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Happy New Year

The Chamber's Journal

41 Year of Publication

YOUR MONTHLY COMPANION ON TAX & ALLIED SUBJECTS

January - 2016 Vol . IV | No. 4

Important Supreme Court Decisions

Happy Republic Day

Direct Taxes
Other Laws
International Taxation

Other Contents

Indirect Taxes
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Best of the Rest
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DIRECT TAXES COMMITTEE

Lecture Meeting on TDS Procedures held on 23rd December, 2015 at Walchand Hirachand Hall, IMC.

CA Avinash Lalwani, President delivering opening remarks. Seen from L to R: S/Shri CA Ketan Vajani, Chairman, CA Mahendra Sanghvi, Past President, Satpal Gulati, CIT (CPC) TDS, Gaziabad, Faculty, Satish Sharma, Hon. Principle CIT (TDS) -1, Faculty, Devi Singh, Hon. Principle CIT (TDS)-1, Faculty, and CA Dinesh Poddar, Convenor.

CA Ketan Vajani, Chairman welcoming the faculties and members. Seen from L to R: S/Shri CA Mahendra Sanghvi, Past President, Satpal Gulati, CIT (CPC) TDS, Gaziabad, Faculty, CA Avinash Lalwani, President, Satish Sharma, Hon. Principle CIT (TDS) -1, Faculty, Devi Singh, Hon. Principle CIT (TDS)-1, Faculty, and CA Dinesh Poddar, Convenor.

Shri Satish Sharma, Hon. Principle CIT (TDS)-1 addressing the members.

Shri Satpal Gulati, CIT (CPC) TDS, Gaziabad addressing the members.

Section of members.

Section of members.

INTERNATIONAL TAXATION COMMITTEE

Intensive Study Group on International Taxation
Jointly with Study Circle (Direct Taxes) Study Circle on International Taxation
held on 21st December, 2015 at Babubhai Chinai Committee Room, IMC.

Mr. Parag Patel addressing the members. Seen from L to R : S/Shri CA Manoj Shah, Past President, CA Ashok Sharma, Chairman, SC & SG Committee, CA Avinash Lalwani, President, CA Naresh Ajwani, Chairman, International Taxation Committee, CA Anup P. Shah, Member and CA Mahendra Sanghvi, Past President.

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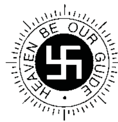

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Editorial

Wish you all a very Happy, Prosperous and Peaceful year 2016. This is a leap year. A leap year by intercalating an additional day corrects the drift in time. The year 2016 has started with substantial work-in-progress as far as pending legislations are concerned. Let's hope there will be more conducive political atmosphere in the country during the year and many legislations may see light of the day.

Year 2015, while parting, has taken away our esteemed past president, a versatile personality who is responsible for imbibing habit of "right to information" in the Income Tax Proceedings and Professionals Mr. Narayan Varma. He left for his heavenly abode on December 24, 2015. He was part of the Editorial Board of the Income Tax Review in the year 2000-01. He is known for his young and fresh views and suggestions. Sir, we are definitely going to miss them. The entire editorial team of the Chamber's Journal expresses its heartfelt condolences and prays that may his soul rest in peace.

On January 5, 2016, we lost Hon'ble S. H. Kapadia who was former Chief justice of India. Justice Kapadia is known for many landmark decisions he had given as judge of the Bombay High Court, Chief Justice of High Court of Uttarakhand and again as judge of Supreme Court and Chief Justice of India. He was a very simple and dedicated judge. The Chamber's Journal has lost a very dedicated and regular reader with the demise of Hon'ble Sri S.H. Kapadia. Hon'ble Justice Kapadia ensured that Chamber's Journals (its earlier version of Income Tax Reviewalso) reached him every month, whether he is at Dehradun or at Delhi. The editorial team expresses its heartfelt condolences and prays that his family gets strength to bear with the loss and his soul rest in peace.

The Special Story of the Chamber's Journal of this month is on various important decisions of the Hon'ble Supreme Court. Experienced and esteemed professionals have analysed the decisions of the Apex Court. I am sure this will help the members a lot. I thank all the professionals who contributed to this issue for sparing their valuable time for Chamber's Journal.

K. GOPAL
Editor

Change & Innovation

From the President

Dear Readers,

WISH YOU A HAPPY AND PROSPEROUS NEW YEAR 2016

Every time as December approaches, you realise that yet another year has passed by before you even knew it. Why it is that time seems to fly by so fast? How is it that some people manage to achieve so much in a year while others remain wondering where all their days went? Perhaps, there is a secret to slowing down time and making the most of every moment at work and in life. ***"The secret of getting the most of every moment at work or in personal life is to enjoy what we do. Paradoxically time actually seems to fly when we are doing things we enjoy. We need to understand that work is as enjoyable as leisure. Work can be enjoyed if we see purpose, pride and a sense of fulfilment in what we do. "Remember, LIFE IS NOT A RACE AND AS LONG AS YOU ARE HAPPY WHERE YOU ARE, YOU ARE ON THE RIGHT TRACK".***

I AGAIN REQUEST YOU TO LIKE THE FACE BOOK PAGE OF CHAMBER "ctcconnect" So we can reach you all on a daily basis.

Current Issue is on "Important Supreme Court Decisions". I must compliment Advocate Paras S. Savla for creating a synopsis to provide excellent coverage to the Current subject of "Important Supreme Court Decisions" I am sure it will be very useful to our members as reference material in their cliental matters.

As we enter in 2016, the world is looking to India to play a crucial role in the new global order. The axis of global balance of power is shifting to the Indo-Pacific region and India must step up and deliver. However, for India to live up to its potential it needs to ride the crest of tech-driven solutions. That's the only way the country can leapfrog transitional phases and emerge as a true knowledge economy. The fiscal deficit for 2015-16 is budgeted at ` 5.5 lakh crore or 3.9% of the GDP. India's fiscal deficit at the end of November was 87% of the target for the entire financial year. The Government is still expected to stay within the budgeted figure without resorting to material spending cuts.

First time CTC had organised 18 events in one month December 2016, spread in 28 event days, more particularly. We had organises 6 events (Mumbai, Delhi and Aurangabad) in a day – dt. 12-12-2015, 4 events in a day – dt. 19-12-2015, 3 events in a day on dt. 20-12-2015.In my view CTC has a dedicated team who are working towards CTC's vision, the only thing is that we should explore hidden talent amongst the CTC Core Committee Members. I know our Core Committee size is more than past years but I request all Core Committee members to come forward so that "WE CAN MAKE OUR CHAMBER A DREAM CHAMBER".

The Student and IT Connect Committee under the Chairmanship of CA Parimal Parikh and his team had organised Half Day ***(Series of three half days) Workshop on Excellence in Excel.*** The event was designed by Vice Chairman CA Dinesh Tejwani. The best part of the workshop was that young and dynamic committee member CA Adarsh Madrecha was the speaker. The event got a houseful attendance. In my view it helped our members and specially their staff for gearing up to be a part of the advance digital Indian economy. ***Second Event*** organised was a ***Lecture meeting on MVAT FORM 704***. Again CTC received a tremendous response from students and members and got houseful attendees. I must appreciate Vice Chairman Aalok Mehta for putting in his efforts for this event. Now our focus should be on how to reach more and more students and give digital India series events to members.

Direct Tax Committee under the Chairmanship of CA Ketan Vajani and his team organised 6 half day joint events named as **"WORKSHOP OF DIRECT TAX"** with The Malad Chamber of Tax Consultants. I must appreciate President of MCTC CA Jayprakash Tiwari and his team to invite us for this joint suburban event. In the past CTC was organising a DIRECT TAX EDUCTION COURSE. In my view it was a replica of that

and it has got very good response. My vision to hold more joint programmes with sister organisations and focus on Suburban part of Mumbai has been fulfilled. The *Second Event* organised was a ***Lecture Meeting on TDS Procedure.*** CTC had invited Dept. people to address the delegates. Again it got a tremendous response. In my view attendance was about 400 to 450 people. The dignitaries were Shri Satish Sharma-Hon. Principal CIT (TDS)-1 as Chief Guest, Shri Devi Singh, Hon. Principal CIT (TDS)-2 and Shri Satpal Gulati, CIT (CPC-TDS) from Ghaziabad was the main speaker. What a brilliant and superb speaker he was. He had come with his team from Ghaziabad. In my view almost all the issues raised by delegates were resolved by him. I request members to send Technical issues related to CPC-TDS to CTC office addressing to Direct Tax Chairman. After vetting and deemed fit as a common issue which affects the common taxpayer, then certainly we will send it to CPC-TDS.

Indirect Tax Committee under the Chairmanship of CA Rajiv Luthiya and his team, started 11 Half day *Joint Workshops on MVAT Act, Service Tax and Allied Law*. It is joint event amongst 6 associations. The response is very good and I would request you to enroll for this event. This long event started in December, 2015 and ends in April, 2016. This workshop is focused on Indirect Taxes i.e. MVAT and Service tax. The selection of Topics and speakers is very good. I must appreciate President Vijay Sachiv, Advocate and his team for inviting us for this event. *Second Event was a* **Seminar on Applicability of VAT and Service Tax on IPR AND IPR Related Transactions (Viz. Trademark, Copyrights, Franchise,** etc). The Quality of Speakers and Contents of this seminar were excellent. In fact members who attended this programme were approaching me to congratulate me for organizing such a good seminar on IPR. The Indirect Taxes Committee has worked very hard and Advisor A. R. Krishnan is playing the "BIG BROTHER'S" role perfectly. The quality of discussions in the Study Circle was great.

Membership and Public Relations Committee under the Chairmanship of CA Hemant Parab and this team organised a Full Day (Joint) Seminar on Direct Taxes at Aurangabad. The attendance was more than 300 people and it was a joint event with the lead taken by The Tax Practitioners Association of Aurangabad. I must appreciate President CA Sachin Kasliwal and WIRC Branch of Aurangabad of ICAI, CA Pankaj S. Kalantri for inviting us to Aurangabad. My special thanks to Sachin Gandhi (Committee member and Past President of STPAM) for helping CTC to hold this Aurangabad Event. After two decades (more than 20 years), CTC visited Aurangabad. Delegates were remembering V. H. Patil Sahab. In my view Hemant and his team is doing a great job in various parts of Maharashtra and I hope these efforts shall be continued in the near future. Regular SAS series is also going on very well.

Allied Law Committee under the Chairmanship of CA Kamal Danuka and his team had organised *"Two days Interactive Residential Conference with Different Professionals on Raw Applicable to Real Estate and Redevelopment*. With 14 speakers and 8 sessions, full justice has been given to all the topics and subjects. This is for the first time that CTC had tried a 1 night and two days Conference and the concept went very well. The delegates have really appreciated in terms of content. On the first day, the last session with delegates was allocated to Fun which in my view is equally important for study. In my view the seminar contents were superb. Delegates shared that the paper book can be used as a one stop solution on Real Estate Law. In future it can be implemented with 6 sessions. Study Circle on Allied law is also doing very well.

Delhi Chapter under the Chairmanship of Mr. P. Garg, Advocate and his team is doing very well. The whole team is working very well. During the last month, Delhi Chapter had organised a Full day seminar on "Case Studies and Expatriate – Taxation and Regulatory issues from both Employer's and Employee's Perspective" and it went very well. I must appreciate the support of Outstation speakers for this seminar

SC & SG Committee under the Chairmanship of CA Ashok Sharma and his team is doing very well. The meetings organised by SC & SG are really a Treasure of Knowledge and one must take full benefit of this. Sharma ji and team are working very hard to update members on current subjects.

International Taxation Committee under the Chairmanship of CA Naresh Ajwani is also doing very well. Naresh is silent worker, full of knowledge and committed towards the end objective. International Taxation Committee is coming out with a book on TDS and EPC. Study Circle on FEMA & TP and ISG is doing very well.

Law and Representation Committee under the Chairmanship of CA Vipul Joshi and team has sent representation on ICDS as on 15-12-2015. CTC team has represented on quite a few provisions of ICDS which may result in nullifying the effect of Supreme Court and High Court decisions. Some of General principles are not recognised like Concept of Materiality, Prudence to Reconcile the income as per books of account maintained as per AS (ICAI) and the income computed as per ICDS – one would prefer to maintain separate books of account for the same. Threshold limit for applicability should be defined and for Shipping and Insurance Companies it should be not applicable. CTC team has recommended deleting or substantially modifying or providing clarification of some of ICDS. The representation is available on CTC Website.

CTC is process of representation to R. V. Easwar Committee for Simplifying Income Tax Law, I request readers to send their suggestions at the earliest to the CTC office by email.

For good team building, I would like to share the following article of Mr. Prakash Shesh:

Difference in Opinion in Team Members i.e. Dissent is Not Enmity: If all of us agreed with others, we would be a race of Zombies. It is disagreement that leads to progress. When we question the status quo, eventually we find better, more efficient answers. One has to just look at the phenomenal progress science has made in order to understand this.

Intelligent people rarely agree with one another. They have their unique personal experiences and they use these to come up with acceptable solutions. If a group leader finds many in his/her team challenging his point of view, he should be happy that he is being offered a chance to view the problem from different angles.

In Our Society culture, respect for elders and guests is given paramount importance and "disagreement" is often perceived as being disrespectful. This is the primary reason why we view "disagreement" so negatively. We are so actively discouraged from childhood from forming our own opinions that we are unsure. Disagreeing with oneself leads to better decision-making, especially when we have no one to assist us. Yes, disagreements between nations have resulted in bloody wars but we are not talking of extreme situations here.

This is about upholding one's own beliefs but be willing to listen to other's arguments. A Japanese proverb says *"If two people constantly agree with each other, then one of them is useless but if two people constantly disagree with each other, then both of them are useless." Let us not shy away from productive disagreements.*

We have lost our past President CA Narayan Varma on 24-12-2015, a charismatic leader who cannot be forgotten. On 23-10-2015, CTC had felicitated him for completion of more than 50 years in profession. Life scientists declare that death is the most critical defining feature of life. All living things die. The Holy Bible says "Unless a seed falls into earth and dies, it cannot produce any grains." That is, a seed had to cease to be itself in order to be a source of life to several others like it. Very often people ask "Why is God playing cruel games with us?" We can give explanations but explanations need not be answers. What is life and what is death? We are looking at death as the opposite of life when, in fact, death is one more expression of Life. At the time of delivery, the body of a mother pushes the child out. When it is pushed out, every child goes through trauma, experiencing a form of death. Tagore asks "Is it death or is it life?" What do we experience? Narayan Bhai your contribution to the profession and social activities are unbeatable and I am sure we professionals will not forget you in the coming years.

My heartiest congratulations to all the winning candidates at the ICAI Elections. Victory and loss are two parts of the same coin. The candidates who lost the battle may come with new vision to serve the professionals and society in large surely in the near future.

I would like to end my communication with Oprah Winfrey's quote "Cheers to a new year and another chance for us to get it right."

Jai Hind

With personal regards

AVINASH LALWANI
President

Chairman's Communication

Dear Members,

Wish you all a very happy, peaceful and prosperous 2016. The Supreme Court is the apex judicial forum in India bestowed with original, appellate and advisory jurisdiction. One of the most significant of aspect of powers enjoyed by the Supreme Court under the Constitution is couched in article 141 which provides that law declared by the Supreme Court is binding on all Courts and Tribunals within the territory of India. The law declared by the Supreme Court is constitutionally recognized as the Law of Land. Under section 260B of the Act, an aggrieved party in a tax dispute may approach the Supreme Court only on substantial question of law. In practice, parties generally take the route of appealing to the Supreme Court under Article 136 as a special leave petition.

The present issue deals with recent important decisions of Hon'ble Supreme Court and the significance of these decisions. We have selected some recent important decisions of Hon'ble Supreme Court delivered in last one year. An in depth analysis of these decisions is important to understand the ramifications of these decisions. The decisions covered are in relation to section 36(1)(iii), section 132, section 158BD, section 80IB (10), section 194I, etc. The authors have made these decisions read like a ready reckoner by analyzing them in a concise and simple manner. I am sure this issue will come in handy to all the professionals in understanding the judgment analyzed in this issue of Chamber's Journal. I would also like to thank Shri. Paras S. Savla for designing of this special story

I would like to thank Shri Vipul Joshi, Shri Rahul Sarda, Shri C. N. Vaze, Shri Rahul Hakani, Shri Chetan Karia, Shri Mihir Naniwadekar, Shri Paras S. Savla and Shri Sameer Dalal for sparing their valuable time in contributing the article.

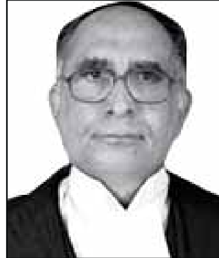
A mere dismissal of SLP by Supreme Court does not mean that High Court decisions are approved on merits so as to be a judicial precedent. However, when Supreme Court dismisses an SLP with reason, it might be taken as the affirmation of the High Court views on merits of the case, thus there is no reason to dilute the binding nature of precedents in such cases. Though such dismissal of SLP may not have binding effect but same is very important information given that issue decided by high court has attained finality. In this issue, the chambers has made an attempt to give the gist of some of the important such SLP's which will help members to evaluate and understand the current legal position on issue involved.

I wish all the members a very happy Republic Day in advance.

CA HARESH KENIA
Chairman – Journal Committee

Chief Justice Sarosh Homi Kapadia

– A tribute by Sohrab Erach Dastur, Sr. Advocate



1. Justice Kapadia was the first Chief Justice born in free and independent India (29th September, 1947). This corresponds to his approach in all judicial matters – free and independent in his thinking and in the pronouncement of judgments – not afraid to dissent where necessary. He was enrolled as an advocate of the High Court at Bombay at the age of 27 years, comparatively an old age for such enrolment, but this was because he had to support himself and his family by engaging himself in an employment prior to qualifying as an advocate. Even to educate himself and to go to college, he had to provide his own finance. He did not have a godfather in the profession. Mr. R. A. Gagrat, a fearless solicitor, who used to take on the most difficult cases – which others shied away from – appreciated lawyer Kapadia's dedication to the profession and took interest in his progress. He later devilled in the Chambers of Mr. Feroze Damania, a leader in the field of labour law. Under his tutelage he developed as a very persuasive lawyer. As an advocate, he handled a variety of different types of litigations and was also a Counsel on the panel of tax lawyers of the Central Government in the High Court. He was meticulous in preparation of cases and was fair in presenting them.

2. In October 1991, he was appointed as an Additional Judge of the High Court at Bombay and was made permanent in March 1993. Ten years later, he was transferred as Chief Justice of the Uttaranchal High Court at Nainital where he was greatly admired. Four months thereafter, he was elevated as a judge of the Supreme Court of India, superseding several other judges on account of his integrity, dedication to work and humility. Six and half years later, on 19th May, 2010 to be precise, he assumed office as Chief Justice of India and held that post for almost two and half years. September was an important month in his life – he was born, enrolled as a lawyer and demitted office as Chief Justice in that month! The care which he took in reading his briefs as a lawyer was also displayed in reading the cases which came before him for decision and Counsel often found that a fact overlooked by him was noted by the Judge. No one could ever question his complete integrity and dedication to the cause of justice. In keeping with his interest in Hinduism and Buddhism, he was also an ascetic in his social life and did not encourage "free mixing" with others in any way, as

he believed that it may affect or appear to affect his independence of decision. He toned up the administration in the Supreme Court.

3. He was in great demand as a speaker at various functions and freely expressed his views on several occasions, but he never let this part of his activity in any way affect his full attendance in Court. In the field of tax law, he delivered many path breaking judgments. In Smifs Securities Ltd. 348 ITR 302, he held that goodwill "created" in the process of amalgamaton was an asset in respect of which depreciation was available under section 32 of the Income-tax Act. In Lovely Exports 319 ITR 5 (report of Supreme Court Cases), he held that share subscription money received by a company, if unaccounted, could be added under section 68 not as the income of the company but, if at all, of the subscriber. In TRF Ltd. 323 ITR 397, he upheld an assessee's right to claim deduction for a bad debt which had been written off without having to prove that it had, in fact, become bad. in Ponni Sugar & Chemicals Ltd. 306 ITR 392 in deciding the thorny issue as to whether a subsidy was on revenue or capital account, he held that it was the object for which the subsidy was given which was the determining factor. Finally, a reference may be made to two decisions which he decided by applying the law, as it stood, even though the facts may have tempted a lesser person to take a contrary view. The first decision is that of Walfort Share & Stock Broker Pvt. ltd. 326 ITR 1 where he upheld a dividend stripping transaction and also laid down important guidelines as to when the disallowing provisions of section 14A can be invoked. In Vodafone's case 341 ITR 1, he laid down the oft quoted dictum of looking at and not looking through a transaction. The fact that the decision may result in foreign and non-resident assessees avoiding Indian tax did not deter him in holding what was the position in law.

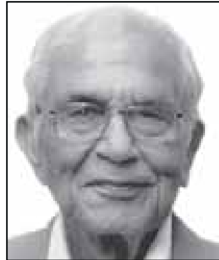
4. Kapadia J's decision (2006 6 SCC 613), dissenting from the view of his two senior colleagues, in the Lalu Prasad fodder scam case evidenced the high regard he had for the time tested principle that justice must not only be done but be seen to be done. His boldness was also evident in his striking down the appointment of P. J. Thomas (2011 4 SCC 1) as Chief Vigilance Commissioner, a decision which caused some embarrassment to the UPA Government.

5. He never sought any favours from the Government, either as a post retirement benefit that each of the three branches - legislative, executive and judiciary – has its own independent roles to play and one should not encroach on that of the other. In memorable words, he said "Judges must eschew any suggestions that duties of the judiciary are owed to the electorate; they are owed to the law which is there for peace, order and good governance".

6. In the early hours of 5th January, 2016 he passed away (even before he had completed the biblical life span of three score and ten years) as calmly as he had always lived his life. He has left behind him his aged grieving parents, his devoted wife and children and numerous professional and friends who admired a man who never succumbed to the temptations which life offers.

Respectful homage to Late Shri Narayan Varma

by Dr. K. Shivaram

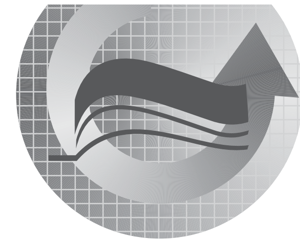


I had the privilege of knowing Late Shri Narayan Varma for more than 37 years due to the close association of both of us with the Chamber of Tax Consultants. Late Shri Narayan Varma was one of the greatest visionaries with ingenious thinking and an astute mind. He pioneered the coming together of two organisations to conduct joint programmes, and it was he who was instrumental in developing joint programmes with the Bombay Chartered Accountants' Society and other organisations of the same ilk. Felicitation of highest taxpayers of Mumbai, starting educational courses for tax professionals and articled clerks, skit on search and seizure were some of the few initiatives of the Chamber that can be attributed to him. One of his greatest virtues was his feeling of fellowship towards the members of the profession; he gave immense opportunities and a sound platform to young professionals who wished to hone their public-speaking skills. He constantly encouraged young professionals and advised them on how to develop their practice. He led the way for others to follow in taking up public interest petitions on taxation issues. It was he who encouraged the idea of having a joint representation by more than one professional organisation. He was considered an authority on the law of Right to Information. I fondly remember reading his column first before I would read any other article in the journal. His contribution to the development of the profession in general and the Chamber in particular is immeasurable and will be remembered for decades to come. Personally, I have learnt a lot from him while working together in the educational activities of the Chamber and the Bombay Chartered Accountants' Society, for which I am really indebted to him.

He was a true professional, and a thorough gentleman. Let us salute the great professional and pay our respectful homage to him. Let each one of us remember his great qualities, a legacy he leaves behind for us to emulate in our lives and professional practice. It may be more appropriate if we can publish a publication every year dedicated to Late Shri Narayan Varma which will help younger professionals to appreciate his great qualities.

May his noble soul rest in eternal peace, and may God grant his family the strength to bear his loss.

11-1-2016



Vipul Joshi, *Advocate*

Sanjeev Lal & Ors. vs. CIT – [(2014) 365 ITR 389 (SC)]

The Facts

The relevant facts, as emerge from the orders, can be summarised as under:

[A.Y. 2005 – 2006]

1.1 One Mr. Amrit Lal was owner of a residential house ["the said property"], which was his self – acquired property. Through his will, he bequeathed the said property, that is house, firstly, to his wife – creating life interest in her favour in the said property – and, on demise of his wife, to his daughter – in – law [pre – deceased elder son's wife – the second Appellant in this case] and two grandsons [pre – deceased elder son's children, one of them being the first Appellant]. After death of Mr. Amrit Lal in 1978, this will was challenged by his younger son, by way of filing a civil suit in August, 1993. It appears that the Trial Court had passed a restrain order in the said civil suit, staying transfer of the said property, in names of the three beneficiaries / legatees under the said will. It appears that by such interim order, the Trial Court had restrained the three legatees from dealing with the said property. [The details of such order / exact wordings of the order are not narrated].

1.2 In the meanwhile, and pending such suit, the wife passed away [September 1993] and the younger son, who had filed the suit challenging the said will, also passed away [December 2000], without leaving any legal heirs. Due to this, on account of non – prosecution, the Trial Court dismissed the suit in May 2004 and vacated the restrain order. The property was thereafter transferred in names of the three legatees in August 2004.

1.3 Pending such final order, in the meanwhile, on 27.12.2002, the three legatees / co – owners had entered into an agreement to sell the said house for ` 1.32 crores. Earnest money of ` 15 lakhs was received at the relevant time and it was agreed that the balance final payment as well as the execution of a Sale Deed and registration thereof would be made within two months after issuance of ownership transfer letter from Estate Office, Chandigarh. After the said order of the trial court passed in May 2004, a Sale Deed was prepared and later on executed on 24-9-2004, on which date possession was handed over to the purchaser as well and the balance final payment was received from the purchaser. Stamp duty of ` 12.90 lacs was paid on such Sale Deed and it was registered accordingly.

1.4 The Appellants had also purchased another residential property on 30.04.2003, for which there was no dispute.

The Issue

2.1 Ostensibly, the issue was whether, in the given facts, the Appellant was entitled for the reinvestment benefit of section 54 of the Act,

and so was the basis proceeded upon by all the authorities. Since there was no dispute about the date of investment in the new house, that is, 30-4-2003, the issue was whether 'transfer' of the said property took place on 24-9-2004, the date of execution of Sale Deed and handing over the possession, as contended by the Department – so as to make the purchase beyond the period of one year before the date of transfer – or on 27-12-2002, the date of agreement to sell, as contended by the Appellant – so as to make the purchase within one year from the date of transfer. In other words, the issue boiled down to interpretation of section 2 (47) of the Act, that defines the term 'transfer'.

Assessment / Appeals

3.1 The Appellant had not filed return of income for this assessment year. Upon receipt of notice u/s. 148 of the Income – tax Act, 1961 ["the Act"], the Appellant filed return, showing NIL capital gain on transfer of the said property by claiming reinvestment benefit u/s. 54 of the Act. The A.O., in the reassessment order, denied the benefit u/s. 54 of the Act on the ground that the purchase of the new residential house on 30-4-2003 was not within, and beyond, the period of one year before the date of transfer, that is, 24-9-2004. This denial of exemption was confirmed by the CIT(A) / Tribunal as well as the High Court. While it is not clear what exactly the stand of the Appellant was before the A.O., CIT(A) and Tribunal as regards the issue, it appears that before the High Court, the Appellant relied upon section 2(47) of the Act to contend that the transfer was effected when the possession of the property was taken or retained in part performance of the contract and, accordingly, the Appellant had transferred the property on 27-12-2012. The High Court summarily dismissed this sole contention on the ground that as per the finding of fact, there was no delivery of possession prior to 24-9-2004 and held that with the execution of the agreement, it could not be said that the Appellant transferred any right in favour of the purchaser.

3.2 Against this order of the High Court, the Appellant preferred appeal before the Apex Court.

Supreme Court

4.1 It appears that before the Supreme Court, there was a shift in the stand of the Appellant, in as much as the Appellant contended that there was 'extinguishment' of the right of the Appellants in the house and, hence, there was a 'transfer' within the meaning of section 2(47) (ii) of the Act. Accepting this argument, the Court reversed the order of High Court. The relevant observations of the Supreme Court can be summarised as under:

(i) In normal circumstances, by executing an agreement to sell in respect of an immovable property, a right *in personam* is created in favour of the transferee/ vendee. When such a right is created in favour of the vendee, the vendor is restrained from selling the said property to someone else because the vendee, in whose favour the right *in personam* is created, has a legitimate right to enforce specific performance of the agreement, if the vendor, for some reason is not executing the sale deed. Thus, by virtue of the agreement to sell some right is given by the vendor to the vendee. ....Consequences of execution of the agreement to sell are also very clear and they are to the effect that the Appellants could not have sold the property to someone else. In practical life, there are events when a person, even after executing an agreement to sell an immovable property in favour of one person, tries to sell the property to another. In our opinion, such an act would not be in accordance with law because once an agreement to sell is executed in favour of one person, the

said person gets a right to get the property transferred in his favour by filing a suit for specific performance and therefore, without hesitation we can say that some right, in respect of the said property, belonging to the appellants had been extinguished and some right had been created in favour of the vendee / transferee, when the agreement to sell had been executed.

(ii) In normal circumstances, the entire property cannot said to have been sold at the time when an agreement to sell is entered into.

(iii) The definition of the word 'transfer' in relation to a capital asset, as laid down in section 2(47) of the Act, also includes, by virtue of sub-clause (ii), the extinguishment of any right in such capital asset.

(iv) On the facts of the case, due to the stay order, the Appellants could not violate such order by executing a sale deed in favour of a third party. As such, it was for a justifiable reason, which was not within the control of the Appellants, that they could not execute sale deed at the time of entering into the agreement to sell, which sale deed was executed and registered after the suit came to be dismissed.

(v) In view of the above, on entering into the agreement to sell, some right in respect of the capital asset was extinguished and, accordingly, transferred in favour of the vendee.

(vi) Even if the issue is looked at from the view of section 54 of the Act, it is very clear that the legislative intention is that the Appellant should be given some relief. Further, purposive interpretation should be given while considering a claim for exemption of tax, so also harmonious construction of such exemption provision.

Some Issues

A. At the outset, it appears that the entire focus all along, right from the assessment stage till the Supreme Court stage, was on eligibility or otherwise of the benefit of section 54 of the Act to the Appellants. However, in course of adjudication of this issue, the core issue had already shifted and the real issue that got emerged was determining in which year 'transfer' took place. The Department had reopened assessment for A.Y. 2005 – 2006, on the basis that the transfer took place on 24.09.2004, that is, the date on which Sale Deed coupled with handing over the possession and payment of the entire balance amount took place. However, it appears – though the exact stand adopted by the Appellants before the A.O. / CIT (A) / Tribunal is not very clear – the Appellant had contended that the transfer took place on 27.12.2002, that is, the date on which the agreement to sell was entered into, so as to bring the reinvestment in the new house property on 30.04.2003 within the period of one year from the date of such transfer. Even these three authorities considered the allowability of reinvestment benefit u/s. 54 as the main issue involved in this controversy and, accordingly, denied the benefit of section 54 of the Act to the Appellant on the facts of the case, by holding that as the transfer took place on 24.09.2004, the reinvestment made in the new residential house, on 30.04.2003, was beyond the period of one year before the date of the transfer. But then the real issue that emerged was the year in which the transfer took place, whether it was in A.Y. 2005 – 2006 as assessed by the Department or A.Y. 2003 – 2004 as contended by the Appellant. If 'transfer' did not take place in A.Y. 2005 – 2006 then there was absolutely no necessity to decide whether the Appellant was entitled to the benefit of section 54 qua

the transfer which took place in any other year, as no other assessment / reassessment proceeding, it appears, were initiated to tax such transfer in any other year. As such, if "transfer" itself did not take place in A.Y. 2005 -2006 as held by the Supreme Court, it really did not matter, and it became irrelevant, whether the Appellant was eligible to get benefit u/s. 54 of the Act, that too, qua the transfer which took place in another year. In other words, once the issue about the year of 'transfer' came to decided, the issue of benefit u/s. 54 became totally irrelevant or, at the most, purely consequential. However, not only in the grounds of appeal filed at all the levels the question raised by the Appellant was regarding allowability of benefit u/s. 54 of the Act but even the Tribunal / Courts, considered the issue on the basis of these grounds of appeal and adjudicated the issue on the touchstone of allowability of section 54 of the Act. Even the Supreme Court, while adjudicating that the transfer took place on 27-12-2002 – and, therefore, not in A.Y. 2005-2006 [the year of appeal before it] – ultimately, held that the Appellant was entitled to relief u/s. 54 of the Act. In view of the above facts, could the court have proceeded to decide the issue about allowability of the benefit u/s. 54 vis-a-vis a transfer, which transfer, accordingly to its own finding, did not take place in the year of appeal before it? Could the issue of allowability of benefit of section 54 of the Act vis-a-vis a transfer, and the consequential exigibility of capital gain, that took place in A.Y. 2003 – 2004 be regarded as a subject matter of the appeal for A.Y. 2005-2006 that was before the Court?

B. Apart from the above issue, certain issues arising on merits can be discussed as under:

5.1 The issue about the effect of entering into mere and simple agreement to sell vis-a-vis 'extinguishment' of 'some right' of the vendor over the immovable property and corresponding creation of such legal right in favour of the vendee, may require deeper scrutiny, keeping in mind the provisions of the Transfer of Property Act, 1882, Specific Relief Act, 1963 and other allied enactments. In absence of details about the agreement to sell in the present case, it is not clear how it was executed, whether it was registered or not and what were its terms and conditions, etc. Does not this ratio run into conflict with the ratio laid down by various courts in the context of general law as well as in the context of the Act [subject to section 2(47)(v) & (vi) of the Act], to the effect that execution of a mere agreement to sell does not occasion 'transfer' within the meaning of sec. 2(47) of the Act? Ordinarily, in case of a sale, it is difficult to apply the test of 'extinguishment'. Once a transaction is of sale of an immovable property, the point of transfer would be decided in accordance with the provisions of Transfer of Property Act, according to which transfer takes place, ordinarily, on execution of Sale Deed and registration thereof, which relates back to the date of execution of the deed. So far as the Income – tax Act, 1961 is concerned, the point of transfer is preponed by making specific insertion of clause (v) to section 2 (47), by virtue of which a transfer in case of an immovable property takes place on entering into a contract in the nature as referred in section 53A of

Transfer of Property Act, coupled with parting with possession. As such, parting with possession is one of the important requirements, if a mere agreement to sell is to be regarded as 'transfer'. This is, of course, besides other conditions to be fulfilled.

5.2 Is it so that in all cases of entering into mere and simple agreement to sell, and without anything more, automatically and invariably 'some right' of the vendor gets extinguished and 'some right' in favour of the vendee gets created, especially irrespective of any other factors?

5.3 Assuming some right / benefit / relief gets accrued in favour of the vendee upon execution of a simple agreement to sell, can this be regarded as a 'capital asset' within the meaning of section 2(14) of the Act? Is there any distinction between right in *personam* and right in *rem* or *quasi in rem*, at least so far as the definition of the term 'capital asset' u/s. 2(14) is concerned?

5.4 Specially in the peculiar facts of the present case, where the agreement to sell was entered into in spite, and in contravention, of the existing and binding clear restrain / stay order passed by a competent Court, could such agreement to sell be legally valid or binding? Did the Appellant have any legal right at all, at that point of time, so as to have power to transfer it? It should be appreciated that on account the stay order, not only the Appellants were restrained from dealing with the property but the property was not even transferred in their names. Assuming such agreement was valid, could such agreement – in the presence of the court stay order – have occasioned transfer of any legal right in the immovable property? In other words, assuming wider interpretation is to be given about creation of 'some right' upon entering into an agreement to sell, on the facts of the case, whether such right got created in the presence of the stay order?

5.5 Assuming 'some right' could said to have been created in favour of the vendee in the present case, what would have been legal implication if, ultimately, the final order of the civil court in the pending suit was the opposite, that is, against the Appellants?

6.1 Even conceding all the above issues, the most important aspect is that even as per the Supreme Court itself, what got extinguished was only 'some right' in the immovable property and not all / the entire rights. For the purpose of the Act, whether such right could be considered as a "land" or "building"? This may be relevant for the purpose of section 50C of the Act. Going further, whether transfer of such 'some right' could be regarded as transfer of a residential house within the meaning of section 54 of the Act? This is because, in the present case, the Appellant had sought, and was ultimately granted by the Supreme Court, the benefit u/s. 54 of the Act, which presupposes transfer of 'a residential house' and nothing else, and not section 54F of the Act. There have been enough legal precedents for the proposition that the terms 'land'

and 'building' are narrower in legal connotation than the term 'immovable property'. While the latter term may include any right in relation to an immovable property, the former terms, simplicitor, do not include any right in the land or building, as the case may be.

6.2 Assuming further that 'some right' – in contradiction to full right – gets transferred with respect to an immovable property upon execution of the agreement to sell, how to measure / value such "some right"? How capital gain would be computed in the year of execution of such agreement? What would be its cost of acquisition? Will there be any further / different / distinct / additional computation of capital gain in the year of ultimate execution of sale deed / conveyance? When the balance right would get transferred? And for what value?

7.1 As regards the issue of purposive interpretation, isn't it that the principle of purposive interpretation can be pressed into service only when there is patent ambiguity involved while interpreting a particular provision? Does the supposed legislative intention behind the incentive provision like section 54 provide such ambiguity while interpreting section 2(47) of the Act?

7.2 As regards the principle of harmonious construction, does such interpretation – as given by the Supreme Court – bring harmony with other provisions or brings disharmony / conflicts with other provisions? If mere and simple execution of an agreement to sell, without anything more, is to be regarded as 'transfer' u/s. 2 (47) (ii) of the Act, doesn't it make sub -clause (v) and sub – clause (vi) [to some extent] thereof totally redundant? Isn't this a case of trying to achieve 'harmony' with section 54, at the cost of creating 'disharmony' within section 2 (47) itself? And, in any case, can it, otherwise also, be regarded as achieving harmony, even with section 54 of the Act, when such interpretation is totally fact based? A little change in fact / reverse fact would, in fact, generate conflict even between section 2 (47) and section 54, on the basis of the same interpretation as done by the Court. Take for example, in this very case, all facts remaining same, except that the date of purchase of the new house was 30-4-2005, instead of 30-4-2003. The very same interpretation with respect to 'transfer' would run in conflict with the very same incentive provision of section 54 of the Act, as the purchase of new residential house on 30-4-2005 would be beyond the period of two years from the date of transfer, that is, 27-12-2002. Interestingly, in such case, the arguments of the assessee and the department would be exactly converse!

8.1 Can interpretation of the term 'transfer' u/s. 2 (47) of the Act be dependent upon the reinvestment benefit that can be available to the assessee u/s. 54 of the Act? In other words, can such incentive provision mould the definition of 'transfer' u/s. 2 (47) of the Act, affecting its interpretation? Can such incentive provision govern /

affect interpretation of a charging provision, especially when charging provision comes first for interpretation / application? Would the decision of the Court have been different if the issue of the incentive provision of section 54 was not at all involved? While there can be no dispute regarding interpreting an incentive provision liberally and in favour of the assessee, can a definition, which is the very basis of a charging provision and which is quite complex, be interpreted 'liberally', just because an assessee, in a given case, may lose benefit of an incentive provision thereafter? This is apart from the fact that even the interpretation given by the Court to the term 'transfer' may not be termed as 'liberal' interpretation, as is discussed later on.

8.2 Can some difficulty, howsoever genuine it might be, faced by an assessee affect / mould interpretation of the term 'transfer' u/s. 2 (47) of the Act? Can such difficulty make a transaction as occasioning 'transfer' u/s. 2 (47) of the Act, where, but for such difficulty, such transaction might not be regarded as occasioning "transfer"? The definition of the term 'transfer' is quite complex and crucial, having far reaching effects on thousands of assesses who transfer their capital asset, as it is the very foundation of charging capital gain. Can interpretation of such important definition be based on hardship faced by an assessee in a particular case, especially when, in fact, such interpretation may put rest of the assessees in hardship? Is this a case of merely applying well settled and well interpreted legal principles governing a definition – without change in the basic interpretation – liberally to the facts of a particular case, in view of genuine hardship faced by the particular assessee; leaving apart soundness of even such approach? Or is this a case where the very definition is interpreted / moulded 'liberally', so as to alleviate hardship faced by an assessee in a particular case? Would the decision of the Court have been different if there was no such hardship involved in the present case? This is very crucial, as much emphasis and importance is placed by the Court on this aspect, that is, the difficulty faced by the Appellant on account of the restraint order of the Civil Court.

9. Everything said and done, ultimately, can this decision adversely affect other assessees, as it has interpreted the definition of 'transfer' u/s. 2 (47) of the Act very liberally and widely? If interpreted literally, need one wait for fulfilment of the conditions of section 2 (47) (v) of the Act, as mere execution of an agreement to sell, without anything more and without any further condition to be fulfilled, may straight away attract capital gain? If, say, only 10% of the consideration is received by the vendor upon execution of an agreement to sell, even if possession is not parted with by the vendor, even if such agreement is not registered and even if such agreement to sell contains various conditions to be fulfilled by the either or both parties, can capital gain stand attracted?

10. Or is it so that the ratio of the judgment be, and is, confined to the 'peculiar facts' of the case and nothing beyond, as mentioned by the court itself?

11. Is it so that the Supreme Court could be said to have adjudicated that the 'transfer' took place in assessment year 2005 – 2006 under Deed of Sale dated 24.09.2004 and, in spite of it, the assessee would qualify for exemption u/s. 54 by purposive reading of the section in a manner that conferred benefit? Can it be said that, in such construction, the court has held the investment in the new property to be eligible for sec. 54 benefit, though made outside the language of sec. 54? Will reading the judgment this way provide a meaning to the decision? Extending it further, can it be said that the court could be said to have held that the transfer, for the purposes of sec. 45 r.w.s. 2(47), was initiated in 2002 but was completed in 2004 and while applying the provisions of s. 54, the initial transfer of 2002 was relevant in the context under a purposive construction? In other words, should the ratio of the decision be understood / confined more in the context of Section 54, rather than in the context of Section 2(47)?

If the decision is read in this manner, many of the issues raised in the earlier paragraphs may become unnecessary. Or is it so??

M/s. Fibre Boards (P.) Ltd. vs. CIT – [(2015) 376 ITR 596 (SC)]

The Facts

The relevant facts, as emerge from the orders, can be summarised as under:

[A.Y. 1991-1992]

1.1 The Appellant, a private limited company and having its industrial unit at Thane, shifted this industrial undertaking to a non-urban area near Pune, Maharashtra. On sale of its land, building and plant and machinery, etc. pertaining to Thane unit, the Appellant become exigible to capital gain of ` 1.08 cores. However, it claimed benefit of section 54G of the Income – tax Act, 1961 [Exemption of capital gains on transfer of assets in cases of shifting of industrial undertaking from urban area] by giving advances amounting to ` 1.11 crores, during the previous year, to different persons for purchase of land, plant and machinery, construction of factory building, etc.

1.2 This claim was denied by the Assessing Officer, and as confirmed by the High Court, on the following two principle grounds:

(i) Till the end of the assessment year, Thane area was not notified as 'urban area' by any general or special order of Central Government, in terms of Explanation to section 54G (1) of the Act.

(ii) Mere giving advance to different persons during the previous year does not amount to utilisation of capital gain / money for acquiring the required assets. The expression "purchase" in section 54G cannot be equated with the expression "towards purchase". The Appellant was required to utilise the amount of capital gain for actually purchase/ acquisition of such land / plant / machinery, etc. during the previous year, or else was required to deposit the money not so

utilised in the Capital Gain Deposit Scheme, which the Appellant failed to do. It was pointed out that the Appellant had admitted, in its letter dated 25-11-1993, that even till that date, land had not been acquired but only possession was taken and no factory building was yet constructed.

Supreme Court

2.1 So far as the first issue regarding absence of notification declaring Thane as urban area is concerned, the Court analysed the legislative history of section 54G of the Act, tracing its root in erstwhile Chapter XXII-B of the Act, which Chapter was omitted with effect from the same day of insertion of section 54G in the Income-tax Act, that is, 1-4-1988. Analysing, in detail, the Law of Repeals in the touchstone of section 24 of the General Clauses Act, which saves certain rights under a repealed provision, the Court held that the notification dated 22-9-1967 issued under the erstwhile Chapter XXII – B of the Act, which had declared Thane as an urban area for the purpose of that Chapter, could said to have continued under and for the purpose of section 54G of the Act. The Court rejected the argument of the Department that such notification stood repealed / ceased to exist upon omission of Chapter XXII – B with effect from 1-4-1988 and it was not saved by the Law of Repeals, because section 24 of General Clauses Act had no application to the facts of the Appellant's case, as section 24 applies only to "repeals" and not "omissions". While so doing, the Court applied the principle of distinction between a "ratio decidendi" and "obiter dicta", as also 'per incuriam' principle for not following the judgements of the Apex Court relied upon by the Department on the aspect of Law of Repeals.

It appears that in view of the above, the Court did not adjudicate the alternative submission of the Appellant that, in any case, the subsequent issue of notification [presumably, Notification No. 9489, dated 23.02.1994], declaring Thane to be urban area, should be regarded as having retrospective effect.

2.2 As far as the second aspect about utilisation of the money of capital gain is concerned, the Court held that section 54G (2) mandates only the amount of the capital gain not 'utilised' towards purchase / acquisition of the specified assets during the previous year and / or till the due date of filing the return of income, to be deposited in Capital Gain Deposit Scheme. There is no mandate to actually purchase land, building, plant and machinery during this period itself. Further, the interpretation pleaded by the Department would render nugatory a vital part of the section 54G, by which the assessees are given a period of three years, from the date of transfer of the old undertaking, to purchase new plant and machinery and / or acquire land or building. Therefore, the advances paid for the purchases / acquisitions of the specified assets during the year of transfer would certainly amount to utilisation by the assessee of the amount of capital gain, within the meaning of section 54G(2) of the Act.

