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Chartered Accountants Association, Ahmedabad

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

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Pleasant State of Mind is Heaven

According to Dr. Radhakrishnan, pleasant state of mind is heaven. We may not have seen heaven or hell. However, we come across many situations in life when we feel so happy from within. We also experience situations when we feel so perturbed or disturbed from within. Going by the meaning of term 'heaven' given by Dr. Radhakrishnan, I observe that I visit heaven and hell frequently. When our mind is tranquil or free from emotional or mental disturbance, we feel very happy or as if we are in heaven. At the same time, when we are perturbed or disturbed or are filled with grief, we feel that life is like a hell.

To achieve pleasant state of mind, we should practice penance of mind. Lord Krishna narrates penance of mind in Shrimad Bhagvad Gita as under.

मनः प्रसादः सौम्यत्वं मौनमात्मविनिग्रहः ।
भावसंशुद्धिरित्येतत्पो मानसमुच्यते ॥

Chapter 17-Verse 16

It means "serenity of mind or tranquility of mind, gentleness, silence, self-control or withdrawal of mind, the purity of mind or purity of purpose or purity of heart-this is called the penance of mind."

The state of the mind determines the state of an individual's consciousness. We can elevate ourselves through the power of our mind and can also degrade ourselves, for the mind can be the friend as well as the enemy of the self.

It is important to realize that we harm ourselves with every negative thought that we harbor in our mind. At the same time, we uplift ourselves with every positive thought that we dwell upon.Resentful, hateful, blaming, unforgiving, critical, and condemning thoughts in mind will have a devastating effect on our personality whereas serenity of mind, gentleness, silence, self-control and good feelings for others will lead to charming personality.

We may think that our thoughts are secret and no other person can make out what we dwell within the mind. We should realize that thoughts not only forge our inner character but also our external personality. This is the reason why we see someone and say, "He seems to be simple and reliable person." For another person, we say, "He seems to be very cunning and deceitful and we should stay away from him." Ralph Waldo Emerson says: "There is full confession in the glances of our eyes, in our smiles, in salutations, in the grasp of the hands."

The following powerful saying shows how our thoughts become our destiny.

“Watch your thoughts, for they become words.

Watch your words, for they become actions.

Watch your actions, for they become habits.

Watch your habits, for they become character.

Watch your character, for it becomes your destiny.”

We should remember that love brings love, and hate brings hate. We should carefully observe and understand the effect of positive and negative thoughts in our mind to realize that purity of mind brings joy and negativity brings grief.

Penance of mind as narrated in Shrimad Bhagvad Gita brings lasting joy and feeling of extreme happiness or cheerfulness. In 6th verse of Chapter 16 of Shrimad Bhagvad Gita, Lord Krishna states that there are two kinds of beings in this world—those endowed with a divine nature and those possessing a demoniac nature. When we see goodness of the world, we rejoice and if we fill our mind with all the dirt of the world, we inculcate habit of cursing others. Practice right thoughts, right actions, right habits, right character shall maximize moments of life with pleasant state of mind. With this practice, mind will have less agitation. Mind without agitation is heaven on earth. Pleasant state of mind only can give us feeling of being in heaven. Let us all practice the art of making the state of mind pleasant and make this world more beautiful place to live in.

❊❊❊

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Banking Sector - A Concern

The month of February has been a nightmare for the banking sector, especially the public sector banks. The series of frauds and scams have surfaced during the last one month with a loss up to the tune of more than 26000 crores to the banking system. The number of such huge scale is itself shocking. This included those perpetrated by jewellers Nirav Modi and Mehul Choksi, Rotomac's Vikram Kothari, and Simbhaoli Sugars.

Recent bank loan frauds

Persons, entities involved	Rs crore
Vijay Mallya-Kingfisher bank loan fraud	9,000
Nirav Modi- Mehul Choksi-PNB scam	12,700
Rotomac-Vikram Kothari-BoB scam	3,695
RP Info System-Shibaji Panja-Canara Bank-scam	515
Simbhaoli Sugars-OBC scam	109
Total	**26,019**

The government's reaction, which may have sprung from the desperation to act decisively, has added to the woes of the distressed banking sector. The Central Bureau of Investigation, India's has taken several PNB employees in custody and the defaulters Modi-Choksi duo have fled the country and remain untraceable. The probe has been extended to various other banks and chiefs of private sector banks are also summoned. It is clear that the investigators are determined to fast tract the investigation and are willing to go to any extent to connect the missing dots. The enthusiasm is welcome—till the time it doesn't turn into a witch- hunt.

The fraud cases that have come to the light are an indication that Indian Banking sector is very vulnerable. Between 2014-15 and 2016-17, the total number of frauds reported in PSBs stand at 8,622, according to a submission in Parliament. A total of 1,146 staff were involved whereas in private sector banks 4,156 frauds were reported involving 568 staff. Red flags are being either ignored by the bankers or the system alerts themselves are failing, eroding the faith in the country's financial system.

Such huge sum getting siphoned off by the fraudsters may not seem to affect a layman but in fact has a huge impact on the economy. The losses inflicted on the banks due to scams and bad loans have a direct bearing on the people of the country.

One, the taxes paid will now be diverted towards recapitalisation of banks, instead of welfare activities. Last year government announced recapitalisation of state-run banks to the tune of Rs 2.11 lakh crore, this after it had already infused Rs 1.18 lakh crore since 2008 into banks. These recapitalisations happen at the cost of various welfare schemes of the government.

Two, it leaves investor poorer. Since PNB scheme came to light, it shares have fallen more than 60%. In fact, other PSU banks too have been bruised, shaking confidence and trust of the investors.

Three, it means less borrowing money available. According to news reports, PNB that's been hit by the scam has lost 10 times its 9-months net income of Rs 1,134 crore due to the recent scam . Banks with inadequate capital will be wary of fresh lending. This, in turn, impacts new borrowers making it harder for them to get loans.

To be sure, a clean-up of the Indian banking sector has anyway been long overdue. What is needed here is a solid action plan between the government, regulator and investigating agencies whereby the banker engaged in genuine business will have the confidence to do his work without the fear of being prosecuted but guilty officials are not spared at any cost.

CA. Ashok Kataria

From the President

CA. Kunal A. Shah
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Dear Members,

I hope that everyone of us has celebrated and enjoyed the festival of colours . Holi is one of the most popular festivals celebrated in India. Year on year, Holi arrives on the Poornima day (full moon day) in the month of Phalguna (February – March). Think of Holi and what comes to our mind is colours, fun, entertainment, songs and drums. I also hope that as we splash and frolic in multiple colours, may we accept the diversity of all people and grow together.

Around the World

Trump sets tariff on steel, aluminum imports, provokes global trade war. US President Donald Trump recently signed two proclamations that impose 25 per cent tariff on imported steel 10 per cent on aluminium, a move that is likely to start a global trade war. The Union government has started working out an action plan to analyse the impact of the recently imposed US tariffs on steel and aluminium and on how to deal with it.

Religions offer unity

There has been maximum bloodshed in the name of religion. Yet, religions, beyond all doubt, possess a deep underlying fundamental unity. That unity springs from divine realisation of oneness of Spirit and essential oneness of existence in the hierarchical ascent of creation from matter to energy, mind and spirit.

That unity transcends innumerable diversities in the way of life, belief system, practice of rites and rituals and sense of self-made divisiveness.

Instead of finding fault with a different system, it calls for mutual understanding with sincere quest and respect. If we seriously seek, we can find too many points of admiration in every religion, but our attitude to see the glass as half empty instead of half-full creates the problem.

From time immemorial, fanatic followers, misguided men and selfish opportunists of various religions have added fire to the powerful fuel of religions and caused heinous hatred and worst bloodshed.

While, ironically, every religion advocates for peace and universal fraternity, fanatic followers with religious bigotry have oftentimes shown religious intolerance disregarding the fact that such bigotry springs from spiritual ignorance and denial of the rightful entitlement of freedom of practising religion by everyone.

Activities at the Association

The Study RRC at TGB Surat was successfully completed. All the participants took the benefit of all the six useful topics by speakers from Gujarat and Maharashtra.

For the very time CAA organised the celebration of "Dhuleti" on 2nd March,2018 jointly with Ahmedabad Branch of WIRC of ICAI. Members enjoyed playing holi with different organic colours , music and delicious food. I thank all the members for gracing the Holi function with their family members.

A lecture meeting on Accounting and Taxation of Derivative Transactions was organised and the program was well attended by the participants.

A Open House with Income tax department was organised by CAA jointly with various organisations wherein Pr. Chief Commissioner of Income Tax (Gujarat) Shri A. K. Jaiswal , Madam Asha Agarwal – Chief Commissioner of Income Tax – II and Shri R.K. Srivastava – Chief Commissioner of Income Tax – TDS, Gujarat along with their esteemed team of commissioners remained present and responded to the queries of the taxpayers. In the address remark Pr. CIT Shri A.K Jaiswal urged the taxpayers to maximum utilize their portal of grievances on Gujarat Govt website. Further relating to the matter of payment of 20% of the demand till the disposal of first appeal, department authorities assured that at the discretion of PCIT, in genuine cases, payment of 20% can be reduced.

After the GST regime , CAA has launched the first publication on FAQs on GST – A Hand book (including E-way Bill) on 12th March,2018 by the worthy hands of Past President of ICAI CA Sunil H. Talati. My sincere gratitude and heartfelt congratulations to the Chairman of the Publication Committee CA. Shailesh C. Shah and his entire committee for the hard and sincere work. I also wish to express my thanks to the authors CA. Punit Prajapati, CA. Avinash Poddar and Dr. CA. Nilesh Suchak for their untiring efforts to make this possible in a short period for benefit of members at large.

Now it's time to gear up for the Statutory Bank Branch Audits and to refresh the norms relating to it, a lecture meeting on Statutory Bank Branch Audit was organised by CAA on 12th March,2018 for the benefit of the members at large.

I would like to conclude with the following thoughts – " Once you replace negative thoughts with positive ones, you'll start having positive results.**- Willie Nelson**

"Optimism is the faith that leads to achievement. Nothing can be done without hope and confidence".**-HelenKeller**

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

With best regards,

CA. Kunal A. Shah
President

Addressing tax challenges of digitization–Introducing Virtual Permanent Establishment

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"*The world's largest taxi firm, Uber, owns no cars. The world's most popular media company, Facebook, creates no content. The world's most valuable retailer, Alibaba, carries no stock. And the world's largest accommodation provider, Airbnb, owns no property. Something big is going on.*"

-*Tom Goodwin*

Something big is indeed going on and digitization is changing the way business is done and the way money is made. Most transactions are now done by using e-commerce, app stores, online advertising, online payment services, cloud computing, participative networked platforms and the likes.

Under the new digital business models, companies are able to generate significant revenues in foreign countries without the need to put up big offices or have employees there. This results in avoidance of tax in source countries which follow the principle of physical presence based taxation rather than economic allegiance. India being one such source country, loses its right to tax business profits that are derived from its economy.

OECD under its BEPS Action Plan 1 has addressed tax challenges arising in digital businesses wherein several options such as tax nexus concept of significant economic presence, Digital Equalisation Levy, withholding tax on certain types of digital transactions, etc. were discussed.

India vide Finance Act, 2016 has already introduced the concept of 'Equalisation levy'. With increasing need to address tax challenges due to digitisation, Finance Bill, 2018 has proposed to adopt a new nexus rule for taxing business profits based on 'significant economic presence'(SEP) also known as 'the virtual permanent establishment (PE)' which will change the fundamental of existing PE framework.

Finance Bill 2018 has proposed to insert explanation 2A to clause (i) of sub-section (1) of section 9 of the Act to provide that SEP in India shall also constitute 'business connection'. For this purpose SEP shall mean:

(i) any 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 the amount as may be prescribed; or

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

Such 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 specified transactions or activities to be deemed to accrue or arise in India and will be liable to tax in India.

BEPS Action Plan 1 proposes several factors for determination of SEP, out of which India has adopted revenue-based and users-based threshold. Both the above stated factors for determination of SEP are mutually exclusive and their threshold will be decided after discussion with the stakeholders.

The introduction of SEP may serve as a welcome step for addressing tax challenges on digitization but here are some implementation challenges as have also been noted in BEPS Action Plan 1:

- <u>Identification of activities</u>: It will be difficult for tax authorities to know that activities are taking place and to identify remote sellers and ensure compliance with domestic rules.

- Determining the extent of activities: Even if the identity and role of the parties involved can be determined, it may be impossible to ascertain the extent of sales or other activities without information from the offshore seller, as there may be no sales or other accounting records held in the local jurisdiction or otherwise accessible by the local revenue authority.
- Information collection and verification: To verify local activity, the market jurisdiction's tax administration may need to seek information from parties that have no operations in the jurisdiction and are not subject to regulation therein.
- Identification of customers: This could prove burdensome and a difficult task where customers are able to disguise their location.
- Attribution of profits to Virtual PE: It is questionable whether under current taxation principles it will be possible to assign any substantial amount of profit to a virtual PE. Today, PE profit attribution is about assigning tax base to the production jurisdiction and not to the market jurisdiction. Thus, there is a need to define the method through which profits will be allocated to Virtual PE.
- Who is the taxpayer: From an enforcement perspective, it makes sense that the company collecting the revenue should be taxed. However, in case of group companies, if the company invoicing the revenue is a mere shell company with no significant people functions, the tax liability should be shifted to the company actually gaining within the same group.
- Defining threshold: Defining proper threshold can address the above challenges. The revenue based and user based factors adopted by India should ensure that SEP should reflect only those contributions which have added value and are resulting from closer and interactive relationships with customers. Further, it is also important to underline that revenue must be linked to digital service. The revenues generated by physical flow of goods shall not be relevant for application of new threshold. Under the users based threshold, the amount of time spent by users on a specific online platform, be it a website or an electronic application, would a better option as it would indicate level of use of infrastructure in specific jurisdiction.
- Equalization levy *vis-a-vis*. SEP: Equalization levy (EL) and SEP are mutually exclusive. SEP's scope is much wider than EL as under EL only specified services (particularly online advertisement) are taxed at 6% on gross basis whereas SEP covers each and every kind of service through which revenue is generated in source country. Further, EL is not applicable to non-residents who have PE in India whereas under SEP, tax will be leviable only in presence of virtual PE and thereafter, profits will be attributed to the PE which will be taxed at 40%.

It is proposed that India will re-negotiate the existing DTAAs for inclusion of the new nexus rule. Till that time, cross border business profits will continue to be taxed as per existing treaty rules. Thus, till the time treaties are modified, taxpayers will be able to avail the benefit of DTAAs wherein the scope of PE is narrower. However, non-treaty jurisdictions such as Hong Kong, Nigeria, etc. will be impacted by the proposed amendment.

Considering increased digital transactions this is a welcome change. However government has to address concerns or the issues highlighted above to make it effective and get its due share of taxes on digital transactions.

***

Glimpses of Supreme Court Rulings

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34 "Sale of Mineral Water" under Legal Metrology Act, 2009.

When 'sale' of food and drinks takes place in hotels and restaurants, there is really one indivisible contract of service coupled incidentally with sale of food and drinks. Since it is not possible to divide the "service element" which is the dominant element, from the "sale element", it is clear that such composite contracts cannot be the subject matter of sales tax legislation. However, vide insertion of Article 366(29-A)(f) supply by way of or as part of any service of food or other article for human consumption is now deemed to be a sale of goods by the person making the transfer, delivery or supply.

Federation of Hotel and Restaurant Association of India Vs. UOI (2018) 2 SCC 97

35 Interpretation of Statutes – External Aids

Statement of objects and Reasons and Preamble-Statement of objects and reasons accompanying a bill, when introduced in parliament, cannot be used to determine the true meaning and effect of substantive provisions of the statute – The object of a provision can certainly be used as an extrinsic aid to the interpretation of statutes and subordinate legislation where there is ambiguity in the words used.

Laurel Energetics Private Limited Vs. SEBI (2017) 8 SCC 541

36 Capital or Revenue/Trading/Business Receipt under Income Tax Act, 1961.

Primary test which is adopted to differentiate between capital and revenue expenditure remains the same, namely, the enduring nature test. It means where the expenditure is incurred which gives enduring benefit, it will be treated as capital expenditure. In contradistinction to the cases where expenditure of concurrent and reoccurring nature is incurred and the latter would belong to revenue field. Technical information and know-how are intangible. They have different and distinct character from tangible assets. In case where there is a transfer of ownership in the intellectual property rights or in the license, it would clearly be a capital expenditure. However, when no such rights are transferred but the arrangement facilitates grant of license to use those rights for a limited purpose or limited period, the courts have held that in such a situation, the royalty paid for use of such technical information or know-how would be in the nature of revenue expenditure as no enduring benefits is acquired thereby.

