JIGnyasa

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Your Quarterly Companion on Tax & Allied Topics

Learning Today
Leading Tomorrow...

The Chamber of
Tax Consultants

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Mumbai | Delhi

www.ctconline.org

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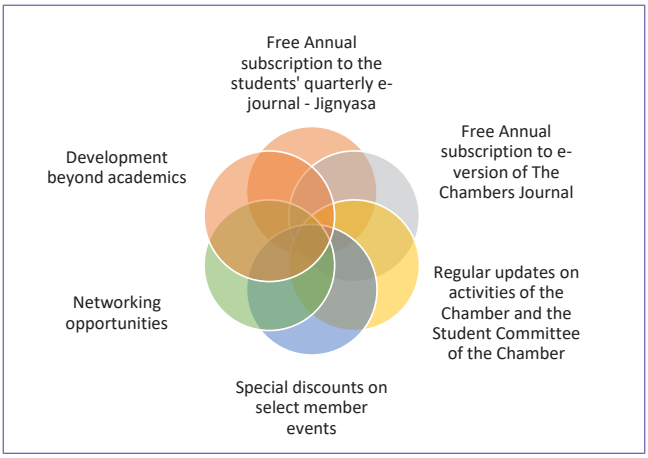
READER'S SUGGESTIONS AND VIEWS

We invite the suggestions and views from readers for improvement of ***Jignyasa***.
Kindly send your suggestions to jou@ctconline.org

Become a Student Member of The Chamber of Tax Consultants

What are the initiatives/programs organised by the Chamber for Students?

What are the benefits of becoming a student member of the Chamber?



Who can become a Student Member?

Any person, who:

- ✓ has completed 18 years of age;
- ✓ is not otherwise eligible to be a member of the Chamber;
- ✓ is pursuing his/her education as a student and has enrolled as a student of Law, Chartered Accountancy, Cost and Management Accountancy, Company Secretary, Chartered Financial Analysts, Business Management or Management Accountancy or Masters in Commerce or such other course approved for this purpose by the Managing Council shall be eligible to be a Student Member.

What are the fees for becoming a Student Member?

The fees for becoming a student member is merely Rs. 590/- [Rs. 500/- + Rs. 90 (GST @ 18%)]

How can one enroll as a Student Member?

You may download the membership form using the below mentioned link
Link : https://rb.gy/rw3xde

You can also get in touch with the Chamber's office at:
Address : 3, Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai 400 020
Email : office@ctconline.org

For any queries, you can also get in touch with Mr. Hitesh Shah (Manager) at:
Mobile : 7977258507

POLICY FOR CONTRIBUTION OF ARTICLES FOR JIGNYASA

Who can contribute?

The Student Members of The Chamber of Tax Consultants shall be allowed to contribute articles to the students' e-journal ***"Jignyasa"***

For which columns shall contributions be accepted?

Every issue of Jignyasa shall have the following four columns for contributions from students:

1. Information Technology
2. Current topics related to the profession
3. SOP on subjects that are related to upcoming due dates
4. A general topic that is relevant to the student members of the Chamber

What is the selection process of the article for publishing?

The selection of the articles to be published shall be based on the following parameters:

1. The topics should be relevant to the Students Members of the Chamber covering the various areas of practice.
2. The Article to be published should be original and must adhere to strict originality guidelines of the Chamber. A declaration to this effect should be submitted to the Chamber.
3. Subjects related to current topics or subjects which are related to the due dates falling in the next quarter shall be given preference.

What are the technical requirements for the article?

1. The article should contain an executive summary of around 100 words.
2. The list of references should be submitted at the end of the article.
3. A photograph of the author should be provided along with the article.
4. The article should be shared only in word format. No other format shall be accepted.

5. There is no specific restriction on the number of words for the article, but preference shall be given to a well written, the most technically correct, complete and concise article.

What is the review process?

The student is advised to approach a member of the Chamber to be his/her mentor for the article. If the interested student cannot find a mentor, the committee shall help him/her approach the members.

Each article shall then be forwarded to an expert for vetting and verification.

The article post vetting and verification shall be forwarded to the author with suggestive changes. Once approved by the author, the amended article shall be forwarded for publishing.

The articles received which are not published in the current issue of Jignyasa shall be parked in the Chamber's locker for the next issue.

Articles that are not found suitable for publication, communication to the Author of the article shall be made to that effect.

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Invitation to STUDENT MEMBERS to contribute articles for Jignyasa

The Student Committee of the Chamber invites the **Student Members** to contribute articles for the e-journal for Students – **Jignyasa**. The objective of the committee is to make a major section of the journal - for the students by the students. The students can contribute articles on latest updates in the tax and allied laws, Standard Operating Procedures that can be used for the upcoming due dates, current scenarios in various industries or any other topic. You can send through your article in word format on jou@ctconline.org along with your name, firm name/college name and a photograph. From among the articles received, the ones approved by the committee shall be published.

President and Chairman Message

Dear Students,

It is always my pleasure to connect with you'll through 'Jignyasa'.

Post September, we professionals experience a breather (to some extent) with passing of due dates for completion of audits and filing of income-tax returns. Surely, a professional works with many other due dates for various other compliances. That's the life of a professional. However, looking forward to next quarter, India celebrates a festive season starting with Navratri, Dusshera, Diwali and Christmas, being the major festivals to be named. The wide variety of festivals celebrated in India is a true manifestation of its rich cultusre and traditions. Indians celebrate festivals with sheer enthusiasm and devotion. The festivals are not really for just holidays. Every festival has its own meaning and related beautifully to life and brings in lots of happiness, colour and prosperity to our lives. Some of the benefits of festivals include: (a) it gives a unique opportunity to gather and spend time with family, friends and community (b) Keeps us closer to our religion and tradition (c) Stress relieving from a hectic work season (d) Provides us a time to break out from normal routine i.e. it breaks the monotony of life (e) Festival celebrations promote communal harmony.

So, I wish everyone a very happy festive season. I hope everyone have a wonderful time during their much-needed break from work and spend time with family and friends and come back to work rejuvenated. May everyone be blessed with success and prosperity.

'Jignyasa', an e-journal 'By the Students – For the Students' provides opportunity to Students to contribute articles on relevant topics. Hence, I would request all Students to please reach out to me or the Chambers office if in case you intend to contribute

an article for the forthcoming editions of Jignyasa on topics in subjects like Direct tax, Indirect Tax, legal updates, efficient use of technology, etc.

I must also thank all the Students, Moderators and the Editors for the Article contributions for this edition of Jignyasa.

I would also like to congratulate all the newly qualified Chartered Accountants. I will request you'll to join the Chamber as a regular member and take benefits of events being organized for professionals on various topics. For students who could not clear the exams, I wish them all the luck and offer one piece of advice i.e. this is not the end of road. You must gather yourself, be motivated, be in a positive frame of mind and put if your best efforts again. Your Dream will surely be achieved.

I hope to meet you'll soon during the CTC events.

Till then, Stay Safe – Stay Healthy.

CA Parag Ved
President

CA Vitang Shah
Chairman
Student Committee

FORTHCOMING PROGRAMMES

GST Annual Return and Reconciliation Statement – Student's Perspective

With the due dates of filing GST Annual Returns fast approaching, the Student Committee of the Chamber of Tax Consultants is pleased to announce an interactive e-workshop uniquely designed for students. The workshop would be conducted by an eminent GST expert who will explain the entire GSTR-9 and GSTR-9C clause by clause and would deal with the various issues/complexities involved by giving practical examples. Key focus areas which Students should keep in mind while working on the annual compliance would also be explained.

Sr. No	Day & Date	Time	Topic	Faculty
1	Monday, 12-Dec-2022	5.00 p.m. to 7.00 p.m.	GST Annual Return and Reconciliation	CA Yash Parmar

Who would attend : Students and Professionals

Participation Fees : For Student Member - Free

For Non-student Member – Rs. 200/- + Rs. 36/- (18% GST) = Rs. 236/-

Mode : Virtual (Zoom Platform)

Other Programmes

Sr. No.	Month	Topics
1	December, 2022	Tech Series
2	January, 2023	The 6th Dastur Debate Competition

Corporate debtor as an going concern

Risha Rathod

Vishesh Srivastav
Advocate

Introduction

"The king is dead – long live the king!" - The meaning of the adage is that the king may die, but the kingdom continues, under the new king. Similarly, in going concern sale under liquidation, the idea is that the concern may survive as is, but under a new owner.

It is a settled economic argument that for lots of entities, there is much better value as a going concern, and too much of a loss of value if the assets of a business are disposed of. In fact, the whole argument of liquidation, which is a collective remedy, rather than enforcement of security interest by creditors, which is an individual remedy, is that a going concern sale by the liquidator as a fiduciary for all creditors is likely to fetch better value for all stakeholders. The unique feature of a going concern sale is that, since the business of the corporate debtor can be transferred as a going concern, there exists a possibility of transfer of a whole lot of intangibles forming part of a business – contracts, leases, licenses, concessions, operational assets, manpower, technology, and so on.

If all that is transferred is the assets of a business, several of these assets either may not be transferable at all, or may require third party concurrence for each such transfer, which may be a great hassle in liquidation. With this viewpoint the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, was amended to permit sale of the corporate debtor as a going concern. Subsequently, a further amendment, IBBI (Liquidation Process) (First Amendment) Regulations, 2018, was made to introduce the concept of "sale of the business of the corporate debtor as a going concern".

Though after a series of amendments, the Liquidation Regulations still do not clarify as to what is a going concern sale, what are the determinants of a going concern sale, how will the liabilities and employees be tacked in a going concern sale and what will happen to the legal entity of the corporate debtor in case of a going concern sale.

In recent times several cases have come up before the Adjudicating Authority/ National Company Law Tribunals ('NCLT/ Tribunals') wherein order to sell the Corporate Debtor as going concern has been pronounced. It is essential to note that the Tribunals with such orders have ensured that the rights of the Acquirer are protected and so directions have been granted for certain reliefs to the Acquirer time and again, which not only keeps the Acquirer motivated to invest in such transactions financially but also otherwise, thereby leading to a smooth and peaceful transition of the Corporate Debtor's business.

In the matter of ***Gaurav Jain vs. Sanjay Gupta, Liquidator of Topworth Pipes & Tubes Private Limited [IA No. 2264 of 2020 in CP(IB) No.1239/MB/2018]***, the Hon'ble NCLT, Mumbai Bench has clarified the concept of sale as going concern, since there is no definition as such for "going concern" either in the Code or in

the Liquidation Regulations, its benefits and treatment of liabilities in such a distinct type of transaction. The Bench specifically stated that sale of Corporate Debtor as a going concern will not dissolve the Corporate Debtor but only the ownership is transferred along with the assets, so the Corporate Debtor as a legal entity remains intact. The Tribunal further stated that the crux of such type of sale is that the equity shareholding of the Corporate Debtor is extinguished and the Acquirer takes over the undertaking with the assets, licenses, entitlements, etc. Such an undertaking includes the business of the Corporate Debtor, assets, properties and rights etc., excluding the liabilities. Thus, the Hon'ble Bench held that:

"In normal parlance "going concern" sale is transfer of assets along with the liabilities. However, as far as the 'going concern' sale in liquidation is concerned, there is a clear difference that only assets are transferred and the liabilities of the Corporate Debtor has to be settled in accordance with Section 53 of the Code and hence the purchaser of this assets takes over the assets without any encumbrance or charge and free from the action of the Creditors."

Reasons/Need for a corporate debtor as a going concern

The quintessential feature of a going concern sale is that it aims at value preservation of the undertaking including intangible assets.

a. The acquirer who acquires the undertaking will have a smooth transition, as it works well with the existing template.

b. There are numerous soft and intangible assets in every company. These include leases, licenses, concessions, trademarks, registrations, contracts and vendor registrations. All of these are reduced to zero value if the entity is taken into liquidation. On the contrary, as the legal entity survives in a going concern sale, the value of the above intangibles will be preserved.

c. A going concern sale helps achieving synergy as the collective value of the assets (taking them with a view to generate future potential returns) would be higher than salvage value of assets disposed separately.

Relevant Provisions of the Code

1. Regulation 32 of the Liquidation Regulations specifies the manner of sale, wherein the Liquidator may sell- (a) an asset on a standalone basis; (b) the assets in a slump sale; (c) a set of assets collectively; (d) the assets in parcels; (e) the corporate debtor as a going concern; or (f) the business(s) of the corporate debtor as a going concern.

2. Section 35(1)(f) of the Code lays down the powers and duties of the liquidator, one of it being, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified.

