CHALLENGES
AVENUES
ACTION

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The best articles published in this Journal in the categories of 'Direct Taxes', 'Company Law and Auditing' and 'Allied Laws and Others' will be awarded the Trophies/ Certificates of Appreciation after being vetted by experts in the profession.

Articles and reading literatures are invited from members as well as from other professional colleagues.

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Transformation Technology

Transformation means change. We are constantly striving to bring about change, inner and the outer world. Change is the changeless law of the nature. Continuous changes are taking place at all levels, the natural level, the physical level or the level of weather. But there is small difference between change and transformation. Any positive change that is intelligent and deliberate is called transformation.

We are always trying to get the outer world in order, so that we may gain happiness. But it is an attempt in futility because the minute we get one thing in order we find another thing that out of its shape. Vedanta says that you and the world are two sides of the same coin; if you change, the world will also follow. As individuals we are all disintegrated within and unless we are able to integrate our inner selves, there may be quantitative change but not a qualitative change in our outer lives.

If you always do what you always did, you will always get what you always got. In spite of the superficial changes we have not made any inner changes and continue on the same path, so we are bound to get what we have always got. All this happens because there is no vision of life. Change or transformation comes only when vision is backed by action. How can we change the vision? For this transformation to happen, we must have a positive scheme to follow.

A verse from the *Srimad Bhagawatam* shows the route we can take in order to bring about this change in our lives. It lists ten factors that we must take care of:

Agamo' pah praja desah kalah karma ca janma ca
Dhyanam mantro'tha samskaro dasaite gunahetavah

1. *Agama* or literature

   Agama means scriptures but refers to all literature and reading material. It includes all kinds of thoughts that we are receiving. We should be careful what we are reading, hearing or watching. Vedas say, "May noble thoughts come to us from all directions". This is important because what we receive and imbibe in turn determines our philosophy or vision.

2. *Apah* or water

   Water refers to all the food and drinks that we consume. The quality of the food and drink intake also has a direct impact on our thoughts. The food intake should be carefully planned as the subtlest part goes to assimilate into our "Mind".

3. *Praja* or company

   We need to guard ourselves from the company we have. What type of people one spends time with has a huge impact on your personality. A person is influenced by and also known by the company he keeps. People around us amidst whom we stay have a great impact in our transformation.

4. *Desa* or place

   The place where we live affects our mind. We often hear people talking about the vibrations of a particular place. It is essential that we must take care of the places we live in or visit.

5. *Kala* or time

Mornings are calm and peaceful. Day time is full of action and night is meant for rest and sleep. Our body clock functions best according to this. Ensuring our daily activities based on this body clock leads us to our transformation.

6. *Karma or* action.

All actions undertaken should have the underline principle of our role and duty at any point of time. Scriptures guide us that we should refrain ourselves from performing any prohibited actions and control our desire ridden actions. Our priority should be to do what we are duty bound and ultimately work for the betterment of the society.

7. *Janma* or birth

People may say that they are not responsible for their birth in a particular family or place they are born into. But, if we accept the theory of re-birth, then we must accept that we are responsible for our present birth. Even if we accept we do not have control over our birth but what are we doing with ourselves after that. Birth is identification with a thought. When we identify with anger, an angry man is born. When anger goes away, there is a peaceful man.

8. *Dhyanam* or meditation

Dhyanam is meditation. As we think, so we become. *Agama* exposes us to a variety of thoughts but our life turns towards the thoughts we choose to take, hold onto or meditate on. Meditation is the consistent holding onto or pursuit of one kind of thought. This in turn will determine what kind of persons we become.

9. *Mantra* or words of inspiration

We may have decided on a course of action, but many difficulties can crop up on the way. At such moments we need inspiring words or guidance which we can hold onto. To keep the mind from wandering, we take help of mantra. Mantras like *"Om Namah Shivay"* can help bring distressed mind under control. *Mantra* like "Clean India" keeps us inspired to keep our surroundings clean.

10. *Samskara* or inherent tendencies

Sanskaras are the inherent tendencies that we have brought from our past. We may be our products of our past but not the victim. There is always an opportunity to improve upon what we are. If we follow a consistent pattern to overcome our weakness we can build strong positive habits against it. Waking up late may a weakness. If a gradual and conscious effort is made to improve upon we end up being an early riser.

These ten factors help us in our goal of transformation. If we analyse our life we will find that, of these ten factors, some are *sattvic*, others *rajasic* and yet others *tamasic*. In each one's life, the permutation and combination of these factors may be different. Some people may be reading good literature but eating *tamasic* food. For a complete transformation our effort should be to make all ten factors *sattvic* in our life.

Source - Transformation Technology by Swami Tejomayananda

Editorial

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Budget 2018 - Senior Citizen Special

Finance Minister Arun Jaitley presented the Union Budget 2018-19 in Parliament on 1st February. This is the first budget after economic reforms such as the Goods and Services Tax (GST), dynamic fuel pricing, mega PSU bank recapitalisation and more. This is also the last full budget of this government before India goes to polls for the General Elections due to take place in 2019. Much was expected in terms of relief from the government considering the union elections next year but to everyone's disappointment, except senior citizens, not much has been given to the middle class in individual taxation or the GST.

Even for professionals and tax consultants there is hardly anything except few changes here and there. Generally, in past, where finance bill has been containing more than 100 clauses proposing changes in the direct and indirect taxes, the count this time was around 50. The length of the finance itself is the indicator of nothing much in the Budget.

No changes have been proposed in the personal income tax rates for the individual or the salaries class. The Finance Minister said in his speech that there has been a 12.6% growth in direct taxes in 2017-18; 18.7% growth in indirect taxes in 2017-18. As many as 85.51 lakh new taxpayers filed their tax returns in 2017-18, as against 66.26 lakhs in 2016-17. The number has increased from 6.47 crore in 2016-17 to 8.27 crore by end of 2017. The obvious reason of not increasing the limit of Rs. 250000 is the government would not like to lose on the number of assessees filing income tax returns.

The standard deduction of Rs 40,000 for salaried taxpayers is a welcome change and this will help to a larger extent to the pensioners who do not enjoy any benefit in form of allowances or perquisites. Senior citizens have been the biggest beneficiaries in the Budget. On one hand pensioners would get standard deduction of Rs. 40000 from their pension income, every senior citizen would also be entitled to deduction of Rs. 50000 from interest income earned from bank or post office deposit. Senior citizens having pension and interest income would be saving tax on Rs. 90000 of income which is in fact a very good proposal for all the senior citizens. That is the reason the Finance Minister stressed in his speech that "to care for those who cared for us is one of the highest honours", underscoring the importance of providing economic support for India's growing population of senior citizens. These tax incentives apart from some announcements in health policies and expenditure on medical treatment will ease the financial burden on people aged 60 and above.

As a matter of policy, principle and prudency it was always unfair that many people did not pay taxes on long term capital gains earned from stock market. Though there was STT being levied on such transaction, government did not collect income tax on that. According to the finance minister, the total amount of exempted capital gains from listed shares and units is around ₹ 3.67 lakh crore as per returns filed for the assessment year 2017-18. The biggest announcement in the Union Budget 2018-19 was the reintroduction of the long-term capital gains (LTCG) tax that would see investors paying 10% tax on the gains exceeding Rs. 1 lakh made by selling shares even after holding them for more than a year. The announcement has made some impact on stock market but it was a much needed amendment.

CA. Ashok Kataria

From the President

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Dear Members,

The Finance Minister has presented the Union Budget for the Financial Year 2018-19, which was the first budget after the GST regime. The Budget focuses on farmer, common citizen, and business environment. The main focus areas of the Budget are Agriculture and Food Processing sector, affordable housing sector, health insurance industry and the textile sector**.**

How To Realise Our Potential As Spiritual Beings – Life is filled with a great paradox. That is, the more we become self-actuated, self-indulgent and self motivated the more selfish and unhappy we become. But we cannot fulfil our spiritual nature by being selfish.

We must always be aware that we are spiritual beings and always assume responsibility to improve ourselves. When we shirk our responsibilities, we cannot function as proper human beings. We lose out on spirituality. In order to become complete, we need to assume responsibility for others and ourselves to fulfil our potential. Let us all hope that we will assume responsibility for ourselves, for our family, for our country and the world.

New Gen Cricket - Gill and Porel star as India U-19s brush aside Pakistan by 203 runs to make World Cup Final. India's performances show that our domestic cricket is on the right path. The U-19 team performed very well which means that the next crop is ready to take the big field.

Activities at the Association

After few months of the GST implementation, number of notifications and circulars are issued. Rules are also amended number of times. Meetings of GST Councils also has recommended and implemented number of changes post implementation. So to track all such changes and understand the implications thereof a second round of GST Lecture Series was launched from 12/01/ 2018 to refresh and to update the knowledge of the members and their staff. Series took a good start with a large number of participants. Lecture on a much awaited topic of E-way Bill was also a part of the series. The lectures in the series were taken by young speakers from Gujarat.

Third Brain Trust Cum Workshop meeting was organised on 20th January,2018 on the topic of Valuation of Shares with special focus on "Discounted Cash Flow Method" by an eminent faculty CA Sujal Shah from Mumbai. The work shop meeting was well participated by the members. Few members carried laptop/iPad at the meeting so that the practical posers could be solved simultaneously in order to get a better understanding.

Like every year a cricket match was played between CAA and Baroda Branch of WIRC of ICAI and after a long time the cricket team of CAA, Ahmedabad lost the match to Baroda Branch of WIRC of ICAI on 21st, Janaury,2018 at the M.S. University Grounds. CAA team played very well giving the target of 112 runs but the Baroda team also showed their tremendous performance in batting and in fielding and won the match.

Challenges & Avenues – There are many avenues in our traditional practice coupled with challenges and to be aware of those challenges and avenues, the professional development committee of CAA organised a lecture meeting on "Overview of Insolvency and Bankruptcy Code" (IBC) and "Overview of RERA". Both the topics were well presented by our beloved members CA Ketul R. Patel and CA Aniket S. Talati respectively.

Work pressure makes our life stressful and hectic. In order to relieve the stress and tension and to live a fearless life, CAA jointly with other professional bodies organised a talk on "Fearless Life" by Shri Sanjay Raval on 30th, January, 2018. The jam pack audience was enriched by the talk on the subject.

A lecture meeting on Union Budget 2018 by Senior Advocate Shri Saurabh Soparkar was organised on 5th February,2018. The members at large took the benefit of the same.

In continuation of a rich tradition of organizing RRC jointly with Bombay Chartered Accountants' Society, CAA has organised 2nd RRC with BCAS at Hotel The Grand Bhagwati , Surat on 23rd & 24th February, 2018 coupled with six useful topics by speakers from ahmedabad, surat and mumbai. All are requested to register and avail the benefit of the same.

I would like to conclude with a thought on life - There is nothing either good or bad but thinking makes it so - William Shakespeare.

Looking forward to your support and participation in future activities of the Association.

With best regards,

CA. Kunal A. Shah
President

RERA : An Overview of the Act and Form 3

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What is RERA?

RERA is Real Estate (Regulation and Development) Act, 2016 that protects buyers in the real estate projects- they are the "King" now. The new law is formulated by Govt. of India as model law, however giving flexibility to states to modify / add their own rules. Since the land belongs to the states, this flexibility is given to the states.

Who needs to register under RERA?

1. COMMERCIAL and RESIDENTIAL projects including PLOTTED DEVELOPMENT.
2. Land under development MORE THAN 500 SQ MTS / NO. Of UNITS exceed 8.
3. Projects which do not have COMPLETION CERTIFICATE before commencement of ACT.

   RENOVATION or REPAIR or REDEVELOPMENT projects not involving Marketing, Advertising, Selling and New Allotment NEED NOT BE REGISTERED.

How to register? What details to be provided?

- Affidavit of Promoter – legal titles of land, land free from encumbrances, project completion date, 70:30 Rule, obtain pending approvals and maintain all relevant documents.
- Complete details of the Project.
- Number and areas of garage for sale and open parking areas.
- Name and address of real estate agents, contractors, architects, structural engineer, and other person concerned with the development of the proposed project.
- Proforma agreement for sale, and the conveyance deed.
- Sanction letter from bank for construction finance and home loan tie-ups.
- Plan of development works to be executed in the proposed project and the proposed facilities.
- Amenities: detailed note explaining the salient features of the proposed project including access to the project, design for electric supply including street lighting, water supply arrangements etc.
- Current status of project and the extent of completion.
- Carpet area of all the units in the project even if earlier sold on any other basis such as super area, carpet area, built-up area etc.
- In case of plotted development, area of the plot being sold to the allottees.

Powers of RERA:

RERA may review the following documents submitted by a promoter:

1. Nature of rights and interests of the promoter to the land.
2. Extent and location of area of land proposed to be developed.
3. Layout of the project.
4. Financial, technical and managerial capacity of the promoter to develop.
5. Plan regarding the development works to be executed in the project.

6. Conformity of development of the project with neighbouring areas.

Ongoing Compliances:

- Updating RERA website on a quarterly basis- updating of website within 7 days after every quarter. Following details need to be updated:
  - i. List of number and types of apartments or plots and Garages booked.
  - ii. Status of construction of building with photographs.
  - iii. Status of construction of each floor with photographs.
  - iv. Status of construction of internal infrastructure and common areas with photographs.
- Promoter shall be liable for all obligations, responsibilities and functions under the Act or rules or regulations-
  - i. Responsible to obtain all the approvals, Completion Certificate (CC), Occupancy Certificate (OC) – commonly known as BU in Gujarat etc.
  - ii. Execute a registered conveyance deed within 3 months from the date of BU.
  - iii. Enable formation of an association or society or co-operative society as the case may be.
  - iv. Adherence to sanctioned plans and project specifications- any addition, alteration will require prior consent of the allottees.
  - v. Warranty for a period of 5 years.
  - vi. No transfer or assignment of his majority rights and liabilities in respect of real estate project to a third party without prior written consent of 2/3rd allottees and without prior approval of the Authority.
  - vii. Obtaining Title Insurance.
- In case of lapse of registration or on revocation of registration, the Authority may take action as it deem fit including carrying out the remaining development works by competent authority or by association of allottees or any other manner as may be determined by the Authority.
- In the case of failure to complete or unable to give possession-
  1. If the allottee intends to withdraw from the project- Return the amount received with interest;
  2. If the allottee does not intend to withdraw, interest to be paid for every month of delay till handing over of the possession.
- In the case of defect in title of the land, Promoter to compensate the allottees in case of any loss caused to them. This claim of compensation shall not be barred by limitation provided under any law for the time being in force.
- Annual Report on Statement of Accounts by Statutory Auditor of the Promoter.

Separate Project account (70:30 rule):

- Of the total collections, only 30% can be withdrawn without any restriction.
- Rest of the amount (70%) can be withdrawn in stages in proportion to the percentage completion of the project (construction cost plus land cost).
- Withdrawals to be certified by CA, Engineer and Architect; Audit report by a practicing CA to be submitted to RERA annually.
- Applicability of aforesaid rule for on-going projects:
  1. 70% of the amount to be realized from the allottees shall be deposited in such separate account.

2. In the event where the estimated receivables of the ongoing project is less than the estimated cost of completion of the project, then 100% of the amount to be realized from the allottees shall be deposited in the said separate account.

Documents required for withdrawal from project account:

- A certificate from Architect certifying the percentage of completion of construction work.
- A certificate from the engineer for the actual cost incurred on the construction work.
- A certificate from a CA for the cost incurred on construction cost and land cost.
- The Chartered Accountant shall also certify the proportion of the cost incurred on construction and land cost to the total estimated cost of the project.
- The total estimated cost of the project multiplied by such proportion shall determine the maximum amount which can be withdrawn by the promoter from the project account.

Tax impact?

i. Possibility of AOP exposure in the case of JDAs considering that the land owner is also considered to be a promoter.

ii. Reorganising of JDA arrangement, especially the revenue share arrangement.

iii. Tax treatment / allowability of expenditure done by a promoter during defect liability period.

iv. Tax treatment / allowability of fines, penalties and interest paid by the promoter.

v. Treatment of expense incurred on a project which is then taken over by the Authority in the case of lapse in registration or revocation of registration.

Issues under RERA Forms - FAQs :

1. For Land Cost:

a. Q. – Which cost can be mentioned against acquisition cost of Land or Development Rights or Lease Rights?

A. - Land or Development Rights or Lease Rights is the Actual cost or FMV. To determine the fair market value of the Acquisition Cost of Land or Development Rights or Lease Rights in the Real Estate Project, the Acquisition Cost shall be the "Indexed Cost of Acquisition".

b. Q. – Can acquisition cost of Land or Development Rights or Lease Rights include interest portion too?

A.-The Acquisition Cost shall also include the amount of interest incurred on the borrowing done specifically for purchases of Land, or Acquiring Development Rights or Lease Rights based on the terms of sanction letter of the said Bank/Financial Institution.

c. Q. – Whether to club everthing in acquisition cost of Land or Development Rights or Lease Rights or to bifurcate it against various sub-heads?

A.-The amount of FSI premium, amount of TDR and payment to SG/CG for stamp duty, transfer fee, reg. charges, etc. should be mentioned separately and should not be clubbed into Acquisition cost of Land.

2. Under Rehabilitation Scheme:

a. Q. – Can redevelopment construction cost be shown under Rehabilitation Scheme sub-head?

A.- Yes. Even though rehabilitation Scheme sub-head is mainly for developers who are doing rehabilitation of slum dwellers / areas, but as per clarification of Circular 2 cost under rehabilitation scheme shall include the cost of construction of redevelopment area too.

b. All amounts payable to slum dwellers, tenants, apartment owners; or appropriate authority or government or concessionaire which are not refundable and are incurred as cost and expenses of such rehabilitation scheme, shall be allowed as part of Land Cost under clause 1(i)(f)(iii) of 1(i)(f)(iv) of the Form 3. For example, maintenance deposits, corpus amount, concession premium or fees, shifting charges to name a few.

c. The amount of interest incurred on the borrowing done specifically for construction of rehabilitation component in rehabilitation scheme shall be included in the interest payable to financial institution etc. under the head of Land Cost. (under Clause 1(i)(a) of form 3.

3. Development Cost/Cost of Construction:

a. Q. – Which cost/amount shall be placed against Estimated Cost of Construction as certified by engineer?

A. -Estimated Cost of Construction as certified by engineer in Form-2 (Engineer's Certificate) at Paragraph 3 of Form-2 shall be placed.

b. Q. – Why cannot the estimated cost incurred till date as per engineer be same / match with the actual cost Incurred & Paid till date as per CA?

