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PROFESSIONAL AWARDS

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

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

QUOTES FOR THE MONTH

Those who live for others really live and those who live only for themselves are more dead than alive.

- Swami Vivekananda

A 'No' uttered from the deepest conviction is better than a 'Yes' merely uttered to please, or worse, to avoid trouble.

- Mahatma Gandhi

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EDITORIAL

INDIAN POLITICS - THE FALLING PROPRIETIES

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Independent India has been hit by series of scams; however the tsunami of scams and the events that have surfaced in the year 2012 are really appalling and unprecedented. The media following Arvind Kejriwal in unearthing various scams has been giving nightmares to many in power. The disgusting drama that has been unfolding in our drawing rooms every evening and the mammoth profits made by the *dramatis* personae, running into a few hundred crores, must have made many salaried people, including top professionals, think if they hadn't entered the wrong profession.

When Arvind Kejriwal separated from Anna Hazare many believed Kejriwal would not be a force any more to reckon with. However the determined former bureaucrat, has whipped up a storm, leveling serious corruption charges against some of the country's senior most politicians.

Sonia Gandhi took over as the President of Indian National Congress in 1998 and since then the only attack on her had been the foreign origin issue which has nothing to do with corruption. But in 2012 came the biggest ever attack on the dynasty by exposing relation between Vadra and DLF . It was said that businessman Robert Vadra, son-in-law of Congress party chief Sonia Gandhi, enjoyed cosy business links with a top real estate and development company in return for favours.

The next in line was Law Minister Salman Khurshid, accusing him and his wife with embezzling public funds meant for an NGO for the disabled that the couple has been running for years. Mr. Khurshid furiously rejected the allegations. But demand of independent investigation made the minister, totally unnerved and this was evident from the press conference of the minister. It was apparent he would explode any minute going red in the face shouting on the gathered journalists. Khurshid further threatened India Today and said that he would replace ink with blood. He also implied that if Kejriwal visited his home constituency Farrukhabad, then how would he go back? One can only wonder the worse it can get from here.

Kejriwal's revelations on BJP President Nitin Gadkari initially appeared to have landed the fighter of corruption on a sticky ground. However the further reports have indicated that company controlled by Gadkari received significant investment and large loans. The sources of such investments are in question alleging corporate frauds by the BJP President. Too many politicians are becoming businessmen and growing their empires at break-neck speeds with all the associates beyond the parties. Why are all political parties helping each other over this ? Where is the propriety lost ?

The bureaucrat-turned-activist-turned-politician has been described by all political parties as a seasoned publicity seeker. Apart from the political faces, independent commentators are also finding Mr. Kejriwal's style of politics uncomfortable. The idea of pointing figures, raising serious allegations against the politicians without substantial evidences and then easily moving for the next episode is being considered nothing but only a gimmick.

There is a point to disagree with Kejriwal's methods but not with his intent. The intent that appears to be absolutely right: expose the corrupt. Kejriwal by talking openly about what he believes as abuse by the powerful has been successful in sending jitters to these influential. One such example of having an impact is when a leading business paper published a story about Mr. Vadras' business dealings last year, it hardly got noticed. But when Kejriwal spoke about it, it swept the air waves and became the biggest talking point in an increasingly cynical nation. Somebody has to stand up and speak out. This code of silence helps protect wrongdoers.

The question arises whether the allegations leveled by Kejriwal would eventually hold on in courts. Whatever may be the outcome it is definitely reminding the men in power the ethics and the ways of good governance. Without a doubt it, is a small step in the evolution of a republic where democracy should not begin and end with winning elections.

Despite numerous scams many are very bullish about the future of the Indian economy, which is fundamentally "robust". The way forward is in a hope that one day India would emerge as one of the economic giants of Asia considering the intellectual human resources we have. The strength, the spirit and the youth of India are going to drive this country to new heights.

CA. Shailesh C. Shah

5 5 5

PRESIDENT'S MESSAGE

CA. Gaurang M. Choksi
Practising since 1986. He can be reached at gmchoksi@yahoo.co.in

Dear Professional Friends,

First of all I would like to remember that on 2nd October, two great leaders of the nation and freedom fighters viz. Shri Mahatma Gandhi and Shri Lalbahadur Shashtri were born. Both the leaders continue to remain in the hearts of the people of India and all across the world. Mahatma Gandhi single handed took us out from the slavery to independence showing us the path of "Truth and Non-violence" and whereas legendary Lalbhadur Shashtri, a man of integrity, showed the importance of agriculture and army giving us the slogan "Jai Jawan Jai Kisan"

Greetings

The month of October brought with it nine day festival of Navratri followed by the celebration of Dushera, a mark of victory of good over evil. I wish all a very "Happy Navratri and "Happy Dushera ".

India's Economic

We have seen that due to non support of allies, UPA Government was not able to initiate bold steps in matter of reforms. Trinamool Congress withdrew its support on the issue of Foreign Direct Investment and tried to pull down the Government, but could not succeed. On exit of Trinamool Congress from UPA, Government has been acting bold and announced long pending reforms. Due to this, India's economy appears to be back on track with great response from the share market in the last month. The Government took a bold step of going ahead with Foreign Direct Investment (FDI) in retail, aviation, broadcasting, insurance and pension. The cut in the Cash Reserve Ratio (CRR) by 25 basis point, is expected to release 17,000 crores of primary liquidity in to the system, which will improve investments and increase growth in the country. However decision like 12% hike in diesel prices and curtailing the subsidies on cooking gas by restricting 6 LPG cooking cylinders per family during the year and substantial increase in open market LPG Gas cylinder prices will have a huge impact on inflation. This would severely affect the "aam aadmi", but the Government has no choice but to remain in stoic silence and hope for a turnaround.

Election

The Institute Elections and Gujarat State Elections are scheduled to be held on 7th & 8th and 13th & 17th of December 2012 respectively. All round campaigns have begun both by Council as well as Assembly candidates. We should make sure and do not fail in exercising our franchise. We have to it as a duty than a right to cast our vote to choose the best and deserving candidate both for Institute and State.

In America, debate for President Election is in final stage between President Barack Obama and his counterpart Mitt Romney. Latest trends show that Obama is slightly ahead of Romney. As the fight seems to be too close, nobody would be able to guess the outcome.

At the Association

At Association, we organised various programmes during the month of October, 2012. (1) On 2nd October, Members in Industry Committee had arranged a program on "Issues in Service Tax" with Shri S. S. Gupta from Mumbai as the faculty (2) on 5th October a lecture meeting in memory of Late Shri K. T. Thakore Saheb was organized on the topic "Judiciary, Public Servants and Human Rights". Shri B.C.Patel, Member, National Human Right Commission and Retd. Chief Justice, Jammu & Kashmir High Court and Delhi High Court addressed on the subject (3) On 13th October 4th Study Circle meeting was held which was led by CA D.S.Rawat, New Delhi on the topic "An Overview of Accounting Standards" (4) On 15th October 5th Study Circle meeting was held which was led by CA Rutvij P. Shah on the topic "Some Issues under Income Tax Act, 1961" (5) On 17th October a programme was held jointly with Chamber of Commerce and other four professional bodies on " An Interactive Session on FEMA provisions" with officials from Reserve Bank of India (RBI) (6) On 26th October 6th Study Circle meeting was held which was led by CA Pramodbhai G. Hemani from Bhavnagar and CA Ajitbhai C. Shah on the topic "Registration and Taxability of Charitable Trust" I thank members for their continuous encouragement by way of participation in all the programs of the Association.

Association's Diwali get together for members is scheduled for Friday, 23rd November at Aangan Party Plot, Opp Nandanvan-4, Jodhpur Gam, Satelite, Ahmedabad.

I would like to take this opportunity to wish all of you "HAPPY DIWALI AND PROSPEROUS NEW YEAR

With regards,

CA. Gaurang M. Choksi.

President

5 5 5

GUJARAT HIGH COURT LEADS IN JUDGMENTS ON CHALLENGE TO REASSESSMENT NOTICES

ARTICLE...

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The question about validity of reassessment notices has been arising before the High Courts and the Supreme Court right from the decision of the Supreme Court in the case of **Calcutta Discount v/s. ITO (1961) 41 ITR 191 (SC)** and the recent being **CIT v/s. Kelvinator of India Ltd. - 320 ITR 561**. Recently in 2011 & 2012 about 50 (reported and unreported) judgments have been delivered by Gujarat High Court on the issue of validity of reassessment notices and it would not be wrong to state that Gujarat High Court leads in deciding largest number of writ petitions challenging reassessment notices.

At the outset reference may be made to a leading decision of the Gujarat High Court in the case of **Dishman Pharmaceuticals and Chemicals Ltd. v/s. Dy. CIT -(2012) 346 ITR 228** which has laid down exhaustively the principles governing validity of reassessment notices. The said principles are as follows :-

"[i] To confer jurisdiction to the Assessing Officer to reopen the assessment under Section 147 of the Income-tax Act, beyond four years from the end of assessment year, following two conditions must be satisfied [a] that the Assessing Officer must have reason to believe that the income chargeable to tax has escaped assessment; and (b) that the same was occasioned, on account of either failure on the part of the assessee to make a return of his income for that assessment year, or to disclose fully and truly all material facts necessary for assessment of that year. (ii) Both conditions are conditions precedent and must be satisfied simultaneously before the Income-tax Officer can assume jurisdiction to reopen an assessment beyond four years of the end of assessment year. (iii) Such reasons must be recorded and if the reasons recorded by the Assessing Officer do not disclose satisfaction of these two conditions, the re-opening notice must fail. (iv) There is no set format in which such reasons must be recorded. It is not the language but the contents of such recorded reasons which assumes importance. In other words, a mere statement that the Assessing Officer had reason to believe that certain income has escaped assessment and such escapement of income was on account of non-filing of the return by the assessee or failure on his part to disclose fully and truly all material facts necessary for assessment would not be conclusive. Nor, would the absence of any such statement be fatal, if on the basis of reasons recorded, it can be culled out that there were sufficient grounds for the Assessing Officer to hold such beliefs. (v) Such reasons must emerge from the reasons recorded by the Assessing Officer and cannot be supplied through an affidavit filed before the Court. However, Gujarat High Court in the case of **Aayojan Developers v. Income Tax Officer (2011) 335 ITR 234(Guj)** has accepted the view that to elaborate such reasons already recorded, reference would be permissible to the affidavit filed by the Department before the Court. (vi) What would amount to true and full disclosure of all material facts must depend on each case and no strait-jacket formula of universal application can be provided. It can however safely be stated that the duty of the assessee is to disclose primary facts and it is not his duty to lead the Assessing Officer to any particular inference of fact or of law on the basis of such primary disclosures. In other words, once the assessee discharges his duty of stating all the primary facts, what inferences and conclusions should be drawn is the duty of the Assessing Officer. (vii) At the time of ascertaining whether the notice was validly issued, what could be the probable conclusion of fresh assessment if re-opening is permitted, is not the inquiry of the Court. In other words, the merits of the proposed action, through opening of the assessment, cannot be gone into by the court beyond prima facie stage."

Broadly the following issues have arisen before the Courts :-

(1) When reassessment notice is issued after passing order Section 143(1) .

Ans : It is clear that while passing order u/s. 143(1) no opinion is formed by the Assessing Officer. Hence, ground of change of opinion would not be available to challenge notice u/s. 148 within 4 years and notice, cannot be challenged except on the ground that there is no "reason to believe".

If the notice is issued beyond 4 years., The Officer has to show that there was non disclosure of material facts necessary for assessment.

(2) When such notice is issued within a period of 4 years after assessment U/s. 143(3)?

Ans : Mere change of opinion is not a valid ground and but the requirement of non disclosure of material facts necessary for assessment need not be there.

H.K Buildcon v/s. ITO – (2011) 339 ITR 535

The Court held that a mere change of opinion by succeeding Officer would not be a ground for reassessment notice.

Rubamin Ltd. v/s Love Kumar -

Spl. C.A. No.16901/2011 dt 30/4/2012 (unreported)

That TDS exemption letters were filed at original assessment . Notice to disallow expenditure as TDS not deducted was quashed as there was no non disclosure and assessee was not liable to deduct TDS & therefore the notice had no basis.

Ashokyot Oxygen Pvt. Ltd. v/s. H.N Patel ITO

(2012) 346 ITR 399

In this case notice was issued after 4 years and reasons did not show failure to disclose material facts. Reopening was on the ground that preoperative expenses were capital in nature, but wrongly allowed as revenue expenditure. The Court struck down the notice as there was no case of non disclosure of material facts.

Balar Exports v/s. Dy. CIT – (2011) 202 Taxman 293

The scrutiny assessment was made by a detailed order regarding export of diamonds in course of business. Notice was issued on the ground that closing stock was under valued. The Court held that when full details were furnished in course of assessment proceedings and the ITO was satisfied and no addition were made the Court held that the reopening was without jurisdiction.

Arvind Polycot Ltd. v/s. Chandra Ram

Spl. C.A No. 2385/2001 dt. 27-8-12 (unreported)

For assessment year 1997-98 scrutiny assessment was made on 28-3-2000. Reopening notice was issued on the ground that Rs. 187 lacs claimed being Voluntary Retired Scheme was allowed as revenue expenditure relying on subsequent CBDT circular dt. 23-1-01 (not u/s. 119). The circulars stated that such payments was for enduring benefit and therefore capital expenditure. The notice was quashed on the ground that it was change of opinion. Full facts were disclosed during the course of assessment.

(3) Whether reassessment notice would be justified after 4 years because of subsequent judgment of the jurisdictional High Court or Supreme Court or retrospective amendment of law?

Ans : Notice after 4 years relying on subsequent judgment of jurisdictional High Court or Supreme Court is not valid. Assessing Officer has to establish non disclosure of material facts.

Doshin Ltd, v/s. ITO - (2012) 342 ITR 6

Here notice was issued after 4 years because of subsequent amendment of the law with retrospective effect. There was no failure on the part of the assessee to disclose material facts. The Court quashed the notice.

Trivenu Ship Breakers v/s. Harsh Prakash – (2011) 335 ITR 284

Notice was issued on the ground that payment of usance interest on purchase of ship was made without deducting TDS. However, Section 10(15) was amended with retrospective date from 1-4-1962 exempting usance interest from TDS requirement. Subsequent retrospective amendment may also knock out the notice as there would be no escapement. Notice was therefore quashed.

Conversely even if because of subsequent retrospective amendment income can be said to have escaped assessment no notice can be issued after 4years as there is no non disclosure of material facts.

Sadbhav Engineering Ltd. v/s. Dy. CIT –

(2011) 333 ITR 483

In this case notice was issued after 4 years based on subsequent amendment of law with retrospective effect. The Court held that there were no failure to disclose and the notice was invalid.

Surat Peoples Co-op. Bank v/s. ITO –

(2011) 336 ITR 218

Here notice was issued after 4 years based on Supreme Court judgment delivered by 2 Judges. However, the same was reversed by larger Bench

of 3 Judges. Notice was therefore held bad. However, even otherwise merely because of High Court or Supreme Court judgment notice cannot be issued after 4 years as there would be no failure to disclose material facts.

Gujarat State Co-operative Agri. & Rural Development Bank v/s. Dy. CIT - (2011) 227 ITR 447

In this case notice was issued after 4 years. There was no failure to disclose material facts necessary for assessment, but the notice was based on subsequent decision of the High Court. It was held that such a notice is not valid.

(4) Whether when facts are disclosed and claims are made but the assessment order is silent and not expressly dealing with the said issue, can it be deemed to have been accepted the claim after examining the same preventing reopening of assessment?

Ans : In this case if the assessment order does not deal with the issue on which claims are made and facts disclosed it is deemed to have been accepted by the Assessing Officer as when claims are accepted it is not necessary to so mention in the assessment order.

FAG Bearings India Ltd v/s. Dy.CIT -

Spl. C.A. No. 16204/03 dt.15/9/2012 (unreported)

At original stage all facts were fully disclosed on four points on which reassessment notice was issued beyond four years and assessment order was passed wherein nothing was mentioned in the order. Court struck down the notice as full facts were fully disclosed and deemed to be accepted.

Shirish C. Parikh v/s. ITO - (2011) 55 DTR 386

The notice was issued after 4 years Court found that full details of purchase of property, payment of price etc. were given to claim relief u/s. 54. The notice was therefore struck down.

Manukant C. Shah, HUF v/s. Dy. CIT

(2011) 61 DTR 235 - 245 CTR 224

The assessee had given full details of unsecured loans given and explained also one inadvertent omission to charge interest from one debtor. Assessing Officer had at the original stage examined these issues. Therefore, there was no failure to disclose and the notice after 4 years and therefore held invalid.

Ashank D. Desai v/s. Asst. CIT - (2012) 346 ITR 326

It was held that reassessment notice was issued after 4 years to disallow interest on borrowings for purchase of shares. During assessment proceedings full details were disclosed and there was no failure to disclose. Accordingly the notice was quashed.

Parle Sales and Services Pvt. Ltd. v/s. ITO -

(2011) 337 ITR 203

In this case notice was issued after 4 years and material facts were disclosed and deduction was allowed after considering all facts. Notice issued to disallow the deduction on the ground that it was capital expenditure. The Court held the notice invalid.

Priya Blue Industries Pvt. Ltd. v/s. ITO –

(2012) 346 ITR 204

Notice was issued after 4 years to disallow deduction of usance interest paid to non residents without deducting TDS. However there was no indication of any default by the assessee to disclose material facts. The notice was therefore quashed.

Sayajee Industries Ltd. v/s. Jt. CIT –

(2012) 336 ITR 360

In this case notice was issued after 4 years, but reasons did not disclose any failure on the part of the assessee to disclose material facts necessary for assessment.

I.P Patel and Company v/s. Dy. CIT –

(2012) 346 ITR 207

In this case notice was issued after 4 years. The Court held that notice did not specify instances of failure to disclose. However, it is sufficient if the failure to disclose can be inferred. Further, sufficiency of material cannot be gone into for holding the notice invalid. This is instance of an adverse decision

Ketan B. Mehta v/s. ACIT - (2012) 346 ITR 254

Here notice was issued after 4 years. During assessment proceedings the fact of borrowing to purchase shares and the details of investment were disclosed. The reasons for issue of notice was that interest was not paid to earn dividend or for acquiring controlling interest in the company.

It was held that there was no failure to disclose material facts and notice was bad.

Sun Pharmaceutical Industries Ltd. v/s. Dy. CIT

Spl. C.A No. 12468/2004 dt. 31-7-2012 (unreported)

In this case for assessment year 1997-98 scrutiny assessment was made and it was sought to be reopened by notice dt. 25-2-04 in connection with income u/s. 115JA. The petitioner had made full disclosure with the return and during the course of scrutiny of various claims and adjustments were made. The notice was set aside as full facts were disclosed (case law fully disclosed).

Also see Sun Pharmaceutical Industries Ltd. v/s. Dy. CIT

Spl. C.A No. 652/05 dt. 6-8-12 (Unreported)

and

Sun Pharmaceutical Industries Ltd. v/s. Dy. CIT

Spl. C.A No. 12468/2004 dt. 31-7-2012.

Bipin Kumar P. Khandheria Advocate v/s. Dy. CIT

Spl. C.A No. 6557/2001 dt. 13-8-12 (unreported)

Return filed before the ward where he was assessed but correct jurisdiction was another officer as it was search case. However it was accepted & assessed. Reassessment notice issued on ground that return filed before wrong ward amounted to return not filed. Held it was invalid notice (case law discussed).

