhya Pradesh State AIDS Control Society a body constituted by the Government of Madhya Pradesh in respect of the specified income arising to that Society, namely: amount received in the form of grants-in-aid from the Government of India; and interest earned on such grants-in-aid.

This notification shall be deemed to apply for the periods 1-6-2011 to 31-3-2013 and shall apply with respect to the Financial Years 2013-14, 2014-15 and 2015-16. The notification shall be effective subject to the following conditions, namely:—

- (a) The Madhya Pradesh State AIDS Control Society does not engage in any commercial activity;
- (b) The activities and the nature of the specified income of the Madhya Pradesh State AIDS Control Society remain unchanged throughout the financial year; and

- (c) The Madhya Pradesh State AIDS Control Society files return of income in accordance with the provision of clause (g) of sub-section (4C) section 139 of the Income-tax Act, 1961.

The grants received by the society shall be received and applied in accordance with the prevailing rules and regulations.

(Notification No. SO 595(E) [No. 9/2016 (F. No. 196/73/2012-ITA.I)], dated 25-2-2016)

INCOME-TAX (THIRD AMENDMENT) RULES 2016 – SUBSTITUTION OF RULE 45 AND FORM 35 FOR E-FILING OF APPEAL WITH CIT

As per sub-section (1) of section 249, of the Income-tax Act, the CBDT made the following rules further to amend the Income-tax Rules, 1962 which shall come into force on the date of their publication in the Official Gazette. In the Income-tax Rules, for rule 45, the following rule has been substituted, namely:—

- (1) Form No. 35 shall be furnished : (a) in the case of a person who is required to furnish return of income electronically i) by furnishing the form electronically under digital signature, if the return of income is furnished under digital signature; (ii)

by furnishing the form electronically through electronic verification code in a case not covered under sub-clause (i) (b) in a case where the assessee has the option to furnish the return of income in paper form, by furnishing the form electronically or in paper form.

- (2) The form of appeal referred to in sub-rule (1), shall be verified by the person who is authorised to verify the return of income under section 140 of the Act, as applicable to the assessee.
- (3) Any document accompanying Form No. 35 shall be furnished in the manner in which the said form is furnished.
- (4) The Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems), as the case may be, shall specify the procedure for electronic filing of Form No. 35 and documents, the data structure, standards and manner of generation of electronic verification code, referred to in sub-rule (2), for the purpose of verification of the person furnishing the said form; and be responsible for formulating and implementing appropriate security, archival and retrieval of policies in relation to the said form so furnished.

(Notification No. SO 637(E) [No.11/2016 (F.No. 149/150/2015-TPL)], dated 1-3-2016)

SECTION 10(46) OF THE INCOME-TAX ACT, 1961 – EXEMPTIONS – STATUTORY BODY/AUTHORITY/BOARD/COMMISSION – NOTIFIED BODY OR AUTHORITY

As per clause (46) of section 10 of the Income-tax Act, 1961 the Central Government notified for the purposes of the said clause, the State Load Dispatch Centre Unscheduled Interchange Fund–West Bengal State Electricity Transmission Company Limited, a trust constituted under the Electricity Act, 2003 in respect of the specified

income arising to that trust, namely residual money in the unscheduled interchange pool balance account; interest on fixed deposits and auto-sweep accounts; and income incidental to or related to unscheduled interchange.

The notification shall be subject to the conditions, namely that the State Load Dispatch Centre Unscheduled Interchange Fund – West Bengal State Electricity Transmission Company Limited shall not engage in any commercial activity, activities and the nature of the specified income remain unchanged throughout the financial years and shall file return of income in accordance with the provision of clause (g) of sub-section (4C) of section 139 of the Income-tax Act, 1961.

This notification shall be deemed to be applicable for the financial years 2012-13, 2013-14, 2014- 15 and applicable for the financial years 2015-16 and 2016-17.

(Notification No. SO 639(E) [No.12/2016 (F.No.196/51/2012-ITA.I)], dated 2-3-2016)

INCOME-TAX (FOURTH AMENDMENT) RULES, 2016 – AMENDMENT IN NEW APPENDIX I (15% DEPRECIATION RATE ON OIL WELLS)

As per section 295 of the Income tax Act, 1961, the CBDT made the rules to amend the Income tax Rules, 1962 which shall come into force on the 1st day of April 2016.

In the Income-tax Rules, 1962, in New APPENDIX I, in the table of rates at which depreciation is admissible, in part a relating to tangible assets, under the sub-heading iii. Machinery and plant, in item (8), in sub-item (xii) relating to mineral oil concerns, and under the block of assets the Depreciation allowance as percentage of written down value on “oil well not covered in the said clause shall be 15%”.

(Notification No. SO 650(E) [No. 13/2016 (F.No. 142/33/2015-TPL)], dated 3-3-2016)

INCOME-TAX (FIFTH AMENDMENT) RULES, 2016 – INSERTION OF RULES 10V, 10VA, 10VB AND FORM NO. 3CEJ AND FORM NO. 3CEK

As per section 9A of the Income-tax Act, the CBDT made the rules to amend the Income-tax Rules, 1962 which shall come into force from the date of their publication in the Official Gazette.

In the Income-tax Rules, 1962, after rule 10UC, rule 10V relating to the guidelines for applicability of section 9A, rule 10VA relating to the approval of fund and rule 10VB relating to the statement to be furnished by the fund have been inserted.

Further, Income Tax Form 3CEJ for the submission of report from an accountant for purposes of section 9A relating to arm's length price in respect of the remuneration paid by an eligible investment fund to the fund manager and Form Income Tax 3CEK for the purpose of the Annual Statement under section 9A of the Income-tax Act, 1961 have been introduced.

(Notification No. SO 1101(E) [No. 14/2016 (F.No.142/15/2015-TPL)], dated 15-3-2016)

EXEMPTIONS – STATUTORY BODY/AUTHORITY/BOARD/COMMISSION – NOTIFIED BODY OR AUTHORITY

As per clause (46) of section 10 of the Income-tax Act, 1961, the Central Government notified the Karnataka Urban Water Supply and Drainage Board a Board constituted under the Karnataka Urban Water Supply and Drainage Board Act, 1973, in respect of the following specified income arising to that Board, namely:—

- (a) Establishment, administrative and supervision charges collected as a percentage of project cost prescribed by the Karnataka Public Works Department Accounts Code of Government of Karnataka;
- (b) Water charges collection for supply of water to local bodies and directly to consumers;

- (c) Interest on investments and fixed deposit in banks;
- (d) Rent collected for letting out head office building 'JAL BHAWAN';
- (e) Forfeiture of earnest money deposit.

This notification shall be effective subject to the conditions that the Karnataka Urban Water Supply and Drainage Board shall not engage in any commercial activity, activities and the nature of the specified income remain unchanged throughout the financial years and shall file return of income in accordance with the provision of clause (g) of sub-section (4C) of section 139 of the Income-tax Act, 1961.

This notification shall be deemed to have been applying for the financial year 2014-15 and shall apply with respect to the financial years 2015-16, 2016-17, 2017-18 and 2018-19.

(Notification No. SO 1139(E) [No.15/2016 (F.No.196/6/2015-ITA.I)], dated 16-3-2016)

SECTION 10(46) OF THE INCOME-TAX ACT, 1961 – EXEMPTIONS – STATUTORY BODY/AUTHORITY/BOARD/COMMISSION – NOTIFIED BODY OR AUTHORITY

As per clause (46) of section 10 of the Income-tax Act 1961, the Central Government notified "National Biodiversity Authority" an authority established under the Biological Diversity Act, 2002 in respect of the following specified income arising to that Authority, namely benefit sharing fee and royalty received, amount received in the form of grant-in-aid from the Government of India, interest, penalty and application fees.

This notification shall be effective subject to the conditions, namely that the National Biodiversity Authority shall not engage in any commercial activity; the activities and nature of the specified income shall remain unchanged throughout the financial years and it shall file return of income

in accordance with the provision of clause (g) of sub-section (4C) of section 139 of the said Act.

This notification shall be deemed to apply for the periods 1-6-2011 to 31-3-2012 and financial years 2012-13, 2013-14, 2014-15 and shall apply with respect to the financial year 2015-16.

(Notification No. SO 1138(E) [No.16/2016 (F.No. 196/28/2012-ITA-I)], dated 16-3-2016)

SECTION 90 OF THE INCOME-TAX ACT, 1961 – DOUBLE TAXATION AGREEMENT – AGREEMENT FOR AVOIDANCE OF DOUBLE TAXATION AND PREVENTION OF FISCAL EVASION WITH FOREIGN COUNTRIES – INDONESIA – REPEAL OF NOTIFICATION NO. GSR 77(E), DATED 4-2-1988

An Agreement between the Government of the Republic of India and the Government of the Republic of Indonesia for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income was signed in July, 2012 and came into force on 5th day of February, 2016. The Agreement provides that the provisions shall have effect in India in respect of income derived in any fiscal year beginning on or after the first day of April next following the calendar year in which the said Agreement enters into force. The Central Government notified that all the provisions of the said Agreement, as provided in the notification shall be given effect to in the Union of India.

(Notification No. SO 1144(E) [No. 17/2016 (F.No. 503/4/2005-FTD-II)], dated 16-3-2016)

INCOME-TAX (SIXTH AMENDMENT) RULES, 2016 – INSERTION OF RULE 8AA: (RULES TO DETERMINE PERIOD OF HOLDING OF CAPITAL ASSETS IN CERTAIN CASES)

As per section 2 of the Income-tax Act, 1961, the CBDT hereby made the following rules further

to amend the Income-tax Rules, 1962 which shall come into force from the 1st day of April, 2016. In the Income-tax Rules, 1962, after rule 8A, the following rule has been inserted, namely:—

"8AA. Method of determination of period of holding of capital assets in certain cases.– (1) The period for which any capital asset, is held by an assessee, shall be determined in accordance with the provisions of this rule.

(2) In the case of a capital asset, being a share or debenture of a company, which becomes the property of the assessee in the circumstances mentioned in clause (x) of section 47 of the Act, there shall be included the period for which the bond, debenture, debenture-stock or deposit certificate, as the case may be, was held by the assessee prior to the conversion."

(Notification No. SO 1146(E) [No. 18/2016 (F.No. 142/1/2016-TPL)], dated 17-3-2016)

SENIOR CITIZENS' WELFARE FUND RULES, 2016

As per the section 128 of the Finance Act, 2015, the Government has made the Senior Citizens' Welfare Fund Rules, 2016 which shall come into force from the date of their publication in the Official Gazette. The Rules further define the establishment, utilisation and administration of the Fund. It also specifies the eligible rate of interest for the money lying in the Fund, publication of information before crediting the unclaimed amount to the Fund and preparation of Annual Report for the activities undertaken in the previous financial year.

(Notification No. GSR 322(E) [F.No. 13/20/2014-NS. II], dated 18-3-2016)

SUKANYA SAMRIDDHI ACCOUNT RULES, 2016

As per section 15 of the Government Savings Banks Act, 1873, and in supersession of the Sukanya Samriddhi Account Rules, 2014 published in the Gazette of India, the Central Government made Sukanya Samriddhi Account Rules, 2016 which shall come into force on

the date of their publication in the Official Gazette. The Rules cites matters in relation to opening of account by the guardian in the name of a beneficiary who has not attained the age of ten years as on the date of opening of the Account. It further states that the mode of deposit in the Account may be made by the guardian or by the beneficiary concerned if such beneficiary has crossed the age of ten years and the date of credit. The interest on deposit shall be compounded yearly at the rate notified by the Government in the Official Gazette from time to time and shall be credited. The other details relating to the operation, transfer, withdrawal and premature closure of the account are provided in the notification.

(Notification No. GSR 323(E) [F.No. 2/3/2014.NS.II], dated 18-3-2016)

INCOME-TAX (SEVENTH AMENDMENT) RULES, 2016 – AMENDMENT IN RULE 114E FOR REPORTING OF FINANCIAL TRANSACTIONS; APPLICABLE FOR FY 2015-16 AND FORM NO. 61A

As per section 285BA, of the Income-tax Act, 1961, the CBDT made the following rules further to amend the Income-tax Rules which shall deemed to come into force from the 1st day of April, 2015. In the Income-tax Rules, 1962, in rule 114E and the Appendix II to the Rules, in Form No.61A certain words have been inserted or substituted. Rule 114E of the Rules, as amended by this rule and shall be applicable for the specified financial transactions carried out during the period from 1st April, 2015 to 31st March, 2016.

(Notification No. SO 1155(E) [No.19/2016 (F.No. 142/28/2012-(SO)TPL], dated 18-3-2016)

INCOME-TAX (EIGHTH AMENDMENT) RULES, 2016 – AMENDMENT IN RULE 17C – FORMS OR MODES OF

INVESTMENT OR DEPOSITS BY A CHARITABLE OR RELIGIOUS TRUST OR INSTITUTION

As per section 295 of the Income-tax Act, 1961 the Central Government made the rules to amend the Income-tax Rules, 1962, which shall be called the Income-tax (8th Amendment) Rules, 2016 and shall come into force on the date of their publication in the Official Gazette.

In the Income-tax Rules, 1962, in rule 17C, after clause (viii), the following clause shall be inserted, namely:—

“(ix) Investment in “Stock Certificate” as defined in clause (c) of paragraph 2 of the Sovereign Gold Bonds Scheme, 2015, published in the Official Gazette.

(Notification No. SO 1206(E) [No. 21/2016 (F.No. 142/1/2016-TPL), dated 23-3-2016)

CIRCULARS

PROMOTION OF PAYMENTS THROUGH CARDS AND DIGITAL MEANS

The Guidelines for the promotion of payments through cards and digital means have been approved. The objectives include improving the ease of conducting card/digital transactions for an individual, reducing tax avoidance, impact of counterfeit money and the risks and costs of handling cash at the individual level and to build a transactions history to enable improved credit access and financial inclusion. The scope covers providing access to financial payment services to every citizen along with ability to conduct card/digital transactions, digitalising Government collections by equipping each collection point with a method to accept card/ digital payments, encouraging corporate, institutions and merchant establishments to facilitate card/ digital payments etc. The goal of the proposed policy changes is to provide the necessary incentives to use digital financial transactions to replace the use of cash – either in Government transactions, or

in regular commerce over a period of time through policy intervention. The Short Term Steps for Promotion of Payments through Card/ Digital Means, which will be implemented within one year, are: Promotion of Card/ Digital Transactions in Government Payments and Collections, measures for Wider Adoption of Card/ Digital Transactions, creating Acceptance Infrastructure Encouraging Mobile Banking/ Payment Channels and Awareness and Grievance Redressal. The Medium Term Steps for Promotion of Payments through Cards/ Digital Means, which may be implemented within two years, are further suggested in the memorandum.

(Office Memorandum [F. No. 01/02/2015-CY.I], dated 29-2-2016)

SECTION 194C, READ WITH SECTION 194J, OF THE INCOME-TAX ACT, 1961 – DEDUCTION OF TAX AT SOURCE – CONTRACTORS/SUB-CONTRACTORS, PAYMENTS TO – TAX DEDUCTION AT SOURCE (TDS) ON PAYMENTS BY BROADCASTERS OR TELEVISION CHANNELS TO PRODUCTION HOUSES FOR PRODUCTION OF CONTENT OR PROGRAMME FOR TELECASTING

The issue of applicability of TDS provisions on payments made by broadcasters/telecasters to production houses for production of content or programme for broadcasting/telecasting has been examined by CBDT in view of representations received in this regard. It has been noted that disputes have arisen on the issue as to whether payments made by the broadcaster/telecaster to production houses for production of content/programme are payments under a 'work contract' or a contract for 'professional or technical services' and, therefore, liable for TDS u/s. 194C or u/s. 194J of the Income-tax Act, 1961. While applying the relevant provision of TDS on a contract for

content production, a distinction is required to be made between (i) a payment for production of content/programme as per the specifications of the broadcaster/telecaster and (ii) a payment for acquisition of broadcasting/telecasting rights of the content already produced by the production house. Where the content is produced as per the specifications provided by the broadcaster/telecaster and the copyright of the content/programme also gets transferred to the telecaster/broadcaster, it has been clarified that such contract is covered by the definition of the term 'work' in section 194C of the Act and, therefore, subject to TDS under that section. This position clearly flows from the definition of 'work' given in clause (iv)(b) of the Explanation to section 194C and the same has also been clarified. However, in a case where the telecaster/broadcaster acquires only the telecasting/broadcasting rights of the content already produced by the production house, there is no contract for 'carrying out any work', as required in sub-section (1) of section 194C. Therefore, such payments are not liable for TDS under section 194C. However, payments of this nature may be liable for TDS under other sections under Chapter XVII-C of the Act.

(Circular No. 4/2016 [F. No. 275/07/2016-IT (B)], dated 29-2-2016)

SECTION 194H, READ WITH SECTION 194C, OF THE INCOME-TAX ACT, 1961 – DEDUCTION OF TAX AT SOURCE – COMMISSION OR BROKERAGE ETC. – TAX DEDUCTION AT SOURCE ON PAYMENTS BY TELEVISION CHANNELS AND PUBLISHING HOUSES TO ADVERTISEMENT COMPANIES FOR PROCURING OR CANVASSING FOR ADVERTISEMENTS

The issue of applicability of TDS provisions on payments made by television channels

or media houses publishing newspapers or magazines to advertising agencies for procuring and canvassing for advertisements has been examined by the CBDT in view of representations. It is noted that there are two types of payments involved in the advertising business: (a) Payment by client to the advertising agency, and (b) Payment by advertising agency to the television channel/newspaper company.

The applicability of TDS on these payments has already been dealt with in where it was clarified in Question Nos. 1 & 2 that while TDS under section 194C (as work contract) will be applicable on the first type of payment, there will be no TDS under section 194C on the second type of payment e.g. payment by advertising agency to the media company. However, another issue has been raised in various cases as to whether the fees/charges taken or retained by advertising companies from media companies for canvassing/booking advertisements (typically 15% of the billing) is 'commission' or 'discount'. It has been argued by the assesseees that since the relationship between the media company and the advertising company is on a principal-to-principal basis, such payments are in the nature of trade discount and not commission and, therefore, outside the purview of TDS under section 194H. The Department, on the other hand, has taken the stand in some cases that since the advertising agencies act on behalf of the media companies for procuring advertisements, the margin retained by the former amounts to constructive payment of commission and, accordingly, TDS under section 194H is attracted. The issue has been examined by the Allahabad High Court in the case of Jagran Prakashan Ltd. and Delhi High Court in the matter of Living Media Limited and it was held in both the cases that the relationship between the media company and the advertising agency is that of a 'principal-to-principal' and, therefore, not liable for TDS under section 194H. The SLPs filed by the Department in the matter of Living Media Ltd. and Jagran Prakashan Ltd. have been dismissed by the Supreme Court

Order. Though these decisions are in respect of print media, the ratio is also applicable to electronic media/television advertising as the broad nature of the activities involved is similar.

In view of the above, it was clarified that no TDS is attracted on payments made by television channels/newspaper companies to the advertising agency for booking or procuring of or canvassing for advertisements. It was further clarified that 'commission' referred to in Question No. 27 of the Board's Circular does not refer to payments by media companies to advertising companies for booking of advertisements but to payments for engagement of models, artists, photographers, sportspersons, etc. and, therefore, is not relevant to the issue of TDS referred to in this Circular.

