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

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

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Audit of Our Life

We are familiar with audit of accounts, records, documents, energy, buildings, facilities, infrastructure and other tangible objects of the material world. But we also need to know that this process of inspecting, correcting and certifying is much needed in our life too.

1. **Physical Audit:**

   Time to time, we need to examine the condition of our body in order to be aware of the changes that take place at the physical level. It is only when such changes come into the scope of our awareness, we take necessary action. We will have two choices: When we find changes happening as a natural process, all we need to do is to learn to accept them. The changes that are effected by our unnatural lifestyle and behaviour must immediately be corrected. Such inspection and correction has to be done by ourselves, and we do not always need a doctor to do that!

   ☺ A man awoke and found his family and neighbours preparing for his funeral. When he protested, his wife asked him to lie down silently saying, "Do you know more than the doctor? He has certified, so you are dead!"

2. **Mental / Emotional Audit:**

   We often find ourselves going through emotional ups and downs. We seem to be losing our patience. Intolerance has crept into our lives and is devouring our peace of mind. Emotional audit helps us to mind our mind better. The scriptures say, "Mind alone is our best friend, and it is our worst enemy too." Most of us know not the ways of our mind, and so feel helpless and clueless when our mind takes us for a ride. We do not know how to handle our own emotions – positive or negative!

   ☺ A man won a lottery of rupees ten crores and was unable to share this with his ailing wife, who would not be able to handle the joy. His friend offered help, and asked the lady, "What would you do if you get ten crores of rupees?" The wife casually replied, "I would give half of the money to you." Hearing this, the man collapsed!

3. **Intellectual Audit:**

   We do update ourselves with knowledge related to our profession through journals like this one, or we attend conferences, use the internet and so on. But profession is just a small part of our life. Do we upgrade our knowledge and understanding of ourselves, our family members or our country? We seem to have very little knowledge about our own culture and tradition. We need to audit our understanding and thinking, so as to upgrade to the next level at regular intervals. Occasions like new years and birthdays give us a reason to make this audit. It is necessary to know how our intellect thinks and decides. As great men say, "What you think is important, but how you think is more important!"

   ☺ If you see others around you losing their head over a problem, and you find yourself at peace, there are two possibilities: (a) you have not understood the problem (b) you are the problem!

4. **Spiritual Audit:**

   This aspect of our personality is perhaps the most neglected. It is said in our scriptures that this spiritual layer of our personality is capable of leading and guiding our life from limitation to immortality, from darkness to light, from sorrow to bliss. But for this, a regular spiritual audit, termed as 'sâdhanâ' in Sanskrit, is inevitable. We must train our instruments to remain still and quiet, so that the Spirit gets enlivened and starts expressing itself. This can be achieved through different techniques like prayer, japa (repetition of a divine mantra), meditation, mauna (silence), solitude, study of scriptures etc. Keeping company of spiritual people (satsanga) is an easy and effective method.

Pujya Gurudev Swami Chinmayananda has given a wonderful formula for achieving the above:

INTROSPECT daily: Being aware of oneself.

DETECT diligently: Know one's positive and negative qualities.

NEGATE ruthlessly: Our weaknesses and undesirable traits need to be removed.

SUBSTITUTE wisely: Negativities must be substituted with positive qualities.

GROW steadily: This is an ongoing process, has to happen regularly.

...and BE HAPPY! – This is our goal, isn't it?!

Editorial

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Alas ! The Helplessness

The profession of chartered accountancy today is at a cross roads facing tough challenges. It is not just the prevalent economic scenario that is posing problems but the matters within the domain of professional interest and practice are erupting as a roadblock. There are various instances observed today where a chartered accountant is found unsure of how to go about. Many professional brethrens are found without any action plan and are stuck in difficulties arising on account of the changing scenario. All seem to be in a dilemma and are unsure of the solutions to the rising problems.

The new Companies Act, 2013 has replaced the old Companies Act of 1956. The new law has brought in a sea wide change in the manner the Company Law is practiced. The Act of 2013 has not just brought the procedural challenges but the entire legal framework for regulation of companies has undergone a change under the new regime. From the time the new provisions have come into force, various programs have been held and continue to be held by various bodies including branches, chapters, study circles including the Association for their members to get acquainted with the new Company law. Almost every chartered accountant has attended some or other such program. One of the big changes that has been brought by the Companies Act 2013 is that now any sum accepted from shareholders will be considered as Deposit unlike earlier which was not the case for private limited companies. There are instances today where members are found discussing as to what would be the status of sums accepted from shareholders before the commencement of the new Act? Are these acceptances outside the purview of the deposits or not? Whether the Registrar of Companies is to be intimated before 30th June or not? After so many programs on the new law, why the members are unable to come with a concrete answer to a very pertinent and basic question? Why this state of helplessness?

The example referred above is one of many where chartered accountants are caught between options of 'to do or not to do'. There are other kinds of challenges raising the issue of how to comply with. One such challenge has now been thrown to the practicing chartered accountants by the income tax department. The Department, w.e.f. 19-06-2014 has made it mandatory for all assessees to update their email-ids and mobile numbers on its website. The idea behind the move of the department may be good, however, the manner and the time at which the procedure has been brought in is causing a lot of hardship for all tax payers and tax consultants.

It has been more than three months to the end of the financial year and still the income tax department has not been able to come out with the online version of return forms to enable assessees to file their income tax returns and the due date for AY 2014-15 is fast approaching. Because of the administrative failure on the part of the Income Tax Department to make available the new return forms immediately after the end of the financial year, for all practical purposes, the tax consultants and tax payers get only about a month to file their income tax returns. Where the priority of all assessees and tax payers would be to file the tax returns after the automatic curtailment of time period, the updation of individual email-ids and mobile number is a huge and a daunting hurdle in complying with the requirement of filing income tax returns before the due date.

May prudency shall prevail and people at the helm of affairs come out with some clarifications and amicable solutions that would bring a sigh of relief for all professionals unraveling them from this state of helplessness!

Namaste,
CA. Ashok Kataria

From the President

CA. Shailesh C. Shah
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Dear Esteemed Reader,

With the new Government sworn in under the Prime Minister Narendra Modi and the budget round the corner, the mood appears upbeat in every sector in the country. All eyes are on the new Indian government as the common-man expects the new team to unveil measures to curb inflation, create jobs, speed up infrastructure projects and create an environment that will boost the economy of the country.

The new Government is right now in its honeymoon period enjoying support from public that has voted it to power with great expectations. The announcements in budget would be the first signal to restore the economic health of the country and send out some positive indications as to how the govemment proposes to deliver its poll promises.

The new Government may have sought 60 months from the electorate and these are early days, however, the 'aam aadmi', living in instant and impatient age suffers the ever growing inflation and corruption, is already showing signs of impatience to wait for fruits that will grow after the system is changed at the fundamental level – as promised by Modi.

The New Government has already touched a raw nerve by increasing rail fares. The rationale behind the 14% hike – the first big one after 11 years – has been missed by a large section of the people. Some of the section of the people has welcomed the rise in the railway fare mentioning that railway department had reached precarious position and it was time to bite the bullet.

Though the bitter pill may be necessary for reviving the economy, it hurts the common man when it hits his pocket. The fare hike controversy and the fear of runaway inflation have, to an extent, overshadowed the positive steps taken by the new government. The new Government has a window of opportunity how to set right the economy if it takes bold decisions and administer the bitter pill which may hit popularity. It has the chance to do things now as it has the mandate and good will. How far it will go is to be seen.

The new Government realises that its' time to take some tough decisions as they are ought to be taken at the start of the term and not at the fag end. It is more likely that the initial unpopular measures might dent the faith of people in the new government.. It would be important for the government to take people along and make them understand their initiatives if they are truly committed to their promises.

The economy is slipping because of various factors. The first big challenge is the rising prices and inflation. Of all types of inflation, when food prices rise, it causes immense distress, leading to unrest and protests. The second is the rising fuel prices in view of the ongoing Iraq crisis. Thirdly, the prediction that there could be weak monsoon. Monsoon has had a delayed start this year, and the risk of it failing has been rising since April when the Indian Meteorological Department released its first forecast. The situation in the country would test the administrative capabilities of the new government and Prime Minister Narendra Modi in particular and his response considering the previous government's utmost failure to deal with these kinds of issues and ultimately people voting them out of power.

The activities at the Association are in full swing. Association has made strong representation against mandatory updation of email IDs and mobile number at the time when the priority is to file income tax returns before the due date. The Association has also made representation on the draft notification under the company law. Further I am pleased to inform you that during the last month the Association had come out with a publication titled 'Handbook on Companies Act 2013'. . The book was in good demand and all the copies printed are sold out. With your support, the entertainment program of 'Hassayaro' has also been a great success. World famous artist Shahbuddin Rathod and Jitubhai Dwarkawala performed at the program. The details of the upcoming program are given in the Association News column. We continue to seek such co-operation from the members round the year.

With regards,
CA. Shailesh C. Shah
President

Not filing your returns on time = Risking 7 precious years of your life

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Introduction

Of late, section 276CC of the Income Tax Act has been the most talked about section across the taxpaying community. Be it the Tamil Nadu Chief Minister Jayalalita's case or the recently emerged National Herald case, section 276CC has found a place in the conversations.

At present there are omnifarious sections in the Income Tax Act which have been introduced decades back, the why and wherefore of which relate to the situation at that point of time. However, these provisions were dormant since long. However, lately various 'enthusiastic' officers have started applying such dormant provisions. Section 276CC is one such glaring example. However, the big idea behind such notices is to amass the compounding fees.

Section 276CC of the Income Tax Act deals with punishment for willful non furnishing of return of income within the prescribed time period. The legislature has since inception always provided a punitive act for non compliance with the provisions relating to filing of income. Prior to 1989, non filing attracted penalty u/s. 271(1)(a) as well as prosecution u/s. 276CC of the Act. However w.e.f. 01.04.1989 the penalty u/s. 271(1)(a) has been done away with and a provision for levy of mandatory interest u/s. 234A has been introduced. However, the legislature has never waived or relaxed the provisions relating to prosecution u/s. 276CC of the Act.

Except for partnership firms and companies, filing of return of income is mandatory if the taxable income exceeds the maximum amount not chargeable to tax. Filing of tax returns is mandatory for firms and companies irrespective of the taxable income. These returns are required to be filed on or before the due date specified under the Act. Non filing of the returns before the end of the relevant assessment year attracts a penalty of Rs. 5000 u/s. 271F of the Act as well as interest u/s. 234A of the Act.

This is where the provisions of Section 276CC also come into play. Section 276CC provides for imprisonment for minimum 3 months and maximum 7 years in case of a willful failure to file the income tax return u/s. 139(1) or 142(1) or 148 if the amount of tax payable exceeds Rs. 3000.

Bare Provision

The provision of the section 276CC reads as under:

[Failure to furnish returns of income]

276CC. *fa ers nw fu yfa st furn s ndue the return of income which he is required to furnish under sub-section (1) of section 139 rbyn t ce given under clause (i) of sub-section (1) of section 142 or section 148 or section 153A, he shall be punishable,—*

( ) nacasew eret eam unt ftax w c w u d have been evaded if the failure had not been discovered, exceeds twenty five hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;

( ) nany t ercase w t m r s nmentf raterm which shall not be less than three months but which may extend to two years and with fine:

Provided*t at a ers ns a n t be r ceeded against under this section for failure to furnish in due time the return of income under sub-section (1) f section 139—*

(i) for any assessment year commencing prior to the 1st day of April, 1975; or

(ii) for any assessment year commencing on or after the 1st day of April 1975, if—

(a) The return is furnished by him before the expiry of the assessment year; or

(b) The tax payable by him on the total income determined on regular assessment, as reduced by the advance tax, if any, paid, and any tax deducted at source, does not exceed three thousand rupees.]

In order to understand the draconian provisions of Section 276CC, let us decode the entire section phrase by phrase in order to have a better clarity on the issue

If a person willfully fails to furnish….

The opening lines of Section 276CC clearly provide that the provisions of the aforesaid sections would apply only when the default is willful and not otherwise. Mere non filing of return does not constitute an offence by itself.

The question that emerges is what is willful default? Willful default, as observed by Wilber Force J. in ***Wellington* v. *Reynold* (1962) 40 TC 209** is "some deliberate or intentional failure to do what the tax payer ought to have done, knowing that to omit to do so was wrong". Earlier, there was a requirement for establishment of *mens rea*. However the law *at presenti* presumes the existence of mens rea and it is for the accused to prove otherwise.

The High Court has in the case of ***Bhavecha Machinery and Ors (2010) 320 ITR 263 (MP)*** held that there has to be a cogent, clear and reliable evidence that failure to file return in time was 'willful' and there should be no possible doubt of its being 'willful'. The failure must be intentional, deliberate, calculated and conscious with complete knowledge of legal consequences flowing from them.

The Andhra Pradesh High Court has in the case of ***ITO V/s. Autofil* [1990] 52 TAXMAN 343 (AP)** held that "It is not the simple failure in submission of the return by the due date that amounts to an offence u/s 276CC but that failure should be willful so as to call for a conviction. Willfulness contemplates some element of evil motive and want of justification. Conviction u/s 276CC is an extreme and exceptional resort and gets warranted only when willfulness in failure to submit *the return in time is established beyond all reasonable doubts and there should be present mens rea, a bad motive and guilty mind. In the absence of this, no conviction shall follow the prosecution under section 276CC*.

In the decision of ***Lal Saraf v/s State of Bihar [1999] 235 ITR 116 (PAT.)*** the Hon'ble High Court observed that when the assessee could not file the return of income for want of books of account which were seized by the income tax department and the copies and extracts were provided after the due date of filing of the return, no proceedings under section 276CC can be initiated. In the above case, the High Court correctly noted that it was not the intention of the assessee not to file the return of income, but due to non-availability of books of accounts which are very much required to file the return of income, he could not file before the due date. The failure was non-deliberate and no prosecution proceedings for such non-deliberate failure could be initiated under sec 276CC.

….In due time

The provisions of Section 276CC further stipulates that the provision of the section would get attracted if the assessee fails to file the return of income in 'due time'.

The time within which the assessee is required to file the return of income has been specified in Section 139(1).

As per the provisions of section 139(1) of the Income Tax Act, 1961, any person under the Act, whose total income for the previous year exceeds the maximum amount which is not chargeable to tax, is required to file return of Income, within the prescribed statutory due date relevant for the

assessment year which is July 31 or September 30 of the said assessment year, as the case may be.

It is therefore important to note here that the expression 'due time' in the section encompasses the time limit specified in Section 139(1) only and not 139(4). Therefore, even if a return is filed within the time limit specified u/s. 139(4) of the Act, section 276CC would get attracted, provided other conditions get satisfied. This is simply because of the fact that if the contrary is permitted, the legislative intent would be violated. However the proviso to this section permits the assessees to file the return of income before the end of assessment year and escape from the noose of section 276CC.

…….the return of income which he is required to furnish under sub-section (1) of section 139 or by notice given under clause (i) of sub-section (1) of section 142 or section 148 or section 153A

Section 276CC applies to situations where an assessee has failed to file a return of income as required under Section 139 of the Act or in response to notices issued to the assessee under Section 142 or Section 148 of the Act.

Section 139 of the Act placed a statutory mandate on every person to file an income tax return in the prescribed form and in the prescribed manner. A plain reading of the above provisions indicates that it is mandatory on the part of the assessee to file the return before the due date.

Further a reference to Sections 142 and 148 is also necessary to properly understand the scope of Section 276CC.

Section 142 provides that the AO may serve on any person who has made a return u/s 139 or in whose case the time allowed u/s. 139(1) has expired, a notice requiring him to furnish the return of income or the prescribed particulars as the case may be. Section 148 refers to the issue of notice where income has escaped assessment.

he shall be punishable,—

(i) in a case where the amount of tax, which would have been evaded

Going further, section 276CC stipulates the punishment for default. However, the section provides for a punishment only if the amount of tax which would have been evaded exceeds the specified limit. However, while computing the amount of tax, advance tax and tax deducted at source ought to be deducted.

However, It is pertinent to note that it is not only when tax is evaded that section 276CC is attracted. Evasion of tax is not a pre-condition for attracting Section 276CC. Even if tax is not evaded, but there is a willful default to file the return of income, prosecution would be launched provided other conditions are satisfied.

…evaded if the failure had not been discovered- exceeds twenty-five hundred thousand rupees

Section 276CC provides that prosecution would be launched if the amount of tax that would have been evaded if the failure would not have been detected exceeds Rs. 25,00,000.

…with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;

Further, this section provides that if all the aforesaid conditions are satisfied, the assessee shall be punishable with imprisonment for a minimum period of six months. However, the term of imprisonment may even extend upto seven years. However, this punishment is applicable only if the amount of tax that would have been evaded exceeds Rs. 25,00,000. Further, this section provides for levy of fine along with imprisonment.

…in any other case, with imprisonment for a term which shall not be less than three months but which may extend to two years and with fine:

However, if the amount of tax that would have been evaded does not exceed Rs. 25,00,000 the term of imprisonment would be a minimum

period of 3 months. However, the aforesaid term may even extend to 2 years along with fine.

Provided that a person shall not be proceeded against under this section for failure to furnish in due time the return of income under sub-section (1) of section 139—

(ii) for any assessment year commencing on or after the 1st day of April, 1975, if—

(a) the return is furnished by him before the expiry of the assessment year; or

(b) the tax payable by him on the total income determined on regular assessment, as reduced by the advance tax, if any, paid, and any tax deducted at source, does not exceed three thousand rupees.]

The proviso to section 276CC has been specifically inserted to give some relief to the genuine assessees. The proviso provides a further period of time during which the return can be furnished without the provisions of section 276CC getting attracted. In other words, even though the due date would be 31st July of the assessment year as per Section 139(1) of the Act, an assessee gets further eight months' time i.e. till the end of the assessment year to complete and file the return and such a return though belated, may not attract prosecution of the assessee.

Similarly, the proviso in clause ii(b) to Section 276CC also provides that if the tax payable determined by regular assessment has reduced by advance tax paid and tax deducted at source does not exceed Rs.3,000/-, such an assessee shall not be prosecuted for not furnishing the return under Section 139(1) of the Act.

Thus the proviso shields the genuine assessees from the rigor of the draconian provisions provided they file the return before the end of the relevant assessment years. Secondly it also protects those who have paid substantial amounts of their tax dues by way of pre-paid taxes.

However it would be pertinent to note here that the proviso to Section 276CC nowhere specifies that those assessees who are covered by the proviso have not committed the offence u/s 276CC of the Act. It is only that no prosecution would be launched against such assessees.

An assessee who comes within clause 2(b) to the proviso, no doubt has also committed the offence under Section 276CC, but is exempted from prosecution since the tax falls below Rs.3,000/-.Such an assessee may file belated return before the detection and avail the benefit of the proviso.

Proviso cannot control the main section, it only confers some benefit to certain categories of assesses. Thus, the offence under Section 276CC is attracted on failure to comply with the provisions of Section 139(1) or failure to respond to the notice issued under Section 142 or Section 148 of the Act within the time limit specified therein

Section 276CC, it may be noted, takes in sub-section (1) of Section 139, Section 142(1)(i) and Section 148. But, the proviso to Section 276CC takes in only sub-section (1) of Section 139 of the Act and the provisions of Section 142(1)(i) or 148 are conspicuously absent. Consequently, the benefit of proviso is available only to voluntary filing of return as required under Section 139(1) of the Act. In other words, the proviso would not apply after detection of the failure to file the return and after a notice under Section 142(1)(i) or 148 of the Act is issued calling for filing of the return of income. Proviso, therefore, envisages the filing of even belated return before the detection or discovery of the failure and issuance of notices under Section 142 or 148 of the Act.

Other Issues

The Curious Case of Jayalalitha

The Supreme Court recently, in the case of Sasi Enterprises (Where in Ms. Jayalalitha is a partner) adopted a firm view. The facts of the case are narrated hereunder:

Miss J. Jayalalithaa and Mrs. N. Sasikala were partners of a firm. The firm did not file the Returns of Income for A.Y. 1990-91, A.Y. 1991-92 and A.Y. 1992-93. The Madras High Court confirmed the complaints against the said firm. The partners in their individual capacity were being prosecuted for non-filing of returns of income by the firm. In their individual returns, they mentioned that as the firm had not finalised its accounts, no returns of the firm had been filed. Thereafter, the Best Judgement Assessments were framed. Thereafter, sanction for prosecution was accorded by the Commissioner of Income tax. The learned Counsel argued on behalf of the firm that in a case when the assessment has not reached to finality, the provision of sec 276CC cannot be applied. The Counsel for the department strongly relied on the principles laid down in the case of ***Prakashnath Khanna & Another v/s CIT & Another (2004) 9 SCC 686*** and submitted that pendency of appellate proceedings is not a relevant factor in relation to prosecution u/s 276 CC of the Act.

The outcome of the judgment is as under:

1. Non-compliance with a notice u/s 142(1)(i) may attract prosecution u/s 276CC.
2. Even after the provision for a levy of mandatory interest u/s 234A of the Act and deletion of Sec 271(1)(a), the legislature has never waived or relaxed its prosecuting provisions u/s 276CC of the Act.
3. The Proviso u/s 276CC takes care of the genuine assessees who either file the belated returns but within the end of the Assessment year or those who have paid substantial amount of their tax dues by prepaid taxes, from the rigour of the prosecution u/s 276CC of the Act.
4. The Proviso to Sec 276CC cannot control the main section, it only confers some benefit to certain categories of assesses.
5. Sec 276CC contemplates that an offence is committed on the Non-filing of the return and it is totally unrelated to the pendency of the assessment proceedings.
6. Merely because there has been a Best Judgement Assessment u/s 144, it would not nullify the liability of the firm to file the return as per Sec 139(1) of the Act.
7. The court in a prosecution of offence, like Sec 276CC has to presume the existence of mens-rea and it is for the accused to prove the contrary and that too beyond reasonable doubt.
8. The appellants have to prove circumstances which prevented them from filing the returns as per Sec 139(1) or in response to notices u/s 142 and 148 of the Act.
9. Finally it was decided that the criminal court is directed to complete the trial within four months from the date of receipt of this Judgement.

Section 278E and Section 276CC

Section 278E deals with the presumption as to culpable mental state, which was inserted by the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986. The moot question that arises is that who is responsible for proving the existence of guilty mind. It has been provided in section 278E that the Courts shall deem the existence of a culpable mental state. It is on the accused to prove the contrary. Resultantly, it is on the assessee to prove the circumstances which prevented them from filing the returns as per Section 139(1) or in response to notices under Sections 142 and 148 of the Act.

Whether pendency of appellate proceedings are a bar to invoking the provisions of Section 276CC?

As per section 276CC, once there is a willful default in filing the return of income the provisions of this section are attracted. Thus pendency of assessment proceedings is not at all a condition relevant for invoking the provisions of this section. However, for determination of the sentence of the offence, the department may resort to best judgment assessment or otherwise to past years to determine the extent of the breach.

It is clear from the language employed by section 276CC that pendency of appellate proceedings is

not a bar to launch of prosecution proceedings. It is trite law that as already held by this Court in ***B. Permanand*** v. ***Mohan Koikal*** (2011) 4 SCC 266 that "the language employed in a statute is the determinative factor of the legislative intent. It is well settled principle of law that a court cannot read anything into a statutory provision which is plain and unambiguous".

Should it have been the intention of the legislature to hold up the prosecution proceedings till the assessment proceedings are completed whether by way of appeal or otherwise, it would have been provided in the section itself.

Section 276CC – A Non Cognisable Offence

Default under this section is a non cognizable offence. Under Section 279(2) of the I-T Act, either before or after the institution of proceedings the Commissioner has the power to compound the offence under Section 276CC.

Order sanctioning prosecution

It is necessary that the authority sanctioning the prosecution should apply its mind before making the order. The authorities ought to refrain from making frivolous and vexatious orders. All the relevant evidence and materials must be considered.

Is charging of interest, levy of penalty and prosecution for same act of omission or commission permissible?

Yes. Provisions for charging of interest, levy of penalty and prosecutions for same acts or omissions exist simultaneously in the Act. The nature and object of these three types of sanctions is different from each other [***Addl. CIT v. Darga pandarinath Tuljayya& Co., (1977) 107 ITR 850 (AP).].*** Interest is in the nature of compensation to the State for such acts of omission and commission which result in delay in payment of various sums due to the Government, while penalty is intended to act as deterrence to acting in contravention of law and to ensure compliance therewith, prosecution is launched to get the delinquents punished for acts of omission and commission which constitute crime under the specific provisions of the Act. ***[Venkata Krishnnaiah& Co. v. CIT. (1974) 93 ITR 297 (AP); Narandas Parmanand Das v. CIT. (1974) 95 ITR 117 (Del.)]***

Conclusion

Time and again the tax payers do not file the return of income either due to lethargy or due to lack of funds for payment of tax. However, little they know about the consequences of their actions. But it is pertinent to mention here that this unawareness is due to the inertia on the part of the Revenue Department till date. The department has always stayed away from taking recourse to the provisions of Section 276CC despite the section being a part of the Act since almost four decades.