Relief and concessions

Several reliefs and concessions are provided by the Adjudicating Authority in the spirit of the Code to ensure that the Corporate Debtor sold as a going concern under Liquidation enjoys similar benefits as available to an approved Resolution Plan in the CIRP. But the situation as it stands today is that, none of the statute addresses the concerns with respect to reliefs and concessions that are to be provided to the successful bidder under the 'sale as a going concern' regime. All the benefits are being passed on to the Resolution Applicant while the Corporate Debtor is at Corporate Insolvency

Resolution Process ('CIRP') stage but when the same Corporate Debtor is relegated to Liquidation, the said benefits are missing for the successful bidder who would want to take over the Corporate Debtor as on 'sale as a going concern' basis. Now is the time for the Legislature to address this pressing issue to encourage the prospective bidders of such sick companies, else the object of the Code seems to be diminishing as in absence of any such encouragement the Corporate Debtor is likely to be liquidated which will result in the demise of such Corporate Debtor. Hence, the acceptance of reliefs by the concerned Statutory Authorities and implementing them through relevant statutes will not only motivate more and more Acquirers to takeover and level up the business of Corporate Debtor under Liquidation, but would save the Corporate Debtor from simply bleeding to death under the Liquidation process. The process allows the current employees of the going company to continue in employment and get paid as per the Corporate Insolvency Resolution Plan. It leads to continued service rather than retrenchments and laying off employees thereby providing relief to the employees as well as the going company which can continue to function simultaneously without being affected by the process of Corporate Insolvency Resolution.

In case of ***IFCI vs. KSK Energy Ventures Ltd. [CP (IB) No.675/7/HDB/2018]***, the NCLT, Hyderabad Bench while relying upon the Supreme Court's judgment in the matter of ***Arcelor Mittal India Pvt. Ltd. vs. Satish Kumar Gupta & Ors.*** ordered the sale of the Corporate Debtor as a going concern and thereafter granted reliefs in favour of the Acquirer, wherein not only claims, liabilities or obligations payable by the Corporate Debtor and pending proceedings against the Corporate Debtor were extinguished but the Tribunal also exempted the Corporate Debtor to comply with SEBI regulations, as otherwise would be required by the Acquirer while taking control over the management of the Corporate Debtor. For easy facilitation of such transaction of takeover, the Tribunal also directed that all the Intellectual Property Rights belonging to the Corporate Debtor shall remain vested with the Corporate Debtor and the existing or erstwhile promoters/ guarantors, or any member in association with earlier management is restrained from doing any business directly or indirectly in connection with the products and services offered by the Corporate Debtor. Thus, paving a protective layer for the Acquirer to acquire the business without any further obstacles or hesitation.

Very recently, the similar Bench in the matter of ***SREI Equipment Finance Ltd. vs. M/s. Vishwa Infrastructures and Services Private Ltd. [CP (IB) 329/7/ HDB of 2018],*** has provided the similar reliefs to the Acquirer and also directed the Liquidator, who is an extended arm of the judiciary to provide support and assistance to the Acquirer and ensure completion of pending filings with the Registrar of Companies, Income Tax Authorities and any other Government/Statutory Authorities for further ease in doing business and smooth completion of the acquisition. The Tribunal also entitled the Corporate Debtor to get the benefits of brought forward losses, if any, subject to the approval of the appropriate authority under the Income Tax Act, 1961 and allowed reliefs pertaining to issuance/renewal of all kinds of licenses/ permissions/approvals required, subject to payment of renewal fees, if any. Thus, for a smooth transmission of the business the Acquirer gets all the rights, title and interest over whole or every part of the Corporate Debtor including and not limited to contracts free from security interest, encumbrances, claim, counter claim or any demur.

Therefore, from the above judgments, it is evident that the Tribunals have granted several reliefs to the Acquirers for keeping

up with the aim of the Code and protecting the Corporate Debtor's value. Thus, it won't be wrong to state that the Tribunals have very well conceptualized the idea that in the well-being of the Acquirer lays the development and enhancement of the Corporate Debtors. It is pertinent to mention that the judiciary has ascertained that Acquirer is not merely given away the Corporate Debtor as a going concern and left vulnerable to make it a profitable one, but is also be provided with relevant and sufficient safeguards in the form of reliefs to run the Corporate Debtor successfully and ensure that the Corporate Debtor is kept ongoing.

NCLT Mumbai-I (09.03.2021) in Gaurav Jain Vs. Sanjay Gupta, [IA No. 2264 of 2020 in C.P. (IB) No. 1239/MB/2018] held that;

The Applicant submits that the mere purchase of the Corporate Debtor as a 'going concern' as per Liquidation Process Regulations will not suffice. In order to ensure smooth running of the business of the Corporate Debtor, it is imperative that certain additional reliefs/concessions/ relaxations/and permissions are allowed which would be essential and necessary to run the business of the Corporate Debtor as a 'going concern'. Unless these reliefs/ concessions/permissions are provided, the purpose of the revival of the Corporate Debtor as a 'going concern' under Liquidation Process Regulations will not be achieved. In fact, these permissions/ relaxation/concessions/reliefs are crucial to kickstart the business of the Corporate Debtor and achieve value maximization of the Corporate Debtor.

15." The Applicant further submits that this Tribunal is empowered to grant necessary reliefs in relation to the Corporate Debtor, sold as a 'going concern' under the provisions of the Liquidation Process Regulations, under Section 60(5)(c) of the Code. Therefore, the Applicant submits that the instant case is a fit case to grant the reliefs in favour of the Applicant."

Clean break clean slate

Section 32A was inserted to give a clean break to successful resolution applicants from the erstwhile management by shielding them and immunizing them from prosecution and liabilities for offences that may have been committed prior to the commencement of the CIRP.

- Prior to the insertion of the abovementioned Section, the corporate debtors were burdened with liabilities and the hassle of prosecutions for past offences. Hence there was a need to incorporate a provision that unburdened the corporate debtor of any liabilities so that they may proceed towards a successful resolution. This Section mainly aims to provide resolution applicants with a fair opportunity to revivify corporate debtors without the threat of liabilities springing from *mala fide* acts of the past.
- Section 32A is a particularly powerful provision as it provides for the prevention of any prosecution, attachment, seizure, action, confiscation or retention against a corporate debtor. The retrospective effect of this non-obstante Section read with Section 238 of the abovementioned code has a favourable overriding application. The wide-reaching application of this provision also raises a question as to what kind of proceedings would come within the ambit of this provision.
- The NCLAT aptly answered this question in the case of ***Shah Brothers Ispat Pvt. Ltd. vs. P. Mohanraj and Ors (2018)***, wherein the NCLAT stated that all criminal proceedings, like the criminal proceedings under the Negotiable Instruments Act 1881 do not come

within the ambit of this above-mentioned Code and hence cannot be overridden by the provision of Section 32A.

- Since this provision is still relatively new, there are only a few cases that have tested the efficacy, but the larger issue still remains that in several situations it might extinguish the remedies of other agencies against the corporate debtor, and it is still left to be seen. The mere approval of a resolution plan can override statutory remedies available to others against the corporate debtors by the virtue of this provision.
- Another considerable issue that might be created by this above-mentioned provision is that it might bar the attachment of property that might have been acquired through criminal acts. Such asset or property may have been acquired by the corporate debtor shortly before the commencement of the CIRP.
- This Section will nullify any action that could be taken to discharge the criminally acquired property or asset. Such illegally obtained assets or properties would be legalized after the conclusion of the CIRP. The widespread application would also ensure that essentially no proceeding can take place in the future against the illegally acquired property. There are many potential pitfalls of the abovementioned provision that can only be identified and rectified by the judiciary.

Manish Kumar vs. Union of India (2021)

This case mainly dealt with the recurring question of the continuity of liability in respect of the offences committed by the corporate debtor. The writ petition challenging the validity of the abovementioned provision on the grounds of arbitrariness and violation of constitutional Articles 300A, 19, 14 and 21 were dismissed by the Supreme Court recently. It was the contention of the Union of India that corporate debtors deserve to start over with a clean slate and the abovementioned Section was incorporated to give a statutory basis for the furtherance of that goal. The Court observed that it is important for the corporate debtors' criminal liability to be extinguished so that the new management can break clean with the past and start over. The unequivocal declaration of the Court which upheld the validity of Section 32A will be binding on all subordinate courts and tribunals.

The Court also added that such immunity as granted under the abovementioned provision shall only be applicable when the resolution plan has been approved and the management has been replaced. To ensure the timely completion of the CIRP it is extremely important to attract investors who might only invest unencumbered from the threat of liability. Such investors must be granted immunity for the acts of the past which they did not commit which has also been stated in the provision itself.

JSW Steel Ltd. vs. Mahender K. Khandelwal and Ors. (2020)

This case which essentially facilitated the incorporation of Section 32A was instrumental in establishing a concrete precedent with regards to this provision. The Section was still in its ordinance stage during the adjudication of this case, but the NCLAT relied on the ordinance to issue a notification to the Enforcement Directorate and the Central government to respond to whether JSW steel would be exempted under the abovementioned Section. During the pendency of the Prevention of Money Laundering Act, 2002 proceedings in this case the NCLAT made the following relevant observations regarding Section 32A.

- That the provision would have retrospective effect as it was merely clarificatory.
- And for the Section to be applicable, the investigating authority must have reason to believe based on material evidence in their possession that the new management had abetted or conspired to commit the offence in question. The investigation authority may not keep such information latent till investigation in all fields have concluded.

The appeal to NCLAT for this case is still pending, and only after its resolution can a conclusive answer be provided to the application of the Section in the present case.

Tata Steel BSL Ltd. and Anr. vs. Union of India and Anr. (2019)

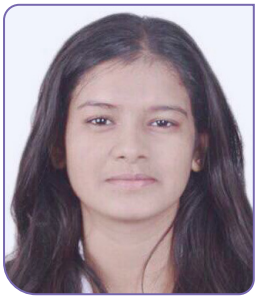
In the present case on the approval of the resolution plan for revival of the petitioner previously known as Bhushan Steel Ltd. Under the IBC process, the Delhi High Court consequently discharged the accused on the plain application of Section 32A of proceedings filed against them for alleged offences before the trial court under the Indian Penal Code 1860, the Companies Act 2013 and 1956.

Conclusion

The courts are still struggling to interpret Section 32A, given the vagueness and ambiguity revolving around the Section. Section 32A aims to detach all liability associated with the corporate debtor and their property and assets to prevent attachment or confiscation of the same which would defeat the object of the Code. The IBC has sought to facilitate successful resolution applicants to start over with a clean slate without the fear of past offences by strengthening the insolvency framework to attain a positive economic outcome.

■■■

Deemed Conveyance



Aditi Borkar

Advait Dalvi
Advocate

INTRODUCTION

In common parlance, conveyance is construed as the transfer of something from one person to another. The Deed of Conveyance is the legal document that allows property to be transferred. In terms of transfer of title, it implies an act of transferring ownership of property from one person to another. A deemed conveyance deed is a legal document used to transfer ownership of land and buildings to a society or association of persons (AOP). However, it might not always be the case that the conveyance is carried out in a smooth manner and sometimes the process could be delayed unnecessarily or disrupted. For example, builders/promoters are legally required to convey the land and building within 4 months of formation of society. But the builders or promoters do not convey the title of land, thereby the society loses the ownership rights. In order to cover such circumstances where the builder failed to convey the right, title and interest, the government has stepped in and amended the Maharashtra Ownership Flats Act,1963, likewise provided a remedy to aggrieved parties for entitlement of ownership and such execution of a document to be known as DEEMED CONVEYANCE.

The District Deputy Registrar (DDR) has been designated as the Competent Authority to hear the parties based on applications from the aggrieved party (Society) with the help of a deemed conveyance lawyer and decide in cases where the builder/developer refuses to agree to the conveyance of the land. If the competent authority decides that the society or legal organization is qualified to receive the conveyance of land and buildings, it will make a positive decision to that effect. Once the society or legal entity has received a deemed conveyance order from the competent authority, it must make a unilateral conveyance deed, attach the deemed conveyance order, and pay the deemed conveyance stamp duty before registering both documents with the sub-registrar of assurance. When a person legally owns real property by taking the steps listed above, this is called a "deemed conveyance."

The competent authority's order of presumed conveyance is final and can't be changed. But Article 226 of the constitution says that people who think they have been wronged can file a writ petition with either the High Court or the Supreme Court. After the presumed conveyance order with unilateral conveyance deed has been issued, the index II must be gathered and sent to the Talati office or City Survey office in order to have the name of the legal entity included in the 7/12 extracts or on the property card.

OBJECTIVE OF CONVEYANCE

1. BECOME LEGAL OWNERS

Any movable/immovable property ownership is documented by title documents; immovable properties are recorded by Survey No., Hissa No., and other identifiers in government records. When such identity markers are documented in the title document (Conveyance Deed) and officially stamped and registered with appropriate authorities, it is incontrovertible evidence of property ownership.

2. TO MAKE ENTRIES IN GOVERNMENT RECORDS

Recording property transactions in government documents proves ownership. A Conveyance Deed has to be executed to make entries in government records.

3. TO HAVE FREE AND MARKETABLE TITLE

If the original owners' names are kept on the title records after a person or organisation has paid the purchase price and taken possession of a property, the buyer will not have a clear and marketable title to the property. Only after the conveyance is complete will the buyer have clear title to the property.

MAHARASHTRA OWNERSHIP FLATS ACT, 1963

The title and preamble of statute clearly implicates the providence of regulations of the promotion of the following;

(i) the construction,

(ii) sale,

(iii) management and

(iv) transfer of flats taken ownership basis in the State of Maharashtra.