The Issues

3.1 The above judgment is a welcome judgment, as it puts to rest the unnecessary controversy surrounding the reinvestment benefit of sections 54, 54F, 54G, etc. with respect to 'utilisation' of the amount of capital gain / net consideration, as the case may be, within the specified period of two years / three years, as the case may be.

3.2 This judgment also elucidates the Law of Repeals as well as the Law of Precedents, which may have great utility generally while interpreting any provision of the Act.

Unitech Ltd. & Anr. vs. UOI & Anr. – [Civil Appeal No. 430 of 2007, Order Dated 04.11.2015]

Facts

The relevant facts, as emerge from the orders, can be summarised as under:

1.1 One M/s. Vidarbha Engineering Industries ["VEI"] [which was also Appellant No. 2 in the above case] was holder of leasehold right [for 30 years] with respect to certain plots of land at Nagpur ["the subject land"]. This lease was obtained from Nagpur Improvement Trust.

1.2 VEI decided to develop the subject land and entered into MOU / collaboration agreement on 17.03.1994 with Unitech Ltd. ["Unitech" – Appellant No. 1 in the above case]. Under this agreement, VEI allowed Unitech to develop and construct a shopping-cum-commercial project on the subject land. The agreement did not contain any clause purporting to transfer the subject land to Unitech. On the other hand, a clause therein specifically provided that nothing in the agreement should be construed to be a demise, assignment or a conveyance. The only consideration accruing to VEI was getting 20% of the total construction area.

1.3 In terms of the then prevailing provisions of Chapter XX-C of the Act, the Appellants filed the prescribed Form 37-I u/s. 269UC of the Act, annexing a copy of the agreement. In the said Form, the Appellant No. 2 [VEI] was described as transferor and the Appellant No. 1 [Unitech] was described as transferee.

1.4 The Appropriate Authority came to the conclusion that the consideration for transaction, which was computed on the basis of the cost of share of 22% constructed area, was understated by more than 15%, having regard to the sale instance of a nearby plot and, accordingly, it passed order for pre-amative purchase of the subject land, *vide* order dated 29-7-1994. The Appellants were unsuccessful in challenging this order before the Bombay High Court [at Nagpur Bench] in the writ filed by it. Hence was the appeal before the Supreme Court.

Supreme Court

2.1 The first issue raised by the Appellant was that just because in Form 37-I the Appellant No. 2 was described as transferor and Appellant No. 1 was described as transferee, the same would not govern true interpretation of the transaction. As this Form contained only the nomenclature of transferor and transferee and contemplated only the transaction of a transfer and not an arrangement of collaboration, the Appellant was constrained to describe themselves as transferor and transferee. However, in reality, there was no transfer of the subject land and VEI had only allowed Unitech to make construction on the land.

The Supreme Court accepted this proposition and held that true construction of a document is always a substantial question of law. Finding substance in this argument of the Appellant, the Court held that VEI, being only the holder of leasehold interest for 30 years, had no authority to transfer the land. The arrangement, as per the Court, merely created a licence in favour of Unitech.

2.2 The main argument of the Appellant was that there did not occur 'transfer', for the purpose of Chapter XX-C, on execution of the collaboration agreement, as no sale, exchange or lease was involved. To this, the findings of the Court can be briefly summarised as under:

(i) That since the agreement involved mere grant of licence / possessionary right, there was no sale, lease or exchange involved in this transaction.

(ii) However, the Parliament has deliberately defined the term 'transfer' wide enough for the purpose of Chapter XX-C. In section 269UA(2)(d), the term "immovable property" is defined and as per sub – clause (ii) thereof, this term "immovable property", for the purpose of pre-amative purchase of immovable property under Chapter XX-C, includes any rights in or with respect to any land. Further, section 269UA(2)(f) defines the term 'transfer' and as per sub-clause (ii) thereof, the term 'transfer' includes, in relation of an immovable property on the nature referred to in sub-clause (ii) of clause (d), doing anything, which has ....the effect of enabling the enjoyment of such property. Applying these two sub-clauses to the facts of the case, the Court held that the collaboration agreement enabled Unitech to enjoy the rights in the property belonging to VEI for the purpose of construction. Consequently, the collaboration agreement effectuated transfer of the subject land from VEI to Unitech within the meaning of Chapter XX – C of the Act {The Court also approved the decision of *Ashis Mukerji vs. UOI & Ors. – [(1996) 222 ITR 168 (Patna)]}.*

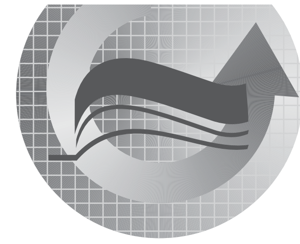
2.3 Thereafter, the Appellant took a plea that the order of the Appropriate Authority was bad in law as, before directing compulsory purchase, it was necessary for the authority to come to a conclusion that there was an attempt to, or in fact, an evasion of taxes. For this purpose, reliance was placed on the decision of the Bombay High Court in the case of *Amarjit Thapar vs. S. K. Laul & Ors. – [(2008) 298 ITR 336 (Bom.)]*, in which the Bombay High Court had held that the power of pre-amative purchase under Chapter XX-C could be exercised only in clear cases of gross / significant undervaluation and the onus of establishing that such undervaluation was a with view to evade tax, was on the revenue. The Court observed that it was not possible to agree with this view of the Bombay High Court in its entirety. It held that it is not possible to say that it must be alleged in the show cause notice or a finding must be rendered in the order that there is evasion of taxes as a *sine qua non* for its validity. Nor is it possible to hold that the onus of establishing undervaluation with a view to evade tax is on the revenue. The true position seems to be that a significant undervaluation, greater than 15% below the fair market value, raises a rebuttable presumption that there is an attempt to evade taxes. For this, the Court placed reliance on its decisions in the case of *C. B. Gautam vs. UOI – [(1993) 199 ITR 530 (SC)].*

2.4 However, on merits, the Court accepted the plea of the Appellants. Reversing the decision of the High Court, it set aside the order of the Appropriate Authority. This was on the basis that the sale instance from the same locality as referred by the Appellants was rejected while the sale instance of a non -comparable plot of an adjoining locality was considered as valid by the Appropriate Authority. Apart from that, the Court pointed out certain serious errors committed by the Appropriate Authority while calculating comparative rates, besides pointing out perversity in the order.

Some Issue

3.1 This judgment will have relevance while interpreting the term 'transfer' as defined in section 2(47) of the Act in relation to capital asset, in as much as the provisions similar to section 269UA(d) (ii) and 269UA(f)(ii), more or less, are incorporated in section 2(47) of the Act.

3.2 The issue is: Is there any significant difference in the language / setting of section 2(47), so as to distinguish this ratio?



Rahul Sarda, *Advocate*

GVK Industries Limited vs. ITO [2015] 371 ITR 453 (SC)

Facts

The assessee entered into an agreement with a Swiss company ABB, which could prepare a scheme for raising finance and loan for the purpose of setting up a 235 MW Gas based power project in Andhra Pradesh at an estimated cost of ` 839 crores. ABB offered its services as financial advisor to the project from July 8, 1993. Those services included, *inter alia,* financial structure and security package to be offered to the lender, making an assessment of export credit agencies world-wide and obtaining commercial bank support on the most competitive terms, assisting the appellant loan negotiations and documentation with lenders and structuring, negotiating and closing the financing for the project in a co-ordinated and expeditious manner. For its services the ABB was to be paid, what is termed as, "success fee" at the rate of 0.75% of the total debt financing. After successful rendering of services the NRC sent invoice to the appellant-company for payment of success fee amount.

The assessee approached the AO for issuing a no objection certificate (NOC) to remit the said sum pointing out that ABB had no place of business in India; that all the services rendered by it were from outside India; and that no part of success fee could be said to arise or accrue or deemed to arise or accrue in India attracting the liability under the Act. The AO rejected the application. However, the Commissioner under his powers under section 264 of the Act permitted the assessee to remit the said sum by furnishing a bank guarantee for the amount of tax. The assessee took steps to comply with the said order but afterwards, the CIT revoked the earlier order and directed the company to deduct tax and pay the same to the credit of the Central Government as a condition precedent for issuance of the NOC, thereby affirming the order of the AO and dismissing the revision petition.

The assessee approached the High Court where the Revenue pointed out that ABB was appointed not only to arrange for the loan but also to render several other financial and general services and also to involve itself in the public issue of the company and on that bedrock it was urged that it squarely falls within the ambit of section 9(1)(vii)(b) of the Act. The further stand of the Revenue was that section 5(2) read with section 9(1)(i)(vii)(b) will apply to the remittance to be made by the company to the ABB as the income would be deemed to have accrued or arisen in India and hence, the Indian company was liable to deduct tax at the prescribed rate before remitting any money to the ABB.

The High Court observed that the advice given to procure loan to strengthen finances may come within the compartment of technical or consultancy service and "success fee" would thereby come within the scope of

technical service within the ambit of section 9(1)(vii)(b) of the Act. Being of this view, the High Court opined the assessee was not entitled to the NOC.

Before the Supreme Court

It was to be seen whether the payment made to the non-resident would be covered under the expression "fee for technical service" as contained in Explanation (2) to section 9(1)(vii) of the Act. What was required to be scrutinised is that the appellant had intended and desired to utilise expert services of qualified and experience professionals who could prepare a scheme for raising requisite finances and tie-up loans for the power projects.

The services rendered by ABB included, *inter alia,* financial structure and security package to be offered to the lender, study of various lending alternatives for the local and foreign borrowings, making assessment of expert credit agencies world-wide and obtaining commercial bank support on the most competitive terms, assisting the appellant company in loan negotiations and documentations with the lenders, structuring, negotiating and closing financing for the project in a co-ordinated and expeditious manner. In other words, the obligation of ABB was to develop comprehensive financial model to tie-up the rupee and foreign currency loan requirements of the project, assist expert credit agencies world-wide and obtain commercial bank support on the most competitive terms and assist the assessee in loan negotiations and documentation with the lenders. Pursuant to the aforesaid exercises carried out by ABB, the company was successful in availing loan/financial assistance in India from the Industrial Development Bank of India.

Therefore, it can be said that the nature of service rendered by ABB can be said to come within the ambit and sweep of the term 'consultancy service' and, therefore, it has been rightly held that the tax at source should have been deducted as the amount paid as fee could be taxable under the head 'fee for technical service'. Therefore, the order of the High Court was upheld.

Conclusion

The term "consultancy services" is not defined in the Act. Therefore, taking cue from the dictionary meaning and the meaning as understood in common business parlance, the services of financial structuring and security package to be offered to the lender, study of various lending alternatives for the local and foreign borrowings, making assessment of expert credit agencies world-wide and obtaining commercial bank support on the most competitive terms, assisting the appellant company in loan negotiations and documentations with the lenders, structuring, negotiating and closing financing for the project in a co-ordinated and expeditious manner was consultancy services.

Oil & Natural Gas Corporation Limited vs. CIT [2015] 376 ITR 306 (SC)

Facts:

The appellant, ONGC has been assessed in a representative capacity on behalf of the different foreign companies with whom it had executed separate agreements for services to be rendered by such companies in connection with prospecting, extraction or production of mineral oils by ONGC.

The appellant and the non-resident companies entered into an agreement by which the latter had agreed to make available supervisory staff and personnel having experience and expertise for operation and management of drilling rigs for the AY 1985-86 and AY 1986-87.

Before the Supreme Court

Whether the amounts paid by the ONGC to the non-resident assessees for providing various services in connection with prospecting, extraction or production of mineral oil is chargeable to tax as "fees for technical services" under section 44D read with Explanation 2 to section 9(1)(vii) of the Act or will such payments be taxable on a presumptive basis under section 44BB of the Act?

A careful reading of the aforesaid provisions of the Act goes to show that under section 44BB(1) in case of a non-resident providing services or facilities in connection with or supplying plant and machinery used or to be used in prospecting, extraction or production of mineral oils the profit and gains from such business chargeable to tax is to be calculated at a sum equal to 10% of the aggregate of the amounts paid or payable to such non-resident assessee. On the other hand, section 44D contemplates that if the income of a foreign company with which the Government or an Indian concern had an agreement, the computation of income would be made as contemplated under the aforesaid section 44D. The Supreme Court analysed the agreements and held that the pith and substance of each of the contracts/agreements is inextricably connected with prospecting, extraction or production of mineral oil. The dominant purpose of each of the agreements was for prospecting, extraction or production of mineral oils though there may be certain ancillary works contemplated thereunder. If that be so, the payments made by ONGC and received by the non-resident assessees or foreign companies under the said contracts was more appropriately assessable under the provisions of section 44BB and not section 44D of the Act.

Conclusion

Once the agreement is for prospecting, extraction or production of mineral oil, income would be chargeable under section 44BB of the Act and not under section 44D of the Act notwithstanding that there are certain ancillary works contemplated under the agreements owing to the doctrine of pith and substance.

Spentex Industries Limited vs. CCEx, Civil Appeal No. 1978 of 2007 dated 9-10-2015 – Supreme Court

Facts

The appellant was engaged in the manufacturing of polyester cotton blended yarn and polyester viscose blended yarn and both these products fell under Chapter 55 of the Schedule to the Central Excise Tariff Act, 1985. For manufacture of the aforesaid product, the assessee had used the raw material which was an intermediate product and paid excise duty thereupon. The final products were also cleared on payment of excise duty on those finished products. The assessee had exported these goods on payment of Central Excise duty in the CENVAT account and, thereafter filed for rebates of excise duty on the final products as well as the intermediate products.

The claim of the appellant was denied by the Deputy Commissioner. However, the Commissioner (Appeals) partly allowed the claim and remanded the matter back to the Deputy Commissioner on the ground that assessee was entitled to one of the two claims for rebate, i.e., either rebate of duty paid on exported goods or the duty paid on inputs used in the exported goods, and not on both of them. The view of the Commissioner (Appeals) was upheld by the High Court.

Before the Supreme Court

Whether or not the manufacturer/exporter is entitled to rebate of the excise duty paid both on the inputs and on the manufactured product,

when excise duty is paid on a manufactured product and also on the inputs which have gone into manufacturing the product and such manufactured product is exported?

Rule 18 stipulates that the Central Government may grant rebate of duty paid on such excisable goods OR duty paid on material used in the manufacturing or processing of such goods. The word 'OR' which is used in between the two kinds of duties in respect of which rebate can be granted is the bone of contention and it is to be interpreted whether it postulates grant of one of the two duties or both the duties can be claimed.

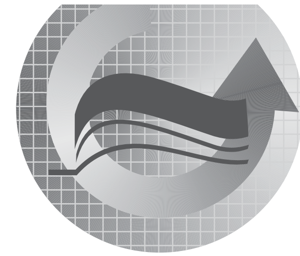
Rule 12 of Central Excise Rules framed in 1944 provided for rebate of duty and Rule 13 enabled exporter to export the goods without payment of duty. From the reading of the aforesaid Rules that from the very beginning, two alternative methods were provided enabling an exporter of goods to get rid of the burden of paying the excise duty; both on excisable goods as well as on materials used in the manufacture of goods. The exporter could either claim rebate when the duty was paid. Or else, he was free not to pay excise duty at all on both types of goods by executing a bond in the prescribed form and fulfilling the conditions prescribed in this behalf. The grant of rebate, in either of the options, has always been in respect of both kinds of excise duties, i.e. on the final product that is exported as well as on the intermediate product on which excise duty is paid/payable and the same is used as raw material in the manufacture of goods. Under the existing Rules also, similar Notifications were issued, i.e., Notification No. 40/2001-CE(NT) dated June 26, 2001 and Notification No. 41/2001-CE(NT) dated June 26, 2001 providing for rebate of whole of duty on excisable goods when exported as well as rebate of inputs used in manufacture/processing of export goods. The kind of procedure and format of prescribed Forms, becomes a clincher insofar as understanding of the Government of the relevant rules is concerned. If the Central Government itself is of the opinion that the rebate is to be allowed on both the forms of excise duties the Government is bound thereby and the rule in question has to interpreted in accord with this understanding of the rule maker itself. The word 'OR' occurring in Rule 18 cannot be given literal interpretation as that leads to various disastrous results and, therefore, this word has to be read as 'and' as that is what was intended by the rule maker in the scheme of things and to carry out the objectives of the Rule 18 and also to bring it at par with Rule 19. Therefore, the view taken by the appellant was upheld.

Conclusion

The word "or" can be construed as "and" when interpreting it as "or" would result in absurd and invidious results. Considering the overall scheme of the Act and Rules, "or" can be interpreted as "and" if the same results in expression of manifest intention of the Legislature.

"All power is within you; you can do anything and everything. Believe in that, do not believe that you are weak; do not believe that you are half-crazy lunatics, as most of us do nowadays. You can do any thing and everything, without even the guidance of any one. Stand up and express the divinity within you."

— *Swami Vivekananda*



CA Chandrashekhar N. Vaze & CA Devendra Jain

Levy of interest u/s. 234B in ITNS 150

CIT vs. Bhagat Construction [2015] 279 CTR 185 (SC)

Introduction

In the assessment order generally a direction is given by the Assessing Officer to levy interest u/s. 234B. The actual calculation of such interest is found in a separate sheet known as ITNS 150. The question whether interest can be charged u/s. 234B in a case where no express direction is given in the Assessment Order by the Assessing Officer, has been answered and explained by the Supreme Court in this judgment.

Facts

1. The assessment order dated 29-3-1995 passed by the Assistant Commissioner of Income Tax, New Delhi, did not contain any direction for the payment of interest u/s. 234B. But the Income-tax Computation Form ITNS 150 attached to the assessment order contained a calculation of interest payable on the tax assessed.
2. Assessee contended that when the assessment order is silent about the direction to levy interest, inclusion of such interest in ITNS 150 is beyond jurisdiction.
3. On appeal, the ITAT held that since no direction had actually been given in the assessment order for payment of interest, no interest can be levied.
4. Delhi High Court upheld the order of the ITAT relying on the decision of Supreme Court in *CIT vs. Ranchi Club Ltd. [2001] 247 ITR 209* which merely dismissed the appeal affirming the High Court judgment reported in *Ranchi Club Ltd. vs. CIT [1996] 217 ITR 72 (Patna).*

On further appeal by the Revenue, Supreme Court held that:

1. Levy of interest u/s. 234B is automatic when the conditions of section 234B are met. In other words, the moment an assessee who is liable to pay advance tax has failed to pay such tax or where the advance tax paid by such an assessee is less than 90 per cent of the assessed tax, the assessee becomes liable to pay simple interest at the rate of one per cent for every month or part of the month.
2. In *Kalyankumar Ray vs. CIT [1991] 191 ITR 634, SC* had held that the Income-tax Computation Form ITNS 150 must be treated as part of the assessment order in the wider sense in which the expression has to be understood in the context of section 143(3).
3. The Supreme Court judgment in the Ranchi Club Ltd.'s case (supra) merely affirmed the Patna High Court judgment in *Ranchi Club Ltd. vs. CIT (supra).* Patna High Court judgment was in the context of challenge of vires of sections 234A and 234B.

4. Controversy in the present case is fairly covered by the judgment of *Kalyankumar Ray vs. CIT [1991] 191 ITR 634 (SC).*

Conclusion

Form ITNS. 150 signed or initiated by the Assessing Officer must be treated as part of assessment order in wider sense and when this Form contained a calculation of interest payable on tax assessed, it could not be said that no direction had been given in assessment order for charging of interest under section 234B.

Discretionary trust – Income assessable in whose hands – Section 166

CWT vs. Estate of HMM Vikramsinhji of Gondal [2014] 268 CTR 232 (SC)

Introduction

Section 166 of the Income-tax Act, 1961 provides, *inter alia* that a beneficiary of a trust can be directly assessed in respect of the income which the representative assessee (trustee) receives on behalf of or for the benefit of the beneficiary. The interesting issue in this case was whether the beneficiary of a discretionary trust be liable to pay tax even if the trustee has not exercised the discretion to remit the income to the beneficiary.

Facts

1. The assessee was the eldest son of late Shri Vikramsinhji, Ex. Ruler of Gondal State, who during the years 1963 and 1964, had executed three trust deeds in USA and two trust deeds in UK for the benefit of the settlor and the members of his family. The dispute in this appeal was about the UK Trust.
2. For the assessment years 1984-85 to 1989-90, the assessee had not shown the income from UK trusts and put a note in the statement of income that UK trusts being discretionary trusts, the income from the said trusts was not included in the total income.
3. A separate note to the effect that no remittance was received from UK, was also put below the statement of income. The assessee had also produced the statement of funds and income account of the UK trusts signed by the trustees, wherein it was specifically stated that the net income for the year had been retained.
4. The Assessing Officer, however, made addition of income from UK trusts in the hands of the assessee for the aforesaid assessment years adopting the same figure as stated by the assessee. On appeals, the Commissioner (Appeals) upheld the action of the Assessing Officer. On second appeals, the Tribunal, after considering certain clauses of UK trust deeds, held that the same were specific trusts and not discretionary trusts. It further held that even if UK trusts were to be treated as discretionary trusts, the assessee would be liable to be taxed under section 166 for the income not distributed and retained by the trustees.
5. Gujarat High Court held that when income had been retained by trustees and it had not been distributed, nor it had been received by assessee and no evidence had been brought by department to show that same had been received by assessee in India, such income could not be taxed in hands of assessee under section 166

On further appeal by the Revenue, Supreme Court held that:

1. Clause 3 of the deeds of settlement executed in UK leaves at the discretion of the trustees to disburse benefits to the beneficiaries. The endorsement made in the returns, as noted above, shows that income was retained by the trustees and not disbursed.

2. For the assessment years under consideration in these appeals, the High Court noted the following distinguishing features, viz., (i) the assessee has not admitted having received the income, (ii) the assessee has not received the said income and (iii) the assessee has not shown as taxable income in the returns of all the years under appeal.

3. A discretionary trust is one which gives a beneficiary no right to any part of the income of the trust property, but vests in the trustees a discretionary power to pay him, or apply for his benefit, such part of the income as they think fit. The trustees must exercise their discretion as and when the income becomes available, but if they fail to distribute in due time, the power is not extinguished so that they can distribute later. They have no power to bind themselves for the future. The beneficiary thus has no more than a hope that the discretion will be exercised in his favour.

4. Merely because the settlor and after his death, his son did not exercise their power to appoint the discretion exercisers, the character of the subject trusts does not get altered. In view of the facts noted above, it was held by the Supreme Court that, the two UK trusts continued to be 'discretionary trust' for the subject assessment years.

Right to charge overdue interest on discounted Bills of Exchange – Whether covered by S. 2(7) of the Interest Tax Act, 1974

State Bank of Patiala vs. CIT [Civil Appeal Nos. 5212-5220 of 2007]

Introduction

The primary issue was about interest that is received by various banks after bills of exchange have been discounted by them and a party defaults and hence has to pay compensation by way of interest as payment is made after the date stipulated in the bill of exchange, whether such payment of compensation to the said banks is "interest" liable to tax under the Interest Tax Act, 1974.

Facts

1. The bank makes purchases of bills of exchange from its customers and charges commission thereon for services rendered by it.

2. The discounted bills so purchased are then presented to the parties concerned for realization.

3. If on presentation the bill is realised within time, no charges are levied by the bank. In case the bills are not realised in time but the other party pays the value of the bill beyond the stipulated time, a certain amount in the form of interest is charged by the bank on a fixed percentage basis for every day of default. This amount is credited by the bank in its interest account.

4. On these broad facts, the Madhya Pradesh High Court, Kerala High Court, Andhra Pradesh High Court, Madras High Court and Rajasthan High Court had all decided that such amounts were not chargeable to tax as "chargeable interest" under the Interest Tax Act. On the other hand, the Karnataka High Court and the Punjab and Haryana High Court had differed from this view and had stated that such amount would be so chargeable.

On appeal by the Revenue to Supreme Court, it was observed by the Apex Court that:

1. The definition of interest contained in the Interest Tax Act, 1974 is a narrow one, and is exhaustive as it is a 'means and includes' definition. Reliance was placed on the following paragraph from *P. Kasilingam vs. P.S.G. College of Technology, 1995 Supp (2) SCC 348*

   "A particular expression is often defined by the Legislature by using the word 'means' or the word 'includes'. Sometimes the words 'means and includes' are used. The use of the word 'means' indicates that "definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in definition". (See : *Gough vs. Gough [(1891) 2 QB 665 : 60 LJ QB 726] ; Punjab Land Development and Reclamation Corpn. Ltd. vs. Presiding Officer, Labour Court [(1990) 3 SCC 682, 717 : 1991 SCC (L&S) 71]).* The word 'includes' when used, enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include. The words "means and includes", on the other hand, indicate "an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions". (See : *Dilworth vs. Commissioner of Stamps [1899 AC 99, 105-106 : (1895-9) All ER Rep Ext 1576] (Lord Watson); Mahalakshmi Oil Mills v. State of A.P. [(1989) 1 SCC 164, 169 : 1989 SCC (Tax) 56]*

2. As per section 32 of the Negotiable Instruments Act, when default of payment takes place, the acceptor of the bill of exchange is bound to compensate any party to the bill for any loss or damage sustained by him and caused by such default. In most cases such loss or damage is a liquidated amount which can be calculated from the rate mentioned on the face of the bill of exchange.

3. The interest on which tax is payable under the Interest Tax Act is primarily on loans and advances made in India. By a deeming fiction, discount on bills of exchange made in India is also included. It is clear, therefore, that discount on bills of exchange would obviously not come within the expression "loans and advances made in India", and consequently any amount that becomes payable by way of compensation after a bill is discounted by the Bank would not be an amount which would be "on loans and advances made in India".

4. Section 2(7) itself makes a distinction between loans and advances made in India and discount on bills of exchange drawn or made in India. It is obvious that if discounted bills of exchange were also to be treated as loans and advances made in India there would be no need to extend the definition of "interest" to include discount on bills of exchange.

5. In accounting sense, there is a conceptual difference between loans and advances on the one hand and investments on the other hand. Section 2(7) defines the word "interest" to mean interest on "loans and advances including commitment charges, discount on promissory notes and bills

of exchange but not to include interest referred to under section 42(1-B) of the Reserve Bank of India Act, 1934 as well as discount on treasury bills". Section 2(7), therefore, defines what is interest in the first part and that first part confines interest only to loans and advances, including commitment charges, discount on promissory notes and bills of exchange.

6. In normal accounting sense, "loans and advances", as a concept, is different from commitment charges and discounts and keeping in mind the difference between the three, the legislature, in its wisdom, has specifically included in the definition under section 2(7) commitment charges as well as discounts. The fact remains that interest on loans and advances will not cover under section 2(7) interest on bonds and debentures bought by an assessee as and by way of "investment". *CIT vs. Sahara India Savings & Investment Corpn. Ltd. (2009) 17 SCC 43.*

7. The right to charge for overdue interest by the assessee banks did not arise on account of any delay in repayment of any loan or advance made by the said banks. That right arose on account of default in the payment of amounts due under a discounted bill of exchange. Interest payable "on" a discounted bill of exchange cannot therefore be equated with interest payable "on" a loan or advance.

Conclusion

Based on above reasoning, Supreme Court held that a subject can be brought to tax only by a clear statutory provision in that behalf. Interest is chargeable to tax under the Interest Tax Act only if it arises directly from a loan or advance. This is clear from the use of the word "on" in section 2(7) of the Act. Since interest payable "on" a discounted bill of exchange cannot be equated with interest payable "on" a loan or advance, such interest is not chargeable to the Interest Tax Act, 1974.

Meaning of the expression "educational institution existing solely for educational purpose and not for purpose of profit – Section 10(23C)

Queen's Educational Society vs. CIT [2015] 372 ITR 699 (SC)

Introduction

Section 10(23C)(iiiad) provides exemption to an educational institution existing solely for educational purposes and not for the purposes of profit and whose aggregate annual receipts do not exceed the amount of annual receipts as may be prescribed (currently ` 1 crore as per Rule 2CA of the Income Tax Rules, 1962). Further, section 10(23C)(vi) provides exemption to an educational institution approved by the prescribed authority, existing solely for educational purposes and not for the purposes of profit and whose aggregate annual receipts exceeds the amount of annual receipts as may be prescribed (currently ` 1 crore as per Rule 2CA of the Income Tax Rules, 1962). The controversy in the present case was about the meaning of the expression "existing solely for educational purpose and not for purpose of profit" – Whether an institution having a large surplus can straightaway be said to be existing for profit.

Facts I

1. The assessee society was engaged in imparting education and in order to maintain a teaching and non-teaching staff and to pay for their salaries and other incidental expenses, it used to charge certain fee from the students.

2. The assessee filed its return claiming exemption of income under section 10(23C)(iiiad).

3. The Assessing Officer found that assessee had generated some surplus during relevant years. He thus taking a view that assessee-society was running educational institution with profit motive, rejected assessee's claim.

4. The Tribunal noted that the surplus had enabled the assessee to acquire its own property, acquire computers, library books, sports equipments etc. for the benefit of the students. Moreover the members of the assessee society had not utilised any part of the surplus for their own benefit. The Tribunal thus taking a view that profit was only incidental to the main object of spreading eduction, allowed assessee's claim for exemption.

5. The High Court, however, relying upon the order passed in the case of *Aditanar Educational Institution vs. Addl. CIT [1997] 224 ITR 310 (SC),* restored the order passed by Assessing Officer.

On appeal by the assessee, Supreme Court held that:

1. The requirements of Section 10(23C)(iiiad) may be summed up as follows:
   - i) Where an educational institution carries on the activity of education primarily for educating persons, the fact that it makes a surplus does not lead to the conclusion that it ceases to exist solely for educational purposes and becomes an institution for the purpose of making profit.
   - ii) The predominant object test must be applied – the purpose of education should not be submerged by a profit making motive.
   - iii) A distinction must be drawn between the making of a surplus and an institution being carried on "for profit". No inference arises that merely because imparting education results in making a profit, it becomes an activity for profit.
   - iv) If after meeting expenditure, a surplus arises incidentally from the activity carried on by the educational institution, it will not cease to be one existing solely for educational purposes.
   - v) The ultimate test is whether on an overall view of the matter in the concerned assessment year the object is to make profit as opposed to educating persons.
2. In *Aditanar Educational Institution vs. CIT [(1997) 3 SCC 346 : (1997) 224 ITR 310], SC* had held that "After meeting the expenditure, if any surplus result incidentally from the activity lawfully carried on by the educational institution, it will not cease to be one existing solely for educational purpose since the object is not one to make profit. The decisive or acid test is whether on an overall view of the matter, the object is to make profit. In evaluating or appraising the above, one should also bear in mind the distinction difference between the corpus, the objects and powers of the concerned entity."
3. In the present case, the Uttarakhand High Court quoted the above paragraph from *Aditanar Educational Institution vs. CIT [(1997) 3 SCC 346* and then followed it by a paragraph of faulty reasoning by the Assessing Officer and the said faulty reasoning of the Assessing Officer has been wrongly said to be the law laid down by the Apex Court.
4. Further, the Supreme Court Judgment in *Municipal Corpn. of Delhi vs. Children Book Trust [1992] 63 Taxman 385* has then been followed by the High Court. SC observed that HC had erred in quoting a portion of a property tax judgment which expressly stated that rulings arising out of the Income-tax Act would not be applicable.

On this reasoning, SC reversed the order of the High Court and upheld the order of the ITAT.

Facts II

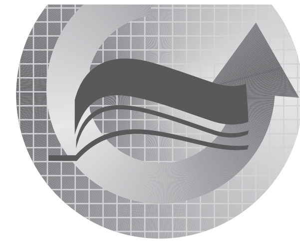
1. By various impugned orders passed, the Chief CIT, Chandigarh withdrew exemptions granted under section 10(23C)(vi) of the Income-tax Act read with Rule 2CA of Income-tax Rules, 1961, for various assessment years.
2. While withdrawing those exemptions, Chief CIT also relied upon *Aditanar Educational Institution vs. CIT [(1997) 3 SCC 346 : (1997) 224 ITR 310]* and Uttarakhand High Court decision in case of *CIT vs. Queens Educational Society [2009] 177 Taxman 326 (Uttarakhand)* and held that the crucial condition is that surplus should result only incidentally and should not be aimed for. If substantial profits are earned in one year, it would be duty of the institution to lower its fees for the subsequent year so that such profits are not intentionally generated. If, however, profits continue year after year then it cannot be said that the surplus is arising incidentally.
3. In various writ petitions filed before the Punjab and Haryana High Court, the orders withdrawing exemption were set aside by the Punjab and Haryana High Court. *[Pinegrone International Charitable Trust vs. Union of India [2010] 327 ITR 73/188 Taxman 402 (P&H)]*

Revenue challenged these orders of Punjab and Haryana High Court before the SC in the present case. SC observed that:

1. Conditions for claiming exemption u/s. 10(23C)(vi) are the same as those for section 10(23C)(iiiad) except for the approval of prescribed authority required in section 10(23C)(vi).
2. Since the Chief CIT's orders cancelling exemption which were set aside by the Punjab and Haryana High Court were passed almost solely upon the law declared by the Uttarakhand High Court in *CIT vs. Queens Educational Society [2009] 177 Taxman 326 (Uttarakhand)* and the said judgment of the Uttarakhand High Court has been set aside by the SC, these orders cannot stand. Consequently, Revenue's appeals from the Punjab and Haryana High Court's judgment are dismissed.
3. The correct tests which have been culled out in the three Supreme Court judgments stated above, namely, *Addl. CIT vs. Surat Art Silk Cloth Mfr. Association [1980] 121 ITR 1/[1979] 2 Taxman 501 (SC), Aditanar Educational Institution vs. Addl. CIT [1997] 224 ITR 310(SC)*, and *American Hotel & Lodging Association Educational Institute vs. CBDT [2008] 301 ITR 86/170 Taxman 306(SC)*, would all apply to determine whether an educational institution exists solely for educational purposes and not for purposes of profit.
4. 13th proviso to section 10(23C) is of great importance in that assessing authorities must continuously monitor from assessment year to assessment year whether such institutions continue to apply their income and invest or deposit their funds in accordance with the law laid down. Further, it is of great importance that the activities of such institutions be looked at carefully. If they are not genuine, or are not being carried out in accordance with all or any of the conditions subject to which approval has been given, such approval and exemption must forthwith be withdrawn.

Conclusion

In this judgment Supreme Court reiterated the principles laid down by it earlier that merely because an institution has earned a surplus, it cannot be held to be existing for profits. Where a surplus was made by educational institution which was ploughed back for educational purposes, said institution was to be held to be existing solely for educational purpose and not for purpose of profit.



Madhur Agarwal, *Advocate*

Mangalore Ganesh Beedi Works vs. CIT (Civil Appeal Nos. 10547-10548 of 2011)

Introduction

The issue in the present case is whether for the assessment year 1995-96, depreciation under section 32 of the Income-tax Act, 1961 ('the Act') can be allowed on acquisition of intellectual property rights (IPRs), treating the same as 'plant', when the category of intangibles has been separately inserted in section 32 w.e.f. 1-4-1999.

Facts

M/s. Mangalore Ganesh Beedi Works (MGBW), a partnership firm, was engaged in the business of manufacturing beedis. The partnership deed provided that, in the event of dissolution, the firm as a going concern and the trademarks used in the course of firm's business would be auctioned and would vest in and belong to the highest bidding partner/(s).

Due to the disputes between the partners, dissolution petition was filed. The High Court *vide* its order dt. 14th June, 1991 dissolved the firm with effect from 6th December, 1987. High Court directed that the assets of the firm would be sold to the highest bidder and the minimum price for the same was kept at ` 30 crore. At the auction, three erstwhile partners formed an association of persons (AOP 3) and bid the highest amount of ` 92 crore for the assets of the firm. Of the total consideration of ` 92 crores, intellectual property rights were valued at ` 72 crores (` 36 crores for technical know-how, ` 21.6 Crores for copyright and ` 14.4 crores for trademarks).The business of the firm passed into the hands of the AOP 3 w.e.f. 18th November 1994.

In the return of income filed by the assessee (AOP 3) for the period between 18th November 1994 and 31st March, 1995, it claimed (i) legal expenses of ` 12,24,700/- as a revenue expense (ii) deduction under sections 35A and 35AB in respect of IPRs acquired. (iii) Alternatively, it claimed depreciation under section 32 on the value of IPRs by treating them as plant.

AO rejected all the claims made by the assessee. CIT(A) allowed the deduction of legal expenses but rejected the other claims of the assessee. Tribunal held in favour of the assessee by allowing the assessee's appeal and dismissing the revenue's appeal. Tribunal recorded a finding of fact that the legal expenses incurred by the assessee were for protecting its business and that the expenses were incurred after 18th November, 1994. High Court reversed the order of the ITAT and allowed the appeal of the Revenue. High Court held that the expenses incurred by the assessee were prior to 21st September, 1994 and were therefore, personal in nature. High Court rejected the claim of the assessee of deduction under sections 35A and 35AB by holding that what was auctioned was only goodwill and no amount was spent by the

assessee towards the acquisition of trademarks, copyrights and know-how. High Court further held that the goodwill was split into know-how, copyrights and trademarks only for the purposes of claiming a deduction under section 35A and section 35AB. High Court did not adjudicate the alternate contention of the assessee that depreciation should be allowed on the value of the IPRs.

Before the Supreme Court : Reasons and decision

Supreme Court allowed the assessee's claim of deduction of legal expenses under section 37. It held as under:

- Supreme Court noted that the Tribunal had arrived at a clear finding of fact that the legal expenses were incurred for protecting the business and that such expenses were incurred after 18th November, 1994 i.e. the date on which the business was handed over to the AOP.
- High Court was not justified in upsetting a finding of fact arrived at by the Tribunal where no substantial question of law was raised in this regard by the revenue before it. Further, even before the Supreme Court no material was produced by the revenue to contend that the finding of fact recorded by the Tribunal was perverse.

  Supreme Court left the issue of deduction under sections 35A and 35AB open in view of the alternative submission of claim of depreciation being made by the assessee. In respect of the claim of depreciation, Supreme Court held as under:
- The definition of 'plant' in s. 43(3) being an inclusive one, the term 'plant' should be interpreted in the sense which people conversant with the subject-matter with which the statute deals would attribute to it.
- IPRs have a value. Further IPRs such as trademarks, copyrights and know-how are commercially necessary and absolutely essential for large business houses.
- Therefore, the trademarks, copyrights and know-how acquired by the assessee would come within the definition of 'plant '.
- Further, it cannot be accepted that it was only goodwill that was auctioned and not the trademarks as accepting such an argument would amount to re-writing Clause 16 of the Partnership Deed which specifically stated that the going concern and all the trademarks used in the course of the said business would vest in and belong to the highest bidder on dissolution.
- The Supreme Court referring to the decision of the Delhi High Court in the case of *D.S. Bist & Sons vs. CIT* held that taxing authorities have no jurisdiction to rewrite the terms of the agreement arrived at between the parties with each other at arm's length when there is no allegation of collusion between them. The Supreme Court held that the commercial expediency of the contract is to be adjudged by the contracting parties as to its terms.

Conclusion

(1) High Court is not justified in upsetting a finding of fact recorded by the Tribunal when no substantial question of law has been raised before the High Court.

(2) The definition of 'plant' is wide enough to cover even intangible assets such as trademarks, copyrights, etc. Depreciation is therefore available on these intangibles even prior to the amendment made in section 32 specifically creating a category of intangibles.

(3) Commercial expediency of the contract is to be adjudged by the contracting parties as to its terms and tax authorities cannot rewrite the terms of the agreement.

ACIT vs. Victory Aqua Farm Ltd. (Civil Appeal Nos. 4429 and 4430 of 2006 & 5099 – 5100 of 2009)

Introduction

Section 32 of the Act grants depreciation in respect of a 'plant' owned by the assessee. While interpreting the term 'plant', issues arose as to whether an asset that was specifically constructed or built as per the business requirements could be classified as a 'plant' so as to be eligible for claim of depreciation. The Supreme Court answered the question in the affirmative holding that depreciation is eligible on such assets treating the same as 'plant'.

Facts

The assessee was engaged in the business of 'Aqua Culture'. It grew prawns in specially designed ponds. Assessee claimed depreciation in respect of these ponds on the ground that they were tools of business and thereby constituted a 'plant' eligible for depreciation under section 32. The AO disallowed assessee's claim.

Before the Supreme Court: Reasons and decision

1. Supreme Court observed that the issue as to whether or not the ponds constituted a 'plant' was to be answered on the basis of 'functional test' and since the ponds were specially designed for rearing/breeding of the prawns, they were to be treated as tools of the business of the assessee and accordingly depreciation was allowable treating the ponds as 'plant'.

2. Supreme Court followed an earlier decision of the Supreme Court in the case of *CIT vs. Karnataka Power Corporation (247 ITR 268)* where it was held that the building which was so planned and constructed so as to serve an assessee's special technical requirements would be treated as a 'plant'.

Conclusion

Supreme Court has applied the 'functional test' to determine whether an asset would be regarded as a 'plant' or not. An asset would be treated as a 'plant' if it is a tool of the business and it is used in a manner so as to meet the specific requirements of the business.

Premier Breweries Ltd. vs. CIT (Civil Appeal No. 1569 of 2007)

Introduction

The assessee challenged the decision of the High Court on the ground that the evidence on record has been re-appreciated by the High Court with a view to ascertain if the conclusion reached by the Tribunal are correct which the assessee submitted was not permissible in the absence of any question of perversity of the finding of the Tribunal being considered by the High Court.

The Supreme Court dismissing the appeal of the assessee observes that the High Court has drawn legal inference from the finding of facts as arrived at by the Tribunal. Hence, there was no requirement of a question regarding perversity of fact being considered by the High Court.

Facts

The assessee was engaged in the manufacture and sale of beer and other alcoholic beverages. The assessee was required to compulsorily sell their products through State owned marketing corporations which, in turn, would sell the liquor to the retailers. The assessee paid commission to certain commission agents for rendering services of co-ordinate with the retailers and State Corporations to ensure continuous supply of goods.

AO and the CIT(A) disallowed the assessee's claim of deduction under section 37 of the Act. The Tribunal allowed the appeal of the assessee by reversing the order of the lower authorities and granting deduction to the assessee of commission paid by the assessee. High Court reversed the findings and conclusions recorded by the Tribunal and held that the assessee had not discharged the burden so as to entitle it to deduction under section 37. High Court held that the decision of the Tribunal is set aside and the order of the CIT(A) is upheld and, reference is answered accordingly.

The assessee did not challenge the merits of the decision of the High Court but submitted that (i) the High Court has erred in reframing the questions after the conclusion of the arguments and without giving the opportunity to the assessee; (ii) the High Court has erred in setting aside the order of the Tribunal in reference jurisdiction; and (iii) the High Court erred in re-appreciating the evidence on record with a view to ascertain, if the conclusion reached by the Tribunal is correct, in the absence of any question of perversity of the finding of the Tribunal being considered by the High Court.

Before the Supreme Court : Reasons and decision

The Supreme Court dismissed the appeal of the assessee and held as under:

1. Supreme Court observed that the High Court did not disturb or reverse the finding of facts as found by the Tribunal but the High Court drew correct legal inferences on the basis of the facts already recorded by the Tribunal. Supreme Court held that the legal inference that should be drawn from the primary facts is eminently a question of law and that it was not necessary for the High Court to have framed a question of perversity before answering the issues that arose.
2. Supreme Court held that the High Court has no power to set aside the order of the Tribunal, however, on the reading of the High Court's order, the error seems to be an error of form and not error of substance.
3. Supreme Court also rejected the argument of the assessee that High Court has reframed the questions of law as the High Court has merely retained three questions of the twelve questions initially framed.

Conclusion

SC held that the HC was right in examining the facts on record and drawing correct legal inference from such facts without going into the issue of perversity of the Tribunal's Order.

CIT vs. Travancore Sugars & Chemicals Ltd. (Civil Appeal No. 2558 of 2005)

Introduction

The amendment by the Finance Act 1988 w.e.f. 1-4-1999 of section 43B(a) to include "cess or fee, by whatever name called" has enlarged the scope of section 43B of the Act.

Facts

The assessee was engaged in the manufacture and sale of foreign liquor and sugar. The assessee was liable to pay what is termed as 'vend fee' which was imposed as a levy by the State Government on three sugar mills. 'Venda Fee' would go into a fund which would then be used for the repair/replacement of old machinery and equipment in these three mills.

The issue that came up before the Supreme Court was whether for the assessment year 1990-91, the provision of section 43B would be applicable to 'vend fee' so that the same will

not be allowed as deduction unless paid by the assessee before the end of the relevant previous year.

Before the Supreme Court : Reasons and decision

Supreme Court held that

1. Disallowance under section 43B(a) (as it stands post its substitution by the Finance Act, 1988) is attracted in respect of any sum payable under any law in force whether such sum is called tax, duty, cess, fee or by some other name.

2. It was clear from the Kerala Government's order dated 28-4-1988 that the 'vend fee' was imposed as a levy on three sugar mills to be used for the repair/replacement of old machinery and equipment in these three mills is in the nature of a 'fee' and therefore covered within the provisions of section 43B(a).

3. Supreme Court held that even if 'vend fee' does not directly fall within the expression 'fee' and is held to be a "privilege" as held by the High Court, it would be regarded as "fee by whatever name called" and would come within the ambit of section 43B(a) of the Act.

Conclusion

Amendment made in section 43B(a) by the Finance Act, 1988 w.e.f. 1-4-1989 has widened the scope of the provision. The disallowance shall now be attracted in respect of any payment which is in the nature of a 'cess or fee by whatever name called'.