(Circular No. 5/2016 [F. No. 275/06/2016-IT (B)], dated 29-2-2016)

SECTION 45, READ WITH SECTION 28(i), OF THE INCOME-TAX ACT, 1961 – CAPITAL GAINS, CHARGEABLE AS – ISSUE OF TAXABILITY OF SURPLUS ON SALE OF SHARES AND SECURITIES – CAPITAL GAINS OR BUSINESS INCOME – INSTRUCTIONS IN ORDER TO REDUCE LITIGATION

Sub-section (14) of section 2 of the Income-tax Act, 1961, defines the term "capital asset" to include property of any kind held by an assessee, whether or not connected with his business or profession, but does not include any stock-in-trade or personal assets subject to certain exceptions. As regards shares and other securities, the same can be held either as capital assets or stock-in-trade/trading assets or both. Determination of the character of a particular investment in shares or other securities, whether the same is in the nature of a capital asset or stock-in-trade, is essentially a fact-specific determination and has led to a lot of uncertainty and litigation in the past. Over the years, the

courts have laid down different parameters to distinguish the shares held as investments from the shares held as stock-in-trade. The CBDT has also summarised the said principles for guidance of the field formations. Disputes, however, continue to exist on the application of these principles to the facts of an individual case since the taxpayers find it difficult to prove the intention in acquiring such shares/securities. In this background, while recognising that no universal principal in absolute terms can be laid down to decide the character of income from sale of shares and securities (i.e. whether the same is in the nature of capital gain or business income), CBDT realising that major part of shares/securities transactions takes place in respect of the listed ones and with a view to reduce litigation and uncertainty in the matter, in partial modification to the aforesaid Circulars, further instructs that the Assessing Officers in holding whether the surplus generated from sale of listed shares or other securities would be treated as Capital Gain or Business Income, shall take into account the following—

- (a) Where the assessee itself, irrespective of the period of holding the listed shares and securities, opts to treat them as stock-in-trade, the income arising from transfer of such shares/securities would be treated as its business income,
- (b) In respect of listed shares and securities held for a period of more than 12 months immediately preceding the date of its transfer, if the assessee desires to treat the income arising from the transfer thereof as Capital Gain, the same shall not be put to dispute by the Assessing Officer. However, this stand, once taken by the assessee in a particular Assessment Year, shall remain applicable in subsequent Assessment Years also and the taxpayers shall not be allowed to adopt a different/contrary stand in this regard in subsequent years;
- (c) In all other cases, the nature of transaction (i.e. whether the same is in the nature

of capital gain or business income) shall continue to be decided keeping in view the aforesaid Circulars issued by the CBDT.

It was however, clarified that the above shall not apply in respect of such transactions in shares/securities where the genuineness of the transaction itself is questionable, such as bogus claims of Long Term Capital Gain/Short Term Capital Loss or any other sham transactions. It was reiterated that the above principles have been formulated with the sole objective of reducing litigation and maintaining consistency in approach on the issue of treatment of income derived from transfer of shares and securities. All the relevant provisions of the Act shall continue to apply on the transactions involving transfer of shares and securities.

(Circular No. 6/2016 [F. No. 225/12/2016-ITA-II], dated 29-2-2016)

SECTION 220 OF THE INCOME-TAX ACT, 1961 – COLLECTION AND RECOVERY OF TAX – WHEN TAX PAYABLE AND WHEN ASSESSEE DEEMED IN DEFAULT - AMENDMENT OF INSTRUCTION NO.1914, DATED 21-3-1996 TO PROVIDE FOR GUIDELINES FOR STAY OF DEMAND AT FIRST APPEAL STAGE

The instruction contains guidelines issued by the CBDT regarding procedure to be followed for recovery of outstanding demand, including procedure for grant of stay of demand. In part 'C' of the Instruction, it has been prescribed that a demand will be stayed only if there are valid reasons for doing so and that mere filing of an appeal against the assessment order will not be a sufficient reason to stay the recovery of demand. It has been further prescribed that while granting stay, the field officers may require the assessee to offer a suitable security (bank guarantee, etc.) and/ or require the assessee to pay a reasonable amount in lump sum or

in installments. It has been reported that the field authorities often insist on payment of a very high proportion of the disputed demand before granting stay of the balance demand. This often results in hardship for the taxpayers seeking stay of demand. In order to streamline the process of grant of stay and standardise the quantum of lump sum payment required to be made by the assessee as a pre-condition for stay of demand disputed before CIT(A), the following modified guidelines are being issued in partial modification of Instruction No. 1914:

- (A) In a case where the outstanding demand is disputed before CIT (A), the Assessing Officer shall grant stay of demand till disposal of First Appeal on payment of 15% of the disputed demand, unless the case falls in the category discussed in Para (B) hereunder.
- (B) In a situation where,
- (a) The Assessing Officer is of the view that the nature of addition resulting in the disputed demand is such that payment of a lump sum amount higher than 15% is warranted (e.g. in a case where addition on the same issue has been confirmed by appellate authorities in earlier years or the decision of the Supreme Court or jurisdictional High Court is in favour of Revenue or addition is based on credible evidence collected in a search or survey operation, etc.) or,
 - (b) The Assessing Officer is of the view that the nature of addition resulting in the disputed demand is such that payment of a lump sum amount lower than 15% is warranted (e.g. in a case where addition on the same issue has been deleted by appellate authorities in earlier years or the decision of the Supreme Court or jurisdictional High Court is in favour of the assessee, etc.),
- the Assessing Officer shall refer the matter to the administrative Pr. CIT/CIT, who after considering all relevant facts shall decide the quantum/proportion of demand to be paid by the assessee as lump sum payment for granting a stay of the balance demand.
- (C) In a case where stay of demand is granted by the Assessing Officer on payment of 15% of the disputed demand and the assessee is still aggrieved, he may approach the jurisdictional administrative Pr. CIT/CIT for a review of the decision of the assessing officer.
- (D) The assessing officer shall dispose of a stay petition within 2 weeks of filing of the petition. If a reference has been made to Pr. CIT/CIT under Para 4(B) above or a review petition has been filed by the assessee under Para 4(C) above, the same shall also be disposed of by the Pr. CIT/CIT within 2 weeks of the assessing officer making such reference or the assessee filing such review, as the case may be.
- (E) In granting stay, the Assessing Officer may impose such conditions as he may think fit. He may, *inter alia*, –
- (i) Require an undertaking from the assessee that he will co-operate in the early disposal of appeal failing which the stay order will be cancelled;
 - (ii) Reserve the right to review the order passed after expiry of reasonable period (say 6 months) or if the assessee has not co-operated in the early disposal of appeal, or where a subsequent pronouncement by a higher appellate authority or court alters the above situations;
 - (iii) Reserve the right to adjust refunds arising, if any, against the demand, to the extent of the amount required

for granting stay and subject to the provisions of section 245.

(Office Memorandum [F. No. 404/72/93-ITCC], dated 29-2-2016)

SECTION 4 OF THE INCOME-TAX ACT, 1961 – ASSOCIATION OF PERSON – ASSESSABLE AS – CLARIFICATION REGARDING TAXABILITY OF CONSORTIUM MEMBERS

A consortium of contractors is often formed to implement large infrastructure projects, particularly in Engineering Procurement and Construction ('EPC') contracts and Turnkey Projects. The tax authorities, in many cases have taken a position that such a consortium constitutes an Association of Persons ('AOP') i.e. a separate entity for charging tax. The claim of taxpayers, on the other hand, is contrary to this view. This has led to tax disputes particularly in those cases where each member of the consortium, although jointly and severally liable to the contractee, has a clear distinction and role in scope of work, responsibilities and liabilities of the consortium members. The term AOP has not been specifically defined in the Income-tax Act, 1961 the issue as to what would constitute an AOP was considered by the Apex Court in some cases. Although certain guidelines were prescribed in this regard, the Court opined that there is no formula of universal application so as to conclusively decide the existence of an AOP and it would rather depend upon the particular facts and circumstances of a case. In the specific context of the EPC contracts/Turnkey projects, there are several contrary ruling of various Courts on what constitutes an AOP. With a view to avoid tax-disputes and to have consistency in approach while handling these cases, the CBDT has decided that a consortium arrangement for executing EPC/Turnkey contracts which has the following attributes may not be treated as an AOP;

- a. Each member is independently responsible for executing its part of work through its own resources and also bears the risk of its scope of work i.e. there is a clear demarcation in the work and costs between the consortium members and each member incurs expenditure only in its specified area of work.
- b. Each member earns profit or incurs losses, based on performance of the contract falling strictly within its scope of work. However, consortium members may share contract price at gross level only to facilitate convenience in billing.
- c. The men and materials used for any area of work are under the risk and control of respective consortium members;
- d. The control and management of the consortium it not unified and common management is only for the *inter-se* co-ordination between the consortium members for administrative convenience.

There may be other additional factors also which may justify that consortium is not an AOP and the same shall depend upon the specific facts and circumstances of a particular case, which need to be taken into consideration while taking a view in the matter. It is further clarified that this Circular shall not be applicable in cases where all or some of the members of the consortium are Associated Enterprises within the meaning of section 92A of the Act in such cases, the Assessing Officer will decide whether an AOP is formed or not keeping in view the relevant provisions of the Act and judicial jurisprudence on this issue.

(Circular No. 7/2016 [F. No. 225/2/2016/ITA.II], dated 7-3-2016)

SECTION 245 OF THE INCOME-TAX ACT, 1961 – SET OFF OF REFUNDS AGAINST TAX REMAINING PAYABLE – REVISED TIMELINE FOR VERIFICATION OF ARREAR OF DEMAND

The procedure to be followed in cases where notice under section 245 has been issued for returns to be processed during FY 2015-16 was specified by CBDT. It was prescribed in the O.M. under reference that —

- (a) In cases where that taxpayer has contested the demand, CPC would issue a reminder to the Assessing Officer about the contention of the taxpayer, asking him to either confirm, or make appropriate changes to the demand within thirty days. In case no response is received from the AO within thirty days. CPC would issue the refund without any adjustment. The responsibility of, non-adjustment of refund against outstanding arrears, if any, would lie with the Assessing Officer.
- (b) In cases where there is no response from the taxpayer, CPC would issue a reminder to the taxpayer, asking him to either agree or disagree with the demand and submit response on the e-filing portal within thirty days. In case no response is received from the taxpayer within thirty, days, CPC would adjust the demand and issue the balance refund, if any, to the taxpayer.

In view of the large volume of pending refunds which are subject to proceedings under section 245 and the time line of 30 days for responding to the notice allowed to the assessee and the same time period allowed to the Assessing Officer to confirm/correct the demand, it is taking too long for the demand to be verified and the refunds to be issued, leading to rise of grievances. With a view to clear the pendency of refunds which are subject to verification under section 245, it has been decided that the timeline of 30 days for the assessee and the Assessing Officer specified in the O.M. may be reduced to 15 days with regard to the notices under section 245 to be issued in the balance period of the current financial year. This is a one-time measure to clear the backlog of refunds and accordingly the reduced timeline of 15 days shall

be valid only till 31-3-2016 with the approval of Chairman, CBDT.

(Office Memorandum F. No .312/109/2015-OT, dated 7-3-2016)

SECTION 268A OF THE INCOME-TAX ACT, 1961 – FILING OF APPEAL OR APPLICATION FOR REFERENCE BY INCOME-TAX AUTHORITY – CLARIFICATION ON APPLICABILITY OF CIRCULAR 21 OF 2015

The monetary limits for filing appeals before the Income Tax Appellate Tribunals and High Courts were raised to ` 10 lakh and ` 20 lakh respectively by Circular 21 of 2015 dated 10-12-2015. Queries have been received regarding the applicability of Circular 21 of 2015 to cross objections filed by the Department before the ITAT under section 253(4) of the Income-tax Act and to references to the High Court under sections 256(1) and 256(2) of the Act. The matter was examined in the CBDT and it is clarified that the monetary limit of ` 10 lakh for filing appeals before the ITAT would apply equally to cross objections under section 253(4) of the Act. Cross objections below this monetary limit, already filed, should be pursued for dismissal as withdrawn/not pressed. Filing of cross objections below the monetary limit may not be considered henceforth. Similarly, references to High Courts below the monetary limit of ` 20 lakh should be pursued for dismissal as withdrawn/not pressed. References below this limit may not be considered henceforth.

(Letter F. No. 279/MISC./M-142/2007-ITJ (Part), dated 8-3-2016)

SECTION 92C OF THE INCOME-TAX ACT, 1961 – TRANSFER PRICING – COMPUTATION OF ARM'S LENGTH PRICE – GUIDELINES FOR IMPLEMENTATION OF

TRANSFER PRICING PROVISIONS – REPLACEMENT OF INSTRUCTION No. 15/2015

The provisions relating to transfer pricing are contained in sections 92 to 92F in Chapter X of the Income-tax Act, 1961 which came into force w.e.f. Assessment Year 2002-03 and have seen a number of amendments over the years, including the insertion of Safe Harbour and Advance Pricing Agreement provisions and the extension of the applicability of transfer pricing provisions to Specified Domestic Transactions. In terms of the provisions, any income arising from an international transaction or specified domestic transaction between two or more associated enterprises shall be computed having regard to the Arm's Length Price. Instruction No. 3 was issued on 20th May, 2003 to provide guidance to the Transfer Pricing Officers (TPOs) and the Assessing Officers (AOs) to operationalise the transfer pricing provisions and to have procedural uniformity. Due to a number of legislative, procedural and structural changes carried out over the last few years, Instruction No. 3 of 2003 was replaced with Instruction No. 15/2015, dated 16th October, 2015. After the issuance of Instruction No. 15/2015, the Board had received some suggestions and queries, which was examined in detail. Accordingly, the Instruction was issued to replace Instruction No. 15 of 2015. This Instruction is applicable for both international transactions and specified domestic transactions between associated enterprises. The guidelines on various issues are provided in the instruction.

(Instruction No.3/2016 [F.No.500/9/2015-APA-II], dated 10-3-2016)

MODIFICATION OF INSTRUCTION NO. 9/2006, DATED 7-11-2006 (GUIDELINES AND PROCEDURE FOR ATTENDING TO REVENUE AUDIT OBJECTIONS)

The Instruction *inter-alia* mandates the initiation of remedial action in case the Revenue Audit

Objection is not accepted by the Department. CBDT has considered the effect of such remedial action and its ultimate fate in appeal. Accordingly, to mitigate the effects of the Instruction, Para 4 and Para 5 of the Instruction are deleted with immediate effect and replaced by the following:

4. Remedial action

- (i) An Audit objection should be accepted and remedial action should be taken in a case where the audit objection relating to an error of facts or an issue of law is found to be correct.
- (ii) Appropriate remedial action should invariably be initiated within two months of the receipt of the Local Audit Report, and necessary orders should be passed within six months thereafter.
- (iii) Where the PCIT/CIT do not accept the Audit objection, he may record his reasons for doing so and inform the AG accordingly within two months from the date of receipt of the LAR. No remedial action needs to be taken in such cases.

5. Second appeal in cases involving Revenue Audit Objection

The adverse order of the First Appellate Authority in cases involving revenue audit objections should be carefully scrutinised by the PCIT/CIT, and appeal should not be preferred if the order is justified either in law or on facts. Reasons for not filing appeal may be recorded by the PCIT/CIT.

(Circular No. 8/2016 [F.No. 246/95/2013-A&PAC-I], dated 17-3-2016)

PRESS RELEASES

DECISIONS OF CBDT CLARIFYING VARIOUS PROVISIONS OF INCOME – TAX ACT FOR REDUCING LITIGATION AND EASING BURDEN OF COMPLIANCE

CBDT has taken a number of decisions to clarify the applicability of various provisions of the Income-tax Act with the objective of easing the burden of compliance and reducing litigation. It has been clarified through Circular No. 1/2016 that under section 80-IA the eligible assessee has the option of choosing the initial year from which the deduction can be claimed. Once the assessee has exercised the option of choosing the initial year, he shall be entitled to the deduction under the section from such year if he fulfills the conditions prescribed in the section. On the issue of consideration received on buyback of shares between the periods 1-4-2000 to 31-5-2013, it was clarified that such consideration shall be taxed as capital gains in the hands of the recipient. Such amount will therefore not be treated as dividend (Circular No. 3/2016). No fresh notice will be issued by the Department on this matter.

Circular No. 6 has been issued enunciating the principles regarding treatment of income derived from transfer of shares and securities as capital gains or business income. The Circular clarifies the situations in which the surplus generated on sale of shares and securities will be treated as business income or capital gains.

A letter has been issued to all Pr. Chief Commissioners of Income Tax/Directors General of Income Tax for removal of difficulties in payment of taxes in Joint Development Agreement cases. CBDT has issued directions that the jurisdictional tax authorities may allow the taxpayer concerned to pay the taxes due on such capital gains in three equal annual installments, subject to levy of interest as per provisions of the Act.

(Press Release, dated 3-3-2016)

SETTING UP OF A DEDICATED STRUCTURE FOR DELIVERY AND MONITORING OF TAX PAYER SERVICES IN INCOME TAX DEPARTMENT

Grievance redressal is a major aspect of citizen centric governance and is an important feature

of the activities of the Income-tax Department. The Income-tax Department is addressing grievances through multi-layered grievance redressal machinery including Centralised Public Grievance Redress and Monitoring System (CPGRAMS), Aayakar Seva Kendras (ASK), online grievance redressal through Central Processing Centre (CPC), etc.

Taking another step in this direction, the CBDT has issued an Order setting up a dedicated structure for delivery and monitoring of tax payer services in the Income-tax Department. Member (Revenue and Tax Payer Services) will oversee the delivery and monitoring of taxpayer services in CBDT. Two separate Directorates, called Directorate of Tax-Payer Services I and Directorate of Tax-Payer Services II have been set up. Together, these Directorates will be responsible for delivery and monitoring of taxpayers services in the field offices and e-services deliverable through various electronic platforms of the Department. They will oversee and co-ordinate all matters relating to grievances of taxpayers and ensure their timely redressal. These Directorates will report to the Member (R and TPS), CBDT through the Principal Director General of Income Tax (Administration).

The responsibility for delivery of tax-payer services has also been specifically assigned at every level in the field offices. This will ensure accountability of officials in redressing grievances in a time bound manner. The Tax Administration Reforms Commission's (TARC) Report has also accorded considerable importance to redressal of grievances and a customer focused approach in the Department through creation of a tax-payer services vertical. The creation of this structure will fulfil some of the most significant recommendations of the TARC.

With this initiative the CBDT expects a noteworthy reduction in taxpayer grievances and enhanced taxpayer satisfaction.

(Press Release, dated 7-3-2016)

SECTION 4 OF THE INCOME-TAX ACT, 1961 – ASSOCIATION OF PERSON – ASSESSABLE AS – CLARIFICATION ON TAXABILITY OF CONSORTIUM MEMBERS

Taxation of consortium of contractors formed to implement Engineering, Procurement and Construction (EPC) contracts/turn key projects has been a subject matter of dispute between Income-tax Department and the consortium. This has been particularly so in cases where each member of the consortium has a clear and distinct role in scope of work, responsibilities and liability of the consortium even though each member is jointly and severally liable to the contractee.

To bring about consistency in approach while handling cases of consortium, the CBDT has issued Circular No. 7/2016 clarifying the attributes of a consortium arrangement which may not be treated as an Association of Persons (AOP). The list of attributes is not exhaustive. There may be additional factors which may justify not treating a consortium as an AOP depending on specific facts and circumstances.