As mentioned above, MOFA was enacted with the aim of providing relief to flat purchasers against sundry abuses, malpractices and difficulties related to above listed regulations. The Act and Rules were framed with a view to effectively prevent the abuses and malpractices of promoters/developers.

The wording of section 11 compelling the promoter to take steps is emphasized by the use of word "shall", as observed in (***Vrindavan Borivali CHS v. Karmakar Bros)***. The same word is used in section 10,11, and 12 casts mandatory obligations on the respective parties. The transferring of title contemplated by section 11 is not an individual based transfer on an ordinary contract giving rise to individual rights and liabilities. In other words, a duty has been cast upon the promoter to bring about the formation of a co-operative society or company to whom the property is to be conveyed after it has been developed. (***Kalpita Enclave Co-Operative v. Kiran Builders Pvt Ltd., 1987***)

SECTION 10 – FORMATION OF SOCIETY

MOFA provides registration of legal bodies which is inclusive of a society. In view of registration, the same came be done independently by the flat buyers. However, the registration of Housing Societies, there are various requisites that must be submitted as per the circular provided by the Co-Operative Department.

Even though there is a provision wherein a society can get registered without the builder's cooperation, many cases exist where the genuine flat buyers are denied registration, leading to a strange situation where the builder can use the legal battle to his advantage, buying himself more time to exploit the flat buyers. Sometimes such societies are deregistered and driven into court battles that are not beneficial for the apartment buyers and the builder, even after the deputy registrar has allowed the registration.

As a result, the statute has established a Competent Authority to decide whether a society's registration is necessary, in order to avoid a protracted legal battle. Competent authority's ruling is provided to a case if an appeal or rehearing of an appeal is filed.

SECTION 11

According to Section 11, the Promoter/ Builder must deliver the conveyance of the land and building to the authorised entities within the time limit. According to Rule No. 9, the builder must hand over the deed to the property within four months of the formation of the legal entities. The government is aware, however, that few builders provide the title without a hitch. Since MOFA does not contain a remedy clause, the parties involved must resort to the following courts:

i. Civil courts & Criminal courts.

ii. Since the apartment buyer is treated as a customer under the terms of the Consumer Protection Act of 1986, he or she may wish to file a complaint with the Consume Court.

It has been observed, however, that enforcing justice through these channels is not simple; it requires significant resources and the efficient time of the office bearers. There are numerous mechanisms for appealing judgments, which will likely result in additional lawsuits. Consequently, societies and aggrieved parties, began resorting to legal remedies. As a result, the builders are still sitting on their land title years after selling the accompanying apartment and receiving full payment.

The rise in FSI and TDR rates as well as the rise in flat rates have stoked the flames of redevelopment of the building. It is often observed that builders has started asking the society for a higher price for the conveyance. Until the transfer of property and the construction of their society are complete, many societies have been unable to begin the re-development process.

Therefore, there were pleas for the establishment of a quasi-judicial authority with the power to hear complaints about conveyances and, once the parties' concerns had been addressed, to issue certificates authorising builders and landowners to transfer their properties to buyers and execute unilateral conveyance deeds so that they could be registered under the Registration Act of 1908.

COMPETENT AUTHORITY

It is settled that one cannot transfer any movable or immovable property unless he possesses the right to do so in accordance with the law. The description of the property in all respects is an essential factor before granting/permitting such transfer and/or for registered agreement and/or registered sale deed. Uncleared/ without description/vague specification of description are always a matter of issue when it comes to the transfer of such property between the parties. The Competent Authority, therefore, is under an obligation to see that the deemed conveyance must be confirmed and satisfied, based upon the written agreement between the parties, before passing and/ or granting the order/judgment on such applications. An individual designated by the State Government to exercise powers under the Act, including the authority to direct deemed conveyance on an application made by flat buyers in accordance with MOFA and Rules, is given to the Competent Authority.

This person must not be below the rank of Deputy Registrar of Co-Operative Societies. In any case, not later than six months after being satisfied that it is a fit situation for issuing the certificate and that it is an appropriate and acceptable case for imposing unilateral performance of the conveyance deed, the Competent Authority must make a decision within a reasonable time, in any case not later than six months, per subsection (4). In the case of Mayfair Housing Private Limited v. State of

Maharashtra and Ors, the court dealt with seeking a direction for deemed conveyance. The Competent Authority ordered deemed conveyance on the part of the developer. When the order was challenged in the High Court, the court ruled that the clause allowing the builder to deem conveyance of the land in favour of the society for a period of 5 years constituted an "unfair trade practice."

The Competent authority at the stage of adjudication has to hear both sides. On the other hand, such authority is empowered to refuse the deemed conveyance on the following grounds-

1. Unfinished paperwork;
2. Two construction companies or builders have a legal disagreement over same plot of land.

The state government of Maharashtra has decided to streamline the process through which societies approve of renovated structures. Housing societies can legally use the land without a building's Possession Occupation Certificate (OC). However, the society must provide an Indemnity Bond or Undertaking indicating that they will be responsible for maintaining the structure in accordance with all applicable laws and ordinances.

ARBITRAL TRIBUNAL

In the case of ***Tirupati Shopping Centre Premises, Co-Op Society v. Shabayesha Construction Company Private Limited***, the Jurisdiction of the Arbitral Tribunal was dealt with. It was submitted that the Arbitral Tribunal can never examine the validity or nullify a quasi-judicial order passed under a statute. The subject matter is maintainable before a court and couldn't fall within the ambit of an Arbitral Tribunal. This contention was based on the fact that the order issued by the quasi-judicial authority would operate in rem, and thus no arbitral proceeding would be required to qualify the maintainability. To which the Arbitral Tribunal in their proceedings said that the recorded finding that the reliefs sought for specific performance are actions in personam and not in rem. In contrast, the petitioner fairly admitted that the order of deemed conveyance could not be adjudicated by a civil court.

The verdict obliterated the contention of inherent lack of jurisdiction of the Arbitral Tribunal and stated in seeking claim for damages and specific performance, the Arbitral Tribunal has jurisdiction to entertain, try and adjudicate upon such claims arising out of not in action in rem. Thus, in view of the proceedings under Section 11 of MOFA being upheld and declared to be valid, the Competent Authority is empowered to pass an order of Deemed Conveyance even in Ex-Parte. Concurrently, in another case of the Apex Court, the ruling evidently provided that the Arbitral Tribunal can rule in its own jurisdiction under Section 16 of the Arbitration and Conciliation Act, 1996. The Court upheld the rationale adopted by the Tribunal and declared that no party is precluded by law or otherwise from establishing their right, title, or interest in the property apart from the presumed conveyance.

PROCEDURE TO BE FOLLOWED FOR DEEMED CONVEYANCE

DOCUMENTS REQUIRED FOR DEEMED CONVEYANCE[1]:

1. The certified copy of the resolution of the applicant for the application for the deemed conveyance (wherever necessary) should be submitted.

1. Government of Maharashtra Co-operation, Marketing and Textile Department Government Resolution No.SaGruYo-2017/Pra.Kra.192/14-S Date : 22nd June, 2018.

2. The certified/attested proof of registration of the organization seeking conveyance should be submitted. (Registration Certificate of the Society)
3. Copy of the Agreement executed between Land Lord and Developers.
4. True copy of the registered agreements for sale executed with the promoter, by a member of the society or the company.
5. The latest 7/12 extract and village Form no.6 (Mutation entries) should be submitted. (wherever applicable)
6. Latest Property card. (Please the CTS Number)
7. The Layout plan approved by the local authority.
8. The building/structure plan approved by the appropriate authority + Tenement statement.
9. IOD Certificate/Commencement certificate
10. Occupation certificate (if any)/ Completion certificate.
11. The actual list of flats and/or shops and/or garages etc. with details of payment of stamp duty and registration.
12. Legal Notice given to the Developer for conveyance if any.

STAGE 1: APPLICATION

To obtain a deemed conveyance order and a certificate, the society or company, or any aggrieved party to the organization, must submit an application along with the required document(s) and a draught of the conveyance deed. The application is presented to the competent authority in person during office hours.

Admitted: A registered post acknowledgement due will be sent to the opponent on Form X within a period of 15 days, requiring a written statement to be filed. Rejected: In case of any defect or deficiency in Form VII, a notice will be sent to the applicant for rectification within 15 days of the extended period

STAGE 2: ADJUDICATION

The draught of the Deemed Conveyance Deed along with the details of stamp duty of all the owners of the flats should be adjudicated by the Joint Registrar or Collector of Stamps. It is stipulated under Para 4 of Form VII that all agreements between the Promoters and Flat Purchasers shall be stamped and registered under the provisions of the Indian Registration Act.

In ***Usha Dongre v. Suresh Kotwal***, there will be instances where the flats were purchased prior to December 10th, 1985 and neither stamp duty nor agreements had been registered. Consequently, the legal prevailing position was brought before the court. To which the court said that the registration of a flat in a co-operative society is not necessary.

In Lajawati G. Godhwani and Anr v. Shyam R. Godhwani & Ors., adjudicated on the disputed fact of penalty with stamp duty, wherein the Court held that the Collector of Stamps cannot recover the stamp duty on the earlier unpaid agreements and has to recover the stamp duty only on the last agreement of the society.

STAGE 3: REGISTRATION

After getting the Deemed Conveyance Deed duly adjudicated, the same should be registered with the office of the concerned Sub-Registrar.

In order to register a unilateral instrument of conveyance as a "Deemed Conveyance," a relevant official appointed under the Registration Act, 1908, must have a copy of the Certificate issued by the Competent Authority and the duly stamped instrument of conveyance.

STAGE 4: MUTATION IN REVENUE RECORDS

Application has to be made to the concerned City Survey Officer for recording/ registering the name as per the Registered Document in the Record of Rights (7/12). The power of Deemed Conveyance shall be completed after the concerned officer records the name of society as occupant on the property card.

CONCLUSION

Several judicial pronouncements have resolved the issues of non-compliance on the part of builders and promoters and relieved the flat purchasers from the problems faced at their end. It is quite a common practice of builders and promoters to exploit the existing and future FSI to withhold the conveyance as long as they can.

From the perspective of the promoters/ builders, several practical problems have been cited in observance of undertaking development of large plots. In most cases, it is likely that the additional construction on the same plot of land and unaffected promised services, straining the common areas or lobbies and leading to inconvenience, is occasionally guided to negotiations during the purchase of the flat. Therefore, the disclosure of vital segments of information is required to be discussed.

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Disallowances under business and professional head

Chirayu Sodani CA Ishraq Contractor

The Computation of the Income from Business and Profession is governed by Section 28 to Section 44DB of the Income Tax Act, 1961 ("the Act").

In this article, I have tried to cover some of the provisions related to business with focus on disallowances under the head, Profits and Gains of Business and Profession

1. Section 36 of the Act

(i) Section 36(1)(va)

- As per provision of Section 36(1)(va) any sum received by an assessee from his employees to which Section 2(24)(x) of the Act applies shall be disallowed in computing the income of such employer if such amount is not credited to the relevant fund on/ before the due date as mentioned in that relevant statute.
- In simple words, if the employer receives any amount being in the nature of the one covered u/s 2(24)(x) towards employee's contribution to PF, ESIC or any other employees' welfare fund and such amount is not deposited by the employer within the prescribed time mentioned in the respective statute, then such amount received and not deposited shall be disallowed and same shall be added back to income of the employer and taxed accordingly. This is a permanent disallowance.

Interplay of Section 36(1)(va) and Section 43B

- The Income Tax Act disallows employees' contribution deposited after due date specified in the respective statute u/s 36(1)(va) r.w.s. 2(24)(x) of the Act if there is a delay in depositing the said contribution to the respective statutory authorities.
- There was extensive litigation on this matter and finally the courts held that so long as the employee's contribution is deposited with the respective statutory authorities on or before the due date of filing of return, the tax payer shall not be subjected to any kind of disallowance and the said contribution shall be allowed u/s 36(1)(va) i.e. it interpreted the provision on the same line that of section 43B of the Act which *interalia* speaks about the allowance of the employers

contribution towards PF, ESIC or any other employees' welfare fund etc before the dye date of filing of return.

- To nullify the effect of the court judgements given in the favour of the tax payers, an amendment was brought out u/s 36(1)(va) vide Finance Act, 2021 by adding *Explanation 2* which states that-

  "For the removal of doubts, it is hereby clarified that the provisions of section 43B shall not apply and shall be deemed never to have been applied for the purposes of determining the "due date" under this clause".

Further this Controversy has been not set at rest by the Hon'ble Supreme court[1] by holding that

1. The essential character of employees' contribution, i.e. part of the employee's income, held in trust by the employer is underlined by the condition that it has to be deposited on or before the due date.
2. Amounts retained by the employer from out of the employee's income by way of deduction etc. were treated as income in the hands of the employer. The significance of this provision is that on the one hand, it brought into the fold of "income; so long it was paid within the prescribed time, to be treated as a deduction (Section 36(1)(va)).
3. The other important feature is that this distinction between the employers' contribution (Section 36(1)(iv)) and employees' contribution required to be deposited by the employer (Section 36(1)(va)) was maintained and continues to be maintained.
4. Since there is a marked distinction between the nature and character of the two amounts – the employer's liability is to be paid out of its income whereas the second is deemed an income, this marked distinction has to be borne while interpreting the obligation of every assessee under Section 43B.
5. Accordingly, the benefit of section 43B can't be made available for the employee's contribution deposited before the filing of the Income-tax Return.

