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# The Chamber's Journal

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1926–2016
90th Year
ज्ञानं परमं बलम्

YOUR MONTHLY COMPANION ON TAX & ALLIED SUBJECTS

July - 2016 Vol . IV | No. 10

## INCOME DISCLOSURE SCHEME, DISPUTE RESOLUTION SCHEME - 2016 AND EQUALISATION LEVY


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One Team Mission

## MANAGING COUNCIL 2016-17

**Seated from (L to R):** S/Shri Parimal Parikh, Past President, Bhavesh Vora, Past President, Manoj Shah, Past President (Invitee), Kishor Vanjara, Past President, Hitesh R. Shah, President, Avinash Lalwani, Imm. Past President, Keshav Bhujle, Past President, Vipul Joshi, Past President, Sujal Shah, Past President.
**Standing from (L to R):** S/Shri Paras S. Savla, Hemant Parab, Shailesh Bandi, Rahul Hakani, Parag Ved, Ketan Vajani, Vikram Mehta, Ajay Singh, Hinesh Doshi, Haresh Kenia, Amit Purohit, Paresh Shah and Ashok Sharma.
**Not in Picture:** S/Shri K. Gopal, Editor, Vipul Choksi and Mahendra Sanghvi

## PRESIDENT 2016-17

Shri Hitesh R. Shah, President, addressing the members at 89th Annual General Meeting

## OFFICE BEARERS 2016-17

**Seated from (L to R)**: S/Shri Hitesh R. Shah, President, Ajay R. Singh, Vice-President
**Standing from (L to R):** S/Shri Hinesh R. Doshi, Hon. Jt. Secretary, Parag S. Ved, Hon. Treasurer and Haresh P. Kenia, Hon. Jt. Secretary.

## RELEASING PUBLICATION AT 89TH ANNUAL GENERAL MEETING HELD ON 4TH JULY, 2016

Dr. K. Shivaram and Shri Kishor Vanjara, Past Presidents releasing the publication "Income Computation & Disclosure Standards" **Seen from L to R:** S/Shri Ashok Manghnani, Hon. Jt. Secretary, Avinash Lalwani, President, Hitesh R. Shah, President elect, Rahul Hakani, Chairman, Research & Publications Committee, Ajay Singh, Hon. Jt. Secretary, Hinesh Doshi, Hon. Treasurer, Paras S. Savla, Vice Chairman and Amit Purohit, Member of Research & Publications Committee

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**July – 2016**

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# The Chamber's Journal





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# Editorial

Here is a warm welcome and hearty Congratulations to the new President of the Chamber of Tax Consultants, Shri Hitesh Shah and also thanks to the immediate Past President, Shri Avinash Lalwani who conducted the affairs of the Chamber with a progressive mindset. Under the Presidentship of Shri Hitesh Shah, I am sure the Chamber would scale new heights in achieving the noble goals of the esteemed organisation. I would also like to thank the President for my re-appointment as the Editor of the Journal.

For people across India, waiting desperately for the arrival of monsoon, it had been a jittery June, with the monsoon making its landfall two weeks later than its scheduled arrival and making slow progress – but July arrived with a bang bringing much relief, especially to the Government and also the weathermen who predicted an above average rainfall this season.

July also arrived with the uncertainty in the name of Brexit that is being viewed as regressive for the economies of not only UK and EU but for the entire world – it may herald difficult times for the European economy but the optimist in me hopes that the same sentiment which fuel the markets would push a sense of practicality into the sentiments of nationalism and national identity that have pushed UK to Brexit. While the violence across the world in the last few months has pushed the world to the edge, what offers hope against terrorism is only unity and comity of nations. I hope the frequency of terrorist attacks across Europe and the constant apprehension of attacks on the American soil would force the western developed nations to re-calibrate their perspective of violence that India had been suffering from decades and push them to abandon the view that it is merely an internal 'law and order' issue.

This month's issue of the Journal has in its focus, the "Income Declaration Scheme, 2016", "Dispute Resolution Scheme" and "Equalisation Levy". I thank all the authors who have given their valuable time and energies to write down the articles which are of immense importance to all of us involved in the field of taxation. Sincere appreciation for their efforts.

**K. GOPAL**
*Editor*

# From the President

Dear Members.

Namaste! With the blessings of Almighty and my parents, I have assumed charge as President of this August body for the year 2016-17. I sincerely thank all of you for considering me appropriate for this post and I accept this responsibility with humility and promise to give my best. It is my father who has inspired and encouraged me to take up this position and because of his blessings I am standing before you.

The Chamber is a **great institution** with a tradition of high **integrity, independence, and professionalism. It is a unique Institution** with membership consisting of , Advocates, CA's CS's, Cost Accountants and ITP's etc.

The Chamber is in its **90th year, a young dynamic organisation which has a glorious past and undisputedly glorious future**. I have seen so many people working selflessly for it. But one person who inspires me the most is 'Patilsaab'. His refined love and affection is contagious and spreads across the board.

I joined the Managing Council as an office bearer for the first time during Presidentship of Mr. Gopal. After joining I started enjoying the bonding amongst team members. Past Presidents, Seniors have always inspired me. I was eagerly waited for the early morning office bearers meetings. It was fun to work as Office Bearer. I always bowed down to the request of incoming President who was in fact friend and my journey as OB continued for seven years. The bonding of office bearers was excellent. It was a journey full of learning and personal development on all fronts.

I have **gained a lot** from this institution in terms of technically upgrading myself and have treasureful of good friends. I have been touched by the warmth given to me by the seniors, Past Presidents, my co-office bearers and the Team Chamber.

I have a wonderful team to work with. My punch line for the year is **"One Team One mission". Team includes members who are within and outside the Managing Council**. Despite not being in council due to number constraint, there are many seniors and members who are silently contributing to The Chamber's activity. They all are part of Team Chamber.

I am confident that my team will help in achieving single mission of dissemination of knowledge and be an echo of my professional brothers.

TheChamber is moving at a great pace. **It is not important that how fast we run but it is important that how steadily and in rhythm we run. One needs to maintain pace without diluting the quality and high standards of education. I intend to make Chamber unique – uniqueness in journal, uniqueness in holding programmes and uniqueness in enhancing social values among professionals.** These are the areas where we can make a difference and is a challenging task. Chamber has always stood up for professionals and benefit of people by making effective representations and holding good programmes. It has its echoes in Government and Ministries as well. Membership is bye-product of these activities and we need not worry about same.

Last year The Chamber extended its arms to various interior places in Maharashtra. We need to expand our activities base beyond geographical limits. It is always a challenge to continue the journey as it requires mobilisation of massive resources.

We are all standing at a cross-road. We see rapid changes that are taking place in all major areas of practice for professionals or even for corporate world. **It's a greater challenge for all of us to deal with such changes**. The much awaited GST Bill is likely to be introduced shortly, Companies Amendment Bill 2016 is already in public domain, Internal Financial Controls have been made effective from FY 2016-17.

On Direct Tax front Income, Income Disclosure Scheme and Dispute Resolution Scheme have also been introduced by Finance Act, 2016 which will remain in vogue till September and December 2016 respectively. New income Disclosures Schemes (ICDS) have been made effective from AY 2017-18. Thus there is greater challenge to deal with such changes by the professionals as well as by the Taxpayers.

It will be important for us to see how we can keep pace with such changes and try to overcome the challenges. **Looking at a positive side, those who will keep themselves updated will emerge stronger than the challenges.**

In view of these changes, the Law and Representation Committee will have a huge responsibility this year. Like in the past we may have to interact more with the authorities and **we should not be afraid of raising our voice by making effective representation and in approaching the Courts** whenever required to strike down the arbitrary action of authorities or against unconstitutional provisions of statutory laws.

**Today Professionals look upon The Chamber as an institution which can take its voice to the Regulators.**

It will be our efforts to keep on innovating and exploring new ideas in carrying out our activities. **We need keep the factory of ideas open 24 hours**. We are consciously aware that all of these new initiatives may not yield desired results but that does not mean that we should stop trying. **We need to create a platform to tap these ideas.**

Apart from holding regular and conventional Seminars, Study Circle Meetings, Workshops, etc., we will work out different mechanism to spread knowledge. Professionals are running

against time to meet various deadlines. We will have to provide a platform that will give them requisite knowledge updates without spending much of time.

Hence there is greater challenge to keep pace with technological changes taking place. Our efforts will get desired results if we are technologically updated and connect with each members. Use of technology will only help in breaking geographical boundaries in reaching larger member base. We have to move towards Digital Chamber. We also need to train our members technically as well on technology front. It is need of an hour to **think beyond and remain ahead.**

The Chamber's Journal is its mouthpiece. It is one of the very well perceived law magazines by the professionals. I see old issues on important topics being preserved in libraries of professionals. **We need to make it more vibrant by introducing new features and increase its reach through use of technology.**

It has always been our effort to come out with unique publications. The new publications launched on ICDS is unique in its contents. We need to come out with such unique publications frequently and its reach to the people.

It will be our endeavour to expand the base of Associate/Corporate Members to cater to the needs of more and more professionals joining industry and also hold more programmes for corporates.

Due to liberalisation of FEMA provisions and increase in FDI limits there is multi-fold increase in cross border transactions. Further due to introduction of anti-avoidance provisions and BEPS provisions whereby every country wants to move towards consumption based regime in international taxation. We need to be very active in keeping our members up to date on the International Tax front by various initiatives.

**The Chamber has entered in 90th year today and we will make unique efforts of celebration through knowledge spreading**. The Chamber has its Chapter at Delhi which has conducted very good programmes at Delhi in FY 2015-16. We need to bring more vibrancy to the Chapter and expand its membership base.

I am conscious of our **duty towards other sister organisations** as well. Though we are separated by different names but object remains the same of imparting knowledge. Hence requires working closely with each other, greater co-ordination with them in terms of holding joint programmes and avoiding overlapping programmes so that members will get maximum benefit.

**All professionals are living a stressful life and it is necessary to improve quality of life.** At the same time finance or building of wealth is always an important aspect for professionals. We need to think on these line in educating our members. Education is a wider term and includes overall development of an individual. A good professional should possess a healthy mind and body.

None of our initiatives will give desired results unless it is backed by an efficient Office Administration. I would like to mention the unstinted support from Chamber's dedicated staff. Still there is greater need to expand the administration base and make it more effective.

Dear members, I hereby request you to participate in our activities whole heartedly and keep on suggesting us on how to improve on it. Most of the Past Presidents, members are either friends or seniors who have always guided me. **I like everyone to maintain relation in the same manner. Designation of President should not create any distance between members and me.** Anyone is free to approach me without any protocol. Your guidance should not change merely because I am holding the post. This post is yours and belongs to you only. **I want to find better connection without WI FI.**

One of the important attributes of good professional is his integrity, respect for the fellow brother and high standard of professionalism which I feel we should cultivate in upcoming professionals. In matters of style, swim with the current; in **matters of principle, stand like a rock.**

It is time for **"Team Chamber"** to reaffirm and work collectively and tirelessly to bring Chamber at new levels of prestige and glory. While doing this we will continue to work towards strengthening the bond created amongst members over the years. I am a firm believer in what is stated in Bhagavad Gita. Our duty is to do "Karma" and the "Fruits" will follow.

I am sure this year Chamber's Journal will achieve newer heights under the leadership of Editor Shri K. Gopal, Chairman of Journal Committee Shri Vipul Choksi and very able team members

The current issue of The Chamber's Journal is well-designed and is on recent issues of Income Disclosure Scheme 2016, Dispute Resolution Scheme 2016 and Equalisation Levy which has been introduced in Finance Act 2016. I am sure this will definitely provide good insights on the subject and will be useful to readers.

I once again thank all of you for considering me fit enough for the post and seek your active participation in all activities of The Chamber.

Jai Hind.

**HITESH R. SHAH**
*President*

# Chairman's Communication

Dear Readers,

I thank the President Shri Hitesh Shah and the Council for having reposed confidence in me by appointing me as the Chairman of the Journal Committee after having served in the same capacity from the years 2008-09 to 2011-12.

The unique feature of the Chamber's Journal for the past several years is the concept of Special Story and that is why the Journal finds a permanent place in the library of distinguished professionals. It shall be my sincere endeavour, along with very able Vice Chairman, Convenors and the Committee members to come up to your expectations by bringing out issues which carry relevant subject matters and are of the highest standard that you expect. We look forward to your feedback and constructive suggestions for further enhancing the quality of the Journal.

The Hon'ble Finance Minister in the Finance Act, 2016 has introduced several amendments to the Income-tax Act including some of the important ones like "Income Declaration Scheme, 2016","Dispute Resolution Scheme" and "Equalisation Levy" which are the topics of the "Special Story" of this issue. One of the promises which the Modi Government had made was to bring back the Black Money and also to reduce the tax litigations. It appears that the Income Declaration Scheme, 2016 is by far the last attempt of the Modi Government and ultimate chance to the tax evaders to declare their black money, before the Government starts action against them. The scheme opened on 1st June, 2016 and will close on 30th September, 2016. We couldn't have thought of any other topics than IDS, 2016, as one of the stories considering the limited time at hand and the intricacies involved.

DRS, 2016 has been introduced with a view to reducing the number of pending litigations and giving an opportunity to the assessees/appellants to settle the disputes by making certain payments and following certain procedures which are discussed in this issue. Equalisation Levy has been introduced with a view to addressing typical direct tax issues relating to e-commerce. Considering the complexities of the topic, we thought it appropriate to cover it in this issue.

I thank the immediate Past Chairman of the Committee Shri Haresh Kenia for conceptualising this story and also the Editor, Shri K. Gopal, my council colleagues Shri Paras S. Savla and Shri Rahul Hakani for designing the structure of this issue.

This issue would not have been possible without the efforts of all the authors who have dealt with the issues, relevant to the topic, in the best possible manner. Sincere appreciation for their efforts.

**VIPUL K. CHOKSI**
*Chairman* – Journal Committee

CA Reepal Tralshawala

# Procedure for filing declaration under Income Disclosure Scheme, 2016 and issues and controversies arising out of the Scheme

## Introduction

Chapter IX of Finance Act, 2016 provides for The Income Declaration Scheme 2016 and as per Circular No. 16/2016, the President gave consent to the scheme on 14-5-2016. The scheme comes into effect from 1-6-2016 and the declaration can be made on or before 30-9-2016 (as per Notification No.32/2016 dated 19-5-2016). The scheme comprises sections 181 to 199 of Finance Act, 2016.

The object of the scheme appears to give final chance to all persons, who have failed to disclose their income/assets for any assessment year prior to AY 2017-18, to come forward and pay tax, surcharge and penalty in respect of such undisclosed income/assets at a flat rate of 45%. Even though it is the claim of the Government that this is final chance and the scheme is different from Voluntary Disclosure of Income Schemes brought earlier, however, the scheme is no different than earlier Voluntary Disclosure Schemes in the sense that the crux of the scheme is to give relief and immunity to the dishonest persons by asking them to make disclosure of their unaccounted income/assets.

## Eligible & Non-Eligible person

**Eligible Persons [Section 183(1) of FA-2016]**

All 7 categories of persons defined in sec. 2(31) of the Income-tax Act, 1961 are eligible to file declaration under this scheme to disclose any income up to AY 2016-17.

Thus, any person, other than non-eligible category, can file declaration, which includes NRI & NRO also (as also specifically included in Form-1) as also clarified in Circular No. 24 of 2016 dated 27-6-2016 in reply to Q. No. 3. Declaration can also be made by any person who is not assessed to tax earlier and who has not filed return of income earlier or even does not have PAN. However such person who does not have PAN will have to obtain PAN before filing declaration (as per Point No.3 of Form-1 for filing declaration) as also clarified in Circular No. 24 of 2016 dated 27-6-2016 in reply to Q. No. 7. Further, the declaration can be made in respect of any assessment year prior to AY 2017-18.

**Non-Eligible Persons/Previous years [Section 196 of FA, 2016]**

a. Person to whom order of detention has been made under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, subject to proviso;

b. Cases covered under Indian Penal Code, the Narcotic Drug and Psychotropic Substances Act, 1985, the Unlawful Activities (Prevention) Act, 1967, the Prevention of Corruption Act, 1988;

c. Person notified under Special Court Act, 1992;

d. Cases covered under Black Money Act, 2015;

e. In relation to undisclosed income of any previous year in cases where notices u/ss.142(1); 143(2); 148; 153A or 153C are issued;

f. A search or survey action has been conducted and time for issuance notice under relevant provision has not expired;

g. Information received under agreement with foreign countries regarding such income;

## Conditions for making declaration [Section 183 of FA, 2016]

Any eligible person can make declaration of undisclosed income chargeable to tax under the Income-tax Act for any assessment year prior to AY 2017-18 on fulfilling the following conditions –

a. Failure to file return of income u/s. 139; – this will cover both 139(1) & 134(4) returns

b. Failure to disclose income in the return of income filed before the date of commencement of this scheme i.e. before 1-6-2016;

c. Income escaped assessment due to omission or failure on part of person to furnish a return or to disclose fully and truly all material facts necessary for the assessment;

d. If declaration is of asset, then fair market value (FMV) as on 1-6-2016 is deemed to be undisclosed income;

e. No deduction of expenses or allowance shall be allowed against income declared.

It is clarified by Circular No. 16/2016 dated 20-5-2016 that the declaration of income in the form of investment in any asset which is located in India. Thus, if the declaration is in respect of any undisclosed asset, then the same can be done only if the asset is located in India.

Now, as per section 183(1) of FA, 2016, it is very clear that declaration can be made only in respect of income which is chargeable to tax under the Income-tax Act. However, for any reason or mistake, declaration made includes item of capital receipt or exempt income, and on which the declarant pays tax, surcharge and penalty, then, even though, such amounts are outside the purview of the Income Declaration Scheme, there is no provision to give refund on such non-chargeable income and in fact, section 191 of FA, 2016 very clearly provides that tax and surcharge paid u/s. 184 of FA, 2016 and penalty paid u/s. 185 of FA, 2016 shall not be refundable. However, issue arises as to whether such amount paid can be adjusted against any other demand or tax payable since it only speaks of non-refundable of such amount. In any case, in order to avoid any such unwanted situation, while filing declaration, utmost care needs to be taken that correct amount of disclosure is made and on which proper tax, surcharge and penalty is paid. Even if any extra amount if paid, the same would not be refunded.

## Tax, Surcharge and Penalty [Sections 184 & 185 of FA, 2016]

| | |
|---|---|
| Tax | 30% of Undisclosed Income [184(1)] |
| Surcharge i.e. Krishi Kalyan Cess | 25% of Tax = 7.5% of Undisclosed Income [184(2)] |
| Penalty | 25% of Tax = 7.5% of Undisclosed Income [185] |
| Total | 45% of Undisclosed Income |

It may be pertinent to note here that section 183 of FA, 2016 refers to declaration of any income chargeable to tax under the Income-tax Act thereby do not refer to undisclosed income as such, and is altogether silent about the same, however, Ss.184 and 185 of FA, 2016 in respect of charging tax, surcharge and penalty refers to undisclosed income declared u/s. 183 of FA,

2016 and thus, the operation of the scheme as a whole may become doubtful. However, as stated above, the object of the scheme is give final chance to all those persons who have not disclosed – (i) their income or (ii) income in the form of investment in assets, by voluntarily disclosing the same and paying tax, surcharge and penalty on the same, and hence, such anomaly created by the provisions of the scheme ought not to arise.

It may also be relevant to note that no basic exemption or reduced rate of tax is available under the Scheme and the tax is to be paid at the flat rate. Thus, the individual slab benefit or tax rate benefit is not available in the scheme. Similarly, even if the declaration is in respect of any income that is chargeable to tax at concessional rates say short term capital gains @15% or royalty/FTS @10% in certain cases, etc., the basic tax will have to be paid at 30% plus surcharge and penalty. At the same time, there is benefit for other taxpayers such as Foreign companies having basic tax rate of 40% or other assessees whose income exceeds one crore where surcharge is more than 10%; however under the Scheme, the tax rate is 30% plus surcharge of 7.5% plus penalty of 7.5%. It can therefore be seen that there is benefit in basic tax rate as well as surcharge to certain class of person whereas there is disadvantage to certain class of person.

## Form and Verification of Declaration [Section 186(1) of FA, 2016]

Sec. 186 of FA, 2016 provides for prescribing of Form and Verification for making a declaration. However, the manner of furnishing the declaration is not prescribed under any of the sections of The Income Declaration Scheme, 2016.

As per Section 199 of FA, 2016 dealing with power to make rules, sub-section (2) of sec. 199 of FA 2016 states that rules may provide for form for making declaration and manner for its verification. However, even here, there is no provision given for manner of furnishing the declaration.

Rule 4 of The Income Declaration Scheme Rules, 2016, provides that a declaration u/s. 183 of FA, 2016 is required to be made in Form 1 and also the manner of furnishing the Form – [straightaway delegated under Rule without power under law, thus a case of delegated legislation without authority under law].

Rule 4 of The Income Declaration Scheme Rules, 2016, provide for the following procedure for filing of declaration, etc.:

| Rule 4 | Particular | Procedure |
|---|---|---|
| (1) | Form | Form 1 |
| (2) | Manner of Furnishing declaration | The declaration shall be furnished either –<br>i) Electronically under digital signature; or<br>ii) Through transmission of data in the form electronically under electronic verification code; or<br>iii) In print form, to the concerned Pr. Commissioner or the Commissioner who has the jurisdiction over the declarant.<br>Circular No. 19/2016 dated 25-5-2016 clarifies that the declaration to be made to Principal Commissioner or the Commissioner who exercises jurisdiction over the declarant u/s. 120 of the Income-tax Act, 1961, as notified by CBDT from time-to-time over such declarant |

| Rule 4 | Particular | Procedure |
|---|---|---|
| | Inquiry in respect of declaration | Though the rules do not provide this, however, by way of FAQ clarification in terms of Circular No. 17/2016 dated 20-5-2016, in response to Q. 12, the CBDT has clarified that the Pr. Commissioner / Commissioner will enquire whether any proceedings u/ss. 142(1)/ 143(2)/148/153A/153C is pending for the assessment year for which declaration is filed. Apart from this, there will be no enquiry conducted by him at the time of declaration.<br><br>The language suggests that no other enquiry at time of declaration, but later whether any enquiry can be done i.e. after declaration and after payment of tax, surcharge and penalty is kept open and hence, there is a possibility of enquiry being conducted after acceptance of the declaration.<br><br>Also as per provision of sec.193 of FA, 2016, declaration made by misrepresentation or suppression of facts shall be void and treated as never been filed. This provision suggests that there could be inquiries made in respect of the declaration. Further, there is no time limit within which such declaration can be held to be void and thus, even if such suppression of facts comes to notice of department any time subsequently, the declaration may be treated as void. |
| (3) | Acknowledge-ment | Within 15 days from the end of the month of filing declaration in Form 1, the Pr. Commissioner/Commissioner shall issue acknowledgement in Form 2 to the declarant. |
| (4) | Proof of payment of tax, surcharge & penalty | As per reading of this sub-rule (4) to Rule 4 of The Income Declaration Scheme, 2016, the declaration made in Form-1 can be filed without payment of tax, surcharge and penalty. Once the declaration filed is acknowledged in Form 2, the declarant can thereafter make payment of tax, surcharge and penalty, which payment can be made till 30-11-2016 [as per sec. 187(2) of FA 2016 read with Notification No. 32/2016] even though the Scheme ends of 30-9-2016.<br><br>Once the payment is made, the declarant has to submit the proof of payment to Pr. Commissioner / Commissioner in Form 3.<br><br>However, here again there is no time limit prescribed for submitting the proof of payment of tax, surcharge and penalty in Form 3. In any case, once the payment is made, it is for the benefit of the declarant that proof of the same is submitted immediately. |
| (5) | Granting certificate of income declared | Within 15 days of submission of proof of payment of tax, surcharge and penalty, the Pr. Commissioner/Commissioner shall grant certificate in Form 4 to the declarant.<br><br>[Again this is delegated legislation without authority of law as sec. 187 of FA, 2016 does not provide for grant of certificate] |

## Signing of Declaration – Sec. 186(2) of FA, 2016

| Sr. No. | Status of Declarant | Declaration to be signed by |
|---|---|---|
| 1 | Individual | Individual. However,<br>(i) In absence of such individual from India, by any person authorised by such individual<br>(ii) If individual is mentally incapacitated from attending his affairs, then by his guardian or any other person competent to act on his behalf<br>In both the above situation, there should be power of attorney for signing on behalf of individual and even though there is no specific requirement to attach such power of attorney along with declaration, it is advisable to attach the same as evidence of signing authority |
| 2 | HUF | Karta of HUF. However, if Karta is absent from India or is mentally incapacitated, then any adult member of such family |
| 3 | Company | Managing Director (MD). However, for any unavoidable reasons, MD cannot sign or in absence of MD in a company, then by any Director of the company |
| 4 | Firm | Managing Partner (MP). However, for any unavoidable reasons, MP cannot sign or in absence of MP in a firm, then by any Partner of the Firm, not being a minor |
| 5 | Any other Association | By any member of such association or principal officer thereof |
| 6 | Any other person | By that person or any other person competent to act on his behalf |

## One Declarant – One Declaration – Section 186(3) of FA, 2016

As per provisions of sec. 186(3) of FA, 2016, a person can make only one declaration in respect of his income or as a representative assessee in respect of income of any other person and if any other declaration filed, the same shall be treated as void. Thus, only one declaration to be filed for any number of assessment years for which the income is declared and Form 1 takes care of this wherein table is given to give details of assessment year to which undisclosed income pertains, the amount of undisclosed income and the nature of undisclosed income i.e. whether derived from house property income, business income, etc. (as specified in Notes to Annexure to Form 1 – Note No. 4)

Various issues arise out of this provision such as-

(i) If declaration filed contains mistakes, or is required to be amended, etc., the same is not possible since there is no provision even for revision of declaration and no other declaration is allowed. In other words, even rectification of declaration is not allowed;

(ii) If a person is filing declaration in a representative capacity – for example, karta of HUF, MD of company, MP of firm, etc., then whether such person can file declaration in his individual capacity or any other capacity is not clarified in the provisions and if it is held later that such person could not have filed declaration, thereby making it void, no certificate

will be granted and no refund of tax, surcharge and penalty paid would be given and at the same time, no benefit of such declaration will be given to the declarant. The consequence of this is not at all clear from the provisions read with rules and various circulars;

(iii) In Form 1, in the verification part, in clauses (b) and (c), the declarant is to certify that he has included all such incomes that relate to him including the income in the name of benamidar and also certify that the income relating to any other person for which declarant is not chargeable to tax is not included in the declaration. For any reason, even if some income is not declared and if later it comes to the notice of the department that the declarant has not included such income, or benamidar income or has included income of other person, then such declaration may be treated as void u/s. 193 of FA 2016, wherein it is provided that where declaration is made by misrepresentation or suppression of facts, such declaration would be void and deemed to have never been filed under the Scheme. Therefore, no benefit of tax, surcharge and penalty paid would be given and it is not clear as to whether the income declared in such void declaration would be once again taxed under normal provisions of Income tax Act, 1961 and no immunity given from penalty, prosecution, etc. However, in FAQ Circular No. 17/2016 dated 20-5-2016, in response to Q. No. 10 the CBDT has clarified that though a person is expected to disclose all his undisclosed income, however, to the extent of undisclosed income disclosed under the Scheme, the benefit of the Scheme will be available.

## Undisclosed income not to be included in total income – Sec. 188 of FA 2016

The Scheme provides that the declaration made of undisclosed income shall not be included in total income of the declarant for any assessment year under Income-tax Act, if declarant pays tax, surcharge and penalty within the time limit prescribed.

Issues arises –

(i) If any one of the three levies i.e. either tax or surcharge or penalty is not paid or the declarant fails to pay any one of the three payments within the time permitted due to genuine reasons and difficulties, then whether the undisclosed income would be included in his total income? If this is read with provision of Sec. 197(b) of FA, 2016, it provides that if the declarant fails to pay tax, surcharge and penalty i.e. all the three ingredients, only then the undisclosed income declared will be included in his total income in the previous year in which declaration is made, which should be AY 2017-18. However, if any one or two of the three ingredients is not paid, the consequences is not stated anywhere.

However, though the language is not clear, from the objective of the Scheme, it appears that even if any one of the three ingredients is not paid, the undisclosed income could be included in the total income of the declarant. This may also apply to cases of short payment of tax or surcharge or penalty even if it is a case of genuine error in computation. This is now clarified by Circular No. 24 of 2016 dated 27-6-2016 in response to Q. No. 1 that if only part of the payment is made, then the declaration under the Scheme shall be invalid.

(ii) Further, assuming that the undisclosed income declared would be included in his total income for AY 2017-18 on failure to make payment of any of the 3 ingredients, then whether he would get benefit of credit of whatever amount he has paid under the declaration is also not clear and is not clarified even in the Circular No. 24 of 2016 dated 27-6-2016.

## Undisclosed income not to affect finality of completed assessment – Section 189 of FA, 2016

It is provided that the declarant shall not be entitled to reopen any assessment or reassessment or to claim any set off or relief in any appeal, reference or proceedings in relation to any such assessment or reassessment in respect of undisclosed income declared or any amount of tax and surcharge paid thereon. It is further clarified in Circular No. 17/2016 dated 20-5-2016 in response to Q. No. 5 that no declaration can be made in respect of assessed undisclosed income and issue is pending before higher forums. It is further clarified by Circular No. 24 of 2016 dated 27-6-2016 in reply to Q. No. 8 that if any proceedings are pending before Settlement Commission, then such person is not eligible under the Scheme. However, certain issues arise i.e.-

(i) Only the declarant is restricted from reopening any assessment or reassessment, etc., but the department is not forbidden to reopen the assessment or reassessment. Hence, if the declarant has made disclosure of certain income or certain asset, which the AO feels is not complete and correct, whether the AO can reopen such assessment or reassessment and tax any additional amount in respect of the same undisclosed income/asset is not at all clear. Similarly, if the AO doubts valuation report of the asset declared, can the AO reopen such assessment or reassessment and tax additional amount calling for valuation report from DVO, etc.

(ii) The declarant is also forbidden from taking any benefit or set off or relief of not only the undisclosed income, but all the tax and surcharge paid thereon. Hence, if for any reason, the declaration is later found to be void or otherwise not acceptable for any reason, the undisclosed income declared may be once again taxed and no set off or relief would be allowed.

(iii) On the same analogy, the tax and surcharge paid may not be allowed to be adjusted. Hence, apart from non-refundable of tax and surcharge paid (as per provision of Section 191 of FA 2016), perhaps, the adjustment of the same may also not be possible.

## Benami Transactions – Section 190 of FA, 2016

Immunity from the provisions of Benami Transactions (Prohibition) Act, 1988 (45 of 1988) shall be granted only if the asset existing in the name of benamidar and declared by the declarant under the scheme is transferred back to the declarant or his legal representative on or before 30-9-2017 (Notification No. 32/2016 dated 19-5-2016). This is also specifically and categorically mentioned in the verification part of Form 1 in clause (i).

## Immunity from Wealth-tax – Section 194 of FA 2016

Where undisclosed income is represented by cash (including bank deposits), bullion, investment in shares, or any other asset and in respect of which the declarant has failed to furnish Wealth Tax return up to AY 2015-16; or has not shown the same in Wealth Tax returns filed; or has understated the value in wealth tax returns filed, then the immunity / exemption is granted from payment of Wealth Tax in respect of such assets declared or to the extent of value of such assets declared in the declaration.

By way of Explanation to section 194 of FA, 2016, it is also clarified that assets declared by firm shall not be included in hands of partners of the firm.

As per sec.194(2) of FA, 2016, no immunity of Wealth Tax is available unless the proof of payment of tax, surcharge and penalty is filed with Pr. Commissioner or Commissioner.

## Confidentiality of information in the declaration – Section 195 of FA, 2016

Section 138 of the Income-tax Act, 1961 is made applicable to declaration made under the Income Disclosure Scheme, 2016. As per Circular No. 17/2016 dated 20-5-2016 also it is clarified that the information in respect of the declaration is confidential as in the case of returns filed by assessees.

## Consequence of not filing declaration under the Scheme – Section 197(c) of FA, 2016

It is provided in clause (c) to section 197 of FA 2016 that where any income has accrued, arisen or received or any assets acquired out of such income prior to 1-6-2016 and no declaration is made in respect of such income under the Scheme the such income or asset would be deemed to have accrued, arisen or received in the year in which a notice u/s.142 or 143(2) or 148 or 153A or 153C of Income-tax Act is issued by AO and provisions of Income-tax Act shall apply accordingly. This is also clarified by Circular No. 24 of 2016 dated 27-6-2016 in reply to Q. No. 4 wherein it is again reiterated that such income or asset shall be assessed in the year in which the notice u/s. 148 or 153A or 153C is issued and in respect of the asset, it will be the FMV of the asset in the year in which the notice is issued and computed as per Rule 3 of the Income Declaration Scheme Rules.

It is very clear from the said provision that the purpose is to penalise the persons for not making declaration under the Scheme, however, various issues arise out of this provision –

(i) As per provisions of Income-tax Act, an assessee could be assessed for maximum of 6 assessment years preceding the assessment year in which the notice is issued u/s. 148 or search is conducted u/s. 132 except for assessing foreign asset for which 16 years are prescribed. If the undisclosed income or asset relates to period beyond the maximum assessable period, whether the same can still be taxed under the normal provisions of Income-tax Act, when there is no such amendment in the Income-tax Act to tax such undisclosed income;

(ii) Under normal circumstances i.e. before the Scheme was introduced, no such income or asset could be brought to tax if the same is beyond the assessable period. The Scheme does not override the provisions of Income-tax Act. Hence, if any income has escaped assessment or is found in search action, the same could be assessed only if it falls within the assessable period. How does the same gets override by sec. 197(c) of FA, 2016 is not clear?

(iii) It is also not clear as to how the AO would give effect to the provision stated in section 197(c) of FA, 2016. For example, assuming that income of AY 2016-17 is not declared and for which notice u/s. 148 of Income-tax Act is issued on 10-12-2018 for reopening of AY 2016-17. As per the provision in the Scheme, the said income should be taxed in the year of issue of notice u/s. 148 i.e. AY 2019-20 whereas the income has accrued/arisen/received in AY 2016-17, how would the AO give effect since AY 2019-20 is not the proceedings open before him and therefore has to issue another notice for AY 2019-20 to assess such income in that year whereas actually the income relates to AY 2016-17. Similar difficulties would arise to tax such income in the year of issue of notice u/s. 142 or 143(2) or 153A or 153C since there may not be any proceedings pending in the year of issue of such notice and in spite of the fact that the income relates to earlier years for which the related notice is issued. Further, under what provision of Income-tax Act, 1961 would the AO be able to tax such income in the year of issue of notice for the reason that the deeming provisions

u/s. 68 to 69C of the Act are very clear i.e. to tax the income in the financial year to which it relates. Hence, under normal circumstances, in the given illustration, the AO is right in assessing the income in the AY 2016-17 however, as per the provision in the Scheme the AO has to assess the same in AY 2019-20. This may give rise to unwanted litigation.

(iv) As per Press release dated 14-5-2016, the non-declaration of undisclosed income under the Scheme will be liable to tax in the year in which the same is detected by the department. However, as stated earlier, if the same relates to period beyond the assessable period, under what provisions of Income-tax Act would the same be taxed in the year of detection? Under the existing provisions, sections 69, 69A, etc. takes care of such unexplained investments, money, etc. to be taxed in the year in which the same are found. Hence, perhaps the effect of provision of section 197(c) of FA, 2016 would also get restricted as per existing provisions of sections 69/69A, etc. unless the Finance Minister makes a new provision under the Income-tax Act in this regard, which is quite possible in the Budget of 2017.

## Information required to be given in Form 1 if undisclosed income is in form of investment in assets

| Sr. No. | Nature of Asset | Information to be provided in Form 1 |
|---|---|---|
| 1 | Immovable Property | Nature (Land/Building), Address, Name in which held, Date of Acquisition, Total Acquisition Cost, Value as per Regd. Valuer on 1-6-2016 along with report and FMV as per Rule 3 to be provided |
| 2 | Jewellery | a) Purity, Weight, Value of Gold,<br>b) Carat, Cut, Colour, Clarity, Value of Diamond (of I carat or more)<br>c) Value of Diamond (less than 1 carat) and other precious stones<br>d) Value of other precious metals to be provided |
| 3 | Artistic work | Nature, Name under which held, Date of Acquisition, Total Acquisition Cost, Value as per Regd. Valuer on 1-6-2016 along with report and FMV as per Rule 3 to be provided |
| 4 | Quoted Shares & Securities | Name of Issuer, Number of Shares, Type of Security, Recognized Stock Exchange where quoted, Name under which held, Date of Acquisition, Total Acquisition Cost, Value as per Regd. Valuer on 1-6-2016 along with report and FMV as per Rule 3 to be provided |
| 5 | Unquoted Equity Shares | Name of Issuer, Number of Shares, Type of Security, Name under which held, Date of Acquisition, Total Acquisition Cost, Value as per Regd. Valuer on 1-6-2016 along with report and FMV as per Rule 3 to be provided |
| 6 | Unquoted Shares other than Equity Shares | Name of Issuer, Number of Shares, Type of Security, Name under which held, Date of Acquisition, Total Acquisition Cost, Value as per Regd. Valuer on 1-6-2016 along with report and FMV as per Rule 3 to be provided |
| 7 | Any other asset | Description of Asset, Name under which held, Date of Acquisition, total Acquisition Cost, Value as per Regd. Valuer on 1-6-2016 along with report and FMV as per Rule 3 to be provided |

Though, as per Circular No. 17/2016 dated 20-5-2016, in response to Q. No. 14, filing of valuation report along with the declaration is not mandatory, however, obtaining of valuation report is mandatory. But, Form 1 provides for attachment of valuation report. Further, in reply to Q. No. 14, it is indirectly stated that while e-filing the declaration, facility for uploading other documents will be available. If the declarant does not file valuation report, is it necessary for the department to call the same since there is no explicit provision in this regard and even if the same is filed, there is no provision for verifying the correctness of the same. The issue appears to be kept open as to whether the department can go into the intricacies of valuation report and take a different stand on the same and declare the declaration as void on ground of misrepresentation of facts or suppression of facts under section 193 of FA, 2016. Even in the Circular No. 24 of 2016 dated 27-6-2016, in reply to Q. No. 6, it is only clarified that if valuation report is not attached, Pr. Commissioner / Commissioner can call for the same to ascertain the correctness of the value of asset quoted in Form 1 before issuing acknowledgement in Form 2 and in such scenario it is necessary for the declarant to furnish the report to the Pr. Commissioner/Commissioner. However, it is not clarified whether the Pr. Commissioner/Commissioner has powers to find the correctness of the valuation report itself?

## Determination of Fair Market Value (FMV) for the purpose of declaration

Rule 3 of The Income Declaration Scheme Rules, 2016 provides for the manner of computing the FMV of assets declared under the Scheme. The same is as under-

| Sr. No. | Nature of Asset | Method of computing FMV |
|---|---|---|
| 1 | Value of Bullion, Jewellery or Precious stone | Higher of<br>i) Cost of Acquisition and<br>ii) The price such bullion, jewellery or precious stone shall ordinarily fetch if sold in the open market as on the 1st day of June, 2016, on the basis of the valuation report obtained by the declarant from a registered valuer |
| 2 | Valuation of archaeological collections, drawings, paintings, sculptures or any work of art (hereinafter referred to as artistic work) | Higher of<br>i) Cost of Acquisition and<br>ii) The price such artistic work shall ordinarily fetch if sold in the open market as on the 1st day of June, 2016, on the basis of the valuation report obtained by the declarant from a registered valuer. |
| 3 | FMV of an immovable property | Higher of<br>i) Cost of Acquisition and<br>ii) The price such property shall ordinarily fetch if sold in the open market as on the 1st day of June, 2016, on the basis of the valuation report obtained by the declarant from a registered valuer. |

| Sr. No. | Nature of Asset | Method of computing FMV |
|---|---|---|
| 4 | Quoted Shares and Securities | Higher of<br>i) Cost of Acquisition and<br>ii) The price determined by taking<br>a) If Share is traded on 1-6-2016, Avg of Lowest and Highest price on 1-6-2016 on recognized stock exchange[RSE]<br>b) If Share is not traded on 1-6-2016,Avg of Lowest and Highest price on date immediately preceeding 1-6-2016, when shares are traded on RSE |
| 5 | Unquoted Equity Shares | Net Worth x Paid up Value of Equity Share capital<br>Total amount of paid up equity share capital as shown in the balance-sheet<br>Net Worth = Value of [Assets – Liabilities], where in<br>Assets = [FMV of Bullion, Jewellery, Precious Stone + FMV of Artistic Work + FMV of Shares and securities + FMV of Immovable property] determined as per Rule 3 + Book Value of Other Assets<br>– Income Tax Paid (-Refund Claimed)<br>– Unamortised Amount of Deferred Exp.<br>– Amount shown as but not representing any asset<br>Liabilities= Book Value of Liabilities in B/s less<br>i) The paid-up capital in respect of equity shares<br>ii) The amount set apart for payment of dividends on preference shares and equity shares<br>iii) Reserves and surplus, by whatever name called, even if the resulting figure is negative, other than those set apart towards depreciation<br>iv) Any amount representing provision for taxation, other than amount of income-tax paid, if any, less the amount of income-tax claimed as refund, if any, to the extent of the excess over the tax payable with reference to the book profits in accordance with the law applicable thereto<br>v) Any amount representing provisions made for meeting liabilities, other than ascertained liabilities;<br>vi) Any amount representing contingent liabilities other than arrears of dividends payable in respect of cumulative preference shares |

| Sr. No. | Nature of Asset | Method of computing FMV |
|---|---|---|
| 6 | Unquoted Shares and Securities other than Equity Shares | Higher of<br>i) Its cost of acquisition and<br>ii) The price that the share or security shall ordinarily fetch if sold in the open market on the 1st day of June, 2016, on the basis of the valuation report obtained by the declarant from a registered valuer |
| 7 | Value of other Assets | Higher of<br>i) Cost of Acquisition or the amount invested and<br>ii) The price the asset would fetch if sold in the open market as on the 1st day of June, 2016,<br>Note: In this case, the Report of registered valuer is not stated. Hence, any extraordinary price can also be taken as value |

By and large, the FMV of asset is the higher of cost of acquisition of the asset or market price as on 1-6-2016 as per valuation report. Thus, if an assessee has to disclose his unexplained asset, he has to adopt market price as on 1-6-2016 since in all cases, perhaps, the cost of acquisition would be lower than the market price as on 1-6-2016. The issue for consideration that arise here is the market price of assets as per the valuation report – Whether is subjected to further scrutiny or inquiry as to the correctness of the FMV as specified in the valuation report. Normally, under the existing provisions of the Income-tax Act, the AO may inquire as to the correctness of the valuation report and also get the asset valued through DVO. There is no such provision under the Scheme nor any clarification issued in this regard.

Thus, whether the valuation report is to be accepted on the face of it without verification is not clear.

Hence, if there is suppression of FMV in the valuation report, whether the department can reject the declaration u/s. 193 of FA 2016 is not clear? This would apply mainly in respect of assets such as immovable property, artistic work, jewellery, etc. It is also not clear as to how such suppression in FMV as on 1-6-2016 would be proved by the department, in case, the same was to be further scrutinised.

Sub-rule 2 to Rule 3 of The Income Declaration Scheme Rules, 2016 provide that in respect of any asset, the investment is represented partly from undisclosed income and partly from income assessed to tax, then the FMV determined under sub-rule (1) shall be reduced by the amount which bears to the FMV as on 1-6-2016, to the same proportion as assessed income bears to cost of asset. Illustration to this effect is given in Circular No. 17/2016 dated 20-5-2016 in reply to Q. No. 4 as under –

> Investment in acquisition of asset in previous year 2013-14 is of ` 500 out of which ` 200 relates to income assessed to tax in A.Y. 2012-13 and ` 300 is from undisclosed income pertaining to previous year 2013-14. The fair market value of the asset as on 1-6-2016 is ` 1500.

The undisclosed income represented by this asset under the scheme shall be: 1500 minus (1500 X 200/500) = ` 900

It is very clear from the illustration itself that undisclosed income of ` 300/- is taxed under the Scheme at ` 900/- and if tax, surcharge and penalty is computed on ` 900/-, it works out to ` 405/-. Thus, though the scheme looks attractive at flat rate of 45%, however, this flat rate of 45% is charged on FMV of the asset as at 1-6-2016, thereby may become unviable for persons to come forward. The undisclosed income of ` 300/- would otherwise attract payment of ` 135/- at flat rate of 45%, but for determining the amount of undisclosed income as per FMV as at 1-6-2016, the payment under the Scheme works out to ` 405/-, which is even more than the undisclosed income earned. Further, if the person does not make declaration, and the department detects the same, in that case, the undisclosed income of ` 300/- may get taxed as against the FMV as at 1-6-2016 and that too at the applicable tax rates. Assuming tax plus interest plus penalty arrived is at 100% of undisclosed income, even then the same would be ` 300/- as against the amount determined under the Scheme of ` 405/-. Thus, the scheme may not be attractive.

Further, it is also important to note that if the undisclosed part of asset say immovable property was made in the year 2005 and since the asset is registered and disclosed in the books of account for and from the year 2005, whether the same could at all be taxed under the normal provisions of the Income-tax Act as falling beyond the assessable period. This is so for the reason that the date of purchase of asset is very much known and the undisclosed income if invested in the said asset would also fall during the date/year of purchase and therefore not fall u/ss. 69/69A of the Act also. It is not clear as to how such undisclosed income could be brought to tax in the year of detection by the department. May be this is hint given by the Finance Minister for various amendments in the Income-tax Act in Budget of 2017.

By Circular No. 24 of 2016 dated 27-6-2016 in reply to Q. No. 9, it is clarified that if land is purchased earlier and disclosed in regular books of account and subsequently, building is constructed on such land and the construction cost is not disclosed, in such scenario the FMV of land & building is to be computed as provided in Rule 3(2) i.e. on proportionate basis. This clarification is itself contrary to the provisions of the Scheme since if only the construction cost of building is not disclosed, there is no reason for such person to declare undisclosed income in respect of land, which was purchased by disclosed income. To take an illustration, if construction cost of building is ` 1,000/- (undisclosed income) and land cost in books duly reflected is ` 100/- (disclosed income) and assuming, the FMV of land and building is valued as at 1-6-2016 at ` 2,500/- due to appreciation in the value of land, then as per the formula provided, the total proportionate undisclosed income to be offered under the scheme would be –

2500 (-) [2500 (x) 100 / 1100] = 2,273/-

Thus, even though the construction cost of building is ` 1,000/-, such person ends up in disclosing total amount of ` 2,273/- for payment of tax, surcharge and penalty, which is completely illogical for any person to declare. Hence, in such cases, if only building FMV is to be declared taking valuation report of building, whether the declaration would be later held to be invalid as filed by misrepresentation / suppression of facts. In fact, this answer has given in the clarification circular itself has created controversy, which earlier was not there since the declarant could have only disclosed building FMV in the declaration.