Various recent Supreme Court rulings including the most talked about case of Sasi Enterprise (Criminal Appeal No. 61 of 2007) where in Ms. Jayalalitha is a partner, have recapitulated the law of the land on the initiation of prosecution proceedings under section 276CC of the Income Tax Act. The Revenue Department has off late strangled the procedures to identify those assessees who have failed to file the return of income. With such tightening procedures, the risk of launch of prospection procedures will have to be borne in mind. Thus it would be in the interest of the assessees to file their return of income within the statutory time period or might be even before the end of the assessment year so as to sidestep from the strangles of Section 276CC of the Act.

The intention of the department is yet to be contemplated but prima facie it emerges that amassing the compounding fees is the big idea rather than to prosecute the assessee in default. It has been high time that a strong representation is made so that the law framers relook into such harsh and rasping provisions of the Act.

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A case Study : Depreciation on Wind Mill

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It is an economic stimulus tragedy. The income tax department has knack to identify few non controversial issues, which can be converted into controversies. Experts lament on this kind of approach with sigh. In the result, one needs to battle out these issues thru legal process. In a lighter tone, it is said, such approach gives stimulus to litigation practice. Anyway let me come to the legal issue. This article is unleashed from such controversy. One of the non controversial issue of claiming depreciation @ 80% (earlier it was 100%) on windmill is attempted by dissecting the purchase value in building, plant and machinery and Wind Turbine Machine and allowing depreciation at 10%, 15% and 80% respectively. The argument subscribed by Income Tax Department is, 80% depreciation is available only on "*windmills and any specially designed devices which run on windmills" which has limited meaning of standing structure of wind turbine generator machine*. The logic applied to arrive this conclusion is more dangerous than interpretation. If this approach is going to continue, investment in solar based power project may face heat in coming days.

Historical Backgrounds of relevant provisions:

Under section 32 of Income Tax Act, depreciation is a mandatory to claim while working out Income from Business or Profession. In case assessee does not prefer to claim depreciation at special rate under Rule 5 (1A), he can claim under New Appendix I (w.e.f. A Y 2006-07), Part A, heading III, item No. 8, Sub item (xiii) and clauses (l) for the specified rate of depreciation on wind mills. Which is read as Under :

"(8)

(xiii) Renewable energy devices being

(l) Wind mills and any specially designed devices which run on wind mills" installed on or before *March 31 2012.

Depreciation Rates:

Asst Yr.	Particulars	Rate of Depreciation	Submission
1987-85 to 1987-88	Old Appendix I **Part I** Heading III **Item D** Sub Item 10A Clause (xii) Wind Mills and any specially designed devices which run on wind mills **Clause(xiii)** Any special devices including electric generators and pumps **running on wind energy**	30%	Wind mills and special devices runs on wind mill including Electric Generators and pumps are two different category. In case legislator wants to define wind turbine is equal to wind mills then Clause (xiii) was sufficient to cover the intention.

1988-89 to 2002-03	Old Appendix I **Part A** Heading III **Item 3** Sub Item (xiii) Clause (*l*) Wind Mills and any specially designed devices which run on wind mills **Clause(m)** Any special devices including electric generators and pumps **running on wind energy**	100%	Wind mills and special devices runs on wind mill including Electric Generators and pumps are two different category. In case legislator wants to define wind turbine is equal to wind mills then Clause **(m)** was sufficient to cover the intention.
2003-04-to 2005-06	Old Appendix **I** **Part A** Heading III **Item 8** Sub Item (xiii) Clause (*l*) Wind Mills and any specially designed devices which run on wind mills **Clause(m)** Any special devices including electric generators and pumps **running on wind energy**	80%	Wind mills and special devices runs on wind mill including Electric Generators and pumps are two different category. In case legislator wants to define wind turbine is equal to wind mills then Clause **(m)** was sufficient to cover the intention.
2006-07 to 2012-13	**New Appendix I** **Part A** Heading III **Item 8** Sub Item (xiii) Clause (*l*) Wind Mills and any specially designed devices which run on wind mills **Clause(m)** Any special devices including electric generators and pumps **running on wind energy**	80%	Wind mills and special devices runs on wind mill including Electric Generators and pumps are two different category. In case legislator wants to define wind turbine is equal to wind mills then Clause **(m)** was sufficient to cover the intention.
2013-14	**New Appendix I** **Part A** Heading III **Item 8** Sub Item (xiii) Clause (*l*)	15%	***Income-tax (Fourth Amendment Rules, 2012 – Depreciation restricted to 15% on wind mills installed after 31-3-2012*** **Notification No. 15/2012 [F.No.149/21/2010-SO (TPL)]**

	Wind Mills and any specially designed devices which run on wind mills **Clause(m)** Any special devices including electric generators and pumps **running on wind energy**		**S.O.694(E), dated 30-3-2012**

Income Department's view is to dissect the Purchase value of Wind Mill into Building for the value of Foundation Cost, normal plant value for labour charges, power evacuation structure cost, grid connectivity charges, transformer cost and all other items other than main wind Turbine equipment. Whether the stand taken by Income Tax department holds good ? This article is evaluating the stand taken by I T department in following paragraphs.

(*a*) **What is a Wind Mill?**

A wind mill includes wind turbine generator, blades, cables, electrical apparatus, towers, permits, rights, transformer, meter and other infrastructures facilities. It is used to generate electricity by converting the kinetic energy of wind into electrical energy.

(*b*) **What is renewable energy**?

Renewable energy is energy which comes from natural resources like sun-light, wind, rain, tides and geothermal heat, which are renewable (naturally replenished). Energy from any source which is not naturally replenish-able is called non-renewable energy. Wind turbine is used to Generate renewable energy.

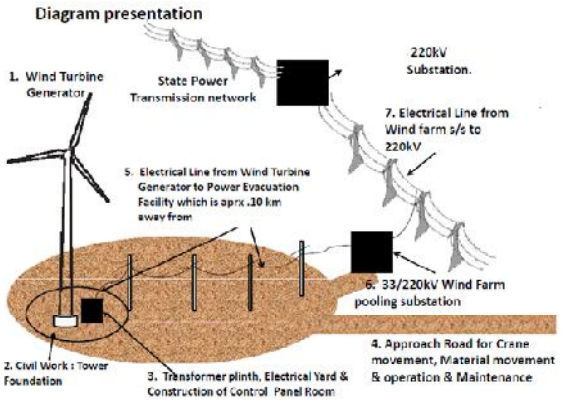

Figure 1 Wind Mill

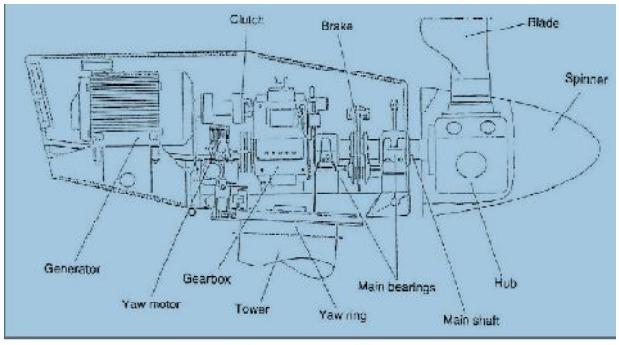

Figure 2. Wind turbine components inside the nacelle.

Thus, A wind turbine is such device comprises of Tower, Gearbox, brakes, rotor, generator, yaw drive, Nacelle, blades, shaft, which are used to generate electricity by converting the energy of wind into rotational motion, and then in to electricity. The total expenses incurred for bringing machine shown as per figure 2 and not only in figure 1, should be construed as wind mill. A stand alone machine as per figure 2 without infrastructure is no use and Infrastructure of figure 1 is also of no use without wind turbine generator. Therefore it is interlinked and interconnected, which can not be detached or dissected for different rate of depreciation by hypothetical formula.

Income Tax Department Approach:

Sr. no	Nature of work /Item	Allowable % depreciation as per I T Department
1	Supply of Wind turbine generator	80%
2	Erection & installation of WTG And civil including foundation work.	10% in some cases 5%

3	Works contract For Electrical work Including supply and installation of electrical items	15% in some cases 10%
4	Power Evacuation Infrastructure cost	15%
5	Providing sub lease Rights of Land and rights of suitable access of surrounding for Wind mill	May or may not allowable or SLM no of years divided by holding period
6	Any other related expenses	15%

Here whole cost of wind mill purchase is separated as per various contract entered with turnkey project supplier. Whether the approach of Income tax department is correct ?

A Case Study:

The first and foremost question comes to mind is whether the dissection done by Department based on various contracts is a correct approach? Answer shall be no. The contracts in this case is prepared for allocation of work among the various agencies of wind mill supplier. Agencies or companies may be associates or outside agency but the fact is Buyer is entering into contract to buy out wind mill from supplier and to ascertain the value of goods and services for other statutory compliance. This understanding may or may not be acceptable. One need to discharge onus based on practical aspects of wind mill.

It should be clear from the works order that all the work to be carried out in relation to Wind Mill only with specific attached job related to either installation of wind turbine tower or transformer platform or testing and commissioning services or connecting electrical line and cable from main generating unit to metering and grid. Any activity related to passive work or alternate use should be ignored.

The word used in applicable Income Tax Rule is "WIND MILL", which has a wide meaning and not confined to generator or gearbox etc. Any act or deed attached to bring wind turbine in active use of power generation should be treated as a part of Wind Mill. Wind Mill is a plant as defined under section 43(3) of Income tax act and it is undertaking itself (M/S The Hutti Gold Mines Co. Ltd. vs Department Of Income Tax, ITA No. 832/Bang/ 2012 –A Y 2008-09). If meaning of wind mill is narrowed to only wind turbine or standing structure of tower or together both, will not justify correct legal position. If meaning is narrow down to such extent, active use of wind turbine will not be possible. All standing equipments are bald and useless. It needs to be integrated and therefore any expenses related to such integration and helping this plant to bring them in use must be said as a part of windmill. Any payment made for labour charges, Government fees, statutory fees, foundation work expenses, electrical components and cables-electrical work within turbine or connecting power generated to grid and transformer expense, metering work charges, surfacing works cost, data lock and control machine cost etc should be treated as a composite cost of Wind Mill. *It is mandatory to establish that all expenditures must be relevant to the Wind Mill and do not result in creating any independent asset.*

It is pertinent to discuss the object of providing higher rate of depreciation on Wind Mill. The country was a part of Kyoto Protocol Treaty and expressed desire to promote renewal energy voluntarily. The country is power deficit and therefore to fillip the gap of power generation by this mode may help to increase the power generation. Keeping in view this, time and again income exemption under section 80IA and 80IB for extension of time limit for setting up power generation unit, amendments have been carried out. Not only that additional depreciation under section 32(1)(iia) has also been provided.

The following passage from Memorandum of Finance (No.2) Bill 1998 suggests the object or thrust of Government to Boost power sector and provide incentives on continuous basis to the electricity generation activities.

Finance (No. 2) Bill, 1998 Provisions Relating to Direct Taxes *" Incentives for Infrastructure Development and Industrialisation*

Tax Holiday to enterprises generating or generating and distributing power extended up to 31.3.2003.

Under the provisions of section 80-IA of the Income-tax Act, a five-year tax holiday and a deduction of 25% (30% in the case of companies) of profit in the subsequent five years is allowed, inter-alia, to an undertaking engaged in the business of generation, or generation and distribution of power or to an industrial undertaking set up in backward States/ districts. The undertaking under the existing provisions should start generating power on or before 31.3.2000.

The country continues to require large investments in power. As the gestation period for such projects is long, to remove uncertainty from the minds of potential investors, the Bill proposes to extend the benefit to undertakings, which commence generation, or generation and distribution of power on or before 31.3.2003. *The proposed amendment will take effect from 1st April, 1999 and will, accordingly, apply in relation to assessment year 1999-2000 and subsequent years.* ***[Clause 37]***

Thus, it is clear from the explanation made as above that power sector and more particularly Renewable energy generation and use of devices based on such energy are eligible for special treatment in terms of taxation. The higher rate of depreciation is a part of such scheme. If we look at the realistic and practical approach that many investments has made due to tax incentives in the form of higher depreciation rate and tax exemption on such income. One need to take holistic view based on the words used in the Act, Rules and schedules attached to that.

Construction and interpretation of word "Wind Mill –Special designed device":

If word "Wind Mills" interpreted in narrow terms then it may be equated to denial of equity and justice. If in real terms , legislator has intention to allow depreciation only on wind energy equipments, in that case word could have been used Wind Turbine Generator (WTG) and not wind mills. Of course both the word sounds in common language synonymous but wind turbine generator has very limited application. If legislator has intention to provide item based depreciation and not in a comprehensive way, it could have been laid down under Rule 5 (1A), Para Appendix 1A for separate depreciation provision similar to table of Appendix 1A.

Therefore it is humbly perused that all relevant expenditure to bring assets (Wind Mill) in operation, should be capitalized and depreciation at the rate prescribed against windmill should be applied on total value.

Support of followings few judgments may be availed for applying ratio, while interpreting word "Wind Mill".

CAS:1 *In the scheme and context of a taxing provision, it would not be right to isolate a word, ascertain its meaning with reference to Law Lexicons and attach to it a meaning which it was never intended to bear. A statute cannot always be construed with the dictionary in one hand and the statute in the other. Regard must also be had to the scheme, context and to the legislative history of the provision [CIT vs. N.C. Budharaja & Co. Etc. Etc. (1993) 114 CTR (SC) 420.*

CAS:2 *An expression may have a variety of meanings but the sense in which it is employed must be gathered from the context. It would not be correct to adopt a strictly literal or technical meaning of an expression while construing a section. In other words, one must not construe a statutory provision mechanically. One must construe it having regard to the object which the legislature had in view in enacting it and in the context of the setting in which it occurs [CIT vs. Insaniyat Trust (1988) 71 CTR (Guj) 145*

CAS:3 *Words have no absolute meaning. They derive colour from those which surround them. It is true that meanings generally overlap. Few words have exact synonyms. The overtones are almost always different [Brutus vs. Cozens (1972) 3 WLR 521, per Lord Reid]. Words are the greatest tricksters. They play pranks with the human mind.*

The Courts must discover the intention of the legislature. So the Courts must not be strict constructionists. The Courts have to be intention seekers [STO vs. Byford Ltd. (1984) 145 ITR 537 (Del)].

CAS:4 Bajaj Tempo Ltd Vs Commissioner of Income Tax, (1992) 196 ITR 188 *Deduction under s. 15C of 1922 Act (s. 80J of 1961 Act)—Allow ability—Industrial undertaking established in a building taken on lease used previously for other purpose—Tools and implements worth Rs. 3,500 of the previous undertaking also transferred—Relief under s. 15C is allowable—Clause (i) of sub-s. (2) of s. 15C does not apply—The provision granting relief was enacted to encourage industrialization and has to be construed liberally—Tools and implements transferred were of insignificant value as compared to the whole assets and literal construction of cl. (i) of s. 15C (2) would defeat the very purpose of enacting the provisions—The key to interpretation is that the new undertaking should not be 'formed' by transfer of building, plant or machinery—Emphasis is on formation not on use.*

Case Laws Based on identical facts:

The income tax assessment is based on facts of each case. The facts are varied from case to case or assessment year to assessment year for the same assessee. Therefore each assessment year is consider as independent for assessing the income. However precedent has its own legal value. When facts are identical and judgments are delivered based on similar facts, which is to be considered as precedent. Whether precedent has a legal force, need to be examined. It has two exceptions; (1) the doctrine of *per incuriam*; (2) doctrine of *sub-silentio*. Therefore while interpreting statute, one need to pay attention to the full judgments rather than conclusion of judgments. Of course conclusion is very important but at the same time, while declaring judgments whether judgment passed by same court or larger bench or higher court has been considered or not to be seen. Secondly whether judgments is rendered on the point, which were never been argued is not binding and doctrine of precedent is not applicable. The principle of *stare decisis is important while applying rule of precedent.*

However when the facts are identical, issue is covered by some judgment of Jurisdictional Tribunal or High court, is binding to all lower revenue authorities working within same jurisdiction. The subordinate authorities including commissioner appeals can not take different views by adopting untenable grounds. Interesting two high court judgments, which are relying on supreme court's judgments, are given below.

Bank of Baroda vs. H.C. Shrivastava (2002) 175 CTR (Bom) 663 : (2002) 256 ITR 385 (Bom) : (2002) 122 TAXMAN 330 (Bom)

Held

" *The judgment delivered by the Tribunal was very much binding on the AO. The AO was bound to follow the judgment in its true letter and spirit. It was necessary for the judicial unity and discipline that all the authorities below the Tribunal must accept as binding the judgment of the Tribunal. The AO being inferior officer vis-a-vis the Tribunal, was bound by the judgment of the Tribunal and* ***the AO should not have tried to distinguish the same on untenable grounds. In this behalf, it will not be out of place to mention that in the hierarchical system of Courts which exists in our country, 'it is necessary for each lower tier' including the High Court, to accept loyally the decisions of the higher tiers.*** *'It is inevitable in hierarchical system of Courts that there are decisions of the supreme appellate Tribunals which do not attract the unanimous approval of all members of the judiciary. But the judicial system only works if someone is allowed to have the last word, and that last word once spoken is loyally accepted. The better wisdom of the Court below must yield to the higher wisdom of the Court above.—CCE vs. Dunlop India Ltd. AIR 1985 SC 330* ***applied."*** ***(Para 16)***

Agrawal Warehousing & Leasing Ltd. vs. Commissioner of Income Tax *(2002) 177 CTR (MP) 15 : (2002) 257 ITR 235 (MP) : (2002) 124 TAXMAN 440*

"Held

Sub-s. (4) of s. 254 attaches finality to the orders of the Tribunal subject to the provisions of s. 256 (or s. 260A). ***Needless to say that the orders passed by the Tribunal are binding on all the Revenue authorities functioning under the jurisdiction of the Tribunal. Obviously, the CIT(A) not only committed judicial impropriety but also erred in law in refusing to follow the order of the Tribunal.*** *Even where he may have some reservations about the correctness of the decision of the Tribunal, he had to follow the order. He could and should have left it to the Department to take the matter in further appeal to the Tribunal and get the mistake, if any, rectified.—Kamlakshi 1991 (55) ELT 433 (SC)* ***applied."*** *(Paras 7 & 8)*

It is equally accepted principle that Judgment of other jurisdictional Tribunal and High Courts are having persuasive value and can not be brushed a side by just saying not applicable or distinguishing facts by placing few words in assessment order or appeal order. The order of jurisdictional tribunal is binding to Income Tax authority. Hence either A O or CIT (A) can not take different views by taking plea that department has not accepted tribunal judgment and has gone for appeal in High court. The relevant judgment's extract is reproduced as under:

Assistant Commissioner of Income Tax vs. Rajave Textiles (P) Ltd. (2013) 22 ITR (Trib) 475 (Chennai)

Held

"In the case law of KKSK Leather Processors Private Limited (supra) the Coordinate Bench above said had decided the issue in favour of the assessee. ***On that, the argument of the Revenue was that the said order had not been accepted and it had preferred tax case appeal before the jurisdictional High Court. Such, did not form a valid ground so as to take a different view and that too without any distinguishing features pointed out by the Revenue.*** *Therefore, CIT(A) had rightly accepted the claim made by the assessee qua depreciation at 80 percent pertaining to the windmills in question. Thus, order of the CIT(A) upheld and Revenue's appeal dismissed."*

(para 9 & 10)

In the present case study ,the facts are related to interpreting word "Wind Mill". Bringing wind mill in existence and operation is based on scientific method. Wind Mill comes in existence by installing various components, hiring labours, getting permission from various state electricity board, connecting power supply cable to state electricity grid or pooling station, developing approach road and laying down cable for power transmission and building control room in case wind mill is Lattice structure otherwise inside the tubular tower. Therefore facts remain same irrespective of size of electricity generation capacity of Wind Mill. The quantity of work and value of Wind Mill may go up or down depending on capacity of Wind Mill. However facts will remain same. Followings are direct judgments on identical facts.

Sr. no	Nature of work /Item	Allowable % depreciation as per I T A.O's version	Tribunal's view
1	Supply of Wind turbine generator	80%	**80%.** This apparatus is only to be treated as Wind Mill as per AO's view. Therefore no controversies.
2	Erection & installation of WTG And civil including foundation	10% in some cases 5%	**80%.**1 In the Income Tax Appellate Tribunal at Ahmedabad, "A" Bench ITA No.3317/Ahd/

	work.		2011, With CO No.44/Ahd/2012 [Asstt.Year:2007-2008] , ACIT (OSD) Vs Parry Engineering & Electronics P. Ltd. Date of Pronouncement : 02-03-2012 2 Aminity Developers & Builders, vs Department Of Income Tax, ITA No. 1505/PN/2011 ,Pune Bench 3 D.Murugesh, Karur vs Department Of Income Tax , I.T.A. No. 1938/Mds/2011, Assessment Year : 2007-08 4 J. Sons Foundry Pvt. Ltd.,, Sangli vs Department Of Income Tax , ITA Nos.815,891,1494&1600/PN/2011 5 Enercon Wind Farms (Jaialmer) P. ... vs Department Of Income Tax , ITA No. 6402 to 6405/Mum/2010 6 M/s British Weaving Company v. DCIT in I.T.A. No.511/Mds/2009 dated 12th March,2010. 7 M/s.Asian Handloom Vs. DCIT (I.T.A. No. No.2291/Mds/2008 dt.20.11.09) 8 JCIT Range-1, Sangli Vs. M/s. Western Precicast Pvt. Ltd., Sangli, ITA No.890/PN/ 2011dated 31.12.2012.**10%** 9 *Poonawala Finvest and Agro Pvt. Ltd V/s. ACIT (2008) 118 TTJ (Pune) 68.* ***Sent back for factual aspects verification*** *10* The A. C. I. T. (OSD), Circle-5 Vs M/s. Precision Technofab & Engineering, ITA No.3200/Ahd/2011 and 167/Ahd/2012, (A.Y.: 2008-09 and 2009-10)
3	Works contract for electrical work including supply and installation of electrical items	15% in some cases 10%	**80%**1 In the Income Tax Appellate Tribunal at Ahmedabad, "A" BENCH ITA No.3317/Ahd/2011, With CO No.44/Ahd/2012 [Asstt.Year:2007-2008], ACIT (OSD) Vs Parry Engineering & Electronics P. Ltd. Date of Pronouncement : 02-03-2012 2 M/s.Asian Handloom Vs. DCIT (I.T.A. No. No.2291/Mds/2008 dt.20.11.09) 3 D.Murugesh, Karur vs Department of Income Tax, I.T.A. No. 1938/Mds/2011, Assessment Year : 2007-08

			4 J. Sons Foundry Pvt. Ltd., Sangli vs Department of Income Tax, ITA Nos.815,891,1494&1600/PN/2011
4	Power Evacuation Infrastructure Cost	15%	**80%**1 M/s.Asian Handloom Vs. DCIT (I.T.A. No. No.2291/Mds/2008 dt.20.11.09) 2 Asst. Comm. Income Tax Circle 1 Ludhiana Vs. Rakesh Gupta 36 TAXMANN 546 (2013) 3 *Trumac Engineering Co. (P.) Ltd.* v. *ITO* Mumbai ITA NO. 55S/Mum/2003 dated 27-6-2008
4	Providing sub lease Rights of Land and rights of suitable access of surrounding for Wind Mill	May or may not allowable or SLM no of years divided by holding period	**80%**1 Asst. Comm. Income Tax Circle 1 Ludhiana Vs. Rakesh Gupta 36 TAXMANN 546 (2013)
5	Any other related expenses	15%	**80%**1 J. Sons Foundry Pvt. Ltd., Sangli vs Department of Income Tax, ITA Nos.815, 891, 1494 & 1600/PN/2011

If meaning of Wind Mill is interpreted in limited or narrow way i.e. standing tower housed with various machinery equipments, parts and blade then the object for which incentive provisions inserted for accelerated depreciation rate is defeated. Reliance of following judgments can be placed for application of ratio to interpret that word Wind Mill is assigned to composite structure of wind turbine generator and not only standing structure of wind turbine generator.

Additional Commissioner of Income Tax vs. Madras Cement Limited 110 ITR 281 (MAD), Foundation done in reinforced concrete for fixing machinery is to be treated as part of the plant and depreciation to be allowed on the plant including the cost of the foundation.

CAS 1.3 Commissioner of Income Tax vs. R.G. Ispat Limited. High Court of Rajasthan Jaipur Bench 210 ITR 1018 (Raj): In order to determine whether a structure is a building or plant, functional test should be applied—If a structure is raised to make the plant operative which could not have functioned in its absence, the structure is plant under s. 43(3)—Massive reinforced concrete structure specially designed to take up load of cranes, therefore, constitutes plant .

CAS 1.4 Commissioner of Income Tax vs. Sibbal Cold Storage, High Court of Madhya Pradesh (1996) 136 CTR (MP) 244, In fact the plant cannot survive independent of building. Some building has to be there in order to house the plant; and as such, the building which houses the plant is a plant. Therefore, the plant includes within its ambit building in which machineries are housed. 'Plant' includes a building in which machineries are housed.