The Circular will not apply to cases where all or some of the members of the consortium are Associated Enterprises as defined in section-92A of the Income-tax Act.

This Circular is expected to reduce litigation with consortium of contractors implementing EPC contracts/turnkey projects.

(Press Release, dated 8-3-2016)

SECTION 9A OF THE INCOME-TAX ACT, 1961 – CERTAIN ACTIVITIES NOT TO CONSTITUTE BUSINESS CONNECTION IN INDIA – RULES IN RESPECT OF FUND MANAGER REGIME UNDER SECTION 9A

Section 9A of the Income-tax Act, 1961 (the Act) provides for special taxation regime with effect from 1-4-2016 to facilitate location of fund

managers of off shore funds in India. Under this regime, the fund management activity carried out through an eligible fund manager in India by an eligible investment fund does not constitute business connection in India of the fund and also does not lead to the residence of the fund in India.

The Rules for operationalisation of the provisions of section 9A of the Act have been inserted in the Income-tax Rules, 1961 which provide for:

- Pre-approval mechanism under which a fund can seek approval at its option from CBDT and once approved, benefit of section 9A would not be denied unless approval is withdrawn under limited circumstances
- Determination of number of members and the participation interest in the fund by looking through the entity where the investment in the fund has been made directly by an institutional entity.
- Relaxation from investor diversification condition in the period of eighteen months or final closing of the fund whichever is earlier, in setting up phase of the fund and in one year period in the winding up phase of the fund.
- Eligibility of the fund will not be impacted in case of temporary non-fulfilment of investor diversification conditions for period up to 90 days.
- Eligibility of the fund will not be impacted in case of any delay in furnishing the statement of activity, if delay does not exceed a period of ninety days.
- A fund shall be said to be controlling or managing a business carried out by any entity, if the fund directly or indirectly holds twenty six per cent of voting right.
- The eligibility of the fund will be impacted only if the remuneration paid or payable by the fund to the fund manager has been determined to be not at arm's length price for a period of three previous years

in succession; or for any three out of the preceding four previous years. A chance transfer pricing adjustment will not impact the eligibility.

(Press Release, dated 16-3-2016)

SMALL SAVINGS SCHEMES – INTEREST RATES ON VARIOUS SMALL SAVINGS SCHEMES FOR 1ST QUARTER OF 2016-17 NOTIFIED

From the year 2012-13, the interest rates on various Small Savings Schemes (SSS) are recalculated and notified in the month of March every year. These rates are applicable for the next financial year and done in line with the recommendations of the Shyamala Gopinath Committee to ensure that the interest rates of Small Savings Schemes are market linked.

Accordingly, as done in the previous years, the interest rates for various Small Savings Schemes were due for recalculation in March 2016. As notified on 16th February, 2016, instead of annual resetting of interest rates for the next financial year, the interest rates from now on will be reset every quarter based on the G-Sec yields of the previous three months. Consequently, the interest rates for various Small Savings Schemes were recalculated with reference to the G-Sec yields of equivalent maturity for the months December 2015 to February 2016. Based on this calculation, the interest rates on various Small Savings Schemes for the 1st quarter of 2016-17 have been notified. The rates of interest on various small savings schemes for the First Quarter of Financial Year 2016-17, on the basis of the interest compounding/payment built-in in the schemes have been provided.

Further, as notified earlier, the additional interest rate spreads which the Government allows on Small Savings Schemes like PPF, Senior Citizen Savings Scheme, Sukanya Samriddhi Scheme, NSC etc. are being continued. The additional spread for these Schemes are 25 basis points for PPF, 100 basis points for Senior Citizen Savings Scheme, 75 basis points for Sukanya

Samriddhi Scheme, 25 basis points for five year time deposit, 25 basis points for National Savings Certificate and 25 basis points for Monthly Income Scheme. These additional interest rate spreads are being continued and are included in the rates notified today.

The quarterly revision of interest rates will ensure that the interest rates under Small Savings Schemes are more dynamically related to the current market rates, thereby enabling the Banks to move their interest rates in line with current money market rates.

(Press Release, dated 18-3-2016)

REPORT OF THE COMMITTEE ON TAXATION TO EXAMINE THE BUSINESS MODELS FOR E-COMMERCE

A Committee on Taxation of e-commerce was constituted by the CBDT to examine the business models for e-commerce, identify the direct tax issues in relation to e-commerce transactions and suggest an approach to deal with these issues. The Committee included officers of the CBDT, representatives from the industry, the Institute of Chartered Accountants of India and tax experts. The Report of the Committee was received by the Government and taken into consideration in the preparation of Finance Bill, 2016. This Report provides the view of the Committee on issues related to taxation of e-commerce and recent international developments in this area.

(Press Release, dated 21-3-2016)

SECTION 197A OF THE INCOME-TAX ACT, 1961 – DEDUCTION OF TAX AT SOURCE – NO DEDUCTION IN CERTAIN CASES – INCLUSION OF INTEREST INCOME IN RETURN OF INCOME FILED BY PERSONS LIABLE TO PAY TAX

Information regarding interest earned by individuals and business entities on term deposit

is filed with the Income-tax Department by banks including co-operative banks and other financial institutions and State treasuries, etc. Form 26AS reflects only those payments on which tax has been deducted and it can be viewed by the individual tax-payer by logging in to www.incometaxindiaefiling.gov.in. The information about interest payments without deduction of tax is also filed by the payer with the Department.

CBDT informed, the persons earning interest income that interest credited/received on deposits is taxable unless exempt under section 10 of the Income-tax Act. Such interest income should be shown in the return of income even in cases where Form 15G/15H has been filed if the earning is not exempt under section 10 of the Income-tax Act and the total income of the person exceeds the maximum amount not chargeable to tax.

Tax payers are advised to collect correct details of interest received or credited and

- File their return of income for assessment year 2014-15 (if not filed already) on or before 31-3-2016 in case their total income exceeds the maximum amount not chargeable to tax.
- Revise their return of income for assessment years 2014-15/2015-16 if the return already filed does not include taxable interest income.
- File return of income for assessment year 2015-16, if not filed so far by including taxable interest income if any, on or before 31-3-2016 and avoid penalty u/s. 271F.

(Press Release, dated 23-3-2016)

SECTION 92CC OF THE INCOME-TAX ACT, 1961 – TRANSFER PRICING – ADVANCE PRICING AGREEMENT (APA) – SIGNING OF 11 UNILATERAL ADVANCE PRICING AGREEMENTS (APAs)

The Advance Pricing Agreement programme was introduced by the Finance Act, 2012 to provide a predictable and non-adversarial tax regime and to reduce litigation in the Indian transfer pricing regime. Taking this programme forward, the CBDT signed 11 unilateral APAs on 28th March, 2016. With this signing, India has entered into 59 bilateral and/or unilateral APAs. 50 of these agreements have been signed in the current financial year. The agreements cover a range of international transactions, including corporate guarantees, royalty, software development services, IT enabled services and trading. The agreements pertain to different industrial sectors like telecom, media, automobiles, IT services, etc. Some of the agreements have rollback provisions and provide certainty to the taxpayers for 9 years with regard to the covered international transactions.

Rollback provisions in APAs were introduced in the July 2014 Budget to provide certainty on the pricing of international transactions for 4 years (rollback years) preceding the first year from which APA becomes applicable. With the notification of Rollback rules in March 2015, the taxpayer has been provided the option to choose certainty in transfer pricing matters with the Government for a total of nine years (5 future years and 4 prior years). Since the notification of the APA scheme on 30-8-2012, approximately 580 applications for APAs have been received and about half of these contain a request for the Rollback provisions.

(Press Release, dated 29-3-2016)





CA Tarunkumar Singhal & Sunil Moti Lala, *Advocate*

INTERNATIONAL TAXATION Case Law Update

A. HIGH COURT JUDGMENTS

1. Even if TNMM is found acceptable as regards all other transactions, it is open to the TPO to segregate a portion and subject it to an entirely different method i.e. CUP if the assessee does not provide satisfactory replies to his queries

Denso India Ltd. vs. CIT – TS-77-HC-2016 (Del.) - TP

Facts

1. The assessee, was engaged in manufacturing and sale of auto electrical products such as starters, alternators, wiper motors, CDI etc. for four-wheel and two-wheel vehicles. Its promoters included two Japanese companies viz. M/s Denso Corporation, Japan and M/s Sumitomo Corporation, Japan which together held 58.20 percent, sufficient to exercise overall management and control over the assessee. During the relevant years, the assessee procured component level inputs from Sumitomo Corporation for the manufacture of its products, constituting approximately 86.30 per cent of its total imports and approximately 35 per cent of its total raw materials consumed. The assessee applied the Transactional Net Margin Method and aggregated all the transactions for benchmarking purposes.

2. The Transfer Pricing Officer ("TPO") accepted the value of the royalty, technical know-how and

testing fees on the basis of TNMM. However, in respect of the purchase of components, the TPO contended that the relationship between the assessee, Denso Japan and Sumitomo Corporation was such that Denso Japan could influence the transactions between the assessee and Sumitomo Corporation and thus the transaction was a deemed international transaction. It was further noted that there was no reasonable explanation to support the sourcing of materials from Sumitomo Corporation which was an intermediary company whereas the manufacturer was in fact Denso Japan, the assessee's AE. Accordingly, the CUP method was applied.

3. Aggrieved, the assessee filed an appeal before the CIT(A) contending that transactions of a broad entity have to be considered as a whole or as a class rather than analysing them on a transaction by transaction basis. The CIT(A) accepted the contentions of the assessee and deleted the addition made by the AO. Subsequently, the Revenue filed an appeal before the ITAT wherein the ITAT accepted the contentions of the Revenue and restored the additions made by the AO.

4. Accordingly, the assessee filed an appeal before the Hon'ble High Court.

Judgment

1. The Court, observed that the cumulative effect of the Transfer Pricing Provisions is to

discern, if, in a given set of circumstances, the assessee has disclosed international transactions and whether they are at arm's length price.

2. It observed that the assessee chose to import components not from the manufacturer but an intermediary, which is a commercial decision which revenue authorities would not normally question but since the vendor of the components was connected with both the assessee and the manufacturer which emerged during the TP proceedings, compelling the TPO to scrutinise the value of such imports and seek details from the assessee, the onus was on the assessee to furnish the details. Relying on the decisions of the Court in *CIT vs. EKL Appliances (2012) 345 ITR 241* and *Sony Ericsson Mobile Communications India Pvt. Ltd. vs. CIT (2015) 374 ITR 118 (Del.)*, wherein it was held that where form and substance of the transaction were the same but the arrangements when viewed in totality differed from those adopted by an independent enterprise behaving in a commercially rational manner, the TPO would be correct in reconsidering the actual transaction as per its perception.

3. Accordingly, it upheld the use of the CUP method as adopted by the AO/TPO and upheld by the Tribunal as a result of which the additions were sustained.

2. Where assessee had deducted tax at source from salary paid overseas to its non-resident employees and paid the same to the Government, merely because tax was not paid within the prescribed time limit under section 200(1) of the Act, it could not be disallowed under section 40(a)(iii) of the Act

ANZ Grindlays Bank vs. DCIT – (2016) 67 taxmann. com 191 (Del.)

Facts

1. The assessee, a non-resident banking company having its principal place of business outside India carried on banking business in India

through its branches situated within the country. During the relevant period, the assessee seconded some of its employees to its Indian branches for the business in India, for which they received a part of their remuneration by way of salaries and perquisites in India which was duly reflected in the profit and loss account of the assessee's Indian branch, on which tax had been deducted at source and deposited with the Government.

2. In addition to the remuneration paid to the aforementioned expatriate employees in India, the assessee's overseas head office also made certain payments to such expatriate employees, which were not accounted for in the Indian branch's Profit and Loss Account drawn up in respect of its business in India. The assessee neither claimed such payments as a deduction for the purposes of computing its income chargeable to tax in India nor deducted any tax under Chapter XVIIB of the Act.

3. Since a large number of assessee's failed to deduct tax at source on the overseas payments made to seconded employees, the CBDT clarified the position *vide* Circular No .685 along with assurance of non-initiation of penalty proceedings in order to ensure compliance. Pursuant to the Circular, the assessee deposited the TDS relevant for assessment years 1985-86 to 1994-95. Since the assessment proceedings of the assessee for AYS 1985-86 to 1990-91 were concluded, the assessee could not claim any deduction for the respective years. However, it claimed deduction for AY 1991-92, the assessment of which was pending before the CIT(A). The CIT(A) denied the assessee deduction on the ground that section 40(a)(iii) of the Act had not been complied with and also that such a claim could not be made in appellate proceedings. The Tribunal was of the view that since no tax was deducted at source under Chapter XVIIB of the Act within the prescribed time limit, no deduction would be permissible.

4. Accordingly, the assessee preferred an appeal before the Hon'ble High Court.

Judgment

1. The Hon'ble High Court examined the relevant sections and held that the Tribunal was incorrect in proceeding on the basis that if the tax due on salaries paid overseas is not deposited strictly within the time prescribed under Chapter XVII B of the Act, Section 40(a)(iii) would be applicable. It held that the plain language of the Section 40(a)(iii) does not permit such interpretation and that if the Parliament so desired, it would have specifically enacted so. This becomes apparent when one reads the legislative amendments made to Section 40 of the Act, as unlike the language of item (B) of sub-clause (i) of clause (a) of Section 40 – the same has not been specifically enacted.

2. Additionally, it disagreed with the contention of the Revenue that no deduction could be claimed by the assessee as the salaries were not reflected in the profit and loss account. The controversy whether an assessee can claim deduction of an expense which is not reflected in its profit and loss account for the relevant period has been authoritatively settled by the Supreme Court in its decision in *The Kedarnath Jute Mfg. Co. Ltd. vs. CIT [1971] 82 ITR 363 (SC)*, which states that book entries are not conclusive.

3. Fees paid by the assessee to non-resident sub-arrangers was not taxable as fees for technical services under the Act since the services were provided outside India and there was no occasion for any income to accrue or arise in India and further the impugned services were not technical, consultancy or managerial services as per the definition of Fees for technical services – Accordingly, no obligation to deduct tax at source under section 195 of the Act

DIT(IT) vs. M/s Credit Lyonnais – TS-143-HC-2016 (Bom.)

Facts

1. The assessee was appointed by the State Bank of India as an arranger for the purpose of mobilising deposits under the India Millennium Deposits Scheme (IMDS). In turn, the assessee was entitled to appoint sub-arrangers for mobilising IMDS both in and outside India. During the relevant year, it received arranger fees and commission from SBI and in turn paid sub-arranger fees to both residents and non-residents. The AO disallowed the said payment under Section 40(a)(i) of the Act as the assessee did not deduct tax under Section 195 of the Act, holding the payment to be fees for technical services.

2. On appeal, the CIT(A) held that the sub-arranger fee paid by the assessee was in the nature of brokerage and commission and not fees for technical services and that there was no question of deducting tax at source on such payments.

3. Aggrieved, the Revenue filed an appeal before the ITAT wherein, relying on CBDT Circular No. 786, the ITAT held that the amount paid to the non-resident sub-arrangers was in the nature of commission/brokerage and there was no obligation to deduct tax under Section 195 of the Act and that the impugned services provided by the sub-arrangers were neither technical, consultancy nor managerial in nature.

4. Subsequently, the Revenue filed an appeal before the Hon'ble High Court.

Judgment

1. The Hon'ble High Court held that the impugned services were rendered by non-resident sub-arrangers outside India and there was no occasion for any income accruing or arising to the non-residents in India.

2. Relying on the decision of the Apex Court in *Toshoku Ltd. TS-4-SC-1980* and CBDT Circular No. 786 of 2000, the Court held that no income could accrue or arise in India where the payment was made for service by a non-resident outside India.

3. Accordingly, it held that as no income had accrued or arisen to the non-resident sub-arrangers

in India, the question of deduction of tax at source under Section 195 of the Act did not arise. It also clarified that its view was in addition to the findings of the ITAT that the services rendered was not technical, consultancy or managerial services under the Act.

B. TRIBUNAL DECISIONS

4. FTS – Definition vs. 9(1)(vii) – Applicability of Section 44D – Consultancy charges on account of construction activity are not taxable as fees for technical services under Section 44D but as business income under the provisions of the Income-tax Act – In assessee’s favour

DDIT vs. MSV International Inc. [2016-TII-34-ITAT-Del.-Intl.] Assessment Years: 2006-07 & 2008-09

Facts

1. The assessee is a foreign company incorporated in the U.S.A. and engaged in the business of providing consultancy services in the areas of highways, transportation, water supply, waste management, etc. The assessee has set up several projects offices in India to carry on its activities in India.

2. During the Assessment Year (AY) 2006-07, the assessee had entered into contracts with various parties, mainly State Governments, to provide them consultancy services as required under such agreements. The assessee disclosed consultancy charges of ` 33.76 million after deducting expenses of ` 28.88 million. The assessee showed a profit before tax of ` 4.88 million.

3. The Assessing Officer (AO) taxed consultancy charges at 20 % under Section 44D read with Section 115A of the Act.

4. The Commissioner of Income Tax (Appeals) [CIT(A)] after considering the provisions of Section 9(1)(vii) of the Act, Section 44D and Section 44DA inserted with effect from 1st April, 2004, held that

the gross receipts of the assessee were covered by the exclusion provided in the definition of FTS, and therefore, the same cannot be taxed as FTS.

Decision

The Tribunal held in assessee’s favour as under :

1. It has been observed that to determine the nature of receipt, it is imperative to examine the scope of the work to be carried out by the assessee. In the present case, the assessee is engaged in the consultancy services, but that is the assessee’s business in India.

2. The AO has made an irrelevant analysis of disclosure in the return of income as well as the nomenclature described in TDS certificate when AO himself agrees that the assessee is engaged in the business of services with respect to highways, transport, etc. Therefore, it cannot be said that assessee is not carrying any business in India.

3. Any consideration which is for the rendering of any managerial, technical or consultancy services is characterised as FTS. However, some exceptions are carved out where such managerial, technical or consultancy consideration is for any construction, etc. or like projects undertaken by the recipient. The AO has failed to consider these exceptions carved out in the definition of FTS. Therefore, the attempt made by the AO was on an incomplete reading of that Explanation ignoring exceptions.

4. From the nature of work carried on by the assessee it was apparent that it had got the consultancy work related to laying down of roads, etc. which was for construction activity or a like project. Undisputedly the services rendered by the assessee were technical in nature but merely because the services were technical in nature they do not qualify as FTS in accordance with the provision of Explanation 2 to Section 9(1) (vii) of the Act.

5. It was observed that the services provided by the assessee fall in the exceptions carved as construction activity and like projects.

6. On a perusal of the decision in the case of *Agland Investment Services Inc. vs. ITO [1985] 22 Taxman 9 (Del.)* it has been observed that the case of the assessee stands on stronger footings than the case relied upon by the tax department.

7. On a perusal of Section 44D of the Act, it indicates that the FTS should have the same meaning as provided in Explanation 2 to Section 9(1)(vii) of the Act. Since receipt of the assessee is not FTS as defined in the above Explanation as it relates to construction activity, such receipt is out of the purview of presumptive taxability under Section 44D of the Act.

8. It is also not controverted that assessee was carrying on similar activities in the preceding years as well, and the income earned from the said activities have been accepted by the tax department as business income and assessment made under Section 143(3) of the Act. Principle of consistency has been accepted by the Indian courts in many judicial precedents

9. Accordingly, it was held that consultancy charges were not taxable as FTS under the provisions of Section 44D read with Section 9(1)(vii) of the Act but were taxable under the provision of Act as business income.