CIT vs. Suman Dhamija (Civil Appeal Nos. 4919-4920 of 2015)

Introduction

Central Board of Direct Taxes (CBDT) in its Instruction dated 9th February, 2011 laid down that the revenue could file appeals only in cases where the tax effect exceeded the monetary limits laid down in the Instructions. Para 11 of the Instructions clarified that these Instructions would apply only to appeals filed on or after 2011 and that the appeals filed earlier would be governed by the Instructions operative at the time when such appeals were filed.

Facts

Appeals and review petitions preferred with the High Court prior to 2011 were disposed of by the High Court in accordance with the said CBDT Instructions.

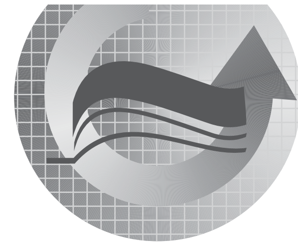
Before the Supreme Court : Reasons and decision

Supreme Court noted that the CBDT Instructions clearly indicate that these would not govern cases which have been filed before 2011 but would apply only to cases filed after the issuance of the said Instructions. Accordingly, Supreme Court allowed the revenue's appeals and set aside the orders passed by the High Court and remitted the matter back to the High Court for readjudication of the appeals.

Conclusion

CBDT has issued Instruction No. 21 of 2015 dated 10th December, 2015, wherein it is stated that the revised monetary limits prescribed for filing an appeal to the Tribunal and High Court would even apply to pending appeals. However, in so far as the appeal to the Supreme Court is concerned, the appeal would be governed by the Instruction on the subject operative at the time when such appeal was filed.

The decision of the Supreme Court would now have to be read with Instruction No. 21 of 2015. As the Instruction applies to pending appeals before the High Court and the Tribunal, the decision of the Supreme Court will not be applicable to decide the status of the appeal before the High Court and Tribunal.



Rahul K. Hakani & Niyati K. Hakani, *Advocates*

Hero Cycles (P) Ltd. vs. Commissioner of Income Tax (Central), Ludhiana (2015) 63 taxmann.com 308 (SC)

Introduction

The claim of interest is often disallowed either entirely or on proportionate basis on the ground that interest free advances are made to sister concern. According to the revenue if assessee has sufficient interest free funds then instead of giving the same to the sister concern without charging any interest assessee can use it in own business or lend it by charging market interest rate. In such cases AO estimates a notional interest on interest free advances. Where assessee also has borrowed money then according to the revenue if assessee would have not advanced any interest free money to the sister concern then no borrowings were required and consequently no interest payment in which case AO would disallow the interest paid on borrowings either entirely or on proportionate basis. These perspective of the revenue raises an alarming and a very fundamental question that is i) Is it going to be the AO who will tell the assessee how to do business? ii) What is the scope and ambit of the term " Business" and "Commercial expediency"? The Apex Court in *Hero Cycles (P) Ltd. vs. CIT (2015) 63 taxmann.com 308 (SC)* has addressed these fundamental questions in the context of claim of deduction of interest u/s 36(1)(iii) when assessee has made interest free advances to its sister concern.

Facts

The present case pertains to the Assessment Year 1988-89. In the income tax return filed by the assessee for the relevant assessment year, the assessee, *inter alia*, claimed deduction of interest paid on borrowed sums from Bank under the provisions of section 36(1)(iii) of the Income-tax Act (hereinafter referred to as 'Act'). During the year the assessee had on grounds of commercial expediency advanced a sum of ` 1,16,26,128/- to its subsidiary company known as M/s. Hero Fibers Limited and this advance did not carry any interest. In addition, the assessee had also given advances to its own directors in the sum of ` 34 lakhs on which the assessee charged from those directors interest at the rate of 10 per cent, whereas interest payable on the money taken by way of loans by the assessee from the Banks carried interest at the rate of 18 per cent.

Findings of Assessing Officer

The aforesaid deduction claimed u/s. 36(1)(iii) was disallowed by the Assessing Officer *vide* his Assesssment Order dated 26-3-1991 on the following two points:

(a) The assessee had advanced a sum of ` 1,16,26,128/- to its subsidiary company known as M/s. Hero Fibers Limited and this advance did not carry any interest. According to the Assessing Officer, the assessee had borrowed the money from the banks and paid interest thereupon. Deduction was claimed as business expenditure but substantial money out of the loans taken from the Bank was

diverted by giving advance to M/s. Hero Fibers Limited on which no interest was charged by the assessee. Therefore, the money borrowed on which interest was paid was not for business purposes and no deduction could be allowed.

(b) In addition, the assessee had also given advances to its own directors in the sum of ` 34 lakhs on which the assessee charged from those directors interest at the rate of 10 per cent, whereas interest payable on the money taken by way of loans by the assessee from the Banks carried interest at the rate of 18 per cent. On this basis, the charging of interest at the rate of 10 per cent from the above-mentioned persons and paying interest at much more rate, i.e., at the rate of 18 per cent on the money borrowed by the assessee cannot be treated for the purposes of business of the assessee.

Findings by Commissioner of Income Tax (Appeals)

The CIT (Appeals) set aside the order of the Assessing Officer holding that the interest paid by the assessee of which deduction was claimed, in the facts of this case, was for business purposes and, therefore, the entire interest paid by the assessee should have been allowed as business expenditure. The CIT(A) gave following critical factual findings :

(a) The assessee even before the Assessing Officer stated that it had given an undertaking to the financial institutions to provide M/s. Hero Fibers Limited the additional margin to meet the working capital for meeting any cash losses. Further, the assessee company was promoter of M/s. Hero Fibres Limited and since it had the controlling share in the said company that necessitated giving of such an undertaking to the financial institutions. The amount was, thus, advanced in compliance of the stipulation laid down by the three financial institutions under a loan agreement which was entered into between M/s. Hero Fibres Limited and the said financial institutions and it became possible for the financial institutions to advance that loan to M/s. Hero Fibres Limited because of the aforesaid undertaking given by the assessee. It was also mentioned that no interest was to be paid on this loan unless dividend is paid by that company. On that basis, it was held that the amount was advanced by way of business expediency

(b) Insofar as the loan given to its assessee Directors is concerned at the rate of 10 per cent is concerned the assessee had demonstrated that on the date when the loan was given that is on 25-3-1987 to these directors, there was a credit balance in the account of the assessee from where the loan was given. It was demonstrated that even after the encashment of the cheques of ` 34 lakhs in favour of those directors by way of loan, there was a credit balance of ` 4,95,670/- in the said bank account. It was for the Assessing Officer to establish the nexus between the borrowings and advancing to prove that expenditure was for non-business purposes which the Assessing Officer failed to do.

Findings of ITAT

The ITAT upheld the aforesaid view of the CIT (Appeals) and thus, dismissed the appeal preferred by the Revenue.

Findings of the High Court

The appeal of revenue was allowed by the High Court *vide* judgment dated 6-12-2006 wherein the High Court relied on its own judgment in the case of *CIT vs. M/s Abhishek Industries Ltd. (2006) 156 Taxman 27 (P&H).*

Findings of the Apex Court

Reversing the decision of the High Court the Apex Court held as under :

(a) The approach adopted by the High Court was clearly faulty in law and cannot be countenanced.

(b) Insofar as loans to the sister concern / subsidiary company are concerned, law in this behalf is recapitulated by this Court in the case of *'S.A. Builders Ltd. vs. Commissioner of Income Tax (Appeals) and Another' [2007 (288) ITR 1 (SC)].*

(c) The ratio of Madhav Prasad Jatia's case *[1979 (118) ITR 200 (SC)]* is that the borrowed fund advanced to a third party should be for commercial expediency if it is sought to be allowed under section 36(1)(iii) of the Act.

(d) In the present case, neither the High Court nor the Tribunal nor other authorities have examined whether the amount advanced to the sister concern was by way of commercial expediency.

(e) It has been repeatedly held by this court that the expression "for the purpose of business" is wider in scope than the expression "for the purpose of earning profits" *vide CIT vs. Malayalam Plantations Ltd. [1964 53 ITR 140 (SC), CIT vs. Birla Cotton Spinning and Weaving Mills Ltd. [1971 82 ITR 166 (SC)], etc.*

(f) In the process, the Court also agreed with the view taken by the Delhi High Court in *'CIT vs. Dalmia Cement (B.) Ltd.' [2002 (254) ITR 377]* wherein the High Court had held that once it is established that there is nexus between the expenditure and the purpose of business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the Board of Directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. It further held that no businessman can be compelled to maximise his profit and that the income tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own view point but that of a prudent businessman.

(g) It is manifest that the advance to M/s. Hero Fibres Limited became imperative as a business expediency in view of the undertaking given to the financial institutions. by the assessee to the effect that it would provide additional margin to M/s. Hero Fibres Limited to meet the working capital for meeting any cash losses. It would also be significant to mention at this stage that, subsequently, the assessee company had off-loaded its shareholding in the said M/s. Hero Fibres Limited to various companies of Oswal Group and at that time, the assessee company not only refunded back the entire loan given to M/s. Hero Fibres Limited by the assessee but this was refunded with interest. In the year in which the aforesaid interest was received, same was shown as income and offered for tax.

(h) Insofar as the loans to Directors are concerned, it could not be disputed by the Revenue that the assessee had a credit balance in the Bank account when the said advance of ` 34 lakhs was given. Remarkably, as observed by the CIT (Appeals) in his order, the company had reserve/surplus to the tune of almost 15 crores and, therefore, the assessee company could in any case, utilise those funds for giving advance to its Directors.

Conclusion

It is incumbent upon assessee to establish by positive evidence the existence of commercial expediency and that the funds were ultimately utilised for business purpose. A bald assertion of commercial expediency will not be sufficient. Further it appears that the attention of the Apex Court was not drawn to the fact that 3 Judge bench of the Apex Court in the case of *ACIT vs. M/s. Tulip Star Hotels (P) Ltd has held that S.A. Builders Ltd. vs. Commissioner of Income-tax (Appeals) and Another, reported in 288 ITR 1,* needs reconsideration. Hence an issue may arise whether the division Bench of the Apex Court in Hero Cycles could have relied on the decision of SA Builders when a 3 judge bench came to the conclusion that the decision in SA Builders case requires reconsideration and consequently whether the decision of the Apex Court in Hero Cycles is a valid decision.

Rajasthan R.S.S. & Ginning Mills Fed. Ltd. vs. Deputy Commissioner of Income-tax, Jaipur (2014) 363 ITR 564 (SC)

Introduction

The issue before the Hon'ble Apex Court in the present case was whether pursuant to scheme of amalgamation, an amalgamating co-operative society can carry forward and set off its accumulated losses against profits of amalgamated co-operative society. The Supreme Court answered in negative. It observed that there is no specific provision under the Income-tax Act providing for carry forward and set off of losses of an amalgamating co-operative society not in existence against the profits of the amalgamated co-operative society u/s. 72 of the Income-tax Act.

Facts

1. There were four co-operative societies in the State of Rajasthan wherein the Government of Rajasthan had substantial shareholding, namely – (i) Rajasthan Cooperative Spinning Mills Ltd.; (ii) Gangapur Co-operative Spinning Mills Ltd.; (iii) Ganganagar Co-operative Spinning Mills Ltd.; and (iv) Gulabpura Cotton Ginning & Pressing Sahkari Samiti Ltd.

2. An administrative decision was taken by the Government of Rajasthan to amalgamate all the aforestated co-operative societies into the assessee co-operative society, namely Rajasthan Rajya Sahkari Spinning & Ginning Mills Federation Ltd. w.e.f. 1-1-1993.

3. Upon amalgamation of the said societies into the assessee society, the registration of the said four co-operative societies had been cancelled and all the assets and liabilities of the said four societies had been taken over by the assessee society by virtue of the aforestated amalgamation.

4. The aforestated four societies were not sound financially and they had substantial accumulative losses.

5. After the amalgamation of the four co-operative societies into the assessee society, when Income-tax returns for the assessment years 1994-95 and 1995-96 were filed by the assessee society, the assessee society wanted to get the accumulated losses of the aforestated societies, of about ` 2,68,39,504/-, carried forward, so that the same could be set off against the profits of the assessee society under the provisions of Ssection 72 of the Income-tax Act, 1961.

6. Decision of the Assessing Officer: The Assessing Officer negatived the assessee's claim for the reason that the said societies were not in existence after their

amalgamation into the assessee society. As the said four societies were not in existence, according to the Assessing Officer, their accumulated losses could not have been carried forward or adjusted against the profits of the assessee society. Assessment orders were passed accordingly.

7. Decision of the CIT (Appeals), ITAT and the High Court:

   The assessment order was confirmed by the CIT (Appeals), ITAT and High Court.

8. Submissions made by the assessee before the apex court.

   1. That upon amalgamation of the aforestated four co-operative societies into the assessee society, by virtue of the provisions of sSection 16(8) of the Rajasthan Co-operative Societies Act, rights and obligations of the societies so amalgamated would not be affected and therefore, all the rights which the societies had with regard to carrying forward of their losses would continue, and as the said societies had been amalgamated into the assessee society, the assessee society ought to have been permitted to set off the losses suffered by the amalgamated societies. Section 16(8) of Rajasthan Co-operative Societies Act, 1965 which is reproduced hereinbelow:

      "16(8) The amalgamation, transfer or division made under this section shall not affect any rights or obligations of the societies so amalgamated, or of the society so divided or of the transferee, or render defective any legal proceedings which might have been continued or commenced by or against the societies which have been amalgamated or divided or the transferee; and accordingly such legal proceedings may be continued or commenced by or against the amalgamated society, the new societies or the transferee, as the case may be."

   2. Further, Section 72(1) of the Act read with Section 16 (8) of the Rajasthan Co-operative Societies Act, 1965 clearly denotes that the assessee had a right to carry forward losses incurred by the amalgamating societies and set off the business losses of the said societies against the profits and gains of the assessee society.

   3. Moreover, the word 'company' used in section 72(A) of the Act should be given wide interpretation so as to include societies in the term 'company' because like companies, societies also have a distinct legal personality and there is no reason for the authorities under the Act to give different treatment to co-operative societies.

   4. The assessee had a vested right to get the accumulated losses of the amalgamated societies adjusted against the profits of the assessee and the said vested right could not have been taken away by the Assessing Officer. So as to substantiate this submission, reliance was placed upon the judgment delivered in the case of *CIT vs. Shah Sadiq & Sons [1987] 166 ITR 102(SC).*

9. Submissions made on behalf of the department before the Apex Court

   1. The registration of the amalgamating societies had been cancelled upon the amalgamation and as they were not in existence at the time when the assessee society was assessed,

there was no question of carrying forward accumulated losses of the amalgamating societies and adjusting them against the profits of the assessee society.

2. Upon the conjoint reading of sections 72 and 72A of the Act, it is clear that the co-operative societies cannot get the benefit of carrying forward and setting off accumulated losses if the said societies were not in existence. Only in case of a 'company', the benefit of set off could be availed by an amalgamated company, if the amalgamating company had accumulated losses which could have been carried forward and adjusted against the profits of the amalgamated company in accordance with the provisions of the Act.

3. Reliance was placed upon judgments delivered in the case of *CIT vs. Madho Pd. Jatia [1976] 105 ITR 179 (SC), Baidyanath Ayurved Bhawan (P) Ltd. vs. Excise Commissioner, U.P. [1971] 1 SCC 4, CIT v. Maharashtra Sugar Mills Ltd. [1971] 82 ITR 452 (SC)* to contend that the tax statute should be interpreted very strictly as there is no equity in tax matters and nothing can be read which is not in the section.

10. Findings of the Apex Court

1. For the purpose of getting carried forward losses adjusted or set off against the profits of subsequent years, there must be some provision in the Act. If there is no provision, the societies which are not in existence cannot get any benefit. The losses were suffered by the societies which were in existence at the relevant time and their existence or legal personality had come to an end upon being amalgamated into another society.

2. The normal principle is that a non-existent person cannot file an income tax return and, therefore, cannot carry forward its losses after its existence comes to an end. All those four societies, upon the amalgamation into the assessee society, had ceased to exist and registration of those societies had been cancelled. In the circumstances, those societies had no right under the provisions of the Act to file a return to get their earlier losses adjusted against the income of a different legal personality, in the assessee society.

3. So far as companies are concerned, there is a specific provision in the Act that upon amalgamation one company with another, losses of the amalgamating companies can be carried forward and amalgamated company can get those losses set off against its profits subject to the provisions of Act. This is permissible by virtue of section 72A of the Act but there is no such provision in the case of co-operative societies.

4. It is pertinent to note that such a provision has been made only with regard to amalgamation companies and later on similar provisions were made with regard to banks, etc., but at the relevant time there was no such provision which would permit the amalgamating co-operative society to carry forward and adjust such losses against the profits of the amalgamated co-operative society.

5. The submission made by the assessee with regard to

discrimination and violation of Article 14 of the Constitution of India would also not help the assessee as there is no discrimination. The societies and companies belong to different classes and simply because both have a distinct legal personality cannot be said that both must be given the same treatment.

6. Thus, the High Court rightly concluded that as there is no provision under the Act for setting accumulated losses of the amalgamating societies against the profits of the amalgamated society, assessee society could not have got the benefit of carrying forward losses of the erstwhile society which were not in existence during the relevant assessment year.

Conclusion

There is no fault which one can find with the decision of the Apex Court that an amalgamating co-operative society cannot carry forward and set off its accumulated losses against profits of amalgamated co-operative society. Now the ball is in the court of the Legislature. The co-operative sector which is bleeding requires such beneficial provisions to get an impetus and hence suitable amendment must be carried out to sections 72A and 72.

Shabina Abraham & Ors. vs. Collector of Central Excise & Customs [2015] 61 taxmann.com 95 (SC)

Introduction

"Nothing is certain except death and taxes." said Benjamin Franklin in his letter dated November 13, 1789 addressed to Jean Baptiste Leroy. To tax the dead is a contradiction in terms. Tax laws are made by the living to tax the living. What survives a dead person is what is left behind in the form of such person's property. An interesting issue was considered by the Apex Court as to whether the dead person's property, in the form of his or her estate, can be taxed without the necessary machinery provisions in the taxing statute. The precise question that arose in the present case was whether an assessment proceeding under the Central Excises and Salt Act, 1944, can continue against the legal representatives/estate of a sole proprietor/manufacturer after he is dead. The Apex Court held in the negative.

Facts

a) Shri George Varghese, the sole proprietor of Kerala Tyre and Rubber Company Limited, by October 1985, stopped manufacturing and production of tread rubber. A show cause notice dated 12-6-1987, for the period January 1983 to December 1985, was issued wherein it was alleged that the assessee had manufactured and cleared tread rubber from the factory premises by suppressing the fact of such production and removal with an intent to evade payment of excise duty. Duty amounting to ` 74,35,242/- was sought to be recovered from the assessee under section 11A of the Central Excises and Salt Act, as it then existed, together with imposition of penalty for clandestine removal.

b) On 14-3-1989, the said Shri George Varghese died. As a result of his death, a second show cause notice was issued on 18-10-1989 to his wife and four daughters asking them to make submissions with regard to the demand of duty made in the show cause notice dated 12-6-1987.

c) *Vide* their reply dated 25-10-1989, the said legal heirs of the deceased stated that none of them had any personal association with the deceased in his proprietary business and were not in a position to locate any

business records. They further submitted that the proceedings initiated against the deceased abated on his death in the absence of any provision in the Central Excise and Salt Act to continue assessment proceedings against a dead person in the hands of the legal representatives. The said show cause notice was, therefore, challenged as being without jurisdiction. As the Central Excise Authorities posted the matter for hearing and refused to pass an order on the maintainability of the show cause notice alone, the legal heirs approached the High Court under Article 226 of the Constitution by filing a Writ Petition in January, 1990.

d) The learned single Judge of the High Court quashed the proceedings against the legal heirs stating that the Central Excise and Salt Act did not contain any provision for continuing assessment proceedings against a dead person. Against this, revenue went in appeal. The Division Bench of the High Court of Kerala reversed the single Judge's judgment. Therefore the legal heirs filed an appeal before the Hon'ble Apex Court.

Submission made by the appellant before the Apex Court

a) Perusal of sections 2(f), (3), section 4(3)(a), section 11 and 11A, as they stood at the relevant time, would show that unlike the provisions of the Income-tax Act, there is no machinery provision in the Central Excise and Salt Act for continuing assessment proceedings against the legal representatives upon the death of an assessee.

b) An assessee under the said Act means "the person" who is liable to pay the duty of excise under this Act and in cases of short levy, such duty can only be recovered from a person who is chargeable with the duty that has been short levied.

c) The learned Counsel further placed reliance on the Central Excise Rules, Rules 2(3) and 7 in particular, to buttress his submission that there is no machinery provision contained either in the Act or in the Rules to proceed against a dead person's legal heirs.

Submissions by the revenue before the Apex Court

a) Inasmuch as a dead man's property can be attached and sold and proceeded against, it is clear that the necessary machinery is contained in the Central Excise and Salt Act.

b) Section 11A of the said Act is a machinery provision and, therefore, the rule to be applied is that that construction should be preferred which makes a machinery section workable.

c) Moreover, the position under the Income-tax Act would be entirely different as income tax is a tax leviable on a person whereas a duty of excise is leviable on manufacture of goods.

Relevant provisions of Central Excise and Salt Act

11. Recovery of sums due to Government. – In respect of duty and any other sums of any kind payable to the Central Government under any of the provisions of this Act or of the rules made thereunder, the officer empowered by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963, to levy such duty or require the payment of such sums may deduct the amount so payable from any money owing to the person from whom such sums may be recoverable or due which may be in his hands or under his disposal or control, or may recover the amount by attachment and sale of excisable goods belonging to such person; and if the amount payable is not so recovered he may prepare a certificate signed by him specifying the amount due from the person liable to pay

the same and send it to the Collector of the District in which such person resides or conducts his business and the said Collector, on receipt of such certificate, shall proceed to recover from the said person the amount specified therein as if it were an arrear of land revenue.

11A. Recovery of duties not levied or not paid or short levied or short paid or erroneously refunded.– (1) When any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if for the words "six months", the words "five years" were substituted."

Findings of the Apex Court

1. Perusal of various provisions of the Central Excises & Salt Act, as they then existed, it is evident that there is in fact no separate machinery provided to proceed against a dead person when it comes to assessing him to tax under the Act.

2. The position under the Income Tax Act, 1922 was also the same until Section 24B was introduced by the Income Tax (Second Amendment) Act of 1933.

3. Prior to the introduction of the aforesaid Section, the Bombay High Court had occasion to deal with a similar question in *Commissioner of Income Tax, Bombay v. Ellis C. Reid, A.I.R. 1931 Bombay 333.* The Division Bench of the Bombay High Court in this case observed that if the legislature intends to assess the estate of a deceased person to tax charged on the deceased in his lifetime, the legislature must provide proper machinery and not leave it to the Court to endeavor to extract the appropriate machinery out of the very unsuitable language of the statute.

4. Given the aforesaid decision of the Bombay High Court, the legislature quickly amended the Income Tax Act, 1922 by inserting Section 24B.

5. This judgment of the Bombay High Court has been affirmed in two other judgments by the Hon'ble Supreme Court. In *Commissioner of Income Tax, Bombay City I v. Amarchand N. Shroff, [1963] 48 I.T.R. 59,* this Court referred with approval to Ellis C. Reid, held that the correct position is that apart from section 24B no assessment can be made in respect of the income of a person after his death. Further, the individual assessee has ordinarily to be a living person and there can be no assessment on a dead person and the assessment is a charge in respect of the income of the previous year and not a charge in respect of the income of the year of assessment as measured by the income of the previous year. Moreover, as observed by this Court in *Bengal Immunity Co. Ltd. v. State of Bihar,* legal fictions are only for a definite purpose and they are limited to the purpose for which they are created and should not be extended beyond that legitimate field. Hence, the fiction created under Section 24B is limited to the cases provided in the three sub-sections of section 24B and cannot be extended further than the liability for the income received in the previous year.

6. Similarly, in *Commissioner of Income Tax, Bombay vs. James Anderson, [1964] 51 I.T.R.*

345, this Court referred with approval to the judgment in Ellis C. Reid's case and further held that even after section 24B was enacted tax cannot be assessed on receipts on the footing that it is the personal income of the legal representative.

7. Further, in *Commissioner of Income Tax, Bombay vs. Darabsha Nasarwanji Mehta, A.I.R. 1935 Bombay 167,* the Bombay High Court held that section 24B of the 1922 Act was not retrospective.

8. Pursuant to the 12th Law Commission Report, a new Income-tax Act was passed in 1961 which contained elaborate provisions for assessment of deceased persons after they die. The anomalies left by section 24B of the 1922 Act, as pointed out in the two Supreme Court judgments referred to above, were sought to be rectified in the new provisions contained in the 1961 Act. Sections 159 and 168 of the Act are apposite in this regard.

9. It can be noticed that under section 159(2), for the purpose of making any assessment, any proceeding taken against the deceased before his death is by deeming fiction deemed to have been taken against his legal representative and may be continued against the legal representative from the stage at which it stood on the date of the death of the deceased. Further, the legal representative under sub-section (3) of 159 is again by deeming fiction deemed to be an assessee himself. However, the liability of such representative is limited only to the extent to which the estate left by the deceased is capable of meeting the tax liability subject to the contingencies mentioned in sub-sections (4) and (5) of section 159.

10. Similarly, under section 168, where the assessee has left a Will, the income of the estate of the deceased person becomes chargeable in the hands of the executor of such Will.

11. Further, it can be seen that the definition of "assessee" contained in section 4(3)(a) of the Central Excise and Salt Act is similar to the definition of assessee contained in the Income-tax Act, 1922. Under that Act, as we have already seen, an assessee means "a person by whom income tax is payable." Under the Central Excise and Salt Act, an assessee means "the person who is liable to pay the duty of excise under this Act". The present tense being used, makes it clear that the person referred to can only be a living person as was held in Ellis C. Reid (supra). Further, the only extension of the definition of "assessee" under the Central Excise and Salt Act is that it would also include an assessee's agent, which has nothing to do with the facts of the present case. It is well settled that a "means and includes" definition is exhaustive in nature and that there is no scope to read anything further into the said definition.

12. Since the notice is served under section 11A, it is only on the person chargeable with excise duty, which takes us back to "assessee" as defined.

13. As seen earlier, learned counsel for the revenue relied upon section 11 of the Act, which, according to him, indicates that an attachment and sale of excisable goods can belong to a dead person and such attachment and sale can continue notwithstanding the death of such person. Apart from the fact that there is nothing about dead persons in Section 11, section 11 is limited only to recovery of sums that are due to the Government. The very opening words in section 11 show that duty and other sums must first be payable to the Central Government under the Act or the rules. If such sums are not "payable" then the provisions of the section do not get attracted at all. We have seen that the Act contains no machinery provisions for proceeding against a dead person's legal

heirs, such as are contained in the Income-tax Act. Obviously, therefore, duty and other sums do not become "payable" without such machinery provisions.

14. Further, section 11 deals with modes of recovery of tax payable and does not deal with the subject matter at hand – namely machinery provisions for assessment in the hands of the estate of a dead person and, therefore, does not have much bearing on the matter in issue in the present case. The argument, therefore, as to the insertion of the proviso to section 11 by an Amendment Act of 2004 so as to provide that if a person from whom some recoveries are due transfers his business to another person, then the excisable goods in the possession of the transferee can also be attached and sold again leads us nowhere.

15. In fact, the Legislature's need to add the proviso shows that nothing can be read into the Central Excise and Salt Act by implication. As has been stated above, section 11 deals with an entirely different situation and the addition of the proviso therein is not of much significance in the present case.

16. The contention that the principles applied in the case of the Income-tax Act should not be applied to the Central Excise and Salt Act as the latter Act is a tax on manufacture of goods and not on persons, does not hold water and can be countenanced by this Court's judgment in the case of *State of Punjab vs. M/s Jullunder Vegetables Syndicate, [1966] 2 S.C.R. 457.* In this case, it was held that though under the partnership law a firm is not a legal entity but only consists of individual partners for the time being, for tax law, income-tax as well as sales tax, it is a legal entity. If that be so, on dissolution, the firm ceases to be a legal entity. Thereafter, on principle, unless there is a statutory provision permitting the assessment of a dissolved firm, there is no longer any scope for assessing the firm which ceased to have a legal existence. This judgment is a complete answer to the contention of learned counsel for the revenue inasmuch as on a parity of reasoning, sales tax is not a personal tax but a tax on the sale of goods. Nevertheless, this Court held that in the absence of any machinery provisions to assess and collect sales tax from a deceased person – in that case it was a dissolved partnership firm – all proceedings against such deceased person/ dissolved firm abate.

17. A reading of the ratio of the majority decision contained in *M/s. Murarilal Mahabir Prasad and Others vs. Shri B.R. Vad and Others, (1975) 2 SCC 736* would lead to the conclusion that the necessary machinery provisions were already contained in the Bombay Sales Tax Act, 1953 which were good enough to bring into the tax net persons who wished to evade taxes by the expedient of dissolving a partnership firm. The fact situation in the present case is entirely different. In the present case an individual proprietor has died through natural causes and it is nobody's case that he has manoeuvred his own death in order to evade excise duty.

18. Moreover, in the judgment in Murarilal's case (supra), so far as partnership firms are concerned, the Income-tax Act contains a specific provision in section 189(1) which introduces a fiction *qua* dissolved firms. It states that where a firm is dissolved, the Assessing Officer shall make an assessment of the total income of the firm as if no such dissolution had taken place and all the provisions of the Income-tax Act would apply to assessment of such dissolved firm. Interestingly enough, this provision is referred to only in the minority judgment in M/s. Murarilal's case (supra).

19. The argument that section 11A of the Central Excise and Salt Act is a machinery

provision which must be construed to make it workable can be met by stating that there is no charge to excise duty under the main charging provision of a dead person, which has been referred to while discussing section 11A read with the definition of "assessee" earlier in this judgment.

20. The definition of the term 'person' under section 3(42) of the General Clauses Act does not take us any further as it does not include legal representatives of persons who are since deceased. Equally, section 6 of the Central Excise Act, which prescribes a procedure for registration of certain persons who are engaged in the process of production or manufacture of any specified goods mentioned in the schedule to the said Act does not throw any light on the question at hand as it says nothing about how a dead person's assessment is to continue after his death in respect of excise duty that may have escaped assessment.

21. The judgment delivered in the case of *Commissioner of Central Excise, Bangalore –III vs. Dhiren Gandhi, 2012 (281) E.L.T. 64 (Karnataka),* is correct in its conclusion that while interpreting the provisions of the Central Excise and Salt Act, legal heirs who are not the persons chargeable to duty under the Act cannot be brought within the ambit of the Act by stretching its provisions. To the extent that this judgment holds what is set out hereinbelow, it is correct:-

    "We do not find any provision in the Act which foists any such liability in the case of intestate succession. In other words, there is no provision which empowers the authorities to recover due from a deceased assessee by proceeding against his legal heirs. The way sections 11 and 11A are worded, it is amply clear, the legislature has consciously kept away the legal heirs from answering to liabilities under the Act."

22. The impugned judgment in the present case referred to Ellis C. Reid's case but has not extracted the real ratio contained therein. It then goes on to say that this is a case of short levy which has been noticed during the lifetime of the deceased and then goes on to state that equally therefore legal representatives of a manufacturer who had paid excess duty would not by the self-same reasoning be able to claim such excess amount paid by the deceased. Neither of these reasons are reasons which refer to any provision of law. Apart from this, the High Court went into morality and said that the moral principle of unlawful enrichment would also apply and since the law will not permit this, the Act needs to be interpreted accordingly. This Hon'ble Court wholly disapproves this approach of the High Court. It flies in the face of first principle when it comes to taxing statutes.

23. In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any assumed deficiency.

24. On the basis of the above, the appeal was allowed and the judgment of the High Court of Kerala was accordingly set aside and that of the learned Single Judge restored.

Conclusion

From the above case it can be concluded that perusal of sections 2(f), (3), section 4(3)(a), sections11 and 11A as they stood at the relevant time would show that unlike the provisions of the Income-tax Act, there is no machinery provision in the Central Excise and Salt Act for continuing assessment proceedings against a dead individual. Further, while construing a taxing statute the Court is not justified by straining the language in order

to hold a subject liable to tax. If the legislature intends to assess the estate of a deceased person to tax charged on the deceased in his lifetime, the legislature must provide proper machinery and not leave it to the Court to endeavour to extract the appropriate machinery out of the very unsuitable language of the statute.

Taparia Tools Ltd. vs. JCIT (2015) 372 ITR 605 (SC)

Introduction

In the present case, the assessee issued debentures during the relevant period. As regards payment of interest, two options were given to debenture holders. As per terms of issue, the debenture holders could either receive interest periodically, that was every half yearly at the rate of 18 per cent per annum over a period of five years, or else, the debenture holders could opt for one time upfront discounted interest payment per debenture. In the second alternative, certain amount was to be immediately paid as upfront on account of interest. At the end of five years period, the debentures were to be redeemed at the face value. Certain debenture holder opted for upfront payment of interest. In cases of parties opting for one time upfront discounted interest, the Assessing Officer allowed only 1/5th of payment as deduction mainly on the ground that in the books of account assessee had debited only 1/5th expenditure in the P/L. A/c. The court was to decide whether, since assessee made actual payment, and course of action adopted by assessee was in consonance with provisions of Act, merely because a different treatment was given in books of account could it be a factor which would deprive assessee from claiming entire expenditure as a deduction?

Facts of the case

The assessee, a public limited company was is engaged in the manufacture and sale of hand tools and forgings. In the AY 1996-97, the company resolved to issue non-convertible debentures (NCDs) aggregating to ` 6 crore on a private placement basis. The debentures issued carried the following terms and conditions:

(a) The face value of the debenture is ` 100 each.

(b) As regards payment of interest on debentures, the debenture holder had the option of either periodically receiving interest half yearly @ 18 per cent p.a. for five years or a one time up front payment of ` 55 per debenture.The option in respect of the payment of interest was to be exercised within 30 days of the date of allotment.

(c) The debentures could be redeemed at par along with 10 per cent redemption premium at any time after the end of the 5th year but not beyond the 7th year.

(d) The debentures shall be secured by way of second charge on the assets of the company.

The assessee was following mercantile system of accounting. It filed its return claiming deduction of upfront interest charges paid during the relevant year. However, said upfront payment of interest on debentures were shown by the assessee as deferred revenue expenditure in, accounts to be written off over a period of five years. However in the computation of income assesssee claimed entire interest expenditure as per S 36(1)(iii). The Assessing Officer, after taking into consideration assessee's books of account, treated said payment as the deferred revenue expenditure to be written off over a period of five years and, therefore, he allowed only 1/5th of the payment made, though the entire payment was made in the relevant year

The Tribunal as well as the High Court upheld the order of the Assessing Officer.

Findings of the Apex Court

a. Section 36 is a residual section. The amount of interest paid in respect of capital borrowed for the purpose of business or

profession is allowed in terms of clause (iii) of sub-section (1) of section 36. Thus any amount on account of interest paid becomes an admissible deduction under section 36 if the interest was paid on the capital borrowed by the assessee and this borrowing was for the purpose of business or profession.

b. There is no dispute, in the present case that the money raised on account of issuance of the debentures would be capital borrowed and the debentures were issued for the purpose of the business of the assessee. In such a scenario when the interest was actually incurred by the assessee, which follows the mercantile system of accounting, on the application of this statutory provision, on incurring of such interest, the assessee would be entitled to deduction of full amount in the assessment year in which it is paid. There is no dispute that interest has, in fact, been 'paid' during the year of accounting. Definition of 'paid' is contained in section 43(ii) to mean actually paid or incurred according to the method of accounting. As per the aforesaid definition, even if the amount is not actually paid but 'incurred', according to the method of accounting, the same would be treated as 'paid'. Since the assessee followed mercantile system of accounting, the amount of interest could be claimed as deduction even if it was not actually paid but simply 'incurred'.

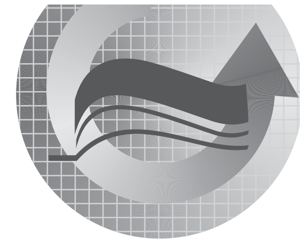
c. Thus the only aspect which needs examination is whether provisions of section 36(1)(iii) read with section 43(ii) were satisfied or not. Once these are satisfied, there is no question of denying the benefit of entire deduction in the year in which such an amount was actually paid or incurred.

d. In the present case not only the liability had arisen in the assessment year in question, it was even quantified and discharged as well in that very accounting year. Normally the ordinary rule is to be applied, namely, revenue expenditure incurred in a particular year is to be allowed in that year. Thus, if the assessee claims that expenditure in that year, the department cannot deny the same. However, in those cases where the assessee himself wants to spread the expenditure over a period of ensuing years, it can be allowed only if the principle of 'matching concept' is satisfied, which up to now has been restricted to the cases of debentures.

e. It has been held repeatedly by this Court that entries in the books of account are not determinative or conclusive and the matter is to be examined on the touchstone of provisions contained in the Act. Once a return in that manner was filed, the Assessing Officer was bound to carry out the assessment by applying the provisions of that Act and not to go beyond the said return. There is no estoppel against the statute and the Act enables and entitles the assessee to claim the entire expenditure in the manner it is claimed.

Conclusion

The decision of the Apex Court strikes a right balance between implementation of the provisions of the Income-tax Act and the general accounting principles. It rightly gives an option to the assessee to decide the extent to which matching principle is to be followed in case of deferred revenue expenditure which will help in solving disputes relating to claim of deferred revenue expenses. This decision will have positive impact in cases where interest is claimed as deduction as a period cost by virtue of S. 36(1)(iii) though income is offered on completed contract basis.



CA Chetan Karia

Sarkar Builders 375 ITR 392 (SC)

1.1 The Hon'ble Supreme Court has settled two controversies relating to interpretation of section 80-IB(10) of the Act. Section 80-IB(10), like all beneficial provisions granting deduction of income, has had a chequered history. It suffered multiple amendments and issues were vigorously litigated.

1.2 Section 80-IB(10) granted deduction of 100% of income earned by an undertaking carrying on business of development of housing project, if prescribed conditions are satisfied.

1.3 The first controversy related to meaning of the term housing project. The contention of the department was that housing project means residential project and therefore if the project had any commercial units, the project was not a housing project and deduction was not available.

1.4 While the said controversy was raging, provisions of section 80-IB(10) were amended by Finance (No 2) Act, 2004 w. e. f. 1-4-2005. By the amendment it was provided that if aggregate area of all commercial units in the project exceed 5% of the project size or 2000 sq. ft., the project was not qualified for deduction u/s. 80-IB(10). The amendment added one more aspect to the existing controversy as to whether the provisions are retrospective. The amendment was by insertion of clause (d) in section 80-IB(10) and it reads as follows:

> "(d) the built-up area of the shops and other commercial establishments included in the housing project does not exceed five per cent of the aggregate built-up area of the housing project or two thousand square feet, whichever is lower."

1.5 The amendment spawned another controversy as to whether it applied to all projects whose profits were offered to tax on or after 1-4-2005 or only to projects approved after the said date. As development of real estate involves span of a few years, it normally happens that project is approved before amendment when it satisfied prescribed conditions but when project is complete and profit is offered to tax, the conditions have changed and therefore project does not satisfy conditions prescribed in the year in which profit is offered to tax.

1.6 The pre-amendment issue was settled by the Hon'ble Supreme Court in case of Brahma Associates ... and it was held that term housing project would mean housing project as approved by local authority and presence of some commercial component would not disqualify the project. The argument of the department that amendment in the year 2004 is retrospective was also rejected.

1.7 The issue before the Hon'ble Supreme Court in case of Sarkar Builders 375 ITR 392 was whether the amendment applied to housing project approved before 1-4-2005. The facts to the extent relevant to the issue was that the assessee had commenced a project for development much before 1-4-2005 and it satisfied the conditions of section 80-IB(10) when it was approved. The work had commenced and assessee was following project completion method of

accounting and therefore no profits from the project had been offered to tax up to AY 2004-05. The project was completed and profits were offered to tax and equivalent amount was claimed as deduction in assessment year subsequent to AY 2005-06. The Hon'ble Supreme Court framed the question of law before it in following words:

> "The question of law, that arises for discussion that needs to be answered is thus common in all these appeals and can be formulated as under:
>
> "Whether Section 80-IB(10)(d) of the Income Tax Act, 1961 applies to a housing project approved before 31-3-2005 but completed on or after 1-4-2005 ?

The question, thus, that arises for consideration is as to whether in respect of those housing projects which finished on or after 1-4-2005, though sanctioned and started much earlier, the aforesaid stipulation contained in clause (d) also has to be satisfied."

1.8 The contention of the department was twofold:

i) That though the amendment in the year 2004 was not retrospective the provisions are retroactive, and

ii) Law as on the first day of assessment year to be applied and as income is offered and deduction claimed in assessment years on or after 1-4.2005, new provisions would apply for allowing deduction u/s. 80IB(10).

1.9 The Hon'ble Supreme Court relied on its earlier judgment in Brahma Associates to hold that housing project may contain commercial component and also that amendment by Finance (No. 2) Act, 2004 is not retrospective.

1.10 The Hon'ble Supreme Court held that assessee's who got plans approved and commenced work had acquired a vested right which cannot be taken away by amendment. It was held that assessee could not have complied with new conditions once project approved and work commenced.

1.11 On the issue that law as on first day of assessment year to be applied, the Hon'ble Supreme Court held that the general proposition is subject to exceptions, when it is provided expressly or by necessary implication. The Hon'ble Supreme Court held that having regard to intent of the provisions, by necessary implication application of law as on first day of assessment year is excluded.

1.12 The Hon'ble Supreme Court further held that conditions cannot be again looked at when profit is offered once project satisfied conditions when approved

1.13 The Hon'ble Supreme Court clarified that its judgment is limited to amendment made by clause d and it is not a general proposition laid down for all amendments.

Spacewood Furnishers P. Ltd. 374 ITR 595 (SC)

2.1 In the case of Spacewood Furnishers P Ltd., the department was in appeal against the judgment of Hon'ble Delhi High Court where assessment u/s. 153A was stopped and warrant of authorisation for search u/s. 132 was held to be invalid.

2.2 The Hon'ble Supreme Court has reiterated certain basic propositions relating to provisions of search u/s. 132. The Hon'ble Supreme Court referred to earlier judgments in *ITO vs. Seth Brothers (1969) 74 ITR 836 (SC), Pooran Mal vs. Director of Inspection (Investigation), Income Tax (1974) 93 ITR 505 (SC)* and *Dr. Pratap Singh vs. Director of Enforcement (1985) 155 ITR 166 (SC)* and held as follows:

"The principles that can be deduced from the aforesaid decisions of this Court which continue to hold the field without any departure may be summarised as follows :

(i) The authority must have information in its possession on the basis of which a reasonable belief can be founded that:

(a) The concerned person has omitted or failed to produce books of account or other documents for production of

which summons or notice had been issued;

OR

Such person will not produce such books of account or other documents even if summons or notice is issued to him.

OR

(b) Such person is in possession of any money, bullion, jewellery or other valuable article which represents either wholly or partly income or property which has not been or would not be disclosed.

(ii) Such information must be in possession of the authorised official before the opinion is formed.

(iii) There must be application of mind to the material and the formation of opinion must be honest and *bona fide*. Consideration of any extraneous or irrelevant material will vitiate the belief/satisfaction.

(iv) Though Rule 112(2) of the Income Tax Rules which specifically prescribed the necessity of recording of reasons before issuing a warrant of authorisation had been repealed on and from 1st October, 1975 the reasons for the belief found should be recorded.

(v) The reasons, however, need not be communicated to the person against whom the warrant is issued at that stage.

(vi) Such reasons, however, may have to be placed before the Court in the event of a challenge to formation of the belief of the authorised official in which event the Court (exercising jurisdiction under Article 226) would be entitled to examine the relevance of the reasons for the formation of the belief though not the sufficiency or adequacy thereof."

2.3 In light of the above settled proposition of law, the Hon'ble Supreme Court held that direction of the Hon'ble High Court that material on the basis of which satisfaction has been recorded prior to issue of authorisation of search be furnished to assessee is incorrect. It was held that:

> "Reasons enable a proper judicial assessment of the decision taken by the Revenue. However, the above, by itself, would not confer in the assessee a right of inspection of the documents or to a communication of the reasons for the belief at the stage of issuing of the authorisation. Any such view would be counterproductive of the entire exercise contemplated by Section 132 of the Act. It is only at the stage of commencement of the assessment proceedings after completion of the search and seizure, if any, that the requisite material may have to be disclosed to the assessee."

2.4 As regards the finding of the search to be invalid, the Hon'ble Supreme Court overturned the same and held that assessment may be recommenced from the stage at which it was directed to be invalid. The Hon'ble Supreme Court held that Court cannot go into sufficiency and adequacy of reasons on the basis of which satisfaction was arrived at before issue of warrant of authorisation of search.

Calcutta Knitwears 362 ITR 673 (SC)

3.1 Though the judgment is in context of provisions of section 158BD, which are no more applicable, the ratio is as relevant even today as similar provisions have been enacted in section 153C and the same will apply with equal force to section 153C.

3.2 An action of search u/s. 132 of the Act is merely an exercise to gather evidence of tax evasion by a taxpayer. To raise a demand of tax payable, the department has to make an assessment utilising such evidence. Tax is payable on completion of assessment and not on collection of evidence during search. Before introduction of provisions of block assessment by chapter XIV B by Finance Act 1995 w.e.f. 1-7-1995, the information and evidences collected were utilised to make an assessment u/s. 143(3) or reassessment u/s. 147. With a view to overcome various hurdles and procedural issues,

the Government introduced block assessment procedure. The said scheme of assessment is triggered the moment an action of search is carried out. Even in the said scheme, some serious issues had arisen and the said scheme was discontinued by Finance Act, 2003 and new provisions of sections 153A, 153B and 153C were introduced.

