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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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Let Go the Hurt !

I am sure all of you must have experienced the feeling of 'Hurt'. Most of you may not have to go very far in past of your present life. If you close your eyes for a moment and start remembering about the incidents of Hurt caused to you, you will see them and the persons involved, emerging frame by frame in your mind, who have given you the feeling of Hurt. This feeling may have come to you due to actions or words or sometimes due to in-action of the concerned person/s. Going a step further, you may also try to visualize the incidents and the persons concerned where your words / action /in-action may have caused Hurt to others. More often than not, the concerned persons would be your spouse, children, parents, friends, office colleagues and occasionally may be an unknown person also.

One example of feeling Hurt: You were told by your wife that she is going to prepare Pav Bhaji for dinner. With this expectation you reach home. Pav Bhaji is your favourite food. You find that instead of Pav Bhaji you are served Khichdi. You lose your temper and say unpleasant things to your wife. You get Hurt and she also gets Hurt. You do not ask her what was the reason for change in menu. Here you assume too many things and hence lose your temper. You think negatively of the situation.

Remember, Hurt has been felt by you due to **Your Perception** of the issue involved. It is a situation where you yourself have become a Complainant as well as a Judge.

Most of us feel like taking a revenge for the Hurt caused to us. Revenge usually does not involve a physical fight but mostly it involves a mental exercise to find out ways of satisfying our self of having taken a revenge. This idea of revenge keeps us in constant remembrance of the incident and gives us subconsciously a depressed feeling. Moreover all our energy gets diverted to unproductive work in waiting to take revenge.

Constant remembrance of Hurt and Revenge, since both are inter connected, acts like a deep ravine in the progress of your spiritual life. To uplift your life, it is required to erase from your memory these two.

What will happen if you don't let go the Hurt?

Perceived Hurt would cause damage to your health, affect your mood, your productivity, your relationships, and ultimately quality of your life.

Those who are already on Spiritual path will agree that when you don't let go the Hurt, consciously or sub consciously you will remember the Hurt quite often. This will give you negative thoughts about the person concerned, which in turn will send negative vibrations to the concerned person. This will result in a debit entry in your 'karmik' account. Your negative thought will be rebounded by negative vibrations and ultimately you will create a negative energy for your self.

The first step should be to think that the Hurt felt by you is on account of Your Perception and your perception is not a Fact. Think that just as you have your perception, so also the other person who you think has caused Hurt has also his perception about the incident. The incident was Your Perception and think that it was an illusion which you mistook as an incident.

If Hurt still persists, one of the simple ways to remove Hurt is to forgive the person concerned who according to **Your Perception** has caused you Hurt. Your act of forgiveness should be a sincere one and not just a formality.

"The weak can never forgive. Forgiveness is the attribute of the strong", said Mahatma Gandhi.

Just as you forgive others, you also have to seek forgiveness for hurt caused by you to others.

Forgiving is difficult to practice initially. But once you start forgiving, you will feel very light and stress free. There will be no negative thoughts and this will help you in enjoying your life.
So, Let Go the Hurt!

Editorial

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Law Encroachment

The basic foundation of the Indian democracy is its three pillars, viz. Legislature, Judiciary and Executive. The role of legislature, parliament and state assemblies is to frame laws for smooth functioning, Executive ensures its proper administrations and implementation and Judiciary takes care of the scenario where there is any violation. The law of the land reigns supreme and every citizen need to abide by it. The question arises are the roles of Legislature, Executive and Judiciary interchangeable? Can the Executive take over the role of the Legislator or exercise its powers in the manner against the spirit of the law framed by the Legislature? The obvious answer to the question is, 'No'.

Of late, especially in administration of the Income Tax Law it is observed that the body responsible for the regulation and management is often found to work as a law maker. The role of Central Board of Direct Taxes is to ensure proper administration of direct tax laws through Income Tax Department. The CBDT, now a days is working arbitrarily without considering the interest of tax payer public in the country. Referring previous editorial, introduction of income tax return forms after the end of three months of a financial year was just one example. The apathy has not stopped there. Recent couple of decisions by the CBDT, against the spirit of law, is adding to the worries of the tax payers as well as tax professionals.