If the technical know-how obtained under the agreement for which technical fee/royalty is paid is for a limited period and only right to use the technical know-how is there during the agreement with no right of acquisition, coupled with the fact that the said technical know-how is utilized for improvising the existing business, the expenditure would be treated as revenue expenditure.

There is no single test or principle or rule of thumb which is paramount. It is ultimately a question of law, but a question which must be answered in the light of all the circumstances which are reasonable to take in to account, and the weight which must be given to a particular circumstances in a particular case, must depend on common sense rather than on strict application of any single legal principle. The idea of "once for all" payment and "enduring benefit" are not be treated as something akin to statutory conditions; nor are the notions of "capital" or "revenue" a judicial fetish. What is "capital expenditure" and what is "revenue" are not eternal varieties of business.

Honda SIEL Cars India Limited Vs. CIT, Ghaziabad (2017) 8 SCC 170

contd. on page no. 590

From the Courts

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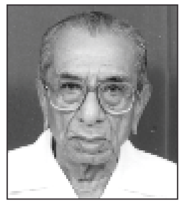

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101 Reopening : Change of opinion : Jivraj Tea Company v/s. Deputy CIT (2017) 394 ITR 422 (Guj)

Issue :

Whether reopening of assessment u/s 147 is permissible on change of opinion?

Held :

During the course of scrutiny assessment proceedings, the Assessing Officer had already examined the details with respect of the purchases made from the sister concerns and the price paid to those sister concerns. Specific queries raised by the Assessing Officer were answered satisfactorily by the assessee and the assessee also justified the purchases from the sister concerns and the purchase price paid to the sister concerns. The subsequent re-opening on the very ground was a mere change of opinion by the subsequent Assessing Officer. Therefore, the notices to reopen the assessment could not be sustained and were to be quashed.

102 Re-opening of assessment u/s 147 : Change of opinion of subsequent Assessing Officer DIT (INTL Tax) v/s. Rolls Royce Indl. Power (I) Ltd. (2017) 394 ITR 547 (Del)

Issue :

Can subsequent Assessing Officer reopen an assessment u/s 147 on change of opinion?

Held :

The pre-condition for invoking the provisions of section 147 of the Income Tax Act, 1961 did not exist. During the course of the original assessment under section 143(3), the previous Assessing Officer had examined the nature of the transactions and the payments received therefore by the assessee. The reopening was not based on any new material. The view taken by the successor Assessing Officer on the same material was nothing but a change of opinion. Once the assessee had discharged the burden of not only producing the account books and other documents, but also the specific material relevant to the assessment, it was for the assessing authority to draw proper inferences of fact and law and the assessee could not further be called upon to do so. The assessee had discharged its burden of disclosing fully and truly all the material facts before the Assessing Officer during the original assessments. There was no basis for the successor Assessing Officer to conclude that "no opinion with regard to taxation" of the payments received for the services rendered had been formed by the predecessor Assessing Officer. The assumption of jurisdiction under section 148 was not valid.

103 Duty of Income Tax Authorities to guide assessee : Kalindee Rail Nirman (Engineers) Ltd. (2017) 394 ITR 684 (Raj)

What should be the duty of the Income Tax Authorities in respect of the tax matters of the Assessee?

Held :

The authorities under the Income Tax Act, 1961 are under an obligation to act in accordance with law. Tax can be collected only as provided under the Act. If an assessee, under a mistake, misconception or not being properly instructed, is over assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected. Section 237 of the Act does not specify that an assessment order must be made and that some amount must be found to be payable as tax and that some amount in excess of that amount should have been paid. Under section 254 of the Act, the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law.

104 Interpretation of statues : Meaning of words viz. "In any other case" and "As the case may be" in Sec. 244(A)(1) and Sec. 244 A(1)(b).

Preeti N. Agarwala v/s. Chief CIT (2017) 394 ITR 557 (Delhi)

Issue :

How the words "In any other case" and "As the case may be" in Sec. 244 (A)(1) and 244A(1)(b) are to be interpreted.

Held :

The sum refundable to the assessees as a result of the waiver of interest order passed by the Chief Commissioner was a definite sum that was wrongly deducted from the assessee as interest. Even if there was no express statutory provision for payment of interest, the Government could not avoid its obligation to reimburse the lawful monies together with accrued interest for the period of undue retention. The words "any other case" were not to be interpreted restrictively and could include situations such as in the assessees' cases. Clause (b) of section 244A (1) stipulated that "in any other case" the interest payable should be calculated at the rate of one half per cent, for every month or part of a month comprised in the period or periods from the date "or, as the case may be" dates of the "tax or penalty" to the date on which refund was granted. This had to be read with the expression "refund of any amount that becomes due" occurring in section 244A (1). When the entire sub-section (1) of section 244 (A) (1) was read as a whole, the legislative intent did not appear to limit the expression "any amount becomes due" occurring in section 244A (1) or the expression in any other case" occurring in section 244(1)(b) only to tax and penalty. The words "as the case may be" referred to the period for which the interest became payable and that the period was said to be the dates of payment of tax or penalty to the date on which the refund was granted. That did not mean that an amount other than tax or penalty could not be included in the expression "in any other case". It was only reflective of the periods for which such interest became payable. The disjunctive "or" between the words "period" and "periods" indicated that "in any other case" interest would be calculated for every month or part of a month comprised in the period or periods from the date on which the refund was granted. The Explanation under clause (b) of section 244A (1) clarified the expression "the dates of payment of the tax or penalty". It was not intended to and did not whittle down the ambit of section 244A (1)(b). There was nothing in the provision which prohibited the payment of interest on the amounts of refund due to the assessee as a result of the waiver of interest under section 220 (2A). The assessee were entitled to interest under section 244A (1)(b) on the amount of interest refunded, from the date of recovery till the date of payment.

105 Genuineness of GIFT : Applicability of Sec. 56(2) : Gift from relative : Proofs necessary

Sunil Thomas v/s. ITO (2017) 394 ITR 619 (Ker)

Issue :

How to establish that a gift received is exempt u/s 56(2)?

Held :

The assessee, a director of a private limited company had declared a total income of Rs. 1,95,000/- for the assessment year 2009-10. Pursuant to a scrutiny assessment, it was found that the assessee had shown income from other sources as nil and had claimed deduction under section 56(2) of the Act in respect of cash gifts received from his non-resident brother. Various opportunities were given to the assessee to prove the required conditions under section 68, the identity of the creditor was shown. In so far as the genuineness of the transaction and the capacity of the creditor were concerned, the assessee had only produced documents which evidenced that the money was transferred to him from his brother through banks. No evidence whatever was produced by the assessee to prove that his brother had the capacity to gift the amounts. The Income Tax Officer assessed the amounts as the income of the assessee. The authorities concurrently arrived at the conclusion that the assessee had failed to prove the required conditions under section 68. On Appeal:

Held, dismissing the appeal, that though the assessee had established the identity of the creditor, he had not succeeded in establishing either the genuineness of the transactions, the capacity or the creditworthiness of the creditor. The genuineness of the transactions and the creditworthiness of the creditor ought to have been proved by the assessee by producing necessary documents with respect to the monetary ability of the creditor to make such substantial gifts to the assessee. Such documents were not made available at any stage of the proceedings to prove the requirements under section 68 of the Act. The assessee had not discharged his burden of proof. The three lower authorities had not committed any illegality justifying interference.

106 What is the procedure to be adopted by Department in u/s 147/148 proceedings.

Simaben Vindorai Ravani v/s. ITO (2017) 394 ITR 778 (Guj)

Issue :

What is the procedure to be adopted by Department in u/s 147/148 proceedings?

Held :

After a notice for reassessment has been issued an assessee is required to file the returns and seek reasons for issuance of such notice. The Assessing Officer is then bound to supply the reasons within a reasonable time. On receipt of reasons, the assessee is entitled to file preliminary objections to issuance of notice and the Assessing Officer is under a mandate to dispose of such preliminary objections by passing a speaking order, before proceeding with the assessment in respect of the assessment year for which notice has been issued.

Held, that the order of reassessment passed without disposing of the objections of the assessee was not valid.

107 Share application money : Genuineness : Three tests

CIT v/s. Gagandeep Infrastructure Pvt. Ltd. (2017) 394 ITR 680 (Bom)

Issue :

What are the three tests to be applied to examine the genuineness of share application money?

Held :

The three essential tests laid down by the courts, namely, the genuineness of the transactions, identity and the capacity of the investors of the share application money along with the premium, had all been examined by the Appellate Tribunal and on facts found satisfied. If the Department took the view that the amount of share application money had been received from bogus shareholders, then it was for the assessing authority to proceed by reopening the assessment of such shareholders and assessing them to tax. It did not entitle the Department to add the money received to the assessee's income as unexplained cash credit.

CIT v/s. Lovely Exports (P) Ltd. [2009] 319 ITR (St.) 5(SC) relied on

(ii) That the proviso to section 68 of the Income Tax Act, 1961 had been introduced by the Finance Act, 2012 with effect from April 1, 2013 and thus was effective only from the assessment year 2013-14 onwards and not for the assessment year 2008-09 in question. Parliament did not introduce the proviso to section 68 with retrospective effect nor did the proviso so introduced stated that it was introduced "For removal of doubts" or that it was "declaratory". Therefore it was not open to give it retrospective effect.

108 Reassessment order without disposing assessee's objections : Invalid : Martech Peripherals P. Ltd. v/s. Deputy CIT (2017) 394 ITR 733 (Mad)

Issue :

When assessee has taken objections in u/s 147 proceedings, whether without disposal of the same, order passed is valid?

Held :

The assessee's return of income for the assessment year 2008-09 was processed under section143 (1) of the Income Tax Act, 1961. On May 7, 2012, the assessee was served with a notice under section 148 of the Act, stating that a reduction in investments in mutual funds was found in the balance sheet of the company, but, in the computation of income, the assessee had not offered any gain or loss on account of the sale of investments in mutual funds. The assessee raised objections against the reassessment stating that the redemptions of the investments was at par. Without waiting for the objections to be disposed of, the Assessing Officer passed the reassessment order bringing to tax the sum received by the assessee as share application money. On a writ petition.

Held, allowing the petition, that the objections filed by the assessee to the notice for reopening of the assessment not having been disposed of, the assessment order could not be sustained.

109 Requirement of Sec. 132 and Sec. 133-A Liberty Marine Syndicate Pvt. Ltd v/s. CIT (2017) 394 ITR 277 (Orissa)

Issue :

What are the essentials to invoke power u/s 132 and Sec. 133-A?

Held :

Before taking a decision for a search and seizure action as contemplated under the provisions of section 132 or section 133-A of the Income tax Act. 1961, it is the bounden duty of the competent authority to be satisfied before invoking the jurisdiction. If the competent authority is of the opinion that the assessee is flouting the provisions of the Act and if in that situation he comes to the conclusion that it is necessary to resort to the provision of section 132, then it cannot be said that there is no reason to resort to the provision of section 132.

Section 132 of the Income Tax Act, 1961 confers power upon the authority for search and seizure. The provision stipulates power upon the authority who must have information in his possession and it is he who must have reason to believe. It is, however not the Commissioner who does the actual search and seizure. This is left to the person whom he authorizes to carry out the search. It follows, therefore, that the seizure of books of account, documents, money, bullion, jewellery or other valuable articles would be dependent on the person so authorized being of the opinion that they would be useful in any income tax proceeding. Therefore, the inspecting officers cannot seize documents, etc. by themselves but must be guided by the Commissioner. The things can be seized only after the Commissioner has seen them and has come to be of the opinion that they are relevant and useful, or else he must set out in the warrant of authorization particulars of such documents, books of account. etc.

The difference in between the wordings of clauses (a) and (b) of sub-section (1) of Section 132 of the Act, 1961 is that under clause (a) action may be taken if a person is searched with a summons to produce or cause to be produced, specified books of account or other documents and fails to do so. But in clause (b) the basis is somewhat different. In the latter case, the Commissioner must have reason to believe that the person to whom a summons has been issued under clause (a) or might be issued, will not produce or cause to be produced any books of account or documents which will be useful and relevant to an income tax proceeding.

Under clause (b), unless summons under clause(a) has been issued, no specification is possible. In such a case the basis is that the assessee will suppress books of account and documents which will be required. The income tax authorities require the power furnished by clause (b) for the very reason that they do not know what the relevant books of account and documents are, and are afraid that they will be concealed or suppressed. The power of seizure under section 132 shall be exercised in accordance with sub-rules (2) to (14). Sub-rule (2) provides that the commissioner must first of all record his reason for issuing a warrant of authority. It then provides as to what should be the form of such warrant and the commissioner after going through the relevant records will reduce the reasons in writing for the future exercise and as such under the law, it is the Commissioner or the competent authority who must have reason to believe that the assessee would not produce certain books of account or document is called upon to do so, and it is he who must be of the opinion that they are relevant for the purpose of any income tax proceeding, under these underlying principles the power conferred U/s.132 is to be exercised by the competent authority.

110 Sec. 263 : Commissioner's powers explained

CIT v/s. Kwality Steel Suppliers Complex (2017) 395 ITR 1 (SC)

Issue :

How the powers of commission u/s 263 of the I.T. Act are to be applied?

Held :

There has to be a proper application of mind by the Commissioner to come to a firm conclusion that the order of the Assessing Officer is erroneous and prejudicial to the interests of the Revenue within the meaning of section 263 of the Income Tax Act, 1961. Thus, two conditions need to be satisfied for invoking such a power by the Commissioner, which are : (a) the order of the Assessing Officer sought to be revised is erroneous and (b) it is prejudicial to the interests of the Revenue. At the same time, this provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer. The order of the Assessing Officer cannot be termed prejudicial simply because the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Assessing Officer has taken one view with which the Commissioner did not agree. Where two views are possible and the Assessing Officer has taken one view and the Commissioner does not agree with the view taken by the Assessing Officer, the assessment order cannot be treated as an order erroneous or prejudicial to the interests of the Revenue. While exercising the revisionary jurisdiction, the Commissioner is not sitting in appeal.

Malabar Industrial Co. Ltd. v/s. CIT [2000] 243 ITR 83 (SC) relied on.

CIT v/s. Arvind Jewellers [2003] 259 ITR 502 (Guj) approved.

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contd. from page 585

37 Remedies for Breach of Contract

U/s. 73 of the Contract Act, the party who suffers breach of contract is entitled to "compensation for any loss or damage caused to him thereby" from the party who has broken the contract. There must be causal connection between the breach of contract and the loss sustained by the party who suffers the breach. The common sense test of causation is whether a breach of contract is sufficiently substantial cause of the plaintiff's loss. In regards to remoteness of damage, in *chitty contracts* it is stated that the important issue is whether a particular loss was within the reasonable contemplation of the parties.

Kanchan Udhyog Limted Vs. United Sprits Limited (2017) 8 SCC 237

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Tribunal News

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61 ACIT vs. Vishnu Packaging [2017] 168 ITD 103 (AHD)

Assessment Year: 2012-13 Order dated: 15th November, 2017

Basic Facts

The assessee is a manufacturer of pan masala. The assessee claimed a deduction in respect of the goods produced by the assessee which, in terms of a court order under the Prevention of Food Adulteration Act, had to be destroyed as it was found the said goods had magnesium carbonate, a known carcinogenic substance, in excess of permissible limits. The AO declined this claim of deduction by invoking the provisions of Explanation to Section 37(1), which lays down that any expenditure incurred by the assessee for the purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business, and, is, accordingly not admissible as deduction in computation of business income. Aggrieved by the order of AO, the assessee appealed before the CIT(A) and the CIT(A) reversed the action of the AO by holding that the destruction of stock containing impermissible levels of magnesium carbonate was a loss incurred during the course of bonafide business and is not hit by Explanation to Section 37(1). Aggrieved by the order of CIT(A), revenue appealed before the ITAT.

Issue

Whether explanation to section 37(1) can be invoked in assessee's case?