3.3 The issue involved in the judgment pertains to section 158BD of chapter XIV B. As discussed earlier, evidence collected during search has to be utilised to make an assessment under the Act. Many times it so happens that evidence collected reveals tax evasion by a person other than person against search action has been initiated. As the special assessment scheme applied to a person on whom search action was initiated, section 158BD provided assessment of a person other than person searched in specified circumstance. The assessing officer of the person on whom search was carried out had to record satisfaction that undisclosed income belongs to a person other than person search. It is settled law that satisfaction has to be recorded before notice is issued to a person other than person searched. However no time limit has been prescribed for recording such satisfaction.

3.4 Issue arose as to time within which such satisfaction has to be recorded. Lower authorities took the view that satisfaction has to be recorded before assessment order is passed in case of person searched.

3.5 The Hon'ble Supreme Court reiterated certain principles of interpretation of fiscal statutes as follows:

> "Before we proceed to explain the said provision, we intend to remind ourselves of the first or the basic principles of interpretation of a fiscal legislation. It is time and again reiterated that the courts, while interpreting the provisions of a fiscal legislation should neither add nor subtract a word from the provisions of instant meaning of the sections. It may be mentioned that the foremost principle of interpretation of fiscal statutes in every system of interpretation is the rule of strict interpretation which provides that where the words of the statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule....

It is also trite that while interpreting a machinery provision, the courts would interpret a provision in such a way that it would give meaning to the charging provisions and that the machinery provisions are liberally construed by the courts. ...

It is the duty of the court while interpreting the machinery provisions of a taxing statute to give effect to its manifest purpose. Wherever the intention to impose liability is clear, the Courts ought not be hesitant in espousing a common sense interpretation to the machinery provisions so that the charge does not fail. The machinery provisions must, no doubt, be so construed as would effectuate the object and purpose of the statute and not defeat the same..."

3.6 The Hon'ble Supreme Court held that the satisfaction note could be prepared at either of the following stages:

> "(a) At the time of or along with the initiation of proceedings against the searched person under Section 158BC of the Act; (b) along with the assessment proceedings under Section 158BC of the Act; and (c) immediately after the assessment proceedings are completed under Section 158BC of the Act of the searched person."

3.7 With these observations, the Hon'ble Supreme Court has remanded the appeals to the respective High Courts for deciding the matters afresh.

Editors' note: In lead case, satisfaction note was prepared on 15-7-2005 and 158BC assessment in case of person searched was dated 30-3-2005. The cases have been remanded to the Hon'ble High Court to decide the issue afresh and issue would be whether satisfaction note on 15-7-2005 can be said to be recorded immediately after assessment proceedings are completed on 30-3-2005?

Mihir Naniwadekar, *Advocate*

This note discusses four recent judgments of the Hon'ble Supreme Court of India, wherein the Hon'ble Supreme Court has dealt with some important principles of law and practical aspects of legal practice. The four judgments are:

Vatika Township vs. CIT 367 ITR 466 (SC)
Zuari Estate vs. DCIT 373 ITR 661 (SC)
Andaman Timber Industries vs. CCE (2015) 281 CTR (SC) 241
Himalayan Co-operative Group Housing Society vs. Balwan Singh AIR 2015 SC 2867

Proviso appended to section 113 by Finance Act, 2002, is to operate prospectively

Vatika Township vs. CIT 367 ITR 466 (SC)

Introduction

Retrospective operation of tax laws has been an extremely controversial issue in the recent past. Arguments are often raised as to whether a certain provision should be treated as merely 'clarificatory' of what the law always has been, or whether it should be treated as levying a substantially new charge only prospectively. One such provision giving rise to great controversy was the Proviso to s. 113 of the Income-tax Act, 1961, introduced by the Finance Act, 2002. The controversy has now been laid to rest by the Constitution Bench of the Hon'ble Supreme Court in the case of Vatika Township.

Facts

In the case of Suresh Gupta, search and seizure operations u/s. 132 of the Act were conducted proor to 1-6-2002. Thereafter, block assessment order for the block period 1-4-1989 to 10-2-2000 was passed. Tax was charged at the rate prescribed in S. 113. Subsequently, the proviso was inserted to S. 113 w.e.f. 1-6-2002. This provided for levy of surcharge at the rate of 10%. After introduction of the Proviso, the AO took the view that the Proviso was merely clarificatory, and passed order u/s. 154. The Tribunal and High Court upheld the assessee's claim that the said amendment was prospective in nature and did not apply to block periods falling before 1-6-2002. However, the plea of the assessee was rejected by the Supreme Court in the case of *Suresh N. Gupta 297 ITR 322.* Ultimately, in the case of Vatika Township, this view was followed by the lower authorities and High Court. When the matter reached the Supreme Court, a Division Bench of the Supreme Court took the view that the decision in Suresh Gupta merited reconsideration. Hence, the issue was referred to a Constitution Bench.

Decision & reasons

After considering the entire law on the matter, the larger Bench held, "On the application of general principles concerning retrospectivity, the proviso to S. 113 cannot be treated as clarificatory in nature, thereby having retrospective effect. The rule against retrospective operation is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication..." It was further held that a completed assessment creates a vested right in favour of assessees. Subsequently introduced amendments cannot be interpreted as taking away or destroying such vested right. It was further pointed out that there cannot be any tax liability unless unambiguously provided in the statute. Hence, doctrine of 'fairness' also militated against giving a retrospective operation of the proviso. The Court also took note of the fact that a conference of Chief Commissioners had suggested a retrospective amendment to s. 113. Despite being aware of these views, the Parliament had consciously brought the proviso in force only with effect from 1-6-2002. The CBDT had also issued Circular No. 8 of 2002, clarifying that the proviso was prospective. In such circumstances, the argument that the proviso was merely clarificatory and hence retrospective, did not find merit. Accordingly, the decision in the case of Suresh Gupta was held to be incorrectly decided and was therefore overruled.

Conclusion

Not only has the Supreme Court settled the controversy on the specific section involved, but also, the general observations of the Supreme Court are highly important. The Court has clarified the position on when amendments can be taken to have retrospective effect, and has also brought in an element of the rule of fairness in deciding such questions.

Reopening of assessment when original proceedings are completed not u/s. 143(3) but u/s. 143(1)
Zuari Estate vs. DCIT 373 ITR 661

Introduction

The question of reopening of assessment is an important issue, on which the Supreme Court and High Courts have been called upon to decide several questions of law. The scheme of the reopening provisions is such that, generally, a reopening is permissible up to 4 years from the end of the relevant AY if there is reason to believe that income has escaped assessment. Beyond 4 years (but within a period of 6 years), reopening is permissible if there is reason to believe that income has escaped assessment on account of any failure on part of the assessee to disclose material facts etc. It is also well settled that the power to reopen is not the same as the power to review. Hence, often in cases where scrutiny assessment is originally completed u/s. 143(3), reopening is challenged on the basis of doctrine of 'change of opinion'. Insofar as cases where there is no completed assessment u/s. 143(3), the reopening generally can be challenged only by showing that there is ex facie no reason to believe that income has escaped assessment. The Supreme Court considered one such situation in Zuari.

Facts

The assessee had duly filed its return of income. The same was processed u/s. 143(1) and an intimation was issued. There were no scrutiny proceedings, and no order was passed u/s. 143(3). Thereafter, the AO issued notice u/s. 148 of the Act on the basis that there was a transfer of property on the facts of the case in the relevant AY. The High Court quashed the reopening on the basis that "no prudent or reasonable person, reasonably instructed in law, could have come to

the conclusion that an agreement as contemplated by section 53A of the Transfer of Property Act had been entered into for the assessment year 1991-92." In other words, the High Court held that on the facts of the case and the recorded reasons, it was ex facie evident that there could not be any "reason to believe" that income had escaped assessment; and in the absence of this jurisdictional condition being satisfied, the proceedings were without jurisdiction. The Revenue appealed to the Supreme Court.

Decision & reasons

The Supreme Court reversed the decision of the High Court. It was held that there is a distinction in cases where the original assessment was completed u/s. 143(3), and where proceedings were completed only u/s. 143(1). It was held, "It may be noted above that under the first proviso to the newly substituted section 143(1), with effect from 1-6-1999, except as provided in the provision itself, the acknowledgment of the return shall be deemed to be an intimation under section 143(1) where (a) either no sum is payable by the assessee, or (b) no refund is due to him. It is significant that the acknowledgment is not done by any Assessing Officer, but mostly by ministerial staff. Can it be said that any "assessment" is done by them? The reply is an emphatic 'no'..." On this basis, it was held that one cannot infer any application of mind on part of the AO when as intimation is issued u/s. 143(1). Following from this, it was contended that on the facts of the case, the question of 'change of opinion' cannot arise; and hence, the order of the High Court was reversed and the appeal was allowed.

Conclusion

Insofar as reopening is concerned, where there is no original assessment u/s. 143(3) but only an intimation u/s. 143(1), it is well-settled that the reopening cannot be challenged on grounds of "change of opinion". Some Courts (notably, Delhi High Court in the case of Orient Craft have held that even in such cases, reopening can be challenged if there is no fresh tangible material. Furthermore, the requirement still exists in law that the proceedings can be reopened only if there is a valid "reason to believe". In Zuari, the High Court had quashed the reopening on the basis that there was no valid reason to believe at all. This requirement applies whether the original proceedings were u/s. 143(3) or u/s. 143(1). The Supreme Court however reversed the judgment of the High Court on the basis that 'change of opinion' could not be alleged. It was not brought to their Lordships attention that the High Court had not decided the matter on the basis of "change of opinion", but on the basis of "no valid reason to believe".

Right to cross-examine witnesses whose statements are relied on Andaman Timber Industries vs. CCE (2015) 281 CTR (SC) 241

Introduction

In the course of assessment proceedings, it may often be the case that the AO relies on the statements of certain third parties. The question often arises as to the weight to be given to such statements, and whether the assessee is entitled to cross-examine the parties giving statements contrary to the assessee's stand. Precisely such an issue was considered by the Hon'ble Supreme Court in Andaman Timber.

Facts

The appellant-assessee was manufacturing plywoods and related products in its factory at South Andamans. Most of the products manufactured at the factory were sold to other dealers at different places across India. The assessee had filed declaration under the relevant provisions of Central Excise Rules, which showed the sale price of the goods. The Revenue found out that there was a lot of price difference between goods sold at ex-factory and delivery basis, as compared with the goods which were sold to the buyers from their depots. Certain investigations were carried out, and statements of two buyers were also recorded. On this basis, Show Cause Notices was served upon the assessee. The assessee *inter*

alia questioned the correctness of the statements of the witnesses, and sought to cross-examine them. Thereafter, the Adjudicating Authority confirmed the demand proposed in the Show Cause Notice. An appeal against this order was dismissed by the Customs, Excise and Service Tax Appellate Tribunal. The Appellant's plea for cross-examination of the witnesses was rejected, by holding, "The plea of no cross examination granted to the various dealers would not help the appellant case since the examination of the dealers would not bring out any material which would not be in the possession of the appellant themselves to explain as to why their ex factory prices remain static…" On appeal, the correctness of this approach of the Tribunal was called into question.

Decision & reasons

The Hon'ble Apex Court held that not allowing the assessee to cross-examine the witnesses whose statements were the basis of the impugned demand, was a flaw. In fact, it was so serious a flaw that it went to the root of the matter, and made the order a nullity on account of violation of principles of natural justice. The Court noted that the order of the Commissioner was based upon the statements given by the two witnesses. The assessee has specifically disputed the correctness of the statements and sought for cross-examination. However, the Adjudicating Authority did not grant this opportunity at all. The Tribunal had simply stated that cross-examination of the witnesses could not have brought out any material which would not already be in possession of the appellant. The Court held, "It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination…. it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above." As the entire demand was based solely on the statements of the two witnesses and no other material, the order of the Tribunal was set aside.

Conclusion

The case arose under the provisions of indirect tax laws; however, the principle laid down by the Hon'ble Supreme Court would be equally applicable to proceedings under direct tax laws as well.

Admission by Counsel – Whether binding on client Himalayan Co-operative Group Housing Society vs. Balwan Singh AIR 2015 SC 2867

Introduction

A practical question may sometimes arise as to the exact scope of a lawyer's authority in representing clients. For instance, let us consider a hypothetical example. Let us assume that certain grounds are raised before an adjudicating authority; and a question is put to the counsel on the facts of the case. Or, the counsel may sometimes be asked if the facts are identical to another decided case. In such circumstances, a difficulty may arise: should the counsel volunteer and make such a statement based on his study of the record, or should he seek express instructions? In the case of Himalayan Co-operative Society, the decision of the Hon'ble Supreme Court reminds us that it is always safer to expressly seek the client's instructions before making any admissions.

Facts

The respondent had registered with the appellant society for the allotment of the residential apartments. The respondent was unable to pay the amount for the allotment of

apartments, despite several reminders from the appellant society. Ultimately, on account of this non-payment, the appellant society removed the name of the respondent from the list of members of society. Aggrieved by this, the respondent preferred an appeal to the co-operative tribunal. During the proceedings before the Tribunal, the counsel appearing on behalf of the appellant-society agreed to a settlement on the lines that the appellant-society would construct the apartments and allot to the respondent. The society claimed to be aggrieved by this settlement, although the same was conceded to before the Tribunal by its own counsel.

Decision & reasons

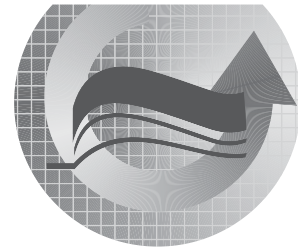
The Hon'ble Supreme Court held that it is the solemn duty of an advocate not to transgress the authority conferred. Lawyers owe fiduciary duties to their clients. They act on behalf of the clients, and are not supposed to act on their own whims. Although they are officers of the Court, the basis of the authority of the lawyer is the consent of the client. They have no authority to act in respect of matters on which they have no authority. Hence, lawyers are required to follow the instructions of the clients rather than substitute their judgment in place of the client. In support of these propositions, the Court also analysed the relevant rules and standards prescribed by the Bar Council of India.

Having described the nature of the lawyer-client relationship, the Hon'ble Supreme Court turned to the facts of the case. It held that where doubt arises regarding the admission on facts by the lawyer, then the court should wary to accept such admissions until or unless lawyer was authorised by the client to make such admissions. In this view of the matter, the appellant-society was not bound to act with the commitment made by the counsel of the appellant-society.

It was held, "…a lawyer must be specifically authorised to settle and compromise a claim… merely on the basis of his employment he has no implied or ostensible authority to bind his client to a compromise/settlement… a lawyer by virtue of retention, has the authority to choose the means for achieving the client's legal goal, while the client has the right to decide on what the goal will be… admissions of fact made by a counsel is binding upon their principals as long as they are unequivocal; where, however, doubt exists as to a purported admission, the Court should be wary to accept such admissions until and unless the counsel or the advocate is authorised by his principal to make such admissions. Furthermore, a client is not bound by a statement or admission which he or his lawyer was not authorised to make… Lawyer generally has no implied or apparent authority to make an admission or statement which would directly surrender or conclude the substantial legal rights of the client unless such an admission or statement is clearly a proper step in accomplishing the purpose for which the lawyer was employed… neither the client nor the Court is bound by the lawyer's statements or admissions as to matters of law or legal conclusions. Thus, according to generally accepted notions of professional responsibility, lawyers should follow the client's instructions rather than substitute their judgment for that of the client."

Conclusion

The judgment serves as a timely reminder of the standards expected of a lawyer, who sometimes has to perform a delicate balancing act of fulfilling duties as an officer of the Court, while at the same time effectively protecting the interests of the client. In concluding its judgment, the Hon'ble Supreme Court has also drawn attention to a famous statement by Lord Brougham: "An advocate, in the discharge of his duty knows but one person in the world and that person is his client."



Paras S. Savla & Viraj Mehta, *Advocates*

Applicability of TDS – Section 194C vs. 194-I Japan Airlines vs. CIT (2015) 377 ITR 372 (SC)

Section 194C provides that tax is required to be deducted when any person pays any sum to a resident for carrying out any work in pursuance of a contract. The major controversy between the tax payers and the department throughout had centered round the interpretation of the expression "carrying out any work (including supply of labour for carrying out any work). Section 194-I provides that tax is required to be deducted when any person pays rent to a resident. One of the issue that arises with regards to deductibility of tax u/s 194C or 194-I, when any payment is made under a composite contract which includes rent as well as facilities availed. Supreme Court in the said case had an occasion to considered such aspect.

Facts

1. There were two appeals before the Supreme Court. One by assessee i.e. Japan Airlines Co. Ltd., against the decision of Delhi high Court; other by the department against the Madras High Court decision favouring Singapore Airlines Limited. Thus, two judgments of the different HCs were in conflict with each other.

2. For the sake of convenience, the Supreme Court detailed the facts of Japan Airlines case were that the assessee was a foreign company incorporated in Japan and engaged in the business of international air traffic. It transported passengers and cargo by air across the globe including India and provided other related services. Airport Authority of India (AAI) levied charges on the assessee for landing and also for parking its aircrafts which was paid by the assessee after deducting tax at source u/s. 194-C of the Act.

3. Assessing Officer passed an order u/s 201(1) of the Act treating the assessee as assessee-in-default for short deduction of tax at source as the AO was of the view that payments for landing and parking charges were covered by the provisions of section 194-I and not u/s. 194-C of the Act.

4. On appeal, the CIT(A) ruled in favour of the assessee, by holding that the landing and parking charges were inclusive of number of services in compliance with the International Protocol. ITAT confirmed the order of CIT(A).

5. On appeal by the department, the High Court following its earlier decision in case of *United Airlines vs CIT (287 ITR 281)* decided in favour of the Revenue. In United Airlines's case, the High Court had taken the view that the term 'rent'

as defined in section 194-I had a wider meaning than 'rent' in the common parlance as it included any agreement or arrangement for use of land. The High Court thus observed that the use of land began when the wheels of an aircraft touched the surface of the airfield and similarly, there was use of land when the aircraft was parked at the airport.

Supreme Court held as under

1. The Court observed that the Madras High Court had larger and clearer picture as against myopic view taken by Delhi High Court. Documents produced before Madras HC i.e. Airport Economic Manual, International Airport Transport Agreement (IATA) revealed that there are various international protocols which mandate all such authorities manning and managing these airports to construct the airports of desired standards which are stipulated in the protocols. The services which are required to be provided by these authorities, like AAI, are aimed at passengers' safety as well as on safe landing and parking of the aircraft. Therefore, it is not mere 'use of the land'. On the contrary, these facilities are to be compulsorily offered by the AAI in tune with the requirements of the protocol.

2. Runways are not constructed like any ordinary roads. Special technology of different type is required for construction of these runways for smooth landing and take-off of the aircraft. There has to be proper lighting, safety area, runway marking, etc. Protocol prescribes the methodology for fixing the charges which again suggested that the charges were fixed based on cost analysis of all the facilities and the services which includes landing charges, lighting charges, approach and aerodrome control charges, aircraft parking charges, aerobridge charges, hangar charges, passenger service charges, cargo charges, etc.

3. In the process of AAI providing all facilities for landing and take-off of an aircraft, 'use of the land' pails into insignificance. What is important is that the charges are payable for providing facilities and not mere use of land.

4. Thereby, keeping the substance behind the charges, it was held that payments are not for use of land *per se* and therefore, it cannot be treated as 'rent' within the meaning of section 194-I. The charges were not for land usage or area allotted *simpliciter*. These were the charges for various services provided. The substance of these charges was ingrained in the various facilities offered to meet the requirement of passengers' safety and on safe landing and parking of the aircraft and these were the consideration that, in reality, governed the fixation of the charges. It includes providing of air traffic services, ground safety services, aeronautical communication facilities, installation and maintenance of navigational aids and meteorological services at the airport.

5. However, one of the reasoning given by the Madras High Court in arriving at the conclusion was negated by the Supreme Court. Madras High Court had held that words 'any other agreement or arrangement for the use of any land or any building' have to be read *ejusdem generis* and it should take it colour from the earlier portion of the definition namely "lease, sub-lease and tenancy". Thereby, it tried to limit the ambit of words "any other agreement or arrangement". The Supreme Court observed that bare reading of the definition of 'rent' contained in

explanation to Section 194-I would make it clear that in the first place, the payment, by whatever name called, under any lease, sub-lease, tenancy which was to be treated as 'rent'. That was rent in traditional sense. However, second part was independent of the first part which gives much wider scope to the term 'rent'. Whenever payment is made for use of any land or any building by any other agreement or arrangement that was also to be treated as 'rent'. Once such a payment was made for use of land or building under any other agreement or arrangement, such agreement or arrangement gives the definition of rent, a very wide connotation.

6. The expression 'rent' is given much wider meaning under this provision than what is normally known in common parlance. In the first instance, it means any payment which is made under any lease, sub-lease, and tenancy. Once the payment is made under lease, sub-lease or tenancy, the nomenclature which is given is inconsequential and the same would be treated as 'rent'. In the second place, such a payment made even under any other 'agreement or arrangement for the use of any 'land or any building' would also be treated as 'rent'. Whether or not such building is owned by the payee is not relevant. The expressions 'any payment', by whatever name called and 'any other agreement or arrangement' have the widest import.

Conclusion

The Supreme Court concluded that contract has to be seen in its pith and substance. Overall dominant object of the contract has to be looked into while determining as under which head tax requires to be deducted. As in the above case, payment was not merely for use of land but also for other facilities and services in which use of land was insignificant. Use of land was incidental in providing services. The Court has not laid any test to determine the significance of use of land in overall contract, and similar issues may always arise in case of composite contracts. The Department may argue that it is use of land *simpliciter* and may rely on *Shambhu Investmest Pvt. Ltd. (263 ITR 143)*, wherein it was while determining the head of income, the court held that rental income has to taxed under Income from House property as the predominant object was to exploit the property.

Scope of grant of exemption provision Oil & Natural Gas Corporation Limited vs. CIT (2015) 377 ITR 117 (SC)

Section 24AA of the Companies (Profits) Surtax Act, 1964 provided the Central Government the power to make exemption in relation to participation in the business of prospecting for extraction, etc., of mineral oils. As per sub-section (1) of section 24AA, Central Government may by notification provide for exemption, reduce rate or modify surtax in favour of any class of foreign companies specifies in sub-section (2).

Sub-section (2) of section 24AA of the Act refers to the companies referred in sub-section (1) of section 24AA of the Act under which the Government is empowered to exempt the companies from surtax. Clause (a) of sub-section (2) of section 24AA of the Act refers to those foreign companies with whom the Central Government has entered into agreement for the association or participation of that Government or any

person authorised by that Government in any business consisting of the prospecting for or extraction or production of mineral oils. Clause (b) of sub-section (2) of section 24AA of the Act specifies any services or facilities or supplying any ship, aircraft, machinery or plant (whether by way of sale or hire) in connection with any business consisting of the prospecting for or extraction or production of mineral oils.

Supreme Court in the said case has explained the principles of interpretation of a law conferring an exemption or concession. The question posing for an answer revolves around the true and correct purpose & effect of exemption notification issued u/s. 24AA of the Surtax Act.

Facts

1. ONGC has been assessed as a representative assessee as per section 160A of Income-tax Act, 1961. ONGC had executed agreements with different foreign companies for services or facilities or for supply of ship, aircraft, machinery and plant, all of which were to be used in connection with the prospecting or extraction or production of mineral oils. The assessees were non-residents executing contract with the ONGC. The ONGC has borne the tax liability on behalf of the non-residents including the surtax also. After completing the assessment of the income-tax under section 44BB of the Income-tax Act, the assessing authority proceeded to assess the surtax under the provisions of the Act and notice was issued to the assessee – ONGC. The assessee filed its written submission claiming exemption of surtax relying on Notification No. GSR 307(E), dated 31-3-1983 and pleaded that the surtax was not leviable on the assessee–foreign company. After scrutinising the contents of contract between the foreign company and the ONGC, the assessing authority recorded a finding of fact that all the contracts were service contracts. The assessee had not challenged that it was not a service contract and it was a works contract, i.e., association or participation in any business consisting of the prospecting for or extraction or production of mineral oils. Accordingly, the assessing authority came to the conclusion that the Notification dated 31-3-1983, was not applicable in the case of the assessee and, therefore, the assessee was not exempted by virtue of the said Notification.
2. CIT(A) reversed the order of assessing authority and the said order was upheld by ITAT. However, High Court reversed ITAT's order.

Supreme Court held as under

1. Section 24-AA of the Surtax Act vests power in Central Government, *inter alia*, to grant exemption to any class of foreign companies. Sub-section (2) refers to two categories of foreign companies. First is foreign companies with whom agreements have been executed by the Central Government for association or participation, including participation by any authorised person, in the prospecting or extraction or production of mineral oils; second being foreign companies who are providing support services or facilities or making available plant and machinery in connection with the business of prospecting or extraction or production of mineral oil in which the Central Government or an authorised person is associated.
2. There is nothing in the provisions of the Act which could have debarred the Central Government from granting exemptions to both categories of foreign

companies mentioned above or to confine the grant of exemption to any one or a specified category of foreign companies. Reading the Notification No.GSR 307(E) dated 31-3-1983 it clearly appears that the exemption has been granted only to first categories i.e. foreign companies with whom the Central Government had executed agreements for direct association or participation by the Central Government or the persons authorised by it (ONGC) in the prospecting or extraction or production of mineral oils.

3. Exemption notification confines or restricts the scope of the exemption to only one category of foreign companies which has been specifically enumerated in sub-section 2(a) of section 24-AA of the Surtax Act and second category of foreign companies that maybe providing services as enumerated in sub-section 2(b) of section 24-AA is specifically omitted in the exemption notification.

4. The omission of this particular category of foreign companies in the exemption notification, notwithstanding the wide amplitude and availability of the power under section 24-AA, clearly reflects a conscious decision on the part of the Central Government to confine the scope of the exemption notification to only those foreign companies that are enumerated in and covered by sub-section 2(a) of section 24-AA of the Surtax Act.

5. The explanatory notes on the provisions of Finance Act shows that the legislative intent behind inclusion of section 24-AA is to encourage foreign companies to enter into participating contracts with the Union Government in the business of oil exploration or production. Further, legislative intent was to seek greater participation of foreign companies in the matter of providing services including supply of ships, aircraft, machinery or plant in connection with business of extraction or production of mineral oils.

6. The foresaid legislative intent which is two-fold is manifested by the two limbs of sub-section 2 of section 24AA of the Surtax Act to which the power of exemption was intended to operate i.e. sub-sections 2(a) and 2(b) of section 24AA. If out of the two limbs where the power of exemption was intended to operate, the repository of the power i.e. Central Government, had consciously chosen to grant exemption in one particular field i.e. foreign companies covered by sub-section 2(a) of section 24-AA, the scope of the grant cannot be enhanced or expanded by a judicial pronouncement.

Conclusion

The Court followed the principle of literal interpretation which means that the statute should be read as it is, without distorting or twisting its language; judicial pronouncements cannot override the intention of the provisions of law. In *ACIT vs. Saurashtra Kutch Stock Exchange Ltd. (2008) 305 ITR 227 (SC)* principle was laid down that the Judges do not make law; they only discover or find the correct law. The law has always been the same. If a subsequent decision alters the earlier one, it (the later decision) does not make a new law. It only discovers the correct principle of law which has to be applied retrospectively. To put it differently, even where an earlier decision of the Court operated for quite sometime, the decision rendered later on would have retrospective effect, clarifying the legal position which was earlier not correctly understood.

Admissibility of an Evidence Shamsher Singh Verma vs. State of Haryana (Criminal Appeal No. 1525 of 2015) (SC)

As per section 294 of Criminal Procedure Code, where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused shall be called upon to admit or deny the genuineness of each such document. Further, sub-section (3) provides that where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry trial or other proceeding.

Supreme Court in the said case has dealt with the issue of whether the accused person has been denied the right to defence.

Facts

1. A report was lodged against the appellant (accused) on 25-10-2013 registered as FIR No. 232 in respect of offence punishable under section 354 of the Indian Penal Code (IPC) and Protection of Children from Sexual Offences Act, 2012 (POCSO) in which complainant alleged that his minor niece was molested by the appellant.

2. After investigation, a charge sheet is filed against the appellant was registered, on the basis of which Sessions case. Charge was framed in respect of offences punishable under Sections 354A and 376 IPC and also in respect of offence punishable under sections 4/12 of POCSO.

3. Prosecution witnesses had been examined in said case, whereafter statement of the accused was recorded under section 313 of the Code of Criminal Procedure, 1973.

4. In defence the accused has examined four witnesses, and an application purported to have been moved under section 294 CrPC filed before the trial court with prayer that the voice of Sandeep Verma (father of the victim) may kindly be ordered to be taken by the experts at Forensic Science Laboratory to be further got matched with the recorded voice. It was further alleged that there is recording of conversation between Sandeep Verma (father of the victim) and Saurabh (son of the accused) and Meena Kumari (wife of the accused).

5. Application was opposed by the prosecution. Trial court rejected the said application. Further, Trial Court's order was affirmed by High Court.

Supreme Court held that

1. The object of section 294 of CrPC is to accelerate pace of trial by avoiding the time being wasted by the parties in recording the unnecessary evidence. Where genuineness of any document is admitted, or its formal proof is dispensed with, the same may be read in evidence.

2. The Court relied on earlier decision, i.e. *R.M. Malkhani vs. State of Maharashtra (1973) 1 SCC 471* which held that a tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue; secondly, there is identification of the voice; and, thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the

tape record. The Court further relied on *Ziyauddin Barhanuddin Bukhari vs. Brijmohan Ramdass Mehra and Others (1976) 2 SCC 17* which held that tape-records of speeches were 'documents', as defined by section 3 of the Evidence Act, which stood on no different footing than photographs and they were admissible in evidence on satisfying the following conditions

a. The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who know it.

b. Accuracy of what was actually recorded had to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, had to be there so as to rule out possibilities of tampering with the record.

c. The subject matter recorded had to be shown to be relevant according to rules of relevancy found in the Evidence Act.

The Court thus held that considering definition of 'document' in Evidence Act and the law laid down by Court in above decisions, it held that compact disc is a document.

3. Endorsement of admission or denial made by the counsel for defence, on the document filed by the prosecution or on the application/report with which same is filed, is sufficient compliance of section 294 of CrPC. On a document filed by the defence, endorsement of admission or denial by the public prosecutor is sufficient and defence will have to prove the document if not admitted by the prosecution. In case it is admitted, it need not be formally proved, and can be read in evidence. In a complaint case such an endorsement can be made by the counsel for the complainant in respect of document filed by the defence.

4. All the prosecution witnesses appears to have been discharged by the prosecution, and the evidence was closed. It is evident that in reply to second last question, the accused has alleged that he has been implicated due to property dispute.

5. Courts below have erred in law in not allowing the application of the defence to get played the compact disc relating to conversation between father of the victim and son and wife of the appellant regarding alleged property dispute.

6. Courts below have erred in law in rejecting the application to play the compact disc in question to enable the public prosecutor to admit or deny, and to get it sent to the Forensic Science Laboratory, by the defence.

7. Appellant is in jail and there appears to be no intention on his part to unnecessarily linger the trial, particularly when the prosecution witnesses have been examined.

Conclusion

In the above case, the Supreme Court has held that compact disc is document under the Evidence act, and further concluded appellant ought to have been granted an opportunity to produce the evidences. We have seen rise of technology in various form of including mobile recordings, CCTV cameras, etc. Relying on the above decision, one many argue that such recordings may be used even in Income tax proceedings.

Validity of Retrospective Amendment Asst. Commissioner of Agricultural IT vs. Netley 'B' Estate & Ors. (2015) 372 ITR 590 (SC)

Section 26(4) of Karnataka Agricultural Income Tax Act has been amended retrospectively from 1-4-1975 wherein applicability of such section is extended to companies & associations of persons and also section is made applicable to an entity on account of dissolution. Further as per the newly inserted explanation, if any income is not received before dissolution then that income will be deemed to be the income in the year of its receipt and firm shall be deemed to be in existence for that year for the purpose of assessment.

Supreme Court in the present case has dealt with the validity of the amendment inserted retrospectively to section 26(4) of Karnataka Agricultural Income-tax Act.

Facts

1. In the relevant case, issue pertains to taxability of agricultural income received by a firm after its dissolution though such income is earned prior to dissolution.

2. Reference was drawn to *L. P. Cardoza and Others v. Agricultural Income Tax Officer and Others [(1997) 227 ITR 421] [Kar. HC].* The question involved before the High Court was as to whether a dissolved firm could be assessed to agricultural income tax after the date of its dissolution in respect of income received from supply of goods made by the firm prior to its dissolution. This question arose in the light of section 26(4) and section 27 as they then stood in 1987. The High Court held that there was nothing in section 26(4) and section 27 to tax income of a firm which is dissolved and for which income is received post dissolution.

3. Subsequently, law was amended retrospectively to supercede the judgment of L. P. Cardoza.

4. The amendment was challenged before Single Judge of the High Court, who held that explanation only clarified the main provision and therefore did not go beyond the main provision.

5. On further appeal, Division Bench held following the judgment in *D. Cawasji and Co., Mysore vs. State of Mysore and Another [1984 (Supp) SCC 490],* that the amending Act of 1997 suffered from the vice that was found in Cawasji's case, and it interfered directly with the judgment of a High Court and would therefore, have to be struck down as unconstitutional for the reason in the statement of objects and reasons for the 1997 amendment, it was held that the object of the amendment was to undo the judgment of the High Court of Karnataka in Cardoza's case.

Supreme Court held that

1. Reading pre-amended section 26(4) along with section 27, made it clear that any sum received after discontinuance of business by a firm is deemed to be the income of the recipient and charged to tax accordingly, if such sum would have been included in the total income of the person who carried on the business had such sum been received before such discontinuance. Section 27 went one step further and also spoke of income of a firm which is dissolved as opposed to a firm whose business had been discontinued. With respect to such income, every person who was, at the

time of discontinuance or dissolution, a partner of such firm was liable to be jointly or severally assessed on such agricultural income as also to pay the same by way of tax, penalty, etc

2. In the amended section 26(4), two changes are made. Whereas in the original provision, no express reference was made to companies or associations of persons, and no reference whatsoever was made to a dissolved firm, both now been added. By the explanation, which is for the removal of doubts, the legislature declares that where before dissolution of a firm, full payment is not received in respect of income that has been earned pre-dissolution, then notwithstanding such dissolution, the said income will be deemed to be the income of the firm in the year in which it is received or receivable and the firm shall be deemed to be in existence for such year for the purposes of assessment. It will be noticed that by this amendment, the basis of the law as it stood when L. P. Cardoza's case (supra) was decided has been changed

3. D. Cawasji's case (supra) was distinguished on basis that the legislature has intended that with effect from 1-4-1975, dissolved firms will by legal fiction will continue to be assessed, for the purposes of levy and collection of agricultural income tax, insofar as they receive income post dissolution but relating to transactions pre-dissolution.

4. The question which fell for decision in Cawasji's case was a retrospective amendment made to the Mysore Sales Tax Act, 1957, in which sales tax was retrospectively raised from 6½ per cent to 45 per cent. The Government was collecting it on the entire sale price of arrack. However, in a batch of writ petitions filed by the licensees, the Karnataka High Court held that the levy of sales tax on excise duty and cesses component of the sale price was incompetent. In other words, it was held that sales tax can be levied only on the price proper but not upon excise duty and cesses which form part of the sale price. With a view to nullify claims for refund, the Karnataka Legislature intervened and amended the Mysore Sales Tax Act with retrospective effect. The amending Act enhanced the rate of tax from 6½% to 45% which meant that the Government need not refund any amount to the licensees pursuant to the aforesaid judgment of the High Court. The Amendment Act was questioned in the High Court but was upheld. On Appeal, the Supreme Court held that the Amendment Act was unconstitutional. On a close reading of the judgment, it is clear that the main ground on which the Act was held to be incompetent was that raising the rate of tax from 6½% to 45% with retrospective effect was "clearly arbitrary and unreasonable" and, therefore, violative of Articles 14 and 19. It was observed that instead of removing the defect/lacuna pointed out by the High Court, the legislature sought to raise the rate of tax steeply with retrospective effect and that it was bad. The judgment cannot be read as laying down that in no event can the legislature seek to render the judgment of the Court ineffective and inoperative by amending or rectifying the defect or the lacuna pointed out, on the basis of which the judgment was rendered.

5. In the present case the legislature has not sought to directly nullify the judgment in Cardoza's case. Legal foundation on which the Cardoza's case was built is retrospectively removed and is within the legislative competence of the legislature.

Judicial decision in Cardoza's case has been rendered ineffective by enacting a valid law on a topic within the legislative field which fundamentally alters or changes the character of legislation retrospectively. Altered conditions are such that the previous decision would not have been rendered by the court if those conditions had existed at the time of declaring the law as invalid. Legislature has not directly overruled the decision of any court but has only rendered decision ineffective by removing the basis on which the decision was arrived at.

1. It was then contended based on *Tata Motors Ltd. vs. State of Maharashtra and Others [(2004) 5 SCC 783]* from para 12 thereof, that withdrawal with retrospective effect of relief properly granted by statute to an assessee which the assessee has lawfully enjoyed as a vested statutory right cannot be taken away unless there be strong and exceptional circumstances justifying the said withdrawal. The Supreme Court held that there is no withdrawal of any right which has become a vested statutory right and which deprives an assessee of anything. What was taxable in the hands of a recipient assessee is now taxable in the hands of a dissolved firm post dissolution only for certain purposes.

6. It was further contended based on *Hardev Motor Transport vs. State of M. P. and Others [(2006) 8 SCC 613]* that by inserting an explanation in a statute, the main provision of the Act cannot be defeated or enlarged. To this, the Supreme Court held that both the main provision, i.e. section 26(4), as well as Explanation were added retrospectively. The main provision has been expanded to include dissolved firms and the explanation creates a legal fiction in furtherance of the main provision by deeming a dissolved firm to be in existence as an assessee for certain purposes.

Conclusion

In exercising legislative power, the legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decision ineffective by enacting valid law on the topic within its legislative field fundamentally altering or changing its character retrospectively. The changed or altered conditions should be such that the previous decision would not have been rendered by the court, if those conditions had existed at the time of declaring the law as invalid. On the other hand courts needs to carefully scan the law to find out;

(a) Whether the view pointed out by the court and invalidity suffered by previous law is cured complying with the legal and constitutional requirements;

(b) Whether the legislature has competence to validate the law;

(c) Whether such validation is consistent with the rights guaranteed in Part III of the Constitution.

The consistent thread that runs through all the decisions is that the legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the legislature must have competence to do the same.

Sameer Dalal, *Advocate*

Precedence Value of Special Leave Petition Dismissed

Article 136 of the Constitution of India ('the Constitution') enables the Supreme Court of India to exercise in its discretion appellate powers by granting special leave from any judgment, decree or order in any cause or matter passed or made by any Court or Tribunal in the territory of India, save Military Tribunals. This power of the Supreme Court is its discretionary power. Here it is pertinent to mention that Article 136 of the Constitution does on confer a right of appeal upon the party, it vests discretion in the Supreme Court to grant special leave to appeal. This power of the Supreme Court is discretionary and very wide but, the Supreme Court has itself imposed certain limitations on its power and has held that it is to be exercised in special and exceptional cases, viz, breach of the principles of natural justice or serious miscarriage of justice – *Sharad vs. State of Maharashtra [AIR 1884 SC 1622].* Even though a petition for grant of special leave to appeal is filed, the judgment / order of the lower court against which leave to appeal has been sought continues to be the final, effective and binding order between the parties.

While hearing the petition for grant of special leave to appeal the Supreme Court does not exercise its appellate jurisdiction it merely exercises its discretionary jurisdiction to grant or not to grant leave to appeal. In other words, while hearing the petition for special leave to appeal, the Supreme Court is called upon to see whether the petitioner should be granted such leave or not.

The jurisdiction conferred by Article 136 of the Constitution can be divided into two (2) stages:

A. Up to the disposal of the prayer for grant of special leave to appeal

If petition seeking grant of special leave is dismissed, it is an expression of opinion by the Supreme Court that a case for invoking appellate jurisdiction of the Court was not made out.

An order refusing special leave to appeal may be by (a) non-speaking order or (b) speaking order. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in the place of the order under challenge. In *Nallannal vs. State - [AIR 1999 SC 2556]* the Supreme Court has made it clear that the dismissal of Special Leave Petition does not amount to upholding of law propounded by the High Court in the decision challenged. In other words an order refusing to grant leave to appeal merely means that Supreme Court was not inclined to exercise its discretion so as to allow the appeal being filed.

If the Supreme Court dismisses a Special Leave Petition by a non-speaking order that is, it does not assign any reason for dismissing the special leave petition, it would neither attract the doctrine of merger nor be a declaration of law by the Supreme Court under Article 141 of the Constitution, as there is no law declared by it.

Even if the Supreme Court applies its mind to the merits of the petitioners prayer for seeking

leave to appeal and then says 'dismissed on merits', then such an order of dismissal would still remain a dismissal by a non-speaking order as no reasons are assigned and no law is declared by the Supreme Court. In this case even if the merits are gone through by the Supreme Court they are on the merits of Special Leave Petition only.

Further, even, if the order dismisses the Special Leave Petition by a speaking order that is, it gives reasons for refusing to grant leave to appeal, then also the doctrine of merger would not be attracted because the jurisdiction exercised is not an appellate jurisdiction but merely a discretionary jurisdiction refusing to grant leave to appeal. However, the reasons stated by the Court would attract applicability of Article 141, if there is a law declared by the Supreme Court which obviously would be binding on all the Courts and Tribunals in India and certainly the parties litigating before it.

A useful reference may be made to a case decided by the Madras High Court in the case of, *CIT vs. Nexus Computer Pvt. Ltd. – [(2009) 313 ITR 144 (Mad.)]* where following observations were made by the High Court at paragraph 7 of the judgment, "Admittedly the decision in Vinay Cement Ltd.'s case (supra),which has been extracted above, is a speaking order passed by the Supreme Court by giving reasons for rejecting the Special Leave Petition. The reasoning given in the dismissal of the special leave petition in the decision of Vinay Cement Ltd.'s case (supra) would bind this Court, as law declared by the Apex Court under Article 141 of the Constitution."

B. When the leave to appeal is granted and petition of special leave converted in to an appeal

Once leave to appeal is granted, the finality of the judgment or order appealed against is put in jeopardy though it continues to be binding and effective between the parties. However, it must be remembered that where merely a leave is granted to the petitioner, the doctrine of merger does not apply, unless the order of the lower Court is held to be a nullity or the order is stayed or suspended by the Supreme Court. In other words, once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of the Supreme Court open up.

The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter, would be an appellate order and would attract the applicability of the doctrine of merger. It would not make any difference if the order of the Supreme Court is a speaking or non-speaking one.

The Bombay High Court in the case of, *Snowcem India Ltd. vs. Dy. CIT – [(2009) 313 ITR 170 (Bom.)]* held that if the Special Leave Petition is only dismissed then there would be no merger of the judgment of the High Court and that the Supreme Court as the Supreme Court had merely refused to grant Special leave to Appeal and, consequently, it was not an order of affirmation. However, where the order passed by the Supreme Court is, 'The Appeals are dismissed' then, it can be said that the judgment of the High Court has been affirmed by the Supreme Court. This would not be the case of only Special Leave Petitions being dismissed. Thus in such circumstance it would be the said that the Supreme Court chose not to interfere with the judgment of the High Court and in such an event the doctrine of merger would not apply.

The Supreme Court in, *Vs.M. Salgoaokar vs. CIT – [(2000) 243 ITR 383 (SC)]* held as under:

'Different considerations apply when a Special Leave Petition under Article 136 of the Constitution is simply dismissed by saying 'dismissed' and an appeal provided under Article 133 is dismissed also with the words 'the appeal is dismissed'. In the former case, it has been laid down by the Supreme Court that when Special Leave Petition is dismissed, it does

not comment on the correctness or otherwise of the order from which leave to appeal is sought. But, what the Court means is that it does not consider it to be a fit case for exercise of its jurisdiction under Article 136 of the Constitution. That certainly could not be so when appeal is dismissed though by a non-speaking order. Here the doctrine of merger applies. In that case, the Supreme Court upheld the decision of the High Court or of the Tribunal from which the appeal is provided under clause (3) of Article 133. This doctrine of merger does not apply in the case of dismissal of Special Leave Petition under Article 136. When appeal is dismissed, the order of the High Courts is merged with that of the Supreme Court'.

Leading case on the subject of result of dismissal of Special Leave Petition is the case of, Kunhayammed (Supra) where the Supreme Court held that where Supreme Court dismisses a Special Leave Petition against a High Court order by passing a non-speaking order, Supreme Court does so in its discretionary jurisdiction and not appellate jurisdiction and in such a case, there is no merger of High Court's order in question with Supreme Court's order dismissing Special Leave Petition.

Can rejection of a petition for special leave to appeal to Supreme Court, take away the jurisdiction of the Court whose order was challenged before the Supreme Court under Article 136 of the Constitution:

A mere rejection of a petition for special leave to appeal to Supreme Court does not take away the jurisdiction of the Court, whose order forms the subject–matter of a petition for special leave, to review its own order if the ground for exercise of the review jurisdiction exist. Supreme Court in, *Kunhayammed vs. State of Kerala – [(2000) 245 ITR 360 (SC)]* held that after dismissal of Special Leave Petition by Supreme Court by non-speaking order, petition by the aggrieved party to High Court to review its own order as per statutory provisions would be maintainable and the same cannot be faulted on the ground of merger of High Court's order with Supreme Court's order as the special leave petition was dismissed, as in law, no such merger.