## General issues

i) Immunity from penalty, prosecution is given only under the Income-tax Act. There is no similar benefit provided under the Sales Tax Act or Service Tax Act or any other Indirect Tax Act. Hence, if professional income was to be declared under the Scheme, the declarant may also end up paying service tax with interest, penalty, etc. and prosecution sword hanging on him under those provisions all the time. Hence, persons may not come forward for making declaration under the Scheme in respect of incomes that has bearing on other Acts wherein no immunity is provided. Even though the FM has given assurance as read in newspaper dated 29-6-2016 in Hindustan Times that no other authority shall take any action in respect of the disclosure made, however, there is no written assurance and no amendment made either in the present Scheme or in other Acts nor clarified by way of circular. Hence, unless the assurance is given in writing, doubts remain over other indirect tax authorities taking action against the declarant.

ii) Capital gains on assets declared under the Scheme would be liable to tax on sale of assets subsequently and the cost of asset would be the FMV as on 1-6-2016 i.e. the amount on which the tax is paid under the Scheme. However, even the holding period is recognised with effect from 1-6-2016. This is clarified in Circular No. 17/2016 dated 20-5-2016 in response to Q. No. 1. However, it is not clarified as to how the capital gains would be computed in respect of asset which is declared in terms of Rule 3(2) i.e. partly acquired from income already assessed to tax and partly from undisclosed income. In such case, the date of acquisition is very much available in the records of the department as also the declarant. Further, how the period of holding will be computed in respect of such asset is also not clarified. There cannot be 2 different periods of holding for the same asset acquired partly out of disclosed income and partly out of undisclosed income.

iii) In FAQ Circular No.17/2016 dated 20-5-2016, in response to Q. Nos. 2 & 3, it is stated that a person will be ineligible if he is served upon a notice u/s. 153A or 153C of the Income-tax Act on or before 31-5-2016 whereas in response to Q. No.6 of the same FAQ, it is clearly stated that if there is a search action conducted and even if notice u/s. 153A of the Act is not issued but time limit for issue of notice u/s. 153A is not expired, then such person is ineligible to declare any undisclosed income under the Scheme, but such person can declare undisclosed income for any assessment year prior to the period covered by 153A provisions. Thus, the Scheme, FAQs, are contradictory to each other and on one hand, it says that person is eligible if notice u/s. 153A of the Income-tax Act is not served on or before 31-5-2016 whereas on the other hand it says that the person is ineligible to file declaration if he is searched u/s. 153A of the Income-tax Act for the assessment years covered u/s. 153A of the Income-tax Act. This aspect is again clarified in Circular No. 24 of 2016 dated 27-6-2016 in reply to Q. No. 5 that once search action is conducted, the said person is not eligible to file declaration.

iv) In reply to Q. No. 11 of Circular No. 24 of 2016 dated 27-6-2016, it is clarified that if notice u/s. 142, 143(2) or 148 is not received on or before 31-5-2016, then such person can make declaration for

the year for which such notice is issued and once the certificate is granted by Pr. Commissioner or Commission in Form No.4, the proceedings initiated u/s. 142, 143(2) or 148 shall be deemed to be closed. Here again controversy is created by the clarification. If notice u/s. 148 is issued for taxing escaped income and reasons for doing so are altogether different then the transaction disclosed by the declarant under the Scheme, how and on what basis the proceeding initiated closes. Similarly, if regular scrutiny notice is issued u/s. 143(2) of the Income-tax Act, how does the regular scrutiny assessment closes just because the disclosure is made by such person under the Scheme since the regular scrutiny assessment has nothing to do with the disclosure made under the Scheme and the same is for assessing the correct total income as declared in the return of income by scrutinising the correction of the returned income.

## Conclusion

The Prime Minister of India has in his 'Chai pe Charcha' very categorically stated that strict and rigorous action will be taken against those who has undisclosed income / asset but still does not avail of the Scheme and at the same time also assured that those who declare under the Scheme, no action against them would be taken. In spite of such remarks from the Prime Minister himself, there are various issues and abnormalities in the Scheme itself as noted above. Further, there is no assurance given in the Scheme as commented by the Prime Minister. It appears that the Scheme is drafted hastily and without considering the fallacies arising from the language of the Scheme and Rules thereof. The Scheme has also forbidden the declarations in case of income earned by way of corruption. It is not clear as to what steps the Government would be taking after the Scheme ends against all those persons who have not disclosed their undisclosed income under the Scheme. Even though income earned from corruption is barred from declaration, there are hardly any people caught and there is no statistic to show how much amount of undisclosed income is unearthed and is taxed to such people and how much amount of tax is actually collected from such people. The Government earlier brought Black Money Scheme for those who have stashed their undisclosed income abroad and very poor response was received and thereafter till date, there is no instance of any person being caught and any action taken against any such person. Similarly, it appears that the way the present Scheme is drafted and more particularly the payment of tax on FMV of asset as at 1-6-2016, not many declarations may be made and till date i.e. almost one month passed since the starting of the Scheme, there is no statistic to show the response received and in fact, still the Government is issuing clarifications, which itself shows poor drafting of the Scheme. Unless the Government clarifies various issues emanating from the Scheme and also the assurance given in writing, it appears that the Scheme would fetch poor response.

"It is very easy to point out the defects of institutions, all being more or less imperfect, but he is the real benefactor of humanity who helps the individual to overcome his imperfections under whatever institutions he may live."

*— Swami Vivekananda*

S. R. Wadhwa, *Advocate**

# Income Declaration Scheme – 2016 – Some Issues

## 1. The Scheme – In Brief

The Income Declaration Scheme – 2016 (The Scheme) contained in Chapter-IX (Sections 181 to 199) of the Finance Act – 2016 has taken effect from 1st June, 2016 by a notification of the Central Government. It provides an opportunity to persons who have not paid their full taxes or have not filed their tax returns in the past to come clean by declaring their undisclosed incomes. The declarations can be made during 1st June to 30th September, 2016. The tax, surcharge and penalty aggregating 45% of the undisclosed income needs to be paid by 30th November, 2016. The procedure for compliance has been laid down in the Income Declaration Scheme Rules – 2016 ('The Rules')

2. The declaration under the Scheme can be made in respect of any undisclosed income or asset in the form of investment in India which was acquired from income chargeable to tax under the Income-tax Act, 1961 (The Act) for any assessment year prior to the A.Y. 2017-18 for which the declarant:-

(i) Failed to furnish a return under section 139 of the Act, or

(ii) Failed to disclose such income in a return furnished before the date of commencement of the Scheme, or

(iii) Such income had escaped assessment by reason of the omission or failure on the part of such person to make a return under the Act or to disclose fully and truly all material facts necessary for the assessment or otherwise.

3. Where income chargeable to tax is declared in the form of an investment in any asset, the fair market value of such asset as on 1st June, 2016, and not its cost, shall be deemed to be the undisclosed income. The fair market value of different assets is to be computed in accordance with the procedure laid down in Rule 3 of the Income Declaration Scheme Rules – 2016, also involving valuation by registered valuers. The Scheme is also applicable to a non-resident where his income liable to tax under the Indian income tax law has escaped assessment.

4. The scope of the declaration is rather restrictive. It can be made only by a non-filer, a stop filer or an existing taxpayer for the assessment year(s) for which no assessment or reassessment proceedings are pending. It has been specifically laid down that no declaration can be made in respect of any undisclosed income chargeable to tax under the Income-tax Act, 1961 for A.Y. 2017-18 or any earlier assessment year where:

(i) Notice u/s. 143(2) or 148 or 153A or 153C of the Income-tax Act has been served upon the person on or before 31st May, 2016 i.e., before the date of commencement of this Scheme and the

assessment proceeding is pending before the Assessing Officer.

(ii) Search has been conducted u/s. 132 or a requisition has been made under section 132A or a survey has been carried out under Section 133A of the Income-tax Act in a previous year and the time for issue of a notice under Section 143 (2) or Section 153A or Section 153C for the relevant assessment year has not expired.

(iii) The case is covered under the Black Money (Undisclosed Foreign Income & Assets) and Imposition of Tax Act, 2015.

(iv) A person in respect of whom proceedings for prosecution of any offence punishable under Chapter IX (Offences relating to public servants) or Chapter XVII (Offences against property) of the Indian Penal Code or under the Unlawful Activities (Prevention) Act or the Narcotic Drugs and Psychotropic Substances Act or the Prevention of Corruption Act are pending.

## 2. Procedure for making a Declaration

5. The declaration under the Scheme is to be made in Form 1 as prescribed in the Rules to the concerned Principal Commissioner or Commissioner (to be called the prescribed authority) who has the jurisdiction on the case of the declarant. The prescribed authority will issue an acknowledgment in Form-2 to the declarant within 15 days from the end of the month in which the declaration is furnished. The declarant shall furnish proof of payment made in respect of tax, surcharge and penalty aggregating to 45% of the disclosed income to the prescribed authority in Form-3 after which, the said authority shall issue a certificate in Form-4 within 15 days of the submission of the proof of payment by the declarant. That certificate will be the proof of the acceptance on account of the declaration.

6. The declaration in Form-1 can also be furnished:

(a) Electronically under digital signature; or

(b) Through transmission of data in the form electronically under Electronic Verification Code: or

(c) In print form to the concerned Principal Commissioner or Commissioner who has jurisdiction over the declarant. The declaration is required to be signed and verified by the person authorised to sign Form-1, namely;

| Sl. No. | Status of the declarant | Declaration to be signed by |
|---|---|---|
| 1. | Individual | Individual; where individual is absent from India, person authorised by him; where the individual is mentally incapacitated, his guardian or other person competent to act on his behalf. |
| 2. | Hindu Undivided Family (HUF) | Karta; where the karta is absent from India or is mentally incapacitated from attending to his affairs, by any other adult member of the HUF |
| 3. | Company | Managing Director; where for any unavoidable reason the managing director is not able to sign or there is no managing director, by any director. |
| 4. | Firm | Managing partner; where for any unavoidable reason the managing partner is not able to sign the declaration, or where there is no managing partner, by any partner, not being a minor. |
| 5. | Any other association | Any member of the association or the principal officer. |
| 6. | Any other person | That person or by some other person competent to act on his behalf. |

## 3. Declaration when Invalid and Non-Est

7. In the following situations, the declaration shall be void and shall be deemed never to have been made:

(a) If the declarant fails to pay the entire amount of tax, surcharge and penalty within the specified date, i.e., 30-11-2016;

(b) Where the declaration has been made by misrepresentation or suppression of facts or information.

Where the declaration is held void for any of the above reasons, it shall be deemed never to have been made and all the provisions of the Income-tax Act, including penalties and prosecution, shall become applicable.

8. Any tax, surcharge or penalty paid in pursuance of the declaration shall, however, not be refundable under any circumstances.

## 4. Benefits of a Valid Declaration

9. Where the declaration is accepted by the jurisdictional Principal Commissioner or Commissioner, the declarant will become entitled to the following benefits:

(a) The amount of undisclosed income declared shall not be included in his total income for any assessment year;

(b) The contents of the declaration shall not be admissible in evidence against the declarant in any penalty or prosecution proceedings under the Income-tax Act and the Wealth-tax Act;

(c) Immunity from the Benami Transactions (Prohibition) Act, 1988 shall be available in respect of the assets disclosed in the declaration subject to the condition that the benamidar shall transfer, to the declarant or his legal representative, the asset in respect of which the declaration of undisclosed income is made on or before 30th September, 2017;

(d) The value of the declared asset shall not be chargeable to wealth-tax for any assessment year or years;

(e) Declaration of undisclosed income will not affect the finality of any completed assessment. The declarant will not be entitled to claim reassessment of any earlier year or Revision of any order or any benefit or set-off or relief in any appeal or proceedings under the Income-tax Act in respect of declared undisclosed income or any tax, surcharge or penalty paid thereon.

## 5. Board's Clarificatory Circulars

10. After notification of the Scheme and the Rules, the Central Board of Direct Taxes, (the Board in brief) has also issued several clarifications through public circulars, namely;

(i) Circular No. 16 of 2016 dated 20th May, 2016 containing the Explanatory Notes on the Scheme

(ii) Circular No. 17 of 2016 dated 20th May, 2016 (14 queries answered)

(iii) User Manual on e-filing of Form No. 1 for income disclosure

(iv) Circular No. 24 of 2016 dated 27th June, 2016 (another 11 queries clarified)

(v) Circular No. 25 of 2016 dated 30th June, 2016 (further 11 queries answered)

The above notifications/circulars are available on the website of the Income-tax Department and can also be accessed through Google. For any assistance from the Department, one can dial Helpline No. 1800-180-1961.

11. *Vide* Circular No. 17/2016 dated 20-5-2016, the Board has given a categorical assurance, that after a valid declaration is made, no further enquires will be conducted except regarding the validity of the declaration namely verifying if any proceeding u/s. 142(1)/143(2)/148/153A/153C is pending

for the assessment year for which, the declaration is made. The information in respect of the declaration will be kept confidential in terms of the provisions of Section 138 of the Act. It has also been clarified that if the declaration is found ineligible due to reasons listed in Section 196 of the Finance Act – 2016 as mentioned in para 4 above, such income shall not be hit by section 197(c) of the Finance Act – 2016. However, the undisclosed income may be assessed under the normal provisions of the Income-tax Act, 1961. Clause (c) of section 197 of Finance Act – 2016 reads as under:-

*"S. 197. For the removal of doubts, it is hereby declared that—*

*(a) and (b) ……..*

*(c) Where any income has accrued, arisen or received or any asset has been acquired out of such income prior to commencement of this Scheme, and no declaration in respect of such income is made under this Scheme,—*

*(i) Such income shall be deemed to have accrued, arisen or received, as the case may be; or*

*(ii) The value of the asset acquired out of such income shall be deemed to have been acquired or made,*

*in the year in which a notice under section 142, sub-section (2) of section 143 or section 148 or section 153A or section 153C of the Income-tax Act is issued by the Assessing Officer, and the provisions of the Income-tax Act shall apply accordingly".*

## 6. Attractive features of the Scheme

### (a) Moderate Tax Rate

12. The tax rate, in aggregate of 45 per cent of the undisclosed income is quite reasonable considering the fact that in case of the detection of the undisclosed income by the Income-tax Department, the rate of 33% together with the aggregate of interest for non-payment or short payment of advance tax and interest for non-filing / delayed filing of tax return alone will exceed 45% of the income.

### (b) Shrinkage of opportunities for Utilisation of Untaxed Income

13. Investments in immovable property and in gold have been the major sources of investments in India. Likewise, investments in foreign countries in undisclosed bank accounts, immovable properties and other financial investments. Steps are being taken to reduce and, where possible, eliminate the use of un-accounted funds in such investments.

### A Confusing Clarification from the Board

14. It is not considered necessary due to constraints of space to paraphrase all the clarifications. However, there is one clarification that has caused good amount of confusion as to its scope and, therefore, needs to be dealt with. It concerns the answer to question No. 5 in Board's Circular No. 25 of 2016 dated 30-6-2016. It is reproduced below for ease of reference:-

> *"Q. No. 5 Where a valid declaration is made after making valuation as per the provisions of the Scheme read with IDS Rules and tax, surcharge & penalty as specified in the Scheme have been paid, whether the department will make any enquiry in respect of sources of income, payment of tax, surcharge and penalty?*
>
> *Answer: No".*

15. The Board's assurance of not making "any enquiry in respect of sources of income" in connection with payment, surcharge and penalty, is led to be common belief that this clarification has brought down the effective rate of tax on disclosed income to 30% instead of 45%. For example, if the disclosure is ` 100/- and the tax, surcharge and penalty paid is ` 45/- and no question will be asked on the source of ` 45/-, in that case on the gross income of ` 145/- (` 100/- and ` 45/-), the tax

payable would be ` 45/- or 31%. The clarification precludes any enquiry into the source of ` 45/- and, therefore, it is a licence not to include the tax payable, from undisclosed source in the total figure of undisclosed income.

16. In the opinion of this author, the view being propounded in some circles is not correct. The assurance is only of exemption from enquiry into the source from where money for payment of tax on the fair value of the assets disclosed under the Scheme was arranged. It does not extend to exempting the money utilized for the payment of tax from its taxability. The tax authority is not precluded under section 193(1) of the Finance Act, 2016 from enquiring if that amount has suffered tax or not. Besides, the declaration by the declarant will be of ` 145/- and not ` 100/-. It is also well accepted that the income tax payable is not an allowable deduction from the assessed income and it has, therefore, to suffer tax.

**Publicity and collection targets**

17. The Income-tax Department has mounted a fairly extensive campaign for publicising the Scheme. The Hon'ble Prime Minister himself exhorted the citizens to avail of the benefit of the Scheme. In fact, the Prime Minister has desired that the number of income taxpayers should be doubled from ` 5 crores to ` 10 crores and the scourge of black money should be banished from the country. Extensive publicity, campaign through every media is being launched. It has also collected a large volume of information from various sources in its computerised data base regarding investments, property registrations and expenditure from undisclosed incomes. A comprehensive data – mining and compliance management programme in the form of "Project Insight" has also been prepared. It will generate a large volume of reliable information about financial transactions undertaken by the taxpayers and the year of each transaction. With the precise information being continuously collected and disseminated for verification purposes, tax evasion will become increasingly very costly. The Government appears to be expecting collection of tax, surcharge and penalty from the Scheme of ` 1.5 lakh crores.

**Repulsive features of the Scheme**

***18.(i) Restrictive Application***

Unlikely the earlier Voluntary Disclosure Scheme, the present Scheme has a very restrictive application. The existing tax payers cannot disclose their untaxed incomes in the years in which the assessment proceedings are pending or searches and seizures and surveys have been conducted or notices for assessment/ re-assessment have been issued or time for the issue has not expired. In effect, the Scheme is restricted to non-filers, stop-filers and the existing tax payers where no assessment/ re-assessment proceedings have started or under contemplation.

***(ii) Unrealistic basis of taxation***

The basis of taxation in respect of undisclosed asset other than money is rather unrealistic and harsh. The fair market value may be several times more than the amount of undisclosed income that was invested in the asset. Although, the fair market value will be taken as the cost for the purposes of determining the capital gains on subsequent sale, severe problems of cash flow will arise in the payment of the taxes due thereon. Moreover, if the asset has been purchased for own use and not for resale, e.g. one house for self residence, the concept of fair market value for determining the undisclosed income for the purposes of taxation becomes harsh and unrealistic.

***(iii) Rigid payment schedule***

Another restrictive feature of the scheme is the rigid payment schedule. The income tax, surcharge and penalty aggregating to 45% has to be paid in full by 30-11-2016 and there is no provision for granting any installment even on payment of interest. Besides, in the case

of existing taxpayers, the current year's self-assessment tax is another liability which needs to be paid by 30th September/31st October, 2016. Grant of installments on payment of a reasonable interest for a maximum period of say one year could perhaps the better alternative.

## Conclusion

**(i) A few specific suggestions**

19. In order to achieve the objectives of the long-term policy of improving compliance levels, a few suggestions need consideration.

**(a) Encourage voluntary compliance in Future**

Encouraging voluntary compliance should be a long-term objective of the Government. It should not end with the expiry of the Scheme. It should be a matter of principle for the income tax administration to treat the default very lightly where the compliance by the taxpayer is voluntary. For example, where a person files his tax return voluntarily, the tax administration should not, as a matter of policy, levy any penalty or start prosecution proceedings. Without such a policy, it is highly debatable if the target o the Hon'ble Prime Minister of having another 5 crores taxpayers may be practicable.

**(b) Lenient treatment where declaration rejected**

Where the declaration filed under the Scheme is rejected by the prescribed authority on the ground that notice for assessment has been issued or time has not expired, the declarant should be treated lightly. While communication the rejection, in addition to the taxation of the income under the normal provisions of the Act which may involve prolonged tax litigation, he should also be given the option of filing a settlement application before the Income-tax Settlement Commission which being an independent judicial forum, could decide the tax liability in a fair and reasonable manner. Where the declaration u/s. 59 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 was rejected on the ground that the undisclosed foreign income and assets was within the knowledge of the Income-tax Department, the declarant was given the option of filing a settlement application so that his admission was treated leniently compared to others who did not make such declaration. (It is ofcourse another matter that none of the declarants has been able to take advantage of that concession given under Board's Circular because the Settlement Commission rejected two applications, though on different facts, and the Government has still not conveyed its views thereon in respect of the applicability in other cases)

**(ii) The way forward**

20. The Scheme in its objective of improving compliance levels relating to payment of the tax liabilities of every resident is laudable. But the concept has to be understood in the context of tax evasion being a part of the economic crimes widely prevalent in the country and such economic crimes include huge demands of untaxed money for various purposes including the funding of elections. Besides, we need to bring upon a cultural change in the society by a well conceived and comprehensive programme of taxpayer education for improving, on a permanent basis the compliance levels. It has also to cover the future taxpayers of the country by spread of taxpayer education at the schools and college levels. Like other modern countries, the Board has to deploy 25%-30% of its manpower, on a permanent basis, for taxpayer education. It has to be borne in mind that the compliance levels are materially influenced by what an average taxpayer considers as a reasonable and simple system of levy and collection of tax.

** Comments welcome at wadhwasr@hotmail.com*

R. P. Garg, *Advocate*

# Income Declaration Scheme, 2016
# Its Justification and Constitutional Validity

Natatorium of black money is not only indoor but more offshore. It hobnobs with the best of society. The black money and tax havens can neither be washed away nor completely eradicated so long as the sovereign nations following their own fiscal policies with different and tempting rates of tax.

The tale of black money and tax havens continues to mesmerise the hitherto inactive civil society activists, policy makers and also judiciary. Though many in the know of the things may not find much to sustain their interest in the continuing debate as nothing seems to be effectively moving to yield tangible results but for the lesser mortals, a lot has been happening to keep the issue at the centre stage.

Wanchoo Direct Taxes Enquiry Committee echoed it in 1981 that tax evasion and black money are closely and inextricably interlinked". The abundance of black money has in fact given rise to a parallel economy operating simultaneously and competing with the official economy. This parallel economy has, over the years grown in size and dimension and even on a conservative estimate, the amount of black money in circulation runs into some thousands of crores in 1981, several lakh crores in 1997 and now, several crore crores in 2016 culled on same statistical ratios.

The generation of black money through tax evasion undoubtedly throws a greater burden on the honest taxpayer and leads to economic inequality and concentration of wealth in the hands of the unscrupulous few in the country. This is contrary to the directive principle enshrined in the Constitution. “Evasion of tax robs the nation of critical resources necessary to undertake programmes for social inclusion and economic development. It also puts a disproportionate burden on the honest taxpayers as they have to bear the brunt of higher taxes to make up for the revenue leakage caused by evasion.”[1]

Black money in a way being "cheap" money because it has not suffered reduction by way of taxation is a natural tender for lavish expenditure and conspicuous consumption. Its existence to a large extent is responsible for inflationary pressures, shortages, and rise in prices and economically unhealthy speculation in commodities. It also leads to leakage of foreign exchange, making balance of payments of the country rather distorted and unreal and tends to defeat the economic policies of the Government by making their implementation ineffective, particularly in the field of credit and investment.

Black money has necessarily to be suppressed in order to escape / detection as it results in

1 Finance Minister in the object and reason stated in introducing Black Money Act, 2015

immobilisation of investible funds which would otherwise be available to further the economic growth of the nation and in turn, foster the welfare of the common man. Being in the hands of a few persons it is causing incalculable damage to the economy of the country. It is akin to a cancerous growth in the country's economy leading to chaos and ruination. There can be no doubt that urgent measures, therefore, are required to be adopted for preventing further generation of black money as also for unearthing existing black money so that it can be channelised for productive purposes with a view to effective economic and social planning.

Wanchoo Committee culled out the several causes responsible for the generation of black money and the principal causes being: (i) high rates of taxation under the direct tax laws: they breed tax evasion and generate black money; (ii) economy of shortages and consequent controls and licences leading to corruption for issuing licences and permits and turning blind eye to the violation of controls; (iii) donations of black money encouraged by political parties to meet election expenses and for augmenting party funds and also for personal purposes; (iv) corrupt business practices such as payments of secret commission, bribes, on money, pugree, etc., which need keeping on hand money in black; (v) ineffective administration and enforcement of tax laws by the authorities; and (vi) deterioration in moral standards such an extent that tax evasion is no longer regarded as immoral and unethical and does not carry any social stigma. These causes need to be eliminated if we want to eradicate the evil of black money.

Stringent are the tax laws, but lesser the implementation highlights the debility of the Administrative Department in taking appropriate actions. Whatever may be the reasons, at least it is a known fact that in the present day economy, it has grown to the size of a parallel economy of unaccounted money. Some sort of 'nail in the bud' approach has to be put up to stop the cancerous growth and to have a black money free economy. Simultaneously measures are to be taken to diminish, empty and wash off the black pool with white natatorium.

Right from the Second World War, it has been continuously engaging the attention of the Government which led to adoption of various measures to curb the generation of black money and bringing it out in the open. For instance, the Government introduced several changes in the administrative set up of the tax department from time-to-time with a view to strengthening the administrative machinery for checking tax evasion. The Government also amended section 37 of the Indian Income-tax Act, 1922 with a view to conferring power on the tax authorities to carry out search and seizure and this power was elaborated and made more effective when the Income-tax Act, 1961 came to be enacted. Apart from these legal and administrative measures taken for the purpose of curbing evasion of tax, certain steps were also taken to tackle the black money built up out of past evasions. In 1946, just at the close of the Second World War, high denomination notes were demonetised so as to bring within the net of taxation black money earned during the War. This was followed by the enactment of the Taxation of Income Investigation Commission Act, 1947. Then came the Voluntary Disclosure Scheme of 1951, popularly known as Tyagi Scheme, to facilitate the disclosure of suppressed income by affording certain immunities from the penal provisions. This scheme was however not successful because it helped to unearth only ` 70 crores of black money. Thereafter, nearly a decade and a half later, a second scheme of voluntary disclosure was introduced by section 68 of the Finance Act, 1965. This scheme, popularly known as the sixty-forty scheme, enabled the tax evaders to disclose suppressed income by paying 60 per cent of the concealed income as tax and bringing the balance of 40 per cent into their books. This scheme was a little more successful than the earlier one, but it could help to net only about ` 52 crores of black money. Closely following on the heels of

this scheme came another scheme under section 24 of the Finance (No. 2) Act, 1965, popularly known as the "Black Scheme" according to which tax was payable at rates applicable to the block of concealed income disclosed and not at a flat rate as under the sixty-forty scheme. This scheme received a slightly better response and the income disclosed under it amounted to about ` 145 cr. The Taxation Laws (Amendment and Miscellaneous Provisions) Ordinance, 1965, followed by an Act in identical terms, provided for exemption from tax in certain cases of undisclosed income invested in the National Defence Gold Bonds, 1980. Subsequent to this Act followed the Report of the Wanchoo Committee and as a result of whose recommendations certain penal provisions in the Income-tax Act, 1961 were made more severe and rigorous. Then, the Voluntary Disclosure of Income and Wealth legislation introduced a scheme of voluntary disclosure of income and wealth providing certain immunities and exemptions to declarants. ` 744 cr. was the disclosure of the concealed income and wealth pursuant to this scheme. Then came VDIS 1997 which extracted a disclosure of ` 33,000 cr. Thereafter in 2015 black money window disclosure of offshore undisclosed income brought ` 3,770 cr. Now the Declaration of Income 2016 is introduced as part of Finance Act, 2016 effective from 1-6-2016. The justification and validity is the focus of this article.

VDIS is the result of disability of enforcement of law which allowed it to grow, it may or may not be successful to achieve the goal and with what magnitude, is anybody's guess! Various attempts made through VDIS in the past gave no encouraging results. Various Committees have given reports against such Voluntary Disclosure Schemes and yet, for reasons best known to it, the Government has again moved the Scheme through the Finance Act, 2016 for enacting Voluntary Disclosure Scheme. The results of these Schemes have been disappointing. Disclosure Schemes have only shaken the confidence of the honest taxpayers and invited contempt for the enforcement machinery. Details of the past schemes and the Revenue generated from the same are tabulated hereunder as:

| Sr. No. | Disclosure Scheme | Year | Income disclosed (Cr.) |
|---|---|---|---|
| 1. | VDIS Tyagi Scheme | 1951 | 70 |
| 2. | National Defence Gold Bonds | 1965 | 18 |
| 3. | National Defence Remitt. Scheme | 1965 | 70 |
| 4. | Sixty-Forty Scheme | 1965 | 52 |
| 5. | Block Scheme | 1965 | 145 |
| 6. | Voluntary Disclosure Scheme | 1975 | 744 |
| 7. | Special Bearer Bonds | 1981 | 963 |
| 8. | Amnesty Scheme | 1985 | 10,778 |
| 9. | Foreign Remittance Scheme | 1991 | 2,200 |
| 10. | India Development Bonds | 1991 | 4,500 |
| 11. | National Housing Bank Scheme | 1991 | 60 |
| 12. | Voluntary Income Disclosure Scheme | 1997 | 33,000 |
| 13 | Disclosure window for offshore Black Money | 2015 | 3,770 |

Compared to 5 lakh cr. estimated in 1997, the disclosure is a peanut, and in the background of excessive unaccounted money belonging to Indian taxpayers such schemes merely lower the image of the Govt., with only petty gains, expressing its inability to catch tax evaders. The issue is whether past mistakes give some message?

**Comments and justification**

i) Voluntary Disclosure Schemes drew flak from the public as being "a sell out to money power", "abject surrender", etc.

To offer any kind of concession to a tax evader is anathema to the rest.

ii) No fair minded, reasonable, unbiased and resolute men, who are not swayed by emotion or prejudice regard such scheme with equanimity and call it reasonable, just and fair, regard it as providing equal treatment and protection in the defence of the rights of being treated equally, which is expected of a sovereign democratic republic.

iii) Any scheme for voluntary disclosure would be immoral in the sense that it would provide immunities and exemptions to dishonest taxpayers vis-à-vis those, who have discharged their tax obligations honestly and religiously and on this count, it would be an unreasonable measure and as held in *Royappa, AIR 1974 SC 555* and *Menaka Gandhi, AIR 1978 SC 597*, that the principle of reasonableness does not exclude notions of morality and ethics…." said Justice A.C. Gupta, J. in the R.K. Garg's case of special bearer bonds case: "It has been held by this Court in the dissenting observations

iv) Resorting to amnesty schemes with immunities from interest, penalties and prosecutions is clear acceptance that the government has lost heart and has no means to check tax evasion and black money. Hence, begging from the taxpayers on their terms is imperative to augment funds. Such an approach would project a very poor image of the Govt. amongst the taxpayers and would be a great setback for voluntary compliance.

v) Any amnesty scheme in any form would have negative effect on the level of compliance among the taxpayers and on the morale of the tax administration.

vi) Expert Committees on taxes in the past have disfavoured such scheme for tapping black money with immunities. Said, the Wanchoo Committee: "We consider that a disclosure scheme is an extraordinary measure, meant for abnormal situations such as after a war or at a time of national crisis. Resorting to such a measure during normal times, and that too frequently, would only shake the confidence of the honest taxpayers in the capacity of the Government to deal with the law breakers and would invite contempt for its enforcement machinery. We are convinced that any more disclosure schemes would not only fail to achieve the intended purpose of unearthing black money but would have deleterious effect on the level of compliance among the taxpaying public and on the morale of the administration. We are, therefore, strongly opposed to the idea of the introduction of any general scheme of disclosure either now or in the future".

vii) Policy of leniency in tax matters has never been found favoured. Shri A. M. Nremner, while giving evidence before the Royal Commission on Income Tax had said as early as in the year 1920: "The real way to prevent fraud …. Is that fraud should be punished by terms of imprisonment; that is the way to stop it. It will never be stopped in any other way; the temptation is so great now. People must be made to understand that if they defraud the revenue, they are committing a mean and despicable offence against everyone of their fellow taxpayers".

viii) A. C. Gupta, J., cried dissent in the case of R. K. Garg[2], clearly saying :

"(i) The issues that arise in the context of amnesty are: Can fair minded, reasonable, unbiased and resolute men, who are not swayed by emotion or prejudice regard such scheme with equanimity and call it reasonable, just and fair, regard it as

2 [1981] 7 Taxman 53 (SC)

providing equal treatment and protection in the defence of the rights of being treated equally, which is expected of a sovereign democratic republic? The answers to these queries had to be obvious NO.

(ii) Such a scheme would have very severe impact on the level of compliance among the taxpayers and on the morale of the tax administration.

(iii) Expert Committees on taxes in the past have disfavoured the amnesties and VDISs for tapping black money with immunities.

(iv) Considering the past history of amnesty schemes, the proposed scheme is not likely to bring big money to the Govt. It is likely to be counterproductive if its negative impact on honest taxpayers and voluntary compliance is taken into account."

ix) Amnesties cannot check onslaught (flow) of black money. These only lessen 'stocks' of such money to some extent, hence no solution to the problem at all.

x) The issue regarding amnesty, as far as India is concerned, stood eclipsed and thought to be closed. The Govt. committed to the Supreme Court in the course of proceedings concerning VDIS 1997 that it would not introduce any disclosure schemes in future. 2015 and 2016 schemes would go against this commitment, which would not behove a Govt.

xi) The deleterious impact of VDIS is that basically, these schemes seek to coax errant tax evaders to disclose their concealed income and wealth in return for taxation at concessional rates and immunity from penalties and prosecution.[3]

xii) By offering *de facto* amnesty for tax evasion, such schemes blunt the deterrent provisions of the tax laws, including the provisions for prosecution.

xiii) Voluntary disclosure schemes have been severely criticised by a number of reports of the Lok Sabha's Public Accounts Committee and the Wanchoo Committee. The main criticisms appear to be as follows:-

(i) The quantitative results are disappointing in relation to even the lowest estimates of tax evasion;

(ii) Much of the income 'disclosed' had already been 'detected' through surveys or searches and seizures; so the disclosure schemes served to protect 'detected' cases from the deterrent provisions of penalties and prosecutions, thus undermining their effectiveness;

(iii) The view that such schemes permit errant taxpayers to forswear their wayward paths is not supported by the large number of 'repeat' beneficiaries of these schemes;

(iv) When such schemes are launched every few years, they reduce the incentives for voluntary compliance in the first place and weaken the morale of both honest taxpayers and the tax administration.

(v) These are taken to be devices to make up for Government's failure and inefficiencies.

xiv) Deteriorated moral standards to such an extent that tax evasion is no longer regarded as immoral and unethical and carry no social stigma.

***Constitutional validity of VDIS***

Article 14 is the touch stone that declares that the State shall not deny any person equality before

3 Report on the study on 'Aspects of the Black Economy in India', carried out by the National Institute of Public Finance & Policy in 1984-85

law or equal protection of law within territory of India. Whenever there is arbitrariness in the State action or a discriminatory law is enacted, it can be challenged and can be struck down as violation of Article 14 of the Constitution. Not all laws need be generic in nature and not same laws are applicable to all persons and it has the flexibility of treating different individuals differently if circumstances demand so. In other words classification is permitted and a law is valid if based on classification, a "reasonable classification" of individuals, objects, and transactions to achieve specific ends, though it prohibits "class legislation" which adopts a discriminatory approach by "conferring particular privileges or liability upon a class of persons.

A statute or provision thereof can be invalid if based on a irrational, unreasonable and arbitrary classification, or on class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed.

A Bench of seven Judges of the Supreme Court in Re. Special Courts Bill[4] gave a descriptive parameters of Article 14, being- 1) that classification can be made for the purpose of legislation; 2) that the classification must not be arbitrary but must be rational, that is to say. it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others; and (ii) that differentia must have a rational relation to the object sought to be achieved by the Act; and 3) that there must be a nexus between the basis of the classification and the object of the Act.

In short, while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it permits classification for the purpose of legislation, provided that such classification is not arbitrary, irrational and unreasonable.

In a direct case of VDIS type 1981Bearer Bond Scheme before a five judges Bench of the Supreme Court in the case of R. K. Garg (supra) upheld the validity of the Scheme, though with one dissent and laid down a set of rules of guidance in judging the validity and the Court attitude in discharge of its constitutional function of judicial review in such cases.

The first is that, there is always a presumption in favour of the constitutionality of a statute and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. This rule is based on the assumption, judicially recognised and accepted, that the Legislature understands and correctly appreciates the needs of its own people, its laws are directed to problems made manifest by experience and its discrimination are based on adequate grounds. The presumption of constitutionality is indeed so strong that in order to sustain it, the court may take into consideration matters of common knowledge, matters of common report, and the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.

Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc.

4 [1979] 2 SCR 476

Adopting the statement of, no less a person than Holmes J, it was observed that the Legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straitjacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the Legislature; more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved.

It also adopted this admonition as has been more felicitously expressed by Frankfurter, J[5] saying in his inimitable style: "In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The Legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic 'regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events-self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability."

The Court must, always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry"; that exact wisdom and nice adaption of remedy are not always possible and that "judgment is largely a prophecy based on meagre and uninterpreted experience". Every legislation particularly of economic matters, is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The Courts cannot, as pointed out by the United States Supreme Court[6] be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the Legislation, because it is not possible for any Legislature to anticipate as if by some divine prescience distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the Legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the Legislature in dealing with complex economic issues.

The problem of black money is an obstinate economic problem which had been defying the Government for quite some time and it was in order to resolve this problem that, other efforts having failed, the Legislature decided to enact the Act even though the effect of its provisions might be to confer certain undeserved advantages on tax evaders in possession of black money; it was choosing between two alternatives: either to allow the black money to remain idle and unproductive or to induce those in possession of it to bring it out in the open

5 in Morey vs. Dond 345 US 457

6 in Secretary of Agriculture vs. Central Reig Refining Co. 94 Lawyers' Edition 381

for being utilised for productive purposes. The first alternative would have left no choice to the Government but to resort to deficit financing or to impose a heavy dose of taxation. The former would have resulted in inflationary pressures affecting the vulnerable sections of the society while the latter would have increased the burden on the honest taxpayer and perhaps led to greater tax evasion. The Legislature therefore decided to adopt the second alternative of coaxing persons in possession of black money to disclose it and make it available to the Government for augmenting its resources for productive purposes and with that end in view, enacted the Act providing for issue of special bearer bonds.

The grant of certain immunities and exemptions to person investing their unaccounted money in purchase of special bearer bonds was an inducement which had to be offered for unearthing black money. It was because those who have successfully evaded taxation and concealed their income or wealth despite the stringent tax laws and the efforts of the tax department are not likely to disclose their unaccounted money without some inducement by way of immunities and exemptions.

It must necessarily be left to the Legislature to decide what immunities and exemptions would be sufficient for the purpose. The court viewed it to be outside its province to consider if any particular immunity or exemption is necessary or not for the purpose of inducing disclosure of black money. That would depend upon diverse fiscal and economic considerations based on practical necessity and administrative expediency and would also involve a certain amount of experimentation on which the court would be least fitted to pronounce. The court would not have the necessary competence and expertise to adjudicate upon such an economic issue. The court cannot possibly assess or evaluate what would be the impact of a particular immunity or exemption and whether it would serve the purpose in view or not. There are so many imponderables that would enter into the determination that it would be wise for the court not to hazard on opinion where even economists may differ.

The court must, while examining the constitutional validity of a legislation of this kind, "be resilient, not rigid, forward looking, not static, liberal, not verbal" and the court must always bear in mind the constitutional proposition enunciated by the Supreme Court of the United States[7], "that courts do not substitute their social and economic beliefs for the judgment of legislative bodies". The court must defer to legislative judgment in matters relating to social and economic policies and must not interfere, unless the exercise of legislative judgment appears to be palpably arbitrary. The court should constantly remind itself[8] of: "The problems of Government are practical ones and may justify, if they do not require, rough accommodations, illogical it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of Government are not subject to our judicial review."

The possibility that one or the other of the immunities or exemptions granted under the provisions of the Act may be taken advantage of by resourceful persons by adopting ingenious methods and devices with a view to avoiding or saving tax cannot be helped because human ingenuity is so great when it comes to tax avoidance that it would be almost impossible to frame tax legislation which cannot be abused. Moreover, the trial and error method is inherent in every legislative effort to deal with an obstinate social or economic issue and if it is found that any immunity or exemption granted under the Act is being utilised for tax evasion

7 In Munn vs. Illinois 94 US 13

8 US Supreme Court said in Metropolis Theater Co. vs. City of Chicago 57 Lawyers' Edition, 730

or avoidance not intended by the Legislature, the Act can always be amended and the abuse terminated. The court expressed the view that none of provisions of the Act is violative of Article 14 and its constitutional validity was upheld.

## Challenge to 1997 VDIS

VDIS reintroduced in 1997 was again challenged before Bombay High Court[9]. The Supreme Court[10] expressed agreement with the view of the High Court observing it in an elaborate judgment which has dealt with the various submissions made assailing the constitutional validity of the Scheme. Taking into consideration the statement made by the learned Attorney General, the court was not inclined to interfere with the impugned judgment of the High Court and dismissed the special leave petition of the Association. The following was the statement indicating the policy the Government is following and will be following in checking tax evasion and the said statement is reproduced as follows :

"1. After December 31, 1997, the Income-tax Department will considerably step up survey operations under section 133A of the Income-tax Act, 1961, and search operations under section 132 of the Income-tax Act, 1961.

2. According to Chapter XIV-B of the Income-tax Act as amended with effect from 1-1-1997, if in the course of a search undisclosed income is detected, then the assessee is liable to the following:

   (i) Tax at the rate of 60 per cent;

   (ii) Penalty which can be up to 300 per cent on the tax evaded;

   (iii) Interest under section 158BFA.

3. In addition, the Finance Minister has announced that in every case of detection of undisclosed income, prosecution will be launched. The relevant provisions are in Chapter XXII of the Income-tax Act.

4. Besides tightening up of legal provisions, the following steps have also been taken :

   (i) Acceleration of the process of issuing Permanent Account Number (PAN);

   (ii) Acceleration of the computerisation of the Income-tax Department;

   (iii) Installation of software to detect the assessees who satisfy the criteria laid down under the proviso to section 139(1) of the Income-tax Act.

5. The Government is committed to making a success of the VDIS, 1997 for fulfilling the objectives set by the Government in the Finance Minister's Budget Speech. We also wish to emphasise that section 72 of the VDIS, 97 guarantees complete confidentiality in respect of declarations."

This VDIS was, by Section 64 of the Finance Act, 1997 called Voluntary Disclosure of Income Scheme. The High Court primarily based its judgment on the Supreme Court guiding principles in R K Garg (supra). These are summarised as:

i) When Parliament adopts a particular mode or method for unearthing unaccounted or black money and considers it to be efficacious, it would not be permissible for Court while exercising jurisdiction under Article 226 of the Constitution to substitute its own decision in place of policy decision taken by Parliament by enacting Scheme. It is not the function of the Courts to sit in judgment over matters of economic policy[11].

9 In All India Federation [1997] 228 ITR 68 (Bom.)

10 In (1998) 98 Taxman 446(SC)

11 Peerless General Finance & Investment Co. Ltd. vs. RBI AIR 1992 SC 1033

ii) Where legislative scheme has decided to give some inducement to black money holders for disclosing unaccounted money, said Scheme could not be said to be reeking with immorality so as to be condemned as arbitrary or irrational.

iii) A Scheme could be said to be arbitrary and violative of Article 14 of Constitution on ground it is not based on intelligible differentia having rational relation to object sought to be achieved.

iv) The Expert Committee's opinion against VDIS cannot come in way of Parliament to enact law to introduce such Scheme. After all, the Committee's report is to be considered as an opinion of expert body. If two or more methods of adjustment of economic measures are available, it is the discretion of the Legislature to prefer one of them. Apart from the Voluntary Disclosure Scheme, the only other alternative method is to take deterrent measures so that taxation laws can be implemented with vigour and the dishonest tax-evaders can be appropriately punished, but this would be a long-term measure and it depends on how it is implemented by the administrative set up. But, by experience and in the atmosphere prevailing in the society, it cannot be said that such Scheme is palpably arbitrary or irrational.

v) It is true that by the Voluntary Disclosure of Income Scheme dishonest taxpayers get advantage; that the honest taxpayers suffer, but, at the same time, the Court has to consider well-established limitations under the Constitution to interfere in such matters; it has also to take into consideration the fact that when the Parliament adopts a particular mode or method for unearthing unaccounted or black money and considers it to be efficacious, it would not be permissible for the Court while exercising jurisdiction under Article 226 of the Constitution to substitute its own decision in place of the policy decision taken by the Parliament by enacting the Scheme. This course is not permissible.

vi) The necessity or not of immunities given and exemptions granted to persons having unaccounted money who have evaded taxation and concealed their income despite stringent tax laws would be outside the province of the Court to consider it for the purpose of inducing the disclosure of black money as it depends upon diverse fiscal and economic considerations based on practical necessity and administrative expediency; and it would also involve certain amount of experimentation on which the Court would be least fit to pronounce.

vii) The argument that, if dishonest taxpayers, who have not paid tax since years, are given this advantage, the tax which they have paid as honest taxpayers be refunded or such benefit should not be given to dishonest tax- evaders, cannot be accepted. All these contentions are known to the Legislature and, after knowing them, it has decided to introduce the Scheme. The Court has no jurisdiction to legislate and direct refund of taxes paid by honest taxpayers in earlier years on ground that honest taxpayers had paid higher tax rate than one to be paid under VDIS.

viii) The Court's platform could not be used for having a debate whether such Scheme would yield results. In no set of circumstances, the Court has jurisdiction to legislate and direct the refund of taxes paid by the honest taxpayers. It is true that honest taxpayers have to pay some premium but that cannot be helped. It is for the Parliament to enact laws pertaining to tax law, giving benefits or immunities to tax-evaders or taxpayers but it is not for the Court to evolve a scheme and direct the Parliament to enact such schemes on

the basis of the view expressed by persons affected and to evolve any such Scheme.

ix) Admittedly, unearthing of unaccounted money is a complex economic problem being faced since years. Even experts would not be in a position to find out an easy solution to this complex problem. For solving this problem to some extent if the Parliament has decided to enact the law, the Court cannot substitute its judgment in place of the legislative judgment in the field of economic regulations or in taxation matters. It is well-settled that the function of the Court is to see that lawful authority is not abused and with regard to legislation, the provisions are not against the Constitution. But, it would not be open to the Court to substitute its decision on economic policy matters.

x) Though stringent law exist, still, it has been difficult for the authorities to take appropriate action against those persons who amass unaccounted wealth to a large extent. Whatever may be the reasons, at least it is a known fact that in the present day economy, there is a parallel economy of unaccounted money. At present, it is impossibility or in any case, a long-term measure. This would not mean that the Parliament cannot take short-term measures to unearth unaccounted black money. It is a known fact that, at present, the atmosphere is not so healthy wherein dishonest tax-evaders would feel ashamed or would be reluctant to avoid legitimate payment of tax. In such an atmosphere, if the Parliament decides to enact law giving certain immunities as inducement for declaration of income to such tax-evaders, it cannot be said that it is palpably arbitrary. Other reasonable view also could be that stringent or deterrent laws alone may not be sufficient to deter such tax-evaders.

xi) Though keeping the magnitude of black money in circulation in the country into account, it would be difficult to find out any short-cut method for unearthing the same; making law or making more stringent law may or may not achieve its objective. These are all trial and error methods which are required to be adopted in dealing with economic affairs and it is not for the Courts to decide whether it is likely to succeed in achieving the object. It can certainly be said that it has nexus with the object sought to be achieved.

xii) If two or more methods of adjustment of an economic measure are available, the legislative preference in favour of one of them cannot be questioned on the ground of lack of legislative wisdom or that the method adopted is not the best or there are better ways of adjusting the competing interests and the claims as the Legislature possesses the greatest freedom in such cases. It is also well-settled that lack of perfection in a legislative measure does not necessarily imply its constitutionality as no economic measure has so far been discovered which is free from all discriminatory impact and that in such a complex area in which no foolproof device exists, the Court should be slow in imposing strict and rigorous standard of scrutiny by reason of which all local fiscal schemes may be subjected to criticism under the Equal Protection clause.[12]

xiii) On classification justification, it culled out and said: a) Classification between persons who are having unaccounted money and honest taxpayers cannot be said to be in any way unreasonable and it has nexus with the object sought to be achieved, i.e., for unearthing unaccounted money by giving some inducement and immunities to such persons; b) Abuse of the Scheme scope for abuse of the Act would not be

12 Secretary to Government of Madras vs. PR. Sriramulu [1996] 1 SCC 345

a ground for invalidating the legislation; c) Suffering of honest taxmen, considering the present social and economic scenario in the country, where it cannot be said that the Government is having other alternative, efficacious remedy and yet it has selected this method to unearth unaccounted money. In such a situation, if the Parliament has decided to give some inducement to holders of black money and allow them to join the mainstream by disclosing their unaccounted income, it cannot be said that the impugned legislation is so reeking with immorality that it can be condemned as arbitrary or irrational; d) VDIS, looking to the extent of black money, is not arbitrary. It is true that dishonesty is given premium and honesty is discounted, but this is required to be recognised as it exists in the society. It would be lifeless logic to concentrate only upon abstract concept of inequity between honest and dishonest taxpayers. Between the two, inequity exists and cannot be ignored in present social set up; e) The fact that more benefits are given to tax-evaders would be difficult to arrive at a conclusion that the provisions of the Scheme are arbitrary and violative of article 14. It is adopted by the Parliament after taking into consideration the economic and social conditions prevailing in the society; and g) Though the court agreed the contention that the provision of a statute may be so reeking with immorality that the legislation can be readily condemned as arbitrary or irrational if considered on the fact that number of such Voluntary Disclosure Schemes have failed, the Parliament, by enacting similar scheme, has added premium on dishonesty which is bound to affect the honest taxpayer and that honest taxpayer in the society is at a discount, however, considering the present social and economic scenario in the country, the court expressed that the Government was having other alternative, efficacious remedy and yet it has selected this method to unearth unaccounted money. In view of admittedly manifold increase in unaccounted money and wealth and despite stringent taxation laws, as stated earlier, for various reasons, it appears that it is not possible for the executive to unearth unaccounted money. In such a situation, if the Parliament decided to give some inducement to holders of black money and allow them to join the mainstream by disclosing their unaccounted income, it cannot be said that the impugned legislation is so reeking with immorality that it could be condemned as arbitrary or irrational.

xiv) In practice, we must usually choose between several unjust, or second best, arrangements; and then we look to non-deal theory to find the least unjust scheme. Sometimes this scheme will include measures and policies that a perfectly just system would be rejected. Two wrongs can make a right in the sense that the best available arrangement may contain a balance of imperfections, and adjustment of compensating injustices.[13]

xv) While dealing with the contention with regard to arbitrariness, the test could only be one of palpable arbitrariness applied in the context of the felt needs of the times and societal exigencies informed by experience.[14]

xvi) To recognise marked differences that exist in fact is living law; to disregard practical differences and concentrate on some abstract identities is lifeless logic'; that it

13 Rauls J in "Modern Trends in Analytical and Normative Jurisprudence" [Introduction to Jurisprudence by Lord Lloyd of Hampstead a Freeman, Fifth edn.]