Held

The Hon'ble ITAT held that the assessee has used carcinogenic substance much in excess of permissible limits resulting in manufacture of product with substantial health hazards and that is the reason that the related stocks had to be destroyed by the law enforcement agencies. The expenses on manufacturing such a noxious product, whether deliberately or inadvertently cannot, therefore, be allowed as deduction under section 37(1) on account of disabling provisions of Explanation 1 to Section 37(1). The assessee had taken a plea that no penalty was imposed on it nor any proceedings initiated. Against which the Tribunal held that as long as expenditure is incurred for a purpose which is prohibited by law, it is immaterial whether penalty was imposed or any other proceedings for manufacturing the said product were initiated or not. As per the ITAT,what was more disturbing was the indifferent attitude of the assessee to the possible damage their products could have caused and without any remorse or regret of its conduct, claim business deduction of expenses incurred on products, which could have seriously endangered health of the consumers of their products. Thus, invoking the Explanation 1 to Section 37(1), the ITAT held the claim of the assessee as legally inadmissible.

62 Arnav Gruh Ltd. vs. DCIT[2017] 168 ITD 518 (MUM)

Assessment Year: 2009-10 and 2010-11 Order dated: 15th December, 2017

Basic Facts

The assessee is a company engaged in the business of builder and property developer. During the assessment proceedings, the AO noticed that the assessee has received an amount as share from joint venture, which was not taxable, whereas, the assessee has debited expenditure towards interest and finance charges. The AO called upon the assessee to explain why expenditure attributable to earning exempt income should not be disallowed. It was submitted by the assessee that it has not earned any exempt income during the year to suffer disallowance under section 14A of the Act. The assessee submitted that since it has voluntarily made disallowance u/s 14A in the computation of total income, no further disallowance was called for. The AO rejected the contention of the assessee and held that disallowance under section 14A has to be made in accordance with rule 8D. Being aggrieved, the assessee appealed before the CIT(A). The CIT(A) agreed on the part that the AO has not recorded any satisfaction however at the same time held that such lapse or omission on the part of the AO is procedural lapse and can be corrected by the first appellate authority, since, his powers are co–terminus with that of the AO. Thus the CIT(A) quantified the disallowance under section 14A. Being aggrieved by the order of CIT(A), assessee appealed before the Hon'ble ITAT.

Issue

Whether satisfaction to be recorded by AO u/s. 14(2) can be substituted by satisfaction recorded by first appellate authority on the basis that his power is co-terminus with that of AO?

Held

The Hon'ble ITAT held that in the course of assessment proceedings, the AO except recording a vague and general observation that the submissions of the assessee was not found tenable has not recorded any satisfaction as to why the claim of the assessee with regard to the disallowance made by it under section 14A is not correct. Further, the ITAT held that it is the AO who has to record his satisfaction with regard to the correctness of assessee's claim before proceeding to disallow expenditure under section 14A. Therefore, when the statutory provisions mandate a particular act to be done by a particular Authority in a particular manner, it has to be done by that authority in that manner only or not at all. Thus, the satisfaction to be recorded by the AO under section 14A(2) cannot be substituted by the satisfaction recorded by the first appellate authority, even, accepting the fact that his power is co–terminus with that of the AO. That being the case, the AO could not have done any further disallowance u/s 14A r/w rule 8D.

63 M/s. Microfirm Capital Pvt. Ltd. vs. DCIT168 ITD 301 (KOL) Assessment Year: 2013-14 Order dated: 30th November, 2017

Basic Facts

The assessee is a company and is in the business of investment and financing. The AO noticed that the company had allotted 2,05,000 shares, 0.1% redeemable non-cumulative preference shares (hereinafter 'RNCPS), of a face value of Rs.10/- each, at a premium of Rs.1,990/- per share, redeemable on expiry of 10 years from the date of allotment at a redemptions price of Rs.5,200/- per preference share. The assessee filed a valuation report from a CA as required under Rule 11UA(c)(c), in support of the valuation of RNCPS of Rs.10/- at a premium of Rs.1,990/-.The AO considered the valuation report and applied Section 56(2)(viib) of the Act. The AO arrived at a conclusion that the assessee has received consideration for issuance of shares in excess of the face value of such shares and that the assessee could not substantiate the fair value during the course of assessment proceedings. He determined the market value of the preference shares issued at Rs.1285.41/- per share as against the market value of Rs.2,000/- per share determined by the assessee and the difference was added as income. Before the CIT(A), the assessee submitted that no opportunity was given by the AO and a show cause notice should have been given. The CIT(A) granted opportunity to the assessee to submit its objections on the issue of valuation of RNCPS. After considering the remand report of the AO and submissions made by the assessee, the CIT(A) held that Section 56(2)(viib) of the Act, applies to the facts of the case as the words used is "shares" which also includes preference shares.

Issue

Whether redeemable non-cumulative preference shares are excluded from ambit of section 56(2)(viib)?

Held

Before the Hon'ble ITAT the assessee contended that RNCPS are quasi debt instruments and not shares *per se* and hence these RNCPS are not covered by the provisions of Section 56(2)(viib) of the Act, which was introduced to deal with equity shares.The Hon'ble ITAT held that Section 56(2)(viib) of the Act covers all types of shares. The argument of the assessee that RNCPS is a quasi-debt and that it was not the intention of the legislature to bring such instruments within the ambit of this Section, is devoid of merit. Also the argument of the assessee that economic consideration that are related to capital formation, employment, industrialisation etc. should lead to purposive and liberal interpretation of the Section was rejected by the ITAT. Resultantly, assessee's appeal was dismissed and it was held that RNCPS cannot be excluded from the ambit of Section 56(2)(viib) of the Act.

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DDIT vs. Credit Agricole Corporate & Investment Bank 89 taxmann.com 345 (MUM)
Assessment Year: 2005-06 Order dated: 5th January, 2018

Basic Facts

The assessee is a non- resident company engaged in corporate and investment banking, operating in India through branches in Mumbai and Delhi. During the assessment proceedings, the AO found that the HO/branches were in receipt of income on four counts i.e. interest paid on subordinated loan to HO, Interest paid on Nostro account, Fee for technical services and payment towards software assistance and FTS for software services rendered). In its reply, to the query raised by the AO, the assessee stated that the branch and the head office were the same entity and the payments made under the heads interest/commission received from the HO/branches was payment to self or was receipt from self and that the sums in question were not taxable. However, the AO did not agree with the assessee and held that as per the provision of Article 7 of the DTAA while computing the income of the branch income had to be considered separately and the payments made under various heads was taxable as FTS as pert Art.13(4) of the DTAA since the assessee had not produced necessary evidences to show that the expenses were not on cost basis. Finally, the AO held that the said were taxable as the income of the HO and that same were FTS taxable under Article 13(2) of the Indo French Tax Treaty. The CIT(A) held that the payments made by the Branch in India are only the reimbursement of expenses incurred by the HO/regional centers and held that that the same was not taxable as income arising to the HO in India. The CIT(A) deleted the addition made by AO. Aggrieved, the revenue preferred an appeal before the ITAT.

Issue

Whether payment made to HO, non-resident company by an Indian branch towards allocation of expenses could not be treated as FTS as there was no proof that HO had specifically made the knowledge available to assessee ?

Held

The Hon'ble ITAT held that assessee had made payment to the HO towards allocation of expenses incurred by the HO. Therefore, such an expenditure cannot be treated as FTS nor can the HO be treated to have rendered any services to the assessee. It was pure and simple allocation of expenses among various group entities. There is nothing on record to prove that the HO had made available knowledge to the India branch by performing activities specifically for the India Branch. Considering these facts the ITAT held that the order of the CIT(A) does not suffer from any legal or factual infirmity. Relying on the judgment of the Hon'ble Delhi High Court in case of Steria (India) Ltd., the ITAT dismissed the ground raised by the AO.

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CYIENT Ltd. v. DCIT 89 taxmann.com 309 (HYD)
Assessment Years: 2004-05, 2006-07, and 2007-08 Order dated: 29thDecember, 2017

Basic Facts

The assessee company is engaged in the business of development of digitized Geographic Database and other software through its Associate enterprise in Noida. Assessee had entered into an international transaction with its AE which was in excess to 5 crore. Hence, case was referred to TPO u/s 92CA for determination of ALP who proposed an adjustment to the total income of the assessee. The AO passed the Assessment order in accordance with TPO's order by making an adjustment to the total income of the assessee.

Aggrieved by the order, assessee preferred an appeal before higher authorities and the matter reached the Tribunal. Hon'ble ITAT in his order has set aside the issue to the file of TPO with the direction to reconsider the issue in accordance with its directions. Consequent to the Hon'ble ITAT's order, the TPO had suggested adjustment of differential amount in accordance with Tribunals directions. Pursuant thereto, AO passed consequential order raising demand.

Aggrieved, assessee preferred objection before DRP, who opined that the order passed consequent to the directions issued by Hon'ble ITAT, is not an order at the first instance and therefore, the DRP is not empowered to issue directions on the issue arising from the said order.

Issue

Whether it is obligatory for the AO to pass a draft assessment order and not a final order even in case of a remand by Hon'ble ITAT?

Held

As evident from the TPO's consequential order that the issue was set aside by the Tribunal not merely to correct mathematical errors in calculations but it is to reconsider the issue in accordance with directions of Hon'ble ITAT and the TPO had reconsidered the various facts before proposing the adjustments. Hon'ble ITAT held that, wherever, AO/TPO exercise their discretion after verification and pass an order, it is incumbent upon them to give the assessee and opportunity to present its case or to appeal against such order. Further, section 144C of the Act specifies that AO first has to pass the draft assessment order and the choice is with assessee either to approach DRP or the CIT(A). Only if the assessee chooses to prefer an appeal before the CIT(A), can the AO pass the final assessment order.

Therefore, the AO shall pass a draft assessment order even in case of remand by ITAT.

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National Oil Well Maintenance Company vs. DCIT[2017] 89 taxmann.com 24 (ITA No. 732/Jp/2015) (Jaipur)
Assessment Year: 2012-13 Order dated: 27th November, 2017

Basic Facts

The assessee-company entered into contract with two companies namely 'OIL' and 'GAIL' for providing cementing services in respect of exploratory as well as development wells which had been planned to be drilled during the contractual period. The assessee filed its return wherein income was offered for tax under section 44BB. The AO, however, opined that assessee's income was liable to be taxed under section 44DA.The CIT(Appeals) upheld the order of AO. Aggrieved, the assessee preferred an appeal before the ITAT.

Issue

Whether the consideration for provision of comprehensive cementing services through equipment, material and personnel as described above will qualify as fees for technical services or qualify for exclusion from technical services under Explanation 2 to section 9(1)(vii)?

Held

The Hon'ble ITAT referred to the Hon'ble Supreme Court decision in the case of ONGC Ltd. and CBDT Circular no.1862 dated 22-10-1990 wherein it is held that mining operations and the expressions "mining projects" or "like projects" occurring in Explanation 2 to section 9(1) of the Act would cover rendering of service like imparting of training and carrying out drilling operations for exploration of and extraction of oil and natural gas and hence payment made under such agreement to a non resident/foreign company would be chargeable to

contd. on page no. 599

Unreported Judgements

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Recently, we have seen many decisions where the issue of share capital by funds flowing from shell companies has been a matter of controversy and in majority of the cases the same are decided against the assessee even at the level of Tribunal. The department taking support of these decisions is also trying to make additions u/s 68 of the Act in respect of even genuine cases of raising of share capital by closely held companies,in spite of the fact that the assessee has been able to discharge the onus expected of him u/s 68 of the Act. Recently, Ahmedabad Tribunal in one such case has given quite elaborate decision laying down the parameters which should be considered for deciding the taxability u/s 68 of the Act in respect of the issue of share capital by the companies.

We hope the readers would find the same useful.

In the Income Tax Appellate Tribunal
Ahmedabad - "C" Bench

Before Shri Rajpal Yadav, Judicial Member

and

Shri Amarjit Singh, Accountant Member
ITA NO. 3619/Ahd/2015
Asstt. Year : 2011-12

M/s Deem Roll Tech Ltd.	Vs DCIT, Cir. 1 (1) (2)
C/o Vinit Moondra CA	Ahmedabad
201, Sarap	
Opp : Navjivan Press	
Ashram Road	
Ahmedabad 380 014	
PAN : AABCD 9176 A	
(Appellant)	(Respondent)

Assessee by : Shri P.F. Jain, AR
Revenue by : Shri Rajdeep Singh, Sr. DR

Date of Hearing : 08/01/2018
Date of Pronouncement : 01/03/2018

Gist Only

A. Facts of the Case:

The assessee company is engaged in manufacturing of Iron and Steel Roll. It filed its return of income declaring a total income of Rs.3.46 crores. During the year the assessee had introduced new share capital of Rs.50 Lakhs. The A.O. directed the assessee to prove the same u/s 68 of the Act. The shares were offered at a premium of Rs.1980/-. The assessee filed complete details in respect of the share applicants and also pointed out that all the amounts were received through banking channels by account paying cheques. The PAN and return copies of the applicants as well as their confirmations were also filed. The A.O. however, asked the assessee to produce all these applicants before him. On failure of assessee to do so, the A.O. made an addition of Rs.35 Lakhs out of Rs.50 Lakhs of share capital introduced by the assessee.

B. Rival Contentions:

The A.R. of the assessee made reference to various case laws of the Hon'ble Gujarat High Court as also other High Courts to buttress the point that the assessee having discharged the onus as expected of him u/s 68 of the Act merely on the ground of non-production of the parties should not suffer such additions u/s 68. The A.R. mainly relied on the following decisions:

i) CIT Vs. Oasis Hospitalities P.Ltd. and Others, 333 ITR 119 (Delhi)

ii) CIT Vs. STL Extrusion P.Ltd., 333 ITR 269 (MP)

iii) CIT Vs. Creative World Telefils Ltd., 333 ITR 100 (Mum)

iv) CIT Vs. Ask Brothers Ltd., 333 ITR 111 (Kar)

v) Pr. Commissioner of Income Tax vs. Softline Creations P. Ltd. 387 ITR 636 (Delhi)

vi) CIT vs. Kamdhenu Steel & Alloys Ltd. 248 CTR 33 (Delhi)

D.R. relied on case law in favour of department.

C. Decision:

The Hon'ble Tribunal gave the reasoning for accepting the contentions of the assessee which is reproduced hereunder verbatim:

"7. We have duly considered rival contentions and gone through the record carefully. Before we embark upon an inquiry on the facts of the present appeal, in order to find out whether the share capital and share premium money received by the assessee during the year is required to be treated as its unexplained credit and deserves to be added under section 68 of the Income Tax Act, 1961,we deem it appropriate to bear in mind certain basic principles/tests propounded in various authoritative pronouncements of the Hon'ble High Courts and Hon'ble Supreme Court. It is also pertinent to observe that both the sides have made reference to a large number of decisions. We do not deem it necessary to recite and recapitulate them because that would make this order repetitive and bulky. We take cognizance of some of them. It is pertinent to observe that in so far as companies incorporated under Indian Companies Act are concerned, whether private limited or public limited companies, they raise their share capital, through shares though manner of raising share capital in private limited company on one hand and public limited company on other hand, would be different. The share capital and share premium are basically irreversible receipts or credits in the hands of the companies. Share capital is considered to be cost of shares on equivalent amount issued and premium is considered as extra amount charged by the company for issue of that capital. In the case of private limited company, normally shares are subscribed by family members or persons known/ close to the promoters. Public limited company, on the other hand, generally raised by public issue inviting general public at large for subscription of these shares. Yet, it is also possible that in the case of public limited company, the share capital is issued in close-circuit. When companies incorporated under the Companies Act raise their capital through shares, various persons would apply for shares and then give share application money. This amount received from such share holder would naturally be credited in the books of accounts of the assessee. Once the alleged share capital is credited to the accounts of the assessee, then role of section 68 would come. It is pertinent to take note of this section. It reads as under:

"Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the officer, satisfactory the sum so credited may be charged to income tax as the income of the assessee of that previous year."

