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The Chamber of Tax Consultants

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PREVENTION OF MONEY LAUNDERING ACT, 2002 (PMLA)

Other Contents

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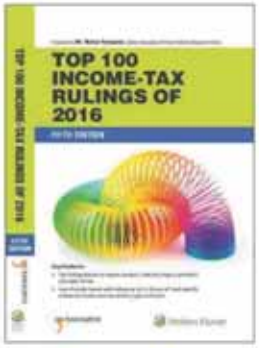

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Editorial

The Finance Act, 2017 has received the President's assent on 31st March, 2017. Thus, the effort of the present Government to bring the Finance Act in effect from 1st April, 2017 by completing all the procedures has been achieved. This effort of the Government has to be appreciated. However, we professionals take the jest of this Government to correct whatever they think is wrong on a unilateral basis. The Government has changed service rules for the members of the Appellate Tribunal without seeking views of the professional bodies. It is disappointing to know that the Finance Minister, who belongs to the discipline of advocates, has not considered it necessary to take the view of the professionals who are regularly appearing before the Income Tax Appellate Tribunal before making any changes to the service conditions of the Members of Appellate Tribunal. These changes are going to have an impact on the independent functioning of the Income Tax Appellate Tribunal. The Hon'ble Finance Minister should have appreciated that the professional bodies were instrumental in maintaining the independence of a judicial body like Income Tax Appellate Tribunal. Here, it may not be out of place to refer to *[2004] 265 ITR 537 (Supreme Court) Ajay Gandhi vs. B. Singh*, wherein, Apex Court has observed as under:

"It may be true that the Tribunal functions under the Ministry of Law and Justice and the Law Secretary is the member of the Selection Board. The Ministry of Law and Justice, Department of Legal Affairs, it is accepted, exercises a disciplinary power over the members of the Tribunal. The Allocation of Business Rules of the Government of India in respect of the Tribunal is placed under the Department of Legal Affairs, Ministry of Law and Justice? Supervisory control under the Rules of Allocation of Business relates to the administrative matters and not the judicial ones. The functions of the Tribunal being judicial in nature, the public have a major stake in its functioning, for effective and orderly administration of justice. A Tribunal should, as far as possible, have a judicial autonomy. The provisions of sections 252, 254 and 255, as noticed hereinbefore, confer a statutory power upon the President to constitute Benches. The Appellate Tribunal is a National Tribunal. The President subject to delegation of powers to Senior Vice-President or the Vice-President, exercises the administrative control over the member thereof. The benches are to be constituted only by the President. No other authority is empowered to do so."

Thus, it seems that the executive wants to dilute the above position by altering the service conditions of the Members of the Income Tax Appellate Tribunal by making an appointment for five years term.

The Special Story of the Chamber's Journal of this month is on Prevention of Money Laundering Act, 2002. After demonetisation, the Government machinery is working overtime to prevent any kind of money laundering. Hence, the Journal Committee has decided to dedicate the April month's Special Story on this topic. Very senior and eminent professionals have contributed to this issue. Hope this will come in handy to the professionals.

I thank Aseem Chawla and his colleague Pranshu Goyal for extending their help in bringing out this issue. I personally thank all the contributors to the story as well as contributors to the regular columns for taking out their valuable time for the Chamber's Journal.

K. GOPAL
Editor

From the President

Dear Members,

It is the beginning of the new Financial year 2017-18 and my best wishes to all of you. It's a new year with a new beginning, new ideas, new planning, new vigour and new hope that things will change for the good.

The Finance Bill, 2017 is passed by the Lok Sabha on 30th March, 2017. Several amendments have been introduced but the concerns expressed by the professional and other organisations have not been addressed.

The Finance Act, 2017 introduced **draconian provisions giving unfettered power to taxmen to search and seize without any real accountability.** Now the Act provides that **"reasons to believe"** recorded for conducting search need not be disclosed before ITO, CIT (Appeals) or ITAT. Assessee will have to file petition before High Court to seek the "reasons to believe" recorded for conducting the search. Rationale behind introducing this provision does not justify the amendment.

The Supreme Court has repeatedly held that the power of search and seizure does not confer any arbitrary authority upon the revenue officers to invade privacy of the citizen. Since a serious invasion of right, freedom and privacy of the taxpayer is involved, the power must be exercised strictly in accordance with law and only for the purposes for which it is authorised. If the action is maliciously taken or power is exercised for collateral purposes or without application of mind or without honest and *bona fide* formation of opinion, it is liable to be struck down. In large number of cases it has held by courts that the search action is unlawful and without application of mind. **Such Unfettered Powers will result into more corruption and creates a regime of Inspector Raj or Bureaucratic Raj.**

Now after the amendment the **question that arises before us is " How does one review "reasons to believe" once it cannot be disclosed before ITO, CIT (Appeals) or ITAT?"**

Hardly a fraction of cases reach High Court and hence non-disclosure becomes the norm. It immunises reasons themselves from review since one cannot review that which is not disclosed. Litigations before Supreme Court and High Court will increase merely to get to see and challenge these reasons, thereby defeating the very purpose of departmental inbuilt multi-layered appeals which is the heart of the IT Act. **Further this amendment applies**

retrospectively from 1962. One needs to wait and watch whether it will be struck down by the courts if challenged.

The new Section 132 also allows tax officers to attach provisionally any property belonging to the assessee, in addition to other existing confiscatory powers along with protracted multi-layered proceedings.

The tax collections mopped up by enforcing stringent tax laws, are being used by politicians to fulfil their election manifestos. Newly elected Government in UP has recently announced **waiver of farmers loan** up to ` 1 lakh aggregating to ` 36,359 crore.

The last major farm debt write-off to the tune of ` 60,000 crore was announced by the UPA Government in Budget 2008-09 and they have been resurrected again as a silver bullet to combat stress among farmers. At a superficial level, this may seem the best short-term solution.

One should be mindful of the fact that writing off loans have adverse impact on economy. We all know public sector banks as a group are in a fragile state, which recorded net loss of ` 17,993 crore in 2015-16. Presently public sector banks (PSU) are under financial stress with the rising level of bad loans or Non-Performing Assets in their books which has acted as a drag on the entire economy and for which the Government does not have any realistic solution to deal with the problem. Writing off the loan will aggravate the financial position of PSU banks **which will collaterally damage banks and weaken the banking system which in turn will hurt farmers too.** In addition to that, **it will also lead to unhealthy competition amongst the states** to go for such write off thereby further aggravating the problem. It creates an environment where farmers anticipates a loan waiver and have little incentive to repay loan which undermines the credit culture as it sets precedent.

Agriculture sector accounting for just about 14% of GDP supports close to half of India's workforce. **Government should think of creating contingency fund** based on certain parameters which will act as hedging mechanism in order to help agrarian sector. The Government can transfer the funds out of such contingency funds through Direct bank transfer or loans of the farmers can be paid out of such funds. Further Government can think of ensuring higher prices for farm produce or create conditions that will allow people to find jobs thereby increasing the income of the farmers. **That will be far more effective than merely treating a symptom.**

The Chamber had organised last month workshop on interpretation of taxing statute as one of its landmark programmes which was inaugurated by the Hon'ble ITAT Member Mr. G. S. Pannu who appreciated conducting of such programmes by the Chamber and suggested to hold more such type of programmes. The programme received a very good response. Many students also participated in the programme.

The Chamber has initiated construction/ reconstruction of Shadanan Shishu Niketan Chopra Chopda District Rudra Prayag Uttarakhand as a part of its Uttarakhand Relief Project. The school was damaged during the major devastation that took place in the year 2013 in Uttarakhand. The construction of the said School has already begun and is expected to get

over by end of May 2017. This will help 70 or more student to get proper educational facilities. **This is the second such school which The Chamber has constructed.** The Chamber is also working on some plan to do more activities for the educational benefits of students. **Further the Chamber has donated to the Trust to undertake educational activities in Uttarakhand and at Jammu and Kashmir.**

In the month of April 2017 the Chamber has initiated many programmes. This year Chamber has introduced many new initiatives for the benefits of its members, professionals, students and corporate members. Keeping the pace with the momentum of introducing new initiatives **the Allied Laws Committee of the Chamber has initiated 1st Moot Court competition amongst the Law colleges in and around Mumbai** under the aegis of Dr Y P Trivedi Moot Court. **Seven Law Colleges from Mumbai have participated in the said Moot Court Competition.** The Moot Court will be held on two days i.e. on 14th and 15th April, 2017. On 14th April, 2017 preliminary round will take place which will be judged by practising Professionals from the Chamber. Semi-final and Final round will take place on 15th April, 2017. Semi-final round will be judged by the Hon'ble Members of ITAT, Mumbai and final round will be judged by the Hon'ble Judges of Bombay High Court. Organising such an event is a mammoth task but Chamber is tuned to organise such mega events. Further the Chamber has also received a highest ever participation this year for its **Dastur Essay Competition.** Chamber is taking initiatives and organising programmes and events not only for professionals but also for students. Many more programmes for students are on anvil. I am sure this will benefit the students and will go a long way. **This year the Chamber has received maximum enrolments towards Student Membership.**

The Chamber has organised programme on Basic understanding of GST, Workshop on GST and programme on" Basic Course in FEMA and also Taxation of Foreign Remittances' jointly with the Malad Chamber of Tax Consultants in the month of April, 2017. **This shows irrepressible zeal and enthusiasm of Chairmen for taking new initiatives and holding unique programmes.** I am sure Members will get benefit of all new initiatives undertaken by it. The Chamber is committed to do more and more work in achieving its object of dissemination of knowledge and undertaking educational activities.

This month issue is on Prevention and Money Laundering Act, 2002 (PMLA). **Traditionally 'Money Laundering' has been understood as process by which money earned through illegitimate means has been given a colour of originated from legitimate source.** This issue deals with understanding of concept of Money laundering, Issues under PMLA, PMLA a global Phenomena, Authorities , their Powers, Appeals and reporting functions under PMLA. I am sure this will certainly help the readers.

I would like to end with a quote of Swami Vivekanand

> ***"Work purifies the heart and so leads to Vidyâ (wisdom)... Virtuous deeds take off the veil from knowledge, and knowledge alone can make us see God"***

HITESH R. SHAH
President

Chairman's Communication

Dear Readers,

Last month witnessed unprecedented election results in the States of UP and Uttarakhand. The ruling party at the Centre though was predicted to win in these two States, it was never expected to be such a land slide victory. Despite lack of majority in Goa and Manipur, the ruling party could garner support from other MLAs and form Government. This development seems to have given positive impetus to the public sentiments at large and there appears to be sudden optimism in air. This is also reflected in the upsurge in the Stock Market as also perceptible surge in business confidence level. Aam aadmi is now eagerly looking forward to Acche Din !! The new financial year has thus begun on a positive note.

Though statistical data in respect of the Pradhan Mantri Garib Kalyan Yojna is not yet available in the public domain, the response to this scheme appears to be lack lustre. But the way amendments are made in the Income-tax Act to discourage cash transactions, the Government appears firm on its resolve to curb black money. Despite all odds, the Government is almost certain to roll out GST from 1st July. After demonetisation, all the banks are flush with funds and therefore there is a reduction in interest rate. In the Monetary policy further rate reduction was expected, but RBI in its wisdom has kept the interest rates unchanged, the effect of which would be known in the current quarter. Banking Industry and especially the Nationalised Banks continue to be haunted by the problem of stressed (non-performing) assets and lower profit margins. Therefore after merger of State Bank of India and its subsidiaries, we should not be surprised if the Government comes out with schemes of merging comparatively smaller Nationalised Banks into bigger banks. In a few years down the line, there is a distinct possibility of a considerable consolidation of the banking industry.

Prevention of Money Laundering Act, 2002 (PMLA) is in existence for the past fifteen years now. Though Banks, Financial Institutions, Financial Intermediaries etc. are implementing this Act by having system in place and informing Financial Intelligence Unit (FIU) about the suspicious transactions, suddenly PMLA has become more prominent post demonetisation due to its stricter implementation. Considering its significant importance in current scenario, the Committee thought to come out with a special issue on PMLA. My sincere gratitude to CA Paresh Vakharia and Aseem Chawla and Pranshu Goel (both from Delhi) for their valuable inputs in making the design for this issue as also Vice-Chairman Bhadresh Doshi and Secretary Haresh Kenia for their efforts in overall co-ordination. I am sure, the members would find this issue useful.

I thank and compliment all the authors for agreeing to write articles and sparing their valuable time and sharing their knowledge on such an important topic despite their busy schedule.

VIPUL K. CHOKSI
Chairman – Journal Committee

Supratim Chakraborty, *Associate Partner, Khaitan & Co.*

Introduction and Overview of Money Laundering

"The clampdown on money laundering and corruption is the common responsibility of all the countries in the world"

— Wang Zhaowen

Introduction

'Money laundering' is not a recent phenomenon and has been prevalent for centuries. However, with unprecedented development of technology, the manner in which money is laundered has become more sophisticated and rampant. The proliferation of money laundering is an international social concern and it often has adverse impacts on the economy of a country. India, along with a number of other jurisdictions, such as the United States of America ("**USA**"), the European Union ("**EU**") and Australia, have recognised the perils associated with money laundering and have taken steps for its prevention. In light of the growing global debate around the concept of money laundering, understanding the meaning and concept of 'money laundering' becomes all the more relevant and important.

The Concept of Money Laundering

Traditionally, 'money laundering' has been identified as the process through which an appearance is created that money earned through illegitimate means has originated from a legitimate source. It is the method by which an attempt is made to hide the source of money from the relevant authorities, as the money is generated from criminal activities such as drug trafficking, bootlegging etc. The aim of money launderers is to provide a legal cover for the income and wealth earned through illegal acts and to avoid detection, prosecution and confiscation of the illegal funds.

Historical Perspective

The earliest known instances of money laundering were seen in China about 2000 years ago. The Chinese traders indulged in commercial activities which were banned by the government. In order to protect the wealth generated from such banned activities, the traders hid the wealth in remote jurisdictions. The hidden wealth was later converted into movable assets and invested in legitimate business of these traders, thus, legitimising the source of the money.

Some historians opine that the origin of the term 'money laundering' was from the popular practice of mafia ownership of launderettes in USA in the 1930's. The launderettes, which were a flourishing cash-intensive business, were used by the mafia to account for proceeds earned by them through criminal activities such as bootlegging, prostitution, extortion, gambling etc. However, it has been argued by some others that coinage of the term 'money laundering' is because, money from illegal

source is put through a cycle of transactions that cleans such money and makes it appear as money earned through legal activities.

USA was the first country that criminalised money laundering by enacting the Money Laundering Control Act of 1986 **("MLCA")** and made it a federal crime. This was done in an attempt by the Congress to address the raging concerns regarding the nexus between laundered money and growth of organised criminal activity in the USA. The adverse socio-economic impact of money laundering was clearly visible to the legislators and strict penal laws were imposed to curb this practice.

By the late 1980s, the problems associated with money laundering had been recognised globally. In 1989 the Financial Action Task Force ("**FATF**") was appointed by the leaders of G-7 nations (Canada, France, Germany, Great Britain, Italy, Japan and USA) to formulate international standards and implement measures to combat money laundering. The FATF monitors the progress of its member states to check the level of compliance with anti-money laundering measures. It also systematically reviews money laundering techniques and their counter-measures. This is done to identify vulnerabilities existing in a country at a national level, as it may have grave implications on the international financial system. India is a valued member of the FATF and has been pro-active in improving its domestic legislations, in order to fulfil its commitment to the FATF.

Apart from financial implications of money laundering, its channels often see a close interplay between money launderers and key political players, wherein such funds cater to the propagation of ideological or political warfare by the political players. The 9/11 terrorist attack is considered one of the greatest examples of this. The attack was funded by Al Qaeda, who were politically against the American policies and ideologies. High level officials of USA have admitted that fighting Al Qaeda financing was integral to the fight against Al Qaeda itself. The attacks revealed the far-reaching implications of money laundering. Thereafter, money laundering became the focus of several international debates and deliberations that aimed at finding ways of combatting and preventing such nefarious activities.

After the 9/11 terrorist attack, the US Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act of 2001"), that granted extra-territorial jurisdiction to the courts in USA under MLCA. This was done to strengthen USA's stance against money laundering in the global arena. Further, the United Nations ("UN"), through the UN Security Council Resolution No. 1373 of 28th September 2001, attempted to prevent and suppress financing of terrorist activities and made the resolution binding on all member states without exception. The Security Council was given the power to use regulatory measures ranging from imposing of sanctions to usage of military force to enforce the aforesaid directive.

Process of Money Laundering – International Perspective

It is usually assumed that money laundering is only an international phenomenon involving various jurisdictions. But money can be laundered exclusively in the national sphere without having any international element. When money is laundered through international circuit it comprises of a series of processes which integrate illegally earned money within the legal monetary system. This process usually takes place through three fundamental steps (which are not water tight compartments and may overlap at times), i.e. placement, layering and integration. These steps are explained below in brief:

Placement

Placement is the process through which illegally earned funds are injected into the financial system of a country. This is achieved by various methods, the common one being depositing the money in several banking institutions by means of small cash deposits in the name of unknown individuals or organisations, in order to avoid detection by

financial regulatory authorities. This is usually considered the riskiest part of the process since chances of detection are highest at this stage. It is also the first step of re-introduction of laundered money into the economy.

Layering

Layering involves a series of transactions by which illegally acquired money is routed through different financial institutions, to separate it from its origin. This movement of funds may often be interjected by purchase of fictional high value commodities such as diamonds, houses, boats etc. to distance the money from its source. In cross-border scenario, the transfer of funds takes place across jurisdictions through different mediums such as shell corporations, banks etc. Detection of money trail becomes difficult with the movement of funds from one jurisdiction to another, especially if it is through several permutations and combinations. There is change in currency of the transferred funds and the funds usually passes through or is parked in countries which do not have reciprocal agreements to disclose financial information. Layering is the most complex step of money laundering that makes tracing the money trail a difficult task for enforcement agencies. Different techniques such as loan on low or no interest rates, fictitious purchases, back-to-back loans are utilised for laundering the money. An important characteristic of this step is to provide anonymity and to hide the audit trail. This is the stage where the launderers take help from professionals to protect themselves from being detected.

Integration

The laundered money is reintroduced in the financial system through the process of 'integration'. At this juncture, the laundered money is usually invested in the economy through paper institutions that are setup in nations, often called financial havens, where financial secrecy is guaranteed. The legal ownership of the laundered money is vested in these paper institutions while the beneficial interest from them is derived by the money launderer. The funds directed from these institutions are then invested into various economic sectors such as capital markets, real estate, catering industry, gold and diamond market and converted to appear as money from legitimate sources.

Techniques Used for Laundering Money

Techniques used in international money laundering

At each stage of money laundering various techniques may be used by the launderers to transfer the funds from one source to the other, camouflage the source of such funds and integrate the same into the legal financial circuit. Following are few widely-used methods of money laundering in the international circuit:

Techniques used during the Placement Phase

Underground Banking Systems: One of the popular methods of laundering money is its transmission through underground banking system. There are three principal types of underground banking system, namely, 'hundi/hawala', 'chop shop/chitti banking' and 'black market peso exchange.' Of these, hawala is the most popular alternative remittance system. Hawala was developed in India and used by Indians like as a regular banking channel in order to facilitate trade before the structured western banking practices were introduced. There is no physical transfer/movement of money in a hawala transaction. It works with a network of operators called hawala operators who function across the globe. Any person wishing to transfer money contacts a hawala operator at the source location. The hawala operator from the source location collects the money from a person and calls upon the other hawala operator at the country where the transfer has to be made (destination location). The hawala operator at the destination location gives the cash to the intended recipient after deducting certain amount of commission. Thus, the money reaches from the transferor to the transferee without the aid of formal banking institutions. The cost of using a hawala operator may be high, but no compliance check is carried out on the source of the money, as would be required if the money was routed through legally recognised channels. This system is widely used to launder money since it eliminates physical movement of money and it obliterates paper trail.

Structuring Deposits: Popularly known as smurfing, this method entails breaking up large quantity of laundered money into smaller, less-suspicious portions which are then deposited into various bank accounts to avoid triggering currency reporting requirements mandated by many countries. These deposits are carried out by multiple people (smurfs) over a prolonged period in order to minimise suspicion.

Other techniques which may also be used in the initial stage for placement of illegitimate funds are smuggling of currency, travellers' cheques, investing in monetary instruments such as banker's cheque, equity shares, company bonds etc.

Techniques used during the Disguising/ Layering Phase

Shell Companies: These are paper companies without substance or commercial purpose that are incorporated to launder money. These companies take the funds from illegitimate source as payment for supplying fictitious goods and services. They create a façade of legitimate economic transactions through a web of false invoices and balance sheets and convert the money from an illegal source into funds from legitimate origin by showing it as paper profit of the business.

Loan at low or no interest rates: Giving of loans at low or no-interest rates allow the launderer to transfer large sums of money to other people and avoid depositing the same into bank accounts or with other institutions. The loans are later repaid in small tranches over a period of time to avoid hitting the reporting threshold. The receiver of the loan is generally aware of the nature of the money, but does not report to the authorities, as he is getting the loan at a favourable rate.

In addition to the techniques discussed above, other methods which may also be used by launderers at this stage are: generating of fictitious sales and purchases, entering into false contracts and arrangements etc.

Techniques used during the Legitimising/ Integration Phase

Purchase of consumer goods for export: Investment in consumer goods such as television sets, appliances etc is beneficial as these can be easily transported across borders without raising suspicion and can be later sold abroad to produce what may appear to be legitimate commercial revenues.

Acquisitions of luxury goods: The launderer can use the funds to purchase luxury goods. One major advantage of purchasing such products is that

large amounts of cash are transformed into a less conspicuous form. Moreover, it is not uncommon for consumers to pay for luxurious goods in cash.

Other techniques which may be used by launderers is to invest the money in cash intensive business, trading in the diamond or gold market, capital market investments, real estate acquisitions etc.

Techniques used for domestic money laundering

There are certain money laundering techniques which have a national orientation and usually do not involve international elements.

Retail or Wholesale Businesses: Retail or wholesale businesses are at times merely fronts where most sales are fictitious in nature. For instance, a merchant has a limited stock, but fictitious sales are booked in its accounts. The extent to which the sales are fictitious and not genuine is the extent to which money has been laundered and ultimately projected as proceeds from legitimate sales. Retail business which has large turnovers, like a fast food restaurant, is a convenient method to commingle the laundered money as legitimate sales, because in such a business, it may be hard to determine the actual amount of sale. Another example can be high-end fashion designers who may show the sales of garments at inflated prices, whereas in reality the garments are sold for a much lesser price. Use of such techniques allow illegal money to be passed off as legitimate money to the extent of the inflated price.

Manufacturing units: Manufacturing units may be used to launder money primarily through two techniques. In the first instance, a bogus manufacturing unit may be set up and false sales may be carried out through such a bogus manufacturing unit. The other technique is where inflated invoices are issued through genuine manufacturing units for the products that are manufactured. Therefore, the extent to which false sales are carried out or the prices are inflated is the extent to which the money is laundered.

Agricultural sector in India: In India, the agricultural sector is majorly exempted from paying tax in order to give a boost to the sector and relief to the farmers. Money launderers often buy land and show high inflated income from agriculture. The extent to which the inflated gains are accounted for is the extent of the illegal proceeds.

There are other techniques as well which may be used at a national level such as purchase of lottery tickets from genuine lottery winners at a premium, encashing chips at casinos and showing them as legitimate wins, depositing small amount of money in a number of bank accounts in the name of fictitious individuals, showing sale of high number of tickets for charity shows etc.

Apart from the techniques mentioned above, there are a plethora of other methods that may be used in various combinations with each other to launder money. The modus operandi is modified and adapted with changing legal requirements and with each reporting of crime. The dynamic nature of the operations of money launderers make detection of such offenses harder for investigative agencies.

Adverse effects of Money Laundering

The adverse effects of money laundering are palpable and, if left unchecked, it can be detrimental to the socio-economic health of the country. It can weaken the social fabric of a country by its strong economic and political influence. Organised crime can infiltrate financial institutions by acquiring control over the economy through large scale investments and by bribing Government officials and politicians.

Money laundering is prejudicial to free enterprises. It threatens to destabilise the financial structure by offering goods and services at much lower prices. This proves prejudicial for private sector as it is unable to compete with the low prices offered by such enterprises. Money laundering adversely impacts the real economy, stunts its growth and diverts its resources to encourage criminal activities and corruption. This in turn affects the country's international trade and capital flow, which is harmful for long-term economic development of

such country. Especially in developing economies, money laundering facilitates the growth of crime and corruption which erodes the chances of sustainable growth of such countries. Also, if money launderers are not prosecuted and 'crime pays of' then it becomes a lucrative source of easy income. It appears more attractive to others and may encourage them to indulge in such acts.

Amongst the various threats posed by money laundering, few prominent ones are:

Terrorism: Money laundering is one of the primary modes of financing politically and ideologically motivated terrorist activities. Various illegal means (ranging from low-level criminal activities such as frauds to highly nefarious activities) are resorted to, in order to collect funds and to thereafter use for spread of terrorist activities.

Threat to Financial Sector Institutions: Globally, the financial sector has become a major target of money laundering activities because they provide a gamut of services and instruments that can be used to conceal the origin of funds. Money laundering leads to internal corruption and causes reputational damage to financial institutions. This smothers the growth of the financial sector and causes economic distortions.

Threat to Economic and Political Stability: The International Monetary Fund has expressed grave concerns about the consequences of money laundering. They have opined that such activities cause potential and palpable threat to a country's financial stability and integrity, resulting in loss of welfare and resources. It has an overall destabilising spill-over effect on economies across the globe. Further, money laundering often adversely impacts the macro-economic analysis by providing distorted economic projections that result in volatile exchange and interest rates, unstable policy decisions, etc.

Persistence of money laundering

Following may be attributed as reasons for persistence of money laundering:

Global nature: In order to truly and successfully hide the source of money, various bogus transactions take place and money is transferred from one account to another off-shore account. Such transfer of money is usually through such countries that have stringent secrecy laws. Additionally, with other countries being involved, it becomes difficult for the agencies / authorities of one country to follow the money trail.

Flexible and Adaptable Operations: The methods and processes used by money launderers do not remain constant and rigid. The methods adopted by them are flexible and adaptable to changing scenarios. Also, money launderers are constantly exploring newer methods and ways for laundering money. This enable money launderers to adapt t o changing scenarios and keep improvising regularly.

Ingenuity of its players along with the vast resources at their disposal: Money launderers have vast resources at their disposal as they acquire money through illegal means and there is no accounting for it. The availability of funds allows money launderers to pay premium price to professionals for their assistance. They use the latest technology and know-how to launder money. The development of internet based transmission of money, increasing international trade networks and transnational fund transfers, have posed new concerns relating to the vice of money laundering. Cyber payment systems are often misused by money launderers and it renders their task seamless with easy and quick transfers across jurisdictions.

Requirement of 'double criminality': The term 'double criminality' means that illegal activities which generate the proceeds is considered a crime under the laws of both the countries where the illegal act is carried out and where the proceeds were eventually laundered. For example, if country A has jurisdiction over money laundering activities that concern proceeds from an illegal activity in country B, most legal systems require that the illegal activities are incriminated both in country

A and country B. Since laws and nature of illegal activities differ from one country to the other, in a situation where the illegal activity takes place in one country and the proceeds are laundered in another country (and in this second country the illegal activity is not considered 'illegal' under its law), it becomes difficult to investigate and prosecute such crimes.

Combating Money Laundering

The process of money laundering can be combatted at all its stages with strong policies and regulatory mechanisms and effective implementation. All or some of the following measures have been taken and means have been devised by countries to counter money laundering at each step:

Placement: The 'placement' stage is considered the most vulnerable stage in money laundering. Thus, regulatory agencies have concentrated on developing methods which make placing of funds without detection a difficult task. Some of these measures are mandatory record-keeping, reporting of large or unusual currency transactions, 'know your customer' norms, reporting of suspicious transactions, cross-border monetary declaration requirements etc.

Layering: Countries have gradually realised that 'layering' of funds is possible because of bank secrecy rules and non-co-operating attitude of certain countries when it comes to sharing of financial information. Governments have also realised that techniques such as nominees and numbered accounts are often used to disguise the actual ownership of funds. Thus, there is increased focus now on transparency in financial systems between countries and sharing of information.

Integration: The 'integration' of illicit proceeds may be countered by strengthening asset forfeiture laws, wherein the Governments have the authority to seize the proceeds from criminal activities even though such proceeds have been reinvested in ostensibly legitimate enterprises.

Conclusion

The adverse impact of money laundering has been a subject of extensive debate and there has been an overall international consensus that such an activity poses immense threat to the financial, social and political stability of a country. There is also a general consensus on the fact that, to reduce the incidence of criminal and terrorist activities that jeopardise the socio-economic structure of a country, it is imperative that international efforts are made to combat money laundering.

International initiatives have been undertaken to foster collaboration amongst countries to combat this vice. Few important ones among them are the "United Nations Convention against Illicit Trafficking in Drugs and Psychotropic Substances", "United Nations Global Programme against Money-Laundering, Proceeds of Crime and the Financing of Terrorism", "the Financial Task Action Force", "Basel Committee's Statement of Principles" and "the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism".

In the international money laundering circuit, financial institutions at times unknowingly assist in laundering of money. Therefore, it is essential that financial entities specifically adopt a more dynamic and holistic approach – renewing the focus on existing programmes to better mitigate the old risks, while simultaneously managing new risks and regulatory requirements. Money launderers have abused the "doctrine of confidentiality" between jurisdictions and used it as a veil to cover their illegal transactions. Thus, in order to have a robust and effective regime that curbs money laundering there has to be co-operation amongst international community to disclose financial information. A concerted and vigorous effort by the global community is required to redress, effectively combat and deter the practice of money laundering and its associated illicit activities.

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Money Laundering Law : Dicey Issues

Introduction

United Nations General Assembly had held its special session in June 1998. At that session, the Member States adopted a Political Declaration. This Declaration called upon the Member States to adopt national money-laundering legislation and programme.

The Government of India considered it necessary to implement the U.N. Political Declaration in 2001. On 17th January, 2001, the President of India gave his assent to *The Prevention of Money-Laundering Act, 2002* ("PMLA"). Enactment of *The Prevention of Money-Laundering Act, 2002* is rooted in the U.N. Political Declaration.

Evolution of Law

The preamble to PMLA shows that it is an *"Act to prevent money-laundering and to provide confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto"*.

Ever since the enactment of PMLA, the Government was called upon to deal with various issues which were not adequately addressed by the existing legal framework. Hence, the Government modified the legal framework from time-to-time, by making amendments to PMLA. The amendments made in 2005, 2009, 2013 and 2016 helped the Government to address various issues. The issues addressed by these amendments were reflected in the Statement of Objects and Reasons appended to each amendment.

Judicial Review

Various amendments made in PMLA helped the Government in addressing issues noticed in the practical working of PMLA. From time to time, various further issues emerged in addition to the ones addressed by the amendments to PMLA. Such further issues came up for judicial review by courts in India. Thus, the Supreme Court and various High Courts critically examined such further issues and gave their considered view to resolve such issues.

In this article, an endeavour is made to analyse some of these issues which are dicey in nature in view of their complexities. The author has provided gist of some important issues of practical significance and the rationale underlying the conclusion reached by the court in respect of each issue.

Some Dicey Issues

To begin with, one may consider the following issues concerning the power to arrest under section 19 of PMLA.

- Whether power to arrest under section 19 of PMLA depends on whether the offence is cognisable or non-cognisable.
- Whether the exercise of powers of arrest under section 19 will require the officer to also follow the procedure laid down in CrPC, viz., registering FIR, seeking Court's permission for arrest in respect of non-cognisable offence.
- Whether the grounds of arrest need to be informed or supplied immediately or as soon as may be? What is the connotation of the expression "as soon as may be" in section 19(1)?
- Are the grounds required to be provided in writing or mere oral communication of grounds is sufficient?

The above-mentioned issues were recently examined by the Bombay High Court[1] in its decision rendered on 14th December, 2016.