Gujarat Fluorochemicals Ltd. v/s. Asst. CIT

Spl. C.A No. 1/2005 dt. 27.08.12 (unreported)

Notice issued because of audit objection, though A.O believed there was no escapement . Held notice bad as reopened on opinion of audit & against his own non belief of escapement.

Garden Finance Ltd. v/s. ACIT

Spl. C.A No. 12251/2002 & 489/2005

Claim for higher depreciation examined and allowed.

No failure to disclose. Material facts notice set aside.

(5) Where a mere claim for deduction or disallowance made but there is no non disclosure can notice be issued?

Ans : Making a claim does not amount to non disclosure.

Cadila Healthcare Ltd. v/s. Dy. CIT –

(2011) 334 ITR 420

Notice was issued after 4 years it was held that mere claim by the assessee for deduction would not amount to failure to disclose and the notice was held bad.

(6) To what extent change of opinion would be permissible for reopening of the assessment. Whether "change of opinion" would amount to "review" which is not permissible?.

Ans : Change of opinion would be no ground to reopen assessment within or beyond 4 years. Change of opinion would amount to "review" of points decided which is not permissible.

(7) Whether duty to disclose primary and material facts necessary for assessment would include drawing of inferences of facts or law or whether that is the duty of the ITO to draw such inferences?.

Ans : Duty disclosure is only of primary and material facts and not inferences of fact or law which are to be drawn by the Assessing Officer. Hence wrong inference of fact or law is not a valid ground if primary and material facts are disclosed.

(8) Whether omitting to apply the law inadvertently or by ignorance would enable the ITO to reopen assessment though primary facts are fully disclosed?

Ans : Omitting to apply the law or ignorance of law or obvious misinterpretation of law would not unable ITO to reopen the assessment within or beyond 4 years - in the later case when primary facts are fully disclosed. Further there has to be escapement.

Devesh Metcast Ltd. v/s. Jt. CIT – (2011) 338 ITR 139

In this case notices for reassessment was issued within 4 years for disallowing set off unabsorbed depreciation on erroneous interpretation of statutory provisions. Hence on correct and obvious interpretation income would not be said to have escaped assessment. Notice was struck down.

(9) Whether the reasons recorded is the only material to be looked at by the Court or subsequent affidavits can be looked at for fresh reasons in

support of the notice, which may contain new reasons?

Ans : The Court is only required to examine the reasons recorded for re opening assessment and not subsequent reasons brought out in affidavit filed in reply to the challenge to reassessment notice. However affidavit may explain the reasons.

Dishman Pharmaceuticals and Chemicals Ltd. v/s.

Dy. CIT (2012) 346 ITR 245

The notice was issued after 4 years. The Court struck down the notice on the ground that there were no existing grounds in the notice and the same cannot be subsequently sustain on another ground not mentioned in the reasons.

Aayojan Developers v/s. ITO – (2012) 335 ITR 234

In this case notice was issued after 4 years reasons were recorded. The Court held that affidavit can explain the reasons but cannot validate the notice in the assessment proceedings. Assessee was allowed deduction for housing project after examining facts. The notice was issued alleging that assessee was a works contractor and not a developer. There was no failure to disclose material facts. The notice was therefore quashed.

(10) Whether the period of limitation for the issue of notice would start after signing the notice or later when it is to put in the course of transmission to the assessee?

Ans : Section 149 of I.T Act prescribes period of limitation within which notice for reassessment can be issued u/s. 148. The word "issue" does not mean merely signing notice but the date of issue would be the date on which the signed notice is put in the course of transmission to the assessee by delivering the same to the Post Office or in other agent to deliver the notice.

Kanubhai M. Patel , HUF v/s. Hiren Bhatt –

(2011) 334 ITR 25

The Court considered the question of limitation as regards issue of reassessment notice and examined the meaning of "issue". It was held that mere signing of notice on a particular date is not sufficient, the date of issue of notice would be the date on which notice was handed over for service to the proper Officer (Post Office). Hence, in case of notice for assessment year 2003-04, it was signed on 31-3-2010 but sent to Speed Post Central on 7-4-2010. It was considered as barred by limitation.

(11) Whether notice issued within period laid down in s. 149 also has to comply with requirement that there should be failure to disclose material facts?

Ans : The impact of two sections, s.149 & s. 147 is different. Even if notice beyond 4 years can be issued in case of non disclosure, it has still to be issued within limitation provided by s. 149.

Sayaji Hotels v/s. ITO - (2011) 339 ITR 498

Here notice was issued after 4 years. It was held that though u/s. 149 maximum limitation was prescribed for issue of Section 147 notice based upon the amount involved. It was held that Section 149 did not override provisions of Section 147. Hence were notice was issued after 4 years the requirement that there should be failure to disclose material facts still exists and hence notice was bad.

(12) Can notice within 4 years be issued on change of opinion?

Ans : Such notice would be invalid.

Tulsi Developers v/s. Dy. CIT – (2011) 59 DTR 351

The Court found that the notice was issued merely on change of opinion and was therefore held invalid.

(13) Once Tribunal has decided there are no bogus purchases. Can notice for reassessment be still issued for taxing such purchases?

Ans : Notice would be invalid.

Connection v/s. ITO – (2011) 335 ITR 465

Vallabh Yarns P. Ltd v/s. CIT – (2011) 335 ITR 465

The Tribunal had in appeal from block assessment deleted addition on account of bogus purchases holding that purchases were not bogus. The Court held that reassessment notice cannot be issued on the ground that purchases were bogus.

(14) If issue is in appeal before Tribunal can notice still be issued for reassessment ?

Ans : Such notice cannot be issued.

National Diary Develipment Board v/s. Dy. CIT

(2011) 54 DTR 217

The notice was issued after 4 years on two grounds, but in the reasons recorded nothing was mentioned to indicate that there was any failure to disclose all material facts. The notice was quashed. It was further held that when the subject matter is in appeal no reassessment notice can be issued on such ground, which is pending in appeal.

(15) Can notice be issued for fishing inquiry without any basis for escapement?

Ans. : No

Bakulbhai Ramanlal Patel v/s. ITO –

(2011) 56 DTR 212

In this case notice was issued beyond 4 years but the reasons did not reflect that the income escaped was over one lac. The notice was therefore struck down. Further, the reasons could not be held to be valid as it was a fishing inquiry stating that matter requires detailed investigation and further clarification. Notice was therefore struck down.

Hotel Oasis (Surat)Pvt. Ltd. v/s. Dy. CIT

(2011)57 DTR 378

In this case notice was issued after 4 years there was nothing in the reasons to indicate whether any income has actually escaped assessment, but notice for reopening was issued to make inquiries. The notice was held bad.

(16) If assessment order has merged with order of CIT(A). Can notice be issued on change of opinion?

Ans : No

United Phosphorus v/s. Addl. CIT – (2011) 56 DTR 193

It was held that notice was merely on change of opinion though the decision was after applying mind to the facts further assessment order had merged with the order of CIT(A) hence also notice was bad.

(17) If claim for 100% depreciation is accepted under s. 143(i)(a) & in subsequent notice u/s. 143(2), Can reassessment notice be issued?

Ans : No

Gujarat Power Corporation v/s. Jt. CIT-

(2011) 238 CTR 91 = 202 Taxman 303

Claim for 100% depreciation on boiler purchased from GEB – return accepted under S. 143(i)(a) accepting the claim. Subsequently notice u/s. 143(2) issued & full details furnished & assessment under s. 143(i)(a) not disturbed. Later notice for reassessment issued on ground of excessive depreciation. Held it was mere change of opinion & notice bad.

Agricultural Produce Market Committee v/s. ITO

(2011) 63 DTR 7

In this case reopening notice was issued on the opinion of the audit party. The ITO had granted exemption u/s. 11, I.T Act and the CIT had granted Registration u/s. 12AA of I.T Act. The reopening on the basis of audit objection was mere change of opinion & notice was invalid.

(18) When revised statement filed & accepted can reassessment notice be issued on ground that revised statement was after statutory period?

Ans : No

Rotary Club of Ahmedabad v/s. ACIT

(2011) 336 ITR 58

The Court held that it cannot find there is any material to believe that income has escaped assessment. The assessee had supplied revised computation which was accepted. The reopening notice was on the ground that the revised statement was given after the statutory period and was therefore invalid. The Court held that this was no ground to commence reassessment proceedings.

(19) Can notice for reassessment be issued while giving effect to CIT(A) order on the ground that it will lead to escapement?

Ans : No

Harsiddh Specific Family Trust v/s. Jt. CIT

(2011) 58 DTR 149

Notice was issued after 4 years, the assessment was opened to give effect to order of CIT(A) but according to ITO giving effect to the order of CIT(A) would result in escapement of income. Court held that there was no failure to disclose material facts the notice was therefore bad.

(20) Can notice be issued when there is no escapement & tax would be less than original assessment?

Contd. on page no. 344

INTRODUCTION

Service tax, at the prescribed rate, is leviable on services in respect of which charge of tax has been created under the Service Tax Act. Normally, service tax is payable by the person who is providing the taxable service. However, the Central government is empowered under section 68(2) of Service Tax Act to notify any other person for liability of service tax. It is popularly known as reverse charge mechanism. The concept of service tax by reverse charge was introduced in the Finance Act, 1994 under Service Tax Rules 2002. Rule 2(1)(d) of Service Tax Rule defines the person liable to pay service tax. Rule 2(1)(d) was amended in 2002 and clause (iv) was inserted wherein it was provided that in specified service instead of service provider service receiver is liable for service tax.

Generally, liability of payment of service tax is affixed either on the service provider or the service recipient, but a new concept is developed according to which for specified services and under specified circumstances, such liability shall be partly on the service provider and partly on the service recipient. The enabling provision has been provided by insertion of proviso to section 68(2) in the Finance Act, 1994. Section 68 of the Finance Act 1994 specifies the persons who are liable for payment of service tax. Finance Act 2012 inserted a proviso to section 68(2) which authorizes the Central Government to notify the service and the extent of service tax payable by service provider and by service receiver respectively. **In other words, by insertion of this proviso both the service recipient and the service provider together are liable to pay the service tax in certain cases.**

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As a result of the insertion of new proviso, notification 15/2012-ST dt. 17-03-2012 had been issued whereby in certain specified services, tax will be paid by service receiver to the extent specified in the said notification. ***New reverse charge mechanism has been made applicable from 1.7.2012. The reverse charge is applicable only if service receiver and/or service provider satisfy certain conditions, otherwise service provider has to pay tax on full amount of service.***

NEW SCOPE OF REVERSE CHARGE

Notification No. 30/2012 dated 20/06/2012 supersedes two notifications viz. Notification no. 15/2012-ST dated 17.3.2012 and notification no. 36/2004-ST dated 31.12.2004. As per old notification no. 36/2004-ST telecommunication service, general insurance business, insurance auxiliary services, services provided from abroad, goods transport agency services, sponsorship services were under reverse charge mechanism. However, under new notification, telecommunication service, services provided from abroad and insurance auxiliary services have not been included in reverse charge mechanism. Rest of the services and few other services are also added under new reverse charge mechanism. To include import of service under reverse charge mechanism separate rules viz. “Place of Provision of Services Rules, 2012” have been framed.

Details and applicability of new reverse charge mechanism in case of all the services:

Sr.No	Description of a service	Service provider	Service receiver	% of service tax payable by the person providing service	% of service tax payable by the person receiving the service
~~1~~	~~**Insurance Agent Services**~~ in respect of services provided or agreed to be provided by an insurance agent to any person carrying on insurance business	Insurance agent	Person carrying on insurance business	Nil	100%
~~2~~	~~**GTA**~~ in respect of services provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road	Goods transport agency	where the person liable to pay freight is,—(a) any factory registered under or governed by the Factories Act, 1948 (63 of 1948);(b) any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any other law for the time being in force in any part of India;(c) any co-operative society established by or under any law;(d) any dealer of excisable goods, who is registered under the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder; (e) any body corporate established, by or under any law; or(f) any partnership firm whether registered or not under any law including association of persons;	Nil	100%
~~3~~	~~**Sponsorship**~~ in respect of services provided or agreed to be provided by way of sponsorship	Any person	Body corporate or partnership firm located in taxable territory	Nil	100%
~~4~~	~~**Arbitral Tribunal**~~ in respect of services provided or agreed to be provided by an arbitral tribunal	Arbitral tribunal	Business entity located in taxable territory	Nil	100%
~~5~~	~~**Advocate Services**~~ in respect of services provided or agreed to be provided by individual advocate or a firm of advocate by way of legal services	Individual advocate or a firm of advocate	Business entity located in taxable territory	Nil	100%
~~6~~	~~**Director's Service**~~ In respect of services provided or agreed to be provided by a director of a company to the said company	Director of a Company	Company	Nil	100%

~~7~~	~~**Support Service**~~ in respect of services provided or agreed to be provided by way of support service by Government or local authority excluding renting of immovable property and services specified in sub-clauses (i), (ii) and (iii) of clause (a) of section 66D of the Finance Act,1994	Government/ local authority	Business entity located in taxable territory	Nil	100%
~~8~~	~~**Renting of motor vehicle to carry passengers to any person who is not in the similar line of business**~~ (a)in respect of services provided or agreed to be provided by way of renting of motor vehicle designed to carry passenger on abated value. (b)in respect of services provided or agreed to be provided by way of renting or hiring any motor vehicle designed to carry passenger on non abated value.	Individual/ HUF/ Proprietary or partnership firm/AOP located in taxable territory	Business entity registered as Body corporate located in taxable territory	Nil 60%	100% 40%
~~9~~	~~**Supply of Manpower**~~ in respect of services provided or agreed to be provided by way of supply of manpower for any purpose	Individual/ HUF/ Proprietary or partnership firm/AOP located in taxable territory	Business entity registered as Body corporate located in taxable territory	25%	75%
~~10~~	~~**Security Service**~~ in respect of services provided or agreed to be provided by way of Security Service	Individual/ HUF/ Proprietary or partnership firm/AOP located in taxable territory	Business entity registered as Body corporate located in taxable territory	25%	75%
~~11~~	~~**Works Contract Services**~~ in respect of services provided or agreed to be provided in service portion in execution of works contract	Individual/ HUF/ Proprietary or partnership firm/AOP located in taxable territory	Business entity registered as Body corporate located in taxable territory	50%	50%
11	in respect of any taxable services provided or agreed to be provided by any person who is located in a non-taxable territory and received by any person located in the taxable territory	Any person	Any person	Nil	100%

Following important points can be drawn out from the various notifications issued by the department on reverse charge:

- There are two types of reverse charge. Complete reverse charge and partial reverse charge.

  In terms of serial nos. 7(b), 8 and 9 of the table in notification no. 30/2012-ST dated 20.6.12, the new partial reverse charge mechanism is applicable to services provided or agreed to be provided by way of :

  (a) renting of a motor vehicle designed to carry passengers on non-abated value to any person who is not engaged in a similar business, or

  (b) supply of manpower for any purpose and security service, or

  (c) service portion in execution of a works contract;

  by any individual, Hindu Undivided Family or partnership firm, whether registered or not, including association of persons, located in the taxable territory to a business entity registered as a body corporate located in the taxable territory.

- Nature of service and status of both, the service provider and service receiver, are important to determine the applicability of partial reverse charge provisions.

- In respect of Goods Transport Services the person who pays or is liable to pay freight for the transportation of goods by road in goods carriage, located in the taxable territory, shall be treated as the person who receives the service as per explanation 1 to Notification No. 30/2012-ST. Therefore the person who pays the freight is liable to pay service tax.

- Sometimes it may not be possible for the recipient of service to know whether the person providing service is individual, partnership, HUF etc. Therefore, the service receiver shall insist upon the declaration from the service provider. The nature of declaration will depend upon the nature of services as different conditions have been imposed under different categories of service.

- Legal service has been defined in Notification No. 25/2012-ST. Which provides that any service provided in relation to advice, consultancy or assistance in any branch of law, in any manner and includes representational services before any court, tribunal or authority.

- Section 65(14) of Finance Act 1994 defines the term body corporate. Body corporate shall have the meaning assigned to it in clause (7) of Section 2 of the Companies Act, 1956 (1 of 1956); {clause (7) of section 2 of the Companies Act, 1956 – "body corporate" or "corporation" includes a company incorporated outside India, but does not include – (a) a corporate sole; (b) a co-operative society registered under any law relating to co-operative societies; and (c) any other body corporate (not being a company as defined under this Act) which the Central Government may, by Notification in the official Gazette, specify in this behalf.

- "Security services" means services relating to the security of any property, whether movable or immovable, or of any person, in any manner and includes the services of investigation, detection or verification, of any fact or activity;

- The CBEC has issued **Notification No. 45/2012-ST dated 7-8-2012**, amending the Notification No. 30/2012-ST dated 20-6-2012 and expanded the scope of reverse charge mechanism. Hence, w.e.f 7-8-2012, the services provided by the director to the company will be covered under the reverse charge mechanism. Service provided by Managing and Whole-time Directors/ Executive Directors will be governed by the exclusion clause contained in the definition of 'service' under Section 65B (44) (b) which provides that service provided by employees to their employers in the course of or in relation to employment will not be considered as service. Services provided by directors who are not said to be in the employment with Company will be covered by this clause. They may be providing their professional/expert services to the company. Hence, their Services would be chargeable to Service tax under Reverse charge by the Company w.e.f 07.08.2012.

PARTIAL EXEMPTION

Notification No. 25/2012-ST dated 20.6.2012 exempts certain services provided by Arbitral Tribunal and Advocates. Advocates can provide services either as individuals or as firms. Legal services provided by advocates or partnership firms of advocates are exempt from service tax when provided to the following:

- an advocate or partnership firm of advocates providing legal services (same class of persons)

- any person other than a business entity

W a business entity with a turnover up to rupees ten lakh in the preceding financial Year

However, in respect of services provided to business entities, with a turnover exceeding rupees ten lakh in the preceding financial year, tax is required to be paid on reverse charge by the business entities. Business entity is defined in section 65B of the Finance Act, 1994 as 'any person ordinarily carrying out any activity relating to industry, commerce or any other business or profession'. Thus it includes sole proprietors as well. The business entity can, however, take input tax credit of such tax paid in terms of Cenvat Credit Rules, 2004, if otherwise eligible. The provisions relating to arbitral tribunal are also on similar lines except that the exemption does not apply for legal services provided by it to an advocate or partnership firm of advocates.

Point of Taxation under Reverse Charge

Both the service provider and service recipient are governed by the Point of Taxation Rules 2011 in respect of the service provided or received by him. Usually for service provider , point of taxation will be at the time of raising of invoice if the invoice is issued within 30 days from the date of completion of service. If invoice is not issued within 30 days, then the date of completion of service will be point of taxation. However for the service recipient, point of taxation shall be governed by Rule 7 of Point of Taxation Rules. As per this rule in case of reverse charge method the point of taxation will be the date of payment. However, proviso to rule 7 states that this will not be applicable if the payment is not made within 6 months of date of invoice. So, under reverse charge method, where the payment is not made within 6 months of date of invoice, point of taxation will be determined as per rule 3 of these rules. Rule 3 specifies that point of taxation will be earlier of three events -

++ Raising of invoice,

++ Provision of service, or

++ Receipt of payment.

Thus, where payment is not made within 6 months, the point of taxation will go back to the date of invoice/ provision of service. And so the assessee has to face the consequences of late payment of service tax.