5. Transfer Pricing – AMP expenses – Disallowance – Incurring more expenditure on AMP compared to comparable companies, cannot be inferred as an international transaction between the assessee and its foreign AE – In assessee’s favour

Essilor India Pvt. Ltd. vs. DCIT [IT(TP)A No. 29/Bang/2014 and IT(TP)A No. 227/Bang/2015] Assessment Year : 2009-10

Facts

1. The assessee is a wholly owned subsidiary of Essilor International SA, France (AE), engaged in the business of trading in finished, semi-finished

ophthalmic lenses, optical meters and processing of semi-finished ophthalmic lenses. The AE charged the royalty for grant of a license to use quoting technology on lenses (anti-glare and hard coating). The assessee purchases ophthalmic lenses from the AE and sells them after some processing.

2. During the year, the assessee had international transactions in the nature of import of lenses, instruments, consumables, fixed assets, royalty, purchase returns, export of lenses, commission receipts, receipt of services (training, web ordering), cost sharing, reimbursements and other related transactions.

3. The assessee adopted the Transactional Net Margin Method (TNMM) as the most appropriate method with operating profit margin to turnover as the PLI. The assessee’s PLI was computed at 13.45% which was higher than the arithmetic mean of two comparables namely GKB Optical Ltd. and Techtran Plylenses Ltd. of (3.31%). Accordingly, it was claimed that the international transactions were at arm’s length.

4. During the assessment proceedings, the TPO observed that the assessee incurred expenditure on account of sales promotion and advertisement to the tune of ` 16.24 cr, which is 14.2% of the total revenue. The TPO noticed that in the case of comparable companies chosen by the assessee viz. GKB Optical Ltd. and Techtran Poly lenses Ltd., the average expenditure on those items worked out to only 3.3% of the turnover.

5. The TPO adopted 3.3 % of the turnover to bench mark the transaction of the AMP with the AE. The TPO had also worked out the operating margin on the total operating cost at 20.22 % after excluding additional expenditure incurred on AMP of ` 8.87 crore from the total operating cost. The TPO also applied the mark-up on the AMP expenditure at 20.22% and proposed a Transfer Pricing (TP) adjustment of ` 10.66 crore.

6. Before the Dispute Resolution Panel (DRP), it was contended that:

a) In the absence of an agreement between the assessee and its AE, the question

of promotion of a brand or sharing the advertisement expenditure does not arise.

- b) It cannot be presumed that there is an international transaction within the meaning of Section 92B of the Income-tax Act, 1961 (the Act).
 - c) The burden of proof lies on the TPO to prove the existence of an international transaction and not on the assessee.
7. The DRP had set aside the issue to the file of the TPO to examine the case in the light of the decision of the Special Bench of the Tribunal in the case of *LG Electronics India Pvt. Ltd. vs. ACIT [2013] 140 ITD 41 (Del.)(SB)* and determine the cost of services provided and apply a margin on the same by applying the cost plus method.

Decision

The Tribunal held in favour of the assessee as under :

1. The AMP expenses incurred by the assessee are only for increasing the sales of its products and no benefit accrued to its AE, and there is no international transaction on AMP expenditure as envisaged within the meaning of Section 92B of the Act.
2. The Tribunal drawing references from the *Sony Ericsson Mobile Communication India (P) Ltd. vs. CIT [2015] 374 ITR 118 (Del.)* decision held that in the cases dealt by the Delhi High Court along with Sony Ericsson were distributors of products manufactured by the foreign AE and not manufacturers themselves.
3. The Tribunal noted that the assessee's in Sony Ericsson did not appear to have questioned the very existence of an international transaction with the foreign AE.
4. The Tribunal categorically observed that the assessee has throughout been contesting before all the authorities, the very existence of an international transaction on account of incurring AMP expenditure between the assessee and its

AE. Accordingly, the law laid down by the Delhi High Court in the Sony Ericsson ruling cannot be applied to the assessee.

5. Drawing references from the Delhi High Court decisions in the case of *Maruti Suzuki India Ltd. vs. CIT [2015] 282 CTR 1 (Del.)*, *Bausch & Lomb Eyecare (India) Pvt Ltd. vs. ACIT [2016] 237 Taxman 24 (Del.)*, *Yum Restaurants (India) Pvt. Ltd vs. ITO [2016] 380 ITR 637 (Del)* and *Honda Siel Power Products Limited vs. DCIT [2015] 64 taxmann.com 328 (Delhi)*, the Tribunal held that no TP adjustment can be made by deducing from the difference between AMP expenditure incurred by the assessee and AMP expenditure of the comparable entity if there is no explicit arrangement between the assessee and its foreign AE.

6. Further, in the absence of machinery provisions, to ascertain the price incurred by the products of the foreign entity, no TP adjustment can be made by invoking the provisions of Chapter X of the Act.

7. Merely because the assessee incurred more expenditure on AMP compared to the expenditure incurred by comparable companies, it cannot be inferred that there existed an international transaction between the assessee and its foreign AE. Therefore, the question of determination of the ALP on such a transaction does not arise.

6. Section 206AA – Applicability – When the foreign recipient is eligible for the benefit of the tax treaty, there is no scope for deduction of tax at source at the rate of 20% under Section 206AA of the Income-tax Act – In assessee’s favour
Wipro Ltd. vs. ITO (2016-TII-27-ITAT-BANG-INTL) Assessment Year : 2011-12

Facts

1. The assessee filed its quarterly E-TDS returns in Form No. 27Q in respect of the payment to non-residents.
2. The AO issued an intimation giving the summary of short deduction and interest payable

for delayed deposit of tax. The AO along with an intimation under Section 200A the Act also issued a demand notice under Section 156 of the Act.

3. The assessee contended before the CIT (Appeals) [CIT(A)] that the AO issued the demand without giving effect to the provisions of the tax treaty. The assessee has deducted tax in accordance with the provisions of the respective tax treaty and therefore, there was no shortfall in the deduction of tax at source in respect of the payments made to non-residents. The CIT(A) confirmed the action of the AO.

Decision

The Tribunal held in favour of the assessee as under :

1. In this case, the AO made the adjustment under Section 200A of the Act, on account of short deduction of tax at source by the assessee respect of payment to non-residents on the ground that the assessee has not furnished a PAN of the non-resident recipients. Accordingly, the assessee was required to deduct tax at the rate of 20% in view of the provisions of Section 206AA of the Act.

2. The Tribunal observed that an identical issue has been considered and decided by the co-ordinate bench of this Tribunal [2015-TII-138-ITAT-BANG-INTL], wherein it was held as under:

- a) The assessee made payment to the non-resident on account of royalty and Fee for Technical Services (FTS). The assessee deducted tax at source at the rate of 10% in some cases and at the rate of 10.56% in some other cases, as per the provisions of Section 115A(1)(b) of the Act.
- b) The AO while issuing the intimation under Section 200A computed the tax liability at the rate of 20%, as provided under Section 206AA of the Act.
- c) The Tribunal held that the benefit of the tax treaty was available to the recipients of the payments, and therefore, the tax liability of

the recipients could not be more than the rate prescribed by the tax treaty or the Act, whichever is lower.

3. In the case of *DDIT vs. Serum Institute of India Ltd. (ITA No. 792/2013) (Pune)*, an identical issue has been considered by the Pune Tribunal, *inter alia*, as under:

- a) Section 206AA of the Act prescribes that if the PAN is not furnished to the person responsible for deducting tax at source, the tax deductor would be required to deduct tax at the higher of the following rates, (a) at the rate prescribed in the relevant provisions of this Act, (b) at the rate/rates in force, or (c) at the rate of 20%.
- b) In the present case, the assessee was responsible for deducting tax on payments made to non-residents on account of royalty and/or FTS.
- c) The Supreme Court in the case of *Azadi Bachao Andolan and Others vs. UOI [2003] 263 ITR 706 (SC)* has upheld the proposition that the provisions made in the tax treaty will prevail over the general provisions contained in the Act to the extent they are beneficial to the assessee.
- d) In this context, the tax treaty entered into between India and the other relevant countries in the present context provide for the scope of taxation and/or a rate of taxation, which was different from the scope/rate prescribed under the Act. Accordingly, the assessee deducted tax at source having regard to the provisions of the respective tax treaty, which provided for a beneficial rate of taxation.
- e) Even the charging Section 4 as well as Section 5 of the Act, which deals with the principle of ascertainment of total income under the Act, are also subordinate to the principle enshrined in Section 90(2) as held by the Supreme Court in the case of *Azadi Bachao Andolan and Others*.

- f) Thus, in so far as the applicability of the scope/rate of taxation with respect to the impugned payments made to the non-residents is concerned, no fault can be found with the rate of taxation invoked by the assessee based on the tax treaty, which prescribes for a beneficial rate of taxation.
- g) Section 206AA of the Act is not a charging section but is a part of the procedural provisions dealing with collection and deduction of tax at source. The provisions of Section 195 of the Act, which casts a duty on the assessee to deduct tax at source on payments to a non-resident, cannot be looked upon as a charging provision.
- h) Where the tax has been deducted on the strength of the beneficial provisions of section tax treaty, the provisions of Section 206AA of the Act cannot be invoked by the AO to insist on the tax deduction at the rate of 20%, having regard to the overriding nature of the provisions of Section 90(2) of the Act.
- i) Section 206AA of the Act does not override the provisions of Section 90(2) of the Act and that in the impugned cases of payments made to non-residents, the assessee correctly applied the rate of tax prescribed under by tax treaty and not as per Section 206AA of the Act because the provisions of the tax treaty were more beneficial.
- j) Thus, the tax demand relating to the difference between 20% and the actual tax rate on which tax was deducted by the assessee in terms of the relevant tax treaty was deleted.
4. The Karnataka High Court in the case of *Bharti Airtel Ltd.*, *inter alia*, observed as under:
- a) The TDS provisions and the charging provisions of the Act, from one single integral, inseparable Code. Consequently, the provisions relating to TDS apply only to those sums, which are 'chargeable to tax' under the Income-tax Act.
- b) While interpreting the provisions of the Act, one cannot read the charging sections of that Act *de hors*, the machinery sections. The Act is to be read as an integral Code.
- c) In order to deduct tax at source, the amount being paid out must necessarily be ascertainable as income chargeable to tax in the hands of the payee.
- d) TDS is a vicarious liability, and it presupposes the existence of primary liability.
- e) Therefore, the TDS provisions have to be read in conformity with the charging provisions i.e. Sections 4, 5 and 9 of the Act.
- f) Based on the Explanation below sub-section (1) of Section 200A of the Act, which clarifies that in respect of deduction of tax at source, where such rate is not in accordance with provisions of this Act, it can be considered as an incorrect claim apparent from the statement.
- g) However, in the case in hand, it is not a simple case of deduction of tax at source by applying the rate only as per the provisions of the Act, when the benefit of the tax treaty is available to the recipient of the amount.
- h) Hence, applying the rate of 20% without considering the provisions of the tax treaty, and consequent adjustment while framing the intimation under Section 200A is beyond the scope of the said provision.
5. No contrary decision has been brought to the notice of the Tribunal in the present case.
6. Consequently, in view of the decision of the co-ordinate bench as well as the other decisions as followed by the co-ordinate bench, the issue is decided in favour of the assessee on both grounds. The provisions of TDS has to be read along with

the tax treaty for computing the tax liability on the sum in question. Therefore, when the recipient is eligible for the benefit of tax treaty, then there is no scope for deduction of tax at source at the rate of 20% as provided under the provisions of Section 206AA of the Act.

7. Similarly, on the issue of jurisdiction, the question of computing the rate of 20% under Section 206AA of the Act is a debatable issue when the recipient is eligible for the benefit of provisions of tax treaty, and therefore, the AO cannot proceed to make the adjustment while issuing the intimation under Section 200A of the Act.

7. Business connection – Permanent Establishment – A foreign company engaged in outsourcing services constitutes a business connection under the Income-tax Act but does not have a PE in India under the India-UK tax treaty – In assessee’s favour

DCIT vs. Vertex Customer Management Ltd. [TS-115-ITAT-2016 (Del.)] Assessment Year: 2004-05

Facts

1. The assessee, a UK based company, is engaged in outsourcing services for its clients in finance, utility and the public sector. The main services provided by the assessee are customer management outsourcing business, service outsourcing and transfer of technology.

2. Vertex Customer Service India Pvt. Ltd. (Vertex India) is an Indian entity in the group, which also carries out outsourced work from the assessee. This outsource work is in relation to contracts of the assessee with PowerGen Retail Ltd. and Last Minute Networks Ltd.

3. The assessee allowed Vertex India, the right to use certain equipment located outside India and claimed reimbursement of expenses incurred on behalf of Vertex India. The assessee offered the payment received from Vertex India for the right

to use equipment outside India as royalty under Article 13(3)(b) of the tax treaty. Regarding the reimbursement, it was claimed that the same was not taxable as it was on a cost to cost basis.

4. The Assessing Officer (AO) held that the assessee has a PE in India under the tax treaty as well as a business connection under the Act and hence computed the profit attributable to such a PE. Regarding reimbursement as it has the effect of reducing the service fee payable to the Indian company was also considered as business profits of the PE in India. Further, royalty was also taxed as a business profit of the PE in India.

5. The Commissioner of Income Tax (Appeals) [CIT(A)] held that the assessee has a fixed place PE in India under the tax treaty and that it does not have a service PE under the tax treaty. Vertex India did not constitute a dependent agent PE under the tax treaty. The assessee has a business connection within the meaning of Section 9(1)(i) of the Act. No further profits can be attributed to the assessee PE in India. Royalty income already declared by the assessee in its return of income cannot be taxed as business income. Reimbursement of expenses on account of third party cost is not chargeable to tax in India as it is directly related to Vertex India, demonstrated by submission of documentary evidence.

Decision

On appeal, the Tribunal held in assessee’s favour as under:

A) Re: Business connection

1. The term ‘business connection’ has not been defined under the Act. The Bombay High Court in the case of *Blue Star Engg. Co. (Bom.) (P) Ltd. vs. CIT [1969] 73 ITR 283 (Bom.)*, following the principle laid down by the Supreme Court in *CIT vs. R D Aggarwal & Co. [1965] 56 ITR 20 (SC)* has stated that since the term business connection admits of no precise definition, the solution of the question must depend upon the facts of each case. Further, various cases like *Bangalore Woollen Cotton & Silk Mills Co. Ltd. vs. CIT [1950] 18 ITR 423 (Mad.)*, *CIT*

vs. Evans Medical Supplies Ltd. [1959] 36 ITR 418 (Bom) and *Jethabhai Javeribhai vs. CIT [1951] 20 ITR 331 (Nag.)* have also held that there is no definition of the term 'business connection' and that the legislature has deliberately chosen words of wide import. The Bombay High Court in the case of *CIT vs. National Mutual Life Association of Australia [1933] 1 ITR 350 (Bom.)* has also laid down the principles of business connection.

2. There are various factors, which need to be looked at while determining whether a business connection exists in a particular situation, or not. The landmark judgment of the Andhra Pradesh High Court in *G. V. K. Industries Ltd. vs. ITO [1997] 228 ITR 564 (AP)* compiles the ratios of various other judgments and lays down various principles of business connection.

3. On perusal of various decisions, it is required to test the business connection principle with respect to continuity, real and intimate connection, attribution of income and common control and professional connection. The connection of the assessee with the Indian entity is continuous in order to have a business connection. There must be a real and intimate connection between the activity carried on by the non-resident outside India with the activity carried out in India. Further, such activity must be one, which contributes to the earnings of profits by the non-resident in his/her business.

4. It is also a settled principle that to conform with the requirements of the expression 'business connection', it is necessary that a common thread of mutual interest must run through the fabric of the trading activity carried on outside as well as inside India and the same can be described as a real and intimate connection.

5. The commonness of interest may be by way of management or financial control or by way of sharing of profits. It may come into existence in some other manner, but there must be something more than the mere transaction of purchase and sale between 'principal to principal' in order to bring the transaction within the purview of business connection.

6. Further, where the Indian and the non-resident entity are both held by the same person or have common control, then the non-resident would be regarded as having a business connection in India. In this case, the assessee secures orders on behalf of the Indian company and outsources the job to the Indian company.

7. There is a continuous relationship between the assessee and its affiliates and its subsidiary company in India. The contract entered into by the assessee and its affiliates outside India is carried out in India. The responsibility of the assessee vis-a-vis, its customer, is concluded in India. The responsibility of the assessee cannot be segregated and will not be complete unless the Indian company provides services to the customers.

8. Accordingly, the assessee had a business connection in India under Section 9(1)(i) of the Act.

B) Re: Fixed Place PE

1. For establishing the fixed place PE test, certain conditions should be satisfied cumulatively i.e. there is a place of business (place of business test), such a place of business is at the disposal of the assessee (disposal test), such a place of business is fixed (permanence test) and that the business of the entity is carried on wholly or partly through such a fixed place of business (activity test).

2. In the present case, the assessee satisfies the place of business test, since Vertex India is the assessee's place of business. However, whether those premises are at the disposal of the assessee or not is an important parameter to constitute a PE. It is not necessary that the premises need to be owned or even rented by the enterprise.

3. The premises should be at the disposal of the enterprise. In the present case, it is not established that the premises were made available to a foreign enterprise. The space provided was not at the disposal of the enterprise since it had no right to occupy the premises. Merely an access was given for the purpose of work, does not satisfy the disposal test.

4. Relying on the Supreme Court's decision in the case of *DIT vs. Morgan Stanley & Co. Inc. [2007] 292 ITR 416 (SC)* it was held that assessee does not have a fixed place PE in India.

C) Re: Dependent agent PE

1. Agency replaces fixed place with a personal connection. Transactions between a foreign enterprise and an independent agent do not result in the establishment of a PE under Article 5 if the independent agent is acting in the ordinary course of their business.

2. The expression 'ordinary course of their businesses' has reference to the activity of the agent tested by reference to the normal customs in the case to issue. It has reference to the normal practice in the line of business in question. However, as per Article 5(5) of the tax treaty, an agent is not considered to be an independent agent if his/her activities are wholly or mostly wholly on behalf of the foreign enterprise and the transactions between the two are not made under arm's length conditions.

3. The twin conditions have to be satisfied to deny an agent the character of an independent agent. In case the transactions between an agent and the foreign principal are at an arm's length, the second stipulation of Article 5(5) would not be satisfied, even if the said agent is devoted wholly or almost wholly to the foreign enterprise.

4. The AO had held that the assessee constituted a dependent agent PE as per Articles 5(4)(a) and 5(4)(c) of the tax treaty. The AO alleged that the Indian and the UK employees co-ordinate with each other for business development as well as marketing. They also secure orders for its parent company either in India or abroad. They negotiate with customers and secure contract for Vertex and its affiliates. However, no material has been brought on record in this regard.

5. Therefore, in view of the business model of the assessee and in the absence of material to suggest that the conditions mentioned in Article 5(4) of the tax treaty are satisfied, it was held that Vertex India does not constitute a dependent agent PE in India.

D) Re: Service PE

The AO has held that the expatriate employees of the assessee were providing services other than fees for technical services in India, and therefore, the assessee had service PE in India in terms of Article 5(2)(k) of the tax treaty. However, the AO has not furnished any material on record to prove the same. The assessee submitted that no employees of the assessee visited India and therefore, the service PE clause does not apply. Accordingly, the Tribunal held that the assessee does not have a service PE under Article 5(2)(k) of the tax treaty.