8. A perusal of the section would indicate that basically this section contemplates three conditions required to be fulfilled by an assessee. In other words, the assessee is required to give explanation which will exhibit nature of transaction and also explain the source of such credit. The explanation should be to the satisfaction of the AO. In order to give such type of explanation which could satisfy the AO, *the assessee should fulfill three ingredients viz. (a) identity of the share applicants, (b) genuineness of the transaction, and (c) credit-worthiness of share applicants. As far as construction of section 68 and to understand its meaning is concerned, there is no much difficulty. Difficulty arises when we apply the conditions formulated in this section on the given facts and circumstances. In other words, it has been propounded in various decisions that section 68 contemplates that there should be a credit of amounts in the books of an assessee maintained by the assessee, (b) such amount has to be a sum received during the previous year, (c) the assessee offers no explanation about the nature and source of such credit found in the books, or (d) the explanation offered by the assessee is not, in the opinion of the Assessing Officer, satisfactory. The Hon'ble Delhi High Court in the case of CIT v. Novadaya Castles (P.) Ltd. 367 ITR 306 has considered a large number of decisions including the decision of Hon'ble Supreme Court in the case of CIT Vs. Durga Prasad [1971] 82 ITR 540 (SC). According to the Hon'ble Delhi High Court basically there are two sets of judgments. In one set of case, the assessee produced necessary documents/evidence to show and establish identity of the share-holder and bank account from which payment was made. The fact that payment was received through bank channels, filed necessary affidavit of the shareholders or confirmations of the directors of the shareholder company. But thereafter no further inquiry was made by the AO. The second set of cases are those where there was evidence and material to show that the shareholder company was only a paper company having no source of income, but had made substantial and huge investments in the form of share application money. The assessing officer has referred to the bank statement, financial position of the recipient and beneficiary assessee and surrounding circumstances.*

9. *Let us take into consideration observations made by the Hon'ble Delhi High Court in the case of Softline Creations P Ltd. (supra) while taking note of judgment of Hon'ble Delhi High court in the case of CIT Vs. Fair Finvest Ltd., 357 ITR 146 (Delhi). Hon'ble Delhi High Court made following observations:*

   "….. This court has considered the concurrent order of the Commissioner of Income-tax (Appeals) as well as the Income-tax Appellate Tribunal. Both these authoritie primarily went by the fact that the assessee had provided sufficient indication by way of permanent account numbers, to highlight the identity of the share applicants as well as produced the affidavits of the directors. Furthermore, the bank details of the share applicants too had been provided. In the circumstances, it was held that the assessee had established the identity of the share applicants, the genuineness of transactions and their creditworthiness; The Assessing Officer chose to proceed no further but merely added the amounts because of the absence of the directors to physically present themselves before him.

   The Income-tax Appellate Tribunal has relied upon a decision of this court in CIT v. fair Finvest Ltd. [2013] 357 ITR 146 (Delhi), wherein somewhat similar circumstances, it was stated as follows (page 152):

   "This court has considered the submissions of the parties. In this case the discussion by the Commissioner of Income-tax (Appeals) would reveal that the assessee has filed documents including certified copies issued by the Registrar of Companiesin relation to the

share application, affidavits of the directors, Form 2 filed with the Registrar of Companies by such applicants confirmations by the applicant for company's shares, certificates by auditors etc. Unfortunately, the Assessing Officer chose tobase himself merely on the general inference to be drawn fromthe reading of the investigation report and the statement of Mr.Mahesh Garg. To elevate the inference which can be drawn on the basis of reading of such material into judicial conclusions would be improper, more so when the assessee produced material. The least that the Assessing Officer ought to have done wasto enquire into the matter by, if necessary, invoking his powers under section 131 summoning the share applicants or directors. No effort was made in that regard. In the absence of any such finding that the material disclosed was untrustworthy or lacked credibility the Assessing Officer merely concluded on the basis of enquiry report, which collected certain facts and the statements of Mr. Mahesh Garg that the income sought to be added fell within the description of section 68.

Having regard to the entirety of facts and circumstances, the court is satisfied that the finding of the Tribunal in this case accords with the ratio of the decision of the Supreme Court in Lovely Exports (supra)"

10. *We also deem it appropriate to take note of some of observations of the Hon'ble Delhi High Court from the decision of Fair Finvest Ltd. (supra). The Hon'ble Court has noticed proposition laid down by the Hon'ble Delhi High Court in the case of CIT Vs. Victor Electrodes Ltd., 329 ITR 271 (Delhi) regarding non*-production of share applicants before the AO. The followingobservations are worth to note:

...In this connection the observation of the jurisdictional High Court in case of Dwarkadhish Investment (Supra) are quite relevant where the court has observed that it is the revenue which has all the power and wherewithal to trace any person. Further in the case of CIT vs. VictorElectrodes Ltd. 329 ITR 271 it has been held that there is no legal obligation on the assessee to produce some Director or other representative of the Director or other representative of the applicant companies before the A.O. Therefore failure on part of the assessee to produce the Directors of the share applicant companies could not byitself have justified the additions made by the AO particularly when the seven share applicant companies through their present Directors have now again filed fresh affidavits confirming the application and allotment of shares with respect to the total amount of Rs.45 Lacs. It is observed that no attempt was made by the AO to summon the Directors of the share applicant companies. Moreover, it is settled law that the assessee need not prove the "source of source". Accordingly it was incumbent upon the department to have enforced attendance of Shri Mahesh Garg or the erstwhile Directors of the share applicant companies and confronted them with the evidences & affidavits relied upon by the appellant and there upon given opportunity to the assessee to cross examine these applicants."

11. *In the light of the above, let us examine the facts of the present case. A notice under section 143(2) providing an opportunity to make submission in support of return of income was served upon the assessee on 28.9.2012. Thereafter questionnaire under section 142(1) was issued on 26.12.2012. The AO has passed assessment order on 21.2.104. He expected the assessee to produce depositors on 14.2.2014 just in a few days*

before finalization of the assessment order. The Hon'ble Delhi High Court in all these cases have propounded that if the assessee has discharged primary onus by submitting confirmation, bank statements, copies of income-tax returns, PAN data then it would be construed that the assessee has discharged primary onus put upon it by virtue of section 68. It is the AO who has to carry out investigation and demonstrate that these materials are not sufficient for discharging the onus cast upon assessee by section 68. No such steps have been taken by the AO. He simply assumed that since the assessee was directed to produce applicants and it failed to produce, therefore, everything is to be construed as manipulated. The Hon'ble Delhi High Court did not approve such steps at end of the assessee. We also make reference to the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Goel Sons Golden Estate Pvt. Ltd., rendered in Tax Appeal No.212 of 2012 dated 11.4.2012. It is also pertinent to observe that share applicants in the present case are individuals from surrounding areas. They are not shell-companies from Kolkatta, who are indulged in providing accommodation entries. Taking into consideration all these facts, we are of the view that the AO failed to carry out any inquiry for falsifying evidence submitted by the assessee in support of its explanation. Therefore, we allow this ground of appeal and delete the addition of Rs.35,00,000/-."

D. The other ground being of insignificant amount, the same is not reproduced here.

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contd. from page 594

tax under the provisions of section 44BB and not section 44D. On the basis of the above the Tribunal held that the provision of comprehensive cementing services is directly associated with drilling operations and inextricably connected with prospecting, extraction or production of mineral oil. Accordingly, the payment would fall in the exclusion from "Fees for technical services" by virtue of explanation 2 to section 9(1)(vii). As the consideration would not qualify as fees for technical services, the applicability of section 44DA was ruled out at the threshold itself. Accordingly, the provisions of section 44BB was held applicable to the case. On the basis of the Delhi High Court decision in case of OHM Ltd 212 taxmann 440 held that even after amendment in Finance Act 2010 section 44BB being more specific provision shall prevail over section 44DA.

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Controversies

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Income from House Property

Issue:

Section 22 is the charging section for Income from House property and mandates that the Annual value of a property shall be chargeable to Income-tax under the head "Income from House property", with certain expectations.

Section 23 gives a mechanism to determine the ALV of the property for the purposes of section 22. As per section 23 the annual value of property shall be deemed to be under clause (a), the sum for which the property might reasonably be expected to be let out from year-to-year or under clause (b) when the property or any part thereof is let out and the actual rent received or receivable by the owner in respect thereof is in excess of the sum which is referred to in clause (a), then the amount so received or receivable would be deemed to be the annual value for the purposes of section 22.

In many of cases substantial amount of interest-free security deposit is being taken by the landlord and annual/monthly rent is fixed on the lower side.

Proposition:

When the assessee, as landlord has received a huge amount of security deposit from the tenant, notional interest cannot be added to ALV.

View against the proposition:

In the event a security deposit collected and refundable interest free and the monthly compensation shows a total mismatch or does not reflect the prevailing rate or the attempt is to deflate or inflate the rent by such methods, the AO is not prevented from carrying out necessary investigation and enquiry. He must have cogent and satisfactory material in his possession which will indicate that the parties have concealed the real position. He must not make a guess work or act on conjectures and surmises. There must be definite and positive material to indicate that the parties have suppressed the prevailing rate. Then the enquiries that the AO can make, would be for ascertaining the going rate. He can make a comparative study and an analysis. In that regard, transaction of identical or similar nature can be ascertained by obtaining the requisite details. However, there also the AO must safeguard against adopting the rates stated therein straightaway. He must find out whether the property which has been let out or given on leave and licence basis is of a similar nature, namely, commercial or residential. He should also satisfy himself whether the rate obtained by him from the deals and transactions and documents in relation there to can be applied or whether a departure therefrom can be made. Before the AO determines the rate by the above exercise or similar permissible process he is bound to disclose the material in his possession to the parties. He must not proceed to rely upon the material in his possession and disbelieve the parties. The satisfaction of the AO that the bargain reveals an inflated rate based on fraud, emergency, relationship and other considerations makes it unreasonable must precede the undertaking of the above exercise.

Where the owner of the property received interest-free security deposit, which was highly disproportionate to the monthly rent charged, it was inferred by the Revenue to be a device to circumvent liability to income tax so that notional interest, it was held, could be treated as income from house property in CIT Vs. K. Streetlite Electric Corporation (2011) 336 ITR 348 (P&H) after referring McDowell and Co. Ltd. Vs. CTO (1985) 154 ITR 148 (SC) for the inference that a measure of tax avoidance cannot be ignored by the AO. The high court felt that the rent could be the amount that can be reasonably expected to be paid from year to year. The High Court also referred to the decision of the Bombay High Court in CIT Vs. J. K. Investors (Bombay) Ltd. (2001) 248 ITR 723 (Bom), where such notional income was not accepted as part of rental income, but this decision was distinguished on the ground that it was not a case where an abnormal deposit was received to circumvent the law for avoiding tax. The High Court, however, had not appreciated that there is no avoidance of tax because the assessee is bound to account the income earned from security deposit as its income.

View in favour of proposition:-

Any deposit received from the tenant for property is a capital receipt and thus, it cannot be treated as income. Further while determining the actual rent, no notional interest on such deposit should be considered. The Delhi High Court in CIT Vs. Asian Hotels Ltd. (2008) 168 Taxman 59 (del) held that in the absence of any specific provision similar to one under the Wealth Tax Act, 1957, it is not permissible to consider notional interest as income either u/s. 23 or as one which is chargeable u/s. 28(iv).

Section 23(1)(a) requires determination of the “fair rent” being “the sum for which the property might reasonably be expected to let from year to year”. If on inquiry AO finds that the actual rent received is less than the “fair/market rent”because the assessee has received abnormally high interest free security deposit, he can undertake necessary exercise in that behalf. However, by no stretch of imagination, the notional interest on the interest free security can be taken as determinative factor to arrive at the “fair rent”. The ALV fixed by the Municipal Authorities can be the basis of adopting the ALV for purposes of section 23. Also in determining the reasonable/ fair rent, extraneous circumstances may inflate/ deflate the “fair rent” (CIT Vs. Moni Kumar Subba (2011) 333 ITR 38 (Del)(FB). See also CIT Vs. ShasthaPharmaLaboritiesPvt. Ltd. (2013) 355 ITR 316 (Kar.), CIT Vs. Tip top Typography (2014) 48 taxmann.com 191 (Bom) (2014) 90 CCH 0007 Mum HC)

The aforesaid conclusion is correct. We may record that permissibility of adding notional interest into actual market rent received was not approved by the Calcutta High Court in the case of CIT Vs. Satya Co. Ltd. [(1997)] 140 CTR (Cal) 569] and categorically rejected in the following words:

“There is no mandate of law whereby the AO could convert the depression in the rate of rent into money value by assuming the market rate of interest on the deposit as the further rent received by way of benefit of interest-free deposit. But s. 23, as already noted, does not permit such calculation of the value of the benefit of interest-free deposit as part of the rent. This situation is, however, foreseen by Schedule III to the WT Act and it authorises computation of presumptive interest at the rate of 15 per cent. as an integral part of rent to be added to the ostensible rent. No such provision, however, exists in the Act. That being so, the act of the AO in presuming such notional interest as integral part of the rent is ultra vires the provision of s. 23(1) and is, therefore, unauthorised. Though what has been urged on behalf of the Revenue is not to be brushed aside as irrational, yet the contention is not acceptable as the law itself comes short of tackling such fact-situation.”

This view of the Calcutta High Court has been accepted by a Division Bench of this Court as well in the case of Commissioner of Income Tax Vs. Asian Hotels Limited [(2008) 215 CTR (Del.) 84] holding that the notional interest on refundable security, if deposited, was neither taxable as profit or gain from business or profession under Section 28(iv) of the Act or income from house property under Section 23(1)(a) of the Act. Rationale given in this behalf was as under:

ITA No.499 of 2008 with ITA No.803 of 2007, ITA No.1113 of 2008, ITA No.388 of 2010, “A plain reading of the provisions indicates that the question of any notional interest on an interest free deposit being added to the income of an assessed on the basis that it may have been earned by the Assessee if placed as a fixed deposit, does not arise. Section 28(iv) is concerned with business income and is distinct and different from income from house property. It talks of the value of any benefit on perquisite, “whether convertible into money or not” arising from "the business or the exercise of a profession." It has been explained by this Court in Ravinder Singh that Section 28 (iv) can be invoked only where the benefit or perquisite is other than cash and that the term "benefit or amenity or perquisite" cannot relate to cash payments. In the instant case, the AO has determined the monetary value of the benefit stated to have accrued to the assessed by adding a sum that constituted 18% simple interest on the deposit. On the strength of Ravinder Singh, it must be held that this rules out the application of Section 28 (iv) of the Act.

Section 23(1)(a) is relevant for determining the income from house property and concerns determination of the annual letting value of such property. That provision talks of "the sum for which the property might reasonably be expected to let from year to year." This contemplates the possible rent that the property might fetch and not certainly the interest in fixed deposit that may be placed by the tenant with the landlord in connection with the letting out of such property. It must be remembered that in a taxing statute it would be unsafe for the Court to go beyond the letter of the law and try to read into the provision more than what is already provided for. The attempt by learned counsel for the Revenue to draw an analogy from the Wealth Tax Act, 1957 is also to no avail. It is an admitted position that there is a specific provision in the Wealth Tax Act which provides for considering of a notional interest whereas Section 23(1)(a) contains no such specific provision."

Summation:

Though *per se*, the notional interest on the interest-free security deposit can not be taken as the determinative factor to arrive at a 'fair rent' since the provisions of section 23(1)(*a*) do not mandate this, as per the majority of judicial views, if AO finds that the actual rent received is less than the 'fair/market rent' because of the reason that the assessee has received abnormally high interest-free security deposit and thereby, the actual rent received is less than the rent which the property might fetch, he can undertake necessary exercise in that behalf to fix the ALV u/s 23(1) of the Act. In the event the rent control legislation is applicable to the premises in question, then the AO has to undertake the exercise contemplated by the rent control legislation for fixation of standard rent.

The Hon'ble Bombay High Court in ***CIT* v. *Tip Top Typography* [2014] 48 taxmann.com 191/ [2015] 228 Taxman 244/[2014] 368 ITR 330 (Bombay)** clarified this as follows:

"In order to determine annual value of property, municipal rateable value may not be binding on Assessing Officer but that is only in cases where he is convinced that interest free security deposit and monthly compensation do not reflect prevailing rate and, in such a case, Assessing Officer can himself resort to enquire about prevailing rate in locality.

The market rate in the locality is an approved method for determining the fair rental value but it is only when the Assessing Officer is convinced that the case before him is suspicious, determination by the parties is doubtful that he can resort to enquire about the prevailing rate in the locality. The municipal rateable value may not be binding on the Assessing Officer but that is only in cases of afore-referred nature."