14 Federation of Hotel &Restaurant vs. Union of India AIR 1990 SC 1637, while dealing with the constitutional validity of the Expenditure Tax Act, 1987

is required to be recognised that there is parallel economy of unaccounted money. In such a situation, if the Parliament arrives at a conclusion, considering the social exigencies, that such Scheme is necessary, it would be difficult to hold that it is palpably an arbitrary enactment.[15]

xvii) The submission that if periodically such types of schemes are to be enacted, even honest taxpayer would feel that it is better not to pay income-tax when due, but to wait for immunity, which will enable him to pay tax on his income at a lower rate and after some period, is on the assumption that the honest taxpayer pays his tax because of some inducement and it is forgotten that honest taxpayer pays his tax not because of inducement, but because he believes that it is his duty to the State to pay tax for better living in a civilised society.

## Kar Vivad Scheme on Discrimination

The classification challenge on introducing Kar Vivad Scheme in Union of India v. Nitdip Textile Processors (P.) Ltd.[16] was on discrimination resulting from fortuitous circumstances arising out of particular situations, in which some of tax payers find themselves, is held not hit by article 14 if legislation as such is of general application and does not single them out for harsh treatment. In this case the classification of the date fixed is the demand notice or show-cause notice after the cut-off date, namely, 31-3-1998 made by the Legislature was held reasonable for the reason that the Legislature has grouped two categories of assesses, namely, the assessees whose dues are quantified but not paid and the assessees who are issued with the demand notice and show-cause notice on or before a particular date, month and year. The Legislature has not extended this benefit to those persons who do not fall under this category or group. The distinction so made cannot be said to be arbitrary or illogical which has no nexus with the purpose of legislation. In determining whether classification is reasonable, regard must be had to the purpose for which legislation is designed. The legislation is based on a reasonable basis which is firstly, the amount of duties, cesses, interest, fine or penalty must have been determined as on 31-3-1998 but not paid as on the date of declaration and secondly, the date of issuance of demand or show-cause notice on or before 31-3-1998, which is not disputed but the duties remain unpaid on the date of filing of declaration. Therefore, the Scheme 1998 did not violate the equal protection clause where there is an essential difference and a real basis for the classification which is made. The mere fact that the line dividing the classes is placed at one point rather than another will not impair the validity of the classification.

It is now well-settled by a catena of decisions of the Supreme Court that a particular classification is proper, if it is based on reason and not purely arbitrary, caprice or vindictive. On the other hand, while there must be a reason for the classification, the reason need not be good one, and it is immaterial that the statute is unjust. The test is not wisdom but good faith in the classification. It is too late in the day to contend otherwise. It is time and again observed by this Court that the Legislature has a broad discretion in the matter of classification. In taxation, 'there is a broader power of classification than in some other exercises of legislation'. When the wisdom of the legislation while making classification is questioned, the role of the Courts is very much limited. It is not reviewable by the Courts unless palpably arbitrary. It is not the concern of the Courts whether the classification is the wisest or the best that could be made. However, a discriminatory tax cannot be sustained if the classification is wholly illusory.

15 State of Gujarat vs. Shri Ambica Mills Ltd. AIR 1974 SC 1300

16 [2011] 15 taxmann.com 59 (SC)

The classification made by the legislature, in its wisdom, of those assessees whose tax arrears are outstanding as on 31-3-1998, or who are issued with the Demand or show-cause notice on or before 31st day of March, 1998 was held reasonable for the reason that the legislature has grouped two categories of assessees namely, the assessees whose dues are quantified but not paid and the assessees who are issued with the Demand and show-cause notice on or before a particular date, month and year. The Scheme 1998 does not violate the equal protection clause where there is an essential difference and a real basis for the classification which is made. The mere fact that the line dividing the classes is placed at one point rather than another will not impair the validity of the classification. The concept of Article 14 vis-a-vis fiscal legislation is explained by this Court in several decisions.

The Court summed up: Article 14 does not prohibit reasonable classification of persons, objects and transactions by the Legislature for the purpose of attaining specific ends. To satisfy the test of permissible classification, it must not be "arbitrary, artificial or evasive" but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the Legislature. The taxation laws are no exception to the application of this principle of equality enshrined in Article 14 of the Constitution of India. However, it is well settled that the Legislature enjoys very wide latitude in the matter of classification of objects, persons and things for the purpose of taxation in view of inherent complexity of fiscal adjustment of diverse elements. The power of the Legislature to classify is of wide range and flexibility so that it can adjust its system of taxation in all proper and reasonable ways. Even so, large latitude is allowed to the State for classification upon a reasonable basis and what is reasonable is a question of practical details and a variety of factors which the Court will be reluctant and perhaps ill-equipped to investigate. It has been laid down in a large number of decisions of this Court that a taxation Statute, for the reasons of functional expediency and even otherwise, can pick and choose to tax some. A power to classify being extremely broad and based on diverse considerations of executive pragmatism, the Judicature cannot rush in where even the Legislature warily treads. All these operational restraints on judicial power must weigh more emphatically where the subject is taxation. Discrimination resulting from fortuitous circumstances arising out of particular situations, in which some of the taxpayers find themselves, is not hit by Article 14 if the legislation, as such, is of general application and does not single them out for harsh treatment. Advantages or disadvantages to individual assesses are accidental and inevitable and are inherent in every taxing Statute as it has to draw a line somewhere and some cases necessarily fall on the other side of the line. The point is illustrated by two decisions of this Court- one, in *Khandige Sham Bhat v. Agricultural Income Tax Officer*[17] when Travancore Cochin Agricultural Income Tax Act was extended to Malabar area on November 1, 1956 after formation of the State of Kerala. Prior to that date, there was no agricultural income tax in that area. The challenge under Article 14 was that the income of the petitioner was from areca nut and pepper crops, which were harvested after November in every year while persons who grew certain other crops could harvest before November and thus escape the liability to pay tax. It was held that, that was only accidental and did not amount to violation of Article 14; the other in Jain Bros (supra), where Section 297(2)(g) of Income-tax Act, 1961 was challenged because under that Section proceedings completed prior to April, 1962 was to be dealt under the old Act and proceedings completed after the said date had to be dealt with under the Income-tax Act, 1961 for the purpose of imposition of penalty. April 01, 1962 was the date of commencement of

17 AIR 1963 SC 591

Income-tax Act, 1961. It was held that the crucial date for imposition of penalty was the date of completion of assessment or the formation of satisfaction of authority that such act had been committed. It was also held that for the application and implementation of the new Act, it was necessary to fix a date and provide for continuation of pending proceedings. It was also held that the mere possibility that some officer might intentionally delay the disposal of a case could hardly be a ground for striking down the provision as discriminatory.

Some of the judgments considered which carry very good expositions of law are:

*i)* *Amalgamated Tea Estate Co. Ltd. vs. State of Kerala*[18]*:*

"8. It may be pointed out that the Indian Income-tax Act also makes a distinction between a domestic company and a foreign company. But that circumstance per se would not help the State of Kerala. The impugned legislation, in order to get the green light from Article 14, should satisfy the classification test evolved by this Court in a catena of cases. According to that test: (1) the classification should be based on an intelligible differentia and (2) the differentia should bear a rational relation to the purpose of the legislation.

9. The classification test is, however, not inflexible and doctrinaire. It gives due regard to the complex necessities and intricate problems of government. Thus as revenue is the first necessity of the State and as taxes are raised for various purposes and by an adjustment of diverse elements, the Court grants to the State greater choice of classification in the field of taxation than in other spheres. According to Subba Rao, J.: "(T)he courts in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the Legislature in the matter of classification, so long as it adheres to the fundamental principles underlying the said doctrine. The power of the Legislature to classify is of wide range and flexibility so that it can adjust its system of taxation in all proper and reasonable ways." *(Khandige Sham Bhat v. Agricultural Income Tax Officer, Kasargod; V. Venugopala Ravi Verma Rajah v. Union of India.)"*

10. Again, on a challenge to a Statute on the ground of Article 14, the Court would generally raise a presumption in favour of its constitutionality Consequently, one who challenges the Statute bears the burden of establishing that the Statute is clearly violative of Article 14. "The presumption is always in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there is a clear transgression of the constitutional principle." *(See Charanjit Lal v. Union of India)"*

*ii)* *Anant Mills Co. Ltd. vs. State of Gujarat*[19]*:*

"25. It is well-established that Article 14 forbids class legislation but does not forbid classification. Permissible classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and the differentia must have a rational relation to the object sought to be achieved by the Statute in question. In permissible classification mathematical nicety and perfect equality are not required. Similarity, not identity of treatment is enough. If there is equality and uniformity within each group, the law will not be condemned as discriminative, though

18 [1974] 94 ITR 479 (SC)

19 [1975] 2 SCC 175

due to some fortuitous circumstances arising out of a peculiar situation some included in a class get an advantage over others, so long as they are not singled out for special treatment. Taxation law is not an exception to this doctrine. But, in the application of the principles, the Courts, in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the Legislature in the matter of classification so long as it adheres to the fundamental principles underlying the said doctrine. The power of the Legislature to classify is of wide range and flexibility so that it can adjust its system of taxation in all proper and reasonable ways (see *Ram Krishna Dalmia v. Justice S. R. Tendolkar and Khandige Sham Bhat vs. Agricultural Income Tax Officer, Kasaragod)* Keeping the above principles in view, we find no violation of Article 14 in treating pending cases as a class different from decided cases. It cannot be disputed that so far as the pending cases covered by clause (i) are concerned, they have been all treated alike."

*iii)* *Jain Bros vs. Union of India*[20]:

The issue in this case was whether the clause (g) of Section 297(2) of the Income-tax Act, 1961 is violative of Article 14 of the Constitution in as much as in the matter of imposition of penalty, it discriminated between two sets of assessees with reference to a particular date, namely, those whose assessment had been completed before 1st day of April 1962 and others whose assessment was completed on or after that date. Whilst upholding the validity of the above provision, this Court has observed: "Now the Act of 1961 came into force on 1st April 1962. It repealed the prior Act of 1922. Whenever a prior enactment is repealed and new provisions are enacted the Legislature invariably lays down under which enactment pending proceedings shall be continued and concluded. Section 6 of the General Clauses Act, 1897, deals with the effect of repeal of an enactment and its provisions apply unless a different intention appears in the statute. It is for the Legislature to decide from which date a particular law should come into operation. It is not disputed that no reason has been suggested why pending proceedings cannot be treated by the Legislature as a class for the purpose of Article 14. The date first April, 1962, which has been selected by the Legislature for the purpose of clauses (f) and (g) of Section 297(2) cannot be characterised as arbitrary or fanciful."

*iv)* *Murthy Match Works v. CCE*[21]:

"15. Certain principles which bear upon classification may be mentioned here. It is true that a State may classify persons and objects for the purpose of legislation and pass laws for the purpose of obtaining revenue or other objects. Every differentiation is not a discrimination. But classification can be sustained only it is founded on pertinent and real differences as distinguished from irrelevant and artificial ones. The Constitutional standard by which the sufficiency of the differentia which form a valid basis for classification may be measured, has been repeatedly stated by the Courts. If it rests on a difference which bears a fair and just relation to the object for which it is proposed, it is Constitutional. To put it differently, the means must have nexus with the ends. Even so, a large latitude is allowed to the State for classification upon a reasonable basis and what is reasonable is a question of practical details and a variety of factors

20 [1970] 77 ITR 107 (SC)

21 [1974] 4 SCC 428

which the Court will be reluctant and perhaps ill-equipped to investigate. In this imperfect world perfection even in grouping is an ambition hardly ever accomplished. In this context, we have to remember the relationship between the legislative and judicial departments of Government in the determination of the validity of classification. Of course, in the last analysis Courts possess the power to pronounce on the Constitutionality of the Acts of the other branches whether a classification is based upon substantial differences or is arbitrary, fanciful and consequently illegal. At the same time, the question of classification is primarily for legislative judgment and ordinarily does not become a judicial question. A power to classify being extremely broad and based on diverse considerations of executive pragmatism, the Judicature cannot rush in where even the Legislature warily treads. All these operational restraints on judicial power must weigh more emphatically where the subject is taxation.

****19. It is well-established that the modern state, in exercising its sovereign power of taxation, has to deal with complex factors relating to the objects to be taxed, the quantum to be levied, the conditions subject to which the levy has to be made, the social and economic policies which the tax is designed to subserve, and what not. In the famous words of *Holmes, J. in Bain Peanut Co. vs. Pinson:* "We must remember that the machinery of Government would not work if it were not allowed a little play in its joints."

*v)* *Elel Hotels and Investments Ltd. vs. Union of India*[22]:

"20. It is now well-settled that a very wide latitude is available to the legislature in the matter of classification of objects, persons and things for purposes of taxation. It must need to be so, having regard to the complexities involved in the formulation of a taxation policy. Taxation is not now a mere source of raising money to defray expenses of Government. It is a recognised fiscal tool to achieve fiscal and social objectives. The differentia of classification presupposes and proceeds on the premise that it distinguishes and keeps apart as a distinct class hotels with higher economic status reflected in one of the indicia of such economic superiority."

*vi)* *P.M. Ashwathanarayana Setty vs. State of Karnataka*[23]:

"... the State enjoys the widest latitude where measures of economic regulation are concerned. These measures for fiscal and economic regulation involve an evaluation of diverse and quite often conflicting economic criteria and adjustment and balancing of various conflicting social and economic values and interests. It is for the State to decide what economic and social policy it should pursue and what discriminations advance those social and economic policies."

*vii)* *Kerala Hotel and Restaurant Assn. vs. State of Kerala*[24]:

"24. The scope for classification permitted in taxation is greater and unless the classification made can be termed to be palpably arbitrary, it must be left to the legislative wisdom to choose the yardstick for classification, in the background of the fiscal policy of the State...."

*viii)* *Spences Hotel (P.) Ltd. v. State of W.B.*[25]:

"26. What then 'equal protection of laws' means as applied to taxation? Equal protection cannot be said to be denied

22 [1989] 44 taxman 304 (SC)

23 [1989] Supp. (1) SCC 696

24 [1990] 2 SCC 502

25 [1991] 2 SCC 154

by a statute which operates alike on all persons and property similarly situated, or by proceedings for the assessment and collection of taxes which follows the course usually pursued in the State. It prohibits any person or class of persons from being singled out as special subject for discrimination and hostile legislation; but it does not require equal rates of taxation on different classes of property, nor does it prohibit unequal taxation so long as the inequality is not based upon arbitrary classification. Taxation will not be discriminatory if within the sphere of its operation, it affects alike all persons similarly situated. It, however, does not prohibit special legislation, or legislation that is limited either in the objects to which it is directed, or by the territory within which it is to operate. In the words of Cooley: It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. The rule of equality requires no more than that the same means and methods be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. Nor does this requirement preclude the classification of property, trades, profession and events for taxation — subjecting one kind to one rate of taxation, and another to a different rate. "The rule of equality of taxation is not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, may impose different specific taxes upon different trades and professions." "It cannot be said that it is intended to compel the State to adopt an iron rule of equal taxation." In the words of Cooley :

"Absolute equality is impossible. Inequality of taxes means substantial differences. Practical equality is Constitutional equality. There is no imperative requirement that taxation shall be absolutely equal. If there were, the operations of Government must come to a stop, from the absolute impossibility of fulfilling it. The most casual attention to the nature and operation of taxes will put this beyond (sic) question. No single tax can be apportioned so as to be exactly just and any combination of taxes is likely in individual cases to increase instead of diminish the inequality."

27. "Perfect equality in taxation has been said time and again, to be impossible and unattainable. Approximation to it is all that can be had. Under any system of taxation, however, wisely and carefully framed, a disproportionate share of the public burdens would be thrown on certain kinds of property, because they are visible and tangible, while others are of a nature to elude vigilance. It is only where statutes are passed which impose taxes on false and unjust principle, or operate to produce gross inequality, so that they cannot be deemed in any just sense proportional in their effect on those who are to bear the public charges that courts can interpose and arrest the course of legislation by declaring such enactments void." "Perfectly equal taxation", it has been said, "will remain an unattainable good as long as laws and government and man are imperfect." 'Perfect uniformity and perfect equality of taxation', in all the aspects in which the human mind can view it, is a baseless dream."

*ix)* *Venkateshwara Theatre vs. State of A.P.*[26]

"21. Since in the present case we are dealing with a taxation measure it is

26 [1993] 3 SCC 677

necessary to point out that in the field of taxation the decisions of this Court have permitted the legislature to exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes."

x) *State of Kerala vs. Aravind Ramakant Modawdakar*[27]:

"Coming to the power of the State in legislating taxation law, the Court should bear in mind that the State has a wide discretion in selecting the persons or objects it will tax and thus a Statute is not open to attack on the ground that it taxes some persons or objects and not others. It is also well-settled that a very wide latitude is available to the Legislature in the matter of classification of objects, persons and things for the purpose of taxation. While considering the challenge and nature that is involved in these cases, the courts will have to bear in mind the principles laid down by this Court in the case of *Murthy Match Works vs. CCE2* wherein while considering different types of classifications, this Court held: (AIR Headnote): [T]hat a pertinent principle of differentiation, which was visibly linked to productive process, had been adopted in the broad classification of power-users and manual manufacturers. It was irrational to castigate this basis as unreal. The failure however, to mini-classify between large and small sections of manual match manufacturers could not be challenged in a Court of law, that being a policy decision of Government dependent on pragmatic wisdom playing on imponderable forces at work. Though refusal to make rational classification where grossly dissimilar subjects are treated by the law violates the mandate of Article 14, even so, as the limited classification adopted in the present case was based upon a relevant differentia which had a nexus to the legislative end of taxation, the Court could not strike down the law on the score that there was room for further classification."

xi) *State of U.P. vs. Kamla Palace*[28]:

"11. Article 14 does not prohibit reasonable classification of persons, objects and transactions by the Legislature for the purpose of attaining specific ends. To satisfy the test of permissible classification, it must not be "arbitrary, artificial or evasive" but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the Legislature. (See Special Courts Bill, 1978, Re, seven-Judge Bench; *R. K. Garg v. Union of India, five-Judge Bench.)* It was further held in R. K. Garg case that laws relating to economic activities or those in the field of taxation enjoy a greater latitude than laws touching civil rights such as freedom of speech, religion etc. Such a legislation may not be struck down merely on account of crudities and inequities in as much as such legislations are designed to take care of complex situations and complex problems which do not admit of solutions through any doctrinaire approach or straitjacket formulae. Their Lordships quoted with approval the observations made by *Frankfurter, J. in Morey vs. Doud*: "In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The Legislature after all has the affirmative responsibility. The Courts have only the power to destroy,

27 [1999] 7 SCC 400

28 [2000] 1 SCC 557

not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the Judges have been overruled by events - self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability."

12. The legislature gaining wisdom from historical facts, existing situations, matters of common knowledge and practical problems and guided by considerations of policy must be given a free hand to devise classes - whom to tax or not to tax, whom to exempt or not to exempt and whom to give incentives and lay down the rates of taxation, benefits or concessions. In the field of taxation if the test of Article 14 is satisfied by generality of provisions the courts would not substitute judicial wisdom for legislative wisdom."

*xii)* *Aashirwad Films v. Union of India*[29]:

"14. It has been accepted without dispute that taxation laws must also pass the test of Article 14 of the Constitution of India. It has been laid down in a large number of decisions of this Court that a taxation statute for the reasons of functional expediency and even otherwise, can pick and choose to tax some. Importantly, there is a rider operating on this wide power to tax and even discriminate in taxation that the classification thus chosen must be reasonable. The extent of reasonability of any-taxation Statute lies in its efficiency to achieve the object sought to be achieved by the Statute. Thus, the classification must bear a nexus with the object sought to be achieved. *(See Moopil Nair vs. State of Kerala, East India Tobacco Co. vs. State of A.P., N. Venugopala Ravi Varma Rajah vs. Union of India, Asstt. Director of Inspection Investigation vs. A.B. Shanthi and Associated Cement Companies Ltd. v. Govt. of A.P.)"*

*xiii)* *Jai Vijai Metal Udyog Private Limited, vs. Commissioner, Trade Tax, UP*[30]:

"19. Now, coming to the second issue, it is trite that in view of the inherent complexity of fiscal adjustment of diverse elements, a wider discretion is given to the Revenue for the purpose of taxation and ordinarily different interpretations of a particular tariff entry by different authorities as such cannot be assailed as violative of Article 14 of the Constitution. Nonetheless, in our opinion, two different interpretations of a particular entry by the same authority on same set of facts, cannot be immunised from the equality clause under Article 14 of the Constitution. It would be a case of operating law unequally, attracting Article 14 of the Constitution."

To sum up: The Constitutional validity of a VDIS or amnesty scheme seems cannot successfully be challenged as the Courts find it impermissible to exercising jurisdiction under article 226 of the Constitution to substitute its own decision in place of policy decision taken by Parliament by enacting Scheme. The benefit immunity or inducement to black money holders for disclosing unaccounted money is not so reeking with immorality so as to be condemned as arbitrary or irrational. When two or more methods of adjustment of economic measures are available, it is the discretion of the Legislature to prefer one of them. By experience and in the atmosphere prevailing in the society, it cannot be said that such Schemes are palpably arbitrary or irrational. Admittedly, unearthing of unaccounted money is a complex economic problem and for solving this problem to some extent if Parliament has decided to enact the law, the Court cannot substitute its judgment in

29 [2007] 6 SCC 624

30 [2010] 6 SCC 705

place of the Legislative judgment in the field of economic regulations or in taxation matters. It would not be open to the Court to substitute its decision on economic policy matters.

Though stringent law exists, still, it has been difficult for the authorities to take appropriate action against those persons who amass unaccounted wealth to a large extent. These are long-term measures and at present, it is impossibility and that should not mean that Parliament cannot take short-term measures to unearth unaccounted black money through Schemes. Though keeping the magnitude of black money in circulation in the country into account, it would be difficult to find out any short-cut method for unearthing the same; making law or making more stringent law may or may not achieve its objective. These are all trial and error methods which are required to be adopted in dealing with economic affairs and it is not for the Courts to decide their success but it can certainly be a nexus with the object sought to be achieved.

On classification justification the court's view almost unanimous that a classification between persons who are having unaccounted money and honest taxpayers cannot be said to be in any way unreasonable and it has nexus with the object sought to be achieved, i.e., for unearthing unaccounted money by giving some inducement and immunities to such persons. It would be lifeless logic to concentrate only upon abstract concept of inequity between honest and dishonest taxpayers. Between the two, inequity exists and cannot be ignored in present social set-up. The fact that more benefits are given to tax-evaders would be difficult to say the Scheme is arbitrary and violative of Article 14.

## Income Declaration Scheme, 2016 – Some odds

1. Though the FM has mentioned that the four-month compliance window for domestic black money holders is not a VDIS and it is also not an amnesty scheme, but interestingly he has used the phrase 'past trangressions' recognising the past wrongdoings of tax evaders and offer them an exit door on payment of 45% of undisclosed income with immunity from prosecution under Income-tax Act, Wealth Tax Act, and Benami Transaction (Prohibition) Act, 1988. If this is not VDIS or amnesty scheme than what is it? It has all ingredients of and is a replica of black money one time disclosure window under BMA. The rate of tax payable under the present scheme is 45 per cent though bifurcated in three segments - tax @ 30%, surcharge (Krishi Kalyan Cess) 7.5% and penalty 7.5% which is 1.5 times of the tax payable under VDIS, 1997 and no penalty.

2. The income chargeable to tax if declared in the form of investment in any asset, the fair market value of such asset as on the date of commencement of this Scheme (1st June 2016) shall be deemed to be the undisclosed income. The fair market value of any asset shall be determined in such manner, as may be prescribed. That FMV, however, is taken as cost of acquisition of the declared asset under Section 49(5) of the Income-tax Act, 1961 for the purposes capital gains. In other words tax on capital gain is pre pond and collected as tax on undisclosed income. This may be perhaps beyond legislative power in as much as to the extent of increase in value of asset it amounts to taxation of no income or on income which is never earned. – see in 1968 the Supreme Court affirmed this view in A. Raman & Co (supra)[31]; in 1973 in the case of Calcutta Discount Company[32]; and 1981 in *K. P. Varghese (1981) 131 ITR 597 (SC).* Again, even if the increase in value is income, which though cannot by any

31 (1968) 67 ITR 11 (SC)

32 (1973) 91 ITR 8 (SC)

stretch of imagination it is self generated and being from self and cannot be taxed as income at all.

3. Interestingly no amendment is made in Section 2(42A) for counting period of holding. Therefore, the position would be that the period of holding will remain that of from the date acquisition. If that happens to be the long term the indexing is to be allowed on from the date of acquisition but on the substituted COI i.e., the market value on 1st of June 2016. That may be a boon to the declarant. It may result in heavy tax burden in the year of declaration but with a heavier benefit of reduction in capital gain tax in the year of sale of that declared asset resulting into a loss under the head capital gain due to indexed cost of acquisition from the date of acquisition on FMV as on 1-6-2016. Where the declarant has sufficient proof of acquiring an asset in past years at a certain amount, such amount only should be considered for levy of tax and penalty aggregating to 45 per cent and not the current fair market value. The tax on current FMV is not practical as the liquidity problem will also arise and making payment of the tax under the Scheme will be almost impossible in some cases. Even otherwise, why one should declare asset, he would only declare income and the assets acquired being out of that can be added to income of the assessee.

Asset declaration income may be and perhaps restricted to those declarations of assets which were received as gifts chargeable to tax u/s. 56(2)(vi) and 56(2)(vii) but not disclosed as income in the year of gifts. But there also to tax that on FMV on 1st June, 2016 would be taxing the difference which represented the value increase without there being income earned or realised, with similar consequences, as aforesaid, in capital gains in the year of sale of declared asset. Again, if for example, a person purchased or acquired by way of gift, a self occupied house in Mumbai for ` 1 crore in year 1995 and its present fair market value is ` 20 crores, the aggregate tax payable under the Scheme will be ` 9 crores. It may not be possible for the person to organize such a huge amount to pay under the one time compliance window scheme as the amount payable is very high and secondly he may not have the liquidity of funds.

As value of asset acquired is deemed that of the year of notice; are we importing the assessment of value of assets under the Income-tax Act though or via this Scheme? Would it be a valid legislation? If the asset is acquired out of this way assessed income no addition can be made for value of property as undisclosed.

Therefore, it being smacking unconstitutional requires drop and restrict the income disclosure to COA and to provide the tax and penalty payable on the basis of cost of assets. It may be stated that under VDIS 1997 or earlier ones the tax was payable on the cost of the asset for the year in which it was acquired. It was introduced in BMA, 2015 but that was a disclosure scheme for assets and money lying outside India in foreign countries and perhaps justifiable. But proposal to tax assets there under “The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015" mooted last year was to catch hold of the black money or assets held outside India. It is a matter of public knowledge that the Scheme was not success in so far as it could only garner disclosure of around ` 4,000 cr with a tax and penalty of ` 2,500 cr. only. Prime reason for failure was because tax was charged on the present market value posing liquidity issues since most of the assets were in

the form of immovable property and assets, other than liquid assets. Compared to earlier VDIS, the 2016 scheme is not attractive, not logical. Rather it grants premium to persons having undisclosed income but who default payment of tax on opting declaration and who do not opt the scheme at all.

4. While providing u/s. 197 of the Finance Act (IDS) for the removal of doubts, a confusion is created when it declared in clause (b) that "where any declaration has been made under Section 183 but no tax, surcharge and penalty referred to in Section 184 and section 185 has been paid within the time specified under Section 187, the undisclosed income shall be chargeable to tax under the Income-tax Act in the previous year in which such declaration is made'. Does it means that no additions, reopening etc shall be made in assessment or reassessment of the respective year prior to A.Y. 2017-18 because the income was declared under IDS but no tax was paid and hence the declared income is now chargeable in the year of declaration i.e., PY 2016-17 AY 2017-18? If that be so who will pay tax and penalty under IDS; he will simply file declaration, not pay tax and get assessed as income of A.Y. 2017-18 on payment of 30% tax and go scot free from penalty , interest and prosecution by declaring himself in the return for A.Y. 2017-18.

5. Again clause (c) provides that where any income has accrued, arisen or received or any asset has been acquired out of such income prior to commencement of this Scheme, and no declaration in respect of such income is made under this Scheme,—

(i) Such income shall be deemed to have accrued, arisen or received, as the case may be; or

(ii) The value of the asset acquired out of such income shall be deemed to have been acquired or made, in the year in which a notice under section 142, sub-section (2) of section 143 or section 148 or section 153A or section 153C of the Income-tax Act is issued by the Assessing Officer, and the provisions of the Income-tax Act shall apply accordingly.

Here also would it mean that no additions, reopening etc shall be made henceforth in assessment or reassessment of the respective year prior to Ay 2017-18 because the income was to be declared under IDS but was not declared, and now chargeable in the year of issuance of notice u/s 142, 143(2) or 148 or 153A or 153C. He will show the income in return of AY 2017-18 pay tax of 30% under I T Act and go scot free from interest, penalty or prosecution.

The position that emerge out is that whereas clause (a) of section 197 IDS does not confer or extend the benefits of the Scheme to persons other than the person making the declaration, clauses (b) and (c) grant premium to defaulters decalarant under IDS or non declarant persons having undisclosed income. They can wash of black money to white, by paying only 30% tax under the Income-tax Act, 1961.

6. Under both these situations the income would be charged to tax in AY 2017-18 the year of the commencement of the scheme on 1-6-2016 or as the case may be the year of issue of notices, and not in the year(s) in which it accrued, arose or was received. This means such income would be taxed at the rates under the Income-tax Act (at 30%) and not at the rates under IDS (at 45% being 30% tax plus 7.5% surcharge +7.5% penalty). And after 1-6-2016, no

addition to income could possibly be made in any of the earlier years prior to 1-4-2017 in any assessment or reassessment made because the undisclosed income of the earlier year accrued, arose or received prior to 1-4-2017 is treated chargeable as the income of the year of declaration or the date of notices,. This is a great boon that seems to have been granted unintended though or by IDS to tax defaulters/ dodgers.

## Conclusion

The problem of black money through indulgence abroad and in the country is a big challenge for the Government and is not likely to be solved by sporadic measures of VDIS. It has to be consolidated efforts covering different areas in one go. The SIT like forum can be constituted in a broader way, not merely as part time supporter, but with full time experts from various fields, including from the judiciary vesting with power to take assistance from the investigating agencies. A permanent forum which completes its assignment in fixed time period should be set up. The forum needs to go about its work seeking the views of all sections of people - taxpayers and non-taxpayers - who are genuinely concerned with the problem of black money in their routine working. Its reports should be released immediately after submission for public discussions. Only then the problem of unaccounted economy in the country may perhaps deal with effectively.

It would, perhaps, be more effective, if attention is paid to current concealment devices practiced on an ongoing basis and enquiries regarding past transactions be made when some concrete information regarding these emerges from the enquiries in the course of the current proceedings. Besides, reforms should be made in practices that lead to generation of black money like political funding, dealing in real estate and efforts can be concentrated on widening the tax base, improve collections and strengthen prosecution machinery for quick results and effective impact. There is no point in beating the bush occasionally to extract some money, which is not in consonance with the efforts and erodes Governments credibility. It needs to be accepted as a hard fact that with global attack on tax evasion, the era of amnesties and VDISs is over now."

To tap black money stashed abroad Double Taxation Avoidance Agreement (DTAA) or Tax treaties and information agreements (EIA) with various countries can be negotiated/re-negotiated in a co-ordinated manner in such a way that requisite information about such incomes/accounts/wealth - not disclosed to parent countries - can be obtained. Now results have started coming under pressure from G20 countries to amend/end bank secrecy law/rules in Switzerland and other countries. India is negotiating such treaties with 36 countries.

More serious action would be necessary in some recalcitrant situations, like in debt-ridden Greece which has come down heavily on tax-evaders, who owed money to the State. Such concerted action is bound to have deterrent impact and stoppage of old practices of laundering unreported funds.

Forums like Tax Justice International have criticised giving of amnesties on the ground that it is a major threat to the European Union's struggle for automatic exchange of information. Hence, instead of bestowing efforts in the form of formulating amnesty/VDIS schemes, it would be more useful to put pressure on the countries, which facilitate strong accumulation and transfer of unaccounted monies.

Economic sanctions against non-co-operation by countries can be thought of by group of well-meaning tax jurisdictions.


Paras S. Savla, *Advocate* & CA Pratik Poddar

# Procedure under Direct Tax Dispute Resolution Scheme, 2016

## Introduction

The Government in the Finance Bill, 2016 has come out with the Dispute Resolution Scheme, 2016 to reduce litigation and enable the Government to realise its dues expeditiously. The Scheme is provided in Chapter X of the Finance Act, 2016 having sections from Sections 200 to 211. The procedure can be summarised in following stages.

1. Eligibility for Declaration
⇩
2. Declaration and conditions thereof
⇩
3. Time and Manner of Payment
⇩
4. Grant of Immunity

The scheme comes into force from 1st June, 2016. The government *vide* Notification No. 35 of 2016 has framed The Direct Tax Dispute Resolution Scheme Rules, 2016 ('the Rules') stipulating various Forms for appropriate implementation of the scheme.

## 1. Eligibility for Declaration

**a) Taxes covered**

The scheme is applicable for the following taxes

i) **"Tax Arrear"**[1] means,

— The amount of tax, interest or penalty determined under the Income-tax Act or the Wealth-tax Act,

— In respect of which appeal is pending before the Commissioner of Income-tax (Appeals)['CIT(A)'] or the Commissioner of Wealth-tax (Appeals) ['CWT(A)']

— As on the 29th day of February, 2016.

ii) "**Specified tax**"[2] means a tax determined

— Which is in consequence of any amendment made to the Income-tax Act or the Wealth-tax Act with retrospective effect

— And relates to a period prior to the date on which the Act amending the Income-tax Act or the Wealth-tax Act, as the case may be, received the assent of the President; and

— A dispute in respect of such tax is pending as on the 29th day of February, 2016

1 "Tax Arrear" as defined under Section 201(1)(h) of the Finance Act 2016
2 "Specified Tax" as defined under Section 201(1)(g) of the Finance Act 2016

**b) Disqualifications**

The provisions of the scheme shall however not apply with respect to tax arrears or specified tax relating to:[3]

i) Search or survey cases where declaration is with respect to tax arrear

ii) Cases where prosecution has been instituted on or before date of filing of declaration

iii) Cases relating to undisclosed foreign income or assets

iv) Cases where information is received under Double Tax Avoidance Agreement. u/s. 90 or 90A of the Act

v) Persons in respect of whom order of detention is passed under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 subject to certain conditions.

vi) Person in respect of whom prosecution for any offence punishable under the provisions of the Indian Penal Code, the Unlawful Activities (Prevention) Act, 1967, the Narcotic Drugs and Psychotropic Substances Act, 1985, the Prevention of Corruption Act, 1988 or for the purpose of enforcement of any civil liability has been instituted on or before the filing of the declaration or such person has been convicted of any such offence punishable under any of those Acts.

vii) Person notified under section 3 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992

**c) Period of declaration**

The declaration under the scheme is to be made from 1st June, 2016 to 31st December, 2016 (As per Sec 202 of the Finance Act, 2016 and Notification 34 of 2016)

**d) Amount payable – Declaration of tax payable**

One of the conditions for the grant of immunity is payment of taxes on the disputed amount. As per section 202, an assessee making a declaration has to pay the following.

- In case of pending Appeal related to tax arrear being

(i) Tax and interest:

| Tax & interest less than 10 lakh | Tax & interest more than 10 lakh |
|---|---|
| Disputed Tax + Interest on disputed tax up to date of assessment or reassessment | Disputed Tax + Interest on disputed tax up to date of assessment or reassessment + 25% of minimum penalty leviable |

(ii) Penalty

25% of minimum penalty leviable + tax & interest payable on the total income finally determined

- In case of specified tax

The amount of tax so determined.

## 2. Declaration and Conditions Of Declaration – Section 203

**a)** Declaration has to be made in duplicate in Form 1 (Rule 3(1) of the Rules), and to be filed before the designated authority.

3 Section 208 of the Finance Act, 2016

**b) Conditions to declaration**

i) Withdrawal of Appeals

(1) Where declaration is with respect to tax arrears,

– Appeal pending before CIT(A) or CWT(A) shall be deemed to have been withdrawn.

(2) Where declaration is with respect to specified tax (Prior condition)

– Where declarant has filed any appeal before CIT(A) or CWT(A) or ITAT or HC or SC or any Writ Petition before HC or SC against order of specified tax, withdraw such appeal or petition and furnish proof of such withdrawal along with the declaration.

– Where declarant has initiated any proceeding for arbitration, conciliation or mediation or has given notice thereof, withdraw such notice or claim prior to declaration and furnish proof along with the declaration.

ii) Undertaking for waiving right

Where declaration is with respect to specified tax, declarant shall also furnish an undertaking in Form 2 (Rule 3(2) of the Rules) waiving his right, whether direct or indirect, to seek or pursue any remedy or any claim in relation to the specified tax which may otherwise be available to him.

iii) Inaccurate particulars or failure of conditions

In the below mentioned cases declaration will be presumed to never have been made and all consequences under the ITA or WTA under which the proceedings against the declarant are or were pending, shall be deemed to have been revived.

(1) Any material particular furnished in the declaration is found to be false at any stage; or

(2) The declarant violates any of the conditions referred to in this scheme; or

(3) The declarant acts in a manner which is not in accordance with the undertaking given by him.

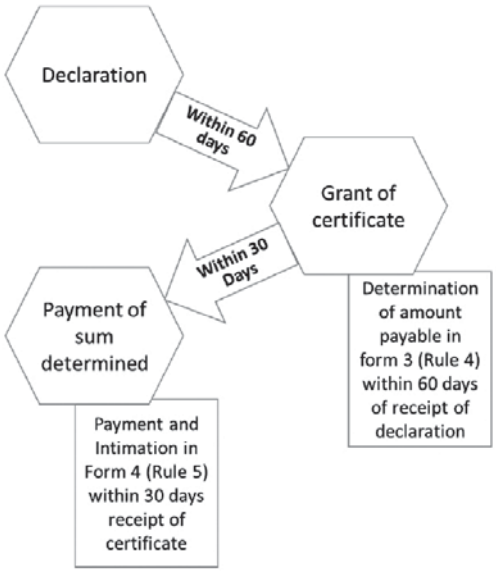
**c) Restriction on Appellate Authority or arbitrator, conciliator or mediator**

Appellate authority or arbitrator, conciliator or mediator cannot proceed to decide any issue in relation to specified tax made in declaration or in relation to order passed by designated authority with regards to sum payable by the declarant.

Note: The declaration and undertaking as the case may be shall be signed by the declarant or any person competent to verify the return of income on his behalf in accordance with section 140 of the Act.

## 3. Time and manner of payment – Section 204

The time frame and the payment procedures can be explained as under:




- Pursuant to the above procedure an order for full and final settlement in Form 5 for tax arrear and Form 6 for specified tax shall be passed by the designated authority (Rule 6)
- Every order as passed above shall be conclusive evidence as to matters stated therein and no matter covered by such order shall be reopened in any other proceedings. Further any payment made shall not be refundable under any circumstances (Section 206)

## 4. Grant of Immunity – Section 205

The designated authority shall subject to conditions, grant:

a) Immunity from instituting any proceedings in respect of an offence

b) Immunity from imposition or waiver, as the case may be, of penalty in respect of

   (i) Specified tax covered in the declaration

   (ii) Tax arrear covered in the declaration to the extent the penalty exceeds 25% of minimum penalty leviable

c) Waiver of interest in respect of

   (i) Specified tax covered in the declaration

   (ii) Tax arrear covered in declaration to the extent the interest exceeds the interest as computed until date of assessment or reassessment.

No benefit, concession or immunity shall be given to the declarant in any proceedings other than those in relation to which the declaration has been made. (Section 207)

## Conclusion

The procedure seems quite simple. However there are few issues to ponder:

i) No time limit has been mentioned for passing of order by the designated authority for full and final settlement. So if no order is passed, whether the benefits of declaration can still be availed.

ii) In case of failure of conditions whether the appeal which was withdrawn or deemed to have been withdrawn will revive. Whether the undertaking given waiving rights to pursue remedy in case of specified tax will be revived if the declaration given is found to be faulty.

The Government seems desperate to reduce litigations. However, such scheme should have been extended to appeals at Tribunal levels also.

Sanjiv M. Shah, *Advocate*

# Direct Tax Dispute Resolution Scheme, 2016 [DTDRS] – Cause and Effect

## I. Introduction

1. The Direct Tax Dispute Resolution Scheme, 2016 [DTDRS] is in many respects similar to Kar Vivad Samadhan Scheme, 1998 [KVSS], but former's overall operative ambit is narrower. Indeed DTDRS salvages previous regime's undoing vis-a-vis retrospective amendments. I have heavily borrowed from precedents delivered under KVSS to project controversies that may arise under DTDRS, but simultaneously I have attempted to contribute creatively wherever possible.

## II. Objective of DTDRS

2. Present dispensation appears to be much concerned about pendency of litigation at First Appeal level i.e. Commissioner of Income Tax (Appeals) [CIT(A)] involving gigantic revenue. In accordance with Finance Minister's speech, nearly three lakh cases are locked in litigation comprising disputed amount ` 5.5 lakh crores and to thaw this number DTDRS is introduced [PARAGRAPH 162]. Another aim is to give opportunity to high profile litigants to end acrimonious past perpetrated by earlier unfriendly tax administration *inter alia* in the form of retrospective amendments much to the chagrin of judiciary. In *CIT vs. SHATRUSAILYA D. JADEJA 277 ITR 435, 442 (SC)*, predecessor KVSS was branded as a tax recovery scheme although nomenclatured as litigation settlement scheme. At this stage, I straightway deal with brasstacks in the exposition that follows.

## III. General propositions of law supported by judicial precedents based on earlier KVSS

3. In *Amit Jhaveri v. UOI 380 ITR 60 (Bom.)*, constitutional validity of KVSS upheld on the premise that differentiation based on persons acquiring / earning property / income through illegal means or property / income being subject matter of prosecution constituting the disqualifying group is neither discriminatory or arbitrary, but founded on intelligent classification having rational connection and nexus with end and intent of KVSS.