E) Re: Profit attribution

Since there is no PE of the assessee in India, the business income is not chargeable to tax in India. Even if it is assumed that there is a PE of the assessee in India, no profit can be attributed since the FAR of such a PE has already been compensated at an arm's length price. Therefore, nothing more should be attributed to it.

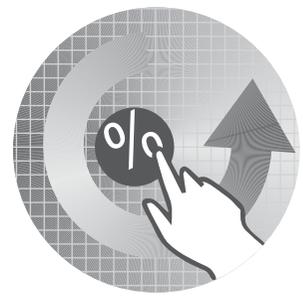
F) Re: Reimbursement of royalty

The assessee while relying on the decision of *ACIT vs. Modicon Network Private Limited [2007] 14 SOT 204 (Del.)* contended that there was no income element in the entire amount of reimbursements. The Tribunal held that it cannot be said that the amount allocated by the assessee was on a cost to cost basis. Therefore, the payment of reimbursement expenses with respect to access circuit, networks, bandwidth and call charges taxable as royalty under Article 13(3)(b) of the tax treaty.





CA. Hasmukh Kamdar



INDIRECT TAXES

Central Excise and Customs – Case Law Update

CENVAT Credit

Polyplastics Industries (I) Pvt. Ltd. vs. Commissioner of Central Excise & Service Tax, Panchkula [2016 (332) e.l.t. 895 (Tri. - Del.)]

Facts in this case were as follows

The assessee in this case was engaged in the manufacture of different automobile parts. During the disputed period, he purchased moulds and availed CENVAT credit of excise duty paid thereon considering the same as capital goods. He thereafter recovered the cost of such moulds from customers by raising invoices. On verification of such invoices the Central Excise department denied the CENVAT credit under Rule 3(5) of CENVAT Credit Rules 2004.

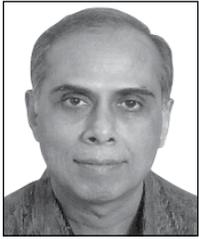
The assessee submitted that moulds purchased from the market are installed in the factory for manufacture of automobile parts and since the moulds have not been removed from the factory provisions of Rule 3(5) of CENVAT Credit Rules 2004 are not applicable for reversal of CENVAT credit. It was further submitted that confusion has arisen because of issuance of invoices on customers for recovery of cost of moulds.

The Department's contention was that the assessee had not produced any evidence to show that moulds have not been removed to the customers under the cover of the invoices issued by the assessee. Further it was urged that since the ownership/title of the mould has been transferred by the assessee to the buyers, CENVAT credit cannot be availed.

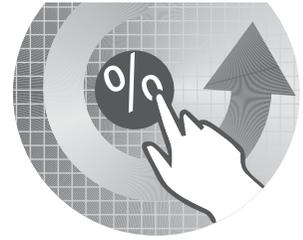
Hon'ble Tribunal observed that from the verification of available records and documents it is clear after visiting the factory of the appellant, the Chartered Engineer has certified that moulds in question are in possession of the appellant and that the said moulds are running in good working condition. The said certificate proves beyond shadow of doubt that the moulds on which CENVAT credit taken by the appellant had been used in the factory for use, in or in relation to manufacture of final product. In view of the fact that said moulds have not been removed from the factory, the provision of Rule 3(5) of the CENVAT Credit Rules will have no application. The said rule provides for payment of equal amount of CENVAT credit, when the CENVAT availed inputs or capital goods are removed as such from the factory. Since moulds, in this case, have not been removed from the factory by the appellant, denial of CENVAT benefit by the authorities is not justified. Further ownership or control of capital goods by the assessee is not a decisive factor for determination of eligibility to CENVAT credit. As per statutory provisions, an assessee is entitled to avail CENVAT credit on the inputs or capital goods, upon fulfilment of the condition that those goods have suffered duty and are received in the factory of manufacture of final product. It was further held that, in this case, since the requirements of the CENVAT statute has been duly complied with by the appellant, denial of CENVAT credit is not proper and justified.

The impugned order confirming the CENVAT demand under rule 3(5) of CENVAT Credit Rules, 2004 was set aside and the appeal was allowed.





CA Rajkamal Shah & CA Naresh Sheth



INDIRECT TAXES

Service Tax – Statute Update

1. Change in point of taxation in relation to payment required to be made recipient of service under partial reverse charge

Proviso added in R. 7 to provide that when a receiver of service is liable to pay service tax under partial reverse charge and rate of tax is changed, the date of invoice shall be the point of taxation in case where service is provided and invoice is issued before the date of change but payment is not made before the date of change.

(Notification No. 21/2016- ST dtd. 30-3-2016)

2. Change in payment under R. 6(3)(i) of CENVAT Credit Rules, 2004

When a service provider providing non exempt service and exempt service, opts to pay 6% of value of exempted goods and 7% of value of exempted services for the purpose of reversal of CENVAT credit, such payment shall now be maximum up to the sum total of opening balance of the credit of input and input services available at the beginning of the period to which the payment relates and the credit of input and input services taken during that period.

(Notification No. 23/2016-C.E. (N.T.), dtd. 1-4-2016)

Comment

The CENVAT Credit Rules were amended *vide* Notification No. 13/2016 – CE (NT) dtd. 1-3-2016 to be effective from 1-4-2016 to the effect that the payment in above cases shall be subject to a maximum of the total credit available in the account of the assessee at the end of the period to which the payment relates to. However, now the service provider shall be required to make payment for reversal of CENVAT credit in accordance with the new Notification No. 23/2016 – CE(NT) from 1st April, 2016 itself.

3. Amendment to ST-3 return formats

Format of ST-3 return is amended to include payment of Swachh Bharat Cess in different situations.

(Notification No. 20/2016 – ST dtd. 8-3-2016)





CA Bharat Shemlani



INDIRECT TAXES

Service Tax – Case Law Update

1. Services

Manpower Recruitment or Supply Agency Service

1.1 CCCEX&ST, Aurangabad vs. Shri Samarth Sevabhavi Trust 2016 (41) STR 806 (Bom.)

The assessee in this case engaged in undertaking harvesting of sugarcane and transporting same to sugar factory for which they have employed labour. The High Court held that, there is no supply of labour *per se* to sugar factory and therefore not liable to service tax under Manpower Recruitment or Supply Agency Service.

Technical Testing and Certification Service

1.2 A. Vanniappan vs. CCE, Tirunelveli 2016 (41) STR 865 (Tri.-Chennai)

The appellant in this case engaged in certification of purity and value of gold on commission basis for pledging in bank. The Tribunal in this case held that, appellant being individual jewellery appraiser receiving commission from bank and not testing and certification charges and services rendered by him, not to be termed as Technical Testing and Certification Service.

Storage & Warehousing Service

1.3 CCEC&ST, Raigad vs. Balmer Lawrie & Co. Ltd. 2016 (41) STR 908 (Tri.-Mumbai)

The issue in the present case regarding taxability of shares received on account of auctioning of abandoned cargo under SWS. The Tribunal held that, in the whole transaction no service recipient is existing therefore no question of providing any service to any person. Merely because section 150 of Customs Act, 1962 provides for distribution of amount of auction proceeds does not mean that service tax is recoverable on said proceeds from warehouse keeper. As per the provisions of FA, 1994 service tax liability attracted only if there exists taxable service, service provider, service receiver and consideration received for taxable service. In case of auction of uncleared goods, ownership of goods passes on to successful bidder who has not received any service of storage or warehousing of goods and such sale proceeds are subjected to Sales tax and not to any Service tax.

Management Consultancy Service

1.4 Indian Hotels Co. Ltd. vs. CST, Mumbai-I 2016 (41) STR 913 (Tri.-Mumbai)

The Appellant (IHCL) in this case entered into an agreement to run, operate and manage hotels owned by *Lokhandwala Hotels Pvt. Ltd. (LHPL)* till completion of formalities of final purchase and signed three separate agreements for this purpose. The department alleged that, impugned activity of running, operating and managing hotel amounting to providing Management Consultancy Service liable to Service tax. The Tribunal held that, tripartite agreements signed between IHCL, LHPL and I-Venture, a consortium of institutional lenders of LHPL, to extricate LHPL from debt, as hotel owned by it running in huge losses. The hotel was given on licence to IHCL. The introductory part and various clauses of agreements clearly indicated true and only actual purpose of acquisition of hotel by IHCL. By making investment in LHPL, the appellant became part owner of assets of hotel and not running hotel as services to LHPL by mere providing any management service. Activities of running, operating and managing hotel co-owned by the appellant is not amounting to providing management and consultancy service.

Erection, Commissioning or Installation service

1.5 *U.P. Rajkiya Nirman Nigam Ltd. vs. CCE, Meerut-I 2016 (41) STR 967 (Tri.-Del.)*

The Tribunal in this case held that, ECI service provided in relation to work of rural electrification is squarely covered in relation to transmission and distribution of electricity and therefore exempt under Notification No. 45/2010-ST and therefore no service tax is recoverable in respect thereof.

Cargo Handling Service

1.6 *Nizamsingh Chauhan vs. CCE, Bhopal 2016 (41) STR 982 (Tri.-Del.)*

The Tribunal in this case held that, handling and transport of manganese ore involving wagon loading, truck loading, transport including stacking and destacking/rehandling etc. is covered under cargo handling service and the transport activity (excluding stacking) forms very small part of entire service rendered.

2. Interest/Penalties/Others

2.1 *Britt Worldwide India Pvt. Ltd. vs. UOI 2016 (41) STR 793 (Bom.)*

The High Court in this case held that, the long delay of 17 months in passing adjudication order after hearing vitiated the order and therefore remanded the matter for rehearing and to be decided afresh.

2.2 *CCE, Goa vs. R. K. Construction 2016 (41) STR 879 (Tri.-Mumbai)*

In the present case, SCN was issued for levy of Service Tax under Commercial or Industrial Construction Service, whereas adjudicating authority confirmed demand under Construction of Residential Complex. The Tribunal held that, assessee not being put to notice under proper category, adjudicating authority traversed beyond allegations in SCN and therefore order not sustainable.

2.3 *CCE, Pune-I vs. Rosy Blue (India) Pvt. Ltd. 2016 (41) STR 994 (Tri.-Mumbai)*

In this case, the department denied refund of service tax paid on Banking & Other Financial Services and Technical Inspection and Certification Service on the ground that these services having been used in import of rough diamonds, which is not relatable with export of goods. The Tribunal held that, these services are used only for making goods exportable and further banking services is used for raising finance not only for imports but also for exports. It is settled

law that when credit on an input service is admissible, similar yardstick to be applied for allowing refund/rebate on export of goods/services. It is also a settled law that banking services are input services whether used before or after manufacture. In view thereof refund is admissible.

3. CENVAT Credit

3.1 Gujarat State Fertilisers & Chemicals Ltd. vs. CCE&ST, Surat-II 2016 (41) STR 794 (Guj.)

The appellant in this case claimed CENVAT credit of service tax paid on commission to sales agent. The High Court held that, agreement with such agents clearly indicated that the appellant is appointed as stockist for sale of goods and commission depended on sales turnover. The issue on similar facts already decided in 2013 (30) STR 3 (Guj.) and since the commission paid is not related to sales promotion, appellant is not eligible to avail CENVAT credit.

3.2 Carrier Airconditioning & Refrigeration Ltd. vs. CCE, Delhi-IV 2016 (41) STR 824 (Tri.-Chan.)

The Tribunal in this case held as under:

- Allowed CENVAT credit of service tax paid on renting of immovable property acquired for setting up branch office for procuring orders and delivery of goods and for providing taxable services.
- Allowed CENVAT credit of service tax paid on construction, architect and interior decorator services used for dismantling of building and construction of storage shed as the said services are used in relation to modernisation, renovation or repairs of factory having nexus with manufacturing activity.

3.3 Mahindra Casting Ltd. vs. CCE, Pune-I 2016 (41) STR 831 (Tri.-Mumbai)

The Tribunal in this case allowed CENVAT credit of service tax paid on agency charges and tour operators services. Credit of welfare expenses incurred in celebrating Dussera festival by buying gifts and setting up of mandap and catering services with employees contribution has been disallowed. Since it is disputed issue and agitated in various forums, penalty is not imposable.

3.4 Maharashtra Cricket Association vs. CCE, Pune-III 2016 (41) STR 833 (Tri.-Mumbai)

The Tribunal in this case allowed CENVAT credit of service tax paid under RCM on architects service and design service used for setting up premises i.e., stadium, of provider of output service. It is further held that, CBEC Circular No. 98/01/2008-ST dated 4-1-2008 is contrary to clear and unambiguous definition of input service and hence not tenable.

3.5 Megha Engg. & Infrastructure Ltd. vs CCE&ST Hyderabad-II 2016 (41) STR 842 (Tri.-Bang.)

The appellant manufactured pipes from duty paid inputs, and cleared such pipes after availing CENVAT credit and paying duty from such availed CENVAT credit. They have also registered under works contract composite scheme and providing services by purchasing pipes from own manufacturing unit. They have not availed any credit as service provider. The department denied CENVAT credit on the ground that appellant is one and only one as a manufacturer and as a service provider. The Tribunal held that, role of manufacturer was over when pipes cleared on payment of duty and thereafter appellants role as service provider emerged. Service provider was at liberty to procure pipes from other manufacturers who

could have availed credit on inputs used for manufacture of pipes. Merely because appellant performing two separate roles, as a manufacturer and also as a service provider under two different registrations, denial of credit is not warranted.

3.6 Kamal Rubplast Industries Pvt. Ltd. vs. CCE, Delhi-III 2016 (41) STR 855 (Tri.-Del.)

The department in this case denied CENVAT credit of service tax paid on construction service and repair of existing factory building and availed during the period April, 2011 to February, 2012 on the ground that after 1-4-2011 those activities not covered under definition of input service. The Tribunal held that, document established that construction service completed prior to 1-4-2011 and as per CBEC Circular No. 354/73/2011-TRU dated 1-4-2011 credit available if service completed before 1-4-2011. Therefore credit cannot be denied for delay in issuing invoice.

3.7 CCE, Surat-II vs. Vishal Malleables Ltd. 2016 (41) STR 855 (Tri.-Del.)

The Tribunal in this case allowed CENVAT credit of bank commission charges on collection of sale proceeds of goods exported out of India as the same is in relation to business activities of assessee.

3.8 Sterlite Industries India Ltd. vs. CCE, Madurai 2016 (41) STR 867 (Tri.-Chennai)

The Tribunal in this case allowed CENVAT credit on garden maintenance in factory area to prevent air pollution being necessity of

law, artwork related expenditure connected to business activity to discharge social responsibility and Forex money service relevant for export and import. However, not allowed CENVAT credit on maintenance of garden in office premises.

3.9 Piramal Healthcare Ltd. vs. CCE, Thane-I 2016 (41) STR 900 (Tri.-Mumbai)

In this case Revenue denied Cenvat credit of service tax paid on custom house agent service on the ground that, the said services have been availed beyond place of removal. The Tribunal held that CBEC Circular No. 999/6/2015-CX dated 28-2-2015 clarified that place of removal in case of export of goods being Port/ICD/CFS and therefore credit is available.

3.10 Carrier Airconditioning & Refrigeration Ltd. vs. CCE, Gurgaon 2016 (41) STR 1004 (Tri.-Del.)

The appellant in this case engaged in repair and maintenance services of sold airconditioners either directly or through sub-contractors under AMC during and beyond warranty period. They have availed CENVAT credit of service tax paid by sub-contractors on amount received as payment for services rendered, treating it as BAS. The Tribunal held that, appellant holding centralised registration for various services and service received from sub-contractors as BAS to be treated as input service for output service of repair and maintenance service under AMC. Further, it is held that, commission agents services of procuring sales orders is input service.



Do not wait for anybody or anything. Do whatever you can. Build your hope on none.

— Swami Vivekananda



Janak C. Pandya, Company Secretary



CORPORATE LAWS

Company Law Update

[2016] 195 Comp Cas 118 (Bom.)

[In the Bombay High Court]

Shakti Insulated Wires P. Ltd. and Others vs. Great View Properties P. Ltd and Others.

Shares of a company, as part of assets of a merged company under a scheme of amalgamation, treated as transmission of shares. Even in case of transmission of shares, it requires approval of the Board of Directors. Thus, Directors are under no obligation to approve the transmission. In such a situation, the normal process of transfer of shares can be invoked

Brief Case

The appeal was filed by the appellant against the Hon. Company Law Board Order, Mumbai Bench ("CLB"). In its order, CLB allowed the petition of the respondent and declared it as owner of 1,980 equity shares of the appellant company. It also directed the appellant company to register the transfer of shares and rectify the register of members.

The brief summary of facts of the application are as follows:

- a. Originally, M/s. Jayalaxmi Holdings P. Ltd. ("JHPL") was holding 1,980 equity shares of the appellant company.

- b. Upon merger of JHPL with the respondent, all assets including the above equity shares and liabilities of JHPL were transferred to the respondent.
- c. Respondent applied to the appellant company for registering the above equity shares in its name as part of transmission.
- d. Appellant rejected the application citing the reason that the said transfer is not transmission of shares but transfer of shares. Thus, it would be in violation of the relevant provisions of the Articles of Association on transfer of shares as to right of pre-emption.
- e. The respondent challenged the above rejection under Section 111 of the Companies Act, 1956.
- f. CLB allowed the petition and directed the appellant to rectify the register of share transfer.

The appellant made the following submissions:

1. The transfer of shares under a scheme of amalgamation is a voluntary transfer between the transferor and the transferee company and should not be considered as transmission by operation of law. Hence, the CLB erred in law by treating this as transmission of shares.

2. The provisions of Article Nos. 21 to 43 of the Articles of Association of the company relating to the procedure for transfer and transmission of shares were referred. Article 22 restricts transfer of shares except after the exhaustion of right of pre-emption provided in Article 23.
3. Transmission of shares falls under Article 39, which states that for this, pre-emption rights do not apply.
4. This being a voluntary transfer of shares, the same will fall under the pre-emption clause of the Articles of Association.
5. The rejection of the transfer of shares was in accordance with the provisions of the Articles of Association of the company.

The question before the Hon. Court was whether a transaction between JHPL and the respondent under the sanctioned scheme of amalgamation was “transfer of shares” or was it equivalent to “transmission of shares”? In its submission, the appellant relied on the Supreme Court judgment in the case of *General Radio and Appliances Co. Ltd. vs. M.A. Khader [1986] 60 Comp Cas 1013 (SC); AIR 1986 SC 1218*.

Judgment and reasoning

The Court partially upheld the decision of the CLB as to transfer of shares. However, the Court altered the Order language. As per the proposed alteration, the appellant shall either register the transfer or allow the respondent to sell the

shares to any other person as suggested by the respondent or buy it through any purchasing member at a fair value.

The Court analysed the judgment referred by the appellant and the provisions of Articles of Association as to what amounts to transfer of shares and transmission of shares. The Court relied on the judgment of the Bombay High Court Division Bench in *Li Taka Pharmaceuticals Ltd. vs. State of Maharashtra, AIR 1997 Bom 7; [1998] 91 Comp Cas 871 (Bom)*. The Court observed that in case of amalgamation, the transferee company purchases undertaking of the transferor company for a specified sum. Such sum is ordinarily paid by way of allotment of shares of the transferee company. In case of amalgamation, there is no general proposal for transfer of shares. The transfer is again subject to the Court order. The transfer is that of the undertaking of the transferor as a going concern and not any individual assets including shares held by the transferor company. Thus, in no situation, the process mentioned in Articles 21 to 38 as to transfer of shares can be complied with. The Court also observed that Article 39 relating to transmission of shares provides for entitlement of any person to shares of the company arising on account of any lawful means other than transfer as per Articles on transfer of shares. The Court also observed that even in case of transmission, the same can be approved only by the Board of Directors. Thus, the Directors are under no obligation to approve the transmission. In such a situation, the respondent is free to invoke the Articles as applicable to the transfer of shares with pre-emption rights.