CAS 1.5 [2013] 37 taxmann.com 264 (Ahmedabad - Trib.) In the ITAT Ahmedabad Bench 'B' Gujarat Green Revolution Co. Ltd. Vs. Assistant Commissioner of Income-tax - 1(1), Seen in the light of the functional test laid down by decision of High Court cited above, we are of the view that in the peculiar facts of the present case the "green house" is an essential part for a company

engaged in the business of Tissue Culture. It cannot be considered as a simple "building" but has to be considered as a plant.

CAS 1.6. In the judgment of the Hon'ble Delhi High Court in the case of ***CIT* v. *Mahanagar Telephone Nigam Ltd.* as reported in 254 ITR 627**, wherein it has been held that the underground cables for telecommunication network form the link between the telephone exchanges and as such forms part of the apparatus of the plant of the assesse engaged in providing the telecommunication network and therefore, the extra shift allowance was allowed on underground cables**.**

CAS 1.7 In case of **CIT Vs. BSES Yamuna Powers Ltd. (2013) 40 TAXMANN 108 (Delhi)** it has been held that computer accessories and peripherals such as, printers, scanners and server, etc., form an integral part of computer system and, hence, they are entitled to depreciation at higher rate of 60 per cent **.**

CAS 1.8 In the case of **CIT v Delhi Airport Service [2001] 170 CTR (Delhi) 534** wherein the Hon'ble Delhi High Court held that Air condition plant is an integral part of the bus and therefore, depreciation on air conditioner fixed in bus is allowable at the rate applicable to Bus instead of rate applicable to Air conditioner.

CAS 1.9 In the case of **CIT VS. SRC Aviation P Ltd. (2013) 37 TAXMANN 308 (Delhi)** held that All types of crafts or modes of transport aided by flight, are entitled to 40 per cent depreciation. In depreciationtable **'airplane-aeroengine'** which is entitled to 40 per cent depreciation, cannot be given a restrictive interpretation so as to include aeroengine only; it will also include 'aircraft' which gives a broader description which includes all manner of craft or means of transport aided by flights such as balloons, planes, etc .

CAS 1.10 ***CIT v. Karnataka Power Corporation (247 ITR 268)*** *where it was held that whether a the building can be treated as a plant*

Consequently it is profoundly be said ,Wind Mill should mean a comprehensive word and all related expenses for installation, erection and commissioning of Wind Turbine Generator, incurred for Civil Including Foundation & allied works, Electrical work Including supply and installation of electrical items , Power evacuation infrastructure Cost, Specific Professional fees, interest payable till electric generation starts, be considered as inseparable part of purchase cost. Therefore Composite /Integrated cost of purchase of Wind mill should be qualified for depreciation at 80% of composite value.

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Glimpses of Supreme Court Rulings

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12 Practice and Procedure –Appeal :

Three basic principles regarding right of appeal, and forum of appeal that can be culled out are :

The forum of appeal available to suitor in a pending action of an appeal to a superior Tribunal which belongs to him as of right is a very different thing from regulating procedure :

That it is an integral part of the right when the action was initiated at the time of the institution of action; and

That if the court to which an appeal lies is altogether abolished without any forum constituted in its place for the disposal of pending matters or for lodgment of the appeal, vested right perishes.

It is well settled proposition of law that enactment dealing with substantive rights are primarily prospective unless they are expressly or by necessary intention or implication given retrospectively. The aforesaid principle has full play when vested rights are affected. In the absence of any in equivocal expose, the piece of legislation must exposit adequate intendment of legislature to make the provision retrospective. The right of appeal as well as forum is a vested right unless the said right is taken away by the registration by an express provision in the statute by necessary intention.

[Himachal Pradesh State Electricity Regulatory Commission and other vs. Himachal Pradesh State Electricity Board (2014) 5 SCC 219]

13 Res Judicata – Review – Precedents:

(a) Res Judicata : The literal meaning of 'res' is 'everything that may form an object of rights and includes an object, subject-matter or status' and 'res judicata' literally means 'matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgments'.

Res judicata pro veritate accipitur is the full maxim which has, over the years, shrunk to mere 'res judicata', which means that res judicata is accepted for truth. The doctrine contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman jurisprudence *interest reipublicae ut sit finis litium* (it concerns the State that there be an end to law suits) and partly on the maxim *nemo debet bis vexari pro una et eadem causa* (no man should be vexed twice over for the same cause).

Even an erroneous decision on a question of law attracts the doctrine of res judicata between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as res judicata.

(b) Review: Order sought to be reviewed must suffer from error apparent on face of order – In absence of such error apparent, even an erroneous judgment / order cannot be a ground for review and finality of judgment order cannot be disturbed.

(c) Precedents: What Court actually decides, not what follows from it, would be binding – Ratio of a decision should be understood in background of facts of the case and can be relied on considering how fact situation of case fits in case to be relied on.

The ratio of any decision must be understood in the background of the facts of the case and the case is only an authority for what it actually decides, and not what logically follows from it. 'The court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed.'

[Dr. Subramanian Swamy vs. State of Tamil Nadu and others (2014) 5 SCC 75]

14 Charitable purpose – Exemption – Sec.13(1)(b):

(a) Determination of the nature of the trust as wholly religious or wholly charitable or both charitable and religious under the Act is not a question of fact. It is a question which requires examination of the legal effects of the proven facts and documents, that is, the legal implication of the objects of the assessee-trust as contained in the trust deed. It is only the objects of a trust as declared in the trust deed which would govern its right of exemption u/s 11 or 12. It is the analysis of these objects in the backdrop of fiscal jurisprudence which would illuminate the purpose behind creation or establishment of the trust for either religious or charitable or both religious and charitable purpose. Therefore, the High Court had erred in refusing to interfere with the observations of the Tribunal in respect of the character of the trust on the grounds that they were pure findings of fact.

(b) That the objects of the assessee-trust were not indicative of a wholly religious purpose but were collectively indicative of both charitable and religious purposes. Although objects (c) and (f) which provided for activities completely religious in nature and restricted to the specific community of the assessee-trust were objects with religious purpose only, the fact that the other objects traced their source to the Holy Quran and resolved to abide by the path of godliness shown by Allah would not be sufficient to conclude that the entire purpose and activities of the trust were purely religious in colour. The objects reflected the intent of the trust as observance of the tenets of the Islam, but did not restrict the activities of the trust, to religious obligations only and for the benefits of the members of the community. The provision of food to public on religious days of community, the establishment of Madarasas and organizations for dissemination of religious education and rendering assistance to the needy and poor for religious activities would reflect the essence of charity. The activity of providing for food on certain specific occasions and other religious and auspicious events of the Dawoodi Bohra community did not restrict the benefit to the members of the community. When the objects of the trust exhibited the dual tenor of religious and charitable purposes and activities. Section 11 of the Act allowed such trust with composite objects to claim exemption from tax as a religious and charitable trust subject to the provisions of section 13. The activities of the trust under such objects would, therefore, be entitled to exemption accordingly.

(c) That the objects of the assessee-trust were based on religious tenets under the Quran according to the religious faith of Islam. The activities of the trust though both charitable and religious were not exclusively mean for a particular religious community. The objects did not channel the benefits to any community if not the Dawoodi Bohra community and thus, would not fall under the provisions of section 13(1)(b) of the Act. The assessee-trust was a charitable and religious trust which did not benefit any specific religious community and, therefore, it could not be held that section 13(1)(b) of the Act would be attracted to the assessee-trust and thereby, it would be eligible to claim exemption under section 11 of the Act.

[CIT Vs. Dawoodi Bohra Jamat (364 ITR 31)]

15 Interest on Refund – Sec.244A:

Interest is a kind of compensation for use and retention of money collected unauthorisedly by the Department. A general right exists in the State to retain any tax collected for its purpose, and a corresponding obligation exists to refund to individuals any sum paid by them as taxes which are found to have been wrongfully exacted or are believed to be, for any reason, inequitable. The statutory obligation to refund carries with it's the right to interest also. This is true in the case of assessees under the Act. When the collection is illegal, there is a corresponding obligation on the Revenue to refund such amount with interest inasmuch as it had retained and enjoyed the money deposited. Even the Department understood the object behind insertion of section 244A, as that, an assessee is entitled to payment of interest for money remaining with the Government which would be refunded. There is no reason to restrict the right to assessees without extending the benefit to a deductor who has deducted tax at source and deposited it before remitting the amount payable to a non-resident.

[Union of India vs. TATA chemicals Ltd. (363 ITR 658)]

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From the Courts

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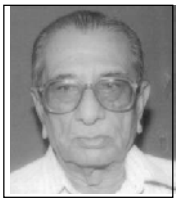

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22 Order pronounced by ITAT in open Court effect of : Attachment and Recovery in defiance thereof.

A.T. Kearney India P. Ltd. v/s. ITO

(2014) 363 ITR 172 (Delhi)

Issue :

Whether order pronounced by ITAT in open court is binding on ITO, can ITO plead ignorance of the same ?

Held :

CIT (Appeal) held in favour of revenue. The revenue issued a notice u/s 221 of the I.T. Act, 1961 to the assesse for recovering the demand amounts due. The assessee filed a letter stating that it had preferred an appeal and stay application before the Tribunal. The Tribunal granted stay and passed an interim order for the period of one hundred eighty days. Even though the Department representative appeared before the Tribunal and the Order on the stay application was pronounced in open court, the authorities attached and took away the proceeds of the assessee's bank account.

On a writ petition, High Court has held as under :

The submission of the revenue that the concerned A.O. was not intimated, cannot be accepted. If such an argument was made before this court where orders are pronounced in court in the presence of counsel, it would certainly not be accepted and in fact would be seriously viewed. In the facts of the case, it clearly amounts to overreach of the interim order of the Tribunal , in a similar situation, this court itself would possibly be initiating contempt proceedings. In these circumstances, the court is of the opinion that the respondent should lift the attachment and ensure that the amounts recovered are deposited back in the petitioner's account within a week.

23 Interest on Refund : India Trade Promotion Organization v/s. CIT (2013) 263 CTR 18 (Del) : (2013) 93 DTR (Del) 425

Issue :

How the interest on refund/part refund due is to be considered?

Held :

The words used in Sec. 244A are "where refund of any amount becomes due and payable to the assessee under the Act" the assessee shall be entitled to receive in addition to the said amount simple interest calculated in the manner stipulated. The legislature has not used the words "tax paid" or "the principle amount of tax paid". The words used by the legislature in Sec. 244A are "any amount" and "said amount". The words are therefore much wider and broad. The words "any amount" word include within its scope and ambit the interest element, which has accrued and is payable on the date of refund. Thus when the revenue does not pay full amount of refund but part amount is paid, they will be liable to pay interest on the balance outstanding amount. The balance outstanding amount may consist of the tax paid or the interest, which is payable till the payment of the part amount and interest payable on the principle amount, which remained outstanding thereafter. It would be incorrect and improper to regard payment of interest when part payment is made as interest on interest.

24 Reopening on the basis of hypothesis not valid : DHFL Venture Capital Fund v/s. ITO (2012) 358 ITR 471(Bom)

Issue :

Can there be a valid reopening on the basis of hypothesis? What is the meaning of words in section "has escaped assessment".

Held :

In this case the whole basis of reopening was the hypothesis that if the provisions of Sec. 61 to 63 were attracted as had been claimed by the assessee and the income of Rs. 32.83 crores which had been claimed by the assessee to be exempt was treated as exempt, in that event an alternate basis for taxing the income in the hands of the association of persons of the contributories was sought to be setup. The entire exercise was only contingent on a future event and a consequence that may enure upon the decision of the Tribunal, if the Tribunal were to hold against the Revenue. A reopening of an assessment u/s 148 could not be justified on such a basis. There had to be a reason to believe that income had escaped assessment. " Has escaped assessment" indicates an event which has taken place. Tax legislation cannot be rewritten by the Revenue or the Court by substituting the words "may escape assessment" in future.

25 Retirement from Firm and Sec.45(4) : CIT v/s. Dynamic Enterprises (2013) 263 CTR (FB) 138 (Kar) : 359 ITR 83 (Kar) (FB).

Issue :

Whether provisions of Sec. 45(4) are applicable on retirement, when retiring partner takes only cash and no asset?

Held :

Sub-sec. (4) of Sec. 45 deals with a distribution of capital assets on the dissolution of a firm or other APO or BOI or otherwise. If in the course of such distribution of capital asset there is a transfer of a capital asset by the firm in favour of a person and it results in profits or gains to the firm, then the said profits or gains shall be chargeable to tax as income of the firm and again for computing said income, Sec. 48 is attracted. In other words, in the process of dissolution of a firm, if a capital asset is transferred to a partner which results in profits or gains, then that income is chargeable at the hands of the firm under this provision. In order to attract sub (4) of Sec. (45), the conditions precedent are : (1) There should be distribution of capital assets of a firm; (2) Such distribution should result in transfer of a capital asset by firm in favour of the partner and (3) On account of the transfer there should be a profit or gain derived by the firm; (4) Such distribution should be on dissolution of the firm or otherwise.

Therefore in order to attract Sec. 45(4) the capital asset of the firm should be transferred in favour of a partner, resulting in firm ceasing to have an interest in the capital asset transferred and the partners should acquire exclusive interest in the capital asset. In other words, the interest the firm has in the capital asset should be extinguished and the partners in whose favour transfer is made should acquire that interest. Then only the profits and gains arising from such transfer are liable to tax u/s 45(4).

When a partner takes away only money towards the value of his share in the firm and when there is no distribution of capital asset/assets among the partners, there is no transfer of a capital asset and consequently no profits or gains are chargeable to tax u/s 45(4).

26 Sec. 244A : Interest on Refund is automatic : CIT v/s. Sahara India Savings and Investment Corporation Ltd. (2013) 218 Taxman 363 (All)

Issue :

Whether an application to claim interest on refund is necessary?

Held :

It may be mentioned that no application is necessary for interest on refund u/s 244A. Interest on refund goes along with refund. No application is required for this purpose in view of mandatory provision u/s 244A(1)(b) of the Act as observed in the case of National Horticulture Board v/s. Union of India (2002) 253 ITR 12 (P & H). The argument that the assessee should have made an application for refund was found to be without any merit. Denial of interest on delay attributable to the assessee as provided u/s 244A (2) would have no application,

merely because of delay in application for refund. At any rate, when the refund is pending before the authorities, failure to apply for the refund cannot be treated as delay attributable to the assessee.

27 Capital Gain u/s 50 and investment u/s 54EC : CIT v/s. Aditya Medisales Ltd. (2013) 218 Taxman 477 (Guj)

Issue :

Exemption for investment u/s 54EC in respect of long term capital gain, deemed short term u/s 50, can be allowed ?

Held :

Gujarat High Court followed two decisions (1) CIT v/s. ACE Builders (P) Ltd. (2006) 281 ITR 210 (Bom) and CIT v/s. Assam Petroleum Industries (P) Ltd. (2003) 262 ITR 587 (Gau) and held as under :-

"We concur with the above decisions. We are in agreement with both the decisions as stated above in holding that capital gain arising of long term capital asset and exemption provided u/s 54 EC of the Act cannot be denied to the assessee only on account of the fact that deeming fiction is created under sec. 50 of the Act. In other words, legal fiction created u/s 50 of the Act is though restricted to computation of capital gains, such deeming fiction cannot restrict application of Sec. 54 EC which allows exemption of capital gains, if assessee makes investment in the specified assets. Thus, the assessee cannot be charged to capital gains when short term gains of long terms capital assets get invested in the areas specified under the law".

28 Profit u/s 115JB and brought forward loss/depreciation : CIT v/s. Prakash Tubes Ltd. (2013) 219 Taxman 22 (Delhi)

Issue :

When tax is payable as per provisions of Sec. 115 J, the brought forward loss/depreciation remains and to be carried forward in entirety?

Held :

When the MAT provisions u/s 115J are applicable, at the first stage, profits are computed under the normal provisions and deductions allowable under the Act have to be taken into consideration. The deductions which are allowed, do not get disturbed or obliterated even if the assessee pays tax on the books profits u/s 115J. Thus when Sec. 115J is invoked and is applied, it does not affect the computation made under the normal provisions. They stand on their own legs and do not get effected. Accordingly, the unabsorbed losses, including investment allowance which were duly taken into consideration and accounted for while computing tax under the normal provisions, do not get displaced or erased and adjustments made have to be given full effect to.

High court took support of the Supreme Court decision in Karnataka Small Scale Industries Development Corporation Ltd. v/s. CIT (2002) 258 ITR 770, (2003) 126 Taxman 121.

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Be strong, my young friends; that is my advice to you. You will be nearer to Heaven through football than through the study of the Gita. These are bold words; but I have to say them, for I love you. I know where the shoe pinches.

- Swami Vivekananda

Tribunal News

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19 SICOM Ltd. VS. JCIT 147 ITD 383 (Mum.)
Assessment year: 1997-98 to 2000-01
Order Dated: 22nd May, 2013

Basic Facts

The assessee is engaged in the business of financing industrial units by providing loans and also by giving assets on lease. During the year under consideration it had claimed depreciation in respect of leased assets under section 32(1). The AO, after analyzing the various lease agreement, came to the conclusion that those were nothing but financial lease in the nature of financial transactions and assesse not being the owner of the assets was not entitled to depreciation in such transactions. The CIT(A), looking to the nature of the various lease agreements, held that there were mainly two categories of lease transactions one in the nature of sale and leaseback transactions and other finance lease i.e. normal lease transactions. In case of normal lease CIT(A) held that the assessee was entitled for claiming the depreciation since it was the owner of the asset and after the expiry of lease period, the equipment or assets were to be returned back to the lessor. So far as sale and leaseback transactions were concerned he set aside the matter to the file of AO to decide the issue afresh. The department challenged the CIT(A)'s order.

Issue

Whether assesse was entitled to depreciation on assets given normal lease transactions& in case of sale and leaseback transactions?

Held

The Hon'ble ITAT noted that depreciation has been disallowed on assets which were given on leased earlier and on which depreciation has been allowed. These assets are also forming part of the "Block of assets". Not only that the depreciation has been allowed in the subsequent assessment years wherein the Department is not in contest. Once these assets have found to be a part of the Block of assets and depreciation has been allowed in the earlier years, the depreciation on some assets cannot be disallowed on the opening written down value by taking a new stand on exactly similar nature of transaction. The tribunal further held that though the principle of res judicata does not apply in income tax proceedings, however if the similar facts are permeate through all assessment years and both parties have accepted a particular stand then the principle of consistency has to be followed. Accordingly the Tribunal held that in so far as the claim of depreciation on opening written down value in case of normal lease & sale & lease back is concerned it cannot be disallowed following the principle of consistency and also that these are already a part of block of assets on which the depreciation has been allowed and the same cannot be disturbed from the block of assets.

In the new lease entered during the year the tribunal granted depreciation in respect of normal lease on the basis of the Supreme Court decision in case of ICDS Ltd. The issue of depreciation on sale & lease back transaction entered into during the year, the matter was set aside to the file of AO for deciding issue fresh since proper material was not available.

20 ACIT v. Nicholas Piramal India Ltd. 147 ITD 675 (Mum)
Assessment Year:1998-99 Order dated: 15th March, 2013

Basic Facts

The assessee had incurred expenditure on providing street lights on the road which leads to assessee's factory, providing ambulance for meeting medical emergencies for residents of village tarsadi, cost of public garden developed. And claimed the same under section 37 of the Act. The AO disallowed

the expenses holding that the same could not be considered as incurred wholly and exclusively for the purpose of the assessee's business. The CIT(A) also confirmed the said disallowances for the same reasons as given by AO.

Issue

Whether community development expenses incurred by assessee company are allowable as deductible business expenditure under section 37(1)?

Held

The Hon'ble ITAT allowed the claim of the assesse on the basis of the Madras High Court decision in case of Madras Refineries Ltd. Wherein it was held that the concept of business is not static. It has evolved over a period of time to include within its fold the concrete expression of care and concern for the society at large and the people of the locality in which the business is located, in particular. Being known as a good corporate citizen brings goodwill of the local community, as also with the regulatory agencies and the society at large, thereby creating an atmosphere in which the business can succeed in a greater measure with the aid of such goodwill.

21 Saurashtra Cricket Association V. CIT 148 ITD 58(RAJ)

Order Dated: 25th October, 2013

Basic Facts

The assessee-trust was created for the promotion of game of cricket in Saurashtra region.The Commissioner cancelled the registration of the assessee-trust by invoking provisions of section 12AA(3) by observing that the trust has arranged one day international matches of cricket and in turn had received TV subsidy/subvention income i.e. sharing of TV broadcasting right income from BCCI and advertisement sales income. The Commissioner was of the view that the assessee-trust had carried out the activities in the nature of trade, commerce or business in view of the first proviso to section 2(15) and, therefore, the object of the assessee-trust are no longer of charitable in nature. The assesse trust filed appeal to the Tribunal.

Issue

Whether on the given facts, Commissioner was right in cancelling the registration under section 12AA(3)?

Held

The Registration has been cancelled by Commissioner on the basis of amended provisions of section 2(15). The action taken by the Commissioner, does not fall within the permissible limits of section 12AA(3) and, therefore, the impugned order is bad in law.The issues raised by the Commissioner, in the impugned order regarding the activities of the trust can be examined by the Assessing Officer in the appropriate proceedings. The findings given by the Commissioner in the impugned order is not permissible keeping in view the limited power available to him under section 12AA(3). Therefore, it would be open for the Assessing Officer to consider all the issues raised in the impugned order, if so advised, in the course of assessment proceedings of relevant years. Therefore, the Registration granted to the assessee-trust under section 12A was to be restored.

22 ITO vs. Zinger Investment (P.) Ltd. 147 ITD 694 (Hyd)

Assessment Year: 2007-08 Order Dated: 21st August, 2013

Basic Facts

The assessee had transferred its manufacturing division to Novapan Industries Limited (NIL) under a scheme of amalgamation. As per scheme of amalgamation under section 391/394 of the Companies Act, all the assets and liabilities of the assessee were vested with NIL against which, the assessee was given investments held by NIL besides allotment of equity shares to the shareholders of the assessee. The AO held that the transfer of the manufacturing division to NIL tantamount to a 'slump sale' within the meaning of section 50B attracting liability of capital gains therein.On appeal, the assessee submitted that the provisions of section 50B were applicable only in the case of sale of an undertaking and not in the case of an arrangement between two companies under section 391/394 of

the Companies Act, 1956. The CIT(A) deleted the order of the Assessing Officer.

On revenue's appeal:

Issue

Whether since no monetary consideration was involved in transferring manufacturing division with all its assets and liabilities to 'N' under scheme of amalgamation approved by Hon'ble High Court of AP, could same be considered to be a slump sale within meaning ascribed under section 2(42C) so as to attract liability of capital gain under section 50B?

Held

To qualify as slump sale, two conditions have to be satisfied viz., (1) there must be transfer of one or more undertaking as a result of sale and (2) the sale should be for a lump sum consideration without values being assigned to the individual assets and liabilities. In the case of the assessee it is not disputed that there is no monetary consideration received for transfer of the assets and liabilities of the manufacturing division to Novapan Industries Ltd. though there may be a transfer of an undertaking. Therefore, considering the facts of the instant case, since there is no monetary consideration involved in transferring the manufacturing division with all its assets and liabilities to Novapan Industries Ltd. under scheme of amalgamation approved by the Hon'ble High Court of AP it cannot be considered to be a slump sale within the meaning ascribed under section 2(42C) so as to attract the liability of the capital gain under section 50B. Accordingly the CIT(A)'s order was upheld.

23 IJM (India) Infrastructure Limited vs. ACIT 147 ITD 437 (Hyd)
Assessment Year: 2008-09 Order dated:22nd August, 2013

Basic Facts

The assessee was a closely held limited company promoted by IJM Corporation, Berhad. It was engaged in the business of works contracts, construction and maintenance of roads, bridges, townships, residential and commercial buildings. It had entered into certain transactions with IJM-IJMII JV between assessee and IJM Corporation, PE of IJM Corporation, Berhard, Malaysia and IJM-NBCC-VRM (JV) between National Building Construction Co. Ltd., VRM and the assessee, who were residents of India. The TPO has treated the transactions between the assessee and its AEs, as international transaction and determined the arm's length price. The objection was raised before the DRP however, the DRP confirmed the Order of TPO.

Issue

Whether since impugned transactions were entered between two resident parties, there was no possibility of shifting of profit outside India or erosion of country's tax base and therefore, transactions between assessee and its AEs were outside purview of transfer pricing regulations?

Held

On the facts of the case, Tribunal held that thePE should be treated as resident in India inasmuch as the business profits attributable to PE are taxable in India and all business decisions relating to PE are entered and concluded in India. In other words, the control and management of the affairs of PE are situated in India, the PE should be treated as resident in India.