Accordingly, delayed employee contribution shall never be allowed u/s 43B.

(ii) Section 36(1)(vii), 36(1)(viia) and Section 36(2)

The allowance of the Bad debts is governed ***Section 36(1)(vii), 36(1)(viia) and Section 36(2)***

Bad debts are charged to P&L A/c either by writing it off in the P&L on account of the same becoming irrecoverable or by the way of making a provision for doubtful debts in respect of the Schedule/Non-Scheduled bank as the case may be.

In the case of Non-Banking companies, a provision made for doubtful debts is not allowed in the computation of income. Deduction of such provision can be claimed in that previous year only in which the said

1. *Checkmate Services Pvt. Ltd. vs. CIT (2022) 143 taxmann.com 178.*

amount becomes irrecoverable and written off as bad debt.

A provision is made on the basis of estimation arising due to past events. Accordingly, a provision for doubtful debt expense is debited in the books of account by recognising a provision for the same in the balance sheet. Such provisions are disallowed in pursuance of Explanation 2 to Section 36(1)(vii) of the Act. Same shall be allowed as and when the bad debts actually occur. However, for any reason, if deduction of such provision has been already taken in any preceding year, and has not been disallowed, then the same shall not be available as a deduction again when the amount actually becomes irrecoverable.

However, if bad debts are written off in the books due to non-recoverability of the same, the same is allowed as a deduction in the year of write off. This position is also supported by the decision of Hon'ble Supreme Court in the case of ***TRF Limited vs. CIT 323 ITR 397 (SC)***.

Section 36(1)(viia) talks about allowance of provision of bad debts to financial institutions and banks. This clause elaborates on the threshold limits available to different financial institutions and banks for claiming bad debts. Any amount in excess of such limit as stated therein shall be subjected to disallowance under the Act.

(iii) Section 40A(13) and Section 36(1)(xviii)

Section 40A(13)

This section states that any kind of marked to market loss or any other expected loss which is not in accordance with Section 36(1)(xviii) of the Act shall be disallowed.

Section 36(1)(xviii)- interalia states that any marked to market loss which is computed in accordance with the Income Computation and Disclosure Standards ("ICDS") notified u/s 145(2) of the Act shall is to be allowed as an expenditure .

Therefore, to claim deduction of marked to market losses as an expense, one needs to keep in mind that Section 36(1)(xviii) and corresponding ICDS is duly complied with. ICDS I on accounting policies provides that MTM loss or an expected loss shall not be recognized unless permitted under other ICDS and only ICDS VI & ICDS VIII provide for MTM losses on Forex derivatives for hedging purpose and securities held as Stock in Trade respectively. As a result, only such losses are allowed as deduction which are covered under the ICDS & the other MTM losses for any other transaction will not be allowed as deduction. In case any conflict arises between the ICDS and the Act, Act shall always prevail over ICDS.

2. Section 37 – General Deductions

Section 37 is a residuary section of the Act. It provides business allowances which are not specifically dealt by Section 28 to Section 43B of the Act. The given section also specifies that the following expenses are not allowed as a business expense-

- Personal expenditure; or
- Capital expenditure; or
- Expenditure not incurred for the purpose of business and profession; or
- Expense incurred under Section 135 of the Companies' Act, 2013 as a Corporate Social Responsibility ("CSR"); or

- Expenditure incurred on an activity which is an offence or if such expenditure is itself an offence under the eyes of law; or
- Expenditure incurred on an activity which is prohibited by law; or
- Expenditure incurred on advertisement in any souvenir, brochure, pamphlet, tract or in any other similar medium published by a political party; or

Capital Expenditure

Though capital expenditure is not a allowable expenditure u/s 37(1) of the Act. However, there are certain other sections such as Section 35, 35A, 35AB, 35AD, etc. in the Act which provide allowance of certain type(s) of capital expenditure on fulfilment of the specified conditions stated therein.

CSR Expenses

- Every company qualifying the criteria defined under Section 135 of the Companies Act, 2013 needs to discharge its Corporate Social Responsibility (CSR) and is required to spend 2% of the average net profits of the preceding 3 years earned by it towards the society in respect of objectives as specified in Schedule VII of Companies Act, 2013. The intention behind disallowing CSR expenses was to avoid companies from making unnecessarily excess provisions for CSR and deflating their profits and claiming the benefit of the same as an allowance under the Income Tax Act.
- Since there was no specific section for the allowance of CSR, taxpayers started taking the deduction of the same under this section. The government did not intend to allow it and the same was disallowed by adding Explanation 2 to Section 37(1) *vide* Finance Act, 2014. This benefit of 100% deduction was subsequently plugged out in pursuance of introduction of such amendment.
- Although, CSR expense cannot be claimed under section 37 of the Act, the same can be claimed under Section 80G of the Act under Chapter VIA in case the contribution is towards those organisations which are registered under section 80G and such contribution is excluding of any amount paid to (i) Swachh Bharat Kosh & (ii) Clean Ganga Fund on account of discharging their CSR.
- However, companies opting to offer income for tax under Section 115BAA and Section 115BAB of the Act are not allowed to claim deduction under 80G w.e.f. AY 2021-22.

Offences and Penalties

This section disallows all kinds of fines, penalties and expenditure towards any offence and acts prohibited by law. Earlier, disallowance under this section triggered only when there was a contravention of an Indian law. Therefore, to remove this ambiguity and enhance the scope of this section further, Explanation 3(i) was introduced under this section vide Finance Act, 2022 to cover penalty and fines under foreign law as well. The said explanation categorically mentions that disallowance shall be done in the hands of the tax payer for contravention of both, Indian law or any law outside India.

It is pertinent to note that interest paid on GST, VAT or any other statutory due is not an offence

under law and same is an allowable expense under section 37 of the Act as the same forms part of operating expenses of the assessee. However, interest on TDS and Income Tax is not allowed in pursuance of Section 40(a)(ii) of the Act. And consequentially cannot be claimed as expenses u/s 37.

Disallowances in respect of expenditure incurred for Medical Professionals

Explanation 3(iii) added to Section 37(1) vide Finance Act, 2022 disallows any benefit or perquisite provided to any person irrespective of the fact whether the recipient is carrying business and profession or not if such benefit is in contravention of a law/rule/guideline as the case may be, for the time being in force (both Indian and foreign) governing the conduct of such person. This was primarily intended to cover benefits provided by pharma companies to medical professionals. This was duly asserted in Memorandum to Finance Bill, 2022 as well by illustrating the case of Indian Medical Association ("IMA") prohibiting medical practitioners from taking any gift, travel facility, hospitality, cash or monetary grant from pharma and allied healthcare sector industries. CBDT had also issued a circular in respect of the issue raised by IMA bearing circular no. 5/2012 dated 01-08-2012 which was eventually challenged in the Himachal Pradesh High Court[2] by holding as under.

> *"The regulation of the Medical Council prohibiting medical practitioners from availing of freebies is a very salutary regulation which is in the interest of the patients and the public. This Court is not oblivious to the increasing complaints that the medical practitioners do not prescribe generic medicines and prescribe branded medicines only in lieu of the gifts and other freebies granted to them by some particular pharmaceutical industries. Once this has been prohibited by the Medical Council under the powers vested in it, s. 37(1) comes into play. The Petitioner's contention that the circular goes beyond the section is not acceptable. In case the assessing authorities are not properly understanding the circular then the remedy lies for each individual assessee to file an appeal but the circular which is totally in line with s. 37(1) cannot be said to be illegal. If the assessee satisfies the assessing authority that the expenditure is not in violation of the regulations framed by the medical council then it may legitimately claim a deduction, but it is for the assessee to satisfy the AO that the expense is not in violation of the Medical Council Regulations."*

Howsoever, the Hon'ble Apex Court has in the case of Apex Laboratories (P.) Ltd. has categorically annulled all the decisions by the ITAT and the High courts by making adverse remarks and holding that the legal position is clear that the claim of

2. *Confederation of Indian Pharmaceutical Industry vs. Central Board of Direct Taxes [(2013) 335 ITR 388 (HP)].*

any expense incurred in providing various benefits in violation of the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 shall be inadmissible under section (1) of section 37 of Act being an expense prohibited by the law

Thereafter the aforementioned explanation has also been introduced signifying the Income tax department's intent of disallowing such benefits or perquisites which were in contravention to the law/rule/guideline of the governing body.

However, if expenses incurred by pharma companies towards medical professionals are purely incurred in professional capacity, for medical science study and are not violative of the rules and regulations of IMA and are supported by regulatory documents, then such expense shall not be subjected to any kind of disallowance u/s 37(1).

Expenditure towards advertisement through a political party

Section 37(2B) of the Act disallows expenditure on advertisement done through pamphlet, brochure published by a political party. However, if any contribution is made to a political party u/s 80GGB or Section 80GGC of the Act except for the fact that the same is not for the purpose of mentioned u/s 37(2B), then the same shall be allowed as a deduction from the Gross Total Income subject to the condition that the assessee does not opt for taxation under Section 115BAA or 115BAB (a company) or Section 115BAC (in case of individual or HUF). For claiming deduction u/s 80GGB and 80GGC, prescribed conditions stated therein needs to be complied with.

3. Section 40

Under Section 40 of the Act, expenditure incurred for business and claimed as a deduction is disallowed if the applicable withholding tax on such expenditure is not deducted or if deducted is not deposited with the government. Such non-compliance triggers disallowance to the extent of 30% of expenditure in case of domestic transactions and 100% of the expenditure in case of foreign transaction. Following are the relevant provisions of this section-

- ***Section 40(a)(i)***
  - Any amount payable in form of royalty, professional fees, technical fees, etc. other than the one taxable under the head, Salary
  - To a non-resident or any other person outside India
  - On which no tax has been deducted or if deducted, the same has not been deposited before the due date of filing of return

  shall trigger 100% disallowance of such expenditure under this section in the previous year in which such default is made.

- ***Section 40(a)(ia)***
  - Any amount payable
  - To a resident
  - On which tax has not been deducted or if deducted, has not been deposited with the government on or before the due date of filing of return.

shall be subjected to disallowance to the extent of 30% of such expenditure.

- ***Section 40(a)(ib)***

  - Any amount payable
  - To a non-resident

  On which equalization levy has not been deducted or if deducted but not deposited with the government on or before the due date of filing of return shall trigger disallowance of 100% of such expenditure in the previous year in which such default is made.

  However, in all the above given 3 scenarios, if the assessee deposits the said amount of Tax or levy as the case may be with the government in any subsequent previous year, he shall be entitled to claim the allowance of such disallowed expenditure in the previous year in which such Tax or levy has been deposited with the government.

  In pursuance of first proviso to Section 201(1), the deductor/ payer shall not be considered to be an assessee in default under section 40(a)(i) and 40(a)(ia), if such tax has been paid by the deductee/payee to the government and that said income has also been disclosed in the Income Tax Return of the payee and such payment of tax and offering of income under the income tax return has been confirmed by a chartered accountant in Form 26A.

- ***Section 40(a)(iii)***

  - Any amount payable to a person taxable under the head Salary
  - To a non-resident or to a person outside India
  - On which tax has neither been deducted nor paid to the government

  shall trigger disallowance under this section.

  It is pertinent to note that expenditure u/s 40(a)(i), 40(a)(ia) and 40(a)(ib) shall be allowed in the subsequent previous year subject to depositing the amount of tax deducted, before due date of filing of return. However, there is no such provision for Section 40(a)(iii).

  It is to be understood that these disallowances shall persist only for those expenditures which are subject to deduction of tax at source under Chapter XVII-B of the Act and levy under Chapter VIII of the Act and not for those which are not subjected to tax deduction at source and equalization levy.

- ***Section 40(a)(ii)***

  This section states that any expenditure claimed as an allowance in form of taxes paid on profits and gains of business and profession shall not be allowed as a deduction while computing income of the assessee. In other words, income tax as an expense is not an allowable deduction.

  It also includes any foreign tax credit or tax relief governed by Section 90 and 91 of the Act. Therefore, if there is a foreign tax deducted of Rs 100 and tax credit available is Rs 60 under section 90A, the tax credit of Rs. 40 which is not available as a credit cannot be claimed as a deduction.

Deduction of Health and Education Cess

Income tax includes surcharge. Explanation 3 was inserted to section 40(a)(ii) *vide* Finance Act, 2022, including health and education cess as a part of tax. Accordingly, no tax payer can claim the deduction of health and education cess while computing its total income.

Before the insertion of the aforementioned explanation, certain tax payers had already taken deduction of health and education cess u/s 43B of the Act which provides deduction of certain expenditure on payment basis if such payment is on/before due date of filing of return. And Cess being one such expenditure under this section qualified for allowance.