Example: In the case where the invoice is issued in July 2012 and the service recipient pays for the same in August 2012 the point of taxation for the service provider will be the date of issue of invoice in July 2012. The point of taxation for the service recipient shall be the date of payment in August 2012. The service provider would be required to pay tax (to the extent liability is affixed on him) by 5 th /6 th August, 2012 or 5 th /6 th October 2012 depending upon the admissibility of benefit under the proviso to rule 6 of the Service Tax Rules 1994. The service recipient would need to pay tax (to the extent liability is affixed on him) by 5 th /6 th September 2012 or 5th or 6th of October 2012 as the case may be.

Raising of Invoice under Reverse Charge

The service provider shall issue an invoice complying with Rule 4A of the Service Tax Rules 1994. Thus the invoice shall indicate the name, address and the registration number of the service provider; the name and address of the person receiving taxable service; the description and value of taxable service provided or agreed to be provided and the service tax payable thereon. As per clause (iv) of sub-rule (1) of the said rule 4A the service tax payable thereon has to be indicated. The service tax payable would include service tax payable by the service provider.

Example: X is Service Provider (SP) and Y is Service Receiver (SR) they fall under reverse charge and ratio applicable is 25-75 for SP & SR respectively. Say an invoice of 10 Lacs (excluding tax) has been raised on 1st August, 2012. For the given facts the computation of service tax shall be as under:

Particulars	Amount (in Rs)
Invoice Value (excluding tax)	10,00,000/-
Service Tax (25% of 12.36% on reverse Charge)	30,900/-
Total Value	10,30,900/-

As per Rule 4A It is required to write in the invoice, tax payable by the service provider only but to give knowledge of service tax liability to service receiver, the bill can be prepared in the following manner also.

Particulars	Amount (in Rs)
Invoice Value (excluding tax)	10,00,000/-
Service Tax @ 12.36%	1,23,600/-
Less: Service tax to be paid by Receiver 75% of 123600	92,700 /-
Net Value	10,30,900/-

A question would arise if the service provider is not liable to pay service tax liability being SSI (aggregate value of taxable service is less than Rs.10 lacs). In that case the service provider will not mention the particulars

in the bill. But even in that case service receiver is liable to pay service tax of his portion. The liability of the service provider and service recipient are different and independent of each other. Thus in case the service provider is availing exemption owing to turnover being less than Rs. 10 lacs, he shall not be obliged to pay any tax. However, the service recipient shall have to pay service tax which he is obliged to pay under the partial reverse charge mechanism.

Valuation

The service recipient would need to discharge liability only on the payments made by him. Thus the assessable value would be calculated on such payments made (Cost of free material supplied and out of pocket expenses reimbursed or incurred on behalf of the service provider need to be included in the assessable value in terms of Valuation Rules). The invoice raised by the service provider would normally indicate the abatement taken or method of valuation used for arriving at the taxable value. However, since the liability of the service provider and service recipient are different and independent of each other, the service recipient can independently avail or forgo an abatement or choose a valuation option depending upon the case, data available and economics.

In respect of Works Contract Service, the value to be taken for payment of service tax, an explanation 2 has been given in Notification No. 30/2012-ST which states that where both service provider and service recipient are the persons liable to pay tax, the service recipient has the option of choosing the valuation method as per his choice, independent of valuation method adopted by the service provider.

Availment and utilization of Cenvat Credit

The service provider can utilize the cenvat credit of input, input service and of capital goods as per cenvat credit rules against the payment of his portion of service tax liability.

However, there may arise some problems for claiming cenvat credit in the case of Service Receiver, especially in a situation where service receiver is SSI and is not liable to excise or service tax. If the service receiver is liable to excise or service tax then, normally the credit of the entire tax paid on the service received by the service receiver would be available to the service recipient subject to the provisions of the CENVAT Credit Rules 2004. The credit of tax paid by the service provider would be available on the basis of the invoice subject to the conditions specified in the CENVAT Credit Rules 2004. The credit of tax paid by the service recipient under partial reverse charge would be available on the basis of the tax paid challan, but subject to conditions specified in the said Rules.

But if the service receiver is not liable to excise or service tax then he will not be able to claim cenvat credit as he is not providing output service and also he is not using reverse charge service as input within the meaning of input and output service as per cenvat credit rules.

It is further explained vide explanation to rule 3(4) of Cenvat Credit rules that "CENVAT Credit cannot be used for payment of service tax in respect of services where the person liable to pay tax is the service recipient." Therefore cenvat credit cannot be used by service receiver in payment of service tax which is paid as recipient of service.

Conclusion

The provisions of reverse charge are very harsh on service receiver. Under this charge if a person receives any of these services and fall under specified category of service receiver then he has to obtain registration under service tax. Service receiver cannot claim general exemption limit of Rs.10 lacs and so service receiver has to pay service tax and fulfill all service tax obligations even on a meager amount of service received.

5 5 5

A man who was completely innocent, offered himself as a sacrifice for the good of others, including his enemies, and became the ransom of the world. It was a perfect act.

Mahatma Gandhi

GLIMPSES OF SUPREME COURT RULINGS

19 PENALTY – SEC.271(1)(C) – INADVERTENT 'SILLY' MISTAKE :

The assessee was a reputed firm and had great expertise available with it, it was possible that even the assessee could make a 'silly' mistake. The fact that the tax audit report was filed along with the return and that is unequivocally stated that the provision for payment was not allowable under Sec.40A(7) of the Act indicated that the assessee made a computation error in its return of income. The contents of the tax audit report suggested that there was no question of the assessee concealing its income or of the assessee furnishing any inaccurate particulars. Apart from the fact that the assessee did not notice the error, it was not even noticed even by the Assessing officer who framed the assessment order. All that had happened was that through a bona fide and inadvertent error, the assessee while submitting its return, failed to add the provision for gratuity to its total income. The assessee should have been careful but the absence of due care, in a case such as the present, did not mean that the assessee was guilty of either furnishing inaccurate particulars or attempting to conceal its income. On the peculiar facts of this case, the imposition of penalty on the assessee was not justified.

[Price Waterhouse Coopers Pvt. Ltd. vs. CIT and another (348 ITR 306 (2012)]

20 RECOVERY OF LOAN – FROM HEIRS OF GUARANTOR :

The liability of a surety is co-extensive with that of principle debtor. Admittedly, the father of the appellants stood guarantor when GP took loan from the bank. Though there are some documents to show that there were two guarantors but who was the other guarantor is not evident from the record, nor such a plea had ever been taken by the appellants before the Courts below. As the appellants had inherited the estate of the guarantor, they are liable to meet the liability of unpaid amount. No fundamental procedural error had been pointed out which would vitiate the order of confirmation of sale and issuance of sale certificate. However, the appellants may move an application before the Collector, concerned authority, in case the excess amount had not been paid to them, for recovery of the same.

[Ram Kishun & Others vs. State of Uttar Pradesh & Ors. (173 Comp Cas 105 (2012)]

21 CONDONATION OF DELAY – GOVERNMENT DEPARTMENT – DELAY:

Unless government bodies, their agencies and instrumentalities have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months or years due to considerable degree of procedural red-tape in the process. Government Departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for Government Departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few. The law of limitation binds everybody including the Government.

[Office of The Chief Post Master General & Ors. Vs. Living Media India Ltd. and Ors. (2012) (348 ITR 7) (SC)]

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FROM THE COURTS

43 DEPRECIATION:- BLOCK OF ASSETS: NON USE OF A PARTICULAR ASSET NOT RELEVANT

C.I.T. V/S OSWAL AGRO MILLS LTD.

(2012) 341 ITR 467 (DEL)

Issue:-

How far non-use of a particular asset is relevant for not allowing depreciation after the concept Block of Assets is introduced?

Held:-

After the amendment of Sec. 32 of the I.T. Act 1961 by the Taxation Laws (Amendment and Misc. Provisions) Act, 1986, Section 32(1) of the Act allows depreciation on the written down value under a block of assets. Sec 2(11) of the Act defines the term "Block of Assets". Along with the amendment of the definition of "written down value" as contained in Sec 43(6) was also amended. Thus, for the A.Y. 1998-99 the written down value of any block of assets shall be the aggregate of the written down value of all assets falling within the block of assets at the beginning of the previous year. From this, adjustment has to be made for the increase or reduction in the block of assets during the year under consideration. The deduction from the block of assets has to be made in respect of any asset, sold discarded or demolished or destroyed during the previous year. Thus, the depreciation is allowed on the block of assets, and the revenue cannot segregate a particular asset therefore on the ground that it was not put to use. Individual assets have lost their identity and the concept of "block of assets" has been introduced for calculating depreciation. Assessees are not required to maintain particulars of each asset separately. The Revenue cannot claim that for allowing depreciation, user of each and every asset is essential even when a particular asset forms part of a "block of assets".

44 SEC 23(2) : FOR THE PURPOSE OF HIS RESIDENCE. MEANING IN THE CASE OF HUF

C.I.T. V/S. HARIPRASAD BHOJNAGARWALA

(2012) 342 ITR 69(GUJ)(FB)

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Issue:-

Whether exemption provided in Sec. 23(2) being allowances for self occupation applies to HUF also?

Held:-

The benefit of relief in respect of self-occupied property u/s 23(2) of the I.T. Act, 1961 is available to the owner who can reside in his own residence. That means, the benefit of relief in respect of self-occupied property is available only to an individual assessee and not to an imaginary assessable entity. An HUF is nothing but a group of individuals related to each other by blood or in a certain manner. An HUF is a family of a group of natural persons. The family can reside in the house, which belongs to HUF. A family cannot consist of artificial persons. There is nothing in the words used in section 23(2), which excludes its application to a HUF which a group of individuals related to each other.

45 SURVEY : RETENTION OF BOOKS BEYOND PRESCRIBED PERIOD : DAMAGES LEVIED

C.I.T. V/S SUBHA AND PRABHA BUILDERS LTD.

(2012) 342 ITR 14 (KARN)

Issue:-

Can department retain books impounded in survey proceedings for indefinite period?

Held:-

The wordings of Sec. 131 of the I.T. Act, 1961 makes it clear that the A.O. can retain the books of account only for 15 days. The outer limit can be crossed with the prior approval of higher authority and for relevant reasons and for a reasonable period and not for an indefinite period. The reasonable period that can constitute on an outer limit is 15 days and, therefore the extended period can supplement the normal 15 days period statutorily fixed by a few more days and not by a few more months or a few more years.

Even after five years, the Revenue did not complete the assessment. It wanted to continue to retain the books abusing the provisions contained in Sec. 131(3)(b). The single judge was justified in entertaining the writ petition, issuing a direction to return the books of accounts and imposing damages of Rs. 25,000/-.

46 CAPITAL GAIN: INDEXED COST OF IMPROVEMENT BY PREVIOUS OWNER: MEANING OF "HELD BY ASSESSEE".

ARUN SHUNGLOO TRUST V/S. C.I.T.

(2012) 205 TAXMAN 456 (DELHI), (2012) 249 CTR (DEL) 294

Issue:-

Whether while computing capital gain improvement by previous owner is to be considered in case by Sec. 49? What is the meaning of "held by assessee".

Held:-

On the above issue High Court has held as under:-

Benefit of indexed cost of inflation is given to ensure that the taxpayer pays capital gain tax on the "real" or actual "gain" and not on the increase in the capital value of the property due to inflation. This is the object or purpose in allowing benefit of indexed cost of improvement even if the improvement was by the previous owner in case covered by section 49. Accordingly there is no justification or reason to not allow the benefit of indexation to the cost of acquisition in case covered by section 49. This is not the legislative intent behind clause (iii) to explanation to Sec. 48.

This is no reason and justification to hold that clause(iii) of the explanation intends to reduce or restrict the "indexed cost of acquisition" to the period during which the assessee held the property and not the period during which the property was held by the previous owner.

The expression "held by the assessee" used in explanation (iii) to Sec. 48 has to be understood in the context and harmoniously with other sections. The cost of acquisition stipulated in Sec. 49 means the cost for which the previous owner had acquired the property. The term "held by the assessee" should be interpreted to include the period during which the property was held by the previous owner.

47 INTEREST ON LATE PAYMENT OF SALES TAX ALLOWED

SHANKAR TRADING CO. (P) LTD. V/S C.I.T.

(2012) 342 ITR 81 (DELHI)

Issue:-

Whether interest on late payment of Sales Tax allowable?

Held:-

"We find that Sec. 17A(2)of the Himachal Pradesh General Sales Tax Act,1968 specifically provides that if the amount of tax or 'penalty' due from a dealer is not paid by him within the period specified in the notice of demand or, if no period is specified within thirty days from the service of such notice, the dealer shall, in addition to the amount of tax or penalty as the case may be, liable to pay simple interest or such amount at the rate of one percentage per month for the first thirty days and for the period subsequent there of at the rate of one and a half percent per month. It is therefore, clear that when there is a demand of the tax and that is not paid within the period specified in the demand notice within thirty days if no period is specified in the said demand notice. Interest is automatically payable by the dealer. It is clear that once there is a notice of demand, for the tax and the same is not paid is indicated above, the interest becomes automatically payable. In this regard, we find that the Tribunal not having considered the provisions of Sec. 17A(2) of the Himachal Pradesh General Tax Act, 1968 committed an error in law".

Consequently the question was decided in favour of the assessee.

48 SEC. 54F: LIBERAL INTERPRETATION

C.I.T. V/S. SAMBANDAM UDAYKUMAR

(2012) 206 TAXMAN 150 (KARNATAKA)

Issue:-

How provisions of Sec. 54F are to be interpreted?

Held:-

Section 54F is a beneficial provision of promoting the construction of residential house. Therefore the said provision has to be construed liberally for achieving the purpose for which it was incorporated in the statute. The intent of the legislature was to encourage investment in the acquisition of a residential house and completion of construction or occupation is not the requirement of law. The words used in the section are "purchased" or "constructed". For such purpose, the capital gain realized should have been invested in a residential house. The condition precedent for claiming benefit under the said provision is the capital gain realised from sale of capital asset should have been parted by the assessee and invested either in purchasing a residential house or in constructing a residential house. If after making the entire payment, merely because a registered sale deed has not been executed and registered in favour of the assessee before the period stipulated he cannot be denied the benefit of section 54F. Similarly, if he has invested the money in construction of a residential house, merely because the construction was not complete in all respects and it was not in a fit condition to be occupied within the period stipulated, that would not disentitle the assesee from claiming the benefit u/s 54F. The essence of the said provision is whether the assessee who received capital gains has invested in a residential house. Once it is demonstrated that the consideration received on transfer has been invested either in purchasing a residential house or in construction of a residential house even though the transactions are not complete in all resects and as required under the law, that would not disentitle the assessee from the said benefit.

49 SEC. 194-H: TAX TO BE DEDUCTED AT SOURCE: RELATIONSHIP OF PRINCIPAL AND CONCESSIONAIRE.

C.I.T. V/S. MOTHER DAIRY INDIA LTD.

(2012) 206 TAXMAN 157 (DELHI), (2012) 249 CTR (DEL) 559

Issue:-

When concessionaires sold milk of the principal, whether relationship was of principal to principal and there was no liability u/s 194-H to deduct tax at source?

Held:-

The main objects of the assessee were to act as selling agents, selling organizer and adviser and to undertake activity in connection with procurement, processing, storage and marketing including retail sale of milk and other products.

According to the revenue, the assessee ought to have deducted tax at source u/s 194-H from the payments made to concessionaires on the footing that the payment represented commission within the meaning of explanation (i) below that section.

The assessee explained that it sold the products to the concessionaires on a principal to principal basis, that the concessionaires bought the products at a given price after making full payment for the purchases on delivery, that the milk and other products once sold to the concessionaires became their property and could not be taken back from them, that any loss on account of damage, pilferage and wastage was to the account of the concessionaires and that, therefore the payment made to the concessionaires could not be treated as "commission" for services rendered and consequently, there was no liability on the part of the assessee to deduct tax from such payments.

It is irrelevant that the concessionaires were operating from the booths owned by the dairy and were also using the equipment and furniture provided by the Dairy. That fact is not determinative of the relationship between the Dairy and the concessionaires with regard to the sale of the milk and other products. So far as the milk and other products are covered these items become their property the moment they took delivery of them and they were selling the milk and other products in their own right as owners. There are two separate relationships.

Hence department was not correct in law in holding concessionaires were carrying business as agents of the dairy, and no liability to deduct tax at source had arisen.

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TRIBUNAL NEWS

36 ACIT Vs. GE PLASTICS INDIA LTD. 137 ITD 309 (AHD.)

A. Y. 2003-04, Order Dated: 23rd March 2012

BASIC FACTS

The assessee-company claimed depreciation on non-compete fee paid. The Assessing Officer disallowed the same on the ground that non-compete fee was not intangible asset under section 32(1)(ii). On appeal, the Commissioner (Appeals) allowed the depreciation treating same as intangible asset. Aggrieved by the same the revenue filed an appeal before the Tribunal.

ISSUE

Whether depreciation on non-compete fee paid is allowable?

HELD

The learned DR of the revenue placed reliance on the Tribunal decision rendered in the case of Srivatsan Surveyors (P.) Ltd. v. ITO [2009] 32 SOT 268 (Chennai) where the issue was decided against the assessee on the basis that the depreciation on restrictive covenant is 'a right in persona' and not a 'right in rem' and, hence, depreciation on it is not allowable as per the provisions of section 32(1)(ii). In the instant case also, non-compete fee was paid for the acquisition of non-compete rights from M/s JISL for agreeing for not entering into or participate in any business which directly compete with the business of the assessee-company. It shows that the facts are similar and, therefore, this Tribunal decision cited by the revenue is applicable in the instant case, but at the same time, the subsequent decision of the Tribunal rendered in the case of ITO v. Medicorp Technologies India (P.) Ltd. [2009] 30 SOT 506 (Chennai) is also regarding the allowability of depreciation on non-compete fees paid by the assessee of Rs. 2 crores and in that case, the issue was decided by the Tribunal in favour of the assessee. It is now settled position of law that when there are two views possible, the view favourable to the assessee should be followed. Hence, this issue is decided in favour of the assessee by following the Tribunal decision rendered in the case of Medicorp Technologies India Ltd.

37 DCIT Vs. ANDAMAN SEA FOOD (P) LTD. 148 TTJ 383 (KOL)

A.Y. 2008-09, Order Dated: 19th June, 2012

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BASIC FACTS

During the course of assessment proceedings, the Assessing Officer noticed that the assessee had claimed a deduction in respect of consultancy charges paid to a Singapore based company GMPL. It was submitted by the assessee that during the relevant financial period, the assessee had carried out huge volume of currency derivative transactions, and that, in terms of agreement with the GMPL, the assessee was required to pay consultancy charges at the rate of 1 per cent of the total transacted volume of forex derivatives, futures and options - subject to a profit realization. It was submitted by the assessee that the services were rendered outside India, for that reason, the amount paid for consultancy services to GMPL could not be said to be 'fees for technical services' so as to attract the provisions of section 9(1)(vii). This argument did not impress the Assessing Officer. As long as the services were used in India, according to the Assessing Officer, the fees for such technical services would be taxable in India. Accordingly, the Assessing Officer proceeded to hold that amounts paid or payable by the assessee to GMPL were taxable in India, and that the assessee having failed to discharge his tax deduction obligation under section 195, the entire amount paid and payable to the said company was liable to be disallowed under section 40(a)(i). The Commissioner (Appeals) held that consultancy fees paid to Singapore based foreign company were not chargeable to tax in India, and thus, provisions of section 40(a)(ia) could not be applied for failure of deduction under section 195.