The decision of Kunhayammed (Supra) was followed by the Calcutta High Court in the case of, *Sanjay Kumar Jain vs. CIT – [(2002) 254 ITR 38 (Cal.)]* The Calcutta High held that, rejection of Special Leave Petition without reasons does not bar the lower Court to exercise its powers of review in order if there is apparent mistake, that can be corrected.

Conclusion

- Where the Supreme Court merely refuses to grant special leave to appeal against the judgment / order it does not mean that the Supreme Court has accepted the correctness of the decision of the lower Court;
- Where the Supreme Court refuses to grant special leave to appeal against the judgment / order then also the doctrine of merger would not be attracted because the jurisdiction exercised is not an appellate jurisdiction but merely a discretionary jurisdiction However, the reasons stated by the Court would attract applicability of Article 141 of the Constitution.
- The High Court judgment doesn't lose it binding effect even if special leave to appeal is granted against its order and the appeal is pending before the Supreme Court.
- After granting leave to appeal even if the appeal is dismissed by a non-speaking order the doctrine of merger applies and it can be said that the Supreme Court has upheld the decision of the Court from which the appeal arose / was filed before it.

LIST OF FEW SLPS DISMISSED BY SUPREME COURT (FROM 1ST APRIL, 2014 TILL 30TH NOVEMBER, 2015)

Sr. No.	Decision	SC – Citation	Sections	HC Ruling	HC – Citation
1	Adobe Systems Software Ireland Ltd vs. ADIT(IT)	SLP (Civil) No. 22154/2014	148	Existence of PE of petitioner i.e. non-resident company was in dispute.Petitioner had not filed return in response to notice issued under section 148.High Court held that non filing of return was not in accordance with law and hence, writ petition to quash reassessment proceedings was dismissed.	(2014) 363 ITR 174 (Del HC)
2	Arvind Footwear Pvt Ltd vs. CIT	SLP (Civil) No. 10365/2014	80IB	Duty drawback would not qualify for a deduction under Section 80 IB since this was not a profit derived from the industrial undertaking.	ITA No. 14 of 2014 (All HC)
3	CIT vs. Avadh Transformers Pvt Ltd	SLP (Civil) No. 21477/2013	148,80IA	Reassessment was initiated to disallow deduction u/s 80IA in view of retrospective amendment. Writ to quash reassessment proceedings was allowed.	(2013) 215 Taxmann 432 (All HC)
4	Centrica India Offshore (P) Ltd vs. CIT	(2014) 227 Taxmann 368 (SC)	9, Article 12 & 13 of India-Canada and India-UK DTAA	Court held that 'secondment agreement' entered into by assessee with overseas companies, employees of those companies used their technical knowledge and skills while assisting assessee in conducting its business of quality control and management. Thus, amounts reimbursed by assessee to overseas companies towards salaries of seconded employees amounted to 'fee for technical services' liable to tax in India.	(2014) 364 ITR 336 (Del HC)
5	CIT vs. Chittorgarh Kendriya Sah. Bank Ltd.	SLP (Civil) No. 8127/2014	271(1)(c), 80P	Where assessee, a co-operative society engaged in business of banking, claimed deduction under section 80P(2) and Assessing Officer disallowed claim of deduction and also levied penalty under section 271(1)(c) upon assessee on plea that it had intentionally claimed inadmissible deduction to reduce taxable income, since claim for deduction had been a matter of bona fide mistake, levy of penalty was not justified	(2014) 41 Taxmann.com 11 (Raj HC)
6	CIT vs. Cray Research India (P) Ltd	SLP (Civil) No. 22031/2013	148	Where only activity undertaken by assessee in India related to maintenance and service of a super computer, which was sold by assessee to Government of India and nature and character of maintenance and service charges received by assessee from Government were within knowledge of Assessing Officer, assessment could not be reopened merely on ground that agreement entered into between assessee and Government was not filed before Assessing Officer	(2012) 343 ITR 212 (Del HC)

Sr. No.	Decision	SC – Citation	Sections	HC Ruling	HC – Citation
7	ITO vs. Deccan Digital Networks Pvt Ltd	(2015) 234 Taxmann 768 (SC)	148,149	Where pre-condition for issuance a notice u/s 148 read with Section 149(1)(c) was not satisfied, then, there was a complete bar to the issuance of such a notice beyond the period of four years.	(2015) 274 CTR 202 (Del HC)
8	CIT vs. Deepak Gupta	SLP (Civil) No. 5100/2014	127	Where the reasons given by AO, towards deciding objections made by assessee, against transfer of jurisdiction were not sufficient, the ITAT was justified in quashing the order u/s 127 on grounds of non-opportunity.	ITA No. 128/2013 (All HC)
9	CIT vs. Devasan Investment Pvt Ltd	[2015] 229 Taxmann 496 (SC)	28,45	Where investment in shares was made with an objective of capital appreciation, there was infrequent-handful of transactions and dividend was also earned. Also, assessee kept a 'target' price for shares before it and as long as such target was not achieved, assessee held shares. However, in few transactions, such target had been achieved within one or two months. However, profit from sale/ purchase of shares was treated as capital gain and not business income.	2014] 365 ITR 452 (Del HC)
10	CIT vs. Durr India Pvt Ltd	SLP (Civil) No. 7958/2014	271(1)(c)	Where contract entered into between assessee and other contracting party provided a clause for liquidated damages from assessee in case of delay in executing work, concealment penalty could not be imposed merely because assessee made a provision for same and claimed it as deduction but no such claim was raised by other party. Assessee's claim for deduction could not be stated to be lacking in bona fides or with mala fide intention.	[2014] 41 Taxmann.com 134 (Mad HC)
11	CIT vs. Enam Securites Pvt. Ltd.	SLP (Civil) No. 38542/2012	48	At time of redemption of redeemable preference shares, assessee would be entitled to benefit of indexation under section 48.	(2012) 354 ITR 64 (Bom HC)
12	Fiitjee Ltd vs. DGIT(IT)	SLP (Civil) No. 17185/2014	132	Issuance of warrant u/s 132 was preceded by detailed scrutiny of materials including the materials pertaining to the petitioner. The enquiry also comprehended certain field visits. HC noted that from the records produced the ultimate decision to issue warrants was taken and cleared at different levels of the Income Tax Department. Hence, writ petition to quash warrant u/s 132 dismissed.	W.P.(C) 238/2014 (Del HC)
13	CIT vs. Finolex Cable Ltd	SLP (Civil) No. 22370/2012	80IB	Where new unit set up during year was a separate identifiable unit, deduction under section 80-IB would be allowable in respect of said unit	(2012) 209 Taxmann 79 (BomHC)

Sr. No.	Decision	SC – Citation	Sections	HC Ruling	HC – Citation
14	CCIT vs. Geetanjali University Trust	SLP (Civil) No. 21035/2013	10(23C)	Assessee-trust was established for educational purpose. It filed an application seeking exemption of its income under section 10(23C)(vi). Commissioner noticed that High Court had passed an order in assessee's case that admissions to medical course had not been made on basis of system approved by Medical Council of India and, thus, those admissions were illegal, and thus Commissioner rejected the application. Court held that though requirement of assessee-institution to provide admissions strictly in accordance with prescribed rules, regulations and statute could not be less emphasized, but still said violation could not lead to its loosing character as an entity existing solely for purpose of education	(2013) 352 ITR 433 (Raj HC)
15	Gulshan Malik vs. CIT	SLP (Civil) No. 30670/2014	2(42A)	In terms of section 2(42A), period of 36 months in respect of booking rights of an apartment with a builder has to be counted from date of execution of agreement to sell, i.e., buyer's agreement and not the date of allotment	(2014) 223 Taxmann 243 (Del HC)
16	CIT vs. Happy Home Enterprises	SLP (Civil) No. 3634/2015	80IB	Amendment to section 80-IB(10) putting restriction on commercial area was prospective in nature and would not apply to housing projects approved prior to 31-3-2005	(2015) 372 ITR 1 (Bom HC)
17	Haryana State Small Industries & Export Corp Ltd vs. CIT	SLP (Civil) No. 3634/2015	57(iii)	There is nothing to show that the expenses claimed as deduction u/s 57(iii) were incurred for earning interest income. As it was not established that expenses sought to be deducted were to facilitate the earning of the interest income and hence it cannot be claimed u/s 57(iii).	ITA No. 90 of 2013 (P&H HC)
18	CIT vs. Industrial Financial Corporation	SLP (Civil) No. 17440/2012	281	Charge created by assessee in favour of financial institution by equitable mortgage of immovable property in question was for valuable consideration and without notice of proceedings for recovery of income-tax dues against assessee, such mortgage was saved by proviso to section 281(1)	(2012) 346 ITR 11 (Guj HC)
19	Kamal Kant Jain vs. CIT	SLP (Civil) No. 8059/2015	271(1)(c)	Assessee received gifts from NRI's and stated that same was received due to his financial difficulty which was found to be incorrect and further, assessee could not provide details of thedonees, penalty levied under section 271(1)(c) was justified	(2014) 51 Taxmann.com 210 (P&H HC)

Sr. No.	Decision	SC – Citation	Sections	HC Ruling	HC – Citation
20	CIT vs. Karnataka Soaps and Detergents Ltd	SLP (Civil) No. 19860/2015	115JA	Merely because in profit and loss account entire expenditure was not deducted and in balance-sheet a portion of it was shown as deferred expenditure, assessee could not be denied benefit of actual expenditure while computing book profit under section 115JA	(2015) 59 Taxmann.com 43 (Kar HC)
21	Keyaram Hotels (P) Ltd vs. DCIT	(2015) 63 Taxmannn. com 301 (SC)	22,28	Where assessee was not engaged in any business activity, rental income earned from letting out commercial complex would be assessed as income from house property and not as business income	(2015) 373 ITR 494 (Mad HC)
22	Kingfisher Airlines Ltd vs. CIT	SLP (Civil) No. 2402-2407/2015	201	Where assessee-company having deducted tax at source from salaries paid to employees, did not deposit with Central Government within prescribed time, Assessing Officer was justified in holding assessee to be assessee-in-default under section 201. Further, In terms of section 201, it is assessing authority who is competent person to pass an order holding an assessee to be 'assessee-in-default' and not Director General (Systems)	(2014) 49 Taxmann.com 49 (KarHC)
23	Kiran Devi vs. CIT	SLP (Civil) No. 5506/2014	271(1)(c), 153C	Pursuant to a search conducted at premises of one 'K' documents pertaining to assessees were found and seized. Assessing Officer issued notice under section 153C to assessee. On receipt of these notices, assessees filed returns for block period. In these returns, they disclosed substantially higher income adding other sources, i.e. rent from house property and income from other sources. Assessing Officer therefore, held that this action of assessee amounted to concealment of income on part of assessees and accordingly, levied penalty under section 271(1)(c). Conduct of assessees in filing returns without full particulars fell within mischief of section 271(1)(c) and they would also not be entitled to claim benefit of exception, carved out in Explanation 5 to section 271(1)(c)	(2013) 212 Taxmann 68 (Del HC)
24	CIT (Exemp) vs. KSRTC Employees Death-Cum-Retirement Benefit Fund	SLP (Civil) No. 7687/2014	11	Where Employees Welfare Fund was approved by Commissioner, only income portion from investment made in violation of section 11(5) and not whole of investment, would be liable to tax	(2014) 225 Taxmann 113 (Kar HC)

Sr. No.	Decision	SC – Citation	Sections	HC Ruling	HC – Citation
25	M J Siwani vs. CIT	(2015) 232 Taxmann 335 (SC)	54F	In terms of provisions of section 54F, where assessee on date of sale of long term capital asset owns a residential house even jointly with another person, his claim for deduction of capital gain arising from sale of asset has to be rejected	(2014) 366 ITR 356 (Kar HC)
26	Manoj Kumar Samdaria vs. CIT	(2015) 232 Taxmann 335 (SC)	28,45	Where assessee was selling shares very frequently, volume and magnitude was very high and he earned only a meagre amount of dividend, income arising from sale of shares was assessable as business income	(2014) 223 Taxmann 245 (Del HC)
27	CIT vs. MWP Ltd	SLP (Civil) No. 7485/2014	271(1)(c)	Mere mention of 'Penalty proceedings under section 271(1)(c) initiated separately' in assessment order, does not amount to a direction under section 271(1)(c) for levy of penalty	(2014) 264 CTR 502 (Kar HC)
28	CIT vs. New Ambadi Estates Pvt Ltd	SLP (Civil) No. 7798/2014	43(5)	Transaction relating to non-convertible security debentures would not fall under definition of "speculative transaction" under s 43(5) and loss incurred in sale of partly convertible debenture is capital loss.	TC 1031-1032/2004 (Mad HC)
29	CIT vs. Nirma Credit & Capital Ltd	SLP (Civil) No. 14009/2015	32AB	Deduction u/s 32AB allowed on investment account withdrawn by assessee for repaying loans. The provisionof law should be interpreted in such a way that it encourages the growth of industry as envisaged in long term financial policy.	Tax Appeal No. 480 of 2006 (Guj HC)
30	Overseas Trading & Shipping Co Pvt Ltd vs. ACIT	[2014] 227 Taxmann 370 (SC)	37	Assessee is engaged in trading of various goods in international market, entered into a contract with a foreign company for import of furnace oil. As it had no licence to legally import furnace oil as per Solvent, Raffinate& Slop [Acquisition, Sale, Storage & Prevention of Use in Automobiles] Order, 2000, it approached its sister concern, who had said license, to undertake and perform contractual obligations arising from said contract against payment of consideration. Assessee claimed said payment as commission. High Court held that though assessee got contract executed through its sister concern, but subsequent purchases from sister concern of very furnace oil, its storage and consequent sale were in complete breach of Solvent, Raffinate& Slop [Acquisition, Safe, Storage & Prevention of Use in Automobiles] Order, 2000, thus, any deduction under section 37(1) could not be allowed to assessee for said payment	[2014] 366 ITR 311 (Guj HC)

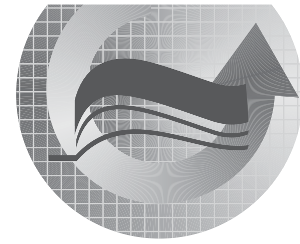
Sr. No.	Decision	SC – Citation	Sections	HC Ruling	HC – Citation
31	ACIT vs. Pradyot K Mishra	SLP (Civil) No. 18318/2014	148	In the reassessment proceedings, AO passed an order accepting assessee's objection that there was no evidence to connect him with certain properties allegedly acquired out of undisclosed income. He dropped reassessment proceedings. Subsequently, a letter was issued by the AO calling upon assessee to avail of opportunity to cross examine complainant i.e. person, who was author of tax evasion petition. High Court allowed the writ petition and quashed the letter for cross examination.	[2014] 362 ITR 24 (Del HC)
32	CIT vs. S. Goyanka Lime & Chemical Ltd	[2015] 64 Taxmannn. com 313 (SC)	148	Where Joint Commissioner recorded satisfaction in mechanical manner and without application of mind to accord sanction for issuing notice under section 148, reopening of assessment was invalid	[2015] 231 Taxmann 73 (MP HC)
33	CIT vs. Sandvik Chokshi Ltd.	SLP (Civil) No. 6155/2015	43	Explanation 3 to section 43 can be invoked if Assessing Officer is satisfied that main purpose of transfer of assets, directly or indirectly to assessee, was reduction of liability of income-tax by claiming depreciation with reference to an enhanced cost. Further, In view of introduction of Explanation 8 to section 43(1)which is retrospective in nature, interest could not be capitalized which was paid after slump sale was effected and factory was in operation and, therefore, such expenses were revenue in nature	[2015] 230 Taxmann 319 (Guj HC)
34	Sanghamitra Bharali vs. CIT	SLP (Civil) No. 6058/2014	45	Purchase of shares being unverifiable and company being untraceable, modus operandi of activities was to be held to be conversion of undisclosed income into LTCG	[2014] 361 ITR 481 (Gau HC)
35	CIT vs. Sapthagiri Distilleries Ltd	[2015] 229 Taxmann 487 (SC)	28	Prior to insertion of clause (va) of section 28, compensation amount received towards loss of source of income and non-competition fee could only be treated as capital receipt and was not liable to tax	[2014] 366 ITR 270 (Kar HC)
36	Shahrooq Ali Khan vs. CIT	SLP (Civil) No. 31860/2014	28,45	Where assessee entered into a memorandum of understanding with owner of property for a consideration, to identify buyers of property, and he had no intention to acquire capital asset in lieu of transfer and only facilitated transfer of capital asset from owner to purchaser and made profits, such profits would be assessible as business income and not capital gains	[2015] 370 ITR 246 (Kar HC)

Sr. No.	Decision	SC – Citation	Sections	HC Ruling	HC – Citation
37	Skyline Advertising Pvt Ltd vs. CIT	SLP (Civil) No. 14701-14703/2014	80IA	Where assessee had developed existing road median, erected bus-shelters and light poles for its advertisement business, activities indulged by assessee-company were part of its normal activities of advertising and publicity rather than one of infrastructure development and therefore, was not eligible for deduction under section 80-IA(4)	[2014] 269 CTR 289 (Kar HC)
38	Union of India vs. Star Television News Ltd	[2015] 373 ITR 528 (SC)	245D	Two provisions, read in a harmonious manner, would mean that Settlement Commission must fulfil its mandatory statutory duty in disposing of such applications as are referred to in section 245D(4A)(i) by date specified therein except where prevented from doing so due to any reason attributable to applicant; and that an application, in respect of which Settlement Commission had been prevented from fulfilling aforesaid mandatory statutory duty due to any reasons attributable on part of applicant, would abate on specified date under section 245HA(1)(iv)	[2009] 317 ITR 66 (Bom HC)
39	CIT vs. Talisma Corporation Pvt Ltd	SLP (Civil) No. 8116/2014	35	Where assessee, engaged in development and sale of software products, incurred certain product development cost which mainly included salary and other general administrative expenses, in view of fact that said expenditure was in respect of scientific research and was incurred in relation to business carried on by assessee, it was to be allowed as deduction under section 35(1)(iv) even if expenditure was capital in nature	[2013] 40 Taxmann.com 400 (Kar HC)
40	CIT vs. Tejas Networks India (P) Ltd	SLP (Civil) No. 5327-5328/2015	37	Tribunal is justified in treating the product development expenses as revenue in nature	ITA No. 353-354 of 2013 (Kar HC)
41	Thumbay Holdings (P) Ltd vs. CIT	SLP (Civil) No. 33710-33712/2014	145	Where assessee, a real estate company, received certain sum for identifying purchaser for third party and was following mercantile system of accounting, sum received by it would be taxable in current year and not when project would be complete	[2015] 61 Taxmann.com 29 (Kar HC)

Sr. No.	Decision	SC – Citation	Sections	HC Ruling	HC – Citation
42	TTG industries vs. CIT	SLP (Civil) No. 24901-24902/2014	32	Where drilling machines and boring machines were not used in manufacture of windmill, same would qualify for depreciation at 25 per cent and not 100 per cent	[2014] 363 ITR 44 (Mad HC)
43	CIT vs. The Urban Co-operative Bank	SLP (Civil) No. 206/2015	9,145	Tax is not payable on non-performing assets even if the bank is following mercantile system of accounting	ITA No. 471 of 2013 (Kar HC)
44	CIT vs. Vector Shipping Services (P) Ltd	SLP (Civil) No. 8068/2014	40(a)	For disallowing expenses from business and profession on ground that TDS has not been deducted, amount should be "payable"and not which has been "paid" by end of year	[2013] 357 ITR 642 (All HC)
45	Velocient Technologies Ltd vs. CIT	SLP (Civil) No. 23307-23308/2015	68	Assessee could not satisfactorily explain whether company genuinely lent monies, onus to prove that amounts came from credible sources was never discharged and hence assessable under section 68	[2015] 376 ITR 131 (Del HC)
46	CIT vs. Vinay Sharma	SLP (Civil) No. 18018/2014	271(1)(c)	Penalty u/s 271(1)(c)was deleted since the Assessee had voluntarily offered the addition to tax during the course of assessment	ITA No. 187 of 2014 (Del HC)
47	Department of Income vs. Vodafone Essar Gujarat Ltd	SLP (Civil) No. 29819/2012	391-394 of Companies Act, 1956	IT Department has locus standi to object to scheme of amalgamation since it is a creditor of the transferor company. Where telecom companies falling under same group proposes a scheme of demerger to segregate their respective passive infrastructure business and telecommunication service business in order to achieve growth and maximisation of value, such scheme could not be disapproved on mere ground that there would be huge tax savings.	[2012] 24 Taxmann.com 323 (Guj HC)

A tremendous stream is flowing toward the ocean, carrying us all along with it; and though like straws and scraps of paper we may at times float aimlessly about, in the long run we are sure to join the Ocean of Life and Bliss.

— *Swami Vivekananda*



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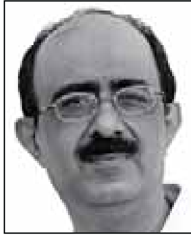


CA Dinesh Kumar Tejwani

DIGITAL INDIA SERIES
Massive Open Online Courses

Digital education took a quantum leap with the introduction of Massive Open Online Courses (MOOC) in 2011.

A MOOC is an online free course, delivered via web, open to a very large number of participants across the globe. For a course to be considered MOOC, it should have the following features :

Course : The basis objective should be learning by students in a definite time frame. It should have some way of assessing the knowledge of students via quizzes or exams. It should have interaction among students-students and teacher-students.

Open : The course must be open to everyone without any prerequisite e.g. a degree. Access to educational resources like videos, text, blogs etc. should be free. However few activities may not be free e.g. getting a certificate at the end of course, or direct access to teacher.

Online : The course must be delivered via internet. This enables anyone across the globe with an internet connection and laptop/mobile to attend the course.

Massive : The course should have massive operational capabilities, so that it can handle few thousand to several lakh students.

As per one report, in 2013, the University of British Columbia offered several MOOCs through Coursera, with the numbers initially signing up ranging from 25,000 to 190,000 per course. Another report cites maximum participants in a course to be at 2,40,000.

MOOC are proving a boon for students as they can now learn from professors from top universities, who are otherwise unavailable to the most.

MOOC are also more appealing to professors as they get a very diverse student base, coming from all parts of the world. This helps them improve their knowledge sharing methods.

xMOOC and cMOOC

Broadly there are two types of MOOC:

xMOOC : In these courses, the content is created by the educator (generally in the form of video lectures. It offers automated testing of participants knowledge. Participants can interact among themselves through discussion forums.

cMOOC : In these type of courses, the content is generated by learners themselves. It provides a very subjective and personal learning experience.

Other features of MOOC

- A course may be meant for a beginner or an experienced learner. Each course outlines the level of knowledge required to take it up.
- The courses are vocational, technical or continuing education. Educational courses can be pre-university, undergraduate and master level courses
- Most courses are 4-6 week long. Some mini MOOC are 2 week long and offer an introduction to a subject.

Typical Course Outline

Area	Covers
Syllabus	Course Topics, Schedule and outcome
Course Material	Videos, Reading material, Quizzes
Community	Discussion Forums, Blog
Help	Technical Support, User Feedback

Advantages

MOOC offer an unparalleled opportunity for anyone with a computer and internet connection to learn completely free. It can be self paced, offering freedom of time management. Interacting with fellow learners through discussion forums offers a new way of thinking and promotes new ideas, motivation to complete course and get a certificate.

Disadvantages

Lack of self motivation results in non completion of course. There have been a very large number of drop outs. Lack of real world, face-to-face interaction with educator and fellow participants makes it less appealing to several learners. Peer review is generally not as accurate as teacher review.

However, several learners in MOOC formed catchup groups to meet in person and discuss the course content.

Prominent MOOC Platforms

Coursera: https://www.coursera.org/

Coursera is a for-profit venture funded company. All its courses are free. The courses are offered in several areas including Humanities, Medicine, Biology, Social Sciences, Mathematics, Business, Computer Science etc. A typical course is 4 to 10 weeks long, giving 1-2 hours of video lectures. These courses provide weekly quizzes, peer-graded assignments and sometimes a final exam.

Few courses offer Signature Track on payment of fee, which entitles a student to a verified certificate upon successful completion. Coursera and University of Illinois at Chicago also offers a degree in business.

Coursera started in 2012 by partnering with Stanford, Princeton, University of Michigan, and the University of Pennsylvania. Currently it offers 1,541 courses in partnership with 140 institutions.

Udacity : www.udacity.com

Udacity is a for-profit organisation created in 2012 Udacity in association with AT&T offers nano-degree programmes, designed to teach programming skills for entry level positions. It also offers courses in non technical areas e.g. entrepreneurship.

Edx https://www.edx.org

Edx is a non-profit organisation which runs on open source software. Edx was created by MIT and Harvard University in 2012. Later over 70 institutions have joined hands with Edx to offer free online courses. IIT Mumbai is one of them.

Edx offers a very wide variety of courses ranging from art and culture, law, philosophy , economics and finance to medicine, engineering and computer science.

Udemy https://www.udemy.com/

Udemy is a marketplace which offers tools for anyone to create a courseware and offer it either free or for fee to students.

Udemy has been able to attract corporate trainers to create courses for employees. Most of the courses are taken for enhancing job related skills. Currently is hosts about 35,000 courses.

Indian Initiatives

SWAYAM : This is a flagship programme launched by the HRD Ministry where central funded institutes and universities will offer free courses. The Ministry believes that at least one crore students will benefit from this project in coming 2-3 years.

NPTEL : National Programme on Technology Enhanced Learning is join initiative of IITs and IISCs and is backed by NASSCOM. The institute is working with companies to see that students with NPTEL certificates get short-listed for jobs. It is planning to offer course transcripts in several Indian languages.

IIMBx : IIMBx is the initiative of IIM Bengaluru. It has joined the open source platform of Edx

to offer free courses from July 2015. Courses ranging from management subjects to specialises topics have since then seen the enrolment of over 93,000 learners from more than 185 countries.

IITBombayx : IIT Bombay too has joined Edx platform to launch 5 self paced free programmes on technical subjects like computer programming, signals and systems and thermodynamics

Others:

- Delhi University had launched a free course in Jan 2015 on the topic "India in Twenty First Century"
- ApnaCourse : eLearning company provides several courses in the area of Banking, Finance, Sales & Marketing, Law, HR and Personal development.
- ISB Hyderabad launched a course in association with Coursera in the area of positive psychology titled "A Life of happiness and fulfilment".

Participation from India

A very large number of learners take up free online courses.

- On Coursera 8% of total participants are from India
- On Edx 12% of total participants are from India

With these numbers, India comes second in terms of participation, the top spot being taken by USA.

Problems facing MOOC

In spite of several benefits, MOOC face the following challenges.

- High cost of production. As per some estimates, a basic MOOC course takes up to 80 to 100 K USD in terms of faculty time, staff cost and infrastructure cost.
- High attrition rate : A study suggests that average completion rate for a MOOC course during last 3 years has been below 13%. The reasons are : no incentive against dropping out, lack of need to complete the course.

Is MOOC for you?

After reading this article, you may decide to take up a MOOC. Before taking up a course, ask yourself the following questions:

- Do you have a suitable laptop/PC and a good internet connection?
- Do you like to learn by watching videos and reading text online?
- Do you like to discuss topics with fellow learners online in discussion forums?
- Do you like to help other participants by answering their queries?
- Do you have patience and motivation to complete a 4-6 week course and get a completion certificate?

Illustrative lists of courses

Giving below illustrative list of courses which may interest readers

Coursera

- Essential of Corproate Finance
- Improving Business Finance and Operations
- Innovating in a Digital World
- Business Analytics
- Strategic Management and Innovation

edX

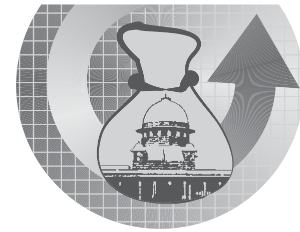
- M&A Professional Certificate
- Finance for everyone – Smart tools for Decision Making
- Personal Finance Planning
- Advanced Credit Risk Management

IIBx

- Introduction to Accounting Part 1 – Basics of Financial Statements
- Introduction to Banking and Financial Markets

Current trends

Slowly and steadily MOOCs are being recognizsed by learners as a way to career growth, as employers see value and acceptance in these courses. Google now lists courses from Coursera as recommended qualification for a job. Several Startups in India now actively promote MOOC among employees. Hence MOOCs will continue to be a source of knowledge for learners and skills enhancement opportunity for those seeking jobs or career growth.



B.V. Jhaveri, *Advocate*

DIRECT TAXES
Supreme Court

1. Division bench of Supreme Court refers matter to larger bench as there was difference of opinion as to whether assessee could claim simultaneous deductions under Section 80-IA/Section 80-IB and Section 80HHC on same profits

Assistant Commissioner of Income-tax, Bengaluru vs. Micro Labs Ltd. [2015] 64 taxmann.com 199 (SC)

Views of Justice Anil R. Dave

(i) Section 80-IA(9) is unambiguous which clearly provides that once an assessee is allowed deduction under Section 80-IA, deduction to the extent of such profits and gains will not be allowed under heading 'C' of Chapter-VI A.

(ii) In the instant case, it is found that the intention of legislature is very clear to the effect that if an assessee claims any deduction under provisions of Section 80-IA or Section 80-IB, he cannot claim deduction to the extent to such profits and gains which had been claimed and allowed under provisions of Section 80HHC of the income-tax Act, because Section 80HHC is included in heading 'C' of Chapter VIA of the Act.

(iii) The High Court was in error while permitting the assessee to get benefit in respect of Section 80HHC as it did not take into account the fact that the profits in respect of which deduction was allowed under Section 80HHC had also been previously allowed under Section 80-IB. This is not permissible by virtue of Section 80-IB(13) provisions of Section 80-IA(9) are also applicable to Section 80-IB.

Views of Justice Dipak Mishra

(i) The first part of sub-Section (9) to Section 80-IA refers to computation of profits and gains of an undertaking or enterprise allowed under Section 80-IA in any assessment year and the amount calculated shall not be allowed as a deduction under any other provisions of this Chapter.

(ii) It is in this context that the Bombay High Court has rightly pointed out that there is a difference between allowing a deduction and computation of deduction. The two have separate and distinct meanings. Computation of deduction is a stage prior and helps in quantifying the amount, which is eligible for deduction. Sub-

Section (9) to Section 80-IA does not bar or prohibit the deduction allowed under Section 80-IA from being included in the gross total income, when deduction under Section 80HHC(3) is computed. In this context it has been held that the expression "shall not be allowed" cannot be equated with the words "shall not quantify" or "shall not be allowed" in computing deduction.

(iii) The effect thereof would be that while computing deduction under Section 80HHC, the gross total income would mean the gross total income before allowing any deduction under Section 80-IA or other sections of Part C of Chapter VIA. But once deduction under Section 80HHC has been calculated, it will be allowed, ensuring that the deduction under Section 80HHC and Section 80-IA when aggregated do not exceed profits and gains of such eligible business of undertaking or enterprise.

In view of the difference of opinion, the matters are referred to a larger Bench.

2. Where pursuant to directions issued by Commissioner (Appeals), Assessing Officer passed a fresh assessment order wherein no satisfaction was recorded for initiating penalty proceedings under Section 271E, impugned penalty order passed under said section deserved to be set aside.

Commissioner of Income-tax, Panchakula vs. Jai Laxmi Rice Mills Ambala City [(2015) 64 taxmann. com 75 (SC)]

For assessment year 1992-93, while framing the assessment the AO opined that the assessee has contravened provisions of Section 269SS and therefore, the AO was satisfied that the penalty proceedings u/s. 271E were to be initiated. The Commissioner (Appeals) allowed assessee's appeal and set aside the Asst. Order with a direction to frame the assessment *de novo*.

After remand, the AO passed the fresh Asst. Order. However, in the said Asst. Order, no satisfaction regarding initiation of penalty proceedings under Section 271E was recorded. It so happened that on the basis of the original Asst. Order, Show Cause Notice was issued to the assessee and it resulted in passing the Penalty Order.

The Tribunal and the High Court held that when original Asst. Order itself was set aside, satisfaction recorded therein for the purpose of initiation of penalty proceedings under Section 271E would also not survive. The impugned penalty order was accordingly set aside.

Dismissing the civil appeal of the Revenue, the Supreme Court held that in so far as fresh Asst. Order is concerned, there was no satisfaction recorded regarding penalty proceedings u/s. 271E of the Act, though in that order the AO wanted penalty proceedings to be initiated u/s. 271(1)(c) of the Act. Thus, in so far as penalty u/s. 271E is concerned, it was without any satisfaction and therefore, no such penalty could be levied.

"You cannot believe in God until you believe in yourself."

— *Swami Vivekananda*

Ashok Patil, Mandar Vaidya & Priti Shukla
Advocates

DIRECT TAXES
High Court

REPORTED

1. Sec. 271(1)(c) – Mere making of claim, that is not sustainable in law, by itself, shall not amount to furnishing inaccurate particulars regarding the income of assessee – No penalty Leviable – AY 2003-04

CIT & Anr.. vs. Euro Footwear Ltd. & Anr. (2015) 94 CCH 0128 All. HC

Assessee claimed deduction u/s. 80 HHC and 80-IB and claimed 30 per cent of gross total income u/s. 80-IB on income derived from (DEPB) as well as on Duty Draw Back Scheme etc. AO held that income derived from DEPB and other export incentives were not income derived from industrial undertaking. AO allowed deductions u/s. 80 IB after deleting duty draw back and export incentives. AO was also of opinion that for claiming deductions on duty draw back etc, assessee had furnished inaccurate particulars and therefore, initiated penalty proceedings u/s. 271(1)(c). Assessee, being aggrieved, filed appeal before CIT appeals, that was allowed and order of penalty was set aside. Department filed appeal and submitted that ITAT committed manifest error in deleting penalty imposed u/s. 271(1)(c). HC dismissed Department's appeal and Held that assessee disclosed all income and claimed certain deductions that were disallowed. Mere fact that certain deductions were disallowed, would not mean that assessee had furnished inaccurate particulars or had concealed particulars of his income. Words "inaccurate particulars" would mean details supplied in return, that was not accurate or that was not exact or correct or that was not according to truth or that was erroneous. There was no finding of AO that a detail supplied by assessee in its return was inaccurate, incorrect, erroneous or false. Question of imposing penalty u/s. 271(1)(c) on mere making of claim could not arise nor such imposition of penalty would be sustainable in law. Mere making of claim for certain deductions by itself would not amount to furnishing inaccurate particulars regarding income of assessee. In *CIT vs. Reliance Petro Products Pvt. Ltd. (2010) 322 ITR 158,* Supreme Court held that mere making of claim that is not sustainable in law, by itself, would not amount to furnishing inaccurate particulars regarding income of assessee. Such claim made by assessee in return, would not amount to inaccurate particulars. Order of ITAT did not suffer from any error of law.

2. Secs. 260A, 40A(3), 28 to 44 – Business Expenses – Validity of deduction – Interpretation of Rule 9B – AY 1992-93

Honey Enterprises & Ors. vs. CIT & Ors. (2015) 94 CCH 0112 Del. HC

Assessee submitted that it was entitled to first deduct all expenses relating to its business pertaining to feature film that had not been screened for a period of 180 days till end of financial year, from gross realisations pertaining to that feature film. Thereafter, assessee had to amortise cost of acquisition of distribution rights of feature films

to extent of remaining surplus. Assessee claimed that remaining unamortised cost of acquisition was to be carried forward for amortization against business income of subsequent year. Revenue submitted that cost of feature films that had not run for a period of 180 days reduced to 90 days by virtue of Income Tax (Ninth Amendment) Rules, 1998 with effect from 1st April, 1999. Till end of financial year, could be amortised to extent of gross realisations pertaining to said film during year and only balance was permitted to be carried forward. On further appeal in HC, HC dismissed assessee's appeal and held that where rights of exhibition had been acquired on minimum guarantee basis, minimum guarantee amount, not being expenditure incurred by distributor for preparation of positive prints of film and expenditure incurred by him in connection with advertisement of film, would be taken as cost of acquisition for purposes of Rule 9B. Cost of acquisition for purposes of Rule 9B would not include any publicity expenditure in connection with films or any expenditure incurred for preparation of positive prints of films. Expenditure incurred on preparation of positive prints of film could not be carried forward for amortisation in terms of Rule 9B as cost of acquisition of distribution rights of that film. Assessee was entitled to deduction to extent that cost of acquisition of films did not exceed amount realised by assessee from exhibiting film on commercial basis and/or sale of rights of exhibition in respect of some of areas. Assessee sought to club two expenses, that was, cost of acquisition of distribution rights of films and cost of prints for purposes of charging same against realisations from those films and for carrying forward excess to next year for purposes of Rule 9B. This was precisely not permissible in terms of Rule 9B(1). Amount permissible as deduction in terms of Rule 9B would be *pari passu* with any other deduction permissible u/s. 37(1).Language of Rule 9B was unambiguous and assessee could not be permitted to claim a carry forward of the cost of distribution rights, which was in variance with computation as provided in Rule 9B of IT Rules .

3. Sec. 4(5), 31(2), 143(1), 147 – Taxable income – Amount of enhanced compensation – AY 1988-89, 1989-90 & 1985-86

CIT & Or. vs. Suman Dhamija & Ors. (2015) 94 CCH 0111 Del. HC

Certain land was notified u/s. 4 of the Land Acquisition Act, 1894 (LA Act) for being acquired for public purpose. Predecessor-in-interest of assessee, i.e. 'X', purchased 1/16th share of *bhumidari* rights in that land. 'X' was not owner of the land himself but had purchased 1/16th of the *bhumidari* rights. 'X' filed his return declaring income including interest from property in question. 'X's auditors submitted letter to AO explaining that 'X' received additional compensation for his share in land in question. AO passed order holding that entire compensation received by 'X' was taxable in year of receipt and Capital Gain was charged. CIT(A) held that since negotiable instrument in nature of treasury vouchers were received by 'X', taxability of said sums had to be examined. AO was directed to examine assessability of amount of capital gains, in AY 1987-88. AO, held that u/s. 45(5) entire amount of compensation was to be taxed in year of receipt and since 'X' was not following mercantile system of accounting, interest received was also taxable in year of receipt. AO made additions on protective basis. CIT(A) held that re-opening of assessments was not justified and invalidated action of AO. ITAT held that reopening of assessments was valid but, ITAT agreed with assessee that enhanced compensation could not be included in total income for reason that no finality was attached to receipt of amount. On further appeal in HC by department, HC dismissed the appeal and Held that where additional compensation was awarded at several stages by different appellate authorities; it necessitated rectification of original assessment at each of said stages. Apparently, there were two strands of litigation; one pertained to right of Assessee to receive compensation that had not attained finality. Thus, although there was transfer of 1/16th share of *bhumidari* right in land in question in favour of assessee, question regarding entitlement of assessee to receive compensation for extinguishment of such right on its vesting in State was still uncertain. Second strand of litigation pertained to enhancement of compensation in reference u/s. 18 of the LA Act. Appeals in those proceedings had also been remanded to Court

and were pending. Therefore, right to receive compensation was intrinsically linked to outcome of appeals arising from proceedings u/s. 31(2) of LA Act. Although award had been made and compensation payable had been enhanced, amount itself was in dispute since dispute was pending in Court. As mentioned, on account of pendency of appeals arising from order of ADJ in proceedings u/s. 31(2) of LA Act, right of assessee to receive said sums was still unclear or inchoate. Consequently, question of bringing to tax enhanced compensation had to await final outcome of above proceedings.

4. Sec. 271(1)(c) – No Penalty u/s. 271(1)(c) – Validity – Clerical error – AY 2007-08

Principal CIT vs. H. V. Williams & Co. (2015) 94 CCH 0124 Kol. HC

While passing assessment order, AO initiated penalty proceedings u/s. 271(1)(c). CIT(A) while deleting imposition of penalty held that Assessee explained mistakes committed by his Accountant while writing account books that were detected by assessee and disclosed to AO. Explanation offered by Assessee was not found to be false or not *bona fide*. CIT(A) held that AO was not justified in imposing penalty u/s. 271 (1)(c). ITAT held that error occurred on behalf of assessee was by mistake of its accountant, who treated said professional income as income from Mutual Funds and salary was claimed on basis of clause mentioned in original partnership deed was not found to be false. On further appeal in HC, HC dismissed appeal of the assesee and held, that mistake was due to error of accountant and it was not *mala fide*. Submission made by assessee was not rebutted by AO in his order, and was duly noted by CIT(A) along with ITAT in their respective orders. HC held that ITAT was justified in dismissing appeal.

5. Sec. 32; 35AB – technical know how acquired and transferred – payments were made in subsequent years – entitled to claim deduction in accordance with sec. 35AB in respect of the sums payable – AY 1999-2000

CIT vs. AMCO Power Systems Ltd. (2015) 127 DTR (Kar.) 193

The assessee had acquired technical know how and the same was transferred on 1-3-1998 for a sum of Rupees 5 crores. The sum was payable in instalments from 31-5-1998, that is from the next financial year. The assessee had for the relevant year claimed deduction u/s. 35AB and the same was disallowed by the AO as the assessee had not paid for the same and hence cannot claim deduction. The Hon'ble High Court held that, the liability to pay arose before 1-4-2008, as the know how was acquired on 1-3-1998, the fact that the amount was paid subsequently does not effect the claim of the assessee in accordance with section 35AB in respect of the amount payable for the transfer of technical know how.

6. Sec. 10A – sale of software by one STP to another STP which eventually exported the same – money received with in foreign currency – deduction available – AY 2001-02.

Tata Elxsi Ltd. vs. ACIT (2015) 127 DTR (Kar.) 327

The assessee is having a unit a STP unit, which is registered with the Software Technology Park, India. For the relevant year under consideration the assessee had claimed deduction under section 10A which also included sale to another STP unit also registered with the Software Technology Park, India, Texas Instruments, which in turn exported the software out of India. The consideration of such sale was received in convertible foreign exchange. The AO held that the sales were domestic sales. The lower appellate authorities held that the sales do not amount to deemed exports. On appeal to the High Court, the Hon'ble High Court held that, once the goods manufactured by the assessee are shown to have been exported out of India, either by the assessee or by another STP unit and the foreign exchange is directly attributable to such exports, then such exporter is eligible for deduction u/s. 10A.

Jitendra Singh & Sameer Dalal
Advocates

DIRECT TAXES
Tribunal

1. Business expenditure – Section 37(1) of the Income-tax Act, 1961 – Assessee engaged in business of process management services for credit cards – Amount paid as licence fee in order to get limited right to use a software programme belonging to other company – Allowable as business expenditure

Depreciation – Section 32 of the Act – Printers, switches, networking equipments, UPS and pen drives – Integral part of computer system – Eligible for depreciation at the rate of sixty per cent (60%). AY: 2007-08 & 2008-09

GE Capital Business Process Management Services (P.) Ltd. vs. Asstt. CIT – [ITA Nos. 2806 / Del. / 11 & 2124 / Del. / 13; Order dated 16-10-2015; Delhi Tribunal]

The assessee company during the relevant period was engaged in the business of process management services for credit cards. For the year under consideration, assessee paid licence fee to a foreign company, for use an accounts receivable processing software for credit card transactions. The licence fee paid was claimed as business expenditure under section 37(1) of the Act.

The Assessing Officer rejected assessee's claim by holding that payment of licence fee was in the nature of capital expenditure.

The CIT(A) confirmed the action of the Assessing Officer.

On appeal Tribunal the Tribunal noted that following terms in the end user licence agreement:

(a) The assessee company is specifically restricted to make copies of the software;

(b) There was a bar on the assessee for use of software for the purpose other than that mentioned in the agreement;

(c) The assessee did not possess right either to sell it or alienate the software in any manner;

(d) Give the right of termination of licence agreement to either parties under various circumstances;

(e) In case of default, committed by the assessee, the rights of assessee to use the software would stand terminated forthwith and

(f) The assessee is required to deliver the licensed programme back immediately to the licensor after removing the same from its systems on termination of agreement.

In view of aforesaid, it is held that a licence fee paid by the assessee to the licensor was revenue expenditure deductible under section 37(1) of the Act.

As regards the assessee's claim of depreciation at the rate of sixty per cent (60%) on printers, switches, networking equipments, batteries, pen drives etc. as against fifteen per cent (15%) allowed by the AO the Tribunal following the decision of jurisdictional High Court in the case of, *CIT vs. BSES Rajdhani Powers Ltd. [IT Appeal No. 1266 of 2010, dated 31-8-2010]* held that the items enumerated above were integral part of the computer system and hence eligible for depreciation at the rate of sixty per cent (60%).

2. Deduction – Section 10AA of the Income-tax Act, 1961 – Special provisions in respect of newly established Units in Special Economic Zones – A unit registered under STP Scheme, to be treated as 'Existing SEZ' and 'Existing Unit' under SEZ Act, 2005 – Therefore, assessee can claim deduction under section 10AA of the Act. AY: 2009-10

ITO vs. Last Peak Data P. Ltd. [ITA Nos. 154& 155 / Kol / 2013; Order dated 30-10-2015; Kolkata Tribunal]

The assessee was engaged in the business of data processing, software development and business process outsourcing. It had one unit registered with Software Technology Park, as one hundred per cent (100%) Export Oriented Unit for computer software. Up to AY 2008-09 the assessee was claiming exemption under section 10B of the Act and the same was allowed to it.

For the AY 2009-10, the assessee claimed deduction of its income from the business under section 10AA of the Act.

The Assessing Officer denied the claim of the assessee for deduction under section 10AA of the Act on the ground that, the condition for claiming deduction were not complied by the assessee. According to the AO the registration of STP unit was granted as per delegated power by inter-Ministerial Standing Committee and monitored by Ministry of Communication and Information Technology, thus, according to the AO as the unit of the assessee, was not located in a SEZ/FTZ and warehousing zone/ an existing SEZ and also because the assessee was not granted approval by a Development Commissioner under the SEZ Act, 2005 assessee was not eligible for deduction under section 10AA of the Act.