In addition to this, reliance was also put on a CBDT Circular of 1967 which mentioned that education cess was not part of income tax and same shall ought to be allowed as a business expenditure. This matter went under extensive litigation and several high courts[3],[4] and ITATs[5],[6] gave decision in favour of the assessee, thereby aiding them in claiming the benefit of such allowance.

The landmark decision of ITAT Kolkata[7] in favour of revenue was the way forward for the legislators for adding an explanation to Section 40(a)(ii) of the Act for making a disallowance of health and education cess and clearing this persistent ambiguity. Resultant, *Explanation 3* was inserted to Section 40(a)(ii) *vide* Finance Act, 2022 This amendment is retrospective w.e.f. 1st April 2005 i.e. AY 2005-06 onwards.

Therefore, it needs to kept in mind that any cess or surcharge applied on tax (imposed on profits and gains of business) shall not be allowed as an expense under any section of the Act.

- ***Section 40(b)***

  This section pre-dominantly deals with aspects related to allowance of interest, commission and any other sort of remuneration given to partners of a partnership firm. Relevant points in context of the same are as follows-

  - Any remuneration given to a non-working partner shall be disallowed.
  - Any remuneration given to a working partner shall be allowed only if it is

3. *Chambal Fertilisers And Chemicals Ltd. vs. JCIT, Income Tax Appeal No.52/2018, 31.07.18.*
4. *Sesa Goa Limited vs. JCIT, Tax Appeal No.18/2013 , dt. 02.2020*
5. *Agrawal Coal Corporation vs. ACIT (ITA No. 776/Ind/2019 dt.22.08.2020) by the ITAT Indore.*
6. *DCIT vs. Graphite India Ltd. (ITA No.472 and 474. Co. No.64 and 66/Kol/2018 decided on 22nd November, 2019) by the ITAT, Calcutta.*
7. *Kanoria Chemicals & Industries Ltd. vs. Addl. CIT (ITAT Kolkata).*

in consonance with the partnership deed.

- Any interest paid to a working partner in excess of 12% p.a. simple interest shall be disallowed
- The remuneration of the working partners shall be calculated as follows-

Book Profit	Remuneration
Loss or Book Profit of first ₹ 3,00,000/-	₹ 1,50,000/- or 90% of book profit, whichever is higher
Book Profit in excess of ₹ 3,00,000/-	60% of book profit in excess of ₹ 3,00,000/-

- "Book Profit" means net profit arrived by following the computation mechanism laid down under Chapter IV-D of the Act as increased by the remuneration paid or payable to all the partners of the firm (if such remuneration was previously deducted while computing net profits).
- Any amount paid in excess of remuneration and interest calculated under this section shall remain to be disallowable u/s 40(b).
- Remuneration clause should be explicitly mentioned in the partnership deed. Otherwise, the same shall be disallowed as an expense to the firm.

4. Section 40A

This section starts with a non-obstante clause and is unaffected by the operation of any other provisions of the Act.

■ *Section 40A(2)*

This section gives additional power to an Assessing Officer to disallow an expenditure paid or payable by the assessee to a related party as defined under clause (b) of sub-section (2), if the officer is of the opinion that such expenditure is-

- Unreasonable or excessive in comparison to the fair market value of goods/services/ facilities of the subject matter; or
- Legitimately not required to be paid or payable looking to the needs of the business or profession; or
- Benefits derived or accrued from them are questionable

Accordingly, the officer may disallow such excess expenditure by exercising power vested to him under this section. This shall be a permanent disallowance of such excess expenditure even though the other party has offered the full amount to tax.

However, the officer shall be required to have material information and facts to support his case. Disallowance cannot be done on adhoc basis. The Courts (in case of ***Quantum Advisors Private Limited vs. Additional Cit Range-1(2) - ITA No. 3989/MUM/2017 & CIT vs. Indo Saudi Services (Travel) Pvt. Ltd. 310 ITR 306 (Bom)***) have also asserted this fact time and again to avoid any kind of unjustifiable disallowance.

- ***Section 40A(3)***

  - Any expenditure incurred in respect of which the assessee has made a payment;
  - To a person;
  - In a day;
  - In a single or aggregate no. of transactions;

  shall be disallowed if payment exceeds ₹ 10,000/- and such payment has been made in any mode otherwise than by an account payee cheque drawn on a bank or account payee bank draft, or use of electronic clearing system through a bank account or through such other electronic mode as may be prescribed.

  However, the same limit shall extend to ₹ 35,000/- if expenditure in respect of which payment is made is for the purpose of hiring, plying or leasing goods carriage.

  This shall be a permanent disallowance.

- ***Section 40A(3A)***

  Any liability standing in the books in respect of an expenditure incurred in the preceding previous year shall be disallowed if payment exceeds ₹ 10,000/- or ₹ 35,000/- as the case may be-

  - To a person
  - In a day
  - In a single or aggregate no. of transactions

  in any mode otherwise than by an account payee cheque drawn on a bank or account payee bank draft, or use of electronic clearing system through a bank account or through such other electronic mode as may be prescribed.

  It is pertinent to note that Rule 6DD of the Income Tax Rules, 1962 laid down certain exceptions where payment exceeding the aforementioned threshold limits in any mode otherwise than by an account payee cheque drawn on a bank or account payee bank draft, or use of electronic clearing system through a bank account or through such other electronic mode as may be prescribed, are allowed as a deduction. In such a case disallowance under Section 40A(3) and 40A(3A) shall not persist.

- ***Section 40A(7)***

  This section has been subjected to extensive debate as to ascertain the allowance and disallowance of payments made and provision created for gratuity.

  This section is applicable on contribution towards **unfunded gratuity and unapproved gratuity fund only.**

  Allowability of contribution made towards approved gratuity fund is governed by Section 43B of the Act and not Section 40A(7). This has been made clear in clause (b) of sub-section (7) of this section.

  - As per section 40A(7)(a), any provision made for the purpose of payment of gratuity to employees on their retirement or termination shall be disallowed. Therefore, any provision created in books for payment of gratuity to be made in future shall be disallowed.
  - However, clause (b) provides allowance of provision of

gratuity in the previous year when the same is due for payment.

- o Therefore, if the gratuity payment becomes due during previous year the same will be allowed as a deduction even though the gratuity is unpaid

Allowance of provision created for contribution towards approved gratuity fund is entitled only when such amount is paid on or before the due date of filing of return. (Section 43B)

5. Section 43B

- This section starts with a non-obstante clause and is unaffected by the operation of any other section of the Act.
- Section 43B allows deduction of certain expenses only when they are paid.
- Allowance under this section shall be available only if the payment of the expenditure incurred is made on or before the due date of filing of return relevant to such previous year. In simple words, the following expenses incurred by the assessee in a previous year shall be allowed only if such expenses have been actually paid and such payment has been done on or before the due date of return filing for such relevant previous year-

  i. Expenditure payable in form of tax, duty, cess or fees, by whatever name called under any law for the time being in force;

  ii. Expenditure payable in respect of contribution made as an employer to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees;

  iii. Expenditure payable in respect of bonus to employees;

  iv. Expenditure payable in form of interest on any loan or borrowing from any public financial institution or a State financial corporation or a State industrial investment corporation, in accordance with the terms and conditions of the agreement governing such loan or borrowing;

  v. Expenditure payable in form of interest on any loan or borrowing from a deposit taking non-banking financial company(NBFC) or systemically important non-deposit taking non-banking financial company(SI-NBFC), in accordance with the terms and conditions of the agreement governing such loan or borrowing;

  vi. Expenditure payable in form of interest on any loan or advances from a scheduled bank or a co-operative bank other than a primary agricultural credit society or a primary co-operative agricultural and rural development bank in accordance with the terms and conditions of the agreement governing such loan or advances;

  vii. Expenditure payable in form of leave encashment to the employees; and

viii. Expenditure payable to Indian Railways for use of Railway asset.

If the payment is not made before the due date of return filing the same will be allowed in the year of payment

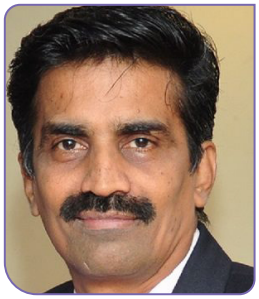
In case the payment is made after the due date of return filing then the said expenditure is allowable as deduction in the year of payment.

Conclusion

The Computation of Income Business or Profession is thus not only governed by the need and exigencies but also by the statute providing for the allowance or disallowance yardstick.

■■■

Presumptive Income applicable for residents' u/s. 44AD, 44AE and 44ADA



Karthikeyan Sakthivel CA T. G. Suresh

1 Harbinger

Presumptive taxation in general involves the use of indirect methods to ascertain the tax liability which differs from the usual rules for ascertaining the tax liability. The term presumptive is used to indicate, there is a legal presumption that the tax payers income is no less than the amount resulting from application of indirect method[1]. In the Indian context, the rules for presumptive taxation are covered under sections 44AD, 44ADA, 44AE, 44B, 44BB, 44BBA and 44BBB of the Income Tax Act 1961(Herein after referred to as "The Act"). The reason for the scheme of presumptive taxation to be popular is, other than a few specified cases the assessee offering income on a presumptive basis is not required to maintain books of accounts as specified under section 44AA of the Act and the compliance cost is also reduced to a substantially minimal level.

The scheme of presumptive taxation was introduced by Finance Act, 1988 by way of Section 44AC, the presumption created by section 44AC was irrebuttable. Since the section could not achieve the desired results, it was deleted by Finance Act, 1992 and Chapter XII C was introduced. Then based on the recommendations of the Raja J. Chelliah's tax reforms committee, sections 44AD and 44AE, were introduced by Finance Act, 1994. Section 44AD introduced by Finance Act, 1994 was available only for construction contractors. To provide relief to small tax payers, section 44AF was introduced by Finance Act, 1997. Section 44AF was applicable for persons engaged in the retail business. The scope of presumptive income is expanded to all businesses by Finance Act 2 of 2009 by means of substitution of section 44AD and concomitantly section 44AF was omitted. The scope of presumptive income was further widened to cover specified professionals by way of introduction of Section 44ADA by Finance Act, 2016. In this article an attempt is made to provide insights on section 44AD, 44ADA and 44AE which are applicable for residents and issues revolving around the same.

1. Tax law design and drafting (Volume -1 : International monetary fund 1996; Victor Thuronyi Chapter 12 – presumptive taxation).

2 Presumption of Income

2.1 Section 44AD

To help a number of small businesses to comply with the taxation provisions without consuming their time and resources as per section 44AD(1), in case of an eligible person who is engaged in the eligible business the income shall be 8% of total turnover or gross receipts or such other sum higher than 8% claimed to have been earned by the assessee.

To promote digital transactions and to encourage small unorganized businesses to accept digital payments, Finance Act 2017 substituted the words 6% as against 8% If the amounts are received by way of Account Payee Cheque, Account Payee Draft, Credit Card, Debit Card, Net Banking, IMPS (Immediate Payment Service), UPI (Unified Payment Interface), RTGS (Real Time Gross Settlement), NEFT (National Electronic Funds Transfer), BHIM (Bharat Interface for Money) Aadhaar Pay[2]. The relevant extract of section is reproduced hereunder:

44AD. *(1) Notwithstanding anything to the contrary contained in sections 28 to 43C, in the case of an* **eligible assessee** *engaged in an* **eligible business**, *a sum equal to eight per cent of the total turnover or gross receipts of the assessee in the previous year on account of such business or, as the case may be, a sum higher than the aforesaid sum claimed to have been earned by the eligible assessee, shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession":*

*[**Provided** that this sub-section shall have effect as if for the words "eight per cent", the words "six per cent" had been substituted, in respect of the amount of total turnover or gross receipts which is received by an account payee cheque or an account payee bank draft or use of electronic clearing system through a bank account [or through such other electronic mode as may be prescribed] during the previous year or before the due date specified in sub-section (1) of section 139 in respect of that previous year.]*

For an assessee to opt for section 44AD, he should satisfy two conditions namely, assessee should be an eligible assessee and the business in which the assessee is engaged should be an eligible business. The term eligible assessee is defined by explanation 1 to section 44AD, and term eligible business is defined by explanation (b) to section 44AD which reads as under,

Explanation.—For the purposes of this section,—

(a) "eligible assessee" means,—

(i) an individual, Hindu undivided family or a partnership firm, who is a resident, but not a limited liability partnership firm as defined under clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009); and

(ii) who has not claimed deduction under any of the sections 10A, 10AA, 10B, 10BA or deduction under any provisions of Chapter VIA under the heading "C. - Deductions in

2. Rule 6ABBA - Inserted by the IT (Third Amdt.) Rules, 2020, w.r.e.f. 1-9-2019.

respect of certain incomes" in the relevant assessment year;

(b) "eligible business" means,—

(i) any business except the business of plying, hiring or leasing goods carriages referred to in section 44AE; and

(ii) whose total turnover or gross receipts in the previous year does not exceed an amount of two crore rupees.