ISSUE

Whether consultancy charges paid by assessee to a Singapore based company in respect of currency derivative transactions were not liable to tax in

India under articles 7 and 12 of India-Singapore DTAA and, thus, assessee was not required to deduct tax at source while making said payments?

HELD

There is no dispute with the factual position that the GMPL did not have any permanent establishment in India, and with the legal principle laid down in the applicable tax treaty that, in the absence of the PE of GMPL, its business profits could not be taxed in India. The taxability under the source State under article 7 of the applicable tax treaty, therefore, clearly fails. So far as taxability under article 12, i.e. with respect to 'Royalties and fees for technical services' is concerned, it is clear that the case of the GMPL could at best fall in section 12(4)(b) but, even for this, it is a condition precedent that the services should enable the person acquiring the services to apply technology contained therein, but then it is nobody's case that services rendered by the GMPL were such that the assessee was enabled to apply technology contained therein as services were simply consultancy services which did not involve any transfer of technology. The amounts received by the GMPL could not be taxed as 'fees for technical services' either.

The revenue has come up with the argument that even if the income embedded in payments to GMPL were not taxable in India under article 7 (i.e. business profits) or under article 12, these amounts were taxable under article 23 of the applicable tax treaty.

The Tribunal highlighted the fact that the Article 23 intends to provide for the taxation of those items of income which are not expressly dealt with by the previous articles in the tax treaty. Hence, Article 23 does not apply on such items of income which are covered in Article 6 to 22 and also stated that as consultancy charges are covered by Article 7, 12 or 14 subject to the conditions mentioned therein, the question of taxation of consultancy charges in Article 23 does not arise. In the absence of the taxability of consultancy charges in India in the given circumstances of the present case, non-deduction of tax at source did not amount to non-compliance on the part of the assessee. Therefore, the appeal of the revenue was dismissed.

38 ACIT Vs. TORRENT PHARMACEUTICALS LTD. 137 ITD 301(AHD)

A.Y. 2005-06, Order Dated 31st May, 2012

BASIC FACTS

In the instant case of assessee, the Commissioner (Appeals) confirmed the disallowance of Rs. 1,24,48,506 being 150 per cent weighted deduction under section 35(2AB) in respect of capital expenditure on motor cars and interest totaling to Rs.82.99 lakhs which was made by the Assessing Officer. The assessee aggrieved by the same went into appeal before the Tribunal.

ISSUE

Whether capital expenditure on motor cars and capitalized interest thereof for in-house research &development is eligible for weighted deduction under section 35(2AB)?

HELD

The Tribunal held that the contention of the assessee that since the salary to employee was eligible for deduction under section 35(2AB), acquisition of motor car for those employees should also be considered as eligible for this benefit had no merit. Simply because of this reason that motor cars were purchased for providing to the employees of research & development wing of the assessee, it could not be accepted that the expenditure was incurred on in-house scientific research & development. The primary condition to be satisfied by the assessee for being eligible for this weighted deduction is that the expenditure was incurred on in-house research & development and then only, it could be accepted that, expenditure on motor car was also eligible for such deduction. The perquisite value of the car being expenditure incurred by the assessee-company on running and maintenance of car etc. could be equated with salary payment to the employees but not the cost of car provided to the employees for travelling. Expenditure on purchase of car could not be accepted as expenditure whether capital or revenue incurred on in-house research & development. The capital expenditure incurred by the assessee on purchase of motor cars could not be considered as expenditure incurred by the assessee on in-house research & development and, therefore, the same was not eligible for weighted deduction under section 35(2AB). Similarly, capitalized interest on purchase of car was also not eligible for this benefit for same reasons because it was equal or similar to cost of car. Hence, the appeal of the assessee was to be rejected.

39 DARWABSHAW B CURSETJEE SONS LTD. vs. ITO, 137 ITD 331 (KOL) (TM),

AY 2003-04, Order Dated: May 31, 2012

BASIC FACTS

The assessee was engaged in the stevedoring business. It had filed its return of income disclosing income of Rs 26,950, and this return was processed under section 143(1). In the assessment so finalized, the assessee had claimed a deduction of Rs 23,25,000 in respect of expenses incurred on voluntary retirement scheme (VRS) on the basis of an opinion taken from a firm of chartered accountants. AO disallowed 4/5th of

the expenditure contending that only 1/5th would be allowed as per section 35DDA. The Assessing Officer also imposed the penalty under section 271(1)(c) for concealment of income. On appeal, CIT(A) confirmed penalty contending that in the immediate previous year, only 1/5th of the expenditure was claimed as deduction and hence there cannot be any bonafide belief on part of the assessee in claiming such expenses. On appeal to ITAT, judicial member was of the view that the assessee had acted in a bona fide manner. Accountant member however was of the view that once the specific provisions of section 35DDA were enacted and the assessee himself had followed the same in earlier year, there was no bonafide belief in claiming deduction and penalty was confirmed. Because of conflicting views, matter was referred to Third Member.

ISSUE

Whether in the given facts and circumstances of the case, the CIT(A) is justified in upholding the levy of penalty under section 271(1)(c) of the Act or not?

HELD

ITAT held that Explanation 6 to section 271(1)(c) makes it clear that the onus is on the assessee to prove, inter alia, that explanation given by the assessee is bona fide. In the instant case, the assessee's explanation for making this claim for deduction, in respect of entire amount paid to the employees for voluntary retirement scheme, is that this admittedly erroneous claim was made because of the expert advice received from their tax consultant, and as such it was a bona fide mistake on the part of the assessee to have claimed the deduction.The assessee himself has followed the prescription of section 35DDA in the immediately preceding assessment years, and even this expert opinion does not hold that the provisions of section 35DDA, for whatever reasons, will not come into play in respect of VRS payments. One can perhaps even understand ignorance about a legal provision, such as of section 35DDA, but once the assessee is on record not only being aware about provision of section 35DDA but also preparing the income tax return in the light of the said provision, there could not be any justification about assessee ignoring the clear mandate of the same provision in the subsequent assessment years and such an action on the part of the assessee, could not be said to be bona fide. Hence the explanation of the assessee is not acceptable and the same is rejected. In any case, expert advice obtained by the assessee lacks credibility and just because the assessee's claim was supported by a chartered accountant's opinion, this fact per se could also not absolve the assessee from penalty under section 271(1)(c).

40 ACIT vs. SIL INVESTMENT LTD 148TTJ 213 (DEL) AY 2006-07, Order Dated: May 04, 2012

BASIC FACTS

Assessee Company was engaged in business of making investments besides other business. Its textile division got demerged into resulting company and a particular loan taken by the assessee got transferred in the scheme of demerger. After the demerger, Assessee Company's books neither show any interest nor any outstanding loan. For the year under consideration it earned certain dividend income and AO disallowed interest and other expenses u/s 14A read with rule 8D. On appeal, CIT(A) deleted the disallowance in relation to the interest expenditure citing the reason that the loan has been transferred to the resulting company and there is no nexus between exempt income and interest expenses and confirmed the disallowanceon other expenses. Aggrieved of the same, assessee and revenue, both went into appeal before tribunal.

ISSUE

Can disallowance u/s 14A be made in respect of loan taken by the company which is transferred in scheme of demerger to the resulting company and no interest expenditure incurred appear in profit and loss account of the company?

HELD

ITAT held that CIT(A) was justified in deleting expenditure as there was no nexus between the interest expense and exempt income. Assessee's contention that no expenditure has been incurred to earn exempt income is baseless. It was also held that applicability of rule 8D from AY 08-09 is supported by various high court's decision and prior to AY 08-09, AO is bound to determine the expenditure incurred in relation to income not forming part of the total income by adopting a reasonable basis. There is, however, nothing in the impugned order as to how this finding has been arrived at by the Commissioner (Appeals). The onus to prove the nexus between the expenditure incurred and the earning of income not forming part of the total income is squarely on the department. In the absence of discharging this onus, no disallowance in this regard can be made, much less sustained, as has been done by the Commissioner (Appeals). There is absolutely nothing on record to show that any part of the expenditure was incurred to earn the exempt income. Therefore, these expenses cannot, in any manner, be said to be relatable to earning of exempt income by the assessee-company. Hence the Commissioner (Appeals) was not at all justified in holding the other expenses incurred by the assessee-company was liable to disallowance under section 14A.

5 5 5

UNREPORTED JUDGMENTS

In this issue we are giving gist of a decision of Hon'ble Gujarat High Court in the case of **ShriLallubhaiJogibhai Patel** in the contextof Wealth Tax as to whether the value of the silver bars which stood confiscated by the Government could be added to the Wealth of the Assessee when confiscation order was set aside in appeal and the appeal was pending on the date of the valuation? We feel the members would find the same useful.

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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

10

TAX APPEAL NO. 179 OF 2000
With
TAX APPEAL NO. 180 OF 2000
TO
TAX APPEL NO. 182 OF 2000

HONOURABLE MR. JUSTICE AKIL KURESHI
HONOURABLE MS. JUSTICE HARSHA DEVANI

W.T.O. - Appellant(s)
Versus
LALLUBHAI JOGIBHAI PATEL - Opponent(s)

Date : 04/09/2012

~~Gist only~~

(1) **~~Facts :~~**

i) The assessment years are 1984-85, 1985-86, 1988-89 and 1989-90. Briefly stated the facts of the case are that silver bars weighing 518 kgs. (hereinafter referred to as the "subject assets") came to be seized from the respondent-assessee by the authorities under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (in short "SAFEMA"). By an order dated 8/6/1979 passed by the competent authority under section 7 of SAFEMA, the subject assets were ordered to be forfeited to the Central Government. The assessee carried the matter in appeal before the Appellate Tribunal for Forfeited Property (ATFP), New Delhi, which came to be allowed on 24/6/1992 and the forfeiture was set aside. In the wealth tax proceedings in relation to the assessment years under consideration, the assessee claimed that the value of the silver bars could not be included in the wealth of the assessee as he was not the owner of the silver bars on the valuation dates corresponding to the assessment years under consideration.

ii) The Assessing Officer rejected such contention and included the value of the subject assets in the total wealth of the assessee for the assessment years under consideration. Being aggrieved, the assessee preferred separate appeals before the Commissioner of Wealth Tax (Appeals) against the assessment orders passed by the Assessing Officer. By a common order dated 28/7/1998, the Commissioner (Appeals) dismissed the appeals by holding that the order of the competent authority on which reliance had been placed by the assessee whereby silver was confiscated on 8/6/1979 was not final and the assessee had right of appeal against such order. He was of the view that by exercising right of appeal, the assessee had moved the appellate forum, which eventually, on 24/6/1992 had set aside the order of competent authority and the silver was restored to the assessee. It, therefore, could not be said that under order of the competent authority, the assessee had lost legally the silver in question.

iii) The Commissioner (Appeals), accordingly, upheld the inclusion of the value of subject assets in the net wealth of the assessee for the assessment years under consideration. The assessee carried the matter in further appeals before the Tribunal. By the impugned order, the Tribunal allowed the appeals by holding that in light of the order of forfeiture dated 8/6/1979, the assessee could not be treated as the owner of the silver bars. These silver bars stood confiscated and forfeited and were thus the property of the Central Government. According to the Tribunal, till the order of forfeiture was set aside by the ATFP vide order dated 24/6/1992, it remained in operation. The Tribunal was of the opinion that the order of the Appellate Tribunal could not operate so as to make the forfeiture nonexistent. As the assessee had lost the ownership of the silver bars on the respective valuation dates, the value of silver bars could not be added to the assessable wealth of the assessee.

Revenue is in appeal against the order of the Tribunal.

(2) **~~Question before Hon'ble Court~~**

"Whether the Appellate Tribunal was right in law and facts in holding that the value of the silver bars which stood confiscated under the Smugglers & Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 could not be added to the wealth of the assessee despite the fact that the confiscation order was subsequently set aside in appeal and the appeal was pending on the date of valuation?"

(3) **~~Department's contentions~~:**

In view of the subsequent order passed by the Appellate Tribunal for forfeited property whereby the order of the competent authority under SAFEMA had been set aside there was no forfeiture of the silver bars from the ownership of the assessee. Under the circumstances, subject assets continued to remain property of the assessee and were assessable as his wealth under the provisions of Wealth Tax Act.

(4) **~~Assessee's Contentions~~:**

By virtue of the order passed by the competent authority under the SAFEMA, the subject assets stood forfeited to the Central Government and consequently that did not belong to the assessee on the relevant valuation dates and therefore cannot be made liable to Wealth Tax. Reliance was placed on the following decisions :

i) Jayantilal Amritlal v/s Commissioner of Wealth Tax - 132 ITR 742

ii) Commissioner of Wealth Tax, West Bengal v/s Bishwanath Chatterjee & others 103 ITR 536

iii) Kedarnath Jute Mfg. Co. Ltd/ v/s Commissioner of Income Tax (Central), Calcutta 82 ITR 363

iv) Commissioner of Income Tax v/s Kalinga Tubes Ltd. – 218 ITR 164

v) Commissioner of Income Tax v/s Bharat Carbon & Ribbon Mfg. Co. P. Ltd. 239 ITR 505

(5) **~~Held :~~**

The Hon'ble High Court after considering the arguments of both the sides, held as under :

i) From the above decisions, the legal proposition that can be culled out is that a judgment, decree or order which is subject matter of challenge before the higher forum, continues to be final, effective and binding as between the parties till such order is set aside, unless it is a nullity or unless the higher forum passes a specific order staying or suspending the operation or execution of the judgment, decree or order under challenge.

ii) Reverting to the facts of the present case, by the order dated 8/6/1979 passed by the competent authority under section 7 of the SAFEMA, the subject assets stood vested in the Central Government free from all encumbrances. Such order continued to be in operation till the same was set aside by the ATFP on 24/6/1992. Thus, merely because the assessee had challenged the order of forfeiture before the Appellate Tribunal, the same would not detract from the fact that in view of the order passed by the competent authority under section 7 of the SAFEMA, the assessee stood divested of his ownership over the subject assets which stood vested in the Central Government free from all encumbrances. Thus, in the interregnum, that is, from the date of passing of the order of forfeiture, till the same was set aside, the said order was in operation and the pendency of the appeal would not reduce the efficacy of such order. The subject assets, therefore, did not belong to the assessee on the relevant valuation dates and could not have been taken into consideration while computing the net wealth of the assessee.

iii) A faint attempt has been made by the learned counsel for the appellant to submit that during the relevant valuation dates, the order of forfeiture had been stayed by the higher forum. In support of such contention, the learned counsel had placed reliance upon a communication dated 6/11/1992 addressed by the assessee to the Assistant Commissioner of Wealth Tax. On a perusal of the said communication, it is apparent that it is nowhere stated therein that the High Court had granted interim stay against the order passed by the competent authority under section 7 of the Act.

iv) In light of the aforesaid discussion, the question is answered in the affirmative. The Appellate Tribunal was right in law and facts in holding that the value of silver bars which stood confiscated under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 could not be added to the wealth of the assessee despite the fact that the confiscation order was subsequently set aside in appeal and the appeal was pending on the date of valuation.

5 5 5

CONTROVERSIES

If no expenditure is incurred for earning exempt income, whether 14A can be applied?

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~~Issue:~~

While computing the income of the assessee, even if no expenditure is incurred for earning exempt income whether any disallowance can be made u/s 14A of the Income Tax Act, 1961?

~~Proposition~~:

It is proposed that if expenditure has been incurred for earning exempt income then only it shall be disallowed. Further, the onus is on the Assessing Officer to determine that the expenditure that has been incurred is for earning exempt income.

~~View against the proposition~~:

"Expenditure incurred in relation to income not includable in total income.

For the purpose of computing total income under this chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under the Income Tax Act, 1956."

~~Finance Act, 2002~~

"Expenditure incurred in relation to income not includible in total income.

14A. For the purposes of computing the total income under this Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act.

Provided that nothing contained in this section shall empower the Assessing Officer either to reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154, for any assessment year beginning on or before the 1st day of April, 2001."

~~Finance Act, 2006~~

"Expenditure incurred in relation to income not includible in total income

14A. (1) For the purposes of computing the total income under this Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act.

(2) The Assessing Officer shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act in accordance with **such method as may be prescribed**, if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under this Act.

(3) The provisions of sub-section (2) shall also apply in relation to a case where an assessee claims that no expenditure has been incurred by him in relation to income which does not form part of the total income under this Act.

Provided that nothing contained in this section shall empower the Assessing Officer either to reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154, for any assessment year beginning on or before the 1st day of April, 2001."

The Central Board of Direct Taxes (CBDT) in exercise of the powers conferred by section 295 of the Income-tax read sub-section (2) of section 14A of the Income-tax Act, 1961 has vide **Notification No. 45/2008, dated March 24th 2008** prescribed the method for determining the expenditure to be disallowed under section 14A in relation to income not forming part of the total income by inserting Rule-8D in the Income-tax Rules. The method for determining of expenses to be disallowed as per Rule-8D read with section 14A is as under:

"Method for determining amount of expenditure in relation to income not includible in total income.

8D(1) Where the Assessing Officer, having regard to the accounts of the assessee of a previous year, is not satisfied with-

(a) the correctness of the claim of expenditure made by the assessee; or (b) the claim made by the assessee that no expenditure has been incurred, in relation to income which does not form part of the total income under the Act for such previous year, he shall determine the amount of expenditure in relation to such income in accordance with the provisions of sub-rule (2).

(2) The expenditure which is to be disallowed shall be the aggregate of (i) to (iii) below:
(i) the amount of expenditure **directly** relating to income which does not form part of total income;
(ii) where interest is not directly attributable to any particular income or receipt, an amount computed in accordance with the following formula, namely:-

Step 1 : Identify expense directly relating to exempt income **(A)**

Step **2** : Aggregate interest expense excluding (A). (B)

Residual interest to be pro-rated as:

$$\text{Residual Interest } \mathbf{x} \text{ investment on } 1^{st} \text{ and last day} \over \text{Average of total assets on first and last day}$$

Step 3 : 0.5% of Average investment towards administrative cost. **(c)**

Step **4** : Total disallowance (A+B+C)

Arbitrary thumb-rule.

No discretion to A.O. to apply any other method.

Disallowance may exceed income / actual expense.

The categories beyond the net of section 14A are:

- Income in respect whereof incentive deduction may be permissible from Gross Total Income under chapter VI-A.
- Income in respect whereof deduction is permissible u/s. 10A, 10AA, 10B,etc.
- Income from investment in debentures (including convertible debentures) or such other instruments income wherefrom is chargeable to tax.
- Income from investment in shares or securities of overseas companies.

I would now like to refer to the following cases:

Godrej & Boyce Mfg Co Ltd -vs.-DCIT (Unreported judgment of Hon'ble Bombay High Court in ITA 626 & WP 758 of 2010 dated 12TH August 2010.

In this case, the assessee claimed exemption in respect of dividend income of 34.34 cr u/s 10(33). The A0 issued show cause notice for disallowance of interest u/s 14A. The explanation of assessee was that-(i) 95% of shares were bonus shares for which no cost was incurred (ii) no investment in shares was made in the current year and no disallowance was made in earlier years (iii) there were sufficient interest free funds available in the form of share capital, reserves etc. which were more than investment in shares. Not satisfied with the said explanation, the A0 made disallowance u/s 14A on pro rata basis.