At the outset, for the purpose of dealing with the above-mentioned issues, it may be noted that the entire scheme of the PMLA makes it clear that PMLA is a complete Code in itself. This signifies that Legislature intended that only the procedure laid down in PMLA is to be followed in respect of the offences punishable under PMLA. Section 71 of PMLA further clarifies this by giving overriding effect to the provisions of PMLA vis-à-vis the provisions of CrPC or any other law. Thus, the provisions of CrPC can be pressed in service only when the provisions of PMLA are silent on the given aspect, such as 'arrest', provided that the same are not inconsistent with the provisions of PMLA.

In the aforementioned background, the issues mentioned above are viewed, as follows.

Whether power to arrest under section 19 of PMLA depends on whether the offence is cognisable or non-cognisable

The Bombay High Court has discussed this issue in the following manner.

In view of the definition of 'cognisable offence' in section 2(c) of CrPC, it is clear that if the offence falls under the First Schedule of CrPC or under any other law for the time being in force, the Police Officer may arrest without warrant. The 'First Schedule' of CrPC specifically provides classification of the offences, which are 'cognisable' or 'non-cognisable'; bailable or non-bailable and triable by a particular Court according to the punishment that is provided for such offences. Under Part II of the First Schedule, 'Classification of Offences against Other Laws' provides that, 'offences punishable with imprisonment for more than three years or upwards would be cognisable and non-bailable'.

The offence under section 4 of PMLA, read with section 3 thereof is punishable with imprisonment for more than three years and which may extend up to seven years or even up to ten years, as the case may be. Therefore, in view of Part II of the First Schedule of CrPC, such offence becomes cognisable.

In the alternative and without prejudice to the above-mentioned proposition, the Bombay High Court also observed that there was no need to debate whether the offences under PMLA are cognizable or non-cognizable, because section 19 of PMLA confers specific power on the authorized officer to arrest any person if, on the basis of the material in his possession, he has reason to believe that a person has been guilty of an offence punishable under PMLA. Thus, it is clear that once the authority forms such reason to believe on the basis of the material in its possession that a person has been guilty of an offence under the Act, such authority can arrest the person. In other words, the 'power of arrest' under section 19 of PMLA does not depend upon whether the offence is cognizable or non-cognizable. This power of arrest under section 19 is, not in any way circumscribed or qualified, depending upon the nature of the offence or the punishment prescribed therefor

1 Chhagan Chandrakant Bhujbal vs. Union [2017] 140 SCL 40 (Bom.)

or its cognizability or non-cognizability. Section 19, in categorical and unambiguous words, lays down that only three conditions are necessary for the arrest of the person for the offence under PMLA, firstly, the reason to believe on the part of the authorized officer that any person has been guilty of the offence punishable under PMLA; secondly, such reason is based on the material in his possession and finally, the reason for such belief is recorded in writing. Section 19 nowhere provides that only when the offence is cognizable, such officer can effect the arrest.

Whether power to arrest under section 19 requires following the procedure laid down in CRPC i.e. registering FIR, etc.

In this connection, it may be noted that section 19 of PMLA does not contemplate either registration of FIR on receipt of information relating to cognizable offence or obtaining permission of the Magistrate in case of non-cognizable offence before taking cognizance or before effecting arrest of the accused in respect of any offence punishable under PMLA. The only conditions laid down under section 19 of PMLA pertain to the reasonable belief of the authority, which is based on the material in its possession. Hence, when there are no such restrictions on the 'power to arrest' under section 19 of PMLA, it cannot be accepted that in addition to the procedure laid down in PMLA, the officer authorised to arrest under PMLA was also required to follow the procedure laid down in CrPC of registering FIR or seeking Court's permission in respect of non-cognisable offence for arrest of the accused under PMLA. If those provisions of Chapter XII of CrPC are to be read even in respect of offences under PMLA, section 19 of PMLA would be rendered nugatory and such cannot be the intention of the Legislature. The Court cannot make any special provision in PMLA as nugatory or infructuous by giving the interpretation which is not warranted by the Legislature.

The manner of communicating the grounds of arrest

The issue for consideration is whether the grounds of arrest must be informed or supplied immediately or "as soon as possible" and whether the same must be communicated in writing or orally. This issue has been addressed as follows.

Section 19(1) does not provide that the grounds of arrest must be immediately informed to the person arrested. The use of the expression 'as soon as may be' in the said provision makes it clear that grounds of arrest need not be supplied at the time of arrest itself or immediately on arrest, but as soon as may be. If it was the intention of the Legislature that the grounds of arrest should be stated in the Arrest Order itself that too in writing, the Legislature would have made strict provision to that effect by using the word 'immediately' or 'at the time of arrest'. The fact that Legislature has not done so but used the words 'as soon as may be', indicates that there is no statutory requirement that the grounds of arrest should be communicated in writing and that too at the time of arrest or immediately after the arrest. The use of the words 'as soon as may be' implies that such grounds of arrest should be communicated at the earliest.

Apart from the above-mentioned three issues examined by the Bombay High Court[2] several other important issues have been considered by the Supreme Court and High Courts. Few such issues are reviewed, as follows.

Can a Chartered Accountant be punished under PMLA along with his client?

This important issue was examined by the Supreme Court in the undernoted decision[3].

2 Chhagan Chandrakant Bhujbal vs. Union [2017] 140 SCL 40 (Bom)

3 CBI vs. Vijay Sai Reddy (2013) 7 SCC 452

In this case, CBI was investigating the corruption on mammoth scale by a Chief Minister to benefit his son who was also an M.P. CBI had sought custody of the respondent chartered accountant who contended that he was merely a chartered accountant who had rendered nothing more than professional service. However, the Supreme Court rejected such contention in the light of serious allegations against the respondent and his nexus with the main accused. The Supreme Court gave weight to the CBI's allegation that the respondent was the brain behind the alleged economic offence of huge magnitude. The bail granted to the respondent by the Special Court and High Court was cancelled by the Supreme Court.

Doctrine of Double Jeopardy – Whether applicable to PMLA

The issue here is whether a person facing criminal charge in a trial court can raise the plea of double jeopardy in terms of Article 20(2) of the Constitution if summoned under PMLA?

This issue was examined by the Madras High Court in the undernoted decision[4].

In this case, charge-sheet was filed by police to investigate predicate offence under sections 419-420 of the *Indian Penal Code*. These offences are scheduled offences under PMLA.

When summons were issued to the petitioner, it was pleaded by her that the summon cannot be issued to her as it will be hit by double jeopardy since police had already filed charge-sheet alleging offence under *Indian Penal Code*.

It was held by the Madras High Court that issuance of summons under PMLA was merely for preliminary investigation to trace proceeds of crime and did not amount to trying a criminal case. Hence, there was no double jeopardy as envisaged under Article 20(2) of the Constitution.

The plea of double jeopardy was also made in another case before the Orissa High Court[5].

In this case, the petitioner was acquitted from the charges under the *Indian Penal Code*. After such acquittal, however, the proceedings under PMLA continued. Hence, the petitioner claimed the benefit of double jeopardy on the ground that the proceedings under PMLA regarding seized properties cannot be allowed to continue after his acquittal from criminal charges under the *Indian Penal Code*.

The Orissa High Court held that even when the accused is acquitted from the charges framed in the Sessions trial, a proceeding under PMLA cannot amount to double jeopardy since the procedure and nature of onus under PMLA are totally different.

Right of cross-examination of witness

The issue before the Delhi High Court[6] on this aspect was whether, at the stage when a person is asked to show cause why the properties provisionally attached should not be declared property involved in money-laundering, a person can claim the right of cross-examining a witness on whose statement a complaint under section 5(5) of PMLA was made.

The Delhi High Court answered this question in negative by observing that, before the Adjudication Order is passed under section 8 of PMLA, it cannot be presumed that the Adjudicating Authority will rely on the statement of the witness sought to be cross-examined by the petitioner. On this ground, it was held that the notice did not have the right to cross-examine the witness at the stage when he merely receives a show-cause notice.

Conclusion

There are several other dicey issues considered by the Supreme Court and High Courts. However, due to constraint of length of this Article, the same have not been discussed here.

4 M Shobana vs. Asst Director (2013) 4 MLJ (Cr.) 286

5 Smt Janata Jha vs. Asst Director (2014) CrLJ 2556

6 Arun Kumar Mishra vs. Union (2014) 208 DLT 56

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Prevention of Money Laundering: A Global Panorama

Various international organisations and multilateral agencies have given their respective description to the term 'Money Laundering'. The essence is same but on a comparative reading there are some variations. The global police watchdog "INTERPOL" (International Police) defines it as "any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources"[1]; the United Nations Office on Drugs and Crime ('**UNODC**')[2] identifies 'Money Laundering' as "the method by which criminals disguise the illegal origins of their wealth and protect their asset bases, so as to avoid the suspicion of law enforcement agencies and prevent leaving a trail of incriminating evidence". Albeit, number of initiatives were taken by some major international organisations to prevent money laundering, the creation of Financial Action Task Force on Money Laundering ('**FATF**') in 1989, brought about the much needed dedicated organisation guiding the member countries[3] in curbing this menace of money laundering. FATF an inter-governmental body established to set standards and promote effective implementation for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system defines 'Money Laundering' as the "processing of criminal proceeds to disguise its illegal origin, thereby enabling the criminal to enjoy the profits without jeopardising the source".

The global community, for the first time identified money-laundering as an international crime in the year 1988 when the United Nations adopted the United Nations Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ('**Vienna Convention**'). The Convention was signed by 171 countries of the world and further implemented by 168 of them, however the aspect of money laundering was dealt in the light of drug trafficking as the Preamble of the Convention itself suggests that *"illicit traffic generates large financial profits and wealth enabling transnational criminal organisations to penetrate, contaminate and corrupt the structures of Government, legitimate commercial and financial business, and society at all its levels" and affirms that the international community is henceforth "determined to deprive persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for so doing".*

1 https://www.interpol.int/Crime-areas/Financial-crime/Money-laundering

2 https://www.unodc.org/unodc/en/money-laundering/

3 The FATF currently comprises 35 member jurisdictions and 2 regional organisations, representing most major financial centres in all parts of the globe. India became the member of FATF in 2010.

In the year 1989, the **Financial Action Task Force** was convened in Paris by the Heads of States of seven major industrialised countries[4] and the President of the European Community under French Presidency with the aim to fight against money laundering, which by then had become an important concern for the developed and developing countries of the world. In April 1990, the Task force issued a report with a comprehensive programme of Forty Recommendations for improving national legal systems, enhancing the role of the financial sector and intensifying co-operation in the fight against money laundering. The said report was endorsed by the Finance Ministers or other competent Ministers of all FATF members in May 1990. Since then, the FATF has been the apex "policy-making body" working to generate the necessary political will to bring about national legislative and regulatory reforms against money laundering. The Recommendations have also been revised further in 1996, 2001, 2003 and in 2012 to ensure an updated and relevant policy guide for the member states.[5]

The link between laundered money and terrorism funding was realised by the world soon after 9/11 incident on the World Trade Center in the United States. Underlining the same, the United Nations Security Council comprising the most developed economies of the world adopted Resolution No. 1373 for the prevention and the suppression of the financing of terrorist acts, the criminalisation of terrorism-related activities and the provision of assistance to carry out those acts, the denial of funding and safe-haven to terrorists and the exchange of information to prevent the commission of terrorist acts. The General Assembly then adopted the International Convention for the Suppression of the Financing of Terrorism which came into force in April, 2002 to take measures to protect their financial systems from being misused by persons planning or engaged in terrorist activities.

The following years witnessed the UN Conventions, against Transnational Organised Crime and against Corruption in September 2003 and December 2005 respectively. The Conventions widened the scope of money laundering offence by covering the proceeds of all serious crimes in addition to the proceeds of illicit drug trafficking. The countries were sought to create a comprehensive domestic supervisory and regulatory regime for banks and non-bank financial institutions, including natural and legal persons, as well as any entities particularly susceptible to being involved in a money laundering scheme.

The Conventions also for the first time ever called for the establishment of financial intelligence units.

A number of initiatives were taken at the international level to tackle money laundering which *inter alia* includes the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988; European Union Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime; Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; United Nations Convention against Corruption.

European Union Convention

The European Union ('**EU**') defines Money Laundering as the process by which criminal proceeds are 'cleaned' so that their illegal origins are hidden. It is underlined that the offence of money laundering has direct connection with organised crimes generating huge profits in cash, such as trafficking in drugs, weapons and human beings as well as fraud.

4 G-7 Countries: Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States.

5 The FATF currently comprises 35 member jurisdictions and 2 regional organisations, representing most major financial centres in all parts of the globe. http://www.fatf-gafi.org/about/membersandobservers/

The European Parliament and the Council of the European Union, responding to the concerns in the field of money laundering adopted Council Directive[6] for the prevention of the use of the financial system for the purpose of money laundering. It required Member States to prohibit money laundering and to oblige the financial sector, comprising credit institutions and a wide range of other financial institutions, to identify their customers, keep appropriate records, establish internal procedures to train staff and guard against money laundering and to report any indications of money laundering to the competent authorities.

The Directive has been revised thrice and the Third Directive[7] was adopted on October 26, 2005 which identifies following instances as money laundering:

(a) Conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action;

(b) Concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity;

(c) Acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity;

(d) Participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the foregoing points;

(e) Activities which generated the property to be laundered which were carried out in the territory of another Member State or in that of a third country.

Europol[8], the European Union's law enforcement agency also has a broad mandate in the area of combating money laundering, and provides Member States with intelligence and forensic support to prevent and combat international money laundering activities. The main objective in tracing illegal assets and money laundering is to:

- Find the criminals involved;
- Disrupt their associates;
- Confiscate the proceeds of their crimes.

The Financial Intelligence Unit ('**FIU**') of Europol, FIU.net further supports the FIUs in the European Union in their fight against money laundering and the financing of terrorism through its decentralised and sophisticated computer network.

OECD Convention

The OECD's First Forum on Tax and Crime, referred to as Oslo Meeting, was convened in March 2011 to support the countries in combating the threats through greater transparency, more effective intelligence gathering, and improvements in co-operation between Government agencies and countries to prevent, detect and investigate offences, prosecute criminals and recover the proceeds of their illicit activities.

The Second Forum on Tax and Crime was held in Rome in June 2012, hosted by the Italian Guardia di Fidanza, and the Third in Istanbul, Turkey. The

6 91/308/EEC on June 10, 1991

7 2005/60/EC

8 The European Police Office (commonly abbreviated Europol) is the law enforcement agency of the European Union (EU) that handles criminal intelligence and combating serious international organised crime by means of co-operation between the relevant authorities of the member states, including those tasked with customs, immigration services, border and financial police etc.

outcome statement of the third meeting stated that the G20 Leaders (at the Saint Petersburg Summit[9]) had emphasized how cross-border tax evasion, money laundering, terrorism financing and corruption undermine public finance, impede economic growth and poverty reduction, threaten financial stability and undermine the rule of law. On this premises and the need to combat financial crimes, the political leaders at the Saint Petersburg Summit supported the ongoing work of the OECD, the Financial Action Task Force (FATF), the World Bank and other organisations to combat these threats.

The Fourth OECD Forum on Tax and Crime was held in Netherlands in September, 2015. Senior officials and experts from over seventy countries gathered in the meeting and international organisations to address the priority issues and support required for the ambitious future programmes. The panels over the two-day discussions included, inter alia, the fight against terrorist financing, emerging tax evasion risks in an era of greater transparency, enabling developing countries to tackle illicit flows, alternative payment platforms used to facilitate tax crime and other financial crimes, financial professional enablers and their role in organized crime, and improving co-operation between tax and anti-money laundering authorities.

The OECD Report *Improving Co-operation between Tax and Anti-Money Laundering Authorities-Access by Tax Administrations to Information held by Financial Intelligence Units for Criminal and Civil Purposes* was released in the Fourth Meeting.[10]

The key recommendation of the Report focused on the need that, subject to appropriate safeguards, tax administrations be granted the fullest possible access to the ***Suspicious Transaction Reports (STRs)*** received from responsible parties by the FIUs in their jurisdictions. For this goal to be achieved, according to the Report, the jurisdictions should not only provide a suitable legislative framework that allow that access, but also ensure the operational structure and the procedures to facilitate the maximum effectiveness in the use of STRs.

The aforesaid Report called for a ***"whole of Government"*** approach to combat money laundering and other financial crimes, recognising that knowledge skills required to effectively fight against these offences are often spread across different bodies, such as tax and customs administrations, FIUs, specialised criminal law enforcement authorities, financial regulators and the public prosecutor's office. As the Report recognised, this approach does not imply altering the fact that FIUs primary function is to tackle money laundering and that of tax administrations to ensure tax compliance; it simply acknowledges that by working closely together all these bodies would be better positioned to achieve their objectives.

Based on a survey conducted by OECD Task Force on Tax Crimes and Other Crimes ('**TFTC**') in 2013, later updated and enlarged in 2014, the existence of a wide range of practices among countries as regards allowing tax administrations access to STRs was confirmed.

The different models for making STRs available to tax administrations can be grouped in three main categories:

- Unrestricted and independent tax administration access to STRs,
- Joint Financial Intelligence Unit and Tax administration decision-making allocation of STRs, and
- FIU decision making on allocation of STRs.

The Report details the strengths and challenges of each model in accordance with countries' practices.

The Report further recommends that as long as the domestic legal framework permits, STRs be used at the tax administration level not only for identifying tax crimes but also for civil purposes, this is, in connection with tax compliance.

When addressing the issue of confidentiality and data protection, the Report identifies three essential building blocks: the legal

9 September 5 and 6, 2013

10 September 2015

framework, information security management (practices and procedures) and monitoring confidentiality, compliance and sanctions to address breaches (improper disclosure or use of information). The Report further states that depending on the national jurisdiction legal framework, there may be also requirements restricting the use of STRs aimed at protecting the reporting entity and the individuals in the reporting entity who actually report the STRs.

Financial Action Task Force ('FATF')

The FATF monitors its Member countries' as well as other countries' progress in implementing the FATF Recommendations; reviews money laundering and terrorist financing techniques and counter-measures; and, promotes the adoption and implementation of the FATF Recommendations globally.

The FATF Recommendations set out a comprehensive and consistent framework of measures which countries should implement in order to combat money laundering and terrorist financing, as well as the financing of proliferation of weapons of mass destruction. The FATF Recommendations, value the diverse legal, administrative and operational frameworks of the countries and different financial systems and therefore, set an international standard, which countries should implement through measures adapted to their particular circumstances.

The main functions of FATF comprise:

(a) Identifying and analysing money laundering, terrorist financing and other threats to the integrity of the financial system, including the methods and trends involved; examining the impact of measures designed to combat misuse of the international financial system; supporting national, regional and global threat and risk assessments;

(b) Developing and refining the international standards for combating money laundering and the financing of terrorism and proliferation **(the FATF Recommendations);**

(c) Assessing and monitoring its Members, through 'peer reviews' **('mutual evaluations')** and follow-up processes, to determine the degree of technical compliance, implementation and effectiveness of systems to combat money laundering and the financing of terrorism and proliferation; refining the standard assessment methodology and common procedures for conducting mutual evaluations and evaluation follow-up;

(d) Identifying and engaging with high-risk, non-co-operative jurisdictions and those with strategic deficiencies in their national regimes, and co-ordinating action to protect the integrity of the financial system against the threat posed by them;

(e) Promoting full and effective implementation of the FATF Recommendations by all countries through the global network of **FATF-Style Regional Bodies (FSRBs)** and international organisations; ensuring a clear understanding of the FATF standards and consistent application of mutual evaluation and follow-up processes throughout the FATF global network and strengthening the capacity of the FSRBs to assess and monitor their member countries;

(f) Responding to significant new threats to the integrity of the financial system consistent with the needs identified by the international community, including the United Nations Security Council, the G-20 and the FATF itself; preparing guidance as needed to facilitate implementation of relevant international obligations in a manner compatible with the FATF standards (for instance, continuing work on money laundering and other misuse of the financial system relating to corruption);

(g) Assisting jurisdictions in implementing financial provisions of the United Nations Security Council resolutions on non-proliferation, assessing the degree of

implementation and the effectiveness of these measures in accordance with the FATF mutual evaluation and follow-up process, and preparing guidance as needed to facilitate implementation of relevant international obligations in a manner compatible with the FATF standards;

(h) Engaging and consulting with the private sector and civil society on matters related to the overall work of the FATF, including regular consultation with the private sector and through the consultative forum;

(i) Undertaking any new tasks agreed by its Members in the course of its activities and within the framework of this Mandateand taking on these new tasks only where it has a particular additional contribution to make while avoiding duplication of existing efforts elsewhere.

As one of its key objectives, the FATF identifies countries with such serious shortcomings in their Anti-Money Laundering / Counter Financing Terrorism **('AML/CFT')** system and engages with them to establish an action plan. It works with them to strengthen their measures to protect the financial system from abuse. Through the work of its International Co-operation Review Group **('ICRG')**, the FATF publicly identifies these countries, which also serves to raise awareness about the risk they represent and help protect the integrity of the global financial system. Once identified, the FATF closely monitors the progress that each country makes to address the weaknesses in their AML / CFT system.

The ICRG process started in 2007 and since then, the FATF has reviewed over 80 countries, and publicly identified 59 of them. Forty-eight have since taken the necessary steps to strengthen their AML / CFT framework.

Recent Global Developments

In its least abridged form, money laundering consists of any act which converts money or other property which is acquired through illegal activity into money or property that appears legitimate, thereby concealing its illegitimate source. The financing of such criminal activity, including terrorist acts, originates with laundered proceeds, generally in the form of cash. However, in the present digitalised set-up and technological advancements, the mode of money laundering has also witnessed substantial changes.

The traditional processes of placement of the criminal proceeds into the financial or other transfer system; layering the funds so as to conceal their original source and integration into the legitimate financial markets have undergone changes to further deceive the legitimate transactions monitoring system.

Some recent transactions/ payment(s) which have been found susceptible are:

Prepaid Value Cards: In 2006, FATF in its report Global Money Laundering & Terrorist Financing Threat Assessment published new payment methods used for legitimate economic transactions which could be exploited by money launderers. It featured the increasing role of non-banks in offering prepaid value cards, electronic purses, mobile payments, internet payment services and digital precious metals.

Better than the ATM network (which generally uses surveillance video), these methods provide criminals new methods of avoiding face-to-face contact with financial service providers who could identify them to police.

Online Payment Systems: Money launderers make illicit cash disappear in a maze of online accounts. Diverse as they are, many of these cyber-criminals have something important in common. The dangers of online payment systems, whether as digital currency, virtual banking systems, or other methods are difficult to address. The locations of the operators and websites are often unknown or they are located in jurisdictions which will not render assistance to a criminal investigation.

It is 'virtually' impossible to trace the physical location of any value because there really is no such location.

Gatekeepers to establish Sophisticated Trusts: Gatekeepers have become a greater money

laundering threat than in previous years. These professional accountants, lawyers, and company service providers engage in both self-laundering and third-party laundering. FATF considers Politically Exposed Persons ('**PEPs**') as gatekeepers because they have access to funds and systems in their country which they can manipulate to personal advantage, and because they have the power to change financial legislation or rules for their own benefit. Such actors often engage in self-laundering of state funds which they have extracted for themselves.

The International Monetary Fund ('**IMF**') conducting work analysing global and national AML / CFT regimes and the interaction of AML / CFT on contemporary matters, highlights virtual currencies, costs of and mitigating strategies for corruption, and the withdrawal of correspondent banking relationships as predominant factors of money laundering.

PMLA (Prevention of Money Laundering Act) – Extra Territorial jurisdiction – An Analysis

Money-laundering is curbed principally in legislative terms by virtue of promulgation of the Prevention of Money Laundering Act, 2002 ('**PMLA'**). The said Act was amended in the year 2012.

Section 2(u) of the PMLA defines **'proceeds of crime'** to include the property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country.

Further, the Indian Penal Code, 1860 suggests extra-territorial application of the Criminal Law in some instances as well. It inter-alia provides that the provisions of the Code shall apply to any offence committed by:

- Any citizen of India in any place, both in and beyond India
- Any person on any ship or aircraft registered in India
- Any person in any place in India committing an offence targeting a computer resource located in India.

The offender of such offences can be dealt with as if the offence has been committed in India.

The formal mechanisms for co-operating with foreign prosecutors are given under section 166A of the Code of Criminal Procedure, 1973.

One such mechanism is through a letter rogatory or formal letter of request. During the course of an investigation into an offence, an application can be made by an investigating officer that evidence is available in a country or place outside India.

The competent court may then issue a letter of request to a court or authority outside India to:

- Examine any person acquainted with the facts and circumstances of the case and record his statement.
- Require such person or any other person to produce any document or thing that may be in his possession pertaining to the case.
- Forward all the evidence to the Court issuing the letter.

The Central Bureau of Investigation serves as the national central bureau for the purpose of correspondence with ICPO-INTERPOL (an international police organisation to extend co-operation between member countries and their police forces, which may furnish or request information or services for combating international crime) to co-operate and co-ordinate with each other in relation to collection of information, location of fugitives and other such ancillary matters.

Further, India has negotiated an extensive network of Double Tax Avoidance Agreements ('**DTAA**') and finalised Tax Information Exchange Agreements ('**TIEA**') with various countries to strengthen exchange of information relating to serious offences such as tax evasion and money laundering etc.

In addition, Mutual Legal Assistance Treaties ('**MLAT**') facilitate co-operation in matters

relating to service of notice, summons, attachment or forfeiture of property or proceeds of crime, or execution of search warrants under section 105 of the Code of Criminal Procedure, India also has adopted the Convention on Mutual Legal Assistance in Criminal Matters and has operational agreements with 34 countries.

Therefore, it is axiomatic to suggest in Indian context, the competent court has reasonable grounds to believe that a property has been obtained by committing an offence, it can make an order of attachment or forfeiture of such property under the provisions of the Criminal Procedural Code. The Court can issue a letter of request to any authority or Court of the contracting state for execution of such order. India has also entered into Mutual Legal Assistance Treaties for asset recovery with many jurisdictions, including the US, UK and UAE.

It can therefore be suggested that the provisions of PMLA and criminal laws in India have jurisdiction which can be exercised over their citizens abroad, for an offence which has been committed within the territory of India or outside it.

In Conclusion

According to the IMF, the scale of money laundering world-wide could be somewhere between 2% and 5% of world GDP[11]. On 1996 statistics[11], this translates into a range of US$590 billion to US$1.5 trillion. Growing concern about this activity has prompted a number of initiatives at the international level.

The increasing significance of international co-operation and cross-border dependence has given powers to international organisations to suggest measures and practically apply them for the causes of money laundering and other illicit manifestations of it.

Some steadfast progress has certainly been made, notably in the countries that have introduced anti-money laundering measures, but the problem yet remains to be fully resolved. The facilities and methods used by launderers are changing all the time as they try to circumvent the preventive measures put in place. Instead of introducing illegally obtained cash into the country's financial system, they move it to other countries where no questions are asked about its origin. Structures involving offshore financial centres seem to have certain common features: a series of financial transactions by the centre's intermediary, use of dummies or other intermediaries to handle the transactions and an international network of shell companies.

Often a laundering deal will involve more than one offshore centre. The inability to obtain credible, real time information about the real owners of the foreign entities with corporate status is one of the chief obstacles to detection, investigation and prosecution of persons suspected of money laundering. In this regard, the non-cooperative countries and jurisdictions, i.e. those that explicitly refuse to co-operate with the FATF, continues to be a cause of major concern.

However, the real challenge of money laundering is more than something which is country specific. It also involves the professional service providers – accountants, lawyers and similar professionals – who operate not only in non-cooperative jurisdiction, but also in some FATF countries. Such service providers set up and manage entities with corporate status, thereby giving the apparatus of money laundering considerable sophistication and a gloss of respectability.

The solution therefore pragmatically rests more in the actual implementation of the policy-making by the Governments and international organizations, and therefore can be resolved effectively through efficient monitoring and inherent discipline by the administrative authorities and decision makers.

11 http://www.imf.org/external/np/speeches/1998/021098.htm

12 Panama, Afghanistan, Iraq, Kenya, Nepal, Nigeria, Vietnam, Sri Lanka, Cyprus etc. Refer http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/?hf=10&b=0&s=desc(fatf_releasedate)

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Prevention of Money Laundering Act, 2002 – Cure or Prevention?

"Terrorists are linked to money laundering, dirty money, drug dealing, arms trafficking. We have to ask ourselves, where do terrorists get their weapons from? Where do they get their communication technology from? Where do they get their financing from? These are some of the aspects where I think the entire international community needs to come together and put a complete stop to access to these three key aspects by the terrorists."

Shri Narendra Modi,
Prime Minister, Union of India[1]

Meaning of Money Laundering

Money Laundering is the process of concealing the illicit origin of money derived from criminal activities. It is the manner in which proceeds of crime are injected into the veins & arteries of mainstream economy of a country and accounted as "untainted" or "clean" money. The International Monetary Fund has defined Money Laundering[2] as follows –

"Money Laundering is a process by which the illicit source of assets obtained or generated by criminal activity is concealed to obscure the link between the funds and the original criminal activity."

Money laundering has a subverting effect on the health of any robust economy by causing inflation and giving a boost to corruption and causing loss of revenue to the Government. Enterprises which function with the proceeds of crime might pose a threat to legitimate competition. Further, money laundering gives an impetus to terrorist activities and anti-national elements by strengthening their financial position.

Methods of Money Laundering

1) Placement

This step involves the introduction of illegal profits in the financial system. This is done by breaking up bulk cash into inconspicuous smaller amounts and depositing the money into financial institutions or purchasing financial instruments. The launderer may also use money changers / currency exchanges to buy foreign currency and transfer them outside the country. The money is usually transferred across international borders for deposit in foreign banks, or used to purchase assets such as artwork, private aircrafts, real estate, precious metals and gems, which may be eventually resold.

1 http://time.com/3849492/narendra-modi-interview/
2 http://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/31/Fight-Against-Money-Laundering-the-Financing-of-Terrorism

2) Layering

The second stage in money laundering is layering. The launderer's objective is to distance the tainted funds as far away from their source as possible. He achieves this by channelising the funds into a web of transactions. Once the money has been placed, it can be siphoned off to offshore bank accounts which are protected by secrecy laws or used to incorporate offshore companies in tax havens. The funds might be channelled through the purchase and sale of investments. The transfer of funds might be camouflaged as payments for goods or services. Shell companies which do not have any business activity serve as a useful conduit for layering.

3) Integration

Integration refers to the stage where the laundered funds re-enter the mainstream economy with a change in colour. At this stage, it appears that the tainted money has been legally earned. Examples include investing in a company, purchasing real estate, luxury goods, etc. This is the final stage in the process. The launderer makes it appear to have been legally earned and accomplishes integration of the "cleaned" money into the economy. By this stage, it is exceedingly difficult to distinguish legal and illegal wealth. It involves making the wealth derived from crime appear legitimate.

Brief Overview of Prevention of Money Laundering Act, 2002 ("PMLA/Act")

The Political Declaration and Global Programme of action adopted by United Nations General Assembly called upon the member States to enact legislation to prevent money laundering. The Indian Government considered it necessary to implement the aforesaid resolution and enacted the PMLA which was brought into effect on 1st July, 2005.

The objective[3] of this Act is to prevent money laundering and to provide for confiscation of properties derived from/involved, in money laundering or matters connected therewith or incidental thereto.

The Act consists of 10 chapters containing 75 sections and 1 Schedule divided in 5 parts.

Chapter No.	Section No.	Description
Chapter I	Sections 1-2	Short title, extent and commencement and definitions
Chapter II	Sections 3-4	Offences and punishment for money laundering
Chapter III	Sections 5-11	Attachment of property, adjudication and confiscation
Chapter IV	Sections 12–15	Obligations of banking companies, financial institutions and intermediaries
Chapter V	Sections 16-24	Survey, searches, seizures, investigation and arrest
Chapter VI	Sections 25-42	Establishment, composition, qualifications, powers and procedures of the Appellate Tribunal
Chapter VII	Sections 43-47	Courts of Trial
Chapter VIII	Sections 48-54	Authorities under the Act their appointment, powers, jurisdiction
Chapter IX	Sections 55-61	Reciprocal arrangement for assistance in certain matters and procedure for attachment and confiscation of property
Chapter X	Sections 62-75	Miscellaneous provisions including punishments, cognisance of offences, offences by companies

3 Preamble of the Act

Section 3 of PMLA defines the offence of money laundering and Section 4 prescribes the punishment for money laundering. Provisions for attachment and confiscation of property involved in money laundering is also provided in the Act. Moreover, PMLA casts an obligation on banking companies, financial institutions and intermediaries for verification and maintenance of records of the identity of all its clients and also of all transactions and for furnishing information of such transactions in prescribed form to the Financial Intelligence Unit-India (FIU-IND). Director of FIU-IND has been empowered by the Act to impose fine on banking company, financial institution or intermediary if they or any of its officers fails to comply with the provisions of the Act.