As per the aforementioned explanations, Individuals, HUF's and partnership firms other than LLP's can opt for section 44AD if such persons have not claimed deductions under aforementioned sections. The turnover criteria to opt for section 44AD is 2 crores and the business of plying, hiring and leasing of goods carriage is ineligible to opt for section 44AD. In the Finance Act 2012, with retrospective effect from AY 11-12 a new subsection was introduced, which created a restrain on certain persons who are engaged in professions specified under section 44AA, earning income in the nature of commission or brokerage or persons carrying on agency business to opt for section 44AD. The extract of the section is reproduced herewith.

(6) The provisions of this section, notwithstanding anything contained in the foregoing provisions, shall not apply to—

(i) a person carrying on profession as referred to in sub-section (1) of section 44AA;

(ii) a person earning income in the nature of commission or brokerage; or

(iii) a person carrying on any agency business.

2.2 Section 44ADA

To rationalize the presumptive taxation scheme and to reduce the compliance burden of the small tax payers having income from profession and to facilitate the growth of professionals section 44ADA was introduced by Finance Act, 2016 with effect from AY 2017-18.

Liken section 44AD, assessee can offer income under section 44ADA of the Act if he is an Individual or partnership firm other than LLP and is engaged in the profession referred under section 44AA(1). The turnover of the assessee should not exceed INR 50 Lakhs to be eligible to opt for this section. Juxtapose to 8% in the case of 44AD, 50% of the turnover or gross receipts or such higher sum claimed to have been earned by the assessee is deemed to the income. The relevant extract of the section is reproduced herewith,

(1) Notwithstanding anything contained in sections 28 to 43C, [in case of an assessee, being an individual or a partnership firm other than a limited liability partnership as defined under clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), who is a resident in India, and] is engaged in a profession referred to in sub-section (1) of section 44AA and whose total gross receipts do not exceed fifty lakh rupees in a previous year, a sum equal to fifty per cent of the total gross receipts of the assessee in the previous year on account of such profession or, as the case may be, a sum higher than the aforesaid sum claimed to have been earned

by the assessee, shall be deemed to be the profits and gains of such profession chargeable to tax under the head "Profits and gains of business or profession".

The professions specified under section 44AA is —

I. Legal
II. Medical
III. Engineering
IV. Architectural profession
V. The profession of accountancy
VI. Technical consultancy
VII. Interior decoration
VIII. Authorised representative,
IX. Film artist (actor, cameraman, director, music director, art director, dance director, editor, singer, lyricist, story writer, screen play writer, dialogue writer and dress designer)[3],
X. Company Secretary[4] and
XI. Information technology professional[5].

2.3 Section 44AE

Section 44AE has been inserted by Finance Act, 1994 with effect from AY 94-95 with a view to provide a method for of estimation of income from the business of plying, hiring or leasing trucks owned by a taxpayer. The scheme applies to persons owning not more than ten trucks. It is not applicable to the persons who do not own any truck but operate trucks taken on hire. The income from each truck, being a heavy goods vehicle, will be estimated at Rs. 1,000/ton for every month or part of a month of the unladen weight during which the truck is owned by the assessee. The income from each truck, other than a heavy goods vehicle, will be estimated at Rs. 7500 for every month or part of a month during which the truck is owned by the assessee. In either case, the taxpayer can declare his income from trucks at a higher amount than that specified above. The extract of the section is reproduced herewith,

44AE *(1) Notwithstanding anything to the contrary contained in sections 28 to 43C, in the case of an assessee, who owns not more than ten goods carriages at any time during the previous year] and who is engaged in the business of plying, hiring or leasing such goods carriages, the income of such business chargeable to tax under the head "Profits and gains of business or profession" shall be deemed to be the aggregate of the profits and gains, from all the goods carriages owned by him in the previous year, computed in accordance with the provisions of sub-section (2).*

(2) For the purposes of sub-section (1), the profits and gains from each goods carriage,—

(i) being a heavy goods vehicle, shall be an amount equal to one thousand rupees per ton of gross vehicle weight or unladen weight, as the case may be, for every month or part of a month during which the heavy

3. Notification No. SO 17(E), dated 12-1-1977
4. Notification No. SO 2675, dated 25-9-1992.
5. Notification No. SO 385(E), dated 4-5-2001.

goods vehicle is owned by the assessee in the previous year or an amount claimed to have been actually earned from such vehicle, whichever is higher;

(ii) other than heavy goods vehicle, shall be an amount equal to seven thousand five hundred rupees for every month or part of a month during which the goods carriage is owned by the assessee in the previous year or an amount claimed to have been actually earned from such goods carriage, whichever is higher.]

3. Meaning of turnover or gross receipts

Section 44AD deems 8% of turnover or gross receipts as income and section 44ADA deems 50% of total gross receipts as income. However, the terms "turnover" and "gross receipts" has not been defined in the Act. As per section 2(91) Companies Act 2013, turnover means

"The aggregate value of the realisation of amount made from the sale, supply or distribution of goods or on account of services rendered, or both, by the company during a financial year".

The term "Gross receipts" as per guidance note on tax audit by ICAI, means

"It will include all receipts whether in cash or in kind arising from carrying on of the business which will normally be assessable as business income under the Act."

Generally, gross receipt means the monies which are received by the assessee whether from business or not. However, based on the principal of ejusdem generis for the purpose of section 44AD the scope of the words "gross receipts" has to be confined to receipts from business only since it follows the word turnover which means the sales effected in the course of business and doesn't include capital receipts.

Since the term "gross receipts" is being used under section 44AD, it was ambiguous as to whether the remuneration or salary received by the assessee from the partnership is eligible for offering to tax under the presumptive scheme.

The Kolkata tribunal in the case of ***Amal Ganguli vs. CIT***[6] held that salary or gross receipts received by the assessee from the partnership firm is a gross receipt and is required to be included in the process of computing the total turnover to determine the applicability of tax audit.

The Hon'ble Madras high court in the case of ***Anand Kumar vs. ACIT***[7], has held that since no business is carried on by the assessee and the business is carried on by the partnership firm, the assessee doesn't have a turnover or gross receipts and cannot offer income under the presumptive scheme.

"The assessee should establish that he is an eligible assessee engaged in an eligible business and such business

6. *Amal Ganguli vs. DCIT, (ITA NO.2135/Kol/2008).*
7. *[2020] 122 taxmann.com 252 (Madras) Anandkumar vs. Assistant Commissioner of Income Tax, Circle-2, Salem.*

should have a total turnover or a gross receipt. Admittedly, the assessee who is an individual in the instant case is not carrying on any business. Therefore, the remuneration and interest received by the assessee from the partnership firm cannot be termed to be a turnover of the assessee [individual]. Similarly, it will also not qualify for gross receipts"

The aforementioned decision is also affirmed by the Hon'ble Bombay high court in the case of ***Perizad Zorabian Irani v. PCIT***[8].

Considering the conflicting decisions and to protect the intent behind introduction of the section, it is humbly submitted that any clarification from the government in this regard could put rest the controversy.

4. Expenses

As per subsections (2) of section 44AD, (2) of section 44ADA and (3) of section 44AE, all the expenses under section 30 to 38 be deemed to have been already allowed and no further deductions shall be allowed in this regard. The words connoted under all the 3 sections is similar in this regard.

Since it is deemed that all the expenses are already allowed, it is ambiguous as to whether the disallowances under section 40 to 43B of the Act be applicable in case of an assessee offering income under presumptive basis.

Even though there is a slight difference in the terminology used, all the three sections begin with a non-obstante clause which overrides section 28 to 43C. The three main disallowance section are section 40, 40A and 43B and it is interesting to note that even these three sections have a non-obstante clause. Section 40 overrides section 30 to 38 of the Act, section 40A overrides the sections which provides for computation of income under the head profits and gains of business or profession and section 43B overrides the entire Act. The main issue here is, which section would override which section.

As far as section 40 is concerned, barring clause 40(b), it deals with disallowances regarding payments for non-deduction of TDS under Chapter XVII-B. The argument of revenue is that "the intention of these section is to provide a restriction and dues to the crown has no limitations", hence disallowance would be attracted under section 40, if TDS is not deducted by the assessee who is offering income under section 44AD. The Surat tribunal in the case of Bipin Chandra Hiralal Thakkar[9], has held that section 44AD would override section 40 and if the assessee has committed a default to deduct TDS, the action can be initiated by the TDS officer and the assessing officer cannot disallow such expense. The relevant extract is reproduced herewith,

"The legal provision of section 44AD of the Act shows an overriding effect over other provisions contained in section 28 to 43C of the Act, I hold that the provisions of section 40(a)(ia) of the Act cannot be invoked in the instant case as the income is directed to be determined on presumptive basis u/s 44AD of the Act".

8. *[2022] 139 taxmann.com 164 (Bombay) Perizad Zorabian Irani vs. Principal Commissioner of Income-tax.*
9. *[2021] 124 taxmann.com 236 (Surat-Trib.) Bipinchandra Hiralal Thakkar vs. Income Tax Officer Ward-1(2)6, Surat*.*

However, the Panaji tribunal in the case of ***Good Luck Kinetic vs. ITO***[10] while examining whether section 43B would be applicable if income is determined on a presumptive basis under section 44AF whose words are similarly worded to the current scheme of presumptive taxation, has held that since the section 43B overrides the entire Act, it would override even the non-obstante provided under section 44AF and disallowance under section 43B can be made even if the assessee is offering income under presumptive basis, the relevant extract is attached herewith.

"a perusal of the provisions of Sec. 43B shows that the said provision is a "restriction" on the allowance of a particular expenditure representing statutory liability and such other expenses claimed in the profit and loss account unless same has been paid before the due date of filing the return. The statutory liability in the present case has not been paid before the due date of filing the return. Further, the non-obstante clause in Sec. 43B has a far wider amplitude because it uses the words "notwithstanding anything contained in any other provisions of this Act". Therefore, even assuming that the deduction is permissible or the deduction is deemed to have been allowed under any other provisions of this Act, still the control placed by the provisions of Sec. 43B in respect of the statutory liabilities still holds precedence over such allowance. This is because the dues to the crown has no limitation and has precedence over all other allowances and claims. In these circumstances, we are of the view that the disallowance made by the AO by invoking the provisions of Sec. 43B of the Act in respect of the statutory liabilities are in order even though the Assessee's income has been offered and assessed under the provisions of Sec. 44AF of the Act."

The view of first decision appears to be more logical because when an income is presumptively taxed u/s 44AD of the Act any further business income by applying the provisions of sections 28 to 43C would get telescoped with the presumptive income determined. To rest the quell it is suggested that a clarification from the board might serve the purpose in this regard.

5 Rebuttable Presumption

The major issue under section 44AC, was that the presumption about income created by the legislature was irrebuttable, to overcome such a difficulty, an option now is given to the assessee to rebut the presumption created by law, i.e., the assessee has an option to offer income lower than the percentages or amounts specified under section 44AD,44ADA and 44AE.

In case of sections 44ADA and 44AE, the law is comparatively simpler to the extent that if the assessee wants to offer income lower than the specified percentage, he is required to maintain books of account and get himself audited under section 44AB.

In the case of section 44AD, till AY 16-17 the law was similar to that of 44ADA and AE. In the Finance Act,

10. *[2015] 58 taxmann.com 267 (Panaji - Trib.) Good Luck Kinetic vs. Income-tax Officer, Ward -2, Margao.*

2016 sub-section (4) was introduced which reads as under

"(4) Where an eligible assessee declares profit for any previous year in accordance with the provisions of this section and he declares profit for any of the five assessment years relevant to the previous year succeeding such previous year not in accordance with the provisions of sub-section (1), he shall not be eligible to claim the benefit of the provisions of this section for five assessment years subsequent to the assessment year relevant to the previous year in which the profit has not been declared in accordance with the provisions of sub-section (1)."

For sub-section (4) to be applicable the assessee must have opted for section 44AD in one assessment year (Say AY 22-23) and is not offering income as per 44AD for any one of the 5 subsequent year (Say AY 24-25), he is not eligible to opt for section 44AD for the next 5 assessment years (AY 25-26 to AY 29-30) and is liable to get himself audited under section 44AB(e) till the end of 5 assessment years (Till AY 29-30).

It is interesting to note that if the assessee has commenced the business in the current year and the turnover doesn't exceed the tax audit limit of INR 1 crore, he is actually not liable to audit under 44AB, however the current ITR Forms doesn't facilitate such an option. Even if the assessee has not opted for section 44AD in any previous year and is having a turnover of less than 2 crores and is declaring income less than 8% or 6% as the case may be, he is mandated to get himself audited under section 44AB which is frivolous and not the provisions of the law. As per the general rule of law, the forms cannot override the Act and it is suggested that required changes are made to the e-filing utility.