A.-While engineer certifies amount of construction cost incurred till date, CA has to ascertain amount of construction cost "Incurred & Paid" till date, i.e. actual amount paid out by promoters out of incurred cost based on the examination of books of account of promoter for the respective project. (Also in any case, actual cost of construction incurred and paid cannot be higher than estimated cost of construction) (The words "incurred" and "incurred & paid" is to be understood as different terms in common parlance.)

c. Q. - Which cost can be mentioned against on-site expenditure?

A.- All costs directly incurred to complete the construction of the entire phase of the project registered.

i.e. salaries, consultants fees, site overheads, development works, cost of services (including water, electricity, sewerage, drainage, layout roads etc.), cost of machineries and equipment including its hire and maintenance costs, consumables etc.

Thus On-site expenditure for development of entire project shall represent the estimated and Incurred & paid cost excluding cost of construction shown under clause 1(ii)a and 1(ii)b,

d. Q. – On-site expenditure will be mentioned only when engineer is mentioning some expenditure under Table – C?

A.-The increase in construction cost due to execution of extra/additional items as certified by the engineer in Table C of the Form 2 shall be allowed to be included in the on-site expenditure (Over and above the actual on-site exp.) for development of entire site etc. Under 1(ii)(a)(iii) of form 3 of Gujarat RERA.

e. "Onsite expenditure" should not include following expenditure:

(i) General administration costs;

(ii) Marketing and Selling costs;

(iii) Research and development costs;

(iv) Cost of unconsumed or uninstalled material delivered at site;

(v) Payments made to sub-contractor in advance of work performed.

f. Payment of Taxes, cess, fees, charges, premiums, interest etc. to any Statutory Authority other charges for plan passing, fire extinguisher, height clearance, B.U permission charges, etc.

g. It may be noted that Income tax paid by the promoters of a Real Estate Project, shall not be allowed to be claimed as cost of the Real Estate Project.

h. Borrowing cost which are incurred directly in relation to a project or which are apportioned to a project construction should only form part of construction cost.

4. Q. – What other areas should be considered while filling Form 3?

- As defined u/s. 2(v) of the Act 'Estimated cost of REP' which means "the total cost involved in developing the REP and includes the land cost, taxes, cess, development and other charges.

- "Total cost incurred and paid" cannot be higher than "Total Estimated Cost".

- Percentage Completion should only be mentioned when Architect Certificate on Completion of Project has been provided.

Form-4 Architects Certificate (On completion of Project) has been prescribed for the same.

- The expression "Amount withdrawn till the date of the certificate as per the Books of Accounts and Bank Statement" appearing at clause 7 of Form 3 of Gujarat RERA means the amounts withdrawn from the Separate Bank Account as per the Books of Accounts and Bank statement of that Separate Bank Account.

- The issuance of certificate has to be in conformity with Assurance Standard issued by Institute of Chartered Accountant of India.

- Certificate must be dated, on letter head of the firm and should contain the Firm Registration Number(FRN).

- It is advisable that the certificate contain a note mentioning that all the amounts/figures taken are as on a particular date i.e. cut-off date.

- It is recommended that certificate contain other notes for proper clarification / justification / disclaimer.

5. Additional Information for Ongoing Projects:

a. Estimated Balance Cost to Complete the Real Estate Project (Difference of Total Estimated Project cost less Cost incurred) [= clause 2 – clause 3]

b. For sold inventory actual unit consideration as per Agreement/Letter of Allotment to be considered. For unsold inventory unit consideration should be considered as decided by management. (This amount can also be higher than Ready recknor rate/ Jantri Rate).

c. For Unsold inventory valuations one can mention the estimated amount at which promoter intends to sell the said inventory in future looking to the present and foreseeable future market.

d. Amount to be deposited in Designated Account – **70% or 100%**.

If 4 is greater than 1, then 70% of the balance receivables of on-going project will be deposited in designated Account. If 4 is lesser than 1, then 100% of the balance receivables of Ongoing project will be deposited in designated Account. Hence here you have to mention the (%) that will be applicable.

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Section 54EC – Tax Savings v/s. Choice of Investments

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Section 54EC of the Income-tax Act, 1961(the Act) was introduced by the government to provide an exemption from tax in respect of capital gain arising from the transfer of any long-term capital asset to the extent the gain is invested in a bond issued by the National Highways Authority of India (NHAI) or Rural Electrification Corporation Ltd. (REC) which is redeemable after 3 years from the date of issue.

This provision was considered attractive since it provided exemption benefits to all taxpayers (not restricting it to individuals / HUFs as the case with other investment-oriented exemption provisions vis-à-vis capital gains) and was applicable to capital gains on all assets (and not limited to specific assets as the case with other provisions). The lock-in applicable to investments made under this provision was considered reasonable considering all the factors.

Finance Bill, 2018 (with effect from 01April, 2019 i.e. applicable from assessment year 2019-2020) proposes to restrict the scope of the exemption by way of the following measures:

1. **Exemption limited to real estate assets**

   Under the erstwhile provisions of Section 54EC of the Act exemption of tax on capital gains in respect of any long-term capital asset whether it was land or building or plant or machinery or securities provided such gain was invested as prescribed. The Budget proposal limits the exemption to capital gains on land or building or both.

2. **Longer lock-in period**

   There is proposal in the Budget to increase the lock-in period of the bonds in which capital gains are to be invested for claiming exemption to five years from three years earlier.

The memorandum to the Finance Bill states that the amendments are proposed in order to rationalize the provisions of the said section and to restrict the scope to land or building or both.

Whilst the limitation of benefit to real estate assets would considerably reduce the scope of benefit, the longer lock-in period may potentially reduce the attractiveness of these bonds. These bonds carry a coupon which is low compared to alternative investment products available in the market. For the taxpayer, making an investment in these bonds is essentially a choice between the following two alternatives:

- Investing the entire capital gains in these bonds which has a coupon rate which is lower than alternative investment options
- Payment of taxes and investing the net capital gains in alternative investment products such as equity-oriented mutual funds, debt funds, etc.

A lower lock-in would have compensated for the low coupon since the taxpayer would be able to liquidate the investment at the end of three years as against five years, thereby restricting the loss of incremental return to three years instead of five years.

A brief comparison of various investment products available in the market vis-à-vis the specified bonds of NHAI and REC is provided hereunder:

Mode of Investment	Return (%) (post tax)	Lock-in period	Risk of return
NHAI / REC	4.5	5 years	Very low
Equity-oriented mutual funds	11 to 13	No lock-in	Moderate to high
Public Provident fund*	8	5 years	Very low
Debt funds	7.5	No lock in	Low to moderate
Deposits with banks	4 to 6	Depends	Low

*available to individuals / HUF with an annual limitation of Rs. 1.50 Lakh

It is apparent from the above comparison that a taxpayer choosing to invest in the specified bonds is essentially forgoing a higher return on investment in order to obtain a tax benefit in respect of the capital gains. The taxpayer may also want to factor the varying risk profile of the aforesaid investment products.

A high level comparison between investment of capital gains proceeds (net of tax) in mutual funds and investment of entire capital gains in specified bonds is provided hereunder:

Particulars	Investment net of tax in debt mutual fund	Investment of net capital gains in equity-oriented mutual fund	Investment of entire capital gains in specified bonds
Amount available for investment	40,00,000*	40,00,000*	50,00,000
Assumed return on investment over 5 years (net of taxes)	7.5%	11%	4.5%
Cumulative return on investment post 5 years	17,42,517-	27,40,233	12,30,910
Corpus at the end of 5 years	57,42,517	67,40,233	62,30,910

*net of taxes @ 20%

From the above analysis, it is apparent that taxpayerswould be able to earna higher return on investment resulting in a higher corpus in case investment is made in equity-oriented mutual fund. It is also important to note that returns from equity-oriented mutual funds vary depending on performance of the stock markets and could result in an even higher corpus for the taxpayer in case of a buoyant stock market. Risk factors should also be understood while deciding on the investment alternative.

In case investment is made in a debt mutual fund, the corpus at the end of five years would be lower than that in case of investment in specified bonds and claiming the exemption of tax on capital gains.

It would be for the taxpayer to consider the aforesaid factors alongside the exemption available under Section 54EC of the Act and decide upon whether to pay taxes on the capital gains and invest in alternative investment products or to claim the exemption and to stay invested for five years in specified bonds.

Information for the editor for reference purposes only

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Glimpses of Supreme Court Rulings

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30 Negotiable Instruments Act

The object of introducing section 138 and other provisions of chapter XVII I the act in the year 1988 was to enhance the acceptability of cheques in the settlement of liabilities. The drawer of cheque is made liable to prosecution on dishonor of cheque with safeguards to prevent harassment of honest drawers. The negotiable Instruments (Amendment and Misc. Provisions) Act, 2002 to amend the act was brought in, inter alia, to simplify the procedure to deal with such matters. The amendment includes provision for offence compoundable. The object of the statute was to facilitate smooth functioning of business transaction.

Offence under section 138 of the Act is primarily a civil, wrong. Burden of proof is on the accused in view of presumption under section 139 but the standard of such proof is "Preponderance of Probabilities". The same has to be normally tries summarily as per provisions of summary trial under CrPc but with such variation as may be appropriate to proceedings under chapter XVII of the act. Thus read, princiof section 258 CrPc will apply and the court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect. The object of the provision being primarily compensatory, punitive element, being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the court. Though compounding requires consent of both parties, even in absence of the such consent, the court, in the interest of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused.

Meters and Instruments Pvt. Ltd. Vs. Kanchan Mehta (2018) 1 SCC 560

31 Advocates – Professional standards and ethics:

Undoubtedly, the legal profession is the major component of the justice delivery system and has a significant role to play in upholding the rule of law. Significance of the professional is on account of its role in providing access to justice and assisting the citizens in securing their fundamental and other rights. The Supreme Court has even earlier expressed the concern on the falling professional norms in the legal profession. The Supreme Court had noted the trend of increasing element of Commercialisation and decreasing element of service. The court has observed that confidence of the public in the legal profession was integral to the confidence of the public in the legal system. Commercialisation to the extent of exploiting the litigant and misbehavior to the extent of browbeating the court, breach of professional duties to the court and the litigant on the part of some members of the legal profession, affecting the right of the part of some members of the legal profession, affecting the right of the litigants to speedy and inexpensive justice, need to be checked.

Role of the legal profession in strengthening the administration of justice must be in consonance with the mandate of Article – 39 A of the constitution to ensure equal opportunity for access to justice. The legal profession must make its services available to the needy by developing its public sector. Like public hospital for medical services, the public sector should have a role in providing legal services for those who cannot afford fee. Maintenance of irreducible minimum stands of the profession is must for ensuring accountability of the legal profession. A methodology is required to be devised

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From the Courts

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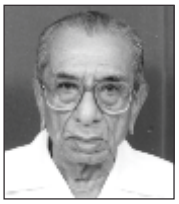

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91 Conversion of stock in trade into Investment
Deeplok Financial Services Ltd. v/s CIT (2017) 393 ITR 395 (Cal)

Issue :

In view of Sec. 45(2) of the I.T. Act which provides for conversion of capital investment into stock in trade whether vice-versa is possible and to be given effect to?

Held :

The Tribunal erred in affirming the order of the Assessing Officer rejecting the conversion of the trading shares into investment shares and treating the long term capital gains that arose from the sale of those shares as profit of trading in shares and chargeable business income. The only reason given by the Appellate Tribunal in rejecting the claim of the assessee for the previous assessment year 2005-06 was that there was no provision in the Income Tax Act, 1961 in respect of conversion of stock in trade into investment. Section 45(2) provided for the conversion by the owner of a capital asset into or its treatment by him as stock in trade of a business carried on by him as chargeable to tax as income of his previous year in which such stock in trade was sold or otherwise transferred by him and fair market value of the asset on the date of conversion or treatment should be deemed to be the full value of the consideration received or accrued as a result of the transfer of a capital asset. The Act however did not provide for the conversion of stock in trade into capital asset. Such omission could not operate as a bar on an assessee. It was a fundamental principle of law that a natural person had the capacity to do all lawful things unless his capacity had been curtailed by some rule of law.

92 Legislative Intent
Principal CIT v/s. IDMC Ltd. (2017) 393 ITR 449 (Guj)

Issue :

Is the court entitled to look into Legislative intent in interpreting a law?

Held :

In the case of claim of additional depreciation when machinery purchased in a year and installed in the next year, Hon. High Court has discussed the "legislative intent" and granted relief by following a Supreme Court decision in the following words:

In the case of Deepak Mahajan (1995) 82 Comp Cas 103, 117(SC), it is observed and held as under:

"Normally courts should be slow to pronounce the Legislature to have been mistaken in its constantly manifested opinion upon a matter resting wholly within its will and take its plain ordinary grammatical meaning of the words of the enactment as affording the best guide, but to winch up the legislative intent, it is permissible for courts to take into account the ostensible purpose and object and the real legislative intent. Otherwise, a bare mechanical interpretation of the words and application of the legislative intent devoid of concept of purpose and object will render the Legislature inane. In given circumstances, it is permissible for courts to have functional approaches and look into the legislative intention and sometimes it may be even necessary to go behind the words and enactment and take other factors into consideration to give effect to the legislative intention and to the purpose and spirit of the enactment so that no absurdity or practical inconvenience may result and the legislative exercise and its scope and object may not become futile".

93 Query raised in Original Assessment proceedings duly replied : No reopening permissible

CIT v/s. Aroni Commercial Ltd.
(2017) 393 ITR 673 (Bom)

Issue :

When on a certain point query is raised by Assessing Officer which is replied by the assessee, Reopening on the same issue is permissible?

Once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that an assessment order should contain reference or discussion to disclose its satisfaction in respect of the query raised.

Held :

Accordingly that the Tribunal found that during the regular assessment proceedings leading to an order a specific question was asked with regard to the claim made for capital gains on account of compensation received on extinguishment of a capital asset. It was only on the Assessing Officer being satisfied with the justification of the assessee's claim that the Assessing Officer accepted it to be capital gains. This was a case where the Assessing Officer did apply his mind as evidenced by the query raised to the very issue which was now sought to be raised as the basis for reopening the assessment. The reassessment proceedings were not valid.

94 Book Profit v/s. Normal Computation : AND Penalty : Pr. CIT v/s. Multiplex Capital Ltd.

SLP © No. 5963 of 2017
@ STATUTES : Page No. 5 of 394 ITR

Issue :

When assessment is computed u/s 115JB, whether penalty proceedings can be taken for concealment in normal working of income?

Held :

Hon. Supreme Court has dismissed the special leave petition of the Department against the judgment of Hon. Delhi High Court in which Hon. Delhi High Court held that since at the stage when the assessing Officer sought to assume jurisdiction to levy penalty for concealment, the assessment was completed u/s 115JB and there was no concealment of any material particulars in respect of that part of the return, penalty proceedings could not have been taken on the basis of normal computation made later.

95 Refund of Assessee : Department's order motivated to delay the refund : Abuse of Power : Oriental Insurance Co. Ltd. v/s. Deputy CIT

(2017) 394 ITR 58 (Delhi)

Issue :

How the court would interfere when the power is misused by the Department?

Held :

For the assessment year 2011-12, the assessee was subjected to penalty under section 271(1)(c) of the Income tax Act, 1961 in a sum of Rs. 342.7 crores on account of income derived from sale of securities. The assessee received a demand notice purporting to curtail the normal period for complying with demand for payment from 30 days to 7 days by exercising discretion under proviso to section 220 of the Act. On a writ petition:

Held, allowing the petition, that the additions were made on account of a highly contentious and entirely debatable issue. The assessee had succeeded in past assessment years and at least in one year the penalty imposed was deleted. Hence, the exercise of discretion under the proviso to section 220(1) of the Act was unwarranted. The Department was entirely motivated in ensuring that the refunds due to the assessee were somehow not given effect to and that the demand was made so as to ensure that all other periods available to the assessee were shortened. This was plain case of abuse of power under section 220(1) of the Act which no court could countenance.

96 Notice of reassessment beyond four years : Notice based on third party's information : Not valid.
Harikishan Sunderlal Virmani v/s. Deputy CIT (2017) 394 ITR 146 (Guj)

Issue :
Notice of reassessment beyond four years on third party's instance is valid?

Held :
The basis for the notice of reassessment was the information received from an external source, viz. the Principal Director of Income Tax (Investigation). On the basis of the information received from another agency, there could not be any reassessment proceedings. After considering the information and material received from other source, the Assessing Officer was required to consider the material on record in the case of the assessee and thereafter was required to form an independent opinion on the basis of the material on record that the income had escaped assessment. Without forming such an opinion, solely and mechanically relying upon the information received from other source, there could not be any reassessment. In the reasons recorded, there was no allegation that there was any failure on the part of the assessee in not disclosing truly and fully material facts necessary for assessment. Under the circumstances, the assumption of the jurisdiction to reopen the assessment beyond the period of four years in exercise of powers under section 147 of the Act was bad in law.

97 Sec. 40(a)(ia) : Meaning of word 'payable' : Palam Gas Service v/s. CIT (2017) 394 ITR 300 (SC)

Issue :
What is the meaning of word "payable" in Sec. 40(a)(ia)? Whether it covers the amounts paid also?

Held :
Section 40(a)(ia) of the Act relates not only to assessees who follow the mercantile system but also assessees who follow the cash system. Section 40(a) is applicable irrespective of the method of accounting followed by an assessee. Therefore, by using the term "payable" the Legislature included the entire accrued liability. If the assessee follows the mercantile system of accounting, then the moment the amount is credited to the account of the payee on accrual of liability, tax deduction at source is required to be made but if the assessee follows the cash system of accounting, then on making payment tax deduction at source has to be made as the liability is discharged by making payment. The provisions for deduction of tax at source are applicable both in the situation of actual payment as well as of the credit of the amount. It follows that section 40(a)(ia) covers not only those cases where the amount is payable but also when it is paid.

When the entire scheme of obligation to deduct the tax at source and paying it over to the Central Government is read holistically, it cannot be held that the word "Payable" occurring in section 40(a)(ia) refers only to those cases where the amount is yet to be paid and does not cover the cases where the amount is actually paid. Once the section mandates a person to deduct tax at source not only on the amounts payable but also when the sums are actually paid to the contractor, any person who does not adhere to this statutory obligation has to suffer the consequences which are stipulated in the Act itself.

98 Accumulation of Income in a Public Charitable Trust : No necessity of detailed plan of expenditure:
CIT (Exemption) v/s. Gokula Education Foundation
(2017) 394 ITR 236 (Ker)

Issue :
In the form No. 10 for accumulation of income to be spent for charitable purposes, details of expenditure is necessary?