The High Court has summarized the principles as under:

"(i) The mandate of section 14A is to prevent claims for deduction of expenditure in relation to income which does not form part of the total income of the assessee;

(ii) Section 14A(1) is enacted to ensure that only expenses incurred in respect of earning taxable income are allowed;

(iii) The principle of apportionment of expenses is widened by section 14A to include even the apportionment of expenditure between taxable and non-taxable income of an indivisible business;

(iv) The basic principle of taxation is to tax net income. This principle applies even for the purposes of section 14A and expenses towards non-taxable income must be excluded;

(v) Once a proximate cause for disallowance is established, which is the relationship of the expenditure with income which does not form part of the total income, a disallowance has to be effected. All expenditure incurred in relation to income which does not form part of the total income under the provisions of the Act has to be disallowed under section 14A."

The High Court held that the provisions of sub-sections (2) and (3) of section 14A and rule 8D are Constitutional valid. The Court held that rule 8D will apply w.e.f. A. Y. 2008-09. The Court further held that even for the prior period, the Assessing Officer is duty bound to determine the expenditure which has been incurred in relation to income which does not form part of the total income by adopting a reasonable basis or method consistent with all the relevant facts and circumstances after a reasonable opportunity to the assessee to place all germane material on the record.

View in favour of the proposition:

The scope of section 14A may extend to the following categories of income.

- Agricultural income.

- Dividend from investment in shares of Indian Companies-listed and unlisted, including subsidiaries whether held as stock-in-trade or investment.
- Investment in equity or tax-free securities oriented portfolio.
- Income from investment in mutual funds, tax free bonds/securities.
- Share of profit from firm/AOP.
- Any other income which is outside the scope of total income, say u/s 10.

I would now like to refer to the following cases:

In the case of ***CIT vs. Walfort Share and Stock Brokers P. Ltd; 326 ITR 1 (SC)*** it was seen that section 14A of the Income Tax Act, 1956 clarifies that the expenses incurred can be allowed only to the extent they are relatable to the earning of taxable income. In many cases the nature of expenses incurred by the assessee may be relatable partly to exempt income and partly to taxable income. In the absence of section 14A, the expenditures incurred in respect of exempt income were being claimed against taxable income. The mandate of section 14A is clear: it desires to curb the practice of claiming the deduction of expense incurred in relation to the exempt income against taxable income and at the same time avail of the tax incentive by way of exempt income without making any appointment of the expenses incurred in relation to the exempt income. The basic reason for insertion of section 14A is that certain incomes are not includable while computing the total income because these are exempt under certain provisions of the Act.

The basic principle of taxation is to tax the net income, i.e., gross income minus the expenditure. On the same analogy, exemption is also in respect of net income. The theory of apportionment of expenditure between taxable and non-taxable has, in principle, been now widened u/s 14A.

A pay back is not expenditure in the scheme of section 14A, for attracting section 14A there has to be a proximate course for disallowance, which is in relationship with the exempt income. Payback or return of investment is not such proximate cause.

A mere receipt of dividend subsequent to the purchase of units, on the basis of a person holding units at the time of declaration of dividend on the record date cannot go to set off the cost of acquisition of the units.

It was held that sections 14A and 94(7) operate in different fields. Section 14A deals with disallowance of the expenditure incurred in earning tax-free income against the profits; on the other hand section 94(7) deals with disallowance of the loss on the acquisition of the asset.

Thus section 14A would be applicable in the case of a composite and indivisible business which resulted in taxable and non-taxable income, where it was not permissible to the Assessing Officer to apportion the expenditure between the taxable and non-taxable income and if the expenditure in relation to exempt income has been claimed/allowed against the taxable income.

In ***CIT vs. Hero Cycles 323 ITR 158 (PH),*** the question was raised that whether disallowance u/s 14A was justified with reference to the facts of the case. The facts of the case were as follows: The assessee was engaged in the business of manufacturing of cycles and the parts thereof. Apart from the business income, the assessee received dividend income not forming part of the total income. The A.O made disallowance u/s 14(A)(3) which was upheld by the CIT(A). However, the Tribunal found that the entire investment had been made by the assessee out of dividend proceeds, sale proceeds, debenture redemption fund etc. Further, cash flow statement showed only the non interest bearing funds had been utilized for making the investments. Bank statement also revealed that the amount of dividend, sale proceeds of shares, debenture redemption money had been deposited and out of his money, investments were made in acquiring shares/ units. **On these facts, it was held by the Tribunal that no expenditure was incurred in relation to exempted income.** Consequently, the disallowance was deleted by the tribunal.**Accordingly in the above case it was held that no question of law was involved and therefore, appeal of revenue was dismissed.**

On appeal before the High Court, it was contended that even when the assessee claimed that no expenditure had been incurred, the correctness of the claim can be gone into by the A.O. Since the claim of the assessee was not found to be acceptable by the A.O., disallowance was justified in view of Rule 8D r/w section 14A(2).

The Honorable Court rejected the said contention in view of the factual finding recorded by the tribunal. It was held that in view of the finding that investment in shares was out of non interest bearing fund, the disallowance u/s 14A was **unsustainable. The contention of the revenue that directly or indirectly some expenditure is always incurred which is to be disallowed is a question of fact. *Disallowance u/s 14A requires finding of the incurring of expenditure.*** Where it is found that for earning

exempted income, no expenditure was incurred, **disallowance cannot be made.**

In the case of ***ACIT vs. Lafarge India Holding (P) Ltd. (2008) 19 SOT 121 (Mum),*** it was held that three conditions should be satisfied before invoking the provisions of section 14A:

i. the assessee should have incurred expenditure.

ii. such expenditure should be in relation to income.

iii. such income does not form part of the total income under this Act.

Thus in the year where there is no income of the assessee which is exempt, provisions of section 14A cannot be applied.

In the case of ***Wimco Seedlings Ltd. vs. DCIT (2007) 107 ITD 267 (Del.) (TM)*** it was held that assessee incurred any expenditure in relation to earning of exempt income. No expenditure other than expenditure apportioned by the assessee itself against agricultural receipt, incurred by the assessee could be apportioned against agricultural receipt for purposes of disallowance u/s. 14A

~~Summation~~:

There can be probable defenses for Nil or Nominal Disallowance u/s 14A. These can be explained as under:

- Section 14A should be limited in application to the expenditure when sole or predominant object is to produce or earn income which is exempt.
- Expenditure which directly relates to the exempt stream should alone be subjected to disallowance.
- Indirect expenditure should be one that bears some 'relation' to exempt income; Rule 8D cannot fictionally create a nexus which is lacking.
- In case of docile investment, income accrues effortlessly or automatically as a matter of course and not because any expenditure is incurred by the taxpayer.

In ***DCIT v/s. ING investment*** it was held the expenditure which is proved to have a nexus with the exempt income can be disallowed. (ITAT Mumbai). In ***Minda investment v/s. D C .,*** the Hon'ble ITAT has held that no expenditure can be disallowed uls 14A unless expenditure has been identified to have been incurred for exempt income.

In ACIT vs. Punjab State Coop & Mktg (ITAT Chandigarh), it was held that in section 14A, disallowance cannot exceed the exempt income. There can be no disallowance uls 14A in absence of nexus between investment in tax-free securities and borrowed funds. The facts of the case were as follows : In AY 2007-08, the assessee received dividend of Rs. 4 lakhs in respect of investment in shares made in earlier years. No investments were made during the year. It was claimed that the investment in the earlier years was made out of reserves & surplus and that there was no expenditure incurred during the year to earn the dividend. The A0 held that as in the earlier years, the assessee had borrowed funds, s. 14A applied. He applied the rate of interest paid on the borrowings and disallowed Rs. 12.73 lakhs. This was deleted by the CIT (A). On appeal by the department, HELD dismissing the appeal

(i) If there is no nexus between borrowed funds and investments made in purchase of shares, disallowance U/S 14A is not warranted (Winsome Textiles 3 19 ITR 204 (P&H) & Hero Cycles 323 ITR ***5*** 18 followed);

(ii) As the total dividend income received was Rs.4 lakhs, a disallowance of Rs.12 lakhs by invoking s. 14A is not warranted.

I.T.O vs. Daga Capital Management (P) Ltd 117 ITD 169 (SB)

Where the Special Bench had to consider whether section 14A applied with respect to dividend earned by an assessee trading in shares and holding shares as stock-in-trade, HELD:

- Section 14A has overriding effect over all other sections allowing deduction.
- Placement of section 14A below section 14 of the Act, viz. "Heads of Income" clearly demonstrates its applicability to all heads of income while computing total income.
- Section 14A(2) and 14A(3) of the Act are retrospective in operation and hence Rule 8D is also retrospective in nature.
- Section 14A is wide enough to cover all types of expenses i.e. direct as well as indirect.
- The words "in relation to" used in section 14A of the Act are very broad expression.
- Section 14A applies to even incidental exempt income, and
- Section 14A would be applicable, even if there is no direct and proximate connection between the exempt income and the expenditure.
- The legal position as on today is as under:
- The decision of the Special Bench in the case of **Daga Capital Management (P) Ltd** (supra) is no more good law for the reasons

- (i) that the provisions of sub sections (2) & (3) of section 14A have been held to be prospective in nature and therefore, would be applicable from assessment year 2007-08 as held by Hon'ble Bombay High Court in Godrej's case;
- (ii) that provisions of section 14A cannot be applied unless there is proximate cause for disallowance as held by the Hon'ble Supreme Court in **Wallfort's** case (supra) and Hon'ble Bombay High Court in **Godrej's** case.
- Therefore, application of the provisions of sub sections (2) & **(3)** of section 14A and Rule 8D is not automatic in each and every case where there is income not forming part of total income.
- (iii) Sub sections (2) and (3) of Section 14A are intended to enforce and implement the provisions of Sub section (1).
- (iv)Hence first step would be to ascertain whether there is proximate connection between the expenditure incurred and the income not forming part of total income. If such proximity is established then A0 would be justified in applying of the provisions of sub sections (2) and (3) of section 14A and Rule 8D.
- (v) The expenditure incurred u/s 14A would include direct and indirect but relationship with exempted income must be proximate.
- (vi) If there is material to establish that there is direct nexus between the expenditure incurred and the income not forming part of total income then disallowance would be justified even where there is no receipt of exempted income u/s 10 in the year under consideration in view of the decision of Special Bench in the case of Cheminvest Ltd (supra).

The basic principle of taxation is to tax the net income. On the same analogy, the exemption is also to be allowed on net basis i.e. gross receipts minus related expenses. Therefore, if any expenditure is directly related to exempted income, it can not be allowed to be set off against taxable profit. On the same analogy, in my opinion, if any expenditure is directly related to taxable income, it cannot be allowed to be set off against the exempted income merely because some incidental benefit has arisen towards exempted income. Whether expenditure relates to taxable income or exempted income would depend on the facts of each case.

There is distinction between return of investment and return from investment. The expenditure incurred is pay out while return of investment is pay back. The loss on sale of shares is pay back which cannot be equated with the expression 'expenditure incurred' and therefore cannot be disallowed merely because exempted income in the form of dividend income has arisen from investment made as held by the apex court in the case of Wallfort(supra).

If sufficient material is on record to establish that investment in shares units was made out of non interest bearing fund, no disallowance can be made out of interest debited to profit & loss account even if there is dividend income from such investments as held by the Hon'ble Punjab & Haryana High Court in the case of Hero Cycles(supra)

Finally it is submitted that the law regarding disallowance u/s. 14A appears to be well settled and clear. In my opinion two unassailable propositions are as under:

1] There has to be nexus to be established by the I.T. Dept. that expenditure is incurred for earning the exempt income. The I.T. Dept has to establish the linkage between incurring of expenditure and earning of exempt income.

2] If no expenditure is incurred for earning the exempt income then no disallowance can be made u/s. 14A of the I.T. Act, 1961. The I.T. Dept cannot apply Rule-8D when no expenditure is incurred for the purpose of earning exempt income. It is well settled law that Rules cannot override the provisions of law.

Recently very important decision is delivered on 5.10.12 by Hon. ITAT Mumbai Bench in the case of **Justice Sam P Bharucha vs. ACIT (ITAT Mumbai)** in the said case the assessee claimed that he has not incurred any expenditures for earning the tax free income and so no disallowance can be made u/s.14A of the I.T.Act 1961. The Hon. Tribunal held that for sec.14A to apply there should be a proximate relation between the expenditure and the tax free income. There must be live nexus between the expenditure and the income not forming part of total income. The AO has to give a finding that the expenditure incurred and claimed by the assesse is attributable to earning of the exempt income. The Hon. Tribunal relied on the decision of:

1] Auchtel Products Ltd. Vs. ACIT (ITAT Mumbai)

2] ACIT vs. SIL Investment Ltd. (ITAT Delhi)

3] Pawan Kumar Parmeshwarlal vs. ACIT (ITAT Mumbai)

The Hon. Tribunal in the case of ACIT vs. SIL Investments Ltd. of Delhi ITAT held that the contention of the revenue that some expenditure directly or indirectly is always incurred for earning exempt income cannot be accepted. The burden is on the AO to establish the nexus of the expenditure incurred with earning of exempt income before making any disallowance u/s. 14A of the I.T. Act, 1961.

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JUDICIAL ANALYSIS

SOME RECENT GUJARAT HIGH COURT DECISIONS ON REOPENING

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- **HIMSON TEXTILE ENGINEERING INDUSTRIES LTD. (SCA 5498 of 2002, Judgment dated 25/06/12)**

Assessment was framed earlier u/s 143(3) of the Act and the deduction claimed u/s 80M was allowed. Later, the assessment was sought to be re-opened by issuance of notice u/s 148 beyond the period of four years from the end of relevant Asst. Year on the pretext that the assessee had, by claiming inaccurate deduction u/s 80M, furnished inaccurate particulars. Since the AO was not in a position to demonstrate as to what is failure on the part of the assessee, requirements of proviso to Section 147 of the Act were not satisfied, re-assessment is without jurisdiction and consequently, notice u/s 148 cannot be sustained.

- **ASHANK D DESAI (SCA 4567 & 4569 of 2002, Judgment dated 02/07/12)**

Assessment was earlier framed u/s 143(3) of the Act and deduction in respect of interest on funds borrowed for making investment in shares of a company was allowed u/s 57(iii). Later, the assessment was sought to be re-opened by issuance of notice u/s 148 beyond the period of four years from the end of relevant Asst. Year mainly for the reason that the said interest was not deductible u/s 57(iii). Assessee had disclosed primary facts in the return of income. During the original assessment proceedings, assessee had also furnished details about borrowings, interest paid thereon and the dividend. Thus, there being no failure on the part of the assessee to disclose fully and truly all the material facts, the impugned notice was quashed.

- **SUN PHARMA INDUSTRIES LTD. (SCA 8343 of 2007, Judgment dated 02/07/12)**

Assessment was earlier framed u/s 143(3) of the Act and deduction u/s 80HHC was allowed. Subsequently, re-assessment proceedings were initiated and a fresh assessment was framed. Later, the assessment was again sought to be revised by issuance of notice u/s 148 beyond the period of four years from the end of relevant Asst. Year aiming at allowing deduction u/s 80HHC after set off of unabsorbed business loss. The issue regarding deduction u/s 80HHC was dealt with twice in the past (one at the time of framing original assessment and second at the time of re-assessment). The sole ground for re-opening the assessment was the decision of the Hon'ble Apex Court in the case of IPCA Laboratory Ltd. vs. DCIT [266 ITR 521 (SC)] which clearly implies that there is mere change of opinion. There was no failure on the part of the assessee to disclose fully and truly all the material facts. Even the reasons recorded for re-opening the assessment didn't mention anything about any failure on the part of the assessee. Hence, the impugned notice was quashed.

- **VODAFONE ESSAR GUJARAT LTD. (SCA 9817 of 2009, Judgment dated 02/07/12)**

Assessment was framed earlier u/s 143(3) of the Act. There was no specific discussion with respect to the claim of deduction u/s 35ABB in respect of expenditure for obtaining license to operate telecommunication services in the Asst. order. The said claim was accepted without any disallowance. The said issue was examined threadbare by AO during the course of assessment proceedings as is apparent from the correspondence between the AO and the assessee. Hence, there being no failure on the part of the assessee to disclose fully and truly all the material facts, the impugned notice was quashed.

- **DHARA VEGETABLE OIL AND FOODS CO. LTD. (SCA 9826 of 2009, Judgment dated 10/07/12)**

Assessment was framed earlier u/s 143(3) of the Act. There was no specific discussion with respect to the claim of deduction u/s 35(1)(i), (ii) & (iv) in respect of expenditure on scientific research in the Asst. order. The said claim was accepted without any

disallowance. The said issue was examined threadbare by AO during the course of assessment proceedings as is apparent from the correspondence between the AO and the assessee. Hence, there being no failure on the part of the assessee to disclose fully and truly all the material facts, the impugned notice was quashed.

- **PREM CONDUCTORS PVT. LTD. (SCA 12513 & 12542 of 2009, Judgment dated 02/07/12)**

As regards SCA 12513 of 2009, an Intimation was passed earlier u/s 143(1) accepting petitioner's claim u/s 80IB for AY 2002-03. Subsequently, re-assessment proceedings were initiated and consequently, claim u/s 80IB was reduced. As regards SCA 12542 of 2009, Assessment was framed earlier u/s 143(3) by partly disallowing claim u/s 80IB for AY 2003-04. Later, the assessment was sought to be revised for both the Asst. Years by issuance of notices u/s 148 beyond the period of four years from the end of relevant Asst. Years aiming at reducing claim u/s 80IB as there was certain other income which was not eligible for deduction u/s 80IB. AO came to know about the same from the returns of income itself. There being no failure on the part of the assessee to disclose fully and truly all the material facts, the impugned notice was quashed.

- **HI-CHOICE PROCESSORS PVT. LTD. (SCA 12768 of 2009, Judgment dated 02/07/12)**

Assessment was earlier framed u/s 143(3) of the Act and AO had duly applied his mind towards increase in turnover and cost of raw materials. Later, the assessment was sought to be re-opened by issuance of notice u/s 148 beyond the period of four years from the end of relevant Asst. Year mainly for the reason alleging that the petitioner had under stated its turnover. During the original assessment proceedings, the assessee had furnished gross profit working, reasons for fall in GP and all other materials essential for framing the assessment. Thus, there being no failure on the part of the assessee to disclose fully and truly all the material facts, the impugned notice was quashed.

- **SUN PHARMACEUTICAL INDUSTRIES LTD., SPARC (SCA 14219 of 2008, Judgment dated 02/07/12)**

Assessment was earlier framed u/s 143(3) of the Act in which interest u/s 234B was calculated without giving benefit of MAT credit to the assessee and benefit of netting of interest was also not allowed while calculating deduction u/s 80HHC. As regards the issue of giving benefit of MAT credit, CIT(A) held that benefit of MAT credit was to be given to the assessee and the same was confirmed by ITAT. As regards the issue of netting of interest, CIT(A) decided the issue in favor of the assessee and the matter was pending before ITAT. In the meantime, re-assessment proceedings were initiated and netting of interest was allowed. Later, the assessment was again sought to be revised by issuance of notice u/s 148 beyond the period of four years from the end of relevant Asst. Year aiming at making additions in respect of the aforesaid issues. The said issues have already been dealt with in the past. There was no failure on the part of the assessee to disclose fully and truly all the material facts. Hence, the impugned notice was quashed.

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Contd. from page no. 322 *Article : Gujarat High Court Leads in Judgments on Challenge to Reassessment Notices*

Ans : No

P.K.M Advisory Services Pvt. Ltd. v/s. ITO

(2011) 339 ITR 585

The Court found that the tax payable on proposed reassessment would be less than tax paid under regular assessment. Therefore there was no escapement and the reassessment proceedings were invalid.