6 Issues

6.1 *Carry forward of unabsorbed depreciation and business loss*

Business loss is carried forward and set-off as per section 72 of the Act, however carry forward of unabsorbed depreciation is governed by section 32, by means of which the unabsorbed depreciation is added to the depreciation of the next year. All the three sections provide that the deduction under sections 30 to 38 of the Act are deemed to have been fully allowed, hence the business loss if any brought forward from the previous year can be set-off against the income computed presumptively. However, unabsorbed depreciation seems to lapse in the year in which the assessee opts to offer income under presumptive basis. The Pune Bench of tribunal in the case of Dy ***CIT v. Sunil M. Kankariya***[11] has also held in examining section 44AE that the assessee is not allowed to set off the unabsorbed depreciation. Liken the issue discussed in para 5, even in this case the e-filing utility doesn't allow to set off the brought forward loss against the income computed under

11. *Dy. CIT vs. Sunil M. Kankariya [2008] 112 ITD 170.*

presumptive basis, this would also require a change in the e-filing utility.

6.2 *Interest and/or remuneration to partners*

Deductions under section 30 to 38 of the Act are deemed to be allowed. Even though the deduction in respect of interest, remuneration and salary of partners are computed in accordance with section 40(b), it is a disallowance section and not an allowance section. The amount computed under section 40(b) is allowed as a deduction only under section 37 of the Act[12]. Due to this fact there was a dichotomy for ages.

The CBDT vide its Circular no. 684 dated 10 June 1994 while explaining the scope of Sections 44AD and 44AE stated that the deduction under section 40(b) of partners' salary and interest would be allowed from the income computed on the presumptive basis.

However, later the CBDT issued another Circular No. 737 dated 23 February 1996 holding that Circular No. 684 dated 10 June 1994 was erroneous to the extent it allowed deduction under section 40(b) and deleted the relevant portion of the earlier circular with retrospective effect from 1994.

This gave rise to wide spread litigations but the controversy was laid to rest by the Finance Act, 1997 which inserted the proviso in Sections 44AD and 44AE specifically providing for deduction under section 40(b) with retrospective effect from Assessment Year 1994-95

Section 44ADA does not contain the provision similar to that of Sections 44AD and 44AE extending the deduction under Section 40(b) and more over the Finance Act, 2016 has omitted the said proviso from section 44AD though not from section 44AE.

As we stand today, the interest and remuneration of the partners are allowed if the income is computed as per section 44AE and it is not allowed if the income is computed as per section 44AD and 44ADA.

6.3 *Opting of both section 44AD and 44ADA*

As per section 44ADA, any person who is carrying on any profession mentioned as per section 44AA, can opt in for this section. Section 44ADA doesn't create any embargo for a person who is also carrying on a business to opt for section 44ADA, however income could be offered under section 44ADA only for the professional income earned by the assessee.

The sine-qua-non as per section 44AD(6) is that the person should not carry on any profession as specified under 44AA or is earning income in the nature of commission or brokerage.

Hence where an assessee who is earning income from both running a business and profession can opt for offering income under section 44ADA for professional income and

12. *Munjal Sales Corpn. vs. CIT [2008] 168 Taxman 43 (SC).*

shall offer the income from business under normal provisions of the Act by maintaining books of accounts however the vice-versa is not possible.

6.4 Advance Tax

As per section 208 of the Act, every person is liable to pay advance tax if the tax payable is more than INR 10,000, in every quarter viz. 15th June, 15th September, 15th December and 15th March. If the assessee is declaring profits under section 44AD or section 44ADA, the entire advance tax shall be due only on 15th of March as per section 211(1)(b) of the Act. It is to be noted that if the assessee is offering income under section 44AE, the assessee is liable to pay advance tax in all the 4 quarters since the section is silent on applicability of advance tax for persons offering income under 44AE.

An issue arises if the assessee has income under 44AD or 44ADA, and also income from other sources. It is ambiguous as to how the computation of advance tax liability and interest thereon is to be computed.

Two views are possible, first one being if the assessee is offering income under scheme of presumptive taxation, the liability to pay advance tax exist only in the fourth quarter which seems to be the intention of the law.

The second view is that, practically, while interest under section 234C is computed by the utility, for income other than income offered under presumptive basis, the utility assumes that advance tax liability is for the respective quarters and only for the income offered under presumptive basis the advance tax liability exists in the fourth quarter, which is in contrary to the provisions of the Act and requires correction in the utility, for the forms to be in conformity with the Act.

7 Comparison

Particulars	44AD	44ADA	44AE
Eligible assessee	Individual/HUF/ Firm(Other than LLP)	Individual or partnership firm other than LLP's	Any person
Eligible Business	Any business except covered in 44AE, engaged in agency or commission	Profession referred to in 44AA	Plying, hiring or leasing goods carriages
Applicability	Turnover or gross receipts should not exceed ₹ 2 Crores and person should not be engaged in 44ADA profession	Gross receipts should not exceed ₹ 50 Lakhs	No. of vehicles owned should not exceed 10 at any time during the previous year

Particulars	44AD	44ADA	44AE
Income	8% or 6% of the turnover, as the case may be	50% of professional receipts	Rs. 7500/month or part of a month(Other than HGV) for each truck. In case of HGV ₹ 1000 per ton/ month
Interest and remuneration	Not allowed	Not allowed	Allowed
Tax audit under 44AB	If 44AD(4) gets attracted	If income offered is less than 50% oof receipt and income offered is more than basic exemption limit	If Income offered is less than presumptive income
Higher Income	Claimed to have been earned by the assessee	Claimed to have been earned by the assessee	Actually claimed to have been earned by the assessee (Circular 5/2010 clarifies that the words actually is introduced as a anti abuse provision)
Instalments of advance tax	100% in last quarter before 15th March	100% in last quarter before 15th March	All the 4 instalments are applicable
Applicability to non-residents	Not applicable	Not applicable	Applicable

8 Conclusion & Way forward

It would be interesting way forward to check how the courts are interpreting the laws with regards to applicability of 43B, 40A, 40, allow ability of interest or remuneration to partners of firms which have opted for presumptive taxation, applicability of section 43CA, applicability and computation of income under presumptive scheme in case of share and VDA traders.

The presumptive taxation which should have been one of the easiest to comply and understand is unfortunately the complex because of the plethora of amendments and judgements. The important reason for introduction of the presumptive scheme of taxation as specified was to reduce the compliance cost and provide a simple scheme of taxation, which unfortunately waded over time.

A simple scheme of presumptive taxation having following characteristics could be considered,

i) A simple scheme of taxation based on turnover with varied rates across industries (for two to three years) as provided in safe harbour rules.

ii) A single form including all the compliances under various acts similar to introduction of spice plus form.

iii) Establishing a separate helpdesk from the government to facilitate the small taxpayers to understand and comply with the law.

Considering the various reforms of the government in the recent past and the vision of the government to reduce the compliance costs of the businesses which was the reason for increasing the limits of tax audit and abolition of GST audit, it would be a matter of time for these provisions to be overhauled.

■■■

Pre-institution mediation under Commercial Courts Act, 2015

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Trupti Khadse
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I. Introduction

Why mediation?

Mediation is not a new concept for India. If we go to the era of Mahabharat Krishna was a mediator between Kauravs and Pandavs. It failed which resulted in to war.

Time has changed. Now people drag opponents to litigation. In today's world, every filing of a suit is the beginning of a long-drawn-out legal war. It destroys the mental peace, harmony, and finances of people. It affects emotional consistency and there is always the anxiety of ups and downs.

Since independence till date, there are more than 1 crore cases pending for disposal. Decrees are waiting for execution so the property is in possession of the Court Receiver.

Money disputes affect economic growth and non-payment of loans is economic mayhem. It's a systematic erosion of wealth.

To overcome these issues government came up with a law of Pre-institution mediation under the Commercial. Courts Act,2015 Every commercial suit before goes to court must first refer to mediation.

Now what is Commercial dispute?

Commercial. Courts Act, 2015 defines this term

Under Section 2(1)(c) the said term is defined as under:

(c) "commercial dispute" means a dispute arising out of-

(i) ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents;

(ii) export or import of merchandise or services;

(iii) issues relating to admiralty and maritime law;

(iv) transactions relating to aircraft, aircraft engines, aircraft equipment and helicopters, including sales, leasing and financing of the same;

(v) carriage of goods;

(vi) *construction and infrastructure contracts, including tenders;*

(vii) *agreements relating to immovable property used exclusively in trade or commerce;*

(viii) *franchising agreements;*

(ix) *distribution and licensing agreements;*

(x) *management and consultancy agreements;*

(xi) *joint venture agreements;*

(xii) *shareholders agreements;*

(xiii) *subscription and investment agreements pertaining to the services industry including outsourcing services and financial services;*

(xiv) *mercantile agency and mercantile usage;*

(xv) *partnership agreements;*

(xvi) *technology development agreements;*

(xvii) *intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits;*

(xviii) *agreements for sale of goods or provision of services;*

(xix) *exploitation of oil and gas reserves or other natural resources including electromagnetic spectrum;*

(xx) *insurance and re-insurance;*

(xxi) *contracts of agency relating to any of the above; and*

(xxii) *such other commercial disputes as may be notified by the Central Government.*

Explanation.-- A commercial dispute shall not cease to be a commercial dispute merely because--

(a) *it also involves action for recovery of immovable property or for realisation of monies out of immovable property given as security or involves any other relief pertaining to immovable property;*

(b) *one of the contracting parties is the State or any of its agencies or instrumentalities, or a private body carrying out public functions;*

What is mediation?

Mediation is a voluntary, binding process in which an impartial and neutral mediator facilitates disputing parties in reaching a settlement[1]. In the recent years, the legislature and judiciary has been keen on promoting mediation as a tool for dispute resolution, which was first introduced by Section 4 of the Industrial Disputes Act, 1947, where conciliation officers were charged with the duty of mediating and promoting the settlement of disputes. The Code of Civil Procedure, 1908 (herein referred

1. "Mediation" published by Mediation and Conciliation Project Committee of Supreme Court of India.
2. Section 89 of The Code of Civil Procedure, 1908.

to as **"CPC"**) was also amended in 1999, to include mediation, among other modes, as a medium to settle disputes outside the Court[2]. Section 12A was inserted along with Chapter IIIA in the Commercial Courts Act, 2015 in 2018 which is worded as follows:

"12A. Pre-Institution Mediation and Settlement—*(1) A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of preinstitution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government."*

This section has been analysed time and again by various High Courts, and for the longest time, the question remained, whether pre-institution mediation was mandatory in the event of a commercial dispute of a specified valuation. High Courts of Bombay, Calcutta and many others have had an almost consistent interpretation of mandating mediation, although in some cases, Madras High Court has held a different viewpoint.

This conundrum was recently solved by the Hon'ble Supreme Court, in the case of ***Patil Automation Private Limited and Ors vs. Rakheja Engineers Private Limited***[3] which dived into the legislative intent behind enacting the Commercial Courts Act and its Amending Act of 2018, the object being, to at least partially mandate mediation on parties to a specific class of commercial suits who do not seek urgent remedy or reliefs. With the ever-growing number of commercial matters, in the presence of the Commercial Courts Act, the apex court observed that courts in India are still bearing the brunt of docket explosion. Section 12A, thus provides for a bypass and a fast-track route without taking the precious time of the court[4] and perhaps even helping to tap into the potential of Section 89 of CPC, which largely remained unused.

II. Opinions of High Courts

Before the Patil Automation case, differing stands were taken by High Courts.

Deepak Raheja vs. Ganga Taro Vazirani[5], a Commercial Summary Suit was filed seeking a decree and a Summons for Judgment seeking a decree, but no application for urgent reliefs was filed. The learned Single Judge held that pre-institution mediation is procedural in nature. The Bombay High Court, in appeal, identified the mandatory nature of Section 12A and contended that the object of Section 12A, being rooted in public interest, the question of waiving it off does not arise.

Dhanbad Fuels Ltd vs. Union of India[6] observed that mediation in India is still at a nascent stage, it needs more awareness and mandatory training of commercial disputes. The learned judge of the Calcutta High Court added that the 2015 Act and

3. *Patil Automation Private Limited and Ors vs. Rakheja Engineers Private Limited 2022 SCC OnLine SC 1028.*
4. Supra.
5. 2021 SCC OnLine Bom 3124.
6. 2021 SCC OnLine Cal 429.

the Rules accompanying it have been framed with an object of improving the *"ease of doing business"*. ***Laxmi Polylab Pvt. Ltd. Eden Realty Ventures Pvt. Ltd.***[7]- Calcutta High Court, very recently held that Section 12A is mandatory. It observed that although Section 12A is procedural in nature, it has a public purpose to swiftly dispose off commercial disputes on an amicable platform. It adds that if Section 12A is read to be a mandatory provision, it achieves the twin objects of expeditious disposal and freeing up time and space for the Court. The same learned judge, in a different matter[8] has emphasized that the object of the 2015 Act is to expedite the disposal of a commercial suit and this can be achieved if pre-institution mediation is mandated.

Awasthi Motors vs. Managing Director M/s. Energy Electricals Vehicle and Anr.[9] Allahabad High Court, making references to the Statement of Objects and Reasons, held that pre-institution mediation is a mandatory provision.

The High Court of Madras, on the other hand held differently. In ***Shahi Exports Private Limited vs. Goldstar Line Limited & Others***[10], the court held that Section 12A is not a mandatory provision and that approaching the court is not a substitute to alternative dispute redressal mechanisms, like mediation. The High Court of Madras concluded this by observing that right to access justice is a constitutional right and it cannot be denied for not utilizing the option of mediation.