Further, the decisions relating to the affairs of the Joint Venture are taken in India and the business is executed in India through a Joint Venture Agreement in India. Therefore,the Joint Ventures are residents in India. Moreover, clause 3 of article 4 of Malaysia provides that a person which includes AOPs also shall be deemed to be residents of the State in which its place of effective management is situated. On perusal of the Joint Venture agreements, it can be seen that all the decisions relating to the Joint Venture are taken in India and, therefore, the JVs are to be treated as 'residents' only. Apart from the above noted points, the present transactions are between two resident parties and therefore, there is no possibility of shifting of profits outside India or erosion of country's tax base. Hence, the transactions with AEs are outside the purview of the transfer pricing regulations.

contd. on page no. 226

Unreported Judgements

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In this issue we are giving gist of a very important decision of Hon'ble Gujarat High Court in the case of **Sahkari Khand Udyog Mandal Ltd.**, wherein the Hon'ble Court has decided the time limits for the purpose of fulfilling the requirements on the part of A.O. as well as assessee before A.O. takes up the reassessment of an assessee.

The decision is also important from another angle on the ground that an issue which has already been decided by the High Court in favour of the assessee and on that very issue a notice for reopening is issued, such notice for reopening can be quashed.

We hope readers would find it useful.

In the High Court of Gujarat at Ahmedabad

Special Civil Application No. 3955 of 2014

Sahkari Khand Udyog Mandal Ltd.…… Petitioner(s)

Versus

Asstt. Commissioner of Income Tax…… Respondent(s)

Appearance:

Mr. Manish J. Shah, Advocate for the Petitioner(s) No.1

Mr. Sudhir M. Mehta, Advocate for the Respondent(s) No.1

Coram : Honourable Mr. Justice Akil Kureshi

and

Honourable Mr. Justice Sonia Gokani

Date : 31/03/2014

Gist only

Facts and Contentions :

The original assessment in the case of Petitioner Co-operative Society for A.Y. 2008-09 was framed u/s 143(3) wherein the brought forward unabsorbed depreciation pertaining to A.Y. 2000-01 was allowed to be carried forward for subsequent year.

Thereafter, assessment was reopened within a period of four years on the ground that such unabsorbed depreciation for A.Y. 2000-01 could only be allowed upto A.Y. 2008-09 and not beyond it and therefore the mention in the original order that the same is allowed to be carried forward for A.Y. 2009-10 is against provisions of law and hence there was reopening of assessment by way of issue of notice u/s 148.

The assessee Petitioner in the Writ Petition to quash the notice and subsequent proceedings relied on the decision of Hon'ble Gujarat High Court in the case of General Motors India P. Ltd. v/s DCIT 354 ITR 244 in which it is held that such carried forward of unabsorbed depreciation and set off would be permissible without reference to any time limit.

On the other hand Counsel for the department opposed the petition contending that in the original assessment this question was not examined and since notice has been issued within the period of four years from the end of relevant assessment year, it is a valid assumption of jurisdiction by A.O. for reopening of assessment.

The petitioner alternatively submitted that since this very Court has decided the issue on merits in favour of the assessee, there is no purpose going to be served by allowing the reassessment proceedings to be continued against the Petitioner and hence the notice be quashed and subsequent proceedings may also be not allowed to be persisted with.

Decision of the Hon'ble High Court :

The Hon'ble High Court held as under :

i) Admittedly there were no queries by the A.O. with respect to carry forward of unabsorbed depreciation beyond eight years and no corresponding representation from the Petitioner in the original assessment proceedings and therefore on this ground reassessment notice cannot be quashed.

ii) However, the Hon'ble High Court found much force in the alternative contentions of the Petitioner that the issue itself has been decided by the Hon'ble Gujarat High Court in favour of the assessee on merits of the case and therefore held that when the ground on which present notice is founded is held to be invalid in law, the very foundation for issuance of notice would not be surviving and hence on that ground the impugned reopening notice is liable to be quashed.

iii) Incidentally, while dealing with the procedure laid down by the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. v/s ITO 259 ITR 19,the Hon'ble High Court laid down further time limit qua different stages in the reopening proceedings in respect of which Hon'ble Supreme Court in the above case was silent. The same are reproduced hereunder:

"(1)Once the Assessing Officer serves to an assessee a notice of reopening of assessment under section 148 of the Income Tax Act, 1961, and within the time permitted in such notice, the assessee files his return of income in response to such notice, the Assessing Officer shall supply the reasons recorded by him for issuing such notice within 30 days of the filing of the return by the assessee without waiting for the assessee to demand such reasons.

(2) Once the assessee receives such reasons, he would be expected to raise his objections, if he so desires, within 60 days of receipt of such reasons.

(3) If objections are received by the Assessing officer from the assessee within the time permitted hereinabove, the Assessing Officer would dispose off the objections, as far as possible, within four months of date of receipt of the objections filed by the assessee.

(4) This is being done in order to ensure that sufficient time is available with the Assessing officer to frame the assessment after carrying out proper scrutiny. The requirement and the time-frame for supplying the reasons without being demanded by the assessee would be applicable only if the assessee files his return of income within the period permitted in the notice for reopening. Likewise the time frame for the Assessing Officer to dispose of the objections would apply only if the assessee raises objections within the time provided hereinabove. This, however, would not mean that if in either case, the assessee misses the time limit, the procedure provided by the Supreme Court in the case of GKN Driveshafts (India) Ltd. (supra) would not apply. It only means that the time frame provided hereinabove would not apply in such cases.

(5) In the communication supplying the reasons recorded by the Assessing Officer, he shall intimate to the assessee that he is expected to raise the objections within 60 days of receipt of the reasons and shall reproduce the directions contained in sub-para 1 to 4 hereinabove giving reference to this judgment of the High Court.

(6) The Chief Commissioner of Income Tax and Cadre Controlling Authority of the Gujarat State, shall issue a circular to all the Assessing Officers for scrupulously carrying out the directions contained in this judgment."

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Controversies

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When Investments are made in acquiring shares of subsidiary company, whether interest paid on loan utilized for acquiring such shares can be disallowed?

Issue:

X Ltd. is holding Co. of Y Ltd. X Ltd. has made investments in acquiring the shares of subsidiary company. X Ltd. has also overdraft facility with the bank and paid interest on such overdraft facility. The Assessing Officer is of the view that interest paid on overdraft is for acquiring shares of the subsidiary company and hence such interest cannot be allowed as deduction either u/s 36(1)(iii) or u/s 57(iii).

Proposition:

When investment is made in acquiring shares of the subsidiary company even out of overdraft facility, the interest has to be allowed as deduction as promoting the business activity of subsidiary company is commercially prudent and is in the interest of holding company. To support the business activity of subsidiary company is always commercially prudent and is in the interest of holding company.

Relevant provisions of the Act:

Section 36(1)(iii) of the Income Tax Act, 1961 provides that interest is allowed as deduction if the following conditions are satisfied :

(a) The assessee must have borrowed money.

(b) Interest is paid or payable on such borrowal.

(c) The borrowed money is used for the purpose of business and profession.

As per Section 57(iii);

"The income chargeable under the head 'Income from Other Sources' shall be computed after making the deduction; of any other expenditure (not being in the nature of capital expenditure) laid out or expended wholly and exclusively for the purpose making or earning such income."

View in favour of the proposition:

Pertinent to the proposition made for this controversy, I cite the novel case of *S.P. Jaiswal EstateVs. CIT [2013] 29 taxmann.com 221 (Kolkata-Trib.)*. The assessee-company was engaged in hotel business. In the course of its scrutiny assessment proceedings for the relevant assessment year, the Assessing Officer, noted that the assessee had not charged any interest on advance given to a subsidiary company and advance to a group company whereas the assessee had paid interest on secured loans taken. The Assessing Officer noted that the subsidiary company, was demerged from the assessee-company and that the said company did not have any commercial activity at present. The Assessing Officer questioned commercial expediency of granting interest free loan to the subsidiary company.

As regards the availability of sufficient interest free funds, the Assessing Officer rejected the claim of the assessee on the ground that while there was an increase in interest free loans to subsidiaries in the current year, there was no such corresponding increase of share capital and reserves and that the increase in the source of funds in the current year was in secured loans from banks. The Assessing Officer thus disallowed interest paid by the assessee on its borrowings in proportion of total advances to the subsidiary and group companies.

On further appeal, the Tribunal held that since assessee's own interest bearing funds were far in excess of the interest free advances given to the subsidiaries, deduction claimed under section 36(1)(iii) in respect of interest on its borrowings could not be declined. It was further observed that

as the assessee was engaged in the hotel business and the subsidiaries were also set up to acquire, set up or manage the hotels, which will advance the cause or achieve objects of the assessee-company, the advances given to the subsidiary companies are required to be treated as having been given in the course of business of the company. Thus the disallowance was deleted.

I would also like to refer to following decisions :

a) Rajeeva Lochan Kanoria (208 ITR 616)

b) Srishti Securities v/s JCIT (152 Taxman 40). ITAT (Mum). Later Confirmed by Bombay High Court in 2009-TIOL-178-HC-Mum-IT vide order dated 22/01/2009 where it was held:

"In above cases, it has been held that interest paid on borrowings for investing in shares of companies either as stock in trade or for acquiring controlling stake is allowable u/s 36(1)(iii). Furthermore, interest expenditure is allowable in view of the judgment of the Hon 'ble Apex Court in case of S.A builders 288 ITR 1 cited by the appellant. The Appellant's application to RBI for acquisition of Applisofts shares demonstrates that the Appellant expected a substantial business from Applisoft on account of Technical services/ Consultancy fees in next 5 years. This conclusively proves the "business purpose" of the investment being made in the said company. I agree that the case laws relied upon by the A.O. are distinguishable on facts from the case of the appellant. In case of V.I baby and others (Supra) cited by the AO, the loans were advanced to partners and relatives of the firm as well as sister concerns interest free and no commercial expediency could be proved. The facts of other judgments relied upon by the AO are also different. The recent decision of the Apex Court in S.A. Builders" case clinches the issue in favour of the Appellant. In view of the above discussion disallowance of interest expenditure made by the AO is deleted."

Further it was held by Hon. ITAT Mumbai bench in the case of **Trigyn Technologies Ltd, ITA No. 4855 (Mumbai) of 2009** as under:

"We have carefully considered the submissions of ld. Representative of parties and orders of authorities below. We have also considered earlier order of Tribunal dated 28.1.2011 for assessment years 2002-03 and 2003-04. We observe that the AO made disallowance of interest of Rs.5,74,25,564/- in assessment year 2002-03 for similar reasons as stated in the assessment year under consideration. We observe that the ld. CIT(A) confirmed the action of AO. But the Tribunal in further appeal after considering the submissions of the assessee vide para 11 at page 9 of the order allowed the claim of the assessee. It is relevant to state that the Tribunal has stated that ld. CIT(A) in the next assessment year viz assessment year 2003-04 himself allowed the relief to the assessee. Tribunal allowed the claim of the assessee in AY 2002-03 after observing that in case business of subsidiary is collapsed it will have severe repercussions on the assessee company. That the synergies of the business operation of the assessee company and its subsidiaries were re-aligned and the functions of the various companies were made complimentary and supplementary to each other, so as to avoid duplication of interest and deriving maximum value in its operation. That each company is inter dependent on the other. That the survival of assessee is also at stake, if the subsidiaries fail. The Tribunal also observed that section 14A of the Act would also not come in the way for the reasons that the majority of the subsidiaries are foreign subsidiaries and the question of section 14A being applied for dividend received from them does not arise. The Tribunal also held that section 14A and section 36(1) (iii) operate in different fields."

View against the proposition:

The Assessee in the latest case of *CIT vs. Deepak Agarwal [2013] 357 ITR 741 (Allahabad)* was engaged in business of financing, invested interest bearing funds in shares of company in which assessee had substantial interest. Assessing Officer, on observing that no income had been derived in respect of such investment, disallowed proportionate interest under section 36(1)(iii) on ground that interest bearing funds had been diverted

to extend financial support to related company. As the assessee was not engaged in business of investment in shares, interest bearing funds invested in shares of related company could not be said to have been utilized for purposes of business, and therefore, proportionate interest was liable to be disallowed under section 36(1)(iii).

I refer to a current judgement in the case of *CITVs. Subrata Roy [2013] 38 taxmann.com 324 (Allahabad High Court)*, wherein the assessee claimed deduction in respect of interest paid on loan for purchase of shares under head 'Income from other sources'. Assessing Officer found that borrowed funds had been invested in a loss making companies of same group in which assessee had substantial interest. Accordingly, he held that assessee had adopted a colourable device to reduce tax liability and disallowed interest claimed by assessee.Since assessee had invested in companies suffering heavy losses and was aware about financial health of all companies of group, there was no possibility to receive any pecuniary benefit and thus, investment made by assessee could not be considered for purpose of business. Interest paid by assessee on borrowed funds was not exclusively and wholly for purpose of business but was a colourable device for tax evasion. The interest on borrowed funds was thus disallowed.

In the case of *Kalindi Investments (P) Ltd. Vs. CIT[2003] 260 ITR 261(Gujarat)*, assessee a limited company borrowed certain sum, major part of which was invested in purchasing of shares of certain company which were subsequently transferred to its wholly owned subsidiary company for consideration to be received in instalments without interest. Assessee's claim for deduction of interest on borrowed fund was disallowed on ground that expenditure was not incurred wholly and exclusively for purpose of making or earning interest.On reading of provision of section 57(viii) in light of facts found there was no making or earning of income relatable to transaction in question and as assessee admittedly was not carrying on any business and, thus, was not having income from business, Tribunal held that assessee was not entitled to deduction of interest under section 57(iii).

The assessee in case of *CIT Vs. Smt. Leena Ramchandran [2011] 10 taxmann.com 109 (Kerala)*was running a business as proprietor engaged in trading of goods. During the relevant assessment year, she paid interest on funds borrowed for purchase of shares in a company of which she had acquired 90 per cent controlling interest in the course of ten years. The assessee claimed that said company was engaged in leasing of household articles and she sold such articles to the said leasing company and, therefore, the utilization of borrowed funds for acquisition of shares of that company was for business purpose entitling her to deduction of interest. The Assessing Officer held that the only benefit, the assessee got from the investment was dividend income which was exempt under section 10(33) and, therefore, in view of section 14A interest paid for earning said income could not be allowed.The Tribunal rightly held that the utilization of borrowed funds for acquisition of shares would not entitle the assessee for claiming deduction of interest paid on such borrowed funds. The assessee was not entitled to deduction of any amount towards interest paid on funds borrowed for acquisition of shares in the company, which helped the assessee only to earn some dividend.

Let me refer to the case of *Sarabhai Sons(P) Ltd. Vs. CIT [1993] 201 ITR 464 (Gujarat)*.The assessee, a shareholder of company Swastik Oil Mills Ltd. (hereinafter referred to as "SOML"), decided to take over the shares from other shareholders so that it could hold 100 per cent shares in 'SOML' and implement its expansion projects. The assessee met with some difficulties in acquiring certain shares as there was resistance from the owners of those shares. Meanwhile, a proposal was put forward by company Karamchand Premchand Pvt. Ltd. (hereinafter referred to as "KPPL") to purchase all the shares of company SOML. Pursuant to that proposal, the assessee sold equity shares of SOML to KPPL at the same purchase price. During the relevant assessment year the

assessee paid certain interest to the shareholders from whom it had purchased shares and also received certain interest from KPPL for unpaid price of shares which it had sold to KPPL. The assessee claimed net deficiency in the interest account calculated on the basis of interest paid by the assessee to the shareholders of the company S on the unpaid purchase price and interest received on unpaid sale price by the KPPL as a deduction in computing its income from other sources. The ITO was of the view that the expenditure in question was of capital nature. He also held that the shares were acquired with a view to hand over the same to KPPL and as such the expenditure incurred towards interest could not be said to have been incurred for the assessee's business or for earning income from other sources. Taking this view, the ITO rejected the claim of the assessee for deduction under section 36 and also under section 57(iii). On second appeal the Tribunal rejected the claim made under section 36 as it found that the assessee was already the managing agent of SOML and purchase of the shares had nothing to do with the managing agency. But, as regards the claim for deduction made under section 57(iii), the Tribunal held that, for an assessment year, its claim was well-founded as it had derived dividend income; however, the assessee's claim for a similar deduction for the succeeding assessment year was not tenable as the assessee had not received any dividend during that year and, secondly, because the obligation of the assessee to make payment of interest to the shareholders of SOML was independent of the right to receive interest from KPPL and, therefore, it was not possible to say that payment of interest was required to be made by it to the shareholders of SOML in order to earn or derive income by way of interest from KPPL.

The connection between the expenditure incurred and the income earned need not be direct. Even if the connection is indirect or incidental, that can be regarded as sufficient for the purpose of section 57(iii). It is also equally clear that, for attracting section 57(iii), it is not necessary that any income in fact should have been earned as a result of the expenditure.

In the instant case the shares which were purchased by the assessee were not for the purpose of earning income, though that could be regarded as the ultimate motive. The shares were purchased by the assessee with a clear purpose or object of getting 100 per cent control over company SOML. If the purpose was to earn income only, or even if that was the dominant purpose, it would not have sold the shares again to KPPL as, by that time, it had already acquired more than 90 per cent shares, and that would have satisfied its object of earning more income by possessing more shares. The reason why the assessee sold the shares was that it was not able to get 100 per cent control by purchasing all the remaining shares. Thus from the nature of the transaction, it became apparent that the expenditure which was incurred by the assessee was not for the purpose of earning income, but for the purpose of getting full control over company SOML. Thus, it became clear that the dominant purpose for which expenditure was incurred was not to earn income. At the highest, it was a mixed purpose. For that reason, it would have to be held that the expenditure incurred in that behalf fell outside the purview of section 57(iii). The Tribunal was therefore, justified in disallowing the assessee's claim.

Summation:

Let me refer to the recent case of *Peninsular Investments Ltd [2013] 213 Taxman 327 (Andhra Pradesh)*. The assesse was engaged in business of investment in shares. During the relevant assessment year, the assessee took loans from its group companies. A part of said loan was used for purchasing shares of another group company of interest. The assessee claimed deduction under section 36(1)(iii) in respect of interest paid on amount borrowed for the purchase of shares. The Assessing Officer rejected the assessee's claim holding that amount of loan was not utilized for earning business income, but it was an attempt to reduce taxable income by paying interest to sister concerns. The Commissioner (Appeals) finding that assessee had shown income from sale of shares as capital gains, took a view that as assessee was not

engaged in the business of sale and purchase of shares.

The Memorandum of Association of the assessee-company provided that the assessee could carry on the business of investment, financing, buying, selling, investing, transferring, disposing off and otherwise dealing in shares, stocks etc., also, the assessee was registered with the R.B.I. as a Non-Banking Financial Company. In the audit report filed by the assessee, the nature of business was referred to as Investment Company and the method of valuation of closing stock was stated to be the lower of cost or market value which method is applicable in case of business stock only. Merely because the assessee had shown the receipts on sale of part of shares as 'long term capital gains', is not conclusive. The Tribunal has held that an entry in the books or classification of a particular item in the annual accounts does not determine the character of income or asset.

The Tribunal has correctly appreciated the evidence on record and came to the conclusion that the business of the assessee is to invest in shares, that the borrowing was for the purpose of business and that the entire amount paid by the assessee on the loans taken by it is allowable as a deduction under section 36(1)(iii).

In the case of ***Amola Holding (P) Ltd.[2010] 328 ITR 275 (Gujarat)***, the AO had disallowed assessee's claim of interest u/s 36(1)(iii) on the ground that the purchase of shares was mainly for acquiring controlling rights in another company. The disallowance was made on the base that borrowed capital was utilized for investment in the shares in some companies. The investments being made by the assessee in capital asset for acquiring controlling rights and the resultant expenditure is a capital expenditure. On the basis of the concurrent findings CIT (A) as well as the Tribunal both found that assessee-company's main object was to carry on the business of sale/purchase of shares, debentures, stocks, bonds, etc. The shares were purchased not for acquiring the controlling rights in another company, but the shares were purchased for non-business purpose, especially, for earning interest and dividend and the disallowance was deleted subsequently.

Looking in the case of *Rajeeva Lochman Kanoria [1994] 208 ITR 616 (Calcutta)*, the assessee, an individual, declared income assessable under the heads 'Profits and gains of business or profession', 'Capital gains' and 'Income from other sources'. The ITO found that he had claimed a business expenditure on account of interest payment made on moneys borrowed by him. It was contended by him before the Assessing Officer that he had borrowed funds for business purposes, like acquisition of shares for acquiring controlling interest in various companies, making loans and advances in the course of financing business and for dealing in shares, etc. The Assessing Officer also found that the assessee had invested in purchase of shares of different companies for acquiring controlling interest and in the financing business. The Assessing Officer observed that the assessee made investment on capital account and as such the interest, if any, paid on borrowed moneys could not be treated as relating to his business activities and, therefore, the net interest paid on borrowed moneys was not deductible in computing the business income under section 28. He, therefore, disallowed interest on the amount invested in purchase of shares of different companies in which the assessee acquired controlling interest. On appeal, the Commissioner (Appeals) confirmed the disallowance made by the Assessing Officer, holding that in the course of its operation of promotion, management, control and financing of various companies, he earned income by way of directors' fees only. On second appeal, the Tribunal observed that the disallowance of interest could not be made merely on the ground that the assessee acquired shares of different companies for acquiring controlling interest. The acquisition of shares for acquiring controlling interest may be a capital expenditure, but no disallowance could be made unless it was found that the borrowed moneys were not used for the purposes of the assessee's business. The Tribunal held that interest paid on borrowed moneys was admissible as a business deduction even when the borrowed money was utilised for

acquiring capital assets, and therefore, the assessee was entitled to deduction.

Referring the case of ***Srishti Securities [2010] 321 ITR 498 (Bombay)***, the assessee-company had borrowed funds which were utilized in its business of acquiring shares by way of investment as well as by way of stock-in-trade. It paid interest on borrowed funds and claimed deduction thereof under section 36(1)(iii). The Assessing Officer disallowed the entire amount of interest paid on the ground that the object of acquiring shares was not to earn dividend but to acquire a controlling interest in the company. On appeal, the Commissioner (Appeals) divided the interest between investment and stock-in-trade on a pro rata basis and held that the assessee was entitled to deduction of interest to the extent borrowed funds were used for acquiring shares by way of stock-in-trade. On appeal, the Tribunal deleted the disallowance made by the Commissioner (Appeals) holding that if funds are borrowed by an investment company for making investment in shares which may be held as investment or as stock-in-trade or for purpose of controlling interest in other companies, interest paid on such borrowed funds would be deductible under section 36(1)(iii).

Let me now refer to recent decision of **Ahmedabad ITAT – ITA No. 2369/Ahd/2010 for A.Y.2007-08 and ITA No. 2452/Ahd/2010 for A.Y.2007-08 decided on 29.4.14 in the case of Dinesh Mills Ltd.**

It was noted by the AO that the assessee did not charge any interest on the investments. As per assessee's explanation, the investment was made in the subsidiary company out of internal accruals of the current financial year. Although the investment was made to earn income as per assessee's explanation, but no income was earned during the year. The AO noted that if assessee has huge reserves and surplus then what was the need to take a term loan and to pay interest on the loan. So, the objection was that on one hand, the assessee was paying huge interest on borrowings, but on the other hand huge amount was invested in equity shares of the subsidiary company. Therefore, as per the AO, interest to the extent of investment in subsidiary company was to be charged at the rate at which assessee was paying interest.

The learned CIT(A) was of the view that the investments made for purchase of shares was legitimate business activity. According to him, a substantial amount was invested in earlier years wherein no such disallowance was made; therefore he held that the AO was not justified for making disallowance. As per Hon. ITAT, each year is an independent year. Facts of the relevant year are to be seen independently and not to be governed by the decisions taken in past.

In this regard I like to mention the decision of jurisdictional High Court in case of **Kalindi Investments (P) Ltd. 124 Taxmann 475**, it was held as under;

"Tribunal disallowed assessee's claim for deduction on account of interest – whether Tribunal was justified in disallowing assessee's claim in view of fact that assessee's claim on account of interest had been disallowed on similar facts in earlier years – Held, yes."

Also other decision of Delhi High Court, their lordships of Delhi Court in Friends Clearing agency Pvt. Ltd. 332 ITR 269 held that if interest is allowed in past same cannot be disallowed in current year.

Also, in the case of Visen Industries Limited it was held that "the investment made by the assessee in the earlier years could not have been taken into consideration for the purpose of making disallowance of interest in relevant year."

In my respectful submission, investing in the shares of the subsidiary company has to be considered as promoting the business activity of the subsidiary company as noted in the case of S.P. Jaiswal Estate. The interest has to be allowed as deduction as encouraging the business activity of subsidiary company is commercially prudent.