Held :
"At this stage we may refer to the decision of this court in the case of Director of Income Tax (Exemptions) v/s. Envisions (2015) 378 ITR 483 (Karn); [2015] 232 Taxman 164/58, wherein the decision of the Calcutta High Court was also relied upon by the Revenue and this court at paragraph 10 had observed thus (Page 486 of 378 ITR):

"In the present case, we find that the revenue does not dispute the fact that all the three purposes specified by the assessee in Form 10 are for

achieving the objects of the trust, and that the purposes as well as objects, are both charitable. Merely because more than one purpose has been specified and details about the plan of such expenditure has not been given, the same would not, in our view, be sufficient to deny the benefit under section 11(2) of the Act to the assessee. As long as the objects of the trust are charitable in character and as long as the purpose or purposes mentioned in Form 10 are for achieving the objects of the trust, merely because of non furnishing of the details, as how the said amount is proposed to be spent in future, the assessee cannot be denied the exemption as is admissible under sub section (2) of section 11 of the Income Tax Act, 1961."

The aforesaid shows that as per the view taken by this court as long as the objects of the trust are charitable in character and as long as the purpose or purposes mentioned in Form 10 are for achieving the objects of the trust, merely because the details are not furnished, the assessee cannot be denied benefit of the exemption under section 11(2) of the Act."

99 Initiation and levy of penalty u/s 271(1)(c) : Time Limit. Principal CIT v/s. Mahesh Wood Products Pvt. Ltd. (2017) 394 ITR 312 (Delhi)

Issue :

How the time limit for initiation and levy of penalty u/s 271(1)(c) is to be calculated?

Held :

Under section 275(1)(c) of the Income Tax Act, 1961, the starting point of "initiation" of penalty proceedings, would be the date on which the Assessing Officer wrote a letter to the Additional Commissioner recommending the issuance of the notice. Though the Additional Commissioner had the discretion whether or not to issue a notice, if he did decide to issue a notice, the limitation would begin to run from the date of the letter sent by the Assessing Officer recommending "initiation" of the penalty proceedings. In the assessee's case, the limitation under section 275(1)(c) began to run on July 23, 2012 and the last date for passing the penalty orders was January 31, 2013. Therefore, the penalty orders issued on February 26, 2013 were barred by limitation.

100 Sec. 179 of I.T. Act : Lifting of corporate veil: Ajay Surendra Patel v/s. Deputy CIT (2017) 394 ITR 321 (Guj)

Issue :

What is the concept of lifting of corporate veil in respect of tax recovery u/s 179 if the I.T. Act?

Held :

Tax evasion cannot be permitted on account of any hyper technicality. The concept of lifting or piercing of corporate veil, as sometimes referred to as cracking the corporate shell, is applied by the courts sparingly. However, it is recognized that boundaries of such principle have not yet been defined and areas where such principle may have to be applied may expand. The concept of corporate body being an independent entity enjoying existence independent of its directors, is a well known principle. However, with ever developing world and expanding economic complexities, courts have refused to limit the scope and parameters or areas where corporate veil may have to be lifted. Two situations where such principle is consistently applied are one, where the statute itself so permits and second, where due to glaring facts established on record, it is found that a complex web has been created only with a view to defraud the Revenue interest of the State and if it is found that incorporation of an entity is only to create a smoke screen to defraud the Revenue and shield the individual who behind the corporate veil is the real operator of the company and beneficiary of the fraud, the courts cannot hesitate in ignoring the corporate status and strike at the real beneficiary of such complex design. The corporate veil can be lifted if it is found that the company is acting as an agent of the shareholders though it has got legal entity.

Section 166(3) of the Companies Act, 1956 spells out that a director shall exercise his duties with due and reasonable care. The fiduciary position of a director in a company does not permit him to say that he knew nothing as he did not take part in the company's affairs. The fiduciary obligation of a director does not cease with his resignation.

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Tribunal News

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55 ACIT vs. Shri Dushyant Kumar Jain 2018-TII-21-ITAT-DEL-INL (ITA No. 1468/Del/2016) (DEL) Assessment Year: 2011-12 Order dated: 27th December, 2017

Basic Facts

The assessee paid commission to foreign parties. The AO noted that TDS had not been deducted as per provisions of section 195(1) of the Act and, therefore, the amount of commission paid was added to the income of the assessee under section 40(a)(i) of the Act.The assessee preferred an appeal before the CIT(A) who deleted the addition after relying on certain judicial precedents. Aggrieved by the order of CIT(A), the revenue appealed before the ITAT.

Issue

Whether commission paid overseas attracts withholding tax liability u/s 195, if exhibitions conducted by agents on behalf of assessee are also held outside India and income from commission to those parties also accrued outside India?

Held

The Hon'ble ITAT held that the CIT(A)has discussed the facts of the case in light of numerous orders of the ITAT/judicial precedents and has reached the conclusion that undeniably the parties to whom the impugned payments were made were residents outside India, the exhibitions conducted by those agents on behalf of the assessee were also held outside India and the income from commission to those parties accrued outside India since no services were rendered in India. The payments were also made outside India and, therefore, no income could be deemed to accrue or arise in India. The ITAT also confirmed the assessee's reliance on the case of Divya Creations (*86 Taxmann.com 276)* and Le Passage to India Tours & Travel (P) Ltd (*54 Taxmann.com 138)* both given by the Delhi Tribunal and thus upheld the order of CIT(A). Revenue's appeal was dismissed.

56 Bank of Baroda vs. DCIT[2017] 88 taxmann.com 103 (ITA No. 1503/Ahd/ 2015) (Ahmedabad) Assessment Year: 2014-15 Order dated: 30th November, 2017

Basic Facts

The assessee was a nationalized bank's branch office. The taxes deducted at source under section 194A by the assessee for the month of September 2014 were deposited by the assessee on 8th October 2014. On these facts, while processing the TDS return under section 200A, interest for delay in depositing the tax at source, for a period of two months, *i.e*. September and October 2014, was charged. On appeal,the assessee contended that the levy of interest should be reduced to actual period of delay in depositing the tax at source, i.e. from the date on which tax was deducted and till the date on which tax was deposited but the CIT(A) confirmed the action of AO.

Issue

Whether interest under section 201(1A) will be levied only from date on which tax was deducted and till date on which tax was deposited provided that it exceeds one month?

Held

The Hon'ble ITAT held that the time limit for depositing the tax deducted at source under section 194A, as set out in rule 30(2)(b) - which applies in the present context, is "on or before seven days from the end of the month in which the deduction is made". In the present case, there is delay which the assessee has not disputed but what has been done is that the interest has been charged for two calendar

months, *i.e.* September and October. The ITAT held that the plea of the assessee indeed meets approval in the sense that the question of levy of interest for the second month can arise only if the period of time between the date on which tax was deducted and the date on which tax was paid to the Government exceeds one month. Therefore, the ITAT directed AO to recompute the levy of interest under section 201(1A) accordingly.

57 Prakash Software Solution (P.) Ltd. vs. ITO [2017] 89 taxmann.com 130 (ITA No. 1390/Ahd/2014) (Ahmedabad) Assessment Year: 2010-11 Order dated: 15th November, 2017

Basic Facts

The assessee had set up an employees' gratuity fund, by the name of Prakash Software Solutions Pvt Ltd Employees Group Gratuity Scheme for administering a scheme, which was named as Prakash Software Solutions Pvt Ltd Employees Group Gratuity-cum- Life Assurance Scheme, in collaboration with the Life Insurance Corporation of India. The Trust was set up on 1st January 2010, effective on same date. On 3rd March 2010, an initial payment was made as premium under this scheme for the period of one year commencing from 1st January 2010. The Gratuity Fund also applied to the Commissioner of Income Tax for approval of the fund vide letter dated 31st March 2010, filed on 7th April 2010. As the payment was made on behalf of the gratuity fund, this premium paid to the LIC was treated as contribution to the said gratuity fund. It was in this backdrop a deduction was claimed for contribution towards approved gratuity fund. The AO disallowed it on the ground that the assessee has applied for the approval of gratuity fund, after making payment to Gratuity Fund. CIT(A) upheld the order of the AO. Aggrieved, the assessee preferred an appeal before the ITAT.

Issue

Whether payment to a gratuity fund on a date prior to date of approval of a gratuity fund be allowed under section 36(1)(v)?

Held

The Commissioner had granted approval vide order dated 1st February 2014 which was effective from the date of application being 7th April 2010. The Hon'ble ITAT held that there is no dispute that the required conditions are satisfied and that is the reason as to why the approval is granted by the Commissioner. The ITAT further held that an approval for a fund which is already set up is in the nature of *post facto* approval and it relates back to the date on which it is set up in accordance with the scheme of the law. Hence, as per ITAT notwithstanding the effective date of date of approval set out by the Commissioner, the approval granted to the employees gratuity trust must be treated as effective from 1st January 2010. Thus, the payment on a date prior to the date of approval does not come in the way of deduction being allowed. As a matter of fact, even going by the approval itself, the date from which the approval is effective is prior to the date of approval. Accordingly, the ITAT allowed the appeal of the assessee.

58 Johnson Matthey Public Ltd. Company vs. DCIT (Intl. Taxation) [2017] 88 taxmann.com 127 (ITA No. 1143/Del/2016) (Delhi) Assessment Year: 2011-12 Order dated: 6th December, 2017

Basic Facts

The assessee was the ultimate parent company of JMIPL which provided guarantees to HSBC and Citibank on a global basis so as to support credit facilities extended to them by banks in India. It has treated the guarantee fees received from Indian subsidiaries to be in the nature of interest income under article 12 of India UK tax treaty and offered it to tax at the rate of 15 per cent while filing its return of income. During the assessment proceedings, the Assessing Officer treated the guarantee fees as taxable under article 23 i.e. Other Income of India UK Double Taxation Avoidance Agreement at the rate of 40 per cent as against 15 per cent. The DRP confirmed said addition.

Aggrieved, the assessee preferred an appeal before ITAT.

Issue

Whether guarantee fees charged by the assessee to provide guarantee to various banks so as to extend credit facilities to its Indian subsidiaries would not fall within the purview of 'interest' and in view of clause 3 of article 23 India-UK treaty, same had to be taxed in India as 'Income from other sources'?

Held

The Hon'ble ITAT held that the term interest, with its widest connotations, indicate the payment of some amount, whatever may be the name that is called with, made by the receiver, pursuant to a loan transaction which isa species of contract. However, payment to be qualified as 'interest' necessarily have to be within the context of loan and shall relate to the parties to the privity of contract. But assessee is a stranger to the privity of loan transactions in as much as the contract of loan is different from the contract of guarantee and there is no relationship of lender-borrower in this transaction. Hence, the same cannot be categorized as interest for the purpose of taxation. Also, the assessee is manufacturing technologically advanced chemicals i.e. catalysts used in automobile and other industries. Therefore, assessee in no way does the business of providing guarantee to earn income on regular basis. The global corporate guarantee entered into by the assessee is only for the limited purpose of securing loans for its subsidiaries and the recharge income is only an incidental one. In these circumstances, it would not account to be a business profit. At the same time, it does not also meet the requirement of *Explanation* to section 9(1)(*vii*). Thus, this guarantee recharge amount cannot be placed in category of Fee for Technical Services(FTS). Having examined the issue with reference to article 12(5) of the Indo U.K. treaty and section 2(28A), the ITAT held that the below authorities are perfectly justified in concluding that the payment does not account to be interest and in view of clause 3 of article 23 of India-UK treaty, in the absence of any specific provision dealing with corporate/bank guarantee recharge, the same has to be taxed in India as per the provisions of the Act. Hence, the assessee's ground of appeal was dismissed.

59 Bhagwati Oxygen Ltd. vs.Assistant Commissioner of Income-tax

[2017] 88 taxmann.com 28 (ITA No. 240/Kol/2016) (Kolkata)

Assessment Year: 2011-12 Order dated: 15th November, 2017

Basic Facts

The assessee-company filed its return of income disclosing a tax liability which includes surcharge and cess. The assessee also has a MAT credit u/s 115JAA of the Act to be adjusted in future years. However, the CPC while calculating the MAT credit completely ignored the surcharge portion and cess portion computed by the assessee. Accordingly, the interest liability u/s. 234B was over-charged. In view of this, the assessee was fastened with a demand payable. Against this intimation, the assessee preferred an appeal before the Ld. CIT (A) where it pleaded that surcharge and cess are a component of tax itself by placing reliance on the decision of Hon'ble Supreme Court in the case of *CIT* v. *K. Srinivasan* [1972] 83 ITR 346. The Ld. CIT (A) however, was not convinced with the argument of the assessee and upheld the demand raised by the CPC. Aggrieved, the assessee preferred an appeal before the ITAT.

Issue

Whether Payment of entire taxes (including surcharge and cess) is eligible for MAT credit u/s 115JAA while calculating interest on 'assessed tax' u/s 234B?

Held

The Hon'ble ITAT held that the payment of entire taxes (including surcharge and cess) is eligible for MAT credit u/s 115JAA of the Act, whereby assessed tax shall be determined after reducing the entire MAT credit for the purposes of calculating interest u/s 234B of the Act. The bifurcation of the total payment of taxes by way of tax, surcharge and cess is only for the administrative convenience

of the Union of India in order to know the purpose for which the said portion of amounts are to be utilized for their intended purposes. Hence, the bifurcation does not change the character of payment from the angle of the assessee who has discharged his statutory dues. Thus , if the same is in excess, it would be eligible for either refund or adjustment as contemplated u/s 115JAA of the Act. By relying on the decision of Hyderabad Tribunal in the case of *Virtusa (India) (P.) Ltd.* v. *Dy. CIT* [2016] 67 taxmann.com 65 placed before by the authorized representative, the appeal of the assessee is allowed.

60 Vodafone India Services Pvt. Ltd. vs. DCIT[2018] 89 taxmann.com 299 (ITA No. 565/Ahd/2017) (Ahmedabad) Assessment Year: 2012-13 Order dated: 23rd January, 2018

Basic Facts

The assessee company is engaged in cellular communications business and played a strategic role in structuring the financial transactions of Vodafone group. IT was noted that as per the termination deed of the agreement dated 6/6/07 (Framework Agreement 2007), the assessee had paid Rs.21.25 crores as termination fees. The assessee was asked to provide with the requisite documents as regard to the termination fees. Further, the TPO noted the explanation of both the assessee and the IDFC and found that the IDFC held 3.15% stake in Vodafone India, as on 1st April 2011, whereason 31st March 2012, it did not had any stake. The TPO also observed that in additions to taking on record assessee's submissions about cashless options for IDFC Investor's 0.1234% direct equity in Vodafone India for a consideration of Rs. 62 crores, the investors under the Framework Agreement, wanted to sell the entire share capital in SMMS Investments Pvt Ltd and therefore, exercised their put option. It was also found by TPO that by the mechanism of the said call and put options, the direct and indirect shareholding of Vodafone Group plc UK had gone up by 2.6%. Thus, the TPO proceeded to examine the issue of applicability of Chapter X of the Act. However, the same was objected by the assessee and therein, made its submissions but, TPO was not impressed with the same. On verifying the documents so furnished by the assessee, the TPO noted that the assessee had the valuable call options which entitled it to subscribe the shares of HEL (Vodafone India) indirectly at a fraction of their FMV and further, the holding company of the assessee was not only a party to the arrangement.

The TPO then noted that the Assessee had failed to provide any benchmarking or ALP for the extinguishment / relinquishment of option rights. Further, the assessee used the valuation of option as an Internal CUP for valuation of termination of option. Therefore, the TPO determined ALP for extinguishment/ relinquishment of option rights at Rs.1588.85 crores and adjustment of the same was proposed to make to the international transaction of the assessee. Thus, following the same, the AO made an addition of Rs.1588.85 croresin respect of termination of call options under the Framework Agreement 2007. The DRP repeated the observations made by the TPO. Therefore, the AO proceeded with the said ALP adjustment. The assessee preferred an appeal before the Hon'ble ITAT.

Issue

Whether when an amount is debited towards termination fees for options having an impact on assessee's profit, the same is to be treated as international transaction u/s 92B?

Whether an arrangement by the foreign AE with respect to the framework agreement and termination can be considered as an international transaction u/s 92B(2)?

Whether when the subsidiary is rendering certain services to the parent company in pursuing its investment interests but not being compensated adequately by the parent, such a situation warrants TP adjustment

Held

The Hon'ble ITAT held that in order to ascertain whether a particular transaction is an international transaction or not, the necessary preconditions which are to be satisfied are (a) that it is in the nature

"an arrangement, understanding or action in concert etc"; (b) that it is between two or more associated enterprises, either or both of whom are non-residents; and (c) that it has a bearing on the profits, income, losses or assets of such enterprises. While the payment is certainly by the Assessee to an Indian entity, the payment is under an arrangement and understanding which has several parties acting in concert and many of these parties are non-resident associated enterprises. The option to purchase entire shareholding in this entity, i.e. SMMS Investments, have been obtained by the Assessee only because of, and clearly as a result of, HTIL-M nominating SMMS Investments for the purpose of purchase of equity shares in, what is now, Omega Investments and as a result of arranging finances for this acquisition. The fact that TII was a foreign controlled entity, as against the IDFC Investors being an independent enterprise, does not make a difference.

In the present case, the assessee has debited to the profit and loss account on account of termination fees for options. Clearly, therefore, in the present case, there is an impact on the profits of the assessee, and, to this extent, this condition is also satisfied. The ITAT rejected the contention of the assessee that the said amount has not been claimed as a deduction in the computation of total income, and, therefore, it has no impact on income of the assessee.

The ITAT further held that the conditions precedent for invoking section 92B(1) are satisfied inasmuch as, with legally enforceable rights or not, foreign AEs, namely VIH- BV and HTIL-M are part of the arrangements and action in concert, and the transaction has a bearing on the profits of the Assessee.The present transaction is that of not only termination of options, but also, transfer of the shareholdings in SMMS Investments to of an Indian subsidiary of VIH-BV at a fraction of its market worth, and this arrangement involves an agreement between not only between Indian entities but also foreign AEs of the Assessee, i.e. HTIL-M and VIH-BV. There may not be formal, written or legally enforceable arrangement, understanding or action in concert, but applying the test laid down in Jubilee Investment's case which would essentially imply that the terms of the relevant arrangement, understanding or action in concert are, in substance, decided by the parent company;

The ITAT added on that not only the investors were selected by the Hutchinson Group, which was taken over by Vodafone Group plc next year, but even the options were received in consideration of HTIL providing credit support to these investors. The fact and evidence about the terms of arrangements of this transaction being decided, in substance, by the foreign AEs is something which is in exclusive knowledge domain of the assessee and its group entities.The assessee decided not to share it and the circumstances are such that the terms of the transactions are established to not at all justified by the known commercial considerations of the assessee, the assessee cannot blame the Revenue for not bringing on record the evidence of the terms of arrangement being decided by the foreign AE. The ITAT in these peculiar facts, which are very unusual facts by any standards, even in the absence of such an evidence, accepted the terms of arrangements being decided by the foreign AE and held that the arrangement, understanding and action in concert, with respect to framework agreement and termination thereof, is an international transaction u/s 92B(2) as well. In other words, while foreign AE and parent company of the assessee is not only a party to the agreement but the terms of the agreement, in substance, are being decided by the foreign AE.