Perfect sincerity, holiness, gigantic intellect, and all-conquering will. Let only a handful of men work with these, and the whole world will be revolutionized.

— Swami Vivekananda



CA Mayur Nayak, CA Natwar Thakrar &
CA Pankaj Bhuta



OTHER LAWS FEMA Update

In this article, we have discussed recent amendments to FEMA through Circulars & Notifications issued by Reserve Bank of India ('RBI') and Press Notes issued by Department of Industrial Policy and Promotion ('DIPP'):

A. Circulars & Notifications issued by RBI

1. Grant of EDF Waiver for Export of Goods Free of Cost

RBI has clarified that the Status Holders shall be entitled to export freely exportable items on free of cost basis for export promotion subject to an annual limit of ` 10 lakh or 2% of average annual export realisation during preceding three licensing years whichever is lower as notified by the Government of India *vide* amendment Notification No. 9/2015-2020 dated June 4, 2015, as against earlier annual limit of ` 10 lakh or 2% of average annual export realisation during preceding three licensing years, whichever is higher.

(A.P. (DIR Series) Circular No. 53 dated March 3, 2016)

(Comment: This is a clarificatory circular to draw attention of AD Banks to the revised norms in conformity with Government of India Notification No. 9/2015-2020)

2. Diamond Dollar Account (DDA) – Reporting Mechanism

Currently, AD Category-I banks have been submitting quarterly reports giving details of the name and address of the firm/company in whose name the Diamond Dollar Account was opened. AD Banks were also required to submit fortnightly statements giving data on DDA balances maintained by them to the Reserve Bank at the specified address.

With a View to liberalise the procedure, the above mentioned statements are dispensed with immediate effect. AD banks are however advised to maintain the above database at their own end and make available the same as and when called upon by the Reserve Bank of India.

(A.P. (DIR Series) Circular No. 54 dated March 23, 2016)

(Comment: This is welcome move which will reduce procedural burden for AD Banks and will enhance ease of doing business)

3. Investment by Foreign Portfolio Investors (FPI) in Government Securities

Limits for investment by FPIs in Central Government Securities for the next half year are proposed to be increased in two tranches, i.e., by ` 105 billion from April 4, 2016 and by ` 100 billion from July 5, 2016 respectively.

Limits for State Development Loans (SDL) are proposed to be increased in two tranches, each of ₹ 35 billion, from April 4, 2016 and July 5, 2016 respectively.

The total increase in limits over the next two quarters would, accordingly, be as under: (₹ in billion)

	Central Government securities			State Development Loans	Aggregate
	For all FPIs	Additional for Long Term FPIs	Total	Total	
Existing Limits	1,354	441	1795	70	1,865
Revised limits with effect from April 4, 2016	1,400	500	1900	105	2,005
Revised limits with effect from July 5, 2016	1,440	560	2000	140	2,140

Further operational guidelines relating to allocation and monitoring of limits will be issued by the Securities and Exchange Board of India (SEBI).

(A.P. (DIR Series) Circular No. 55 dated March 29, 2016)

(Comment: This move is in line with borrowing requirements of the Central/State Governments and will increase inflow of forex and the liquidity)

4. External Commercial Borrowings (ECB) – Revised framework

RBI, in consultation with the Government of India has made the following changes in the ECB framework:

- i. Companies in infrastructure sector, Non-Banking Financial Companies – Infrastructure Finance Companies (NBFC-IFCs), NBFCs – Asset Finance Companies (NBFC-AFCs), Holding Companies and Core Investment Companies (CICs) will also be eligible to raise ECB under Track I of the framework with minimum average maturity period of 5 years, subject to 100 per cent hedging.

- ii. “Exploration, Mining and Refinery” sectors which are not included in the Harmonised list of infrastructure sector but were eligible to take ECB under the previous ECB framework (c.f. A.P. (DIR Series) Circular No. 48 dated September 18, 2013) will be deemed as in the infrastructure sector, and can access ECB as applicable to infrastructure sector under (i) above.
- iii. Companies in infrastructure sector shall utilise the ECB proceeds raised under Track I for the end uses permitted for this Track. NBFCs-IFCs and NBFCs-AFCs will, however, be allowed to raise ECB only for financing infrastructure.
- iv. Holding Companies and CICs shall use ECB proceeds only for on-lending to infrastructure Special Purpose Vehicles (SPVs).
- v. The individual limit of borrowing under the automatic route for aforesaid companies shall be as applicable to the companies in the infrastructure sector (currently USD 750 million).
- vi. Companies in infrastructure sector, Holding Companies and CICs will continue to have the facility of raising

ECB under Track II of the ECB framework subject to the conditionalities prescribed thereof.

The companies added under Track I should have a Board approved risk management policy. Further, the designated AD Category-I bank shall verify that 100 per cent hedging requirement is complied with during the currency of ECB and report the position to RBI through ECB 2 returns.

In relation to the ECB framework announced *vide* AP DIR Series Circular No. 32 dated November 30, 2015, it is further clarified that:

- i. The designated AD Category-I banks may, under the powers delegated to them, allow refinancing of ECBs raised under the previous ECB framework, provided the refinancing is at lower all-in-cost, the borrower is eligible to raise ECB under the extant ECB framework and residual maturity is not reduced (i.e., it is either maintained or elongated).
- ii. ECB framework is not applicable in respect of the investment in non-convertible Debentures (NCDs) in India made by Registered Foreign Portfolio Investors (RFPIs).
- iii. Minimum average maturity of Foreign Currency Convertible Bonds (FCCBs)/ Foreign Currency Exchangeable Bonds (FCEBs) is 5 years irrespective of the amount of borrowing. Further, the call and put option, if any, for FCCBs shall not be exercisable prior to 5 years.
- iv. Only those NBFCs which are coming under the regulatory purview of the Reserve Bank are permitted to raise ECB. Further, under Track III, the NBFCs may raise ECBs for on-lending for any activities including infrastructure as permitted by the concerned regulatory department of RBI.

- v. The provisions regarding delegation of powers to designated AD Category-I banks is not applicable to FCCBs/FCEBs.
- vi. In the forms of ECB, the term “Bank loans” shall be read as “loans” as foreign equity holders/institutions other than banks, also provide ECB as recognised lenders.

(A.P. (DIR Series) Circular No. 56 dated March 30, 2016)

(Comment: This is a welcome rationalisation in the ECB framework announced vide AP DIR Series Circular No. 32 dated November 30, 2015 taking into account prevailing external funding sources, particularly for long term lending and the critical needs of infrastructure sector of the country)

5. Import of Rough, Cut and Polished Diamonds

To ease the operational difficulties faced by the importers of rough, cut & polished diamonds, powers have been delegated to AD banks for permitting clean credit for a period exceeding 180 days from the date of shipment to the AD banks, subject to the following conditions:

- i. AD banks being satisfied of the genuineness of the reason and *bona fides* of the transaction and also that no payment of interest is involved for the additional period.
- ii. The reasons for such extensions are due to financial difficulties and/or quality disputes, as in the case of normal imports (for which such extension of time period for delayed payments has already been delegated to the AD banks).
- iii. The importer requesting for such extension is not under investigation/no investigation is pending against the importer.
- iv. The importer seeking extension is not a frequent offender. Since there is a possibility that the importer may have dealings with more than one AD bank, the AD bank allowing extension may devise a mechanism based on their commercial judgment, to ensure this.

v. AD banks may allow such extension of time up to a maximum period of 180 days beyond the prescribed period/due date, beyond which they may refer the cases to respective Regional Office of the Reserve Bank.

(A.P. (DIR Series) Circular No. 57 dated March 31, 2016)

(Comment: This is welcome move which will reduce operational difficulties and enhance ease of doing business)

6. Foreign Direct Investment (FDI) in India – Review of FDI policy – Insurance sector

Upon review of FDI policy for Insurance sector by the Government of India, RBI has enhanced the limit of foreign investment in insurance sector from 26 to 49 per cent under the automatic route subject to terms and conditions notified through DIPP Press Note No. 1 dated 23rd March, 2016.

Accordingly, Schedule 1, Annex B of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000, has been amended as follows:

Sl. No.	Sector/Activity	Foreign Investment Cap (%)	Entry Route	Major Change
F.7	Insurance			
F.7.1	Insurance	49%	Automatic	Earlier Automatic up to 26% Government route beyond 26% and up to 49%
(i)	Insurance			
(ii)	Insurance Company			
(iii)	Insurance Brokers			
(iv)	Third Party Administrators			
(v)	Surveyors and Loss Assessors Other Insurance Intermediaries appointed under the provisions of Insurance Regulatory and Development Authority Act, 1999 (41 of 1999)			
F.7.2	Other Conditions			
	a) No Indian Insurance company shall allow the aggregate holdings by way of total foreign investment in its equity shares by foreign investors, including portfolio investors, to exceed forty-nine percent of the paid up equity capital of such Indian Insurance company. b) The foreign investment up to forty-nine per cent of the total paid-up equity of the Indian Insurance Company shall be allowed on the automatic route subject to approval/verification by the Insurance Regulatory and Development Authority of India. c) Foreign investment in this sector shall be subject to compliance with the provisions of the Insurance Act, 1938 and the condition that Companies receiving FDI shall obtain necessary license/approval from the Insurance Regulatory & development Authority of India for undertaking insurance and related activities. d) An Indian Insurance company shall ensure that its ownership and control remains at all times in the hands of resident Indian entities as determined by Department of Financial Services/Insurance Regulatory and Development Authority of India as per the rules/regulation issued by them from time-to-time.			

Sl. No.	Sector/Activity	Foreign Investment Cap (%)	Entry Route	Major Change
	<p>e) Foreign portfolio investment in an Indian Insurance company shall be governed by the provisions contained in sub-regulations (2), (2A), (3) and (8) of Regulation 5 of FEMA Regulations, 2000 and provisions of the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014.</p> <p>f) Any increase in foreign investment in an Indian Insurance company shall be in accordance with the pricing guidelines specified by Reserve Bank of India under the FEMA Regulations.</p> <p>g) The foreign equity investment cap of 49 per cent shall apply on the same terms as above to Insurance Brokers, Third Party Administrators, Surveyors and Loss Assessors and Other Insurance Intermediaries appointed under the provisions of the Insurance Regulatory and Development Authority Act, 1999 (41 of 1999).</p> <p>h) Provided that where an entity like a bank, whose primary business is outside the insurance area, is allowed by the Insurance Regulatory and Development Authority of India to function as an insurance intermediary, the foreign equity investment caps applicable in that sector shall continue to apply, subject to the condition that the revenues of such entities from their primary (i.e., non-insurance related) business must remain above 50 per cent of their total revenues in any financial year.</p> <p>i) The provisions of paragraphs F.2.2 (4) (i) (b) & (d), relating to 'Banking-Private Sector', shall be applicable in respect of bank promoted insurance companies.</p> <p>j) Terms 'Control', 'Equity Share Capital', 'Foreign Direct Investment' (FDI), 'Foreign Investors', 'Foreign Portfolio Investment', 'Indian Insurance Company', 'Indian Company', 'Indian Control of an Indian Insurance Company', 'Indian Ownership', 'Non-resident Entity', 'Public Financial Institution', 'Resident Indian Citizen', 'Total Foreign Investment' will have the same meaning as provided in Notification No. G.S.R 115 (E), dated 19th February, 2015 issued by Department of Financial Services and regulations issued by Insurance Regulatory and Development Authority of India from time to time.</p>			

(A.P. (DIR Series) Circular No. 58 dated March 31, 2016/Notification No. FEMA. 366/2016-RB dated March 30, 2016)

(Comment: This is a welcome liberalisation in the insurance sector which has a great potential of attracting FDI. This move will also enhance the prospect of disinvestment of Public Sector Insurance Companies)

B. Press Notes issued by DIPP

1. Review of Foreign Direct Investment (FDI) on Insurance sector

The Government of India has liberalised its Foreign Direct Investment policy on Insurance Sector. Accordingly, Paragraph 6.2.18.7 of the 'Consolidated FDI Policy Circular 2015' effective 12-5-2015 has been amended.

(Press Note No. 1 (2016 Series) dated March 23, 2016)

(Comment: These amendments are first issued by DIPP and after which notified by RBI vide Circular and Notification. The amendment have been enumerated above)

2. Review of Foreign Direct Investment (FDI) on Pension sector

The Government of India has liberalised its Foreign Direct Investment policy on Pension Sector. Accordingly, Paragraph 6.2.18.7 bis of the 'Consolidated FDI Policy Circular 2015' effective 12-5-2015 has been amended. The amendment is as follows:

Sl. No.	Sector/Activity	Foreign Investment Cap (%)	Entry Route
Insurance			
6.2.18.7 bis.	Pension	49%	Automatic
F.7.2	Other Conditions		
	i. Foreign investment in the Pension Sector is allowed as per the Pension Fund Regulatory and Development Authority (PFRDA) Act, 2013. ii. Foreign Investment in Pension Funds will be subject to the condition that entities bringing in foreign equity investment as per Section 24 of the PFRDA Act shall obtain necessary registration from the PFRDA and comply with other requirements as per the PFRDA Act, 2013 and Rules and Regulations framed under it for so participating in Pension Fund Management activities in India. iii. Wherever such foreign equity investment involves control or ownership by the foreign investor or, transfer of control or ownership of an existing pension fund from resident Indian citizens and/or Indian companies owned and controlled by resident Indian citizens to such foreign investing entities as a consequence of the investment, including through transfer of shares and or fresh issue of shares to non-resident entities through acquisition, amalgamation, merger etc., it would require Government approval in consultation with the Department of Financial Services, PFRDA and other entities concerned and the onus of compliance to these conditions will be on investee Indian pension fund company. The meaning of ownership and control would be as per the Foreign Direct Investment policy.		

(Press Note No. 2 (2016 Series) dated March 23, 2016)

3. Guidelines for Foreign Direct Investment (FDI) on E-commerce

As per the extant FDI Policy, Foreign Direct Investment up to 100% under the automatic route is permitted in Business to Business (B2B) e-commerce. No FDI is permitted in Business to Consumer (B2C) e-commerce. However, as per extant FDI Policy, FDI is permitted in B2C e-commerce in the following circumstances:

- i. A manufacturer is permitted to sell its products manufactured in India through e-commerce retail.
- ii. A single brand retail trading entity operating through brick and mortar stores, is permitted to undertake retail trading through e-commerce.
- iii. An Indian manufacturer is permitted to sell its own single brand products through e-commerce retail. Indian manufacturer would be the investee company, which is the owner of the Indian brand and which manufactures in India, in terms of value, at least 70% of its products in house, and sources, at least 30% from Indian manufacturers.

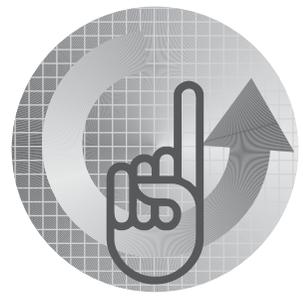
In order to provide clarity to the FDI policy on e-commerce sector, the following guidelines have been formulated:

I. Definitions

- (i) **E-commerce** – E-commerce means buying and selling of goods and services including digital products over digital & electronic network.

- (ii) **E-commerce Entity** – E-commerce entity means a company incorporated under Companies Act, 1956 or the Companies Act, 2013 or a foreign company covered under section 2(42) of the Companies Act, 2013 or an office, branch or agency in India as provided in section 2(v)(iii) of FEMA 1999, owned or controlled by a person resident outside India and conducting the E-commerce business .
 - (iii) **Inventory based models of E-commerce** – Inventory based models of e-commerce means an e-commerce activity where inventory of goods and services are owned by e-commerce entity and it is sold to the consumers directly.
 - (iv) **Market based models of e-commerce** – Market based models of E-commerce means providing of an information technology platform by an e-commerce entity on a digital & electronic network to act as a facilitator between buyer and seller.
- II. Guidelines for Foreign Direct Investment on e-commerce sector**
- (i) 100% FDI under automatic route is permitted in market place in model of e-commerce.
 - (ii) FDI is not permitted in inventory based model of e-commerce.
- III. Other conditions**
- (i) Digital & electronic network will include networks of computers, television channels and any other internal application used in automated manner such as web pages, extranets, mobiles etc.
 - (ii) Marketplace e-commerce entity will be permitted to enter into transaction with seller registered on its platform on B2B basis.
 - (iii) E-commerce market place may provide support services to sellers in respect of warehousing, logistics, order fulfilment, call centre, payment collection and other services.
 - (iv) E-commerce entity providing a marketplace will not exercise ownership over the inventory i.e. goods purported to be sold. Such an ownership over the inventory will render the business into inventory based model.
- (v) An e-commerce entity will not permit more than 25% of the sales effected through its marketplace from one vendor or their group companies.
 - (vi) In marketplace model goods/services made available for sale electronically on website should clearly provide name, address and other contact details of the seller. Post sales, delivery of goods to the customers and customer satisfaction will be responsibility of the seller.
 - (vii) In marketplace model, payments for sale may be facilitated by the e-commerce entity in conformity with the guidelines of the Reserve Bank of India.
 - (viii) In marketplace model, any warrantee/ guarantee of goods and services sold will be responsibility of the seller.
 - (ix) E-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field.
 - (x) Guidelines on cash and carry wholesale trading as given in para 6.2.16.1.2 of the FDI Policy will apply on B2B e-commerce
(Press Note No. 3 (2016 Series) dated March 29, 2016)
(Comment: Presently, the discounting model on e-commerce websites works by way of the e-commerce entities subsidizing the vendors for offering discounts on their products which are listed on the e-commerce entities' website. E-commerce entities may no longer be able to induce the vendors to offer discounts since such entities are now prohibited explicitly from directly or indirectly influencing the sale price of goods and services. The cash back schemes provided by the e-commerce entities may also become casualty due to such prohibition. It may be noted that the various conditions do not apply to Indian e-commerce entities and therefore may provide greater flexibility to them over e-commerce entities which have FDI. The press note states that it is effective immediately although one may call into question its legal backing without corresponding amendment in the FEMA Regulations.)





Ajay Singh, Advocate & CA Namrata Bhandarkar

BEST OF THE REST

1. Motor vehicle accidents – Causing death by negligence – Sentencing policy – Nonchalant attitude Indian drivers, driving in a rash and negligent manner – Urgent need to scrutinise relook at and revisit the sentencing policy – Penal Code 1860, S.304-A

Jagdish Ram and Shavinder Kumar met with a motor car accident when an respondent driving an Indica came from the opposite side at a very high speed and hit the car of Jagdish and dragged it to a considerable distance as a result of which it fell in a ditch. The injured were taken to the Hospital where they succumbed to death because of the injuries. The brother-in-law of the deceased filed a criminal suit against the respondent under sections 273/304-A IPC for rash and negligent driving. The Session Court of Patiala convicted the respondent under section 304-A IPC and sentenced him to undergo rigorous imprisonment for a period of 1 year and pay fine of ₹ 2,000 with a default clause. On appeal before the High Court, the conviction was upheld but the sentencing was reduced. Hence, this order was appealed before the Supreme Court.