All these questions have been recently decided by about 50 (reported and unreported) judgments of the Gujarat High Court delivered in 2011 and 2012.

It will be seen that virtually all major issues have been decided by the Gujarat High Court relying at times to various Supreme Court judgments delivered. This clearly shows the leading position of Gujarat High Court in deciding largest number of cases dealing with validity of reassessment notices.

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INTERNATIONAL TAXATION

Delhi Tribunal ruling on comparability issues in transfer pricing

This article summarizes a recent ruling of the Delhi Income-Tax Appellate Tribunal (Tribunal) in the case of M/s. Actis Advisors Private Ltd (Assessee) on certain transfer pricing issues related to a captive service provider rendering services to its Associated Enterprises (AEs). The Tribunal has adjudicated on issues relating to selection of comparability data in a transfer pricing analysis.

Based on a detailed analysis of the Assessee's and Transfer Pricing Officer's (TPO) approach to selection of comparable data and having regard to the facts of the case, the Tribunal held that companies that performed functions similar to that performed by the Assessee but incurred marketing expenses could be considered as comparable to the Assessee who did not incur any such expenses. According to the Tribunal, such marketing expenses incurred over a period of time by services companies may not create marketing intangibles and may not have any impact on the margins earned so as to vitiate comparability with the Assessee. The Tribunal further held that companies having significant volatility in margins, disproportionate to other potentially comparable companies, should not be considered as comparables. The Tribunal also held that companies having related party transactions (RPT) to the extent of up to 25% could be considered as comparable and agreed with the Assessee's contention on the need to apply quantitative criteria for screening comparables based on the size/turnover of the Assessee. The Tribunal held that companies operating in different business lines but within the same sector can be considered as comparable and acknowledged the need for working capital adjustments. In addition, consistent with other Tribunal findings, the Tribunal upheld the use of single year data.

Background and facts of the case

The Assessee, an Indian subsidiary of Actis Holding Private Limited, is engaged by its AEs to provide financial advisory services, management consultancy services, undertake feasibility studies and diagnose operational difficulties of existing units/ advice on disinvestment. For the financial years (FY) 2005-06 and 2006-07, the Assessee rendered advisory and consultancy services and was remunerated on a cost plus basis. The Assessee selected Transaction Net Margin Method as the most appropriate method to benchmark its international transaction and based on the application of quantitative and qualitative criteria for accepting/ rejecting comparable data, arrived at a final set of comparable companies. The Assessee considered a multiple-year average of the net margins of comparables to conclude the transaction to be at arm's length. One of the quantitative criteria employed by the Assessee in the TP study for one of the years, was to reject companies that had marketing expenses in excess of 3% of sales.

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During audit proceedings, the Tax Authority rejected the economic analysis and conducted a fresh comparable search based on current-year data. Specifically, the Tax Authority modified the screening filters used by the Assessee for selecting comparable data, introduced additional comparables and denied the adjustment for differences in working capital. Based on the analysis, the Tax Authority made an upward TP adjustment to the value of the international transactions undertaken by the Assessee. Being aggrieved by the Tax Authority's order, the Assessee filed its objections with the Dispute Resolution Panel (DRP), an alternate dispute resolution mechanism under the Indian Tax Law (ITL). The DRP upheld the adjustment proposed by the Tax Authority.

The Assessee filed an appeal before the Tribunal, the second-level appellate authority, against the TP adjustment. The Tribunal set aside the assessment order for FY 2005-06 observing that the DRP had not disposed of the objections of the Assessee by passing a speaking order. During the second round, the DRP accepted only one of the contentions of the Assessee (rejected one of the companies chosen by the TPO) and rejected all other objections raised by the Assessee.

Assessee's arguments

- The Assessee contended that companies that incur marketing expenses would generate intangibles resulting in a return on such investment in the future and hence have higher margins. Accordingly, application of an advertising and marketing expense filter is appropriate.
- The Assessee objected to inclusion of certain companies considered as comparable by the Tax Authority as the companies were in engaged in rendering of engineering services, data analytics and geographic information services that are high-end services compared to the back-office services provided by the Assessee.
- The Assessee argued that companies with huge fluctuations in margins, having related party transactions in excess of 15% should be excluded.
- The Assessee contended that a quantitative criteria based on turnover should be used and companies having turnover significantly higher than its turnover are not comparable. In support of its contentions, the Assessee relied on various rulings wherein a turnover filter of INR 10 million - 2 billion was applied.
- The Assessee argued that an uncontrolled entity is expected to earn a market rate of return on its capital, independent of its operation, whereas the Assessee has not put to use the capital of its own resources as all costs were borne by the AEs. Therefore an adjustment to the profit margin for non-utilisation of the essential capital for its day to day working should be given.

Tax authority's arguments

- With regard to the exclusion of companies incurring marketing expenditure in excess of 5%, the Tax Authority argued there is no specific correlation between the incurrence of expenses and return in the year of incurrence because the expenses only contribute to brand-value in future years. Companies with minimal/ nil marketing expenses have also shown higher profits than companies incurring marketing expenses.
- On rejection of companies engaged in high-end services, it was contended that neither the Assessee nor the lower level authorities analyzed the horizontal or functional line within relevant sector for the purposes of comparability analysis.
- The Tax Authority objected to the use of multiple-year data, stating that the transfer pricing rules provide for mandatory use of relevant year data only and that the use of multiple-year data is an exception.

Ruling of the Tribunal

Use of marketing expense as a quantitative criteria

The Tribunal held that companies having marketing expenses could be considered as comparable. The Tribunal stated that the marketing expenses incurred over a period of time by companies in service industries may not create marketing intangibles unlike manufacturing or distribution companies. The

Tribunal held that the profit margin of a company is dependent on numerous factors and may not be influenced only by one factor.

Exclusion of companies with huge fluctuation in margins

The Tribunal agreed with the Assessee's contention that, if the result of a company over a period exhibits significant profit fluctuation, there could be reasons for such fluctuation beyond normal operational factors. Accordingly, companies with volatile margins should not be considered as comparable. While providing its findings, the Tribunal also observed that high-margin companies cannot be summarily rejected as long as they are earning consistent margins.

Appropriateness of related party transactions filter of 25%

The transfer pricing rules do not define the expression "related party transaction." The Tribunal held that looking at the scheme of transfer pricing rules and threshold limits provided under the definition of "associated enterprise" (i.e., enterprise holding 26% share) and "substantial interest" under other provisions of the tax law (i.e., persons having not less than 20% of the voting of the company), rejection of companies having related party transactions greater than 25% of the total revenue is an appropriate filter.

Inclusion of companies in the same sector

The Tribunal, agreeing with the contentions of the Tax authority, held that the companies operating in the same sector are comparable irrespective of the horizontal/ functional categorization within the industry. The Tribunal held that companies cannot be rejected merely because they offer different services as long as they are in the same industry/sector. Rejection of companies with high turnover

The Tribunal accepted the contention of the Assessee to apply quantitative criteria for screening comparable companies based on size/turnover relative to the size/ turnover of the Assessee and upheld the exclusion of companies with huge turnover.

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FEMA UPDATE

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Overseas Investment by Indian Parties in Pakistan

Ref.: A. P. (DIR Series) Circular No. 25 dated September 7, 2012

Attention is invited to the Notification No. FEMA 120/ RB-2004 dated July 7, 2004 [Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2004] (the Notification), as amended from time to time.

2. In terms of Regulation 6 (2) of the Notification ibid, "Notwithstanding anything contained in these Regulations, investment in Pakistan shall not be permitted." It has now been decided that the overseas direct investment by Indian Parties in Pakistan shall henceforth be considered under the approval route under Regulation 9 of the Notification, ibid.

3. Necessary amendments to the Foreign Exchange Management (Transfer or Issue of Any Foreign Security), Regulations, 2004 are being issued separately.

~~External Commercial Borrowings (ECB) Policy – Repayment of Rupee loans and/or fresh Rupee capital expenditure – USD 10 billion scheme~~

Ref.: A. P. (DIR Series) Circular No. 26 dated September 11, 2012

Attention is invited to A.P. (DIR Series) Circular No. 134 dated June 25, 2012.

2. As per the extant guidelines, the maximum permissible ECB that can be availed of by an individual company under the scheme is limited to 50 per cent of the average annual export earnings realised during the past three financial years.

3. On a review, it has been decided:

   (a) to enhance the maximum permissible limit of ECB that can be availed of to 75 per cent of the average foreign exchange earnings realized during the immediate past three financial years or 50 per cent of the highest foreign exchange earnings realized in any of the immediate past three financial years, whichever is higher;

   (b) in case of Special Purpose Vehicles (SPVs), which have completed at least one year of existence from the date of incorporation and do not have sufficient track record/past performance for three financial years, the maximum permissible ECB that can be availed of will be limited to 50 per cent of the annual export earnings realized during the past financial year; and

   (c) The maximum ECB that can be availed by an individual company or group, as a whole, under this scheme will be restricted to USD 3 billion.

4. All other aspects of the scheme mentioned in A.P. (DIR Series) Circular No. 134 dated June 25, 2012 would remain unchanged.

~~External Commercial Borrowings (ECB) Policy – Bridge Finance for infrastructure sector~~

Ref.: A. P. (DIR Series) Circular No. 27 dated September 11, 2012

Attention is invited to A.P. (DIR Series) Circular No. 26 dated September 23, 2011.

2. As per the extant guidelines, Indian companies in the infrastructure sector, where "infrastructure" is as defined under the extant guidelines on External Commercial Borrowings (ECB), have been allowed to import capital goods by availing of short term credit (including buyers' / suppliers' credit) in the nature of 'bridge finance', under the approval route, subject to the following conditions:-

   (i) the bridge finance shall be replaced with a long term ECB;

(ii) the long term ECB shall comply with all the extant ECB norms; and

(iii) prior approval shall be sought from the Reserve Bank for replacing the bridge finance with a long term ECB.

3. On a review, it has been decided to allow refinancing of such bridge finance (if in the nature of buyers'/suppliers' credit) availed of, with an ECB under the automatic route subject to the following conditions:-

(i) the buyers'/suppliers' credit is refinanced through an ECB before the maximum permissible period of trade credit;

(ii) the AD evidences the import of capital goods by verifying the Bill of Entry;

(iii) the buyers'/suppliers' credit availed of is compliant with the extant guidelines on trade credit and the goods imported conform to the DGFT policy on imports; and

(iv) the proposed ECB is compliant with all the other extant guidelines relating to availment of ECB.

4. The borrowers will, therefore, approach the Reserve Bank under the approval route only at the time of availing of bridge finance which will be examined subject to conditions mentioned in para 2(i) and (ii).

5. The designated AD - Category I bank shall monitor the end-use of funds and banks in India will not be permitted to provide any form of guarantees for the ECB. All other conditions of ECB, such as eligible borrower, recognized lender, all- in-cost, average maturity, end-use, maximum permissible ECB per financial year under the automatic route, prepayment, refinancing of existing ECB and reporting arrangements shall remain unchanged and should be complied with.

6. The amended ECB policy will come into force with immediate effect and is subject to review.

Trade Credits for Import into India

Ref.: A. P. (DIR Series) Circular No. 28 dated September 11, 2012

Attention is invited to A.P. (DIR Series) Circular No. 87 dated April 17, 2004 and A.P. (DIR Series) Circular No. 24 dated November 01, 2004.

2. As per the extant guidelines, for import of capital goods as classified by DGFT, AD banks may approve trade credits up to USD 20 million per import transaction with a maturity period of more than one year and less than three years (from the date of shipment). No roll-over/extension is permitted beyond the permissible period. AD banks are also permitted to issue Letters of Credit/ guarantees/Letter of Undertaking (LoU) /Letter of Comfort (LoC) in favour of overseas supplier, bank and financial institution, up to USD 20 million per transaction for a period up to three years for import of capital goods, subject to prudential guidelines issued by the Reserve Bank from time to time. The period of such Letters of credit / guarantees / LoU / LoC has to be co-terminus with the period of credit, reckoned from the date of shipment. AD banks shall not, however, approve trade credit exceeding USD 20 million per import transaction.

3. On a review, it has been decided to allow companies in the infrastructure sector, where "infrastructure" is as defined under the extant guidelines on External Commercial Borrowings (ECB) to avail of trade credit up to a maximum period of five years for import of capital goods as classified by DGFT subject to the following conditions: -

(i) the trade credit must be abinitio contracted for a period not less than fifteen months and should not be in the nature of short-term roll overs; and

(ii) AD banks are not permitted to issue Letters of Credit/guarantees/Letter of Undertaking (LoU) /Letter of Comfort (LoC) in favour of overseas supplier, bank and financial institution for the extended period beyond three years.

4. The all-in-cost ceilings of trade credit will be as under:

Maturity period	All-in-cost ceilings over 6 months LIBOR*
Up to one year	
More than one year and up to three years	350 basis points
More than three years and up to five years	

* for the respective currency of credit or applicable benchmark

The all-in-cost ceilings include arranger fee, upfront fee, management fee, handling/ processing charges, out of pocket and legal expenses, if any.

5. All other aspects of Trade Credit policy will remain unchanged and should be complied with. The amended trade credit policy will come into force with immediate effect and is subject to review based on the experience gained in this regard.

6. Necessary amendments to the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000 dated May 3, 2000 are being issued separately wherever necessary.

~~Overseas Direct Investments by Indian Party – Rationalisation~~

Ref.: A. P. (DIR Series) Circular No. 29 dated September 12, 2012

Attention is invited to the Notification No. FEMA 120/ RB-2004 dated July 7, 2004 [Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2004] (the Notification), as amended from time to time. It has been decided to amend the guidelines relating to submission of Annual Performance Report (APR) as under:

2. An Indian party, which has set up / acquired a Joint Venture (JV) or Wholly Owned Subsidiary (WOS) overseas in terms of the Regulations of the Notification ibid, shall submit, to the designated Authorised Dealer every year, an Annual Performance Report (APR) in Form ODI Part III in respect of each JV or WOS outside India and other reports or documents as may be specified by the Reserve Bank from time to time, on or before the 30th of June each year. The APR, so required to be submitted, has to be based on the latest audited annual accounts of the JV / WOS, unless specifically exempted by the Reserve Bank.

3. The exemption granted for submission of APR based on the un-audited accounts of the JV / WOS subject to the terms and conditions as specified in the A.P (DIR Series) Circular No. 96 dated March 28, 2012 shall continue.

4. Necessary amendments to the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004 are being issued separately.

~~Establishment of Liaison Office (LO) / Branch Office (BO) / Project Office (PO) in India by Foreign Entities – Clarification~~

Ref.: A. P. (DIR Series) Circular No. 31 dated September 17, 2012

Attention is invited to Notification No. FEMA 22/2000-RB dated May 3, 2000 viz. Foreign Exchange Management (Establishment in India of Branch or Office or other Place of Business) Regulations, 2000 as amended from time to time, in terms of which a person resident outside India requires prior approval of the Reserve Bank for establishing LO / BO in India.

2. In terms of Notification No FEMA 95/2000-RB dated July 02, 2003 general permission is granted to a foreign company to open project office in India provided it has secured from an Indian company, a contract to execute a project in India, and subject to satisfying certain other criteria.

3. It is clarified that permission to establish offices, in India by foreign Non-Government Organisations/ Non-Profit Organisations/Foreign Government Bodies/Departments, by whatever name called, are under the Government Route as specified in A. P. (DIR Series) Circular No. 23 dated December 30, 2009. Accordingly, such entities are required to apply to the Reserve Bank for prior permission to establish an office in India, whether Project Office or otherwise.

~~Foreign investment in Single–Brand Product Retail Trading/ Multi-Brand Retail Trading / Civil Aviation Sector / Broadcasting Sector / Power Exchanges - Amendment to the Foreign Direct Investment Scheme~~

Ref.: A. P. (DIR Series) Circular No. 32 dated September 21, 2012

Attention is invited to the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000, notified vide Notification No. FEMA 20/2000-RB dated May 3, 2000, as amended from time to time.

2. The extant Foreign Direct Investment policy has since been reviewed and it has now been decided as follows:

   a) FDI up to 100 per cent is now permitted in Single–Brand Product Retail Trading by only one non-resident entity, whether owner of the

brand or otherwise, under the Government route subject to the terms and conditions as stipulated in Press Note No. 4 (2012 Series) dated September 20, 2012 issued by the Department of Industrial Policy & Promotion, Ministry of Commerce & Industry, Government of India.

b) FDI up to 51 per cent is now permitted in Multi-Brand Retail Trading under the Government route, subject to the terms and conditions as stipulated in Press Note No. 5 (2012 Series) dated September 20, 2012 issued by the Department of Industrial Policy & Promotion, Ministry of Commerce & Industry, Government of India.

c) Foreign airlines are permitted FDI up to 49% in the capital of Indian companies in Civil Aviation Sector, operating scheduled and non-scheduled air transport, under the automatic/ Government route subject to the terms and conditions as stipulated in Press Note No. 6 (2012 Series) dated September 20, 2012 issued by the Department of Industrial Policy & Promotion, Ministry of Commerce & Industry, Government of India.

d) FDI limits in companies engaged in providing Broadcasting Carriage Services under the automatic/Government route have been reviewed and the same would be subject to the terms and conditions as stipulated in Press Note No. 7 (2012 Series) dated September 20, 2012 issued by the Department of Industrial Policy & Promotion, Ministry of Commerce & Industry, Government of India.

e) FDI up to 49% is permitted in Power Exchanges registered under the Central Electricity Regulatory Commission (Power Market) Regulations, 2010, under the Government route, subject to the terms and conditions as stipulated in Press Note No. 8 (2012 Series) dated September 20, 2012 issued by the Department of Industrial Policy & Promotion, Ministry of Commerce & Industry, Government of India.

3. A copy each of Press Note Nos. 4,5,6,7 and 8 (2012 Series) dated September 20, 2012 issued in this regard is enclosed with **A. P. (DIR Series) Circular No. 32 dated September 21, 2012.**

4. Necessary amendments to Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 (Notification No. FEMA 20/2000-RB dated May 3, 2000) are being notified separately.

~~Foreign Exchange Management Act, 1999-Import of gold in any form including jewellery made of gold/precious metals or / and studded with diamonds / semi precious / precious stones - clarification~~

Ref.: A. P. (DIR Series) Circular No. 34 dated September 24, 2012

Attention is invited to the provisions contained in A.P.(DIR Series) Circular No.59 dated May 6, 2011, in terms of which, AD Category – I banks have been permitted to approve Suppliers' and Buyers' credit (trade credit) including the usance period of Letters of Credit for import of rough, cut and polished diamonds, for a period not exceeding 90 days, from the date of shipment.

2. It is clarified that Suppliers' and Buyers' credit (trade credit) including the usance period of Letters of Credit opened for import of gold in any form including jewellery made of gold/precious metals or/ and studded with diamonds/ semi precious / precious stones should not exceed 90 days, from the date of shipment.

3. All the instructions issued for direct import of gold, vide A.P. (DIR Series) Circular No.2 dated July 9, 2004; import of Platinum / Palladium/ Rhodium / Silver vide A.P. (DIR Series) Circular No.12 dated August 28, 2008; advance remittance for import of rough diamonds, vide A.P. (DIR Series) Circular No. 21 dated December 29, 2009 and import of rough, cut and polished diamonds, vide A.P.(DIR Series) Circular No.59 dated May 6, 2011, shall remain unchanged.

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Always aim at complete harmony of thought and word and deed. Always aim at purifying your thoughts and everything will be well.