III. *Supreme Court in Patil Automation vs. Rakheja Engineers (P) Ltd.*

Decided that Section 12A is mandatory in nature, any suit violating this mandate must be rejected under Order VII Rule 11 of CPC. A commercial suit was filed, seeking sums of money, but was objected on the grounds of not complying with Section 12A. Following the learned single judge in ***Ganga Taro Vazirani,*** the trial court rejected this objection stating *"Section 12A of the Act is not a penal enactment for punishment"* and *"there is no embargo in filing the Suit without exhausting the remedy of mediation"*. Nevertheless, the parties were directed to mediation. In appeal, the Punjab and Haryana High Court confirmed the findings of the trial court and stated that *"Courts are meant to deliver substantial justice"*[11] and that the plaint should not be rejected on the grounds that an alternative dispute resolution was not opted.

Challenging the order of the High Court, an SLP was filed, wherein the Supreme Court held that the legislature intended Section 12A to be mandatory, it is not merely a procedural provision and any suit violating the mandate of Section 12A would be visited with rejection of the plaint under Order VII Rule 11 of

7. 2021 SCC OnLine Cal 1457.
8. *Dredging and Desiltation Company Pvt. Ltd vs. Mackintosh Burn and Northern Consortium 2021 SCC OnLine Cal 1458*.
9. 2021 SCC OnLine All 256.
10. 2021 SCC OnLine Mad 16516.
11. *Patil Automation Private Limited and Ors vs. Rakheja Engineers Private Limited 2022 SCC OnLine SC 1028.*

CPC. The apex court further observed that nobody has an absolute right to file a civil suit, and the same can be barred absolutely unless certain requirements are to be complied with. It also stated that the same would not apply to suits where urgent interim reliefs are being sought. The Supreme Court reasoned its findings by going into the legislative intent behind the 2018 Amendment Act, which highlights the need to tackle the obstacle of docket explosion. Mediation being a viable solution for the same, the court also observes that the legislature has also expressly excluded the period undergone for mediation for determining limitation under the Limitation Act, 1963.

Responding to the criticism against mandating pre-institution mediation, that it is against the fundamental principle of access to justice, as has been held by Madras High Court in Shahi Exports (supra), the Supreme Court states that such a provision has been carefully added, keeping in mind that when urgent reliefs are sought, an aggrieved person may approach the courts without undergoing the process of mediation. Moreover, mediation offers a completely new approach to adjudicate a dispute, where arriving at a win-win situation through compromise is a better choice in the era of docket explosion which is a long drawn-out process.

The court also expressed some concern regarding the indispensable requirements for mediation to become a potent alternative dispute resolution tool. Some pre-requisites like the existence of infrastructural facilities and the availability of a properly trained mediator, as commercial disputes are technical in nature and knowledge of commercial law and business is essential[12]. Calling upon the experts and officials to discharge their duties which would help courts with the problem of docket explosion, the Court stated, "It is all well to pass a law with sublime objects as in this case. However, the goal will not be realised unless the State Government and all other relevant Authorities bestow their attention in the matter of providing adequate facilities."

Bolt Technology OU vs. Ujoy Technology (P) Ltd.[13] before the Delhi High Court, recently heard an objection filed by the Defendant, seeking for rejection of the plaint filed by the Plaintiff owing to non-compliance with Section 12A. The Defendant relied upon Patil Automation to substantiate his case, but the court rejected the objection on the ground that the Plaintiff had offered to resolve the dispute amicably and the Defendant refused this offer[14].

IV. Foreign trends on Pre-institution Mediation

Mediation has not been defined in the United Kingdom law, but ADR has been described as *"collective description of methods of resolving disputes otherwise than through the normal trial process"* in the glossary to the Civil Procedure Rules (CPR). Since the Woolf Reforms of 1999

12. *Dhanbad Fuels Ltd vs. Union of India 2021 SCC OnLine Cal 429.*
13. 2022 SCC OnLine Del 2639.
14. "Mandatory Pre-Institution Mediation- Effective Remedy to Declog Courts in India" Abhijnan Jha and Urvashi Misra, Lexology [https://www.scconline.com/blog/post/2022/10/22/mandatory-pre-institution-mediation-effective-remedy-to-declog-courts-in-india/#fn15] Accessed on 25th October, 2022.

has come into effect, parties to a commercial suit are to consider an alternate dispute resolution tool and they fail to do so or ignore a request to mediate without providing a justification, the court has a wide discretion to order that party to pay some or all of their opponent's legal costs, regardless of whether they succeed in the underlying claim[15]. For example, in ***Thakkar vs. Patel***[16], the Claimant attempted mediation as a tool to resolve the dispute, but the defendant failed to cooperate by delaying the process. Thus, the court found this behaviour of the defendant unreasonable and an order for costs was made against them. The judges are not at liberty to compel mediation, but they have been taking an active role to encourage parties to pursue the option of mediation.

Courts in Singapore have defined Mediation as *"a way to resolve a legal dispute without going to trial."*[18] Here, mediation can be requested at any stage of the proceeding by any of the parties to the dispute, provided that all parties agree to use mediation. The law of mediation in Singapore is governed by The Mediation Act, 2017 along with, the Singapore Convention on Mediation Act, which came into force in 2020. The Singapore Convention was a much needed legislation to facilitate and govern cross-border mediation and to enforce its settlement agreement. A party can do so by applying to the courts of Singapore which saves time and money for all signatory countries.

In the United States, there is no governing or regulatory body for mediation. The American Bar Association and the American Arbitration Association have standard practises which are well-respected in the field of mediation. Many states have attempted to coordinate their legislation by adopting the Uniform Mediation Act, or adopting the state's own mediation statute with similar provisions[19].

V. Conclusion

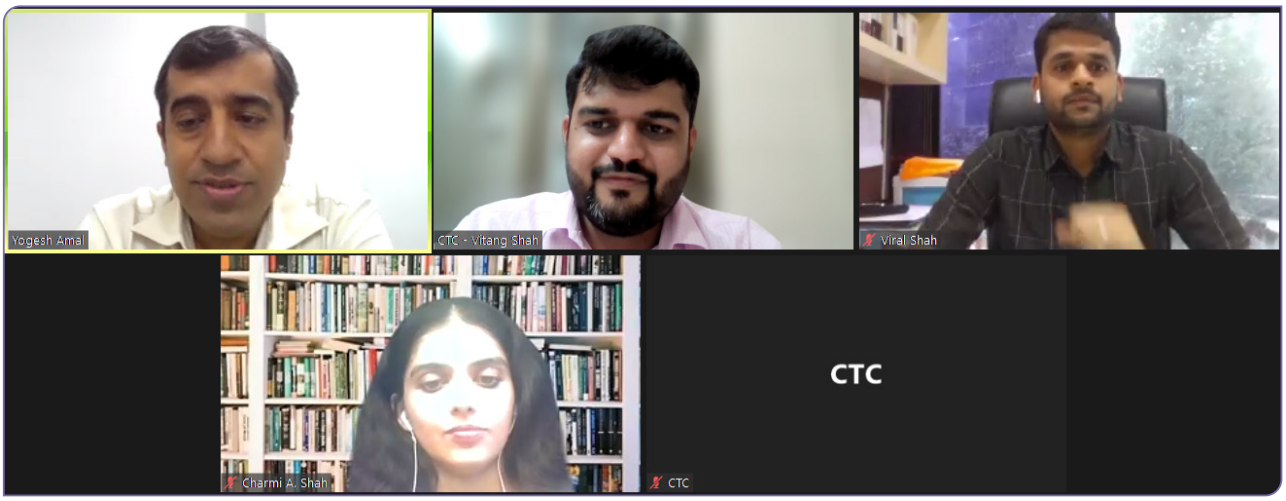
Looking at various countries who have implemented Mediation, especially Singapore, which has a legislation to that effect, for timely resolving commercial suit, India is also not far behind. While Patil Automation is the Judiciary's effort to encourage mediation, the Legislature also seems to be doing its part by making an attempt to help the Indian courts. The Mediation Bill which is proposed to be introduced in the parliament soon, is being examined by the standing committee, and it might just be the definitive answer or a permanent solution to India's problem of docket explosion.

15. "Mediation in United Kingdom" Penningtons Manches Cooper LLP, Lexology, [https://www.lexology.com/library/detail.aspx?g=02ee5416-79ba-484b-bd62-eb26318d330b] Accessed on 31st October, 2022.
16. (2017) EWCA Civ 117.
17. *Thakkar vs. Patel [(2017) EWCA Civ 117].*
18. "Mediation" Singapore Courts- The Judiciary [https://www.judiciary.gov.sg/alternatives-to-trial/mediation/what-is-mediation-(from-1-april-2022)] Accessed on 30th October 2022.
19. "Mediation in USA" Polsinelli PC, Lexology [https://www.lexology.com/library/detail.aspx?g=1afc5951-1db6-4f91-8e3b-500022484dbd] Accessed on 31st October, 2022.

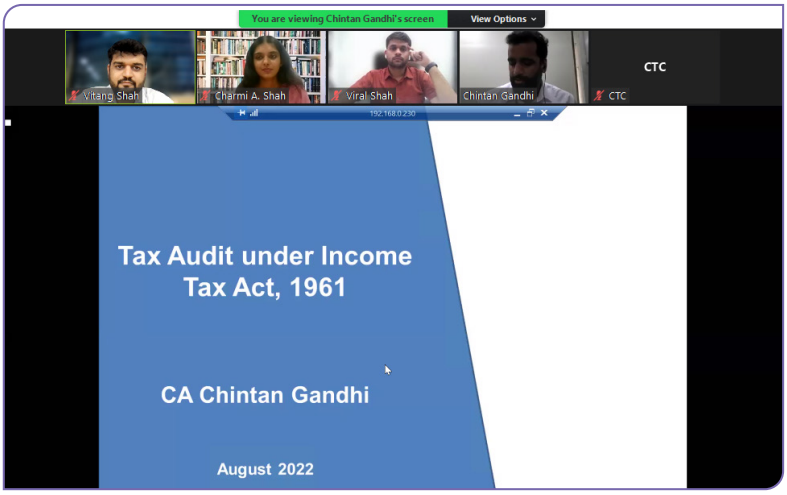
Glimpses of Past Events

Webinar on Tax Audit and Income Tax Return – Student Perspective (Virtual Mode)

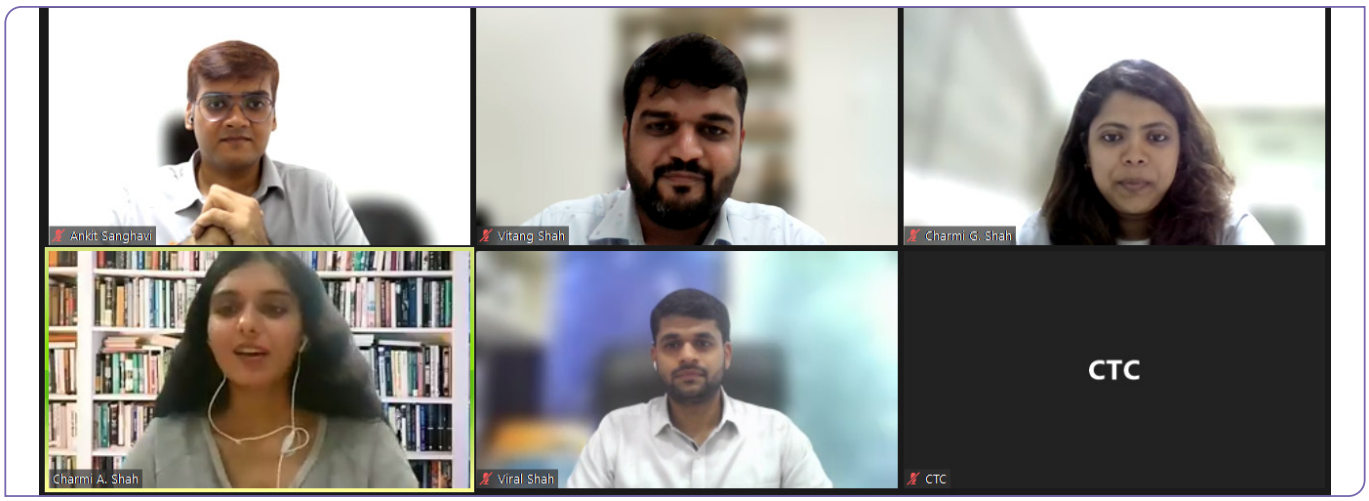
Tuesday, 16th August, Wednesday, 17th August and Thursday, 18th August, 2022.



Speaker : Shri Yogesh Amal addressing the participants



Speaker : Shri Chintan Gandhi addressing the participants



Speakers : Shri Ankit Sangnavi & Ms. Charmi G. Shah addressing the participants

The Chamber of Tax Consultants

Estd. 1926

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.

Unveiled by **Shri S. E. Dastur,** Senior Advocate on 30th January, 2008.

The Chamber of Tax Consultants

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