On appeal the Tribunal affirming the decision of the CIT(A) held that as the assessee, was unit registered under STP Scheme hence, it has to be treated as 'Existing SEZ' and 'Existing Unit' under SEZ Act, 2005 and therefore can claim benefits available to SEZ under section 10AA of the Act.

3. Deductions – Section 80QQB of the Income-tax Act, 1961 – Royalty incomes, etc. of authors of certain books other than text books – Expression 'work of literary' in section 80QQB of the Act means not only such work which deals with any particular aspect of literature viz., poetry, etc. but, also a work which is any writing, would also come within the ambit of literary work.

Income from house property – Section 23 of the Act – Annual value – Where a Will under which the assessee was entitled to the house property was not probated – Assessee was not the owner of house property – 'Notional rent' there from could not be assessed in the hand of the assessee. AY: 2005-06

Dilip Loyalka vs. Asstt. CIT - [ITA No.: 536 / Kol / 2013; Order dated: 4-12-2015; Kolkata Tribunal]

The assessee was an individual, by profession a Chartered Accountant. He had authored books on Income-tax and received royalty on his book, 'How to Handle Income Tax Problems'. The royalty for his book received was claimed as deduction under section 80QQB of the Act.

The Assessing Officer disallowed deduction on the ground that the book on income-tax is not a literary work invoking the provisions of Explanation to section 80QQB, clause (b) of the Act.

The CIT (A) confirmed the order of the AO.

On appeal Tribunal held that assessee had authored a book on income tax problems in question answer form which was titled 'How to Handle Income-tax Problems', as his book was on a complex issue which really needed intellect and knowledge thus, the book was a literary work in terms of section 80QQB of the Act and the royalty received on same would be entitled to deduction under section 80QQB of the Act.

Further, the AO noted from the Balance Sheet of the assessee that he had included a house property in it, which was inherited from his late mother, who expired in the year 1998. The AO, computed the annual value of the house property for the purpose of charging of tax and accordingly, he assessed the same as income from house property in the hands of the assessee.

The assessee claimed before the AO that he has got the house property as per the Will of his late mother but, the Will has not yet been probated and accordingly, no notional income can be added to the income of the assessee.

The Tribunal following the decision of the Apex Court in the case of, *Mrs. Hem Nolini Judah vs. Mrs. Isolyne Sarojbashini Bose – [1962 AIR SC 1471]* held that no notional rent can be assessed in the hands of the assessee while computing income of the assessee under the head Income from house property because the assessee is not the owner of the house property, as the Will of his late mother under which he was entitled to the house property was not probated.

4. Search and seizure – Section 153 C of the Income-tax Act, 1961 – Scope of assessment – Where assessment made on assessee consequent to search in another case, Assessing Officer is bound to issue notice under section 153C of the Act – AO proceeding with reassessment under section 147/148 of the Act against the assessee – Assessment order passed under section 143(3), read with section 147 of the Act – Held to be illegal, arbitrary and without any jurisdiction. AY's: 2008- 09 & 2009-10

G. Koteswara Rao vs. DCIT – [ITA Nos.: 400 to 407 / Viz. / 2014; Order dated 29-10-2015; Visakhapatnam Tribunal]

During the course of search carried out in case of a developer, certain incriminating documents were seized from which indicated that the assessee along with others had invested certain amount for purchase of lands. The assessee admitted before the Investigating authority that he had source for investments for a part of the amount and the balance amount was declared as unexplained investment. The AO based on the assessee's statement, issued notice under section 148 of the Act to reopen the assessment and completed the assessment under section 143(3), read with section 147 of the Act.

On appeal before the Tribunal, the assessee contended that his assessment could not be reopened under section 147 of the Act. It was argued that the AO should have issued notice under section 153C, read with section 153A, and proceed to assess or reassess the total income of each of assessment year falling within six assessment years as referred to in section 153A of the Act as assessment in his case was made consequent to search in another case.

The Tribunal allowing the appeal of the assessee held, that in case of assessment made on assessee consequent to search in another case the AO. is bound to issue notice under section 153C of the Act and thereafter, proceed to assess income under section 153A of the Act. However, if the A.O. proceeds with reassessment under sections 147/148 of the Act and passed assessment order under section 143(3) of the Act, same would be illegal, arbitrary and without any jurisdiction.

CA Sunil K. Jain

DIRECT TAXES
Statutes, Circulars & Notifications

NOTIFICATIONS

Authorising Punjab National Bank – Subscription under Public Provident Fund Scheme, 1968 and Senior Citizens Savings Scheme Rules, 2004

In regard to Para 2(b) of Public Provident Fund Scheme and Rule 2(e)(ii) of Senior Citizens Savings Scheme Rules, the Central Government authorised four thousand four hundred twelve branches of Punjab National Bank to receive subscriptions under the above said schemes.

(Notification [F.No. F.7/33/2015-NS.II], dated 12-11-2015)

Section 200 of the Income-tax Act, 1961 – Deduction of Tax at Source – Duty of person deducting tax – Stringent authentication mechanism through corporate headquarter server for filing of correction statements & download of TDS certificate, consolidated files etc. by banks/corporates

CPC-TDS initiated "corporate connect" with an intent to pursue TDS compliance related issues of all branches of a corporate with their corporate headquarter. The criticality of this initiative can be understood from the fact that 30% of total TDS defaults and 80% of total PAN errors pertain to only 4,000 PAN entities. This will have the following three benefits: (i) Secured access of sensitive third party data: Only authorised representative of banks/corporates will be able to access TRACES portal as the login would be through corporate server only. (ii) Corporate headquarter can keep track of the access requests of the branches and this will help in enforcing discipline among the branches. (iii) No need to procure separate digital signature for each bank/corporate branch to access TRACES portal on account of routing of request through corporate server.

(Notification No. 3/2015[F. No. DGIT(S)/CPC (TDS)/CORP. Authentication MECH/2015-16/14557-14690], dated 1-12-2015)

Section 197A of the Income-tax Act, 1961 – Deduction of Tax at Source – Non-deduction in certain cases – Simplification of procedure for Form No. 15G & 15H

Section 197A of the Income-tax Act provides for no deduction in certain case by submitting a declaration using Forms 15G/15H as laid down in Rule 29C of the Income Tax Rules. The person responsible for paying any income of the nature referred to in section 197A shall enable the payee to furnish the declaration in electronic

form after due verification through an electronic process. The declarant shall mandatorily quote his/her PAN in the declaration Form 15G/15H in accordance with the provisions of section 206AA(2).

A unique identification number shall be allotted to declaration (paper/electronic). The payer shall digitise the paper declaration and upload all declarations received during a particular quarter at Income Tax Departmental site on quarterly basis.

(Notification No. 4/2015 [F.No: DGIT(S)/CPC (TDS)/DCIT/15H/2015-16/14425-556, dated 1-12-2015)

Section 90 of the Income-tax Act, 1961 – Double Taxation Agreement – Agreement for avoidance of double taxation and prevention of fiscal evasion with foreign countries – Thailand

Agreement between the Government of the Republic of India and the Government of the Kingdom of Thailand for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income was signed in Thailand on the 29th day of June, 2015. The Agreement shall have effect in India in respect of income derived in any fiscal year beginning on or after the first day of April following the calendar year in which the said Agreement enters into force. In regard to section 90 of the Income-tax Act the Central Government notified that all the provisions of said Agreement be given effect to in the Union of India.

(Notification No. 88/2015 [F.No. 503/5/2005-FTD-II] / SO 3244(E), dated 1-12-2015)

Income-tax (Eighteenth Amendment) Rules, 2015 – Insertion of Rule 127 – Service of notice, summons, requisition, order and other communication

In regard to section 282 read with section 295 of the Income-tax Act the Central Board of Direct Taxes made Income-tax (18thAmendment) Rules, 2015. After rule 126, following rule shall be inserted:

"127. Service of notice, summons, requisition, order and other communication (1) For the purposes of sub-section (1) of section 282, the addresses (including the address for electronic mail or electronic mail message) to which a notice or summons or requisition or order or any other communication under the Act (hereafter in this rule referred to as "communication") may be delivered or transmitted shall be as per sub-rule (2).

(2) The addresses referred to in sub-rule (1) shall be – (a) for communications delivered or transmitted in the manner provided in clause (a) or clause (b) of sub-section (1) of section 282 – (i) the address available in the PAN database of the addressee; or (ii) the address available in the income-tax return to which the communication relates; or (iii) the address available in the last income-tax return furnished by the addressee; or (iv) in the case of addressee being a company, address of registered office as available on the website of Ministry of Corporate Affairs: Provided that the communication shall not be delivered or transmitted to the address mentioned in item (i) to (iv) where the addressee furnishes in writing any other address for the purposes of communication to the income-tax authority or any person authorised by such authority issuing the communication; (b) for communications delivered or transmitted electronically— (i) E-mail address available in the Income-tax return furnished by the addressee to which the communication relates; or (ii) the email address available in the last Income-tax return furnished by the addressee; or (iii) in the case of addressee being a company, E-mail address of the company as available on the website of Ministry of Corporate Affairs; or (iv) any E-mail address made available by the addressee to the Income-tax authority or any person authorised by such Income-tax authority."

(Notification No. 89/2015 [F.No. 133/79/2015-TPL]/ GSR 923(E), dated 2-12-2015)

Section 35AC of the Income-tax Act, 1961 – Eligible projects or schemes, expenditure on – Notified eligible projects or schemes

The Central Government, with reference to sub-section (1) read with clause (b) of the Explanation to section 35AC of the Income-tax Act, on the recommendation of the National Committee for Promotion of Social and Economic Welfare, notified the institutions approved by the said National Committee and also notified the scheme(s)/project(s) carried out by the notified institutions as eligible projects. The notified institutions and their projects are given in the mentioned notification.

(Notification No. SO 3033(E) [No. 265/2015 (F.No. V.27015/4/2015-SO (NAT.COM))], dated 7-12-2015)

Section 80C of the Income-tax Act, 1961 – Deduction – In respect of pension fund

In regard to Section 80C(2)(xiv) of the Income-tax Act, the Central Government specified the HDFC Retirement Savings Fund, set up by the HDFC Mutual Fund registered under the Securities and Exchange Board of India (Mutual Funds) Regulations, as a pension fund for the purposes of the said section for the assessment year 2016-17 and subsequent assessment years.

(Notification No. 91/2015 [F.No. 178/21/2014-ITA-I]/ SO 3313(E), dated 8-12-2015)

Income-tax (Twentieth Amendment) Rules, 2015 – Insertion of Rule 12CB & Form No. 64C & Form No. 64D

In regard Section 295 read with sub-section (7) of section 115UB of the Income-tax Act, CBDT made the Income-tax (20th Amendment) Rules, 2015. In the Income-tax Rules, 1962, after rule 12CA, the following rule shall be inserted:

"12CB. Statement under sub-section (7) of section 115UB. (1) The statement of income paid or credited by an investment fund to its unit holder shall be furnished by the person responsible for crediting or making payment of the income on behalf of an investment fund and the investment fund to the — (i) unit holder by 30th day of June of the financial year following the previous year during which the income is paid or credited in Form No. 64C, duly verified by the person paying or crediting the income on behalf of the investment fund in the manner indicated therein; and (ii) Principal Commissioner or the Commissioner of Income-tax within whose jurisdiction the Principal office of the investment fund is situated by 30th day of November of the financial year following the previous year during which the income is paid or credited, electronically under digital signature, in Form No. 64D duly verified by an accountant in the manner indicated therein (2) The Principal Director General of Income-tax (Systems) or Director General of Income-tax (Systems), as the case may be, shall specify the procedure for filing of Form No. 64D and shall also be responsible for evolving and implementing appropriate security, archival and retrieval policies in relation to the statements of income paid or credited so furnished under this rule"

(Notification No. SO 3357(E) [No.92/2015 (F.No. 142/22/2015-TPL], dated 11-12-2015)

Income-tax (Twenty First Amendment) Rules, 2015 – Substitution of Rule 37BB

In regard to Section 195(6) read along with section 295 of the Income-tax Act, CBDT made the Income-tax (21st Amendment) Rules, 2015. In the Income-tax Rules, for rule 37BB, the Rule "37BB. Furnishing of information for payment to a non-resident, not being a company, or to a foreign company" given in the mentioned notification should be inserted.

(Notification No. GSR 978(E) [No.93/2015 (F.No. 133/41/2015-TPL], dated 16-12-2015)

Section 90 of the Income-tax Act, 1961 – Double taxation agreement –

Agreement for avoidance of double taxation and prevention of fiscal evasion with foreign countries – Macedonia

In regard to section 90 of the Income-tax Act the Central Government directed that all the provisions of the Agreement between the Government of the Republic of India and the Government of the Republic of Macedonia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income as set out in the mentioned notification, shall be given effect to in the Union of India from the first day of April, 2015 being the first day of the next fiscal year following the year in which the said Agreement entered into force.

(Notification No. 94/2015 [F.No.503/08/2004-FTD-I], dated 21-12-2015)

CIRCULARS

Section 192 of the Income-tax Act, 1961 – Deduction of Tax at Source – Salary – Income-tax Deduction from salaries during Financial Year 2015-16 under section 192

The Circular contains the rates of deduction of income-tax from the payment of income chargeable under the head "Salaries" during the financial year 2015-16 and explains certain related provisions of the Act and Income-tax Rules, 1962. The relevant Acts, Rules, Forms and Notifications are available at the website of the Income Tax Department – www.incometaxindia.gov.in.

(Circular No. 20/2015 [F.No. 275/192/2015-IT(B)], dated 2-12-2015)

Section 119 of the Income-tax Act, 1961 – Income-tax Authorities – Instructions to subordinate authorities – Extension of time for deposit of tax deducted at source and tax collected at source and last date of payment of December instalment of Advance Tax for F.Y. 2015-16 for State of Tamil Nadu

The Central Board of Direct Taxes extended the due date [under section 200(1) of the Act] for paying to the credit of the Central Government, tax deducted at source and the due date [under section 206C(3)] for paying to the credit of the Central Government, tax collected at source, in respect of deductions or collections made during the month of November, 2015, from 7th of December, 2015 to 20th of December, 2015 in respect of deductor located in the State of Tamil Nadu.

The Central Board of Direct Taxes extended the last date of payment of December installment of advance tax for FY 2015-16 from 15th December, 2015 to 31st December, 2015 in case of all the assessees, corporate and other than corporate, in the State of Tamil Nadu and Union Territory of Puducherry.

(Order [F. No. 385/26/2015-IT(B)] and [F. No. 385/26/2015-IT(B)], dated 5-12-2015 and 15-12-2015 respectively)

Section 268A of the Income-tax Act, 1961 – Filing of appeal or application for reference by Income-tax authority – Revision of monetary limits for filing of appeals by the department before Income Tax Appellate Tribunal, High Courts and Supreme Court

In supersession of the Central Board of Direct Taxes Instruction No. 5/2014, dated 10-7-2014, CBDT prescribed monetary limits and other conditions for filing departmental appeals (in Income-tax matters) before Appellate Tribunal and High Courts and SLP before the Supreme Court. The monetary limits are ` 10,00,000/- ` 20,00,000/- and ` 25,00,000/- before the Appellate Tribunal, High Court and Supreme Court respectively. It was clarified that an appeal

should not be filed merely because the tax effect in a case exceeds the monetary limits prescribed above. Filing of appeal in such cases is to be decided on merits of the case. The word "tax effect" means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of the issues against which appeal is intended to be filed.

(Circular No. 21/2015 [F. No. 279/Misc. 142/2007-ITJ (PT.)], dated 10-12-2015)

Section 43B of the Income-tax Act, 1961 – Business disallowance – Certain deductions to be allowed only on actual payment – Employer's/ Employee contribution – Allowability of employer's contribution to funds for welfare of employees in terms of section 43B(b)

In the light of the Supreme Court's decision in the matter *Commissioner vs. Alom Extrusions Ltd., [2009] 185 Taxman 416 (SC)*, CBDT decided that no appeals may henceforth be filed on the grounds of non allowance of any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees, on or before the 'due date' and appeals already filed, if any, on this ground before Courts/Tribunals may be withdrawn/not pressed upon.

(Circular No. 22/2015 [F. No. 279/MISC./140/2015-ITJ], dated 17-12-2015)

Section 119 of the Income-tax Act, 1961, read with sections 6 and 84 of the Black Money (undisclosed foreign income and assets) and Imposition of Tax Act, 2015 – Income-tax authorities – instructions to subordinate authorities – Notified Income-tax authority

In regard to section 6 and section 84 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 ['Act'), the Central Board of Direct Taxes directed that w.e.f. 18th December, 2015 the purposes of making declaration of undisclosed foreign assets under section 59 of the said Act and matters related thereto, shall be the designated Income-tax authority Shri Rahul Navin, CIT(TP)-1, New Delhi .

(Order [F. No. 225/322/2015/ITA.II], dated 17-12-2015)

Section 6 of the Income-tax Act, 1961 – Residential status – Draft guiding principles for determining Place of Effective Management (PoEM) of a company

The Explanatory Memorandum to the Finance Bill, 2015 stated that a set of guiding principles to be followed in the determination of Place of Effective Management (PoEM) would be issued for the benefit of the taxpayers as well as the tax administration. Accordingly, the guiding principles were proposed to be issued in the mentioned circular.

(Letter [F No. 142/11/2015- TPL] dated 23-12-2015)

PRESS RELEASES

Section 145 of the Income-tax Act, 1961 – Method of accounting – Income Computation and Disclosure Standards (ICDS) notified under section 145(2)

The Central Government notified 10 ICDS *vide* Notification No. S.O.892(E) dated 31st March, 2015. After notification of the ICDS the stakeholders stated that certain provisions of ICDS may require clarifications/guidance for proper implementation. These implementation issues raised by the stakeholders were referred to an expert committee comprising of

departmental officers and professionals and the committee is currently examining these issues.

(Press Release, dated 26-11-2015)

Section 92CC of the Income-tax Act, 1961 – Transfer Pricing – Advance Pricing Agreement (APA)

The APA programme was introduced in the Income-tax Act, 1961 in 2012 *vide* the Finance Act, 2012. 5 APAs were concluded in the first year and 4 APAs got signed in the second year. This year has already witnessed the conclusion of 22 APAs. It is the aim of the CBDT to finalise another 30 to 40 APAs before the end of this fiscal to provide stability and confidence to foreign enterprises operating in India.

(Press Release, dated 27-11-2015)

Section 90 of the Income-tax Act, 1961 –Double Taxation Agreement – Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Foreign Countries – Japan – Protocol between Government of India and Government of Japan on amendment of said agreement

The Union Cabinet approved signing and ratification of Protocol between India and Japan for amending the Double Taxation Avoidance Convention (DTAC) signed between the two countries in 1989 for avoidance of double taxation and for prevention of fiscal evasion, through a protocol. The protocol will facilitate exchange of information, as per accepted international standards, on tax matters including bank information and information without domestic tax interest. There is a further provision in the Protocol for sharing any information received from Japan, with authorisation of the competent authority in Japan and vice versa, in respect of a resident of India, with other law enforcement agencies. The Protocol also has a provision for India and Japan to lend assistance to each other in collection of revenue claims, as well as for exemption of interest income from taxation in the source country, with respect to debt-claims insured by the Government or Government-owned financial institutions.

(Press Release, dated 2-12-2015 and 11-12-2015)

Section 90 of the Income-tax Act, 1961 – Double Taxation Agreement – Meeting between – Meeting between heads of revenue administration of India and Korea for suspension of collection of taxes during pendency of Mutual Agreement Procedure (MAP)

A meeting was held on 9th December, 2015 between Indian and Korean delegations headed by Revenue Secretary and Commissioner, National Tax Service, Korea under the Memorandum of Understanding for Mutual Co-operation between the countries. During the meeting, a new Memorandum of Understanding (MoU) on suspension of collection of taxes during pendency of Mutual Agreement Procedure (MAP) was signed. This MoU will relieve the burden of double taxation for the taxpayer in both the countries during the pendency of MAP proceedings. Further, both sides noted that transfer pricing dispute cases will be taken up for MAP under the revised DTAA between India and Korea.

(Press Release, dated 9-12-2015)

New facility of pre-filing TDS data while submitting online rectification

Central Board of Direct Taxes simplified the process of online rectification of incorrect TDS details filed in the Income Tax Return. Taxpayers were required to fill in complete details of the entire TDS schedule while applying for rectification on the e-filing portal of the Income-tax Department. To avoid this inconvenience, a new facility has been provided for pre-filing of TDS schedule while submitting online rectification request on the e-filing portal to

facilitate easy correction or updating of TDS details. This is expected to considerably ease the burden of compliance on the taxpayers seeking rectification due to TDS mismatch

(Press Release, dated 10-12-2015)

Clarification regarding defective returns notices issued to FII/FPIs

Notices of defective returns were issued under section 139(9) of the Income-tax Act to Foreign Institutional Investors/Foreign Portfolio Investors (FIIs/FPIs) in cases where Balance Sheet and P&L account were not filled. In order to overcome this difficulty, it was clarified that such returns will not be treated as defective in cases where the FIIs/FPIs: (i) is registered with SEBI (ii) has no Permanent Establishment/ Place of Business in India (iii) has provided basic information required under section 139(9)(f) of the Income-tax Act, if there is business income

(Press Release, dated 10-12-2015)

Section 139A of the Income-tax Act, 1961 – Permanent Account Number – Amendment of rules regarding quoting of PAN for specified transactions

The Government decided that quoting of PAN will be required for transactions of an amount exceeding ` 2 lakh regardless of the mode of payment. The monetary limits have now been raised to ` 10 lakh from ` 5 lakh for sale or purchase of immovable property, to ` 50,000 from ` 25,000 in the case of hotel or restaurant bills paid at any one time, and to ` 1 lakh from ` 50,000 for purchase or sale of shares of an unlisted company. In keeping with the Government's thrust on financial inclusion, opening of a no-frills bank account such as a Jan Dhan Account will not require PAN. Other than that, the requirement of PAN applies to opening of all bank accounts including in co-operative banks. The changes to the Rules will take effect from 1st January, 2016. A chart highlighting the key changes to Rule 114B of the Income-tax Act is attached to the mentioned press release.

(Press Release, dated 15-12-2015)

INSTRUCTIONS

Section 115JB of the Income-tax Act, 1961 – Applicability of Minimum Alternate Tax (MAT) – Foreign companies

In view of the decision as reflected in the Press Release dated 24-9-2015 and the commitment made by the Government before the Supreme Court it was reiterated that with effect from 1-4-2001, the provisions of section 1151B shall not be applicable to a foreign company (including an FlI/FP1) if — (i) the foreign company is a resident of a country with which India has a Double Taxation Avoidance Agreement and such foreign company does not have a permanent establishment in accordance with the provisions of the relevant Double Taxation Avoidance Agreement, or (ii) the foreign company is a resident of a country with which India does not have a Double Taxation Avoidance Agreement and such foreign company is not required to seek registration under section 592 of the Companies Act, 1956 or section 380 of the Companies Act, 2013. In view of the above the Supreme Court disposed of the Civil Appeal No. 4559/2013 in the case of Castleton Investment Ltd. The field authorities were advised that pending assessments involving applicability of MAT on foreign companies (including Ells/FP1s) should be completed in accordance with the decision of the Government.

(Instruction No. 18/2015 [F. No. 153/12/2015-TPL] dated 23-12-2015)

CA Tarunkumar Singhal & Sunil Moti Lala, *Advocate*

INTERNATIONAL TAXATION
Case Law Update

A. AUTHORITY FOR ADVANCE RULINGS

1) Payment of Penalty to the US Government is not liable to deduction of tax at source under section 195 of the Income-tax Act, 1961 ('the Act')

Satyam Computer Services Ltd. – AAR No. 1066 of 2011

Facts

1. The applicant is an Indian company incorporated under the Companies Act, 1956. Its shares are listed on the NSE and BSE and its American Depository Receipts were listed in the New York Stock Exchange. Pursuant to the Satyam scam, investigations were launched against the applicant and a complaint was filed by the US Securities and Exchange Commission against the applicant in the United States District Court. During the proceedings, the applicant agreed to pay USD 10 million as penalty to the US Government without admitting or denying the allegations in the complaint.

2. The applicant sought an advance ruling as to whether the penalty amount payable to the US Government would be liable to deduction of tax at source under the Income-tax Act, 1961 and if so, at what rate was tax to be deducted.

Ruling

The AAR held that unless the payment made attracted tax under the provisions of the Act there would be no liability to deduct tax under section 195 of the Act. It held that penalty ordered by the US Court could never attract any tax and therefore it was axiomatic that the payment being a penalty would not be liable to TDS under section 195 of the Act. The Department also conceded that there would be no necessity of deducting tax at source.

B. HIGH COURT JUDGMENTS

2) Payment of royalty by wholly owned subsidiary to offshore parent company @ 3 per cent of sales considered to be at arm's length price in light of Clause IV of Press Note No. 9 (2000 series)

CIT vs. SGS India Pvt Ltd – ITA No. 1807 of 2013 – AY 2002-03

Facts

1. The assessee, a wholly owned 100 per cent Indian subsidiary of Generale De Survillance (SGS), Geneva, was engaged in the business of providing certification with regard to various agricultural, mineral, petroleum and consumer goods. In order to provide such services, it paid

SGS a royalty ranging between 2.5 per cent to 4 per cent of the revenue generated from such services. For the purposes of transfer pricing, the assessee contended that royalty at the rate of 3 per cent should be considered as the arm's length price for such payment and relied on the approval granted by the Foreign Investment Promotion Board for the same.

However, the TPO did not accept the same and placed reliance upon the Press Note No. 9 (2000 series) issued by the Ministry of Commerce and Industries, which provided that royalty was to be paid at 1 per cent of domestic sales and 2 per cent of export sales for the use of trademark of a foreign collaborator and therefore lowered the benchmark rate to below 3 percent.

2. The CIT(A) upheld the order of the AO / TPO pursuant to which the assessee filed an appeal before the ITAT. The ITAT concluded that royalty ranging between 5 to 8 per cent could not be faulted as it was covered by the FIPB instructions and also observed that the assessee had identified uncontrolled transactions in its transfer pricing study wherein royalty was paid at 10 per cent. Therefore it held that that the benchmarking at 3 per cent was appropriate. Aggrieved, the Revenue filed appeal before the Honourable High Court.

3. Before the Honourable High Court, the assessee contended that the Revenue relied on Clause III of the Press Note No. 9 (2000 series), whereas the assessee, being a wholly owned subsidiary was covered under Clause IV of the said Press Note which provides for royalty at the rate of 8 per cent on exports and 5 per cent of domestic sales by wholly owned subsidiaries to offshore parent companies.

Judgment

1. The Honourable High Court noted that it was undisputed that the assessee was a wholly owned subsidiary of its parent company and therefore Clause IV would be applicable to the assessee and not Clause III. Clause IV allows payment of royalty upto 8 per cent on export sales by wholly owned subsidiaries to its offshore parent company. It further observed that the DR also agreed with the fact that Clause IV would apply to the assessee. Accordingly, it held that the 3 per cent rate adopted by the assessee for benchmarking its royalty payment was correct and well within the limits prescribed by the Ministry of Commerce and Industries and therefore held that the payment was at ALP.

3) Provision for obsolete stock to be considered as non-operating due to its abnormal / extraordinary nature and it does not lead to any undue advantage to the assessee

PR CIT vs. Federal Mogul Automative Products (India) Pvt. Ltd. – ITA No. 848 / 2015

Facts

1. The assessee, a 100 percent subsidiary of Federal Mogul Automative Products (India) Pvt. Ltd., was engaged in the business of manufacturing of 'Champion spark plugs' (automobile ancillary) and also undertook marketing and distribution for the group's products such as wiper blades, glow plugs, ignition coils, oil seals etc. During the relevant year, the assessee imported materials, semi-finished goods and finished goods from its AEs and applied the TNMM as the most appropriate method and arrived at 8 comparable companies, the average operating profit to operating cost margin of which amounted to 8.04 per cent as compared to 10.94 per cent in the case of the assessee.

2. The TPO re-computed the operating margin of the assessee and included the provision for obsolescence as a result of which he made an adjustment to the value of raw materials imported by the assessee.

3. The CIT(A) partly allowed the appeal of the assessee observing that none of the comparable companies except one had a provision for stock obsolescence that too of 1.03

per cent of sales as opposed to 8.98 per cent of the assessee. CIT(A) accepted the plea of the assessee that since the provision was abnormal and extra-ordinary in nature it was required to be excluded from operating costs. The order of the CIT(A) was upheld by the ITAT.

4. Aggrieved, the Revenue filed an appeal before the Hon'ble High Court.

Judgment

1. The Honourable High Court held that the question addressed by the CIT(A) and ITAT was whether or not the assessee was gaining any undue advantage in claiming the provision and not whether the assessee was claiming it as a one-time measure or on a recurring basis. The Court held that ultimately, the entire exercise of determining ALP was to ensure that there is no avoidance of tax via resort to an accounting device and since the provision for stock obsolescence did not lead to any undue advantage to the assessee, it held that the analysis undertaken by the CIT(A), affirmed by the ITAT did not suffer from any legal infirmity.

4) The answer to the issue whether a transaction is at arm's length price or not is not dependent on whether the transaction results in an increase in the assessee's profit. Transactions pertaining to purchase of inputs / utilisation of services could not be aggregated merely because they were used in the manufacture of a final product

Knorr Bremse India Pvt. Ltd. vs. ACIT – [2015] 63 taxmann.com 186 (Punjab & Haryana)

Facts

1. The assessee, a wholly owned subsdiary of Knorr Bremse Asia Pacific Holding Limited, was engaged in the manufacture of air brake sets for cars and wagon coaches, shock absorbers, valves, computer control break systems and various break accessories. Its business was segregated into two parts – manufacture and distribution. During the relevant year, it entered into various international transactions with its AEs and used TNMM to benchmark the transactions under the two aforesaid segments. The PLI of the assessee pertaining to the manufacturing segment was 9.01 per cent, higher than the average PLI of the 5 comparables selected and that of the distribution segment was at 5.20 per cent as opposed to 3.53 per cent in case of the comparable companies.

2. With respect to three of the international transactions undertaken by the assessee viz. professional consultancy paid to its AE, management support fee paid to its AE and fee for SAP consultancy services provided by its AE the TPO held that the services were a class of transactions on their own and therefore required to be benchmarked separately. Accordingly, he computed the ALP at nil using the CUP method on the ground that the said services were routine in nature and that the assessee need not have made any payments on account of such services. Further, the TPO contended that the services could have been availed locally and that there was no evidence that the services benefitted the assessee or led to an increase in its profits.

3. The DRP upheld the view of the TPO with respect to the separate benchmarking of the transactions and also upheld the view of the TPO in determining the ALP of the said transactions at nil. However, the DRP made an observation that the SAP licence had been purchased at a lower rate as compared to the prevalent rates. The ITAT also upheld the order of the DRP and TPO but directed the TPO to delete the addition made on account of SAP licence pursuant to the observation made by the DRP.

4. Aggrieved, the assessee preferred appeal before the Honourable High Court.

Judgment

1. The Honourable High Court noted that the reasoning adopted by the Tribunal, TPO and

DRP in determining the ALP of the professional consultancy and management support services at nil was that the assessee had not been able to substantiate that the payment for services had actually increased profits. It disagreed with the aforesaid approach and held that the answer as to whether a transaction was at arm's length or not was not dependent on whether it resulted in an increase in the assessee's profits. It held that the only question was whether the transaction was a *bona fide* transaction and not for the purposes of diverting profits. The Court held that whether a transaction was at arm's length or not depends on the facts of each case relating to the transaction itself and profit is only a possibility. It further held that merely because an international transaction led to a profit it could not be held to be at arm's length price. The Court also held that absent any law, an assessee could not be compelled to avail services in India as against availing services from its AEs outside India.

2. However, with regard to the separate benchmarking of the professional consultancy fee, management support fee and SAP fees paid, the High Court agreed with the approach of the TPO. It held that merely because the goods and services were used by the assessee for the manufacture of a final product they could not be aggregated for benchmarking purposes. The end product requires several inputs which may be acquired as a part of a single transaction or by way of separate transactions. It held that aggregating the transactions and benchmarking it as a whole under TNMM would give a skewed picture as one of the transactions may be at a bargain and one overpriced thereby compensating each other. The Court further observed that the fact that the entities from which the services were received were all part of the same group was not determinative of whether they were part of a single international transaction.

3. The Court remanded the matter to the Tribunal with a direction to reassess the evidence on record in light of the above observations.

5) Turnover and size of companies are relevant factors in determining comparability

CIT vs. Pentair Water India Pvt. Ltd. – Tax Appeal No. 18 of 2015

Facts

1. The assessee was engaged in the business of manufacture of fibre glass pressure vessels used for water treatment viz. – Code line, Composite Pressure vessels and FRP pressure vessels along with setting up inhouse facility for catering to engineering, design and product development needs as well as manufacture of swimming pool equipment.

2. The TPO made an addition of ` 1.68 crores based on the comparable companies selected by him. The CIT(A) upheld the addition but directed the TPO to recompute the margin at a lower rate.

3. Pursuant to the order of the CIT(A), the assessee filed an appeal before the ITAT. The ITAT deleted the addition while excluding companies with abnormally high profits and high turnover. The ITAT excluded HCL Comnet Systems & Services Ltd., Infosys BPO Ltd. and Wipro Ltd. on account of the fact that their turnover was roughly 23 times, 65 times and 93 times the turnover of the assessee, respectively.

4. Aggrieved, the Revenue preferred an appeal before the Honourable High Court and contended that the size and turnover of a company were not deciding factors for treating a company as comparable.

Judgment

1. The Honourable High Court upheld the order of the ITAT and held that that the said companies were large and distinct companies where the area of development of subject services were different and as such the profits earned therefrom could not be equated with the profits of the assessee.

2. The High Court held that turnover was a relevant factor to consider the comparability of companies.

6) Companies having fluctuating profit margins as compared to prior and succeeding years are not to be considered as comparable. Where a company outsources a substantial portion of its work or undergoes a merger / acquisition during the year, it could not be considered as comparable

Pr. CIT vs. Xchanging Technology Services India Pvt .Ltd. – ITA 813 / 2015 (Del.)

Facts

1. The assessee, a subsidiary of Xchanging Resourcing Services Ltd., UK was engaged in rendering contracted software development services and Information Technology Enabled Services to its Group companies. During the relevant year, the assessee provided its AEs with Information Technology enabled services and applied TNMM as the most appropriate method. The assessee chose 14 comparable companies with the average margin of 11.19 percent as opposed to its margin of 14.98 per cent.

2. The TPO modified the comparable companies and arrived at 6 companies with an average margin of 33.68 per cent and accordingly made an upward adjustment.

3. The assessee filed appeal before the ITAT wherein it objected to the inclusion of Cosmic Global and Accentia Technologies Ltd as comparables and pleaded for the inclusion of Microland Ltd. The Tribunal excluded Cosmic Global as it performed translation services functionally dissimilar as compared to the assessee and also because it outsourced a substantial portion of its activities as compared to the assessee who performed inhouse activities. The Tribunal excluded Accentia in view of the fact that there was a merger of the company with another entity and remitted the comparability of Microland Ltd. to the file of the TPO.

4. Aggrieved, the Revenue preferred an appeal before the Honourable High Court.

Judgment

1. The Honourable High Court upheld the order of the Tribunal excluding Cosmic Global and Accentia on the aforesaid grounds and dismissed the appeal of the Revenue.

7) RPM most appropriate method for benchmarking trading transactions where there was no value addition

CIT vs. M/s. Luxottica India Eyewear Pvt. Ltd. – ITA No. 852 of 2015 (Del.)

Facts

1. The assessee, a wholly owned subsidiary of Luxottica Holding BV Group, is engaged in the business of trading of sunglasses and frames. During the relevant year the assessee entered into international transactions of purchase of goods and reimbursement of expenses and adopted TNMM as the most appropriate method and also corroborated the ALP using the Resale Price Method.

2. The TPO initially proposed to apply the RPM method but at a later stage applied TNMM holding that TNMM provides more flexibility as compared to RPM and the assessee itself had selected TNMM. The DRP upheld the order of the TPO.

3. The assessee preferred an appeal before the Tribunal and submitted that since it was a trader and there was no value addition to the products the RPM was the most appropriate method. Ruling in favour of the assessee, the Tribunal held that the RPM was the most appropriate method in case of the assessee being a trader. It observed that the assessee purchased the goods from its AE and sold them to independent third parties without any

value addition. Following the decisions of the Tribunal in Textronix India Pvt Ltd. (ITA No 1334 / Bang. / 2010) and Loreal India Pvt Ltd. (TS-293-ITAT-2012 (Mum.) – TP), it held that the functional profile of the assessee was that of a trader and the characterisation of the transaction was purchase and sale of goods and therefore, the RPM was the MAM.

4. Aggrieved, the Revenue filed an appeal before the Honourable High Court.

Judgment

The Honourable High Court upheld the order of the Tribunal and dismissed the Revenue's appeal as it found no reason to interfere with the conclusion arrived at by the Tribunal.

C) TRIBUNAL DECISIONS

I. India-US DTAA – Whether Indian group Co. constitutes DAPE – Held: The Indian company constitutes dependent agent permanent establishment of the US television company since it was habitually exercising an Indian authority to conclude binding contracts on behalf of the Foreign Co. – In favour of the Revenue

NGC Network Asia LLC vs. JDIT – [2015] 64 taxmann.com 289 (Mumbai - Trib.) – Assessment Years : 2007-08 & 2008-09

Facts

1. The assessee is a US based company and is a subsidiary of 'Fox Entertainment Group inc'. It holds100 per cent shares in NGC Network (Mauritius) Holden Ltd, which in turn, holds 99 per cent shares in NGC Network (India) Private Limited (NGC India). All these companies are either subsidiaries/affiliate companies of News Corporation, USA.

2. The assessee is the owner of two television channels viz., The national geographic Channel and Fox International channel. It is engaged in the business of broadcasting of its channels in various countries including the Indian sub-continent. The assessee is eligible for the tax treaty benefit.

3. The assessee appointed NGC India as its distributor to distribute its television channels and also to procure advertisements for telecasting in the channels. Hence, the assessee generates two streams of revenues from India, i.e. (a) Fee for giving distribution rights for telecasting of its channels and (b) Advertisement revenues.

4. During the assessment year (AY) 2007-08, two agreements entered by the assessee with NGC India in respect of advertisement revenues. As per the old agreement, the assessee has given commission at 15 per cent to NGC India and retained 85 per cent of the advertisement revenue. As per the new agreement, it has received fixed amount from NGC India for giving contract of procuring advertisements.

5. The assessee claimed that both types of income were not taxable in India and accordingly did not offer them in the return of income filed for AY 2007-08.

6. The Assessing Officer (AO) held that the advertisement revenues as well as distribution revenues are taxable in India since NGC India is having a DAPE of the assessee under the tax treaty. The AO accordingly assessed 25.34 per cent of the advertisement revenues as income of the assessee attributable to India, i.e. in the ratio of worldwide profits to worldwide revenue, in accordance with Rule 10B(ii) of the Income-tax Rules, 1962 (the Rules). The Dispute Resolution Panel (DRP) upheld the order of the AO.

On appeal, the Tribunal observed and held as under:

A) Whether advertisement air time shall fall under the category of goods

1. The advertisement revenue would depend upon the number of advertisements received

and also the quantity of airtime used. There should not be any dispute that NGC India has acted as an agent of the assessee under the old agreement.

2. In the case of *Ambient Space sellers Ltd vs. Asia Industrial Technology Pvt. Ltd. [1998] PTC (18) (Bom)* it was held that 'Signals' shall constitute goods since they can also be transmitted, transferred, delivered, stored and possessed. In the case of *CIT vs. Sun TV Ltd. [2008] 296 ITR 274 (Mad)* it was held that the right assigned to telecast the programmes in foreign countries either by sale of video cassettes or with the help of satellites are having attributes required for bringing the property involved within the meaning of 'goods' as the same has utility, capability of being bought and sold; and capable of being transmitted, transferred, delivered stored and possessed.

3. The 'advertisement airtime' is an item that can be identified and abstracted, since the telecasting time limit is predetermined. The right over the advertisement air time may also be capable of being possessed till the time of its expiry. For example, if a person purchases the right over the advertisement airtime of say, 30 minutes to be used before the expiry of a particular month, then the said can possess the right till the expiry of that month. Accordingly, after the expiry of that month, the said right would automatically lapse and hence the characteristic of 'capable of being stored' would have limited application in this case.

4. One of the main characteristics of 'goods' is that it should be capable of being 'consumed' or 'used'. There should not be any doubt that the 'advertisement airtime' shall have value or capable of being used/consumed only, if the concerned advertisement material is telecast by the assessee herein, i.e., the advertisement air time gets is value only if the assessee agrees to telecast the concerned advertisement material.

5. In the case of 'goods', it gets separated from its manufacturer, and it can be used/consumed by anyone independent of or without any support from the manufacturer. Further, the 'goods' shall be capable of universal use. However, the 'advertisement air time', in the present case, is related to the television channels owned by the assessee only.

6. The advertisement airtime sold by the assessee or NGC India shall not have any value with regard to other television channels, meaning thereby, the same cannot be separated from the assessee. In the present case the 'advertisement airtime' fails to satisfy the test that it is capable of being used/consumed independently, i.e., independent of the assessee herein.

7. The AO correctly held that the 'advertisement air time' cannot fall under the category of 'goods'. It is only a right given to NGC India to procure advertisements. Though the 'right to procure advertisements' for particular 'airtime' may be capable of being transferred, but the same cannot be consumed/used by the buyer of the right, without the assistance from the assessee by way of telecasting the same in the television channels.

B) Principal and agent relationship

1. In the new agreement, it is provided that the relationship between assessee and NGC India is that of 'principal to principal', whereas the tax authorities have taken the view that they still continue the 'principal to agent' relationship even under the new agreement also.

2. The nature of principal-agent relationship was examined by the Delhi High Court in the case of *CIT vs. Idea Cellular Ltd. [2010] 325 ITR 148 (Del.)*. In a principal to the principal relationship in respect of the sale of goods, the manufacturer does not come in the picture in respect of the further sale of goods. The 'advertisement airtime' does not give to anybody the right of universal use and the same is restricted to the channels owned by the assessee only.

3. Even after the sale of 'advertisement airtime' by the assessee, the purchaser gets only a right to enforce the assessee herein to telecast the advertisement material of the purchaser, i.e., assessee's concurrence to telecast the advertisements and also actual telecasting alone brings value to the 'advertisement airtime'.

4. The assessee's involvement till the completion of telecasting of advertisement material is essential in order to maintain the value of advertisement airtime. Hence, 'advertisement airtime' cannot be categorised as 'goods' within the legal meaning of the said term. Accordingly, what is being sold by the assessee is only the facility of telecasting of advertisements through the advertisement materials given by the clients.

5. NGC India cannot be considered to be selling any 'goods' and in effect, it is only canvassing the advertisements for the assessee herein. Thus, NGC India provides only agency services to the assessee and in turn, the assessee is providing advertisement services or telecasting services to the clients.

6. The concept of purchase and sale of goods, cannot be applied to the facts of the present case. Accordingly, it was held that NGC India was only enabling the assessee to procure the advertisements for telecasting them, and hence cannot be considered as selling advertisement airtime independent of the assessee. Accordingly, NGC India cannot be considered to be 'an independent principal/ agent' in respect of dealing in advertisement airtime relating to the television channels owned by the assessee.

7. In effect, the NGC India was only canvassing the advertisements for the assessee through the purchase and sale of advertisement airtime relating to the television channels owned by the assessee. It makes NGC India an 'agent' of the assessee, since the advertisement airtime, *per se,* does not have any value without the assessee agreeing to telecast the advertisement material.

8. It is a well settled proposition that the substance shall prevail over the form and hence even if the new agreement states that the relationship between the assessee and NGC India is that of 'principal to principal' basis, it has been observed that the relationship between them actually exists on 'principal to agent' basis only.

9. Under the old agreement, the assessee paid 15 per cent of the revenue as commission to NGC India and under the new agreement it has sold advertisement airtime for a fixed consideration. The assessee has only changed the method of giving compensation to NGC India or method of generating revenue from the broadcasting of advertisements.

C) Dependent Agent PE

1. On a perusal of the various clauses of the new agreement, the Tribunal observed that NGC India habitually exercises in India an authority to conclude contracts on behalf of the assessee and the same is binding on the assessee since it has agreed to broadcast the advertisements procured by NGC India.

2. Hence, NGC India should be classified as 'dependent agent' of the assessee in terms of Article 5(4)(a) of the tax treaty. Accordingly, the assessee was having PE in India through its dependent agent NGC India in terms of Article 5(4)(a) of the treaty, since NGC India has been given full authority to conclude the contracts in India.

D) Attributions of profits

1. The assessee contended that Transfer Pricing Officer (TPO) has held that since transaction entered into is at arm's length price (ALP), no further attribution is necessary. Further, the assessee relied on various decisions : *DIT vs. Morgan Stanley & Co. Inc. [2007] 292 ITR 416 (SC), DIT vs. BBC Worldwide Ltd. [2011] 203 Taxman 554 (Del.), DIT vs. B4U International Holdings Ltd. [2015] 57 taxmann.com 146 (Bom.).* However, the decisions relied on by the assessee

was distinguishable on the facts of the present case. The observations made by the Supreme Court in the case of Morgan Stanley shall apply where the payments made by the foreign company to the Indian company for the services availed by it.