Mahatma Gandhi

SERVICE TAX REVIEW

In this issue, judgements on Business Auxilliary Services and Management Consultants Service are reported for the benefit of Members.

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1. Whether service tax will be levied on fees received by assessee-cricketer from RCB under Business Auxiliary Service contending that assessee had advertised/promoted products of various companies?

[2012] 23 taxmann.com 439 (Bang. - CESTAT) CESTAT, BANGALORE BENCH Rahul Dravid *v.* Commissioner of Service tax

~~Facts:-~~

Assessee-cricketer received fees from Royal Challengers Bangalore (RCB) for playing IPL . RCB had entered into MoUs with various companies whereunder uniform of cricketers (including assessee) bore logo/mark/sign of such companies. Department sought to levy service tax on fees received by assessee-cricketer from RCB under Business Auxiliary Service contending that assessee had advertised/promoted products of various companies. Assessee contended that cricket is a game of skill and his activity of playing cricket on field couldn't be subject to service tax.

~~HELD :~~

Adjudicating authority didn't consider substantive contentions of assessee and instead relied on Wikipedia, MoUs and other materials without putting assessee put to notice. There was violation of principles of natural justice by adjudicating authority.Accordingly, matter was remanded for fresh adjudication .

Accordingly, the authority set aside the impugned orders and allow these appeals by way of remand with the request to the Commissioner to pass speaking orders in de novo adjudication of the show-cause notices in accordance with law after giving the party a reasonable opportunity of being heard. Needless to say that all the contentions of the assessee should be duly considered by the adjudicating authority. Further it is clear that the assessee should be given copies of the MoUs referred to in the show-cause notices. It goes without saying that, upon receipt of copies of such documents, the assessee shall have liberty to file additional replies/written submissions vis-a-vis the show-cause notices.

Both the appeals and the stay petitions therein are stand disposed of in the above terms.

2) Whether activity of establishing central server in different offices of transport department would be covered under 'Business auxiliary service?

[2012] 19 taxmann.com 62 (New Delhi - CESTAT) CESTAT, NEW DELHI BENCH Smart Chip Ltd. *v.*Commissioner of Central Excise, Bhopal*

~~Facts:-~~

Assessee had entered into an agreement with State Government to establish a central server in different offices of transport department. For doing said activity, assessee loaded operating systems on blank cards procured by it, stored photo/thumb impression and other information in said card and, ultimately, dispatched same to customers on behalf of transportation authority of State. Service tax demand was confirmed on assessee for said activity under category of 'Business auxiliary service'

~~HELD:-~~

In terms of the agreement, the assessee had obligation to establish a central server in different

offices of the transport department. The clause of agreement relating to the objectives/standard performance of the system agreed between the parties nowhere persuades to conceive that the assessee carried out specific independent activities with different kinds of remuneration, package for such works. There was also no split of the contract made to examine different aspects to ascertain taxability thereof nor also any effort was made in the adjudication to find out whether different payments were received during different periods and whether such payment is attributable to any taxable service provided.

There is no scheme of global taxation in the Finance Act, 1994. Taxing entries are very specific and those are enumerated in section 65(105) of the said Act. The terms and expressions used there are defined by various sub-sections of section 65. When there is no effort made to judge the activity carried out by the assessee in accordance with the letters of law, adjudication fails to sustain.

It could not be accepted that section 65(19)(iv) will be applicable to the instant case. The object was not procurement of goods or services. Object of the contract as that was spelt out in agreement is to build a system. Revenue also fails to get help by piecemeal reading of the law without proving that the services provided by the assessee were auxiliary in nature to serve the purpose of business of client. By no stretch of imagination, building a system can be conceived to be 'Business Auxiliary Service'.

3) **Whether responsibilities of management would be brought into ambit of words 'in connection with management of any organization' and levy service tax under the category of Management or Business Consultants Service?**

[2012] 23 taxmann.com 331 (New Delhi - CESTAT) CESTAT, NEW DELHI BENCH ERNST & Young (P.) Ltd. *v.* Commissioner of Service Tax, New Delhi*

~~Facts:-~~

During relevant period the assessee provided services of assistance required for complying with the regulation of Reserve Bank of India, Foreign Investment Promotion Board etc. and also for filing application for import export code, returns under Income-tax Act, returns with the office of Registrar of Companies, sales tax returns etc.

Though assessee was paying service tax under head management consultant, it had not paid service tax on above compliance services provided by it.

The revenue took view that above service would be covered under 'Management consultant's service'. Accordingly show-cause notice was issued invoking extended period of limitation, to demand short-payment of service tax. The demand was confirmed.

~~Held:-~~

It was held that though compliance with laws is part of the responsibilities of management such responsibility per se cannot bring it into the ambit of the words 'in connection with the management of any organization' used in section 65 (105)(r) and section 65(65) to tax such services.

The decision of the Apex Court in the case of Collector of Central Excise v. Parle Exports (P.) Ltd. [1990] 183 ITR 264 gives the rule that a taxing entry should be understood in the same way in which these are understood in the ordinary parlance. According to CBEC the ordinary meaning of management will not cover compliance service. According to the adjudicating authority ordinary meaning of management covers compliance services. The view of CBEC was to be concerned with and the view of the adjudicating authority was to be rejected, since every responsibility of management cannot be considered as management function. For example the management may have a responsibility to set up a canteen in a factory employing large number of workers. A person who gives advice on initial setting up of that canteen cannot be considered to be giving Management Consultancy Service.

5 5 5

FROM PUBLISHED ACCOUNTS

AS-28 IMPAIRMENT OF ASSETS

NMDC LIMITED ANNUAL REPORT 2011-12

~~Note-2.32: Disclosures Under Accounting Standards~~

2.32.9 Impairment of assets (AS-28)

Action has been initiated to sell the plant and machinery of Sillica Sand Project, Lalapur and UPFO plant at Vizag.

The impairment of assets has been reviewed during the year in respect of the following cash generating units, included under the segment "Other Minerals and Services" and necessary adjustments have been carried out as detailed below:

CA. Pamil H. Shah
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Rs. In crore

Unit	Year of impairment	Impaired Amount as on 01-04-11	Adjustments during 2011-12		Impaired Amount as on 31-03-2012
			Reversal	Addition	
UPFO,Vizag	2005-06	37.46	1.09	-	36.37
SSP, Lalapur	2005-06	12.54	-	-	12.54
SAF Plant at Sponge Iron	2004-05	15.48	-	-	15.48
Unit Windmills at Donimalai	2011-12	-	-	52.76	52.76

R.P.P. INFRA PROJECTS LIMITED ANNUAL REPORT 2011-12

~~Notes forming part of the Consolidated Accounts (Contd)~~

15. Impairment of Assets:

The carrying amount of assets, other than inventories is reviewed at each balance sheet date to determine whether there is any indication of impairment. If any such indication exists, the recoverable amount of the assets is estimated. The recoverable amount is the greater of the asset's net selling price and value in use which is determined based on he estimated future cash flow discounted to their present values. An impairment loss is recognized whenever the carrying amount of an asset or its cash generating unit exceeds its recoverable amount. Impairment loss is reversed if there has been a change in the estimates used to determine the recoverable amount.

PBA INFRASTRUCTURE LIMITED ANNUAL REPORT 2011-12

~~Note: PART-B~~

~~Statement of Significant Accounting Policies~~

o. ~~Impairment of Assets~~:

As at each balance sheet date, the carrying amount of assets is tested for impairment so as to determine:

- The provision for impairment loss required, if any, or
- The reversal required of impairment loss recognized in previous periods, if any, impairment loss is recognized when the carrying amount of asset exceeds its recoverable amount. Recoverable amount is determined;
- In the case of an individual asset, at higher of net selling price and the value in use.

NATIONAL BUILDINGS CONSTRUCTION CORPORATION LTD ANNUAL REPORT 2011-12

NOTE- 40

Significant accounting policies

14. IMPAIRMENT OF ASSETS

The company identifies impairable assets based on individual assets concept at the year-end in the terms of para 5-13 of AS-28 issued by ICAI for the purpose of arriving at impairment loss thereon, if any, being the difference between the book value and recoverable value of relevant assets. The impairment loss recognized in the prior accounting periods is reversed if there has been a change in the estimates of recoverable amount.

ZENTH BIRLA (INDIA) LIMITED ANNUAL REPORT 2011-12

Consolidated Notes to the Financial Statements

(m) Impairment of assets:

The carrying amount of assets, other than inventories is reviewed at each balance sheet date to assess whether there is any indication of impairment in respect of such assets or group of assets (cash generating unit). If such indication exists, the recoverable amount of such asset or group of assets is estimated. If such recoverable amount of the assets or the group of assets is less than its carrying amount, an impairment loss is reckoned by reducing the carrying amount to its recoverable amount. If there is an indication at the balance sheet date that a previously assessed impairment loss no longer exists, the recoverable amount is reassessed and the asset is reflected at the recoverable amount, subject to a maximum of depreciable historical cost.

FIEM INDUSTRIES LIMITED ANNUAL REPORT 2011-12

NOTES ON CONSOLIDATED FINANCIAL STATEMENTS FOR THE YEAR ENDED 31ST MARCH 2012

Q. Impairment

Consideration is given at each balance sheet date to determine whether there is any indication of impairment of the carrying amount of the Company's fixed assets. If any indication exists, an asset's recoverable amount is estimated, an impairment loss is recognized whenever the carrying amount of an assets exceeds its recoverable amount. The recoverable amount is the greater of the net selling price and value in use. In assessing Value in use, the estimated future cash flows is discounted to their present value based on an appropriate discount factor.

A2Z MAINTENANCE & ENGINEERING SERVICES LIMITED

Notes forming part of the consolidated financial statements

g) Impairment

The carrying amounts of assets are reviewed at each balance sheet date if there is any indication of impairment based on internal/external factors. An impairment loss is recognized wherever the carrying amount of an asset exceeds its recoverable amount. The recoverable amount is the greater of the asset's net selling price and value in use. In assessing value in use, the estimated future cash flows are discounted to their present value using the pre-tax discount rate that reflects current market assessment of the time value of money and risks specific to the asset. After impairment, depreciation / amortisation is provided on the revised carrying amount of the asset over its remaining useful life.

GUJARAT NARMADA VALLEY FERTILIZERS COMPANY LIMITED ANNUAL REPORT 2011-12

Significant accounting policies

4. Impairment:

The carrying amounts of assets are reviewed at each balance sheet date if there is any indication of impairment based on internal /external factors. An impairment loss is recognized wherever the carrying amount of an asset exceeds its recoverable amount. The recoverable amount is the greater of the asset's net selling price and value in use. In assessing value in use, the estimated future cash flows are discounted to their present value at the weighted average cost of capital.

After impairment, depreciation is provided on the revised carrying amount of the asset over its remaining useful life.

A previously recognized impairment loss is increased or reversed depending on changes in circumstances. However, the carrying value after reversal is not increased beyond the carrying value that would have prevailed by charging usual depreciation if there was no impairment.

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INDIRECT TAXES CORNER

CA. Bihari B. Shah
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[I] VARIOUS JUDGMENTS ON SCHEDULE ENTRY:

[A] VACUUM CLEANER:

Vacuum cleaner falls under "Electrical Goods" which were defined in an inclusive manner under the Bihar Finance Act.

Eureka Forbes Ltd vs. State of Bihar (2011) 43 VST 303 (S.C)

[B] PISTON RINGS USED IN AUTOMOBILES – DECLARED GOODS:

Piston rings designed/manufactured for used in automobiles were held to be declared goods and not auto parts by virtue of their special inclusion in the list of declared goods in section 14(iv)(viii) of the CST Act – Discs, Rings, Forgings and Steel Castings.

State of Punjab vs. Federal Gogul Goetze (India) Ltd. (2011) 43 VST 100 (P & H)

[C] MOUTH FRESHENER (MUKHWAS):

Mouth Freshener was held to be a distinct commodity in common parlance – distinct from the ingredients (Spices) that went into its making. Hence, it could not be covered under the entry, C-91 which read as "Spices of all varieties and forms". The entry would cover only products which retain their essential character of being a spice. Hence, mouth freshener was taxable under the residuary entry.

CST vs. Swastik Trading Co. (2011) 44 VST 241 (Bom)

[D] STAINLESS STEEL GAS STOVE:

It cannot be classified as a stainless steel product under Entry A-28 of Punjab General Sales Tax Act, 1948 since the stainless steel body was merely an accessory which gives more convenience, beauty and protection to the stove but all other important functional attachments of the stove were made of non-stainless steel material.

Excise & Taxation Commission, Punjab vs. Srihind Gas Sirhind (2011) 44 VST 185 (P&H).

[E] MOBILE HYDRAULIC CRANE:

It does not fall under "Hoists & Lifts" but under the expression, "similar variety of machinery" in the schedule entry relating to "Crane Lorries"

State of Tamil Nadu vs. Coimbatore Alcohol & Chemicals Ltd. (2011) 43 VST 89 (Mad).

[II] GIST OF IMPORTANT JUDGMENTS OF OTHER STATES:

[A] **DEALER:**

Educational Institution:

The Uttarakhand High Court held that Educational Institution supplying food to its residential students was not a dealer since the primary object of such institution was to impart education to students residing in the hostel. The High Court set aside the levy of tax on the supply of food by treating it as the transactions of sale of food to the students. In that connection the court observed that the provisions of deemed sale u/s. 2(40)(f) of Uttarakhand Vat Act was applicable only to the persons doing business of buying or selling goods.

Scholars Home Senior Secondary School vs. State of Uttarakhand & Anr. (2011) 19 STJ 311 (Uttara).

[B] **TRANSFER OF RIGHT TO USE GOODS:**

[i] **Supply of Electricity Meters to consumers:**

The A. P. High Court held that supply of meters to consumers for measuring electricity supplied against which rentals were collected amounted to transfer of right to use goods. The petitioner's contention that the meters were "immovable property" being attached to the earth was not accepted. The Court, on the basis of the relationship between the Electricity Transmission Company and the consumers and their contractual rights and obligations and the provisions of the Electricity Act, Electricity Supply Act and other related laws held that the Meters were meant for the exclusive use of the consumer and all the ingredients of transfer of right to use the goods were present. Hence Meter rentals were liable to be taxed under APGST Act, 1957.

A.P. State Electricity Board vs. State of A. P. (2011) 43 VST 359 (A.P)

[ii] **Hire of Audio – Visual equipment by a Hotel to its customers:**

Hire of audio – video visual equipment whereby the equipment was to be used solely by the customer and no operator was provided either by the outsourcing agency or the hotel amounted to transfer of right to use equipment and was a deemed sale within the purview of Article 366(29A)(d). As the dealer did not render any service in relation to the A/V equipment, it was not a contract for services. In the absence of evidence that the dealer had paid service tax, the Court held that the dealer could claim refund of service tax in appropriate legal proceedings. Interestingly, Central Excise and Service Tax Dept. was also afforded an opportunity of being heard.

Viceroy Hotels Ltd. vs. CTO [2011] 43 VST 424 (A.P)

[iii] **Hire of Transit Concrete Mixer:**

G manufactured ready mix concrete (RMC) at batching plants in Hyderabad. Dealers entered into agreements with G to provide transportation services for shipping RMC by hiring specially designed Transit Mixers. The dealers were required to provide a fleet of Transit Mixers painted in a particular style and colour as per the brand name of G to transport RMC as per delivery schedules to be given by G. Although drivers were providers by the dealers, they were to obey instructions issued by G and adhere to delivery schedules given by G. Full control on the method, manner and time of using the Transit mixers owned by the dealers vested absolutely with G. Under the circumstances, the Court held that there was transfer of right to use the goods.

G.S. Lambs & Sons vs. State of A.P.(2011) 43 VST 323 (A.P)

[iv] **Supply of SIM Cards – Sale or Service?**

Supply of SIM cards by Mobile Telephone Operators forms part of the value of taxable service and not sale of goods since SIM cards are not sold as goods independent of the services provided. The value of SIM cards forms part of the activation charges as no activation was possible without a valid functioning SIM card.

The S. C. has thus, in the light of material now brought on record and which was not available while deciding BSNL's case (2006) 3 VST 95 (SC), held that the supply of SIM cards was merely incidental to the service being provided and facilitated the identification of the subscriber, their credit, and other details and was not liable to sales tax. The State of Kerala had also dropped proceedings for levy of sales tax on SIM cards and the issue was settled beyond doubt that only service tax was applicable.

Idea Mobile Communications Ltd. vs. CCEC (2011) 43 VST 1 (SC).

(SOURCES: ALL INDIA FEDERATION OF TAX PRACTITIONERS JOURNAL)

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CORPORATE LAWS UPDATE

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NOTIFICATIONS:

(1) Amendment in Companies (Issue of Indian Depository Receipts) Rules, 2004 Date : 01.10.2012.

G.S.R. (E) In exercise of the powers conferred by clause (a) of sub-section(1) of section 642 read with section 605A of the Companies Act, 1956 (1 of 1956), the Central Government hereby makes the following rules, further to amend the Companies (Issue of Indian Depository Receipts) Rules, 2004 namely:-

1(1) These rules may be called the Companies (Issue of Indian Depository Receipts) Amendment Rules, 2012.

(2). They shall come into force from the date of publication in the Official Gazettee.

2. In the companies (Issue of Indian Depository Receipts) Rules, 2004, in rule 10, for sub-rule(i), the following sub-rule shall be substituted, namely;

"(i) A holder of IDRs may transfer the IDRs, may ask the domestic depository to redeem them or, any person may seek reissuance of IDRs by conversion of underlying equity shares, subject to the provisions of the Foreign Exchange Management Act, 1999, Securities and Exchange Board of India Act, 1992, or the rules, regulations or guidelines issued under these Act, or other law for the time being in force."

(2) Clarification in Form 23AC & 23ACA Dt. 05.10.2012

~~CORRIGENDUM~~

G.S.R (E) In the notification of the Government of India, Ministry of Corporate Affairs published in the Gazette of India vide G.S.R.(E) dated 21st September, 2012 relating to amendment of the Companies (Central Governments) General Rules and Forms (6th Amendments Rules, 2012) for Forms 23AC and 23ACA, in page number 7, in table number C and page number 8, table number E. In the said Rules, for the word "to Directors" appearing after the word loans and advances shall be substituted by word ~~"By Directors~~".

3. Amendment in the companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2011 Date: 12th October, 2012.

G.S.R (E) – In exercise of the powers conferred by sub-section (1) of Section 642 read with section 610B of the Companies Act, 1956 (1 of 1956), the Central Government hereby makes the following rules further to amend the companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2011, namely ;

1. (1) These rules may be called the Companies (Filing of Documents and forms in Extensible Business Reporting Language) Amendment Rules, 2012.

(2) They shall come into force with effect from the 14.10.2012.

2. In the Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2011 -

(a) In rule 2, for clause (b), the following clause shall be substituted namely;

(b) "Annexure" means the Annexures enclosed to the rules':

(b) In rule 3, for the word "Annexure", the word and figure 'Annexure I' shall be substituted:

(c) after rule 3, the following rule shall be inserted –

"4. The following class of companies have to file their Balance Sheet, Profit and Loss Account and any other document as required under Section 220 of

the Companies Act, 1956 with the Registrar using the Extensible Business Reporting Language (XBRL) taxonomy given in Annexure II for the financial year commencing on after 1st April, 2011 with e-Form No. 23AC-XBRL specified under the Companies (Central Government) General Rules and Forms, 1956 namely:-

(i) all companies listed with any Stock Exchange(s) in India and their Indian subsidiaries: or

(ii) all companies having paid up capital of rupees five crore and above; or

(iii) all companies having turnover of rupees one hundred crore and above; or

(iv) all companies covered under rule 3,

Provided that the companies in Banking, Insurance, Power Sectors and Non-Banking Financial companies are exempted for Extensible Business Reporting Language (XBRL) filing for the financial year commencing on or after 1st April, 2011.