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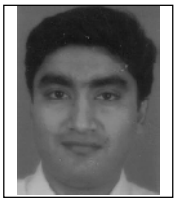
Judicial Analysis



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Scope of assessment in set aside proceedings

Gemini Oils Private Limited vs ITO (ITA No. 2563/Mum/2005)

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10. It is a settled law that the scope of the proceedings after remand will necessarily have to be determined with reference to the terms of the order whereby the appellate authority has remitted the case to the AO. The AO has same powers in making fresh assessment as he had originally when makingthe assessment order u/s. 143 of the Act. However, this power can be used only when the First Appellate Authority set aside the assessment and direct the AO to make a fresh assessment, without imposing any restrictions or limitations as to how the fresh proceedings are to be conducted by the AO which means that as long as no restrictions have been placed by the Appellate Authority on the scope of the proceedings after remand by directing a fresh assessment to be made by the AO, the AO is competent to redo the assessment in accordance with law after taking into account all matters and aspects that would be relevant in making the original assessment, which also means that it is open to the First Appellate Authority to limit the scope of the enquiry by the AO to any specific aspect or issue. It is well settled that an Appellate Authority while setting aside the case can give directions and lay down limits for the inquiry to be made by the assessing authority. When such a direction is made and limits are laid down, the power and jurisdiction of the assessing authority to deal with the case, after remand, depend on the specifications of the remand order, which means that the assessing officer has no jurisdiction to enter into any question which falls outside the limits laid down.

11. In the case of CIT Vs Mansa Ram and Sons (1991) 190 ITR 453 (All.) Hon'ble High Court has held that where the revisional order limits the AO's jurisdiction to make a fresh assessment with regard to only two items, the AO has no power to add other amounts or to make other additions to the assessee's income.

12. A similar view has been taken by the Hon'ble M.P High Court in the case of CIT Vs Hope Textiles Ltd. (1997) 225 ITR 993 (MP) wherein the Hon'ble High Court thus held that "that the Commissioner (Appeals) had in his remand order made a clear direction to the Assessing Officer to reconsider the case only in regard to the matter relating to the disallowance out of machinery repairs. The Assessing Officer had, therefore, clearly travelled beyond the specifications of the remand order in making the additions and the appellate authorities were right in deleting the additions. The order of the Tribunal was based on a proper appreciation of the settled legal position and did not, therefore, give rise to any referable question of law".

14. A similar view has been taken in the case of CIT Vs Jawaharlal Nagpal (1988)171 ITR 136 (MP) in which the Court has held that "in the fresh assessment proceedings after the original assessment had been set aside, the ITO had no jurisdiction to tax new sources of income."

15. In short, the scope of the fresh assessment following the Appellate order depends on the subject matter of the appeal and the appellate order read as a whole in its proper context. If a subordinate Tribunal refuses to carry out directions given to it by a superior Tribunal in the exercise of its powers, the result will be chaos in the administration of justice. This ratio is laid down by the Hon'ble Supreme Court in

the case of Bhopal Sugar Industries Vs ITO (1960) 40 ITR 618. No doubt in order to attract this principle, It is necessary that the order of the superior Appellate authority should be clear, certain and definite in its terms and without any ambiguity.

16. Let us now consider the above judicial discussion in the light of the order of the Ld. CIT(A) while disposing the original assessment order. A perusal of the findings of the Ld. CIT(A) clearly show that the CIT(A) was concerned with the additions made in the original assessment order. In the light of the additions made therein, the CIT(A) set aside the assessment for denovo consideration which clearly show that the directions of the Ld. CIT(A) for denovo assessment were restricted to the additions made by the AO in the original assessment order.

17. We have carefully perused the assessment order under appeal before us and we find that in the denovo assessment, the AO has travelled beyond the directions of the Ld. CIT(A) by making additions which were not at all there in the original assessment proceedings. To sight a few instances in the original assessment order, the AO has made additions in respect of sundry creditors in the name of 5 parties holding that the sundry creditors shown by the assessee are not genuine which resulted into an addition of Rs.11,67,360/- in the denovo assessment, The AO has made addition to the tune of Rs. 2,50,14,190/- u/s. 69 of the Act as bogus purchases made from these 5 parties. Another example, in the original assessment, the AO has made addition of Rs. 50,00,000/- as unaccounted estimated purchases and Rs. 1,95,000/- on account of opening work-in-progress whereas in the denovo assessment, the AO has made addition of Rs. 50,03,000/- on account of creditors not payable. The above example clearly show that the AO has travelled beyond the directions given by the Ld. CIT(A) while setting aside the original assessment order. As the AO has failed to carry out the legal duty to impose on him which has resulted into the destruction of a basic principle of natural justice, such action of the AO cannot be upheld.

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19. In our considerate view, the additions made by the AO were not made in the original assessment and by making such addition the AO has travelled beyond the directions of the CIT(A), in the light of the discussions made hereinabove. The additional grounds raised by the assessee deserve to be allowed. Accordingly, we quash the order of the AO and reverse the findings of the Ld. CIT(A). As we have decided the appeal on the point of law by quashing the assessment order, we do not propose to decide the issue on merit.

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Kellogg India (P.) Ltd. v. ACIT [2013] 33 taxmann.com 397 (Mumbai - Trib.)

29. In ground No. 1, the assessee has challenged the disallowance of Rs. 39,47,212, in respect of free food allowance.

30. The facts, which are relevant for our adjudication, are that this is the second round of appeal and in the first round, the Assessing Officer has made 50 per cent. of disallowance out of these expenses on ad hoc basis. This was further reduced to 25 per cent. by the Commissioner (Appeals). Against this disallowance, the assessee went in appeal before the Tribunal, wherein the Tribunal set aside this matter before the Assessing Officer to examine this issue afresh.

31. In the second round of appeal, the Assessing Officer, in pursuance of the directions given by the Tribunal, made 100 per cent of disallowance at Rs.39,47,212, on the ground that these expenses are already a part of cost of raw material and processing of the said free food and is included in manufacturing cost and purchases. Such a disallowance of 100 per cent has been confirmed by the Commissioner

(Appeals) on the ground that it amounts to claim of double deduction.

32. Before us, learned counsel for the assessee submitted that once the matter has been set aside by the Tribunal, the assessee cannot be put into a worst situation than what it was at the time of original assessment. Since after giving effect to the order of the Tribunal, there cannot be any scope of enhancement of assessment and, therefore, the disallowance made in the original assessment should stand. In support of this contention, he relied on the judgment of the hon'ble Supreme Court in *Mcorp Global (P.) Ltd.* v. *CIT* [2009] 309 ITR 434/178 Taxman 347 (SC).

33. On the other hand, the learned Departmental Representative submitted that this is clearly a case of double deduction and does not amount to any kind of enhancement of assessment as the verdict of the Tribunal was to examine the issue afresh.

34. We have heard the rival contentions and perused the material available on record. It is now a settled proposition of law that the Appellate Tribunal under section 254(1) of the Act, had no power to take back the benefit conferred by the Assessing Officer or enhance the assessment. When the matter has been restored by the Tribunal, the income cannot be enhanced by the Assessing Officer from that determined at the time of original assessment proceedings, which was the subject matter of dispute before the Tribunal. This proposition of law has been upheld by the hon'ble Supreme Court in *Hukumchand Mills Ltd.* v. *CIT* [1967] 63 ITR 232, and had now been reiterated in *Mcorp Global (P.) Ltd.* (*supra*). Therefore, in view of this proposition of law, the enhancement of assessment by making 100 per cent disallowance in respect of free food allowance cannot be sustained and the same is restricted to 50 per cent, as made by the Assessing Officer in the original round of proceedings. Consequently, this ground is allowed to this extent only.

S.P. Kochharv. ITO [145 ITR 255 (All.)

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9. Two questions fall for our consideration in these writ petitions: Firstly, whether after remand of the case by the Tribunal, the ITO could have gone beyond the directions given in the remand order and look into the matters which were not the subject-matter of appeal before the Tribunal. The second question is as to whether notice under section 148 could be issued when the assessment proceedings were still pending.

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11. As for the powers of the Tribunal, sub section (1) of section 254 says that the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

12. The powers of the Tribunal in dealing with appeals are expressed in the widest possible terms and are similar to the powers of an appellate court under Civil Procedure Code. The Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The word 'thereon' is significant in as much as it restricts the jurisdiction of the Tribunal to the subject matter of the appeal. In other words, the original grounds of appeal and such additional grounds as may be raised by the leave of the Tribunal constitute the jurisdiction of the Tribunal. It can only adjudicate upon such grounds and not beyond them. It is not open to the Tribunal to adjudicate or give a finding on a question which does not constitute the subject-matter of the appeal as constituted by the original grounds of the appeal and such additional grounds as may be raised by the leave of the Tribunal. Further, the words, 'pass such orders thereon as it thinks fit' include all the powers except the power of enhancement which is conferred upon the AAC by section 251. The distinction that the AAC is competent to examine all matters covered by the assessment order while the Tribunal is to confine itself to the subject-matter of the appeal is also to be kept in view.

13. The scope of ITO's powers to make a fresh assessment under an order of remand passed by the appellate authority has come up for consideration in numerous cases. This Court in *J.K. Cotton, Spg. &Wvg. Mills Co. Ltd.* v. *CIT* [1963] 47 ITR 906, laid down that where on an appeal from an assessment, the AAC set aside the assessment and directed the ITO to make a fresh assessment, the ITO is bound by the directions of the AAC in making the fresh assessment. But subject to those directions, he has the same powers in a fresh assessment as he had originally when making an assessment under section 23 of the 1922 Act. The same view was reiterated in *Abhai Ram Gopi Nath*v. *CIT* [1971] 79 ITR 339 (AH.). The Kerala High Court in *K.P. Moideenkutty*v. *CIT* [1981] 131 ITR 356 has held that the competence of the AAC is not restricted to deal with the subject-matter of the appeal. He may examine all matters covered by the assessment order and correct the assessment in respect of such matters even to the prejudice of the assessee and may remand the case to the ITO for enquiring into the items which were not the subject-matter of appeal. Where, on appeal from an assessment, the AAC sets aside the assessment and directs the ITO to make a fresh assessment without imposing any restriction or limitation as to how the fresh proceedings are to be conducted by the ITO, the ITO has the same powers in making any such fresh assessment as he had originally when making an assessment under section 143 of the Act and the ITO is competent to re-do the assessment in accordance with law after taking into account all matters and aspects that would be relevant in making the original assessment. It is open to the AAC to limit the scope of enquiry by the ITO to any specified aspect or issue.

14. The decision of the Calcutta High Court in *Katihar Jute Mills* (P.) *Ltd.* v. *CIT* [1979] 120 ITR 861 is to the same effect. The Punjab and Haryana High Court in *Kartar Singh* v. *CIT* [1978] 111 ITR 184 ruled that where an assessment is set aside by the Tribunal and remanded to the ITO, it is not open to him to introduce into the assessment new sources of income so as to enhance the assessment. Any power to enhance is confined to the old sources of income which were the subject matter of appeal to the Tribunal.

15. What thus comes out is that the powers of the AAC are wider than those of the Tribunal. The AAC while hearing an appeal under section 251 can examine all matters covered by the assessment order and correct the assessment in respect of all such matters even to the prejudice of the assessee. He may remand the case to the ITO for enquiring into the items which were not the subject- matter of appeal also. If he sets aside an assessment and remands the case to the ITO for making a fresh assessment, the powers of the ITO while making the fresh assessment are the same as if he were making an original assessment under section 143(3) of the Act. The AAC can, however, limit the powers of the ITO by giving suitable directions in regard to the scope of enquiry by the ITO. In the absence of such direction or restriction on the power of the ITO, while making a fresh assessment, the ITO is not bound by anything that had happened either when he made the original assessment or when the appeal was heard. When the remand is made by the Tribunal, the position is different. The powers of the Tribunal are confined to the subject-matter of appeal as constituted by the original grounds of appeal and such additional grounds as may be raised by the leave of the Tribunal. Thus, when the Tribunal allows the appeal and sets aside the assessment and remands the case for making a fresh assessment, the power of the ITO is confined to such subject-matter only. He cannot take up the questions which were not the subject-matter of appeal before the Tribunal. This will be so even though no specific direction has been given by the Tribunal. If a specific direction is given, then there is no scope whatsoever for the ITO to travel beyond those directions or restrictions.

16. In the instant case, the matter had come up before the Tribunal in the appeal filed by the revenue. The revenue had challenged the deletion of three additions, *viz.*, Rs. 85,625, profit on sale of land, Rs. 3,420, profit on sale of land to Smt. Bawa and Rs. 2,268, profit on plot sold to Smt. Krishna Kochhar. In regard to latter two additions, the Tribunal agreed with the AAC and held that in respect of sale of land to Smt. Krishna Kochhar, there was no extraneous consideration involved and no question of earning any profit. As regards sale of plot to Smt. Bawa, it was held to be a distress sale made to purchase peace and that also did not yield any profit. As regards the profit of Rs. 85,625, the view taken by the Tribunal was that insofar as the sales which had been made prior to the relevant previous year were concerned, they could not be considered for arriving at any such profit in respect of the year under consideration, that is, 1970-71. In the relevant previous year apart from the two sale deeds, one made in favour of Smt. Kochhar and the other in favour of Smt. Bawa, there was only one more sale deed of Rs. 40,000 in favour of Smt. Sandhu which alone was relevant for consideration in this year. The profit in respect of this transaction could be arrived at by estimating the cost price of the plot and the land sold and there from the cost price of the building and the plot retained by the petitioner shall be excluded and further he shall be given the benefit of the development expenditure, if any, incurred by him for developing the land. The subject- matter of inquiry was, therefore, restricted by the Tribunal to this very transaction only and the method in which the profit was to be arrived at was also indicated. That being so, the ITO was not justified in embarking on an enquiry into any other item not covered by these directions. Certainly the various notices issued by him under sections 142(1) and 143(3) of the Act were not justified. This petition, therefore, is liable to succeed.

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contd. from page 213

24 Viacom 18 Media (P.) Ltd. Vs. ADIT 162 TTJ 336 (Mum). Assessment Year 2009-10 TO 2011-12; Order dated:28th March, 2014

Basic Facts

The assessee, engaged in broadcasting television channels from India, received transponder service from Intelsat, a tax resident of USA, in lieu of a fee. The assessee approached to the AO under 195(2) of I-T Act for Nil withholding tax certificates, for such payment of fees to Intelsat, which was denied by the AO

Issue

Whether fee payable to Intelsat is in the nature of 'Royalty' in the light of amended provisions of section 9(1)(vi) as well as under Article 12 of Indo-US DTAA?

Held

The definition of term 'royalty' remained unchanged despite insertion of Explanation 6 by Finance Act 2012. The introduction of Explanation 6 w.e.f.01-6-1976 is clarificatory in nature and, therefore, it does not amend the definition of royalty per se. There is no quarrel on the point that any payment for use or right to use of process is in the nature of royalty as per the provisions of Article 12(3) of DTAA as well as per the Explanation 2 of section 9(1)(vi) of the Act. Since the term 'process' is not defined under the DTAA, therefore, by virtue of Article 3(2) of the India-US DTAA, the meaning of term 'process' as defined in the Act would apply for this purpose. The use of transponder by the assessee for telecasting/broadcasting the programme involves the transmission by the satellite including up-linking, amplification, conversion for downlinking of signals which falls in the expression 'process' as per Explanation 6 of section 9(1)(vi). Hence the payments made for use/ right to use of process falls in the ambit of expression 'royalty' as per DTAA as well as per provisions of Income Tax Act.

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USA - Non Disclosure of Overseas Income Immunity

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As elaborated earlier in August 2013 issue US citizens, Green Card Holders, H1B Visa holders and all USA tax residents are required to report global income in their Federal Tax Return and Federal Tax on such global income is payable subject to credit being granted for tax paid overseas.

US tax residents are also required to report maximum value of specified foreign financial assets to the US treasury on or before 30th June every year and since 2011 reporting of overseas financial assets has become mandatory if the maximum value of overseas assets exceeds US$ 50,000 as on 31st December or US$ 75,000 during the tax year and in case of married couple tax-payers filing US$ 100,000 and US$ 150,000 respectively in Form 8938 together with Federal Tax Return in Form 1040.

Out of ignorance great majority of US tax residents had not disclosed their foreign income or assets but unfortunately ignorance of law not being an excuse such defaults were subject to civil and criminal penalties. To mitigate this difficulty IRS had offered Offshore Voluntary Disclosure Initiative (OVDI) and Offshore Voluntary Disclosure Program (OVDP) requiring tax residents to pay taxes for 8 years and file Foreign Bank Account Report (FBAR) returns for 8 years and also pay penalty of 25% / 27.5% penalty of maximum value of overseas assets during last 8 years.

The Internal Revenue Service of USA probably sensed that this penalty of 27.5% was a hurdle for defaulting US tax residents to opt for OVDP and therefore the IRS has extended a friendly gesture to the defaulting taxpayers by forgiving them for their genuine and bonafide negligence of not paying federal tax on such overseas income and not declaring overseas financial assets to the Treasury by reducing the penalty to a token 5% of the peak year end balance of the preceding six years and federal tax for previous three years only under the Streamlined Filing Compliance Procedures "(SFCP) being introduced recently on 18th June, 2014.

For availing the benefits of SFCP the tax payer should not be under audit or criminal investigation by the IRS. The tax payer is also required to certify under penalty of perjury that non compliance of US tax and reporting of Foreign Assets were "non willful". Each case will be reviewed independently by the IRS and if the Financial Institutions is under investigation by IRS where in the US resident is maintaining a financial account offshore penalty will be 50% of maximum value of overseas financial assets. For such Financial Institutions wherein IRS is already investigating tax payers will have the option of buying peace of mind by paying miscellaneous offshore penalty of 50% of the value of overseas assets.

US tax payer residing outside USA has been granted exemption from the token 5% penalty too. As such they are required only to pay federal tax for preceding 3 years and file delinquent Foreign Bank Account Report (FBAR) returns for preceding 6 years together with appropriate applications.

The IRS has shown extreme leniency and granted total immunity from civil and criminal penalties by requiring innocent non-willful defaulter US tax payers to pay a token penalty and minimal tax. A back-of-the envelope calculation shows that the IRS leniency results in tax savings bonanza for a tax payer who could have skipped tax payment on

overseas income for a period of 20 years and also results in substantial tax savings for tax payer defaulting for 10 years or more. Calculations for a US$ 1 mn deposit in an overseas account in 1994 show interesting results of interesting tax savings.

Over 20 years US$ 1 mn would have grown to US$ 2 mn at nominal interest of 4% per year resulting in an income of US$ 1 mn . This overseas income of US$ 1 mn would have attracted tax liability of say US$ 0.30 mn.

Now under SFCP , only 5% penalty will be applicable to maximum balance over last 6 years say US$ 2 mn which amounts to US$ 0.10 mn only. And the tax payer will be required to pay tax for previous three years - say US$ 40000 being 30% tax of US $ 0.135 mn. So the total payment will amount to US$ 0.14 mn and the SFCP results in tax savings of US$ 0.16 mn.

The relief from penalties is extended in case of non filing of FBAR returns too as even civil penalty for failure of FBAR filing is catastrophic. Penalty for non-willful FBAR filing failure is $10,000 for each year whereas if proved willful the penalties can be as high as $100,000 or 50% of the amount in the account for each violation. A taxpayer in Florida was penalised recently with 150% of his overseas account balance. Now under the SFCP a defaulting tax payer is required just to file FBAR returns for previous six years and the 5% penalty takes care of FBAR failures too.

Salient features of the SFCP are :

I. Eligibility:

01 Only individual US tax payers are eligible to opt for SFCP.

02 This would include US citizens, Green Card Holders, H1B visa holders covered by the definition of US tax residents and any of such tax residents residing abroad can also opt for SFCP.

03 The tax payer must have filed tax returns for most recent preceding 3 years. i.e. Year 2011, 2012 and 2013.

04 If the tax payer has sought extension for filing tax returns for the year 2013 then most recent preceding 3 years are year 2010, 2011 and 2012.

II. Non Eligible Individuals :

01 Tax payers in whose cases IRS has initiated civil examination of tax returns for any taxable year.

02 It is not necessary that the examination results in undisclosed overseas assets or income.

03 Tax payers under criminal investigation by IRS are also not eligible.

04 Tax payers who have submitted applications under Overseas Voluntary Disclosure Program (OVDP) can also opt for SFCP.

III. Penalty & Tax :

01 Penalties will be computed at 5% of amount of highest value of overseas assets during the period over last 6 years.

02 Federal Tax of hitherto undisclosed overseas income for last 3 years is to be paid.

IV. Defaults Covered :

01 Failure of reporting overseas income and pay tax thereon under US tax laws.

02 Failures to file FBAR reports. Earlier FBAR reporting was required to file on form TD F 90- 22.1 which is now replaced from the current year by form FINCEN 114 which be filed online and

03 Failures to file in specified information regarding such overseas assets in various forms e.g. Form 3520; 8938 etc.

04 Such failure of filing should be by way of " Non-willful conduct " which is defined to

mean any conduct that is due to negligence, inadvertence, or mistake or conduct that is the result of a good faith misunderstanding of the requirements of the law."

V. Preconditions :

01 Tax payers opting for SFCP declaration should be a taxpayer who has failed to fulfill statutory obligations as a result of "non willful conduct".

02 Non willful conduct has been explained as "Non-willful conduct is conduct that is due to negligence, in advertence, or mistake or conduct that is the result of a good faith misunderstanding of the requirements of the law."

03 Tax payers who do not qualify for SFCP may opt for OVDP and pay 27.5 percent offshore penalty on the highest balance had during previous eight years.

04 However if the taxpayer has an undisclosed account at a bank listed on the IRS posted list the penalty is 50 percent.

05 The SFCP does not guarantee that the IRS will not recommend criminal prosecution if rejected.

VI. Procedures:

01 Tax payer must file amended US Tax Returns together with all required information for last 3 years.

02 One should file delinquent FBAR (New Form FinCEN 114) of last 6 years for which due date has passed.

03 One is required to pay tax, interest and 5% offshore penalty on aggregated highest balance of all foreign financial assets as at end of last 6 years.

04 "Streamline Domestic Offshore Procedures" should be read in red at the top of the page of amended tax returns.

VII. Conclusion :

01 Procedural compliance should be strictly adhered to by filing specified documents together with receipts of tax and penalty payment which are required to be physically submitted to the IRS office Austin, Texas. The tax payer will be free to opt for SFCP till the IRS declares closure of said scheme.

02 The SFCP is once in a life time opportunity for defaulting tax payers who have not paid taxes on overseas income or not filed appropriate forms or provided information about overseas Financial assets.

03 Besides the advantage of peace of mind and exemption from civil and criminal liabilities the tax payers actually saves on tax.

04 Post SFCP tax payer can freely repatriate his overseas wealth into USA and enjoy the liquidity in USA.

05 One can freely and legally enjoy the income and corpus of overseas financial assets in any place across the world too. Society is structured around rules and regulations and citizens are expected to abide by the same. For easy enforcement of rules statutes provide for strict civil and criminal penalties for the law-breakers laws the rules. But when the law breaking is across the board and that too more out of ignorance it is pragmatic for a Government to offer immunity and give one time opportunity to citizens to revert back on the legal ways with lenient penalties. IRS has chosen to take this path breaking step of one time amnesty and it would therefore be appropriate for defaulting taxpayers to approach and take advice of an experienced Certified Public Accountant and also a Law Attorney and proceed ASAP.

(This article is co-authored by CA. Darshita Sanghvi)

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FEMA Updates

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12 Export of Goods - Long Term Export Advances

In view of requests received from exporters, it has been decided to permit AD Category- I banks to allow exporters having a minimum of three years' satisfactory track record to receive long term export advance up to a maximum tenor of 10 years to be utilized for execution of long term supply contracts for export of goods subject to the conditions.

For full text refer to: A.P. (DIR Series) Circular No. 132

http://www.rbi.org.in/scripts/BS_CircularIndexDisplay.aspx?Id=8890

13 Export of Goods - Long Term Export Advances

An Authorised Dealer banks shall crystallise, that is, convert the credit balances in any inoperative foreign currency denominated deposit into Indian Rupee, in the manner indicated below:

(i) In case a foreign currency denominated deposit with a fixed maturity date remains inoperative for a period of three years from the date of maturity of the deposit, at the end of the third year, the authorised bank shall convert the balances lying in the foreign currency denominated deposit into Indian Rupee at the exchange rate prevailing as on that date.

(ii) In case of foreign currency denominated deposit with no fixed maturity period, if the deposit remains inoperative for a period of three years (debit of bank charges not to be reckoned as operation), the authorised bank shall, after giving a three month notice to the depositor at his last known address as available with it, convert the deposit from the foreign currency in which it is denominated to Indian Rupee at the end of the notice period at the prevailing exchange rate.

For full text refer to: A.P. (DIR Series) Circular No. 136

http://www.rbi.org.in/scripts/BS_CircularIndexDisplay.aspx?Id=8909

14 Liberalised Remittance Scheme (LRS) for resident individuals-Increase in the limit from USD 75,000 to USD 125,000

It has now been decided to enhance the existing limit of USD 75,000 per financial year (April-March) to USD 125,000 with immediate effect. Accordingly, AD Category –I banks may now allow remittances up to USD 125,000 per financial year, under the Scheme, for any permitted current or capital account transaction or a combination of both.