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Controversies

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Issue:-

For forming HUF as an assessable entity under the Income Tax Act whether it is necessary to have two male coparceners?

Introduction:-

The word HUF used in the Income Tax Act is in the sense in which a Hindu Joint Family is understood under the personal law of Hindus. In order to constitute a joint family, It is not always necessary that there should be two male coparceners. Even prior to Hindu Succession Act 1956, a wife female member was entitled to maintenance under the Hindu woman's right to property Act 1937. The limited right has been converted to a full right u/s. 14 of the Hindu Succession Act. After marriage a person can form a HUF and to be assessed in the status of HUF. Landmark judgments of the Honourable Supreme Court in the case of

1. Gowli BuddannaVs. CIT 60 ITR Pg. 293 S.C.
2. Narendranath (N.V.) Vs. CIT (Wealth Tax) 74 ITR Pg. 190

can be reported to.

Proposition:-

The joint Hindu Family with all its incidents is a creature of law and cannot be created by act of parties except to the extent that a stranger may be adopted in the family. It is proposed in absence of a son, the income is assessable in the hands of the assessee as an individual.

View against the proposition:-

HUF can receive gifts from anybody including a stranger. In any case, as held by the Supreme Court, (Ref CIT vs. Satyendra Kumar (1998) 232 ITR 360(SC) a gift by mother also can be a source of HUF property. In case of a gift whether from a father, mother, relative or a friend the intention of the donor is important. If there are express provisions to the effect in the deed of gift or will that the son would take the property for the benefit of the family that is decisive. The donor or testator dealing with self-acquired property may by evincing the appropriate intention, render to the property gifted the character of a joint family property or as the case may be a separate property in the hands of the done vis-à-vis his male issue. (Refer C.N Arunachala Mudaliar vs. C.A Muruganatha Muddliar (1953) AIR 1953 SC 495 and CIT vs. M. Balasubramanian (1990) 182 ITR 117 (Mad). It is necessary to take care while making the Will or the gift. Clause should be specific and the donee HUF should open bank account in the name of the HUF. Indication should be clear (Refer CIT v/s. Maharaja Bahadur Singh & others (1986) 162 ITR 343(SC). Thus gift given to person's HUF without any other co-parser with female members can claim status of HUF.

View in favour of Proposition:-

The Supreme Court in SurjitLal Chhabda vs. CIT (1975) 101 ITR 776 on the above question stated: "Kathoke Lodge was not an asset of a pre-existing joint family. Doctrine of blending or impressing with the Character of HUF party into the family hotchpot does not apply. The appellant has no son. His wife and unmarried daughter were entitled to be maintained by him from out of the income of Kathoke Lodge while it was his separate property. Their rights in that property are not enlarged for the reason that the property was thrown into the family hotchpot. Not being coparceners of the

appellant, they have neither a right by birth in the property nor the right to demand its partition nor indeed the right to restrain the appellant from alienating the property for any purpose whatsoever. Their prior right to be maintained out of the income of Kathoke Lodge remains what it was even after the property was thrown into the family hotchpot: the right of maintenance, neither more nor less. Thus, Kathoke Lodge may be usefully described as the property of the family after it was thrown into the common stock, but it does not follow that in the eye of Hindu law it belongs to the family as it would have if the property were to devolve on the appellant as a sole surviving coparcener. The property which the appellant has put into the common stock may change its legal incidents on the birth of a son but until that event happens the property in the eye of Hindu law, is really his. He can deal with it as a full owner unrestrained by considerations of legal necessity or benefit of the estate. He may sell it, mortgage it or make a gift of it. Even a son born or adopted after the alienation shall have to take the family hotchpot as the finds it. A son born, begotten or adopted after the alienation has no right to challenge the alienation. It was held that income from the Lodge shall be chargeable to tax in the individual hand. It shall be assessable in the hands of the HUF on birth or adoption of the son. (Refer S.K Bohra vs. CIT (1988) 173 ITR 400(Rajasthan).

Summation:-

There is considerable controversy on these aspects. There are divergent views expressed by different courts from time to time. One view is that since a HUF, as known under Hindu law, can consist of even husband and wife only, once such a HUF has come into existence upon marriage of a Hindu male, such family can receive property from any source and regard the same as HUF property. However, the other view is that in such a case, a distinction should be made between a property that already has characteristic of a joint property (for example, property received on partition) and other than such properties. In case of receipt of properties of the former kind, such family (that is consisting only of husband and wife) can receive and treat such property as joint Hindu family property. But in case of latter (that is, in the cases like gift or will), unless there are at least two coparceners in the family, such HUF cannot receive or treat such property as HUF property. In other words since in such family of husband and wife there is only one coparcener i.e husband (wife being a mere member and not coparcener), if such HUF wants to receive and regard any property from an outside source as HUF property then it has to have another coparcener in the family i.e. son. The earlier view seems to a better one. Of course, a Donor or testator must indicate that he gives it to the person's HUF.

A Hindu Undivided Family (HUF) is the normal condition of Hindu Society. The HUF with all its incidents is a creature of law and cannot be created by act of parties.

A Hindu Undivided Family is different from a Hindu coparcenary. A Hindu coparcenary is special feature of the Mitakshara School of Hindu Law. It consists exclusively of male members, much narrower than Hindu Undivided Family. A coparcenary includes only those who acquire by birth an interest in the joint or coparcenary property. No coparcenary can commence without a common male ancestor.

The Hindu Succession Act, 1956 has been amended with effect from September 9, 2005 with a view to give daughter on birth equal right as a son on his birth, consequently, the daughter has right to be a coparcener and also a right to claim partition or vest her individual property in the HUF. These are important rights hitherto denied to the daughter

Thus to start an HUF at least two coparceners are required either son or daughter. Therefore only husband and wife cannot create an HUF, unless the property has been received by a coparcener on partition or otherwise. There is no impediment to start a new HUF by gift from family members.

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Judicial Analysis

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Can Sales be added as Cash Credit u/s 68 of the Income Tax Act?

CIT vs Vishal Exports Overseas Limited (Tax Appeal No.2471 of 2009)

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2. In this appeal pertaining to the assessment year 1998-99, the revenue has framed the following question for our consideration:-

   "Whether the Appellate Tribunal is right in law and on facts in confirming the order passed by CIT(A) in deleting the disallowance of Rs.70,00,000/- made on account of unexplained cash credit u/s. 68?"

3. The issue arises in the following factual background. The respondent assessee is a manufacturer exporter. During the previous year relevant to the assessment year under consideration, the assessee claimed certain benefits under section 80HHC of the Income Tax Act, 1961 ('the Act', for short) which included an amount of Rs.70 lakhs which according to the assessee, represented its export sale. The Assessing Officer however on the strength of investigation carried out by the Director of Revenue Intelligence, came to the conclusion that no such sales were ever made. In fact, the assessee and other entities had connived to claim bogus benefits on the basis of exports not genuinely made in a surreptitious manner to claim other tax benefits such as DEPB remissions including deductions under section 80HHC of the Act. While, therefore, denying such benefit of deduction under section 80HHC of the Act, the Assessing Officer simultaneously held that such amount of Rs.70 lakhs would represent the unexplained cash credit of the assessee and he accordingly decided to tax the same under section 68 of the Act. In the order dated 26-3-2004 which the Assessing Officer had passed, he held that the export turnover eligible for deduction under section 80HHC is reduced from Rs.585.91 crores to Rs.585.21 crores. In other words, the Assessing Officer disallowed the assessee's claim for deduction under section 80HHC of the Act by the said amount of Rs.70 lakhs.

4. The assessee carried the issue in appeal. The Commissioner (Appeals) vide his order dated 22-12-2004 allowed the appeal. He upheld the assessee's contention that the addition of Rs.70 lakhs in respect of bogus exports was not justified. He, in fact, held that there was no cogent evidence in possession of the Assessing Officer to hold that such sales were bogus. The C.I.T. (Appeals) on facts thus reversed the finding of the Assessing Officer that the amount of Rs.70 lakhs represented bogus sales of the assessee. He, therefore, while deleting the additions under section 68 of the Act, further directed granting of deduction under section 80HHC of the Act with respect to such amount also.

5. Revenue carried the matter in appeal before the Tribunal. The Tribunal did not address the question of correctness of the C.I.T. (Appeals)'s conclusion that amount of Rs.70 lakhs represented the genuine export sale of the assessee. The Tribunal however, upheld the deletion of Rs.70 lakhs under section 68 of the Act observing that when the assessee had already offered sales realisation and such income is accepted by the Assessing Officer to be the income of the assessee, addition of the same amount once again under section 68 of the Act would tantamount to double taxation of the same income.

6. Having heard learned counsel for the parties and having perused the documents on record, we are in agreement with the above view of the Tribunal. According to the Assessing Officer, Rs.70 lakhs represented bogus sales and therefore the eligibility of the assessee's deduction under section 80HHC of the Act came to be reduced by such amount. Having done so, the Assessing Officer further proceeded to add the same amount under section 68 of the Act.

7. In view of the above situation, we do not find any reason to interfere with the Tribunal's order. Before closing, however, one issue needs clarification. As noted earlier, C.I.T. (Appeals) had allowed the appeal of the assessee in toto. He, in fact, reversed the Assessing Officer's finding that the sale was bogus and that no export was made. On this basis, he not only deleted addition under section 68 of the Act, but also directed that the assessee shall be entitled to deduction under section 80HHC of the Act for such disputed amount also. This aspect of the matter was not decided by the Tribunal though both sides presented their rival contentions. In fact the Tribunal's finding that Assessing Officer's order would amount to double taxation proceeds on the basis that such amount of Rs.70 lakhs is deleted while working out section 80HHC benefits. If C.I.T. (Appeals)'s conclusion that the amount in question represented genuine exports sale was sustained, there was no question of double taxation. Ordinarily, therefore, we would have been inclined to remand the proceedings before the Tribunal for a finding on this issue. However, learned counsel for the assessee clarified that the assessee does not claim any deduction under section 80HHC of the Act to the extent of such disputed amount of Rs.70 lakhs. In other words, he agreed that the Assessing Officer's working out of the deductions under section 80HHC of the Act on the export sale of the assessee of Rs.585.21 crores against the original claim of the assessee of such deduction of Rs.585.91 crores is correct. He submitted that, in fact, in the present case, such diminution of the assessee's eligibility for deduction under section 80HHC of the Act would have no bearing on the assessee's ultimate tax liability. With respect to this last submission, we express no opinion. However, in view of a clear stand taken before us and the statement made, we are not required to remand the proceedings before the Tribunal to the above limited extent also.

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Nitisha Silk mills Pvt. Ltd.vs. ITO (ITA No. 896/Ahd/2011)

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8. Regarding ground No.2, it was submitted by the Ld. A.R. that the addition was made by the A.O. in respect of cash sale declared by the assessee on 16.5.2006, 17.5.2006 and 31.3.2007. He further submitted that the amount in question was already credited by the assessee to the P & L account by way of sale and, therefore, the same cannot be added again. Reliance was placed on the judgment of Hon'ble Bombay High Court rendered in the case of R.B. Gurnam Fatehchand Vs ACIT as reported in 75 ITR 33.

9. As against this, Ld. D.R. of the revenue supported the order of authorities below.

10. We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below and the judgment cited by the Ld. A.R. We find that this is noted by the A.O. on page 30 para 7 of the assessment order that the assessee has claimed to have effected cash sales of grey cloth on three dates i.e. 16.5.2006, 17.5.2006 and 31.3.2007 totaling an amount of Rs.9,95,870/-. The A.O.'s objection is this that why cash sale is only on these three dates in

the year and not on other dates. With regard to this objection of the A.O., it was submitted by the assessee before the A.O. vide written submission dated 29.12.2009 that since the assessee decided to discontinue the business, major quantity of grey cloth lying in various process houses were called back without processing and the grey cloth so received was sold in cash. It is also submitted that some of the process houses could not trace grey cloth of the assessee and therefore, cash equal to that value of grey cloth was given by the owners of the process houses. Considering these facts of the present case, in its entirety, we are of the considered opinion that the claim of the assessee regarding cash sales under peculiar conditions that the assessee was discontinuing its business and therefore some sales were made in cash cannot be summarily rejected. We also find that it is observed by the Ld. CIT(A) on pages 51-52 of his order that the assessee could not provide even the names and addresses of those parties to whom cash sales were claimed to have been made. This is the main basis on which Ld. CIT(A) has confirmed the decision of the A.O. In our considered opinion, **it cannot be said that in the case of cash sales, the assessee is bound to keep record of the names and addresses of the buyers**. The judgement of Hon'ble Bombay High Court cited by the Ld. A.R. rendered in the case of R B Gurnam Fatehchand vs ACIT as reported in 75 ITR 33 also supports the case of the assessee. In that case also, the assessee was not in a position to give the addresses of the customers to whom cash sales were made. Under these facts, it was held by the Hon'ble Bombay High Court that this cannot be the basis to reject the book results. Respectfully following the judgment of Hon'ble Bombay High Court, we delete this addition also. Ground No.2 is also allowed.

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ITO vs Jethu Ram P:rem Chand [2001] 114 TAXMAN 219 (DELHI)(MAG.)

Facts

While framing the assessment for the assessment year 1990-91, the Assessing Officer noted that the assessee had sold substantial quantities of rice but the addresses of the buyers were not mentioned in the cash memos. He also observed that the truck numbers in respect of loading of the rice were not recorded. The Assessing Officer, therefore, concluded that the cash sales amounting to Rs. 35.48 lakhs represented cash introduced by the assessee and, therefore, treated the same as unexplained income under section 68. On appeal, the Commissioner (Appeals) deleted the addition observing that the assessee was maintaining day-to-day stock registers in which no defects had been pointed out by the Assessing Officer.

On appeal by the revenue :

Held

It was obvious that the assessee made purchases from J.R. New Delhi, on 5-1-1990 to the tune of 1970 quintals and the sales in cash of the same were made on 8-1-1990 and thereafter. As the purchase as well as sales were duly recorded in the books of account and the assessee had shown the profits on these sales made in the return of income, one failed to understand as to how the figure of total cash sales amounting to Rs. 35,48,005 could be treated as unexplained cash credit under section 68. The assessee made available to the Assessing Officer all the necessary particulars of the party from whom the assessee purchased the goods which were sold in cash and became the subject-matter of controversy at hand. The Assessing Officer in his wisdom thought it fit not to examine the supplier. It indicated that he was satisfied with the genuineness of the purchase aspect of the transaction. It was not the case of the revenue that the assessee had not shown any purchase in its books of account against which the sales had been recorded. The case law cited by the revenue as to the burden of proof on

the assessee was not applicable to the facts of the present case, because the factum of purchase and sale of the goods in the assessee's books of account stood established beyond a shadow of doubt. Under these circumstances, the order of the Commissioner (Appeals) was to be upheld.

Harish Kumar *vs.* DCIT [2003] 85 ITD 366 (HYD.)

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2. The assessee is an individual. Ground Nos. 1 to 6 relate to addition of Rs. 51,92,750 under section 68 of the Income-tax Act, 1961. The relevant facts are as follows.

3. For the assessment year 1998-99, the appellant submitted a return of income disclosing an income of Rs. 5,64,270 which *inter alia* included capital gains of Rs. 3,84,270 on sale of gold and jewellery. The computation of total income has been exhibited at pages 51 and 52 of the Paper Book filed by the appellant. The appellant availed the benefits of Voluntary Disclosure of Income Scheme of 1997 and declared gold and diamonds at Rs. 2,64,040 and Rs. 16,38,700 respectively, aggregating to Rs. 19,02,740, being the value of gold and diamonds and the necessary certificate under the disclosure scheme of 1977 was issued by the Commissioner of Income-tax, A.P., Hyderabad, *vide* certificate No. 09027 dated 30-12-1997.

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The sale of gold at Rs. 4,59,979 was accepted as genuine by the Assessing Officer, while the sale of diamonds to Shukra Jewellers, Surat, aggregating to Rs. 51,92,750 was not accepted as genuine. The entire sale value of diamonds at Rs. 51,92,750 was added by the Assessing Officer. Copies of the sale bills in respect of sale of diamonds to M/s. Shukra Jewellers, Surat, have been enclosed to the assessment order and have been furnished by the assessee in the paper book at pages 15, 16 and 17. The assessment was completed on 30-3-2001 determining the taxable income at Rs. 57,57,020 and this included the addition of Rs. 51,92,750 being the sale value of diamonds sold at Surat treated as unexplained credit and added under section 68 of the Income-tax Act.

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29. We have considered the submissions of both sides and perused the relevant record available with us and perused the paper books filed by both sides. We are of the considered opinion that the sum of Rs. 51,92,750 representing the sale of diamonds to Shukra Jewellers, Surat, cannot be sustained for the reasons stated below.

30. It is an admitted fact that the appellant had declared gold and jewellery under the VDIS 1997 and it was accepted by the Department by issue of necessary certificate in accordance with the said scheme. It is also a fact that the gold and diamonds were sold separately. It is also an admitted fact that the sale of gold which was separated from the diamonds was made for Rs. 4,59,979 at Hyderabad and this sale has been accepted. The fact remains that the diamonds were separated. As regards the sale of diamonds to Shukra Jewellers, Surat, we find from the material evidence placed before us that the identity of the party has been established, the transaction is genuine and the creditworthiness of Shukra Jewellers has been proved beyond doubt by the assessee. The bank accounts of M/s. Shukra Jewellers which were collected by the Assessing Officer showed that the amounts were received by account-payee DDs from Mumbai. The DDs were taken by Shukra Jewellers and sent to the appellant which were credited in the appellant's bank account and used for business purposes of his business entities. As regards the credits in the bank account of Shukra Jewellers, we agree with the submission of the learned authorised

representative of the appellant that it is not the duty of the appellant to prove the sources of the credits in the bank account of Shukra Jewellers. The appellant cannot establish the source of the source. The decision of the Honourable Madras High Court in *S. Hastimal's* case (*supra*) also supports this view of the appellant.