(d) for the workd 'Annexure', the word and figure 'Annexure I' shall be substituted;

(e) after the word and figure 'Annexure I', as so substituted, the following shall be inserted, namely:-

'Annexure II'

Extensible Business Reporting Language (XBRL) Taxonomy for Balance Sheets and Profit and Loss Accounts as required under Section 220 of the Companies Act, 1956 for the financial year commencing on or after 1st April, 2011.

4. Quality of XBRL filing certified by Professional members. General Circular no. 33/2012 Government of India, Ministry of Corporate Affairs Date : 16.10.2012

To,

The President,

Institute of Chartered Accountants of India, Institute of Company Secretaries of India and Institute of Cost Accountants of India,

1. You are aware that XBRL filing of financial statements by a select class of companies for FY 2010-11 was mandated vide Ministry of Corporate Affairs Notification GSR No.748(E) dated 05.10.2011. The e-Forms were duly certified by CA/CS/CWA professionals for their completeness and correctness in representation with respect to audited financial statement of the Company.

2. A random scrutiny of XBRL filing of financial statements by few companies to MCA for FY 2010-11 reveals significant variations in disclosures in published results and the XBRL filings due to 'incorrect' mapping of disclosures. It has been observed that few disclosures were 'mapped/tagged' with incorrect accounting concept despite availability of appropriate element in taxonomy. It has also been observed that provisions of "Block Text tagging" and/or "footnote" have been inappropriately used to report disclosures, like subsidiary details, related party transactions, Director's Report etc., even when appropriate elements were available in the taxonomy for such disclosures. Few instances of "incorrect" tagging of XBRL documents are provided at Annexure – I.

3. Such filing are inaccurate and do not adequately represent true and fair view of the State of affairs of the company as per Section 211 of the Companies Act, 1956. Such XBRL filings, apart from being misleading, also dilute the effectiveness of XBRL for stakeholders' usage relating to the companies. It is unfortunate that professionals have certified the authenticity of such incorrect data, for which they are liable to penalized. Such lapses defeat the very purpose of introducing XBRL filings which are meant to elicit more detailed and refined information as to the affairs of companies. Please note that XBRL filings are being minutely scrutinized to see if similar mistakes also appear in a larger sample.

4. It is bounden duty of Institutes to direct its members to take necessary steps to improve the quality of XBRL filing for FY 2011 – 12 to be undertaken by its members. The Institute may conduct further trainings, issue guidelines, etc. so that such quality related issues are appropriately resolved.

5. This may be accorded high priority.

Yours faithfully,

Sd/-

Annexure – I

GENERAL XBRL FILING ERRORS

Errors	Observation
Cash Flow Statement not tagged.	The Cash Flow Statement for FY 2010-11 is available in the Audited Financial Statements (PDF File). However, the same has not been tagged in XBRL financial statements filed at MCA portal.
Information of all subsidiaries not provided in XBRL financial statements.	Information about one Subsidiary hass been tagged in XBRL financial statements whereas the Company had nine Subsidiaries.
Information of all related party transactions not provided in XBRL financial statements.	Related party Disclosures have not been tagged in XBRL financial statement.
Parenthetical (additional disclosures) information not tagged in XBRL financial statements.	Aggregate Market Value of investments not provided by way of foot note. Additional information on issued, Subscribed & Paid up Share Capital not explained by way of footnote.
Footnotes not tagged in XBRL financial statements.	Footnotes on Share Capital, Secured Loan, Reserve and Surplus, unsecured loan-fixed deposits, investments, Fixed Assets, Security Deposit etc. have not been tagged. Footnote on "Investments" has not been given.
Different presentation in PDF and XBRL filings.	The Annual Report presented before the shareholders the figures were presented in Rs. Thousands whereas in the XBRL documents the figures were provided in Rs. Lakhs.
Incorrect usage of Footnote.	Director's Report provided by way of footnote whereas separate tags are available for tagging of Directors' Report. Similarly, for Auditors' Report, Significant Accounting policies, Unsecured Loan, Current Liabilities, etc. Footnote has been incorrectly used.

INCORRECT USAGE OF TAGS

A. When appropriate taxonomy element is available

Line Item	Tag Used (label)	Correct Tag (label)
Secured Cash Credit from Banks.	Term Loan	Working Capital Loans Banks Secured
Investment in Quoted Equity Shares	Unutilized Money	Equity Securities Long Term Quoted.
Bad debts written off	Other Provisions created	Bad debts Advances written off
Investment (joint Venture)	Equity securities long-term unquoted non-trade	Investment joint ventures.
Power and fuel expenses	Electricity expenses	Cost power fuel
Advertising and Brand marketing	Traveling conveyance	Advertising and promotional expenses.
Traveling and conveyance	Legal professional charges.	Traveling conveyance.
Purchase/Sale of Fixed Assets.	Purchase other Assets, proceed disposal other assets.	Purchase tangible fixed Assets, Proceeds sale disposal tangible fixed assets.

B. Incorrect tagging / inaccurate disclosures

Line Item	Tag Used	Correct Tag	Remarks
Stock Differential (Decrease)/ Increase	Not tagged separately	Increase / decrease inventories	Clubbed with 'Other expenditure'.
Salaries, Wages & Bonus	Tagged as zero	Amount is 92,539,039	It is a mandatory tag. Clubbed with 'Other expenditure'.
Power, Fuel, Water & Gas	Tagged as zero	Amount is 248,737,864	Clubbed with 'Other expenditure'
Manufacturing cost	Tagged as zero		Clubbed with 'Other expenditure'. It is a manufacturing company.
RAW MATERIALS CONSUMED Opening Stock	Not tagged	Stock of Raw Materials, Opening Balance	Given as part of footnote to 'Raw Materials Consumed'
RAW MATERIALS CONSUMED Add; Purchases	Not tagged	Purchase Raw materials, during year	
RAW MATERIALS CONSUMED Less: Closing Stock	Not tagged	Stock of Raw Materials, Closing Balance.	
Deferred Tax Liability (Net)	Net Deferred Tax Assets	Deferred Tax Liability	Tagged with negative sign.
Deferred tax liabilities (Net)	Deferred tax liability depreciation	Deferred tax asset other, Deferred Tax asset VRS payment, Deferred tax asset provision for doubtful debts, etc.	Disaggregated disclosures all consolidated into 'Deferred tax liability depreciation'

CASE LAWS:

1. ITP Ltd. v. Union of India - Calcutta High Court 26 taxmann.com 199 SEPTEMBER 12, 2012

Section 394, read with section 391, of the Companies Act, 1956 - Amalgamation - Whether a scheme of amalgamation and/or arrangement sanctioned by High Court under section 391 would attract mischief of Indian Stamp Act, 1899 in State of West Bengal - Held, yes

Facts

- The transfer and transferee companies were run by the common management having controlling block of shares.
- They proposed a scheme of amalgamation for transfer of business by the transferor-company in favour of the transferee-company.
- As per the scheme, all immovable properties and assets, liabilities of the transferor-company would automatically stand vested in the transferee-company.
- As per the scheme, since transferee-company would control ninety per cent of paid-up capital of the transferor-company such vesting of properties including leasehold land would be exempt from payment of Stamp Duty as per the Notification dated 16-1-1937 issued by the then Governor of Bengal applicable to the State.
- The Single Judge held that the sanction of the scheme would require appropriate Stamp Duty and the Notification dated 6-1-1937 would have no application in the instant case.
- On appeal:

Arguments of the companies

- The company raised an issue as regards competency of the Judge to take the plea of imposition of Stamp Duty.

- It was contended that transfer of business being a movable property would not attract any Stamp Duty as per the said Act of 1899.
- It was contended that case Hindustan Lever v. *State of Maharashtra* [2003] 117 Comp. Cas. 758 (SC) would have no application because of the distinguishing feature involved in the case.

Argument of the State

- It was contended that the scheme for merger or demerger would have the effect of transfer that would attract appropriate duty.

Issue Involved

- Whether a scheme of amalgamation and/or arrangement sanctioned by the High Court under section 391would attract the mischief of Indian Stamp Act, 1899 in the State of West Bengal and, if so, to what extent ?

HELD

Inter vivos transfer too place

- *The Apex Court in* Hindustan Lever *(*supra*) relied on their own decisions in* Rubi Sales & Services (P.) Ltd. *v.* State of Maharashtra *[1994] 1 SCC 531 that interpreted 'conveyance' and 'instrument' to hold that a consent decree would attract appropriate Stamp Duty. While doing so, the Maharashtra amendment was considered wherein* Rubi Sales & Services (P.) Ltd. *(*supra*) held such amendment was introduced 'out of abundant caution'. It also held, such amendment would not mean that the consent decree was otherwise not covered by the definition of 2(*g*) or 2(*e*). The Apex Court held, 'it was clear from the terms of the consent decree that it is also an instrument under which the property has been transferred by one person to another'.* Hindustan Lever's *case (*supra*) was nothing but an extension of Rubi Sales & Services (P.) Ltd.'s case (*supra*). The elaborate decision considered the State amendments. It also considered cases of* Miheer H. Mafatlal *v.* Mafatlal Industrial Ltd. *AIR 1997 SC 506 and* General Radio & Appliances Co. Ltd. *v.* M.A. Khader *AIR 1986 SC 1218. Section 2(1) would define 'instrument' as per the Bombay Stamp Act that is* pari materia *with our section 2(14). The Apex Court, in no uncertain terms held, the scheme of amalgamation was not involuntary. It rather reiterated its earlier view expressed in* General Radio & Appliances Co. Ltd.'s *case (*supra*) and* Miheer H. Mafatlal's *case (*supra*). It is true,* Hindustan Lever's *case (*supra*) considered Maharashtra amendment. However, there is no reason as to how the same would not be applicable in State of West Bengal. [Para 16]*
- *The Apex Court held, it was 'transfer of property' being 'inter vivos'. Section 5 of the Transfer of Property Act would squarely be applicable in a scheme of amalgamation or demerger. It was a transfer between two 'juristic persons'. Hence, it was nothing but one of the methods of transfer in corporate field that would certainly be* inter vivos*. As inter vivos transfer would definitely attract Stamp Duty as per the said Act of 1899 and/or the State amendments applicable therefore. [Para 17]*

Transfer between two distinct entities

- *On the question of 'holding subsidiary' it is opined that corporate entities are having distinctive features. Shareholders do not own the corporate entity. Lifting of the corporate veil might suggest otherwise. [Para 18]*
- *In the eye of law, corporate entities are distinct. Hence, transfer from A to B would definitely be a 'transfer' to come within the scope of* Hindustan Lever quoted *(*supra*), attracting appropriate duty. [Para 19]*

Stamp duty to be levied

- *As per the proposed law that was pending for consideration of the President of India, scheme of amalgamation and/or arrangement would involve two per cent Stamp Duty whereas the 'conveyance' as of date would require payment of duty at the rate of seven per cent. It is for the State to fix the rate. So long the new law does not come in force the existing law would prevail. [Para 20]*

For full Text of the judgement refer www.taxmann.com

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FROM THE GOVERNMENT

(A) INCOME TAX

1) Press Release – " Tax Accounting Standards"

Section 145 (1) of the Income-tax Act, 1961 ('the Act') provides that the income chargeable under the head "Profits and gains of business or profession" or "Income from other sources" shall [subject to the provisions of sub-section (2)] be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee. Section 145 (2) provides that the Central Government may notify Accounting Standards ('AS') for any class of assessees or for any class of income.

The Committee constituted by CBDT has submitted its Final Report in August, 2012. The Committee recommended that the AS notified under the Act should be made applicable only to the computation of taxable income and a taxpayer would not be required to maintain books of account on the basis of AS notified under the Act. The Committee examined all the 31 AS issued by the ICAI and recommended notification of AS on 14 issues under the Act and formulated drafts of AS on these issues. The Committee has termed them as "Tax Accounting Standards" (TAS) to distinguish from the AS issued by the ICAI/notified under the Companies Act, 1956.

The Final Report of the Committee (including drafts of the 14 TAS submitted by the Committee) is uploaded on Income-tax Department website (www.incometaxindia.gov.in) .

2) *Deduction of Tax At Source on Payments of Gas Transportation Charges by the Purchaser of Natural Gas to the Seller of Gas*

Representations have been received from various sections of the industry on the difficulties faced in the matter of Tax Deduction at Source on Gas Transportation Charges paid by the purchasers of Natural gas to the sellers of gas.

Further It is clarified that in case the Owner/Seller of the gas sells as well as transports the gas to the purchaser till the point of delivery, where the ownership of gas to the purchaser is simultaneously transferred, the manner of raising the sale bill (whether the transportation charges are embedded in the cost of gas or shown separately) does not alter the basic nature of such contract which remains essentially a 'contract for sale' and not a 'works contract' as envisaged in section 194C of the Act. Hence in such circumstances, provisions of Chapter XVII-B of the Act are not applicable on the component of Gas Transportation Charges paid by the purchaser to the Owner/Seller of the gas. The use of different modes of transportation of gas by Owner/Seller will not alter the position.

(For full text refer circular no-9/2012 dated 17-10-2012)

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3) Notification no-42 / 2012 regarding Insertion of rule 112f in Income Tax Rules, 2012 , dated 04-10-2012

The Central Government hereby makes the following rules further to amend the Income-tax Rules, 1962, namely:-

1. (*i*) These rules may be called the Income-tax (14th Amendment) Rules, 2012.

(*ii*) They shall come into force from the 1st day of July, 2012.

2. In the Income-tax Rules, 1962, after rule 112E, the following rule shall be inserted, namely:-

"Class or Classes of cases in which the Assessing Officer shall not be required to issue notice for assessment or reassessment of the total income for six assessment years immediately preceding the assessment year.

112F. The class or classes of cases in which the Assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made, shall be the cases-

(*i*) where, as a result of a search under sub-section (1) of section 132 of the Act or a requisition made under section 132A of the Act, a person is found to be in possession of any money, bullion, jewellery or other valuable articles or things, whether or not he is the actual owner of such money, bullion, jewellery etc.; and

(*ii*) where, such search is conducted or such requisition is made in the territorial area of an assembly or parliamentary constituency in respect of which a notification has been issued under section 30 read with section 56 of the Representation of the People Act, 1951 (43 of 1951), or where the assets so seized or requisitioned are connected in any manner to the ongoing election in an assembly or parliamentary constituency.

Provided that this rule shall not be applicable to cases where such search under section 132 or such requisition under section 132A has taken place after the hours of poll so notified;

Provided further that this rule shall not be applicable to cases where any assessment or reassessment has abated under the second proviso to section 153A and where any assessment or reassessment has abated under section 153C".

(B) ~~SERVICE TAX~~

1) ~~Extension of submission of service~~ tax ~~return~~

The Central Board of Excise & Customs hereby extends the date of submission of Service Tax Return in form ST-3 for the period 1st April,2012 to 30th June,2012 from 25th October,2012 to 25th November,2012 vide order no-3, dated 15th October,2012.

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Contd. from page no. 346

Single-year data vs multiple-year data

The transfer pricing rules provide that the data to be used in analyzing the comparability of uncontrolled transactions with an international related party transaction shall be the data relating to the relevant financial year in which the intercompany transaction was entered into. The use of the prior two years data is only an exception and has a limited role to the extent the same has an influence on the determination of the transfer prices in relation to the intercompany transaction that is being compared. Relying on judicial precedents, the Tribunal held that only the current year data is to be used for comparability purposes.

Adjustment for differences in working capital

The Tribunal accepted the contention of the Assessee that the working capital would have effect on the profit and held that if the Assessee was not required to use its own working capital then it would be a relevant factor for determining the profit margin and an adjustment to eliminate the disparity would always be required. Further, the Tribunal noted that the Tax Authority in the subsequent years had granted the adjustment to the Assessee and hence set aside the issue to the file of the AO to grant working capital adjustment.

Comments

Globalization has led many multinational enterprises to establish information technology, research and development (R&D) and back office operations in India. Generally, the Indian affiliates providing services operate as "captive service providers" getting remunerated on a cost plus basis and are insulated from key business risks. One of the key transfer pricing controversies that arise in cases of such transactions is the criteria for selection of comparable data.

The process followed to identify potential comparables is an important aspect of the comparability analysis. The choice of selection criteria has a significant influence on the outcome of the analysis and should therefore reflect the most meaningful economic characteristics of the transactions compared. The ruling highlights the importance of adequately documenting the justification of choice and application of comparable selection criteria, especially quantitative criteria. While the ruling accepts a broad-base selection of comparable data within the same sector/ industry, the principle may need to be applied on a case-by-case basis, having regard to the effect on reliability of the analysis.

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ASSOCIATION NEWS

CA. Ashok C. Kataria
Hon. Secretary

CA. Chintan M. Doshi
Hon. Secretary

FORTHCOMING PROGRAMMES:

Date/Day	Time	Programmes	Speaker	Venue
23-11-2012 Friday	07:00 pm	Diwali Get Together	-	Aangan Party Plot, Opp Nandanvan-4, B/h Jodhpur Gam, Satellite, Ahmedabad
04-12-2012 Tuesday	05:30 pm	7th Study Circle Meeting on "Highlights & Issues under Foreign Contribution Regulation Act, 2010	CA. Chandravadan A. Shah	H. K. Hall, Opp. Handloom House, Ashram Road, Ahmedabad
22-12-2012 Friday	08:30 am	President XI vs Secretary XI	-	Sardar Patel Stadium, Nr. Stadium Circle, P.O. Navjivan, Ahmedabad
03-02-2013 Friday	08:30 am	Chartered Accountants Association vs Baroda Branch of WIRC of ICAI	-	Sardar Patel Stadium, Nr. Stadium Circle, P.O. Navjivan, Ahmedabad

ON THE WEBSITE

The Association has made representation to the Finance Minister on various issues arising in Service Tax under the new regime. The detailed representation as compiled by CA. Vinit N. Shah is hosted on the website of the Association at the following link:

http://www.caa-ahm.org/LegalDetails.php?legalid=121

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GLIMPSES OF EVENTS GONE BY:

Program on Service Tax

Members in Industry Committee organized a program on Service Tax on 02-10-2012 in Association with Ahmedabad Branch of ICAI. The speaker at the program was Shri S.S.Gupta from Mumbai. The learned speaker explained various issues relating to Reverse Charge Mechanism, Place of Supply Rules and Point of Taxation Rules. The program received a huge response from the members with more than 270 participants.

(L to R – CA. Ashok Kataria, CA. Purshottam Khandelwal, CA. Gaurang Choksi, CA. S.S.Gupta)

K.T.Thakore Memorial Lecture

On 05-10-2012, lecture meeting was arranged in memory of Late Shri K.T. Thakore saheb on the topic of “Judiciary, Public Servants and Human Rights”. The guest speaker for the program was Hon’ble Justice Shri B.C.Patel, Member National Human Rights Commission and former chief justice of Jammu & Kashmir High Court and Delhi High Court. The program was well attended by members, ITAT members and also Hon’ble Justice (Retd.) R.A.Mehta, Gujarat High Court.

(L to R – Ashok Kataria, Hon’ble Justice Shri B.C.Patel,
CA. Prakash B. Sheth, CA. Chintan Doshi and CA. Gaurang Choksi)