4. KVSS applies only to enactments legislated by Parliament and not to those which are within exclusive competence of State Governments and consequently, immunity contemplated therein cannot be extended to subjects within special domain of States *[Master Cables vs. State of Kerala 296 ITR 8, 12 (SC)].*

5. In *B. P. Jain and Associates vs. CIT 381 ITR 423 (Del.)*, it was laid down that instructions under KVSS which are inconsistent with provisions embedded therein do not bind declarant. However, if instructions relax rigour of law postulated in the scheme then such favourable view ought to be followed by revenue *[Keshavji Ravji vs. CIT 183 1, 17 (SC)].*

6. If appeal is filed with and addressed to wrong officer by assessee, but department does not either return the papers to enable assessee to present same to correct appellate authority or alternatively make over documents to competent authority in hierarchy, declaration cannot be rejected on footing that no appeal is pending *[Radha Vinyl vs. CIT 364 ITR 199 (AP)].*

7. Appeal is "pending" despite being unmaintainable by virtue of its irregularity and incompetency [e.g., when it is held to be barred by limitation] which question can only be decided by appellate Court before whom appeal is filed *[CIT vs. Shatrusailya D. Jadeja 277 ITR 435, 442, 443 (SC)* following *Renuka Datla vs. CIT 259 ITR 258 (SC)* and *Tirupathi Balaji vs. State of Bihar (2004) 5 SCC 1* (Two Judge *Bench-KVSS – Section 95(i)(c)); Sheela Goenka vs. 326 ITR 402 (Guj.)* following *277 ITR 435 (SC)* – albeit condonation application for delay in filing appeal was not disposed of]. Aforesaid authority i.e. 277 ITR 435 (SC) was followed in *Swan Mills vs. UOI 296 ITR 1 (SC)* [Two Judge Bench-excise case], but, in this precedent, cardinal distinction is that Tribunal subsequently ruled that appeal before Commissioner (Appeals) was presented in time. It may be noted that contrary view is adopted in the context of revision petition while reckoning eligibility for KVSS *[Compuwel Systems vs. Hasan 260 ITR 86 (SC)* – Three Judge Bench]. In *Minal Fusade vs. CIT 285 ITR 229 (Bom.)* [where pendency of appeal to Tribunal vis-à-vis second declaration after rejection of first one was held to satisfy criteria of "pending" though condonation application dismissed by CIT(A) was questioned which was later on condoned by Tribunal] it was observed that Apex Court rulings in 277 ITR 435 and 260 ITR 86 are not conflicting and no such divergence was noticed by highest Court of land in 277 ITR 435. However, there is one more angle to foregoing confounded situation, in that, language in sections 95(i)(c) [direct tax enactment) and 95(ii)(c) [indirect tax enactment] under erstwhile KVSS is "admitted and pending" as projected in *Shree Amarlal Kirana v. CIT 267 ITR 48 (MP)* which implies that mere filing of late appeal is not sufficient to constitute pendency unless delay is condoned which may take place after declaration is filed. In any event, under DTDRS such a circumstance may not arise since only parameter to be fulfilled is that appeal / dispute should be "pending".

8. After certificate is issued under the scheme, assessing authority possesses no jurisdiction to reopen assessment for a specific assessment year in respect matters covered by declaration except on ground that declaration furnished is false *[Killick Nixon vs. DCIT 258 ITR 627, 634 (SC); Sushila Rani vs. CIT 253 ITR 775, 780 (SC)* – Certificate issued is conclusive as to the matters stated therein]. In *TVS Motor Company vs. ACIT 293 ITR 394, 399 (Mad.),* declaration encompassing dispute of setting off of losses while computing deduction under section 80HH was considered as false inasmuch as it was found that assessee claimed deduction for 11th year [Assessment year 1995-96] when 10 years had already lapsed in assessment year 1994-95 and consequently, reassessment proceedings on the latter count was sustained.

9. In *Faridabad Investment Company vs. CIT 289 ITR 273, 282, 283 (Cal.),* it was propagated following *Sushila Rani vs. CIT 253 ITR 775 (SC)* [wrong understanding of High Court judgment regarding adjustment of refunds against tax dues of respective years nonetheless amendment of certificate not permissible except on grounds of false declaration] and *UOI vs. Onkar Kanwar 258 ITR 761 (SC)* [refund of excise duty under KVSS refused though paid under protest] that tax paid under KVSS cannot be refunded notwithstanding that settlement was in connection with controversy of non-compete fee, a capital receipt, not assessable to tax inasmuch as certificate issued is conclusive not liable to be reopened under any circumstances.

10. Immunity from prosecution is granted only for offences appertaining to direct tax enactments and by no stretch of imagination it could rope in the Prevention of Corruption Act, 1988 because ex-facie public servants are not

embraced within definition of "person" *[CBI vs. Sashi Balasubramanian 289 ITR 6 (SC)]*.

11. Declaration cannot be rejected without valid and cogent reasons and bereft of affording an opportunity of being heard to declarant *[Gopaldas vs. UOI 285 ITR 393 (MP); Kaliannan vs. CIT 261 ITR 466 (Mad.)* – principles of natural justice read into KVSS, more particularly, when additional tax liability is imposed; *Coverage and Consulants vs. UOI 250 ITR 289 (MP)*, DA must pass a reasoned order mentioning basis of arriving at tax payable].

12. In *Bhilwara Spinners vs. CIT 285 ITR 80 (AT) (Jodh)*, Tribunal advocated that Commissioner under section 263 can revise matters unconnected with disputed income and settled tax arrears inasmuch as curtailment of power to re-examine is confined to matters stated in order passed pursuant to declaration.

13. Compounding of offence does not wipe out taint of initiation of prosecution prior to coming into force of KVSS and consequently, assessee is not entitled to avail of benefits under said scheme *[Jayapradha vs. CCIT 284 ITR 385 (Mad.)*.

14. In *Hemlatha Gargya vs. CIT 259 ITR 1*, Supreme Court laid down that statutory deadline prescribed for payment of tax under Voluntary Disclosure of Income Scheme, 1997 was mandatory because of deployment of word "shall" coupled with the fact that consequences of non-compliance are spelled out in the scheme itself. Moreover, where assessee seeks to claim a benefit under a statutory scheme he is bound to strictly satisfy conditions prescribed therein and under such circumstances, equitable considerations cannot be pressed into service. Designated Authority [DA] cannot act beyond provisions of the scheme or modify explicit terms stipulated therein in absence of specific provision. Similar view endorsed in *Ranganatha Associates vs. UOI 261 ITR 646 (Kar.)* following *259 ITR 1 (SC)* rejecting argument that latter is distinguishable on premise that it is rendered under VDIS; *Mangilal Jain vs. CIT 267 ITR 693 (Kar.)* in relation to KVSS. In *Band Brothers Engineering Works vs. UOI 282 ITR 474, 479*, Gujarat High Court concluded that in the absence of any specific provision in KVSS for condoning delay in making payment of tax arrears, DA rightly declined to issue certificate and as a consequence, also expressed its helplessness to come to rescue to the Petitioner in a discretionary writ jurisdiction even though such a position is undoubtedly harsh and also refused to issue directions to DA to refund the amount with interest inasmuch as sum was deposited in pursuance of declaration under KVSS.

15. However, Supreme Court in 259 ITR 1 supra directed revenue authorities to refund / adjust all payments deposited by assessees after time limit in accordance with law since they were not discharged in terms of the scheme. Such a contention is also countenanced under KVSS in *Marigold Engineers vs. UOI 274 ITR 17 (All.)* Following *Birumal vs. CIT 243 ITR 234 (P and H)* and *Vasantlal Tulsidas Agrawal vs. CIT [2002] 254 ITR 255 (Guj.)* distinguishing *Onkar Kanwar 258 ITR 761 (SC)*.

16. Protective assessment and demand do not qualify for KVSS owing to the fact that such demand in legally not enforceable like regular substantive assessment demand and thus does not fit into philosophy of existence of actual legally determined demand / tax arrears under KVSS *[Jaganathan vs. ACIT 216 ITR 305 (Kar.)]*.

17. Receipt of cheque before due date of payment under KVSS, but its subsequent successful encashment relates back to the date of delivery of cheque being the date of payment following *CIT vs. Ogale Glass Works 25 ITR 529 (SC) [Vardhaman Chemicals v. CCE and C 263 ITR 460 (Bom)]*.

18. Person who was served with a notice under section 158BD [now section 153C] as a result of search on a third party can avail of benefits of KVSS inasmuch as no warrant

of authorisation was issued in his name for conducting search *[Bhagwat P. Poddar vs. CIT 263 ITR 119 (All)*. Aforementioned lacunae is plugged in DTDRS *vide* section 208(a)(i) of Finance Act, 2016.

19. Self assessment tax paid under section 140A of the Income-tax Act, 1961 on admitted income cannot be adjusted against tax while arriving at disputed tax under KVSS *[Venugopala vs. CIT 263 ITR 30 (Kar)]*.

20. Adjustment of refund in conformity with section 245 can only made by officers specified under that section that too with prior intimation to assessee and therefore, Commissioner of Income Tax [CIT] or other officer not below rank of CIT being the constituted DA cannot arrogate such a power *[Ranganatha Associates vs. UOI 261 ITR 646 (Kar)]*. Where prescribed procedure of section 245 is not espoused, in that, there is no such proof evidencing compliance, amount should be trated as outstanding,

21. In *CIT vs. Shaily Engineering 258 ITR 437,* Supreme Court laid down that commencement of subsequent rectification proceedings to delete demands emanating from intimation issued previously was tainted with ulterior object to not only to defeat and nullify concessions of KVSS available to Assessee, but for extraneous considerations of making same additions under Section 143(3) for purpose of creating fresh demand and thus is vitiated and bad in law as it suffers from malice amounting to abuse of authority.

22. In *Mangilal Jain vs. CIT 257 ITR 31 (Ker.),* it was propounded where payments are not appropriated by assessee disputed tax ought to be computed by first adjusting them against outstanding tax and not interest because Explanation to section 140A is inapplicable to KVSS. Nevertheless, where payment is pin-pointedly made in challan towards a particular head, such an allotment must be adhered to and cannot be disturbed *[Injecto Plast vs. UOI 323 ITR 287 (All)]*.

23. Tax deposited in a wrong challan not in accordance with format issued by DA will not make it illegal since what is mandated by KVSS is payment of tax within time limit stipulated *[Pitamberdas Dulichand vs. CIT 244 ITR 542 (Guj)]*.

## IV. Specified Tax arising from Retrospective Amendments

24. Current rulers at the helm of the Finance Ministry want to put an end to litigation emanating from unpopular and unsavoury substantive alterations in charging sections engrafted in Income-tax Act, 1961 by earlier powers-that-be *vide* Finance Act, 2012 to purportedly overcome judicial pronouncements in favour of the assessee such as *Vodafone International Holdings vs. UOI 341 ITR 1 (SC), TCS vs. State of AP 271 ITR 401 (SC); DIT vs. Ericsson 343 ITR 470 (Del.)* and the like. Section 201(1)(g) of Finance Act, 2016 defines "specified tax" as tax the determination of which is in consequence of or validated by any amendment made to the Income-tax Act, 1961 or Wealth Tax Act, 1957 with retrospective effect and relates to a period prior to the date on which the Act amending foregoing Acts received the assent of the President coupled with condition that a dispute in respect of such tax is pending as on 29-2-2016. In my opinion, retrospective amendments which operate from a particular and specified date mentioned in the Act modifying aforementioned Acts will fall within the realm of "specified tax" and not those construed as declaratory / clarificatory by judiciary on an interpretation of language of a particular amendment. Import of the expression "pending" is already expounded hereinbefore and will apply *mutatis mutandis*.


CA Himanshu Parekh & CA Nikhil Lund

# Equalisation Levy

The Finance Act, 2016 has introduced an Equalisation Levy ('EL') [popularly known as India's 'Google tax'] at the rate of six per cent of consideration payable for specified services provided by non-residents. The EL provisions are applicable with effect from 1 June, 2016.

EL is applicable on specified services provided by a non-resident to a:

- Person resident in India and carrying on business or profession; or
- Non-resident having a Permanent Establishment ('PE') in India.

However, the provisions of EL are not applicable if:

- The non-resident providing the specified service has a PE in India and the specified services are effectively connected with such a PE;
- The aggregate amount of consideration received / receivable from each payer in a year does not exceed ` 100,000; or
- The payment is not for the purpose of carrying out business or profession in India.

The term *'specified services'* has been defined to include the following:

- Online advertisement;
- Provision for digital advertising space; or
- Any facility or service for the purpose of online advertisement; and
- Any other service as may be notified by the Central Government in this behalf.

Before we discuss the impact of the newly introduced EL, it would be worthwhile to understand the rationale for its introduction.

## Why Equalisation Levy?

***Growth of digital economy***

Digital economy refers to an economy that is based on digital computing technologies. The advent of technology has led to a significant growth in digital economy and e-commerce platforms – buying a product, availing a service or undertaking business transactions is simply a click away. The Organization of Economic Co-operation and Development (OECD) in Action Plan 1 on 'Addressing the Tax Challenges of the Digital Economy' of its report on Base Erosion and Profit Shifting ('BEPS')[1] has aptly stated that

1 On 5 October 2015, the OECD issued a final package of reports in connection with its Action Plan to address BEPS, as well as a plan for follow-up work and a timetable for implementation. The OECD's BEPS Action Plan, which was launched in July of 2013, and endorsed by the G20, includes 15 key areas for identifying and curbing aggressive tax planning and practices, and modernizing the international tax system.

'digital economy is increasingly becoming the economy itself'.

***Tax issues surrounding digital economy***

The digital economy has led to tax challenges, not just in India but across the world. The typical tax issues relating to e-commerce/ digital transactions include characterisation of payments (either as 'royalty' or 'fees for technical services' (FTS)) and establishing a nexus or link between a taxable transaction, activity and a taxing jurisdiction, the difficulty of locating the transaction, activity and identifying the taxpayer for income tax purposes[2]. The present international taxation rules envisage cross-border taxation of business income in the country of source only if income is earned through a PE in the source State. Most of the multinational companies in the digital economy sector are able to conduct their business through the internet, thereby eliminating the need for setting up a PE in the market country and thereby avoiding tax therein.

In India, the taxability of e-commerce transactions has been dealt by the Mumbai and Kolkata Benches of the Income Tax Appellate Tribunal ('ITAT') in the context of taxability on sale of advertising space on a website[3]. The ITAT, ruling in favour of the assessee concluded that the payments made by Indian entities to non-resident website companies (such as Google, Yahoo, etc.) are not in the nature of royalty or FTS and in the absence of a PE of the non-resident entity in India, the payments were not taxable in India.

It may be worthwhile to note some of the observations of the Kolkata Tribunal in the case of *ITO vs. Right Florists Pvt. Ltd.* wherein the Tribunal while concluding that a foreign search engine (like Google) could not constitute a PE in India through its website, observed as under:

- In traditional commerce, physical presence was required in the source country. However, a search engine's presence in a location, other than the location of its effective place of management, is only on the internet or by way of a website, which is not a form of physical presence.
- Conventional PE tests fail in the virtual world even though a reasonable level of commercial activity is carried on by the foreign enterprise in the source country.
- In the context of tax treaties entered into by India, a search engine cannot be treated as a PE unless its web servers are also located in the same jurisdiction.
- The Government of India while expressing its reservations on the OECD view on constitution of a PE by a website has merely stated that a website may constitute a PE in certain circumstances but has not specified these circumstances. It is difficult to fathom the underlying principle embedded in this reservation and hence it cannot have a practical impact on this aspect.

The above observations of the Kolkata Tribunal clearly bring out the anomalies in the present tax system in taxing income earned by foreign digital enterprises from India.

***Need to tax digital transactions***

Recognizing the gravity of the menace and waking up to the growing tax avoidance structures built as a result of the flexibilities provided by digital economy, the OECD in its report on BEPS addressed the issue in its very first Action Plan – 'Addressing the Tax Challenges of the Digital Economy'. It identified structures set up to eliminate or reduce tax in market country by avoiding a taxable presence

2 As explained in the Memorandum to the Finance Bill, 2016

3 Yahoo India (P) Ltd. vs. DCIT (2011) 140 TTJ 195 (Mumbai ITAT), Pinstorm Technologies (P) Ltd. vs. ITO (2013) 154 TTJ 173 (Mumbai ITAT), ITO vs. Rights Florists (P) Ltd. (2013) 143 ITD 445 (Kolkata ITAT)

i.e. PE therein. The TFDE[4] analysed the following three options to address the tax challenges of the digital economy:

1. A new nexus in the form of significant economic presence;
2. A withholding tax on certain type of digital transactions; and
3. Equalization Levy.

None of the above options were recommended by OECD in its final BEPS report (under Action Plan 1) as it required further work and substantial changes to key international tax standards. However, countries were not precluded from introducing any of the three options in their domestic tax laws, provided their existing treaty obligations and international legal commitments are respected. The final package of Reports / Action Plans was released by OECD on 5th October, 2015.

***Indian Committee Report***

The Central Board of Direct Taxes set up a Committee on Taxation of e-Commerce ('Committee') to evaluate a proposal for Equalisation Levy on Specified Transactions. The Committee after examining the three options analysed in OECD's BEPS report noted that the first two options i.e., a new nexus in the form of significant economic presence and a withholding tax on certain type of digital transactions would require changes in a number of tax treaties entered into by India, whereas EL provides a simpler option which can be adopted under domestic laws without requiring amendments to the tax treaties. The Committee presented its report on 3rd February, 2016 recommending introduction of EL on a list of thirteen specified services, including online marketing and advertisements, cloud computing, website designing hosting and maintenance, digital space, digital platforms for sale of goods and services and online use or download of software and applications.

***Introduction of Equalisation Levy***

Taking into account the recommendations of the Committee, the Hon'ble Finance Minister, *vide* Finance Bill 2016 introduced 'Equalisation Levy' as a measure to tax income accruing to foreign e-commerce companies from India.

## Impact of Equalisation Levy

***Scope of transactions covered under the third limb of the definition of 'specified services'***

An interesting aspect which could have a far reaching impact is the third limb of the definition of 'specified services' which includes payments made towards 'any facility or service for the purpose of online advertisement'. A wider and liberal interpretation of the phrase 'for the purpose of online advertisement' could lead to all direct and indirect payments falling within the definition of 'specified services' and accordingly being subject to EL. This could include payments made to non-residents towards services for creation / production of advertisements, payments to artists who would perform in online advertisements, etc. In support of this view, one may rely on the provisions of Section 37 of the Income-tax Act, 1961 ('Act'), wherein Courts have widely construed the expression 'expenditure incurred for the purpose of business or provision' so as to include even expenses which are incidental to the business.

However, given the background and context in which EL has been introduced in the Finance Act (which is to tax digital transactions), in our view, the applicability of EL should be restricted to payments which are directly related to placing of online advertisements or wherein the proximate purpose of making the payment

4 The Task Force on the Digital Economy (TFDE), a subsidiary body of the Committee on Fiscal Affairs (CFA) in which non-OECD G20 countries participate as Associates on an equal footing with OECD countries, was established in September 2013 to develop a report identifying issues raised by the digital economy and detailed options to address them.

is online advertisement. This view finds support from a CBDT Circular[5] issued under the Fringe Benefit Tax ('FBT') regime wherein the CBDT has interpreted the term 'purpose' to mean the proximate purpose and not the distant purpose.

***Impact on consumers and small enterprises***

The impact of EL on the consumers is limited as it is applicable only with respect to B2B transactions – B2C transactions are outside the purview of EL. Further, the provisions also provide for an exemption threshold of ` 1 lakh per payer (for all transactions in aggregate), thus eliminating the need for small Indian enterprises with digital ad spends of less than ` 1 lakh, to comply with EL provisions.

***Collection of EL made certain***

EL has been inserted through a separate chapter in the Finance Act (Chapter VIII) i.e. it does not form part of the Income-tax Act, 1961. This has been done so as to exclude it from the purview of the beneficial provisions of the tax treaties (which would have otherwise made its introduction redundant). Thus, foreign digital enterprises will not be entitled to claim relief under the tax treaties and resort to the favourable judicial precedents (discussed above).

Further, considering the practical difficulty in tracing non-resident digital companies, the obligation to deduct and deposit EL has been cast on the Indian payer. In order to ensure compliance of EL, an amendment to Section 40(a) of the Act has also been made which disallows expenses incurred towards specified services in case of failure of the assessee to deduct and deposit EL to the credit of the Government treasury.

***Requirement to gross up payments***

The EL provisions require the payer to deduct EL from the consideration payable to the non–resident for providing specified services and deposit the EL into the Government treasury within specified time. The provisions also require the payer to deposit EL, even though it is not deducted from payments made to the non-residents. Thus, where a non-resident does not agree for deduction of EL i.e. the arrangement is a net of EL arrangement, a question arises whether the Indian payer is required to gross up the consideration for the purpose of depositing EL?. One could argue that in the absence of a provision corresponding to Section 195A of the Act (which requires grossing up of TDS in net of tax contracts), there is no need for grossing up of EL. For example on an invoice of ` 100 raised by the non-resident, the Indian payer could remit ` 100 to the non-resident and deposit ` 6 to the Government treasury.

An argument against the above view would be that grossing up is required even in the absence of an enabling provision. The CBDT *vide* Circular No. 155 [F.No. 484/31/74-FTD], dated 21-12-1974 and Circular No. 370 [F.No. 391/3/78-FTD], dated 3-10-1983 had clarified the manner of computing the grossed up amount for computing the tax to be deducted under Section 195 of the Act, in a net of tax contract.

Further, it would also be pertinent to note the penalty provisions contained in Section 171 of the Finance Act, 2016 which provide for a levy of penalty for failure to deduct or pay EL. A plain reading of Section 171 seems to suggest that a penalty (of 100% of the EL amount) could be levied in situations wherein EL is not deducted from the payments made to a non-resident. This would imply that where the Indian payer bears the burden of EL and deposits it to the credit of the Government treasury, it could still be subject to a penalty of the EL amount (` 6 in our example) for non-deduction of the EL from the payment to the non-resident.

In order to mitigate the risk of penalty, one may consider grossing up the consideration for the purpose of computing the EL. This would mean

5 Circular No. 8/2005 dated 29-8-2005

that EL has been impliedly deducted from the payments made to the non-resident. Continuing the example mentioned above, the Indian payer may gross up the consideration amount to ` 106.38, deduct EL of ` 6.38 from it and deposit it into the Government treasury.

***Additional compliances for Indian payers***

As regards Indian payers, it is not only the deduction and payment obligation which it is required to be fulfilled but they also need to undertake an annual filing reporting for all transactions which are subject to EL. While the EL return (prescribed form – Form No. 1) seems to be a fairly simple form, it could bring with it an entire set of compliance proceedings in the form of intimations, rectification applications, penalty proceedings, etc. These compliances will only result in an additional burden on the Indian payers who are currently complying with several periodic filings, assessments, litigations, for various forms of taxes such as corporate tax, TDS, service tax, VAT, etc.

***Impact on non-residents – availability of credit of EL in Home Country***

The non-resident service provider is not required to undertake any compliances (including filing of corporate tax return) with respect to EL in India. This is due to the insertion of Section 10(50) in the Act which exempts income in the hands of the non-resident, which is chargeable to EL.

The only hiccup for the non-resident service provider is to claim a credit of the EL deducted in India (relevant in situations where the non-resident agrees to bear the deduction of EL). It is pertinent to note that EL is not in the nature of income tax (i.e. it is specifically exempt from the purview of taxation of income under Section 10(50) of the Act). Having said that, it may be noted that Article 2(4) of most of the tax treaties with India provides that the Convention shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Convention. However, this requires the competent authorities of both countries to acknowledge EL as a form of income-tax and make an amendment to the existing tax treaty. Given that EL is levied under the Finance Act 2016 and not under the Income-tax Act, it is highly debatable whether it can be said to be identical or substantially similar to income tax. Further, in the absence of issuance of a certificate for EL (similar to a withholding tax certificate), it may be practically very difficult for the foreign enterprise to claim a credit of EL in its Home Country, though the same may result in double taxation of the same income in the Country of Source (by way of EL) as well as in the Country of Residence (by way of corporation tax).

## Conclusion

EL is a pious effort on the part of the Indian Government which seems to be influenced by the discussions under Action Plan 1 of the OECD BEPS project report.

Experience in some of the other countries shows that tax on digital transactions has been introduced as GST, consumption tax, or VAT. From an Indian standpoint, online advertisement transactions are currently subject to service tax at fifteen per cent under the reverse charge mechanism.

Thus, in effect EL (being levied in addition to the prevailing service tax) would result in an increase in the cost of doing business, either for the Indian advertiser or for the non-resident service provider (depending whether the arrangement is a net of EL arrangement or not).

CA Ganesh Rajgopalan

# Procedural Aspect of Equalisation Levy

## 1. Introduction

Finance Act, 2016 (FA, 2016) contains Chapter VIII which provide for an equalisation levy of 6% to be deducted from amounts paid to non-residents as consideration for specified services. The provisions relating to the equalisation levy have come into effect from 1st June, 2006. The CBDT has also notified the Equalisation Levy Rules, 2016, which lay down the procedural framework for compliances to be undertaken and procedures to be followed. These rules would also be effective from 1st June, 2016.

## 2. Charging provisions

An equalisation levy is chargeable at the rate of six per cent of the amount of consideration for any specified service received or receivable by a non-resident from a person resident in India or from a non-resident having a permanent establishment in India. "Specified service" is defined to mean online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement and includes any other service as may be notified by the Central Government.

The equalisation levy shall not be charged where –

- The non-resident providing the specified services has a permanent establishment in India; or
- When the aggregate consideration received by the non-resident service provider does not exceed rupees one lakh during the year; or
- Where the payment is made by a person resident in India or a permanent establishment in India for purposes other than business or profession.

## 3. Collection and recovery

The obligation for collection of equalisation levy from payments to non-residents for specified services is imposed upon the payer being every person who is a resident and carries on business or profession or a non-resident having a permanent establishment in India. The threshold for deducting the levy is the aggregate amount of consideration for the specified services exceeding one lakh rupees [Section 166 of FA, 2016]. It shall apply to consideration received after the 1st June, 2016 being the date on which the chapter is notified.

The equalisation levy deducted during any calendar month shall be paid by the assessee to the credit of the Central Government by

the seventh day of the following month by remitting it into the Reserve Bank of India or in any branch of the State Bank of India or any authorised bank accompanied by an equalisation levy challan [Challan No. ITNS 285] [Rule 4 of EL Rules read with section 166(2), FA 2016]. The challan specifies Tax Code as 0045 – Other Taxes and Duties on Commodities and Services.

As per rule 3 of the EL Rules, the levy, interest, refund due and the consideration paid for the specified service shall be rounded off to the nearest multiple of ten.

The provisions of the Income-tax Act with respect to collection and recovery of tax contained in Chapter XVII-D are made applicable to the equalisation levy.

## 4. Furnishing of Annual Statement

An annual statement is required to be filed by every assessee on or before 30th June of the immediately following financial year containing prescribed particulars in respect of all specified services during such financial year. The statement shall be in Form No. 1 to be delivered to the Assessing Officer or to any other authority or agency authorised by the Board in this behalf. The statement may be furnished by the assessee either electronically through digital signature or electronically through electronic verification code (Rule 5 of EL Rules).

From a literal reading of the provisions, it appears that there is no exemption from filing the required statement even for assessees carrying on business or profession who do not have any payments towards specified services during a financial year and a NIL statement may be required to be filed. This may be unintended.

Where an assessee fails to furnish the statement within the prescribed time, he may furnish a statement any time before the expiry of two years from the end of the financial year in which the specified services were provided. It is also possible for an assessee to file a revised statement where the assessee notices any omission or wrong particulars in his original statement [section 167(2) FA, 2016].

Where an assessee fails to furnish the statement, the Assessing Officer may serve a notice upon him requiring him to furnish the statement within thirty days of the service of the notice [Rule 6, EL Rules read with section 167(3) FA 2016]. There is no time limit prescribed for the Assessing Officer to issue such a notice.

## 5. Processing of statement

Section 168 of the Finance Act provides for the processing of the annual statement filed by the assessee. A statement filed by the assessee shall be processed in the following manner-

- Equalisation levy may be computed after adjusting for any arithmetical error;
- Interest, if any, shall be computed on the basis of sum deductible;
- Sum payable or refund due to the assessee shall be determined after adjusting for the levy paid by the assessee;
- An intimation shall be prepared and sent to the assessee specifying the amount of demand or refund;
- Refund, if any, due to the assessee shall be granted to him.

No intimation shall be sent after the expiry of one year from the end of the financial year in

which the statement is furnished. The notice of demand shall be served upon the assessee by the Assessing Officer in Form No. 2. Where any sum is determined payable under section 168(1), the intimation issued shall be deemed to be a notice of demand [Rule 7, EL Rules].

The Chapter VIII does not have a provision for granting interest on refund due to the assessee or for adjustment of refund due for any year against demand outstanding pertaining to any other year.

The Assessing Officer may amend an intimation issued under section 168 in order to rectify any mistake apparent from the record within one year from the end of the financial year in which the intimation sought to be amended was issued. The Assessing Officer can rectify such mistake either *suo motu* or on any mistake being brought to his notice by the assessee.

Where on an amendment to any intimation which has the effect of increasing the liability of the assessee or reducing a refund, a notice is required to be served to the assessee and the assessee should be given a reasonable opportunity of being heard [Section 169(2)]. Where such an amendment to the intimation results in enhancing the sum payable by the assessee or reducing a refund already made, the Assessing Officer shall make an order specifying the sum payable [Section 169(3)].

## 6. Interest on delayed payment

Section 170 provides for interest on failure to credit the equalisation levy to the account of the Central Government within the stipulated period. Such delay shall attract simple interest at the rate of one per cent of such levy for every month or part of a month by which such crediting of the tax or any part thereof is delayed. Such failure to credit equalisation levy to the credit of Central Government which attracts interest under this section includes instances where the assessee has deducted the levy but has not paid it to the Government as well as instances where he has failed to deduct the levy. It is not enough for the levy to be paid but the levy should be credited to the account of the Central Government.

## 7. Penalties

### (a) For failure to deduct and pay equalisation levy

Provisions relating to penalty for failure to deduct and pay the levy are contained in section 171 of the FA, 2016. Where an assessee fails to deduct equalisation levy, he shall, in addition to paying the levy as required under section 166(3) and any interest under section 170, be liable to a penalty equal to the amount of the levy that he failed to deduct.

Where the assessee having deducted the equalisation levy, fails to pay such levy to the credit of the Central Government, he shall be liable, in addition to any interest under section 170, to a penalty for an amount of rupees one thousand every day during which the default continues. However, the penalty shall not exceed the amount of equalisation levy payable.

When the assessee fails to deduct the amount of levy but pays the levy as required in 166(3) of FA 2016, the assessee could still be liable to penalty as he has failed to deduct the levy. This interpretation is from a literal reading of the provision, and may be unintended.

### (b) For failure to furnish annual statement

Failure to furnish statement within the time prescribed under sub-sections (1) and (3) of section 167 shall attract a penalty of rupees one hundred per day for the period during which the default continues [section 172

FA, 2016]. No penalty shall be imposable if the assessee proves to the satisfaction of the Assessing Officer that there was reasonable cause for such failure [Section 173 FA, 2016].

## 8. Appeals

### (a) To Commissioner of Income Tax-Appeals

An assessee aggrieved by an order of penalty under section 171 of the FA, 2016 shall appeal to the Commissioner of Income Tax (Appeals) within a period of thirty days of the receipt of the order in Form No. 3 either electronically under digital signature or through electronic verification code accompanied by a fee of one thousand rupees [Rule 8 EL Rules read with section 174].

However, where the Assessing Officer determines any sum payable as equalisation levy and consequently imposes penalty, the assessee can go in appeal only against the imposition of the penalty. There appears to be no provision for appealing against the determination of the levy itself.

The provisions contained in sections 249 to 251 in the Income-tax Act relating to the procedure to be followed in appeal as well as the powers of the CIT (Appeals) apply to an appeal to CIT (Appeals) in this Chapter.

### (b) Appeal to Appellate Tribunal (Section 175)

Both the assessee and the Assessing Officer who are aggrieved by an order of the Commissioner of Income Tax (Appeals) can file an appeal before the Appellate Tribunal within sixty days from the date on which the order of the Commissioner (Appeals) is received. The appeal to the Tribunal is to be filed in Form No. 4 accompanied by a fee of one thousand rupees [Rule 9, EL Rules].

The provisions contained in sections 253 to 255 of the Income-tax Act relating to the procedures to be followed and orders to be passed by the Appellate Tribunal shall apply to such an appeal.

## 9. Prosecution for false statement

If a person makes a false statement in any verification under this Chapter or any rule made thereunder, or delivers an account or statement, which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be punishable with imprisonment for a term which may extend to three years with fine. The offence shall be deemed to be non-cognizable [Section 176, FA 2016]. Prosecution can be instituted for any offence only with the previous sanction of the Chief Commissioner of Income Tax [Section 177 FA, 2016].

"Learn everything that is good from others, but bring it in, and in your own way absorb it; do not become others. Do not be dragged away out of this Indian life; do not for a moment think that it would be better for India if all the Indians dressed, ate, and behaved like another race."

*— Swami Vivekananda*

CA Ganesh Rajgopalan

# Equalisation Levy – Applicability of Non-Discrimination Rules in International Agreements

Chapter VIII of the Finance Act, 2016 introduces equalisation levy on consideration for specified services to be paid to non-residents. The levy was introduced after the CBDT Committee issued a Report in February, 2016 proposing the levy.[1] This levy is imposed only on payment to non-residents intuitively leads one to question whether or not the levy is discriminatory under the rules contained in international agreements. This article examines the non-discrimination provisions in international treaties and agreements.

## 1. Non-discrimination rules in tax treaties

### 1.1 Background

Article 24 of the OECD and UN Model Convention contains a set of non-discrimination rules. The Article provides rules against nationality discrimination, discrimination against stateless persons, discrimination in taxation of permanent establishments, discrimination in deduction for payments to non-residents and discrimination in respect of enterprises owned by non-residents. These rules apply to taxes of every kind whether or not those taxes are covered by the Convention.

### 1.2 Whether Treaty could impinge on a Finance Act

Equalisation levy is imposed under the provisions of the Finance Act and not the Income-tax Act, 1961 (ITA). Whether or not a Treaty non-discrimination rules can affect the charging of equalisation levy is discussed in this section.

Tax Treaties are entered into by the Central Government pursuant to the powers granted to it under section 90(1) of the ITA. Section 90(2) provides that where there exists a tax treaty, the provisions of the ITA shall apply to the extent they are more beneficial to the taxpayer. The charge of income-tax in respect of a foreign company at a rate higher than the rate at which a domestic company is chargeable was challenged under the non-discrimination rule. In *Chohung Bank*,[2] the Tribunal held that the rates of taxes, which are provided by the annual Finance Acts, are beyond the provisions of the ITA and hence they are not subjected to the provisions of the tax treaties. The Tribunal further held that a tax treaty gets preference only with respect to provisions of the ITA and unless so specifically provided in a particular tax treaty, the rate of tax which is prescribed in an Annual Finance Act cannot give way to the treaty. Similarly, in *Delmas France*,[3] on similar facts, the Mumbai

1. Report of CBDT Committee on Taxation of E-Commerce, February, 2016 (eCommerce Committee Report)
2. Chohung Bank vs. Deputy Director of Income-tax (2006) 6 SOT 0144 (Mum)
3. Delmas France vs Asstt Director of Income-tax (2015) 67 SOT 0336 (Mumbai) (URO)

Tribunal held that since no specific tax rate was provided in Indo-French DTAA, there was no conflict between the domestic law and the DTAA.

Finance Act, 2016 contains the provisions for imposition of equalisation levy. Currently, there is a debate about whether or not the equalisation levy is a 'tax covered' in a tax treaty. In this context, it may be useful to refer to paragraph 6 of Article 24 of the OECD Model which states that the provisions of this Article shall, notwithstanding the provisions of Article 2, apply to taxes of every kind and description. Some of the India's tax treaties contain this paragraph while several specifically restrict the application of the non-discrimination article to the taxes covered under the respective treaties or the paragraph is absent.

Interestingly, in Chohung Bank, the Tribunal came to the conclusion that a treaty cannot extend to the Finance Act which specifies the rates of tax though the India-Korea Treaty extends the non-discrimination article to taxes of every description.[4] Similar conclusion in the case of Delmas France is understandable especially since the applicable Indo-French Treaty does not have such a provision.[5]

If the equalisation levy is considered to fall within the 'taxes covered' under a treaty, in the absence of a permanent establishment of the non-resident in India, the levy would not be imposable. Since then the equalisation levy is a non-starter, there would be no occasion to apply the non-discrimination article. On the other hand, if the levy is not a tax covered under the relevant treaty, in treaties that are similar to the OECD Model, the non-discrimination article applies to the levy. Two non-discrimination rules that could be relevant are discussed below.

### *1.2.1 Nationality non-discrimination*

Article 24(1) mandates that there should be no discrimination by a Contracting State against the national of the other Contracting State. The primary requirement under this paragraph is that the circumstances of the two nationals being compared should be 'in the same circumstances'. The OECD added the words 'in particular with respect to residence' which clarifies that the residence of the taxpayer is one of the factors in determining whether he and the person with whom he is compared are placed in same circumstances. The discrimination has to be due to nationality and not due to any other aspect including residence for this rule to apply. Considering that equalisation levy is chargeable not because the person is a national of the other State but because he is a non-resident, this rule arguably has no application.

### *1.2.2 Deduction non-discrimination*

*(a) Introductory remarks*

Para 4 of the OECD Model contains the deduction non-discrimination rule. Under this rule, any deduction to a resident of a Contracting State for payment made to resident of the other Contracting State should be available under the same conditions as a deduction for payment made to a resident of that State. In effect, this rule aims to prevent the indirect discrimination which would arise if the sums were not deductible in case of payments to non-residents while such deduction is available for payments to residents. This rule is designed for parity in eligibility for deduction between payments made to the residents and non-residents. It provides for neutrality in availability for tax deductions for payments made to the residents of treaty partner countries vis-à-vis payments made by an enterprise to local residents under the same conditions.[6]

*(b) Income-tax rulings*

In *Herbalife International*,[7] the Delhi High Court was examining whether disallowance for non-

4. Article 25(5) of India – Korea DTAA reads as follows: "The provisions of this Article shall, notwithstanding the provisions of Article 2, apply to taxes of every kind and description. It appears strange that the Tribunal came to the conclusion that Article 25 of the Treaty cannot override the Finance Act.
5. Article 26, India-France DTAA
6. Dy Commissioner of Income-tax vs. Gupta Overseas (2014)160 TTJ 0257 (Agra)
7. Commissioner of Income-tax vs. Herbalife International India P Ltd (2016) 96 CCH 0007 Del HC

deduction of tax at source under section 40(a)(i) of the ITA was discriminatory. This was the position before introduction of similar disallowance under section 40(a)(ia) for non-deduction of tax at source on payments to residents. The Court held that Article 26(3) of the India - US DTAA calls for an enquiry into whether the above condition imposed as far as the payment made to the non-resident is any different as far as allowability of such payment as a deduction when it is made to a resident. According to the High Court, it is not so much about the requirement of deduction of TDS per se but the consequence of the failure to make such deduction that is relevant. The Court explained the deduction non-discrimination rule as under:

> "The expression 'under the same conditions' in Article 26(3) of the DTAA clarifies the nature of the receipt and conditions of its deductibility. It is relatable not merely to the compliance requirement of deduction of TDS. The lack of parity in the allowing of the payment as deduction is what brings about the discrimination."

*(c) Applicability to equalisation levy*

The question to be asked is whether or not a similar disallowance due to non-deduction of equalisation levy contained in section 40(ib) of the ITA falls foul of the deduction non-discrimination rule contained in treaties. This question arises since there is no disallowance requirement for non-deduction of the levy for payments to residents. Three arguments and possible response is discussed below:

**First argument**

One defence against application of the deduction non-discrimination rule could be that since there is no requirement for equalisation levy on payments to residents the deduction for payments to non-residents is not in the same conditions for payments to residents.

However, the parity in treatment is not for the deduction for equalisation levy from payments to both non-residents and residents but the consequence of the failure to make such a deduction. Absence of a disallowance for non-deduction of the levy from payments made to residents since there is no requirement to deduct the levy in such cases goes to the root of lack of parity that the deduction non-discrimination rule aims to prevent.

**Second argument**

Another argument against the application of the deduction non-discrimination rule could be that there is a TDS requirement for payments to residents of any sum towards advertisement contracts while there is no such deduction requirement for payments to non-residents. Hence, the equalisation levy (as its name suggests) is intended to bring the non-residents on par with residents.

However, this argument overlooks the provisions of section 195 which provides for deduction of tax subject to the income being chargeable to tax in India. A payment to a non-resident towards advertising services attracts TDS as does a payment to residents. The requirement of chargeability to tax in India is not a concession given to the non-resident that the equalisation levy aims to correct. For instance, where the advertisement income of the non-resident of a non-treaty country is received in India, it would be subject to TDS. The difference in the rate of withholding is not discrimination as has been discussed in section above.

**Third argument**

The third argument against application of non-discrimination Article is that equalisation levy is not a tax covered under the treaties. However, the point to note is the deduction non-discrimination rule seeks parity in treatment for deductions in respect of payments to a residents and non-residents. The 'deduction' refers to deduction from gross income for computing income-tax. Thus, denying a deduction while in computing income-tax due to failure to deduct a levy which is not a 'tax covered' would still contravene the deduction non-discrimination rule.

### 1.3 Conclusion

The non-discrimination rules in treaties do not help defend the imposition of equalisation levy

only on the non-residents for the reason that a treatment for non-residents which is different from that to residents is per se not prohibited. In fact, the nationality non-discrimination rule expressly recognises this fact when it holds residents and non-residents are 'not in the same circumstances'.

However, while determining the taxable profits of a resident payer, payments made to non-residents are not deductible 'under the same conditions' as the payments made to residents which results in lack of parity that the deduction non-discrimination rule aims to prevent.

## 2. Non-discrimination rules in trade laws

### 2.1 Background

The OECD / G20 BEPS Report on Action Plan 1 – Digital Economy considered equalisation levy as one of the options to battle stateless income, i.e. income which does not suffer tax in any country. The Report states that an equalisation levy could be considered as an alternative way to address the direct tax challenges of the digital economy and refers to similar levies in the insurance sector which have been used by some countries in order to ensure equal treatment of foreign and domestic suppliers.[8] However, the Report stopped short of recommending the levy since a levy that applied only to non-residents would be likely to raise substantial questions with respect to trade agreements. The obvious reference was to the non-discrimination provisions in these agreements.

This section looks at the non-discrimination provisions in the General Agreement on Trade in Services (GATS). As the equalisation levy is in respect of specified services and not in respect of goods, the non-discrimination provisions in the General Agreement on Tariff and Trade (GATT) may probably not apply extensively and is not discussed.

### 2.2 Non-discrimination rules in GATS

#### *2.2.1 Most favoured nation (MFN) treatment*

MFN treatment and National Treatment are two rules relating to non-discrimination in the GATS. MFN treatment requires that with respect to any measure[9] affecting trade in services, each Member[10] shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country. In the context of equalisation levy, there is no discrimination based on nationality and MFN treatment is not further discussed here.

#### *2.2.2 National Treatment*

*(a) Provisions explained*

Article XVII of GATS provides that each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers. Unlike the MFN treatment obligation, National Treatment is not a general obligation but sector-specific commitments which every WTO Member undertakes by inscribing them in its Schedule. The Schedule is a legal document which is annexed to the GATS and has equal force.

The commitments to be inscribed in the Schedule are both in respect to market access and national treatment and are given sector-wise to enable consistency and aid comparison. These sectoral entries are referenced to the United Nations Central Product Classification system codes. These CPC Codes given against each service sector or sub-sector entered in the Schedule aid in easy identification and detailed explanation of the services activities covered by the sector concerned. It is for a Member to choose service sectors / sub-sectors of its choice for including in its Schedule. Further, in respect of the sectors inscribed in the

8. Addressing the Tax Challenges of the Digital Economy, OECD / G20 (Digital Economy Report), para 302
9. GATS Art. XXVIII:(a) defines a measure to mean 'any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form'.
10. Refers to a Member-country which is a signatory to the WTO Agreements.

Schedule, the commitments are to be given for all the four modes of supply as defined in Article I:2 of the GATS.[11]

Commitments are of three kinds:

- Where a Member intends not to limit its commitment in a sector and mode of supply, the entry in the Schedule reads NONE against that sector and mode of supply.
- Where the member intends to remain free to introduce or maintain measures inconsistent with national treatment or market access, the term "UNBOUND" is entered against a given sector and mode of supply.
- A Member could also limit the extent to which it grants market access or national treatment for the services listed in its Schedule, by inscribing the "conditions and qualifications" mentioned in Article XVII either under "Limitations on market access" or under "Limitations on national treatment.

*(b) Interpretation of national treatment obligations*

It is a three-step process to interpret the National Treatment obligations of a Member. These are to establish:

– That the Member has assumed National Treatment commitment in the relevant sector(s) or mode(s) of supply, set out in its Schedule;

– That the measure in question "affects the supply of services" in the relevant sector(s) and mode(s); and

– That the measure does not accord to the services / service suppliers of any other Member treatment no less favourable than that accorded by the Member to its own like services and service suppliers.

A measure does not accord a 'treatment no less favourable' when the 'design and operation of the measure create distortions which ***modify the conditions of competition*** to the detriment of services and service suppliers of other countries.[12] It can be appreciated that this "treatment no less favourable' in GATS is significantly broader in scope than the non-discrimination rules contained in double tax treaties which only prevent discrimination in specific situations.

*(c) Equalisation levy and National Treatment Obligations*

Imposition of equalisation levy is a 'measure' as defined in GATS. As the levy seeks to bring into its ambit specified services rendered from outside India, arguably, its imposition will affect the supply in services from outside India. Further, the levy will make the service suppliers from within India more competitive and thus modify the conditions of competition as they existed before the imposition of the levy to the detriment of the non-resident service suppliers.

The eCommerce Report of the CBDT Committee recommends thirteen services including online advertising services, online music, online movies, online games, online books, online software, online news, online maps and GPS systems for the imposition of the equalisation levy.[13] The Government, presumably to test the waters, chose to impose the levy only on advertising services i.e. services in respect of online advertisement and provision of digital advertising space. It is widely believed that the other services recommended by the eCommerce Committee could be added to the list of "specified services" in the future.

On a perusal of India's Schedule of commitments with respect to National Treatment, India has not given any commitment in respect of advertising services. In the absence of a specific commitment in

11. These four modes are 1) Cross-border supply, 2) Consumption abroad, 3) Commercial presence and 4) Presence of natural persons. For our purposes, Mode 1 and 2 are relevant as Mode 3 and 4 would most probably result in a permanent establishment and the equalisation levy may not be imposable.
12. Argentina – Measures relating to Trade in Goods and Services, Panel Report para 6.135
13. eCommerce Committee Report, para 193.

its Schedule to GATS, arguably, there is no hurdle in imposing an equalisation levy on advertising services and service suppliers of other Members which accords a less favourable treatment than that available to like services and services suppliers in India.

However, an examination of the other recommended services is illuminating. India has given full commitment without any limitation for enhanced telecommunication services (also referred to as value added services) for cross-border supply. These value-added services include "online information and/or data processing services" under the CPC Code 843. These services include services like provision of online information by content providers and other online content. Any expansion of the scope of "specified services" to other services connected with the digital economy could cover these services where India has committed to provide national treatment without limitation. An equalisation levy on such services arguably could violate India's national treatment obligations.