31. As regards the appellant's presence at Surat on the dates of sale of jewellery on 22-2-1998, 15-3-1998 and 25-3-1998, the Revenue has relied on the credit card statement of Standard Chartered Bank and bank account entries on 25-3-1998 to hold that on these dates the appellant was at Hyderabad and, therefore, he could not have been at Surat on the aforesaid dates. In this connection, we accept the submission of the learned authorised representative of the appellant that credit card statements and bank account entries on 25-3-1998 cannot be relied upon as these were collected behind the back of the appellant and were never put to the appellant for rebuttal, as held by the Honourable Supreme Court in *Kishinchand Chellaram's* case (*supra*).

32. Notwithstanding the above, we hold that although the Revenue claims that the appellant was in Orchid Restaurant, Hyderabad, on 22-2-1998, when the first sale of diamonds took place, no evidence has been brought on record to show that the appellant was present during the day time on 22-2-1998. We have also found as a matter of fact that the sale of diamonds of other members in the family were on 3-12-1997, 8-12-1997, 16-12-1997 and 12-1-1998. The travel time from Mumbai to Hyderabad is an hour as noted by the Assessing Officer at page 24 in the last paragraph of his order and the travel time from Mumbai at Surat is 3 to 4 hours and, therefore, the presumption of the Assessing Officer that the appellant was at Hyderabad during the day when the business was transacted is not supported by any documentary evidence. The submission of the learned authorised representative of the appellant that the appellant was at Surat/ Mumbai on 21-2-1998 and 22-2-1998 has also equal force to support that the appellant was in Hyderabad on 22-2-1998 only in the late hours of the night.

33. As regards the sale of diamonds on 15-3-1998, we find that the appellant had stated in response to question No. 128 (page 71 of the appellant's paper book) that he was at Surat on most of the dates and not necessarily on all the dates. In view of the fact that preceding the date of 15-3-1998, there were sales of diamonds on 3-12-1997, 8-12-1997, 16-12-1997 and 24-1-1998 of other family members of the appellant, we accept the plea of the appellant that the sale of diamonds on 15-3-1998 was genuine.

34. As regards the sale of diamonds on 25-3-1998, it has been the contention of the revenue that the appellant was at Hyderabad on 25-3-1998 as he withdrew a cheque on 25-3-1998 and this was debited in the bank account of M/s. Neeru Textiles, Hyderabad, (page 13 of the department's paper book). We have perused the statement and the rejoinder of the appellant. We have verified the bank statement and found that the sum of Rs. 5,00,000 was not drawn on 25-3-1998 but was credited to the bank account of M/s. Neeru Textiles and it is a transfer entry on 25-3-1998 from the bank account of Harish Kumar (Ind.) in State Bank of India to the bank account of M/s. Neeru Textiles and, therefore, the contention of the Revenue that the appellant was at Hyderabad on 25-3-1998 is not correct.

35. As regards letters filed by the learned departmental representative at pages 15 to 19 of the paper book, we hold that these are internal correspondence between the Income-tax Department at Surat and at Hyderabad which were never put to the appellant. None of these letters, which are in the form of general statements, pertains to Shukra Jewellers with

whom the appellant had transactions. A specific reference to letter dated 5-3-2001 at page 21 of the paper book shows that the DCIT, Surat, clearly mentioned that the jurisdiction of Shukra Jewellers lies with Mumbai office and not Surat and, therefore, nothing turns on this correspondence. As for the postal remark (page 22 of the Revenue's paper book) that the letter addressed to Shukra Jewellers was returned, we hold that on a perusal of the letter dated 16-1-2001 addressed by the DCIT, 2(1), Hyderabad, and letters dated 19-2-2001 (pages 106 and 114 of the appellant's paper book) that the correct present address of Shukra Jewellers is at Mumbai and not at Surat and the letter was therefore returned 'unserved'. Nothing turns on this issue as far as the genuineness of the transaction is concerned.

36. We have also noted that the appellant was examined on 2-3-2001, 3-3-2001, 10-3-2001, 13-3-2001 and 14-3-2001 and over 173 questions were put to the appellant. The appellant in response to question Nos. 140 to 143 (page 74 of the appellant's paper book) was called upon to describe the diamond purchaser's premises and this was answered by the appellant with minute details. Besides, it is not as though the sale of diamonds was done in 30 to 60 minutes as contended by the Revenue. The sale followed external enquiries made by the appellant, as stated in response to question No. 70 (page 60 of the appellant's paper book) and the appellant got the best price at Surat.

37. The contention of the learned departmental representative that the books of account, computer floppies and other evidences relating to purchase of diamonds by M/s. Shukra Jewellery Ltd. could not be verified on the pretext that these were washed away in floods in the heart of Surat and that the purchaser could not retrieve the same, is contrary to the facts and evidence on record. Shukra Jewellers co-operated in all enquiries of the Department. In fact, the loss of books and floppies in floods does not pertain to Shukra Jewellers as could be seen from the letter dated 5-3-2001 (pages 20 and 21 of the Revenue's paper book) addressed by DCIT (Inv.) Circle 1(1), Surat, to DCIT, Circle 2(1), Hyderabad. We further find that M/s. Shukra Jewellery Ltd. was summoned under section 131 of the Income-tax Act, 1961 (page 112 of the appellant's paper book) and that they confirmed the transaction and answered the questions raised by the Assessing Officer (pages 114 & 116 of the paper book). The purchase of diamonds was reflected in the Stock Register maintained by Shukra Jewellers. The payments were made by DDs from Mumbai. The facts that the appellant himself removed the diamonds at his own risk and that the payments were received a month after handing over of the diamonds which was again a risk taken by the appellant, cannot be a ground to hold that the transactions of sale of diamonds were not genuine. The initials placed on the business purchase invoices of M/s. Neeru Textiles, in which the appellant is a partner, were the dates meant for payment and the endorsements were made earlier. This had been demonstrated by the appellant with documentary evidence (pages 83 to 110 of the paper book). We hold that in respect of huge deposits of amounts in the bank account of Shukra Jewellers, the appellant cannot be called upon to comment on the same as the department ought to have examined Shukra Jewellers as summons under section 131 was issued (page 112 of the appellant's paper book). The proceedings thereafter have not been placed before us by the Revenue.

38. Thus, the identity of Shukra Jewellers, genuineness of the transaction and creditworthiness of Shukra Jewellers have been amply established by the appellant. We shall now consider the judicial decisions cited by the appellant and the Revenue.

39. The decisions relied on by the learned authorised representative of the appellant, *viz.*, *Kishinchand Chellaram* (*supra*) and *Giridhar Agency's* case (*supra*), support the view that information collected behind the back of the assessee cannot be relied upon. In the present case, the entire examination of Expert jewellers relating to opinion on segregation of diamonds (page 13 of the Revenue's paper book), reference to credit card statements of Standard Chartered Bank on 22-2-1998, 15-3-1998 and 25-3-1998, adverse inferences drawn on the bank statements of Shukra Jewellers and the entire material contained in the Revenue's paper book from pages 9 to 23, were either collected behind the back of the appellant or never put for rebuttal and, therefore, these cannot be relied on. Even otherwise, on facts we have held that these evidences do not in any way strengthen the case of the department that the transaction in the sale of diamonds are not genuine. We also find that the entire addition of Rs. 51,92,750 has been made on presumptions, surmise and suspicion and, therefore, cannot stand, on the basis of the following judgments:—

(1) *Uma Charan Shaw & Bros.* case (*supra*).

(2) *Hazari Lal Roopchand* v. *CIT* [1967] 65 ITR 488 (All.).

(3) *Sheo Narain Duli Chand* v. *CIT* [1969] 72 ITR 766 (All.).

(4) *Dhananjaya Reddy* v. *State of Karnataka* 2001 4 SEC 9 (SC).

(5) *ACIT* v. *Shailesh S. Shah* [1997] 63 ITD 153 (ITAT, Mumbai).

The Honourable Supreme Court in *Orissa Corprn. (P.) Ltd.* (*supra*), the Patna High Court in *Balji Bros. (P.) Ltd.'s* case (*supra*), and the Bombay High Court in the case of *Orient Trading Company Ltd.* (*supra*), have held that if the loans are given by account-payee cheques, the entry stands in the name of a third party whose identity is established and who is an income-tax assessee and furnishes such other information, it can be said that the assessee has discharged the burden and it will not thereafter be for the assessee to explain how or in what circumstances the third party had obtained the money. Applying the aforesaid tests, it is found as a matter of fact that Shukra Jewellers has been identified, they are income-tax assessees, their bank account obtained by the Revenue establish their creditworthiness and, therefore, the appellant has discharged his onus and hence the Assessing Officer was wrong in disbelieving the transaction of sale of diamonds without bringing in any evidence to the contrary.

40. The Honourable Supreme Court in *CIT* v. *Noorjahan (P.K.) (Smt.)* [1999] 237 ITR 570[1], held that the discretion postulated in section 69 before making the addition has to be judiciously exercised. The provisions of section 68 are in *pari materia* with section 69. Section 68 also used the word "may" and, therefore, before making an addition under section 68, the Assessing Officer has to exercise his discretion judiciously. Applying the aforesaid tests, we find that it is not so. In spite of the facts pointing in the direction of genuineness and identity of Shukra Jewellers and their creditworthiness not being in doubt, the addition has been made on presumptions, surmises and suspicions and, therefore, the judgment of the Supreme Court (*supra*) applies to the facts of the present case. We, therefore, hold that the Assessing Officer has erred in making the addition of Rs. 51,92,750 under section 68 of the Income-tax Act, 1961.

41. We find that the case laws relied on by the learned departmental representative are all distinguishable on facts and do not apply to the facts of the appellant's case. The decision of the Calcutta High Court in the case of *Precision*

Finance (P.) Ltd. (*supra*), wherein it has been stated that it is for the assessee to prove the identity of creditors, their creditworthiness and genuineness of the transaction, related to a Cash Credit entry. In the case on hand, though it is a sale transaction, it has been found factually that the appellant brought to the notice of the Revenue that the transaction was genuine and all the tests laid down by the Calcutta High Court (*supra*) have been satisfied. In fact, this decision favours the appellant. In reply to the contention of the learned departmental representative that the appellant had not produced M/s. Shukra Jewellers, the learned authorised representative of the appellant submitted that it was not the appellant's duty to do so, and relied on the decision of the Calcutta High Court in *CIT* v. *Emerald Commercial Ltd.* [2001] 250 ITR 539[2] .

42. The Commissioner (Appeals) has relied on the judgment of the Supreme Court in *Durga Prasad More's* case (*supra*) 546-547. This decision is clearly distinguishable since the question of applying the test of human probabilities etc. does not arise on the facts of the appellant's case as they are all based on actual facts. The reference to the judgment of the Supreme Court in *Sumati Dayal's* case (*supra*) is of no avail as the facts therein related to the burden of proof being on assessee to prove that amounts credited did not represent income. We have already held on the basis of documentary evidence and facts that the assessee had discharged the burden of proving that the entire sale transaction in diamonds was genuine. Reliance was also placed on the Full Bench decision of the Delhi High Court in *Sophia Finance Ltd.'s* case (*supra*), to state that the provisions of section 68 are also applicable to any credit, not necessarily cash credits, and it covers also sale transactions. Yet one has to see the degree of burden of proof that lies on an assessee in relation to sale transactions. On the facts of the present case, we have already held for elaborate reasons that the appellant has discharged the onus cast on it.

43. The learned departmental representative relied on the judgment of the Honourable High Court of Andhra Pradesh in the case of *R.B. Mittal* (*supra*). The principle laid down therein is that the assessee has to prove the genuineness of credits and creditworthiness of parties in relation to cash credits. We have already held that the onus cast on the appellant to prove the genuineness of the transaction and the creditworthiness of Shukra Jewellers has been discharged by the appellant in the form of Shukra Jewellers directly confirming the genuineness of the transaction to the Assessing Officer *vide* their letter dated 19-2-2001 (page 114 r.w. page 116 of the appellant's paper book) and their creditworthiness has been established from their bank accounts collected by the Assessing Officer. Therefore, the decision of the Honourable High Court of Andhra Pradesh (*supra*), far from helping the cause of the Revenue, supports the claim of the assessee that the transaction is genuine.

44. Having regard to the facts of the present case and having perused all the evidences and paper books placed before us and after considering all the legal decisions on the subject, we hold that the Assessing Officer was not justified in treating the transaction of sale of diamonds of Rs. 51,92,750 with M/s. Shukra Jewellery Ltd. as not being genuine and, therefore, erred in adding the sum of Rs. 51,92,750 under section 68 of the Income-tax Act, 1961. We, therefore, delete the addition of Rs. 51,92,750.

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International Tax proposals of Finance Bill 2018

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On 1st February 2018, the Finance Minister of India presented the Union Budget (Budget) for the tax year 2018-19. The key proposals of Budget 2018 includes, among others, proposals to reduce the 30% corporate tax rate to 25% for certain companies, introduce tax on long-term capital gains from listed securities and expand domestic "business connection" thresholds.

On Transfer Pricing front, the Government has provided a relief to taxpayers by proposing to extend the time allowed for furnishing the Country by Country Report ("CbCR") to 12 months from the end of the reporting accounting year. Further, aligning the due date for furnishing of the CbCR by the Constituent Entity in India, the parent entity of which is outside India, with the reporting accounting year of parent is also a positive move. Similarly, the due date for furnishing the CbCR by the Alternate Reporting Entity (ARE) has been aligned with its local jurisdiction timelines.

In this article, we have discussed the key international tax proposal introduced by the Finance Bill 2018.

A. Concept of Business Connection expanded

Background

Under the existing provisions of Explanation 2 to clause (i) of sub-section (1) of section 9, business connection includes business activities carried on by non-resident through dependent agents. The scope of business connection under the Act is similar to the provisions relating to Dependent Agent Permanent Establishment (DAPE) in India's Double Taxation Avoidance Agreements (DTAAs). In terms of the DAPE rules in tax treaties, if any person acting on behalf of the non-resident, is habitually authorised to conclude contracts for the non-resident, then such agent would constitute a PE in the source country.

However, in many cases, with a view to avoid establishing a permanent establishment (hereafter referred to as 'PE') under Article 5(5) of the DTAA, the person acting on the behalf of the non-resident, negotiates the contract but does not conclude the contract. Further, under paragraph 4 of Article 5 of the DTAAs, a PE is deemed not to exist when a place of business is engaged solely in certain activities such as maintenance of stocks of goods for storage, display, delivery or processing, purchasing of goods or merchandise, collection of information. This exclusion applies only when these activities are preparatory or auxiliary in relation to the business as a whole.

The OECD under BEPS Action Plan 7 reviewed the definition of 'PE' with a view to preventing avoidance of payment of tax by circumventing the existing PE definition by way of commissionaire arrangements or fragmentation of business activities. In order to tackle such tax avoidance scheme, the BEPS Action plan 7 recommended modifications to paragraph (5) of Article 5 to provide that an agent would include not only a person who habitually concludes contracts on behalf of the non-resident, but also a person who habitually plays a principal role leading to the conclusion of contracts. Similarly Action Plan 7 also recommends the introduction of an anti fragmentation rule as per paragraph 4.1 of Article 5 of OECD Model tax conventions, 2017 so as to prevent the tax payer from resorting to fragmentation of functions which are otherwise a whole activity in order to avail the benefit of exemption under paragraph 4 of Article 5 of DTAAs.

Further, with a view to preventing base erosion and profit shifting, the recommendations under BEPS Action Plan 7 have now been included

in Article 12 of Multilateral Convention to Implement Tax Treaty Related Measures (herein referred to as 'MLI'), to which India is also a signatory. Consequently, these provisions will automatically modify India's bilateral tax treaties covered by MLI, where treaty partner has also opted for Article 12. As a result , the DAPE provisions in Article 5(5) of India's tax treaties, as modified by MLI, shall become wider in scope than the current provisions in Explanation 2 to section 9(1)(i). Similarly, the anti- fragmentation rule introduced as per paragraph 4.1 of Article 5 of the OECD Model Tax Conventions, 2017 has narrowed the scope of the exception under Article 5(4), thereby expanding the scope of PE in DTAA vis-a-vis domestic provisions contained in Explanation 2 to section 9(1)(i). In effect, the relevant provisions in the DTAAs are wider in scope than the domestic law.

However, sub-section (2) of section 90 of the Act provides that the provisions of the domestic law would prevail over corresponding provisions in the DTAAs, to the extent they are beneficial. Since, in the instant situations, the provisions of the domestic law being narrower in scope are more beneficial than the provisions in the DTAAs, as modified by MLI, such wider provisions in the DTAAs are ineffective.

In view of the above, Finance Bill has proposed to amend the provision of section 9 of the Act so as to align them with the provisions in the DTAA as modified by MLI so as to make the provisions in the treaty effective. Accordingly, clause (i) of sub-section (1) of section 9 is being proposed to be amended to provide that "business connection" shall also include any business activities carried through a person who, acting on behalf of the non-resident, habitually concludes contracts or habitually plays the principal role leading to conclusion of contracts by the non-resident.

It is further proposed that the contracts should be-

(i) in the name of the non-resident; or

(ii) for the transfer of the ownership of, or for the granting of the right to use, property owned by that non-resident or that the non-resident has the right to use; or

(iii) for the provision of services by that non-resident.

This amendment will take effect from 1st April, 2019 and will, accordingly, apply in relation to assessment year 2019-20 and subsequent assessment years.

B. Introduction of Significant Economic Presence

Ordinarily, as per the allocation of taxing rules under Article 7 of DTAAs, business profit of an enterprise is taxable in the country in which the taxpayer is a resident. If an enterprise carries on its business in another country through a 'Permanent Establishment' situated therein, such other country may also tax the business profits attributable to the 'Permanent Establishment'. For this purpose, 'Permanent Establishment' means a 'fixed place of business' through which the business of an enterprise is wholly or partly carried out provided that the business activities are not of preparatory or auxiliary in nature.

By and large, the above article appears to be useful only when business is carried out through traditional ways like physical presence of a non-resident in the source country.

While in fact, in the last few decades, with the help of information and communication technology, some new and complex business models operating remotely through digital medium have emerged.

Under these new business models, the non-resident enterprises interact with customers in another country without having any physical presence in that country resulting in avoidance of taxation in the source country. Therefore, the existing nexus rule based on physical presence do not hold good anymore for taxation

of business profits in source country. As a result, the rights of the source country to tax business profits that are derived from its economy is unfairly and unreasonably eroded.

Business Connection Test – insertion of explanation 2A to section 9(1)(i)

As per existing section 9 (1)(i), income shall be deemed to accrue or arise in India, if it accrues or arises, directly or indirectly, through or from any business connection in India.