Though the notional interest on interest free security deposit cannot be directly added to the rental income to determine ALV of the property, yet the total mismatch between interest free security deposit collected and the monthly rent fixed can be a reasonable indicator for the AO to investigate further into the matter to arrive at the fair ALV by making necessary enquiries. [***CIT* v. *Moni Kumar Subba*[2011] 10 taxmann.com 195/199 Taxman 301/333 ITR 38 (Delhi)(FB)].**

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Judicial Analysis

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Agreement to Sale vs Transfer – Some useful Judgments

CIT *v.* Balbir Singh Maini [2017] 398 ITR 531 (SC)

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18. Section 53A, as is well known, was inserted by the Transfer of Property Amendment Act, 1929 to import into India the equitable doctrine of part performance. This Court has in *Shrimant Shamrao Suryavanshi*v. *Pralhad Bhairoba Suryavanshi* [2002] 3 SCC 676 stated as follows:

"16. But there are certain conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under Section 53-A of the Act. The necessary conditions are:

(*1*) there must be a contract to transfer for consideration of any immovable property;

(*2*) the contract must be in writing, signed by the transferor, or by someone on his behalf;

(*3*) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;

(*4*) the transferee must in part-performance of the contract take possession of the property, or of any part thereof;

(*5*) the transferee must have done some act in furtherance of the contract; and

(*6*) the transferee must have performed or be willing to perform his part of the contract."

19. It is also well-settled by this Court that the protection provided under Section 53A is only a shield, and can only be resorted to as a right of defence. *RambhauNamdeoGajre* v. *Narayan BapujiDhgotra* [2004] 8 SCC 614 ,para 10. An agreement of sale which fulfilled the ingredients of Section 53A was not required to be executed through a registered instrument. This position was changed by the Registration and Other Related Laws (Amendment) Act, 2001. Amendments were made simultaneously in Section 53A of the Transfer of Property Act and Sections 17 and 49 of the Indian Registration Act. By the aforesaid amendment, the words "the contract, though required to be registered, has not been registered, or" in Section 53A of the 1882 Act have been omitted. Simultaneously, Sections 17 and 49 of the 1908 Act have been amended, clarifying that unless the document containing the contract to transfer for consideration any immovable property (for the purpose of Section 53A of 1882 Act) is registered, it shall not have any effect in law, other than being received as evidence of a contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by a registered instrument. Section 17(1A) and Section 49 of the Registration Act, 1908 Act, as amended, read thus:

"17(1A). The documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then they shall have no effect for the purposes of the said Section 53A."

"49. Effect of non-registration of documents required to be registered.

No document required by Section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall—

(*a*) affect any immovable property comprised therein, or

(*b*) confer any power to adopt, or

(*c*) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1887 (1 of 1877) or as evidence of any collateral transaction not required to be effected by registered instrument."

20. The effect of the aforesaid amendment is that, on and after the commencement of the Amendment Act of 2001, if an agreement, like the JDA in the present case, is not registered, then it shall have no effect in law for the purposes of Section 53A. In short, there is no agreement in the eyes of law which can be enforced under Section 53A of the Transfer of Property Act. This being the case, we are of the view that the High Court was right in stating that in order to qualify as a "transfer" of a capital asset under Section 2(47)(v) of the Act, there must be a "contract" which can be enforced in law under Section 53A of the Transfer of Property Act. A reading of Section 17(1A) and Section 49 of the Registration Act shows that in the eyes of law, there is no contract which can be taken cognizance of, for the purpose specified in Section 53A. The ITAT was not correct in referring to the expression "of the nature referred to in Section 53A" in Section 2(47)(v) in order to arrive at the opposite conclusion. This expression was used by the legislature ever since sub-section (v) was inserted by the Finance Act of 1987 w.e.f. 01.04.1988. All that is meant by this expression is to refer to the ingredients of applicability of Section 53A to the contracts mentioned therein. It is only where the contract contains all the six features mentioned in *Shrimant Shamrao Suryavanshi* (*supra*), that the Section applies, and this is what is meant by the expression "of the nature referred to in Section 53A". This expression cannot be stretched to refer to an amendment that was made years later in 2001, so as to then say that though registration of a contract is required by the Amendment Act of 2001, yet the aforesaid expression "of the nature referred to in Section 53A" would somehow refer only to the nature of contract mentioned in Section 53A, which would then in turn not require registration. As has been stated above, there is no contract in the eye of law in force under Section 53A after 2001 unless the said contract is registered. This being the case, and it being clear that the said JDA was never registered, since the JDA has no efficacy in the eye of law, obviously no "transfer" can be said to have taken place under the aforesaid document. Since we are deciding this case on this legal ground, it is unnecessary for us to go into the other questions decided by the High Court, namely, whether under the JDA possession was or was not taken; whether only a licence was granted to develop the property; and whether the developers were or were not ready and willing to carry out their part of the bargain. Since we are of the view that sub-clause (v) of Section 2(47) of the Act is not attracted on the facts of this case, we need not go into any other factual question.

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RatnaTrayi Reality Services (P.) Ltd. *v.* ITO [2013] 356 ITR 493 (Gujarat)

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13. In view of such legal position, we may revisit the facts and ascertain for ourselves whether, on the basis of the reasons recorded by the Assessing Officer, it can be stated that he could form a belief that income chargeable to tax had escaped assessment. In our opinion, the

Assessing Officer has committed a grave error in issuing impugned notice on the basis of reasons recorded. As noted earlier, the petitioner had first entered into MOU to form a consortium of different entities to bid for a large piece of land which would require sizable investment. The petitioner participated in such auction proceedings. The bid was accepted being the highest. Petitioner, thereupon, entered into an agreement to sale with the society. Ultimately, as per the terms of the agreement and the understanding between the petitioner and other signatories to the MOU at the instance of the petitioner, the society entered into a separate sale deeds in favour of various parties. We fail to see how the revenue can contend that under such circumstances, there was escapement of income under the head of short term capital gain.

14. Section 45 of the Act pertains to 'capital gains'. Sub section (1) thereof provides inter alia that any profits or gains arising out of transfer of capital asset affected in the previous year shall be chargeable to income tax under the head 'Capital gains' and shall be deemed to be the income of the previous year in which the transfer took place. Essentially, requirement of attracting said provision to sub-section (1) of Section 45 therefore, is the transfer of capital asset. We fail to see how the revenue can contend that the petitioner had transferred any capital asset that too during the previous year relevant to assessment year under consideration. Merely because the petitioner entered into an agreement with the said society which agreement contained a clause that the final sale deed would be executed in favour of such other persons as the petitioner may indicate, by itself cannot give rise to a presumption that the land in question stood transferred in favour of the petitioner on the date of such agreement as contended by the revenue. The said agreement dated 08.04.2004 is a simple agreement to sale immovable property. The petitioner had paid part sale price at the time of execution of such agreement. Substantial portion of the sale price was yet to be paid. The petitioner was given instalments for doing so. The possession of the property was retained by the seller and was to be handed over only upon full payment of sale consideration. Merely because in addition to such terms the agreement also envisaged that the ultimate sale deeds may be executed in favour of the persons that the petitioner may indicate, by no way would convert such agreement to sale into one of sale deed.

15. Section 19 of the Transfer of Property Act only provides that where, on a transfer of property, an interest is created in favour of a person without specifying the time when it is to take effect, or specifying that it is to take effect forthwith or on the happening of any event which is certain, such interest is considered as a vested interest, unless a contrary intention appears from the terms of the transfer. Even if such provision is seen as creating a vested interest in the petitioner to ultimately purchase the land in question, the transfer would be completed only when actual sale deed takes place. By merely creating a vested right in the petitioner to compel the society to execute the sale deed at a later stage, would not by itself amount to actual transfer of the property on the date of the agreement. There may be variety of situations under which the ultimate sale deed may not take place. For example, if the petitioner itself fails to muster enough resources to pay the remaining sale price, the agreement to sale would fail. As per the terms of agreement; the seller may either forfeit the earnest money or a portion of the sale consideration deposited by the petitioner upfront but surely the sale would not be completed. In a given case after the agreement to sale, both parties may not ultimately execute the sale deed and cancel the agreement on mutually agreed terms. We can think of many other situations developing other situations between the agreement to sale and actual sale due to which, the final event of sale may never take place. The revenue's attempt therefore to equate an agreement to sale to one of the transfer of property, in our opinion, lacked any valid basis in law.

16. Section 5 of the Transfer of the Property Act, which is more relevant for our consideration pertains to definition of transfer of property and reads as under:

"5. "Transfer of Property" defined-In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, [or to himself] and one or more other living persons; and "to transfer property" is to perform such act.

[In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.]

17. Section 5 thus provides that transfer of property means an act by which living person conveys property, in present or in future, to one or more other living persons or to himself and one or more other living persons. In the present case, the society had not, by virtue of agreement dated 08.04.2004, transferred the property in favour of the petitioner. The society had only agreed to do so on certain terms and conditions. Most important condition being that of the purchaser paying remaining purchase price without which the sale could never be completed. In the meantime the possession of the land was retained by the society. An agreement to sale without there being anything more, obviously cannot be equated with transfer of property. Section 5 of the Transfer of Property Act also enforces this view.

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Suraj Lamp & Industries (P.) Ltd. *v.* State of Haryana [2011] 340 ITR 1 (SC)

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2. The *modus operandi* in such SA/GPA/WILL transactions is for the vendor or person claiming to be the owner to receive the agreed consideration, deliver possession of the property to the purchaser and execute the following documents or variations thereof:

(*a*) An Agreement of sale by the vendor in favour of the purchaser confirming the terms of sale, delivery of possession and payment of full consideration and undertaking to execute any document as and when required in future.

Or

An agreement of sale agreeing to sell the property, with a separate affidavit confirming receipt of full price and delivery of possession and undertaking to execute sale deed whenever required.

(*b*) An Irrevocable General Power of Attorney by the vendor in favour of the purchaser or his nominee authorizing him to manage, deal with and dispose of the property without reference to the vendor.

Or

A General Power of Attorney by the vendor in favour of the purchaser or his nominee authorizing the attorney holder to sell or transfer the property and a Special Power of Attorney to manage the property.

(*c*) A will bequeathing the property to the purchaser (as a safeguard against the consequences of death of the vendor before transfer is effected).

These transactions are not to be confused or equated with genuine transactions where the owner of a property grants a power of Attorney in favour of a family member or friend to manage or sell his property, as he is not able to manage the property or execute the sale, personally. These are transactions, where a purchaser pays the full price, but instead of getting a deed of conveyance gets a SA/GPA/WILL as a mode of transfer, either at the instance of the vendor or at his own instance.

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Relevant Legal Provisions

7. Section 5 of the Transfer of Property Act, 1882 ('TP Act' for short) defines 'transfer of property' as under:

"5. Transfer of Property defined : In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself [or to himself] and one or more other living persons; and "to transfer property" is to perform such act."

Section 54 of the TP Act defines 'sales' thus:

"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made. Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale.-A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property."

Section 53A of the TP Act defines 'part performance' thus :

"**Part Performance**. - Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract :

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

8. We may next refer to the relevant provisions of the Indian Stamp Act, 1999 (Note: Stamp Laws may vary from state to state, though generally the provisions may be similar). Section 27 of the Indian Stamp Act, 1899 casts upon the party, liable to pay stamp duty, an obligation to set forth in the instrument all facts and circumstances which affect the chargeability of duty on that instrument. Article 23 prescribes stamp duty on 'Conveyance'. In many States appropriate amendments have been made whereby agreements of sale acknowledging delivery of possession or power of Attorney authorizes the attorney to 'sell any immovable property are charged with the same duty as leviable on conveyance.

9. Section 17 of the Registration Act, 1908 which makes a deed of conveyance compulsorily registrable. We extract below the relevant portions of section 17.

"Section 17 - *Documents of which registration is compulsory*.—(1) The following documents shall be registered, namely:—

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Overview of US tax reform

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Background

On 22 December 2017, US President Donald Trump signed into law the Tax Cuts and Jobs Act of 2017 (TCJA) which has been described as the most significant US tax law change in a generation.

Overall, the tax changes are a net tax cut for corporations, however more than a few companies will end up paying more in taxes as a result of the changes. A careful review of each companies' fact patterns will be needed in order to estimate the post-law change after-tax cash flow for many companies. The new tax law contains a number of substantial changes for companies doing business in the US, most of which will be effective 01 January 2018 for calendar year taxpayers. The more significant changes can be separated into two different categories: (i)general corporate income tax changes; and (ii) international tax changes, both of which contain provisions to encourage investment in the US.

The more significant general corporate income tax changes include:

- Reduction of the 35% US corporate income tax rate to 21%;
- Temporary immediate expensing for qualified depreciable property;
- Limitations on the ability to deduct related and unrelated party interest expense (30% of EBITDA, changed to EBIT in 2022);
- Anti-hybrid rules that may disallow a deduction for certain related party interest and royalty payments;
- Limitation on utilization of net operating losses (NOLs) to offset only 80% of prospective taxable income, but NOLs can be carried forward indefinitely (existing NOLs are grandfathered); and
- Changes to deductibility of executive compensation for certain public US companies.

Most of these changes are intended to make the US tax system more competitive on a global basis, in particular the rate reduction and immediate expensing opportunity. The changes also had the effect of adopting certain of the OECD's Base Erosion and Profit Shifting (BEPS)proposals, including the increase limitation on interest deductions and anti-hybrid provisions.

In addition to the changes above, the US modified its system of international taxation. The following summarize some of the key changes to the international tax rules:

- Limited participation exemption regime
- Imposition of a one-time transition tax on US persons with untaxed offshore earnings, levied at a 15.5% rate for cash/cash equivalents and 8% rate for the balance (payable over eight years)
- Reduced income tax rates for deemed intangible income earned from exports - 13.125% until 2025(referred to as Foreign Derived Intangible Income, or FDII)
- Limitations on the ability to benefit from tax deductions for certain payments made to foreign related parties (referred to as the Base Erosion and Anti-Abuse Tax, or BEAT), and
- New controlled foreign corporation(CFC) rule that subjects deemed intangible income of a CFC to a residual US tax to the extent the CFC income is not subject to high enough rate of foreign tax(referred to as Global Intangible Low Taxed Income, or GILTI)

For a company considering the location of a manufacturing facility, service shub or global rights to intangible property, the incentivized tax rate of 13.125% under the FDII regime maybe just enough to encourage that investment to be made in the US rather than outside of the US (when taking other considerations into account like infrastructure, education levels, the rule of law, etc.). Similarly, multinational corporation may think twice before housing functions, risks or intangible assets used by the US outside of the US if the US company will not benefit from a tax deduction upon making payments to foreign related parties under the BEAT (particularly if the jurisdiction of the foreign related party is going to tax the payment). The new CFC rule should also discourage US multinationals from moving intangible property offshore if the income earned from such IP is going to be subject to a residual US tax under the GILTI regime, thus reducing any tax benefits from moving the IP.

We have summarized below the key TCJA provisions affecting corporate tax base:

Provision	**Description**
Net interest expense limitation	• Limits deduction to net interest expense that exceeds 30% of adjusted taxable income (ATI) plus business interest income. • Initially, ATI computed without regard to depreciation, amortization or depletion. Beginning in 2022, ATI would be decreased by those items.
Expensing (provided under Section 168(k) bonus depreciation)	• Immediate deduction of qualified property placed in service after September 27, 2017 and before 2023. • Increased expensing phases-down starting in 2023 by 20 percentage points for each of the five following years. • Eliminates original use requirement. • Taxpayers may elect to apply 50% expensing for the first tax year ending after September 27, 2017.
Net operating losses (NOL)	• Limits NOLs to 80% of taxable income for losses arising in tax years starting after 2017. • Generally repeals carry back provisions • Allows NOLs to be carried forward indefinitely, subject to interest rate adjustment.
Domestic dividends received deduction (DRD)	• Retains the 100% dividends received deduction for members of the same consolidated group, reduces the deduction for dividends received from a 20% owned corporation from 80% to 65%, and reduces the deduction for less than 20 percent owned corporations from 70% to 50%
Foreign dividends received deduction (DRD)	• Domestic corporations allowed a 100% deduction for the foreign-source portion of dividends received from 10% owned (vote or value) foreign subsidiaries. • Deduction is not available for capital gains or directly-earned foreign income.
Amortization of research and experimentation expenditures	• Requires amortization of domestic research and experimentation (R&E) expenditures over five years. • 15 year amortization for R&E conducted outside the US. • R&E specifically includes expenses for software development. • Requires amortization for expenses incurred in tax years beginning after 2021.
Transition tax	• One-time transition tax on post-1986 earnings of 10% owned foreign subsidiaries accumulated in periods of 10% US corporate shareholder ownership. • 15.5% rate on cash and cash equivalents, and 8% rate on the remainder.