*(d) General exceptions*

Article XIV of GATS provides for general exceptions from general and specific commitments made by Members. Under these provisions it is permitted for a Member to impose a measure that is inconsistent with its national treatment obligations if the difference in treatment is aimed at ensuring equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members.[14] This exception however is subject to the requirement that such a measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services. Direct taxes are defined to include, inter alia, 'all taxes on total income'.[15]

In the context of the imposition of equalisation levy, if the 'specified services' are expanded to include services sectors where India has undertaken obligations for national treatment, applicability of general exceptions in Article XIV of GATS will have to be examined. More particularly, it has to be examined if equalisation levy is a 'direct tax', that is, a tax on income for the exception to apply. On the other hand, if the levy is a direct tax so that the exception applies, it would get covered under 'same or similar taxes' in treaties! Either way, it would be difficult to sustain the levy on such services.

### 2.3 Conclusion

Extending the equalisation levy to a large number of online services that form a significant component of the digital economy could be challenged in the WTO as a violation of India's national treatment commitments. The implications of the levy under the WTO agreements including GATS need to be taken into account before the scope of the levy is expanded to include other services recommended by the eCommerce Committee. A broader and deeper examination than that attempted here is required so that any law which seeks to tax non-residents is compliant with India's obligations under its trade agreements.

A potential solution to a probable violation of non-discrimination rules in trade agreements suggested in the Digital Economy Report is to ensure equal treatment of domestic and non-resident enterprises by imposing the levy on both domestic and foreign entities.[16] However, the Report is inconclusive on whether or not this would be complaint with the non-discrimination provisions under the trade laws.

14. Article XIV:(d), GATS
15. Article XXVIII:(o), GATS defines direct taxes to "comprise all taxes on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, and taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation".
16. Digital Economy Report para 306.


Sujit Ghosh & Kamal Sawhney, *Advocates*

# "Equalisation Levy" Under Chapter VIII of Finance Act, 2016

## 1. Jurisprudence in India relating taxation of income of non-residents from online advertisements

India has been one of the leading participants in the BEPS discussion. Following the recommendations under Action Plan 1, India has introduced an Equalisation Levy so as to tap the income accruing to foreign e-commerce companies in India. The Equalization Levy has been introduced requiring a person making payment for 'specified services' rendered by a non-resident, which does not have any permanent establishment in India, to withhold 6% of gross amount paid, as an Equalisation Levy. At present, the Equalisation Levy is applicable to consideration paid or payable in respect of 'online advertisement', 'any provision for digital advertising space' or 'any other facility or service for the purpose of online advertisement'. However, it must be noted that the Act provides the Government with powers to include any other service as a 'specified service' by notification in future.

Since Equalisation Levy has been levied under a separate chapter under the Finance Act of 2016 and not under the Income-tax Act, there would not be any credit for the Equalisation Levy deducted by the payer against tax liability in the country of residence of the non-resident.

This is not the first attempt to tax income by way of revenues from advertisements on websites/ online portals located outside the country. There have been a number of cases where Assessing Officers have sought to tax the said income as being fee for technical services or even royalty under the definitions available under the double tax avoidance agreements (DTAA) or under section 9 of the Income Tax Act, 1961("Act"). The stand taken in these assessment proceedings was that these payments fall within the ambit of fee for technical service or royalty, and the assessee making the payment should have deducted tax at source under section 195 of the Act. Since the assessee had failed to deduct the tax under section 195 these payments were liable to be disallowed as a deduction in computation of income under section 40(a)(i) of the Act. These orders have not been able to pass judicial scrutiny of the Courts and in various judgments the Courts have taken the view that these payments do not satisfy the definition of fee for technical service or royalty either under the Act or the treaty. In fact they have explicitly held these to be in the nature of the business income of the non-resident payee. It has been further held that in the absence of a permanent establishment (PE), such payments could not be taxed in India. The final word on this has yet to be said. The revenue has taken these matters in further appeal and the fate of these assessments would in all likelihood be

decided by the Hon'ble Apex Court. Therefore, the revenue has not in any manner given up its stand that these payments fall within the ambit of either fee for technical service or royalty. Assessing Officers continue to frame assessments treating these payments to be so covered.

1.1 In the case of *Yahoo India (P) Limited vs. DCIT dated June 24, 2011*[1], the assessee viz. Yahoo India had made payments for online advertisements to Yahoo Holdings (Hong Kong) Limited without withholding tax at source. The said payment was sought to be disallowed by the tax officer under section 40(a) of the Income-tax Act, 1961 (The Act). [section 40(a) of the Act provided that if any payment is made to a non-resident on which tax is not withheld, such payments are to be allowed as deductible expenses only in the year in which taxes are actually withheld at source]. The case of the tax officer was that the payment to the non-resident was in the nature of (a) business income & (b) royalty. The tribunal concluded that the payment was not in the nature of royalty but was actually business income of the non-resident and since the non-resident did not have any permanent establishment in India, the business income could not be taxed in India. Since the income from online advertisement was not taxable in India, there was no requirement to withhold tax at source on such payment. Accordingly, the Tribunal concluded that the disallowance under section 40(a) of the Act was not correct. In the case of *ITO vs. People Interactive (India)(P.) Limited dated February 29, 2012*[2], the non-resident provided dedicated web-hosting solution to the resident payer. The tax officer in this case too disallowed the payment under section 40(a) of the Act on the ground that the payment for server was in the nature of royalty as the payment was for use of equipment. The tribunal in the case too held that the payment was not in the nature of royalty as the resident payer had no control over the server. The income of the non-resident was business income and in absence of any permanent establishment in India, the business income was not taxable in India. In the case of *ITO vs. Right Florists (P) Limited dated April 12, 2013*[3], the Tribunal concluded that income from advertisement services provided by google was not taxable in India neither as royalty nor as fees for technical services. The income was business income and in absence of permanent establishment of the non-resident in India, the same was not taxable in India.

1.2 The key element that emerges from these decisions is that income from such online advertisement has been characterised as the business income of the non- resident entity. Under the current domestic tax provisions read with applicable Double Taxation Avoidance Agreements (DTAAs), business income can be taxed only when the non-resident has presence in India through which it earns business income. The salient point to be appreciated is that the character of the receipt in the hands of the non-resident assesse has already been determined by the courts. As per these decisions this is nothing but business income for these parties. Therefore, the new levy may be give any nomenclature, but **what it essentially brings to tax is the business income of these entities.**

## 2. Recommendation under Base Erosion and Profit Shifting Final Action 1

2.1 Action Plan 1 was aimed at addressing the challenges raised by Digital Economy and the BEPS issues in the Digital Economy. The Digital Economy presented some key features such as extreme mobility of users / intangibles / business functions / data portability / multi-sided business models / monopoly and volatility in business market. All these factors could escalate and aid in BEPS.

1. ITA 506 / Mum / 2008 for AY 2004-05
2. ITA 2180 / Mum / 2009 for AY 2005-06 (& also other Assessment years)
3. ITA 1336 / Kol / 2011 for AY 2005-06

2.2 The final report developed several options such as (a) significant economic presence nexus, where a non-resident has a significant economic presence in a tax jurisdiction evidenced by factors such as revenue from remote transactions, local domain names, localised websites, local currency payment options, number of active users in a tax jurisdiction, online contracting and data collection; (b) withholding taxes on digital income from goods or services ordered online. The tax could be final tax or as a back-up measure to enforce net-basis taxation; & (c) an Equalisation Levy (i.e. a tax to equalise the tax burden on remote and domestic suppliers of similar goods and services.

2.3 It recommended that either of the three measures could be imposed through domestic legislation and are not recommended as an international standard. However, the report stated that the countries may wish to impose these measures to address Digital Economy BEPS concerns that these countries believe are not adequately addressed as stop-gap measures until OECD's recommendations are fully implemented. At the same time a clear caveat was added to state that such measures would have to necessarily be in conformity with the international treaty obligations of the said country.

## 3. E-Commerce Committee Report suggesting the charge of Equalisation Levy

3.1 It was in the backdrop of the OECD deliberations that the Central Government constituted a high powered Committee to examine measures that could be adopted in India.

3.2 The Committee noted the positive aspects of Equalisation Levy to be recognised as one of the possible options that can be resorted to by countries for addressing the tax challenges arising from digital economy under their domestic laws. Equalisation Levy avoids complications related to determination of nexus, characterisation of payments and attribution of profits. Income tax and GAAR provisions would also not be applicable since it is not levy of income tax.

3.3 The Committee at para 130 of the Report has stated that the Equalisation Levy on the gross amounts of transactions or payments made for digital services appear to be in accordance with the entries at Serial Number 92C and 97 of the First List in the Seventh Schedule of the Constitution.

## 4. Memorandum giving reasons behind Equalisation Levy under Chapter VIII

4.1 The digital economy is growing significantly faster than the global economy as a whole. In the digital domain, business may be conducted without regard to national boundaries and may dissolve the link between income-producing activity and a specific location. Business in digital domain doesn't seem to occur in any physical location but instead takes place in the "cyberspace".

4.2 The typical direct tax issues relating to e-commerce are the difficulties of characterising the nature of payment and establishing a nexus or link between a taxable transaction, activity and a taxing jurisdiction, the difficulty of locating the transaction, activity and identifying the taxpayer for income tax purpose.

4.3 OECD has recommended to impose a final withholding tax on certain payments for digital goods or services provided by a foreign e-commerce provider or imposition of an Equalising Levy on consideration for certain digital transactions received by a non-resident from a resident or from a non-resident having a PE in the other contracting state.

4.4 Considering the potential of new digital economy, it is found essential to address the challenges in terms of taxation of such digital transactions. Therefore, it has been proposed to insert a new chapter titled "Equalization Levy" in the Finance Bill.

## 5. Some features on the chargeability of "Equalisation Levy" under Chapter VIII of FA 2016

5.1 Equalisation Levy is defined to mean the tax leviable on the consideration received or receivable for any "specified services" under the Chapter VIII.

5.2 "Specified Services" means online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement and includes any other service as may be notified by the Central Government.

5.3 Under the Charging section 162 of the said chapter, "On and from the Commencement of this Chapter, there shall be charged an Equalisation Levy of 6% of the amount of consideration for any specified service received or receivable by a person, being a non-resident from

(i) A person resident in India and carrying on business or profession; or

(ii) A non-resident having a PE in India

5.4 Any person who

(i) Fails to deduct the whole or any part of the Equalisation Levy as required under section 163 (i.e. levy on the specified services) or

(ii) Having deducted, fails to pay the levy to the credit of the Central Government shall pay

- In the case of (i) above, in *addition to the levy in accordance with the provisions of 163(3)* [cases where the assessee fails to deduct the levy] and interest as per section 167, ***a penalty*** equal to the amount of Equalisation Levy that he failed to deduct under 163(3);
- In case of (ii) above, in *addition to the levy in accordance with the provision of 163(2)* [cases where the assessee deducts equalisation levy but fails to deposit], and interest as per section 167, ***a penalty*** of one thousand rupees for every day for which the failure continues. However, such penalty shall not exceed the Equalisation Levy amount.

5.5 It has further been provided that an assessee aggrieved by an order imposing penalty under this Chapter may appeal the same before CIT(A) and the provisions of section 249 to 251 of the Income-tax Act shall apply.

## 6. Grounds for challenging Constitutional validity of the Equalisation Levy

**Power to levy taxes under List 1, List II & List III of Seventh Schedule**

6.1 The power to legislate on a subject has to flow from the Constitutional scheme. As per Article 246 the power to legislate on matters forming part of list I (the Union List) lies with the Central Government. The power to legislate on a matter which is the subject matter of list II (the State List) falls within the domain of the respective State Legislatures. Lastly, the Union and the State both have powers to legislate in respect of List III (the Concurrent List). The residuary power to legislate under the Indian Constitution has been vested with the Union Parliament under Article 248 read with Entry 97 of the Union List.

6.2 Entry 82 of the Union relates to "Taxes on income other than agricultural income". Entry 92C relates to "Taxes on Services" and Entry 97 pertains to "Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists".

**Power to levy taxes under Entry 97 of List I**

6.3 For legitimately exercising its power under entry 97 of List I, the Union of India has to ensure that the subject matter of tax does not form part of any of the entries in List II or List III, else such exercise of power would be beyond the legislative competence and would be ultra vires the Constitution.

6.4 Considering that none of the Entries in List 1 makes any mention of Equalisation Levy, it is fairly clear that the new impost is being levied by exercise of powers under Entry 97, List 1 of the Seventh Schedule of the Constitution. As already mentioned, para 130 of the Report of Committee on Taxation of e-Commerce mentions that "Equalisation Levy on gross amounts of transactions or payments made for digital services appears to be in accordance with entries at serial number 92C (taxes on services) and 97 (any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists).

6.5 Though Entry 92C was inserted to List I by Constitution (Eighty-Eight Amendment Act) 2003, the same has not yet been notified.

**Is the levy beyond the legislative competence of the Union?**

6.6 Entry 55 of List II (i.e. State List), exclusively confers power on the State Government to levy taxes on advisement (other than advertisements published in newspapers and advertisements broadcast by radio or television). This means that the State Government is the sole repository of power to levy tax on internet based advisement. It is a highly contentious issue whether the Equalisation Levy being a levy on internet based advertisement can at all be levied by the Union of India since the power to levy such tax vests with the States in List II. Therefore, if the levy is indeed nothing but a tax on advertisement, then the levy can be challenged on grounds of transgression by the Union on a power exclusively reserved for the State.

6.7 In cases, where there is such apparent conflict the Courts in India have adopted the aspect theory of taxation. This as expounded in various judicial decisions states that the tax on the same transaction may be justified if it is demonstrated that the two taxes are on different aspects of the same transaction (for example a tax on distinct aspects of service and sale). In the present case a distinct aspect which is being subjected to equalisation levy is not discernible. It is the same consideration being paid for hosting an online advertisement which is being subjected to Equalisation Levy.

6.8 The levy may also be viewed from Service tax perspective. Service tax is a tax on consideration charged for an activity viz., service. Equalisation Levy is also imposed on consideration received for specified activities. Therefore, it appears that the subject matter of both service tax and equalisation levy is the service. Under such a situation, even from a service tax point of view, the proposed levy fails the test of "single aspect – single tax-". In other words, while different aspects of the same transaction can be subject to different taxes (as per Supreme Court), the corollary would be that the same aspect of a given transaction cannot be subjected to different taxes. Therefore, even from a service tax point of view, the proposed levy should fail. In fact, to examine this issue further the transaction in question is nothing but consideration paid for hosting online advertisements. The attempt to tax this transaction either under the umbrella of service tax or in the garb of Equalisation Levy is constitutionally dubious. In effect the transaction being subjected to both taxes is one that falls squarely within the four corners of Entry 55 of List II. In light of this even the recent amendment under service tax to bring online advertisements within its fold is questionable.

6.9 Further, in order to ascertain the nature of levy, the pith and substance of the action has to be examined. By applying this test, it would appear that the pith and substance of the proposed levy is essentially to tax the income and if that be so, then the imposition stands violative of Entry 97, List 1 of the Seventh Schedule read with Entry 82 thereof. As already stated, the judiciary has characterised the nature of the payment for online advertisement (which is now being sought to be taxed under Equalisation Levy), as the business Income of the non-resident. If those decisions were to be relied upon, it would be clear that in the garb of

levying equalisation tax, attempt is being made to essentially levy tax on income.

6.10 In any case, the Union would have to demonstrate that other than the aspect of Income, and the aspect of Service, there exists a third aspect on which it intends to levy the proposed tax.

**Challenge of Levy on the basis of attempt to avoid Treaty obligation**

6.11 The proposed levy has been kept outside of the Income-tax Act. However, similar transactions entered by a person with a non-resident having PE in India would be subject to Income-tax and therefore, not subject to Equalisation Levy. Action Plan also suggests that the levy is only a temporary measure until OECD suggestions are fully implemented. It would go to show that DTAA provisions have been specifically sought to be not made applicable. Such an attempt can be questioned in view of treaty obligations that the Government has undertaken in exercise of powers under Article 253 of the Constitution, read with commitment under Article 51 of the Constitution to respect international treaties. Therefore coining a new levy outside the ambit of the Income-tax Act, is nothing sort of a colourable device to get over the treaty obligation of the Government, and hence impressible. It is essentially the income arising from hosting online advertisements which is ultimately brought to tax. Since such an attempt to do so under the Income-tax Act, had failed to pass muster with the Courts and the only recourse was to amend the treaty for which international consensus was absent, the income is being brought to tax by cosmetically keeping it outside the purview of the Income-tax Act

**Challenge of Levy in the absence of effective charging section**

6.12 There is no causal link between the levy and the taxable person as the provision of tax does not state that the "recipient of service" is the person liable to tax. Instead it merely says that the "recipient shall be obliged to deduct and has been referred loosely as an assessee." Levy of tax and deduction are two independent events. Unless the levy is imposed on a taxable person, obligation to deduct cannot be fastened on another which is neither the person that is earning the income/consideration nor rendering/performing the economic activity giving rise to the taxable event. The equalisation levy would add to the cost of the transaction which is currently @ 6%. The service tax on the transaction currently is 15%. There is no credit for the payment of Equalisation Levy. Going forward, there is a likelihood of increase in not only scope of services but also in the rate of Equalisation Levy. This makes the total tax prohibitive.

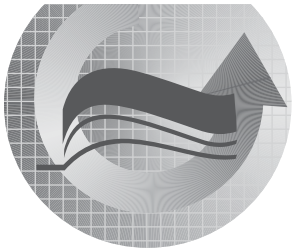
**Challenge of Levy in the absence of effective remedial recourse**

6.13 There is currently no provision to effectively appeal and challenge the levy itself on the ground that the services are not covered within the scope of "specified services". The appellate remedy is with respect to levy of penalty, which is usually not the case in any tax legislation. This itself would be an appropriate ground to assail the levy on grounds of arbitrariness.

## Conclusion

The imposition of Equalisation Levy under Chapter VIII appears to be an action taken in haste on the basis of recommendations made under Action Plan 1 without due consideration having been given to the Constitutional aspect of the levy. It is not clear whether the levy is a short term measure or is intended to be a long term one. The interest of business is likely to be adversely affected and more so if one were to expect the scope and rates being increased in future.

It is only a matter of time until someone challenges the Equalization Levy as being not a valid enactment.



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Ms. Dristi Balwant Jain

# Religion and Terrorism

It was a usual Monday morning, the only newness being that I was supposed to go to a new client place in Kalbadevi. Just as a kid, I am always fascinated by new surroundings. This being a commercial area; it is always in a state of hustle bustle. Walking slowly and carefully towards my destination, absorbing the surroundings, As an incorrigible reader, I have this habit of reading everything and anything I see around I saw this banner put outside a Masjid, this time was no different. The banner read “We are Muslims and we do not support ISIS in anyway”. I understand in the light of the terror attacks happening throughout the world, this was merely a statement by the Muslims on behalf of their community to disassociate themselves from the terror organizations and that they do not support the cause in any way. It could also be a possibility that it is to avoid any agitation and maintain peace.

Unfortunately, or maybe fortunately in this case I tend to over think for little things. As I walked towards my client place, there were a few nagging thoughts in my head which lingered throughout the day.

At the end of the day, I vented out and spoke to my mom regarding it, the unfairness of it. Well, wasn’t it unfair that the entire community had to justify in the first place that they were not supportive to these organizations. Didn’t we stereotype a particular religion on basis of a few black sheep or even on the basis of little knowledge we possess or what is highlighted by the media? If explained in legal terms, it is like dragging a third party to the court and accusing them of aiding the guilty where they were not even a party to the transaction in the first place.

This is an incident which took place at a local level, but there are plenty of examples of us stereotyping a community or religion. Many Indians have often been detained at US airports, a recent example being prominent actor Shah Rukh Khan, an incident which took place for the second time. When the authorities were questioned they could not offer a reasonable explanation as to why they did so, while Mr. Khan claimed it was because he had a Muslim name. Much outrage broke out when our ex-President late Dr. ABJ Abdul Kalam had also been frisked on twice, once in 2009 and once in 2011 despite the fact that he is on the Bureau of Civil Aviation Security's list of people exempted from security screening in India. Other Indians which have experienced similar stories are actors Mr. Aamir Khan, Mr. Irrfan Khan and John Abraham, director Mr. Kabir Khan, UP Minister Azam Khan etc.

What could be the possible cause for creating stereotypes? Is it because we term any terror organisation on the basis of which religion most of the members belong to? Does this naming make us prejudiced against a particular religion? But then have we forgotten what wise men say, “Terror has no nation and religion.”

Sometimes to prove a theorem, we assume the theorem to be false and then prove how it is right. Likewise, let us assume that this statement is false and that any religion does promote terrorism to impose their cause or ideology.

We all will agree that the beliefs and ideologies of a religion are based on their holy books or scriptures and if one has to gain knowledge and understanding about a particular religion it is through their holy books. Let us take a look at the teachings of the widely practised religions throughout the world.

According to statistics, Christians form the largest population in the world accounted at 32.5%. Here is an excerpt from the Bible, which is the holy book of the Christians:

"Here are six things that the LORD hates, seven that are an abomination to him: haughty eyes, a lying tongue, and hands that shed innocent blood, a heart that devises wicked plans, feet that make haste to run to evil, a false witness who breathes out lies, and one who sows discord among brothers."

Beloved, never avenge yourselves, but leave it to the wrath of God, for it is written, Vengeance is mine, I will repay, says the Lord." To the contrary, "if your enemy is hungry, feed him; if he is thirsty, give him something to drink; for by so doing you will heap burning coals on his head." Do not be overcome by evil, but overcome evil with good.

The above lines require little interpretation skills, as they explicitly state that killing or murdering innocent blood or any planning or execution of any evil plan is not prescribed and uncalled for under any circumstances. If someone states that if the other person is evil, then would that justify such heinous actions? The Bible asks us to treat friends and foes alike and that vengeance was in His hand and that the only way to overcome evil was by overpowering it with good.

Islam as a religion and Muslims as a community form the second highest population in the world. Now here is an excerpt from the Quran (translated):

"He who kills a soul unless it be (in legal punishment) for murder or for causing disorder and corruption on the earth will be as if he had killed all humankind; and he who saves a life will be as if he had saved the lives of all humankind." - Quran 5:32

The above lines state that killing a soul is only justifiable when the killing would do more good than harm to the humankind. If anyone does anything contrary, it is highly unforgivable. Also, they give high regard to lives saved by them.

"There is no compulsion in religion. The right way has become distinct from error." (The Cow, 2:256).

It is forbidden to impose Islam as a religion on other people; they have to willingly choose it. This exposes the hollowness of most of the stories we hear of people imposing their religion and claiming it has been suggested by their God while this is clearly impermissible.

Hindus form 14% of the world's population. The Bhagavad Gita as well as the Vedas are considered to be the religious scriptures of Hinduism, though we can safely say it is predominantly "The Holy Gita".

So here are a few verses from the Gita:

*"Yadayapy ete na pasyanti lobhopahata-cetash*
*Kula-ksaya-krtam dosam mitra-drohe ca patakham*
*Katham na jneyam asmabhih papad asman nivartitum*
*Kula-ksaya-krtam dosam prapasyadbhir janardana"*

The translation goes this way:

"O Krishna, although these men, their hearts afflicted by greed do not see the sinful reaction in quarrelling with friends and the crime of destroying family members; why should we refrain from this sinful act understanding this grievous crime of destroying family members."

The Bhagavad Gita is very vague regarding this and requires reading between the lines. But the above lines can also be summed up, saying that the Gita also justifies killing of another soul only if it is absolutely essential i.e. to uphold the dharma. Hinduism describes dharma as the

natural universal laws whose observance enables humans to be contented and happy, and to save themselves from degradation and suffering. Killing another innocent soul would result in violating the dharma. It believes that since we are all God's children, thus when we He is unable to hold the dharma, we must uphold it.

Now, I have heard and read countless arguments where a contrary view is expressed. These scriptures are considered to be satanic and have a different interpretation. Well, that is the beauty of any language. If the law can interpreted differently, why cannot the scriptures? Sometimes, the language can be so vague that it is almost a though the writer wishes the interpretation to be the reader's own. An interpretation of anything written depends on who you are, and what you understand out of it. Maybe it is how much you relate to it or how would you want to understand it as, to cater your needs and likes. So, when the terrorist do anything in the name of religion, it is whatever they have understood from it, or maybe it is merely a lack of complete knowledge on their behalf. So am I trying here to justify the terrorists' actions? Certainly not! Whatever you have understood from the scriptures and your actions are merely a reflection of your own character and morals. Can one not use their intelligence to understand that this is not what possibly my religion would preach? Does it not hurt one's conscience to kill an innocent life? As it is said in the Gita, that we are no one to decide someone else's life and death cycle.

The point I'm trying to prove here is, religion is merely a mask a terrorist wears to propagate his cause and ideologies. Countless disasters have broken out when religious extremism and terrorism combined with each other.

Religion always has a powerful impact in one's life. It is a powerful tool to propagate one's ideas and often impose a certain belief. Religion can inspire people's potential and make them undaunted in the face of death. By using a religion's doctrine, they believe they have the permission to do whatever they feel. After all, "It is written and billions approve it:" But for me, I am of the belief that once you are a terrorist you belong to no religion, for no religion justifies your action. You merely lack the courage to own up for your actions and what you believe in, thus playing a blame game and putting it on the religion.

So then by my above definition one may draw a conclusion that all terrorists are atheists? An atheist is someone who disbelieves or lacks belief in the existence of God. Their actions are highly determined by logic, science, intelligence and conscience. But then, aren't most of the terrorist attacks carried out in the name of God?

We must understand one thing clearly, just like there is a black sheep in a family; every religion also has their black sheep. How would it feel if someone judged you merely for your flaws overlooking your good attributes? One cannot judge the entire community by their black sheep. Moral and ethics do not co relate with religion. These terrorists are merely misguided individuals who act without understanding the enormity of their actions. They have embraced that kind of life by their own will, thus letting go even of the humanity and compassion let alone religion. I read this image on a popular networking site which said "There are good Christians (King Martin Luther) and evil Christians (Adolf Hitler), good Muslims (Malcolm X) and evil Muslims (Osama Bin Laden). Alternatively, there are ethical people who live without religion (Bill Gates) and evil people who live without religion (Joseph Stalin)." which is certainly the kind of broad outlook we should keep.

If religion and terrorism are two relatively disassociated subjects, why are they linked so often together? While I was fiddling with my pen, thinking as to what to write for this essay, I just typed "Definition of terrorism" on Google to have better understanding to the subject. The definition was "the unofficial and unauthorised use of violence and intimidation in the pursuit of political aims". I was glad that at least someone had got the definition of terrorism correctly. Political aims or a person's selfish gains lead to terrorism. In pursuit

of these aims, people are not even hesitant to pit a nation against another, a community against another, solely for their benefits.

Examples where political objectives have been dressed in the clothing of religion would include:

The IRA terrorist campaign to remove British rule from Northern Ireland (dressed up as a Catholic campaign)

The Al Qaeda Campaign to remove US presence from Middle East (dressed up as Islamic jihad)

The Zionist Campaign to achieve a Jewish homeland in Palestine (dressed up as a Jewish campaign).

Now what has a great impact on what we see, hear or read about the world? The media, absolutely! The media has a way with words and presenting the news. It can play with your mind and so it does, all the time. Like for example, a news headline could be "Muslim terrorist enters India" or it could just be "Terrorist enters India" all depending on the way they want their reader or audience to look it at it. In the first case, you may notice how the reporter has purposely mentioned the name of the religion the terrorist belongs to while in the second case he does not do so. If the media is biased towards a particular religion, then just as in the first case it will purposely mention the religion of a person to create a stereotype mindset in the minds of the people. Sometimes, if the media is a mere puppet of a political interest, any act of terror may be conveniently be omitted just as to not draw the wrath of the politician or political party.

You might feel that I sound cynical and that the media is autonomous body and gives an unbiased view regarding any news. Though that would be an idealistic case, we are talking about reality here. I was speaking to a friend of mine, a former correspondent at a leading newspaper. I confided in her, my interests in written journalism when she told me how she had dug out some dirt on a leading builder and no other newspaper had managed to get hands on this news yet. But, the story never got published. This was because this builder was a heavy advertiser in the same newspaper, and if they did publish a story against them, they would lose tons of money thus affecting the newspaper's revenue. If a leading builder could have such an impact on what got published, we can infer how much a political party with vested interest could. While I was searching for further content for this essay, I just wanted to search for terror organisations that had its roots in different nations. I saw a link that said "Christian terror organisations that equal ISIS". Intrigued by the title, I tried opening the link but the page had been brought down. I am not trying to imply anything here. Maybe it was brought down due to false content in the article or maybe someone powerful did not want this negative aspect to be highlighted, though I have a strong feeling it is the latter. It's another example of how the media content can be controlled.

If we observe carefully many news channels and newspapers are closely linked to political parties; Shobhna Bharti, owner and Editor-in-Chief of Hindustan Times is a Congress MP from Rajya Sabha, Karan Thapar, from CNN IBN is closely related to the Nehru family while famous anchor couple Rajdeep Sardesai and Sagarika Ghose have also been associated with the Congress."It takes a great deal of bravery to stand up to our enemies, but just as much to stand up to our friends". So do they have the courage to stand up against their own? I highly doubt. Regular viewers of these channels will certainly admit that these news channels do show an inclination towards a political party which goes to prove how biased our media is.

From the above instances we can certainly conclude interests could be anything, money, power, family etc. At a global level, sometimes, an entire nation could itself be the political or vested interest. Just like a political party, a few dominant nations can control the news what people worldwide see. These interests make the media channels play with your mind and manipulate the news in such a manner that it

complements their motives and interests, paints a rosy picture for them, or show what they want in good light. It is the way how we say a glass is half empty or half full. Many of the times, the media imparts half information or half knowledge or hushes up an incident. A little knowledge is a dangerous thing.

If everyone works according to the most powerful person or group, the only way to curb terrorism would be if there was a greater and a more powerful society which does not support it. But in many cases, it can be observed that those vested in power, do not use it for everyone's good and that it is often misused for personal interests. Political parties often pit man against man to cash on votes. It can be inferred that the terrorist groups must have someone powerful and rich aiding them monetarily. They must also be helping them get out of tricky spots. There is no reasonable explanation for how are they able to carry out their operations so smoothly without being traced back or discovered. I am not implying that it can only and solely be politicians; it could be any powerful and imminent personality. How often have we not heard on news of many famous personalities being linked to terrorists groups? It may just be a rumour, but often rumours have some truth in them and that there is no smoke without any fire. It works on a simple principle "You scratch my back and I'll scratch yours."

Here is an edited excerpt from a leading newspaper in our country:

"According to the Sunday Guardian, the infamous 26/11 attacks were only possible because of Indian involvement and that high ranking politicians from both the UPA and the NDA had contacts with Dawood. The Sunday Guardian further claims that Dawood had transferred properties which were in his name to nominees and benamis in 2002 itself, so that nothing of any value was seized anywhere in the world, including in India, where he has substantial assets, especially in Mumbai and Hyderabad. The sources allege that neither Vajpayee nor Manmohan Singh tried any effective counter measures to overcome Dawood's actions. The sources state that the 26/11 Mumbai terror attacks would not have succeeded if Dawood did not have longstanding contacts within the Mumbai Police, and within the political network both in Maharashtra and the country. The report alleges that many high ranking politicians were afraid of being exposed if the domestic angle to 26/11 was seriously probed - so it never was. "It was as though the investigators were told not to believe that there was a network in India, which provided information to ISI proxies about the interior layout and work schedules of the Taj Mahal and Oberoi Trident hotels," say the sources to Sunday Guardian. The sources state that the 26/11 Mumbai terror attacks would not have succeeded if Dawood did not have longstanding contacts within the Mumbai Police, and within the political network both in Maharashtra and the country. The report alleges that many high ranking politicians were afraid of being exposed if the domestic angle to 26/11 was seriously probed – so it never was. "It was as though the investigators were told not to believe that there was a network in India, which provided information to ISI proxies about the interior layout and work schedules of the Taj Mahal and Oberoi Trident hotels," say the sources to Sunday Guardian. More shockingly, the report claims that at least two senior NDA leaders and four UPA leaders were in contact with Dawood before 26/11, but all but one of the six dropped their association with him after the attacks. The last politician also stopped contact with him in 2011. In fact, Dawood in 2006 travelled on an international flight from the UAE to South Africa and the seat next to him was occupied by a senior politician who knew whom he was talking to throughout the journey, claim the US experts to Sunday Guardian."

An example of how deep rooted a political rivalry could be would be Ishrat Jahan's case where there were different governments at the Centre and the State. The Centre made the entire incident look like a fake encounter, punishing several officials in the process. It was later discovered that the UPA had changed an affidavit for political gains. Even though LeT operative Mr. David Headley

admitted that Ishrat Jahan was indeed associated with LeT, the Centre misused the situation for their political gains, thus putting the security of the entire country under danger.

Former Pakistan President Pervez Musharraf acknowledged that his country supported and trained terror groups like LeT in 1990s for fanning militancy in Kashmir. While this is only an example of someone at high power admitting to support terrorism at some point, there are a lot of people yet to own up or discover. Let us not forget, it takes two to tango and before the pot calls the kettle black we must also look where we may have also gone wrong. If there are terrorists attacking our country, India must be having our own share of black sheep who have been causing terror within and outside India. Obviously, since this defames our nation and often is omitted to be mentioned by our media. After all, which media would like to against people of their own country. If at all, the media does broadcast this news, plenty of the people will jump to the conclusion that they are defaming the country as a whole and accuse the media channel to support be a "deshdrohi" while many of them will still be in denial, not accepting that there could be a problem at their end too.

So it can be said that terror organisations manage to infiltrate our Government and various important and powerful organisations. They are able to do so because we are not even united as a nation. If a political party could place its political rivalry above preventing terrorism, it can easily be understood how easily they are willing to compromise the nation's security for fulfilment of personal objectives.

Yet another question arises. They have adequate contacts to carry out the operations. But in order to run any organisation you need manpower. How do they manage to recruit ordinary people to join their cause, especially in such large numbers? A major strength of these organisations is their conviction power. It's a wonder how they turn around the situation in such a manner that they can convince a wrong thing to be the right thing. They do so by addressing something in a person's personality, circumstances or environment which makes what they say appealing to him. They have several ways to manipulate people to do what they want. They will showcase only one side of the issue or provide them with half information. For example, this was told by Ajmal Kasab. After 2002 Gujarat riots, LeT terrorists in Pakistan kept on showing the video recordings of Hindu fringe groups attacking Muslim houses, shops and people. This created sympathy that Muslims are being targeted in India, so they urged their followers to fight against India.

Other tactics would include:

1. Providing a completely misinterpreted understanding of religion,
2. Forbidding the ignorant people to read different books and interacting with 'foreign' individuals,
3. Building on the deep rooted hatred that some have towards the societies and particular communities,
4. Creating new artificial means to ignite the flame of hatred in the minds of the weak (as happened in Iraq after the formation of the new interim government; cases have been reported of false flag blasts, riots, rapes, etc.),
5. Dehumanisation of humans by extreme psychological, sexual, emotional tortures as seen in Abu-Gharaib, Guantanamo, Israeli prisons, and in today's ISIS.
6. Usage of drugs and various biological agents to weaken the intellectual capabilities (as seen in the Saudi sponsored FSA and ISIS) and also drugs like Viagra,
7. Immense promises of financial support to their families and friends,
8. Extreme propaganda of their might via social networking sites, etc.

There are often instances which have been terror attacks, yet have never been labelled that way.

When Americans took 1 million lives in Iraq for oil, when Serbians rape Muslim women in Kosovo/ Bosnia, when Russians kill 200,000 Chechen in bombing, when Jews kick out Palestinians, when American drones kill families in Pakistan/ Afghanistan, when Israel kills 10,000 Lebanese civilians because of two missing soldiers; aren't these cases of terrorism? Maybe the magnitude of the terror differs from different terror organisations, but it doesn't mean you evade reporting the other acts of terror too.

A justification offered to me for the acts of terrorism, which rather sounds lame and baseless is "It was merely an act of defence". Defence can be defined as an act of defending from or resisting attack. Therefore foiling a terror attack, maintaining adequate security, punishing the guilty would qualify as a defence and not counter attacking a nation just because a particular terrorist organisation belongs to that nation.

As Mahatma Gandhi has rightly said, "An eye for an eye can make the whole world blind". The current affairs have been highlighting the attacks by ISIS taken place all over the world, notably being the Paris attacks, Russian plane attack, Turkey peace rally bombing etc. US countered these attacks by attacking Syria, where thousands of innocent were killed on both the sides. The media drew little attention to the Syria, Beirut, Afghanistan, Iraq attacks while the Paris attacks were given more media coverage conveniently ignoring the other attacks. Both of them were indiscriminate attacks, and for me both very well came under the definition of terrorism.

I will be quoting Mr. Howard Zinn who says "How can you have a war on terrorism when war itself is terrorism?" The Bible says "He shall judge between the nations, and shall decide disputes for many people; and they shall beat their swords into ploughshares, and their spears into pruning hooks; nation shall not lift up sword against nation, neither shall they learn war anymore"and "You have heard that it was said, 'An eye for an eye and a tooth for a tooth.' But I say to you, do not resist the one who is evil. But if anyone slaps you on the right cheek, turn to him the other also". Our great leader Gandhiji also says "Non violence is a weapon of the strong".

I am not denying that the counter attacks will not have an impact, but one cannot overlook the innocent lives lost in this process. Also, this will merely have an impact in the short term. Sometimes, it may even work contradictory to the cause. Killing, beheading or imprisoning can further lead to agitation among all the terror organisations thus encouraging them to find further excuses to continue with their terror attacks.

What would one propose to do in such a tricky situation? It is almost like being stuck between the devil and the deep sea. As Mahatma Gandhi has said" Hate the sin, not the sinner". If we view terrorism as a tree, killing the terrorists is merely cutting the leaves. If we have to uproot a tree we must uproot the idea and causes from the roots.

There are seemingly innocently small factors which lead to a rise in terrorism:

## 1. Black Money

Black money is a prolonged problem in our country. The new government making countless efforts to bring the black money stashed abroad back to our country. Terrorists need huge amounts of funding to carry out their operations. Most of this funding that comes is black money. If every monetary transaction in the world is accounted for, there would be little or no leakage of the money. This would mean that no one could possibly sponsor the terrorists without it being accounted for. This is easier being said than done. It would require years of efforts and understanding of the complex economy and the symbiotic relationship of the various factors in an economy.

Our Prime Minister, Narendra Modi is of the same view. An excerpt from an article from FirstPost says "Modi also spoke about how terrorists get funding from criminal activities such as bank robberies, vehicle thefts, fake currency and drug smuggling. The Paris attacks are a reminder of

this, he said. The dastardly acts committed in Paris a few days ago are a grim reminder that terrorists have shown remarkable flexibility and adaptability in meeting their funding requirements. Disrupting fund flow constrains the capabilities of terrorists and reduces their ability to execute attacks. This involves putting in place both systemic safeguards, and targeted economic sanctions based on credible counter-terrorism intelligence."

## 2. Education

Most of the terrorists are youth aged 14-30. It's a tender age where minds are hazy and confused. Unless someone would guide them the right way, one could easily go astray. Innocent minds are played with by great masterminds. They possess great power of conviction such that they could even sell air to anyone. The only reason why the youngsters join such organisations is because they believe that is the only right way possible, or possibly the only way to lead their life. They have been brainwashed in such a manner that they are forced to believe that they are fighting for a right cause. If these kids were educated the right way, taught about their religion in the right manner, about the world and educated adequately to earn their own living they would perhaps not fall to the traps of those masterminds. They will be able to distinguish between right and wrong and think for themselves. One must also remain aware enough to know when they are being brainwashed or led in a wrong direction and stop it at the beginning itself. The lack of education also leads to poverty.

## 3. Poverty

Most organisations lure new recruits by providing them with their basic necessities, food, water and shelter to them and their families. In return, they require the service of such individuals. In their eyes, anybody who takes care of their basic necessities and provides them with food and shelter is good. Out of gratitude and sheer obligation they help the terrorist. Terrorists have also known to contact local antisocial bodies who accumulate such hungry and poor people that can be manipulated for their operations. They convince them by either providing food or scaring them. Often, huge amounts of money are offered which they cannot refuse. Many a times, they are aware that what they are doing is wrong, but see no way out of it. When a weak minded poor person sees huge money which he may never be able to earn throughout his life, his moral and ethics are clouded. He is tempted and is then willing to do anything and everything.

## 4. Curbing the terrorist's means to contact people

In recent times, ISIS has been particularly successful in recruiting its members through Facebook and Twitter which just adds to the global appeal to the organisation. They have become so adept at social media that they are able to reach out individuals at a global scale. Potential recruits include friends or family of someone already affiliated with the organisation. It accepts all kind of people, from different backgrounds, different status of the society creating a sense of belonging for the recruits. It could be anyone, even you and me. A girl from Pune had been brainwashed in a chat room and convinced to join the terrorists. A similar case occurred where four boys from Kalyan where one of them was killed in the clashes in Iraq. Though most of the accounts belonging to members from ISIS have now been disabled by the site, but there was a certain laxity for the same. If we could enable prompt action for the same and if the means of communication for them could be curbed it would cause them a hindrance. Messages being intercepted on a large scale would cut down the various means of communication possible for the terrorists.

## 5. Strict enforcement of the law

India has an exhaustive set of laws in place: Unlawful Activities (Prevention) Act, 1967, Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA), Prevention of Terrorism Act (2002) in place. All we need is strict enforcement of these laws and prompt action to be taken in all the cases.

At a micro level, as citizens we could keep a tab on any suspicious happenings around us, any unclaimed object lying at public places, anything which is out of the ordinary and needs attention. It will only aid our Government to maintain our safety.

Concluding this essay, my dad often says "The world is full of good people, only the bad get highlighted." The words could not be any truer. Before we make assumptions about communities or people based on a few incidents, we must understand that we know a fraction of them which are being highlighted in the news. Let us have a broad outlook and know that there are countless who are not like them. Let's break the stereotypes we have in our head. Everything we hear and see may not be true. Let us question and reason out our own thoughts and actions guided by our conscience, morals and ethics. I am sure then all of us will go on the right path. Pause. Reflect. Empathise.

I will go a little offbeat and quote a character from one of my favourite series, Harry Potter. Dumbledore says "We are only as strong as we are united, as weak as we are divided". Yes, it is true we are different. We may be different by gender, age, race, caste, religion; the list is endless, but if we want to join hands together we must look beyond our differences. We are human beings first, and then only can we be distinguished by human created differences. As a human being, we realise that we are all fighting the same battle here, a battle where there is no space for you and me, only us; A battle against terrorism.

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B.V. Jhaveri, *Advocate*

# DIRECT TAXES
## Supreme Court

### Assessment of shipping companies under the "Tonnage Tax" Scheme in Chapter XIIG of the Income-tax Act, 1961 in the context of "slot charters" explained.

*CIT vs. M/s. Trans Asian Shipping Services (P) Ltd.*

*Civil Appeal No. 5869 of 2016*

*(Arising out of SLP (Civil) No. 25251/2015, dated 5th July, 2016)*

It is only income from the business of operating qualifying ship that has to be computed in accordance with the provisions of Chapter XIIG. As per Section 115VB of the Act, a company is regarded as operating a ship if it operates any ship which is owned by it or a ship which is chartered by it and it also includes a case where even a part of the ship has been chartered by it in an arrangement such as slot charter, space charter or joint charter etc. The question that has arisen for consideration pertains to 'slot charter' i.e. should the 'slot charter' operations of a 'Tonnage Tax Company' be carried on only in 'qualifying ships' to include the income from such operations to determine the 'tonnage income' under 'TTS' in terms of the provisions of Chapter XIIG of the Act? In other words, is the income derived from 'slot charter' operations of a 'Tonnage Tax Company' liable to be excluded while determining the 'Tonnage Income' under the 'TTS' if such operations are carried on in ships which are not 'qualifying ships' in terms of the provisions of that Chapter of the Act and the relevant provisions of the Income Tax Rules, 1962?

Their Lordships of the Supreme Court held as under:

"2. When the scheme of the aforesaid special provision for computation of income under TTS is exempted, we find the balance tilted in favour of the assessee as that was the precise purpose in introducing TTS in India. It may be stated in brief that in view of the stiff competition faced by the Indian shipping companies vis-a-vis foreign shipping lines, and in order to ensure an easily accessible, fixed rate, low tax regime for shipping companies, the Rakesh Mohan Committee in its report (of January, 2002) recommended the introduction of the TTS in India, which was similar to, and adopted some of the best global practices prevalent. The whole purpose of introduction of the Scheme was to make the Indian shipping industry more competitive in the global space by rationalising its tax cost. For the reason that it is impossible to cater to all shipping routes on owned ships, it is an accepted and widely prevalent practice globally and in India that shipping companies engage in slot charter operations. If such slot charter arrangements are not entered into, then

*[Contd. on page 104]*

Ashok Patil, *Advocate*

# DIRECT TAXES
## High Court

### 1. Sections 148, 147, 144, 143(2), 142(1) – Notice issued u/s. 148 on the down stream company of the assessee could not amount to service on the assessee – Assessment u/s. 144 is to be squashed – AY 2005-06.

*Techpac Holdings Ltd. vs. DCIT (2016) 135 DTR (Bom.) 322*

Service of notice u/s. 148 of the assessee company's subsidiary was not valid service of notice, more so when the Revenue was aware of the address of the assessee, further, transfer of assessee's company's shares was by its shareholders and not by the assessee company and therefore AO could not have reason to believe that income of the assessee chargeable to tax in India has escaped assessment, notice u/s. 148 and order u/s. 144 were liable to be squashed.

### 2. Section 4 – Contribution by members of a Association cannot be subject to tax for the mere reason the surplus is invested in Mutual Funds – AY 2007-08

*CIT vs. Air Cargo Association of India Ltd. (2016) 135 DTR (Bom.).*

Contributions made by the members to the assessee association cannot be a subject matter of tax merely because the part of its excess of income over expenditure is invested in mutual funds, what is taxable is only income earned from mutual fund.

### 3. Sections 2(15), 11(4A), 12A, 12AA(3) – Premises of assessee was let out to another party to run educational courses – Which was in line with the object of the assessee that is advancement of education – Registration cannot be cancelled – AY 2009-10

*DIT(E) vs. Lala Lajpatrai Memorial Trust (2016) 136 DTR (Bom.) 233*

Letting out of premises by assessee trust which was engaged in educational activities, to another institute to conduct law college and management institution did not attract the proviso to sec. 2(15), and also sec. 11(4A) was also applicable and therefore held that registration of the trust cannot be cancelled.