Business connection has been discussion in Explanation 2 to section 9(1)(i). Further, new explanation 2A is proposed to be added which states that significant economic presence ("SEP") of a non-resident in India shall also constitute "business connection" in India.

SEP is defined to mean:

(a) Transaction in respect of any goods, services or property carried out by a non-resident in India including provision of download of data or software in India, if the aggregate of payments arising from such transaction or transactions during the previous year exceeds such amount as may be prescribed; **or**

(b) Systematic and continuous soliciting of business activities or engaging in interaction with such number of users as may be prescribed, in India through digital means:

It is also provided that

- the transactions or activities shall constitute SEP in India, whether or not the non-resident has a residence or place of business in India or renders services in India.
- only so much of income as is attributable to the transactions or activities referred to in clause (a) or clause (b) shall be deemed to accrue or arise in India.

Important to note that the proposed amendment in the domestic law will enable India to negotiate for inclusion of the new nexus rule in the form of 'significant economic presence' in the Double Taxation Avoidance Agreements. It may be clarified that the aforesaid conditions stated above are mutually exclusive.

The threshold of "revenue" and the "users" in India will be decided after consultation with the stakeholders.

Further, it is also clarified that unless corresponding modifications to PE rules are made in the DTAAs, the cross border business profits will continue to be taxed as per the existing treaty rules.

This amendment will take effect from 1st April, 2019 and will, accordingly, apply in relation to assessment year 2019-20 and subsequent assessment years.

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FEMA Updates

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18 Refinancing of External Commercial Borrowings

This refers to paragraph 2 of the Statement on Developmental and Regulatory Policies issued along with the Fifth Bi-monthly Monetary Policy Statement for 2017-18. In terms of the extant provisions in paragraphs 2.15 and 2.16 (xiii) of Master Direction No.5 dated January 1, 2016 on "External Commercial Borrowings, Trade Credit, Borrowing and Lending in Foreign Currency by Authorised Dealers and Persons other than Authorised Dealers", as amended from time to time, Indian corporates are permitted to refinance their existing External Commercial Borrowings (ECBs) at a lower all-in-cost. The overseas branches/ subsidiaries of Indian banks are however, not permitted to extend such refinance.

In order to provide a level playing field, it has been decided, in consultation with the Government of India, to permit the overseas branches/subsidiaries of Indian banks to refinance ECBs of highly rated (AAA) corporates as well as Navratna and Maharatna PSUs, provided the outstanding maturity of the original borrowing is not reduced and all-in-cost of fresh ECB is lower than the existing ECB. Partial refinance of existing ECBs will also be permitted subject to same conditions.

All other aspects of the ECB policy remain unchanged. AD Category - I banks may bring the contents of this circular to the notice of their constituents and customers.

A.P. (DIR Series) Circular No. 15, January 4, 2018

For Full Text refer to https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=11198

19 Excerpts of draft directions released by RBI on hedging of commodity price risk and freight risk in overseas markets

Definitions:

i. Hedging – The activity of undertaking a derivative transaction to reduce an identifiable and measurable risk. For the purpose of these directions the relevant risks are commodity price risk and freight risk.

ii. Eligible entities – Eligible entities refer to resident entities other than Individuals.

iii. Direct Exposure to Commodity Price Risk – An eligible entity will be said to have direct exposure to commodity price risk if it purchases/sells a commodity (in India or abroad) whose price is fixed by reference to an international benchmark ; or

b. It purchases/sells a product (in India or abroad) which contains a commodity and the price of the product is linked to the price of the commodity by a defined formula.

iv. Indirect Exposure to Commodity Price Risk – An eligible entity will be said to have indirect exposure to commodity price risk if it purchases/sells a product (in India or abroad) which contains a commodity and the price of the product is not linked to the price of the commodity by a defined formula.

v. Exposure to Freight Risk – An eligible entity will be said to have exposure to freight risk if it is engaged in the business of import or export of goods or is engaged in the business of shipping.

vi. Bank(s) – Bank(s) refer to AD Category – I bank(s).

vii. Permitted Instruments – Permitted instruments refers to exchange traded futures and options and OTC derivatives.

viii. Eligible Commodities – Eligible commodities refers to commodities whose price risk may be hedged as indicated below:

a. Direct exposures to commodity price risk: All commodities.

b. Indirect exposures to commodity price risk: Aluminum, Copper, Lead, Zinc, Nickel, and Tin. The list of eligible commodities, indirect exposure to whose price risk may be hedged overseas, would be reviewed annually.

Hedging of Commodity Price Risk: Eligible entities having exposure to commodity price risk for any eligible commodity may hedge such exposure in overseas markets using any of the permitted instruments.

Hedging of Freight Risk: Eligible entities having exposure to freight risk may hedge such exposure in overseas markets by using any of the permitted instruments.

Other Operational Guidelines:

i. Banks may permit eligible entities to hedge commodity price risk and freight risk overseas using permitted instruments after satisfying itself that a. The entity has exposure to commodity price risk or freight risk, contracted or anticipated.

b. The quantity proposed to be hedged and the tenor of the hedge is in line with the exposure.

c. In case of OTC derivatives, that the requirement to undertake such hedges is necessary in terms of the exposure of the entity.

d. Such hedging is taken up under a Board approved policy and decisions are taken by the competent authority as per the powers delegated by the Board.

e. The entity has the necessary risk management policies in place.

f. The entity has reasonable understanding of the instruments proposed to be used for hedging.

ii. OTC contracts shall be booked with entities regulated by the banking / financial / securities regulator of the host country. For this purpose, a list of acceptable jurisdictions shall be specified by FEDAI.

iii. Structured derivatives may be permitted to eligible entities who are listed on recognized domestic stock exchanges and fully owned subsidiaries thereof or entities whose net worth is higher than INR 200 crores subject to the following conditions:

a. There is no net inflow of premium direct or otherwise.

b. No leveraged products is used.

c. No derivatives involving another derivative as underlying is used.

d. No exotic derivative products is used.

iv. All payments/receipts related to hedging of exposure to commodity price risk and freight risk shall be routed through a special account with the bank for this purpose.

v. The bank shall keep on its records full details of all hedge transactions and related remittances made by the entity for this purpose.

vi. The bank shall obtain an annual certificate from the statutory auditors of the entity confirming that the hedge transactions and the margin remittances are in line with the exposure of the entity. The statutory auditor shall also comment on the risk management policy of the entity for hedging exposure to commodity price risk and freight risk and the appropriateness of the methodology to arrive at quantum of these exposures.

vii. The bank shall undertake immediate corrective action in case of any irregularity or misuse of these directions and report the same to Chief General Manager, Financial Markets Regulation Department, Reserve Bank of India.

6. Banks are permitted to issue Standby Letters of Credit (SBLC) / Guarantees on behalf of their clients in lieu of making a direct remittance of margin money for commodity and freight hedging transactions entered into by their customers.

For full text refer: https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=42848

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GST Updates

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Recommendations made on GST Rate changes on services

The Union Finance Minister Shri Arun Jaitley Chaired the 25th Meeting of the GST Council in New Delhi on 18th Jan, 2018. The Council has recommended many relief measures regarding GST rates on goods and services covering many sectors and commodities. The Council has also recommended issuance of certain clarifications on issues relating to GST rates and taxability of certain goods and services.

Major recommendations of the Council are summarized below.

Changes relating to GST rates on certain services

(A) Exemptions / Changes in GST Rates / ITC Eligibility Criteria

1 To extend GST exemption on Viability Gap Funding (VGF) for a period of 3 years from the date of commencement of RCS airport from the present period of one year.

2 To exempt supply of services by way of providing information under RTI Act, 2005 from GST.

3 To exempt legal services provided to Government, Local Authority, Governmental Authority and Government Entity.

4 To reduce GST rate on construction of metro and monorail projects (construction, erection, commissioning or installation of original works) from 18% to 12%.

5 To levy GST on the small housekeeping service providers, notified under section 9 (5) of GST Act, who provide housekeeping service through ECO, @ 5% without ITC.

6 To reduce GST rate on tailoring service from 18% to 5%.

7 To reduce GST rate on services by way of admission to theme parks, water parks, joy rides, merry-gorounds, go-carting and ballet, from 28% to 18%.

8 To grant following exemptions:(i) To exempt service by way of transportation of goods from India to a place outside India by air;(ii) To exempt service by way of transportation of goods from India to a place outside India by sea and provide that value of such service may be excluded from the value of exempted services for the purpose of reversal of ITC.The above exemptions may be granted with a sunset clause upto 30th September, 2018.

9 To exempt services provided by the Naval Insurance Group Fund by way of Life Insurance to personnel of Coast Guard under the Group Insurance Scheme of the Central Government retrospectively w.e.f. 1.7.2017.

10 To exempt IGST payable under section 5(1) of the IGST Act, 2017 on supply of services covered by item 5(c) of Schedule II of the CGST Act, 2017 to the extent of aggregate of the duties and taxes leviable under section 3(7) of the Customs Tariff Act, 1975 read with sections 5 & 7 of IGST Act, 2017 on part of consideration declared under section 14(1) of the Customs Act, 1962 towards royalty and license fee includible in transaction value as specified under Rule 10 (c) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

11 To allow ITC of input services in the same line of business at the GST rate of 5% in case of tour operator service.

12 To reduce GST rate (from 18% to 12%) on the Works Contract Services (WCS) provided by sub-contractor to the main contractor providing WCS to Central Government, State Government, Union territory, a local authority, a Governmental Authority or a Government Entity, which attract GST of 12%. Likewise, WCS attracting 5% GST, their sub-contractor would also be liable @ 5%.

13 To enhance the exemption limit of Rs 5000/- per month per member to Rs 7500/- in respect of services provided by Resident Welfare Association (unincorporated or nonprofit entity) to its members against their individual contribution.

14 To reduce GST rate on transportation of petroleum crude and petroleum products (MS, HSD, ATF) from 18% to 5% without ITC and 12% with ITC.

15 To exempt dollar denominated services provided by financial intermediaries located in IFSC SEZ, which have been deemed to be outside India under the various regulations by RBI, IRDAI, SEBI or any financial regulatory authority, to a person outside India.

16 To exempt (a) services by government or local authority to governmental authority or government entity, by way of lease of land, and (b) supply of land or undivided share of land by way of lease or sub lease where such supply is a part of specified composite supply of construction of flats etc. and to carry out suitable amendment in the provision relating to valuation of construction service involving transfer of land or undivided share of land, so as to ensure that buyers pay the same effective rate of GST on property built on leasehold and freehold land.

17 To amend entry 3 of notification No. 12/2017-CT(R) so as to exempt pure services provided to Govt. entity.

18 To expand pure services exemption under S. No. 3 of 12/2017-C.T. (Rate) so as to include composite supply involving predominantly supply of services i.e. upto 25% of supply of goods.

19 To reduce job work services rate for manufacture of leather goods (Chapter 42) and footwear (Chapter 64) to 5%.

20 To exempt services relating to admission to, or conduct of examination provided to all educational institutions, as defined in the notification.To exempt services by educational institution by way of conduct of entrance examination against consideration in the form of entrance fee.

21 To enhance the limit to Rs 2 lakh against Sl. No. 36 of exemption notification No. 12/2017-C.T. (Rate) which exempts services of life insurance business provided under life micro insurance product approved by IRDAI upto maximum amount of cover of Rs. 50,000.

22 To exempt reinsurance services in respect of insurance schemes exempted under S.Nos. 35 and 36 of notification No. 12/2017-CT (Rate).[It is expected that the premium amount charged from the government/insured in respect of future insurance services is reduced.]

23 To increase threshold limit for exemption under entry No. 80 of Notification No. 12/2017-C.T. (Rate) for all the theatrical performances like Music, Dance, Drama, Orchestra, Folk or Classical Arts and all other such activities in any Indian language in theatre GST from Rs.250 to 500 per person and to also extend the threshold exemption to services by way of admission to a planetarium.

24 To reduce GST on Common Effluent Treatment Plants services of treatment of effluents, from 18% to 12%.

25 To exempt services by way of fumigation in a warehouse of agricultural produce.

26 To reduce GST to 12% in respect of mining or exploration services of petroleum crude and natural gas and for drilling services in respect of the said goods.

27 To exempt subscription of online educational journals/periodicals by educational institutions who provide degree recognized by any law from GST.

28 To exempt the service provided by way of renting of transport vehicles provided to a person providing services of transportation of students, faculty and staff to an educational institution providing education upto higher secondary or equivalent.

29 To extend the concessional rate of GST on houses constructed/ acquired under the Credit Linked Subsidy Scheme for Economically Weaker Section (EWS) / Lower Income Group (LIG) / Middle Income Group-1 (MlG-1) / Middle Income Group-2 (MlG-2) under the Housing for All (Urban) Mission/Pradhan Mantri Awas Yojana (Urban) and low-cost houses up to a carpet area of 60 square metres per house in a housing project which has been given infrastructure status, as proposed by Ministry of Housing & Urban Affairs, under the same concessional rate.

30 To tax time charter services at GST rate of 5%, that is at the same rate as applicable to voyage charter or bare boat charter, with the same conditions.

31 To levy concessional GST @12% on the services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of building used for providing (for instance, centralized cooking or distributing) mid-day meal scheme by an entity registered under section 12AA of IT Act.

32 To exempt services provided by and to FédérationInternationale de Football Association (FIFA) and its subsidiaries directly or indirectly related to any of the events under FIFA U-20 World Cup in case the said event is hosted by India.

33 To exempt government's share of profit petroleum from GST and to clarify that cost petroleum is not taxable *per se*.

(B) Rationalization of certain exemption entries

1 To provide inCGST rules that value of exempt supply under sub-section (2) of section 17, shall not include the value of deposits, loans or advances on which interest or discount is earned (This will not apply to a banking company and a financial institution including a non-banking financial company engaged in providing services by way of extending deposits, loans or advances).

2 To defer the liability to pay GST in case of TDR against consideration in the form of construction service and on construction service against consideration in the form of TDR to the time when the possession or right in the property is transferred to the land owner by entering into a conveyance deed or similar instrument (eg. allotment letter). No deferment in point of taxation in respect of cash component.

3 To tax renting of immovable property by government or local authority to a registered person under reverse Charge while renting of immovable property by government or local authority to un-registered person shall continue under forward charge

4 To define insurance agent in the reverse charge notification to have *the same meaning as assigned to it in clause (10) of*

section 2 of the Insurance Act, 1938, so that corporate agents get excluded from reverse charge.

5 To insert a provision *in GST Rules under section 15 of GST Act* that the value of lottery shall be 100/112 or 100/128 of the price of lottery ticket notified in the Gazette (the same is currently notified in the rate notification).

6 To add, in the GST rate schedule for goods at 28%, actionable claim in the form of chance to win in betting and gambling including horse racing.

7 To insert in GST rules under section 15 of GST Act,-*Notwithstanding anything contained in this chapter, value of supply of Betting & Gambling shall be 100 % of the face value of the bet or the amount paid into the totalizator*.

(C) Clarifications

1) To clarify that exemption of Rs 1000/- per day or equivalent (declared tariff) is available in respect of accommodation service in hostels.

2) To clarify that fee paid by litigants in the Consumer Disputes Commissions and any penalty imposed by these Commissions, will not attract GST.

3) To clarify that elephant/ camel joy rides are not classified as transportation services and attract GST @ 18% with threshold exemption to small services providers.

4) To clarify that leasing or rental service, with or without operator, of goods, attracts same GST as supply of like goods involving transfer of title in the said goods. Therefore, the GST rate for the rental services of self-Propelled Access Equipment (Boom. Scissors/Telehandlers) is 28%.

5) To clarify that,

1) Services provided by senior doctors/ consultants/technicians hired by the hospitals, whether employees or not, are healthcare services which is exempt.

2) Hospitals also provide healthcare services. The entire amount charged by them from the patients including the retention money and the fee/ payments made to the doctors etc., is towards the healthcare services provided by the hospitals to the patients and is exempt.

3) Food supplied to the in-patients as advised by the doctor/nutritionists is a part of composite supply of healthcare and not separately taxable. Other supplies of food by a hospital to patients (not admitted) or their attendants or visitors is taxable.

6) To clarify that services by way of –

1) admission to entertainment events or access to amusement facilities including casinos, race-course

2) ancillary services provided by casinos and race-course in relation to such admission.

3) services given by race-course by way of totalisator (if given through some other person or charged separately as fees for using totalisator for purpose of betting, are taxable at 28%. Services given by race-course by way of license to bookmaker which is not a service by way of betting and gambling, is taxable at 18%.

It is proposed to issue notifications giving effect to these recommendations of the Council on 25th January, 2018.

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GST & VAT
Judgments / Updates

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[I] Important Notification:

[i] The Govt. of Gujarat has issued a Notification dated 19.01.2018 for undertaking the Audit under Rule 44 for the period 01.04.2017 to 30.06.2017 whose taxable turnover is more than Rs. 25.00 Lacs. The date is extended for the submission of Audit Report as well as Form No. 205B i.e. Annual Return till 28th Feb. 2018.

[ii] The Commissioner of Commercial Tax has issued a Public Circular on 29th Jan. 2018 in respect of the submission of Audit Report for the year 2016-17 should be available and filed on or before 28th Feb. 2018.

[II] Important Judgments:

[i] Hon. Gujarat High Court in case of Jyoti Overseas P. Ltd. V. State of Gujarat.

Issue:

The Hon. Vat Tribunal has confirmed the Penalty u/s. 34(7) as well as 34(12) of the GVAT Act. However the Hon. Gujarat High Court has allowed the Penalty contended that there was no mala fide intention on the part of the appellant to avoid Tax.

Held:

The assessee is a dealer and purchaser of raw Isabgul. The assessee would purchase such Isabgul from local dealers who were commission agents in the State of Gujarat. Such purchased goods would be sent by the assessee by branch transfer to its processing unit at Abu Road. After processing, the refined Isabgul would be exported directly from Abu Road. The dispute pertains to the period between 10.08.2006 to 31.03.2007 during which the assessee did not pay the Value Added Tax at the relevant time. On a surprise visit by the authorities of the Vat Department at the premises of the assessee, this modus according to the department was detected. The assessee volunteered to pay the entire tax with interest. The department thereafter instituted penalty proceedings. The Asst. Commissioner of Commercial Tax by his order dated 31.03.2011 imposed the penalty of Rs. 78,54,958/- under section 34(7) of the Value Added Tax Act and a matching penalty under section 34(12) of the Act and thus levied a total penalty of Rs. 1,57,09,916/- on the assessee. It may be noted that both the penalties were imposed @ 150% of the tax involved.