Global Intangible Low Taxed Income (GILTI)	• This provision is meant to discourage the location of high-value activities outside the US. • It functions as a mandatory annual inclusion of global intangible low taxed income (GILTI) determined on an aggregate basis for all controlled foreign corporations owned by the same US shareholder, with partial credits for foreign taxes properly attributable to the GILTI amount. • The GILTI inclusion effectively taxes foreign earnings in excess of a 10% rate of return on fixed assets at a reduced rate by providing a 50% deduction initially (subject to certain limitations), reduced to 37.5% for tax years beginning after 2025. At a 21% federal corporate tax rate, the deduction results in effective rates of 10.5% and 13.125% respectively)
Foreign Derived Intangible Income (FDII)	• This provision is generally designed to encourage locating intangible assets in the US by providing a lower effective tax rate on high-returns related to foreign sales. While this calculation is more complex than GILTI, the calculation is similar in that returns in excess of 10% of fixed assets form the basis of the calculation. • This is achieved by providing domestic corporations a deduction against foreign-derived intangible income (subject to certain limitations) of 37.5% initially, reduced to 21.875% for tax years beginning after 2025. At a 21% federal corporate tax rate, the deduction results in effective rates of 13.125% and 16.40625% respectively.
Base Erosion Anti-Abuse Tax (BEAT)	• The BEAT functions as a minimum tax which will be paid by taxpayers with significant payments to foreign related entities. • If certain thresholds are met (e.g., a global corporate group which has a three-year annual average of at least $500 million of gross receipts), BEAT is levied on an applicable taxpayer's taxable income determined without regard to certain deductible amounts paid or accrued to foreign related persons; depreciation or amortization on property purchased from foreign related persons; and certain reinsurance payments to foreign related persons. • Generally 10% rate for tax years beginning before 2026, and 12.5% thereafter (but 11% and 13.5% for banks and registered securities dealers).

Concluding remarks

Overall, the tax law changes are beneficial for most companies. The significant corporate income tax rate reduction, the immediate expensing for qualified property purchases, FDII and the limited participation exemption regime could make up for the adverse law changes like the interest expense limits, the BEAT and GILTI. We anticipate that the new laws will encourage investment in the US, in particular in the M&A space, and could encourage US multinationals to invest off-shore when the investments makes sense from a business perspective. Thus, while corporate taxation is still a significant consideration for any return on capital analysis, the good news is that with respect to the US, it should be less of a significant hindrance to investing in the US, or outside of the US for US multinationals

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FEMA Updates

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20 Master Direction – Foreign Investment in India

Foreign Investment in India is regulated in terms of clause (b) sub-section 3 of section 6 and section 47 of the Foreign Exchange Management Act, 1999 (FEMA) read with Foreign Exchange Management (Transfer or Issue of a Security by a Person resident Outside India) Regulations, 2017 issued vide Notification No. FEMA 20(R)/2017-RB dated November 7, 2017. These Regulations are amended from time to time to incorporate the changes in the regulatory framework and published through amendment notifications.

2. Within the contours of the Regulations, Reserve Bank of India also issues directions to Authorised Persons under Section 11 of the Foreign Exchange Management Act (FEMA), 1999. This Master Direction lays down the modalities as to how the foreign exchange business has to be conducted by the Authorised Persons with their customers/ constituents with a view to implementing the regulations framed.

3. Instructions issued on Foreign Investment in India and its related aspects under the FEMA have been compiled in this Master Direction. The list of underlying circulars/ notifications which form the basis of this Master Direction is furnished in the Appendix.

4. Reporting instructions can be found in Master Direction on Reporting (Master Direction No. 18 dated January 1, 2016). The person/ entity responsible for filing such reports shall be liable for payment of late submission fee for any delays in reporting.

5. It may be noted that, whenever necessary, Reserve Bank shall issue directions to Authorised Persons through A.P. (DIR Series) Circulars in regard to any change in the Regulations or the manner in which relative transactions are to be conducted by the Authorised Persons with their customers/ constituents and/ or amend the Master Direction issued herewith. This Master Direction has been issued under sections 10(4) and 11(1) of the Foreign Exchange Management Act, 1999 (42 of 1999) and are without prejudice to permissions/ approvals, if any, required under any other law.

FED Master Direction No. 11/2017-18 dated January 4, 2018 (updated as on January 12, 2018)

For Appendix and full text refer:https://rbi.org.in/Scripts/BS_View MasDirections.aspx?id=11200

21 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.

2. 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.

3. 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.

4. The aforesaid Master Direction No. 5 dated January 01, 2016 is being updated to reflect the changes.

5. The directions contained in this circular have been issued under section 10(4) and 11(2) of the Foreign Exchange Management Act, 1999 (42 of 1999) and are without prejudice to permissions / approvals, if any, required under any other law.

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

For full text refer to: https://rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=11198

22 Risk Management and Inter-bank Dealings: Revised guidelines relating to participation of a person resident in India and Foreign Portfolio Investor (FPI) in the Exchange Traded Currency Derivatives (ETCD) Market

This refers to Foreign Exchange Management (Foreign Exchange Derivative Contracts) Regulations, 2000 dated May 3, 2000 (Notification No. FEMA.25/RB-2000 dated May 3, 2000), as amended from time to time, A.P. (DIR Series) Circular No. 90 dated March 31, 2015 relating to participation of a person resident in India in the Exchange traded currency derivatives (ETCD) market, A.P. (DIR Series) Circular No. 91 dated March 31, 2015 relating to participation of a Foreign Portfolio Investor (FPI) in the ETCD market.

2. Currently, persons resident in India and FPIs are allowed to take a long (bought) or short (sold) position in USD-INR upto USD 15 million per exchange without having to establish existence of underlying exposure. In addition, residents & FPIs are allowed to take long or short positions in EUR-INR, GBP-INR and JPY-INR pairs, all put together, upto USD 5 million equivalent per exchange without having to establish existence of any underlying exposure.

3. It has now been decided to permit persons resident in India and FPIs to take positions (long or short), without having to establish existence of underlying exposure, upto a single limit of USD 100 million equivalent across all currency pairs involving INR, put together, and combined across all exchanges.

4. The onus of complying with the provisions of this circular rests with the participant in the ETCD market and in case of any contravention the participant shall be liable to any action that may be warranted as per the provisions of Foreign Exchange Management Act, 1999 and the regulations, directions, etc. issued thereunder. These limits shall also be monitored by the exchanges, and breaches, if any, may be reported to the Reserve Bank of India.

5. All other operational guidelines, terms and conditions shall remain unchanged.

6. This circular has been issued under Sections 10(4) and 11(1) of the Foreign Exchange Management Act, 1999 (42 of 1999) and is without prejudice to permissions/approvals, if any, required under any other law.

A. P. (DIR Series) Circular No. 18 February 26, 2018

For full text refer: https://rbidocs.rbi.org.in/rdocs/Notification/PDFs/134APDIR26021839B2053698A94 BFDA0CA65D3936FFAF3.PDF

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GST Updates

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Clarifications regarding GST in respect of certain services (Circular no 32/06/2018-GST)

Sr No	ISSUE	CLARIFICATION
1	Is hostel accommodation provided by Trusts to students covered within the definition of Charitable Activities and thus, exempt under Sl. No. 1 of notification No. 12/2017-CT (Rate).	Hostel accommodation services do not fall within the ambit of charitable activities as defined in para 2(r) of notification No. 12/2017-CT(Rate). However, services by a hotel, inn, guest house, club or camp site, by whatever name called, for residential or lodging purposes, having declared tariff of a unit of accommodation below one thousand rupees per day or equivalent are exempt. Thus, accommodation service in hostels including by Trusts having declared tariff below one thousand rupees per day is exempt. [Sl. No. 14 of notification No. 12/2017-CT(Rate) *refers*]
2	Is GST leviable on the fee/amount charged in the following situations/cases: – (1) A customer pays fees while registering complaints to Consumer Disputes Redressal Commission office and its subordinate offices.These fees are credited into State Customer Welfare Fund's bank account. (2) Consumer Disputes Redressal Commission office and its subordinate offices charge penalty in cash when it is required. (3) When a person files an appeal to Consumers Disputes Redressal Commission against order of District Forum, amount equal to 50% of total amount imposed by the District Forum or Rs 25000/- whichever is less, is required to be paid.	Services by any court or Tribunal established under any law for the time being in force is neither a supply of goods nor services. Consumer Disputes Redressal Commissions (National/ State/ District) may not be tribunals literally as they may not have been set up directly under Article 323B of the Constitution. However, they are clothed with the characteristics of a tribunal on account of the following: - (1) Statement of objects and reasons as mentioned in the Consumer Protection Bill state that one of its objects is to provide speedy and simple redressal to consumer disputes, for which a quasijudicial machinery is sought to be set up at District, State and Central levels. (2) The President of the District/ State/National Disputes Redressal Commissions is a person who has been or is qualified to be a District Judge, High Court Judge and Supreme Court Judge respectively. (3) These Commissions have been vested with the powers of a civil court under CPC for issuing summons, enforcing attendance of defendants/ witnesses, reception of evidence, discovery/ production of documents, examination of witnesses, etc. (4) Every proceeding in these Commissions is deemed to be judicial proceedings as per sections 193/228 of IPC. (5) The Commissions have been deemed to be a civil court under CrPC.

Sr No	ISSUE	CLARIFICATION
		(6) Appeals against District Commissions lie to State Commission while appeals against the State Commissions lie to the National Commission. Appeals against National Commission lie to the Supreme Court. In view of the aforesaid, it is hereby clarified that fee paid by litigants in the Consumer Disputes Redressal Commissions are not leviable to GST. Any penalty imposed by or amount paid to these Commissions will also not attract GST.
3	Whether the services of elephant or camel ride, rickshaw ride and boat ride should be classified under heading 9964 (as passenger transport service) in which case, the rate of tax on such services will be 18% or under the heading 9996 (recreational, cultural and sporting services) treating them as joy rides, leviable to GST@ 28%?	Elephant/ camel joy rides cannot be classified as transportation services. These services will attract GST @ 18% with threshold exemption being available to small service providers. [Sl. No 34(iii) of notification No. 11/2017-CT(Rate) dated 28.06.2017 as amended by notification No. 1/2018-CT(Rate) dated 25.01.2018 *refers*]
4	What is the GST rate applicable on rental services of self-propelled access equipment (Boom Scissors/ Telehandlers)? The equipment is imported at GST rate of 28% and leased further in India where operator is supplied by the leasing company, diesel for working of machine is supplied by customer and transportation cost including loading and unloading is also paid by the customer.	Leasing or rental services, with or without operator, for any purpose are taxed at the same rate of GST as applicable on supply of like goods involving transfer of title in goods. Thus, the GST rate for the rental services in the given case shall be 28%, provided the said goods attract GST of 28%. IGST paid at the time of import of these goods would be available for discharging IGST on rental services. Thus, only the value added gets taxed. [Sl. No 17(vii) of notification No. 11/2017- CT(Rate) dated 28.6.17 as amended *refers*].
5	Is GST leviable in following cases: (1) Hospitals hire senior doctors/ consultants/ technicians independently, without any contract of such persons with the patient; and pay them consultancy charges, without there being any employer employee relationship. Will such consultancy charges be exempt from GST? Will revenue take a stand that they are providing services to hospitals and not to patients and hence must pay GST? (2) Retention money: Hospitals charge the patients, say, Rs.10000/- and pay to the consultants/ technicians only Rs. 7500/ - and keep the balance for providing ancillary services which include nursing care, infrastructure facilities, paramedic care, emergency services, checking of	Health care services provided by a clinical establishment, an authorised medical practitioner or para-medics are exempt. [Sl. No. 74 of notification No. 12/2017- CT(Rate) dated 28.06.2017 as amended *refers*]. (1) Services provided by senior doctors/ consultants/ technicians hired by the hospitals, whether employees or not, are healthcare services which are exempt. (2) Healthcare services have been defined to mean any service by way of diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognized system of medicines in India[para 2(zg) of notification No. 12/2017- CT(Rate)]. Therefore, hospitals also provide healthcare services. The entire amount charged by them from the patients including the retention

Sr No	ISSUE	CLARIFICATION
	temperature, weight, blood pressure etc. Will GST be applicable on such money retained by the hospitals? (3) Food supplied to the patients: Health care services provided by the clinical establishments will include food supplied to the patients; but such food may be prepared by the canteens run by the hospitals or may be outsourced by the Hospitals from outdoor caterers. When outsourced, there should be no ambiguity that the suppliers shall charge tax as applicable and hospital will get no ITC. If hospitals have their own canteens and prepare their own food; then no ITC will be available on inputs including capital goods and in turn if they supply food to the doctors and their staff; such supplies, even when not charged, may be subjected to GST.	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 are taxable.
6	Appropriate clarification may be issued regarding taxability of Cost Petroleum.	As per the Production Sharing Contract(PSC) between the Government and the oil exploration & production contractors, in case of a commercial discovery of petroleum, the contractors are entitled to recover from the sale proceeds all expenses incurred in exploration, development, production and payment of royalty. Portion of the value of petroleum which the contractor is entitled to take in a year for recovery of these contract costs is called “Cost Petroleum”. The relationship of the oil exploration and production contractors with the Government is not that of partners but that of licensor/lessor and licensee/lessee in terms of the Petroleumand Natural Gas Rules, 1959. Having acquired the right to explore, exploit and sell petroleum in lieu of royalty and a share in profit petroleum, contractors carry out the exploration and production of petroleum for themselves and not as a service to the Government. Para 8.1 of the Model Production Sharing Contract (MPSC) states that subject to theprovisions of the PSC, the Contractor shall have exclusive right to carry out Petroleum Operations to recover costs and expenses as provided in this Contract. The oil exploration and production contractors conduct all petroleum operations at their sole risk, cost and expense. Hence, cost petroleum is not a consideration for service to GOI and thus not taxable per se. However, cost petroleum may be an indication of the value of mining or exploration services provided by operating member to the joint venture, in a situation where the operating member is found to be supplying service to the oil exploration and production joint venture.

GST & VAT Judgments

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[I] Important Judgment:

[i] Hon. High Court of Gauhati in case of Sonipur Solvex Ltd. regarding classification of Goods.

Issue:

Whether Rice Bran and de-oiled Rice bran are one and same product and de-oiled Rice Bran would be covered under Entry No. 34 of Part A of Assam Vat Act?

Held:

Hon. High Court has decided that Rice bran and de-oiled Rice bran are one and the same product and would cover under Entry No. 34 of Assam Vat Act.

This judgment is useful so far the dealers of Gujarat are concerned because in Gujarat so many rice mills are working and therefore this judgment will be useful to them.

Gist of the judgment is as under.

The assessee was engaged in the manufacture of rice bran oil from rice bran. After extraction of oil, the rice bran was sold as de-oiled rice bran, which was essentially used as cattle feed.

It claimed exemption from tax in respect of de-oiled rice bran under Entry No. 3 of the First Schedule of the Assam Value Added Tax, 2003 [VAT ACT].

The Assessing Authority held that de-oiled rice bran was very much covered under Entry No. 34 of Part A of the Second Schedule of the Vat Act and was taxable at the rate of 4 per cent.

A conjoint reading of Entry No. 3of the First Schedule and Entry No. 34 of Part A of the Second Schedule makes it clear that rice bran is excluded from the list of exempted goods and has been included in the list of goods taxable. The question, therefore, is whether rice bran and de-oiled rice bran are one and the same or different products. If both are one and the same product, then de-oiled rice bran shall be a taxable goods. In the case of Oil Seeds, Oil Trade and Industry's Association v. State of Karnataka [1998] 111 STC 234, the Karnataka High Court after examining various reports by giving cogent reasons has already held that rice bran and de-oiled rice bran are one and the same product. The decision of the Karnataka High Court is directly on the point. Not only this, the decision of Karnataka High Court has also been approved and followed by the Calcutta High Court in the case of Sethia Oils Ltd. v. Assistant Commissioner, Commercial Taxes [2004] 137 STC 41. The Calcutta High Court has even held that since there is no change in the composition of rice bran and de-oiled rice bran , both the products are same and de-oiled rice bran is rice bran and nothing else. After perusing the decisions, one also finds in complete agreement with the conclusion of both the Karnataka High Court and Calcutta High Courts is that rice bran and de-oiled rice bran are one and same product.