The Act empowers the Directorate of Enforcement to carry out investigation in cases involving offence of money laundering and also to attach the property involved in money laundering. PMLA provides for establishing an Adjudicating Authority to exercise jurisdiction, power and authority conferred by it essentially to confirm attachment or order confiscation of attached properties.

PMLA has designated one or more courts of sessions as Special Court or Special Courts to try the offences punishable under PMLA and offences with which the accused may, under the Code of Criminal Procedure 1973, be charged at the same trial. Under the Act, Central Government is permitted to enter into an agreement with Government of any country outside India for enforcing its provisions, exchange of information for the prevention of any offence under PMLA or under the corresponding law in force in that country or investigation of cases relating to any offence under PMLA[4].

Life Cycle of the Act – Major Amendments

PMLA has been amended thrice till date since the time of its enactment. The first amendment to the Act was by the Prevention of Money Laundering (Amendment) Act, 2005, second amendment was by Prevention of Money Laundering Act, 2009 and the third in the year 2013 by the Prevention of Money Laundering (Amendment) Act, 2013.

Prevention of Money Laundering (Amendment) Act, 2005

The key amendments made by this Amendment Act are as follows –

- Definition of Investigation was inserted since the word investigation and investigation officer were used by several sections in the Act.
- Under Section 45, all offences were cognisable. If an offence is cognisable, then any police officer in this country can arrest without a warrant. Section 19 says, only the Director or Assistant Director should investigate the offence. Thus, Section 45 of the Act was amended to resolve the conflict.

Prevention of Money Laundering (Amendment) Act, 2009

The Prevention of Money Laundering (Amendment) Act, 2009 came into force from June 1, 2009.

Important changes brought out by the Amendment Act of 2009 are as follows –

- Definitions of authorised person; designated business or profession; offence of cross border implications; and payment system operator were incorporated. Changes were made in the definitions of financial institution, non-banking financial company and scheduled offence.
- Provisions with regard to attachment of property involved in money laundering

4 http://www.dor.gov.in/overview_pml

and search and seizure were amended. Also, provisions for attachment seizure, confiscation of property in a contracting state were amended.

- The age of retirement of Chairperson and Members of the Adjudicating Authority was increased from 62 years to 65 years. Provision for mandatory consultation with the Chief Justice of India before removal of the Chairperson or a Member of the Appellate Tribunal was inserted.
- Certain offences were added to Part A and Part B of the Schedule of the Act. These offences include those pertaining to insider trading and market manipulation as well as smuggling of antiques, terrorism funding, human trafficking other than prostitution, and certain environmental crimes. A new category of offences which have cross-border implications was enacted as Part C of the Schedule.

Prevention of Money Laundering (Amendment) Act, 2012

The following are the key amendments to the PMLA Act:

- The definition of offence of money laundering was expanded to include activities like concealment, acquisition, possession and use of proceeds of crime
- The upper limit of fine of ` 5 lakh was removed. After the amendment, the quantum of fine proportionate to the seriousness of the offence will be determined by the Court on a case-to-case basis
- The Act originally provided for attachment of property for 150 days. It has been increased to 180 days. The Act, prior to its amendment, provided that the person from whom property is attached must have been charged of having committed a scheduled offence. This amendment expands the scope of attachment by stipulating that any proceeds of crime which are even likely to be concealed or transferred can be attached. Further, this amendment provided that if any proceeds are to be used for any purpose which will frustrate the confiscation of proceeds of crime, then such property will also be attached.
- The concept of Reporting Entity has been introduced by this Amendment Act. Banks, intermediaries, financial institution and persons carrying out designated business or profession are responsible for maintaining records of all transactions and give access to information to the Director. The Amendment Act provides that reporting entity has to report an attempted transaction. These are done in order to cut down suspicious transactions from the very beginning.
- Powers of the Director to call for records and conduct inquiries were strengthened.
- The Adjudicating Authority is empowered to pass an order for freezing of property so that it can be seized or confiscated later.
- In any proceedings relating to proceeds of crime under this Act, in case a person is charged with the offence of money laundering under Section 3 of the Act, it shall be presumed by the Court or the Adjudicating Authority that such proceeds of crime are involved in money laundering unless the contrary is proved.
- It is clarified that a company can be prosecuted and the prosecution or conviction of legal juridical person is not contingent on prosecution of any individual
- Monetary threshold is removed for the offence of money laundering. Prior to the amendment, Part B of the Schedule in the Act included merely those crimes where

the total value involved is ` 30 lakh or more whereas Part A did not specify any monetary limit of the offence.

Key Provisions of the Act

Offence of Money Laundering and Punishment for Offence of Money Laundering

Section 3 of the Act defines the offence of money-laundering as follows-

"Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in a process or activity connected with the ***proceeds of crime*** *including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of the offence of money laundering,"*

From the above-mentioned definition, it is clear that involvement in the process or activity connected with the proceeds of crime and showing such proceeds as untainted property constitutes the offence of money laundering. In this context, it is pertinent to examine the definition of the term proceeds of crime.

According to Section 2(1)(u) of PMLA, the expression "proceeds of crime" means any property derived or obtained directly or indirectly, by any person as a result of criminal activity relating to a ***scheduled offence*** or the value of any such property.

Section 2(1)(y) of the Act defines the term scheduled offence as follows-

"Scheduled offence" means

(i) The offences specified under Part A of the Schedule[5]; or

(ii) The offences specified under Part B of the Schedule if the total value involved in such offences is thirty lakhs or more[6]; or

(iii) The offences specified under Part C of the Schedule.

A conjoint reading of the definitions of offence of money laundering, proceeds of crime and scheduled offence indicates that a person commits an offence of money-laundering if he projects property derived from an offence which is mentioned in the Schedule of the Act, as untainted. In common parlance, the offences mentioned in the Schedule are known as predicate offences.

The expression "property" according to Section 2(1)(v) of PMLA means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located.

Punishment for Money Laundering

Section 4 of the Act prescribes the punishment for money laundering. Whoever commits the offence of money laundering shall be punishable with:

1. When proceeds of crime involved in money-laundering relates to any offence mentioned in Paragraph 2 of Part A of the Schedule (i.e., Offences under the Narcotic Drugs and Psychotropic Substances Act, 1985), rigorous imprisonment for a term which shall not be less than three years and which may extend to ten years and fine.
2. In any other case, rigorous imprisonment for a term which shall not be less than 3 years but which may extend to seven years and fine.

Attachment of Property Involved in Money-Laundering

The term attachment has been defined by Section 2(1)(d) as –

"Attachment" means prohibition of transfer, conversion, disposition or movement of property by an order issued under Chapter III.

5 According to Section 2(x), Schedule means the Schedule to this Act
6 Presently, there are no offences in Part B of the Schedule

Section 5 of the Act sets out the procedure for attachment of property by a Director or any other officer not below the rank of the Deputy Director, if such Director has reason to believe that any person is in possession of any proceeds of crime and such proceeds of crime are likely to be concealed or transferred. Further, the Central Government has notified the following Rules in relation to attachment of property-

1. The Prevention of Money Laundering (issuance of Provisional Attachment Order) Rules, 2013 pertaining to the manner of issue and service of provisional attachement order.

2. The Prevention of Money Laundering (Taking "Possession of Attached or Frozen properties Confirmed by the Adjudicating Authorities Rules, 2013 pertaining to the procedure for taking possession of attached or frozen property."

Obligations of Reporting entities

Section 2(1)(wa) defines the term 'reporting entity as follows-

"reporting entity" means a banking company, financial institution, intermediary or persons carrying on a designated business or profession."

A person carrying on designated business or profession has been defined by Section 2(1)(sa) as –

"Person carrying out designated business or profession" means –

(i) A person carrying on activities for playing games of change for cash or kind, and includes such activities associated with casino.

(ii) A Registrar or Sub-Registrar appointed under section 6 of the Registration Act, 1908 as may be notified by the Central Government

(iii) Real estate agent as notified by the Central Government

(iv) Dealer in precious metals, precious stones and other high value goods as may be notified by the Central Government.

(v) Person engaged in safekeeping and administration of cash and liquid securities on behalf of other persons, as may be notified by the Central Government.

(vi) Person carrying on such other activities as the Central Government may, by notification, so designate from time-to-time.

Section 12 of the Act casts an obligation on the reporting entity to maintain a record of transactions. Rule 3 of Prevention of Money Laundering (Maintenance of Records) Rules, 2005 prescribes the transactions for which the reporting entities are required to maintain records. An illustrative list of transactions are provided as under –

a) All cash transactions of value of more than ten lakh rupees or equivalent in foreign currency.

b) All series of cash transactions integrally connected to each other which have been individually valued below rupees ten lakhs where such series of transactions have taken place within a month and monthly aggregate exceeds an amount of ten lakhs or its equivalent in foreign currency.

c) All transactions involving receipts by non-profit organisations of value more than rupees ten lakh, or its equivalent in foreign currency.

d) All suspicious transactions whether or not made by cash. The term suspicious transactions has been defined by rule 2(g) of Money Laundering (Maintenance of Records) Rules, 2005. Suspicious transactions means a transaction referred to in clause (h) including an attempted transaction, whether or not made in case, which to a person acting in good faith

(a) Gives rise to a reasonable ground of suspicion that it may involve proceeds of offence specified in the Schedule to the Act, regardless of the value involved

(b) Appears to have been made in circumstances of unusual or unjustified complexity; or

(c) Appears to have no economic rationale or *bona fide* purpose

(d) Gives rise to a reasonable ground of suspicion that it may involve financing of activities relating to terrorism

e) All cross-border wire transfers of value more than rupees five lakhs or its equivalent where either the origin or the destination of funds is in India

f) All purchase and sale by any person of immovable property valued at rupees fifty lakhs or more that is registered by the reporting authority as the case may be.

The record of the aforementioned transactions is required to be maintained for a period of ten years from the date of transaction between the client and the reporting entity.

Section 12 of the Act also makes it mandatory for the reporting entity to furnish information of transactions whether attempted or executed to the director. It makes it mandatory for the reporting entity to verify the identity of its clients, identify the beneficial owner of any of such of its clients and maintain record of documents evidencing identity of its clients and beneficial owners as well as account filed and business correspondence relating to its clients. The verification of clients identity is known as KYC norm, i.e., Know Your Customer norm. Section 13 of the Act confers power on Director to make enquiry and impose a fine for non-compliance for the provisions of Section 12. The Central Government has appointed the Director, FIU to exercise the powers conferred under Section 12 and Section 13.

Presumptions under PMLA

According to Section 22, where any records or property is found in the possession of any person in course of a survey or search, the presumption is that such records or property belong to such person and the contents of such records are true. Section 23 states that where money laundering involves two or more interconnected transactions and one or more transactions is/are proved to be involved in money laundering, then for the purposes of adjudication or confiscation or for the trial for the money laundering offence, it shall be presumed that the remaining transaction form part of such interconnected transactions. Section 24 states that in proceedings relating to proceeds of crime under this Act, in a case of a person charged with the offence of money laundering as per the provisions of Section 3, the Authority or the Court shall presume that proceeds of crime are involved in money laundering. In other words, Section 24 places the onus on the accused to prove that the proceeds of crime are untainted.

Conviction under PMLA

Directorate of Enforcement vs Hari Narayan Rai[7]

In the first money laundering conviction a special court in Ranchi has convicted former Minister of Jharkhand under PMLA. Before becoming the minister, Hari Narayan Rai had ` 5,000 as his bank balance but accumulated a huge amount during his tenure as Minister under three Chief Ministers namely Arjun Munda, Madhu Koda and Shibu Soren.. Hari Narayan Rai had purchased immovable properties, in his wife's name, in the names of his relatives and in the names of his business concerns. These people had no ostensible source of income and started filing IT return in their

7 ECIR 01/Pat/09/AD

name and thus showed his proceeds of crime as untainted property. He also purchased a number of movable properties all fuelled by corruption. The accused has fabricated tall stories of receiving loans from different sources as a defence to save himself from the charges of corruption. Initially the Jharkhand Vigilance Bureau had lodged an FIR and filed a chargesheet for the amount of ` 1.63 crore. Then the Anti-Corruption Bureau, started probe in 2008 against former Chief Minister Madhu Koda and his then Cabinet colleagues including Hari Narayan Rai. Hari Narayan Rai had been charged of having committed the provisions of scheduled offence of Sections 420, 423, 424, 120B of IPC, 1860 and Section 13 of PMLA in police report filed under Section 173(2) of Cr. P.C. 1973 by Vigilance Bureau, Ranchi before the Vigilance Court, Ranchi. Then an ECIR was recorded by ED under PMLA in the year 2009. The court was convinced by the evidence and witnesses produced by the Enforcement Directorate and convicted him accordingly. Hari Narayan Rai has been sentenced to 7 years of rigorous imprisonment with a fine of ` 5,00,000 or 18 months of additional rigorous imprisonment, if he fails to deposit the fine. The court also found him guilty of laundering the proceeds of crime to a tune of ` 3,72,54,016 and has confiscated all the properties used by him to launder money. This is a historic judgment as this becomes the first conviction under PMLA in the country which was enacted in 2002 and implemented from 2005 in order to check and curb black money and grave financial crimes.

Supreme Court's decision in the Hasan Ali Case

Union of India vs. Hasan Ali[8]

The allegation against the accused is that they have committed an offence punishable under Section 4 of the Prevention of Money Laundering Act, 2002. The said case has been registered on the basis of a complaint filed by the Deputy Director, Directorate of Enforcement on the basis of the Report based on certain information and documents received from the Income Tax Department.

An investigation was also conducted under the Foreign Exchange Management Act, 1999, ('FEMA'). Show cause notices were issued to the accused for alleged violation of Sections 3A and 4 of FEMA for dealing in and acquiring and holding foreign exchange to the extent of ` 36,000 crores approximately in Indian currency, in his account with the Union Bank of Switzerland. Inquiries also revealed that Shri Hassan Ali Khan had obtained at least three Passports in his name by submitting false documents, making false statements and by suppressing the fact that he already had a Passport.

Based on the aforesaid material, the Directorate of Enforcement arrested the accused and produced him before the Special Judge, PMLA and was remanded in custody which was rejected and the accused was released on bail. The Union of India thereupon filed Special Leave Petition and upon observing that the material made available on record *prima facie* discloses the commission of an offence by the accused punishable under the provisions of the PMLA, the Supreme Court disposed of the appeal as well as the Special Leave Petition and set aside the order of the Special Judge, PMLA and directed that the accused be taken into custody. Thereafter, the accused was remanded into custody. The Apex Court observed –

"23. Having carefully considered the submissions made on behalf of the respective parties and the enormous amounts of money which the Respondent No. 1 had been handling through his various bank accounts and the contents of the note signed by the Respondent No. 1 and notarised in London, this case has to be treated a little differently from other cases of similar nature. It is true that at present there is only a nebulous link between the huge sums of money handled by the Respondent No. 1 and any arms deal or intended arms deals, there is no attempt on the

8 2011 11 SCR 778

part of the Respondent No. 1 to disclose the source of the large sums of money handled by him. There is no denying the fact that allegations have been made that the said monies were the proceeds of crime and by depositing the same in his bank accounts, the Respondent No. 1 had attempted to project the same as untainted money. The said allegations may not ultimately be established, but having been made, the burden of proof that the said monies were not the proceeds of crime and were not, therefore, tainted shifted to the Respondent No. 1 under Section 24 of the PML Act, 2002."

Demonetisation and Money Laundering

In a bid to clampdown on black money in the economy and to stem terror funding, the government moved to delegalise the use of ` 500 and ` 1,000 notes on 8th November 2016. The move took out ` 14 lakh crores from the economy overnight. The government had expected that around ` 3 lakh crore of the discontinued currency may not come back into the banks as deposits, rendering that much black money useless. However, according to the latest estimates over ` 11 lakh crore has found its way back into banks, and it is quite likely that nearly all the currency may come back into the banking system, giving rise to suspicions that black money hoarders have found a way to convert their illicit income into deposits. As a result, the Enforcement Directorate is conducting inquiries on the records of a number of bank branches across lenders in the country to check money laundering and hawala dealings in the aftermath of demonetisation. These inquiries will ascertain if there have been any violations of the Foreign Exchange Management Act (FEMA) under PMLA. The ED is keeping a special tab on persons who have deposited a large amount of cash at one go. Amongst suspicions that certain bank managers and employees have been helping hoarders of undisclosed income convert their black money into white, the ED has already arrested two managers of Axis Bank in New Delhi and 19 others were suspended by the bank for allegedly being involved in illegal activity after demonetisation. The next few months will be crucial as the ED will conduct further crackdowns of a similar nature.

Conclusion

It has been noticed that despite having adequate provisions in PMLA for combating the menace of money laundering, the conviction rate is abysmal. The ED has far reaching powers under this Act to carry out investigation, search and survey. However we believe that the accused get away scot free with a mere rap on their knuckles as the cases get dragged for years. Moreover, the investigative authorities are unable to keep up with the latest methods of money laundering and this is major hindrance as they fail to establish an air tight case in a court of law. In many instances, the accused flee the country before action is initiated against them.

On 1st April, 2017 with the start of the New Financial Year, the Enforcement Directorate ("ED") launched a massive countrywide operation to check money laundering and raided at least 100 locations across sixteen States as part of a crackdown on shell companies.

The raids were carried out under the Prevention of Money Laundering Act and the Foreign Exchange Management Act to check instances of money laundering and illegal foreign exchange transactions. The action is part of the mandate given to the ED under a Special Task Force (STF) that was recently created by the Government on the directions of the Prime Minister's Office.

The legislature has time and again made best efforts to remove the lacunae in the Act. The Act can be implemented successfully only if the Authorities remain vigilant and professional help is sought by means of new techniques such as forensic auditing, utilising technology in the right earnest.

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Consequences of the Offence under Prevention of Money Laundering Act, 2002 The Draconian Mandate

In this present period of technological advancement, where the world economies are interdependent and resources can be exchanged between the sovereign borders seamlessly, combatting the global phenomenon of money laundering is most urgent than ever.

As already highlighted by my fellow authors in the previous articles, assistance of the sophisticated communication technology and swift flow of capital and resources outside the national boundaries, has helped the money launderers across the globe to route the proceeds of crime through different jurisdictions, thereby distancing the proceeds from its origin. The secretive way of transferring the proceeds of crime to different jurisdiction in guise of proceeds from a legal activity primarily through or from countries having strict banking secrecy and relaxed exchanged control laws is the biggest hindrance for enforcement agencies around the world to combat this menace of money laundering.

Albeit, due to the clandestine nature of money-laundering, it is difficult to estimate the total amount of money that goes through the laundry cycle, the estimated amount of money laundered globally in one year is 2 - 5% of global GDP, or $800 billion - $2 trillion in current US dollars.

Looking at these devastating numbers, combatting money laundering is a key concern for the nations across the globe, because of its micro and macro effect. Though, the act of money laundering may not be characterized as a crime against any particular individual, howbeit, the same is against the society as a whole because of its significant implications on the economic stability and security of a country. Money Laundering is posing more threat than ever because of its unprecedented character, its unpredictable effect on the nation's financial system and the possibility of the laundered funds being used for terrorist financing, drugs, arms and human trafficking, etc.

In quest for a definitive anti money laundering law in India, Prevention of Money Laundering Bill 1998 was introduced in the Parliament on August 4, 1998. The same was revised in the year 1999 after incorporating the recommendations of the Standing Committee on Finance. The Bill received the assent of the Hon'ble President of India and became the Prevention of Money Laundering Act, 2002 ('Act') on January 17, 2003. The Act came into force with effect from July 1, 2005.[1]

1. In line with the recommendations received from FATF, the Act has been amended in the years 2009, 2012, 2013 and 2015.

In furtherance of the knowledge imparted by the other respected writers, the author through this paper, highlights and pens down his views on the draconian mandate of the legislature on the consequences of the offence of money laundering activities in or pertaining to India.

Attachment

In an unprecedented approach, the Act provides for attachment of any property being any proceeds of crime even before any findings or judgment by the judiciary of occurrence of any scheduled offence and the property or proceeds of crime being generated out of such offence. Section 5[2] of the Act does provides power to the enforcement directorate to attach the property *suo motu*, for a maximum period of 180 days, if he on the basis of the material in possession has a reason to believe that a person is in possession of any proceeds of crime and such property or proceeds of crime is likely to be concealed, transferred or dealt in any manner which may frustrate the proceedings relating to confiscation of such property later down the line.

Albeit, the First Proviso to Section 5 of the Act provides that an order for attachment, in relation to a scheduled offence, can be made only after a charge sheet has been forwarded to a Magistrate under section 173[3] of the Code of Criminal Procedure, 1973, or a complaint has been filed by a person, authorised to investigate the offence mentioned in the Schedule, before a magistrate or Court for taking cognisance of the scheduled offence, as the case may be, the Act

2. Section 5

(1) Where the Director or any other officer not below the rank of Deputy Director authorised by the Director for the purposes of this section, has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that

(a) Any person is in possession of any proceeds of crime and

(b) Such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter, he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed:

Provided that no such order of attachment shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under Section 173 of the Code of Criminal Procedure, 1973 (2 of 1974), or a complaint has been filed by a person authorised to investigate the offence mentioned in that Schedule, before a Magistrate or Court for taking cognisance of the scheduled offence, as the case may be, or a similar report or complaint has been made or filed under the corresponding law of any other country:

Provided further that, notwithstanding anything contained in first-proviso, any property of any person may be attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money laundering is not attached immediately under this Chapter, the nonattachment of the property is likely to frustrate any proceeding under this Act.

(2) The Director, or any other officer not below the rank of Deputy Director, shall, immediately after attachment under sub-section (1), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority, in a sealed envelope, in the manner as may be prescribed and such Adjudicating Authority shall keep such order and material for such period as may be prescribed.

(3) Every order of attachment made under sub-section (1) shall cease to have effect after the expiry of the period specified in that sub-section or on the date of an order made under sub-section (2) of section 8, whichever is earlier.

(4) Nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment.

Explanation: For the purposes of this sub-section, "person interested", in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

(5) The Director or any other officer who provisionally attaches any property under sub-section (1) shall, within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the Adjudicating Authority.

3. Section 173 CrPC: Report of police officer on completion of investigation……

also empowers the authority to attach property/ proceeds of crime, even before submission of the police charge sheet under Section 173 of the Code of Criminal Procedure, if there has been reason to believe that if the property is not attached, it is likely to obstruct any proceeding under the Act. The reason to believe must be based on some material or tangible information that aid in formation of such belief, else the whole process is liable to be negated. Hon'ble High Court of Delhi in the case of *Gautam Khaitan and Anr vs. Union of India W.P. (C) 8970/2014* did acknowledge the aforesaid principle and held that there is no fetter on the officer concerned in exercising his powers of provisional attachment *qua* such persons, prior to the filing of a charge sheet with a competent court *qua* scheduled offences under section 173 of the Cr.P.C., as long as he has reasons to believe, on the basis of material in his possession, that if the property, which is involved in money laundering, is not attached immediately, the non-attachment could lead to frustration of proceedings under the Act.

One of the prominent cases seen in the recent times is the case of Mr. Vijay Mallya, the Indian liquor baron, whose properties have been confiscated on the premise that such properties reflect the proceeds of crime made out of a scheduled offence. Kingfisher defaulted in repayment of loans worth ` 9,091. 4 crore to a consortium of banks. In such a scenario, complaints, FIRs are filed and registered against Mr. Mallya on account of fraud and/or breach of trust, thereby establishing an offence under the scheduled offences under the Act and hence invoking the provisions of provisional attachment of the property under the Act.

The idea behind provisional attachment as prescribed in sub-section (1) of Section 5 is to prevent frustration of the criminal proceeds as they might be gradually converted and transformed with a view to inject them in the economy as clean money. Before any such damage is done, the urgency of the situation requires the provisional attachment to be made. If an opportunity of hearing is given prior to the attachment, the proceeds of crime may change its hands and form and tracing therefore may become difficult. Also, having regard to the exigency of the public interest involved in attaching the property believed to be the proceeds of crime involved in money laundering, the possession of the property is not disturbed.

The centre point of Section 5 is to attach every property involved in money laundering setting aside the fact that whether it is in possession of the person charged of having committed a scheduled offence or any other person, provided that it must be proceeds of crime and are likely to be concealed, transferred or dealt with in any manner, which may hinder the proceedings relating to confiscation of such crime proceeds under the Act.

The severity of the instant provision is also evident from the fact that Section 5 does not entail the principles of natural justice. Section 5 of the Act, does not specifically provide an opportunity of being heard to the affected person, prior to passing the order of such attachment. Such denial of affording an opportunity of hearing is considered as a violation of the principles of natural justice.

When the Director has a reason to believe on the basis of material in his possession that the proceeds of crime or the property involved in money-laundering has to be provisionally attached, he shall make a provisional attachment order in accordance with the Prevention of Money-Laundering (Issuance of Provisional Attachment Order) Rules, 2013 and endorse a copy of such order to all concerned including the persons in possession of the properties and the Adjudicating Authority.[4]

4. Rules 3 and 4 of the The Prevention of Money-Laundering (Issuance of Provisional Attachment Order) Rules, 2005.

The provision under Section 5 of the Act further states that a person whose property is 'provisionally attached' shall not be barred from its enjoyment. The notion 'provisional attachment' and 'enjoyment' therefore exist simultaneously and as such it is difficult to strike a harmonious chord between the two. The Madras High Court cleared the doubt by asserting that the Government can always ensure that the proceedings for confiscation are not frustrated by retaining symbolic, legal and constructive possession of the property.[5] The Court explained further that once a property is attached and necessary encumbrances are entered in the records of Sub-Registrar and once a prohibitive order is also passed, no alienation can take place and therefore the provisions of the Act are not frustrated. The Karnataka High Court rules in this context that when there is an appellate remedy against the substantive order, all subsequent actions of the authority under the statutory provision will remain subject to the result of the decision that would be taken by the Appellate Authority. When the petitioner pleaded that there is a residential house in the property and immediate physical possession of the same would affect her rights, the Court held that the authorities shall retain the constructive possession but shall not physically dispossess them for a period of three weeks till the petitioner files the appeal before the Appellate Authority.[6]

The provision further mandates the Director or the officer attaching the property to file a complaint to the Adjudicating Authority within thirty days of such attachment. Hon'ble High Court of Delhi, while explaining the adjustment between clauses (1) and (5) of Section 5 lays down that though the provisional order of attachment is valid for 180 days, it is required by the designated/authorised officer to file a complaint before the Adjudicating Authority within a period of 30 days from the date on which the attachment is ordered. Thereafter, the Adjudicating Authority issues notice on the said complaint, if it believes that the person has committed an offence under Section 3 of the Act within 30 days. Through this notice, the Adjudicating Authority calls upon the addressee to indicate the sources of his income, earning or assets out of which or by means of which he acquired the property so attached along with the evidences, relevant information and other particulars on the basis of which he would prove that the property in question does not attract the offence of money-laundering.[7]

Punishment for the offence of Money Laundering

Offence of money laundering is a grave felony and provides for a punishment apart from the punishment prescribed under the scheduled offence. Section 4[8] of the Act provides for a rigorous imprisonment[9] for term of not less than three years and which may extend to seven years, to anyone who commits the offence of money laundering. However, the maximum punishment may extend to ten years, where the

5. A. Kamarunnisa Ghori vs. The Chairperson, Prevention of Money Laundering [CDJ 2012 MHC 3104]
6. Smt. P. Vijayalakshmi vs. Deputy Director, Enforcement Directorate and Adjudicating Authority, Writ Petition Nos. 29626/2011 and 29829/2011.
7. Gautam Khaitan and Anr. v. Union of India and Anr. Delhi High Court W.P.(C) 8970/2014.
8. Section 4: Punishment for money-laundering.—Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine which may extend to five lakh rupees: Provided that where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the provisions of this section shall have effect as if for the words "which may extend to seven years", the words "which may extend to ten years" had been substituted.
9. In terms of Section 53 of the Indian Penal Code, rigorous imprisonment means imprisonment with hard labour. It is legitimate to expect a prisoner sentenced to rigorous imprisonment to do hard labour, whether he consents to it or not.

proceeds of crime relate to an offence specified in Part IV of the Schedule i.e. offences under the Narcotic Drugs and Psychotropic Substances Act, 1985.

The Schedule annexed to the Act lists down offences under various civil and criminal legislations which form the basis of culpability under Section 3 of the Act. The Act mentions the offence, person liable under which, shall be held guilty under Section 3 and punishable under Section 4 of the Act. Conversely, if the offence committed by a person does not fall under any of the categories mentioned under the Schedule, the proceeds of such a crime shall not be covered under the purview of 'proceeds of crime' as mentioned under Section 3 of the Act. In other words, a person shall not be guilty of the offence of money laundering until and unless the proceeds of crime, being laundered relates to a scheduled offence[10]. Thus, until and unless no crime under a scheduled offence has been committed, punishment for an offence of money laundering cannot arise.

A person may not be held to have committed an offence under any of the scheduled offence, however, may be held liable for punishment under the provisions of the Act if found guilty of offence of money laundering under Section 3 of the Act. Here, yourselves may recap the article of my fellow authors, where the enlarged scope of Offence of Money Laundering under Section 3 of the Act is explained. Section 3 is not only restricted to the person accused of committing a scheduled offence but includes all those persons who directly or indirectly were involved in the process of projecting the proceeds of crime as an untainted property, irrespective of the fact whether they were involved in the scheduled offence themselves or not.

The Schedule to the Act provides for twenty-nine legislations to be termed as Scheduled Offence. The provisions of the Act shall only be applicable in the scenario, wherein, the proceeds of crime relate to criminal activity pertaining to such legislations only. Income-tax Act, 1961, Foreign Exchange Management Act, 1999 does not form part of the list and hence any Act of tax evasion shall not qualify for offence under the Prevention of Money Laundering Act, 2002. Having said so, the offence under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 is a scheduled offence under the Act.

The Act shall be applicable on residents as well as non-residents even if the scheduled offence is committed outside India but the process of money laundering is executed in India and *vice versa.*

Since the section provides for minimum sentence to be granted by the court, it does not accord any discretion to the court for awarding any lesser than the minimum prescribed sentence, even on any special or adequate ground. In the case of *State of Andhra Pradesh vs. S. R. Rangadamppa*[11], where the Hon'ble High Court of Andhra Pradesh reduced the sentence below the prescribed limit, the Supreme Court held that, "We are unable to understand why the High court reduced the sentence. The statue prescribes a minimum sentence. It does not provide any exceptions and does not vest the court with any discretion to award a sentence beyond the prescribed minimum under any special circumstances. The learned judge has himself noticed that the sentence imposed is the statutory minimum. Having noticed that the statute prescribes a minimum sentence for the offence, the High Court has understandably reduced the sentence of imprisonment to less than the minimum permissible. The high Court was clearly in error in doing so."

The provisions of Section 4 providing for punishment for offence of money laundering are not retrospective in nature in as much as

10. Schedule Offence are the offences provided in the Schedule of the Prevention of Money Laundering Act, 2002

11. State of Andhra Pradesh vs. S. R. Rangadamppa 1982 CR.L.J. 2364; AIR 1982 SC 1492

the charge of offence punishable under the Act cannot be levelled for transactions of projecting the proceeds of crime as an untainted property before the commencement of the Act. Hon'ble High Court of Bombay while deciding on the criminal bail matter of Hasan Ali Khan, held that a person cannot be prosecuted for an offence committed before the enactment of the Act.

Punishment for providing false or incorrect information

Provisions of the Act not only penalise and punish the person involved in the process of money laundering, but also provides for penalty and punishment in a scenario, wherein, a person acts maliciously and provides false or incorrect information / documentation to the Authorities.

Section 63 of the Act provides for punishment in the aforesaid scenario, but is divided into two segments, one providing for the penalty and punishment in a scenario where a person wilfully and maliciously provides wrong information and other where the person, though legally bound to state the truth, refuse to answer any questions or sign any statement made by him.