For full text refer to: A.P. (DIR Series) Circular No. 138

http://www.rbi.org.in/scripts/BS_CircularIndexDisplay.aspx?Id=8918

15 Foreign investment in the Insurance Sector – Amendment to the Foreign Direct Investment Scheme

The extant FDI policy for insurance sector has since been reviewed. Accordingly, effective from February 4, 2014, foreign investment by way of FDI, investment by FIIs/FPIs and NRIs up to 26% under automatic route shall be permitted in insurance sector subject to the conditions specified in the Press Note 2 (2014 Series) dated February 4, 2014.

For full text refer to: A.P. (DIR Series) Circular No. 139

http://www.rbi.org.in/scripts/BS_CircularIndexDisplay.aspx?Id=8924

16 Foreign investment in India – participation by registered FPIs, SEBI registered long term investors and NRIs in non-convertible/redeemable preference shares or debentures of Indian companies

It has now been decided to allow registered Foreign Institutional Investors (FIIs), Qualified Foreign Investors (QFIs) deemed as registered Foreign Portfolio investors, registered Foreign Portfolio Investors (FPIs), long term investors registered with SEBI – Sovereign Wealth Funds (SWFs), Multilateral Agencies, Pension/ Insurance/ Endowment Funds, foreign Central Banks to invest on repatriation basis, in non-convertible/redeemable preference shares or debentures issued by an Indian company in terms of A.P. (DIR Series) Circular No. 84 dated January 6, 2014 and listed on recognized stock exchanges in India, within the overall limit of USD 51 billion earmarked for corporate debt. Further, NRIs may also invest, both on repatriation and non-repatriation basis, in non-convertible/redeemable preference shares or debentures as above.

For full text refer to: A.P. (DIR Series) Circular No. 140

http://www.rbi.org.in/scripts/BS_CircularIndexDisplay.aspx?Id=8928

17 Pledge of shares for business purposes in favour of NBFCs

With a view to further rationalising the process and reducing the transaction time, it has been decided to delegate to the AD Category – I banks the powers to allow pledge of equity shares of an Indian company held by non-resident investor/s in accordance with the FDI policy, in favour of the Non - Banking Financial Companies (NBFCs) – whether listed or not, to secure the credit facilities extended to the resident investee company for bona-fide business purposes / operations, subject to compliance with the conditions

For full text refer to: A.P. (DIR Series) Circular No. 141

http://www.rbi.org.in/scripts/BS_CircularIndexDisplay.aspx?Id=8930

18 Transfer of assets of Liaison Office (LO) / Branch Office (BO) / Project Office (PO) of a foreign entity either to its Wholly Owned Subsidiary (WOS) / Joint Venture (JV) / Others in India– Delegation of powers to AD Banks

With a view to smoothen the entire process of closure of LO/BO/PO, it has been decided to delegate the powers relating to transfer of assets of LO/BO/PO to AD Category-I banks subject to compliance with the prescribed stipulations.

For full text refer to: A.P. (DIR Series) Circular No. 142

http://www.rbi.org.in/scripts/BS_CircularIndexDisplay.aspx?Id=8939

19 Annual Return on Foreign Liabilities and Assets. - Reporting by Indian Companies – Revised format

In order to collect information on Indian companies' Outward Foreign Affiliated Trade Statistics (FATS) as per the multi-agency global 'Manual on Statistics of International Trade in Services', the FLA return has been modified marginally and is made available on the RBI website (www.rbi.org.in '! Forms category '! FEMA Forms) along with the related FAQs (www.rbi.org.in '! FAQs category '! Foreign Exchange)

For full text refer to: A.P. (DIR Series) Cir. No. 145

http://www.rbi.org.in/scripts/BS_CircularIndexDisplay.aspx?Id=8945

20 Export and Import of Currency: Enhanced facilities for residents and non-residents

In view of the evolving economic conditions and with a view to facilitating travel requirements of residents travelling aboard as well as non-residents visiting India, it has been decided to allow all residents and non-residents (except citizens of Pakistan and Bangladesh and also other travellers coming from and going to Pakistan and Bangladesh) to take out Indian currency notes up to Rs. 25,000 while leaving the country.

For full text refer to: A.P. (DIR Series) Cir. No. 146

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Service Tax Decoded

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Declared Services

Something that is in fact not true or in existence shall be considered to be true or in existence if legal fiction is created by the deeming provision in the law. It is well settled principle that the Parliament is empowered to create a legal fiction and levy tax on the subject which is not otherwise covered under the normal provisions of the statue. Once the Parliament has spoken, courts will give full effect to the legal fiction. Meaning thereby, courts will not entertain disputes regarding taxability of the subject covered under the legal fiction.

Section 66E of the Finance Act, 1994 creates legal fiction and declares nine services stated therein as services irrespective of the fact that whether they are "services" or not. All disputes prevailing regarding applicability of service tax in pre-negative list era, on services stated in the list of declared services are now put to end by creating legal fictions through Section 66E.

Section 65B(44) defines the term "service" and specifically includes "Declared Services" as covered in the Section 66E. Section 65B(22) defines "declared services" as any activity carried out by a person for another person for consideration and declared as such under Section 66E. Thus, for declared services also, following conditions are to be satisfied. There should be an activity, such activity should be carried out by a person for another and such activity should be carried out for consideration. Hence, basic conditions as provided in definition of "service" are equally provided for declared services also.

As provided in the Section 66E, following shall constitute declared services.

1. Renting of Immovable Property

Many time validity of service tax on renting of immovable property has been challenged. In the case of Home Solutions Retails (India) Ltd. [2009 (14) S.T.R. 433 (Del.)], Hon'ble Delhi High Court had struck down the levy of service tax on renting of immovable property. Although, the said judgment is overcome by the amendment in the year 2010 and also overruled by the same High Court in case of same assessee [2011 (24) S.T.R. 129 (Del.)]; matter is still pending before the Hon'ble Supreme Court. To put the end of the controversies, now it is provided that renting of immovable property is a declared service. Now, whether renting of immovable property is a service in general parlance or not is irrelevant and service tax has to be paid.

In terms of Section 65B(41) renting means allowing, permitting or granting access, entry, occupation, use or any such facility, wholly or partly, in an immovable property, with or without the transfer of possession or control of the said immovable property and includes letting, leasing, licensing or other similar arrangements in respect of immovable property.

It is worth noting that renting of residential dwelling for use as residence is a service in Negative List in terms of Section 66D(m) and hence service tax is not to be levied in such case. Further, this entry in Negative List is applicable only if both the following conditions are satisfied. Firstly, the property should be a residential dwelling i.e. meant for residence and secondly, it should be used as residence. Meaning thereby even if residential dwelling unit is rented out for a commercial use by the

tenant, it will be subject to service tax. Similarly, a non-residential property is let out and tenant is using the same as residence, still service tax would be applicable.

It is noteworthy that status of the tenant, whether it is commercial concern or not is not important but the use of the property is important. For example, Mr. X has rented out a residential unit to M/s. ABC Private Limited for use of its employee as residence. It is a service covered in Negative List.

Paragraph 6.1.5 of the Education Guide dated 20-6-2012 clarifies that Halls, rooms etc. let out by hotels/restaurants for a consideration for organizing social, official or business functions or letting out of halls for cultural functions are covered within the scope of renting of immovable property and would be taxable if other elements of taxability are present.

2. Construction Services

Construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly is declared service.

However, where the entire consideration is received after issuance of completion certificate by the competent authority is not a declared service. It means that where any unit is not booked till the completion certificate, service tax is not required to be paid on that unit. However, even if only token amount as booking is received before issuance of completion certificate and rest of amount is received after issuance of completion certificate, such activity by builder/developer is a declared service and service tax is to be discharged on entire consideration. Above deeming fiction is incorporated in the law w.e.f. 1st July, 2010.

Now, it can't be argued that for the period before sale deed, builder/developer is providing services to himself as the right in the immovable property transfers to the buyer only on execution of sale deed. Now, such controversies are put to end. Irrespective of the model adopted in the construction scheme, if any consideration is received before issuance of completion certificate, service tax is to be discharged.

Completion Certificate is to be obtained from Competent Authority. Competent Authority means the Government or any authority authorised to issue completion certificate under any law for the time being in force. For example, in Ahmedabad, Ahmedabad Urban Development Authority (AUDA) is authorized to issue completion certificate and date on which certificate is issued by the AUDA will be considered as cut-off date. If entire consideration is received after that date, service tax would not be levied.

In the case where there is no requirement for such certificate from such authority, it will be sufficient if certificate has been obtained from any of the following authority.

1. Architect registered with Council of Architecture constituted under the Architects Act, 1972.
2. Chartered Engineer registered with the Institution of Engineers (India).
3. Licensed surveyor of the respective local body if the city of town or village or development or planning authority.

Further, in terms of explanation (II) to the Section 66E(b) of the Finance Act, 1994 the term "construction" includes, not only new construction but additions, alteration, replacements or remodelling of any existing structure also.

3. Temporary Transfer of Intellectual Property Right

In terms of Section 66E(c), temporary transfer or permitting the use or enjoyment of any

intellectual property right is a declared service. It is worth noting that permanent transfer of Intellectual Property Right is not subject to service tax. Such transfer may be subject to sales tax and Central Government doesn't have power to levy tax the same.

Copyright, patent, know-how etc. are examples of Intellectual Property Rights. When owner of such property doesn't sale the property but merely allows another person to use or enjoy such intellectual property for consideration it is a declared service and service tax is to be levied thereon.

4. Information Technology Software

In the terms of Section 65B(28) 'information technology software' means any representation of instructions, data, sound or image, including source code and object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of a computer or an automatic data processing machine or any other device or equipment.

Development, design, programming, customization, adaptation, upgradation, enhancement, implementation of information technology software is a declared services under entry (d) of the Section 66E. It can be seen that the above entry is designed to cover all aspects of software development.

Generally, in software industry, developer keeps ownership of the source code (intangible property) and he just allows use of the software by buyer (or so called buyer). Developer don't transfer the right to use the software but just allow the use of the software, meaning thereby, person who gets the software is able to use the software but not able to sale the same or allow any other person to use the software. Thus, developer merely grants the license to buyer to use the goods. Thus, in case a license to use software, even if it is pre-packaged, imposes restrictions on the usage of such licenses interfere with the free enjoyment of the software by the buyer.

If it is so, such license would not result in transfer of right to use the software within the meaning of Clause 29(A) of Article 366 of the Constitution of India and hence not excluded from the definition of the service as stated in Section 65B(44). If it is not deemed sale as stated in the said Article, Central Government is entitled to levy tax on such transaction and Service Tax is being levied.

'Even intellectual property, once it is put on to a media, whether it be in the form of books or canvas (in case of painting) or computer discs or cassettes, and marketed would become "goods".'- Hon'ble Supreme Court in the case of Tata Consultancy Services V. State of Andhra Pradesh [2002 (178) E.L.T. 22 (SC)]. As decided in the above case, sale of software, which is put on the media like Compact Disc (CD), is a "goods" and hence subject to levy of Sales Tax/Value Added Tax.

Now, if the software is put on the media like CD and buyer is merely given a license to use the software, transactions would be subject to local sales tax as well as of provision of service and both the taxes namely sales tax and service tax would be levied. Now, as the contemporary judgments are being delivered by the various courts, it would not be the strong argument that Sales Tax and Service Tax are mutually exclusive.

Where source code are being transferred to the buyer of the software and software is put on the media and software is developed or designed or programmed or customized, specifically for buyer, question may arise weather it is a contract of sale of goods or provision of service. As explained in the Paragraph 6.4.5 of the Education Guide Dated

20-6-2012, the contract is essentially for design and development of software and it would fall in the declared list entry even if the software is finally delivered in the form of goods. However, this is a question of fact and terms of the each contract should be referred to. But if, to development, design, programming, customization, adaptation, upgradation, enhancement, implementation of software, are essential in the contract, it is a declared service under entry (d) of the Section 66E and Service Tax would be levied.

5. Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act

Following three activities are covered in this entry of declared services.

1. Agreeing to the obligation to refrain from an act,
2. Agreeing to the obligation to tolerate an act or a situation.
3. Agreeing to the obligation to do an act.

For all three activities, "agreeing to the obligation" is necessary. To refrain from an act or situation or tolerate an act/ a situation or to do an act should be "obligation" of a person. Further, a person shall "agree" to that obligation. If there is no obligation, activity can't be considered as declared service. Even if there is an obligation, but such obligation is not agreed by the person, but he is otherwise has to do the activity, the activity can't be considered as a declared service under this entry.

As explained in the Education Guide, by virtue of a non-compete agreement one party agrees, for consideration, not to compete with the other in any specified products, services, geographical location or in any other manner. Such action on the part of one person is also an activity for consideration and will be covered by the declared services.

6. Transfer of goods without transfer of right to use such goods.

To levy sales tax, it is not necessary that a legal title of the goods transfers from the seller to buyer. When "Right to Use" goods are also transferred along with the goods, it is a deemed sales under Article 366(29A)(d) of the Constitution of India and hence subject matter of the States and hence, only state Government has power to levy tax on that and it is subject to Sales Tax.

If goods are transferred but "right to use" those goods are not transferred, it is not deemed sale and Central Government has power to levy tax on that and it is subject to service tax. It is a deemed service under Section 66E(f) of Finance Act, 1994.

Allowing use of goods and transfer of right to use are two different things. Where, possession and control both are transferred along with the goods, it is a transfer of "right to use". Where the control is still with the person who transfers the goods, it is not a transfer of "right to use" and that will subject to service tax.

Whether, a transaction involves transfer of possession and control is a question of facts and it is to be decided based on the terms of the contract and other material facts. This could be ascertainable from the fact whether or not VAT (sales tax) is payable or not. – Paragraph 4.4.3 of the Circular No. 334/1/2008-TRU dated 29th February, 2008.

7. Activities in relation to Hire Purchase or System of Payment by Instalments

In terms of Article 366(29A)(c) of the Constitution of India delivery of goods on hire-purchase or any system of payment by instalment is a deemed sale and there is no question of levy of tax by Central Government. However, service portion is also involved in such transactions and it is not pure contract of sale. Only service portion, i.e. related activities

are declared service under Section 66E(g) of the Finance Act, 1994.

8. Service portion in execution of a works contract

In terms of the Article 366 (29A) of the Constitution of India, transfer of property in goods involved in execution of works contract is deemed to be a sale of such goods. Only goods portion in the works contract are deemed to be a sale and not the entire contract and service portion in particular. Such service portion in the works contract only is a declared service under Section 66E(h).

Works contract means contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any moveable or immoveable property or for carrying out any other similar activity or a part thereof in relation to such property – Section 65B(54).

W.e.f 1st July, 2012, contracts related movable property, are also covered in the definition of the works contract.

Applicability of service tax under the category of the works contract is depend on the applicability of the sales tax/value added tax. To consider a contract as works contract under service tax it is prerequisite that the transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods. If such transfer of property in goods is not subject to sales tax, such contract can't be considered as works contract under service tax.

Further, valuation of a works contract is governed by Rule 2A of the Service Tax (Determination of Value) Rules, 2006. In terms of sub-rule (i) of the said rule, for service tax, value of the a works contract shall be gross amount charged for the works contract less the value of property in goods transferred in the execution of the said works contract. Hence, only service portion is subject to service tax. Central Government neither has power to levy tax on sale of the goods in works contract nor that portion is subject to service tax.

9. Serving of Food

In terms of Article 366(29A)(f) the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink is a deemed sale and State Government is empower to levy tax on that and Central Government is not entitled to levy tax on that. However, service portion in such transactions is a declared service under Section 66E(i) of the Finance Act, 1994.

In terms of Rule 2D of the Service Tax (Determination of Value) Rules, 2006, the value of an activity in such a contract shall be 40% and 60% for restaurant and outdoor catering respectively. It is noteworthy that technically it is not the abatement from the taxable value but the taxable value itself is 40%/ 60% as the case may be. For example, total turnover of a restaurant is Rs.20 Lacs in the financial year 2013-14. In this case taxable turnover for service portion is only Rs.8 Lacs only and the threshold exemption of Rs.10 Lacs as provided under Notification No. 33/ 2012-ST is still available to that restaurant in the financial year 2014-15.

It is noteworthy that in the case of Kerala Classified Hotels and Resorts Association V. Union of India, [2013 (31) S.T.R. 257] Hon'ble High Court of Kerala has struck down the levy of service tax on service in relation to serving of food or beverages and held that the Central Government is not empower to levy tax on such services. Although the decision is delivered in the context of pre-negative list provisions, ratio laid down is still applicable.

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Service Tax - Recent Judgements

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13 Banas Security & Personal Force v. Commissioner of Central Excise & Service Tax [2014] 45 taxmann.com 84 (Gujarat)

Where an important ground/contention raised in written submission is not considered, order must be set aside and remanded back for consideration afresh.

Facts

Assessee did not appear in person before Tribunal but sent a request to decide appeal on merits after considering synopsis, compilation and submissions already filed. Though ground of valuation of services was raised in submissions, Tribunal passed order only considering issue of penalty. Assessee's request for rectification of appellate order was turned down.

Held

The High Court of Gujarat held that an important ground/contention raised in written submission was not considered. Hence, appellate and rectificatory orders were set aside and matter was remanded before Tribunal for fresh consideration with a direction to assessee to attend personal hearing.

14 D.P. Singh Chadha v. Commissioner of Central Excise, Ludhiana [2014] 44 taxmann.com 395 (Punjab & Haryana)

Composite services could not be classified as commercial or industrial construction services after introduction of works contract services from 1-6-2007.

Facts

Assessee entered into composite contracts for construction of residential flats for Improvement Trust. Department demanded tax thereon with interest and penalty. On assessee's stay application, Tribunal opined that composite services could not be classified as commercial or industrial construction services after introduction of works contract services from 1-6-2007 and also the assessee's claim of benefit of composition scheme was invalid, as assessee neither filed ST-3 Returns nor remitted service tax liability after availing Composition Scheme or exhibit overt conduct. The assessee was liable to pre-deposit the service tax liability plus proportionate interest out of demand with interest and penalty.

Held

The High Court of Punjab and Haryana held that Pre-deposit of tax along with proportionate interest out of total demand plus interest and equal penalty, was reasonable and justified. Hence, appeal was dismissed being devoid of substantial question of law.

15 Greenwich Meridian Logistic (I) (P.) Ltd. v. Commissioner of Service Tax, Mumbai-II, [2014] 42 taxmann.com 536 (Bombay)

Freight forwarders are not, prima facie, liable to service tax and even otherwise, case is arguable one; therefore, pre-deposit was reduced.

Facts

Assessee, a freight forwarding agency, was engaged in business of booking cargo space on shipping lines for consideration and thereafter allotting same to exporters for consideration. Department sought levy of service tax under business auxiliary services on ground that assessee was promoting service of cargo space provided by shipping line. Assessee argued that it was not agent of shipping lines and was not providing any service but was buying cargo space from shipping lines and selling such space to exporters, which amounts to trading and resultant

contd. on page no. 246

VAT Demystified

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VAT on Construction Contracts

1. Introduction

As we all are aware that anything which can be taxed under VAT has to be **'goods'** and there should be **'sale of goods'**. Entry 92A of List I (i.eUnion List) and entry 54 of List II (i.e State list) of Seventh Schedule of Constitution of India reads as under:

Entry 92A of List I: Taxes on the sales or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-state trade or commerce.

Entry 54 List II: Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I

On first principles, it is generally understood that VAT can be applicable only on **sale of goods** and similarly Service Tax is applicable only on providing services, and therefore been the general understanding that a sale of immovable property cannot be a subject matter of tax under VAT.

This principle is well accepted in case of 'resale' of immovable property by an investor or in case of second sale.

Conceptually, a works contract involves some edition, accretion or accession in relation to a basic goods or nucleus belonging to the owner / contractee.

2. Types of Works Contracts

- **Divisible Contracts**

  Divisible Contracts are contracts in which value of material and labour are separately mention.

- **Indivisible Contracts**

  Indivisible Contracts are such contracts in which value of material and labour are not separately mention or not ascertainable.

3. Position prior to 46th Amendment in the Constitution

Prior to 46th amendment in the constitution, divisible contracts were chargeable to tax on material part, but indivisible contracts were not chargeable to tax reason being they are indivisible contracts and value of material is not separately ascertainable. The landmark case is discussed below:

The State of Madras V.GannonDunkerley& Co.(Madras) Ltd. reported in 9 STC353 (SC)

Case was before the Hon'ble Supreme Court of India, to decide whether value of material used in the construction works liable to tax on sales under Entry 54 in List II in Schedule VII of the Constitution.

Hon'ble Supreme Court held that " we are of the opinion that there is no sale as such of materials used in a building contract, and that the Provincial Legislatures has no competence to impose tax thereon under Entry 54."

Hon'ble Supreme Court further clarified that "it must bestated that the above conclusion has reference to works contracts, which are entire and indivisible".

4. 46th Amendment in the Constitution

Article 366'(29A) "tax on the sale or purchase of goods" includes-

(b) a tax on the transfer of property in goods (whether as goods or in some other form)

involved in the execution of a works contract;

As a result of the 46th constitutional amendment, the contract which was **single and indivisible has been altered by legal fiction into a contract which is divisible into one for a sale of goods and other for supply of labour and services** and as aresult such a contract which is single and indivisible has been brought at par with a contract containing two separate agreements.

5. A transaction may be termed as works contract, if:

Hon'ble Supreme Court in the case of Hindustan Shipyard Ltd. Vs. State of Andhra Pradesh (2000) 119 STC 533 (SC)

A transaction may be termed as works contract, if:

(i) There is transfer of chattel to chattle i.e. work on the property of the contractee or work has been executed solely on the basis of specification provided by the contractee.

(ii) Contractee becomes the deemed owner during construction itself andthe contractor has no right to remove the goods transferred during construction;

(iii) There must be a principle of accretion and accession. In case of works contract of immovable property, goods are transferred on the principle of accretion and in the case of movable property, on the principle of accession; and the contract must be an indivisible contract.

6. The Journey up to K. Raheja Development Corporation. 141 STC 298 (SC).

Background of the case:

Company enter into development agreement with owners of lands. Thereafter they get plans sanctioned. After approval of the plans they construct residential apartments and/or commercial complexes. In most cases before they construct the residential apartments and/or commercial complexes they enter into agreements with the intended purchasers.

The agreements provide that on completion of the construction the residential apartments and/or commercial complex would be handed over to the purchasers who would get an undivided interest in the land also. The owner of the land would then transfer the ownership directly to the society which is being formed under the Karnataka Ownership Flats Act,1974.

The question before court was, whether the appellants are dealers and are liable to pay tax under the Karnataka Sales Tax Act.

Held that, "Thus the appellants are undertaking to build as developers for the prospective purchaser. Such construction/ development is to be on payment of a price in various instalments set out in agreement. As the appellants are not the owners they claim 'lien' on the property. Of course, under clause 7 they have right to terminate the agreement and to dispose off the unit if a breach is committed by the purchaser. However, merely having such a clause does not mean that the agreement ceases to be a works contract within meaning of the term that the said Act. All that this means is that if there is a termination and that particular unit is not resold but retained by the appellants, there would be no works contract to that extent. But so long as there is no termination the construction is for and on behalf of purchaser. Therefore, it remains a works contract within the meaning of the term as defined under the said Act. It must be clarified that if the agreement is entered into after the flat or unit is already constructed, then there would be no works contract. But so long as the agreement is entered into before the construction is complete, it would be a works contract."

7. Supreme Court Judgement in the case of Larsen and Toubro Ltd v. State of Karnatake [2013] 65 VST 1(SC)

Recently hon'ble Supreme Court has delivered judgement in above case and held that:

a) For sustaining the levy of tax on the goods deemed to have been sold in execution of a works contacts, three conditions must be fulfilled:

- ✓ There must be a works contracts
- ✓ The goods should have been involved in the execution of a works contract and
- ✓ The property in those goods must be transferred to a third party either as goods or in some other form.

b) The dominant **nature test has no application** and the traditional decisions which have held that the substance of the contract must be seen have lost their significance where transactions are of the nature contemplated in article 366(29A).

Even if the dominant intention of the contract is not to transfer the property in goods and rather it is rendering of service or the ultimate transaction if transfer of immovable property, then also it is open to the states to levy sales tax on the materials used in such contract if such contract otherwise has elements of works contracts.

c) Activity of construction undertaken by the developer would be works contract only from the state the developer enters into a contract with the flat purchaser. The value addition made to the goods transferred after the agreement is entered into with the flat purchaser can only be made chargeable to tax by the State Government.