The assessee challenged the order of the Asst. Commissioner before the Tribunal. Before the Tribunal, the assessee contended that there was no mala fide intention on the part of the assessee to avoid tax. In fact the assessee under a bona fide belief that no tax was payable, had not deposited the same with the government. To support such a contention, the assessee relied on various circumstances including a letter written by the assessee to the Commissioner of Sales Tax on 22.05.2006 requesting him to clarify the assessee's tax liability under the circumstances to which the assessee had received no reply. The assessee also pointed that the tax was paid immediately on demand with interest without murmur. The assessee contended that the Value Added Tax Act was brought into effect shortly before the period of tax default, certain amendments were made in the relevant taxing provisions. Even the consultants were not clear about the tax

liability under such circumstances and that the other dealers in the State were not paying taxes. The assessee also relied on a provisional assessment order dated 13.06.2007 for the period between 22.05.2006 to 31.03.2007 in which also the authority had not raised any tax demand. According to the assessee, these factors when seen cumulatively would demonstrate that it was a pure bona fide error in not paying the tax and the assessee had no mala fide intention of avoiding tax liability. The assessee also argued that had the product been exported from the State of Gujarat admittedly there would have been no tax liability. It was, therefore, contended that the authority committed a serious error in imposing penalty that too at the highest possible rate prescribed under the statute.

The Tribunal by the impugned judgment allowed the appeal in part. The Tribunal did not accept the assessee's contention that there was no intention on the part of the assessee to avoid tax. However, taking note of certain mitigating circumstances, the Tribunal was of the opinion that imposing penalty at the highest rate was not correct. The Tribunal, therefore, reduced the penalty to 20% of the amount of the tax involved. This judgment, the assessee has challenged in the present tax appeal.

First of the three questions framed refers to simultaneous penalties being imposed under sub-section 7 and sub-section 12 of Section 34 of the Vat Act. The second and third questions pertain to the correctness of the judgment of the Tribunal imposing penalty by reducing the same to 20% of the amount of tax involved. At the outset, learned Advocate for the appellant did not press question no. 1 and the same is therefore disposed of without answering it. He, however, argued at length on question nos. 2 & 3. Taking us through the documents on record and in particular the judgment of the Tribunal under challenge, he submitted that there were strong grounds suggesting that non-payment of tax was a pure bona fide error on the part of the assessee. The entire issue was in a flux. Major amendments were made in the law only recently. Other dealers who were purchasing Isabgul and selling it from within the State after processing, admittedly did not have any tax liability. The assessee bona fide believing himself at par with such dealers did not pay tax. The fact that the provisional order of assessment did not raise any demand of tax on such sales, would demonstrate that even the authorities were not clear on the tax liability. Counsel also relied on the letter dated 22.05.2006 written by the assessee to the Commissioner seeking clarification on the question of tax liability.

All these factors when seen cumulatively, would persuade us to accept the assessee's contention that there was no mala fide intention on the part of the assessee to avoid tax. If at all it was a bona fide error actuated by the facts and circumstances noted above. Even the Tribunal did not discard the assessee's contention about the recent amendments about possible confusion and the fact that the authority making provisional assessment also did not raise a tax demand. Despite these observations, the Tribunal sustained a portion of the penalty imposed by the Asst. Commissioner which in our opinion was passed on certain presumptions not supported by materials on record. For example, the Tribunal observed that since the assessee was having the processing unit at Abu Road and was exporting the goods from Abu Road, it may not be able to keep the sale prices at a competitive level with other dealers and therefore it might have stopped paying the tax. There was no material warranting such a presumption. Be that as it may. For the reasons stated above, in our opinion, the Tribunal committed an error in maintaining even a part of the

penalty. It is well settled that it is not necessary to impose penalty simply because it is legal to do so. Sub-section 7 of section 34 of the Act provides for a penalty in a case where the dealer in order to evade or avoid payment of tax commits certain defaults such as fails to furnish returns or furnishes incomplete or incorrect returns or avails of tax credit which he is not eligible to. Thus, the element of mens rea is of importance. It is only if the Commissioner is satisfied that the dealer in order to evade or avoid payment of tax has taken such steps that penalty under sub-section 7 of Section 34 can be imposed. Sub-section 12 of Section 34 though provides for penalty where the tax liability ultimately assessed exceeds a certain percentage of the tax paid by the assessee, it still gives discretion to the authority to impose penalty not exceeding one and one half times the difference between the tax paid and the tax assessed. The legislature having set out an upper limit for imposition of tax without providing for any minimum mandatory tax, has left a wide discretion on the competent authority which discretion must be exercised taking into account relevant factors.

Under the circumstances, the order of the Tribunal is reversed. Question Nos. 2 and 3 are answered by recording that in facts of the case the authority committed an error in imposing penalty on the assessee under sub-sections 7 and 12 of Section 34 and the Tribunal committed an error in confirming part of such penalty. Appeal is allowed. The order of the Tribunal is set aside.

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contd. from page 530

as a part of social audit of the profession wherein consumers of justice were required to be given role.

As far as lawyers' fee as barrier to access to justice is concerned, the law commission of India has observed that it is the duty of parliament to prescribe fee for services rendered by member of the legal profession. First step should be taken to prescribe floor and ceiling in fees.

B. Sunitha Vs. State of Telangana and Another (2018) 1 SCC 638

32 Charitable trust Exemption u/s. 11:

Depreciation is allowable to charitable trust even if the entire expenditure incurred for acquisition of capital assets has been treated as application of income for charitable purpose u/s. 11(1)(a). Once assessee is allowed depreciation, it shall be entitled to carry forward the depreciation as well – Section 11(6) inserted by finance (No.2) Act, 2014 is effective from A.Y. 2015-16 and it is prospective in nature.

CIT vs. Rajasthan & Gujarati Foundation (2018)300 CTR (SC) 1

33 HUF & Individual Property

It is settled principle of Hindu Law that there is a legal presumption that every Hindu family is joint in food, worship and estate and in the absence of any proof of division, such legal presumption continues to operate in the family-burden, therefore, lies upon the member who after admitting the existence of jointness in the family properties asserts his claim that some properties out of entire lot of ancestral properties are his self-acquired property- It was therefore, obligatory upon the plaintiffs to have proved that despite existence of jointness in the family, properties described in schedule 'B' & 'C' were not part of ancestral properties but were their self-acquired properties.

Adiveppa&Ors. Vs. Bhimappa&Anr. (2018) 300 CTR (SC) 124

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CENTAX PUBLICATION PVT. LTD.

Corporate Law Update

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MCA Updates:

1. The Companies (Appointment and Qualification of Directors) Amendment Rules, 2018:

Following changes have been made vide the Companies (Appointment and Qualification of Directors) Amendment Rules, 2018.

· In the companies (Appointment and qualification of Directors) Rules, 2014 (hereinafter referred to as the principal rules), in rule 9,

(A) for the marginal heading, the following marginal heading shall be substituted, namely: -

"Application for allotment of Director Identification Number before appointment in an existing company"

(B) for sub-rule (1), the following shall be substituted, namely:-

"(1) Every applicant, who intends to be appointed as director of an existing company shall make an application electronically in Form DIR-3, to the central Government for allotment of a Director Identification Number (DIN) along with such fees as provided under the companies (Registration offices and Fees) Rules, 2014.

Provided that in case of proposed directors not having approved DIN, the particulars of maximum three directors shall be mentioned in Form No.INC-32 (SPICe) and DIN may be allotted to maximum three proposed directors through Form INC-32 (SPICe)";

(C) in sub-rule (3),

(I) In sub-clause (a), after sub-clause (iii), the following sub-clause shall be inserted, namely:-

"(iiia) board resolution proposing his appointment as director in an existing company";

(II) for clause (b), the following clause shall be substituted, namely:-

"(b) Form DIR-3 shall be signed and submitted electronically by the applicant using his or her own Digital signature certificate and shall be verified digitally by a company secretary in full time employment of the company or by the managing director or director or CEO or CFO of the company in which the applicant is intended to be appointed as director in an existing company,".

· In annexure to the principal rules,

(A) Form No. DIR-3 shall be substituted with the new Form No. DIR-3.

(B) Form No. DIR-12 shall be substituted with the new Form No. DIR-12.

[F. No. 1/22/2013 CL-V-Part- III dated 20.01.2018]

2. Companies (Incorporation) Amendment Rules, 2018:

W. e. f. 26.01.2018, following changes have been made vide the Companies (Incorporation) Amendment Rules, 2018.

· In the Companies (Incorporation) Rules, 2014 (hereinafter referred to as the principal rules), for rule 9, the following rule shall be substituted, namely:-

"**9. Reservation of name**.- An application for reservation of name shall be made through the web service available at www.mca.gov.in by using RUN (Reserve Unique Name) along with fee as provided in the Companies (Registration offices and fees) Rules, 2014, which may either be approved or rejected, as the case may be, by the Registrar, Central Registration Centre".

- In the Principal rules, in rule 10, the words, letters and figure "Form No.INC-7" shall be omitted.

- In the principal rules, for rule 12, the following rule shall be substituted, namely:-

"**12. Application for incorporation of companies**. An application for registration of a company shall be filed, with the Registrar within whose jurisdiction the registered office of the company is proposed to be situated, in Form No.INC-32 (SPICe) along with the fee as provided under the Companies (Registration offices and fees) Rules, 2014;

Provided that in case pursuing of any of the objects of a company requires registration or approval from sectoral regulators such as the Reserve Bank of India, the Securities and Exchange Board, registration or approval, as the case may be, from such regulator shall be obtained by the proposed company before pursuing such objects and a declaration in this behalf shall be submitted at the stage of incorporation of the company".

- In the principal rules, in sub-rule (1) of rule 38, the following proviso shall be inserted.-

(i) in sub-rule (1), after the proviso, the following proviso shall be inserted, namely:-

"provided further that in case of incorporation of a company having more than seven subscribers or where any of the subscriber to the MOA/AOA is signing at a place outside India, MOA/AOA shall be filed with INC-32 (SPICe) in the respective formats as specified in Table A to J in Schedule I without filing form INC-33 and INC-34";

(ii.)In sub-rule (2), after the proviso, the following proviso shall be inserted, namely:-

'Provided further that in case of companies incorporated, with effect from the 26th day of January, 2018, with a nominal capital of less than or equal to rupees ten lakhs or in respect of companies not having a share capital whose number of members as stated in the articles of association does not exceed twenty, fee on INC-32 (SPICe) shall not be applicable".

- In annexure to the principal rules,

(A)Form No. INC-1 shall be substituted with the new Form No. RUN.

(B) Form No. INC-3 shall be substituted with the new Form No. INC-3.

(C) Form No. INC-7 shall be omitted.

(D)Form No. INC-12 shall be substituted with the new Form No. INC-12.

(E) Form No. INC-22 shall be substituted with the new Form No. INC-22.

(F) Form No. INC-24 shall be substituted with the new Form No. INC-24.

(G)Form No. INC-32 shall be substituted with the new Form No. SPICe.

(H) in form No.INC-33 and in Form no.INC-34, for the words and figures 'INC-1' the word 'RUN' shall be substituted.

[F. No. 1/13/2013 CL-V-Part- I, VOL. II dated 20.01.2018]

3. Companies (Registration Offices and Fees) Amendment Rules, 2018:

W. e. f. 26.01.2018, following changes have been made vide the Companies (Registration offices and Fees) Amendment Rules, 2018.

- In the companies (Registration offices and Fees) Rules, 2014, [herein after refer to as the principal rules), in rule 10, in sub-rule (3), the following proviso shall be inserted, namely:-

"provided that no re-submission of the application is allowed in the case of reservation of a name through web service - RUN".

- In the principal Act, in the Annexure, in item I (Fee for filings etc. under section 403 of the Companies Act, 2013), for the Table of Fees to be paid to the Registrar, the following shall be substituted namely:

(1) A. Table of Fees to be paid to the Registrar:

(l) In respect of a company having a share capital:	**Other than OPCs and Small Companies (in rupees)**	**OPC and Small Companies (in rupees)**
l. (a) For registration of OPC and small companies whose nominal share capital is less than or equal to Rs.10,00,000	-	-
(b) For registration of OPC and small companies whose nominal share capital exceeds Rs. 10,00,000, the fee of Rs. 2000 with the following additional fees regulated according to the amount of nominal capital:For every Rs. 10,000 of nominal share capital or part of Rs. 10,000 after the first 10,00,000 and upto Rs. 50,00,000	-	200
2 (a) For registration of a company (other than OPC and small companies) whose nominal sharecapital is less than or equal to Rs. 10,00,000 at the time of incorporation.	-	-
b) For registration of a company (other than OPC and small companies) whose nominal sharecapital exceed Rs. 10,00,000, the fee of Rs.36,000 with the following additional fees regulated according to the amount of nominal capital :	-	
(i) for every Rs. 10,000 of nominal share capital or part of Rs 10,000 after the first Rs. 10,00,000 upto Rs. 50,00,000.	300	-
(ii) for every Rs. 10,000 of nominal share capital or part of Rs. 10,000 after the first Rs. 50,00,000 upto Rs. one crore.	100	-
(iii) for every Rs. 10,000 of nominal share capital or part of Rs. 10,000 after the first Rs. 1 crore.	75	-
Provided further that where the additional fees, regulated according to the amount of the nominal capital of a company,		

exceed a sum of rupees two crore and fifty lakh, the total amount of additional fees payable for the registration of such company shall not, in any case, exceed rupees two crore and fifty lakhs		
3. For filing a notice of any increase in the nominal share capital of a company, the difference between the fees payable on the increased share capital on the date of filing the notice for the registration of a company and the fees payable on existing authorized capital, at the rates prevailing in the date of filing the notice:		
(a) For OPC and small companies whose nominal share capital does not exceed Rs. 10,00,000.	-	2000
(b) For OPC and small companies for every Rs. 10,000 of nominal share capital or part of Rs. 10,000 after the first Rs. 10,00,000 and upto Rs. 50,00,000, Other than OPC and small companies	-	200
(c) For increase in nominal capital of a company whose nominal share capital does not exceed Rs. 1,00,000.	5000	
(d) For increase in nominal capital of a company whose nominal share capital exceed Rs. 1,00,000, the above fee of Rs. 5,000 with the following additional fees regulated according to the amount of nominal capital :		
(i) for every Rs. 10,000 of nominal share capital or part of Rs. 10,000 after the first Rs. 1,00,000 upto Rs. 5,00,000.	400	-
(ii) for every Rs. 10,000 of nominal share capital I or part of Rs 10,000 after the first Rs. 5,00,000 upto Rs. 50,00,000.	300	-
(iii) for every Rs. 10,000 of nominal share capital or part of Rs. 10,000 after the first Rs. 50,00,000 upto Rs. one crore	100	-
(iv) for every Rs. 10,000 of nominal share capital or part of Rs. 10,000 after the first Rs. 1 crore	75	-
Provided further that where the additional fees, regulated according to the amount of the nominal capital of a company, exceed a sum of rupees two crore and fifty lakh, the total amount of additional fees payable for the registration of such company shall not, in any case, exceed rupees two crore and fifty lakhs		
4. For registration of any existing company, except such companies as are by this Act exempted from payment of fees in respect of registration under this Act, the same fee is charged for registering a new company.		
5. For submitting, filing, registering or recording any document by this Act required or authorized to be submitted, filed, registered or recorded:		

(a) in respect of a company having nominal share capital of less than Rs. 1,00,000.	200	
(b) in respect of a company having a nominal share capital of Rs. 1,00,000 or more but less than Rs. 5,00,000.	300	
(c) in respect of a company having a nominal share capital of Rs. 5,00,000 or more but less than Rs. 25,00,000.	400	
(d) in respect of a company having a nominal share capital of Rs. 25,00,000 or more but less than Rs. 1 crore or more.	500	
(e) in respect of a company having a nominal share capital of Rs. 1 crore or more.Provided that in case of companies to be incorporated with effect from 26.0.l.2018 with a nominal capital which does not exceed rupees ten lakhs fee shall not be payable.	600	
6. For making a record for registering any fact by this Act required or authorised to be recorded or registered by the Registrar:		
(a) in respect of a company having- nominal share capital of less than Rs. 1,00,000.	200	
(b) in respect of a company having- nominal share capital of less than Rs. 1,00,000.	300	
(c) in respect of a company having- nominal share capital of Rs. 5,00,000 or more but less than Rs. 25,00,000.	400	
(d) in respect of a company having- nominal share capital of Rs. 25,00,000 or more but less than Rs. 1 Crore.	500	
(e) in respect of a company having a nominal share capital of Rs. 1 crore or more.	600	
(II) In respect of a company not having share capital:		
7. For registration of a company whose of members as stated in the articles of association, does not exceed 20.	-	
8. For registration of a company whose numbers of members as stated in the articles of association, exceeds 20 but not exceeds 200.	5000	
9. For registration of a company whose number of members as stated in the articles of association, exceeds 200 but is not stated to be unlimited, the above fee of Rs. 5,000 with an additional Rs. 10 for every member after first 200.		
10. For registration of a company in which number of members is stated in the articles of association to be unlimited.	10000	
11. For registration of any increase in the number of members made after the registration of the company, the same fees as would have		

been payable in respect of such increase, if such increase had been stated in the articles of association at the time of registration : ***Provided*** that no company shall be liable to pay on the whole a greater fee than Rs. 10,00d in respect of its number of members, taking into account the fee paid on the first registration of the company.		
12. For registration of any existing-Company except such companies as are by this Act exempted from payment of fees in respect of registration under this Act, the same fee as is charged for registering a new company.		
13. For filing or registering any document by this Act required or authorized to be filed or registered with the Registrar. Provided that in case of companies to be incorporated with effect from 26.01.2018 whose number of members as stated in the articles of association, does not exceed 20, fee shall not be payable.	200	
14. For making a record of or registering any fact by this Act required or authorised to be recorded or registered by the Registrar.	200	

(1) The above table prescribed for small companies (as defined under section 2(85) of the Act) and one person companies defined under Rule related to chapter II read with section 2(62) of the Act shall be applicable provided the said company shall remain as said class of company for a, period not less than one year from its incorporation.

(2) The above table of fee shall be applicable for any such intimation to be furnished to the Registrar or any other officer or authority under section 159 of the Act, filing of notice of appointment of auditors or Secretarial Auditor or Cost Auditor.

(3) The above table of fee and calculation of fee as applicable for increase in authorised capital shall be applicable for revised capital in accordance with sub-section (11 of 233 of the Act, (after setting off fee paid by the transferor company on its authorised capital prior to its merger or amalgamation with the transferee company].

(4) The above table of fee shall be applicable for filing revised financial statement or board report under section 130 and 131 of the Act.