Sub Section (1) to Section 63 of the Act provides for imprisonment for a term which may extend to two years or with fine up to ` 50,000 or both, where, a person knowingly, intentionally, with an ill intention gives false information causing an arrest or search to be made under the provisions of the Act. Thus, the provisions of the Act, also envisioned the situation of misuse of the draconian provisions of the Act for one's ulterior motives and hence provided for punishment or penalty in such a situation. Reading between the lines of the provision, would suggest that prosecution is not mandatory in such a scenario, and the court may only levy penalty in such a scenario. The provision, does not provide for the minimum quantum of the punishment nor the penalty. The provision only provides for a maximum punishment of three years imprisonment. It is at the discretion of the court in fixing the degree of punishment or penalty or both, however imprisonment cannot be for more than three years.

Furthermore, in terms of Sub-Section (2) to Section 63 of the Act, the Authority is entitled to impose penalty which shall not be less than five hundred rupees but which may extend to ten thousand rupees for each default or failure by a person in respect of:

i. Failure to provide the truth, to the concerned authority, in respect of any question or matter in relation to an offence under section 3 of the Act.

ii. Refusal to sign any statement made by him for which he is legally obliged to the authority

iii. Omission to attend or produce books of account or document in accordance of the summon issued under Section 50.

The instant provision only provides for a miniscule penalty and has not laid down any punishment on such failure or deliberate refusal. However, for deliberate failure to acknowledge the summons issued under Section 50 of the Act may result into a simple imprisonment for a term which may extend to six months or fine or both in terms of the provisions of Section 174 of the Indian Penal Code, 1860.

Scheme of the Section makes it imperative for the authority to give a reasonable opportunity of being heard to the person concerned before imposing any penalty or launching any prosecution proceedings.

Penalty on Reporting Entity

Under Section 12 of the Act, all Banking Companies, Financial Institutions and Intermediaries are required to maintain a record of all transactions, including information relating to transactions for a period of 5 years, in such

manner as to enable it to reconstruct individual transactions, and furnish to the concerned authorities under the Act, all information relating to such transactions, whether attempted or executed; the nature and value of such transactions; verify the identity of its clients and the beneficial owner, if any; and maintain record of documents evidencing identity of its clients and beneficial owners as well as account files and business correspondence relating to its clients.

The failure on the part of the reporting entity to furnish such requisite information on being sought by the Director, may lead to a monetary penalty not less than ` 10,000 but which may extend to ` 1,00,000 for each such failure.

Cognizable Offence

Any offence in terms of the provisions of Section 3 of the Act is a cognizable and a non-bailable offence. In view of Section 2(c) of the Code of Criminal Procedure 'Cognizable Offence' is an offence for which a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant. Thus, if a complaint is made against a person or the police considers that a person is involved in the proceeds of crime and reflecting the same as an untainted property, the said person can be arrested on such suspicion without any requirement of FIR, or warrant.

However, Section 45 of the Act clearly states that notwithstanding the provisions contained in the Code of Criminal Procedure, no police officer shall investigate into an offence under the Act, unless specifically authorised by the Central Government by a general or special order. The provisions of the Act have given an overriding effect upon any other law and further explicitly mentions that any provisions of the Code of Criminal Procedure which are inconsistent with the provisions of this Act which deal with attachment, confiscation, investigation and prosecution shall not apply.

Conclusion

During the second 'Enforcement Day' function organised by Enforcement Directorate on May 1, 2014, Hon'ble President of India, Shri Pranab Mukherjee has said: "Money Laundering is a global menace, and law enforcement agencies of all countries have to co-operate to fight it". Although, the provisions of attachment, confiscation, penalty and punishment are draconian in itself, the same are considered reasonable and warranted to protect the interest (financial) of the victim and the public at large.

If you salute your work you do not have to salute anybody

If you pollute your work you have to salute everybody

— Dr. A. P. J. Abdul Kalam

Be more dedicated to making solid achievements than in running after swift but synthetic happiness

— Dr. A. P. J. Abdul Kalam

S. N. Raj, *Advocate*

Authorities under PMLA and their powers and functions

I. Overview of different Authorities under PMLA

1. The Adjudicating Authorities are appointed under Section 6 of the Prevention of Money Laundering Act, 2002 (PMLA) and an Adjudicating Authority comprises of a Chairperson and two other Members. The Adjudicating Authority adjudicates, as to whether the alleged property is involved in money laundering or not. In case, if the property is proved to be subject matter of money laundering in Adjudication proceeding, the Adjudicating Authority would proceed to confirm the Order of Attachment or Confiscation of Property thereof, under Section 8 of PMLA. The Adjudicating Authority has all the powers of a Civil Court under the Code of Civil Procedure,1908. An appeal by aggrieved person from the order of Adjudicating Authority is maintainable before the Appellate Tribunal constituted under Section 25 of PMLA.

2. There are several authorities duly appointed by the Central Government in accordance with Section 49 of PMLA. The authorities are constituted under PMLA, in order to effectively investigate and collect evidences of money laundering. The authorities constituted under PMLA are empowered with very wide powers, functions, duties and responsibilities as more specifically contemplated under PMLA, in order to efficiently deal with the menace of money laundering.

3. The authorities appointed under the PMLA by the Central Government are of different classes or hierarchy, namely i) Director or Additional Director or Joint Director, ii) Deputy Director, iii) Assistant Director and iv) Such other class of officers, that may even include officers below the rank of Assistant Director to be appointed by the aforesaid authorities.

II. General Powers and Functions of the Authorities appointed under PMLA

1. The authorities have been provided several powers relating to summoning, production of documents and even recording of evidence under PMLA. Section 50 of PMLA enshrines the aforesaid powers of the authorities.

2. The Director is empowered with all the powers of a Civil Court under the Code

of Civil Procedure, 1908 and the Director is vested with several powers and they are as follows: i) Enforcing the attendance of any person including any Officer of a Banking Company, Financial Institution or a Company and examining them on oath relating to any issue pertaining to money laundering or matters ancillarily connected thereto. ii) Compelling the production of documents from any person. iii) Receiving evidence on affidavits. iv) Conducting of any inspection and discovery thereof. v) Issuing Commissions for examination of witnessses and documents, etc. It is pertinent that all the aforesaid powers that are independently vested with a Director under Section 50 of PMLA is also vested with the Adjudicating Authority under Section 11 of PMLA.

3. The proceedings conducted during the course of investigation under PMLA by the authorities is deemed to be a judicial proceeding within the meaning of Section 193 and Section 228 of the Indian Penal Code. Thus, if false evidence is adduced by a person before Authorities, the said person could also be prosected for adduction of false evidence or for fabricating false evidence and same would tantamount to an offence of perjury punishable under the Indian Penal Code.

4. During the course of their investigation the authorities, have the power to impound and retain the records produced before them in the proceedings, after providing reasons for the same. However, the Assistant Director and Deputy Director have a limited power to impound documents and retain the records only for a period of three months, but the same could be retained by them in consonance with Section 50 (5) even beyond the said period of three months only after obtaining the previous approval of the Director.

5. As per Section 54 of PMLA, certain officers are required to assist the authorities in their inquiry and functions during the course of their investigation, such officers include the Income Tax Authorities contemplated under Section 117(1) of the Income-tax Act, 1961, the officers of SEBI, the Officers of body corporate appointed under the Central or a State Act, the officers of Reserve Bank of India, the officers of Enforcement Directorate constituted under Foreign Exchange Management Act, 1999, etc.

6. PMLA provides unfettered powers upon the authorities, but at the same time the Act also unequivocally imposes reasonable restrictions upon the authorities, not to function in an arbitrary manner in conducting their searches. Section 62 of PMLA contemplates punishment against any erring authority or officer, who without any reasons to be recorded in writting conducts vexatious searches in any place or searches any person or arbitrarily arrests any person under a false pretext of money laundering. The erring officer or authority, if found to be guilty under Section 62 of PMLA, during trial could be convicted with imprisonment for a period which may extend up to two years or with fine up to rupees fifty thousand or with both.

III. Power of Survey, Search and Seizure by the Authorities under PMLA

- **Power of Survey**

1. The authority constituted under PMLA has the powers of making survey as per Section 16 of PMLA, if the said authority is having reason to believe that an offence under Section 3 of PMLA has been committed,

2. The power of the authorities is only confined to their designated local area or territories to which the authorities are duly authorised and every person, proprietor, concern or employee is duly bound to furnish information to the authorities. The authorities doing the survey may also record

the statement of the person present at the place being surveyed.

3. The authority is also duly bound to forward a copy with reasons to be recorded in writing along with the materials in his possession, that was collected by him during the process of the said survey to the Adjudicating Authority in a sealed envelope.

- **Search and Seizure**

1. The director or any other officer not below the rank of Deputy Director after having information in his possession to believe that any person had committed money laundering may authorise any subordinate officer to conduct a search into any premises by breaking open the premises, lock, door, locker, etc. and seize any record or property found as a result of such seizure.

2. During the course of the aforesaid search and seizure the authority has the power to examine on oath any person, who is found to be in possession of any property relating to offence of money laundering.

3. The authority is duly bound to forward a copy with reasons to be recorded in writing along with the materials in his possession, that was collected by him during the process of the said search and seizure to the Adjudicating Authority in a sealed envelope.

4. The aforesaid search could be conducted only with respect to a scheduled offence, wherein a charge-sheet or report has been forwarded to a Magistrate under Section 173 of Code of Criminal Procedure or in cases wherein, a complaint has been filed by a person authorised to investigate the offence mentioned in the schedule before a Magistrate. It is pertinent to note herein, that the authority does not derive the powers of search and seizure otherwise and the existence of the aforesaid circumstance, is *sine qua non* for invocation of the powers of search and seizure by the authority or its duly authorised person as per proviso to Section 17 (1) of PMLA.

5. The search of persons could be made by an authority as per Section 18 of PMLA and the authority is empowered to search the person and seize such record or property in the possession of the person, which is connected with the offence of money laundering.

6. As per Section 18(3) of PMLA, if a person is about to be subjected to a search by an authority and if the said person requests or requires such personal search or seizure thereof, from his person, to be done only before or in presence or supervision of a Gazzetted Officer, Superior Officer or a Magistrate, such person should be forthwith taken to a Gazzetted Officer, Superior Officer or a Magistrate within stipulated time period of 24 hours (i.e., excluding the time undertaken in travelling).

7. The said search could be made only in the presence of two or more witnesses and the witnesses are required to remain present during the entire search and seizure conducted by the authority. The authority is required to prepare the list of property seized and duly record the statement of the concerned person or persons and the witnesses. The authority is also required to obtain the signature of the witnesses as per Section 18(7) of PMLA.

8. A female person can be Searched only by a female.

IV. Power of Arrest, Retention of Property and Records by the Authorities under PMLA

- **Power of Arrest**

1. The Authority has unfettered powers to arrest any person if the authority, possesses

material to believe the commission of offence under PMLA.

2. The authority is also duly bound to inform the person arrested about the grounds for the arrest being effectuated. The arrested person has to be produced mandatorily within a period of 24 hours before a Magistrate as per Section 19 of PMLA (i.e., excluding the time undertaken in travelling).

- **Power of Retention of Property and Records**

1. The Authority has the power to retain the Property and Records found to be part of money laundering only till the time period of three months from the date of seizure and the said time period however, could be extended pursuant, to the order of Adjudicating Authority, if the same is required for the purpose of adjudication under Section 8 of PMLA.

2. Subsequent to the passing of the confiscation order the property, that is not part of money laundering as per the adjudication will be returned back by the Adjudicating Authority and similarly after the passing of the confiscation order by the Adjudicating Authority the records shall be returned to the person from whose possession or custody the said records came to be seized.

3. The director or authorised officer is authorised to retain the property or record as per Sections 20 and 21 of PMLA respectively, till the time an appeal is filed by the aggreived person i.e., the accused before the Appellate Tribunal or forty five days from the date of the Order of confiscation being passed by the Adjudicating Authority, whichever, is earlier.

V. Presumption as to Records and Property, Presumption relating to Inter Connected Transactions and burden of Proof on accused under PMLA

1. If the records and property found in the possession of a accused, *ex-facie* reveals that the said property or record could be part of an offence of money laundering, then in that event the same shall lead to a presumption under law against the accused, that he is guilty of holding such property or record pertaining to money laundering as per Section 22 of PMLA.

2. In circumstances, wherein it is found from the records seized by the Authority from accused or otherwise, that the money laundering has been done involving two or more inter-connected transactions, it is presumed as per Section 23 of PMLA, that inter-connected transactions only form part and parcel of money laundering and hence, the said inter connected transactions are subject to confiscation and adjudication under Section 8 of PMLA by the Adjudicating Authority.

3. A person being accused of a crime under Section 3 of PMLA, is presumed to be guilty unless proven otherwise, by the accused as per Section 24 of PMLA. The PMLA is a draconian Act since, it is contrary to the golden rule of criminal jurisprudence that "the accused is presumed to be innocent until proven to be guilty". Section 24 casts burden and onus solely upon the accused to establish that the alleged proceeds of crime are his untainted property. The said presumption under Section 24 of PMLA apart from being opposed to the very fabric of criminal law is also violative of Article 14 and Article 21 of the Constitution of India.

CA Paresh P. Shah

Appeal to PMLA Tribunal and function of Tribunal

1. Background and Hierarchy

1.1 Organisational Set up

The Directorate of Enforcement, with its Headquarters at New Delhi is headed by the Director of Enforcement. There are five Regional offices at Mumbai, Chennai, Chandigarh, Kolkata and Delhi headed by Special Directors of Enforcement.

There are Zonal and Sub-Zonal Offices of the Directorate throughout the country as per the needs of the ED.

1.2 Functions

The main functions of the Directorate are to:

1. Investigate contraventions of the provisions of Foreign Exchange Management Act, 1999 (FEMA) which came into force with effect from 1-6-2000.
2. Investigate offences of money laundering under the provisions of Prevention of Money Laundering Act, 2002 (PMLA) which came into force with effect from 1-7-2005 and to prosecute the persons involved in the offence of money laundering. There are 156 offences under 28 statutes which are Scheduled Offences under PMLA.
3. Adjudicate Show Cause Notices issued under the repealed Foreign Exchange Regulation Act, 1973 (FERA) up to 31-5-2002 for the alleged contraventions of the Act and prosecution incidental thereto, and
4. Render co-operation to foreign countries in matters relating to money laundering.

2. Adjudicating Authority

In terms of sub-section (1) of section 6 of Preventions of Money Laundering Act, 2002, an Adjudicating Authority under PMLA has been constituted to exercise jurisdiction, powers and authority conferred by or under the said Act.

Adjudicating Authority exercises jurisdiction, powers and authority conferred by or under the PMLA. Where the Adjudicating Authority decides that any property is involved in money-laundering, Adjudicating Authority shall, by an order in writing confirm the attachment of the property made or retention of property or record seized (as under section 5 of PMLA).

The Adjudicating Authority is not bound by the procedure laid down in the CPC but "shall be guided by the principles of natural justice" and shall be entitled to regulate its own procedure.

The role of Adjudicating Authority is to consider attachments made by authorities and grant or refuse permission for retention and confiscation of seized property.

The Director or any person aggrieved by an order made by the Adjudicating Authority under this Act, may prefer an appeal to the Appellate Tribunal. Appeal has to be filed within a period of forty-five days from the date of receipt of a copy of the order made by the Adjudicating Authority. Appellate Tribunal may entertain an appeal after the expiry of the period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period [Section 26].

3. Appellate Tribunal

3.1 Set-up

Under Section 25 of the Prevention of Money-laundering Act, 2002, the Central Government has established an Appellate Tribunal. Section 28(4) of the PMLA provides that "the Chairperson or a Member holding a post as such in any other Tribunal, established under any law for the time being in force, in addition to his being the Chairperson or a member of that Tribunal, may be appointed as the Chairperson or a Member, as the case may be, of the Appellate Tribunal under this Act.

3.2 Composition

The Tribunal consists of a Chairperson and two other Members. The Chairman and one Member of ATFP holds additional charge of the post of Chairman and Member of Tribunal under PMLA.

A person shall not be qualified for appointment as Chairperson unless he is or has been a Judge of the Supreme Court or of a High Court or is qualified to be a Judge of the High Court. The appointment of Chairperson shall be made on the recommendation of the Chief Justice of India.

3.3 Functions

Appellate Tribunal has been constituted to hear appeals against the orders of the Adjudicating Authority and the authorities under the said Act.

Appeals to the Tribunal can be made by the Director, or any person aggrieved by an order of the Adjudicating Authority, or any banking institution or allied institution within 45 days from the date on which the order is received.

Further appeal can be made against the order of the Tribunal to High Court within 60 days.

Appellate Tribunal is vested with powers of a civil court. It can also review its decisions and decide cases *ex parte*.

3.4 Appellate Authority against the order passed by the Appellate Tribunal

Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law or fact arising out of such order. Thus appeal can be filed before High Court on any question of law or fact.

High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days [Section 42].

4. Special Courts

4.1 Set-up

For trial of offence punishable under section 4 of PMLA, 2002, the Central Government, in consultation with the Chief Justice of the respective High Courts, by notification, has designated one or more Courts of Session as Special Court or Special Courts for such area or areas or for such case or class or group of cases as specified in the notifications.

While trying an offence of money laundering under PMLA, 2002, a Special Court has also to try the offences, with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial [Section 43].

4.2 Offences triable by the Special Courts under PMLA

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence of money laundering punishable under Section 4 of PMLA, 2002 and any scheduled offence connected

to the offence of money laundering, shall be triable by the Special Court constituted for the area in which the offence has been committed.

The Special Court can take cognizance of any offence of money laundering upon a complaint being made by an authority, without the accused being committed to it for trial.

The provisions of the CrPC shall apply to the proceedings before a Special Court.

Applications for bail should be made before the High Court having jurisdiction. No person accused of an offence for a period of more than 3 years under Part A of the Scheduled offence shall be released without the public prosecutor being given a chance to oppose the release and there are grounds for believing he is not guilty except a person under the age of 16 years or a woman or a sick and infirm person.

4.3 Trial Court to commit cases to Special Courts under PMLA

In case a Trial Court has taken cognizance of a scheduled offence, then in such cases, on an application by the authority authorised to file a complaint under PMLA, the Trial Court (which has taken cognizance of the scheduled offence) shall commit the case relating to the scheduled offence to the Special Courts under PMLA.

The Special Court, PMLA, on receipt of such case committed to it, shall proceed to deal with it from the stage at which it is committed [Section 44(1)(c)].

4.4 Appellate Authority against the order passed by Special Court

The High Court may exercise, so far as may be applicable, all the powers conferred by Chapter XXIX or Chapter XXX of the Code of Criminal Procedure, 1973 (2 of 1974), on a High Court, as if a Special Court within the local limits of the jurisdiction of the High Court were a Court of Session trying cases within the local limits of the jurisdiction of the High Court [Section 47].

5. Parallel streams of proceedings

It may be noted that once the Complaint Report is filed with the Special Court by the office of the ED, the investigation / attachment proceedings before the Director and / or the Adjudicating Authority will continue and in parallel, trial proceedings before the Special Court will also be continuing by the prosecution for determining proof of guilt of the accused 'beyond reasonable doubt' and the establishment of '*mens rea*' in order to demonstrate that there is "substantial probable cause" to form opinion that the property under attachment is proceeds of crime.

Thus, there is the possibility of a matter under PMLA going from Special Court to High Court and in parallel, going from adjudicating officer to Appellate Tribunal to High Court. The matter may continue under both the streams of proceedings unless the Special Court decides in favour of the accused. In such a case, probably the adjudicating officer during adjudication process or at the stage of Appellate Tribunal, as the case may be, will have to consider the findings of the Special Court to decide the matter.

6. Civil Courts and PMLA

No suit can be brought in any civil court to set aside or modify any proceeding taken or order made under PMLA, 2002 and no prosecution, suit or other proceeding shall lie against the Government or any officer of the Government for anything done or intended to be done in good faith under the PMLA, 2002 [Section 67].

Thus, jurisdiction of civil courts is barred. The offence of money laundering is triable only by a special court constituted for the area in which the offence has been committed.

7. Conflict between PMLA and Other Acts / Laws

The provisions of PMLA, 2002 have over-riding effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force [Section 71].


Pranshu Goel, *Senior Associate, Phoenix Legal* & Amrin Sawhney

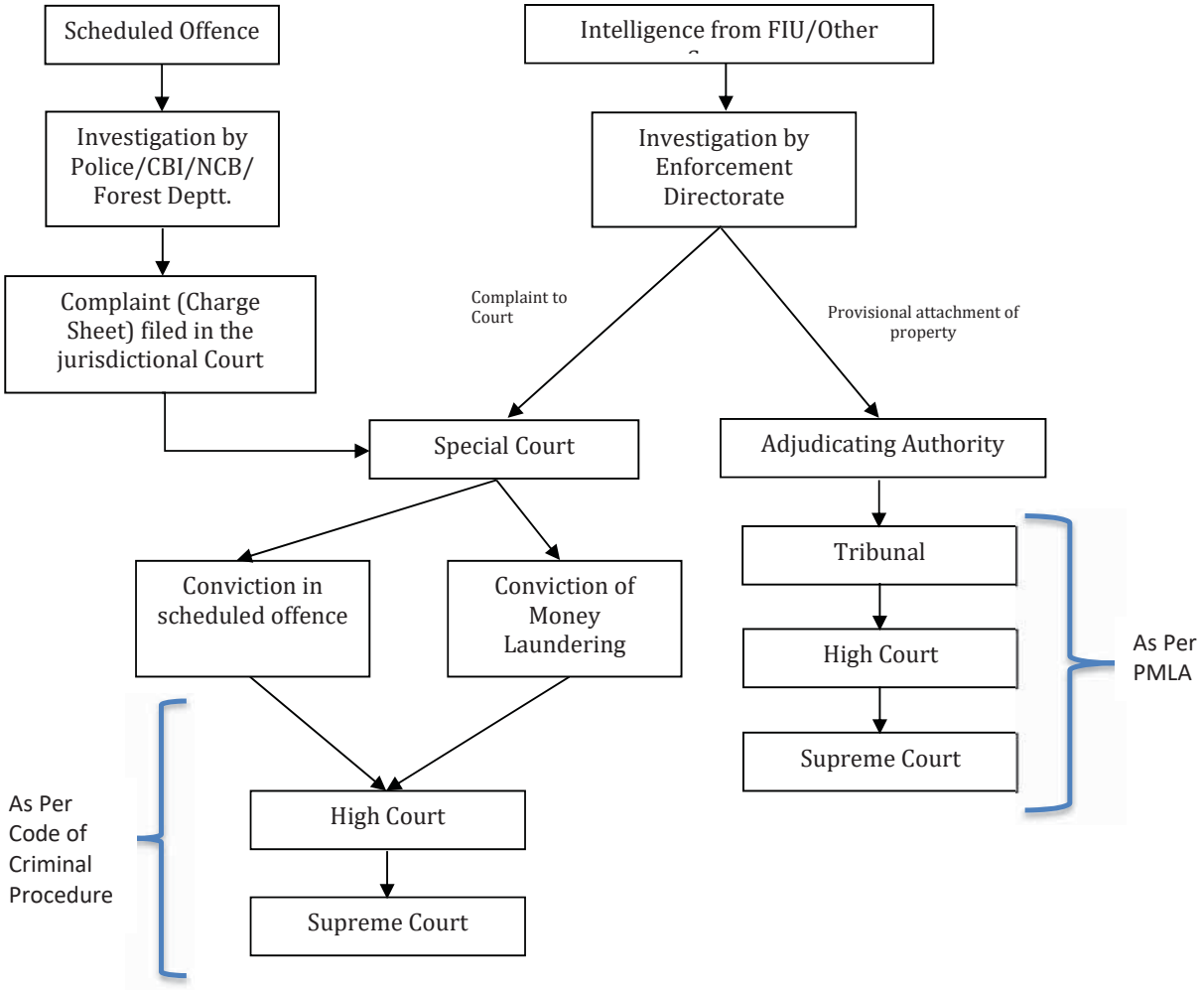
Prevention of Money Laundering Act, 2002: Appellate Jurisdiction

By now yourselves will agree that the Act is a special Law and a self-contained code intended to address the increasing scourge of money laundering and provides for attachment of property derived from or involved in money laundering and prosecution of those involved directly or indirectly in the process or activities of money laundering.

In the Article titled ***'Consequences of Offence under Prevention of Money Laundering Act, 2002: The Draconian Mandate',*** the Author did elucidate on the draconian provisions of the Prevention of Money Laundering Act, 2002 ('**Act**'). *Vide* this Article, the Author has discussed the appellate remedies enshrined under the Act against such consequences.

The Act provides for separate provisions pertaining to attachment and confiscation of property; and a separate procedure for adjudging an offence under the Act. Though, the Act provides for a well laid appellate remedy against the attachment of the property, it also lays down the aspect of a Special Court for the trial of the scheduled offence along with the offence under the Act. However, procedure regarding any appeal against the order of the Special Court is prescribed to be governed by the Criminal Procedure Code.

The procedure is explained via following pictorial representation.



With the backdrop of the above provisions, it is pertinent to note that the aggrieved party can proceed for appeal to the Tribunal, High Court and Supreme Court, only with respect to attachment or confiscation of tainted property, being proceeds from crime. The Act does not specifically prescribe for any recourse against the order of the Special Courts and refers to the provisions of the Code of Criminal Procure, 1973 for any appeal and revision of the order of the Special Court.

As highlighted in the earlier Article, the Act empowers the Director to attach and confiscate the tainted property *suo motu*, for a maximum period of 180 days, provided that he has reasons to believe that the property has been acquired out of criminal proceeds of a scheduled offence.

Although, the very purpose of the provisions of provisional attachment is to curb concealment, transfer or dealing of the proceeds of crime to frustrate proceedings under the Act, appellate remedies are also provided under the Act to keep a check against such severe powers of the enforcement directorate.

As already discussed earlier, the Director or any other officer who provisionally attaches the

property under the provisions of the proposed Act is mandatorily required to file a complaint before the Adjudicating Authority within a period of 30 days from such attachment. Going further, the Adjudicating Authority shall serve a notice of minimum thirty days under section 8 of the Act, on the affected person requiring him to indicate the sources of his income, earnings or assets by which he has acquired such attached property and to show cause as to why such seized properties do not reflect criminal proceeds and hence shall not be confiscated by the Central Government. The Adjudicating Authority considering the reply of the person aggrieved, the Director, any other officer, and taking into consideration all the relevant materials, documentation and evidences placed on record, shall decide whether the property is involved in money laundering or not.

On affirmation by the Adjudication Authority, the property shall be attached and the possession of the same shall be taken over by the Enforcement Directorate, till the conclusion of the trial of an offence. However, if the Adjudicating Authority decides otherwise, the attachment order shall be revoked, subject to decision of the Appellate Tribunal.

Section 26 of the Act allows the Director or any person aggrieved in respect of an order passed by the Adjudicating Authority to prefer an appeal before the Appellate Tribunal within a period of 45 days or otherwise from the receipt of such order of the Adjudicating Authority.

Since, my fellow colleague in his Article has already discussed in detail the appellate remedy before the Hon'ble Money Laundering Appellate Tribunal, I shall throw some light on the provisions pertaining to the remedy from the Hon'ble High Court and Supreme Court in this regard.

Appeal to High Court

Section 42 of the Act provides that an appeal can be made before the Hon'ble High Court by an aggrieved person, against any decision or order passed by the Appellate Tribunal pertaining to attachment of the property. Although, appeal should be filed within a period of sixty days of communication of such decision or order, the High Court may entertain an Appeal beyond a period of 60 days if it is satisfied that the Appellant was prevented by sufficient cause from filing the Appeal within the said period.

Director or the person whose property is attached, whosoever is aggrieved by the order of the Hon'ble Tribunal can appeal before the Hon'ble High Court against the order of the Tribunal. In such a scenario, the jurisdiction of the High Court shall depend on the area in which the aggrieved party ordinarily resides or carries on business or personally works for gain; and in a scenario where the Central Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondent, any of the respondents, ordinarily resides or carries on business or personally works for gain.

In view of the scheme of the Act, the Appeal to the Hon'ble High Court is the Second Appeal, the first being to the Appellate Tribunal against the order passed by the Adjudicating Authority.

Although, the Second Appeal, unlike many other statutes is not restricted in its scope to the "Question of Law" but extends to the "Question of fact" as well[1], however, it is also an established fact that while determining whether the Question of Law arising in a case is a substantial one, the general rule is that the High Court will not interfere with the concurrent findings of the Courts[2] below unless the order appealed is not based on any evidence, or on

1 Under the scheme of the Income-tax Act, 1961 First Appeal is before the Hon'ble Commissioner of Income Tax (Appeals) and Second Appeal is before the Hon'ble Income Tax Appellate Tribunal. Appeal before the Appellate Tribunal, being the Second Appeal is on the question of law as well as facts.

2 Radha Mohan Lakhotia vs. Deputy Director, Prevention of Money Laundering (Amendment) Act, 2010 (5) Bom.CR. 625

misreading of evidence, wrong inferences, ignored evidences and facts etc.

Thus, in an appeal against the judgment of the Hon'ble Tribunal, Prevention of Money Laundering, the High Court, generally, is not required to go into the question of fact or appreciation of evidence, however, if it is apparent that certain evidences, information etc. was not considered or misconstrued etc., Hon'ble High Court may apart from 'question of law' can also consider the 'question of fact'.

Writ Jurisdiction

Albeit, the Act lays down a formal procedure for appeal against the decision of the Adjudicating Authority pertaining to attachment of the property, being proceeds of crime, the Hon'ble High Court may entertain writ petitions, even though an alternate remedy by way of normal forum of hierarchy of Tribunal and Courts is available.

However, Hon'ble High Courts shall entertain the Writ petitions and exercise their discretionary powers as provided in terms of Article 226 of the Constitution of India, only in exceptional circumstances, where either the Adjudicating Authority acted without jurisdiction or there was violation of the principles of Natural Justice. In the recent decision of the Hon'ble High Court of Delhi in the case of *Rose Valley Hotels and Entertainments Limited vs. Secretary, Department of Revenue, Ministry of Finance*[3], while entertaining a writ petition filed against the confiscation order passed by the Adjudicating Authority, relied on the decision of the Hon'ble Supreme Court in the case of *Whirlpool Corpn. vs. Registrar of Trade Marks*[4], wherein, the Supreme Court laid down the triple test for entertaining a writ petition despite availability of the remedy of an appeal in contractual matters i.e., firstly if the action of the respondent is illegal and without jurisdiction, secondly if the principles of natural justice have been violated and thirdly if the petitioner's fundamental rights have been violated.

In the case of *Barik Biswas vs. Union of India & Ors.*, Hon'ble High Court of Delhi also dismissed the writ petition and held that *"the action of coming to this Court is premature and therefore, this Court is of the view that since the petitioners have effective and efficacious remedy under PMLA, necessitating institution of the petition by invoking extraordinary jurisdiction of this Court is not appropriate at this stage. If this Court were to enter into the merits of this case at this stage, it would amount to scuttling the statutorily engrafted mechanism i.e., PMLA."*

However, the Hon'ble High Court of Madras in the case of *A. Kamarunnisa Ghori and Others*[5], accepted the writ petition on a limited point, where the Enforcement Directorate and Adjudicating Authority interpreted the law in a way different from the view point of the Hon'ble Court. Against the argument of presence of alternate remedy, the Hon'ble Court held that *"in view of the fact that the order of the Appellate Tribunal is ultimately subject to an appeal to this Court under Section 42 of the Act. By the time the petitioners go before the Appellate Authority and thereafter come up before this Court under Section 42, the petitioners would have long lost possession of their properties"* and hence prejudiced.

The recent judicial pronouncements, highlight that although, the Hon'ble High Courts are not accepting the writ petitions pertaining to attachment of properties, since an alternate remedy is available under the law, however, if the authorities act in an preconceived, arbitrary manner without giving due regard to the evidences on record and the principles of natural justice, Hon'ble Court may act upon its discretionary power under Article 226 of the Act. The decision of the Hon'ble High Court shall also depend upon the type of the writ application, being Habeas Corpus, Mandamus, Certiorari, Prohibition and Quo-Warranto.