### 4. Section 28(iv) – Amount waived on One Time Settlement Scheme – Benefit assessable u/s. 28(iv) of IT Act – AY 2006-07

*CIT vs. Ramaniyam Homes (P) Ltd. (2016) 239 Taxman 486 (Mad.)*

Assessee was indebted to the bank. Assessee was indebted to the bank under One Time Settlement Scheme and the bank waived certain amount of interest and principal amount out of total dues. AO held that amount of waiver of principal amount of loan was to be treated an income u/s. 28(iv) of IT Act. CIT(A) and Tribunal allowed appeal of the assessee relying on the decision of *Iskraemeco Regent Ltd. vs. CIT (2011) 331 ITR 317 (Mad.)* and held that S.28(iv) had no application to cases involving waiver of principal amount of loan. On revenue's appeal in HC, HC allowed appeal of the revenue and reversed the findings of lower authorities and held that waiver of loan would certainly tantamount to the value of a benefit. This benefit may not arise from the business of the assessee. But it certainly arises from 'Business'. Also the assessee held that when a portion of the loan is waived, the total amount of loan shown on the liabilities side of the Balance Sheet is reduced and the amount shown as capital reserves is increased to the extent of waiver. Waiver of principal amount would constitute income falling u/s. 28(iv) being the benefit arising for the business.

## 5. Section 41(1) – Creditor not traceable – No cessation of liability u/s. 41(1) of IT Act

*CIT vs. Alvares Thomas (2016) 239 Taxman 456 (Karn.)*

During assessment proceedings, AO made addition to assessee's income by invoking provisions of S.41(1) in respect of cessation of trading liability. On CIT(A) & Tribunal relying on decision of HC in case of *CIT vs. Shri Vardhman Overseas Ltd.* deleted the said addition. On revenue's appeal, HC dismissed Revenue's appeal and held that merely because creditor could not be traced on date when verification was made, is not a ground to conclude that there was cessation of liability has to be cessation in law, of debt to be paid by assessee to creditor.

## 6. Section 54 – Late submission of occupancy certificate – No denial of S. 54 deduction

*CIT vs. Girish L. Ragha (2016) 239 Taxman 449*

Assessee sold residential property. He entered into an agreement with the Builder for purchase of flat and invested sale proceeds of a flat and invested sale proceeds in it within prescribed period of 2 years. He was required to get house and occupancy certificate within 2 years. After purchase of property, there was a civil suit filed by other parties and assessee could not complete construction and licence for the constructing house and was accordingly issued after 4 years. The assessee having invested sale proceeds in purchase of flat, claimed deduction u/s. 54 in respect of capital gain arising from sale of residential property. The department rejected claim of the assessee. CIT(A) allowed appeal of the assessee relying on the decision of Madras HC. Tribunal upheld the claim of the assessee. On further appeal in HC, HC held that since assessee had invested money within stipulated period and delay in obtaining occupancy certificate was beyond the control of the assessee, assessee could be entitled for deduction u/s. 54 of the IT Act.

## 7. Section 73 – Units of mutual fund/bonds – Not speculation loss in business

*CIT vs. Hertz Chemicals ltd (2016) 239 Taxman 431 (Bom.)*

Assessee offered its profit and loss from share trading as income from speculation for the purpose of S.73 and amounts received as loss in speculation business. AO held that activity dealing in mutual funds/bonds was

*[Contd. on page 135]*


Jitendra Singh & Sameer Dalal
*Advocates*

# DIRECT TAXES
## Tribunal

### Reported

**1. Concealment penalty – Section 271(1)(c) of the Income-tax Act, 1961 – Addition on account of debatable issue of deemed dividend under section 2(22)(e) – Assessee furnished all the details in return – Penalty levied under section 271(1)(c) of the Act is unjustified. A.Ys.: 2002-03 to 2004-05 & 2006-07 to 2008-09**

*Trimurty Buildcon (P) Ltd. vs. DCIT [2016] 135 DTR (Jp) (Trib.) 161*

The assessee is engaged in the business of real estate development. The business premises of the assessee were subjected to search and seizure action under section 132 of the Act on 3-5-2007. Thereafter assessment was completed under section 153A of the IT Act. During the relevant years assessee company raised loans from its sister concerns *Trimurty Landcon (India) Pvt. Ltd., Abhishek Finlease Pvt. Ltd., Abhishek Estate Pvt. Ltd.* and *Trimurty Colonisers & Builders Pvt. Ltd.* These loans received were offered for tax as Deemed Dividend during the course of assessment proceedings and were accordingly taxed. The assessee had not filed any appeal. The A.O. initiated proceedings to levy penalty on the above addition under section 2(22)(e) of the Act. During the course of penalty proceedings, assessee submitted that amounts were offered for tax voluntarily. These loans received for business purposes, all group companies are engaged in similar line of real estate business and that Deemed Dividend law is not applicable on business advances. The loans were re-paid back. The assessee further explained that on business advances made by the assessee company to its shareholders for business purposes are not covered under section 2(22)(e) of the Act as deemed dividend. However, the A.O. passed the order under section 271(1)(c) of the Act and levied penalty on the addition made on account of deemed dividend under section 2(22)(e) of the Act. On appeal the First Appellate Authority upheld the action of A.O.

The assessee being aggrieved by the order passed learned CIT(A) preferred an appeal before the Hon'ble Jaipur Appellate Tribunal. The Appellate Tribunal was pleased to allow the appeal of the assessee and directed the learned A.O. to delete the penalty levied under section 271(1)(c) of the Act by observing that the assessee filed the return under section 139 for all the years and disclosed the particulars of shareholding pattern, advances taken and given by the assessee company/individual in return itself. The accumulated profit also has been disclosed. Thereafter assessee filed return under section 153A of the IT Act wherein also all the detailed facts and figures were disclosed

in the return. The assessee's case is auditable. The assessee at the time of quantum addition as well as at the time of penalty proceedings has reiterated that these advances are in the course of regular business. It is a running account, said advances later on repaid. This issue is debatable and various courts particularly in the case of *Creative Dyeing & Printing (P) Ltd. (2009) 318 ITR 0476 (Del.)* wherein it has been held that business transaction is not covered under section 2(22)(e) of the Act.

## 2. Revision – Section 263 of the Income Tax Act, 1961 – Show cause notice issued under section 263 of the Act on the basis of proposal received from A.O. is bad in law. A.Y.: 2010-11

*Shantai Exim Ltd vs. CIT [2016] 136 DTR (Ahd.) (Trib.) 313*

The assessee-company filed its return of income for the year under consideration on 26-9-2010 declaring total income of ` 59,07,546/-. The same was selected for scrutiny and assessment was finalised under section 143(3) of the Act on 30-3-2013 determining total income at ` 87,89,730/-. The A.O. sent a proposal under section 263 to the office of CIT-2, Surat having jurisdiction over the assessee company on the basis that various issues remained to be verified during the course of assessment proceedings which had made the order erroneous in so far as it was prejudicial to the interest of revenue. The CIT after receiving the above proposal issued a show cause notice under section 263 of the Act to set aside the assessment order passed under section 143(3) of the Act as it is erroneous and prejudicial to the interest of revenue. The assessee filed detailed reply to the show cause notice before the CIT. However, the CIT exercising the revisionary powers vested in him has passed the impugned order and set aside the assessment order passed under section 143(3) of the Act treating the same erroneous and prejudicial to the interest of the revenue.

The assessee being aggrieved by the above order passed by CIT preferred an appeal before the Ahmedabad bench of the Appellate Tribunal. The Appellate Tribunal was pleased to quash the show cause notice issued under section 263 of the Act by observing that it is not in dispute that the CIT has invoked section 263 merely on the basis of information and proposal received from the concerned A.O. Therefore, it could not be termed that the CIT himself has called for the records. Hence, the revision proceedings initiated on the basis of recommendation of the A.O. is bad in law.

## 3. Income from other sources – Section 56 of the Income-tax Act, 1961 – interest received on motor accident compensation – not chargeable under the head income from other sources. A.Y.: 2012-13

*Urvi Chirag Sheth vs. ITO [2016] 136 DTR (Ahd) (Trib.) 345*

The assessee before the Hon'ble Tribunal is an individual. On 18th May 1990, the assessee was travelling in a car, which met a serious accident, leaving her permanently disabled, what is termed by the competent authority, at ninety per cent level. She claimed a compensation of ` 15,00,000/- for this tragic loss of her physical abilities. Her claim was upheld by the Hon'ble Apex Court on 26th April, 2011. The assessee has also received interest on the said claim of compensation. According to A.O. the interest component on compensation awarded by Hon'ble Supreme Court is taxable as it is covered under section 145A(b) r.w.s. 56(viii) of the Act. On appeal the First Appellate Authority upheld the action of the A.O.

The assessee being aggrieved filed an appeal before the Hon'ble Ahmedabad Appellate Tribunal. The Appellate Tribunal was pleased to allow the appeal of the assessee by observing that when principal transaction i.e. accident compensation for the delayed payment of which

the interest is awarded, itself is outside the ambit of taxation, similar fate must follow for the subsidiary transaction, i.e. interest for delay in payment of compensation, as well. Hence, the interest awarded by the court on account of delay in payment of motor accident compensation cannot be taxed in the hands of the assessee.

## 4. Charitable purpose – Section 2(15) of the Income-tax Act, 1961 – Pre-schooling is an integral part of term 'education' as envisaged under section 2(15) – Denial of registration under section 12A unjustified. A.Y.: 2013-14

*Green Acres Educational Trust vs. DCIT – [2016] 70 taxmann.com 347 (Mumbai - Trib.)*

The assessee-trust was constituted for the purpose of imparting high quality education to students of all castes, creeds and communities by way of setting up schools (including pre-primary schools), colleges, and educational and vocational training institutes in India. It filed an application seeking registration under section 12A. The DIT (exemption) rejected the application for grant of registration under section 12A of the Act by observing that the assessee was running the pre-school which was stage prior to normal schooling, and therefore, its activities could not be treated as falling within the gamut of 'Education' as per section 2(15). The assessee being aggrieved by the above order preferred an appeal before the Hon'ble Mumbai Appellate Tribunal. The Appellate Tribunal allowed the appeal of the assessee by observing that one cannot isolate 'education' given at one of the stages to say that it should not be treated as part of 'education'. The pre-schooling has become today a mandatory prelude to school education. It is like step number one in the ladder. If step number one is taken properly, then other higher steps would be achievable more efficiently and effectively. Thus, there is no justification in the view adopted by the DIT(E) that pre-schooling is not part of education activity. Pre-schooling is very much integral part of the term 'education' as has been envisaged under section 2(15) of the Act.

*[Contd. from page 99]*

Indian shipping companies will not be able to take up contract of affreightments and these contracts would have fallen to only foreign shipping lines thereby making Indian shipping industry uncompetitive. Such slot charter arrangements being with a shipping company but not in relation to or for a particular ship, it is impossible for the Indian shipping company to identify the cargo ship, which carried the goods. ….. ."

"27. We would also like to refer to Circular No. 05/2005 dated 15-7-2005 explaining the need and essence of the introduction of these provisions which was issued contemporaneously by the Central Board of Direct Taxes (CBDT). The Circular clarifies that the Scheme is a "preferential regime of taxation". It also clarifies that "charging provision is under Section 115VA read with Section 115VF and Section 115VG." Circulars of CBDT explaining the Scheme of the Act have been held to be binding on the Department repeatedly by this Court in a series of judgments including *Azadi Bachao Andolan vs. Union of India 263 ITR 706, Navnit Lal Jhaveri vs. K. K. Sen 56 ITR 198 SC,* and *UCO Bank vs. CIT 237 ITR 889 SC."*

CA Sunil K. Jain

# DIRECT TAXES
## Statutes, Circulars & Notifications

### NOTIFICATIONS

### Section 202 of the Finance Act, 2016 – Tax payable, declaration of – Notified date on which a person may make declaration to designated authority in respect of tax arrears or specified tax under Direct Tax Dispute Resolution Scheme, 2016

The Central Government appointed the 31st day of December, 2016 as the date on or before which a person may make a declaration to the designated authority in respect of tax arrears or specified tax under the Direct Tax Dispute Resolution Scheme, 2016.

*(Notification No. SO 1902(E) [No. 34/2016 dated 26-5-2016)*

### Direct Tax Dispute Resolution Scheme Rules, 2016

The Central Government made the rules regarding the Direct Tax Dispute Resolution Scheme Rules, 2016 which shall come into force on the 1st day of June, 2016. The rules provide the definitions, Form of declaration and undertaking under section 203, Form of certificate under sub-section (1) of section 204, procedure for Intimation of payment and the form in which designated authority will order.

The Notification prescribe the Form 1 under rule 3(1), for FORM OF DECLARATION, Form 2 under rule 3(2) for UNDERTAKING, Form 3 under rule 4 for FORM OF CERTIFICATE OF INTIMATION, Form 4 under rule 5 for INTIMATION OF PAYMENT, Form 5 under rule 6 for ORDER FOR FULL AND FINAL SETTLEMENT OF TAX ARREAR and Form 6 under rule 6 for ORDER FOR FULL AND FINAL SETTLEMENT OF SPECIFIED TAX UNDER SECTION 204(2), READ WITH SECTION 205 OF THE FINANCE ACT, 2016 IN RESPECT OF THE DIRECT TAX DISPUTE RESOLUTION SCHEME, 2016

*(Notification No. SO 1903(E) dated 26-5-2016)*

### Section 163 of the Finance Act, 2016 – Equalisation Levy – Notified date on which Chapter VIII of said Act shall come into force

The Central Government appointed the 1st day of June, 2016 as the date on which Chapter VIII of the said Act regarding equalisation levy shall come into force.

*(Notification No. SO 1904(E) dated 27-5-2016)*

### Equalisation Levy Rules, 2016

The Central Government made the rules for carrying out the provisions of Chapter VIII of the Finance Act relating to Equalisation Levy, which may be called the Equalisation Levy Rules, 2016 and shall come into force on the 1st day of June,

2016. It gives details of definitions, Rounding off of consideration for specified services, equalisation levy, etc., Payment of Equalisation levy, Statement of specified services, Time limit to be specified in the notice calling for statement of specified services, prescribed forms for Notice of demand, Form of appeal to Commissioner of Income-tax (Appeals) and Form of appeal to Appellate Tribunal

*(Notification No. SO 1905(E) dated 27-5-2016)*

## Income-tax (Thirteenth Amendment) Rules, 2016 – Amendment in Rule 31A

The Central Board of Direct Taxes, hereby, makes the following rules further to amend the Income-tax Rules, 1962, namely the Income-tax (13th Amendment) Rules, 2016 which shall come into force from the 1st day of June, 2016. In the said rules in rule 29B, in rule 31A, in sub-rule (4A), for the words "seven days", the words "thirty days" have been substituted in connection with the duty of the person deducting tax.

*(Notification No. SO 1923(E) dated 31-5-2016)*

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

The Central Government notified for the purposes of the above said clause:

- The Pollution Control Board, Assam, a body constituted by Government of Assam,

  and
- The Uttar Pradesh State AIDS Control Society, a body constituted by the Government of Uttar Pradesh.

*(Notification No. SO 1944–1945 (E) both dated 2-6-2016)*

## Section 48 of the Income-tax Act, 1961 – Capital Gains – Computation of – Notified Cost Inflation Index under section 48, Explanation (v) – Financial Year 2016-17

The Central Government notified after serial number 35 and the entries relating thereto, the following serial number and entries to be inserted by which the cost inflation index for the Financial Year 2016-17 to be 1125.

*(Notification No. SO 1948(E) dated 2-6-2016)*

## Income-tax (Fourteenth Amendment) Rules, 2016 – Amendment in Rule 8D

As regard sub-section (2) of section 14A of the Income-tax Act the Central Government made the following rules further to amend the Income-tax Rules, 1962, called the Income–tax (14th Amendment) Rules, 2016 which shall come into force on the date of their publication in the Official Gazette in connection with the expenditure in relation to income which does not form part of the total income.

*(Notification No. SO 1949(E) [F. No. 370142/7/2016-TPL], dated 2-6-2016)*

## Special Deposit Scheme – Notified rate of interest w.e.f. 1-4-2016 to 30-6-2016 on deposits made under said scheme for non-government provident, superannuation and gratuity funds

It is notified that the deposits made under the Special Deposit Scheme for non-Government Provident, Superannuation and Gratuity Funds, announced in the Ministry of Finance shall with effect from 1st April, 2016 to 30th June, 2016, bear interest at 8.1% (eight point one per cent).

*(Notification No. 5 (4)-B (PD)/2016, dated 3-6-2016)*

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

The existing provisions of section 197A of the Income-tax Act *inter alia* provide that tax shall not be deducted, if the recipient of certain payment on which tax is deductible furnishes the payer a self-declaration Form No. 15G/15H

in accordance with provisions of the said section. The due date for quarterly furnishing of 15G/15H declarations received by the payer from 1-4-2016 onwards has been notified in this Notification. The payer shall now have to furnish 15G/15H declarations received during the period from 1-10-2015 to 31-3-2016 on e-filing portal (http://incometaxindiaefiling.gov.in) in the given format on or before 30th June, 2016.

*(Notification No. 9/2016 dated 9-6-2016)*

### Section 56 of the Income-tax Act, 1961 – Income from other sources – Chargeable as – Notified classes of persons, who make any consideration exceeding face value for issues of shares of a 'startup' company

The Central Government, notified the 'classes of persons' for the purposes of the above said clause as being the 'person' defined under sub-section (31) of section 2 of the said Act, being resident, who make any consideration exceeding the face value for issues of shares of a 'startup' company.

*(Notification No.45/2016 [F.No. 173/103/2016-ITA-I], dated 14-6-2016)*

### Section 197A, read with sections 10(23D), 115tc and 194a, of the Income-tax Act, 1961 – Deduction of Tax at Source – No deduction in certain cases – Notified payments

The Central Government notified that no deduction of tax under Chapter XVII of the said Act shall be made on the payments of the nature specified in clause (23DA) of section 10 of the said Act received by any securitisation trust as defined in clause (d) of the Explanation to section 115TC of the said Act. The notification shall come into force from the date of its publication in the Official Gazette.

*(Notification No. SO 2142(E) dated 17-6-2016)*

### Section 197A, read with section 194H, of the Income-tax Act, 1961 – Deduction of Tax at Source – No deduction in certain cases – Notified payments – Supersession of Notification No. SO 3069(E), dated 31-12-2012

The Central Government notified that no deduction of tax under Chapter XVII of the said Act shall be made on the payments of the nature specified below, in case such payment is made by a person to a specified bank (i) bank guarantee commission; (ii) cash management service charges; (iii) depository charges on maintenance of DEMAT accounts; (iv) charges for warehousing services for commodities; (v) underwriting service charges; (vi) clearing charges (MICR charges) including interchange fee or any other similar charges by whatever name called charged at the time of settlement or for clearing activities under the Payment and Settlement Systems Act, 2007; (vii) credit card or debit card commission for transaction between merchant establishment and acquirer bank. 2. This notification shall come into force from the date of its publication in the Official Gazette.

*(Notification No. SO 2143(E) dated 17-6-2016)*

### Public Provident Fund (Amendment) Scheme, 2016 – Amendment in Paragraph 9

The Central Government made the scheme further to amend the Public Provident Fund Scheme, 1968 as the Public Provident Fund (Amendment) Scheme, 2016 which shall come into force on the date of its publication in the Official Gazette. In the Public Provident Fund Scheme, 1968, in Paragraph 9 for sub-rule 3(C), sub-paragraph has been substituted, for premature closure of his account or the account of a minor. It also provides Calculation showing the interest payable to depositor.

*(Notification [F.No. 1/04/2016-NS.II], dated 18-6-2016)*

### Income-tax (Fifteenth Amendment) Rules, 2016 – Amendment in Rules 114F, 114H – Tax Deduction and Collection – And substitution of Form No. 61B

The Central Government in connection with above subject, with respect to registration of persons, due diligence and maintenance of information, and the Central Board of Direct Taxes for matters relating to statement of reportable accounts amended rules 114F, 114H and substituted the Form 61B.

*(Notification No. SO 2151(E) [No. 48/2016 (F.No. 142/6/2016-TPL)], dated 20-6-2016)*

## CIRCULARS

### Section 36(1)(vii), read with Section 36(2), of the Income-tax Act, 1961 – Bad debts – Admissibility of claim of deduction of bad debt

Proposals have been received by the CBDT regarding filing of appeals/pursuing litigation on the issue of allowability of bad debt that are written off as irrecoverable in the accounts of the assessee. The dispute relates to cases involving failure on the part of assessee to establish that the debt is irrecoverable.

The board directed that claim for any debt or part thereof in any previous year, shall be admissible under section 36(l)(vii) of the Act, if it is written off as irrecoverable in the books of account of the assessee for that previous year and it fulfils the conditions stipulated in section 36(2) of the Act. Accordingly, no appeals may henceforth be filed on this ground and appeals already filed, if any, on this issue before various Courts/Tribunals may be withdrawn/not pressed upon.

*(Circular No. 12/2016 [F.No. 279/Misc./140/2015-IT]], dated 30-5-2016)*

### Section 201(1)(b) of the Finance Act, 2016 – Designated Authority – "Designated Authority" under Direct Tax Dispute Resolution Scheme, 2016

Finance Act, 2016 provides to the "declarant" a mechanism to resolve disputes pending before Commissioners of Income Tax (Appeals) as on 29-2-2016 and pertaining to "disputed tax"and/or "specified tax". The Scheme also provides for the notification of the "designated authority" by the Principal Chief Commissioners of Income Tax. Considering the requirements of the scheme, administrative efficiency, convenience of tax payers and equitable distribution of work, the Principal Chief Commissioners of Income Tax addressed above will notify that the jurisdictional Principal Commissioner of Income Tax or the Commissioner of Income Tax, as the case may be, who exercises jurisdiction under section 120 of the Act, as notified by the CBDT from time-to-time over such "declarant", shall be the "designated authority" as referred to in the Scheme.

*(Letter [F. No. 279/MISC/M-61/2016], dated 1-6-2016)*

### Section 206C of the Income-tax Act, 1961 – Collection at Source – Profits and Gains from business of trading in alcoholic liquor, forest produce, scrap, etc. – Clarifications on amendment made in section 206C by Finance Act, 2016

In order to reduce the cash transactions in sale of goods and services Finance Act, 2016 has expanded the scope of section 206C(1D) to provide that the seller shall collect tax at the rate of 1% from the purchaser on sale in cash of any goods (other than bullion and jewellery) or providing of any services (other than payment on which tax is deducted at source under Chapter XVII-B) exceeding two lakh rupees. The amendments brought in section 206C by Finance Act, 2016 are applicable from 1st June 2016. The board has considered the number of queries and decided to clarify the points raised by issue of this circular in the form of questions and answers which may be referred in connection.

*(Circular No. 22/2016 [F.No. 370142/17/2016-TPL], dated 8-6-2016)*

### Clarifications for Implementation of FATCA and CRS

Pursuant to the consultations held with Financial Institutions (FIs) regarding implementation of FATCA and CRS, the following clarifications are issued.

## Press Releases

### Section 90 of the Income-tax Act, 1961 – Double Taxation Agreement – India

## Mauritius Double Taxation Avoidance Agreement and related issues – Constitution of a working group to examine consequential issues arising out of amendment

With a view to examine the consequential issues arising out of amendments to India–Mauritius Double Taxation Avoidance Convention and related issues, a Working Group headed by Joint Secretary (FT&TR-II), CBDT and comprising of departmental officers and representatives of SEBI, custodians, brokerage firms and fund managers has been constituted. The Working Group will submit its report to the CBDT within 3 months, after examining the relevant issues.

*(Press Release, dated 13-6-2016)*

## India and Switzerland agree to move towards an early agreement for implementation of AEOI between two countries

Fighting the menace of Black Money stashed in offshore accounts has been a key priority area for this Government. To further this goal, the two sides agreed to pursue the ongoing dialogue on tax and financial matters in a spirit of mutual friendship and co-operation. The text of the 'Joint Statement signed by the two Secretaries at the conclusion of the meeting is part of this press release.

*(Press Release, dated 15-6-2016)*

## Section 44AB, read with section 44AD, of the Income-tax Act, 1961 – Audit Compulsory – Clarification on threshold limit of Tax Audit under section 44AB and section 44AD

Section 44AB of the Income-tax Act makes it obligatory for every person carrying on business to get his accounts of any previous year audited if his total sales, turnover or gross receipts exceed one crore rupees. However, if an eligible person opts for presumptive taxation scheme as per section 44AD(1) of the Act, he shall not be required to get his accounts audited if the total turnover or gross receipts of the relevant previous year does not exceed two crore rupees. The higher threshold for non-audit of accounts has been given only to assessees opting for presumptive taxation scheme under section 44AD.

*(Press Release, dated 20-6-2016)*

## Clarification on news report that Income Tax Department is going to arrest wilful defaulters of tax

Certain sections of the press have been carrying news reports that Income Tax Department is going to arrest wilful defaulters of tax. CBDT clarified that no such statement has been authorised by the Income-tax Department. Though the provisions for arrest and detention by the Tax Recovery Officers in respect of the non-compliant tax defaulters are contained in the Income-tax Act, these are used extremely sparingly.

*(Press Release, dated 21-6-2016)*

## Section 90 of the Income-tax Act, 1961 – Double Taxation Agreement – Cabinet approves protocol amending agreement for avoidance of Double Taxation and Prevention of Fiscal Evasion with Belgium

The Union Cabinet has approved the signing of a Protocol amending the Agreement between India and Belgium for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income. The amendment in the Protocol will broaden the scope of the existing framework of exchange of tax related information between the two countries, which will help curb tax evasion and tax avoidance. The Protocol will also revise the existing treaty provisions on mutual assistance in collection of taxes.

(Press Release, dated 22-6-2016).


CA Tarunkumar Singhal & Sunil Moti Lala, *Advocate*

# INTERNATIONAL TAXATION
## Case Law Update

## A. HIGH COURT JUDGMENTS

### 1. Where the dominion / control over the equipment used for providing services to the customer were with the Petitioner only, mobilisation / demobilisation charges received by it could not be taxed as Royalty (for use of equipment) under the DTAA – Consideration received for installation activities could not be taxed as FTS under Article 12(4)(a) since the said services were not ancillary or subsidiary to the mobilisation / demobilisation charges – Also the installation activities were not taxable as FTS under the Act as well as it fell under the exclusionary clause of Explanation 2 to Section 9(1)(vii)

*Technip Singapore Pte. Ltd. vs. DIT – (2016) 70 taxmann.com 233 (Delhi)*

**Facts**

1. The Petitioner, a company incorporated in Singapore was a leading solutions provider of offshore construction, engineering, project management and support services to the oil and gas industry worldwide. It entered into a contract with Indian Oil Corporation Ltd. ('IOCL') for construction work in India involving the installation of a Single Point Mooring ('SPM') including anchor chains, floating and subsea hoses supplied by IOCL. The Petitioner did not have any project office or any other premises in India for executing the contract. Accordingly, it deputed men and materials at the offshore site where the installation activities were performed. The Petitioner approached the AAR to determine whether the consideration received by it was taxable under the Act as well as the India-Singapore DTAA.

2. The AAR held that although the work performed by the Petitioner was composite, IOCL had paid for each item of work separately and that the payment for the use of equipment i.e. the barges (mobilisation and demobilisation expenses) constituted royalty under section 12(3)(b) of the India-Singapore DTAA. Further, it held that the installation work was ancillary and subsidiary to the use of equipment and therefore was taxable as Fees for Technical Services under Article 12(4)(a) of the India-Singapore DTAA.

3. Aggrieved, the Petitioner filed a Writ Petition before the Hon'ble High Court.

**Judgment**

1. The Court rejected the contention of the Revenue that the work of mobilisation /

demobilisation and the work of installation were two separable contracts. With regard to the taxability of mobilisation and demobilisation charges as royalty under Article 12(3)(b) of the India-Singapore DTAA, it held that for a payment to be characterised as one for the use of equipment, the equipment must have been used by IOCL. It noted that as per the contract the control of the equipment remained with the Petitioner and did not get transferred to IOCL. Accordingly it concluded that there was a difference between the use of equipment by the Petitioner for IOCL and the use of equipment by IOCL and held that since the equipment was used for rendering services to IOCL, it could not be converted into a contract of hiring equipment by IOCL and therefore could not be considered as royalty.

2. The Court held that the installation activities could not be considered as FTS under Article 12(4)(a) of the India-Singapore DTAA in light of its findings that the demobilisation charges were not taxable as royalty. It further held that the construction and installation of SPM did not transfer any technology, skill, experience or know-how to enable IOCL to undertake such activities on its own. Additionally, the Court held that the payment would not be considered as FTS under the Act as well since it fell under the exclusionary clause of Explanation 2 to Section 9(1)(vii) of the Act.

3. The Court further held that the determination of existence of a PE in India was not urged before the AAR and therefore could not be contended before the Court. It noted the following facts which were uncontroverted viz. that the Petitioner had no fixed place of business in India, that its employees were present in India only for a period of 41 days (less than the threshold for installation PE – 183 days) and that it did not have a project office in India.

4. Accordingly, it held that the sum received by the Petitioner pursuant to the contract with IOCL was not taxable in India.

## 2. Interest on refund paid by the Revenue fell under the definition of 'Interest' under Article 12(4) of the India-Italy DTAA and therefore exempt under Article 12(3)(a) of the DTAA as paid by the Government

*Ansaldo Energia SPA – TS-276-HC-2016 (Mad.)*

**Facts**

1. The assessee, a resident of Italy, was entitled to refund of taxes as well as interest on such refund under section 244A of the Act pursuant to the order passed by the AO giving effect to the orders of the Tribunal and CIT(A) for AYs. 2000-01 to 2002-03. While making payment of interest on refund, the AO deducted TDS at 42.024 per cent. Aggrieved, the assessee filed an appeal before the CIT(A).

2. The CIT(A) dismissed the appeal filed by the assessee. On further appeal, the ITAT also held that the payment was subject to TDS @ 42.024 per cent.

3. Accordingly, the assesee preferred an appeal before the Hon'ble High Court, contending that the interest on refund fell under the definition of 'interest' contained in Article 12(4) and therefore exempt from tax as per Article 12(3) of the India-Italy DTAA.

**Judgment**

1. The Court relied on the decision of the Apex Court in *UOI v. Tata Chemicals Ltd – (2014) 363 ITR 612*, wherein it was held that refund due and payable to the assessee is a debt owed and payable by the Revenue and that the State having received the money without right, and having retained and used it was bound to make the party good, just as an individual would under like circumstances. The Court held that Section 244A of the Act uses two important expressions viz., 'becomes due' and 'be entitled to' which was a clear indication that the assessee would be entitled to interest only if the refund of any amount became due. Accordingly, it held

that anything that was due was naturally in the nature of a debt claim and therefore interest on refund due fell under the definition of interest under Article 12(4) and since the same was paid by the Government of India to the assessee, it was exempt from tax under Article 12(3)(a) of the India-Italy DTAA.

2. Further, it dismissed the contention of the Revenue, that the impugned interest was taxable in the hands of the assessee as per Article 12(6) read with Articles 5 and 7 of the DTAA on the ground that Article 12(6) (which states that where the payer of interest has a PE in a contracting state, such interest borne by the PE would be deemed to arise in that State) would not apply to the instant case as the assessee having a PE in India was the recipient of interest and not the payer.

3. Accordingly, it held that interest on refund of tax received by the assessee was not taxable under the India-Italy DTAA.

### 3. Companies engaged in software development, software products, marketing and finances could not be considered as comparable to a software development service provider in the absence of relevant segmental data

*Pr. CIT vs. Cash Edge India Pvt Ltd – TS-262-HC-2016 (Del.) – TP*

**Facts**

1. The assessee was engaged in the business of providing software development services to its AEs. During the relevant assessment year, the TPO held that the data of three comparable companies viz., Persistent Systems Ltd., Zylog Systems Ltd. and Wipro Technology Services were to be included for determination of ALP. The assessee, filed objections before the DRP which were dismissed. Accordingly, the assessee preferred an appeal before the ITAT.

2. The ITAT directed the exclusion of Persistent Systems Ltd. and Wipro Technology Services and remitted the issue with respect of Zylog Systems Ltd. with directions to ascertain the relevant audited segmental data.

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

**Judgment**

1. With regard to the inclusion of Persistent Systems Ltd., the Court held that the company was involved in software development, software products and marketing and that it did not publish segmental data as a result of which it could not be compared to the assessee in light of Rule 10(b) to 10(e) of the Income-tax Rules, 1962.

2. With regard to Wipro Technology Services Ltd, it held that the said company was part of the Citi Group and was acquired by Wipro Ltd. as a subsidiary during the relevant year. Additionally, it held that there was no published segmented data as far as software development or its finances were concerned and therefore the same could not be considered as comparable.

3. Accordingly, the Court upheld the order of the Tribunal and held that no substantial question of law arose.

## B. TRIBUNAL JUDGMENTS

### 4. Transfer Pricing – BPO vs. KPO – Assessee considered as BPO in subsequent years, cannot be considered as KPO in earlier year for providing same services – Held – In favour of the assessee

*SNL Financial (India) Pvt. Ltd. vs. DCIT 2016-TII-268-ITAT-AHM-TP Assessment Year: 2009-2010*

**Facts**

1. The assessee is engaged in the business of gathering, collating, organising, arranging, storing and transmitting all types of financial information in written, electronic or any other medium through the database, web applications,

and analytical models and to act as the consultant, counsellors on all matters relating to finance, trade and industry. It is a wholly owned subsidiary of a US based company.

2. During the Assessment Year (AY) 2009-10, the assessee entered into an international transaction with its Associate Enterprise (AE) in the nature of rendering of data analysis and data entry services. For the year under consideration, the TPO categorised the assessee as a KPO.

3. For the same international transactions under the same agreement in AY 2013-14, the assessee exercised an option of Safe Harbour Rule. After analysing the facts and the same agreement while examining the applicability of Safe Harbour Rules, the TPO considered the assessee as a low-end service provider and categorised the assessee as a BPO.

4. Objections filed by the assessee for AY 2009-10 with the Dispute Resolution Panel (DRP) did not bring any relief, which brought the assessee before the Tribunal.

**Decision**

The Tribunal held in assessee's favour as follows:

1. Taking cognisance of Safe Harbour Rules entered by the assessee, the Tribunal held that if under the same agreement, the TPO had accepted the assessee's contention and had categorised it as low-end service providers/BPO, then how for an earlier period, the nature of services would be different? In other words, the same agreement cannot give rise to two types of services, merely on the basis of services being provided at different times.

2. The TPO in the proceedings for the purpose of Safe Harbour Rules paid a visit in the office of the assessee, and himself/herself collected information regarding nature of services.

3. Based on above, the Tribunal held that impugned assessment order is not sustainable including that of the DRP and therefore, restore the issue back to the AO for fresh adjudication. The Tribunal specifically directed the AO to take into consideration the TPO's order for the purpose of Safe Harbour for AY 2013-14.

## 5. Section 5(2)(a) – Non Resident Indian – Services rendered outside India – Whether salary received by the non-resident in India is taxable in India on receipt basis – Held: Yes, in favour of the Revenue

*Shri Tapas Kr Bandopadhyay vs. DDIT 2016-TII-138-ITAT-KOL-INTL Assessment Year: 2010-11*

**Facts**

1. The assessee was employed as a marine engineer and had worked in international waters during the relevant FY and received remuneration from two entities. The assessee's employment contracts with overseas shipping entities were through an Indian agent, and the contracts were executed in India.

2. The assessee was on international waters rendering services during the course of the voyage and had stayed for less than 182 days in India during the relevant FY. Hence, he qualified as a non-resident in India for the relevant FY.

3. Based on his residential status, he claimed the incomes received from both these entities as exempt from tax in India on the basis that such incomes were earned outside India in foreign currency and were merely remitted to his NRE accounts in India on his instructions.

4. Based on the passport of the assessee and other details submitted by the assessee, the Assessing Officer (AO) accepted the residential status of the assessee as 'non-resident'. However, the AO sought to tax the incomes claimed exempt by the assessee on the ground that the said incomes were received in India and hence, were taxable in India under Section 5(2)(a) of the Act, irrespective of the residential status of the assessee. As the assessee was not a resident of any other State as already stated by him, tax treaty

benefits will not be applicable on his income. The AO further observed that these incomes were credited in to the NRE bank accounts by the employers, and therefore, the assessee had control over such amounts for the first time in India and added such sums as incomes taxable in India.

5. On an appeal before the Commissioner of Income Tax (Appeals) [CIT(A)], the assessee argued as under:

a) He qualified as non-resident, entire services were rendered outside India, and neither of the employers for which services were rendered had a permanent establishment in India.

b) Payment for services rendered outside India was made by the entities in foreign currency which was in turn remitted to the NRE accounts in India.

c) 'Received in India' under the Section 5(2)(a) of the Act should be interpreted as income received in India in Indian currency. Remittance made in foreign currency to NRE account cannot be considered as 'income received in India'.

d) Where a foreign company makes payment to non-residents for services rendered outside India, point of receipt of income by the non-resident assessee should be considered as outside India and not in India.

6. The CIT(A) was not convinced by the arguments put forth by the assessee and therefore, upheld the AO's order, *inter alia* applying the decision of the Mumbai Tribunal in the case of *Captain A. L. Fernandez vs. ITO (2002) 81 ITR 203 (Mum.) (TM).* In that case, the Mumbai Tribunal had held that:

a) The salary for services rendered aboard a ship outside the territorial waters of any country would be taxable in India if it were received in India as per Section 5(2)(a) of the Act.

b) When salary income received by the assessee has accrued or arisen in India under Section 5(2)(a) of the Act, it is not necessary to examine whether the salary is also deemed to accrue or arise in India by applying Section 9(1) of the Act and the Explanation thereto.

7. Before the Tribunal, the assessee relied on the following judgments:

A) *DIT vs. Prahlad Vijendra Rao (2011) 198 taxman 551(Kar.)* where the High Court of Karnataka had held that:

a) Salary received by the non-resident marine engineer for services rendered by him on a foreign going Indian ship which mainly remained away from the Indian coast accrued outside India and was not taxable in India.

b) The criteria for applying the definition of Section 5(2)(b) of the Act would be such income which is earned in India for the services rendered in India and not otherwise.

c) Under Section 15 of the Act even on an accrual basis salary income is taxable, i.e., it becomes taxable irrespective of the fact whether it is actually received or not; only when services are rendered in India it becomes taxable by implication. However, if services are rendered outside India such income would not be taxable in India.

d) Income earned by the non-resident assessee while working outside India has not accrued in India and is not deemed to accrue in India.

B) *CIT vs. Avtar Singh Wadhwan [2001] 115 Taxman 536 (Bom.)* where the Bombay High Court held that :

a) In the case of a non-resident, if income accrues outside India, the same is not taxable.

b) Under Section 9(1)(ii) of the Act, where the salary is earned in India, it shall be

regarded as income arising in India. Explanation to that Section declares that income of the above nature payable for services rendered in India shall be regarded as income earned in India. This Explanation clearly indicates that where the salary is payable for services rendered in India, the same shall be regarded as income earned in India. Therefore, the relevant test to be applied is where the services have been rendered. If the services were rendered in India, then the salary income shall constitute income arising in India.

C) *Arvind Singh Chauhan [2014] 42 taxman.com 285 (Agra)* where the Agra Tribunal held that:

a) The connotation of income having been received and an amount having been received are qualitatively different. Salary amount was received in India, but the salary income was received outside India.

b) Income cannot be taxed at every point of receipt. Salary had accrued outside India and, by arrangement, was remitted to India. Hence, it will not constitute receipt of a salary in India to trigger taxability under Section 5(2)(a) of the Act.

8. The tax department contended that the charging Section 4 of the Act does not specify the term 'in India' and does not have a bias based on the residential status of the assessee. Further, as per Section 15 of the Act, salary can be due to a nassessee anywhere in the world and the location where salary is received is of no consequence in respect of taxability in India as in the decision of the Supreme Court of India (the Supreme Court) in the case of *CIT vs. L W Russel [1964] 53 ITR 91 (SC).*

**Decision**

The Tribunal held in favour of the Revenue as under:

1. The Tribunal observed that the Supreme Court in the case of L. W. Russel had determined the term 'due' as qualified by 'whether paid or not' in respect of salary income as connected with the contractual right of the employee to receive his salary and has no relation to location or place of services rendered or where the salary becomes 'due'.

2. There was no evidence in the present case to support the submission of the assessee that the salary income was received outside India and then brought to India for the sake of convenience. The fact that the employers and not the assessee had directly remitted the sum to India shows that the assessee had control over the said sum only in India.

3. If not taxed in India by virtue of receipt in India, such salary income would not suffer tax anywhere in the world. Accepting the assessee's argument would render Section 5(2)(a) of the Act redundant. It is elementary that a statutory provision is to be interpreted to make it workable rather than redundant. If income should first accrue or arise in India and then should be received in India, to be included under Section 5(2)(a) of the Act, then there would be no need for having the said Section in the statute.

4. The judgments relied upon by the assessee were distinguishable on the following basis:

a) The cases of Avtar Singh Wadhwan and Prahlad Vijendra Rao are factually distinguishable , since the question raised was not in relation to Section 5(2)(a) of the Act.

b) The decision in the case of Arvind Singh Chauhan followed the decision in the case of *CIT vs. A. P. Kalyankrishnan [1992] 195 ITR 534 (Mad)* where income had suffered tax outside India and then was received in India for the sake of convenience. In the present case, the income had neither suffered tax nor been received in any other jurisdiction. In the case of Arvind Singh Chauhan, the Agra Tribunal took a view that the assessee had a lawful right to receive a salary at the location of the foreign employer and the transfer of money

to India was only a matter of convenience. However, as per Section 5(2)(a) of the Act, the relevant criterion is not the right to receive a salary but the receipt of salary income which is in India.

c) The decision in the case of Captain A. L Fernandez clearly lays down that salary for services rendered aboard a ship outside the territorial waters of any country would be taxable in India if it was received in India as per Section 5(2)(a) of the Act. This decision was not brought to notice to the Agra Tribunal in the case of Arvind Singh Chauhan. Following the decision of the Mumbai Tribunal in the case of Captain A. L. Fernandez, the salary income received by the non-resident assessee in the present case were held as taxable in India by virtue of receipt in India as per Section 5(2)(a) of the Act.

## 6. Transfer pricing adjustment on free of charge Corporate guarantee and Letter of Comfort deleted, adjustment for interest-free advances upheld – Partly in favour of the assessee

*M/s. TVS Logistics Services Ltd. vs. DCIT 2016-TII-321-ITAT-MAD-TP Assessment Year: 2011-12*

**Facts**

*Re: Interest-free loans advanced*

1. The assessee advanced funds to its AEs without charging any fee / interest, with the sole intent of business expansion outside India. These advances were not made from its borrowings, instead, the assessee had surplus funds in the form of equity capital and termed this activity as shareholder activity.

2. During the same year, the assessee also paid INR 10.05 crore towards interest on borrowed loan. Accordingly, providing an interest-free loan to AEs and subsequently paying interest on borrowed loan was looked upon as shifting of profits outside India. Interest on advanced loans was computed using LIBOR by the Transfer Pricing Officer (TPO), and the same was confirmed by the Dispute Resolution Panel (DRP).

*Re: Free of charge guarantee extended*

1. The assessee had extended the corporate guarantee on behalf of its AE for which no guarantee fee was charged. The assessee contended that guarantee extended does not involve any cost, therefore, has no bearing on profit, income, loss or asset of the assessee.

2. The adjustment made by the TPO adopting LIBOR rate of interest. DRP upheld the adjustment further stating that in the event of failure of the AE to repay the loan, the assessee would have to naturally repay the loan resulting in shifting of profit and tax outside India.

*Re: Free of charge letter of comfort extended*

1. The assessee had issued an LOC to its AE claiming it as an obligation on the part of the assessee to give an LOC to enable the AE to borrow funds comfortably. As there was no profit element present, it was outside the purview of international transaction.

2. The TPO imputed a recovery charge of 1 per cent for the risk exposure of the assessee resulting from the LOC extended for the loan taken by the AE. DRP confirmed the method adopted by the TPO and upheld the adjustment.

**Decision**

*A) Re: Interest-free loans advanced to AEs*

1. The equity shares raised by the assessee is only for the purpose of expansion of its business and there is no compulsion for the assessee to utilise funds raised in the form of equity capital within India.

2. There is no prohibition for expanding the assessee's business outside India after observing necessary formalities. However, on account of the assessee borrowing loans and paying interest to the extent of INR 10.05 crore in India, it would naturally reduce the tax liability in India.

3. In an event of the assessee not diverting the equity capital to its AE and instead using it in its own business would not have necessitated the assessee to borrow funds in India; this is a clear case of an attempt to shift profits outside India and reduction of tax burden in India by claiming the interest payment as expenditure.

4. Interest on funds advanced to AEs outside India has to be computed on the notional basis by applying LIBOR rate.

B) *Re: TP adjustment for corporate guarantee and LOC*

1. Relying on the decision in the case of *Bharti Airtel Limited v. ACIT [2004] 43 taxmann.com 150 (Del.)*, and *Redington (India) Limited v. ACIT [2015] 41 ITR 646 (Chen.)*, the Tribunal upheld that the guarantee extended by the assessee does not involve any cost to the assessee and hence, was outside the ambit of international transaction. Accordingly, determination of arm's length price may not be necessary.

2. Mere pendency of appeal against the decision of this Tribunal in Redington India cannot be a reason to take a different view, unless and until the order is reversed by the Madras High Court.

3. An LOC is similar to a guarantee, and hence, the stand taken by the Tribunal shall hold good for an LOC.

4. The adjustment made by the TPO as confirmed by the DRP is not justified, and hence, the addition may be deleted for both corporate guarantee and LOC.

## 7. Transfer Pricing – Whether AMP expenditure incurred by assessee on behalf of its AE can be disallowed, merely because the expenditure incurred had indirectly helped in augmenting the brand value owned by its overseas AE, in case there was no contractual obligation to recover money from the AE and the increased AMP expenditure has led to enhanced sales and profitability of the assessee's product as well – Held: No. Whether a perceived/ notional indirect benefit to the AE, due to incurring of certain expenditure by an assessee in India, will be covered under the TP provisions – Held: No. Whether it can be inferred that the assessee has recovered some amount from its AE if the expenditure incurred by assessee had indirectly helped in augmenting the brand value owned by the overseas AE, in absence of any evidence on record to show sharing/ incurring AMP expenditure under the head by the assessee on behalf of its AE – Held: No in favour of the assessee

*Mondelez India Foods Pvt. Ltd. vs. Addl. CIT 2016-TII-297-ITAT-MUM-TP Assessment Year: 2005-06*

**Facts**

1. The assessee, formarly known as Cadbury India Ltd., and engaged in the business of manufacturing and marketing of malted food, drinks and chocolates, had filed its return declaring total income of ` 61.98 crores

2. During assessment, the AO noted that the assessee had entered into international transactions with its AEs, and accordingly he reffered the matter to the TPO, who then observed that the assessee had entered into a technical assistance and royalty agreement with CSOL (AE) for availing benefits of technical knowhow developed by the AE relating to the manufacturing, processing, distributing and marketing of products as well as benefits of continuing research and development (R&D) undertaken by CSOL.

3. In pursuance of the same, the assessee had agreed to pay royalty to the AE @ 1.25%, and had paid royalty to the tune of ` 6.35 crore and ` 730.41 lakh for the use of trade mark.

4. The TPO was of the opinion that royalty paid by the assessee on trade-marks could not be allowed. Further, on perusal of the accounts of the assessee, the TPO noticed that the assessee had debited AMP expenses amounting to ` 85.15 crores, that it was 11.11% of the sales recorded by the assessee during the year, that industry average under the said head worked out to 6.55% only.