The Learned Counsel for the Petitioner has relied upon a Division Bench decision dated 06.10.2010 of the Karnataka High Court rendered in Raichur Solvents Ltd. v. The Commissioner of Commercial Taxes [S.T.A. No. 702/2010 dated 06.10.2010] Karnataka, wherein it is held that De-Oiled Rice Bran is also included in the list of exempted goods i.e. First Schedule of Karnataka Sales Tax Act, 1957. In that case, the issue was whether De-Oiled Rice Bran falls under First Schedule, which contains the list of exempted goods. In Entry No.5 of the First Schedule, mostly products of animal feed including De-Oiled

Cake and feed supplements are mentioned. No cattle feed is shown to be included from this Entry. And since De-Oiled Rice Bran is used as Cattle Feed in the form of cake, the Division Bench comparing it with De-Oiled Cake, has held the same to be also in the list of exempted goods. But the Division Bench has nowhere held that De-Oiled Rice Bran and Rice Bran, which is also essentially used as cattle feed, are different products. Unlike Entry No. 5 of the First Schedule of Karnataka Sales Tax Act, 1957, the Assam State Legislature, in the Act of 2003, has consciously excluded Rice Bran from similar Entry No. 3 of the list of exempted goods i.e. First Schedule and included it in the list of goods taxable i.e. Second Schedule.

Held:

Meaning thereby, the State Legislature has made product 'Rice Bran' in any form taxable. The Division Bench decision of the Karnataka High Court is, therefore, distinguishable and does not help the petitioner.

[ii] Hon. Madras High Court in case of Mahaveer Trading Co. v. Asst. Commissioner has decided that input Tax Credit on purchase of Rep and Depb held admissible under the Tamilnadu Value Added Tax.

Facts:

The assessee is a dealer registered under the Act. The assessee claimed tax credit in respect of REP License and DEPB. The assessing officer rejected the claim on the ground that REP and DEPB are not goods falling under the First Schedule. The assessing officer, accordingly, passed assessment orders and raised dues against the assessee. Being aggrieved, the assessee filed writ petition before the Madras High Court.

Held:

The Hon. High Court held that the assessing officer while issuing the notice, accepted that DEPB licenses are considered as goods but denied the relief to the assessee on the sole ground that the goods do not fall under the First Schedule. If that is so, how the assessing officer should treat the transaction especially, when the assessee has taken a stand that the facts in the case of Shah Kantilal Jayantilal, were entirely different.

The Hon. High Court observed the important aspect, which the assessing officer had failed to take into consideration is the advance ruling given by the authority under section 48A of the Act. The said ruling is binding on the assessing officer. The assessing officer cannot get over the advance ruling unless and until, the assessing officer is able to establish that the said ruling will not apply to the facts of the present case.

The Hon. High Court held that though the said clarification would not be binding on the assessing officer, yet it should be of persuasive value, since it was clarified that if the dealers resold DEPB license, they have to pay tax and it is further clarified that in that event, they are eligible to input tax credit to the extent of DEPB license resold by them. The Hon. High Court directed that the assessing officer should re-consider the matter afresh taking note of the factual issues. The assessment orders came to be quashed and writ petitions came to be allowed.

[ii] Hon. Allahabad High Court in case of Ghoop Kishore Pramodkumar v Commissioner of VAT Tax has decided that the Raw Material purchase on Tax free basis is used in the manufacturing of Goods not directly but ultimately exported, whether claim of Export Sales is correct ?

Facts:

The assessee is a dealer registered under the Act. The assessee purchased menthe oil on tax free basis in terms of the exemption notification. The oil so purchased was used in manufacture of menthol. The goods manufactured by the

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Corporate Law Update

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1. Amendments to the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016:

W. e. f. 07.02.2018, following amendments have been made:

a. The Resolution Professional shall appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor. After the receipt of resolution plans, the resolution professional shall provide the fair value and the liquidation value to each member of the committee of creditors in electronic form, on receiving a confidentiality undertaking. The resolution professional and registered valuers shall maintain confidentiality of the fair value and the liquidation value.

b. The Resolution Professional shall submit the information memorandum in electronic form to each member of the committee of creditors within two weeks of his appointment as resolution professional and to each prospective resolution applicant latest by the date of invitation of resolution plan, on receiving confidentiality undertaking.

c. The Resolution Professional shall issue an invitation, including the evaluation matrix, to the prospective resolution applicants. He may modify the invitation as well as the evaluation matrix. However, the prospective resolution applicant shall get at least 30 days from the issue of invitation or modification thereof, whichever is later, to submit resolution plans. Similarly, he will get at least 15 days from the issue of evaluation matrix or modification thereof, whichever is later, to submit resolution plans. An abridged invitation shall be available on the web site, if any, of the corporate debtor, and on the web site, if any, designated by the IBBI for the purpose.

d. While the Resolution Applicant shall continue to specify the sources of funds that will be used to pay insolvency resolution process costs, liquidation value due to operational creditors and liquidation value due to dissenting financial creditors, the committee of creditors shall specify the amounts payable from resources under the resolution plan for these purposes.

e. A Resolution Plan shall provide for the measures, as may be necessary, for insolvency resolution of the corporate debtor for maximization of value of its assets. These may include reduction in the amount payable to the creditors, extension of a maturity date or a change in interest rate or other terms of a debt due from the corporate debtor, change in portfolio of goods or services produced or rendered by the corporate debtor, and change in technology used by the corporate debtor.

f. The Resolution Professional shall submit the resolution plan approved by the committee of creditors to the Adjudicating Authority, at least 15 days before the expiry of the maximum period permitted for the completion of the corporate insolvency resolution process.

2. Notification regarding Exemption to Government Companies under section 129(6) of Companies Act, 2013 from recognizing Deferred Tax Assets/ Deferred Tax Liability under AS-22/Ind AS-12:

The provisions of Accounting Standard 22 or Indian Accounting Standard 12 relating to deferred tax asset or deferred tax liability shall not apply, for seven years with effect from the 1st April, 2017, to a Government company which:—

(a) is a public financial institution under sub-clause (iv) of clause (72) of section 2 of the Companies Act, 2013;

(b) is a Non-Banking Financial Company registered with the Reserve Bank of India under section 45-IA of the Reserve bank of India Act, 1934; and

(c) is engaged in the business of infrastructure finance leasing with not less than seventy five per cent. of its total revenue being generated from such business with Government companies or other entities owned or controlled by Government.

[F. No. 17/32/2017-CL-V dated 05.02.2018]

3. Companies (Registered Valuers and Valuation) Amendment Rules, 2018:

Vide the Companies (Registered Valuers and Valuation) Amendment Rules, 2018, in the Companies (Registered Valuers and Valuation) Rules, 2017, in rule 11, for the figures, letters and word "31st March, 2018", occurring at both the places, the figures, letters and word "30th September, 2018" shall be submitted.

Now, the revised Rule 11 shall be read as under:

"Any person rendering valuation services under the Companies Act, 2013, on the date of commencement of Companies (Registered Valuers and Valuation) Rules, may continue to render valuation services without a certificate of registration under these rules up to 30th September, 2018.

Provided that if a company has appointed any valuer before such date and the valuation or any part of it has not been completed before 30th September, 2018, the valuer shall complete such valuation or such part within three months thereafter."

[F. No. 1/27/2013-CL-V (Part) dated 09.02.2018]

4. NOTIFICATION OF PROVISIONS OF COMPANIES (AMENDMENT) ACT, 2017:

The Ministry of Corporate Affairs has appointed 09th February, 2018, as the date on which the following provisions of Companies (Amendment) Act, 2017, shall come into force.

Sr. No.	Sections of Companies (Amendment)Act, 2017 effectivefrom 09.02.2018	Amended Section of Companies Act, 2013	Title
1	Section 2 (except clause (i) and clause(xiii))	Section 2 (except clause 6 andclause 87)	Definitions w.r.t Cost Accountant 2(28), Debenture 2(30), Financial Year 2(41), Holding Company 2(46), Interested Director 2(49) (omitted), Key Managerial Personnel 2(51), Networth 2(57), Public Company 2(71), Public Financial Institution 2(72), Related Party 2(76), Small Company 2(85), Turnover 2(91), have been amended. Definitions w.r.t. Associate Company & Subsidiary Company has not yet been notified.
2	Section 3	Insertion of Section 3A	Member severally liable in certain cases.
3	Section 7	Section 21	Authentication of Documents, Proceedings & Contracts.
4	Section 9	Section 35	Civil liability for mis-statements in prospectus.
5	Section 11	Section 47	Voting Rights.
6	Section 12	Section 53	Prohibition on issue of shares at discount.

7	Section 14	Section 62	Further issue of share capital.
8	Section 17	Section 76A	Punishment in contravention of acceptance of deposits.
9	Section 27	Section 100	Calling of Extra-General Meeting.
10	Section 28	Section 101	Notice of Meeting.
11	Section 29	Section 110	Postal Ballot.
12	Section 32	Section 123	Declaration of Dividend
13	Section 34	Section 130	Re-opening of accounts on court's or Tribunal's order.
14	Section 35	Section 132	Constitution of National Financial reporting Authority(NFRA).
15	Section 38	Section 136	Right of member to copies of audited financial statement.
16	Section 41	Section 140	Removal, resignation of auditor and giving of special notice
17	Section 42	Section 141	Eligibility, qualifications and disqualifications of auditors
18	Section 43	Section 143	Powers and duties of auditors and auditing standards.
19	Section 44	Section 147	Punishment on contravention of provisions relating to appointment of auditors (Section 139 to Section 146).
20	Section 45	Section 148	Central Government to specify audit of items of cost in respect of certain companies.
21	Section 47	Section 152	Appointment of directors.
22	Section 48	Section 153	Application for allotment of DIN.
23	Section 50	Section 160	Right of persons other than retiring directors to stand for directorship.
24	Section 51	Section 161	Appointment of additional director, alternate director and nominee director.
25	Section 53	Section 165	Number of directorships.
26	Section 59	Section 180	Restrictions on powers of Board.
27	Section 60	Section 184	Disclosure of interest by directors
28	Section 63	Section 188	Related Party Transactions
29	Section 64	Section 194	Prohibition on forward dealings in securities of company by director or key managerial personnel (Omitted)
30	Section 64	Section 195	Prohibition on insider trading of securities (Omitted)
31	Section 72	Section 223	Inspector's Report
32	Section 73	Section 236	Purchase of minority shareholding
33	Section 74	Section 247	Valuation by registered valuers
34	Section 77	Section 379	Application of Act to Foreign Companies
35	Section 78	Section 384	Debentures, Annual return, registration of charges, books of Account and their inspection

36	Section 79	Section 391	Application of section 34 to 36 and Chapter XX (Winding Up)
37	Section 82	Section 409	Qualification of president and Members of National Company Law Tribunal(NCLT)
38	Section 84	Section 411	Qualification of Chairperson and Members of National Company Law Appellate Tribunal (NCLAT)
39	Section 85	Section 412	Selection of Members of NCLT & NCLAT
40	Section 90	Section 441	Compounding of certain offences
41	Section 91	Insertion of Section 446A & 446B	Factors for determining level of punishment & Lesser penalties for one Person Companies or Small companies.
42	Section 92	Section 447	Punishment for fraud
43	Section 93	Section 458	Delegation by Central Government of its powers and functions

[F. No. 1/1/2018-CL-I dated 09.02.2018]

5. The Companies (Removal of Difficulties) Order, 2018:

Vide this order following changes have been effected in the Companies Act, 2013, in section 169, in sub-section (1), :-

(i) before the proviso, the following proviso shall be inserted, namely:-

Provided that an independent director re-appointed for second term under sub-section (10) of section 149 shall be removed by the company only by passing a **special resolution** and after giving him a reasonable opportunity of being heard:";.

(ii) in the existing proviso, for the words "provided that", the words "Provided further that" shall be substituted.

[F. No. 7/8/2016-CL-I dated 21.02.2018]

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Allied Laws Corner

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Insolvency and Bankruptcy Code

Recently the National Company Law Appellate Tribunal in the case of **State Bank of India vs. V. Ramakrishnan** reported in **91 taxmann.com 68** held that under the Insolvency and Bankruptcy Code, Moratorium period is applicable not only to the properties owned by the debtors but also to the properties owned by the Personal Guarantor.

A. Facts of the Case :

1. Mr. V. Ramakrishnan (1st Respondent), Director of M/s. Veesons Energy Systems. Ltd. ("Corporate Debtor") given personal guarantee and mortgagor of collateral securities of his assets with the Appellant-State Bank of India ("Financial Creditor") against the facilities availed by the 'Corporate Debtor'. In view of the personal Guarantee given by Mr. V. Ramakrishnan (1st Respondent), he comes within the meaning of 'Personal Guarantor' as defined under sub-section (22) of Section 5 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code")

2. The State Bank of India ("Financial Creditor") invoked its right under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (hereinafter referred to as "SARFAESI Act, 2002") against the 'Personal Guarantor' under Section 13(2) on 4th August, 2015 for recovery of Rs. 61,13,28,785.48/- from the said 1st Respondent as securities. The notice was challenged by the 'Corporate Debtor' before the Hon'ble High Court of Madras, which was dismissed with costs on 17th November, 2016. Thereafter, the State Bank of India ('Financial Creditor') issued a Possession Notice dated 18th November, 2016 under Section 13(4) of the SARFAESI Act, 2002 and taken symbolic possession of the secured assets.

3. Having failed to get relief from Hon'ble High Court of Madras, the 'Corporate Debtor' invoked Section 10 of the 'I&B Code' which was admitted, order of 'Moratorium' was passed and an 'Interim Resolution Professional' was appointed.

4. Even after declaration of the 'Moratorium', the Appellant- State Bank of India ('Financial Creditor') continued to take measure under SARFAESI Act, 2002 and proceeded against the property of the 'Personal Guarantor' (1st Respondent) and issued Sale Notice on 12th July, 2017.

5. Being aggrieved the 'Personal Guarantor' (1st Respondent), who is also the promoter of the 'Corporate Debtor' filed application before the Adjudicating Authority (National Company Law Tribunal), Chennai, for stay of proceedings under SARFAESI Act 2002, including the auction notice dated 12th July, 2017. The Adjudicating Authority by impugned order dated 18th September, 2017 observed that 'Moratorium' prohibits transferring, encumbering, alienating or disposing of by the 'Corporate Debtor' any of its assets or any legal right or beneficial interest therein.

6. In view of the provisions of 'I&B Code', Section 140 of the Indian Contract Act, 1872 and the decision of the Hon'ble High Court of Madras, the Adjudicating Authority allowed the Interlocutory Application preferred by the 'Personal Guarantor', and restrained the Appellant-

State Bank of India ('Financial Creditor') from proceeding against the 'Personal Guarantor' till the period of 'Moratorium' is over.

B. Findings of the National Company Law Appellate Tribunal :

1. 'I&B Code, 2016' is in three parts. Part I- 'Preliminary' including the definitions given therein applies to both Part II- 'Insolvency Resolution and Liquidation for Corporate Persons' and Part III- 'Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms'.

2. As per Part II, 'Insolvency Resolution' and 'Liquidation Proceedings' can be initiated only against the 'Corporate Persons' and not against an individual, including 'Personal Guarantor', as defined under sub-section (22) of Section 5 of the 'I&B Code' and reads as follows: -

   "5. Definitions. % ....*(22) "personal guarantor" means an individual who is the surety in a contract of guarantee to a corporate debtor.*"

3. For the purpose of sub-section (8) of Section 5 of the 'I&B Code', though counter-indemnity obligation in respect of a guarantee, if disbursed against the consideration for the time value of money comes within the meaning of 'Financial Debt', no insolvency and liquidation proceeding can be initiated against the 'Personal Guarantor' under Part II.

4. Part III relates to 'Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms', including a person who is 'Personal Guarantor'. For the said reason, in a case where proceeding has been initiated against the 'Corporate Debtor', if simultaneous proceeding is to be initiated against the 'Personal Guarantor' for bankruptcy proceedings, an application relating to the 'Insolvency Resolution or Bankruptcy' of a 'Personal Guarantor' of such 'Corporate Debtor' require to be filed before the same Adjudicating Authority (National Company Law Tribunal) hearing the 'Insolvency Resolution Process' or 'Liquidation Proceedings' of a 'Corporate Debtor'. This is, as apparent from sub-sections (2) & (3) of Section 60 of the 'I&B Code', which is quoted below: -

   "60. Adjudicating Authority for corporate persons. % …………….
   (2) Without prejudice to sub section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or bankruptcy of a personal guarantor of such corporate debtor shall be filed before such National Company Law Tribunal. (3) An insolvency resolution process or bankruptcy proceeding of a personal guarantor of the corporate debtor pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor."