3 [2015] 60 taxmann.com 427 (Delhi)/[2015] 131 SCL 749 (Delhi)
4 [1998] 8 SCC 1
5 WP No. 1912, 2870,13421 and 22062 of 2011

Special Courts

Scheme of the Act, provides power to a Special Court for trial of offence of Money Laundering as provided in Section 3 read with Section 4 of the Act. Special Court is nothing but Courts of Session which are designated as a Special Court for the purposes of such Act by the Central Government in consultation with the Chief Justice of High Court.

By virtue of Section 44 of the Act, the Special Court is entitled to try the offences under Section 3 read with Section 4 of the Prevention of Money Laundering Act as well as the connected scheduled offences. Thus, the Special Court shall undertake the trial of the Scheduled Offence along with the offence under the Act.

Shorn of all embellishment, the special Court is a Court of original criminal jurisdiction and to make it functionally oriented some powers are conferred by the statute. It has to function as a court of original Criminal jurisdiction not being bound by the terminological status description of magistrates or a Court of Sessions except those specifically conferred and specifically denied. Under the Code, it will enjoy all powers which a Court of original criminal jurisdiction enjoys save and except the ones specifically denied.[6] The Court has to be treated as a Court of original criminal jurisdiction and shall have all the powers as any Court of original criminal jurisdiction has under the Criminal Procedure Code except those specifically denied. This clause provides that the offences punishable under this Act shall be tried only by the Special Court.

The Special Judge empowered under this Act, can try offences under the Prevention of Money Laundering Act along with Scheduled Offences. The said power of the Special Court to try an offence under the PMLA along with the scheduled offence was upheld by Jharkhand High Court in one of the matter[7] while discussing the provisions of Section 44 of the Act.

The Court which has taken cognizance of the scheduled offence, being a Court other than the Special Court which has taken cognisance of the complaint of the offence of money laundering, is enabled on an application by the authority to commit the case related to the scheduled offence to the Special Court. Upon the receipt of the case, the Special Court is mandatorily required to proceed to deal with the case from the stage at which it was committed.

Furthermore, the provisions of Section 47 of the Act provide for the appellate and revisionary remedy. In terms of the provision of Section 47 of the Act, the aggrieved party can avail the remedy of appeal to the High Court and the Supreme Court respectively against the orders of the Special Court, in terms of the powers and procedure laid down by Chapter XXIX or Chapter XXX of the Code of Criminal Procedure, 1973.

Thus, instead of providing a specific procedure, as laid down for the attachment orders passed by the Adjudicating Authority, the Act provides for the procedure laid down under the Code of Criminal Procedure, 1973 for appeal against the order of the Special Court.

Conclusion

Although, the Act provides for the concept of Special Courts for the trial of the offences alleged under any of the Scheduled Offences as well as the offences under the Prevention of Money Laundering Act, 2002, to speed up the trial and disposal of the abundant cases pending in multiple forums. However, in a country, where several matters are pending before different judicial forums for number of years, a parallel set of litigation, pertaining to the attachment and taking possession of the property, the fate of which depends entirely upon the decision of the Special Court, seems wastage of the precious time of the courts.

6 A. R. Antulay vs. R. S. Nayak & Anr. (1984) 2 SCC 500

7 Hari Narayan Rai vs. State of Jharkhand–2010 Lawsuit (Jharkhand) 448 dated 5-4-2010

CA Bhavesh Vora

PMLA Obligations of Reporting Entities

Background

Prevention of Money Laundering Act (PMLA), 2002 was enacted by the Parliament of India on 17th January 2003 and implemented with effect from 1st July, 2005 nationwide. India, as a growing economic powerhouse, was lacking an effective and efficient mechanism to prevent money laundering cases and a yardstick to avoid future violations. The regulatory environment for entities like Banks and Non-Banking Financial Companies (NBFCs) was being developed in a reactive manner, and the boom in the financial activities in the country had made the adoption of such a mechanism long due. Also, developments of major scams due to Money Laundering like the Benex Scandal, which had, on an estimate, amounts between USD 7 Billion and USD 9 Billion in a span of 7 odd years between 1996 and 2002. Such scams sent ripples throughout the economies around the world, and a consensus on effective mechanism to prevent money laundering was reached even at the United Nations General Assembly level. This issue posed a major threat to even the largest of the economies of that time and therefore, India adopted the PMLA, to ensure that money laundering does not become a threat to the rising growth rates of the developing country.

Importance of PMLA

PMLA was established and implemented in the country with three major requirements brought into consideration.

Control Money Laundering

The basic and the most important objective of PMLA is to prevent and control money laundering in the country.

Seizing of Property

Another important objective is to obtain and / or seize the property obtained from laundered money.

Other issues of Money Laundering

Other major objective of PMLA is to deal with any other issues connected with and arising out of money laundering in the country.

Money laundering had increased exponentially and continues to rise due to various externalities affecting the business space of all economies. Some of the many externalities that acted as major variables in the past, and also do affect today, are:

Globalisation

Globalisation of markets and financial flows, especially upon rise of internet and networking

technologies has been acting as a major variable for money laundering. The strife to create a single market with the help of internet made it possible for the development of cross-border flow of funds, within nanoseconds, by leaping over jurisdictions effortlessly on a day-to-day basis.

Deregulation
Deregulation of financial markets has not brought along any consistency or coherence in respect of Money Laundering regulations.

Competition and profitability
Also, globalisation has resulted in vast global competition, meaning more competitors and increasing pressure being built on entities to deliver profits. Proceeds of not-so-legal activities do often flow in the cycle, which legal businesses may resort to in desperation of achieving competitive profitability.

In order to balance out such variables, PMLA acts as a counterbalance in the bird's eye view of the economy.

Reporting entities

PMLA has been made applicable to various entities regulated by distinct regulators. Entities such as Banks, NBFCs, Intermediaries, Chit Fund Companies, Co-operative Banks and Housing Finance Institutions, all have to comply with the PMLA and the rules and regulations framed thereunder.

Regulators
For the purpose of PMLA, Financial Intelligence Unit, i.e. FIU-Ind, is the apex body for Anti Money Laundering and Prevention of Money Laundering activities.

Additional regulations have also been framed by the respective regulator for effective functioning of the mechanism on the basis of the specific activity set of the regulated entity.

Entities covered [Section 2(1)(wa)]
The PMLA prescribes that every Banking Company, Financial Institution and Intermediary has to comply with the provisions of PMLA. The entities named above are some of the many covered under this definition.

Voluntary adoption
In order to comply with the provisions of PMLA in true spirit and to avoid chances of business frauds, the reporting entities have to voluntarily adopt practices and business processes, which are PMLA compliant and help easy detection of suspicious transactions. Adoption of such business processes helps the reporting entity to reduce the risk involved for a transaction to be of money laundering in nature.

Obligations of reporting entities

The activities of reporting entities are such that they require the identity of clients to ensure the operational risk levels are kept low. Since such reporting entities are engaged in retail, generally with low value high volume transactions, the risk of money laundering is high.

Customer Identification [Rule 9]
In order to address the above-mentioned issue, PMLA has prescribed the Identification norms to be complied with by the regulated entities.

Such regulations state that the reporting entities have to ensure that at the time of commencement of an account based relationship with the client, it has, with necessary and adequate documentation, identified its client, has verified their identity and has obtained all such information about the client, necessary for the purpose and nature of such business relationship.

For clients transacting in a non-account based relationship with the reporting entities, the reporting entities have to ensure that verification of the client is done as per that of account based relationships if the amount of transaction/s is

equal to or more than Rupees Fifty Thousand, either as a single transaction or several transactions considered in aggregate that appear to be connected.

A major activity that would reduce the compliance risk of the entity is to obtain all such necessary documentation and establish customer identification.

Along with customer identification, verification of **beneficial ownership** is also critically essential to avoid structures, which are specially designed to conceal the identity of the person ultimately responsible.

Maintenance of records [Rule 10 and Rule 3]
PMLA has prescribed that the reporting entities have to maintain documentation and other records in prescribed formats.

Records of documents evidencing beneficial ownership are to be maintained by the reporting entities for a minimum period of five years from the date of closure of business relationship of the client with the reporting entity, in order to ensure availability of records in case litigation is filed in the future.

Records relating to transactions have to be maintained for a minimum period of five years from the date of transaction of the reporting entity with the client.

Regulators of the entities may provide for periods longer than that mentioned in the PMLA, depending on the nature of activities of the regulated entity.

Confidentiality
The data / records so maintained by the reporting entities relating to the transactions have to be stored in a confidential manner.

Reporting requirements
Another obligation put forth by the PMLA on reporting entities is that the reporting entities have to furnish information of all cash transactions exceeding Rupees ten lakhs or its equivalent in foreign currency, either individually or in aggregate of transactions in a month.

Reporting entities also have to furnish information of all transactions relating to receipts by non-profit organizations in excess of Rupees ten lakhs.

All cash transactions with forged / counterfeit currency and all suspicious transactions (Whether in cash or not) have to be reported to FIU-Ind.

Further, cross border wire transfers exceeding Rupees Five Lakhs and all purchase and sale by any person of immovable property valued at fifty lakh rupees or more that is registered by the reporting entity have to report under PMLA.

Reporting by the reporting entities have to be done online on the website of PMLA in specified report formats for various transactions.

A table containing the various Reports, Description of details to be furnished in such reports and its Due Dates is mentioned under the article.

Entity – Specific obligations
Entities regulated by the **Reserve Bank of India** (Financial Institutions) have to comply with the **Know Your Customer (KYC) Direction, 2016** issued by the Reserve Bank of India. The said direction was issued in order to consolidate the guidelines issued by various regulating bodies of RBI. This direction holds the guidelines prescribed under PMLA for reporting entities as the baseline, while taking the risk assessment procedure a step further. This is done by including On-going due diligence, assessment of accounts held by politically exposed persons, freezing and closure of accounts, etc.

Entities regulated by the **Securities and Exchange Board of India (SEBI)** have to comply with the SEBI Master Circular CIR/ ISD/AML/3/2010 dated December 31, 2010, as

amended from time-to-time (last amended on 12th March, 2014) in order to comply with the PMLA obligations.

Conclusion

PMLA has put forth extant regulations to ensure the optimum functioning of the economy, free from Money Laundering – which has proved to be a source of revenue leakage and having damaging impact to the business environment.

It is also essential to understand that laws and regulations cannot protect the entire business operation. PMLA acts as a principle-based baseline rule structure that every institution shall follow in spirit to ensure the integrity of the business and to mitigate essential financial and compliance risks that often go unnoticed.

Reporting Obligations of Reporting Entities

Sr. No.	Report	Description	Due Date
1.	CTR	All cash transactions of the value of more than rupees ten lakhs or its equivalent in foreign currency. All series of cash transactions integrally connected to each other which have been valued below rupees ten lakhs or its equivalent in foreign currency where such series of transactions have taken place within a month.	15th day of the succeeding month
2.	CCR	All cash transactions where forged or counterfeit currency notes or bank notes have been used as genuine or where any forgery of a valuable security or a document has taken place facilitating the transactions.	
3.	NTR	All transactions involving receipts by non-profit organisations of value more than rupees Ten lakhs or, its equivalent in foreign currency.	
4.	CBWTR	All cross-border wire transfers of the value of more than five lakh rupees or its equivalent in foreign currency where either the origin or destination of fund is in India.	
5.	STR	All suspicious transactions whether or not made in cash.	Not later than seven working days on being satisfied that the transaction is suspicious.

Report IPR, requiring reporting of all purchase and sale by any person of immovable property valued at fifty lakh rupees or more that is registered by the reporting entity, is yet to be notified. Upon notification of the said report, the same would be required to be furnished on or before 15th day of the month succeeding the quarter.

Requirements for Customer Identification under Rule 9	
Customers/Clients	**Documents [Certified copy of any one of the following officially valid documents (OVD)]**
Accounts of individuals – Proof of Identity and Address	Any two documents from the OVD: • Passport • PAN card • Voter's Identity Card issued by Election Commission • Driving Licence • Job Card issued by NREGA duly signed by an officer of the State Government • The letter issued by the Unique Identification Authority of India (UIDAI) containing details of name, address and Aadhaar number
Accounts of Companies	• Certificate of incorporation • Memorandum and Articles of Association • A resolution from the Board of Directors and power of attorney granted to its managers, officers or employees to transact on its behalf • An OVD in respect of managers, officers or employees holding an attorney to transact on its behalf.
Accounts of Partnership firms	• Registration certificate • Partnership deed • An officially valid document in respect of the person holding an attorney to transact on its behalf
Accounts of Trusts and foundations	• Registration certificate • Trust deed • An officially valid document in respect of the person holding a power of attorney to transact on its behalf

Customers/Clients	Documents [Certified copy of any one of the following officially valid document (OVD)]
Accounts of unincorporated association or a body of individuals	• Resolution of the managing body of such association or body of individuals • Power of attorney granted to him to transact on its behalf • An officially valid document in respect of the person holding an attorney to transact on its behalf • Such information as may be required by the reporting entity to collectively establish the legal existence of such an association or body of individuals
Accounts of Proprietorship Concerns Proof of the name, address and activity of the concern	Apart from Customer identification procedure as applicable to the proprietor any two of the following documents in the name of the proprietary concern would suffice • Registration certificate (in the case of a registered concern) • Certificate/licence issued by the Municipal authorities under Shop & Establishment Act • Sales and income tax returns • CST/VAT certificate • Certificate/registration document issued by Sales Tax/Service Tax/Professional Tax authorities • Licence/certificate of practice issued in the name of the proprietary concern by any professional body incorporated under a statute.

Sources:

1. Prevention of Money Laundering Act, 2002 and rules framed thereunder
2. www.fiuind.gov.in
3. Know Your Customer (KYC) Directions, 2016
4. Various articles in The Wall Street Journal between 1997 and 2002 relating to the Benex Scandal.

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S. N. Inamdar, *Sr. Advocate*

HOT SPOT
Need to change approach

There are several provisions in the Income-tax Act which make you wonder why such unreasonable and illogical provisions were made? What must be the reason? When you probe the reason, you find that the object is to collect tax through honest tax payers by shifting the obligation from IT Dept to them. To make things worse, the provisions are complicated and you are asked to discharge the function which really should be carried out by the Tax Dept. – not only without any reward or remuneration, but if you fail to discharge this duty, penalty is imposable. Poor taxpayers not only have to pay their own tax honestly and diligently, but also collect tax on behalf of the Government from suspected tax evaders. I propose to deal with three such provisions to illustrate my point, but let me assure you that there are more. You will find them, if you look for them.

The reason behind these previsions is to enable the Government to collect tax through honest tax payers from suspected tax evaders.

Thus, there is fundamental fallacy and arrogance towards the taxpayers.

I. Section 115BBC

This provision prescribes that where a charitable trust or institution receives an anonymous donation of over ` 1 lakh or 5% of total donations, the charitable institution must pay tax at the maximum marginal rate i.e. 30% on the such donation by treating them as their own income (Note the plural). No distinction is made between donation to corpus and other donations. Sub-section (2) exempts donations to charitable trusts wholly for religious and charitable to provisions other than anonymous donation to university or other educational institution or any hospital or other medical institution run by such trust. This provision is applicable, even if the amount of such donation is spent for charitable purposes.

The provision defies logic. Firstly the word 'anonymous' itself means not identified if from an unknown identity. But sub section (3) defines anonymous donation to mean voluntary contribution where the person receiving such contribution does not maintain a record of the identity indicating the name and address of the person

making such contribution and such other particular as may be prescribed! (Emphasis supplied).

Now, how does one maintain and record the name and address of an unidentified and unknown contributor. If the provision seeks to rope in capitation fees, can it be described as 'voluntary'? If it is voluntary, it is not a capitation fee at all. And it is in consideration of admission to a particular educational institution. Thus it appears to be a senseless provision. On plain interpretation, the limit of ` 1 lakh applies to aggregate donations and not to each donation.

And why should an admittedly charitable institution bear the tax of the anonymous donor and that too at the maximum rate?

The basic purpose of levy and collection of tax is to enable Government to spend on public purposes (including administration exp.) Then what else is a charitable institution doing? It also exists for Public purposes. Then why impose such obligations and then deprive them of 30% of donation received by them?

As far as donor is concerned, it is a 100% outgo for him as he does not even claim or get a deduction u/s. 80G or any other section. Thus he is spending 100% of such assumed income of his for public purposes only.

And how an anonymous donation is made "with a specific direction" that it is for any university or other educational institution. Government seems to assume that both the Trustees and the donor possess extra-sensory powers!

Therefore this approach is fundamentally wrong, fallacious and unjust. If black money is coming in the mainstream via anonymous donation, Government should welcome it. How and why Government should be concerned with the source and colour of a donation? It should keep strict watch on the spending by charitable trusts. In order to ensure that the money is spent on charitable objects only, they may make stringent rules and strengthen 'Charity Commissioner's' powers. But to punish the receiver of alleged black money, who brings the same in the main stream and spends for public good, is not the way to deal with the issue. Therefore there is a strong need to change the approach towards black money in this form.

II. Section 206C(1D)

This is one more provision where the fundamental approach itself is wrong to deal with cash expense and tax evasion.

Firstly, the section is very badly drafted. It talks of 'providing any service, but does not define the word 'service' (note the singular).

Secondly it refers to buyer of the services. The word 'buyer' means a person who buys i.e. obtains in exchange of payment.

In case of services, they are availed of and not bought, in the commercial sense. But the section refers to chapter XVII-B which in section 194-J speaks of "professional services". It is not clear whether it will apply to medical services such as hospitalisation or surgery or other consultation services also. Further, on a plain and literal interpretation, since the word 'service' is used in singular the consideration must for that specific service and not the bill in the aggregate. What is worse, is that this prevision may be applied to charitable hospitals also. Some considerations observed in I above will apply with greater force here.

It is almost impracticable for such hospitals to receive cheques from patients and more importantly should they spend their time in such tedious activities, when they do not have adequate and qualified manpower to render medical services? And how will they receive consideration? Suppose the patient avails of the services, issues a cheque, but it bounces? (Particularly outstation or emergency patients). Can they deny discharge to a patient till his cheque is cleared? If your object is to curb use of unaccounted money, is this a sound practice whereby only charitable institution and honest taxpayers are punished for carrying out IT Departments obligation and duty which is thrust upon them! Why can't a vigilance officer be stationed at large hospitals where medical treatment is likely to be costly? Most of the hospitals and nursing homes are run and managed by individual doctors.

The word "seller" is used to govern the items inserted by amendment by Finance Act 2016 w.e.f. 1-6-2016. Do the charitable hospitals 'sell' medical services or render public services?

Here also, there is urgent need to change the approach and delete such harsh and impractical provision or at least to come out with full clarification as to its scope and exact meaning of the words so loosely used. If the object is to more towards digital economy make the infrastructure reads first and then punish charitable Trusts and hospitals.

III. Section 115TD

Third provision falling in this category which is another glaring example requiring change in approach is section 115TD introduced by Finance Act, 2016 w.e.f. 1-4-2016. In substance, it provides that where a trust or institution enjoying the status of a Charitable Trust under the Income-tax Act, is dissolved or ceases to be charitable trust under the IT Act and availed of exemption under section 11 and has not handed over the assets to another charitable institution / trust recognized as such under the Income-tax Act within one year, is required to pay additional income tax at the maximum rate. The concept introduced for the first time in tax laws is 'accreted income'.

The word 'accreted' is defined in Oxford English Dictionary as "grown or formed by accumulation". But section 115 TD defines it exhaustively in these words : Section 115TD(2) – "The accreted income for the purpose of sub-section (1), means the amount by which the aggregate fair value of the total assets of the trust, as on the specified date, exceeds the total liability (obviously on the specified date only) computed in accordance with the method of valuation as may be prescribed. Thus net worth of an institution on this specified date computed presumable by adopting market value is deemed to be the income of one year and that too without bothering to amend Section 2(24) and then it is to be taxed at maximum marginal rate.

The section does not even specify over what period the assets should have been acquired – may be in 100 years in some case. The pious purpose of making this draconian and patently unconstitutional law is stated to be as under:

"There is need to ensure that the benefit conferred over the years by way of exemption is not misused and to plug the gap in law that allows the charitable trusts having built up corpus / wealth through exemption being converted into non-charitable organisation with no tax consequence."

This section applies to charitable societies registered under Societies Registration Act, 1860 also Section 20 of this Act provides

that this Act shall apply to societies formed for charitable or public purpose section 13 provides that upon dissolution no members shall receive profit but asset shall be given to some other society by '3/5th majority of member. But this clause does not apply to section 8 companies limited by shares. It will cover such company if it has no share capital-say limited by guarantee. Bye-laws of the society can provide for penalties. Thus it is felt that all these allied provisions should have been considered before hurriedly enacting the law.

It is further stated that

"In order to ensure that the intended purpose of exemption availed of by trust or institution is achieved, a specific provision in the Act is required for imposing a levy in the nature of an exit tax which is attracted in case of conversion or dissolution and does not transfer the assets to another charitable organisation.

It overlooks that a charitable trust not recognized under the IT Act, may still be a charitable trust and not private property. It is therefore difficult to appreciate how such a sense less levy of income tax on an amount (whether actually realised or not) on value of assets, which by no stretch of imagination can be considered as income.

Under section 4 income tax is to be levied on income and not on amounts which are not income at all. It only provides that the total income is to be computed" in accordance with and subject to the provision which may include levy of additional income tax but it has to be a tax on income only. As Lord MacNaghten reminded the Law Lords. "Income Tax, if I may remind my lords, is a tax on income, and not to collection of taxes. This fallacious approach and holier than though attitude needs to be changed at the earliest before the Income-tax Act and the Constitution of India become polluted.

If you want to punish unscrupulous trusts or trustees then a simple provision can be introduced in section 56(2)(x) being introduced by Finance Act 2017, in the proviso by adding the following words at the end of 'cl. (vi) and vii) as a proviso to it.

"Provided that nothing in cl (vi) and d(vii) above shall apply to assets / amounts received from such a trust on its dissolution or conversion into a non-charitable organisation, unless the recipient is a charitable trust or institution registered under section 12AA of this Act.

But what can be achieved by simple straight forward measure is contaminated because of a faulty approach.

Even otherwise the section is badly drafted. It does not make any distinction between assets representing accumulated income which has enjoyed tax exemption, and donation received towards or by way of corpus or assets acquired out of gifts to corpus. The expression 'accreted income' is clearly misleading.

The section also ignores the provisions of Section 36 of the Bombay Public Trusts Act, 1950 which requires Charity Commissioner's previous sanction who also has power to impose conditions.

All these provisions of various laws should have been reconciled before making a sweeping provision in the Income-tax Act, instead of in other relevant Acts.

Thus all the above three provisions demonstrate that there is need to change the basic approach of the legislatures in making laws before embarking on debatable amendments in its enthusiasm to abolish or curb black money. Else remedy will prove more deadlier than the disease!

B. V. Jhaveri, *Advocate*

DIRECT TAXES
Supreme Court

1. SLP dismissed against High Court's ruling that where assessee claimed a sum to have been derived from share business but in course of search proceedings admitted under Section 132(4) that it included accommodation entries, levy of penalty under section 158BFA was justified

[2017] 79 taxmann.com 184 (SC)

Supreme Court of India

JRD Stock Brokers (P.) Ltd. vs. Commissioner of Income Tax-II, New Delhi

The income offered in the block return was claimed as has been derived from the share business. However, in the course of the search the assessee had admitted that the said amount included accommodation entries. Estimation of income directed by the Tribunal was accepted by the assessee. Penalty u/s. 158BFA(2) was imposed. The case of the assessee was that levy of penalty cannot be based on an estimation or a voluntary act of the assessee such as surrender.

Confirming the penalty, the Delhi High Court held that since determination of additional income in the course of block assessment order was based upon a material discovered, i.e., the statement made by the assessee u/s. 132(4) that radically changed the character of income originally declared and therefore, levy of penalty was justified (375 ITR 600).

The SLP filed by the assessee company was dismissed without assigning any reason.

2. Section 32: Title to immovable property cannot pass when its value is more than ` 100/- unless it is executed on a proper stamp paper and is also duly registered with the sub-Registrar. Accordingly, a lessee cannot be said to be the "owner" for purposes of claiming depreciation. Under Explanation 1 to section 32, the lessee is entitled to depreciation on the cost of construction incurred by him but not on the cost incurred by the owner and reimbursed by the lessee

Mother Hospital Pvt. Ltd. vs. Commissioner of Income-tax, Trichur [Civil Appeal No. 3360 of 2006, dated 8th March, 2017]

1. Earlier a partnership firm Mother Hospital had been constituted by Dr. M. Ali, Dr. Ayesha Beevi and their three children. 4.3 acres of

land belonged to the firm. The purpose of the partnership firm was to run a super speciality hospital and accordingly, the firm started construction of the hospital building. Since it was felt expedient to form a private limited company to run and manage the hospital (then under construction), a company was formed for the said purpose and was incorporated on 30-12-1988. Thereafter, an agreement was entered into between the firm and the company by which it was agreed that the firm will complete the construction of the building and hand over possession of the same on completion, on the condition that the entire cost of construction of the building should be borne by the company. The relevant clause in the agreement reads:

"The hospital building shall belong to the company on the company taking possession thereof; but however that the firm has and will have a lien on the hospital building and on any improvements or additions thereto until the money owing by the company to the firm by virtue of this agreement is fully paid off."

2. The company took possession of the building on its completion on 18-12-1991 and is running the hospital therein with effect from 19-12-1991. The accounts of the company have been debited with the cost of construction of the building, i.e., ` 1,37,83,149.83. The accounts of the firm have also been credited with the payments of ` 1,06,78,456/- made by the company to the firm for completion of the construction. The balance amount payable by the company to the firm has been carried as the company's liability in its Balance Sheet, for which the firm had a lien on the building. This amount has also since been paid to the firm. The one time building tax payable by the owner of a building under the Kerala Building Tax Act was also paid by the company. Since the ownership of the land had to remain with the firm, it was also agreed that the land would be given on lease by the firm to the company and agreement dated 1-2-1989 provided for the said contingency as well in clause 4(g) which reads as under:

"(g) In consideration of the FIRM agreeing with the COMPANY to permit situation of the hospital building or any additions thereto belonging to the FIRM as aforesaid, the COMPANY shall pay to the FIRM a ground rent of ` 100/- per month, but however that the liability to pay such ground rent shall be on and from the 1st day of April, 1993 only."

3. The first assessment year of the company was 1992-93. The appellant-company filed its return for the said year in which it claimed depreciation on the building part of the said property under Section 32 of the Income-tax Act, on the ground that it had become the "owner of the company". The assessment officer, after construing the provisions of the aforesaid agreement came to the conclusion that the appellant-assessee had not become the owner of the property in question in the relevant assessment year and, therefore, rejected the claim of depreciation.

4. Appeal preferred by the assessee-company before the Commissioner of Income Tax (Appeals) met with the same fate. However, in further appeal before the Income Tax Appellate Tribunal (ITAT), the appellant succeeded. This success, however, was proved to be only of temporary nature inasmuch as the appeal of the Revenue against the order of the ITAT filed under Section 260A of the Income-tax Act before the High Court was allowed setting aside the aforesaid order of ITAT. The High Court held that the assessee had not become the owner of the property in question in the relevant assessment year and clause 4(g) could not confer any ownership rights on the assessee.

5. Dismissing the appeal of the appellant company the Supreme Court held as under:

"We are in agreement with the view taken by the High Court. Building which was constructed by the firm belonged to the firm. Admittedly it is an immovable property. The title in the said immovable property cannot pass when its value is more than ` 100/- unless it is executed on a proper stamp paper and is also duly registered with the sub-Registrar. Nothing of the sort took place. In the

absence thereof, it could not be said that the assessee had become the owner of the property.

"Before us another argument is raised by the learned counsel appearing for the appellant. It is submitted that having regard to clause 4(g), the appellant had become the lessee of the property in question and since the construction was made by the appellant from its funds, by virtue of Explanation (1) to Section 32 of the Income Tax Act, the assessee was, in any case, entitled to claim depreciation.

"This explanation reads as under:

"32(1)

.....

Explanation 1. Where the business or profession of the assessee is carried on in a building not owned by him but in respect of which the assessee holds a lease or other right of occupancy and any capital expenditure is incurred by the assessee for the purposes of the business or profession on the construction of any structure or doing of any work in or in relation to and by way of renovation or extension of or improvement to the building, the provisions of this clause shall apply as if the said structure or work is a building owned by the assessee."

"As is clear from the plain language of the aforesaid explanation, it is only when the assessee holds a lease right or other right of occupancy and any capital expenditure is incurred by the assessee on the construction of any structure or doing of any work in or in relation to and by way of renovation or extension of or improvement to the building and the expenditure on construction is incurred by the assessee, that assessee would be entitled to depreciation to the extent of any such expenditure incurred.

"In the instant case, records show that the construction was made by the firm. It is a different thing that the assessee had reimbursed the amount. The construction was not carried out by the assessee himself. Therefore, the explanation also would not come to the aid of the assessee."

3. S. 35D: Premium collected by a company on subscribed share capital is not "capital employed in the business of the Company" within the meaning of section 35D so as to enable the claim of deduction of the said amount as prescribed u/s. 35D.

Berger Paints India Ltd. vs. CIT, Delhi-V

[Civil Appeal No. 2162 of 2007, dated 28th March, 2017]

The Supreme Court had to consider whether "premium" collected by the appellant-Company on its subscribed share capital is "capital employed in the business of the Company" within the meaning of Section 35D of the Act so as to enable the Company to claim deduction of the said amount as prescribed under Section 35D of the Act? Answering the question in negative, the Supreme Court held as under:

(i) The expression "capital employed in the business of the company" is defined in the Explanation appended to sub-section (3) of section 35D of the Act.

(ii) The above clearly shows that capital employed in the business of the company is the aggregate of three distinct components, namely, share capital, debentures and long term borrowings as on the dates relevant under sub-clauses (i) and (ii) of Clause(b) of the Explanation. What was all the same argued by the counsel for the appellant was that premium was a part of the share capital and had, therefore, to be reckoned as 'capital employed in the business of the company'. There is, in

our view, no merit in that contention. The Tribunal has pointed out that the share capital of the Company as borne out by its audited accounts is limited to ` 7,88,19679/-. The company's accounts do not show the reserve and surplus of ` 19,66,36,734/- as a part of its issued, subscribed and paid up capital. It is true that the surplus amount of ` 19,66,36,734/- is taken as part of shareholders fund but the same was not a part of the issued, subscribed and paid up capital of the Company. Explanation to Section 35D(3) of the Act does not include the reserve and surplus of the Company as a part of the capital employed in the business of the Company. If the intention was that any amount other than the share capital, debentures and long term borrowings of the Company ought to be treated as part of the capital employed in the business of the company, the Parliament would have suitably provided for the same. So long as that has not been done and so long as the capital employed in the business of the Company is restricted to the issued share capital, debentures and long term borrowings, there is no room for holding that the premium, if any, collected by the Company on the issue of its share capital would also constitute a part of the capital employed in the business of the Company for purposes of deduction under Section 35D. The Tribunal was, in that view of the matter, perfectly justified in allowing the appeal filed by the Revenue and restoring the order passed by the Assessing Officer.

(iii) Second, on the other hand, non-mentioning of the words does indicate the legislative intent that the Legislature did not intend to extend the benefit of Section 35D to such sum.

(iv) These two reasons are in conformity with the view taken by this Court in the case of *Commissioner of Income Tax, West Bengal vs. Allahabad Bank Ltd., (1969) 2 SCC 143.* wherein the question arose as to whether an amount of ` 45,50,000/- received by the assessee (bank) in cash as "premium" from its various shareholders on issuing share on premium is liable to be included in their paid up capital for the purpose of allowing the assessee to claim rebate under Paragraph D of Part II of the first Schedule to the Indian Finance Act, 1956.

(v) As rightly pointed out by the learned Attorney General appearing for the Revenue, the Companies Act provides in its Schedule V - Part II (Section 159) a Form of Annual Return, which is required to be furnished by the Company having share capital every year. Column III of this Form, which deals with capital structure of the company, provides the break-up of "issued shares capital break up". This column does not include in it the "premium amount collected by the company from its shareholders on its issued share capital". This is indicative of the fact that such amount is not considered a part of the capital unless it is specifically provided in the relevant section.

(vi) Similarly, as rightly pointed out, Section 78 of the Companies Act which deals with the "issue of shares at premium and discount" requires a Company to transfer the amount so collected as premium from the shareholders and keep the same in a separate account called "securities premium account". It does not anywhere say that such amount be treated as part of capital of the company employed in the business for one or other purpose, as the case may be, even under the Companies Act.