5. The TPO directed the assessee to file the details of AMP expenses, sales and royalty paid for a period of last 10 years. After analysing the details, the TPO concluded that the assessee was paying higher and higher royalty to the AE, that the AMP had also recorded steady growth over time and so had the sales, that the marketing expenditure which was ` 20.13 crore in the AY 1996-97 had increased to ` 85.15 crore for the year under appeal, that the royalty had increased from ` 2.07 crore to ` 13.56 crore for the same period.

6. He held that high degree of correlation between the royalty payment and sales on one hand and AMP expenditure and sales on the other was not a matter of coincidence, that it was coming out as a feature of business undertaken by the assessee. Accordingly, he asked the assessee to show cause as to why the cost of higher marketing expenditure entirely borne by it should not be apportioned/allocated in the ratio of benefit accruing to the overseas AE as a result of higher sales. The TPO thereafter computed ` 1.52 crore as the cost apportioned/allocable out of the AMP cost incurred by the assessee for the benefit accruing to the AE. However, the cost was restricted to ` 71.00 lakhs, in view of the disallowance/adjustment in income made on account of royalty for trade mark.

7. On first appeal, the First Appellate Authority (FAA) directed the assessee to submit the average expenditure incurred by the companies in the FMCG sector/comparables. Upon observing the details, the FAA observed that the average of expenditure of the companies in the FMCG segment was 8.89% on sales is against such expenditure of the assessee at the rate of 10.45%. He held that the companies chosen by the assessee were not the same that could be considered for benchmarking, that if the amount corresponding to the difference in average marketing and advertisement expenses of those companies and that of the assessee would be at 1.56%. He applied the difference to the total sale and determine the adjustment to ` 11.95 crores. Finally, he upheld the order of the TPO.

**Decision**

On further appeal, the Tribunal held in favour of the assessee as follows:

1. It is found that the assessee is the market leader of the chocolate market in India, that it was commanding 70% of the market share in the year under appeal, that it had debited AMP expenses, amounting to ` 85.15 crores to its P& L. a/c, that the net turnover of the assessee was of ` 766.21crores, that it was 11.11% of the sales recorded by the assessee during the year, that it had also paid royalty amounting to ` 13.56 crores for the same period, that the TPO computed ` 1.52 crores as the cost apportioned/allocable out of the A&M cost incurred by the assessee for the benefit accruing to the AE, that he restricted the cost to ` 71 lakh, in view of the disallowance/adjustment in income made on account of royalty for trade mark, that the average AMP expenditure by the leading FMCG companies for the period 2001-05 was 10.28%, that the AMP expenditure incurred by the assessee during the same period was 10.45%, that the assessee had contended that its profitability (PBT to sales ratio) @10.85% was much higher compared to the average profitability of the comparables at the rate of 3.57%, that the FAA had held that higher rate profitability could not be a justification of this proportionate expenditure, that in the appellate proceedings the FAA had proposed further addition, that finally he upheld the order of the TPO and confirmed the addition of ` 71 lakh, that there was no contractual obligation to recover money from the AE, that it

was separately paying royalty for use of brand and trade-mark.

2. There is no reason for not holding that the increased AMP expenditure led to enhanced sales and profitability, that for the purpose of analysing the AMP expenditure incurred by and the comparables it is necessary to consider various factors. If the expenditure incurred by the assessee is considered in the background of the growth achieved by it, one has to agree with the argument of the assessee that it made rapid progress in the Indian market post liberalisation period and AMP played an important role in it.

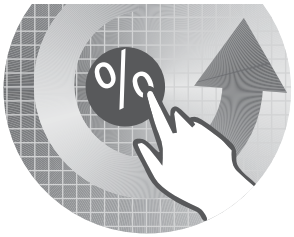
3. There exists a fundamental and basic distinction between the provisions of Section 37 and section 92 of the Act-as the first is expense oriented and the second is pricing oriented. The FAA tried to incorporate the ingredients of Section 37 while dealing with the TP adjustments, when he talked of the 'higher expenditure' and 'justification' of such expenditure. In our opinion, the approach of the FAA was not in accordance with the basic philosophy of TP provisions. It is the assessee who has to decide how much to spend for earning his income. The tax authorities are prevented from entering into the proverbial shoes of the assessee to decide the justification of the expenditure. The FAA had not proved that the expenditure incurred by the assessee for advertisement was covered by those sections. Therefore, in our opinion he had adopted a totally incorrect approach, while dealing the allowability of AMP expenditure.

4. It is further observed that the claim of the assessee is factually correct that it had incurred the AMP expenditure for creating product awareness and to recall the value of existing products and that it had a local marketing strategy of making advertisement/slogans in the local language. In our opinion, KUCH MEETHA HO JAY campaign proves the claim made by the assessee. The TPO had ignored the fact that films/TV advertisements of the assessee had the local messaging concept. Such local advertisement campaigns can never be held to be driven towards serving the interests of the AE. The TPO/FAA had not controverted the fact that the AE was the owner of intellectual property of the 'Cadbury' brand and that it was responsible for promoting the brand all over the globe and that the brand related exercise at the cost of the AE for the overall brand positioning and management benefitted the assessee also in an indirect manner.

5. Nothing has been brought on record to prove that the assessee was directly or indirectly promoting the global brand rather than promoting its own products. In our opinion, there exists a fine but very important distinction between products promoted and nurtured by an assessee and the brand owned and supported by its AE. Therefore, until and unless something positive is brought on record about sharing/incurring AMP expenditure under the head by an assessee on behalf of its AE, it cannot be held that it should have recovered some amount from the AE as the expenditure by it indirectly helped in augmenting the brand value owned by its overseas AE.

6. The assessee was incurring expenditure for its products whereas the AE was looking after the ground at global level. If the AMP expenditure incurred by them benefitted indirectly in the local/ international market, it would not mean that it was an international transaction. In our opinion, a perceived/notional indirect benefit to the AE, due to incurring of certain expenditure by an assessee in India, is not covered by the TP provisions.

7. Considering the facts-like absence of an agreement between the assessee and the AEs for sharing AMP expenses, payment made by the assessee under the head AMP to the domestic parties, failure of the TPO to prove that expenses were not for the business carried out by the assessee in India, we are of the opinion that the transaction in question was not an international transaction and that the TPO had wrongly invoked the provisions of Chapter X of the Act for the said transaction.



CA. Hasmukh Kamdar

# INDIRECT TAXES
## Central Excise and Customs – Case Law Update

*Mayar India Ltd. vs. Commissioner of Central Excise, Delhi–II*

*[2016 (336) E.L.T 546 (Tri.–Del.)*

**Classification**

The facts in this case were as follows –

The assessee was engaged in the manufacture of various Ayurvedic medicines like Neem, Boswellia, Serrata, Ashwagandha, Gymnema, etc. The products were classified under Tariff Heading 3003.31 and claimed full exemption. Revenue felt that these products are rightly classifiable under Tariff Heading 3003.39 and liable to duty as "Patent or Proprietary Medicament" as these products carried trade names "Sivananda" and "Om" and hence appeared to have been sold as P or P Medicines.

After enquiry, the original authority classified these products under Tariff Heading 3003.39 and confirmed duty liability and imposed equal amount of penalty also.

The assessee's appeal against the Department's order was rejected by the Commissioner (Appeal). Assessee therefore filed this Appeal before Hon. Tribunal.

On behalf of the assessee it was submitted that -

(a) All the Ayurvedic medicines now under consideration are manufactured as per the formulae prescribed in authoritative text books of Ayurveda.

(b) For a product to be classified under Tariff Heading 3003.31, the conditions are that

  (i) The product should be manufactured in accordance with formulae described in the texts.

  (ii) All ingredients used are to be mentioned in the said books and

  (iii) The product should be sold under the name as specified in such books. The appellants satisfy all these conditions.

(c) The learned Commissioner (Appeals) has not dealt with any of the submissions made by the assessee with reference to scope of tariff classification under Heading 3003.31. The decision relied on by the Commissioner (Appeals) are not at all relevant to their case.

(d). Reliance was placed on Tribunal's decisions in *Zandu Pharmaceuticals – 2004 (172) E.L.T. 457 (Tri-Mum.); 2006 (198) E.L.T. 257 (Tri-Mum), Dabur India Ltd. – 2007 (218) E.L.T. 211 (Tri.-Sel.)* and *Hon'ble Supreme Court's decision in Astar Pharmaceuticals (P) ltd. – 1995 (75) E.L.T. 214 (S.C.)*

On behalf of the Revenue it was submitted that apart from name of the medicines the product labels clearly mentioned the trade name 'Sivananda' with a registered design of 'Om'. Such trade mark is meant to link the product with the company and the products are to be considered as proprietary medicines.

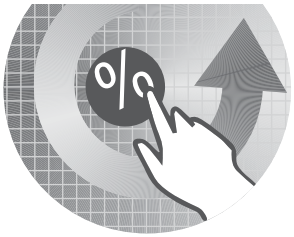
The Hon'ble Tribunal observed as follows –

The point for decision in these appeals is whether the Ayurvedic medicines manufactured by the assessee are to be classified under Tariff Heading 3003.31 or 3003.39. The admitted facts are that the assessee is manufacturing these various Ayurvedic medicines in accordance with the formulae described in the authoritative books of Ayurveda. Further, it is also an admitted fact that the products carry the name as specified in such books. However, the point of dispute is whether or not the medicines which are sold under the name as specified in such books are sold in effect in proprietary name of the assessee.

The patent or proprietary medicaments other than Ayurvedic, Unani, etc., are specially mentioned under Tariff Heading 3003.10. However, there is no specific heading for patent or proprietary medicaments which are exclusively Ayurvedic. Such medicines are sought to be classified under Tariff Heading 3003.39 as "- - other" under the main heading 'medicaments'. It is clear that such non-specific residual heading can be invoked only when specific headings are not found applicable to the products in question. It was submitted by the assessee that the conditions to be fulfilled for classifying the products under tariff Heading 3003.31 are satisfied in the present case. The area of dispute is with reference to the name in which the said Ayurvedic medicines are sold by the assessee. The original adjudicating authority observed that the goods are not sold exclusively under the name as specified in such authoritative text books. Since these medicines are sold with the registered trade mark/ brand name "Sivananda" and "Om" these are to be considered as patent or proprietary medicaments classifiable under residual Heading 3003.39. The Hon. Tribunal further noted that there is no such condition of the product to be sold exclusively in the name mentioned in the text books. Heading 3003.31 stipulates that medicaments to be manufactured exclusively in accordance with the formulae described in authoritative books specified in the first Schedule to the Drugs and Cosmetics Act, 1940, etc., and sold under the name as specified in such books. There is no dispute that the impugned goods are manufactured in accordance with the formulae of the authoritative text and name as mentioned in the text are mentioned in the packing of the product. The Hon. Tribunal also pursued copies of labels used for marketing these medicaments. The mention of the house name/ brand name "Sivananda" /"Om" cannot lead to the conclusion that these products are not sold in the name specified in Ayurvedic text. In Zandu Pharmaceuticals (Supra), the Tribunal held that the word "Zandu" appearing on the label of Ayurvedic medicines will not disentitle the assessee from claiming the exemption available to Ayurvedic medicaments. As per C.B.E. & C. Clarification dated 29-3-1994, the Chavanprash prepared as per Ayurvedic text books and sold as Chavanprash, if the manufacturer's name or mark, logo, symbol, etc., is also prominently displayed, in such situation also full exemption as available to Ayurvedic medicines is to be extended. It was also noted that the Hon'ble Supreme Court in Astra Pharmaceuticals Pvt. Ltd., held that there is distinction between house mark and product mark. A monograph which only identifies the manufacturer would not make the medicines patent or proprietary.

Considering the above analysis, it was held that the assessee is right in classifying these products under Tariff Heading 3003.31 and claimed exemption available to Ayurvedic medicaments.

Accordingly, the appeal filed by assessee is allowed.



CA Janak Vaghani

# INDIRECT TAXES
# VAT Update

## 1. Notification

### Notification No. VAT. 1516/CR-83/Taxation-1 dated 9-6-2016

### Date of coming into force section 10(1) of The Maharashtra Tax Laws (Levy, Amendment and Validation) Act, 2016

The Government of Maharashtra has issued above notification to specify 10th June, 2016 from which section 10(1) of The Maharashtra Tax Laws (Levy, Amendment and Validation) Act, 2016 shall come into force.

## 2. Trade Circular

### Trade Circular No. 19T of 2016, dated 30-6-2016

### FAQs on Settlement of Disputes in Arrears Act, 2016

The Commissioner of Sales tax by above referred trade circular has answered various FAQs on settlement of disputes in Arrears Act, 2016.

## 3. Website Updates

**i) List of Order/Judgments delivered by Hon'ble Maharashtra Sales Tax Tribunal and received by Legal Branch**

The List of Order/Judgments delivered by Hon'ble Maharashtra Sales Tax Tribunal and received by Legal Branch for the period from 1-4-2016 to 30-6-2016 is made available in the website under "What's New".

**ii) Draft Model GST Law**

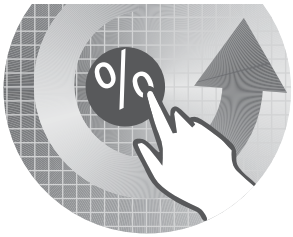
Draft Model GST Law is made available in the website under "What's New".

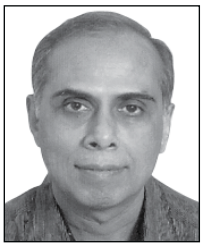
**iii) List of New RC granted from 25-5-2016 to 1-7-2016**

The list of new Registration Certificates granted under various Acts during the period from 25-5-2016 to 1-7-2016 is made available under "What's New".

**iv) Cases Selected for Assessment, Issue Based Audit for 2012-13.**

List of cases selected for assessment, Issue Based Audit along with missing declaration for the period 2012-13 is made available in the website under "What's New".






CA Rajkamal Shah & CA Naresh Sheth

# INDIRECT TAXES
## Service Tax – Statute Update

### 1. Exemption in respect of services by Senior Advocate

Entry 6(c) of Notification No. 25/2012-ST dated 20-6-2012 (Mega Exemption Notification) provided exemption in respect of legal services provided by senior advocate to non-business entities w.e.f. 1-4-2016.

Above exemption Entry 6(c) of Mega Exemption Notification is substituted to provide exemption for legal services provided by senior advocate to:

i) Any person other than a business entity; or

ii) A business entity with a turnover up to ` 10 lakh in the preceding financial year.

Exemption will now also be available to smaller business entities having turnover less than ` 10 lakh in immediately preceding financial year in addition to non-business entities.

*[Notification No. 32/2016 – ST dated 6-6-2016]*

### 2. Person liable to pay tax in respect of representational services by Senior Advocate

Clause (DD) inserted to Rule 2(1)(d)(i) to provide that business entity who is litigant, applicant or petitioner is liable to pay service tax on services provided by a senior advocate for representing before any court, tribunal or authority directly or indirectly through another advocate or a firm of advocates.

*[Notification No. 33/2016 – ST dated 6-6-2016]*

### 3. Amendments in Reverse charge Notification No. 30/2012-ST dated 20-6-2012

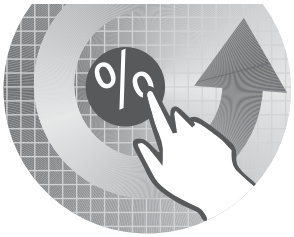
Clause (iva) is inserted to paragraph I(A) of Notification No. 30/2012-ST dated 20-6-2012 wherein services provided by a senior advocate for representing before any court, tribunal or authority directly or indirectly through another advocate or a firm of advocates is notified as taxable service liable to reverse charge mechanism.

Serial No. 5 of Notification No. 30/2012-ST dated 20-6-2016 amended to provide that services provided by individual advocate or a firm of advocates by way of legal services, directly or indirectly, service recipient will be liable to pay 100% of the liability.

*Explanation III* inserted to state that the business entity located in the taxable territory who is litigant, applicant or petitioner, as the case may be, shall be treated service recipient for the purpose of this notification.

*[Notification No. 34/2016 – ST dated 6-6-2016]*

*[Contd. on page 128]*



CA Bharat Shemlani

# INDIRECT TAXES
## Service Tax – Case Law Update

## 1. Services

**Club or Association Service**

***1.1 CCE&C, Surat-I vs. Surat Tennis Club 2016 (42) STR 821 (Guj.)***

The High Court in this case relying on decision in *Gujarat Sports Club Ltd. 2013 (31) STR 645 (Guj.)* held that, the Tribunal fully justified in dropping demand of service tax under club or association services on similar facts.

***1.2 Gondwana Club vs. CC&CE, Nagpur 2016 (42) STR 895 (Tri.-Mumbai.)***

The Tribunal in this case held as under:

- Receipts from members are not liable to tax. Service Tax under FA, 1994 is not on entity or on amounts received by entity. It is on specified taxable service and hence taxability can arise only to the extent that each transaction between member and club can meet test of conformity with section 65(105) (zzze) of FA, 1994.
- The recovery of amounts from staff towards accommodation provided to them are not liable to service tax as contractual privileges of employer-employee relation are outside the purview of service tax and this activity does not come within the definition of taxable service of renting of immovable property.
- The receipts towards providing consumables to members are liable to service tax.

**Telecom Service**

***1.3 Idea Cellular Ltd. vs. UOI 2016 (42) STR 823 (P&H)***

The High Court relying on Apex Court decision in 2006 (2) STR 161 (SC), held that activation of SIM card is a service and not sale. In absence of any statutory provision under State VAT law authorising collection of sales tax/VAT on SIM cards its collection from petitioners is without authority of law and hence non-est. Further, the State Government is directed to transfer the amount due as refund of unauthorisedly collected VAT to Service Tax Department for adjusting same towards demand made by them.

**Business Support Service**

***1.4 Samsung India Electronics Pvt. Ltd. vs. CCE, Noida 2016 (42) STR 831 (Tri.-Del.)***

The appellant in this case engaged in activity of identifying customers in India on behalf of foreign manufacturers and canvassing

features of CDMA Mobile phones and also provided services of repair and maintenance of said phones. The appellant contended that same is export of service. The Tribunal held that, the facts of the case are similar to precedent decision of Tribunal in *Blue Star Ltd. 2014-TIOL-2257-CESTAT-Mum.* and services are performed in India on behalf of client situated abroad and thus provided to said client abroad hence qualifies as export of service.

***1.5 Wonder Cars Pvt. Ltd. vs. CCE, Pune-I 2016 (42) STR 1055 (Tri.-Mum.)***

The department in this case sought to demand service tax on collection of smart card/ vehicle registration fees and other charges. The Tribunal held that, such charges are neither covered under 'Customer Relationship' nor even under residuary category 'other transaction processing' under BSS, hence not leviable to service tax.

**Dredging Service**

***1.6 R. P. Shah vs. CCE, Thane-II 2016 (42) STR 839 (Tri.-Mumbai)***

The Tribunal in this case relying on decision in *Reliance Michigen (JV) 2014 (35) STR 620 (Tri.-Mum.)* held that desilting of Mithi river is liable to service tax. Further it is held that there is no suppression of facts or mis-representation from any public authorities as the work of desilting of river was in public domain as contract was awarded by Government of Maharashtra.

**Construction Service**

***1.7 Harsh Construction vs. CCE&ST, Surat 2016 (42) STR 844 (Tri.-Ahmd.)***

The Tribunal relying on Larger Bench decision in Bhayana Builders Pvt. Ltd. 2013 (32) STR 49 (Tri.-LB) held that free supplies to sub-contractor by construction service provider is not includible in gross amount.

**Maintenance or Repair Service**

***1.8 CCE, Goa vs. Tyresoles India Pvt. Ltd. 2016 (42) STR 861 (Tri.-Mumbai)***

The Tribunal relying on majority decision of Tribunal in *2012 (26) STR 225 (Tri.-Chennai)* held that benefit of deduction of cost of raw materials consumed in providing retreading of old and used tyres is not available. The concept of deemed sales of goods applicable only in works contract service and not in case of present service therefore value of rubber includible in gross amount and benefit of Notification No. 12/2003-ST is not available.

**Scientific and Technical Consultancy Service**

***1.9 CCE, Pune-I vs. Sai Life Sciences Ltd. 2016 (42) STR 882 (Tri.-Mumbai)***

The assessee in this case exported scientific and technical consultancy service and claimed refund of accumulated CENVAT credit. The department rejected refund on the ground that since performance of service was within India, same is not amounting to export of service. The Tribunal held that, appellant offering research and development expertise in new compounds of pharmaceutical products and even though some chemicals are provided by service recipient, service provided are not in relation to these materials to invoke bar in terms of rule 4 of POPS Rules, 2012. Further it is settled law that service tax being destination based tax services which are received abroad and payment of which is remitted in foreign exchange are covered in export of service.

**Manpower Recruitment & Supply Agency Service**

***1.10 Israni Networking vs. CCE, Mumbai 2016 (42) STR 917 (Tri.-Mumbai)***

The Tribunal in this case held that, supplying models/actors for advertising of products or TV serials/films is not covered within the definition of Manpower Recruitment & Supply

Agency Service during the periods from 2001-02 to 2002-03.

**Rent-a-Cab Service**

***1.11 S. K. Kareemun vs. CCEC&ST, Hyderabad 2016 (42) STR 988 (Tri.-Bang.)***

The appellant in this case provided buses for transportation of passengers to APSRTC on stage carriage basis. According to the agreement consideration is paid on per KM basis and drivers also provided along with buses. The appellant contended that service tax is not leviable as it is joint operation between two entities. The High Court held that, providing buses on hire to APSRTC is independent activity and not a joint operation with States for plying buses. It is further held that, even though the buses with stage carriage permits cannot be hired according to Motor Vehicles Act, 1988, the chargeability of service tax on impugned services is independent of provisions contained in Motor Vehicle Act, 1988.

**Business Auxiliary Service**

***1.12 Franco Indian Pharmaceuitical (P) Ltd. vs. CST, Mumbai 2016 (42) STR 1057 (Tri.-Mumbai)***

The appellant in this case manufacturer of pharmaceutical products used their marketing network to market pharmaceutical products of their group companies and getting compensated on percentage of sales value. The contract also indicated that employees of appellant deputed to group companies were governed by conditions applicable to that group company and goods sold by deputed employees had to be considered as sale of that group company. The Tribunal in this facts held that, appellant only deputed employees to group companies who were called back after job was completed and such activity is not a BAS as the appellant did not render any service of promotion or marketing of goods manufactured by group companies.

## 2. Interest/Penalties/Others

***2.1 Bordubi Engineering Works vs. UOI 2016 (42) STR 803 (Gau.)***

The High Court in this case held that, the proviso to section 73(1) of FA, 1994 extending limitation period from six months to five years has to be construed strictly. The initial burden is on Department to prove that situations visualised by proviso existed and once it is able to bring on record material to show that appellant was guilty of any of those situations visualised by section then burden shifts and then applicability of proviso has to be construed liberally. The Law required intention to evade payment of duty then it is not mere failure to pay duty and it must be something more. The assessee must be aware that duty was leviable and it must be deliberately avoided payment of the same. The word 'evade' in context means defeating provisions of law of paying duty and it is made more stringent by use of word 'intent'. There must be deliberate avoidance of payment of duty payable in accordance with law and mere omission on part of assessee is not sufficient unless it is deliberate attempt to escape from payment of service tax.

***2.2 Bengal Investment Ltd. vs. AC(TARC) ST-I 2016 (42) STR 817 (Cal.)***

The High Court in this case held that, the Commissioner (Appeals) is not having any statutory power to condone the delay beyond 30 days. The said statutory provision is to be strictly construed and any other approach would make statutory provision otiose and open floodgate of writ petition before High Court.

***2.3 Vikram RMC (P) Ltd. vs. CST, Delhi 2016 (42) STR 866 (Tri.-Del.)***

The Tribunal in this case held that, ancillary and incidental activities of pouring, pumping and laying of concrete entirely being related to sale of RMC without any service element and therefore not liable to service tax.

***2.4 CCE, Pune-I vs. Shrikrishna 2016 (42) STR 907 (Tri.-Mumbai)***

In the present case the issue before Tribunal was whether unamended provision of section 78 of FA, 1994 according to which 100% penalty or amended provision of section 78 according to which 50% penalty is applicable in case where transactions are reflected in the books of account, when the offence has taken place during the period unamended section 78. The Tribunal held that, there is no saving clause in section 38A of CEA, 1994 for saving erstwhile section 78 nor even anything provided in amended section 78 regarding the non-applicability of amended provision in the case pertaining to period prior to amendment thus amended section 78 applicable at the time of adjudication of SCN.

***2.5 Sri Balaji Agency vs. CCE&ST, Trichy 2016 (42) STR 914 (Tri.-Chennai)***

The Tribunal in this case held that, in view of law settled by Apex Court in *Singh Enterprises 2008 (221) LET 163 (SC), Commissioner (Appeals)* having no power to condone the delay beyond statutory period and hence appeal is rightly dismissed.

***2.6 A. S. Transport vs. CESTAT Chennai 2016 (42) STR 957 (Mad.)***

In this case, the appellant while conceding demand on merits of levy of service tax on Cargo Handling Service, raised contention of time bar on ground that since no penalty is imposed in original order, ingredients of extended period cannot be invocable for demand also. The High Court held that, plea of appellant is on wrong premises and merely non-imposition of penalty is not ground for non-invoking extended period of limitation. It is further held that, new plea for first time cannot be raised before Court.

***2.7 J. P. Morgan Services India Pvt. Ltd. vs. CCE(ST) Mumbai 2016 (42) STR 982 (Tri.-Mumbai)***

The Tribunal in this case held that, neither rule 5 of CCR, 2004 providing for grant of refund nor Notification No. 12/2005-ST providing for rebate of service tax paid in respect of export of services provides that the assessee has to export services on or after 19-4-2005 to avail benefit of rebate of CENVAT credit. Hence, it cannot be said that only export made after 19-4-2005 were eligible for refund in rule 5. Further it is held that, substantial benefit cannot be denied in absence of specific embargo in rules.

***2.8 Schenck Rotec India Ltd. vs. CCE, Noida 2016 (42) STR 1066 (Tri.-Del)***

The appellant in this case submitted claim for refund of duty within one year but claim for interest amount paid filed after one year of payment of such amount. The Tribunal held that claimant has to file refund application claiming refund of both duty as well as interest amount before expiry of one year from the relevant date.

## 3. CENVAT Credit

***3.1 CCE, Chandigarh-I vs. Rine Machine Tools 2016 (42) STR 809 (P&H)***

The High Court in this case held that in view of settled law the credit of service tax paid on outward freight up to customers premises is admissible.

***3.2 Essar Steel India Ltd. vs. CCE&ST, Surat-I 2016 (42) STR 869 (Tri.-Ahmd.)***

The appellant in this case received services from overseas agents for market information on quarterly basis for various market and segment of party. The Tribunal after going through agreement it is held that agreement with appellant are to be construed as sales promotion agreement and credit thereon is admissible. Further it is held that, explanation inserted in rule 2(l) providing that sales promotion includes services by way of sale of dutiable goods on commission basis is declaratory in nature, hence effective retrospectively.

### *3.3 Hinduja Global Solutions Ltd. vs. CCEST&C, Bengaluru 2016 (42) STR 932 (Tri.-Bang.)*

The Tribunal in this case allowed CENVAT credit on service tax paid on services of advise, procedural issue as to raising finance by pledging of shares, advisory services provides in relation to disinvestment of stakes and acquisition of shares in a company etc. as the expansion of business activity is directly connected with the activity of service provided by appellant to their service recipient which is nothing but the correlation to business undertaken by the appellant.

It is further held that, credit is admissible in respect of invoices raised by ISD for the service received prior to registration of HO as an ISD.

### *3.4 CCE, Jaipur vs. National Engineering Industries Ltd. 2016 (42) STR 945 (Raj.)*

The High Court in this case held that, prior to insertion of clause (d) in Rule 7 of CCR, 2004, there was no requirement of distributing input service credit on *pro rata* basis.

### *3.5 Ashoka Industries vs. CCE, Jaipur-I 2016 (42) STR 1009 (Tri.-Del.)*

The appellant in this case sold goods on FOR Destination basis and claimed CENVAT credit of GTA service and insurance service. The Tribunal held that payment of goods by buyer on receipt and acceptance basis and hence responsibility of transportation and transit insurance is on appellant, hence credit admissible for both services.

### *3.6 Adani Port & Special Economic Zone Ltd. vs. CST Ahmedabad 2016 (42) STR 1010 (Tri.-Ahmd.)*

The Tribunal in this case held as under:

- Allowed CENVAT credit on various services as they fall under inclusive part of definition of input services used for providing operating port and its services.
- Cement and Steel used for construction of jetty cannot be considered to be used for providing taxable output service and they are neither capital goods nor inputs hence CENVAT credit thereon is not admissible.

*[Contd. from page 124]*

## 4. Exemption from Levy of Krishi Kalyan Cess (KKC) on outstanding Invoices as on 31-5-2016

Krishi Kalyan Cess will not be leviable on taxable services subject to the following:

- Invoice has been issued on or before 31st May, 2016 and
- Services have been rendered and completed on or before 31st May, 2016.

*[Notification No. 35/2016-ST dated 23-6-2016]*

## 5. Exemption from Levy of service tax on services of transportation of goods by vessel (import freight)

Ocean freight in respect of services of transportation of goods by vessel from outside India to custom station in India will be exempt from service tax provided:

- Invoices for services have been issued on or before 31st May, 2016; and
- Import Manifest or the Import Report, as required under Section 30 of the Customs Act, 1962 has been delivered on or before 31st May, 2016; and
- Service provider / recipient should produce the Custom certified copy of such Import Manifest or Import Report.

*[Notification No. 36/2016-ST dated 23-6-2016]*

Janak C. Pandya, Company Secretary

# CORPORATE LAWS
# Company Law Update

## Case Law No. 1

*[2016] 196 Comp Cas 441 (Bom.)*

*[In the Bombay High Court]*

*Subhiksha Trading Services Ltd. and Another vs. Azim Premji*

**Any precondition in the Articles of Association to file any suit or commence any litigation on behalf of the company shall be complied with and filing of any suit or litigation without complying with such precondition is nonest and cannot be legitimised**

**Brief Case**

The plaintiffs filed this suit against the defendant alleging defamation by the defendant. Plaintiff No. 1 is a Company named Subhiksha Trading Services Ltd., and plaintiff No. 2 is Mr. R. Subramanian, promoter and managing director of plaintiff No.1.

The defendant had first challenged the maintainability of the suit on following grounds:

1. That plaintiff No. 2 had no authority to file the suit on behalf of plaintiff No. 1;
2. The Articles of Association of plaintiff No. 1, provides that any resolution for commencement or discontinuation of any litigation as set out therein requires the consent of at least one director nominated by the VC Investor; and
3. There was no such board resolution authorising plaintiff No. 2 to file the suit.

In response to above, plaintiff No. 2 filed an affidavit giving evidence claiming to be authorised to deal with all legal matters in respect of plaintiff No.1.

This Hon. Court had twice earlier passed an order rejecting the petition as well as review petition of plaintiff No. 2 on the ground mentioned above.

Thus, the issue before this court was whether plaintiff No. 2 had authority to file this suit on behalf of plaintiff No.1 or not.

The submissions made by the defendant among other things were as under:

1. As per Article 17A of the Articles of Association, to commence or discontinue any litigation or arbitration which is material in the context of the company's business, while passing the board resolution, at least one director nominated by the VC investor or VC Investor consents or votes in favour of the same was required.
2. The present suit is material in the context of the company's business.

The Official Liquidator ("OL") appointed by Madras High Court had submitted that under Section 441 read with Section 457 of the Companies Act, 1956, the OL was entitled to prosecute the suit on behalf of plaintiff No. 1 and could ratify the filing of the suit to overcome the defect of non-compliance with Article 17A. In its support, reliance was placed on the judgment in the case of *All India Reporter Ltd. vs. Ramchamdra Dhondo Datar*, *AIR 1961 Bom 292*

Plaintiff No. 2 made the following submissions:

1. Article 17A as produced by the defendant is incomplete and inchoate documents and hence cannot be relied upon.

2. Article 37 of the documents which state that the contents of three agreements (i) investment agreement; (ii) investment agreement-I; and (iii) subscription agreement, would form part of the Articles. Further, the clause in the said agreements would supersede the other Articles, if the terms therein were to be in conflict with the other Articles. Thus, article placed by the defendant suppressing the three documents as above cannot be relied upon.

3. Whether consent of VC investor has been obtained and that conditions of Article 17A be made applicable existed.

4. In light of Section 28 of the Indian Contract Act, 1872, the Articles restraining filing of the suit without the consent of the VC Investor are void.

5. The company's business has no nexus with the litigation herein. The litigation is relating to tort of defamation and is in no manner a matter related to company's business.

6. The suits related to company's business alone, such as its premises, licences, employees, trademarks and copyrights, supply arrangements, contractors and vendors and the like would if at all get attracted under Article 17A.

The re-submission from the defendant's side was as under:

1. The submission of plaintiff No. 2 that the Articles of Association produced by the Defendant were incomplete and inchoate is baseless as they have submitted the copy of articles of association which has been taken on record.

2. In review petition, plaintiff No. 2 had submitted that evidence would be required to ascertain whether the consent had been obtained from the VC Investor and whether conditions of Article 17A were to be made applicable.

**Judgment and reasoning**

The Hon. High Court has dismissed the suit.

The following points were considered by the Court:

1. The Board resolution relied upon by plaintiff No.2 was passed before Article 17A was inserted. On the date of filing of the suit, apparently the Board had not passed any resolution granting authority to any person under Article 17A of the articles of association.

2. With regard to plaintiff No. 2's contention as to evidence was required to ascertain whether VC Investor's consent was obtained and whether conditions as per Article 17A is to be made applicable.

3. The Court has noted that the above issue is already closed by earlier order. In earlier two occasions, plaintiff No. 2 had not pleaded that the VC investors' shareholding had fallen below 2% or that the company was listed. Even in the present hearing, in answer to an express question put by this Court and the defendant's request that the plaintiff

No. 2 on oath gave statement as to VC investor shareholding fallen below 2%, the plaintiff No. 2 had just failed and avoided to provide an answer and stated only that evidence was required.

4. Plaintiff has himself placed on record a judgment of the Madras High Court, which records that the transferor company is not a listed company.

5. With regards to treating the Articles of Association as incomplete and inchoate documents, the plaintiff No. 2 himself had tendered the copy of the Articles of Association before this Court which contains Article 17A and Article 37.

6. Plaintiff No. 2 being a promoter and managing director of plaintiff No.1, had not produced before the Court the copies of agreements. Further, it had not asserted before this Court that there is any inconsistency between the provisions of Articles 1 to 36 and the said agreements.

7. With regard to provisions of Article is void to the extent of provisions of Section 28 of the Indian Contract Act, 1872. Upon analysing Section 28, the Court noted that Article 17A does not bar the filing of the suit but only prescribes a condition precedent for filing of the suit. Further, Section 28 is related to restricting a party enforcing his rights, whereas present case is in respect of the tort of defamation. Thus, *ex facie*, Section 28 will have no application.

8. With regard to the present case not being relevant to the company's business, the court reviewed the plaint which had admitted that the defamatory allegations concerning the company's business have been made and which had caused considerable adverse impact on the company's business leading to "substantial damages…."

9. The Court also referred to various statements made in the plaint related to damage caused to company's business due to defamatory statement made by the defendants.

10. Article 17A states that litigation must be "material in the context of company business, and need not actually relate to its business". The said facts are admitted by the Plaintiffs.

11. The OL's submission that he can ratify the failure to obtain consents as required under Article 17A was not accepted as the same would amount to an opportunistic misuse of the provisions of law.

CA Mayur Nayak, CA Natwar Thakrar &
CA Pankaj Bhuta

# OTHER LAWS
## FEMA Update

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

### A. Circulars issued by RBI

### 1. Foreign Exchange Management (Foreign Currency Accounts by a Person Resident in India) Regulations, 2015

An Indian startup, complying with the conditions laid down in GOI Notification No. GSR 180(E) dated February 17, 2016 issued by DIPP, having an overseas subsidiary is now allowed to open a foreign currency account with a bank outside India for the purpose of crediting the foreign exchange earnings out of exports / sales made by the said startup or its overseas subsidiary. The balances held in such accounts, to the extent they represent exports from India, shall be repatriated to India within the period prescribed for realisation of exports, in Foreign Exchange Management (Export of Goods and Services) Regulations, 2015 dated January 12, 2016.

Payments received in foreign exchange by an Indian startup arising out of sales / export made by the startup or its overseas subsidiaries will be a permissible credit to the EEFC account maintained in India by the startup.

The existing facility of opening foreign currency account outside India, available to the Life Insurance Corporation of India or the General Insurance Corporation of India and their subsidiaries for the purpose of meeting the expenditure incidental to the insurance business carried is now extended to any insurance / reinsurance company registered with the Insurance Regulatory and Development Authority of India (IRDA) and they can now open a foreign currency account with a bank outside India to carry out insurance / reinsurance business.

*(A.P. (DIR Series) Circular No. 77 dated 23rd June, 2016)*

***(Comments: This is a welcome move in line with the Government of India's startup initiative. Liberalisation in policy for opening foreign currency accounts abroad for private insurers/ reinsurers will put them at par with LIC/GIC.)***

### 2. Permitting writing of options against contracted exposures by Indian residents

As announced in the Bi-monthly Monetary Policy Statement on April 7, 2015, in order to encourage participation in the Over the Counter (OTC) currency options market and improve its liquidity, resident exporters and importers of goods and services are allowed to write (sell)

standalone plain vanilla European call and put option contracts against their contracted exposure, i.e. covered call and covered put respectively, to any AD Cat-I bank in India subject to operational guidelines, terms and conditions given in the circular.

*(A.P. (DIR Series) Circular No. 78 dated 23rd June, 2016)*

***(Comments: This is likely to encourage OTC currency options which will enhance the depth of Foreign Exchange Derivatives Contracts resulting in maturity of the market and overall reduction in hedging costs.)***

## 3. External Commercial Borrowings (ECB) – Approval route cases

With a view to rationalizing and expediting the process of giving approval, ECB proposals received in the Reserve Bank above a certain threshold limit (refixed from time-to-time) shall be placed before the Empowered Committee. The Reserve Bank will take a final decision in the cases taking into account the recommendation of the Empowered Committee.

*(A.P. (DIR Series) Circular No. 80 dated 30th June, 2016)*

***(Comments: For ECB under approval route cases the applications were considered by an Empowered Committee keeping in view the overall guidelines, macroeconomic situation and merits of the specific proposals. Now the final decision shall rest with the RBI based on the recommendation of the Empowered Committee.)***

## 4. Settlement System under Asian Clearing Union (ACU)

As the payment channel for processing 'ACU Euro' transactions is under review, it has become necessary to temporarily suspend operations in 'ACU Euro' with effect from July 01, 2016. Accordingly, all eligible current account transactions including trade transactions in 'Euro' are permitted to be settled outside the ACU mechanism until further notice.

*(A.P. (DIR Series) Circular No. 81 dated 30th June, 2016)*

## B. Press Notes issued by DIPP

## 1. Review of Foreign Direct Investment Policy on various sectors

In order to attract investments, the Government of India has reviewed the FDI Policy on various sectors and made following changes in the Consolidated FDI Policy issued on June 7, 2016

| Sr. No. | Sector | Existing Policy | Changes |
|---|---|---|---|
| 1 | Trading in food products (including through e-commerce mode) manufactured / produced in India | Covered under the general category of trading of products and accordingly are subject to restrictions and sectoral caps applicable for FDI in wholesale trading / single brand retail trading / multi-brand retail trading, depending upon the case | Separate Category–100 per cent FDI under approval route for trading, including through e-commerce, in respect of food products manufactured / produced in India |
| 2 | Defence sector | FDI up to 49 per cent allowed under automatic route<br>– Beyond, 49 per cent under approval route in cases where such FDI is likely to result in: | – FDI permitted up to 49 percent under automatic route<br>– FDI beyond 49 per cent under approval route in cases where such FDI is likely to result in access to |

| Sr. No. | Sector | Existing Policy | Changes |
|---|---|---|---|
| | | a) Access to modern technology; and<br>b) State of the art technology in the country | modern technology or for other reasons to be recorded<br>– The condition of access to state-of-art technology in the country has been done away with<br>– FDI limit has now been made applicable to manufacturing of small arms and ammunitions covered under the Arms Act, 1959 |
| 3 | Broadcasting carriage services: Teleports; Direct to home; Cable Networks; Mobile TV; Headend-in – the Sky Broadcasting services; and Cable networks | – FDI up to 49 per cent under automatic route<br>– FDI beyond 49 per cent up to 100 per cent under approval route | FDI is allowed up to 100 per cent under automatic route subject to Infusion of fresh foreign investment, beyond 49 per cent, in a company not seeking license / permission from sectoral ministry, resulting in change in ownership pattern or transfer of stake by existing investor to new foreign investor, will require government approval. |
| 4 | Pharmaceutical | – Greenfield projects – 100 per cent under automatic route; and<br>– Brownfield project – FDI up to 100 per cent under approval route | – Greenfield projects – 100 per cent under automatic route; and<br>– Brownfield projects – FDI up to 74 per cent is allowed under automatic route. Beyond 74 per cent approval route would continue to apply |
| 5 | Civil Aviation Sector | Airports<br>– Greenfield projects – 100 per cent under automatic route; and<br>– Brownfield project – 74 per cent under automatic route and thereafter, up to 100 per cent under approval route.<br>Airport Transport Services<br>FDI up to 49 per cent under automatic route | Airports<br>Greenfield projects – 100 per cent under automatic route; and<br>Brownfield project – 100 per cent under automatic route.<br>Airport Transport Services<br>FDI up to 100 per cent is allowed, up to 49 per cent under automatic route and beyond 49 per cent through approval route (other than in case of investment by foreign airline, where FDI up to 49 per cent is allowed) |

| Sr. No. | Sector | Existing Policy | Changes |
|---|---|---|---|
| 6 | Private Security Agencies | 49 per cent FDI under approval route | – FDI up to 49 per cent under automatic route, and<br>– Beyond 49 per cent and up to 74 per cent under approval route |
| 7 | Establishment of branch office (BO), liaison office (LO) or project office (PO) | Separate clearance from Reserve Bank of India / security clearance was required for establishment of BO / LO / PO in Defence<br>Telecom, Private Security and Information and Broadcasting sectors | No such approval is required in cases where approval is granted by Foreign Investment Promotion Board (FIPB) or the concerned Ministry / regulator |
| 8 | Animal Husbandry | 100 per cent under automatic route subject to compliance with controlled conditions | The controlled conditions prescribed have been done away with |
| 9 | Single Brand Retail Trading | In cases involving FDI beyond 51 per cent, 30 per cent of values of goods purchased were to be sourced from India | The sourcing requirements have been relaxed up to three years for entities having 'state-of-art' and 'cutting edge' technology the sourcing norms have been relaxed for another 5 years |

*[Contd. from page 101]*

considered to be an activity of dealing of shares as speculation business which resulted in certain addition. On appeal CIT(A) deleted the addition by following the decision of Apex Court in Apollo Tyres Ltd. and allowed the appeal of the assessee. Tribunal upheld the appeal of the assessee. Tribunal upheld the findings of CIT(A) and dismissed revenue's appeal. On appeal in HC, HC dismissed revenue's appeal and upheld the findings of Tribunal and held that case was covered by the decision of the Apollo Tyres Ltd. wherein the Apex Court has given the finding that a provision of UTI Act create a fiction to make a Unit Trust of India a deemed dividend. However, the Act held that there is no deeming provision for Unit to be considered as share. Thus Units are not shares.

## 8. Section 4 – Principles of consistency – AY 2011-12

*Madhukar C Ashar vs. UOI (2016) 239 Taxman 367 (Bom.)*

Assessee filed his Return of Income in the status of an AOP right from A.Y. 2005-06. Tax payable on an income earned by AOP was allocated amongst various members of AOP and it was accepted by revenue. However, as return of income for A.Y. 2011-12 was filed electronically, earlier consistent practice of profit of AOP being allocated to its members could not be brought to the notice of the AO. AO issued initimation u/s. 143(1) determining tax liability of AOP. On revision, CIT upheld intimation u/s. 143(1) holding that assessee was liable to pay tax as an AOP as shares of members of AOP were indeterminate. Allowing the Writ Petition, the Hon'ble HC held that though principles of *res judicata* would not apply to tax matters, yet there being no change either in facts or in law, views expressed in one year are binding for subsequent year and if impugned orders wanted to depart from consistent view taken earlier, it must so justify.


Ajay Singh, *Advocate* & CA Namrata Bhandarkar

# BEST OF THE REST

**1. Recovery – Taking over possession of secured property – *Bona fide* pre-existing tenant in secured asset – Can assail measures taken by secured creditor of taking possession of secured property under S. 13(4) as well as steps taken under S. 14 of the Act before Tribunal or Magistrate – Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act Ss. 13(4),14**

State Bank of India had advanced a loan to the respondent company and had granted property at Kolkata as security. The said company failed to repay the loan, the same was declared as Non Performing Asset (NPA). Proceedings were initiated by issuance of notice dated 29-10-2013 to the respondent company. Symbolic possession was taken and newspaper publications appeared at the behest of the Bank. Subsequently, appellant bank took out an application under Section 14 of the Act before the Chief Metropolitan Magistrate seeking permission of the Magistrate to take physical possession of the secured asset. Learned Magistrate by order dated 3-7-2014 allowed the Bank to take physical possession of the secured asset. The writ petition was filed by a third party claiming to be a tenant since 12-8-2006 challenging the order passed by Chief Metropolitan Magistrate dated 3-7-2014 in respect of the property in Kolkata contending that he as a tenant being in possession of the property cannot be evicted except under due process of law. He placed reliance on an unregistered tenancy agreement dated 12-8-2006 and rent receipts issued by the respondent company. The learned judge in a detailed order allowed the writ petition by setting aside the order of the Chief Metropolitan Magistrate opining that secured creditor is at liberty to approach the relevant authority in terms of Section 14 of the Security and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 in respect of the secure property.

The Calcutta High Court observed that in view of the law declared in *Kalsaria (AIR 2016 SC 530)*, *Mardia Chemicals Limited (AIR 2004 SC 2371)*, *Kanaiyalal (2011 AIR SCW 1194)* and *Ashok Saw Mill (AIR 2009 SC 2420)*, it was held that a *bona fide* pre-existing tenant in the secured asset is entitle to assail measures taken by the secured creditor to take possession of the secured property under Section 13(4) of the Act as well as steps taken by the secured creditor under Section 14 of the Act before the Tribunal or the learned Magistrate as the case may be. The court then directed the writ petitioner tenant to approach the learned Magistrate with an application to substantiate his contention of pre-existing tenancy, in case the appellant Bank seeks further course of action under Section 14 of the SARFAESI Act against the borrower in respect of the secure asset.