5. Therefore, a 'Financial Creditor', including Appellant-State Bank of India, if intends to proceed against the 'Personal Guarantor' of the 'Corporate Debtor', may file an application relating to 'Bankruptcy' of the 'Personal Guarantor' before the same Adjudicating Authority ('Division Bench, Chennai' herein). Though, Part III of the 'I&B Code' has not yet notified but the Adjudicating Authority is vested with all

the powers of the Debt Recovery Tribunal (Adjudicating Authority under Part III) as contemplated under Part III of the 'I&B Code' for the purpose of sub section (2) as apparent from sub-section (4) of Section 60 of the 'I&B Code' as quoted below: -

"60. Adjudicating Authority for corporate persons. % *(4) The National Company Law Tribunal shall be vested with all the powers of the Debt Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2).*

6. Section 14 of the 'I&B Code' empowers the Adjudicating Authority to declare 'Moratorium' for prohibiting all of the matters as stipulated thereunder and quoted below :

"14. Moratorium. % *(1) Subject to provisions of sub sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—*

(a) *the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*

(b) *transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*

(c) *any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;*

(d) *the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.*

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

7. On bare perusal of the aforesaid provisions, it is clear that not only institution of suits or continuation of pending suits or proceedings against the 'Corporate Debtor' are prohibited from proceedings, in terms of clause (b) of sub-section (1) of Section 14 of the 'I&B Code', transfer, encumbrance, alienation or disposal of any of its assets of the 'Corporate Debtor' and/ or **any legal right or beneficial interest therein** are prohibited. Clauses (c) & (d) of sub-section (1) of Section 14 of the 'I&B Code' prohibits recovery or enforcement of any

security interest created by the corporate debtor in respect of its property including the property occupied by it or in the possession of the 'Corporate Debtor'

8. Sub-section (1) of Section 31 relates to 'approval of resolution plan', which reads as follows: -

"31. Approval of resolution plan. *% (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.*"

9. From the aforesaid provisions, it is clear that 'Resolution Plan' if approved by the 'Committee of Creditors' under sub-section (4) of Section 30 and if the same meets the requirements as referred to in sub-section (2) of Section 30 and once approved by the 'Adjudicating Authority' is not only binding on the 'Corporate Debtor', but also on its employees, members, creditors, guarantors and other stakeholders involved in the 'Resolution Plan', including the 'Personal Guarantor'.

10. In view of the aforesaid provisions, it is held that the **'Moratorium' will not only be applicable to the property of the 'Corporate Debtor' but also on the 'Personal Guarantor'.**

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contd. from page 617

assessee was not directly exported by him but was ultimately exported. According to the assessee, since the goods manufactured from the goods purchased on exemption basis were ultimately exported, the condition of the exemption notification stood complied.

Held:

The Allahabad High Court held that one of the primary eligibility conditions to qualify for exemption placed by the exemption notification is that the manufactured goods are exported out of India. A plain reading of the terms of the notification establishes that the primary issue which must govern the grant exemption is the export of the manufactured goods. The notification neither mandates nor provides that the manufacturer himself export the goods out of India. The emphasis is on the manufactured goods being exported and not that the manufactured goods have ultimately been exported out of India.

The Hon. High Court held that the reasoning which weighed with the department to deny relief to the assessee on the score cannot be sustained. However, the matter cannot end here. The issue as to whether the manufactured goods have moved in the course of export cannot be determined on the basis of the exemption notification since this would principally have to be answered with reference to the provisions encapsulated in section 5 of the CST, 1956. The matter has not been examined from the view of section 5(3) and there has been no consideration of the 'same goods' principle flowing from the said provision nor has there been an examination of an inextricable link between the first purchase and ultimate export. Both these aspects of the matter would therefore merit a consideration of the entire issue afresh. The revision application came to be allowed by remand.

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From Published Accounts

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Taxes on income - Annual Report 2016-17

Claris Lifesciences Limited

Current taxes

Current income tax assets and liabilities at the amount expected to be recovered from or paid to the taxation authorise. The tax rates and tax laws used to compute the amount are those that are enacted or substantively enacted, at the reporting date.

Current income tax relating to items recognised outside statement of profit and loss (either in other comprehensive income or in equity). Current tax items are recognised in correlation to the underlying transaction either in OCI or directly in equity. The management periodically evaluates positions taken in the tax returns with respect to situations in which applicable tax regulations are subject to interpretation and establishes provisions where appropriate.

Deferred taxes

Deferred tax is provided using the balance sheet method on temporary difference between the tax base of assets and liabilities and their carrying amounts for financial reporting purposes at the reporting date.

Deferred tax liabilities are recognised for all taxable temporary differences, except, when the deferred tax liability arise from the initial recognition of goodwill or an asset or liability in a transaction that is not a business combination and, at the time of the transaction, affects neither the accounting profit nor taxable profit or loss.

Deferred tax assets are recognised for all deductible temporary differences, the carry forward of unused tax credits and any unused tax losses. Deferred tax assets are recognised to the extent that it is probable that taxable profit will be available against which the deductible temporary differences, and the carry forward of unused tax credits and unused tax losses can be utilised, except when the deferred tax asset relating to the deductible temporary difference arise from the initial recognition of an asset or liability in a transaction that is not a business combination and, at the time of the transaction, affects neither the accounting profit or loss.

The Group recognises tax credits in the nature MAT credit as an asset only to the extent that there is convincing evidence that the Group will pay normal income tax during the specified period, i.e., the period for which tax credit is allowed to be carried forward. In the year in which the Group recognises tax credits as an asset, the said asset is created by way of tax credit to the statement of profit and loss. The Group reviews such tax credit asset at each reporting date and writes down the asset to the extent the Group does not have convincing evidence that it will pay normal tax during the specified period. Deferred tax includes MAT tax credit.

Any deferred tax asset or liability arising from deductible or taxable temporary difference in respect of unrealised inter-Group profit or loss on inventories held by the Group in different tax jurisdictions is recognized using the tax rate of the jurisdiction in which such inventories are held.

The carrying amount of deferred tax assets is reviewed at each reporting date and reduced to the extent that is no longer probable that sufficient taxable profit will be available to allow all or part of the deferred tax asset to be utilised. Unrecognised deferred tax assets are re-assessed at each reporting date and recognised to the extent that it has become probable that future taxable profits will allow the deferred tax assets to be recovered.

Deferred tax assets and liabilities are measured at the tax rates that are expected to apply in the year when the asset is realised or the liability is settled, based on tax rates (and tax laws) that have been enacted or substantively at the reporting date.

Deferred tax relating to items recognised outside statement of profit and loss is recognised outside statement of profit and loss (either in other comprehensive income or in equity). Deferred tax items are recognised in correlation to the underlying transaction either in OCI or directly in equity.

Deferred tax assets and deferred tax liabilities are offset if a legally enforceable right exists to set off current tax assets against current tax liabilities and the deferred taxes relate to the same taxable entity and the same taxation authority.

Gayatri Projects Limited

i) Current Tax

Provision for Current tax is made based on the liability computed in accordance with the relevant tax rates and provisions of Income Tax Act, 1961 I as at the balance sheet date and any adjustments to taxes respect of the previous years, penalties if any related to income tax are included in the current tax expense.

ii) Deferred Taxes

Deferred Tax is the tax expected to be payable or recoverable on differences between the carrying amount of the assets and liabilities for financial reporting purpose and the corresponding tax bases used in computation of taxable profit. Deferred tax issued are recognized and carried forward only to the extent that there is a reasonable certainty that sufficient future taxable income will be available against which such Deferred Tax Assets can be realized.

Current and deferred tax is recognized in profit or loss, except to the extent that it related to items recognized in other comprehensive income or directly in equity. In this case, the tax is also recognized in other comprehensive income or directly in equity, respectively.

Visa Steel Ltd.

2.2.10 Income Tax –

The income tax expense or credit for the period is the tax payable on the current period's taxable income based on the applicable income tax rate for each jurisdiction adjusted by changes in deferred tax assets and liabilities attributable to temporary differences and to unused tax losses.

The current income tax change is calculated on the basis of the tax laws enacted or substantively enacted at the end of the reporting period. Management periodically evaluates positions taken in tax return with respect to situations in which applicable tax regulation is subject to interpretation. It establishes provisions where appropriate on the basis of amounts expected to be paid to the tax authorities.

Deferred income tax is provided in full, using the liability method, on temporary differences arising between the tax bases of assets and liabilities and their carrying amounts in the separate financial statements. However, deferred tax liabilities are not recognised if they arise from the initial recognition of goodwill. Deferred income tax is also not accounted for if it arises from initial recognition of an asset or liability in a transaction other a business combination that at the time of the transaction affects neither accounting profit nor taxable profit (tax loss). Deferred income tax is determined using tax rates (and laws) that have been enacted or substantially enacted by the end of the reporting period and are expected to apply when the related deferred income tax asset is realised or the deferred income tax liability is settled.

Deferred tax assets are recognised for all deductible temporary differences and unused tax losses only if it is probable that future taxable amounts will be available to utilise those temporary differences and losses.

Deferred tax liabilities are not recognised for temporary differences between the carrying amount and tax bases of investment subsidiaries and interest

contd. on page no. 630

From the Government

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Income Tax

Centralised Communication Scheme, 2018.

The CBDT hereby makes the following scheme for centralized issuance of notice, namely.

- The Centralized Communication Scheme, 2018 and shall come in to force on the date of its publication in the Official Gazette.

- **Issue and service of notice-**

  (1) The Centralised Communication Centre shall issue notice to any person requiring him to furnish information or documents for the purpose of verification of information in his possession.

  (2) The notice shall be issued under digital signature of the designated authority.

  (3) The notice shall be served by delivering a copy by electronic mail, or by placing a copy in the registered account on the portal followed by intimation by Short Message Service.

  (4) The information or documents called for under sub-paragraph (1) shall be furnished on or before the date specified in the notice as specified in paragraph 4.

  (5) The designated authority shall also run sustained campaign to ensure compliance by way of sending electronic mails, Short Message Service, reminders, letters and outbound calls.

- **Response to notice-**

  (1) The Centralised Communication Centre may prescribe a machine readable structured format for furnishing the information or documents by the person in response to the notice issued under subparagraph (1) of paragraph 3.

  (2) The Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems) shall specify the procedure, formats and standards for furnishing response to the notices.

- **No personal appearance-**

  No person shall be required to appear personally or through authorised representative before the designated authority at the Centralised Communication Centre in connection with any proceedings.

- **Power to specify procedure and processes-**

  (1) The Principal Director General of Income-tax (Systems) or Director General of Income-tax (Systems) shall specify from time to time, procedures and processes for effective functioning of the Centralised Communication Centre, including the following matters, namely:-

    (a) format and procedure for issue of notice;

    (b) receipt of any information or document from the addressee in response to notice;

    (c) mode and format for issue of acknowledgment of the response furnished by the addressee;

    (d) provision of web portal facility including login facility, tracking status of verification, display of relevant details, and facility of download;

    (e) call centre to answer queries and provide support services, including outbound calls and inbound calls seeking information or clarification;

(f) managing administration functions such as receipt, scanning, data entry, storage and retrieval of information and documents in a centralised manner;

(g) grievance redressal mechanism in the Centralised Communication Centre.

- **Definitions:-**

In this scheme, unless the context otherwise requires,—

a) "Act" means the Income-tax Act, 1961 (43 of 1961);

b) "Director General" means the Director General of Income-tax appointed under sub-section (1) of section 117 of the Act and authorised by the Board in this behalf;

c) "Principal Director General" means the Principal Director General of Income-tax appointed under sub-section (1) of section 117 of the Act and authorised by the Board in this behalf;

d) "Designated authority" means the income-tax authority prescribed under sub-section (1) of Section 133C of the Act who is in charge of the Centralised Communication Centre;

e) "Portal" means the web portal of the Centralised Communication Centre.

(Notification No. SO 771(E) [No.12/2018 (F.NO.370142/22/2017-TPL)], Dated 22-2-2018)

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contd. from page 628

in joint arrangement where the Group is able to control the timing of the reversal of the temporary differences and it is probable that the differences will not reverse in the foreseeable future.

Deferred tax assets and liabilities are offset when there is a legally enforceable right to offset current tax assets and liabilities and when the deferred tax balances relate to the same taxation authority. Current tax assets and tax liabilities are offset where the Company has a legally enforceable right to offset and intends either to settle on a net basis, or to realise the asset and settle the liability simultaneously.

Current and deferred tax is recognised in profit or loss, except to the extent that it relates to items recognised in other comprehensive income or directly in equity. In this case, the tax is also recognised in other comprehensive income or directly in equity, respectively.

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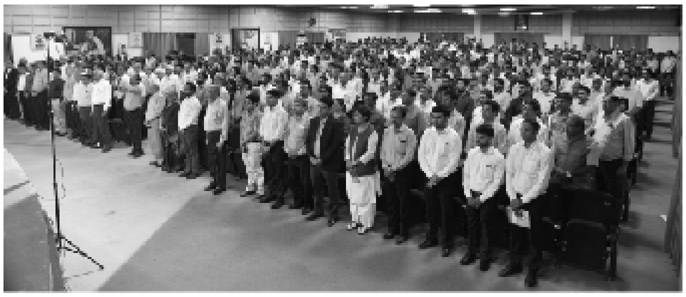
Association News

CA. Riken J. Patel
Hon. Secretary

CA. Maulik S. Desai
Hon. Secretary

Glimpses of Past Events



Large Audience at Budget Meeting by Senior Advocate Shri Saurabh Soparkar

Speech by Senior Advocate Shri Saurabh Soparkar on Union Budget

Release of Union Budget Booklet by the worthy hands of Senior Advocate Shri Saurabh Soparkar

3rd Brain Trust cum Workshop Meeting by CA. Sujal Shah on Valuation of Shares

Lecture Meeting by CA. Nayan Kothari on Statutory Bank Branch Audit

Dhuleti Celebrations with CAA Members

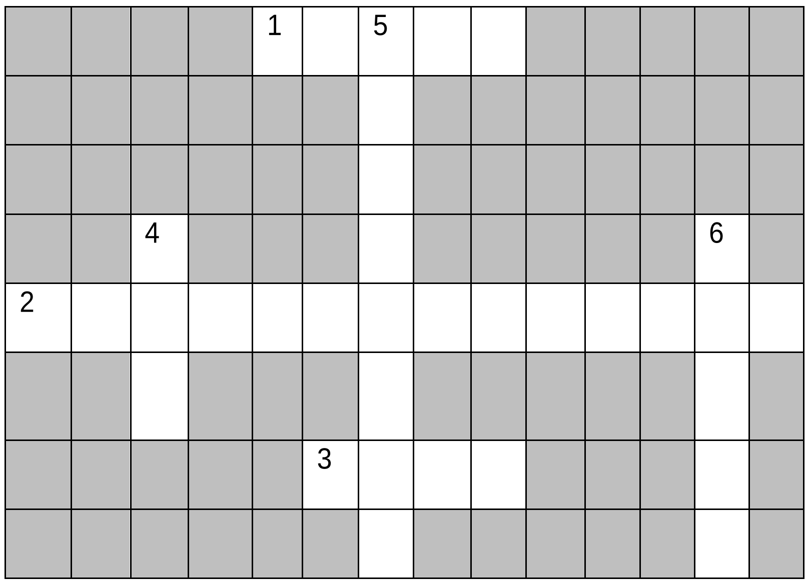
ACAJ Crossword Contest # 46

Across

1. The corporate veil can be lifted if it is found that the company is acting as an _______ of the shareholders though it has got legal entity.
2. _______ comes only when vision is backed by action.
3. In the Finance Bill 2018, it is proposed to increase the lockin period of the bonds u/s 54EC from three to _____ years.

Down

4. The HUF with all its incidents is a creature of ______ and cannot be created by act of parties.
5. In the Union Budget 2018-19, new explanation 2A to section 9(1)(i) is proposed to be added by which significant _______ presence of a non resident in India shall constitute as business connection in India.
6. In Union Budget 2018, standard deduction of Rs. _______ thousand is proposed for salaried taxpayers.



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 01/04/2018.
5. The decision of Journal Committee shall be final and binding.

Winners of ACAJ Crossword Contest # 45

1. CA. Parin Kapadia
2. CA. Falguni Anada

ACAJ Crossword Contest # 45 - Solution

Across

1. Supply
2. Non resident
3. Happy

Down

4. Subsequent
5. Revival
6. Thirty

❇ ❇ ❇

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