4. S.147: Entire law on reopening of assessments pursuant to audit objections explained in the context

of the corresponding provisions of the Bihar Finance Act. If the AO disagrees with the information/ objection of the audit party and is not personally satisfied that income has escaped assessment but still reopens the assessment on the direction issued by the audit party, the reassessment proceedings are without jurisdiction

Larsen & Toubro Ltd. vs. State of Jharkhand and Ors.

[Civil Appeal No. 5390 of 2007, dated 21st March, 2017]

The Supreme Court had to consider whether on the information given by the audit team of the Auditor General, Bihar, the Assessing Authority was satisfied that reasonable ground exists to believe that a part of the turnover of the appellant-Company has escaped assessment within the meaning of Section 19 of the Bihar Finance Act, 1981 based on which the assessing officer can re-open the assessment? The point arose for consideration whether an 'audit objection' can be construed as 'information' within the meaning of Section 19 of the State Act.

The Supreme Court held as under:

(i) It is also pertinent to understand the meaning of the word 'information' in its true sense. According to the Oxford Dictionary, 'information' means facts told, heard or discovered about somebody/ something. The Law Lexicon describes the term 'information' as the act or process of informing, communication or reception of knowledge. The expression 'information' means instruction or knowledge derived from an external source concerning facts or parties or as to law relating to and/ or having a bearing on the assessment. We agree that a mere change of opinion or having second thought about it by the competent authority on the same set of facts and materials on the record does not constitute 'information' for the purposes of the State Act. But the word "information" used in the aforesaid Section is of the widest amplitude and should not be construed narrowly. It comprehends not only variety of factors including information from external sources of any kind but also the discovery of new facts or information available in the record of assessment not previously noticed or investigated. Suppose a mistake in the original order of assessment is not discovered by the Assessing Officer, on further scrutiny, if it came to the notice of another assessor or even by a subordinate or a superior officer, it would be considered as information disclosed to the incumbent officer. It will be information in his possession within the meaning of Section 19 of the State Act. In such cases of obvious mistakes apparent on the face of the record of assessment, that record itself can be a source of information, if that information leads to a discovery or belief that there has been an escape of assessment or under-assessment or wrong assessment.

(ii) There is a catena of judgments of this Court holding that assessment proceedings can be reopened if the audit objection points out the factual information already available in the records and that it was overlooked or not taken into consideration. Similarly, if audit points out some information or facts available outside the record or any arithmetical mistake, assessment can be re-opened.

(iii) It would be sufficient to refer to a judgment of this Court in *Anandjiharidas & Co. vs. S.P. Kasture AIR 1968 SC 565* wherein it was held that a fact which was already there in records doesn't by its mere availability becomes an item

of "information" till the time it has been brought to the notice of assessing authority. Hence, the audit objections were well within the parameters of being construed as 'information' for the purpose of Section 19 of the State Act.

(iv) We are of the clear view that on the basis of information received and if the assessing officer is satisfied that reasonable ground exists to believe, then in that case the power of the assessing authority extends to re-opening of assessment. The question still is as to whether in the present case, the assessing authority was satisfied or not.

(v) From a perusal of the last paragraph of the aforementioned report of the audit party, it is clear that the Assessing Officer was of the opinion that as the goods had not been transferred to appellant-Company but had been consumed, so it does not come under the purview of taxation. In other words, the Assessing Officer was not satisfied on the basis of information given by the audit party that any of the turnover of the appellant-Company had escaped assessment so as to invoke Section 19 of the State Act. From the above, it also appears that the assessing officer had to issue notice on the ground of direction issued by the audit party and not on his personal satisfaction which is not permissible under law.

(vi) In view of the above discussion, we are of the considered view that the order dated 27-2-2006 passed by the Deputy Commissioner, Commercial Taxes, Urban Circle, Jamshedpur is without jurisdiction and the High Court was not right in dismissing the petition filed by the appellant-Company. We, therefore, allow the appeal and set aside the order dated 27-2-2006 passed by the Deputy Commissioner, Commercial Taxes, Urban Circle, Jamshedpur as well as the order dated 17-11-2006 passed by the Division Bench of the High Court of Jharkhand. However, the parties shall bear their own costs.

Cases referred

M/s. Indian & Eastern Newspaper Society, New Delhi vs. Commissioner of Income Tax, New Delhi (1979) 4 SCC 248.

Bhimraj Madanlal vs. State of Bihar and Another (1984) 56 STC 273.

Usha Sales (Pvt.) Ltd. vs. The State of Bihar (1985) 58 STC 217.

Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes). Ernakulam vs. M/s. Thomas Stephen & Co. Ltd. Quilon (1988) 2 SCC 264.

Commissioner of Income Tax vs. P. V. S. Beedies Pvt. Ltd. (1998) 9 SCC 272.

Anandji Haridas and Co. (P) Ltd. vs. S. P. Kasture and Others AIR 1968 SC 565.

Commissioner of Customs, Mumbai vs. Virgo Steels, Bombay and Another (2002) 4 SCC 316.

Supreme Paper Mills Limited vs. Assistant Commissioner, Commercial Taxes, Calcutta and Others (2010) 11 SCC 593, Chatturam & Ors. vs. CIT, Bihar AIR 1947 FC 32.

Commissioner of Income Tax, U.P., Lucknow vs. M/s. Gurbux Rai Harbux Rai (1971) 3 SCC 654.

M/s. Phool Chand Bajrang Lal and Another vs. Income Tax Officer & Another (1993) 4 SCC 77.


Ashok Patil & Priti Shukla, *Advocates*

DIRECT TAXES
High Court

1. TDS – Section 194C vis-a-vis 194J

Principal CIT vs. Senior Manager (Finance) Bharat Heavy Electricals Ltd. (2017) 291 CTR (P&H) 161.

TDS inspection was carried out u/s. 133A of IT Act, 1961 on the Respondent. The Assessing Officer found that the respondent had made payment to five contractors in respect of various contracts and deducted tax in respect thereof u/s. 194C of IT Act. The Assessing Officer found that all the contracts involved the provisions of Professional and technical services which fell within the ambit of the provisions of Section 194J of the Act and the amount paid under the contracts constituted fees for Professional or Technical services attracting Section 194J or whether they constituted payments of Section 194C of IT Act. The Assessing Officer concluded that contractors were required to employ qualified engineers and highly skilled manpower to execute certain activities so as to provide fault free services to the Respondent. The services of contractors therefore involved fees for technical services attracting the provisions of s.194J of IT Act and thereafter treated assessee as assessee in default u/s. 201(IA) of IT Act. CIT(A) reversed finding of Assessing Officer. On Revenue's appeal in HC, HC held in favour of assessee and held that after reading contract as whole the services are for the purposes of erecting, commissioning, testing and trial operation of the equipment in accordance with and subject to the terms and conditions of the contract, contract was not for the provisions of technical services, Section 194J was not therefore applicable. Court also held that Section 19J is not a residuary clause and therefore Section 194C and Section 194J are independent provisions.

2. Capital or Revenue Expenditure – Software development exp.

Indian Aluminium Ltd. vs. CIT (2017) 291 CTR (Cal) 196

Assessee company was engaged in the business of manufacture and production of aluminium and related products. During the year, assessee incurred expenditure on software development and claimed it as deferred revenue expenditure in its books of account and also amortised certain amount by debiting the same in its P&L A/c of the previous year. The Assessing Officer disallowed it as Capital expenditure in scrutiny proceedings u/s. 143(3) of IT. On appeal, CIT(A) held in favour of assessee. On revenue's appeal in Tribunal, Tribunal once again reversed the findings of CIT(A) and sustained Assessing Officer's finding. On further appeal in HC, Hon'ble HC decided in favour of assessee and held that Software

developed by the assessee is application software which allows it to efficiently carry out mining activity for the extraction of bauxite. Application Software is distinct from system software as it has to be constantly updated due to rapid advancements in technology and increasing complexity of the features. Software industry is one such field where advancements and charges happen at a lighting pace and it is difficult to attract any degree of endurability even to system software let alone application software. Therefore HC held that Tribunal erred in law in confirming the disallowance of expenditure incurred for software development as Capital expenditure.

3. Exemption u/s. 10(23C)(vi) – Educational institution

Ganpat University vs. Arvind Shankar, CCIT (2017) 147 DTR (Guj.) 335

Petitioner being a University was a Trust registered under the Bombay Public Trust Act and enjoys registration u/s. 12AA of IT Act approved under S. 80G(5) of Act. The University was engaged in imparting educational courses in various fields such as engineering, computer, management, Pharmacy, Computer etc. The Trust also runned secondary and higher secondary schools. The object was to impart knowledge for the advancement of mankind. Petitioner filed an application seeking exemption u/s. 10(23)(vi) of the Act under the prescribed format. The Revenue noticed that the accounts of the University showed profit of extremely high percentage which was 80.35%, 67.37% & 58.91% for A.Ys.: 2008-09, 2009-10 & 2010-11 respectively. The Revenue also observed that Petitioner has not filed the audited account which was requirement as per 10th Proviso to Section 10(23C) of the Act and asked assessee to explain why on such ground also the application should not be rejected. The Petitioner's contention before Assessing Officer was that the Institution was not runned for profit motive. The contention was rejected by both Assessing Officer and Chief CIT as CIT viewed that trust was required to file audit report in terms of the 10th proviso to Section 10(23C) which it failed. On assessee's appeal in HC, Hon'ble HC set aside the appeal and remanded the matter back to the Assessing Officer for reconsideration on the aspect that generating certain surplus after carrying out educational activities by itself would not indicate that institution did not exist for educational purposes but for the purposes of making profit. Requirement of filing of the audit report as required under the 10th proviso to Section 10(23C) obviously would arise at the time of filing of the return and not at the time of filing of application for approval.

4. Withdrawal of appeal – No rectification u/s. 254(2)

Jayant D. Sanghvi vs. ITAT & Ors. (2017) 147 DTR (Bom.) 370.

Petitioners appeal u/s. 263 of IT Act was withdrawn by the Revenue u/s. 254(1) of the Act. The dismissal of the appeal was at the specific request of the Petitioner as contained in his letter dated 23-4-2010 seeking unconditional leave of the Tribunal to withdraw the appeal. Thereafter Petitioner filed MA for recall of the order dated 7-5-2010. The basis for the recall of the order dated 7-5-2010 was that appeal was withdrawn in Tribunal in view of the counsel's advice. On 14-11-2013 Tribunal dismissed the MA *vide* order dated 7-5-2010. On Writ Petition in HC, Hon'ble HC held that from the impugned records, the fact that the appeal was withdrawn on the specific request of the Petitioner himself and in which there was no reference to the fact that the appeal was withdrawn because of the advice of his advocate. Tribunal dismissed MA order u/s. 254(2) of the IT Act. It was also noted that

the Writ Petition was filed by the Petitioner four years after the impugned order u/s. 254(2) of the IT Act. On Writ Petition in HC, Hon'ble HC dismissed the writ Petition and held that the communication dated 23-4-2010 addressed to the Tribunal for withdrawal of the appeal was by the assessee himself and in that communication he did not mention that the appeal was withdrawn on account of legal advice. In absence of any advice of advocate to withdraw his appeal, it cannot be said there was any error apparent on the record.

5. Section 37(1) – Payment for failure to install pollution control device – Compensation paid for causing damage to environment – Deduction allowable – A.Y. 2003-04

Shyam Sel Ltd. vs. DCIT (2017) 148 DTR (Cal.) 167

The assessee in the instant case had failed to install pollution control device. The payment was recovered from the assessee by the State Pollution Control Board for the purpose of compensating for the damage caused to the environment. It was held that the payment was for the purpose of compensating the damage to the environment and this compensation had been recovered on the 'polluter pays principle' adopted by the Organization for Economic Co-operation and Development. It was not the case that the business of the assessee was illegal, the compensation was failure on part of the assessee to install the equipment, and there it was held the compensation was expenditure incurred for the purpose of the business and Explanation 1 to section 37(1) was not attracted and therefore the deduction is allowable.

6. Section 158BC – Scope *vis-à-vis* incriminating material – Block assessment cannot be based on material come into possession subsequent conclusion of search operations

CIT vs. Pinaki Misra (2017) 148 DTR (Del.) 219

In the instant case the additions were made by the AO on material which formed a part of the original assessment and from material gathered from extraneous sources and not from material seized from a search. The High Court held that the block assessment is to be carried out on the basis of material found during the course of search and not as a result of other documents or other material which come into the possession of the AO subsequent to the conclusion of the search operation unless and until such material has a connection or relationship with certain material or evidence found during the course of search.

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DIGEST OF CASE LAWS
Tribunal

Reported

1. Business expenditure – Section 37(1) of the Income-tax Act, 1961 – Expenditure incurred on setting up of a new unit for manufacturing of same product which is already manufactured by the assessee – expenditure is allowable as business expenditure

Hinduja Foundries Ltd. vs. ACIT (2017) 148 DTR (Chennai)(Trib.) 158

The assessee before the Hon'ble Appellate Tribunal was engaged in the business of manufacturing iron casting. The assessee during the relevant assessment year established new unit which has been capitalised in the books of account. However, while computing the taxable income, the assessee claimed the same as revenue expenditure on the ground that the new unit is merely an expansion of the existing unit. The A.O. rejected the claim of the assessee on the ground that the assessee has established new industrial undertaking independent from the existing industrial undertaking. Hence, the expenditure incurred by the assessee is capital in nature. On appeal the First Appellate Authority upheld the action of the A.O.

The assessee being aggrieved by the order passed by learned CIT(A) preferred an appeal before the Hon'ble Appellate Tribunal, Chennai. The Appellate Tribunal was pleased to allow the appeal of the assessee by observing that assessee having established new units for manufacturing the same product which it was already manufacturing, expenditure incurred in connection with setting up of new units is allowable as revenue expenditure.

2. Deduction under Section 80P(2)(a)(iii) of the Income-tax Act, 1961 – Sale of toddy taped from coconut trees of members belonging to co-operative society – Amounts to marketing of agricultural produce of members – Entitled to deduction. A.Ys.: 2008-09 to 2011-12

Kannur Range Kallu Chethu Vyavasaya Thozhilali Sahakarana Sangam Ltd vs. ACIT (2017) 148 DTR (Coch.) (Trib.) 189

The assessee before the Appellate Tribunal is a co-operative society engaged in the business of sale of toddy. Toddy is tapped from coconut trees belonging to the members of the society. The members of the society are toddy tappers.

The objective of the society as per its bye-laws is to market toddy brought by its members. The assessee filed its return of income and claimed deduction under Section 80P on its entire income. The A.O., however, disallowed the claim of the assessee on the ground that toddy obtained by the assessee is not an agricultural produce and the marketing of which cannot be treated as marketing of agricultural produce. On appeal, the First Appellate Authority upheld the action of the A.O.

The assessee being aggrieved by the order passed by learned CIT(A) preferred an appeal before the Hon'ble Appellate Tribunal, Kochi. The Appellate Tribunal was pleased to allow the appeal of the assessee by observing that admittedly coconut tree is an agricultural tree and toddy is tapped from the stems of the coconut tree. The stems grow into coconut which is an agricultural produce, just as sugar, made out of sugarcane, is an agricultural produce. Thus, toddy is an agricultural produce made out of stems of coconut tree. Thus, the assessee marketing toddy extracted from coconut trees grown by its members, is engaged in marketing agricultural produce of its members entitled to deduction under Section 80P(2)(a)(iii) of the Act.

3. Revision – Order erroneous as well as prejudicial to the interest of revenue – Section 263 of the Income Tax Act, 1961 – Assessee furnished reply to the show cause notice and furnished the relevant details – Onus is on the CIT to prove with cogent material that explanations put forth were not proper and assessment was erroneous and prejudicial to interest of Revenue. A.Y. 2011-12

Riverbank Developers Pvt. Ltd. vs. CIT (2017) 49 CCH 0136 (Kol.)(Trib.)

The assessee before the Hon'ble Appellate Tribunal was a private limited company which was set up as joint venture promoted by Bata India Ltd. and Calcutta Metropolitan Group Limited for developing a township project on the land belonging to Bata India Ltd. at Batanagar. As in the past, during the relevant year the appellant was engaged in development of land, construction & management of properties, buildings & assets and the principal project undertaken during the year was 'Calcutta Riverside' township at Batanagar. For the A.Y. 2011-12 the assessee filed its return of income declaring loss of ` 7,99,47,129/-. The return was selected for scrutiny assessment by issuing statutory notice under Section 142(1) of the Act calling upon the assessee to furnish information, details & documents with regard to various issues specified in the questionnaire annexed with the notice. After considering the submissions, information and documents furnished from time-to-time, order under section 143(3) was passed assessing net loss of ` 7,81,44,753/-. Subsequently Pr. CIT-4, Kolkata issued a show cause notice requiring the assessee to show cause as to why the assessment order should not be revised, since in his opinion the order was erroneous in so far as prejudicial to the interest of the Revenue. In response to said notice, the assessee filed detailed explanation and documents to show that the order under Section 143(3) could not be held to be erroneous as well as prejudicial to the interest of revenue. The learned CIT however rejected the explanations and the details furnished and passed the impugned order setting aside the assessment and directing the AO to examine the case properly after giving opportunity of being heard to the assessee.

The assessee being aggrieved by the order passed by learned CIT filed an appeal before the Hon'ble Appellate Tribunal, Kolkata. The Appellate Tribunal was pleased to cancel the order passed by learned CIT under Section 263 of the Act by observing that no

specific document or evidence was specified by the learned CIT in his order which he had expected or required the assessee to produce but which the assessee failed to produce at the stage of revision. Assessment has been set aside by the learned CIT only with a view to give the A.O. one more opportunity of conducting roving enquiry without establishing in any specific manner as to how A.O.'s assessment order dated 28-3.2014 was erroneous in so far as prejudicial to the interest of the Revenue. By setting aside the assessment and directing the A.O. to pass fresh order of assessment, the learned CIT has merely given the AO a second inning which is not the aim and object of Section 263 of the Act.

4. Concealment penalty – Section 271(1)(c) of the Income-tax Act, 1961 – Bogus software purchases – addition was made on the basis of post search enquiries – Penalty levied as the addition was confirmed by the Appellate Authorities – Penalty proceedings are independent of assessment proceedings and mere confirmation of addition cannot be sole ground to levy penalty of assessment. A.Ys. 2008-09 to 2010-11

Chintels India Ltd. vs. ACIT (2017) 49 CCH 0134 (Del.)(Trib.)

The assessee is a company engaged in business of horticulture, agriculture and real estate. The assessee's business and residential premises were subjected to search action under Section 132 of the Act.

During the enquiry after the search and seizure operation it was found that the assessee had purchased software of ` 42,424,550/- from M/s. Macro Infotech Ltd. The A.O. observed that M/s. Macro Infotech Ltd. is formed by one Shri Tarun Goyal, who has confirmed in his statement given under Section 132(4) during the search and seizure action that the said company was engaged in issuing bogus bills and which did not have any expertise in software business. The A.O., therefore, held that the assessee had taken the bogus bills to inflate their expenditure. Thus, the A.O. disallowed the claim of depreciation on the software purchased from M/s. Macro Infotech Ltd. The disallowance made by the A.O. was upheld by the Appellate Tribunal. The A.O. also passed order under Section 271(1)(c) of the Act levying penalty on the additions confirmed by the Appellate Authorities. On appeal the First Appellate Authority upheld the action of the A.O.

The assessee being aggrieved by the order passed by learned CIT(A) preferred an appeal before the Hon'ble Appellate Tribunal, Delhi. The Appellate Tribunal deleted the penalty levied by the A.O. by observing that settled position of law that penalty proceedings are independent of assessment proceedings and that mere confirmation of addition cannot be sole ground to levy penalty. In penalty orders, the AO has himself observed that entire proceedings of assessments were based on a) post search enquiries b) statement of Shri Tarun Goyal, which have been key factors to impose penalty u/s. 271(1)(c). In present appeals, it undisputed that no incriminating material was unearthed during assesssee's search u/s. 132, that no independent enquiry and examination took place during assessment proceedings *qua* Shri Tarun Goyal and Micro Infotech Ltd., that only post search enquiries were made on the basis of the entire assessment and penalty proceedings. Scales are different in penalty and quantum proceedings and penalty cannot be automatic to confirmation of addition in quantum proceedings.


CA Tarunkumar Singhal & Sunil Moti Lala, *Advocate*

INTERNATIONAL TAXATION
Case Law Update

A. HIGH COURT

1. The Court deleted the disallowance of technical know-how fees paid in respect of services unavailed by the assessee by relying on its earlier year judgment wherein it was held that TPO cannot disallow part of the expenses without applying one of the prescribed methods.

Merck Ltd. [TS-130-HC-2017(Bom.)-TP]

Facts

i) The assessee, had entered into an agreement with its AE for receiving the technical know-how consultancy in 11 different areas and had accordingly, paid technical know-how fees. The service was provided by AE for 5 out of 11 different areas.

ii) The TPO disallowed the proportionate expenditure in respect of areas for which no service was availed and after determining value of certain services as nil, he proposed a TP adjustment.

iii) The Tribunal following decision in assessee's own case for earlier AY wherein it was held that TPO cannot disallow a part of the expenses without applying one of the methods prescribed under TP Regulations, deleted the TP addition. It further held that TPO cannot determine value of certain services at Nil and since, the margin of the assessee was higher than comparable companies under TNMM, the TP addition for technical know-how fee was unwarranted.

iv) Aggrieved, the Revenue preferred appeal before the High Court.

Held

i) The Court observed that in the earlier AY as well, the Revenue had filed an appeal against the Tribunal's order and the Court had approved the finding of Tribunal that the agreement for technical know how / consultancy was in respect of all the twelve services and the assessee could avail of all or any one of these twelve areas listed out in the agreement as and when the need arose.

ii) It had further held that since Revenue had not applied any specific TP method and had not carried out any benchmarking with comparables to work out proportionate disallowance, attributing nil value by AO to nine of the services not availed of by the assessee was not justified.

iii) In view of its earlier decision in the assessee's own case, the Court dismissed the Revenue's appeal stating that the same did not give rise to any substantial question of law.

2. The Court disposed of the writ petition against the Nil ALP determination by TPO and directed the TPO to reconsider assessee's submission

AB Mauri India Pvt. Ltd. [TS-1097-HC-2016(Mad.)-TP]

Facts

i) The assessee entered into an intra-group services agreement with its AE to avail support services primarily in the nature of marketing, finance, technology and human resource and paid cost plus 5% mark-up as management charges to AE for availing the said services.

ii) The TPO concluded that payment of management fees was not required since there was no improvement in revenue, and thus determining ALP of the said service at Nil, made an adjustment.

iii) The Tribunal observed that the TPO had not discussed the appropriate method for computing ALP and simply concluded that management fees payment was not justified as there was no improvement in revenue. It held that the TPO was required to compare the management fees with that of the comparable companies in India on the basis of the methods prescribed under Rule 10B and since the TPO had failed to compare assessee's payment with comparable companies, the matter had to be reconsidered. Accordingly, it remitted the matter back to AO/TPO to examine the issue in light of method prescribed under Rule 10B. On remand, the TPO once again computed ALP of the management fees at Nil without comparing the same with that of comparable companies.

iv) The assessee filed a writ petition against the show cause notice issued and contended that upon remand by the Tribunal, the TPO had once again computed ALP of management fees paid at 'Nil' without comparing the same with independent comparable companies as directed by the Tribunal.

Held

i) The Court disposed of the writ petition holding that no interference was called for at this stage. However, it directed the TPO to consider the assessee's submissions in their entirety.

3. Where the Tribunal remands the matter with identical directions as given by it in earlier years, it should refrain from making further observations regarding the mode and manner in which the TPO/AO should comply with the said directions

Fosroc Chemicals India Private Limited [TS-158-HC-2017(KAR)-TP]

Facts

i) The assessee, M/s. Fosroc Chemicals India, a subsidiary of M/s. Fosroc International Ltd., U.K was engaged in manufacturing and marketing of speciality construction chemicals.

ii) The technical know-how was supplied to the assessee by its AE M/s Fosroc International Ltd., U.K and the same was benchmarked using TNMM as the most appropriate method.

iii) TPO was of the view that the payment for technical and management fees to AE was an independent transaction which had to be analysed by applying CUP method. Accordingly, he held that the assessee had failed to prove the ALP of the technical and management costs paid to its AE and thus, determining the ALP of the same as Nil, made the TP adjustment.

iv) The Tribunal, relying on the co-ordinate bench ruling in the assessee's own case for earlier AY, wherein on identical facts, it had remanded the issue of ALP determination to the TPO, set aside the AO's order for the relevant year also with identical directions as was given in earlier AY. However, the Tribunal made further observations regarding the mode and manner in which TPO/AO should exercise power.

v) The assessee filed appeal before the High Court challenging the Tribunal's order and contended that the Tribunal should not have made further observations after remanding the issue to TPO / AO for following earlier year's Tribunal decision.

vi) The Revenue contended that Tribunal had just elaborated about various aspects to be examined by the TPO / AO while complying with the direction of remand and that therefore, there was no contradiction in the order of the Tribunal *vis-à-vis* the earlier direction given by the Tribunal for the earlier AY.

Held

i) The Court stated that it was a well settled view that the Tribunal is bound by its earlier view, more particularly in respect of the very same assessee and that, once the finding was recorded to remand with a particular direction, the Tribunal should have refrained itself from making any observation with regard to the mode and the manner in which the direction was to be complied with.

ii) The Court held that once the Tribunal found that the matter deserved to be remanded to TPO / AO with the identical direction as was given in the case of the assessee for earlier AY, the Tribunal ought to have ended there and it was not open to Tribunal thereafter to control the power of TPO / AO.

iii) It further held that the TPO / AO would be required to consider this matter in the same manner as was considered earlier in light of the directions given for the earlier AY.

4. The Court confirmed Tribunal's order deleting concealment penalty levied u/s. 271(1)(c) for TP addition made as the assessee had satisfied the requisite conditions of good faith and due diligence as stipulated in Explanation 7 to Section 271(1)(c)

Mitsui Prime Advanced Composites India Pvt. Ltd. [TS-135-HC-2017(Del.)-TP]

Facts

i) Assessee engaged in business of trading, carried out manufacturing for the first time, pursuant to 'Project Consultancy and Business Transfer Agreement' entered by it with its AE – Grand Siam Composites Co. Ltd. (GSC). As a consequence of this agreement, the business of the AE with Maruti Suzuki Ltd. was transferred to the assessee with all the business activities, contracts etc. and the AE had also agreed to provide consultancy services in relation to the transition of such business, technical information, know-how etc. relating to the products manufactured and sold to Maruti Suzuki. Further, the assessee paid GSC for availing engineering services for installing plant and machinery. It also paid to its another AE – Prime Polymer Co. Ltd., Japan for availing management support services for assistance in business operations. The assessee had adopted TNMM as the most appropriate method for benchmarking the aforesaid international transactions.

ii) The TPO determined ALP of the international transactions viz., availing of specified business and consultancy services, engineering support services and management support services at Nil under the CUP method, by contending that assessee did not avail any services for which the payment was made to its AEs as no benefit had been received and that there was duplication of services. Consequently, the TPO made an addition.

iii) The difference in the adoption of method from TNMM to CUP, led to reduction of losses and since the returned loss was marginally reduced, the assessee did not challenge the addition in quantum proceedings.

iv) According to the AO, since the explanation offered by the assessee was not satisfactory and did not display good faith, he levied penalty u / s. 271(1)(c) on the ground that an adverse

order u/s. 92C attracted the 7th Explanation to section 271(1)(c).

v) The Tribunal held that the TPO had evaluated international transaction of payment for consultancy service in connection with the 'project consultancy and business transfer agreement' to AE as a mere rendering of service and disregarded the fact that payment was mainly for acquiring business of Maruti Suzuki Ltd. and receipt of technical know-how etc. for the manufacture of products to be sold to Maruti Suzuki Ltd. As regards the engineering support services, the Tribunal observed that the same was paid for installing plant and machinery for supplying goods to Maruti Suzuki. As regards, management support services, the Tribunal observed that the agreement with AE provided that AE would assist in business operations of assessee and in market development. It rejected Revenue's contention that no services were availed by assessee noting that the manufacturing facility resulted in sale of goods which indicated benefit derived from payment of 3 international transactions. It further held that since no manufacturing activity was done by the assessee in the past, the services under the agreement could not be characterised as duplication of services.

vi) With regards to penalty levied, the Tribunal held that levy of penalty was not automatic upon the addition being made and that the necessary criteria for penalty imposition was not surrender/acceptance of addition but evaluation of circumstances leading to same and if a surrender of an addition is made due to failure of the assessee to establish his case to the satisfaction of the AO despite the genuineness of the explanation, it will not call for imposition of penalty, notwithstanding that such an addition has been confirmed in appeals.

vii) Aggrieved, the Revenue filed appeal to the High Court against the order of Tribunal and contended that the assessee was obliged to disclose the benefits and advantages they had derived from the services and such failure resulted in rejection of TNMM and losses and accordingly, penalty u/s. 271(1)(c) was justified.

Held

i) The Court upheld the Tribunal's order deleting the penalty and observed that the assessee's claim was in respect of a new line of business of manufacturing and accordingly, held that failure of the assessee to disclose the benefits and advantages they had derived from the services *per se* could not have triggered the automatic presumptive application of 7th Explanation of Section 271(1)(c).

5. The Court upheld Tribunal's order deleting TP addition on account of royalty payment for technical know-how and usage of brand made by assessee since the restriction of royalty payment was arbitrary and *ad hoc*

Johnson & Johnson Ltd. [TS-171-HC-2017(Bom.)-TP]

Facts

i) The assessee made payment of royalty to its AE for the use of brand and trademark at 1% of net sales (net of taxes) and for use of technical/marketing know-how provided at 2% (net of taxes) on sale of manufactured and traded finished goods. It had also borne the taxes arising out of payment of brand royalty and royalty on technical/marketing know-how.

ii) The assessee's brand usage royalty agreement covered the period from 1st July, 2001 to 31st March, 2002. The assessee had submitted draft agreement to the RBI on 10th August, 2001 for which approval was granted on November, 2001 and thereafter, the final agreement was executed on 14th March, 2002 which provided for payment of royalty w.e.f. 1st July, 2001. Further, the know-how agreement was also approved by the RBI.

iii) With regards to payment of royalty for the use of brand and trademark, the TPO accepted the same to be at ALP and for technical know-

how royalty paid on manufactured goods, the TPO restricted it to 1% instead of 2%. As regards technical know-how royalty on sale of traded goods, the TPO observed that royalty was not required to be paid on traded products and that the same was covered in brand royalty. Accordingly, he disallowed the same. As regards, taxes borne by the assessee on the royalty payment for brand usage and technical know-how, the TPO observed that as per the agreements the assessee was not required to bear the tax liability. Accordingly, he disallowed the tax paid on the brand royalty as well as royalty for technical know-how.

iv) With regard to technical know-how royalty paid on manufactured goods, CIT(A) held that restricting the royalty paid to 1% by the TPO was arbitrary and *ad hoc* as the TPO did not determine the ALP of the technical know-how by adopting any of the methods prescribed u/s. 92C of the Act. In respect of royalty paid on sale of traded goods, CIT(A) deleted the disallowance since the payment was an integral part of the know-how agreement. In respect of royalty payment on brand usage for the period 1st July, 2001 to 14th March, 2002, the CIT(A) disallowed the royalty paid as the assessee had failed to produce minutes of its board meeting recording the decision to make the payment of brand usage royalty at 1% w.e.f. 1st July, 2001. In respect of the tax on brand royalty, CIT(A) confirmed the disallowance made by the TPO. However, he deleted the disallowance of tax on royalty paid for technical know-how.

v) The Tribunal confirmed the order of CIT(A) deleting the TP addition in respect of technical know-how royalty on manufactured goods made by the TPO by restricting royalty from 2% to 1%. In respect of royalty on traded goods, the Tribunal confirmed the order of CIT(A) allowing the same since the same was paid as per the know-how agreement approved by RBI. However, in respect of royalty on brand usage, it reversed CIT(A)'s disallowance of royalty payment since CIT(A) had ignored the fact that approval of RBI was obtained and thereafter the final agreement was executed. Relying on the decision in *CIT vs. Associated Electrical Agencies 266 ITR 63 (Mad HC)*, it held that even if there was no agreement to support the payment, yet where the payment was made on account of commercial expediency, the same ought to be allowed. With regards to tax paid on brand royalty and technical know-how, the Tribunal observed that the respective agreements specifically mentioned that the royalty was to be remitted net of taxes and for which requisite RBI approval was obtained. Accordingly, with respect to taxes on brand and technical know-how royalty, the Tribunal deleted the disallowance since the assessee had entered into commercial agreement with its AE to bear the taxes which was also approved by the RBI. Accordingly, it held that the same could not be questioned while calculating ALP.

vi) Aggrieved, the Revenue filed appeal before the High Court.