Against the hue and cry in response to changes in tax audit forms, the CBDT extended the date of obtaining and furnishing tax audit report u/s 44AD to 30-11-2014. One would fail to understand whether such a decision taken by the Board is made without taking into consideration the provisions of the Income Tax Act. The Board has been granted certain powers to alter some dates for proper administration under section 119 of the Income Tax Act. Extending date for filing of return u/s 139 is one such authority granted. However, the Board has no such power to alter the date of obtaining and furnishing the tax audit reports. There is no reference of section 44AB in section 119 of the Income Tax Act. It appears that the people who are issuing such illegal circulars are not acquainted with the basic provisions of law. If so is the case, how they would be administering the law?

The Board has not stopped here. Recently another circular has been issued making it mandatory for all tax deductors to file an online declaration on the website of the Department, where in a quarter there is no tax deducted and deposited. Is there any provision under the Income Tax Law that mandates a tax deductor to file such declaration? Again the answer seems to be 'No'. Various courts have held in past that there is no liability on the part of the tax deductor to furnish TDS statements, if there is no tax deductible and payable for any period. Despite this, the Board has come with an impulsive circular framing its own law ignoring the provisions of the Income tax Act.

Instances have been heard of land encroachment; however, it would be the first time where the Income Tax Law is encroached by certain group of people responsible for its smooth administration and in fact not just the law but the process of the law making with the aid of illegal circulars. The poor tax payer of the country, left with no choice, accepts, accommodates and adjusts himself to follow such mandates.

Namaste,
CA. Ashok Kataria

From the President

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Dear Esteemed Readers,

Prime Minister **Narendra Modi**'s maiden Independence Day Speech at the Red Fort was highly memorable. Any student wanting to develop oratorical capabilities can certainly use Prime Minister Modi's extempore speech at the Red Fort as an inspiration. His Speech laid out his biggest concerns for the country. His speech touched almost every aspect. He spoke of governing through consensus and not on the basis of majority in Parliament. He emphasised that nation building could not be left to the government alone, but time has come that people stop asking "Mera Kya" and "Mujhe kya", and contribute to the collective sense of duty and responsibility for national interest. Spelling out his vision of "come and make in India", he invited manufacturers to invest in India and step up its industrial growth and that may be the booster for the profession as far as professional opportunities are concerned. He urged the youth to unleash their potential and work towards manufacturing goods locally that are currently on the import list.

"Made in India must be a synonym for excellence... Try and make one thing that India won't need to import... the country must become a global exporter. But ensure zero-defect when it comes to quality". Swachh Bharat or Clean India will be another campaign high on his priority list. Urging people to clean homes, villages and towns" across the nation, Modi said this would be a fitting tribute to Mahatma Gandhi on his birth anniversary. The vision seems to be clear, only time would tell whether we are able to make India a better nation.

Since last many years September is a month when almost all chartered accountants are normally busy in preparing tax audits reports along with filing returns of income. However the position this time is somewhat different. The reason behind this is that CBDT unexpectedly changed the formats of the tax audit report U/S 44AB of Income-tax Act and to everyone's surprise these new formats were made applicable from Financial Year 2013-14, for which the date of filing tax audit reports is 30/09/2014. Due representation has been made by various bodies including representation made by our Association to postpone the applicability of the new report from next year. CBDT has extended the due date for obtaining and furnishing of report of audit u/s 44AB of the Act for the Assessment Year 2014-15.

The order of CBDT has created lots of confusion amongst the taxpayer and tax professionals by not extending the due date of filing income tax return. Our Association has again made a strong representation for extending the due date of filing the return. The copy of representation is already sent to all the members by e-mail.

At the Association Residential Refresher Course was organized at Jaypee Palace Hotel and Convention in beautiful city of Agra from 2nd to 6th August 2014. There were total 95 participant in the Residential Refresher Course. I am pleased to inform that the Central Council of ICAI was also at the same venue and we all had a chance to meet our all central council members. We felicitated all the central council members including the President and the Vice President at this occasion. I reckon that this was a maiden event in the history of the Association where the members of the Association got to meet all the council members. It was fruitful exchange of views. The experienced team of Cultural and Entertainment Committee led by the young and dynamic chairman and convenor organized the program that allowed members and family members to showcase their talent in Antakshri. 40 participants got the opportunity to present themselves on the big platform. The program was thoroughly enjoyed by all the members and their family members. Apart from Entertainment, second Brain Trust Meeting was organized on the topic of "Issues in Tax Audit" with CA. Sanjay R. Shah and CA Hardik Sutaria, as the trustees of the meeting.