[F. No. 01/16/2013 CL-V-Pt- I dated 20.01.2018]

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Allied Laws Corner

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Insolvency and Bankruptcy Code

Recently the National Company Law Tribunal, Ahmedabad Bench in the case of **Shalby Limited vs. Dr. Pranav Shah** reported in **90 taxmann.com 7** held that since reliefs prayed in the insolvency petition were to initiate corporate insolvency process by appointing Insolvency Resolution Process and not for recovery of money, Arbitration Tribunal was not having jurisdiction on same despite existence of arbitration clause in agreement.

A. Facts of the Case :

1. There is a Consultancy Agreement dated 30.09.2008 between the operational creditor and the corporate debtor. As per the said agreement, operational creditor was required to provide his services to the corporate debtor in return for the consideration prescribed in the agreement and subject to fulfilment of the terms and conditions stipulated in the said agreement. Duration of the agreement is till the operational creditor attains the age of sixty years.

2. It is also stated that there was exchange of e-mails during the month September-October, 2016 and those e-mails were deliberately suppressed by operational creditor in this petition.

3. It is also stated that operational creditor in breach of the agreement started offering his full time services elsewhere and therefore, corporate debtor was constrained to address a notice dated 22.06.2017 to the operational creditor. It is also stated that operational creditor abruptly discontinued his services without serving notice period. Corporate debtor demanded an amount of Rs. 77,80,473/- from the operational creditor. According to the corporate debtor to counter the said claim of corporate debtor, operational creditor concocted a fictitious claim and filed Company Petition (IB.) No. 123 of 2017.

4. It is the case of the corporate debtor that, there exists long outstanding and long drawn disputes between the corporate debtor and operational creditor even prior to issuance of said notice by operational creditor on 04.08.2017.

5. According to the petitioner, in view of Clause 16 of the Consultancy Agreement dated 30.09.2008, the parties in Company Petition (IB.) No. 123 of 2017 should be relegated to arbitration under the provisions of Arbitration and Conciliation Act, 1996.

6. It is further stated in the application that, as per clause 16 of the Consultancy Agreement dated 30.09.2008 any dispute under or arising out of the agreement and appointment letter whether relating to the interpretation or performance of the agreement shall be referred to sole arbitrator to be appointed by the company in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

B. Filing of Insolvency Application by the Operational Creditor and against that filing of Application under the Arbitration and Conciliation Act by the Operational Debtor

1. Operational creditor filed Company Petition (IB.) No. 123 of 2017 under section 9 of The Insolvency and Bankruptcy Code, 2016 with a request to trigger Corporate Insolvency resolution process in respect of corporate debtor - Shalby Ltd.

2. In the said petition, objections were filed by the corporate debtor. Operational creditor also filed rejoinder. Even before filing the objections, corporate debtor filed this application (IA 285 of 2017) under section 8 of the Arbitration and Conciliation Act, 1996 with a prayer to relegate the parties to Company Petition (I.B.) No. 123 of 2017 to Arbitration.

C. Arguments of both the Counsels :

1. On this application, operational creditor filed objection stating that objective of Insolvency and Bankruptcy Code 2015 is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate person, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interest of all the stakeholders including alteration in the priority of payment of government dues. According to the operational creditor, this petition is filed not to recover the amount due from the corporate debtor but it is filed to have Corporate Insolvency Resolution Process in respect of the corporate debtor since the corporate debtor is unable to pay the operational debt due to the operational creditor. Further it is stated in the objection that the subject matter which is under adjudication in Company Petition (IB.) No. 123 of 2017 is within exclusive jurisdiction of adjudicating authority. It is further stated that Arbitral Tribunal has no jurisdiction over the subject matter of Insolvency Resolution Process or the liquidation process contemplated under the IB code and, therefore, the parties cannot be relegated to arbitration. It is contended by the learned counsel for corporate debtors that Hon'ble Supreme Court in the decision in *Haryana Telecom Ltd.* v. *Sterlite Industries (India) Ltd.* [1999] 22 SCL 156 clearly held as follows: —

"an arbitrator notwithstanding any agreement between the parties, could have no jurisdiction to order winding up of a company since such power is conferred on a Court by the Companies Act"

2. Learned counsel appearing for the corporate debtor relied upon the decision of Hon'ble Supreme Court in *Mobilox Innovations Pvt. Ltd.* v. *Kirusa Software Pvt. Ltd.* [2017] 85 taxmann.com 292/144 SCL 37 wherein it is held that what is the scope of dispute. In this application it is not necessary to find out whether there is any dispute in existence before issuance of notice under Section 8 of the Code since that issue can be gone into Company Petition (IB.) No. 123 of 2017.

3. Learned counsel appearing for the corporate debtor contended that winding up process is a right in *personam* and not rights *in rem*. Therefore, arbitrator may not have jurisdiction to decide the winding up of a company. Learned senior counsel appearing for the corporate debtor further contended that Corporate Insolvency Resolution Process is a right *in personam* and not right *in rem*. He further contended that since no admission order has been passed at this stage parties can be relegated to arbitration, on the ground insolvency resolution plan not yet commenced.

D. Findings of the Hon'ble NCLT, Ahmedabad Bench :

1. Argument of learned senior counsel for the corporate debtor that Insolvency Resolution Process is not a right *in rem* and it is only against a particular person do not merit acceptance. Even in Corporate Insolvency Process the claims of all the creditors should be taken into consideration by Resolution Professional and resolution

contd. on page no. 573

From Published Accounts

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IND AS 18- Revenue Recognition - Annual Report 2016-17

Claris Life Sciences Limited

Revenue is recognised to the extent it is probable that the economic benefits will flow to the Company and the revenue can be reliably measured, regardless of when the payment is being measured at the fair value of the consideration received or receivable, taking into account contractually defined terms of payment and excluding taxes or duties collected on behalf of the government. The Company has concluded that it is the principal in all of its revenue arrangements since it is the primary obligor in all the revenue arrangements as it has pricing latitude and is also exposed to inventory and credit risks.

Based on Ind AS 18 issued by the ICAI, the Company has assumed that recovery of excise duty flows to the Company on its own account. This is for the reason that it is a liability of the manufacturer which forms part of the cost of production, irrespective of whether the goods are sold or not. Since the recovery of excise duty flows to the Company on its own account, revenue includes excise duty.

However, sales tax / value added tax (VAT) is not received by the Company on its own account. Rather, it is tax collected on value added to the commodity by the seller on behalf of the government. Accordingly, it is excluded from revenue.

The specific recognition criteria described below must also be met before revenue is recognised.

Sale of product

Revenue from the sale of products is recognised when the significant risks and rewards of ownership of the products have passed to the buyer, usually on delivery of the products. Revenue from the sale of products is measured at the fair value of the consideration received or receivable, net of returns and allowances, trade discounts and volume rebates.

Rendering of services

The Company is providing management consulting towards various operational and strategic activities and certain other shared services to some of its subsidiaries. Income from such management consultancy and shared services are recognised in the statement of profit and loss in which such services are rendered.

Interest income

For all financial assets measured either at amortised cost or at fair value through other comprehensive income, interest income is recorded using the effective interest rate (EIR). EIR is the rate that exactly discounts the estimated future cash payments or receipts over the expected life of the financial instrument or a shorter period, where appropriate, to the gross carrying amount of the financial asset or to the amortised cost of a financial liability. When calculating the effective interest rate, the Company estimates the expected cash flows by considering all the contractual terms of the financial instrument but does not consider the expected credit losses. Interest income is included in other income in the statement of profit and loss.

Dividends

Revenue is recognised when the Company's right to receive the payment is established, which is generally when shareholders approve the dividend.

Rental income

Rental income arising from operating leases on investment properties is accounted for on a straight-line basis over the lease terms and is included in operating income in the statement of profit or loss due to its operating nature.

VISA Steel Ltd

Interest income from debt instruments is recognised using the effective interest rate method. The effective interest rate is the rate that exactly discounts estimated future cash receipts through the expected life of the financial asset to the gross carrying amount of a financial asset. When calculating the effective interest rate, the Group estimates the expected cash flows by considering all the contractual terms of the financial instrument (for example, prepayment, extension, call and similar options) but does not consider the expected credit losses.

Dividends are recognised in profit or loss only when the right to receive payment is established, it is probable that the economic benefits associated with the dividend will flow to the Group, and the amount of the dividend can be measured reliably.

Revenue is measured at the fair value of the consideration receivable. Amounts disclosed as revenue are inclusive of excise duty and net of returns, trade discounts, rebates, Value Added Tax and amounts collected on behalf of third parties.

The Group recognises revenue when the amount of revenue can be reliably measured, it is probable that future economic benefits will flow to the Group and specific criteria have been met for each of the Group's activities as described below. The Group bases its estimates on historical results, taking into consideration the type of customer, the type of transaction and the specifics of each arrangement.

Sale of Goods: Revenue from the sale of goods is recognised when the goods are delivered and titles have passed, at which time all the following conditions are satisfied:

- the Group has transferred to the buyer the significant risk and rewards of ownership of the goods;
- the Group retain neither continuing managerial involvement to the degree usually associated with ownership nor effective control over the goods sold;
- the amount of revenue can be measured reliably;
- it is probable that the economic benefits associated with the transaction will flow to the Group; and
- the costs incurred or to be incurred in respect of the transaction can be measured reliably.

Sale of Services: Sales are recognised upon the rendering of service and are recognised net of service tax.

All other items are recognised on accrual basis.

Gayatri Projects Limited

A. Revenue from Operations

a. Revenue from Construction activity:

i) Income is recognized on fixed price construction contracts in accordance with the percentage of completion basis, which necessarily involve technical estimates of the percentage of completion, and costs to completion, of each contract/ activity, on the basis of which profits revenue is recognized at cost of work performed on the contract plus proportionate margin, using the percentage of completion method. Percentage of completion is the proportion of cost of work performed up to the date, to the total estimated contract costs

ii) The stage of completion of contracts is measured by reference to the proportion that contract costs incurred for work performed up to the reporting date to the estimated total contract costs for each contract

iii) Price escalation and other variations in the contract work are included in contract revenue only when:

a) Negotiations have reached at an advanced stage such that it is probable that customer will accept the claim and

b) The amount that is probable will be accepted by the customer and can be measured reliably.

iv) Incentive payments, as per customer-specified performance standards, are included in contract revenue only when:

a) The contract has sufficiently advanced such that it is probable that specified performance standards will be met; and

b) The amount of the incentive payments can be measured reliably.

v) Contract Claims raised by the company which can be reliably measured and have reached an advanced stage of arbitration and pending in High court have been recognized as income.

b. Revenue from supply of materials:

Revenue from supply of materials is recognized when substantial risk and rewards of ownership are transferred to the buyer and invoice for the same are raised.

c. Revenue receipts from Joint Venture Contracts

i) In work sharing joint venture arrangement, revenues, expenses, assets and liabilities are accounted for in the Company's books to the extent work is executed by the Company.

ii) In Jointly Controlled Entities, the share of profits or losses is accounted as and when dividend/share of profit or loss are declared by the entities.

d. Other Operational Revenue:

i) All other revenues are recognized only when collectability of the resulting receivable is reasonably assured.

ii) Revenue is reported net of discounts, if any.

B. Other income

i) Interest income is accounted on accrual basis as per applicable interest rates and on time proportion basis taking into account the amount outstanding.

ii) Dividend income is accounted in the year in which the right to receive the same is established.

iii) Insurance claims are accounted for on cash basis.

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contd. from page 570

plan will be prepared taking into consideration the value of the debts, assets of the company, the nature of business of the company *etc*. Therefore, this kind of issues are not within the jurisdiction of arbitration.

2. The reliefs prayed in this petition is only to initiate corporate insolvency process by appointing insolvency resolution professional but not for recovery of money. Therefore, this Adjudicating Authority is of the considered view that the Arbitration Tribunal is not having jurisdiction over the subject matter of Company Petition (IB.) No. 123 of 2017 irrespective of arbitration clause in the Consultancy Agreement dated 30.09.2008.

3. The decision relied upon by the learned counsel for corporate debtor in *Haryana Telecom Ltd.* (*supra*) applies to the facts of the case also.

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From the Government

CA. Kunal A. Shah
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Income Tax

1) CBDT issues instructions for conducting E-Assessment

The Central Board of Direct Taxes (CBDT) had issued a revised format of notice(s) under section 143(2) of the Act. Para 3 of these notice(s) provided that assessment proceedings in cases selected for scrutiny would be conducted electronically in 'E-Proceeding' facility through assessee's account in E-filing website of Income Tax Department.

The circular mandated that except for search-related assessments, proceedings in other pending scrutiny assessment cases shall be conducted only through the 'E-Proceeding' functionality in ITBA/E-filing. However, in cases where the concerned assessee objects to conduct of assessment proceedings electronically through the 'E-Proceeding' facility, such cases, for the time-being, may be kept on hold.

"Further, considering the situation that some of the stations have limited bandwidth, being VSAT stations and stations with limited capacity where bandwidth is in the process of being upgraded, it has been decided that till 31.03.2018, such stations, in accordance with target stipulated in Central Action Plan for the financial year 2017-18, may undertake and complete only ten percent scrutiny cases (which are getting barred by limitation on 31.12.2018) having the potential to effect recovery during the current year itself. The list of such stations shall be specified by the Pr. DGIT(Systems),"

For inquiries before assessment in terms of section 142(1)(ii) of the Act, notice shall be issued electronically and delivered upon the assessee in his 'E-Filing' account. While filing the response electronically in compliance with the notice under section 142(1)(ii) of the Act, the concerned assessee shall verify it in the manner prescribed under Rule 14 of Income Tax Rules, 1962.

All departmental orders/communications / notices being issued to the assessee through the 'e-Proceeding' facility are to be signed digitally by the Assessing Officer.

It said that Online submissions may be filed until the office hours on the date stipulated for compliance.

The facility will be automatically closed seven days before the time barring date. In certain circumstances such as where the Officer wants to verify the original books of accounts, for cross-examination of witnesses, when assessee requests personal hearing etc., the Assessing Officer can follow the offline proceedings. The circular further mandated that when an assessment is done through e-proceedings, case records and note sheets must be prepared and maintained electronically.**(For full text refer Instruction No.01/2018, dated 12/02/2018)**

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CONGRATULATIONS

CA. PRAFULLA CHAJJED, member of our Association, on being elected as the Vice President of ICAI.

Association News

CA. Riken J. Patel
Hon. Secretary

CA. Maulik S. Desai
Hon. Secretary

Forthcoming Programmes

Date/Day	Time	Programmes	Speaker	Venue
05/03/2018 Monday	4.00 p.m. to 7.30 p.m.	Hedging of Foreign Exchange Risks through Derivative Instruments&Accounting & Taxation Aspect of Derivative Transactions	CA. Ashish Goyal - AVP Business Development Gujarat Region – NSE & Mr. Ankur Kapoor- AVP Currency - Emkay Global* Eminent Speaker	Shantinath Hall, **"ICAI BHAWAN"** 123, Sardar Patel Colony, Naranpura, Ahmedabad - 380014
07/03/2018 Wednesday	5.00 p.m. to 7.00 p.m.	Open House with Income T.ax Department		GCCI Hall, Ashram Road, Ahmedabad
10/03/2018 Saturday	5.00 p.m. to 7.00 p.m.	Lecture Meeting on Statutory Bank Branch Audit	CA. Anand Sharma	H. K. Conference Room, H. K. College Ashram Road, Ahmedabad

Glimpses of Past Events

25th January 2018 – GST Series – Lecture on Place of Supply and ITC – CA. Brijesh Thakar

29th January 2018 – Introduction to RERA – CA. Aniket Talati

29th January 2018 – Overview of IBC & Its Challenges for Professionals - CA. Ketul Patel

10th February 2018 – Memorial Lecture (CA. C. F. Patel & Shri K. T. Thakor) on the topic Inspired Living – Beyond the Mundane – Smt. JAYA ROW.

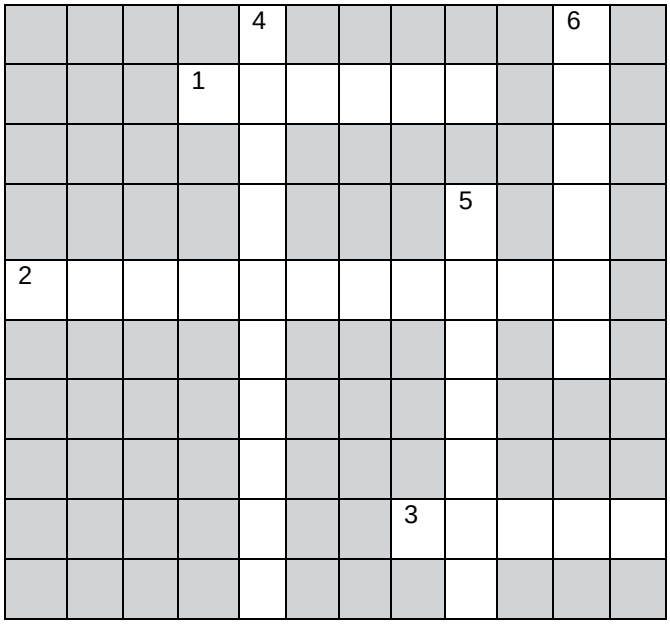
ACAJ Crossword Contest # 45

Across

1. Individual selling to unregistered second hand vehicle dealer is not a _____ and therefore no GST is applicable.
2. The business income earned by _____ is chargeable to tax in India only to the extent reasonably attributable to the operations carried out in India.
3. For every actions undertaken by any human being, the ultimate object is to be _____.

Down

4. The reasons for reopening the assessment have to be confined to those set out in the order and they cannot be improved upon filing _____ affidavits.
5. The Bankruptcy and Insolvency Act, 2017 helps firms by making the _____ process and/or liquidation easier.
6. A company accepting secured deposits from the public shall within _____ days of such acceptance.



Notes:

1. The Crossword puzzle is based on previous issue of ACA Journal.
2. Two lucky winners on the basis of a draw will be awarded prizes.
3. The contest is open only for the members of Chartered Accountants Association and no member is allowed to submit more than one entry.
4. Members may submit their reply either physically at the office of the Association or by email at caaahmedabad@gmail.com on or before 05/03/2018.
5. The decision of Journal Committee shall be final and binding.

Winners of ACAJ Crossword Contest # 44

1. CA. Gaurang Choksi
2. CA. Jaini Zaveri

ACAJ Crossword Contest # 44 - Solution

Across

1. Happiness
2. Retrospectively
3. Financial

Down

4. Sixty
5. Reassessment
6. Foundation

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