Held

i) In respect of royalty paid on technical know-how, the Court upheld the order of Tribunal and held that the TPO is mandated by law to determine the ALP by following one of the methods prescribed u/s. 92C of the Act and since this exercise had not been carried out by TPO, determination of ALP by the TPO was *ad-hoc* and arbitrary.

ii) As regards royalty on usage of brand, the Court upheld the view taken by the Tribunal since there was an understanding between the parties that the royalty payment would be made w.e.f. 1st July, 2001 and RBI approval had also been obtained.

iii) The Court further, admitted the Revenue's appeal against Tribunal's deletion of tax on trademark/brand name royalty since as per the clause in the agreement, there was no condition for royalty being net of taxes and approval taken from RBI could not have be taken to be augmenting the terms of agreement.

iv) It also admitted the Revenue's appeal against Tribunal's deletion of the disallowance made for royalty on traded goods.

6. The Court admitted Revenue's appeal against Tribunal's order quashing TP assessment framed on the amalgamating company

Maruti Suzuki India Ltd. [TS-172-HC-2017(Del.)-TP]

Facts

i) The assessee, Maruti Suzuki India Ltd., was the successor of Suzuki Powertrain India Ltd. (erstwhile entity i.e. amalgamating company), which amalgamated with the assessee w.e.f. April 1, 2012.

ii) The erstwhile entity i.e. amalgamating company had undertaken international transactions with its AE, against which the TPO proposed adjustment on account of excess royalty, considering arm's length royalty @ 3% instead of 1.39%. Accordingly, the AO framed the assessment in the hands of erstwhile entity / amalgamating company after incorporating the TP addition.

iii) The Tribunal observed that the amalgamation was effective from April 1, 2012, pursuant to approval by Delhi HC *vide* order dated January 29, 2013, while assessment was framed *vide* order dated March 3, 2015 and accordingly, the amalgamating company was not in existence at the time of passing the assessment order and therefore, the assessment was void *ab initio*. Referring to the provisions of Section 170(2) as per which assessment in case of amalgamation must be made on the successor (i.e. amalgamated company) and not on predecessor (i.e. amalgamating company), the Tribunal rejected the contention of the Revenue that assessment was rightly framed on the erstwhile entity / amalgamating company which had filed the return of income and was in existence when the income was earned.

iv) Aggrieved, the Revenue filed appeal before the High Court.

Held

The Court admitted the appeal of Revenue against the order passed by the Tribunal.

7. Disallowance cannot be made by the AO in the final order if the same is not made in the draft order u/s. 144C

Woco Motherson Advanced Rubber Technologies Limited [TS-173-HC-2017(Guj.)-TP]

Facts

i) The assessee, Woco Motherson Advanced Rubber Technologies Limited, a joint venture between Woco Germany and Motherson India and was engaged in manufacturing of high quality rubber parts etc. The assessee had entered into an international transaction with Woco Sharjah (AE) for payment of technical services fees.

ii). The TPO noted that Woco Sharjah was located in low tax jurisdiction and that the assessee had made payment for technical services fees to it while the intangibles associated with the manufacturing process were owned by Woco Germany. Accordingly, he compared the transaction of technical services with Sharjah AE with that of royalty-free licensing of manufacturing process intangibles with German AE. The assessee contended before the TPO that services by Woco Sharjah and Germany were distinct, as the technical services agreement with Woco Sharjah was for achieving operational and technical competencies, relating to the know-how and technology licensed to the assessee by Woco Germany whereas Woco Germany had granted the assessee a non-exclusive licence to manufacture, use, exercise or sell licensed products / use its know-how and inventions. The TPO however, rejecting the contention of the assessee, determined ALP of technical services at Nil and proposed an adjustment. This was confirmed by DRP.

iii) Further, the AO while passing the final assessment order made a disallowance of deduction claimed u/s. 10AA of the Act, despite the fact that it was not proposed in the draft assessment order.

iv) With regard to payment of technical fees, the Tribunal observed that Revenue's comparison of technical fees to Woco Sharjah with royalty free licensing of manufacturing process intangibles from German AE was not valid since transaction with the German AE was an intra-AE transaction and the same could not be considered as valid internal CUP. Further, it observed that both the services were distinct and that the Sharjah entity had the requisite expertise and skills for rendition of the technical services and the actual rendition of services was also reasonably evidenced on the basis of travel and work details of personnel. Accordingly, the Tribunal rejected Revenue's Nil ALP determination and deleted the TP adjustment. With regard to disallowance of claim u/s. 10AA, the Tribunal deleted the disallowance since no such disallowance was proposed in the draft assessment order and held that this was contrary to the scheme and procedure u/s. 144C.

v) Aggrieved, the Revenue filed appeal before the Hon'ble High Court and contended that the Tribunal had erred in deleting the upward adjustment made to the ALP for technical services fees paid by the assessee. Revenue also contended that there was no restriction provided u/s. 144C by which the AO was barred from making any additions/disallowances other than those mentioned in the draft assessment order and that non-mentioning of any proposed addition/disallowance in the draft assessment order was merely a procedural lapse and the matter could have been remanded by the Tribunal to the AO to pass fresh assessment order.

Held

i) With regard to technical fees paid, the Court admitted the appeal of the Revenue against Tribunal's order deleting the TP adjustment.

ii) Further, with regard to the disallowance of claim u/s. 10AA, the Court considered the scheme of Section 144C and observed that objections submitted by the assessee and consideration of such objections by DRP are dealt with respect to the variations proposed in the draft assessment order and accordingly, Section 144C confirms with the principle of natural justice.

iii) It held that if objections of Revenue are considered then the assessee shall never get an opportunity to raise objections against additions or disallowances which were never proposed in the draft assessment order. Accordingly, it upheld the Tribunal's order of deleting the disallowance made by the AO w.r.t. to the claim of the assessee u/s. 10AA.

iv) It further rejected contention of the Revenue that non-mentioning of additions/disallowance in the draft assessment order could not be said to be mere procedural lapse.

v) It further held that while passing a regular assessment order, if AO proposes to make any further addition and/or disallowances, he must issue a notice u/s. 142 and the assessee should be given an opportunity to raise objection against such addition and/or disallowance.

8. The Court upheld the Tribunal's order rejecting TPO's approach of benchmarking commission from trading activities based on commission rate for indenting business and vice versa

Sojitz India Private Limited [TS-177-HC-2017(Del.)-TP]

Facts

i) The assessee was engaged in carrying out trading as well as indenting activities with both its AEs and unrelated parties.

ii) The TPO determined the ALP of trading activities by comparing the rate of commission earned on trading activities with that earned on indenting business and vice versa.

iii) The DRP, rejected TPO's approach of benchmarking commission from trading activities based on commission rate for indenting business and vice versa.

iv) The Tribunal affirmed the order passed by DRP following its decisions in the assessee's own case for the earlier AYs wherein it was held that the assessee's indenting business was not comparable with trading activity and there was no reasoning or justification for applying the margins earned in the trading activity to the indenting activity since the two were distinct and separate.

v) Aggrieved, the Revenue preferred appeal before the High Court.

Held

i) The Court upheld the order of Tribunal relying on its decision in the case of *Sumitomo Corporation India Pvt. Ltd. [TS-202-HC-2015(DEL)-TP]*, wherein the Court had confirmed the Tribunal's finding that indenting transactions were different from trading transactions.

9. Where post the remand by the Tribunal the inclusion of the comparables by the authorities lacked reasoning, the Court held that it would be open for the assessee to contest the inclusion of comparables on whatever grounds it chooses to urge.

Agnity India Technologies P. Ltd. [TS-175-HC-2017(Del.)-TP]

Facts

i) The assessee was enagaged in providing the software development services to its overseas AEs and operated as a limited risk bearing captive service provider. For benchmarking its international transactions, it adopted TNMM as the most appropriate method.

ii) The TPO rejected the assessee's TP study and conducted a fresh search selecting certain comparables including some from the assessee's selection.

iii) On appeal, the Tribunal excluded 11 comparables from the list of comparables. However, on further appeal by the Revenue, the Court set aside the Tribunal's order and remanded the matter back to it for fresh consideration. In the second round of appeal, the Tribunal remitted the comparability of 8 companies to TPO for reconsideration and directed the inclusion of 3 comparables.

iv) Aggrieved, the assessee appealed before the High Court and questioned the inclusion of all 11 comparables and contended that inclusion of the comparables lacked reasoning.

Held

i) The Court held that even though remittance of the issue by the Tribunal was justified, however, the lack of reasoning by the authorities for inclusion of the comparables would mean that the matter would be open for the assessee and it had right to contend that the inclusion of comparables was not in accordance with law for whatever grounds it choose to urge.

10. The Court upheld the Tribunal's order deleting TP adjustment on royalty payment on the basis of commercial and business expediency of the transaction

Frigoglass India Pvt. Ltd. [TS-180-HC-2017(Del.) -TP]

Facts

i) The assessee, engaged in glass door merchandising, entered into an international transaction for payment of royalty to its AE. The assessee adopted combined transactions approach under TNMM as the most appropriate method since the transaction of payment of royalty was closely linked to the manufacture of glass door refrigerators.

ii) The TPO rejecting the TNMM, adopted CUP method as the most appropriate method and further, determined the ALP of royalty payment as Nil since the assessee was unable to demonstrate the benefit arising to it which was upheld by the DRP.

iii) The Tribunal, relying on the decision of *EKL Appliances 341 ITR 241 (Del. HC),* deleted the adjustment on royalty payment since the TPO while determining the ALP at Nil erred in judging the commercial and business expediency of expenditure. The Tribunal further upheld the assessee's combined TNMM approach as against the CUP method adopted by TPO since no comparable transactions were brought on record by the AO/DRP.

iv) Aggrieved, Revenue appealed to High Court and contended that the TPO/DRP correctly determined the ALP of the royalty payment as Nil.

Held

i) The Court upheld the Tribunal's order and held that Tribunal had correctly relied on the decision of EKL Appliances.

11. The Court directed the Tribunal to decide whether AMP expenses constitute an international transaction requiring TP adjustment in light of the rule enunciated in Sony Ericsson Mobile Communications case

Pepsico India Holding Pvt. Ltd. [TS-178-HC-2017(Del.)-TP]

Facts

i) The assessee, engaged in the business of production and sale of soft drinks, incurred certain AMP expenses during the year.

ii) The TPO based upon the prevailing understanding with regard to applicability of the bright line test (BLT), held that AMP expenses incurred by the assessee were subject to TP adjustment.

iii) DRP also confirmed the TPO's approach.

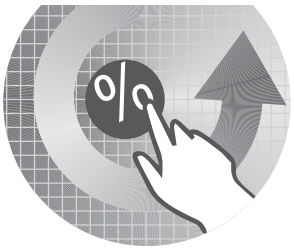
iv) On appeal by the assessee, the Tribunal noting that the TPO had made the adjustment based on the BLT, relying on the *LG Electronics vs. ACIT [TS-11-ITAT-2013(Del.)-TP]* which had been subsequently overruled by the jurisdictional High Court in case of *Sony Ericsson Mobile Communications India Pvt. Ltd. v. CIT [TS-96-HC-2015(Del.)-TP]* remitted the matter to TPO for reconsideration.

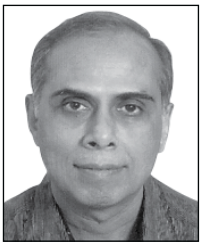
v) Aggrieved, the assessee appealed before the High Court.

Held

i) The Court observed that in case of *LG Electronics vs. ACIT [TS-11-ITAT-2013(Del.)-TP],* adoption of bright line test was upheld which was subsequently, overruled in the case of *Sony Ericsson Mobile Communications India Pvt. Ltd. vs. CIT [TS-96-HC-2015(Del.)-TP].*

ii) The Court, relying on the decision in the case of *Passage to India Tour & Travels (P) Ltd. vs. DCIT [TS-15-HC-2017(Del.)-TP],* remitted the matter to Tribunal with direction to examine whether the AMP expense constitutes an international transaction for which ALP determination and TP adjustment was required in the light of the rule enunciated in the decision of Sony Ericsson Mobile Communications case.






CA Rajkamal Shah & CA Naresh Sheth

INDIRECT TAXES
Service Tax – Statute Update

Circular No. 1053/02/2017-CX dtd. 10-3-2017

The Government of India has issued a Master Circular on Show Cause Notice, Adjudication and Recovery rescinding 89 circulars issued earlier. The circular is divided in four parts i.e. Part I deals with Show Cause Notice related issues, Part II deals with issues related to Adjudication proceedings, Part III deals with closure of proceedings and recovery of duty and Part IV deals with miscellaneous issues. The circular is available on the website of the Chamber. However, certain important clarifications normally not followed in practice, are highlighted below:

Para 3.2 of the circular – Ingredients for extended period

Extended period can be invoked only when there are ingredients necessary to justify the demand for the extended period in a case leading to short payment or non-payment of tax. The onus of establishing that these ingredients are present in a given case is on revenue and these ingredients need to be clearly brought out in the Show Cause Notice along with evidence thereof. The active element of intent to evade duty by action or inaction needs to be present for invoking extended period.

Para 3.6 of the circular – Power to invoke extended period is conditional

Power to issue notice for extended period is restricted by presence of active ingredients which indicate an intent to evade duty as explained above. Indiscriminate use of such restricted powers leads to fruitless adjudications, appeals and reviews, inflates the figures of outstanding demands and above all causes unnecessary harassment of the assessees. Therefore, before invoking extended period, it must be ensured that the necessary and sufficient conditions to invoke extended period exists.

Para 3.7 of the circular – Second SCN invoking extended period

Issuance of a second SCN invoking extended period after the first SCN invoking extended period of time has been issued is legally not tenable. However, the second SCN, if issued would also need to establish the ingredients required to invoke extended period independently. For example, in cases where clearances are not reported by the assessee in the periodic return, second SCN invoking extended period is quite logical whereas in cases of wilful misstatement regarding the clearances made under appropriate invoice and recorded in the periodic returns, second SCN invoking extended period would be difficult to sustain as the department comes in possession of all the facts after the time of first SCN. Therefore, as a matter of abundant precaution, it is desirable that after the first SCN invoking extended period, subsequent SCNs should be issued within the normal period of limitation.

Para 5.0 of the circular – Consultation with the noticee before issue of Show Cause Notice

Board has made pre Show Cause Notice consultation by the Principal Commissioner/ Commissioner prior to issue of show cause notice in cases involving demands of duty above ` 50 lakhs (except for preventive/offence related SCN's) mandatory *vide* instruction issued from F No. 1080/09/DLA/MISC/15 dated 21st December, 2015. Such consultation shall be done by the adjudicating authority with the assessee concerned. This is an important step towards trade facilitation and promoting voluntary compliance and to reduce the necessity of issuing show cause notice.

Para 11.2 of the circular – Other important points

Cases involving taxability, classification, valuation and extended period of limitation shall be kept out of the purview of adjudication by Superintendents. Such cases, up to ` 10 lakhs, shall also be adjudicated by the Deputy Commissioner/ Assistant Commissioner in addition to the cases exceeding ` 10 lakhs but not exceeding ` 50 lakh.

Para 11.3 of the circular – Where differential duty/demand of duty is paid without interest, in such cases, Show Cause Notices demanding interest and levy of penalty should be issued. In the Show Cause Notice, the reference of duty already paid should also be mentioned.

Para 11.4 of the circular – As regards adjudication of the notices issued for recovery of interest alone, it is clarified that these cases should be decided by the proper officer based on the monetary limit fixed for the duty amount involved and not on the basis of the amount of interest. Therefore, the amount of duty on which interest has not been paid, should be the monetary criterion for deciding the authority to decide such cases.

Para 13.0 of the circular – Service of Show Cause Notice and relied upon documents

A show cause notice and the documents relied upon in the Show Cause Notice needs to be served on the assessee for initiation of the adjudication proceedings. The documents/ records which are not relied upon in the Show Cause Notice are required to be returned under proper receipt to the persons from whom they are seized. Show Cause Notice itself may incorporate a clause that unrelied upon records may be collected by the concerned persons within 30 days of receipt of the Show Cause Notice. The designation and address of the officer responsible for returning the relied upon records should also be mentioned in the Show Cause Notice. This would ensure that the adjudication proceedings are not delayed due to non-return of the non-relied upon documents.

Para 14.1 of the circular – Settlement of Cases

As per Board instruction every Show Cause Notice should be forwarded, along with a letter stating that party can approach settlement of case through Settlement Commission. Where the noticee approaches the Settlement Commission, the matter needs to be transferred to call book till the matter is decided by Settlement Commission. In case matter is not finally accepted for settlement by the Settlement Commission, the Show Cause Notice should be adjudicated in normal manner, in case the Settlement Commission, settles the matter, the show cause notice should be taken out of call book and shown as disposed of.

Para 14.2 of the circular – Filing of written submissions

Show Cause Notice generally provides a time limit of thirty days for submission of written reply, however the time limit may be extended by the adjudicating authority on written request of the assessee. Where the assessee fails to submit a written reply, the adjudicating authority may issue a letter requesting the noticee to submit reply to the SCN.

Para 14.3 of the circular – Personal hearing

At least three opportunities of personal hearing should be given with sufficient interval of time so that the noticee may avail opportunity of

being heard. Separate communications should be made to the noticee for each opportunity of personal hearing. In fact separate letter for each hearing/extension should be issued at sufficient interval. The Adjudicating authority may, if sufficient cause is shown, at any stage of proceeding adjourn the hearing for reasons to be recorded in writing. However, no such adjournment shall be granted more than three times to a noticee.

Para 14.7 of the circular – Body of the order

At any cost, the findings and discussions should not go beyond the scope and grounds of the Show Cause Notice.

Para 14.8 of the circular – Quantification of demand

The duty demanded in an adjudication order cannot exceed the amount proposed in the Show Cause notice.

Para 17.3 of the circular – Adjudicating Authority is a quasi-judicial authority and is legally bound to adjudicate the case independently and judiciously taking into consideration the audit objection by CERA/CRA, reply of the department as referred above, reply of the party, relevant legal provisions, case laws on the subject and relevant circulars of the Board, if any. **In this regard the following extract from the judgment in the matter of Simplex Infrastructure Ltd. vs. Commissioner of Service Tax of the Hon'ble Kolkata High Court dated 7-4-2016 at para 74 may be followed in letter and spirit while discharging one's role as an Adjudicating Authority.**

"It is well settled that a quasi-judicial authority must act judiciously and not at the dictates of some other authority. It is quite evident that the Commissioner issued the impugned Show Cause Notice at the instance of CERA without any independent application of mind, and thereby, abdicated his powers and duty, which is not permissible in law".

Accordingly, it is directed that the audit objection by CERA should be independently examined and where necessary, Show Cause Notice should be issued. It is expected that the SCN is a consequence of independent examination carried out on receipt of CERA/CRA objection. Such independent findings should be incorporated in the Show Cause Notice as well as in the adjudication order".

Para 17.4 of the circular – Where an issue was under audit objection and has been subsequently either judicially settled, by say judgment of Hon'ble Supreme Court or where a circular of the Board has been issued on the subject, further correspondence with the Board on the audit objections, even if they have become DAPs, is not necessary and such cases may be adjudicated on merits taking into consideration the latest judgments and circulars.

Para 20.2 of the circular – Recovery during pendency of litigation

(iv) Section 35F of the Central Excise Act, 1944 has been amended with effect from 6-8-2014 to provide for mandatory payment of 7.5% or 10% of the duty demanded where duty demanded is in dispute or where duty demanded and penalty levied are in dispute for admission of appeal before Commissioner (Appeals) or CESTAT. Once the amount is paid, no coercive action shall be taken for recovery of the balance amount during the pendency of the appeal proceedings before these authorities.

Para 20.3 of the circular – In cases where stay application is pending before Commissioner (Appeals) or CESTAT for periods prior to 6-8-2014, no recovery shall be made during the pendency of the stay application.

Para 22.2 of the circular – The facility to pay arrears in installments shall generally be granted to companies which show a reasonable cause for payment of arrears in installments such as the company being under temporary financial distress. Approval to pay in installments and the number of installments should be fixed such that an appropriate balance between recovery of arrears and survival of business is maintained taking into consideration the overall financial situation of the company, its assets, liabilities, income and expenses. Frequent defaulters

may not be allowed payment of arrears in installments. The decision shall be taken on a case to case basis taking into consideration the facts of the case, interest of the revenue, track record of the company, its financial situation, etc.

Para 25. of the circular - No SCN on voluntary payment

In any case of short payment or non-payment of tax/duty in a case not involving extended period of time, a person who has paid the duty payable along with interest, if any, by ascertaining the duty himself, or as ascertained by the Central Excise Officer shall not be served any notice in respect of the duty so paid or for any penalty. The provisions of Section 11A(1)(b) read with Section 11A(2) may be referred to in this regard.

Para 26. of the circular – Refund of pre-deposits

(ii) Pre-deposit for filing appeal is not payment of duty. Hence, refund of pre-deposit need not be subjected to the process of refund of duty under Section 11B of the Central Excise Act, 1944. Therefore, in all cases where the Appellate Authority has decided the matter in favour of the appellant, refund with interest should be paid to the appellant within 15 days of the receipt of the letter of the appellant seeking refund, irrespective of whether order of the Appellate Authority is proposed to be challenged by the Department or not.

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Janak C. Pandya, *Company Secretary*

CORPORATE LAWS
Company Law Update

Case Law No. 1

[2017] 201 Comp Cas 162 (NCLT)

[Before the National Company Law Tribunal – Mumbai Bench]

Vyomesh M. Shah and Another vs. Vinca Developer P. Ltd. and Others

Cause of action is a state of fact which entitles a one person to obtain remedy in court against another person. The exercise of rights by one person to protect his economic interest does not raise any "cause of action" for another person which entitled him to obtain such court remedy.

Brief case

This petition has been filed under Sections 241 and 241 of the Companies Act, 2013 ("Act") for oppression and mismanagement of the Company. The petitioners are Individual shareholders of Vinca Developer P. Ltd. ("Company" or "R1").

The facts of the case is as follows:

1. The petitioners are two individuals who also own another company called 'Hubtown'.
2. The petitioners in their individual capacity and also through Hubtown have invested in the Company and together own 90% of Class A equity shares of the Company.
3. A foreign company owns balance 10% of Company's Class A equity shares.
4. The petitioners and Hubtown also own 100% of Class B equity shares of the Company which entitles them 0.001% voting rights.
5. The foreign company also owns 3 compulsory convertible debentures (CCDs) in the Company, which upon conversion, would entitle the foreign company to have 99% voting rights.
6. Based on the above investment, the Company has invested in two subsidiaries by way of optionally convertible debentures (OPCDs).
7. The OPCDs has assured IRR of 14.75% and for which IDBI Trusteeship Services Ltd., has been appointed as Debenture Trustee.
8. Hubtown also has issued an unconditional, absolute and irrevocable Corporate Guarantee in favour of the Debenture Trustee on behalf of the two subsidiaries for any payment default made by these two subsidiaries or for violating the terms of the debenture agreement.
9. As per the subscription agreement and the Articles of Association of the Company, the foreign company has certain reserved matters rights.

10. As per the rights pertaining to the reserved matters, the approval of the nominee director of the foreign company is a must.
11. Two subsidiaries failed to pay the amount payable and the Debenture Trustee issued notice to Hubtown for the enforcement of the Corporate Guarantee.
12. As Hubtown failed to reply to the said notice, the Debenture Trustee filed the summons for judgment. The Hon'ble High Court of Bombay granted unconditional leave to Hubtown to defend the same for commercial reasons.
13. The Debenture Trustee then appealed to the Hon'ble Supreme Court against the above order.
14. The Supreme Court allowed the Debenture Trustee's appeal. *Ref. IDBI Trusteeship Services Ltd vs. Hubtown Ltd. [2017] 1 SCC 568.*

The petitioners' claimed reliefs as follows:

1. To modify the Articles of Association of the Company as provided in the Table F to the Schedule I of the Act.
2. To restrain the nominee directors of the foreign company to act as directors and giving further instructions to the Debenture Trustee.
3. To declare and direct that the board of directors of the Company are not bound to act as per nominee directors' instruction, which is illegal and unlawful.
4. To declare all actions taken by the Debenture Trustee as illegal, null and void.
5. To direct for conversion of OPCDs issued by subsidiary companies into equity shares.
6. Not to convert CCDs into equity unless the transaction is made in compliance of Foreign Exchange Management Act, 1999 (FEMA) and release of guarantees and securities.
7. To direct the foreign company and its nominee directors to compensate the Company for loss caused due to their failure to perform the fiduciary duties and obligations.
8. Ad interim reliefs for certain matters.

The petitioners' submissions are as under:

1. The investment by the foreign company into the Company and then into two subsidiaries is nothing but foreign investment in subsidiaries routed through the Company which is in violation of FEMA.
2. In view of the above, rights attached to the above investment shall not be exercised by the foreign company and need to be set aside.
3. Foreign company's action for realisation of its money is an oppressive conduct against the petitioners.
4. The nominee directors of the foreign company opposed to discuss any reserved matters including on OPECD as a consequence of which the decisions remained pending on account of their affirmative vote.
5. The foreign company will have 99% shareholding, if the CCDs are converted, which will be detrimental to the petitioners' interest and the Company.
6. The nominee directors are not co-operating in holding annual general meetings and board meetings of the Company.
7. The nominee directors are more interested in matters relating to CCDs and OPCDs, thus without board approval, they are giving instructions to the Debenture Trustee, which is against the interests of the Company.
8. In view of the provisions related to the reserved matters and affirmative vote to the nominee directors in the Articles of

Association, the Company is unable to take any decisions to protect its interests.

9. The above provisions in the Articles of Association are invalid as provided in Section 6 of the Act.

10. The Company *vide* its board resolution has terminated the appointment of the Debenture Trustee. Despite this, the Debenture Trustee has filed the summary suit and winding up petition against Hubtown.

11. The Company also passed a resolution discharging Hubtown from its Corporate Guarantee obligation, which was conveyed to the Debenture Trustee and the foreign company.

12. The acts of the nominee directors and Debenture Trustee restrained the Company from functioning, including leasing of properties and raising funds in subsidiary companies. They need to be restrained for acting as directors and to give any direction to the Debenture Trustee.

The submissions made by the respondents are as follows:

1. The petitioners have invested only ` 12.5 crores against the foreign company's investment of ` 418 crores.

2. The petitioners on their own entered into an agreement to get ` 418 crores into the Company.

3. They have on their own and voluntarily given the affirmative vote to the nominee directors of the foreign company in case of reserved matters.

4. They have voluntarily agreed to incorporate the clauses of the agreement as to reserved matters in the Articles of Association of the Company.

5. They have entered into debenture agreement making the Company and its subsidiaries as parties for the issuance of OPCDs.

6. The argument that the compliances of articles is oppressive to the petitioners is inconceivable.

7. The Debenture Trustee has already invoked guarantee given by Hubtown to ensure that money invested in subsidiaries comes back to the Company.

8. The option of conversion of OPCDs into equity is nothing but letting the petitioners themselves free out of the guarantee given by Hubtown to the Debenture Trustee.

9. Conversion of OPCDs is a reserved matter and hence affirmative vote of the nominee director is a must. The petitioners cannot impose an obligation on the nominee directors to exercise their affirmative votes.

Judgment and reasoning

The bench dismissed the petition. The Bench also directed the petitioners to pay an exemplary cost for filing this vexatious and frivolous litigation. The Bench observed that the rights of the foreign company as to invoking the Corporate Guarantee and giving instructions are contractual rights. Their exercising such rights do not make any case under Section 241 of the Act. Bench also observed that after reviewing the entire petition, no "cause of action"arose due to the foreign company exercising its rights. The Bench referred the judgment in case of *Navinchnadra N. Majithia vs. State of Maharashtra [2000] 7 SCC 640* to find the meaning attributed to the phrase "cause of action". On FEMA violations, after analysing the Supreme Court judgment, the Bench observed that violation of FEMA, if assumed, only makes the transactions irregular. As per the provisions of the Indian Contract Act, 1872, it will not make the contract null and void. Further, unless the contract is vitiated by fraud or devoid of immoral consideration or against the public policy, contract is always valid and binding on the parties.



CA Mayur Nayak, CA Natwar Thakrar &
CA Pankaj Bhuta

OTHER LAWS
FEMA Update and Analysis

In this article, we have discussed recent amendments to FEMA through Circulars and Notifications issued by RBI & Press Note issued by DIPP:–

1. Risk Management and Inter-bank Dealings: Operational flexibility for Indian subsidiaries of Non-resident Companies

Currently, a person resident in India is allowed to enter into a foreign exchange derivative contract in accordance with provisions contained in Schedule I, and a person resident outside India is allowed to enter into a foreign exchange derivative contract with a person resident in India in accordance with provisions contained in Schedule II of the Notification No. FEMA 25 /RB-2000, dated 3rd May, 2000, as amended from time-to-time.

With a view to provide operational flexibility to multinational entities and their Indian subsidiaries exposed to currency risk arising out of current account transactions emanating in India, the extant hedging guidelines contained in Schedule II have been amended subject to terms and conditions provided in Annex I to this circular in line with the announcement made in the Statement on Developmental and Regulatory Policies of Reserve Bank of India dated October 4, 2016. Accordingly, such non-residents are allowed to enter into foreign exchange derivative contract with AD banks in India to hedge an exposure to exchange risk of and on behalf of its Indian subsidiaries.

[A.P. (DIR Series) Circular No. 41 dated 21st March, 2017/ Notification No. 384 dated March 17, 2017]

2. Purchase of foreign exchange from foreign citizens and others – Withdrawal of restrictions imposed during demonetisation of Indian currency notes

During the demonetisation process foreign citizens (i.e. foreign passport holders) were allowed to exchange foreign exchange for Indian currency notes up to a limit of ` 5,000/- per week till December 15, 2016 subject to the tenderer submitting a self-declaration that this facility was not availed of during the week.

In line with restoration of limits on cash withdrawals from bank accounts and ATMs, RBI has restored the status quo ante regarding purchase of foreign exchange from customers by authorised persons as mentioned in paragraph 4.4 (e) (iii) of Annex to A.P. (DIR Series) Circular No. 17 dated November 27, 2009.

Accordingly (a) Requests for payment in cash in Indian Rupees to resident customers towards purchase of foreign currency notes and/or Travellers' Cheques from them may be acceded to the extent of only US $ 1,000 or its equivalent per transaction. (b) Requests for payment in cash

by foreign visitors / Non-Resident Indians may be acceded to the extent of only US $ 3,000 or its equivalent. (c) All purchases within one month may be treated as single transaction for the above purpose and also for reporting purposes. (d) In all other cases, APs should make payment by way of 'Account Payee' cheque / demand draft only.

[A.P. (DIR Series) Circular No. 42 dated 30th March, 2017]

3. Investment by Foreign Portfolio Investors in Government Securities

The RBI has increased the limits for investment by FPIs in Central Government Securities and State Development Loans (SDLs) for the quarter April-June 2017 by ` 110 billion and ` 60 billion respectively with effect from April 1, 2017. The total increase in limits over the next quarter would, accordingly, be as under:

` billion

	Central Government securities			State Development Loans	Aggregate
	For all FPIs General Category	Additional for Long-term FPIs	Total	For all FPIs (including Long-term FPIs)	
Existing Limits	1520	680	2200	210	2410
Revised limits for quarter April-June, 2017	1565	745	2310	270	2580

[A.P. (DIR Series) Circular No. 43 dated 31st March, 2017]

4. Foreign Direct Investment (FDI – LLP) in Limited Liability Partnerships (LLP) formed and registered under the Limited Liability Partnership Act, 2008

RBI through Notification has substituted Schedule 9 to in respect of FDI in Limited Liability Partnerships (LLP) formed and registered under the Limited Liability Partnership Act, 2008.