The Hon'ble Supreme Court while observing the facts in this case relied on the observations made by the Apex Court while dealing with the sentencing policy in the case of *Gopal Singh*

vs. State of Uttarakhand (2013) 7 SCC 545 that in operating the sentencing system law should adopt the corrective machinery or deterrence based on factual matrix. By depth modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and circumstances in each case, the nature of crime, the manner in which it was planned, the motive for commission of the crime, the conduct of the accused, the nature of weapons and all other attending circumstance are relevant facts which would enter into area of consideration.

The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows the significant discretion to the judge but the same has to be guided by certain principle. In certain cases the nature of culpability the antecedents of the accused the factum of age the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent environment, the effect propensity to become a social threat or nuisance and sometimes lapse of time in the commission of crime and his conduct in the interregnum bearing in the mind the nature if the offence the relation between the parties and attractability of the doctrine of bringing the convict to the value-based social mainstream may be the guiding factors, needless to emphasis these are certain

illustrative aspects put in a condensed manner we may hasten to add that there can neither be a straitjacket formula nor a solvable theory in a mathematical exactitude, it would be dependent on the facts of the case and rationalised judicial discretion. Neither the personal perception of the judge nor self-adhered moralistic vision nor should hypothetical apprehensions be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a court the real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors indicative therein before and also have been stated in a number of pronouncements by this court. On such touchstone the sentences are to be imposed the discretion should not be a realm of fancy, it should be embedded in the conceptual essence of just punishment.

While carrying out this complex exercise, it is obligatory on the part of the court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim. The Apex Court affirmed the decision of the High Court of sentencing to six months from one year.

State of Punjab vs. Saurabh Bakshi (2015) 5 SCC 182

2. Contract and specific relief – Contingent contracts – Failure of Contingents contract distinguished from frustration of contract: Contract 1872, S. 32, S.56

The Appellants executed an agreement to sell 164 bighas, 7 biswas of the land on 2-8-1995 as precondition for sale, permission from the competent authority under section 118 of the Himachal Pradesh Land Reforms Act was necessary. The onus to obtain the relevant permission was cast on plaintiffs in

the agreement to sell. The plaintiffs managed to obtain permission for only 145 bighas of land. As the stipulated time for obtaining permission for the entire area expired the plaintiffs sought extension from the defendants. This extension was denied which eventually led to filing of suit. In the suit the plaintiff pleaded frustration of contract and sought refund of the money already paid with interest. The learned single judge decreed the suit, finding that there was frustration of contract. Aggrieved by the same, the defendants filed an appeal before the High Court. The Division Bench held that the contract under question was not “frustrated” as understood in Indian law in terms of section 56 of the Contract Act, 1872. The plaintiffs were at fault for their failure to obtain the necessary permission for the entire area, as the obligation to obtain the permission for the entire areas rested with them. The plaintiffs had committed the breach of the agreement, however, the defendants had not committed any breach and permission having been obtained for at least 145 bighas of land sale could have been completed to this substantial portion of the suit property. Aggrieved by the same the defendant filed an appeal before the Apex Court.

The Division Bench of the High Court held that findings recorded by the learned single judge on grant of permission to the entire 164 bighas 7 biswas of land as agreed between the parties to sell in favour of the plaintiffs does not amount to the frustration of contract for the reason that the State Government at first granted permission to the plaintiffs for the pursuance of 125 bighas and thereafter granted permission to 145 bighas of land. Further, the Division Bench of the High Court has held that there is no material on record to show that after the second permission was granted, the plaintiff took further steps to get permission from the State Government for purchasing the remaining land. Even if such permission was not granted and permission was specifically refused the contract between the parties would not stand frustrated. It is further rightly held

by the Division bench of the High court that the parties at the time of the agreement could not have presumed that the permission must have been granted. Further, it has observed that supposing the State Government refuses to grant permission for purchase of land, then obviously it would be case of the contract not being able to be performed. But, when the State Government grants the permission for lesser area of land than the agreed upon area in the agreement by the defendants, the plaintiffs could not have elected to purchase the lesser area i.e. 145 bighas for which permission was granted.

It was further observed the learned Division Bench has rightly rejected the arguments of the plaintiffs that permission for purchase of 145 bighas of land granted by the State Government in favour of the plaintiffs, was not sufficient to set up the plant as in this regard no evidence worth the name to support this plea of the plaintiffs has been produced before the court. Further the High Court has rightly assigned its reasons on the basis of project reports of the plaintiffs, the State Government and the Department of Industries and taking all relevant aspects into consideration as decided that permission should be granted in favour of the plaintiffs for purchase of 145 bighas of land. This fact would clearly indicate according to the Industries Department, sale of land of 145 bighas in favour of the plaintiffs by the defendants was sufficient to set up the industry for which purpose the plaintiffs have entered into an agreement with the defendants. Further, in impugned judgment the High Court assigns its reason stating that the parties may or may not get the permission for the purchase of the entire land. However, in the absence of such condition expressed in the agreement, the contract between the parties does not frustrate particularly, when the plaintiffs has an alternative to purchase 145 bighas of land from the defendants.

For the above observation made by the High Court, the Supreme Court found no reason

to interfere with the impugned order and the appeal was dismissed.

Gian Chand and Other vs. York Exports Limited and Another (2015) 5 SCC 609

3. Doctrine of feeding grant by estoppels – Applicability – Transfer of immovable property of original owner by unauthorised person by fraudulent or erroneous representation Property Law – Transfer of Property Act, 1882, Sec. 43

The original plaintiff was the owner and title holder of the suit property but her son by making a false and fraudulent representation that the property belonged to him, transferred the same in favour of the appellant. During the pendency of the First Appeal before the District Court, the vendor (son of the original plaintiff) died. Although on his death, the children did not inherit or succeed to any interest in the property through their deceased father, but they were impleaded as legal representatives in the appeal. However, during the pendency of the present appeal before the Supreme Court, the original plaintiff died. After her death, the respondents being the grandchildren inherited and acquired interest in the suit property. The question was whether the appellant transferee was entitled to the benefit of section 43 of the Transfer of Property Act against the grandchildren of the original plaintiff.

The Supreme Court held that in their opinion the appellant would not be entitled to take the benefit of the doctrine of feeding the estoppel. Section 43A of Transfer of Property Act is based on the principle of estoppel. This Doctrine known in English law has formed part of Roman-Dutch law, according to which where a granter has purported to grant an interest in the land which he did not at the time possess, but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the earlier grantee. The finding of the facts

recorded by the two courts based on the records that the original plaintiff was the owner and the title holder of the said property by making false and fraudulent representation by her son that the property belonged to him transferred the same in favour of the appellant. During the pendency of the First Appeal before the District Court the vendor (son of the original plaintiff) died. Although on the death, his children did not inherit or succeeded any interest in the property, through the deceased father, but they were impleaded as legal representatives in the appeal. However, during the pendency of appeal the original plaintiff died. After her death, the respondents being the grand children inherited and acquired interest in the suit property. Admittedly, the deceased son of the original plaintiff never acquired any interest in the suit property owned by his mother during his lifetime. In the aforesaid premises, the doctrine of feeding the estoppels would not come into operation as against the grandchildren of the original plaintiff. Section 43 applies when the transferor having no interest in the property transfers the same but subsequently acquires interest in the said property, the purchaser may claim the benefit of such subsequent acquisition of the property by the transferor. Had it been the case, where the son during his lifetime succeeded or inherited the property but died subsequently, then to some extent it could have been argued that the heirs who inherited the property on the death of their father would be bound by the principle of estoppels. Therefore, in a case where a transferor never acquired by succession, inheritance or otherwise any interest in the property during his lifetime then the provision of section 43 will not come into operation against the heirs who succeeded the property of the grandmother. For all the reasons stated above, the court did not find any merits in the appeal and case was dismissed.

Agricultural Produce Marketing Committee vs. Bannamma (Dead) by Legal Representatives (2015) 5 SCC 691.

4. Deficiency of service – Builder – Registered Agreement – Builder/developer failed to deliver peaceful possession of property – Complainant filed complaint seeking relief – compensation on account of mental agony and rate of interest on the payment made was directed to be paid: Consumer Protection Act

Opponent is a builder/developer, entered into registered agreement with the complainant on 13-9-2012 for sale of flat bearing No. 202 in Building No. 2 on second floor of the project developed by the opponent named and styled as “N. G. Sterling” for total consideration of ` 49,50,750/-. No date of possession was mentioned in clause 50 of the said registered agreement. Complainant has paid the entire consideration except the amount required to be paid at the time of handing over possession which works out to ` 50,068/-. Having paid the entire consideration minus the amount payable at time of possession, the opponent failed to deliver peaceful and vacant possession of the subject flat even though opponent were in position to obtain occupation certificate from competent authorities on 12-8-2013. On the contrary, opponent demanded extra amount outside the provision of registered agreement, even though, such extra amount was paid by cheques, which were not encashed during the validity period by the opponent. Opponent again put forth demand for issue of fresh pay order in view of unencashed one. At this point of time, dispute arose between the parties. Therefore, consumer complaint has been filed praying for handing over possession of the subject flat and claiming monetary relief of ` 30,90,817/- for the deficiency of service on the part of the opponent.

The Hon'ble State Consumers Disputes Redressal Commission observed that after obtaining occupation certificate on 12-5-2013 or immediately thereafter the complainant

should have been put into possession as the complainant dutifully complied with the obligations under the stipulation of agreement and was ever ready to pay agreed balance consideration. Thus, complainant discharged his contractual obligations. It is the only opponent who failed to abide and act upon the terms of registered agreement in accepting the balance amount of ` 88,533/- as per the agreement and hand over the possession. Instead the opponent put forth the extra demand of ` 2,04,645/- with no justification whatsoever. Therefore, failure on the part of opponent resulted into consumer dispute and the complainant was unnecessarily dragged to knock the doors of the State Commission subjecting to mental agony for his no fault. Therefore, suitable compensation on account of the avoidable delay to hand over the possession would meet the ends of justice. However, we make it clear that the prayer for total compensation of ` 30,90,817/- on account of deficiency is not supported by documentary evidence, therefore, we are not inclined to consider the same. However, in the interest of justice, we are of the considered view that the complainant was entitled to receive the possession by end of September 2014 [2 years from date of agreement], opponent has deprived the complainant by not handing over the same, though received occupation certificate and entire consideration except some balance amount which was required to be paid at the time of possession. Opponent has been using the large sum without complying the contractual obligations. Consumer Fora are court of equities, therefore, we are of the view that reasonable rate of interest on the amount paid by the complainant from date of filing of the complaint would meet the ends of justice. In view of the above observation the court directed the builder to hand over vacant and peaceful possession of the flat within 30 days from the payment of balance consideration from the complainant. The opponent was further directed to pay interest @ 9% on the amount of ` 49,00,682/- from the date of filing the

complaint within 30 days and payment of ` 1 lakh as cost for the mental agony suffered.

Mr. Mehul Jayantilal Gandhi vs. RNA Builders (NG) CC No. CC/14/296 dated 1-2-2016 (State Consumer Disputes Redressal Commission, Maharashtra)

5. Deficiency and negligence in rendering services – Builder – Payment made in full to builder – Held complainants have suffered mental pain and agony to obtain their dream house – Builder directed to pay costs and grant peaceful possession of the flat

Complainant No. 1 is a retired person and complainant No. 2 is residing at abroad. Hence, she has given power of attorney to her mother. The opponent-M/s. Superior Builder is a builder & developer doing construction work at different places. The complainants had agreed to purchase Row House No. 1 in the building Friends Co-op. Hsg. Society Ltd., Airoli, Navi Mumbai, admeasuring for total consideration of ` 20 lakh on or about 18-2-1996. The complainants have paid total amount of ` 20,00,001/- to the opponents. The opponents/developers agreed to deliver possession of the premises on or before 31-12-1997. The opponents failed to hand over possession of the premises within stipulated time. The opponents have given reasons that due to dispute between the other flat owners and the builders in respect of payment terms and other issues, the work of the said society building had been stopped. The opponents/builder have informed that they have filed petition in Hon'ble Supreme Court to get 1.5 F.S.I. and that matter will be decided within short time and accordingly they will get additional F.S.I. and they will likely to change the plan and structure and therefore, it will take sometime to hand over possession. On inquiry opponents gave assurances and informed

that problem would be sorted out shortly. Thereafter, it was said Mishra Builders, one of its partners, was not ready to finish final work and water and electric connection in the said Society and for that it would take more time and they are trying to give possession.

Complainants filed an complaint and demanded vacant and peaceful possession of the premises from the opponents or in the alternate it was requested to return of the amount to the complainants as per prevailing market rate with interest @18% p.a. Notices were given to the opponents but of no use. It is alleged that the complainants have suffered loss due to opponents/builder. Opponents are guilty of malpractices, delay, defect, deficiency and negligence in rendering services of handing over possession of the premises to the complainant. Ultimately, complainants have filed present complaint and claimed possession of subject Row House.

The material question which is touching to the route of this consumer complaint is, whether the opponents are guilty of deficiency in service. Allotment of Row House to the complainants for consideration by the opponents is not at dispute.

The Hon'ble State Consumers Disputes Redressal Commission observed that full amount of consideration as mentioned in agreement executed on 1-4-1996 was accepted by the opponents. No explanation by the opponents as to why the excess amount was received from the complainants. Notice issued by the opponents to the complainants is totally silent about receipt of excess money and execution of the receipts. It appears that plea of termination of the agreement is totally concocted just with a view to create defence. The opponents should have proved their *bona fides* by depositing the amount of received

consideration in the office of the Commission although the cheque issued by them could not be honoured. The opponents failed to follow the terms and conditions of the lawful agreement executed in favour of the complainants. They raised several difficulties before the complainants for not handing over the possession. As per agreement the complainants were required to receive possession from the opponents on 31-12-1997. Nothing is on record to show that there is any dispute between the opponents and M/s. Mishra Builders. The opponents failed to give lawful possession of Row House to the complainants in spite of receipt of huge consideration. Delay in handing over possession itself is a deficiency in service. The complainants have waited for their dreamed house since 1996 till today. Without any base the opponents have raised the defence that agreement of sale is terminated by sending notice which was served to the opponents after filing of the complaint. The cheque sent along with the notice was useless. The complainants have duly proved deficiency in service on the part of the opponents while rendering the services to the complainants. It was held that the complainants have suffered mental pain and agony. They have booked Row House in the year 1996 and waited for possession. Ultimately they are forced to file the consumer complaint. Therefore, it was directed that the complainants are entitled for amount of ` 5,00,000/- towards compensation due to mental pain, agony and financial loss. They were required to issue notice and to appoint lawyer to file litigation. They are entitled for amount of ` 1,00,000/- towards costs of litigation.

C. V. Subramaniyen & Ashwini Subramaniyen vs. M/s. Superior Builders

CC No. CC/12/311 dated 27-1-2016 (State Consumer Disputes Redressal Commission, Maharashtra)





Kishor Vanjara, *Tax Consultant*



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CA Rajaram Ajgaonkar



ECONOMY AND FINANCE

A REBOUND

Contrary to the month of February, fortunately, the month of March, 2016 turned out to be very positive for Indian as well as global economies. The positive news flow continued throughout the month, globally as well as in India. The commodity prices improved across the world and that gave a respite to economies of many exporter countries. The crude oil prices improved due to some control in supply and that became positive news, not only to the oil exporting countries but to the whole world, as global trade was negatively affected by low oil prices. The Indian Budget for the year ushered a positive sentiment in the country and that created a bounce back in the Indian stock markets and also to the sentiments in the Indian economy. Further the sentiments were also pushed up by positive global signals.

Though the month of February was very uncertain and it rocked the stock markets across the world; suddenly the winds changed, supported by a steady increase in crude oil prices. During the month, the WTI crude oil climbed from around 36 \$ to 42 \$ per barrel, though some part of the gain retraced towards the end of the month. That has silenced the predictors of the doom of crude. Some of them had predicted that crude can fall down even up to 20 \$ a barrel, which does not seem to be a possibility in the near future. These positive

factors supported the sentiments and helped to increase the demand of commodities across the board. Improved prices of commodities to reasonable levels can ignite larger volumes of global trade and higher economic activities in the world, aiding much needed positive sentiment.

Currently, the biggest positive support for the global economy is that of the US. The country is steadily growing in spite of turmoil in many parts of the world. In all probabilities, the positivity will continue at least for a while. The economy will help to keep the morale of the world intact and also stimulate growth in many countries. It can also save some economies from getting into recession. The FED had indicated at the beginning of the calendar year that there will be more than one interest rate hike during the year. Therefore, the game changer in near future for the country is the US FED rate which though not altered in the recent meeting, can be revisited after a couple of months. The stand of FED in the meeting was more dovish and not purely aligned with the interests of the US economy; and it appeared to be considerate to the rest of the world, which can easily get affected by the US interest rate. The bounce back of the global stock markets in the month of March was partly due to this moderate stand of the FED. So long as interest rates are not hiked or there are indications of an immediate hike,

the global markets can remain perched at the current levels unless there is some other major event disturbing the equilibrium.

The struggling Europe has not found much of a respite in the month of March though the sentiments in the region were pushed up by the US economy as well as moderate comments by the US FED. The region is already suffering because of slow growth, high taxes and refugee influx from the nearby disturbed regions. To add to the woes, the terrorist activities have increased in the developed countries of the region, destabilising the sentiments and increasing the risk to life, property and well being. Unfortunately, a solution does not seem to be in sight. There are reasons to believe that the problems can worsen in the near future. The initial benefits of making Eastern European economies join in the European Union are over and some of the countries have already become a drag on the Union. Further, there is a referendum taking place in the United Kingdom in respect of continuing in the Euro zone. If Brexit happens, it will be detrimental to the whole of Europe.

The troubles of China are far from over but there are signs of stabilisation in the economy in the month of March. The respite may be temporary because the problems of that economy are fairly deep rooted and structural. However, China not being a pure market economy and having substantial Government influence, the efforts of the country can yield better results, at least over a short-term. The Chinese stock markets have improved a bit along with global stock markets. Probably, even property markets are becoming better in the country, based on Government initiatives. How long this can continue is a major concern. For growing at a reasonable rate over the next few decades, China needs to convert its economy from being an export oriented economy to a consumption oriented economy. It also needs to boost its service sector. The transition is not easy and lots of efforts will be needed to achieve the desired results. Slowing Chinese economy is not good for the country and it is

also not good for the rest of the world, as its economic interests are spread widely across the world.

Emerging markets other than India and China and many other developing countries are not growing well. Many of them are dependent on exports of commodities or oil and low prices thereof is affecting the economic well being of these countries. Though some green shoots are visible in commodity prices, it is very difficult to say when the markets will improve to a reasonable level to come out of the current distress zone. Economies of these countries being connected with commodities and global trade therein; there is less likelihood of their immediate revival.

On the back of positive budgetary provisions as well as global cues, sentiments in the Indian Economy have improved in the month of March. However, there are doubts about sustainability of the positive trends, at least in the near future. Next three months are going to be very crucial for the economic direction of the country. April and May are the two months of corporate results in India and during these months, facts and figures will replace the estimates. Sentiments will depend upon how corporates in India perform; and what they are planning for the next financial year. The month of June will give more clarity on the progress of Monsoon, though estimates will be forthcoming in the earlier months. India, being an agrarian economy, a lot will depend on the monsoon which has been weak and inadequate over the last couple of years. It has battered the agrarian economy and therefore the rural consumption. Below par monsoon has also affected the food prices, thereby affecting food inflation in the country. There are lots of hopes but it may be advisable to wait and watch before committing. Efforts are being made by the Government but their result is a culmination of many variables and many of them are out of the control of any group of individuals or the Government. The Indian economy is very well linked with global economies and any stress in the world can affect progress of India.