2. Accordingly, the certification of ALP by the TPO and the decision of various courts would be applicable only in respect of the payments made by a foreign company to its Indian Associated Enterprise (AE) in respect of services availed by it. However, if the foreign company receives any money from the Indian soil and if it is held to be having a PE, then the taxability of the same have to be examined in accordance with the provisions of India-USA treaty as well as under the provisions of Income-tax Act, 1961 (the Act).

3. It has been observed that the assessee had contended before the AO that it is not taxable at all in respect of advertisement revenue and hence it has been observed that the assessee has not challenged the income worked out by the AO. Therefore, in the interest of natural justice, it has been held that the assessee should be provided an opportunity to submit its contentions with regard to the computation of income from advertisement revenues.

4. Accordingly, for this limited purpose, the issue has been restored to the file of the AO. If the assessee does not have to say anything in this regard, the income computed by the AO shall stand.

E) Taxability of royalty

1. During the year under consideration, the assessee generated income through distribution rights of channels. The AO held that the revenue generated on granting of distribution rights was in the nature of royalty and accordingly assessed 15 per cent of thereof as income of the assessee under Article 12 of the tax treaty.

2. It has been observed that the AO has made a general observation that the Article 12 of the tax treaty shall be applicable without critically analysing the provisions of the treaty. Though the AO has also referred to the provisions of Explanation 2 to section 9(1)(vi) of the Act for examining the definition of the term 'royalty', yet the AO has not critically discussed its applicability to the impugned payment.

3. The definition of the term 'royalty' given in section 9(1)(vi) of the Act as well as in the India-USA tax treaty uses the expression 'process'. The said expression has not been defined in the tax treaty, but the same has been defined in Explanation 6 to section 9(1)(vi) of the Act.

4. The aforesaid Explanation has been inserted by the Finance Act, 2012. It had been observed that the various decisions relied upon by the assessee had been rendered before the insertion of the Explanation 6 or the applicability of the above said Explanation has not been examined therein. Hence, the question whether the payment received by the assessee for giving distribution rights shall fall in the category of 'royalty' needs to be examined afresh at the end of the AO.

5. Further, while dealing with the issue relating to the advertisement revenue, the High Court held that the assessee is having DAPE. The said fact also needs to be taken into account while examining the issue.

II) Transfer Pricing – Issue of corporate guarantee is in nature of 'shareholder activities'/'quasi-capital' and thus, could not be included within the ambit of 'provision for services' under the definition of 'international transaction' under section 92B of the Income-tax Act, 1961 – In favour of the assessee

Micro Ink Ltd. vs. ACIT – [2015] 63 taxmann.com 353 (Ahmedabad – Trib.) – Assessment Year : 2006-07

Facts

1. During Assessment Year (AY) 2006-07, the taxpayer issued various corporate guarantees on behalf of its subsidiaries, without charging them any consideration. The stand of the taxpayer was that these guarantees did not cost the taxpayer anything, nor any charges were recovered for the same, and that the 'said guarantees were in the form of corporate guarantees/quasi-capital and not in the nature of any services'.

2. The Transfer Pricing Officer (TPO) had made an adjustment by computing the arm's length price (ALP) of the corporate guarantee at two per cent on the basis of following reasoning:

a) Guarantees are chances that someone will have to pay for them, if chance is 100 per cent, i.e. in all cases one has to pay for it, guarantee fees will be simply equal to the guarantee amount. However, if it is only a probability, and only in few cases it will have to be paid, its charges are just a percentage of it. Banks normally compute guarantee charges on the basis of their experience in handling such situations.

b) Guarantees given by the taxpayer makes its own borrowing costlier; as its assets get used in guaranteeing, it has to raise costlier capital without being able to use its own those very assets. There cannot be a direct link to the guarantees given for the purpose of computing cost, but the fact remains that there was cost to the guarantor. In view of the above discussions, guarantee fees is calculated at two per cent, which is the prevalent market rate for guarantee fees.

3. Aggrieved by the TPO order, the taxpayer filed objections before the Dispute Resolution Panel (DRP). The DRP rejected the objection raised by the taxpayer, referred to and relied upon the 'OECD Transfer Pricing Guidelines for Multinational Permanent Establishments' and the decision of the Tax Court of Canada in the case of *G E Capital Canada vs. Her Majesty the Queen [2009] TCC 563. The Assessing Officer (AO)* thus proceeded to make the ALP adjustment in respect of corporate guarantee at INR 2.32 crores.

Decision – The Tribunal held in the favour of the assessee, as follows :

1. The Tribunal observed that similar issues have already been covered by the decision in the case of *Micro Inks Ltd. vs. ACIT [2013] 144 ITD 610 (Ahd).* Wherein the Ahmedabad Tribunal observed that similar products are not sold to any other concern, at the same price or even any other price, and interest is levied on the similar credit period allowed to those independent parties, but not to Micro USA. The question of excess credit period arises only when there is a standard credit period for the product sold at the same price and the credit period allowed to the AEs is more than the credit period allowed to independent enterprises. That is not the case here. The credit period for finished goods cannot be compared with credit period for unfinished goods and raw materials, and in any case, when products are not the same, there cannot be any question of prices being the same.

2. The Tribunal held that issuance of corporate guarantee was in the nature of 'shareholder activities'/'quasi-capital' and thus could not be included within the ambit of 'provision of services' under the definition of 'international transaction' under section 92B of the Act.

3. It distinguished the revenue's reliance on Bombay High Court judgment in Everest Kanto [2015] 56 taxmann.com 361 (Mumbai – Trib.) wherein guarantee commission was actually charged by the taxpayer, unlike in the present case. The grievance against the issuance of corporate guarantee being held to be an international transaction could not have come up for consideration.

4. In the case of Vodafone India Services, applicability of retrospective amendment to

section 92B of the Act had been considered in context of 'transfer' and not 'international transaction'. The amendment clarifies the two aspects of transfer – the asset itself and the manner in which it is dealt with. The issue considered by the High Court was prior to the amendment, whereas in the present case, it is the amended definition which would have to be considered. In the present case, we do not find either necessary or proper to indicate the application of section 2(47) of the Act as amended to the present proceedings. In view of the above discussions, the decision is equally misplaced and devoid of legally sustainable merits.

5. Further, the Tribunal also distinguishes the Canadian decision of G E Capital Canada relied upon by the revenue authorities stating:

a) The same did not even deal with the fundamental question as to whether issuance of a corporate guarantee is an international transaction at all; and

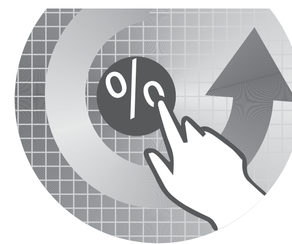
b) The provisions of the Act and the Canadian Income-tax Act, 1985 are so radically different that just because a particular transaction is to be examined on ALP in Canada, that alone cannot be a reason enough to hold that it must meet the same in India as well.

6. The Tribunal held that revenue cannot seek to widen. The Tribunal held that revenue cannot seek to widen of the best practices recognised by the OECD work.

7. The Tribunal analysed the business model of bank guarantees, with which corporate guarantee are sometimes compared, in the context of benchmarking the ALP of corporate guarantee. A bank guarantee is a surety that the bank, or the financial institution issuing the guarantee, will pay off the debts and liabilities incurred by an individual or a business entity in case they are unable to do so. Even when such guarantees are backed by one hundred per cent deposits, the bank charges a guarantee fees. Whereas in case of corporate guarantees, it is issued without any security or underlying assets. There is no recourse available with the guarantor if there is any default. Such guarantees are issued based upon the business needs and not risk assessment or underlying asset which generally the banks asks for. In general, therefore, bank guarantees are not comparable with corporate guarantees.

8. Further relying on the decision of *CIT vs. EKL Appliances Ltd. [2012] 345 ITR 241 (Del),* states that even if issuance of corporate guarantee is accepted as 'provision for service', such service needed to be recharacterised to bring it to tune with commercial reality, as 'no independent enterprise would issue a guarantee without an underlying security as has been done by the taxpayer and also states that issuance of corporate guarantees is covered by the residuary clause of section 92B definition.

9. However, in the decision in Bharti Airtel, the Delhi Tribunal has explained in detailed, the legal position of the section 92B of the Act and has specifically brought that the onus is on the Revenue to demonstrate that the transaction is of such nature so as to have a bearing on its profits, income, losses or assets. Such impact should be on a real basis and not on contingent or hypothetical basis. These conditions are not satisfied in the present case. It was held that, 'when the taxpayer extends an assistance to the AE, which does not cost anything to the taxpayer and particularly for which the taxpayer could not have realised money by giving it to someone else during the course of its normal business, such an assistance or accommodation does not have any bearing on its profits, income, losses or assets, and, therefore, it is outside the ambit of international transaction under section 92B(1) of the Act' and deletes transfer pricing adjustment.



CA. Hasmukh Kamdar

INDIRECT TAXES

Central Excise and Customs – Case Law Update

Exemption

Steel Authority of India Ltd. vs. Commissioner of C. Ex., Raipur [2015 (325) E.L.T. 901 (Tri. – Del.)]

The facts of this case are that the appellant supplied the steel plates to Delhi Metro Rail Corporation and claimed exemption under Notification No. 6/02 – Central Excise, dated 1-3-2002 Serial No. 260A. The appellant produced the necessary certificate issued by the competent authority to issue the certificate before the authorities below for claiming the exemption under said notification but the Adjudicating Authority denied the benefit of exemption on the ground that steel plates are not equipments as per Entry No. 260A of the Notification 6/02. Therefore, appellant is not entitled for exemption. Consequently, the demand of duty along with interest was confirmed and penalty was also imposed.

Aggrieved by the said order, appellant filed this appeal to Hon. CESTAT.

On behalf of the appellants it was submitted that the steel plates supplied to DMRC are part of equipments/structure of DMRC and same is covered under the Serial No. 260A of the Notification No. 6/02. It was further submitted that the appellant has obtained the necessary certificate issued by the competent authority to claim exemption. Therefore, the appellants are entitled to claim exemption under said notification. Reliance was placed on the clarification issued by Joint Secretary (TRU) *vide* F. No. 354/7/2003, dated 14-9-2004 to the effect that the items, in question, are part of traction equipment. Reliance was also placed on the decision of Hon. CESTAT in the case of *Commissioner of C. Ex. Mumbai-III vs. Precihole Machine Tools Pvt. Ltd. [2011 (272) E.L.T. 423 (Tri.-Mum*bai)] and *Commissioner of Customs (Imports), Mumbai vs. Tullow India Operations Limited [2005. (189) E.L.T. 401 (S.C.)]* wherein it is held that when the appellant has produced required certificate issued by the competent authority, the appellant is entitled to claim the benefit of exemption.

On behalf of the Department it was submitted that the steel plates, in question, are neither equipments nor rolling stock to claim the duty free exemption under the said notification.

The Hon. CESAT observed that exemption under Notification No. 6/02, dated 1-3-2002 at Serial No. 260A is available to "All items of equipments including machinery and rolling stock, procured by or on behalf of Delhi Metro Rail Corporation Ltd. for use in the Delhi MRTS project." Further the condition stipulated is that the appellant is to produce the certificate issued by Managing Director, Co-Director-Rolling Stock Electrical and Signalling and Co-Director (Finance) of Delhi Metro Rail Corporation to the effect that:-

(i) The goods are procured by or on behalf of the Delhi Metro Rail Corporation Ltd., for use in the Delhi MRTS project; and

(ii) The goods are part of the inventory maintained by the Delhi Metro Rail Corporation Ltd., and shall be finally owned by the Delhi Metro Rail Corporation Ltd.

Hon. CESTAT further noted that the certificate is produced by the appellant and the said certificate has been issued by Director-Rolling Stock, Electrical and Signalling, DMRC certifying that the conditions stipulated in Condition No. 61 attached to Serial No. 260A of the notification as follows.

Certified that:

1. The goods are procured by or on behalf of the Delhi Metro Rail Corporation Ltd. for use in the Delhi MRTS project and;

2. The goods are part of the inventory maintained by the Delhi Metro Rail Corporation Ltd. and shall be finally owned by the Delhi Metro Rail Corporation Ltd.

The short issue therefore was whether steel plates cleared by the appellant qualify as equipment or not.

It was further observed that as per notification, all items of equipment are entitled for exemption. Definitely the steel plates have been used by the appellant for fabrication of equipment/structure which also has the support of the TRU letter F. No. 354/7/2003, dated 14-9-2004 to say that item in question is part of traction equipment.

Therefore, the Hon. CESTAT held that appellant has complied with the conditions of Notification No. 6/02, dated 1-3-2002, Serial No. 260A, and entitled for benefit of the said notification.

In these terms, the impugned order was aside with consequential relief, if any.

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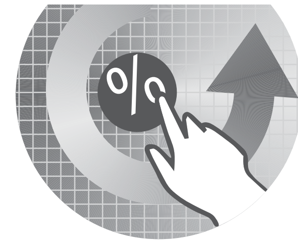


Nikita Badheka, *Advocate & Notary*

INDIRECT TAXES
VAT Update

A. Circulars by Commissioner of Sales Tax

A.1 Circular number 19T of 2015 dated 21-12-2015 – Downloading of digitally signed Registration certificate.

By this circular the Commissioner has explained the modified system of downloading the digitally signed TIN certificate. The modalities to download are provided in Annexure A to the notification. It is clarified that the dealer will also receive the hardcopy of circular through courier.

A.2 Circular number 20T, dated 31-12-2015 – Restructuring of Maharashtra Sales tax department.

The functional organisation structure of VAT administration lead to practical difficulty to the dealers as they were subjected to compliance with different divisional officers like return, audit, refund, recovery, etc. To ease the difficulties of the dealers and to provide single window system to the dealers, the Maharashtra Sales Tax department is restructured to PIN CODE wise allocation of dealers to different officers called nodal officers.

Under this new system each dealer will have a nodal officer who will look after the functions of amendment and cancellation of registration, returns, follow ups, audits, assessment and issue based audits, processing refunds, issuance of CST forms, cross-checks and recovery of dues, etc. Some of the officers would be assigned the function of registration of new dealers as also survey of unregistered dealers at the instruction of concerned JC.

The tables 1 and 2 in the above circular shows the new nodal division and concerned number of officers, Assistant Commissioner and Deputy Commissioners. The allocation is given as per the PIN CODES of the registered address of dealers for Mumbai, Pune and other areas of Maharashtra. The details of allocation to each nodal officer are given.

It is clarified that the cases of dealers under PSI shall remain with the existing PSI nodal officers. It is also made clear that the officers should not transfer partly heard cases and the cases time barring on or before 31st March 2016. Such cases identified by the officer shall be completed by existing officer within the stipulated time frame.

In case of any grievances in this regard, the concerned dealer may approach Additional Commissioner of the concerned zone.

As regards appeal, it is clarified that there will be no change in the appellate authority pertaining to demand notices issued till 31st December, 2015. The reshuffling of the appellate authority pertaining to all the assessing authorities will take place from 1st January, 2016 only.

B. Notification in respect of set-off of goods covered by Schedules D-13 and D-14

B.1 By notification number VAT 1515/CR-158/taxation-1 dated 30th December 2015, Rule 52 B is added with effect from 1st January, 2016. Schedule D-13 refers to aerated and carbonated non-alcoholic beverages whether or not containing sugar or sweetening matter or flavour or any other additives. The rate of tax is 25% with effect from 1st October, 2015. Similarly the rate of tax on cigars and cigarettes is increased to 35% w.e.f. 1st October, 2015.

The new set-off Rule 52 B restricts the set-off available on goods covered under the above 2 Entries that is D-13 and D-14. If the claimant dealer has purchased the goods covered under D-13 or D-14 he shall be entitled to claim set off in respect of these goods only to the extent of aggregate of:

1. The taxes paid or payable under the CST Act on the inter-State resale of corresponding goods
2. And the taxes paid on the purchases of the said goods, if sold locally under the MVAT Act.

The set-off under this rule shall be claimed only in the month in which corresponding sales of such goods is effected by claimant dealer.

As per the proviso, this rule will not apply to the purchases of the goods which are sold in course of export of goods outside India.

B.2 Exemption to certain drugs and medical equipment.

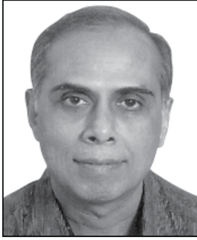
By notification number VAT 1515/CR-169/taxation-1 dated 2nd January, 2016 schedule A is amended with effect from 2nd Jan 2016.

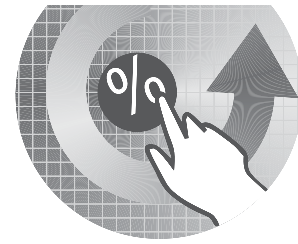
After entry 12A to Schedule A of exempt goods a new Entry is inserted as 12B. Drugs and medical equipments used in dialysis for the treatment of patient suffering from kidney disease as notified by the State Government from time-to-time would be exempt from payment of whole of tax.

C. FAQ in Form e-704.

Detailed FAQ's in form e-704 are available on website www.mahavat.gov.in on link - http://www.mahavat.gov.in/Mahavat/insheets/FAQ%20on%20e%20704.pdf. Members are requested to go through the FAQ as it would assist them while uploading the audit reports and resolving the practical problems.

> "Each work has to pass through these stages—ridicule, opposition, and then acceptance. Those who think ahead of their time are sure to be misunderstood."
>
> — *Swami Vivekananda*





CA Rajkamal Shah & CA Naresh Sheth

INDIRECT TAXES

Service Tax – Statute Update

1. Applicability of service tax on services received by apparel exporters in relation to garment fabrication

On the issue that whether a job worker engaged in fabrication/stitching, labelling etc. of garments is providing manpower supply service or involved in process amounting to manufacture, the Board has come out with a circular that normally a job worker cannot be regarded as providing manpower supply service. This view is based on particular agreement forwarded by the Apparel Export Promotion Council and such agreements would fit into a job work involving process amounting to manufacture or production of goods and covered under negative list [S. 66D(f)]. However, it is not necessary that every job work can be regarded as covered under negative list but would depend on the terms of agreement in respect of service being provided.

[Circular No. 190/9/2015-ST dated 15-12-2015]

Writer's note:

Reader's may please note that though the circular is issued in respect of clarification sought by Apparel Export Promotion Council in relation to export of garments, the same would be applicable in case of manufacturing of garment through job work generally.

2. Extension in date of payment of service tax for the month of November

The Central Government has extended the date of payment of service tax for the month of November 2015 to 20th December 2015 for the State of Tamil Nadu and Union Territory of Puducherry (expect Mahe & Yanam)

[Notification No. 26/2015-ST dated 9-12-2015 and 27/2015-ST dated 18-12-2015]

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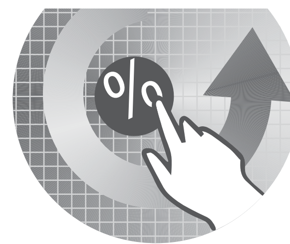


CA Bharat Shemlani

INDIRECT TAXES
Service Tax – Case Law Update

1. Services

Lottery Distribution Service

1.1 Future Gaming & Hotel Services (Pvt.) Ltd. vs. UOI 2015 (40) STR 833 (Sikkim)

The issue in this case was regarding reverse charge mechanism on lottery distributors who purchased lottery tickets in bulk from State Government. The High Court held that, the second tier comprising of selling and marketing agents who purchased lottery tickets from distributors in bulk has severed all other relations. There was no privity of contract between distributors and sellers and buyers down line after second tier. Hence, the levy of reverse service tax *vide* Notification No. 30/2012-ST as amended by Notification No. 7/2015-ST was unsustainable and struck down.

Banking & Other Financial Service

1.2 Chiplun Nagari Sahakari Patsanstha Ltd. vs. CCE, Kolhapur 2015 (40) STR 957 (Tri.-Mumbai)

In this case, the appellant a co-operative society providing service to its own members by taking interest paying deposits from them and lending to needy members on interest after charging some clerical charges. The Tribunal held that, appellant admittedly working for welfare of its members and not accepting or lending money from public at large. It is settled law that service tax is not payable on services provided by Association to its members.

Club or Association Service

1.3 Cricket Club of India Ltd. vs. CST, Mumbai 2015 (40) STR 973 (Tri.-Mumbai)

The Tribunal in this case held as under:

- The principal of mutuality applies squarely to appellant as members club and therefore entrance fees for admission of new members is not liable to service tax.
- Entrance fees is onetime payment visited upon members of clubs or association for inclusion into restricted group constituting membership of club or association and provision of service is not perceptible as *quid pro quo* for payment of entrance fees.
- Monthly contributions by members cannot be attributable to identifiable activity, hence not to be deemed to be consideration liable to be taxed. Further, contributions for discharge of liabilities or meeting common expenses of group of persons aggregating for identified common objectives not to meet criteria of taxation under FA, 1994 in absence of identifiable service benefiting identified individual or individuals making contribution in return for benefit so derived.

Business Auxiliary Service

1.4 My Car Pvt. Ltd. vs. CCE, Kanpur 2015 (40) STR 1018 (Tri.-Del.)

The Tribunal in this case held as under:

- After sales service provided to customers of Maruti Udyog Ltd. accounted as commission on extended warranty is liable to service tax under BAS.
- Maintaining mobile vehicles to attend complaints of customers who purchased Maruti vehicles is facility provided to customer on behalf of MUL liable under BAS.
- Since no consideration is received for free services provided to customers, same is not liable to service tax.
- Incentives received on sale of spare parts are either compensatory payment or in nature of performance based trade discount on achieving certain performance target or activity mutually beneficial to both assessee and MUL is not liable to tax under BAS.
- No consideration is received from MUL for carrying out buying and selling used/pre-owned cars, hence not liable to service tax.

1.5 Rail Tel Corporation of India Ltd. vs. CCE (Adj.) New Delhi 2015 (40) STR 1131 (Tri.-Del.)

The Tribunal in this case held that, leasing of tower space on microwave towers to various cellular operators prior to coverage under more specific category Telecommunication Service w.e.f. 1-6-2007 is not liable to service tax under BAS. There is nothing in Finance Act to suggest transplant of any part of BAS into telecom service w.e.f. 1-6-2007.

1.6 Omar Agencies (Hutch) vs. CCE, Allahabad 2015 (40) STR 1135 (Tri.-Del.)

The Tribunal in this case after relying on series of decisions held that, providing/selling SIM cards/recharge vouchers in lieu of certain commission is not liable to service tax under BAS. It is also held that, credit wrongly taken on various input services is required to be reversed as the output is not liable to service tax.

Commercial Training or Coaching Service

1.7 CCE, ST & C vs. Maersk India Pvt. Ltd. 2015 (40) STR 1059 (Mum.)

In this case, the assessee incurred expenses towards training of staff outside India. The department sought to tax the same under RCM. The High Court held that, admittedly no coaching service is performed/rendered in India as coaching classes situated outside India. In view thereof, the same is not liable to service tax.

1.8 Sadhana Educational & People Dev. Ser. P. Ltd vs. CCE Pune-III 2015 (40) STR 1107 (Tri.-Mumbai)

The Tribunal in this case held as under:

- Postgraduate level courses in the field of Marketing, Finance, Human Resource, System Management, etc. is not entitled for exemption under Notification No. 24/2004-ST.
- Amounts recovered towards students special funds, alumni fund and deposit fund which were used for various expenses and sale of forms/prospectus and re-exam fees is not includible in value of service.
- Student deposit fund collected as a refundable security deposit to meet unforeseen expenses is not includible in value of service.

Interior Decorator Service

1.9 Divekar Associates vs. CCE, Pune-III 2015 (40) STR 1101 (Tri.-Mumbai)

The appellant in this case engaged in manufacturing of furniture as per design,

drawing and specifications provided by the customer. They have also undertaken work of modular partition and activities executed under supervision through sub-contractor and manufactured all types of furniture at site out of own raw materials. The Tribunal held that the said activities are not liable to service tax under category of Interior Decorator Service.

Renting of Immovable Property Service

1.10 CCE, Nashik vs. Deoram Vishrambhai Patel 2015 (40) STR 1146 (Tri.-Mumbai)

The department in this case sought to demand tax by clubbing of rent received by all co-owners letting out jointly owned property in individual capacity. The Tribunal held that, co-owners not to be considered liable for service tax jointly or severally and there is no association of persons and they all are individuals and liable to tax in that capacity only.

Manpower Recruitment & Supply Agency Service

1.11 D. S. Chavan Engineering Works vs. CCE&C, Nashik 2015 (40) STR 1150 (Tri.-Mumbai)

The department in this case sought to tax welding and gas cutting service provided on firm rate basis for NTPC under Manpower Recruitment & Supply Agency Service. The Tribunal held that, perusal of work order does not indicate assessee is required to supply only manpower, hence not liable to service tax under the said service.

Transport of Goods/Passengers by Air Service:

1.12 Kingfisher Airlines Ltd. vs. CST, Mumbai 2015 (40) STR 1159 (Tri.-Mumbai)

The department in this case sought to levy service tax on excess baggage charges recovered from passengers under Transport of Goods by Air Service instead of Transport of Passengers by Air Service. The Tribunal held that, carrying of baggage, including excess baggage by Airlines is integral part of transport of passengers by Air and an incidental activity of main service. Further there is no element of transport of unaccompanied goods under this service. Also there is no separate contract for such service and essential characteristic of activity to be taken. Since service tax on passenger transport under main service, was fixed per passenger during relevant period no further tax can be demanded. Extended period of limitation cannot be invoked as issue being of interpretation of taxing statute and being debatable one.

2. Interest/Penalties/Others

2.1 Hemangi Enterprises vs. CCE, Pune-I 2015 (40) STR 945 (Tri.-Mumbai)

In this case the appellant handed over cash after withdrawing from Bank to Tax Consultant for depositing the service tax who instead of the depositing the same with exchequer, pocketed and committed a fraud. The Tribunal observed that there is no evidence that such fraud is committed with connivance of appellant or within his knowledge and he has paid the entire service tax along with interest. It is held that, appellant was unaware of fraud and having paid entire tax along with interest is eligible for waiver of penalty.

2.2 Shubham Electricals vs. CCE&ST, Rohtak 2015 (40) STR 1034 (Tri.-Del.)

The Tribunal in this case held that, the SCN was vague and incoherent and in SCN there is no single assertion proposing to levy and collect service tax on basis of any specified taxable service allegedly rendered except several alternative taxable services speculated to have been proved. It is further held that, failure to gather relevant facts for issuing proper SCN cannot provide justification for vague and incoherent SCN resulting in serious transgression of due process of law and hence SCN and consequent OIO is unsustainable and liable to be quashed.

It is also held that, best judgment ought to be used only for ascertaining quantum of

tax liability, where actual extent of liability cannot be determined with mathematical precision on account of non-availability of relevant documents or financial records. The best judgment assessment cannot be used for determination of specific taxable service provided. The conclusion regarding taxable event and liability to tax under appropriate fiscal legislation authorising levy and collection of such tax is matter for determination with precision and clarity and not by process of guess work or speculation.

2.3 *Ask Me Enterprise vs. UOI 2015 (40) STR 1041 (Guj.)*

The petitioner in this case applied for STVCES, 2013, wherein they have paid more than 50% of dues before 31-12-2013 and balance dues paid before 30-6-2014, but under wrong accounting code of interest and penalty. The department rejected the application on the ground of non-deposit of dues within time under proper accounting code. The High Court held that the petitioner followed entire procedure prescribed in scheme and paid entire admitted amount much before prescribed and therefore, rejection of application on such hyper technical ground is not justified.

3. CENVAT Credit

3.1 *Bharti Hexacom India Ltd. vs. CCE, Jaipur-I 2015 (40) STR 1033 (Tri.-Del.)*

The Tribunal in this case allowed CENVAT credit of service tax paid on catering service and renting of immovable property where towers installed for boosting signals as the said services are input services used for providing taxable output service.

3.2 *Sri Krishna Pharmaceuticals Ltd. vs. CCEC&ST, Hyderabad-III 2015 (40) STR 1039 (Tri.-Bang.)*

In this case, the appellant availed credit of service tax paid for rent of Unit III at Unit I. The Tribunal following the decision in *Doshion Ltd. 2013 (288) ELT 291 (Tribunal)* held that no extra benefit accruing to assess and no loss caused to revenue and procedural irregularities to be ignored and hence, credit is admissible.

3.3 *CST-I, Mumbai vs. FIL Capital Advisors (India) Pvt. Ltd. 2015 (40) STR 1073 (Tri.-Mumbai)*

The Tribunal in this case allowed CENVAT credit of service tax paid on general insurance and medical insurance policies taken for employees and outdoor catering service. It is also held that, merely because certain bills were in individual names, is not a ground for denial of benefit as expenses reflected in books of account of appellant.

3.4 *Mangalore Refinery & Petrochemicals Ltd. vs. CCE&ST, Mangalore 2015 (40) STR 1093 (Tri.-Bang.)*

The Tribunal in this case disallowed CENVAT credit of service tax paid on construction of school and SC/ST colony as the same has no nexus with manufacturing activity. It is also held that, extended period of limitation cannot be invoked as there is no evidence to show suppression or misstatement with *mala fide* intent as the credit availed has been reflected in statutory records and monthly returns filed.

3.5 *HCL Technologies Ltd. vs. CCCE&ST, Noida 2015 (40) STR 1124 (Tri.-Del.)*

The Tribunal in this case held as under:

Allowed CENVAT credit of service tax paid on following services:

- Rent-a-Cab Services availed by BPO company providing BAS to overseas client.
- Courier Service used for dispatch of documents.
- Management, Maintenance and Repair Service used for painting and mica finishing work.
- Manpower Recruitment and Quality Control Service.

- Security Agency Service used to provide security to employees required to work and leave office at odd hours.
- Cleaning Services carried out at guest house premises.
- Business Support Service used in conducting summits to help improve company's cliental and promote and develop business.
- Legal Consultancy Service used for drafting reply and appeal papers.
- Chartered Accountancy Service used for compliance of industrial and labour laws and also for statutory compliances under Income-tax Act, 1961 and Companies Act, 1956 etc.

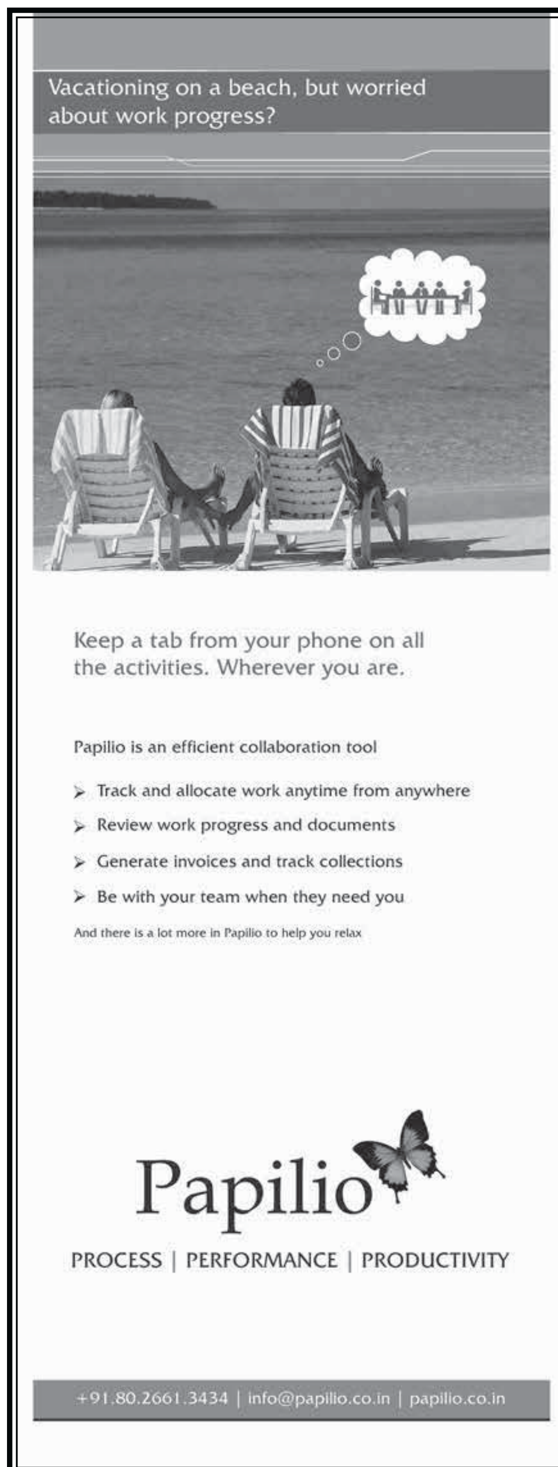
Disallowed CENVAT credit of service tax paid on following services:

- Stay in hotels on guise of heading renting of immovable property.
- Design service for supply of coffee mugs bearing logo of company.

It is also held that, non mentioning of registration number of service provider is only procedural lapse and credit not to be denied on account of procedural lapse when substantive entitled itself is not disputed.

3.6 Rohan Motors Ltd. vs. CST, Noida 2015 (40) STR 1153 (Tri.-Del.)

The appellant in this case utilised credit on advertising services which were common to all units. The department contended that, appellant should have availed credit on proportionate basis. The Tribunal held that, rule 7 of CCR, 2004 during relevant period did not provide for distribution of credit on proportionate basis and if the appellant failed to take ISD registration, the same is procedural lapse for which benefit of credit not to be denied.



Janak C. Pandya, Company Secretary

CORPORATE LAWS
Company Law Update

[2015] 193 Comp Cas 397 (SC)

[In the Supreme Court of India]

Purnima Manthena and Another vs. Dr. Renuka Datla and Others

A question of Law, as is comprehended in section 10FA of the Companies Act, 1956 would arise only if a decision which is the foundation thereof suffers from perversity due to error of fundamental principal law.

Brief facts

This appeal is filed against the Judgment and Order dated April 15, 2015 of the Telangana and Andhra Pradesh High Court. The Judgment is in the name of *Dr. Smt. Renuka Datla vs. Biological E. Ltd. [2015] 193 Comp Cas 356 (T & AP).*

Biological E. Ltd ("Company") is engaged in the business of pharmaceuticals products and vaccines. A family dispute arose after the death of Dr. Vijay Kumar Dalta, the Managing Director and Founder of the Company and husband of Dr. Smt. Renuka Dalta ("Respondent No. 1" or "R1"). R1 joined the Company as a Medical Director and over a period of time was made as Executive Director. At the time of death of Mr. Vijay Kumar Dalta, the Board of the Company consisted of three directors i.e. petitioner, R1 and Mr. G.V. Rao ("R6"). R1 was holding 81% of the shares of the Company. R6 has offered to resign from the Company *vide* his letter dated April 6, 2013. However, upon request of the family members, he withdrew his decision to resign by writing another letter on April 9, 2013. On the same day, a meeting of the Board of Directors of the Company was convened and the same was attended by three daughters of the petitioner. R1 did not attend the meeting. In the said meeting Mrs. Indira Pusapati (R5) was appointed as director on casual vacancy caused by the death of Dr. Vijay Kumar Dalta.

Subsequently, two board meetings were held in April 2013 and R1 did not attend the same. In one of the meetings, two daughters, namely, Mrs. Purnima Manthena and Ms. Mahima Dalta were present. In the said meeting following matters were considered:

a. Board took note of the Will of Dr. Vijay executed in favour of Ms. Mahima Dalta;

b. The Board decided to transfer the equity shares of Dr. Vijay in favour of Ms. Mahima;

c. Ms. Mahima and Mrs Purnima were appointed as additional directors; and

d. Ms. Mahima was appointed as Managing Director.

Subsequent to the above, there were further board meetings convened in which certain shares of Dr. Vijay were transferred to Ms. Mahima and Mrs. Purnima as per decision of the members of the HUF.

R1 sent several communications of her opposition to the above proceedings of the meetings and claimed that no notice of the Board meeting was sent to her. Before the Annual General Meeting of the Company, R1 filed the petition before the Company Law Board under Section 409 of the Companies Act, 1956 ("Act"). In the said petition, she sought the following declarations:

a. That the appointments of her three daughters as directors of the Company by virtue of board meetings held in April 2013 be nullified;

b. That Mr. G. V. Rao having resigned on April 6, 2013 with immediate effect was neither entitled to continue as director nor did have any authority to convene the aforesaid meetings;

c. All acts, deeds and decisions taken in the said meetings be adjudged to be void and not binding on the Company;

d. To restrain holding of the AGM; and

e. Appointment of two *ad hoc* directors.

The CLB rejected the petition for above interim order based on various pleadings and other documents as made available before it. *Prima facie*, the CLB was of the view that there is no change in management or ownership of the Company. R1 is continuing as Executive Director of the Company.

Aggrieved by the above order, R1 filed an appeal under Section 10F of the Act with the Hon'ble High Court. A similar Civil Suit was initiated by R1 based on the Will of Dr. Vijay. In the said suit, R1 asked for a declaration to be the absolute owner of the shares of the Company and a direction to the defendants therein to transfer the same by recording her name in relation thereto. Another claim made was to delineate her extent of claim to the shares in the capacity of a working spouse/widow of late Dr. Vijay.

R1 withdrew her petition before the CLB, but later filed a new petition before the CLB under Sections 111A, 237, 397, 398, 402 and other relevant provisions of the Act. In the said petition, R1 also pleaded that the respondents were contemplating to transfer and assign the undertakings of the Company to other companies incorporated and managed by them. In the said petition, a proposed Scheme of Arrangement for demerger of undertakings of the Company as filed before High Court was also placed.

The CLB, after pursuing the other side's submissions and facts, again declined to give any interim relief to R1. R1 then filed an appeal before the High Court which allowed the same.

The High Court granted the following reliefs:.

a. An *ad hoc* board of directors to be constituted having the appellant and respondents as directors.

b. *Ad hoc* board to be made responsible for day-to-day functions of the Company and all decisions will be unanimous.

c. No transfer or dealing with 81% shares held by Dr. Vijay till the dispute of succession is settled.

d. CLB to give final judgment on Company Petition.

The present appeal is against the said High Court Order. The arguments put forward are as follows:

a. CLB Order of August 2014 did not generate any questions of law and hence the application under Section 10F is not contemplated.

b. Mr. G. V. Rao shall continue to be a director since he has withdrawn his resignation letter prior to the board meeting of April 9, 2013.

c. R1's letter after one year is an afterthought and even the board meetings were void, the same got sanctified in the AGM.

d. In their support, judgments in *V.S. Krishnan vs. Westfort Hi-Tech Hospital Ltd. [2008] 3 SCC 363, Wander Ltd. vs. Antox India P. Ltd. [1990] (Supp) SCC 727; CIT vs. Scindia Steam Navigation Co. Ltd. [1962] 1SCR 788* were referred.

The submission from R1 are as follows.

a. The denial of interim relief by the CLB adversely impacts the legal right of R1 and thus justifying the High Court intervention under Section 10F of the Act.

b. The locus and competence of Mr. G. V. Rao also questions that R1 was unaware thereof and no such emergency to rush through such steps when she was in the state of mourning due to the loss of her husband.

c. In their support, reliance was placed in the judgments in the case of *Raj Kumar Shivhare vs. Assistant Director, Directorate, Director of Enforcement [2010] 4 SCC 772; Dale* and *Carrington Inct. P. Ltd vs. P. K. Prathapan [2005] 1 SCC 212* etc.

Judgments and reasoning

The Court allowed the appeal. The Court also mentioned that the CLB and the civil court would decide the proceedings before them on merits. The Court analysed the provisions of Section 10F of the Act. The Court analysed the expressions "decision or order" and "any question of law arising out of such order". The Court referred the decision on *CIT vs. Scindia Steam Navigation Co. Ltd. [1962] 1SCR 788.* In the said judgment, it was held that when a question of law is neither raised nor considered by it, it would not be a question arising out of its orders notwithstanding that it may arise on the findings given by it. The scope of Section 10F was dwell by the court in *Dale and Carrington Inct. P. Ltd. vs. P. K. Prathapan [2005] 1 SCC 212.* The Court also reviewed the judgments as relied by both the sides. The Court was of the view that having regard to the stage at which the CLB Order had been passed, no exhaustive examination of the factual and legal aspects ought to have been undertaken by the High Court. The Court noted that the CLB, while granting interim reliefs, has satisfied itself with the undertakings offered on behalf of the appellants and other directors. The High Court decisively furnished its view and thus leaving little or none for the CLB to decide, which is not contemplated under Section 10F of the Act.

"Books are infinite in number and time is short. The secret of knowledge is to take what is essential. Take that and try to live up to it."

— *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 Notifications & Circulars issued by RBI:

A. Circulars issued by RBI

1. Guidelines on trading of Currency Futures and Exchange Traded Currency Options in Recognised Stock Exchanges – Introduction of Cross-Currency Futures and Exchange Traded Option Contracts

Currently, in terms of Foreign Exchange Management (Foreign Exchange Derivative Contracts) Regulations, 2000 dated May 3, 2000 (Notification No. FEMA. 25/RB-2000 dated May 3, 2000) market participants, i.e., residents and eligible non-resident market participants are permitted to trade in US Dollar (USD) - Indian Rupee (INR), Euro (EUR)-INR, Pound Sterling (GBP)-INR and Japanese Yen (JPY)-INR currency futures contracts and USD-INR currency option contract in recognised stock exchanges,

In order to enable direct hedging of exposures in foreign currencies and facilitate execution of cross-currency strategies by market participants, as announced in the Fourth Bi-monthly Monetary Policy Statement 2015-16 (Para 38), RBI has permitted the recognised stock exchanges to offer the following with immediate effect –

– Cross-currency futures contracts and exchange traded option contracts in the currency pairs of EUR-USD, GBP-USD and USD-JPY, which were not permitted earlier.
– Exchange traded currency option contracts in EUR-INR, GBP-INR and JPY-INR in addition to the existing USD-INR option contracts.

Market participants are allowed to take positions in the cross-currency futures and exchange traded cross-currency option contracts without having to establish underlying exposure subject to the position limits as prescribed by the exchanges. The position limit is summarised in table below-

Type of market participant	Position limit for Foreign Currency (FCY)-INR contracts (both futures and options)	Position limit for cross-currency contracts (both futures and options)
Clients and Foreign Portfolio Investors (FPIs)	USD 15 million for USD-INR pair and USD 5 million for EUR-INR, GBP-INR and JPY-INR, for all pairs put together, per exchange, across all contracts for positions taken without establishing underlying exposure.	As per the limits specified by the exchanges without having to establish underlying exposure.
	For hedging underlying exposures, participants may take positions in either FCY-INR contracts or in combination with cross-currency contracts up to the underlying exposure and as per	

Type of market participant	Position limit for Foreign Currency (FCY)-INR contracts (both futures and options)	Position limit for cross-currency contracts (both futures and options)
	limits specified by the exchanges in terms of the guidelines stipulated in A.P. (DIR Series) Circular Nos. 147 dated June 20th, 2014 and No. 90 dated March 31st, 2015 for residents and A.P. (DIR Series) Circular No. 148 dated June 20th, 2014 for FPIs	
AD Cat-I bank trading members	As per the position limits specified by the exchanges subject to the Net Open Position Limit (NOPL) and Aggregate Gap Limits (AGL) in terms of A.P. (DIR Series) Circular No. 86 dated March 1, 2013. Further, any synthetic USD-INR position created using a combination of exchange traded FCY-INR and cross-currency contracts shall have to be within the position limit prescribed by the exchange for the USD-INR contract.	

AD Category-I banks are permitted to undertake trading in all permitted exchange traded currency derivatives within their Net Open Position Limit (NOPL) subject to limits stipulated by the exchanges (for the purpose of risk management and preserving market integrity) provided that any synthetic USD-INR position created using a combination of exchange traded FCY-INR and cross-currency contracts shall have to be within the position limit prescribed by the exchange for the USD-INR contract.

(A.P. (DIR Series) Circular No. 35 dated December 10, 2015)

(Comment: This is a welcome move by RBI as it will enable direct hedging of exposures in foreign currencies and facilitate execution of cross-currency strategies by market participants. It will provide a boost for doing business worldwide. This may have an effect of increasing cross-currency volume on exchanges and could bring down hedging cost.)

B. Notifications issued by RBI

1. Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2015

The Notification has made following amendments in the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004 (Notification No. FEMA. 120/2004-RB dated July 7, 2004).

a) Amendment of the Regulation 21 (2) (ii)

After Regulation 21(2)(ii), the following proviso shall be inserted, namely:

"Provided that under these Regulations, the Reserve Bank may, in consultation with the Government of India, change / prescribe for the automatic as well as the approval route of FCCBs, any provision or proviso for issuance of FCCBs."

b) Amendment to the Regulation 21(2)(iii)

After Regulation 21(2)(iii), the following proviso shall be inserted, namely:

> "Provided that under these Regulations, the Reserve Bank may, in consultation with the Government of India, change / prescribe any provision or proviso for issuance of FECBs."

(Notification No.FEMA.359/2015-RB dated 2nd December, 2015)

(Comment: This Notification is pursuant to A.P. (DIR Series) Circular No. 32 dated November 30, 2015 to provide a smooth transition. Hitherto, FCCB scheme had not taken off the way it was desired due to market conditions including high hedging cost. This notification empowers RBI to quickly respond to business needs and hence a step in the right direction in accordance with the policy announcements made in the Union Budget, 2015).

2. Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) (Amendment) Regulations, 2015

The Notification has made the following amendments in the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000 (Notification No. FEMA. 3/2000-RB dated 3rd May 2000).

a) Amendment to the Schedule I

In Schedule I, after paragraph 3, the following paragraph 4 has been inserted:-

> "Provided that under these Regulations, the Reserve Bank may, in consultation with the Government of India, prescribe for the automatic route, any provision or proviso regarding various parameters listed in paragraphs 1 to 3 above of this Schedule or any other parameter as prescribed by the Reserve Bank and also prescribe the date from which any or all of the existing proviso will cease to exist, in respect of borrowings from overseas, whether in foreign currency or Indian Rupees, such as addition / deletion of borrowers eligible to raise such borrowings, overseas lenders / investors, purposes of such borrowings, change in amount, maturity and all-in-cost, norms regarding security, pre-payment, parking of ECB proceeds, reporting and drawal of loan, refinancing, debt servicing, etc."

b) Amendment to the Schedule II

Further, in Schedule II, after paragraph 5, the following paragraph 6 has been inserted:-

> "Provided that under these Regulations, the Reserve Bank may, in consultation with the Government of India, prescribe for the approval route, any provision or proviso regarding various parameters listed in paragraphs 1 to 5 above of this Schedule or any other parameter as prescribed by the Reserve Bank and also prescribe the date from which any or all of the existing provisions will cease to exist, in respect of borrowings from overseas, whether in foreign currency or Indian Rupees, such as addition / deletion of borrowers eligible to raise such borrowings, overseas lenders / investors, purposes of such borrowings, change in amount, maturity and all-in-cost, norms regarding security, pre-payment, parking of ECB proceeds, reporting and drawal of loan, refinancing, debt servicing, etc."

(Notification No. FEMA.358/2015-RB dated December 2, 2015)

(Comment: This Notification is pursuant to A.P. (DIR Series) Circular No. 32 dated November 30, 2015. Through the Notification, RBI has been empowered to announce policy measures in respect of borrowings & lending to quickly respond to the business and economic needs and is a step in right direction.)

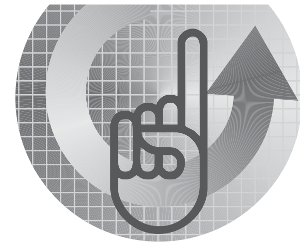
3. Foreign Exchange Management (Manner of Receipt and Payment) (Amendment) Regulations, 2015

In partial modification of Notification No. FEMA 14/2000-RB dated 3rd May, 2000, Reserve Bank of India has made the following amendments to Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2000 in the Regulation 5, after sub-regulation (2)(b) following shall be added at (c):

> "Any other mode of payment in accordance with the directions issued by the Reserve Bank of India to authorised dealers from time to time."

(Notification No. FEMA.357/2015-RB dated December 7, 2015)

(Comment: Through this Notification, RBI is empowered to prescribe additional mode(s) to prescribe the manner of payments in foreign exchange. This is a welcome move to smoothen the payments for imports into India. The proposed measure will expand the scope of the clearing mechanism resulting into saving in transaction cost and faster settlement of dues).



Ajay Singh, *Advocate* & CA Namrata Bhandarkar

BEST OF THE REST

1. Constructive *res judicata* – As per the principles of constructive *res judicata*, the contention, which ought to have been taken and if not taken is deemed to have been concluded and cannot be again raised in appeal

Appellant while filing a review application submitted before the Court that there was an apparent arithmetic mistake in calculation for the purpose of computation of the surplus land. It was submitted that if the calculation as made by the appellant is considered, there will be difference of about 2 acres of land as against the land already declared as surplus of 7 acres and 26 gunthas.

The Hon'ble Gujarat High Court observed that when the calculation was made by the first authority i.e. Mamlatdar and ALT and if there was mistake on the part of the Mamlatdar and ALT in calculation for the purpose of declaration of the land as surplus land, such mistake could have been brought to the notice of the First Appellate Authority by the appellant. If it was missed by the Appellate Authority at the First Appellate stage, then, it could also be agitated in the revisional proceedings before the Tribunal and thereafter before the learned Single Judge of this Court in the writ petition and subsequent litigation. Not only that, after the land was declared as surplus land, there were revenue mutations. At the relevant point of time also, the appellant had opportunity to bring it to the notice of the authority that there was mistake in calculation, if any. No such attempt as per the appellant was made, since as per the appellant, such did not strike to him or that it was missed *bona fide*.

The Hon'ble Gujarat High Court observed that at the most, it can be said that a contention, which ought to have been taken in appeal or in revision or in writ jurisdiction has not been taken and as per the principles of constructive *res judicata*, the contention, which ought to have been taken and if not taken is deemed to have been concluded. It is hardly required to be stated that the principles of constructive *res judicata* are read in order to give sanctity to the decision of the competent forum or the Court, as the case may be. The party, after the decision is over and carried up to the highest Court of the land, cannot be heard to say that something was missed, may be by mistake or otherwise and it be considered again. If the contention of the appellant is considered and entertained, it would run counter to the settled principles of constructive *res judicata*. In view of above it was held that the appellant cannot be permitted to raise the contention and there is no case made out for interference. Hence, the appeal was dismissed having no merits.

Ratilal Maganlal Patel Thru. Legal Heirs vs. District Collector AIR 2015 (NOC) 1144 (Guj.)

2. Partition suit for share in dwelling house belonging to joint family – Original shareholder had transferred his share in favour of person claiming benefit – Transferee being legal representative of the deceased and being his nephew dwelling in the same house he is also entitled benefit under section 4 of Act – Partition Act, 1993, Section 4

The brief facts of this case are that the property which is in shape of a house, belonged to one Garib. He had one daughter Smt. Saryoo Devi who was married to Baijnath. Garib executed a gift deed in favour of Smt. Saryoo Devi and Baij Nath in respect of house in question giving half share to each. The possession was also handed over to them. Shri Raj Narain and Vishwanath were tenants in a portion of the house. Later on 23-2-1970 Saryoo Devi who had half share in the house in question sold the same in favour of Raj Narain and Bechai. Admittedly, Raj Narain and others were not the family members of Smt. Saryoo Devi and Baij Nath, they were strangers.

Raj Narain and Bechai filed a suit for partition of the house and claimed half share and claimed that their share may be partitioned and they may be given possession. The suit was contested by Baij Nath *inter alia* on the ground that in view of Section 4 of the Partition Act, the plaintiffs were not entitled for partition as they were not member of the undivided family and he is not entitled to buy the share sold by Smt. Saryoo Devi in favour of Raj Narain and Bechai. The Trial Court decreed in the favour of Raj Narain and Bechai. On further appeal it was confirmed that Baij Nath was a member of the family and is entitled to purchase the share of the appellant Raj Narain and Bechai ,in view of Section 4 of the Partition Act.

A review application filed by appellant Om Prakash Verma, the heirs of Raj Narain and Bechai who were the original appellants with the allegation that during the pendency of this appeal Baijnath transferred his portion *vide* registered sale deed dated 25-5-1988 in favour of one Phoolchand. Later on on 7th August 1989 Baijnath expired and and that the appeal was heard on 15th July and the transferree from Baijnath, Phool Chand was not entitled to claim any benefit on the basis of Section 4 of the Partition Act. The said review petition was dismissed. Special Leave Petition before the Apex Court was also dismissed.

In further proceeding initiated by Phoolchand the matter reached to the High Court as to the issue whether Phoolchand is entitled to benefit of Section 4 of Partition Act or not?.

The Hon'ble Allahabad High Court observed that undisputedly Baijath was held to be entitled to get the benefit under Section 4 of the Partition Act. The matter was challenged up to the Apex Court and was settled. The appellant challenged the decision passed in Second Appeal as well as in the review petition before the Apex Court and also taken all the grounds of objection regarding availability of benefit of Section 4 of the Partition Act to Phool Chand. The said Special Leave Petition was also dismissed in limine . Even dismissal of the Special Leave Petition in limine will put to an end the question of availability of benefit of Section 4 of Partition Act to Phool Chand

Therefore, Hon'ble Allahabad High Court observed that the view taken by both the courts below is perfectly legal. Once Phool Chand is admitted to be the legal representative of Baijnath he is also entitled to the same benefit which were available to Baijnath. Further both the courts below have decided that Phool Chand being the legal representative of Baijnath and is nephew of Baijnath and living with Baijnath in the same house is also entitled to the benefit of Section 4 of the Partition Act. The question of availability of benefit of Section 4 of the Partition Act to Phoolchand was maintained by the Apex Court. Therefore, the court held that the appeal lacked merits and was accordingly dismissed.

Om Prakash Verma & Others vs. Phool Chand AIR 2015 (NOC) 1263 (All.)

3. Suit for recovery – Limitation – Loan given for six months – Default in payment – Suit for recovery filed by Plaintiff within three years from date of expiry of six months of disbursal of principle amount – Held not barred by Limitation – Limitation Act, 1963 Art.55

The Chairman and Managing Director of the Appellant approached the Plaintiff and the State of Orissa in 1996 for subscription of an amount of ` 25,00,00,000/- in equity/preference share/optionally convertible debenture (OCDs) with a view to financing the above company for establishment of the Pig Iron Plant at Duburi. On consideration of proposal the plaintiff sanctioned a loan of ` 20,00,00,000/- on 7-2-1997. As per the terms and conditions of the loan sanction order, the loan was for a period of six months with an interest @30% per annum, by way of secured optional convertible debentures and the plaintiff would hold the second charge on the assets. The loan was to be paid and the debentures be redeemed on the expiry of six months from the date of loan. The proposed terms as per the sanction letter dated 7-2-1997 were accepted by defendant through its Managing Director where after defendant No. 1 issued two debentures certificates each in favour of the plaintiff for a total amount of ` 17,00,00,000/- carrying interest @ 30% per annum repayable on expiry of six months from the date of disbursement of the loan. Out of the sanctioned amount the plaintiff disbursed ` 7,00,00,000/- on 7-2-1997 and ` 10,00,00,000/- on 21-2-1997.

The defendants defaulted in repayment of the loan, both principal and interest after the due date and instead requested *vide* their letter dated 2-8-1997 for extension of time for repayment. Notices had also been issued by the plaintiff to the guarantors. Thereafter, defendant No. 4 in his capacity as Chairman of defendant No. 1 issued letter dated 15-9-1998 to the plaintiff requesting to reduce the interest on loan to 16% from 30% and to extend time for repayment up to November, 2001. The defendants also indicated a schedule for repayment of OCDs of ` 17,00,00,000/- with interest @ 16% per annum starting from December,1999 up to November, 2001. The plaintiff did not agree to the request.. However, lastly, the defendants having failed to repay the loan, the plaintiff was compelled to file the suit claiming ` 34,54,63,014/- towards principal and interest

The defendants filed their written statement taking formal pleas that there was no cause of action and the suit was barred by limitation and was not maintainable. It was specifically stated by them that the term of payment of interest @ 30% per annum cannot be said to have been accepted by the defendants, since the parties did not have equal bargaining power and the defendants signed the agreement only in token of receipt of sanction letter, which cannot be equated with acceptance of terms governing sanction of the loan. It is stated that the defendants are not liable to pay interest @ 30% which is arbitrary. The trial court framed six issues and on consideration of the evidence on record decreed the suit

Before the Hon'ble Orissa High Court, the appellants had raised the issue that the suit was barred by time in terms of Article 19 of the Limitation Act, 1963 and the trial court has not considered the question of limitation in its proper perspective. On the other hand, Plaintiff submits that Article 55 and not Article 19 of the Limitation Act applies to the present case, since the loan granted in favour of the appellants was made payable after six months of disbursement and, therefore, the period of limitation started running after completion of six months from the date of disbursement and, therefore, the suit was not barred by time if calculated accordingly. It was also submitted that assuming that Article 19 of the Limitation Act applies, since the appellants acknowledged the debt before the claim was barred, a fresh limitation began to run from the date of such acknowledgement and, therefore, there is no limitation.

The High Court observed that it is an admitted position that as per condition no. (a) of the loan

sanction order says that the loan is for a period of six months and shall carry interest @ 30% per annum. As per condition No. (b) the repayment of the loan and redemption of debentures shall be made on the expiry of six months from the date of the loan. These conditions of the sanction order were accepted by the defendants-appellants and were made part of the loan agreement. The conditions make it abundantly clear that the loan was repayable only on expiry of six months from the date of disbursal. Counted from the date of expiry of six months of disbursal of the principal amounts, the suit is within three years from the date of expiry of six months as required under Article 55 of the Limitation Act. Specific period having been prescribed in the sanction order for repayment, the transaction falls within the ambit of Article 55 and not Article 19 of the Limitation Act, 1963. Even assuming that Article 19 of the Limitation Act would apply, it is an undisputed position that the appellants by writing letters to the respondents on 15-9-1998 and 15-5-1999 asking for extension of time for repayment of the loan with request further to reduce the rate of interest from 30% to 16%, they have acknowledged the debt (loan). The acknowledgments are before the expiry of three years from the date of disbursement of loan amount. Hence, further period of three years from the last acknowledgment would be counted. Thus, it was held that the suit is filed within the period of limitation and not barred by time and therefore appeal was accordingly dismissed.

Mideast Integrated Steel Ltd & Others vs. Industrial Promotion of Investment Corporation of Orissa Ltd AIR 2015 (NOC) 246 (Ori.)

4. Award by foreign court for recovery of unpaid hire in respect of vessel – Plea that such claim is not maritime claim – Rejected – Admiralty jurisdiction can be invoked by High Court for execution of a foreign decree in India – Civil Procedure Code, Section 44A

The plaintiff chartered the vessel "Mineral Capeasis" to one Industrial Carriers Inc. (hereinafter referred to as 'ICI') for a period of 12 to 13 months. The said vessel was duly delivered into the service of ICI on 15-8-2008. In pursuant to Clause 11(a) hire of USD 183,000 per day was payable by ICI to the plaintiff every 15 days in advance. ICI paid three installments of hire but failed to pay 4th installment of hire which became due on 17th August, 2008 amounting to USD 26,42,556.62. On 30th September, 2008, the plaintiff gave notice to ICI to make the outstanding payment. However, ICI did not make such payment to the plaintiff. The plaintiff, therefore, invoked the London arbitration clause of the charter party on 7th October, 2008 and referred all the disputes and differences arising out of the said charter party to arbitration in London and appointed arbitrator and thereby called upon ICI to appoint their arbitrator which they failed to appoint.

Vide an order dated 29,12,2014 in Admiralty Suit No. 30 of 2014 directed the Port Authority and the Customs Authorities at Mundra to arrest the defendant vessel lying at Port of Mundra within the territorial waters of India in pursuant to which the defendant vessel has been arrested. The applicant – original defendant has, therefore, filed this application for vacating the order of arrest.

The case of the plaintiff that plaintiff is entitled to enforce the judgment and decree issued on 23rd December, 2014 under Section 44A of Code of Civil Procedure, 1908 as it is passed by Superior Court of a reciprocating territory viz. United Kingdom. The plaintiff is, therefore, entitled to execute the said decree against ICI by arrest of the defendant vessel as per the laws and various judgments prevailing in India as ICI and the defendant vessel are beneficially owned and controlled by Viktor Baranskyi and the Baranskyi family. The contention of the applicant is that the plaintiff is not entitled to invoke the admiralty jurisdiction of this Court. In support of the said contention, it was submitted that the claim of the plaintiff cannot be termed as a

maritime claim. The Arrest Conventions of 1952 and 1999 do not include the claim arising out of an award to be a maritime claim.

The Gujarat High Court observed that it is clear that the High Courts in India are superior courts of record. They have original and appellate jurisdiction. They have inherent and plenary powers. Unless expressly or impliedly barred, the High Courts have unlimited jurisdiction, including the jurisdiction to determine their own powers. The real purpose of arrest in both the English and the Civil Law systems is to obtain security as a guarantee for satisfaction of the decree. All actions in the civil law – whether maritime or not – are in personam, and arrest of a vessel is permitted even in respect of non-maritime claims, and the vessel is treated as any other property of the owner, and its very presence within jurisdiction is sufficient to clothe the competent Court with jurisdiction over the owner in respect of any claim. On the other hand, admiralty actions in England, whether in rem or in personam, are confined to well defined maritime liens or claims and directed against the res (ship, cargo and freight) which is the subject matter of the dispute or any other ship in the same beneficial ownership as the res in question. The attachment being only a method of safeguarding the interest of the plaintiff by providing him with a security. Such attachment by arrest is only provisional and its purpose is merely to detain the ship until the matter has been finally settled by the competent Court. The admiralty jurisdiction of the High Court is dependent on the presence of the foreign ship in Indian waters and founded on the arrest of that ship.

It was further observed that Section 44-A thus indicates an independent right, conferred on to a foreign decree-holder for enforcement of its decree in India. The conferment of jurisdiction in terms of Section 44-A, cannot be attributed to any specific jurisdiction but an independent and an enabling provision being made available to a foreigner in the matter of enforcement of a foreign decree.

In view of the aforesaid Gujarat High Court was of the opinion that it is having admiralty jurisdiction to entertain the present suit and therefore the contention was discarded.

M. V. Cape Climber vs. Glory Wealth Shipping Pvt Ltd. AIR 2015 (NOC) 1204 (Guj.)

5. Lacuna in Act – No constitutional inhibition against State legislature from curing lacuna or removing defect in Act with retrospective effect i.e., from date such defect such defect or lacuna had occurred – Haryana Development and Regulation of Urban Areas Act, 1975, Section 3

Legislature has varied means and measures to undertake the exercise including either conferment of jurisdiction where jurisdiction had not been properly envisaged before or by reenacting retrospectively a valid law and then by fiction the tax, fee or charge already collected are saved under the reenacted law. Similarly, the Legislature may clarify the true and correct meaning and interpretation of the law under which the tax was collected and then by legislative fiat it can make the new meaning binding upon the Courts. There is no usurpation of Judicial Powers so long as the Legislature by its Act does not take control of Judicial Powers in its hands and is just exercising its powers conferred upon it exclusively by the Constitution. Parliament or State Legislature are vested with the exclusive power of legislation and make the laws prospectively as well as retrospectively. Retrospective application of law is an Act of the Sovereign Legislature Article 102[1][a] includes the power to enact such law retrospectively. From the above resume of discussion, it was held that there is no constitutional inhibition against the State Legislature from curing the lacuna or removing

DLF Ltd. And Ors vs. State of Haryana And Ors. AIR 2015 (NOC) 1142 (P&H)

CA Rajaram Ajgaonkar

ECONOMY AND FINANCE

VOLATILITY CONTINUES

The last month of December 2015 turned out to be quite eventful for the global economy. Finally the Federal Reserve System of the US (FED) decided to change the easy money policy and increase benchmark interest rate by quarter of a per cent after a long period of 9 years. The rate has now inched up to 0.50%, which itself is quite low. The historical decision marked a major change of policy by the US on the back of increasing growth and employment with further expectations of sustaining the same in the near future. The FED not only raised the interest rates but also gave a road map of future increase in interest rates giving some visibility of the expected events over the next couple of years. The increase in interest rates in the US may be a game changer for many economies of the world. If the rate hike is gradual, many economies will be able to sustain the pressure of the same. However, any abrupt increase after the first rise may have major impact on the developing economies. A talk has started that there may be a second rise in the FED rate in the month of March based on inflation numbers in the US. If the rate is increased by another 0.25% by then, it can cause heavy fluctuations in currency values, which may affect global trade and can even make some of the underdeveloped and developing economies vulnerable. Too much is at stake for the rest of the world on the decision of the FED on which it has no control.

The US economy continues to do well in contrast to many developed economies. It has found its rhythm and 2016 is expected to be still better. Fortunately, for the US, things are falling in place and it is also good news for the countries which have substantial exports to the US. The world economies are bound to benefit from the US growth and it is a ray of hope for many stagnating economies in Europe and even Japan. A major stress may be caused by the oil exporting economies due to their stressed finances as a result of low crude oil prices. Their budgets and developmental plans are substantially affected. In extreme cases, some of the economies may go into recession. The scenario has become quite uncertain for the world and uncertainty can cause delays in decision making, resulting in further slowdown.

Over the last 18 months, the global prices of crude oil and natural gas have plunged substantially. Crude has come down from 110 USD a barrel in June, 2014 to 37 USD a barrel now thereby dropping two thirds. Natural gas prices have fallen in tandem and have slipped to about 2.35 USD per MMBtu. This fall is drastic and it has a major impact on the kitties of gas and oil producing countries. The ramping up of production by many countries to sustain the revenue is turning out to be counterproductive and it may result in

a further fall in prices. Currently, there is a substantial oversupply of crude oil and gas as their consumption is not able to keep pace with production. In the current low growth conditions prevalent across the globe, the possibility of increase in consumption is also limited. Therefore, many are expecting prices to remain low for at least a couple of quarters. Some economists are predicting further fall in prices, which can not only be detrimental to oil and gas producing countries but can also destabilise economic order of the world. If the phenomenon continues for some more time, many high cost producers will go out of business as their realisation will be lower than their cost. This will eventually result in a reversal of cycle but nobody can predict when this will happen. The short term outlook for oil and gas prices is quite dismal and the world will have to face the repercussions emerging therefrom.

Though the oil and gas debacle is the major story of the recent months, even commodities are not better off. They continue their long term downward trend due to inadequate demand and over capacity in the world. The correction in the phenomenon is not likely to emerge quickly and most of the commodities will continue to give pain to their producers as well as exporting countries such as Australia, Malaysia, Indonesia, Brazil and many countries of the African continent.

The risk of terrorism continues to shadow the world, and day-by-day the uncertainty in respect thereof is increasing. Unfortunately, the terrorists are getting access to high-tech weapons and ammunition, which can cause heavy destruction. The risk of terrorism is not only limited to countries which are actually involved in any conflicts or controversies. Many unconnected countries are becoming soft targets of terrorism wanting to grab global attention. Terrorism is emerging as one of the latest risks for the world economies. A possibility of a terrorist attack reduces the confidence of investors. Terrorism is likely to reduce the pace of growth of the world for decades to come.

Many had great hope from India, especially after a change of guard at the Center, post the Parliamentary elections. There were a lot of promises made with sincerity and that drove the sentiment. Now after a year, the euphoria is over and reality is emerging. As the ruling alliance has no majority in the upper house, they are not able to implement and pass required bills and make required changes in laws, which are essential for the faster growth of the economy. As a result, reforms are not gathering the required speed and investment in the economy from domestic and foreign investors is not gathering adequate pace. It is hampering the ease of doing business in the country, indirectly affecting growth of businesses. There are no immediate hopes of drastic changes in business environment especially considering global factors and the targeted 8% growth may remain elusive for the current year.

The Indian Government has gained substantial advantage due to fall in prices of crude oil and petroleum products. Though some benefit is passed on to the consumers, a substantial benefit is retained by the Government by increase in excise duty, which may help to control the budgetary deficit. Due to lowering of petroleum prices, many subsidies on the derivatives have reduced, giving further advantage to the Government. This development will allow the Government to manage the budgetary deficit better, paving a way to further reduce inflation making room for the Reserve Bank of India (RBI) to reduce interest rates. Lower interest rates will augur well to boost new investments in the country. It may also increase demand for housing, which may result in reducing the glut in that sector. However, the changes are likely to happen gradually and not with a bang. This has made Indian as well as foreign investors a bit disappointed.

Inflation in India is easing. If the RBI keeps its stand on the interest rates and banking ratios and there are no sudden surprises on the supplies side; inflation can ease further. Lower

inflation can keep the Indian currency stable and can improve the investment climate in the country. India had quite high interest rates over a very long period, except for a few years. As the economy develops, there will be a tendency towards lowering of interest rates. India seems to be on the right path but the goal is far off and it can take years to achieve.

As was the case in most parts of the world, the Indian stocks could not sustain the gains, which they earned in the earlier months. The falling commodity prices and increase in interest rate in the US created an all round negative sentiment for the economy. News from the Parliament was not encouraging as the winter session could not pass many desired legislations, which could boost reforms. In the New Year, the stock markets are waiting for the corporate results of the quarter just ended. The stock markets in India are likely to remain range bound for the coming months, unless the run-up for the budget starts. Though a dull quarterly results season is expected, the silver lining is the increase in car sales. Car sales are an indicator of the medium term future of an economy. At many a times a surge in car sales precedes a visible economic improvement. In the last quarter of the current financial year, if the car sales continue to surge at a double digit rate, year-on-year basis; then it is likely that green shoots in the economy will be visible soon and that may give a positive impact on the stock markets. Based on the current scenario, the Indian stock markets are not likely to go down much but when will they improve, remains a million dollar question.

The recent stand of the RBI gives a positive signal about reduction of interest rates. They may further go down over regular intervals, if inflation is controlled. Inflation seems to be cooling down and its continuation indicates that the interest rates may gradually come down. Falling interest rates are likely to push up the demand for immovable properties in the country. The impact will be more pronounced in the case of low value housing, wherein the investments are small and most of the purchasers are the actual users. This sector of the property market is likely to improve first and the improvement may start within next six months to one year period, if not earlier. Buying activity in properties costing more than Rupees one crore is likely to remain sluggish for a longer period and it will start inching up only when there is certainty of improvement in economic growth rate in India.

The investment in deposits and bonds should take appropriate cues from the global events. There is a pressure on the RBI to reduce interest rates and it is very likely that gradually it will be done, subject to inflation control. With improved economic growth, the interest rate will fall down as has happened in many developed economies. Many central banks use interest rates as a tool to stimulate or cool down their economies. However, as a country develops, it has more capital available, which causes pressure on the interest rates. It is likely that interest rates in India will cool off further and therefore smart investors should take long term calls in respect of their investment in this asset class. The tax free bonds being issued by many PSUs are looking attractive as their coupon rates are above 7%. They are likely to fetch around 11% pre tax yield for the investors in highest tax bracket.

The uncertainty for investors remains intact due to many global as well as local factors. Though the short term direction of the Indian economy remains uncertain, the long and medium term look bright and attractive. Investors need to remain cautious in respect of equities. They can become a bit aggressive on their term deposit investment allocation as well as bond purchases. Yield from these investments is likely to fall over the next few years.

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

The Chamber News

Important events and happenings that took place between 8th December, 2015 to 8th January, 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 17th December, 2015.

Life Membership

1	Mr. Kara Harish	CA	Hyderabad
2	Mr. Hadkar Madhukar Vishwanath	CA	Mumbai
3	Mr. Soman Uday Shankar	CA	Mumbai
4	Mr. Vignesh Krishnaswamy	CA	Chennai
5	Mr. Gandhi Sachin Ramesh	ITP	Mumbai

Ordinary Membership

1	Mr. Shah Pankaj Ghamshyam (Oct. 15 to Mar. 16)	CA	Madhya Pradesh
2	Mr. Jaipuria Rajendra Gopikisan (Oct. 15 to Mar. 16)	Advocate	Yavatmal
3	Mr. Mehta Amar S. (Oct. 15 to Mar. 16)	CA	Mumbai
4	Mr. Shah Sharad Anandlal (Oct. 15 to Mar. 16)	CA	Pune
5	Mr. Karandikar Kaustubh Ram (Oct. 15 to Mar. 16)	ITP	Thane (West)
6	Mr. Marella Venkat Rao M. S. Murthy (Oct. 15 to Mar. 16)	CA	Bangalore
7	Mr. Palan Manohar S. (Oct. 15 to Mar. 16)	Advocate	Kalyan (West)
8	Mr. Vaishampayan Mukund Manohar (Oct. 15 to Mar. 16)	CA	Panvel
9	Mrs. Amritkar Ashwini Amol	ITP	Thane
10	Mr. Loya Raman Satyanarayan (Oct. 15 to Mar. 16)	CA	Aurangabad
11	Mr. Mehta Atul Haridas (Oct. 15 to Mar. 16)	CA	Mumbai
12	Mr. Gogri Ashish Bhailal	CA	Mumbai
13	Mr. Shah Jigar Harshad	CA	Mumbai
14	Mr. Jain Pinkesh Sureshkumar	CA	Pune
15	Ms. Aneja Gurkiran Gurneet	CA	Mumbai

II. Past Programmes

1. ALLIED LAWS COMMITTEE:

A. **Two Days Interactive Residential Conference with Different Professionals on Law Applicable to Real Estate and Redevelopment** was jointly held with AIFTP (WZ) & J. B.

Nagar CPE Study Circle of WIRC of ICAI on 19th & 20th December, 2015 at Silent Hill Resort, Manor, Palghar. The conference was inaugurated by Shri Ramesh Prabhu by lighting the lamp followed by Keynote address. The Conference was addressed by eminent speakers and Brains' Trust Session was held where eminent trustees replied to the queries raised by the delegates.

III. Future Programmes

(For details of the future programmes, kindly visit www.ctconline.org or refer the CTC News of January, 2016)

1. ALLIED LAWS COMMITTEE

A. The **Half Day Seminar on Labour Laws** jointly with BCAS will be held on 23rd January, 2016 at BCAS, 7, Jolly Bhavan, New Marine Lines.

B. The **Student Series on Internal Audit** will be held on 4th, 5th, 11th & 12th February, 2016 at CTC office.

2. CORPORATE MEMBERS COMMITTEE

A. The **Full Day Seminar on Limited Liability Partnership** jointly with Direct Taxes Committee will be held on 27th February, 2016 at West End Hotel, New Marine Lines.

3. DIRECT TAXES COMMITTEE

A. The **Full Day Seminar on Capital Gain** will be held on 16th January, 2016 at West End Hotel.

B. The **Lecture Meeting on Section 14A – The Unending and Unpredictable Journey** will be held on 22nd January, 2016 at Walchand Hirachand Hall, IMC. The Lecture meeting will be addressed by CA Yogesh Thar.

C. **Half Day Workshop on Direct Tax Provisions of Finance Bill 2016** jointly with WIRC of ICAI will be held on 12th March, 2016 at M. C. Ghia Hall, Kala Ghoda, Fort.

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 from 31st January, 2016 to 30th April, 2016 at STPAM Library Hill, Mazgaon.

B. The **Workshop on Finance Bill, 2016 (Indirect Taxes Provisions)** Jointly with WIRC of ICAI will be held on 12th March, 2016 at M. C. Ghia Hall, Fort.

C. The **4th Residential Refresher Course on Service Tax** will be held on 29th to 31st January, 2016 at Aamby Valley City, Pune.

5. INTERNATIONAL TAXATION COMMITTEE

A. The **Workshop on Taxation of Foreign Remittances** will be held between 22nd & 23rd January, 2016 at West End Hotel.

B. The A**dvanced FEMA Conference** will be held on 18th March, 2016. Kindly block the date in your calendar. More details would be available in next announcement.

C. The **Advanced Practical Workshop on Principles of Transfer Pricing** will be held on 22nd, 23rd, 29th & 30th April, 2016. Interested members are requested to block their dates for the workshop. More details would be available in next announcement.

6. LAW & REPRESENTATION COMMITTEE

A. **Suggestions for Representation before Justice (Retd.) Shri R. V. Eshwar**

CTC is in process of making representation to R. V. Eshwar Committee for Simplifying Income Tax Law. Readers are requested to send their suggestions to the Chamber's office at the earliest.

7. MEMBERSHIP & PUBLIC RELATIONS COMMITTEE

The **Half Day Seminar on "Allied Laws"** jointly with Vapi Branch of WIRC of ICAI will be held on 28th January, 2016 at Atul Club, Valsad, Gujarat.

8. RESIDENTIAL REFRESHER COURSE & SKILL DEVELOPMENT COMMITTEE

The **39th Residential Refresher Course** will be held between 18th to 21st February, 2016 at Mercure Lavasa Accor Group of Hotels, Lavasa & Lavasa International Convention Centre.

Keynote Speaker: Padma Bhushan Dr. S. B. Majumdar, Founder and President, Symbiosis and Chancellor, Symbiosis International University.

Mr. Arvind Sonde, Advocate will have Live talk with Mr. Y. P. Trivedi, Senior Advocate & Past President and Mr. S. E. Dastur, Senior Advocate & Past President. This session will be an anchored talk show where both the Luminaries will share their experiences in "Attainment of Excellence" in person with the Anchor and the delegates.

The Papers will be Presentated by Mr. Hiro Rai, Advocate, CA Jagdish Punjabi, CA Anup Shah and CA Yogesh Thar. CA Rajan Vora & Shri Vipul Joshi, Advocate will be Brain Trustees for the Brain Trust Session on Direct Tax.

9. STUDENT & IT CONNECT COMMITTEE

A. The **Half Day Visit at National Stock Exchange** will be held on 9th January, 2016 at National Stock Exchange, BKC.

B. The **Understanding Startup Investments** will be held on 21st January, 2016 at Kilachand Hall, Churchgate.

C. The **Office Productivity : Technology Tools and Tips** will be held on 10th February, 2016 at Conference Room, Consultair Investments Pvt. Ltd., Eros Theatre Building, Churchgate.

D. **The Dastur Essay Competition – 2016 for Student of Law & Accountancy**

Topics : (1) India's Priceless Heritage, (2) Religion & Terrorism, (3) My favourite Sports Person.

For Rules & Regulations of the Essay Competition kindly visit Chamber's website www.ctconline.org.

E. The **Lecture Meeting on Statutory Audit of Bank Branches and Practical Issues** on the subject "Overview of Bank Branch Audit including LFAR and IRAC Norms" by CA Vipul Choksi will be held on 21st March, 2016 at Maheshwari Bhavan, Marine Lines, Mumbai. All are cordially invited to attend the meeting.

10. DELHI CHAPTER

A. The **Full day Seminar on Prevailing Industries Issues / Concerns and Case Studies on Companies Act 2013 & Felicitation Function of Past President Shri Ved Verma** on 16th January, 2016 at India International Centre, New Delhi.

B. The **Half day seminar on Finance Bill 2016** – jointly with Northern Region Chapter of International Fiscal Association – India Branch / other professional bodies will be held on 3rd March, 2016 at Multipurpose Hall, Lodhi Estate, New Delhi.

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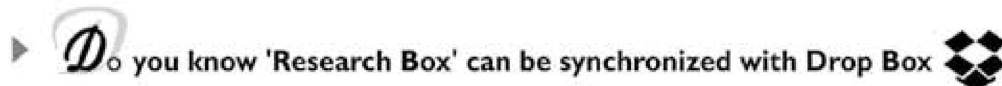

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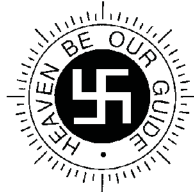


The Chamber of Tax Consultants

Vision Statement

The Chamber of Tax Consultants (The Chamber) shall be a powerhouse of knowledge in the field of fiscal laws in the global economy.

The Chamber shall contribute to the development of law and the profession through research, analysis and dissemination of knowledge.

The Chamber shall be a voice which is heard and recognised by all Government and Regulatory agencies through effective representations.

The Chamber shall be pre-eminent in laying down and upholding, among the professionals, the tradition of excellence in service, principled conduct and social responsibility.

INTERNATIONAL TAXATION COMMITTEE

FEMA Study Circle Meeting on the subject "Foreign Exchange Regulations in relation to Overseas Investments by Indian Residents" held on 10th December, 2015 at CTC Conference Room.

CA Rajesh P. Shah addressing the members.

Transfer Pricing Study Circle Meeting on the subject "Recent Issues and Controversies in Transfer Pricing" held on 11th December, 2015 at Kilachand Hall, IMC.

CA Karishma Phatarphekar addressing the members.

STUDY CIRCLE & STUDY GROUP COMMITTEE

Study Circle Meeting on the subject "Recent Developments in International Tax Law – From Indian cases and International Perspective" held on 9th December, 2015 at Kilachand Hall, IMC.

CA Hiral Sejpal addressing the members.

Study Group Meeting on the subject "Recent Judgments under Direct Taxes" held on 24th December, 2015 at Babubhai Chinai Committee Room, IMC.

CA Anish Thacker addressing the members. Seen from L to R : S/Shri CA Dinesh R. Shah, Convenor, Nishit Gandhi, Advocate, CA Ashok Sharma, Chairman, CA Avinash Lalwani, President and CA Dilip Sanghvi, Vice Chairman.

ALLIED LAWS COMMITTEE

Study Circle Meeting on the subject "Mediation & Conciliation" held on 15th December, 2015 at Kilachand Conference Room, IMC.

Shri Prathamesh D. Popat, Advocate addressing the members. Seen from L to R: S/Shri CA Avinash Lalwani, President, CA Kamal Dhanuka, Chairman and Ms. Priti Shukla, Advocate, Member.

INDIRECT TAXES COMMITTEE

Study Circle Meeting on the subject "Interpretation of Statutes with reference to Indirect Tax" held on 8th December, 2015 at Babubhai Chinai Hall, IMC.

Shri Vishal Agarwal, Advocate addressing the members. Seen from L to R : CA Rajiv Luthia, Chairman, CA Avinash Lalwani, President and CA Akhil Kedia, Convenor.

CTC – DELHI CHAPTER

Full Day Seminar on 'Case Studies on Secondment and Expatriate – Taxation & Regulatory Issues from both Employer's and Employee's Perspective' held on 12th December, 2015 at India International Centre, New Delhi.

CA Hinesh Doshi, Hon. Jt. Treasurer welcoming the faculties & delegates. Seen from L to R : S/Shri CA Puneet Gupta, Faculty, CA Surabhi Marwah, Faculty and CA R. P. Garg, Chairman, Delhi Chapter.

CA R. P. Garg, Chairman, Delhi Chapter welcoming the faculties and delegates.

Faculties

CA Janak Kapadia

CA Surabhi Marwah

CA Vikas Garg

CA Puneet Gupta

MEMEMBERSHIP & PUBLIC RELATIONS COMMITTEE

Full Day Seminar on Direct Taxes at "Aurangabad" Jointly with Aurangabad Branch of WIRC of ICAI and Aurangabad Tax Practitioners Association held on 12th December, 2015 at ICAI Bhavan, Aurangabad.

CA Avinash Lalwani, President, CTC delivering the opening remarks. Seen from L to R : S/Shri Javed Ali, ITP, Rahul Sarda, Faculty, CA R. H. Malpani and Pankaj Pallod, ITP.

Faculties

Shri Vipul Joshi, Advocate

Shri Rahul Sarda, Advocate

Shri Paras S. Savla, Advocate

CA Vyomesh Pathak

Dignitaries during the inauguration of lighting the lamp at Full Day Seminar on Direct Taxes at "Aurangabad". Seen from L to R : S/Shri Paras S. Savla, Faculty, Mr. Sachin Gandhi, Member of Membership & PR Committee, CA Vyomesh Pathak, Faculty, CA Sachin Lathi, Secretary, TPA, Vipul Joshi, Faculty, CA Avinash Lalwani, President of CTC, CA Sachin Kasliwal, President of Tax Practitioners Association of Aurangabad, CA Pankaj Kalantri, Chairman of WIRC of ICAI, CA Hemant Parab, Chairman, Membership & PR Committee, Mr. Rahul Sarda, Faculty, CA Renuka Deshpande, Secretary of Abad Br of WIRC of ICAI

Self Awareness Series on the subject "Cause and Control of Diabetes and Heart Disease" held on 8th December, 2015 at CTC Conference Room.

Dr. Balkrishna V. Khare addressing the members.

Self Awareness Series on the subject "Eat Healthy – Live Healthy" held on 6th January, 2016 at CTC Conference Room.

Mr. Madhav Joshi addressing the members.

INDIRECT TAXES COMMITTEE

Seminar on Applicability of VAT and Service Tax on IPR and IPR related Transactions (viz., Trademark, Copyrights, Franchise, etc.) held on 12th December, 2015 at Terrace Hall, West End Hotel.

CA Hitesh R. Shah, Vice President welcoming the faculties and delegates. Seen from L to R : S/Shri CA Pranav Kapadia, Course Co-ordinator, CA Parind Mehta, Faculty, CA Rajiv Luthia, Chairman, CA Divyesh Lapsiwala, Faculty and CA Atul Mehta, Convenor.

CA Rajiv Luthia, Chairman welcoming the faculties and delegates. Seen from L to R : S/Shri CA Pranav Kapadia, Course Co-ordinator, CA Parind Mehta, Faculty, CA Hitesh R. Shah, Vice President, CA Divyesh Lapsiwala, Faculty and CA Atul Mehta, Convenor.

Faculties

CA Parind Mehta

CA Divyesh Lapsiwala

Brain Trust Session

Shri C. B. Thakar, Trustees addressing the delegates by replying the queries. Seen from L to R : S/Shri CA Akhil Kedia, Convenor, Ajay Singh, Hon. Jt. Secretary, V. Sridharan, Trustees, CA A. R. Krishnan, Advisor, CA Vikram Mehta, Vice Chairman and CA Naresh Sheth, Member.

Section of delegates.

DIRECT TAXES COMMITTEE

Intensive Study Group (Direct Taxes) Meeting on the subject "Recent Important Decisions under Direct Taxes" held on 16th December, 2015 at CTC Conference Room.

Shri Nishit Gandhi, Advocate addressing the members.

DIRECT TAXES COMMITTEE

Workshop on Direct Taxes jointly with the Malad Chamber of Tax Consultants held on 5th, 6th, 12th, 13th, 19th & 20th December, 2015 at Conference Hall, N. L. College, Malad.

CA Avinash Lalwani, President, CTC delivering opening remarks. Seen from L to R: S/Shri CA Dinesh Poddar, Convenor, Direct Taxes Committee, CTC CA Ketan Vajani, Chairman, Direct Taxes Committee, CTC, CA Ashok Mehta, Faculty, Jaiprakash M. Tiwari, President, MCTC, Sachin Gandhi, Member and Adarsh Parekh, Vice President, MCTC.

CA Ketan Vajani, Chairman, Direct Taxes Committee, CTC, welcoming the faculties and delegates. Seen from L to R: S/Shri CA Dinesh Poddar, Convenor, Direct Taxes Committee, CTC, CA Avinash Lalwani, President CTC, CA Ashok Mehta, Faculty, Jaiprakash M. Tiwari, President, MCTC, Sachin Gandhi, Member and Adarsh Parekh, Vice President, MCTC.

Faculties

CA Ashok Mehta

CA Paresh Vakharia

Shri Ajay Singh, Advocate

Shri Vipul Joshi, Advocate

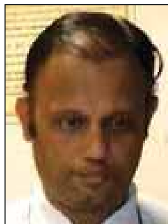
CA Mahendra Sanghvi

CA Naresh Ajwani

CA Reepal Tralshawala

CA Atul Suraiya

CA Jagdish Panjabi



Shri Mandar Vaidya, Advocate

Shri Rahul Hakani, Advocate

CA Rajesh Kothari

ALLIED LAWS COMMITTEE

Two Days Interactive 2nd Residential Conference with Different Professionals on Law Applicable to Real Estate and Redevelopment jointly with AIFTP (WZ) & J.B. Nagar CPE Study Circle of WIRC of ICAI held on 19th & 20th December, 2015 at Silent Hill Resort, Manor

CA Avinash B. Lalwani, President, CTC delivering the opening remarks. Seen from L to R : S/Shri CA Kamal Dhanuka, Chairman, Allied Laws Committee, CTC, CA Ramesh Prabhu, Key Note Speaker, CA Ashok Manghnani, Hon. Jt. Secretary, M. P. Reddy, Convenor, J. B. Nagar CPE Study Circle of WIRC of ICAI.

CA Kamal Dhanuka, Chairman, Allied Laws Committee, CTC welcoming the faculties & delegates. Seen from L to R : S/Shri CA Avinash B. Lalwani, President, CTC, CA Ramesh Prabhu, Key Note Speaker, CA Ashok Manghnani, Hon. Jt. Secretary, M. P. Reddy, Convenor, J. B. Nagar CPE Study Circle of WIRC of ICAI.

CA Ramesh Prabhu inaugurating the Conference by lighting the lamp. Seen from L to R : CA Deepak Thakkar, Faculty, CA Kamal Dhanuka, Chairman, Allied Laws Committee, CTC, CA Avinash Lalwani, President, CTC, M. P. Reddy, Convenor, J. B. Nagar CPE Study Circle of WIRC of ICAI, CA Rajiv Luthia, Faculty, Sanjay Buch, Faculty and CA Ashok Sharma, Member, CTC.

CA Ramesh Prabhu delivering Keynote address. Seen from L to R : S/Shri CA Kamal Dhanuka, Chairman, Allied Laws Committee, CTC, CA Avinash Lalwani, President, CTC, CA Ashok Manghnani, Hon. Jt. Secretary and M. P. Reddy, Convenor, J. B. Nagar CPE Study Circle of WIRC of ICAI.

Faculties

Shri Sanjay Buch, Advocate & Solicitor

Shri Anil Darshethkar

CA Rajiv Luthia

Shri Ajay R. Singh, Advocate

Shri P. A. Jani, Solicitor

Shri Nirav Jani, Advocate

CA Deepak Thakkar

CA Sunil Goyal

ALLIED LAWS COMMITTEE

Two Days Interactive 2nd Residential Conference with Different Professionals on Law Applicable to Real Estate and Redevelopment jointly with AIFTP (WZ) & J.B. Nagar CPE Study Circle of WIRC of ICAI held on 19th & 20th December, 2015 at Silent Hill Resort, Manor

Brains' Trust/Panel Discussion Session

Brains' Trust Session. Seen from L to R : S/Shri CA Kamal Dhanuka, Chairman, Allied Laws Committee, CTC, Shri K. Gopal, Moderator, CA Hitesh R. Shah, Vice President, Shri K. K. Ramani, Trustee and Shri Ajay Singh, Hon. Jt. Secretary.

Shri K. Gopal, Moderator addressing the members by replying the queries. Seen from L to R : S/Shri CA Kamal Dhanuka, Chairman, Allied Laws Committee, CTC, CA Hitesh R. Shah, Vice President, Vipul Joshi, Trustee, CA Sunil Gabhawalla, Trustee, CA Deepak Thakkar, Faculty and M. P. Reddy, Convenor, J. B. Nagar CPE Study Circle of WIRC of ICAI.

Group Photo

STUDENT AND IT CONNECT COMMITTEE

Lecture Meeting on MVAT Form 704 held on 14th December, 2015 at Maheshwari Bhavan, Marine Lines, Mumbai.

CA Parimal Parikh, Chairman, Student & IT Connect Committee welcoming the faculty & Members.

CA Deepali Mehta addressing the members. Seen from L to R : S/Shri CA Avinash Lalwani & CA Aalok Mehta, Vice Chairman.

Section of members

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