[Notification No. FEMA.385/2017-RB dated 3rd March, 2017]

(Comments: Foreign companies can be appointed as Designated Partners. Individuals who have been appointed as DP are not required to satisfy residency test under FEMA. Clarity has been provided for conversion of company which is having FDI provided there are no sectorial restrictions or FDI linked performance conditionality. RBI circular is still awaited)

5. Foreign Direct Investment (FDI) in E-Commerce

RBI through Notification has notified FDI Policy in E-Commerce as contained in Para 5.2.15.2 of the Consolidated FDI Circular by substituting Serial No. 16.2 of Annexure B of Schedule 1 of the Notification No. 20.

[Notification No. FEMA.387/2017-RB dated 9th March, 2017]

6. FAQs – External Commercial Borrowings (ECB)

RBI Update on FAQs as on March 23, 2017 now contains new and updated Question 25 in the FAQs on External Commercial Borrowings (ECB).

Refer https://www.rbi.org.in/Scripts/FAQView.aspx?Id=120

7. FAQs – Issuance of Rupee Denominated Bonds Overseas

RBI Update on FAQs as on March 23, 2017 now contains updated FAQs 3 on Issuance of Rupee Denominated Bonds Overseas.

Refer https://www.rbi.org.in/Scripts/FAQView.aspx?Id=26

Ajay R. Singh, *Advocate*

BEST OF THE REST

1. Passport application of minor – Parents of minor separated – Mother can act as natural guardian of minor – Section 5 of Passport Act, 1920

The petitioner being minor has filed this petition through his maternal grandfather. The mother of petitioner came to be previously wedded with one Shri Deepak Jalali and out of the said wedlock Master Saien, petitioner herein, was born. However, the marriage between the parties could not materialise and the same came to be dissolved.

It is averred that the petitioner continues to live with his maternal grandfather at Jammu. It is averred that on 23-6-2015 the petitioner through his mother applied online for issuance of passport in his favour. However, Respondent *vide* communication dated 1-7-2015, has informed that as the petitioner-applicant, who is minor, has been residing with his mother at Delhi, so his mother cannot apply from the jurisdiction of Jammu for issuance of passport in favour of petitioner and a penalty of ` 5,000/- has also been imposed on the mother of petitioner.

The Hon'ble Court observed that admittedly, as per the school documents, the petitioner throughout studied at Jammu, except for the period with effect from 12-3-2014 to 9-4-2015 when he remained with his mother at New Delhi and was admitted in 5th standard in Public School.

The school documents reveal that except for 5th standard, the petitioner was studying at Jammu right from nursery to 6th standard. Further, even when the petitioner had applied for issuance of passport through his mother, he was studying at Jammu. Therefore, the respondent has wrongly come to the conclusion that the petitioner was staying up at Delhi when he had wrongly applied for issuance of passport from the jurisdiction of Jammu.

Further, as regards the contention to provide any documentary proof to the effect that she is the only guardian of the child, the Apex Court in *Githa Hariharan vs. Reserve Bank of India (AIR 1999 SC 1149)* has held that mother can act as a natural guardian of child, *inter alia*, the event the father is indifferent towards the child or if the child is put under custody of mother by mutual understanding between the parents. Further, the High Court of Delhi in case, *Shalu Nigam vs. The Regional Passport Officer: (AIR 2016 Del 130)* has held that mother's name is sufficient in certain cases like the present one to apply for passport, especially as a single

women can be a natural guardian and also a parent. Therefore, petition was allowed.

Saien vs. Union of India & Others AIR 2017 Jammu and Kashmir 12.

2. Eviction proceedings – Employee of tenant, a partnership – Firm – is never considered to be in actual possession of tenanted premises – Bound by the decree once passed against his employer-tenant : Maharashtra Rent Control Act

The appellants are the plaintiffs (landlords) whereas the respondents are the defendants (tenant). On 9-3-1982, the landlords served a quit notice on the tenant – firm and determined the tenancy by demanding arrears of rent. Since the firm did not pay the arrears as demanded and nor vacated the suit house, the landlords were constrained to file a civil suit. The suit was filed against one employee of the firm–defendant No. 1 and partners of the Firm-defendant Nos. 2 to 9 in the Court.

The Trial Court, held that the suit house was let out to the firm through their partners (defendant Nos. 2 & 3) and, therefore, the firm was the tenant. Secondly, the Firm had committed defaults in payment of arrears of rent and also failed to repay when demanded by the plaintiff. Thirdly, defendant No. 1 was an employee of the firm. Fourthly, defendant No. 1 was not the tenant of the plaintiff as claimed by him and was in unauthorized occupation of the suit house as a trespasser. Fifthly, the Firm and its partners (defendant Nos. 2 to 9) having failed to pay the arrears of rent, are liable to be evicted from the suit house under the Bombay Rent Control Act. Sixthly, the suit did not abate on the death of plaintiff No. 1 because plaintiff No. 2 is already on record and sufficiently represent the estate of the deceased, plaintiff No. 1. Seventhly, liberty was granted to the plaintiff to file separate suit against defendant No. 1 under the general law to claim possession of suit house because he was found to be in possession of the suit house as trespasser and no eviction decree can be passed against a trespasser under the Rent laws.

Felt aggrieved, Plaintiff No. 2 filed First Appeal, the District Judge allowed the appeal and decreed the suit against all the defendants as claimed by the plaintiffs. It was held that defendant No. 1 being an employee of the firm was bound by the decree passed against the firm and its partners (defendant Nos. 2 to 9). It was further held that defendant No. 1 failed to prove that he became plaintiff's tenant in his individual capacity by entering into a fresh contract of tenancy on vacating the suit house by the original tenant as claimed by them.

The Hon'ble Supreme Court observed that an employee of a tenant is never considered to be in actual possession of tenanted premises much less in possession in his legal right. Indeed, he is allowed to use the tenanted premises only with the permission of his employer by virtue of his contract of employment with his employer. An employee, therefore, cannot claim any legal right of his own to occupy or to remain in possession of the tenanted premises while in employment of his employer or even thereafter *qua* landlord for want of any privity of contract between him and the landlord in respect of the tenanted premises.

There was, therefore, no need for the appellant to file a separate suit to claim

possession of the suit house against defendant No. 1 under the general law as he was well within his legal right to execute the decree for eviction from the demised premises in this very litigation not only against the original tenant but also against all the persons who were claiming through such tenant. As mentioned above, defendant No. 1 was such person who was held to be claiming through the tenant being its employee and was, therefore no need to make him a necessary party in the proceeding.

Thus, it was not necessary for the appellants to have impleaded defendant No. 1 in the rent proceedings. The reason being that in rent proceedings the lessee/tenant is the only necessary or/and proper party and none else. A person, who claims through lessee/tenant, is not a necessary party.

Nandkishor Savalaram Malu (dead) vs. Hanumanmal G. Biyani (D) Thr. Legal Heirs AIR 2017 Supreme Court 82

3. Secondary evidence – Photocopy of document – Admissibility: Evidence Act, Section 65

The petitioner has filed a petition for eviction of the respondent from the demised premises. The defence of the respondent, however, is that he is in possession of the demised premises in the capacity of lessee having paid ` 1,50,000/- as lease money for a period of 99 years to its owner late Shri Amar Singh. The petitioner, however, submits that there is no question of execution of legal and valid lease deed by late Shri Amar Singh because he was only a co-sharer in the demised premises along with petitioner and one Rajinder Jaar. In an Application filed u/s. 65 of Evidence Act whereby the permission was sought by the petitioner to prove the lease deed, by way of leading secondary evidence, which was declined and the application was dismissed. A short question before the Court is i.e., *qua* admissibility of the permission sought to prove the photocopy of the lease deed, by way of allowing the respondent to produce the secondary evidence.

The Court observed that a bare perusal of Section 65 of Indian Evidence Act makes it crystal clear that secondary evidence may be given of the existence, condition, or contents of a document in either of the situations enumerated thereunder. As a matter of fact, the case of the petitioner did not fall under either of such situation for the reason that no proof is forthcoming *qua* existence of original copy of unregistered document. The condition precedent to grant permission to prove a document by way of allowing to produce secondary evidence is that the said document is in existence and also that the original or primary evidence thereof is either lost, missing or not available. The loss, destruction or misplacement of the document or that the same is/was in possession of either adversary party of the applicant or executant thereof should be proved on record. A photocopy of the document cannot be admitted in secondary evidence. A certified copy of the document, however, is legally admissible in evidence. In the case of a registered document also, it is the certified copy thereof which is admissible in secondary evidence. The Apex Court in Government of *Andhra Pradesh vs. Karri Chinna Venkata Reddy and Others, AIR 1994 Supreme Court 591* has held that a photocopy of document is not admissible in evidence until or unless the original record of such document is produced or examined.

Therefore, the Respondent is not justified in claiming that in view of the petitioner has admitted the signatures of Amar Singh, the

executant on this document, existence thereof stands established. As such, is a case where there is no proof of existence of original lease deed nor is there any explanation having come on record as to how and where it has been lost and that despite of efforts made, the same could not be traced out. It is also not the case of the respondent that the original lease deed was retained by the executant, Shri Amar Singh with him. Therefore, the petition was dismissed.

Roshan Lal Sharma vs. Wattan Singh Dogra AIR 2017 Himachal Pradesh 6

4. Judicial notice – Custom – repeatedly recognised by courts, it passes into law of land – Proof thereof, not necessary: Evidence Act, 1872

The case of the petitioners is that the petitioners are the residents of Lower Shajouba having dwelling houses, there was heavy rainfall in that area of Shajouba resulting into land slide Thereupon, the authority of Public Works Department instead of repairing the old road started constructing a new road passing through the homestead as well as agricultural land of the petitioners at village without following the due process of law and thereby caused loss and damages, not only to the land over which dwelling houses were there but also to the standing trees and crops.

In that event the petitioners filed a representation before the Commissioner (Works), Government of Manipur requesting therein to pay compensation for causing damage to the houses, standing crops and trees etc., but the authority did not pay any heed to the request made by the petitioners.

It has been pleaded that the lands situated in hill areas of Manipur have never been subjected to survey and as such, one cannot claim ownership over the land situated in the village of the hill areas. Further, it has been pleaded that in the mao society the villagers live together in the village and each family does have right to use certain land for construction of dwelling house and kitchen garden. It is the Village Council/Village Authority who does have Supreme right over the land in the village and hence, the Village Council is free to take decision for the development of any land. On account of any development if displacement of the family takes place it is the responsibility of the Village Council to settle them. Thus, it has been pleaded that when the Village Council had been given sanction to construct diversion road over the said land the petitioners being not owner are not entitled to any compensation.

The issue which has fallen for consideration is that under the customary law whether the petitioners do have right of ownership over the land on which they were having dwelling house and part of the land was being used for agriculture purposes The prayer is that the respondents-State be directed to pay compensation in terms of provision of the Land Acquisition Act for taking over the land of the petitioners.

The Court observed that it would be worthwhile to note here that ordinarily custom pleaded needs to be proved under Section 57 of the Evidence Act but nothing need to be proved if the Courts can take judicial notice. When a custom had been repeatedly recognised by the Courts, it passes into law of the land and proof of it then becomes unnecessary under Section 57 of the Evidence Act. This proposition has been laid down by *Ujagar Singh vs. Mst. Jeo, Air 1959 SC 1041.* It be stated that the

decision rendered in the aforesaid case by Judicial Commissioner has subsequently been taken notice of by the Courts in case of *Vumsuan & 3 Ors. vs. Nokam Vaiphei & 3 Ors.: 1995 (III) GLT 617.* Under the circumstances, there remains no doubt that the petitioners were having right of ownership over the land on which diversion road was constructed without resorting to provision of the Land Acquisition Act and thereby the petitioner are entitled to compensation which should be paid in the same term which had been paid to one of the similarly situated persons namely, Mr. N. Lortho & Anr. in terms of the order passed by this Court in W.P(C) No.887 of 2007 after determination of the area of the land of the petitioners, which was actually taken over for the purpose of constructing diversion road and other relevant factors so that the compensation be paid to the petitioners within six months.

N. Lokho and Others vs. State of Manipur and others AIR 2017 Manipur 5.

5. Electronic evidence – Memory cards and CD being document in terms of s. 65-B shall be admissible as electronic evidence : Evidence Act 1872

In connection with murder a case has been registered. Trail Court had framed charge against the accused for commission of aforesaid offences and trial of the case as such is in progress.

An application was filed by the accused, 'For taking on record the memory cards, CD and for permitting the Laptop to be played in the Court, with a further prayer to permit the petitioners to confront PW 2 with his earlier statement, as given by him to the press and media, video recording of which in CD has been presented before the Trial Court along with Laptop chips and certificate from the person under whose management said instruments were and have been from the time of its recording with a further prayer for directing the ETV Urdu to produce the recording of the same for cross-examination of the said witness in accordance-with law" has been rejected by the trial Court.

Section 65-B of the J & K Evidence Act, 1977 envisage that any information contained in electronic record which is printed on tained in electronic record which is printed on a paper, stored, recorded or copied in optical electronic media produced by a computer (hereinafter referred to as the computer out-put) shall be deemed to be also a document, subject to the condition enshrined therein the section, shall be admissible in any proceedings. The memory cards and CD, no doubt, is a document in terms of section 65-B but same has to satisfy the conditions enshrined which essentially can be better looked into at the time defence is asked to enter upon his defence.

The Court observed that the Trial Court when confronted with said position was required to take the memory cards and CD and also to mark as exhibit tentatively so as to avoid hampering of progress of the trial. Hon'ble Supreme Court in the judgment rendered in the case of *Bipin Shantilal Panchal vs. State of Gujarat & Anr., (AIR 2001 SC 1158, paras 12 to 15),* has ruled that whenever an objection is raised during evidence taking stage regarding admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit.

The trial court should have allowed to play the Laptop so as to contradict the witness

with his earlier statement in order to enable him to admit or deny the same.

The Court further observed that basically, the defence wanted to play the Laptop and to place on record the memory cards and CD because same was necessitated in view of the statement of certain witnesses and in view of the statement of PW (2) as well, who, while deposing in the Court, has stated that he was present on spot at the time of occurrence, means he saw the occurrence whereas defence was in possession of videos depicting that PW(2) had reached the spot after the occurrence, means he has not seen the occurrence, which fact, according to the defence, was corroborated by the statement of PW(2) recorded by the press on spot and it is that statement which has been videographed, memory card and CD has been prepared and same has been put on Laptop, therefore, it was a material question to be put to the witness and then it was choice the witness to say yes or no to the same.

The cross-examination of the witness, in fact, is aimed at eliciting truth and in the process defence has every right to contradict the witness. If same is denied, then the very object of cross-examination will get defeated. The defence has a right to make every endeavour to impeach the credit of the witnesses, as is permissible, for truth to prevail.

In view of the stated facts, the Trial Court was directed to take on recorded the memory cards and CD, being a document in terms of section 65-B of the Evidence Act, However, same will remain subject to objections and will also remain subject to proof to be produced by defence in terms of section 274, Cr.P.C.

Sultan Mir & Ors. vs. State of J & K AIR 2017 Jammu and Kashmir 9.

Black color is sentimentally bad. But every black board makes the students life bright

— Dr. A. P. J. Abdul Kalam

Life and Time are the World's best teachers. Life teaches us to make good use of Time and Time teaches us the value of Life.

— Dr. A. P. J. Abdul Kalam

We should not give up and we should not allow the problem to defeat us.

— Dr. A. P. J. Abdul Kalam

Kishor Vanjara, *Tax Consultant*

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CA Hinesh R. Doshi, CA Haresh P. Kenia
Hon. Jt. Secretaries

The Chamber News

Important events and happenings that took place between 8th March, 2017 and 8th April, 2017 are being reported as under.

I. Admission of New Members

1) The following new members were admitted in the Managing Council Meeting held on 27th March, 2017.

Life Membership

1	Mr. Goyal Anurag Anil	CA	Jaipur
2	Mr. Shetye Siddharth Shyam	CA	Pune
3	Mr. Mistry Rajnikant Ramesh	CA	Mumbai
4	Mr. Joshi Rakesh Fanindra	CA	Mumbai
5	Mr. Punjabi Jagdish Thakurdas	CA	Mumbai
6	Mr. Sarangapani Ragunath	CA	Mumbai
7	Mr. Shah Mayur Bharat	CA	Mumbai
8	Mr. Aggarwal Sunil	CA	Delhi
9	Mr. Mehta Vikram (Tran. Ord. to Life)	CA	Mumbai
10	Mr. Jain Nimesh Popatlal	CA	Mumbai
11	Mr. L. Vijayan M. Lakshmanan	CA	Salem
12	Mr. Venkidusam Sakthivel	CA	Namakkal
13	Mr. Save Gaurav Vidyadhar	CA	Mumbai

Ordinary Membership

1	Mr. Vora Bandish Atul (2017-18)	CA	Mumbai
2	Mr. Govardhan Sunil Manohar (2017-18)	CA	Pune
3	Mr. Patil Rahul Vishnu (2017-18)	CA	Pune
4	Miss Borar Puja Babulal (2017-18)	CA	Kolkata
5	Mr. Gupta Aayush Gopal (2017-18)	CA	Kolkata
6	Mr. Kulkarni Abhijit Sheshrao (2017-18)	CA	Pune
7	Miss Shah Charmi Girish (2017-18)	CA	Mumbai

8	Mr. Fernandas Paschal Arelino (2017-18)	B.Com.	Mumbai
9	Mr. Pandit Shivprasad Dattatraya (2017-18)	CA	Nashik
10	Mr. Agrawal Abhishek Mahaveer Prasad (2017-18)	CA	Mumbai

Student Membership

1	Mr. Chinmaya Sanjay Deodikar	ICAI Student	Pune
2	Mrs. Swanandi Paingankar Pravin	ICAI Student	Pune
3	Mr. Upadhyay Ajay Laxminarayan	ICAI Student	Pune
4	Mr. Bamorya Palash Pavan	ICAI Student	Pune
5	Mrs. Goydani Surbhi Brijkumar	ICAI Student	Pune
6	Miss Sancheti Prachi Padamchand	ICAI Student	Pune
7	Miss Puranik Vrunda Umakant	ICAI Student	Pune
8	Mr. Bajaj Mayur Govind	ICAI Student	Pune
9	Mr. Shimpi Samesh Chotulal	ICAI Student	Pune
10	Mr. Agarwal Aayush Roopnarayan	ICAI Student	Pune
11	Mrs. Nuwal Anuja Ashok	ICAI Student	Pune
12	Mrs. Ingale Bhargavi Vijay	ICAI Student	Pune
13	Mr. Phakatkar Suyog Sanjay	ICAI Student	Pune
14	Miss Deshmukh Sudeshna Prashant	ICAI Student	Pune
15	Mr. Bhattad Ashish Sanjay	ICAI Student	Pune
16	Mr. Joshi Alok Chandrashekar	ICAI Student	Pune
17	Mr. Kulkarni Avinash Prakash	ICAI Student	Pune
18	Miss Mungi Gauri Makarand	ICAI Student	Pune
19	Mr. Patel Umesh Kantilal	ICAI Student	Pune
20	Mr. Patel Pratik Lalit	ICAI Student	Aurangabad
21	Mr. Waybhat Amol Vishnu	ICAI Student	Pune
22	Mr. Garg Somay Jitendra	ICAI Student	Pune
23	Mr. Hegde Ketan G.	ICAI Student	Pune
24	Mr. Pawar Chetan Santosh	ICAI Student	Pune
25	Mr. Jaiswal Abhijeet S.	ICAI Student	Pune
26	Mr. Ranade Prathamesh Anand	ICAI Student	Pune
27	Mrs. Sengar Shivangi Patvardhansingh	ICAI Student	Pune
28	Mr. Popandiya Lalchan Gopal	ICAI Student	Pune
29	Miss Pethe Mitali Umesh	ICAI Student	Pune
30	Mr. Ogale Prathamesh Vivek	ICAI Student	Pune
31	Mrs. Gharge Priyanka Bapusaheb	ICAI Student	Pune
32	Mrs. Chordiya Shital Surajmal	ICAI Student	Pune
33	Mr. Jokhi Farzad A.	ICAI Student	Pune

34	Mr. Chhetri Ram Kumar	ICAI Student	Pune
35	Mrs. Naik Shalmali Gajanan	ICAI Student	Pune
36	Mrs. Deshpande Ankita Girish	ICAI Student	Pune
37	Mr. Bhalgat Lokesh S.	ICAI Student	Pune
38	Miss Jacob Kavya Tom	ICAI Student	Pune
39	Mr. Shah Anup Bipin	ICAI Student	Pune
40	Mr. Jain Harshit Amrit	ICAI Student	Pune
41	Miss Dhanesha Divya Rakesh	ICAI Student	Pune
42	Mrs. Natani Aayushi Prakash	ICAI Student	Pune
43	Mr. Agrawal Tejas Rajendra	ICAI Student	Pune
44	Miss Khandelwal Vinita Ravindra	ICAI Student	Pune
45	Miss Padhya Isha Sanjeev	ICAI Student	Pune
46	Mr. Patil Abhijeet	ICAI Student	Pune
47	Mrs. Jain Soumya	ICAI Student	Pune
48	Mrs. Kabra Nidhi	ICAI Student	Pune
49	Mr. Hingmire Ramraj	ICAI Student	Pune
50	Mrs. Dudhani Ankita	ICAI Student	Pune
51	Mr. Parihar Mahavir	ICAI Student	Pune
52	Mr. Gadgil Shivram Rajendra	ICAI Student	Pune
53	Mr. Soni Sumit Murlimanohar	ICAI Student	Pune
54	Mr. Gandhi Tejus Sunil	ICAI Student	Pune
55	Mr. Shingavi Jinesh Javahar	ICAI Student	Pune
56	Mrs. Phadnis Pranita	ICAI Student	Pune
57	Mr. Lodha Tejas	ICAI Student	Pune
58	Mr. Khariwal Suyash	ICAI Student	Pune
59	Mr. Maurya Lalitranjan	ICAI Student	Pune
60	Mr. Bothara Gaurav	ICAI Student	Pune
61	Mr. Bhuraki Param	ICAI Student	Pune
62	Mr. Nikam Shubham	ICAI Student	Pune
63	Mr. Gumashe Dhananjay	ICAI Student	Pune
64	Mr. Yardi Mangesh	ICAI Student	Pune
65	Mr. Dayama Pravin	ICAI Student	Pune
66	Mr. Nangare Vivek Vishwas	ICAI Student	Pune
67	Mr. Rahul Dhere	ICAI Student	Pune
68	Mr. Vanbhatte Murali	ICAI Student	Pune
69	Mr. Mehta Jigar	ICAI Student	Pune
70	Mr. Shah Kinchit Hemant	Law Student	Mumbai
71	Ms. Jain Priyanka Pravin	Law Student	Mumbai

72	Mr. Salia Saumil J.	ICAI Student	Mumbai
73	Mr. Zagde Nidhi	ICAI Student	Mumbai
74	Mr. Jain Anshul	ICAI Student	Mumbai
75	Ms. Tanna Shefali Ravijit	Law Student	Mumbai
76	Ms. Ghadi Pooja	ICAI Student	Mumbai
77	Mr. Bhise Saurabh	ICAI Student	Mumbai
78	Mr. Shah Rushil	ICAI Student	Mumbai
79	Mr. Kori Harsh	ICAI Student	Mumbai
80	Mr. Jain Ashwin Atulkumar	Law Student	Mumbai
81	Ms. Singhavi Kshipra	ICAI Student	Mumbai
82	Ms. Mehta Sushma Utkarsh	Law Student	Mumbai

Associate Membership

1	Allanasons Private Limited	Mumbai

II. Past Programmes

1. DIRECT TAXES COMMITTEE

A. The **Study Course on Interpretation of Taxing Statutes** was held on 17th & 18th March, 2017 at Babubhai Chinai Hall, IMC, 24th and 25th March, 2017 at Jai Hind College, Churchgate. The course was inaugurated by Mr. G. S. Panny by lighting the lamp following Keynote address.

B. The **Webinar** on the subject **"Recent Developments in Capital Gains"** by Shri Vipul B. Joshi, Advocate was held on 22nd March, 2017.

2. LAW & REPRESENTATION COMMITTEE

A. "Post-Budget Memorandum 2017 – Suggestions on Direct Taxes" was submitted to the Hon'ble Finance Minister, Government of India on 22nd March, 2017.

B. Representation on "Issues faced on e-filing portal of the Income Tax Department" was submitted to Shri Sushil Chandra, Chairman, Central Board of Direct Taxes on 29th March, 2017.

(For Details and Study Material of the Past Programmes, kindly visit www.ctconline.org)

III. Future Programmes

(For details of the Future Programmes, kindly visit www.ctconline.org or refer The CTC News of April, 2017)

1. ALLIED LAWS COMMITTEE

Dr. Y. P. Trivedi Tax Moot Court Competition will be held on 14th & 15th April, 2017. The Preliminary Rounds will be held at Government Law College, Semi-Final at ITAT and Final Round at Walchand Hirachand Hall, IMC.

The CTC members are requested to take the advantage of attending any or all rounds of the Moot Court Competition.

2. DIRECT TAXES COMMITTEE

Full Day Workshop on **"Income Computation & Disclosure Standards (ICDS)** – Covering: Issues, Case Studies, Implementation and Reporting Requirement" will be held on 17th June, 2017.

3. INDIRECT TAXES COMMITTEE

The 4 days Orientation Course on **"GST Law Bill"** will be held on 26th, 27th, 28th & 29th April, 2017 at Jai Hind College, Churchgate.

4. INTERNATIONAL TAXATION COMMITTEE

A. The Basic Course on **"FEMA and Taxation of Foreign Remittance"** jointly with The Malad Chamber of Tax Consultants will be held on 29th, 30th April, 2017 & 6th & 7th May, 2017 at Durgadevi Saraf Institute of Management Studies, Malad.

B. The **"11th Residential Conference on International Taxation, 2017"** will be held on 22nd June, 2017 to 25th June, 2017 at The Hotel Taj, Nashik.

5. STUDENT & IT CONNECT COMMITTEE

A. The Seminar on **"Understanding of GST"** will be held on 15th April, 2017 at Babubhai Chinai Committee Room, IMC.

B. The Half Day Seminar on **"DATA Crunching & Reporting with Pivot Tables"** will be held on 26th May, 2017 at Jai Hind College, Churchgate.

C. The Study Course for **"Articles Orientation Programme (Only for Students)"** will be held on 2nd, 3rd, 9th, 10th, 16th and 17th June, 2017 at Maheshwari Bhawan, Marine Lines, Mumbai.

D. The Sixth Dastur Essay Competition - 2017 for Student of Law & Accountancy:

Topics: (1) Demonetisation – Challenges in Cash Less Economy

(2) Accountability – Government, Businessmen, Professionals and Other

(3) Freedom of Expression and Action – Can it ever be curtailed?

7. RENEWAL OF MEMBERSHIP FEES 2017-18

The Renewal fees for Annual Membership, Study Group, Study Circle and other Subscription for the financial year 2017-18 falls due for payment on 30th April, 2017. The Renewal notices has been sent separately which contains entire information of members as per CTC Data Base. In case any change of information of members shown in form, kindly provide updated information along with the form.

Members are requested to visit www.ctconline.org for online payment of the Renewal fees.

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.


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STUDY CIRCLE & STUDY GROUP COMMITTEE

Study Circle on International Taxation Meeting on the subject "Place of Effective Management (POEM)" held on 2nd March, 2017 at SNDT Committee Room.

CA Bijal Desai addressing the members

Study Circle Meeting on the subject "Overview of Sections 68, 69, 69A, 115 BBE & Penalty u/s. 271 AAC of I.T. Act, 1961" held on 6th March, 2017 at SNDT Committee Room.

CA Jagdish Punjabi addressing the members

Study Group Meeting on the subject "Recent Judgments under Direct Taxes – Part I & II" held on 7th March, 2017 & 30th March, 2017 at SNDT Committee Room.

Mr. Vipul B. Joshi, Advocate addressing the members. Seen from L to R : S/Shri Ms. Priti Shukla, Advocate and CA Ashok Sharma, Chairman

ALLIED LAWS COMMITTEE

Allied Laws Study Circle Meeting on the subject "Issues Relating to Transfer, Transmission and Nomination in case of Co-operative Housing Societies and Companies" held on 9th March, 2017 at SNDT Committee Room.

Mr. Swapnil Bangur, Advocate, Bombay High Court addressing the members.

Intensive Study Group on Ind–AS Meeting on the subject "Ind-AS 101 – First Time Adoption of Indian Accounting Standards – Case Studies and Implications Part – II" held on 16th March, 2017 at SNDT Committee Room.

CA Zubin Billimoria addressing the members.

Workshop on "Statutory Audit of Bank Branches and Practical Issues" held on 1st April, 2017 at CTC Conference Room.

CA Vipul Choksi addressing the delegates.

CA Hemant Parab addressing the delegates.

INDIRECT TAXES COMMITTEE

Study Circle Meeting on the subject "GST Impact Analysis on Manufacturing Units" held on 23rd March, 2017 at SNDT Committee Room.

CA Jignesh Ghelani addressing the members.

INTERNATIONAL TAXATION COMMITTEE

Intensive Study Group on International Taxation Meeting jointly with Study Circle on International Taxation & Study Circle Meetings on the subject "GAAR – A Case Study Analysis" held on 20th March, 2017 at SNDT Committee Room.

CA Ganesh Rajgopalan addressing the members.

FEMA Study Circle Meeting on the subject "Capital and Current Account Transactions (including bank accounts)" held on 21st March, 2017 at CTC Conference Room.

CA Natwar Thakrar addressing the members

DIRECT TAXES COMMITTEE

Webinar on "Recent Developments in Capital Gains (Including amendments by Finance Bill, 2017" held on 22nd March, 2017.

Mr. Vipul B. Joshi, Advocate addressing the members.

Intensive Study Group on Direct Taxes on the subject "Recent Important Decisions under Direct Taxes" held on 23rd March, 2017 at CTC Conference Room.

Mr. Paras S. Savla, Advocate addressing the members.

DIRECT TAXES COMMITTEE

Study Course on "Interpretation of Taxing Statutes" held on 17th & 18th March, 2017 at Walchand Hirachand Hall, IMC, and 24th & 25th March, 2017 at Jai Hind College

CA Hitesh R. Shah, President delivering the opening remarks. Seen from L to R: S/Shri G. S. Pannu, Hon. Member, ITAT, Keynote Speaker, CA Mahendra Sanghvi, Past President and CA Ashok Mehta, Convenor

Shri G. S. Pannu, Hon. Member, ITAT inaugurating the course by lighting the lamp. Seen from L to R : S/Shri Ajay R. Singh, Vice President and CA Hitesh R. Shah, President

Faculties

CA Ketan Vajani, Chairman welcoming the faculties and delegates

Shri G. S. Pannu, Hon. Member, ITAT delivering Keynote address to the delegates

Mr. Deepak Tralshawala, Advocate

Mr. Sunil Moti Lala, Advocate

Mr. Bharat Raichandani, Advocate

Mr. Ajay R. Singh, Advocate

CA Geeta Jani

Mr. B. V. Jhaveri, Advocate

Mr. V. Sridharan, Senior Advocate

Mr. Nitesh Joshi, Advocate

THE CHAMBER OF TAX CONSULTANTS HAS INITIATED PROJECT OF RECONSTRUCTION OF SHREE SHADNAN SHISHUNIKETAN PRIMARY SCHOOL IN CHOPADA DISTRICT RUDRAPRAYAG, UTTARAKHAND AS PART OF ITS UTTARAKHAND RELIEF PROJECT

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Budget Publications 2017 by Dr. Girish Ahuja & Dr. Ravi Gupta

Direct Taxes Ready Reckoner with Tax Planning, 18E
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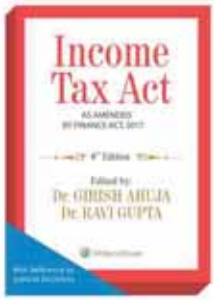

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- Income Tax Mini Ready Reckoner, 20E
- Direct Taxes law & Practice (Professional Edition), 9E
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- Guide to Depreciation under Income Tax Act, 1961 & Companies Act, 2013, 13E
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- Guide to Tax Deduction at Source, 14E
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- Concise Commentary on Income Tax with Tax Planning/Problems & Solutions, 18E
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