8. Provisions under Gujarat VAT Act.

- **Sec 2(10)*"dealer"***: means any person who, for the purpose of or consequential to his engagement in or, in connection with or incidental to or in the course of his business buys, sells, manufactures, makes supplies or distributes goods, directly or otherwise, whether for cash or deferred payment, or for commission, remuneration or otherwise and includes,-

f) **any person who transfers property in goods (whether as goods or in some other form) involved in the execution of works contract;**

- **Section 2(13) "goods**": means all kinds of movable property (other than newspapers, actionable claims, electricity, stocks and shares and securities) and includes live stocks, all materials, articles and commodities and **every kind of property (whether as goods or in some other form) involved in the execution of works contract**, all intangible commodities and growing crops, grass, standing timber or things attached to or forming part of the land, which are agreed to be severed before sales or under the contract of sale;

- **Section 2(23) "sale":**means a sale of goods made within the State for cash or deferred payment or other valuable consideration and includes,-

(b) transfer of property in goods (whether as goods or in some other form) involved in execution of a works contract,

- **Section 2(24) "sale Price":**means the amount of valuable consideration paid or payable to a dealer or received or receivable by a dealer.....and includes,-

(a) ……,

(b) in relation to the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract, such amount as is arrived at by deducting from the amount of valuable consideration paid or payable to a person for the execution of such works contract, the amount representing labour charges for such execution;

(c) ……..,

- **Section 2(30) "taxable turnover"**: means the turnover of all sales or purchases of a dealer during the prescribed period in any year, which remains after deducting therefrom,-

(a) …….,

(b) ……,

(c) in case of turnover of sales in relation to works contract, the charges towards labour, service and other like charges, and subject to such conditions as may be prescribed:

Provided that in the cases where the amount of charges towards labour, service and other like charges in such contract are not ascertainable from the terms and conditions of the contract, the amount of such charges shall be calculated in such manner as may be prescribed;

14A. Composition of tax on works contract.r.w. Rule 28(8).

(1) Notwithstanding anything contained in this Act, the Commissioner may, in such circumstances and subject to such conditions as may be prescribed, permit every dealer referred to in sub-clause (f) of clause (10) of section 2 to pay at his option in lieu of the amount of tax leviable from him under this Act in respect of any period, a lump sum tax by way of composition at such rate as may be fixed by the State Government by notification in the Official Gazette having regard to the incidence of tax on the nature of the goods involved in the execution of the total value of the works contract.

(2) The provisions of sub-sections (3) and (4) of section 14 shall apply mutatis mutandis to a dealer who is permitted under sub-section (1) to pay lump sum tax by way of composition.

(3) Where any dealer has opted for composition of tax under the earlier law and commenced the work in pursuance of any specified works contract prior to the appointed day and such work is not completed before the appointed day, such dealer shall pay the tax for the remaining work in accordance with the provisions of this Act.

Sub-sections (3) and (4) of section 14

(3) A dealer who is permitted under sub-section (1) to pay lump sum tax

(a) shall not be entitled to claim tax credit in respect of tax paid by him on his purchases,

(b) shall not charge any tax under this Act in his sales bill or sales invoice in respect of the sales on which lump sum tax is payable; and

(c) shall not issue tax invoice to any dealer who has purchased the goods from him.

(4) A dealer who is permitted under sub-section (1) to , pay lump sum tax shall be liable to pay purchase [tax leviable under sub section (1)(3)(4)and(6)of section 9,] in addition to the lump sum tax under this section.**(On the purchases effected from unregister dealer)**

Rule 18AA: Deduction of charges towards labour, service, etc.

(1) The value of the goods at the time of the transfer of property in the goods (whether as goods or in some other form) involved in the execution of a works contract shall be determined by deducting the amounts paid by way of price for sub-contract made with a registered dealer, if any, pertaining to the said works contract.

(2) A registered dealer who claims any deduction referred to in sub-clause (c) of clause (30) of section 2, shall -

(a) maintain true and correct records for such deductions;

(b) prove to the satisfaction of the Commissioner that he has actually paid the amount in the year in which he claims such deduction; and

(c) furnish true and correct evidences for claiming such deductions at the time of assessment or when asked to furnish in any proceedings:

Provided that where the amount of charges towards labour, service and other like charges are not ascertainable or the accounts maintained by the contractor are not sufficiently clear or intelligible, a lump sum deduction shall be admissible in accordance with the percentage mentioned in the Table below, and the sale price of the goods at the time of the transfer of property shall be determined accordingly.

TABLE

Sr. No.	Description of Works Contract	Percentage of deduction
1.	Construction, improvement or repair of any building, road, bridge, dam, canal or other immovable property.	Thirty per cent.

Rule 28(8) (vi-a)

(1) the dealer shall not use the goods in the execution of works contracts covered under the permission to pay lump sum tax, if such goods are

(i) purchased in the course of inter-State trade or commerce or imported from outside the territory of India, or

(ii) received from his branch situated outside the State or from his consigning agent outside the State ;

(2) if such dealer uses any taxable goods in the execution of works contract covered under the permission to pay *lump sum* tax, such goods ought to have borne the tax payable under the Act;

(3) if such dealer has already claimed the tax credit for the goods held in the stock on the date of effect of permission and such goods are going to be used in the works contract for which permission to pay *lump sum* tax is sought for, he shall reverse such tax credit; and

(4) if the permission to pay *lump sum* tax is granted under clause (bb), the dealer shall not dispatch the goods to his branch situated outside the State or to his consigning agent outside the State:

Conclusion

In short, as per Gujarat VAT Law, on works contracts the dealer is liable to pay either at normal rate u/s 7 i.e on deemed sale value of goods with reference to rule 18AA or liable to pay under composition scheme u/s 14A of Gujarat VAT Act.

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VAT - Recent Judgements and Updates

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Statute Updates

[I] Important Judgments:

[1] M/s. Gunjan Times v/s. State of Gujarat (Second Appeal Nos. 128 & 129 of 2014 dated 22.04.2014]

Issue:

The business under Proprietorship transferred to a Pvt. Ltd. Co. Under the circumstances, whether new registration is to be taken or only changes are to be made?

Facts:

The appellant is a dealer registered under GVAT Act as well as CST Act and the appellant has started the business under Proprietorship of Mr. Gaurish Madan. The business of the appellant was trading in watches and goggles. The business is transferred to a Pvt. Ltd. Company under the name of M/s. Gunjan Times Pvt. Ltd. Since there was a change in the ownership of the business, in view of the provisions contained in section 26(1)(a) of the Vat Act, Company has made application by making any amendment in the registration certificate. However, the Ld. Commercial Tax Officer has rejected the said application of making amendment in the certificate of registration by invoking the provisions contained in sec, 26(6) and sec. 15(2) of the Vat Act, observing that a Pvt. Ltd. Company being a legal entity and therefore amendments in the certificate of registration cannot be granted. Under the circumstances, the appellant has filed the appeal before the Hon. Tribunal

Order:

The Hon. Tribunal after discussing the entire facts and circumstances of the case, ordered that the authorities refusing to grant amendment in the registration certificate are not just and proper and made it clear that as and when such registration is restored, the amendment sought to be made by the appellant in the registration certificate is required to be granted.

The important paragraphs are reproduced hereunder for the benefit of the readers.

The Hon. Tribunal has considered rival submissions and the facts of the case. The Hon. Tribunal has also gone through the relevant statutory provisions relied upon by both the parties. There is no dispute about the fact that the appellant has made an application seeking amendment in the registration certificate for invoking provisions contained in Section 26(1)(a) and (d) of the Vat Act. Section 26(1)(a) says that where a registered dealer transfers his business, in whole or in part, or transfer his place of business, by sale, lease, leave or license, hire or any other manner whatsoever, or otherwise disposes of his business or any part thereof or effects or comes to know of any other change in the ownership of the business or as per the clause (d) of section 26(1) where the registered dealer enters into partnership or other association in regard to his business or effects any changes in the ownership of the business, he shall within the prescribed time inform the prescribed authority accordingly of the change in the constitution or as the case may be, dissolution of the firm. Based on these provisions of the Vat Act, the appellant has made an application within the prescribed period of 30 days to the learned Commercial Tax Officer for change in registration certificate as admittedly the appellant was originally carrying on the business under the proprietorship of M/s. Gaurish Shashi Madan and from 1st April 2013

the said business was transferred to the Pvt. Ltd. Company, namely Gunjan Times Pvt. Ltd. In the company, the Proprietor of the appellant firm is also one of the directors as well as vendors. Thus, the action of the appellant satisfies the first condition namely, the appellant has transferred his business and as a result thereof there was a change in the ownership of business. The appellant has also satisfied the condition laid down in section 26(1)(d) of the Act as the appellant has entered into an agreement to form private limited company in relation to his business and effected change in the ownership of business. Thus, the appellant has rightly made an application for amendment in the registration certificates. Even Rule 8 of the Vat Rules deals with amendment in certificate of registration. It says that when the registered dealer changes the place of business which is situated within the jurisdiction of his registering authority or an of the contingency or event mentioned in clause (a) to (d) of section 26(1) of the Act, such dealer shall give intimation of such change in writing within 30 days from the date of change to the registering authority. The appellant has, therefore, rightly made an application to the Commercial Tax Officer informing about the changes and requesting him to grant the amendment in the registration certificate. Sub Rule (2) of Rule 8 makes it obligatory on the part of the learned Commercial Tax Officer to make necessary amendment in the certificate of registration and to return the certificate of registration to the dealer within 30 days from the date of receipt of the application. Instead of doing that the learned Commercial Tax Officer has rejected the said application under mis-conception of facts and law.

As a matter of fact, provisions contained in section 21(7) of (7A) are not applicable at all. The appellant has not applied for cancellation of registration as neither the appellant has discontinued his business or absolutely transferred the said business to the Pvt. Ltd. Company. He has kept his interest in the business so transferred to the Pvt. Ltd. Company as he is one of the directors and also stake holders. Provisions of Section 21(7A) are also not applicable as simply because the registered office of M/s. Gunjan Times Pvt. Ltd. is situated in the State of Maharashtra, it does not mean that the business transferred to the said company would not be carried out in the State of Gujarat where the appellant was carrying on business under proprietorship of Gaurish Shashi Madan. Even otherwise, it is not open for the registering authority to cancel the registration of the appellant as section 27(1)(b) of the Act makes it very clear that where in the case of transfer of whole business by a dealer, the transferor already hold certificate of registration under this Act, the Commissioner may cancel the certificate of registration of such dealer or the transferor as the case may be, from such date as may be specified by him. Admittedly, in the present case, even if it is admitted that the appellant has transferred his business to Gunjan Times Pvt. Ltd. it is nobody's case that Gunjan Times Pvt. Ltd. is already holding certificate of registration under this Act. In this view of the matter, it is not just and proper to refuse the amendment sought by the appellant in the registration certificate.

[2] M/s. Star Bakery v/s. State of Gujarat (Appeal No. 928 to 931 of 2011 dated 21.4.2014)

Issue:

The dealer is having the permission of paying Lump Sum Tax. Whether he has to pay the tax of the sale of tax free goods or not?

Facts:

The appellant is running a bakery and manufacturing Breads, Pastry Cakes etc. The sale of breads is tax free u/s. 5 of the Vat Act. Pastry and cakes etc. are taxable u/s. 7 of the

Vat Act. The appellant has opted Lump Sum Payment of Tax under the scheme provided u/s. 14 of the Vat Act. The appellant is paying lump sum tax at 2% notified by the bakery activity and is not paying lump sum tax on the turnover of sale of breads covered u/s. 5 of the Vat Act. The A. O. while finalizing the provisional asst. order has imposed the lump sum tax on the tax free sales against which the appellant has preferred the first appeal and on the dismissal of first appeal, the appellant has preferred a second appeal before the Hon. Tribunal.

The Hon. Tribunal has dismissed the appeal filed by the appellant and the orders passed by the authority below are confirmed i.e. the tax is to be paid on the sale of tax free goods under the provision of payment of lump sum tax scheme and also levied the interest but no penalty was imposed.

The important paragraphs of the judgment are reproduced hereunder for the benefit of the readers.

The Ld. S.T.P. of the appellant further submitted that since the appellant had not paid the lump sum tax on tax free sales on the bona fide understanding of law that it is not liable to tax on the sales covered under section 5, the Ld. Assessing Officer has no jurisdiction to assess the appellant provisionally under section 32 of the Act. It is not a case of concealment or evasion of tax. Therefore, the provisional assessment order passed by the Assessing Officer is sacking the jurisdiction and hence it is required to be quashed and set aside. He has, therefore, submitted that this Tribunal should hold that the appellant's holding permission under section 14 of the vat Act are not required to pay tax on the tax free goods. This Tribunal should further hold that the dealer holding lump sum permission has to pay lump sum tax @ 2% modified by notification issued on the turnover of sales liable to tax under section 7 of the Vat Act. This Tribunal should also hold that the words "turnover of sales" of the notification should be understood as "turnover of sales" liable to tax under section 7 of the Act in order to meet with the ambit and scope of section 14 of the Vat Act.

The Ld. Government Representative appearing for the respondents in all these appeals has relied on the orders passed by the authorities below and submitted that the Assessing Officer has rightly levied lump sum tax on sales of tax free goods viz. breads. He has further submitted that the appellants once having opted to pay lump sum tax under section 14 of the Act is not entitled to contend before the Tribunal to pay such lump sum tax only on the taxable goods as the appellants are liable to pay such lump sum tax on total turnover of sales. He has further submitted that section 14 of the Act has to be read as a whole along with proviso to subsection (1) of section 14 and all its sub clauses.

It is also important to note here that the appellants are enjoying the benefit of lump sum tax on turnover of their sales, by virtue of the provision contained in section 14(1)(a) of the Act. Section 14(1)(a) of the Act, no doubt, refers to the payment of lump sum tax in lieu of the amount of tax payable under section 7 of this Act and section 7 refers to the levy of tax on the turnover of sales of goods specified in Schedule II or Schedule III.

However before invoking the provisions of section 14(1)(a) of the Act, one cannot ignore the proviso with its sub-clauses and as discussed above the proviso, specifically states that, the Commissioner shall not grant permission to pay lump sum tax under sub-section (1) of section 14 of the Act to a dealer who is engaged in the previous year or engaged in the activity of the manufacture, other than such activity as the State Government may, by an order in writing specify. Since State Government has already specified in writing while issuing their notification, the accessibility of the turnover of sales are governed by the said notification and the appellants are liable

to pay lump sum tax @ 2% on the total turnover of tax whether taxable or tax free.

In view of the facts and the provisions of law, The Hon. Tribunal does not find much substance in the various submissions made on behalf of the appellant in support of their claim in these appeals. The Hon. Tribunal is also of the view that the authorities relied upon by the Learned Counsel appearing for the appellant in support of their claims are not applicable to the facts of the case. The Hon. Tribunal does not find that the notification issued under section 14(1) (a)(vi) of the Act or its interpretation made by us is contrary to the provisions contained in section 5 or section 7 of the Act.

The Hon. Tribunal, however, makes it clear that the issue involved in all these appeals is pure and simple legal issue and everything depends upon the legal interpretation of the statutory provisions contained in the Act and on the basis of these provisions if the appellants have formed one particular belief and filed their returns or took a particular stand, it cannot be said that they have committed any default, hence, the penalty levied by the Assessing Officer in Second Appeal No. 1068/2012 filed by M/s. Bismillah Bakery deserves to be deleted.

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contd. from page 237

profit could not be charged to service tax. Tribunal held, that the appellant rendered services to the shipping lines and was liable to pay service tax under the category of business auxiliary services.

Held

In view of judgment in Leaap International (P.) Ltd. v. CST [2013] 40 STT 340/35 taxmann.com 14 (Mad.) where pre-deposit ordered was much less than demand within period of limitation, assessee was entitled to relief in this case. Moreover, assessee has an arguable case in appeal pending before Tribunal. Hence, requirement of pre-deposit was halved.

16 State Trading Corpn. of India Ltd. v. Commissioner of Service Tax, Mumbai[2014] 43 taxmann.com 165 (Mumbai - CESTAT) CESTAT, Mumbai Bench

In case of high-sea sales transactions, margin earned by seller, which forms part of customs value for charge of customs duty in hands of buyer, cannot be charged to service tax under Business Auxiliary Services.

Facts

Assessee, engaged in trading/import/export of various commodities, used to : (a) place import orders on behalf of various traders/merchants; (b) purchase said goods on own account; and (c) when goods arrive in India, sell these goods to customers on High Seas Sale basis adding a mark-up ranging from 1 per cent to 1.5 per cent of value of goods. Import formalities were being complied with by customers and they were paying customs duty on their purchase price (inclusive of assessee's margin). Department argued that assessee was rendering services of import and export to customers, and therefore, margin of 1 per cent to 1.5 per cent was liable to service tax.

Held

It was evident from import documents as well as invoices that transaction was one of trading or sale. As per Board's circular dated 11-5-2004, in case of High Seas Sales transaction, customs duty was to be discharged on value inclusive of trade margin and same had actually been subjected to customs duty. Therefore, mark-up/margin part of customs value cannot be taken out and subjected to Service Tax under guise of Business Auxiliary Services.

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Business Valuation

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Academic Refresher:
Understanding the Value,

Business Valuation and its fundamentals- II
Approaches to Valuation

In last article we referred fundamentals of valuation like definition of value, importance of purpose calling the need of valuation, deciding on the valuation date, premise of valuation and standards of valuation. Once these fundamentals of valuation are decided, the next is choosing the appropriate technique/s of value estimation based on the selected approach/es.

Approaches to Valuation

In broadest possible terms, there are three approaches to value any asset, business or business interest:

1. The asset approach
2. The income approach
3. The market approach (Relative valuation approach)

Option Pricing (Real Option)

One other approach called, Option Pricing or contingent claim method is emerging as a better contender to value assets that have option like characteristics.

There are some assets that cannot be valued with conventional valuation models because their value builds up almost entirely from their option characteristics. For example, a biotechnology firm with a single promising patent for cancer drug wending its way through the approval process can not be easily valued using discount cash flow or relative valuation models or just considering its assets strength. Real option technique is also used when we want to consider the option to delay making investment decisions or option to expand the business or to value a patent or an undeveloped natural resource reserve as an option. The value of an option is determined by six variables – the current value of the underlying asset, the variance in this value, strike price, life of option, the risk free interest rate and the expected dividends/ returns on the assets.

There are two types of real options:

- Growth options
- Flexibility options.

Growth options give a firm the ability to increase its future business. Examples include research and development, patent or brand development, mergers and acquisitions, leasing or developing land, or most pertinent launching a technology initiative.

Flexibility options, on the other hand, give a company the ability to change its plans in the future. Management can choose the option to delay, expand, contract, switch uses, outsource or abandon projects.

One critical difference between traditional income approach and real options is the effect of uncertainty (or risk) on value. Uncertainty typically is considered bad for the valuation of traditional cash flows. In contrast, uncertainty *increases* the value of real options.

Rule of thumb

International glossary of business valuation terms define "Rule of thumb" as "*a mathematical formula developed from the relationship between price and certain variable based on experience, observation, hearsay or a combination of these; usually industry specific".*

Rules of thumb are simple pricing techniques that are typically used to approximate the market value of a business. Rules of thumb typically come in the form of a percentage of revenues or a multiple of a level of earnings. For example, a rule of thumb for pricing a auto manufacturer may be 40% of annual

revenues plus inventory or two times seller's discretionary earnings (pre-tax net income + depreciation + interest + salary for one owner/ operator at the market rate of compensation). It may be a multiple of specific measure of a business like price per seat in case of call center business or price per room for hotel business or price per student for private coaching classes or price per Bed for nursing-home operators, or price per subscriber for cable television business.

Rules of thumb fail to consider the specific characteristics of a company as compared to the industry or other similar companies. In addition, rules of thumb do not reflect changes in economic, industry, or competitive factors over time. None of the rules provide sufficient information to assess the uniqueness of the business, such as management depth, customer relationships, industry trends, reputation, location, competition, capital structure and other information unique to the business. It is also a question for an appraiser to decide whether to use a trailing or historical data or current years data or estimated figures (forecasted or leading) to apply with the chosen rule of thumb.

Widely-accepted business appraisal theory and practice does not include specific methodology for rules of thumb in developing a value estimate, as there is typically no empirical evidence relating to how the rules were derived or if, in fact, the rules are reflective of transactions in the market. As such, business appraisers do not use rules of thumb in determining an indication of value. However, rules of thumb can be useful in testing the value conclusion arrived through the appraiser's selected approaches and methods. Such sanity checks are a way for business appraisers to test the reasonableness of their value conclusion. "Be careful, thumbs come in many sizes and shapes!"

So, we can conclude that although rules of thumb may provide insight on the value of a business, it is usually better to use them for reasonableness tests of the value conclusion.

Important information to consider while selecting the approach/es for valuation

Rule of thumb being useful to test the reasonableness of value and Option pricing being a technique useful for particular cases and to value specific assets or business only, normally appraisers concentrates more on three basic approaches which are the most popular and applicable while valuing a business. So, let us get back to the most widely used approaches to valuation viz. Asset Approach, Income Approach, and Relative Valuation Approach.

The leading business valuation associations, the American society of Appraisers (ASA), the Institute of Business Appraisers (IBA) and the National Association of Certified Valuation Analysts (NACVA) and now, the draft rules under the Companies Act, 2013, all have recognized the above three as major approaches to business valuation.

There are numerous methods within each of these approaches that the appraiser or valuer may consider in performing valuation. For example, under the asset approach, the appraiser often need to choose between either valuing just tangible assets or valuing tangible and intangible assets on stand-alone basis or all intangible assets as a collective group. In the income approach, the appraiser can use a discounted cash flow method or a capitalization of earnings method. Again these can be applied to value the entire business or only equity value. In the market approach, the appraiser can use guideline company multiples or multiples derived from near past transactions, may be of public or/and private business concern. Some methods focuses usage of historical performance, some give some other weight to expected performance in near future while some relies on current data and market happenings. Therefore, many times, appraiser determines final value by applying average/weighted average / mean / geometric mean on values derived by one or more methods, relevant for the purpose of valuation.

All three approaches *should be considered* in each valuation. However, it is not common to use all three approaches in each valuation.

Which approach should be used ?

Now, the essential question is which approach is to consider for valuing a business?

The appraiser faced with the task of valuing a business or its equity has to choose among different approaches – Asset Valuation, Earnings Valuation, and Relative Valuation and within each approach, he must also choose among different models. Reliant on the purpose of the valuation, the task of choosing appropriate valuation techniques will be driven by the characteristics of business being valued – Asset involvement and its dispositions, the level of earnings, growth potential, the sources of earnings growth, the stability of leverage and dividend policy. Matching the valuation model to the business being valued is as important a part of valuation as understanding the models and having the right inputs. It is like a kitchen that has many chefs with multifarious stuff on platform but no recipes. A business appraisal is in fact an *opinion* of the individual appraiser, and the appraiser has significant flexibility in formulating his opinion.

Rule 17 of Draft Rules formulated for Chapter XVII Section 247 of the Companies Act 2013, lay down several points need to be considered while deciding the appropriate technique to proceed on valuation assignment:

a) Nature of the business and the history of the enterprise from its inception;

b) Economic outlook in general and outlook of the specific industry in particular;

c) Book value of the stock and the financial condition of the business;

d) Earning capacity of the company;

e) Dividend paying capacity of the company;

f) Goodwill or other intangible value;

g) Sales of the stock and the size of the block of stock to be valued;

h) Market prices of stock of corporations engaged in the same or a similar line of business;

i) Contingent liabilities or substantial legal issues, within India or abroad, impacting the business;

j) Nature of instrument proposed to be issued, and nature of transaction contemplated by the parties.

International Private Equity and Venture Capital Valuation (IPEV) Guidelines (Oct. 2006) says that

"The valuer will select the valuation methodology that is the most appropriate and consequently make valuation adjustments on the basis of their informed and experienced judgment. This will include consideration of facts such as:

- *relative applicability of the methodologies used given the nature of industry and current market conditions*
- *quality and reliability of the data used in each methodology*
- *comparability of enterprise or transaction data*
- *the stage of development of the enterprise; and*
- *any additional considerations unique to the subject enterprise".*

So, IPEV also emphasis to consider the basic characteristics of all the three approaches. However it gives more weight age to use market based approach for deciding the fair investment value. It narrates that:

"In assessing whether a methodology is appropriate, the valuer should be biased towards those methodologies that draw heavily on market-based measures of risk and return. Fair value estimates based entirely on observable market data will be of great reliability that those based on assumptions.

Methodologies utilizing discounted cash flows and industry benchmarks should rarely be used in isolation of the market-based measures and then only with extreme caution. These methodologies may be useful as a cross-check of values estimated using the market-based methodologies."

"……Due to high level of subjectivity in selecting inputs for this technique, DCF based valuations are useful as a cross check of values estimated under market based methodologies and should only be used in isolation of other methodologies under extreme caution."

IPEV indicates the usage of DCF for the businesses with absence of significant revenues, profits or

positive cash flows, however with the caution about the inherent disadvantage of high level of subjectivity involved in the method.

For FAS 157, FASB (Financial Accounting Standard Board) clarifies that,

"consistent with existing valuation practice, valuation techniques that are appropriate in the circumstances and for which sufficient data are available should be used to measure fair value. This Statement does not specify the valuation technique that should be used in any particular circumstances. Determining the appropriateness of valuation techniques in the circumstances requires judgment."

The statement provides for using single technique or multiple techniques, subject that, the results of those techniques evaluated and weighted, as appropriate, in determining fair value. The valuation techniques may differ, depending on the asset or liability and the availability of data. However, in all cases, the objective is to use the valuation technique (or combination of valuation techniques) that is appropriate in the circumstances and for which there are sufficient data.