*State Bank of India and another vs. Vivek Kumar Kejriwal AIR 2016 Calcutta 176 (Cal HC)*

**2. Counter-claim – Maintainability – Counter-claim filed almost two and half years after framing of issues – Cause of action on basis of it accrued before filing of written statement – Plaintiff's evidence yet to be recorded – No prejudice would be caused if counter-claim was adjudicated upon along with main suit – Nor serious injury or irreparable loss would be suffered by Plaintiff. CPC Order OR 6A**

The respondent Tej Prakash Jarath filed a suit against Om Prakash Jarath (the father of the plaintiff in the suit) and Vijay Prakash Jarath (the eldest brother of the plaintiff) respectively. The defendants filed written statement on 11-11-1992. Thereupon, issues came to be framed on 18-10-1993. After framing of the issues, the Petitioners Vijay Prakash Jarath before this Court, filed a counter-claim on 17-6-1996 i.e almost two and a half years after the framing of the issues. The trial court, *vide* its order dated 28-10-1996 accepted the aforesaid counter-claim. The above order dated 28-10-1996, came to be assailed by the respondent-plaintiff – Tej Prakash Jarath through Civil Miscellaneous Writ Petition before the High Court of Uttarakhand. The High Court relying on the judgment in the case of Rohit Singh &ors v State of Bihar,( AIR 2007 SC 10) concluded that the counter-claim filed by the petitioner defendant before the trial court was not legally acceptable.

On appeal before the Apex Court, the Apex Court observed that sub-clause (1) of Section 6A of Order VIII of CPC, leaves no room for any doubt, that the cause of action in respect of which a counter claim can be filed, should accrue before the defendant has delivered his defence, namely, before the defendant has filed a written statement.

It is not a matter of dispute in the present case, that cause of action for which the counter-claim was filed in the present case, arose before the respondent-plaintiff filed the suit (out of which these petitions / appeals have arisen). It is therefore apparent that the appellants before this Court were well within their right to file the counter-claim.

The Hon'ble court further observed that, it was quite apparent from the factual position noticed that after the issues were framed on 18-10-1993, the counter-claim was filed by the appellants before the Court almost two and half years after the framing of the issues. The court was satisfied, that there was no justification whatsoever for the High Court to have declined, the appellant before the court from filing his counter-claim on 17-6-1996, specially because, it is not a matter of dispute, that cause of action, on the basis of which counter claim was filed by defendant nos. 3 and 4, accrued before their written statement was filed on 11-11-1992. In the present case, the respondents – plaintiff's evidence was still being recorded by the trial court, when the counter-claim was filed. It has also not been shown, that any prejudice would be caused to the respondent-plaintiff before the trial court, if the counter-claim was to be adjudicated upon along with the main suit. The court therefore set aside the order passed by the High Court and restored the order passed by the trial court.

*Vijay Prakash Jarath vs. Tej Prakash Jarath AIR 2016 Supreme Court 1304*

**3. Intellectual Property – Prior registration and prior user – First user test or "first in the market" test – Held, prior user's rights will override those of a subsequent user even though subsequent user had been accorded registration of its trade mark – Trade Marks Act – 1999, Sec. 34**

Medical Technologies Ltd., the respondent-plaintiff's are engaged in the business of manufacture and marketing of pharmaceutical products and medicinal preparation and as pleaded that they have acquired high reputation and goodwill in the market.

The dispute centred on Medical Technology's 'Profol' drug, and Neon Laboratories Ltd's

(appellant-defendant) introduction and sale of a drug, with the same molecular compound, under the name of 'Rofol'. While Medical Technology started using the name 'Profol' in 1998 it never registered it. Whereas Neon Laboratories Ltd. registered the trade-mark 'Rofol' in 1992 but didn't use it till 2004. Therefore, while Medical Technology had a prior user date, Neon Laboratories Ltd had a prior registration date.

The primary argument of the appellant-defendant is that it had received registration for its trade mark 'Rofol' in class V on 14-9-2001 relating back to the date of its application viz 19-10-1992 and on that date the respondents were not entities on the market. However, the appellant-defendant conceded that it commenced use of the trade mark 'Rofol' only from 16-10-2004 onwards. Litigation was initiated by the respondents plaintiffs, not the appellant-defendant, even though the latter could have raised the issue to the respondent-plaintiff using a similar mark to the one for which it has filed an application for registration as early as in 1992. The appellant defendant finally filed a notice of motion in the Bombay High Court as late as 14-12-2005, in which it was successful in being granted an injunction as recently as on 31-3-2012. The position that emerges is that while the appellant defendant had applied for registration of its trade mark several years prior to the respondent plaintiffs (1992 as against 26-5-1998 at the earliest), the user thereof had remained dormant for twelve years. In this period, the respondent-plaintiffs had not only applied for registration but had also commenced production and marketing of the similar drug and had allegedly built up a substantial goodwill in the market for 'Profol'.

The Supreme Court observed that section 34 of the Trade Marks Act, 1999 palpably holds that a proprietor of a trade mark does not have the right to prevent the use by another party of an identical or similar mark where that user commenced prior to the user or date of registration of the proprietor. This "first user" rule is a seminal part of the Act. While the case of the respondent-plaintiff is furthered by the fact that their user commenced prior to the appellant-defendant, the entirety of the section needs to be taken into consideration, in that it gives rights to a subsequent user when its user is prior to the user of the proprietor and prior to the date of registration of the proprietor, whichever is earlier. In the facts of the case at hand, the appellant defendant filed for registration in 1992, six years prior to the commencement of user by the respondent-plaintiff. The appellant defendant was thus not prevented from restraining the respondent-plaintiff's use of the similar mark 'Profol' but the intention of the section is to protect the prior user from the proprietor who is not exercising the user of its mark *prima facie* appears to be in favour of the respondent- plaintiffs. The court held that the Plaintiff-Respondents, had made a *prima facie* case that they had already been using their trade mark before the defendant-appellant, started using its mark. Therefore, on the basis of the 'first in the market' test, the Court stated that Medical Technologies would be entitled to a temporary injunction.

*Neon Laboratories Ltd. vs. Medical Technologies Ltd and others (2016) 2 Supreme Court Cases 672*

**4. Bank guarantee – Injunction – Restraining encashment of bank guarantee – Sum claimed by respondent not relating to contract for which Bank guarantee had been furnished – Arbitration proceedings in relation to that other contract pending – Sum claimed is neither a sum due in praesenti nor a sum payable – Bank guarantee in question being in nature of performance guarantee furnished for execution work of earlier contract – And said work having been completed to satisfaction of respondents, they had no rights to encash bank guarantee. Arbitration and Conciliation Act (26 of 1996), S. 9**

The respondents, i.e., North Central Railway had invited tender in connection with laying down

of Agra-Etwah new BG Rail line. This tender was applied by the appellant and the same was accepted by the respondents *vide* agreement dated 22-8-2005. The date of commencement of work was 14-3-2005 and the date of completion of work was 13-3-2007. On 14-7-2006, another work was given the respondent in relation to Development of New Passsenger Terminal at Anand Vihar (East Delhi). In connection with grant of Anand Vihar works, the appellant company submitted a bank performance guarantee. The work of contract dated 22-8-2005, could not be completed within the prescribed time/extended time by the appellant due to non-availability of site because of agitation of the farmers and non-supply of the specification of drawing of most of the small bridges by the respondent and the contract was terminated *vide* its letter dated 30-4-2009 and the rest of the work was allotted to another company without any information to the appellant. On completion of assignment of Anand Vihar works it sought release of the bank guarantee from the respondents. The respondent company. The respondent wrote a letter to bank to encash the bank guarantee for the loss caused due to cancellation of contract of 22-8-2005.

The Hon'ble Supreme Court observed that the wordings of the Clause 62 of GCC provides for determination of contract owing to default of contractor. The relevant portion of clause 62 reads as under: "The amounts thus to be forfeited or recovered may be deducted from any moneys then due or which at any time thereafter may become due to the contractor by the Railway under this or any other contract or otherwise."

Further, it was observed by the Hon'ble Apex Court that firstly, arbitration proceedings in relation to the contract dated 22-8-2005 were still pending. Secondly, the sum claimed by the respondents from the appellant did not relate to the contract for which the Bank Guarantee had been furnished but it relates to another contract dated 22-8-2005 for which no bank guarantee had been furnished. Thirdly, the sum claimed by the respondents from the appellant is in the nature of damages, which is not yet adjudicated upon in arbitration proceedings. Fourthly, the sum claimed is neither a sum due in praesenti nor a sum payable. In other words, the sum claimed by the respondents is neither an admitted sum and nor a sum which stood adjudicated by any Court of law in any judicial proceedings but it is a disputed sum and lastly, the Bank Guarantee in question being in the nature of a performance guarantee furnished for execution work of contract dated 14-7-2006 (Anand Vihar works) and the work having been completed to the satisfaction of the respondents, they had no right to encash the Bank Guarantee.

*M/s. Gangotri Enterprises Ltd vs. Union of India and Others AIR 2016 Supreme Court 2199*

## 5. Consumer – Builder – Booking of flat *vide* allotment letter – Flat sold by builder to another party – Party demanded compensation at market value of the flat – Held booking amount to be returned along with interest @ 12% pa. and cost ` 30,000/-

Complainant is the registered Consumer Welfare Association and the complainant-2 is the person who had booked a flat admeasuring 880 sq. ft. [built up] on 6th floor of proposed 'A' wing of building for the price of ` 8,80,000/- to be constructed on plot in Borivali (West) *vide* allotment letter dated 20-6-1995. The allotment letter gives the schedule of the payment as per progress of the construction and it is also written in the said allotment letter that agreement will be executed in due course. The complainant further stated that during the period 1995 to 1998, the complainant No. 2 made several visits to office of the opponent to inquire about the progress in the construction of the booked flat. Complainant further stated that on 27-4-1998, he has sent a registered letter to the opponent showing his readiness and willingness to pay the instalments for the flat. The complainant No. 2 further stated that the opponent gave him

vague assurances and excuses for the delay in commencing construction with no demand for instalments, the complainant addressed letter dated 7-2-2006. It was further stated that the complainant No. 2 requested for meeting to clarify and during the meeting the complainant was shocked to hear from the opponent that the complainant's allotted flat was sold to other person and opponent was willing to refund the booking amount. The complainant further stated that he sent a notice dated 30-11-2012 through his advocate to the opponent demanding possession of the flat to which the opponent has replied through his advocate by letter dated 29-12-2012 alleging having written letters dated 30-9-1999, 17-12-1999, 19-4-2000 calling for instalment payment and letter dated 12-8-2000 cancelling and terminating the allotment letter dated 20-6-1995 and forfeiting the booking amount of ` 1 lac. The complainant again *vide* letter dated 8-3-2013 has issued a notice through advocate denying to have received the alleged letters of the opponent and showed willingness to pay the remaining amount. The opponent *vide* his reply dated 22-3-2013 informed that he has already terminated the agreement and matter be treated as closed. Alleging that the opponent has committed deficiency in service, the complainant No. 2 has filed consumer complaint with prayers that the opponent be directed to pay to the complainant a compensation of ` 58,35,840/- [` 66,15,840/- being current value of booked flat (-) balance amount payable against agreed price of ` 8,80,000/-] for the deficiency in service and unfair trade practice and costs of ` 20,000/-.

The opponent further stated that the allegations and contentions of the complainant are hypothetical, absolutely false, bogus and imaginary. The opponent further stated that the claim of the complainant is hopelessly time barred. The opponent further stated that the entire claim of the complainant is based on the allotment letter dated 20-6-1995. It is further stated that the allotment letter cannot be said to be the concluded contract till such time the agreement under the provision of the MOFA Act is not executed. It is further stated that the complainant has suppressed the vital and material facts. Therefore, the opponent has prayed that as the allotment letter is terminated and hence there is no relationship between the complainant No.2 and the opponent as consumer and service provider, the complaint may please be dismissed.

It was observed by the Hon'ble Consumer State Redressal Commission that not a single evidence was produced by the complainant No. 2 regarding communication with the opponent. Thus, after the allotment letter dated 20-6-1995 and registered letter dated 11-4-1998, the complainant has not placed any evidence to prove the fact that he was in contact with the opponent as against this, the opponent has proved on record, the letter various letter filed by him. It is clear that the complainant No. 2 was not in contact with the opponent after the allotment letter and letter dated 27-4-1998. The complainant No. 2 himself had stated in para 9 of the complaint that "the complainant demanded a meeting to clarify the opponents revised proposition and at the meeting the complainant was shocked to hear from opponent that the complainant's allotted flat has been sold to other purchaser and the opponent was willing to refund the amount with interest. Further, as regards prayer of the complainant No. 2 that he is entitled for compensation as per ready reckoner, as per the facts and circumstances of the case, it will not be just and fair to allow the prayer of the complainant. Though the opponent has terminated the allotment *vide* his letter dated 12-8-2000, however, he has not returned the booking amount to the complainant No. 2 therefore, it was directed that complainant No. 2 is entitled to booking amount of ` 1 lac with interest @ 12% p.a and cost of ` 30, 000/-

*Consumers Welfare Association vs. Ms. Vasundhara Builders & Developers*

*[The Hon'ble State Consumer Disputes Redressal Commission, Maharashtra Mumbai, Consumer Complain No.CC/13/323 dt. 5-4-2016]*

CA Rajaram Ajgaonkar

# ECONOMY AND FINANCE

## THE BREXIT

In spite of various risks and some unforeseen events, June, 2016 turned out to be quite positive for the global economies. In the initial weeks of the month, there was an anxiety about the FED rate hike. However, the FED meeting turned out to be less eventful than expected and after the meeting many started believing that the rate hike will happen at a slower pace than expected. That was good news for many countries, who were concerned about the exodus of capital from their economies on such hike. The second major event was the referendum in the United Kingdom regarding the question whether to remain in the European Union (EU) or to exit therefrom (Brexit). Initially the votes appeared to be in favour of remaining in the EU. Even a few days before the referendum, the indications supported such a verdict. But the actual result of the vote was in favour of leaving EU and suddenly the global markets went into a tizzy. The stock markets around the world lost around 2% to 7% value in a single day. Many people were vouching for the event to be very negative for the world economy. But the very next week a new realisation dawned upon the world and the stock markets across the globe rebounded. Therefore, the month ended well for most of the stock markets.

The US economy continued to show steady progress. Though the job data published during the month was not as encouraging as expected, as the unemployment has come down in the country, there was not much anxiety on that account. The progress of the economy being satisfactory, there was an expectation of a rate hike by the FED. However, considering the struggle of many developed economies of the world, the FED has probably taken the decision of going slow on the rate hike. Their bi-monthly meeting ended without a rate hike. The US economy is likely to continue its expansion in the near term unless it gets affected by a sudden external factor. An emerging cause of concern is the strengthening of the currency of the country. On the Brexit referendum result, the US Dollar appreciated against most of the currencies. This may make imports for US cheaper and its exports dearer. Slowing exports can be a concern to the country, if the strength of its currency is maintained. It is also feared that the US had an economic expansion for a longer period than the past average and therefore some risk may be lurking, which can push the economy down. Apparently, the risks are appearing to be limited as of now but it is said that history repeats itself.

Brexit has put the European Union (EU) in a very awkward position. The majority mandate given by 'the United Kingdom' (UK) is likely to have hurt the pride of the EU. There are talks that as the decision is made, the UK should get out of the union quickly and should not linger on. The decision of Brexit was probably not in the interest of the UK economy and was based more on sentiment and social factors. Various geographies in UK have voted differently

about Brexit. Various strata of the society have voted differently based on their respective understanding and perception of the subject. Probably politics has played a bigger role than economics in the decision making. The decision may harm the finances of the country, which was evident from the fact that after the decision was taken, the British Pound plunged. There is also a feeling that even after the vote, Brexit may not actually happen due to political reasons. Its happening also poses the UK to a possibility of separation of some regions. Only time will tell how things will take shape as the phenomenon has emerged suddenly and it is unprecedented. The event will definitely have repercussions on the global economy but what will happen is difficult to gauge at this stage.

Though Europe is showing a brave face, the region may have serious repercussions of Brexit. The UK was one of the strong players in the European Union and its exit may make some of the better off countries to toe the same line. The event has definitely weakened the EU politically and even economically. The EU is currently suffering from low growth. In spite of stimulus such as quantitative easing by the Central Bank, growth is hardly picking up. Brexit may further hamper the economic growth of the countries in the region. Even Euro may get weakened. The EU is facing certain social problems due to influx of refugees as well as migration of labour to the developed regions, resulting in loss of jobs and reduction in pay of the locals. This has already caused unhappiness within a section of the population. These social issues may become more prominent and separatist movements may start. The economic uncertainty may continue to plague the EU.

Struggle of China to keep the economic momentum is becoming more and more obvious. The debt level in the country is increasing and that is a matter of serious concern. If efforts are made to reduce the debt, it may affect the economic growth. China will have to do a tight rope walk to ease the situation. Otherwise it may result in hard landing of the economy, which is harmful not only to that country but to the rest of the world as well. The economy of the country is second largest in the world and problems therein can push the world into a recession.

India seems to be a bright spot in the current uncertain global scenario. While the rest of the world is struggling for growth, India is growing faster than seven per cent, which is a creditable growth rate. The best thing is that the Indian growth is likely to sustain and may even accelerate due to Indian demography and reform process being pursued in the country. After the new Government coming in power, lot of changes have come in place and many more are in the process. In the first couple of years, the efforts taken by the Government and bureaucracy have not resulted in much ground level change in the business environment in India. Those two years were also years of drought in the country, which affected the purchasing power of rural India. The rain Gods are expected to favour the country and that can give a push to the economy. Implementation of the 7th pay commission is likely to give more money in the hands of Government servants in the near future and may result in increased demand of consumer durables. It is likely that the economy will start improving but it's visibility may take some more time. If the GST can be passed quickly, it can result in positive sentiments and will give a boost to businesses. The country seems to be on the right path but how fast it can accelerate remains a matter of guess.

On the Brexit vote the major stock markets across the world collapsed between 2 - 7%. However, there was a pull back next week and majority of the losses were erased. Though many experts cautioned the world of the negative impact of the vote in the referendum, after the initial jerk, the stock markets have acted cool. People are believing that the global risk to growth is increasing but asset prices are not ready to ease due to liquidity pumped in by a number of central banks. The high liquidity has driven high the prime asset prices across the world. Though the growth is low, the prices are not coming down. It is possible

that a bubble like situation might have emerged in various pockets across the world in respect of valuations of equities and properties. The precious metals, which are considered as safe heaven assets are also ruling high. The central banks are not able to pull back the liquidity in their countries due to low growth rate as such an act may result in recession. It is not only unable to curb the bubbling of asset prices but also increasing the inequality, which may brew social unrest. The job of central banks is likely to be more difficult over the next few years.

During the month, Indian stock markets improved after initial uncertainties. The Brexit is not likely to have much direct impact on the Indian economy but its fallouts can make some indirect negative impacts. The Indian stock markets lost some ground after the initial shock, but it immediately bounced back and closed about 2% in green for the month. The sentiment was also aided by expectations of higher than average rainfall. Though the monsoon arrived late, its progress during the month was satisfactory. Well spread rains can bring prosperity to rural areas and that has improved the sentiment. Global investors are looking at India with new focus in absence of inadequate opportunities in other parts of the world. In spite of uncertainties, India got investments of about half a billion dollars from foreign investors during the month. Sentiment is positive and it is likely to remain positive for the month of July as well. It is possible that the GST bill will get passed in the monsoon session. If that happens, it will be an additional booster for the stock markets. Things are looking positive but a couple of factors should not be ignored. Though there is a positive sentiment, Indian stock markets are not cheap. Historical PE ratio is nearing 23, which is much higher than five years average of 19.6. That reduces scope for great returns over a short period. There is an uncertainty about sailing through of the GST bill. If it does get through in the forthcoming session of Parliament, it will be a disappointment. The uncertainty of Europe can also affect the sentiments of Indian stock markets. Investors need to be cautious even though the asset class of equity looks best poised for growth in the Indian economy.

Good monsoon can reduce the inflation in the economy and that can pave a way to reduce the interest rates. In spite of the inclination of Government of India, the Reserve Bank of India (RBI) has been holding back the reduction of interest rates due to inflationary pressure. In a few months from now, there is expected to be change of guard at the RBI: which may result in a quarter per cent reduction in interest rate in calendar year 2016 itself. Reduction of half per cent of interest rate is also likely in 2017. Investors may maintain their allocation on debt instruments but an increase in allocation to equity will be essential at some point of time to garner better returns.

Due to uncertainty emerging out of Brexit, the traditionally best safe heaven asset, namely gold, has displayed a sharp price rise. It has appreciated more than 10% in the month. The part of the rally in gold is due to weakening of the Indian Rupee and a part of it is on account of a global rally in the precious metals, due to increased uncertainty. Gold may remain strong for a while due to resurgence of its demand. Even silver is doing very well in tandem with gold. These precious metals are likely to remain strong at least for some more time. If Rupee depreciates further, it will result in further rise in gold prices.

The times are uncertain for the world but they are looking reasonably good for India. Indian equity as an asset class appears stretched but global liquidity is driving it and may continue to do so. If the stock markets appreciate by more than 4% from the current levels in the next couple of months, it will be advisable to book partial profits. Selective increase in equity allocation may turn out to be advantageous for investors in the months to come. Property market is still sluggish and may continue to remain so. The times are uncertain and India cannot remain decoupled from the uncertainty.


CA Hinesh R. Doshi, CA Haresh P. Kenia
*Hon. Jt. Secretaries*

# The Chamber News

Important events and happenings that took place between 8th June, 2016 to 8th July, 2016 are being reported as under:

## I. Brief Report on 89th Annual General Meeting

At the 89th Annual General Meeting held on Monday, 4th July, 2016 the following business was transacted:

i) The Annual Report for the year 2015-16 was approved & adopted.

ii) The Accounts for the year ended 31st March, 2016 was adopted.

iii) Mr. J. L. Thakkar, Chartered Accountant, was appointed as Auditor for the year 2016-17 and will hold office upto the next AGM.

iv) Results of the elections for the year 2016-17 were declared as follows :

- Mr. Hitesh R. Shah was elected as President
- The following thirteen members were elected to the Managing Council

1. Mr Ajay Singh
2. Mr. Ashok Sharma
3. Mr. Amit Purohit
4. Mr. Haresh Kenia
5. Mr Hemant Parab
6. Mr. Hinesh Doshi
7. Mr. Ketan Vajani
8. Mr Paras S Savla
9. Mr. Parag Ved
10. Mr. Paresh Shah
11. Mr Rahul Hakani
12. Mr. Shailesh Bandi
13. Mr. Vikram Mehta

## 2. THE DASTUR ESSAY COMPETITION

The first three winners of the Dastur Essay Competition:

| Position | Name | Subject | College / Organisation Name |
|---|---|---|---|
| 1st | Ms. Dristi Balwant Jain | Religion & Terrorism | Shrawan Agarwal and Associates, Chartered Accountant, Mumbai |
| 2nd | Ms. Sonali Mahesh Borase | Religion & Terrorism | SSPA & CO., Mumbai |
| 3rd | Ms. Dhrumi Chetan Dedhia | Reshaping India Through Priceless Heritage | GBCA & Associates Chartered Accountants, Mumbai |

All three winners were felicitated by offering Trophy, Certificate and Cheque by Past Presidents Mr. Kishor Vanjara, Mr. Manoj Shah and Mr. Vipin Batavia respectively.

Other three winners who were present were also felicitated and given the certificates.

## RELEASE OF PUBLICATION ON INCOME COMPUTATION DISCLOSURE STANDARDS

Dr. K. Shivaram and Mr. Kishor Vanjara, Past Presidents, released the publication on "Income Computation Disclosure Standard".

## FELICITATION FUNCTION OF PAST PRESIDENTS:

Shri Keshav B. Bhujle and Shri Kishor Vanjara, Past Presidents were felicitated by Office Bearers for completing glorious Twenty Five years in the Managing Council.

## THE NEW TEAM FOR 2016-17:

i) In the First Managing Council Meeting held on Monday, 4th July, 2016, the following members were elected as Office Bearers:

| | Name | Designation |
|---|---|---|
| 1. | Mr. Ajay R. Singh | Vice President |
| 2. | Mr. Hinesh R. Doshi | Hon. Jt. Secretary |
| 3. | Mr. Haresh P. Kenia | Hon. Jt. Secretary |
| 4. | Mr. Parag S. Ved | Hon. Treasurer |

ii) The following eight members were co-opted to the Managing Council for the year 2016-17:

| | | | |
|---|---|---|---|
| 1. | Mr. Keshav Bhujle | 5. | Mr. Parimal Parikh |
| 2. | Mr. Kishor Vanjara | 6. | Mr. Sujal Shah |
| 3. | Mr. Vipul Joshi | 7. | Mr. Mahendra Sanghvi |
| 4. | Mr. Bhavesh Vora | 8. | Mr. Vipul Choksi |

iii) **Editor & Editorial Board of the Chamber's Journal:**

Mr. K. Gopal was appointed as Editor of "The Chamber's Journal" Mr. Yatin Vyavaharkar, Mr Manoj Shah, Mr. Paras Savla and Mr. Heetesh Veera was appointed as Asst. Editors.

**Editorial Board**

Mr. V. H. Patil was appointed as Chairman, Editorial Board.

**Members**

1. Mr. Keshav Bhujle
2. Mr. Pradip Kapasi
3. Mr. Kishor Vanjara
4. Mr. A. S. Merchant
5. Mr. Vipul Joshi

iv) **Committees**

The following Committees were formed and their Chairmen, Co- Chairmen and Vice Chairmen were appointed

| | Committee | Chairman / Co-Chairman / Vice Chairman |
|---|---|---|
| 1. | Allied Laws | Mr. Rahul Hakani |
| 2. | Corporate Members | Mr. Bhavesh R. Vora |
| 3. | Direct Taxes | Mr. Ketan Vajani |
| 4 | Indirect Taxes | Mr. Vikram Mehta |
| 5 | International Taxation | Mr. Paresh Shah |
| 6 | Journal | Mr. Vipul Choksi |
| 7 | Law & Representation | Mr. Mahendra Sanghvi |
| 8. | Membership & Public Relations | Mr. Hemant Parab |
| 9. | Research & Publication | Mr. Paras S. Savla |
| 10. | Residential Refresher Course & Skill Development | Mr. Shailesh Bandi |
| 11. | Student & IT Connect | Mr. Parimal Parikh<br>Mr. Amit Purohit – Co-Chairman |
| 12. | Study Circle & Study Group | Mr. Ashok Sharma |
| 13. | 90th Year Celebration | Mr. Kishor Vanjara<br>Mr. Sujal Shah – Co-Chairman |

v) **Delhi Chapter:**

The following members were appointed as Chairman and office Bearers of Delhi Chapter:

| | | |
|---|---|---|
| 1. | Mr. R. P. Garg | Chairman |
| 2. | Mr. Suhit Agarwal | Co-Chairman |
| 3. | Mr. Vijay Gupta | Jt. Hon. Secretary |
| 4. | Ms. Sapna Gupta | Jt. Hon. Secretary |
| 5. | Mr. Harish Kumar | Hon. Treasurer |

## II. Past Programmes

### A) DIRECT TAXES COMMITTEE

(i) Full Day Seminar on **"Appellate Proceedings, DRP and AAR"** was held on 11th June, 2016 where Mr. G. S. Pannu, ITAT Member delivered Keynote address.

(ii) Full day Seminar on **"Income Computation and Disclosure Standards"** was held on 2nd July, 2016. The Overview of ICDS and Historical Background was given by CA Kamlesh Vikamsey, Past President ICAI.

**B) CORPORATE MEMBERS COMMITTEE**

i) Full Day Seminar on **"Startup Roundup – Business, Regulation and Tax Perspective"** was held on 18th June, 2016 where Mr. Sanjay Mehta, Angel & PE Investor, delivered Keynote address.

ii) Lecture Meeting on **"Internal Financial Control – Way Forward for Private Companies and their Auditor"** was held on 28th June, 2016 at IMC. The meeting was addressed by CA Himanshu Kishnadwala.

**C) INTERNATIONAL TAXATION COMMITTEE**

**10th Residential Refresher Conference on International Taxation, 2016** was held from 23rd to 26th June, 2016 at Rhythm Resorts, Lonavala. The conference was attended by 156 delegates which includes 7 delegates on non-residential basis. The Conference was addressed by eminent faculties in the field of International Taxation.

**D) INDIRECT TAXES COMMITTEE**

Half Day Seminar on **"Intricate issues in VAT Returns and Settlement of Arrears in Dispute"** was held on 8th June, 2016 where Mr. Rajiv Jalota, Hon'ble Commissioner of VAT, Maharashtra State, delivered Keynote address.

## III. Future Programmes

**(For details of the future programmes, kindly visit www.ctconline.org or refer The CTC News of July 2016)**

**A) DIRECT TAXES COMMITTEE**

The Direct Tax Update Series Lecture Meeting on "**Income Declaration Scheme 2016 – Provisions and Issues**" will be held on 5th August, 2016 at 4th Floor, Walchand Hirachand Hall, IMC, Churchgate, Mumbai and the meeting will be addressed by Dr. K. Shivaram, Senior Advocate and Senior officer from IT Department.

**B) INTERNATIONAL TAXATION COMMITTEE:**

Half Day Workshop on "**Tax Implications of EPC of Contracts, Indirect Transfer and Real Estate Funds – Case Studies**" will be held on 19th July, 2016 and will be addressed by CA Vishal J. Shah.

**C) MEMBERSHIP & PUBLIC RELATIONS COMMITTEE**

The Half Day Seminar on **"Real Estate Laws & GST Overview"** jointly with Trimbak Study Circle of Nashik will be held on 16th July, 2016 at Hotel Bon Vivant, Old Gangapur Naka, Opp Dongare Vasatigruh Maidan, Nasik – 422 002.

## 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.

# INDIRECT TAXES COMMITTEE – 2015-16

**Half Day Seminar on "Intricate Issues in VAT Returns and Settlement of Arrears in Dispute" held on 8th June, 2016 at Jaihind College Auditorium.**

CA Avinash Lalwani, President (2015-16) delivering Opening Speech. **Seen from L to R :** S/Shri Ashish Sharma, Dy. Commissioner, Faculty, CA Rajiv Luthia, Chairman, Nitin Shaligram, Project Director, Faculty, Girish Nehte, Dy. Commissioner, Faculty, Pramod Dumre, Dy. Commissioner, Faculty and Vivek Sawale, Jt. Commissioner, Faculty.

CA Rajiv Luthia, Chairman, welcoming the faculties and delegates. **Seen from L to R :** S/Shri CA Avinash Lalwani, President (2015-16), Nitin Shaligram, Project Director, Faculty, Rajiv Jalota, Hon'ble Commissioner of VAT, Maharashtra State, Faculty and CA Vikram Mehta, Vice Chairman.

Dignitaries during the inaugural session at Seminar. **Seen from L to R :** S/Shri Ashish Sharma, Dy. Commissioner, Faculty, Pramod Dumre, Dy. Commissioner, Faculty, CA Hinesh R. Shah, Vice President (2015-16), CA Rajiv Luthia, Chairman, CA Avinash Lalwani, President (2015-16), Rajiv Jalota, Hon'ble Commissioner of VAT, Maharashtra State, Faculty, CA Deepak Thakkar, Session Chairman, CA Pranav Kapadia, Faculty, Girish Nehta, Dy. Commissioner, Faculty, Vivek Sawale, Jt. Commissioner, Faculty, Nitin Shaligram, Project Director, Faculty, CA Vikram Mehta, Vice Chairman, CA Manish Gadia, Member and CA Ashok Manghnani, Hon. Jt. Secretary.

Shri Rajiv Jalota, Hon'ble Commissioner of VAT, Maharashtra State delivering Key note address. **Seen from L to R:** S/Shri CA Rajiv Luthia, Chairman, CA Avinash Lalwani, President (2015-16), Nitin Shaligram, Project Director, Faculty and CA Vikram Mehta, Vice Chairman.

**Faculties**

Shri Nitin Shaligram,
Project Director

Shri Girish Nehte,
Dy. Commissioner

Shri Vivek Sawale
Jt. Commissioner

Shri Pramod Dumre
Dy. Commissioner

Shri Ashish Sharma
Dy. Commissioner

CA Deepak Thakkar
Session Chairman

CA Pranav Kapadia

## ALLIED LAWS COMMITTEE

**Lecture Meeting on "Succession – Issues includes Wills, Intestate Succession, Partition and Gifts" held on 17th June, 2016 at A. V. Centre, Jai Hind College.**

CA Avinash B. Lalwani, President delivering Opening speech. **Seen from L to R :** S/Shri CA Anil Sharma, Convenor, CA Kamal Dhanuka, Chairman, CA Anup Shah, Faculty and Pravin Veera, Advisor.

CA Kamal Dhanuka, Chairman welcoming the faculty and members. **Seen from L to R :** S/Shri CA Anil Sharma, Convenor, CA Anup Shah, Faculty, CA Avinash Lalwani, President and Pravin Veera, Advisor.

CA Anup Shah addressing the members.

Section of Members.

## STUDENT & IT CONNECT COMMITTEE

**Lecture Meeting on the subject "Companies (Auditor's Report) Order, 2016 (CARO – 2016) held on 21st June, 2016 at Maheshwari Bhawan.**

CA Abhay Arolkar addressing the members.

## MEMBERSHIP & PUBLIC RELATIONS COMMITTEE

**Self Awareness Series on the subject "The Power of the Precedent" held on 20th June, 2016 at CTC Office.**

Mr. S. A. Ahmed, Advocate addressing the members.

## STUDY CIRCLE & STUDY GROUP COMMITTEE

**Study Circle Meeting on the subject "Recent Issues in Taxation of Real Estate & Other Transactions" held on 30th June, 2016 at Babubhai Chinai Committee Room, IMC.**

CA Jagdish Punjabi addressing the members.

**Study Group Meeting on the subject "Recent Judgments under Direct Taxes" held on 14th June, 2016 at Babubhai Chinai Committee Room, IMC.**

Shri Vipul Joshi, Advocate addressing the members.

Shri Aditya Ajgaonkar addressing the members.

## INDIRECT TAXES COMMITTEE

**Study Circle Meeting on the subject "Issues in Excise Duty on Jewellery Industry" held on 30th June, 2016 at Maheshwari Bhawan**

CA Vinod Awtani chairing the session

CA Darshan Ranavat addressing the members.

## DIRECT TAXES COMMITTEE

**Intensive Study Group on Direct Taxes on "Recent Important Decisions under Direct Taxes" held on 27th June, 2016 at CTC Office.**

CA Ashok Mehta addressing the members.

## INTERNATIONAL TAXATION COMMITTEE AND STUDY CIRCLE & STUDY GROUP COMMITTEE

**Joint Meeting of the Intensive Study Group on International Taxation, Study Circle on International Taxation and Study Circle (Direct Taxes) on the subject "Is the Equalisation Levy Compatible with India's Tax Treaty Network?" held on 15th June, 2016 at Eros Conference Room, Theatre Building.**


CA Naresh Ajwani, Chairman, International Taxation Committee welcoming the faculty and members. **Seen from L to R:** S/Shri Avinash Lalwani, President, Dr. Amar Mehta, Faculty and CA Ashok Sharma, Chairman, Study Circle & Study Group Committee.

Dr. Amar Mehta addressing the members.

**Transfer Pricing Study Circle Meeting on the subject "Base Erosion and Profit Shifting including CBCR Documentation" held on 9th June, 2016 at CTC Office.**

Mr. Anand Kankani addressing the members.

## MEMBERSHIP & PUBLIC RELATIONS COMMITTEE – 2015-16

**Half Day Seminar on "ICDS and Income Tax Amendment in Budget 2016" jointly with The Nanded Branch of WIRC of ICAI and Tax Practitioners Association, Nanded held on 12th June, 2016 at Hotel Atithi, Shivji Nagar, Nanded.**


CA Hemant Parab, Chairman, Membership & Public Relations Committee, CTC, welcoming the faculties and delegates. Also seen Mr. Avinash Lalwani, President, CTC and members from Nanded Branch of WIRC of ICAI and Tax Practitioners Association, Nanded


CA Avinash Lalwani, President, CTC and CA Hemant Parab, Chairman, Membership & Public Relations Committee, CTC inaugurating the seminar by lighting the lamp.

**Faculties**

CA Vyomesh Pathak addressing the delegates

CA Bhadresh Doshi addressing the delegates

Section of delegates

## STUDENT & IT CONNECT COMMITTEE

**Lecture Meeting on "Professional Opportunities in Information Technology Era" held on 10th June, 2016 at CTC Office.**

CA Alok Jajodia addressing the members

CA Maitri Savla addressing the members

# INTERNATIONAL TAXATION COMMITTEE – 2015-16

**10th Residential Refresher Conference on International Taxation, 2016**
**held from 23rd June, 2016 to 26th June, 2016 at Rhythm Resorts, Lonavala.**

Dignitaries during the inaugural lamp lighting at 10th Residential Refresher Conference on International Taxation, 2016. **Seen from L to R :** S/Shri CA Jay Kalra, Member, CA Paresh P. Shah, Past Chairman (2014-15), CA Jimit Devani, Conference Co-ordinators, CA Ujwal Thakrar, Member, CA Isha Sekhri, Member, CA Namrata Dedhia, Member, Ms. Varsha Galvankar, Convenor, CA Rutvik Sanghvi, Member, CA Rajesh L. Shah, Member, CA D. S. Sharma, Member, CA Nilesh Kapadia, Member, CA Rashmin Sanghvi, Faculty, CA Avinash Lalwani, President (2015-16), CA Kirit Dedhia, Member, CA Naresh Ajwani, Chairman, CA Ashok Manghnani, Hon. Jt. Secretary, CA Shreyas Shah, Member, CA Ganesh Rajgopalan, Convenor and CA Kartik Badiani, Conference Co-ordinator.

**Faculties**

CA Rashmin Sanghvi addressing the delegates on the subject "Equalisation Levy". **Seen from L to R :** S/Shri CA Nilesh Kapadia, Member, CA Ganesh Rajgopalan, Convenor, CA Avinash Lalwani, President (2015-16) and CA Kartik Badiani, Conference Co-ordinator.

CA Vishal Gada | CA Samir Gandhi | CA Anup Shah | Mr. Sanjeev Sharma, CIT (APA) – 2 | Mr. Rahul Navin, CIT (TP) – 1 | CA Shefali Goradia | CA Pinakin Desai, Chairman, Panel Discussion | Mr. Sunil Moti Lala, Panellist | CA Vishal J. Shah, Panellist

Group photo of delegates

## DIRECT TAXES COMMITTEE – 2015-16

**Full Day Seminar on Income Computation & Disclosure Standards (ICDS) held on 2nd July, 2016 at Walchand Hirachand Hall, IMC.**

Dignitaries during the inaugural session at seminar on Income Computation & Disclosure Standards (ICDS) **Seen from L to R :** S/Shri Rahul Hakani, Chairman, Research & Publications Committee, CA Paras K. Savla, Past President & Chairman – Corporate Members Committee, CA Ketan Vajani, Chairman, CA Kamlesh Vikamsey, Past President, ICAI, Faculty, CA Avinash Lalwani, President (2015-16) and CA Dinesh Poddar, Convenor.


CA Kamlesh Vikamsey, Past President, ICAI addressing the delegates. **Seen from L to R :** S/Shri CA Ketan Vajani, Chairman, CA Avinash Lalwani, President (2015-16) and CA Dinesh Poddar, Convenor.


CA Pradip Kapasi addressing the delegates. **Seen from L to R :** S/Shri CA Ketan Vajani, Chairman, CA Avinash Lalwani, President (2015-16) and CA Apurva Shah, Member.


CA Gautam Nayak addressing the delegates. **Seen from L to R :** S/Shri CA Dinesh Poddar, Convenor, Ajay R. Singh, Hon. Jt. Secretary and CA Ashok Mehta, Member.


CA H. Padamchand Khincha addressing the delegates. Seen from L to R : S/Shri Mandar Vaidya, Vice Chairman, CA Hinesh Doshi, Hon. Treasurer and CA Devendra Mehta, Member.


CA Yogesh Thar addressing the delegates. **Seen from L to R :** S/Shri CA Ketan Vajani, Chairman, CA Avinash Lalwani, President (2015-16) and CA Ashok Manghnani, Hon. Jt. Secretary.

## CORPORATE MEMBERS COMMITTEE – 2015-16

**Full Day Conference on "Startup Roundup – Business, Regulation and Tax Perspective" held on 18th June, 2016 at St. Regis Hotel, Lower Parel, Mumbai.**

CA Avinash Lalwani, President (2015-16) delivering Opening Speech. **Seen from L to R :** S/Shri CA Vitang Shah, Convenor, Mr. Sanjay Mehta, Angel & PE Investor, Faculty, CA Paras K. Savla, Chairman and CA Neha Gada, Convenor.

CA Paras K. Savla, Chairman, welcoming the faculties and delegates. **Seen from L to R :** S/Shri CA Vitang Shah, Convenor, CA Avinash Lalwani, President (2015-16), Mr. Sanjay Mehta, Angel & PE Investor, Faculty and CA Neha Gada, Convenor.

Mr. Sanjay Mehta, Angel & PE Investor delivering Key note address. **Seen from L to R:** S/Shri CA Vitang Shah, Convenor, CA Avinash Lalwani, President (2015-16), CA Paras K. Savla, Chairman and CA Neha Gada, Convenor.

**Faculties**

CS Rishikesh Vyas, Partner, Vyas Deshpande & Associates

CA Anup Shah, Partner, Pravin P. Shah & Company

Mr. Sunaman Sood, Acendo Capital Advisors

CA Manish Sheth, Group CFO JM Financials, Panellist

CA Abhishek Barai, Co-Founder My Cute Office, Panellist

Ms. Debadutta Upadhyay, Founder Timesaverz, Panellist

CA Niraj Sanghvi, Tata Consultancy Services, Panel Moderator

## Meeting with Commissioner of Sales Tax Maharashtra Shri Rajiv Jalota on 7-7-2016 Appraising him of the problems / difficulties faced by dealers due to delay in MVAT automation

CA Hitesh R. Shah, President (2016-17) offering The Chamber's Journal to Shri Rajiv Jalota, Commissioner of Sales Tax Maharashtra. **Seen from L to R :** S/Shri CA Pranav Kapadia, Member, CA Manish Gadia, Member, CA Vikram Mehta, Chairman, Indirect Taxes Committee (2016-17), and other members of Sales Tax Practitioners Association.

## DIRECT TAXES COMMITTEE – 2015-16

**Full Day Seminar on Appellate Proceedings, DRP and AAP held on 11th June, 2016 at Hotel West End, Mumbai.**


CA Ketan Vajani, Chairman, welcoming the faculties and delegates. **Seen from L to R :** S/Shri K. Gopal, Past President, Shri G. S. Pannu, ITAT Member, Faculty, CA Hitesh R. Shah, Vice President (2015-16), Ajay R. Singh, Hon. Jt. Secretary & Faculty.


Shri G. S. Pannu, ITAT Member inaugurating the seminar by lighting the lamp. **Seen from L to R :** S/Shri CA Hitesh R. Shah, Vice-President (2015-16), K. Gopal, Past President, CA Hinesh Doshi, Hon. Treasurer, Ajay R. Singh, Hon. Jt. Secretary & Faculty and CA Ketan Vajani, Chairman.

**Faculties**

Shri Ajay R. Singh, Advocate

Ms. Jigna Talati

Ms. Arati Sathe, Advocate

Shri Deepak Tralshawala, Advocate


Shri G. S. Pannu, ITAT Member delivering Key note address. **Seen from L to R :** S/Shri K. Gopal, Past President, CA Hitesh R. Shah, Vice President (2015-16), Ajay R. Singh, Hon. Jt. Secretary & Faculty and CA Ketan Vajani, Chairman.

## CORPORATE MEMBERS COMMITTEE

**Lecture Meeting on "Internal Financial Control – Way Forward for Private Companies and Their Auditor" held on 28th June, 2016 at Walchand Hirachand Hall, IMC.**


CA Paras K. Savla, Chairman welcoming the faculty and members. **Seen from L to R :** S/Shri CA Neha Gada, Convenor, CA Avinash B. Lalwani, President, CA Himanshu Kishnadwala, Faculty and CA Ashutosh Pednekar, Member.


CA Himanshu Kishnadwala addressing the members. **Seen from L to R :** S/Shri CA Neha Gada, Convenor, CA Avinash B. Lalwani, President, CA Paras K. Savla, Chairman and CA Ashutosh Pednekar, Member.

## WINNERS OF 5TH THE DASTUR ESSAY COMPETITION, 2016

**The winners of 5th The Dastur Essay Competition, 2016 were felicitated by presenting a Trophy, Cash Prize and Certificates by Shri Kishor Vanjara, Shri Manoj C . Shah and Shri Vipin Batavia**

1st Winner – Ms. Dristi Balwant Jain, Shrawan Agarwal & Associates, Chartered Accountants, Mumbai.

2nd Winner – Ms. Sonal Mahesh Borase, SSPA & Company, Mumbai.

3rd Winner – Ms. Dhrumi Chetan Dedhia, GBCA & Associates, Chartered Accountants, Mumbai

The winners of The Dastur Essay Competition, 2016 along with Office Bearers and Chairman of Student & IT Connect Committee.

## FELICITATION FUNCTION OF PAST PRESIDENTS SHRI KESHAV B. BHUJLE, ADVOCATE, AND SHRI KISHOR VANJARA FOR COMPLETING 25 GLORIOUS YEARS IN THE MANAGING COUNCIL OF THE CHAMBER OF TAX CONSULTANTS

Dr. K. Shivaram Past President felicitating Shri Keshav B. Bhujle, Past President by offering plaque. **Seen from L to R :** S/Shri Ashok Manghnani, Hon. Jt. Secretary, Hitesh R. Shah, President elect, Kishor Vanjara, Past President, Hinesh R. Doshi, Hon. Treasurer, Avinash Lalwani, President and Ajay R. Singh, Hon. Jt. Secretary.

Dr. K. Shivaram Past President felicitating Shri Kishor Vanjara, Past President by offering plaque. **Seen from L to R :** S/Shri Ashok Manghnani, Hon. Jt. Secretary, Avinash Lalwani, President, Hitesh R. Shah, President elect, Keshav B. Bhujle, Past President, Ajay R. Singh, Hon. Jt. Secretary and Hinesh R. Doshi, Hon. Treasurer.

Past Presidents Shri Keshav Bhujle and Shri Kishor Vanjara with Office Bearers and Past Presidents.
**1st Raw - Standing from L to R:** S/Shri Bhavesh Vora, Paras K. Savla, Dr. K. Shivaram, Vipin Batavia, Sujal Shah and Manoj Shah, Past Presidents.
**2nd Raw – Standing from L to R:** S/Shri Ashok Manghanani, Hon. Jt. Secretary, Avinash Lalwani, Imm. Past President, Parimal Parikh, Past President, Hitesh R. Shah, President-elect, Hinesh R. Doshi, Hon. Treasurer, Ajay R. Singh, Hon. Jt. Secretary and A. S. Merchant, Past President.

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