The global stock markets bounced back in the month of March but the overall performance of the markets for the financial year 2015-16 was not good. Most of the stock markets lost value over the period but the bounce back has created some hopes. Indian equity markets advanced by 10% during the month. The markets are expected to be choppy in the near future. The current overall valuation of Indian stock markets is not cheap. The valuation levels indicate that the markets are fairly valued based on forward PE ratio. Under such circumstances, though investment can be made in small lots and systematically, high risk taking needs to be avoided. More informed decisions can be taken in the month of May-June. Volatility will continue and investors with deep pockets and holding capacities will gain as compared to investors using borrowed capital.

Interest rates have started easing in India and they are likely to ease further. Though some quarters are expecting faster correction in the interest rates due to governmental pressure, many others are not so optimistic. The Reserve Bank of India (RBI) has stuck to its moderate stand in the April review and the Repo Rate has been cut by 25 basis points. The RBI Governor is sticking to his stand for controlling inflation, though the Government may not be happy with the same, due to political reasons. Though the changes will be gradual, they will be far reaching; and opportunities in debt will become less lucrative. Investors should stick to their asset allocation philosophy and keep investing in the debt instruments such as fixed deposits and long and medium-term bonds. Every deduction in interest rates is likely to cause capital appreciation to the bond holders, unless the bonds are very short-term.

The property market in India continues to remain in stress. The land prices are high and so are the prices of the end products. As the developers of properties have made a lot of money in earlier decades and as unaccounted money has played a major role in the property market, the Government seems to have

developed a bias against this industry. The property construction and transactions are subject to high taxation, including stamp duty. In the current regime of high property prices and high interest rates, the affordability of properties is going down. Therefore, though there is a huge demand for properties, transactions are much less. Though substantial quantities of constructed and under construction properties are on the market for sale, needy buyers are not able to buy them because of their non affordability. Except for commercial properties, the rental yields are low and investors are not aggressively pursuing property investments. As of now, there is no clarity when sunny days will return to property investors and developers.

The rally in the prices of precious metals has continued in the month of March but it seems that gold is fairly priced. There may be some steam left in silver but the metal remains unpredictable. Partial booking of profit may be advisable, if investors have bought below 10% of the current prices.

Indian currency had become weak in the initial weeks of March and touched a new level of 68 rupees to a US dollar. However, towards the end of the month, the rupee improved and has come near the level of 66 to a US dollar. The strength of the rupee is mainly due to the improved balance of payment situation of India, inflow from foreign investors and also partially due to RBI operations in the currency market. Strengthening of rupee above the level of 65 to a US dollar may not be desirable, as it will impact the fragile export performance of the economy due to erosion of competitiveness. High net worth investors may invest through LRS route, which will reduce the risk of their overall portfolio.

There is a marked improvement in sentiments in the month of March but overall ground realities have not changed much. Investors should remain focused and avoid aggressive risk taking. Better opportunities may emerge for equity investors in the month of May.





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

The Chamber News

Important events and happenings that took place between 8th March, 2016 and 8th April, 2016 are being reported as under.

I. Admission of New Members

- 1) The following new members were admitted in the Managing Council Meeting held on 22nd March, 2016.

Life Membership

1	Mr. Badheka Parth Rajen	Advocate	Mumbai
2	Mr. Shah Hiten Kantilal (Transfer from Ord. to Life)	ITP	Mumbai
3	Mr. Mishra Rishikesh Akhilesh	CA	Mumbai
4	Mr. Chheda Jay Manoj	CA	Mumbai
5	Mr. Khatri Bharat Pohumal	CA	Mumbai

Ordinary Membership

1	Mr. Buch Hareesh Gulabrai	CA	Mumbai
2	Mr. Khatod Ramprakash Shivratn	CA	Mumbai
3	Mr. Puthran Anilkumar Ramchandra	ITP	Mumbai

Student Membership

1	Mr. Shah Dhaval Dinesh	LLB Student	Mumbai
2	Mr. Patel Jash Prakash	CA Student	Mumbai
3	Mr. Singh Satyendra Kumar Bharat Prasad	M.Com. Student	New Delhi
4	Mr. Pansare Vijay Sudan	LLB Student	Thane

II. PAST PROGRAMMES

1. INTERNATIONAL TAXATION COMMITTEE

Advanced FEMA Conference was organised jointly with BCAS on 18th March, 2016 where Mr B. P. Kanungo, Executive Director, RBI inaugurated the Conference by lighting the lamp followed by Keynote address. The Conference was addressed by RBI officials along with CA Dilip Thakkar, CA Shabbir Motorwala and Mr Kumar Saurabh Singh, Advocate. The Conference was well-attended.

III. FUTURE PROGRAMMES

(For details of the future programmes, kindly visit www.ctconline.org or refer The CTC News of April, 2016)

1. ALLIED LAWS COMMITTEE

- A. **Two Days Education Course on Capital Market** will be held on 29th & 30th April, 2016 at West End Hotel and Conference Room, Consultair Investment Pvt. Ltd., Churchgate respectively.
- B. **Lecture Meeting on “Real Estate (Regulation and Development Act 2016)** will be held on 27th April, 2016 at A. V. Centre Hall, Jaihind College, Churchgate.
- C. **Two Half Day Series on “Auditing – A Way Forward – SME PERSPECTIVE”** will be held on 3rd & 4th June, 2016 at CTC Conference Room. Enrolment is restricted to 25 members on first come first serve basis.

2. DELHI CHAPTER

Full Day Seminar on “Start-Ups” – Understanding Funding, Regulatory & Taxation Aspects will be held on 23rd April, 2016 at India International Centre, New Delhi.

3. DIRECT TAXES COMMITTEE

- A. **Full Day Seminar on Appellate Proceedings, DRP and AAR** will be held on 16th April, 2016 at West End Hotel, New Marine Lines, Mumbai - 400 020.
- B. **Full Day Seminar on Income Computation and Disclosure Standards (ICDS)** will be held on 11th June, 2016. The other details will be announced in due course.

4. INDIRECT TAXES COMMITTEE

- A. The remaining session of **Workshop on MVAT Act, Service Tax & Allied Laws** jointly with AIFTP (WZ), BCAS, MCTC, STPAM and WIRC of ICAI will be held on 2nd, 16th, 30th April, 2016 & 7th May, 2016 at STPAM Library Hill, Mazgaon.
- B. **Half Day Workshop on Service Tax** with the support of Ahmedabad Branch of WIRC will be held on 10th April, 2016 at Auditorium, Ahemadabad.

5. INTERNATIONAL TAXATION COMMITTEE

- A. The Advanced **Workshop on Principles of Transfer Pricing (4 Days)** will be held on 22nd, 23rd, 29th & 30th April, 2016 at West End Hotel, New Marine Lines, Mumbai.
- B. **10th Residential Refresher Conference on International Taxation, 2016** will be held from 23rd to 26th June, 2016 at Rhythm, Lonavala.

6. MEMBERSHIP & PUBLIC RELATIONS COMMITTEE

- A. The **Full Day Seminar on “Direct Tax as TAXMINT 2016** with support of The Jamnagar branch of WIRC of ICAI will be held on 23rd April, 2016 at Jamnagar.
- B. The **Full Day Seminar on “Various Laws and Procedures** related to individuals jointly with the Jamnagar Rotary Club will be held on 24th April, 2016 at Jamnagar.

7. RESIDENTIAL REFRESHER COURSE & SKILL DEVELOPMENT COMMITTEE

A Lecture Meeting is organised on the subject “Achieve More with Less” – “Make Every Moment Count” will be held on 20th April, 2016 at CTC Conference Hall. The meeting is restricted to 25 members on first come first serve basis.

8. STUDENT & IT CONNECT COMMITTEE

A. The **Youth Residential Refresher Course** (for CA, CS, Students and Corporate Members under 40 years of age) jointly with Bombay Chartered Accountant’s Society will be held on 17th to 19th April, 2016.

B. **Lecture Meeting on “Provisions related to TDS & Questions & Answers** will be held on 21st April, 2016 at Maheshwari Bhavan, 1st Floor, Princess Street, Mumbai. All are cordially invited to attend the meeting.

9. OTHER

A. RENEWAL NOTICE – 2016-17

The Renewal Fees for Annual Membership, Study Group and Study Circle and other Subscription for the F.Y. 2016-17 falls due for payment on 1st April, 2016. The renewal notices are sent separately which contains entire information of members as per CTC Database. In case any change in information of Member as shown in form, kindly provide updated information along with the form. Members are requested to visit the website www.ctconline.org for online payment.



STUDY CIRCLE & STUDY GROUP COMMITTEE

Study Circle on International Taxation Meeting jointly with Transfer Pricing Study Circle Meeting held on 1st April, 2016 at Kilachand Hall, IMC.



CA Harshal Bhuta addressing the members on the subject “Key proposals in the Finance Bill, 2016 from international tax perspective”



CA Gaurav Shah addressing the members on the subject “Key proposals in the Finance Bill, 2016 from transfer pricing perspective”

INTERNATIONAL TAXATION COMMITTEE

Transfer Pricing Study Circle Meeting jointly with Intensive Study Group on International Taxation and FEMA Study Circle Meeting on the subject “Indian Transfer Pricing Litigation Experience” held on 4th April, 2016 at CTC Conference Room.



CA Mehul K. Shah



Mr. Mehul Modi

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STUDY CIRCLE & STUDY GROUP COMMITTEE

ALLIED LAWS COMMITTEE

Study Circle Meeting on “Finance Bill, 2016 – Direct Tax Provisions” held on 14th March, 2016 at Babubhai Chinai Committee Room, IMC.



CA Praful Poladia addressing the members.

Study Group Meeting on the subject “Recent Judgments under Direct Taxes” held on 25th March, 2016 at Babubhai Chinai Committee Room, IMC.



Mr. Ajay R. Singh, Advocate addressing the members.



Mr. Gautam Thacker, Advocate addressing the members.

Allied Laws Study Circle Meeting on “Consumer Protection under the Competition Law” held on 15th March, 2016 at CTC Office.



CS Surendra U. Kanstiya, Former Chairman, Consumer Guidance Society of India addressing the members.

STUDENT & IT CONNECT COMMITTEE

Lecture Meeting on “Protect Yourself from Cyber Frauds” held on 17th March, 2016 at Walchand Hirachand Hall, IMC.



CA Avinash Lalwani, President delivering Opening Speech. Seen from L to R : S/Shri CA Maitri Savla, Convenor, CA Parimal Parikh, Chairman, Dr. Anupam Saraf, Faculty and CA Dinesh Tejwani, Vice Chairman.

CA Parimal Parikh, Chairman welcoming the faculty and members. Seen from L to R: S/Shri CA Maitri Savla, Convenor, Dr. Anupam Saraf, Faculty, CA Avinash Lalwani, President and CA Dinesh Tejwani, Vice Chairman.



Dr. Anupam Saraf, Former IT Advisor to Chief Minister of Goa, Former CIO of Pune City addressing the members.



Section of members.

CORPORATE MEMBERS COMMITTEE

Panel Discussion on 'Impact of Budget Proposals on Indian Economy and Capital Markets in Current Global Scenario' held on 9th March, 2016 at Walchand Hirachand Hall, IMC.



CA Hitesh R. Shah, Vice-President delivering the Opening Remarks. Seen from L to R: S/Shri CA Neha Gada, Convenor, CA Paras K. Savla, Chairman, Sailesh Raj Bhan, Deputy CIO, Reliance Mutual Fund, Faculty, Raghvendra Nath, Managing Director, Ladderup Wealth Management, Faculty, Ms. Meghna Shah, Economist, UTI Asset Management Co., Faculty and CA Hasmukh Dedhia, Vice Chairman.

CA Paras K. Savla, Chairman welcoming the faculties and delegates. Seen from L to R : S/Shri CA Neha Gada, Convenor, Sailesh Raj Bhan, Deputy CIO, Reliance Mutual Fund, Faculty, Raghvendra Nath, Managing Director, Ladderup Wealth Management, Faculty, Ms. Meghna Shah, Economist, UTI Asset Management Co., Faculty, CA Hitesh R. Shah, Vice-President and CA Hasmukh Dedhia, Vice Chairman.



Faculties



Mr. Raghvendra Nath,
Managing Director,
Ladderup Wealth
Management



Mr. Sailesh Raj Bhan,
Deputy CIO,
Reliance Mutual
Fund



Ms. Meghna Shah,
Economist, UTI Asset
Management Co.,
Mumbai



Section of Members

INTERNATIONAL TAXATION COMMITTEE



Intensive Study Group on International Taxation Meeting on the subject "Finance Bill, 2016 - Amendments impacting Cross-Border Transactions and Non-residents" held on 10th March, 2016 at CTC Office.

CA Natwar Thakrar addressing the members.

FEMA Study Circle Meeting on the subject "Recent FEMA Update" held on 16th March, 2016 at CTC Office.



Mr. D. T. Khilnani, Advocate addressing the members. Seen from L to R : S/Shri Devendra Mehta, CA Naresh Ajwani, Chairman, CA Avinash Lalwani, President, CA Manoj Shah, Past President and CA Shreyas Shah, Convenor.

INTERNATIONAL TAXATION COMMITTEE

Advanced FEMA Conference jointly with BCAS held on 18th March, 2016 at Walchand Hirachand Hall, IMC.



CA Avinash Lalwani, President, CTC delivering Opening Speech. Seen from L to R : S/Shri CA Dilip Thakkar, Moderator, B. P. Kanungo, Executive Director, RBI, Faculty, CA Raman Jokhakar, President, BCAS, CA Gautam Nayak, Chairman, International Taxation Committee, BCAS, CA Dhishant Mehta, Convenor, International Taxation Committee, BCAS and CA Naresh Ajwani, Chairman, International Taxation Committee.



CA Avinash Lalwani, President, CTC inaugurating the Conference by lighting the lamp. Seen from L to R: S/Shri CA Gautam Nayak, Chairman, International Taxation Committee, BCAS, CA Dilip Thakkar, Moderator, B. P. Kanungo, Executive Director, RBI, Faculty, CA Raman Jokhakar, President, BCAS.

CA Naresh Ajwani, Chairman, International Taxation Committee, CTC welcoming the faculty and delegates. Seen from L to R : S/Shri CA Dilip Thakkar, Moderator, B. P. Kanungo, Executive Director, RBI, Faculty, CA Raman Jokhakar, President, BCAS, CA Avinash Lalwani, President, CTC, CA Gautam Nayak, Chairman, International Taxation Committee, BCAS and CA Dhishant Mehta, Convenor, International Taxation Committee, BCAS.



Mr. B. P. Kanungo, Executive Director, RBI delivering Key note address to delegates. Seen from L to R : S/Shri CA Dilip Thakkar, Moderator, CA Raman Jokhakar, President, BCAS, CA Avinash Lalwani, President, CTC, CA Gautam Nayak, Chairman, International Taxation Committee, BCAS, CA Dhishant Mehta, Convenor, International Taxation Committee, BCAS and CA Naresh Ajwani, Chairman, International Taxation Committee, CTC.



CA Dilip Thakkar, Session Moderator addressing the delegates. Seen from L to R : S/Shri Gautam Gandhi, J. K. Pandey, A. K. Pandey, CGM, Foreign Exchange Department, Jayasree Gopalan, Sanjay Kumar, Anita Mehta, Madhusmita Dutta, RBI Officers and CA Kartik Badiani, Convenor, International Taxation Committee, CTC.

INTERNATIONAL TAXATION COMMITTEE

Advanced FEMA Conference jointly with BCAS held on 18th March, 2016 at Walchand Hirachand Hall, IMC.



Mr. J. K. Pandey, RBI Offer replying to the queries. Seen from L to R : S/Shri CA Gaurang Gandhi, Convenor, International Taxation Committee, BCAS, CA Dilip Sanghvi, Session Moderator, A. K. Pandey, CGM, Foreign Exchange Department, RBI, Jayasree Gopalan, Sanjay Kumar, Anita Mehta, Madhusmita Dutta, RBI Officers and CA Kartik Badiani, Convenor, International Taxation Committee, CTC.



CA Shabbir Motorwala addressing the delegates. Seen from L to R : S/Shri CA Naresh Ajwani, Chairman, International Taxation Committee, CTC, CA Manoj C. Shah, Past President, CTC and Ms. Varsha Galvankar, Convenor, International Taxation Committee, CTC.

Mr. Kumar Saurabh Singh, Advocate addressing the delegates. Seen from L to R : S/Shri CA Gautam Nayak, Chairman, International Taxation Committee, BCAS, CA Vijay Gupta, Hon. Jt. Secretary, Delhi Chapter, CTC and CA Rutvik Sanghvi, Convenor, International Taxation Committee, BCAS.



Section of Delegates.

MEMBERSHIP & PUBLIC RELATIONS COMMITTEE

Lecture Meeting on the subject "The Challenge of Change" held on 18th March, 2016 at A. V. Centre Hall, Jai Hind College



CA Hemant Parab, Chairman welcoming the faculty and members. Seen from L to R : S/Shri CA Natwar Trivedi, Convenor, CA Avinash Lalwani, President and Puja Adarshjeevan Swami, BAPS Swaminarayan Mandir, Dadar.



Puja Adarshjeevan Swami addressing the members. Seen from L to R : S/Shri CA Natwar Trivedi, Convenor, CA Avinash Lalwani, President and CA Hemant Parab, Chairman.

DIRECT TAXES COMMITTEE

Half Day Workshop on “Direct Tax Provisions of Finance Bill - 2016” jointly with WIRC of ICAI held on 12th March, 2016 at M. C. Ghia Hall, Fort.



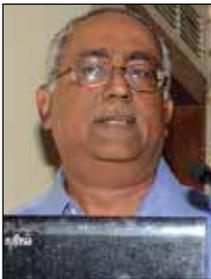
CA Avinash Lalwani, President, CTC delivering Opening Speech. Seen from L to R : S/Shri CA Ketan Vajani, Chairman, Direct Taxes Committee, CTC, CA Kishor Karia, Chairman of the session and CA Gautam Nayak, Faculty.

CA Ketan Vajani, Chairman, Direct Taxes Committee, CTC welcoming the faculty and delegates. Seen from L to R : S/Shri CA Kishor Karia, Chairman of the session, CA Avinash Lalwani, President, CTC, CA Gautam Nayak, Faculty and CA Priti Savla, RCM-WIRC of ICAI.



CA Kishor Karia chairing the session. Seen from L to R : S/Shri CA Ketan Vajani, Chairman, Direct Taxes Committee, CTC, CA Avinash Lalwani, President, CTC, CA Gautam Nayak, Faculty and CA Priti Savla, RCM-WIRC of ICAI.

Faculties



CA Gautam Nayak



CA Chetan Karia



Section of members

STUDENT & IT CONNECT COMMITTEE

Lecture Meeting on Statutory Audit of Bank Branches and Practical Issues held on 21st March, 2016 at Maheshwari Bhawan, Chirabazar.



CA Aalok Mehta, Vice Chairman welcoming the Faculty and Delegates.



CA Vipul Choksi addressing the delegates.



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