IPEV (International Private Equity and Venture) valuation Board while commenting on the IASB's discussion paper "Fair value measurements" published in November 2006 expresses its apprehension that

"Having a single source of guidance for all fair value measurements in IFRS's would probably reduce complexity and improve consistency in measuring fair value. However, in order to achieve its objective, such a document should not aim at being exhaustive in its guidance in order not to create more confusion for accounts preparers, users and auditors.

Consequently, the document should adopt a consistent theoretical approach and should not try to solve issues that are specific to certain markets, assets or asset classes and then apply those solutions to all other situations. The IPEV valuation Board fears that doing so will create principles and guidelines that are too theoretical and difficult to apply to specific situations."

So, the valuation guidelines should not aim to be exhaustive and it must not restrict the analyst's wisdom to apply in specific circumstance.

As read from the Para 13 of CCI guidelines (1990), *"The guidelines are intended to provide the basic framework for valuation and to minimize the element of subjective consideration. While they should be applied fairly and consistently in all cases, they should not be regarded as eliminating the exercise of discretion and judgment needed to arrive at a fair and equitable valuation."*

The values that we obtain from the different approaches described above can be very different and deciding which one to use can be a critical step. This judgment, however, will depend upon several factors, some of which relate to the business being valued but many of which relate to us, as the appraiser.

For FAS 157, FASB (Financial Accounting Standard Board) clarifies that,

"consistent with existing valuation practice, valuation techniques that are appropriate in the circumstances and for which sufficient data are available should be used to measure fair value. This Statement does not specify the valuation technique that should be used in any particular circumstances. Determining the appropriateness of valuation techniques in the circumstances requires judgment."

The fair value hierarchy under FAS 157 also, focuses on the inputs, not the valuation techniques, thereby requiring judgment of appraiser in the selection and application of valuation techniques. It specifically requires that the valuation techniques used to measure fair value should maximize the use of observable inputs and minimize the use of unobservable inputs.

Valuation is relative to purpose. Therefore, the calculated value of a business will vary depending on how it's intended to be used, and the differences can be substantial. The value established for tax purposes or for investment is not the same value established for divestiture.

The values that we obtain from the different approaches described above can be very different and deciding which one to use can be a critical step. This judgment, however, will depend upon several factors, some of which relate to the business being valued but many of which reliant to us, as an appraiser.

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Corporate Law Update

CA. Naveen Mandovara
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(A) MCA UPDATES:

1. Certification of E-forms/ non e-forms under the Companies Act, 2013 by the Practicing Professionals:

- The Ministry has clarified that where any instance of filing of documents, application or return or petition etc. containing false or misleading information or omission of material fact or incomplete information is observed, the Regional Director or the Registrar, shall conduct a quick inquiry against the professionals who certified the form and signatory thereof including an officer in default who appears prima facie responsible for submitting false or misleading or incorrect information pursuant to requirement of the prescribed Rules; 15 days notice may be given for the purpose.
- The Regional Director or the Registrar will submit his/her report in respect of the inquiry initiated, irrespective of the outcome, to the E -Governance cell of the Ministry within 15 days of the expiry of period given for submission of an explanation with recommendation in initiating action u/s 447 and 448 of the Companies Act, 2013 wherever applicable and also regarding referral of the matter to the concerned professional Institute for initiating disciplinary proceedings.
- The E-Gov cell of the Ministry shall process each case so referred and issue necessary instructions to the Regional Director/ Registrar of Companies for initiating action u/s 448 and 449 of the Act wherever prima facie cases have been made out. The E-Gov cell will thereafter refer such cases to the concerned Institute for conducting disciplinary proceedings against the errant member as well as debar the concerned professional from filing any document on the MCA portal in future.

[General Circular-10/2014 dated 07th May, 2014]

2. One time opportunity for extension of Period of Reservation of Name:

- Many stakeholders had reserved names for the purpose of Company incorporation with 60 days prescribed validity expiring during the above mentioned period but they could not avail of the 60 days prescribed period for using the name to complete the corresponding incorporation requirements due to the non-availability of services on the MCA21 portal to stakeholders from 1st April, 2014 to 28th April, 2014, hence, the MCA has extended the validity of reservation up to 31st May, 2014, of all such names with due date of expiry between 1st April, 2014 to 28th April, 2014.

[General Circular-11/2014 dated 12th May, 2014]

3. Applicability of PAN requirement for Foreign Nationals.

- To remove the difficulties being faced by Foreign Nationals while filing Incorporation form (lNC-7) due to mandatory requirement of submission of PAN details of intending Directors at the time of filing the application for incorporation, the MCA has clarified that PAN details are mandatory only for those foreign nationals who are required to possess "PAN" in terms of provisions of the Income Tax Act, 1961 on the date of application for incorporation.
- Where the intending Director who is a Foreign National is not required to compulsorily possess PAN, it will be sufficient for such a person to furnish his/ her passport number, alongwith undertaking stating that provisions of mandatory applicability of PAN are not applicable to the person concerned.

[General Circular-12/2014 dated 22nd May, 2014]

4. Extension of validity period for names reserved as on 31st March, 2014.

- In continuation of the General Circular No. 11/2014 dated 12/05/2014, approval of the

Competent Authority is hereby conveyed to extend continuity of all reserved names as on 31st March 2014 for another fifteen days period from the date of issue of this circular.

[General Circular-13/2014 dated 23/05/2014]

5. Clarifications on Rules prescribed under the Companies Act, 2013 – Matters relating to appointment and qualifications of directors and Independent Directors. :

(i) Section 149(6)(c): "pecuniary interest in certain transactions" :—

· The MCA has clariûed that in view of the provisions of section 188 which take away transactions in the ordinary course of business at arm's length price from the purview of related party transactions, an 'ID' will not be said to have 'pecuniary relationship' under section 149(6)(c) in such cases.

· It is also clarified that 'pecuniary relationship' provided in section 149(6)(c) of the Act does not include receipt of remuneration, from one or more companies, by way of fee provided under sub—section (5) of section 197, reimbursement of expenses for participation in the Board and other meetings and proût related commission approved by the members, in accordance with the provisions of the Act.

(ii)Section 149: Appointment of 'IDs':

· Explanation to section l49(1l) clearly provides that any tenure of an 'ID' on the date of commencement of the Act shall not be counted for his appointment/ holding office of director under the Act. In view of the transitional period of one year provided under section 149(5), it is hereby clarified that it would be necessary that if it is intended to appoint existing 'IDs' under the new Act, such appointment shall be made expressly under section l49 (10)/ (11) read with Schedule IV of the Act within one year from 13th April, 2014, subject to compliance with eligibility and other prescribed conditions.

(iii) Section l49(10)/(11) – Appointment of 'IDs' for less than 5 years:-

· The MCA has clarified that section l49(10) of the Act provides for a term of "up to five consecutive years" for an 'ID'. As such while appointment of an 'ID' for a term of less than five years would be permissible, appointment for any term (whether for five years or less) is to be treated as a one term under section l49(10) of the Act. Further, under section l49 (11) of the Act, no person can hold office of 'ID' for more than 'two consecutive terms'. Such a person shall have to demit office after two consecutive terms even if the total number of years of his appointment in such two consecutive terms is less than 10 years.

· In such a case the person completing 'consecutive terms of less than ten years' shall be eligible for appointment only after the expiry of the requisite coo1ing—off period of three years.

(iv) Appointment of 'IDs' through letter of appointment:—

· The MCA has clarified that in view of the specific provisions of Schedule IV, appointment of 'IDs' under the new Act would need to be formalized through a letter of appointment even in case of appointment of existing 'IDs' .

[General Circular-14/2014 dated 09/06/2014]

6. Clarification regarding maintaining register in new format [sub-section (9) of section 186]:

· The Ministry has clarified that registers maintained by companies for loans/ guarantee/security/making acquisition pursuant to sub-section (5) of Section 372A of Companies Act,1956 may continue as per requirements under these provisions and the new format prescribed vide Form MBP-2 shall be used for particulars entered in such registers on and from 01/04/2014.

[**General Circular-15/2014 dated 09/06/2014]**

7. Applicability of PAN requirement for Foreign Nationals :

· In continuation of the General Circular No. 12/2014 dated 22.05.2014 regards the above subject, the MCA has clarified that the provisions of the said Circular are applicable to a Foreign National who is a subscriber / promoter at the time of incorporation of the Company.

· In case, the said subscriber/promoter does not possess Permanent Account Number (PAN), he / she shall furnish a declaration in the prescribed proforma, as an attachment to the Incorporation Form (INC-7).

· MCA has further clarified that, in case of a Resident Director of the proposed company he/ she shall be required to submit PAN details at the time of incorporation.

[General Circular-16/2014 dated 10/06/2014]

8. Filling of MGT-10:

· In continuation of General Circular No. 06/ 2014 dated 29.03.2014 and 09/2014 dated 25.04.2014, MCA has clarified that stakeholders are required to fill Form MGT-10 physically, get it duly signed/certified by a professional and file it along with other required enclosures as attachments with the prescribed General E-form No. GNL-2.

· This temporary arrangement will continue till an E-Form for MGT-10 is made available. Fee applicable for MGT-10 will be as per the Table of Fees prescribed in Companies (Registration Offices and Fees) Rules, 2014.

[General Circular-17/2014 dated 11/06/2014]

9. Clarification for filing of Form No. INC-27 for conversion of company from public to private under the provisions of Companies Act, 2013:

· As the relevant provisions of Companies Act, 2013 (second proviso to sub-section (1) and sub-section (2) of section 14) have not been notified, the MCA has clarified that in view of this, the corresponding provisions of Companies Act, 1956 (Proviso to sub-section (1) and sub-section (2A) of Section 31) shall remain in force till corresponding provisions of Companies Act, 2013 are notified.

· The Central Government has delegated such powers under the Companies Act, 1956 to the Registrar of Companies (ROCs) vide item No. (c) of the notification number S.O. 1538(E) dated the 10th July 2012 and this delegated power remains in force.

· Applications for such conversions, therefore, have to be filed and disposed as per the earlier provisions.

[General Circular-18/2014 dated 11/06/2014]

10. Clarifications on Rules prescribed under the Companies Act, 2013 – Matters relating to share capital and debentures :

(i) Share Transfer Forms executed before 1st April, 2014:—

· In case of the Share Transfer Forms executed before 1st April, 2014 as per earlier Form 7B but which are yet to be accepted / registered by companies, the MCA has clarified since the transaction relating to transfer of shares is a contract between two or more persons / shareholders, any share transfer form executed before 15th April, 2014 and submitted to the company concerned within the period prescribed under relevant section of the Companies Act, 1956 needs to be accepted by the companies for registration of transfers.

· In case any such share transfer form, executed prior to 1st April, 2014, is not submitted within the prescribed period under the Companies Act, 1956, the concerned company may get itself satisfied suitably with regard to justification of delay in submission etc.

· In case a company decides not to accept the share transfer form, it shall convey the reasons for such non-acceptance within time provided under section 56(4)(c) of the Act.

(ii) Delegation of powers by board under rule 6(2)(a):

· The MCA has clarified that the powers of the Board provided under rule 6(2)(a) of companies (Share Capital and Debentures) Rules, 2014 with regard to issue of duplicate share certiûcates can be exercised by a Committee of Directors, subject to any regulations imposed by the Board in this regard.

[General Circular-19/2014 dated 12/06/2014]

11. Clarification with regard to voting through electronic means:

· The MCA has noticed that compliance with procedural requirements, engagement of Depository Agencies and the need for clarity on matter like demand for poll/postal ballot etc will take some more time. Accordingly, it has decided not to treat the relevant provisions as mandatory till 31st December, 2OI4.

[General Circular-20/2014 dated 17/06/2014]

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From Published Accounts

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AS-15 Employee Benefits

Notes forming part of financial statements for the year ended 31-03-2014

CMC Limited

Employee benefits include provident fund, gratuity fund, superannuation fund, employee state insurance scheme, compensated absences, and post-employment medical benefits.

Post–employment benefit plans

Payment to defined contribution retirement benefit schemes are charged as an expense as they fall due.

For defined benefit plans in the form of gratuity fund and post-employment medical benefits, the cost of providing benefits is determined using the Projected Unit Credit method, with actuarial valuations being carried out at each Balance Sheet date. Actuarial gains and losses are recognised in the Statement of Profit and Loss in the period in which they occur. Past service cost is recognised immediately to the extent that the benefits are already vested and otherwise is amortised on a straight-line basis over the average period until the benefits become vested. The retirement benefit obligation recognised in the Balance Sheet represents the present value of the defined benefit obligation as adjusted for unrecognised past service cost, as reduced by the fair value of scheme assets. Any asset resulting from this calculation is limited to past service cost, plus the present value of available refunds and reductions in future contributions to the schemes.

Short-term employee benefits

The undiscounted amount of short-term employee benefits expected to be paid in exchange for the services rendered by employees are recognised during the year when the employees render the service. These benefits include performance incentive and compensated absences which are expected to occur within twelve months after the end of the period in which the employee renders the related service. The cost of such compensated absences is accounted as under:

I. In case of accumulated compensated absences, when employees render the services that increase their entitlement of future compensated absences; and

II. In case of non-accumulating compensated absences, when the absences occur.

Long-term employee benefits

Compensated absences which are not expected to occur within twelve months after the end of the period in which the employee renders the related service are recognised as a liability at the present value of the defined benefit obligation as at the Balance Sheet date less the fair value of the plan assets, if any out of which the obligations are expected to be settled.

ICICI Bank Limited

Staff Retirement Benefits

Gratuity

The Bank pays gratuity to employees who retire or resign after a minimum prescribed period of continuous service and in case of employees at overseas locations as per the rules in force in the respective countries. The Bank makes contribution to a trust which administers the funds on its own account or through insurance companies.

The actuarial gains or losses arising during the year are recognised in the profit and loss account.

Actuarial valuation of the gratuity liability is determined by an actuary appointed by the Bank. Actuarial valuation of gratuity liability is determined based on certain assumptions regarding rate of

interest, salary growth, mortality and staff attrition as per the Projected unit credit method.

Superannuation Fund

The Bank contributes 15.00% of the total annual basic salary of certain employees to superannuation funds managed and administered by insurance companies for its employees. The Bank also gives an option to its employees, allowing them to receive the amount contributed by the Bank along with their monthly salary during their employment.

The amount so contributed/paid by the Bank to the superannuation fund or to employee during the year is recognised in the profit and loss account.

Pension

The Bank provides for pension, a defined benefit plan covering eligible employees of erstwhile Bank of Madura, erstwhile Sangli Bank and erstwhile Bank of Rajasthan. The Bank makes contribution to a trust which administers the funds on its own account or through insurance companies. The plan provides for pension payment including dearness relief on a monthly basis to these employees on their retirement based on the respective employee's years of service with the Bank and applicable salary. Actuarial valuation of the pension liability is determined by an actuary appointed by the Bank. Actuarial valuation of pension liability is calculated based on certain assumptions regarding rate of interest, salary growth, mortality and staff attrition as per the projected unit credit method.

The actuarial gains or losses arising during the year are recognised in the profit and loss account.

Employees covered by the pension plan are not eligible for employer's contribution under the provident fund plan.

Provident Fund

The Bank is statutorily required to maintain a provident fund as a part of retirement benefits to its employees. Each employee contributes a certain percentage of his or her basic salary and the Bank contributes an equal amount for eligible employees. The Bank makes contribution as required by The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 to Employees' Pension Scheme administered by the Regional Provident Fund Commissioner. The Bank makes balance contributions to a fund administered by trustees. The funds are invested according to the rules prescribed by the Government of India.

Actuarial valuation for the interest rate guarantee on the provident fund balances is determined by an actuary appointed by the Bank.

The actuarial gains or losses arising during the year are recognised in the profit and loss account.

Leave encashment

The Bank provides for leave encashment benefit based on actuarial valuation conducted by an independent actuary

Chemfab Alkalis Limited

1. Defined Contribution Plan
   a. Fixed contribution to provident fund are recognized in the accounts at actual cost to the company.
   b. Super Annuation Fund: The Company makes contribution to a scheme administered by the insurer to discharge its liabilities towards super annuation to the employees. The Company has no other liability other than its annual contribution.
2. Defined Benefit Plan
   a. Gratuity: The Company makes contribution to a scheme administered by the insurer to discharge gratuity liabilities to the employees. The Company records its gratuity liability based on independent actuarial valuation as at the Balance Sheet date using the Projected Unit Credit Method. Actuarial gains and losses are immediately recognized in the Statement of Profit and Loss.
   b. Accumulated compensated absence: The Company records its Compensated absence liability based on actuarial valuation as at the Balance Sheet date by an independent actuary using the Projected Unit Credit Method.

contd. on page no. 256

From the Government

CA. Kunal A. Shah
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Income Tax

1) CBDT notified cost inflation index for the financial year 2014-15 as 1024, vide notification no. 31, dated 11/06/2014.

Wealth Tax

1) Notification regarding amendment in Wealth – tax Rules, 1957

CBDT here by makes the following rules further to amend the Wealth tax Rules, 1957,namely:

A) In case of individuals, HUF and companies the return of net wealth in respect of assessment year 2013-14 and earlier assessment years shall be in form BA.

B) In case of individuals, HUF and companies the return of net wealth in respect of assessment year 2014-15 and any other subsequent assessment years shall be in form BB.

C) In case of individuals and HUF the return of net wealth in form BB in respect of assessment year 2014-15 and any other subsequent assessment years shall be furnished electronically under digital signature , provided provisions of section 44AB of the income tax are applicable to such individuals and HUF. Otherwise they can file the wealth tax return in a paper form.

D) The return of net wealth in form BB shall not be accompanied by a statement of computation of tax payable or proof of tax and interest paid or any other document required to be attached with the return of net wealth under any provisions of the Act.

(For form BB and full text refer notification no. 32, dated 23/06/2014)

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contd. from page 255

From Published Accounts

3. Other Employee Benefits

Other employee benefits are estimated and accounted as per the Company's policy and the terms of the employment contract.

Claris Lifesceinces Limited

Retirement benefits

Defined Contribution Plan :

The Company's contributions paid/ payable for the year to Provident Fund and ESIC are charged to the profit and loss account for the year.

Defined Benefit Plan :

The Company's liabilities towards gratuity and leave encashment are determined using the projected unit credit method which considers each period of service as giving rise to an additional unit of benefit entitlement and measures each unit separately to build up the final obligation. Past services are recognised on a straight-line basis over the average period until the amended benefits become vested. Actuarial gain and losses are recognised immediately in the profit and loss account as income or expense. Obligation is measured at the present value of estimated future cash flows using a discounted rate that is determined by reference to market yields at the balance sheet date on Government bonds where the currency and terms of the Government bonds are consistent with the currency and estimated terms of the defined benefit obligation.

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Association News

CA. Abhishek J. Jain
Hon. Secretary

CA. Nirav R. Choksi
Hon. Secretary

Forthcoming Programmes

Date/Day	Time	Programmes	Speaker	Venue
14.07.2014	6.00 pm to 8.00 pm	Technical Aspects of Finance Bill, 2014	Shri Saurabh N. Soparkar	Tagore Hall, Paldi, Ahmedabad.
18.07.2014	5.00 pm to 7.00 pm	3rd Study Circle Meeting on "Budget Amendment"	Service tax - CA. Nilesh V. Suchak and Income Tax - CA. Jignesh Shah	H.K. College Conference Hall, H. K. College, Ashram Road, Ahmedabad.
02.08.2014 to 06.08.2014		41st Residential Refresher Course	Various Speakers	Jaypee Palace Hotel & Convention Centre, AGRA.
09.08.2014		2nd Brain Trust Meeting on "Issues on Tax Audit (Tax and Audit Perspective)	CA. Sanjay R. Shah	ATMA Hall, Ashram Road, Ahmedabad.

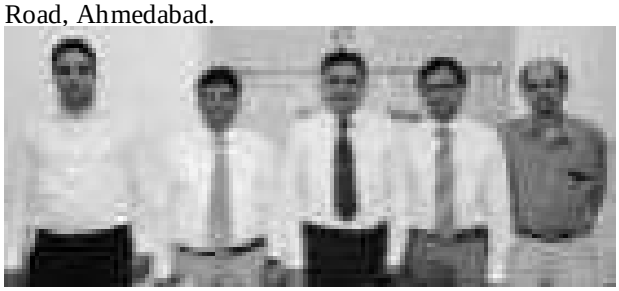
Glimpses of events gone by:

A Programme **'Hassayro'** Organised by the Entertainment and Cultural Committee on 13th June 2014, at Tagore Hall, Ahmedabad.

A Programme by Information Technology Committee on **"Generating Financial Statements in Revised Schedule VI** was held on 20th June 2014 at AMA, ATIRA Campus, Near IIM, Ahmedabad.

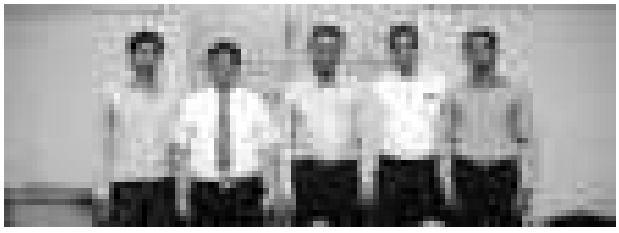
(L to R C.A. Abhishek J. Jain, CA. Shailesh C. Shah, Speaker Mr. Deepak Gupta, CA. Anuj J. Sharedalal and CA. Vijay M. Valia)

1st Brain Trust cum Workshop Committee Programme was held on 21st June 2014 on the topic of **"Issues in Service Tax – A Mixed Bag"** at ATMA Hall, Ashram Road, Ahmedabad.



(L to R CA. Abhishek J. Jain, CA. Shailesh C. Shah, Speaker CA. Rajiv Luthia, CA. Kunal A. Shah and CA. Yogi K. Upadhyay)

2nd Study Circle Meeting was held on 25th June 2014 on the topic of **"CA as a Practitioner and Net Working of CA Firms** at H.K. College Conference Hall, Ashram Road, Ahmedabad.



(L to R CA. Naishal Shah, CA. Shailesh Shah, Speaker CA. Dhinal Shah, CA. Abhishek Jain, CA. Mehul Shah)

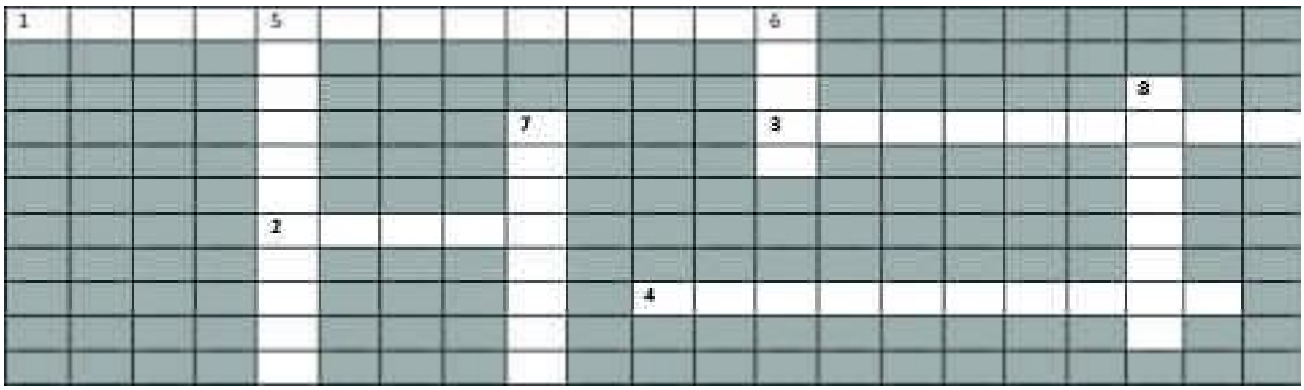
ACAJ Crossword Contest # 3

Across

1. Manufacture, supply and installation of lift is treated as _____.
2. Due to peculiar nature of services it is difficult to determine the _____ of service.
3. Service tax paid on Group Personal Accident of _____ is eligible for credit as input service.
4. Interest on enhanced compensation is to be taxed on _____ basis.

Down

5. Benefit of _____ is not available to Independent Directors.
6. If tax payable determined does not exceed _____ thousand rupees, in such cases assessee cannot be prosecuted u/s 276CC.
7. CAA's updates are now available on this social networking site.
8. This is how E.Sreedharan popularly known as.



Notes:

1. The Crossword puzzle is based on previous issue of ACA Journal.
2. Three lucky winners on the basis of a draw will be awarded prizes.
3. The contest is open only for the members of Chartered Accountants Association and no member is allowed to submit more than one entry.
4. Members may submit their reply either physically at the office of the Association or by email at caaahmedabad@gmail.com on or before 28/07/2014.
5. The decision of Journal Committee shall be final and binding.

Winners of ACAJ Crossword Contest # 2
1. CA. Kamlesh Parikh
2. CA. Gaurang Choksi
3. CA. Dhaval Patel

ACAJ Crossword Contest # 1 - Solution

Across

1.	RegisteredValuers	2.	Shantiniketan
3.	Agra	4.	Bangladesh

Down

5.	Gross Profit	6.	Mananam
7.	RBI	8.	Service

❊ ❊ ❊