The results of CA Final and IPC examinations conducted in May / June 2014 were declared recently. I congratulate all those who passed in the examination. And those students who could not succeed, I can only say that when one fails he should never give up because FAIL means "First Attempt In Learning". If you get No in the result remember No means " Next Opportunity" . So be positive and work hard.

With regards,
CA. Shailesh C. Shah
President

Taxation of Charitable Trusts

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The first Budget of the BJP led NDA Government, under the leadership of Shri Narendra Modi, was presented in the Parliament on 10th July, 2014. This Budget, with the Finance (No.2) Bill 2014, has been passed without any serious discussion on the amendments made in the Income Tax Act (Act). The Finance (No.2) Act, 2014 has received the assent of the President on 6th August, 2014.

There are some positive features in the Finance Act which reduces the burden of tax on Individuals, HUFs etc., as also gives incentives for increasing savings, encouragement to small and medium size manufacturing Companies with a view to create new jobs and encourage growth of economy. Some steps are also taken to reduce tax litigation, to expand scope for approaching Authority for Advance Ruling, Settlement Commission etc. However, one disturbing area relates to some of the amendments made in the Act whereby additional powers are given to CIT w.e.f. 1.10.2014 to cancel Registration of charitable Trusts u/s 12AA for non-compliance of some of the provisions of sections 11 or 13 of the Act. These provisions are very harsh and will put a large number of Public Trusts and Institutions into difficulties. The Finance (No.2) Act, 2014, amends section 10(23C), 11 and 115 BBC of the Income tax Act from A.Y. 2015-16. Sections 12A and 12AA have been amended from 1.10.2014. These amendments relating to Charitable Trusts and Institutions are briefly discussed in this article.

1 **Charitable and Religious Trusts cannot claim exemption u/s 10** : A trust or institution which is registered or approved or notified as a charitable or religious Trust under section 12AA or 10(23C) (iv), (v),(vi) and (via) will not now be entitled to claim exemption under any of the general provisions of section 10.

The intention is that such entities should be governed by the special provisions of sections 10(23C) 11,12 & 13, which is a code by itself, and should not be eligible to claim exemption under other provisions of section 10. Therefore, such entity will not now be entitled to claim that its income, like dividend income (exempt u/s. 10(34)) or income from mutual funds (exempt u/s. 10(35)), or interest on tax free bonds, is exempt under section 10 and hence not liable to tax. Such income continues to qualify for exemption under section 10(23C) or section 11.

Agricultural income of such an entity, however, will continue to enjoy exemption under section 10(1). Further, such an entity eligible for exemption under section 11 will not be barred from claiming exemption under section 10(23C).

2 **Depreciation on Capital Assets**:

(i) Hitherto, almost all courts in India, while interpreting Section 11, have held that income of a charitable trust u/s 11 is to be computed on the basis of accounting method adopted by the trust following the commercial principles. (CIT V/s Trustees of H.E.H. Nizam's Supplemental Religious Endowment Trust 127 ITR 378(AP), CIT V/s Estate of V.L.Ethiraj 136 ITR 12 (Mad) and CBDT circular No.5-P (Lxx-6) dated 19.06.1968).

On this basis the courts have taken the view that depreciation on assets of the trust is to be deducted for the purpose of calculation of Income of the trust in commercial sense u/s 11 of the Income Tax

Act. The well settled principle of law, as laid down by various courts, during the last more than 50 years is that under the scheme of Section 11, there are following two steps

(a) In the first step income of the trust is to be "computed" on commercial principles and depreciation on capital assets is to be deducted for this purpose.

(b) In the second step the income so computed is to be compared with "application" of this income to objects of the trust. For application of such Income, Capital and Revenue expenditure incurred during the year for the objects of the trust is be compared with the figure of Income as computed in (a) above.

Therefore, "Depreciation" and expenditure for acquiring "Capital Asset" fall under two different fields and there is no double deduction of expenditure (Refer CIT V/s Framjee Cawasjee Institute 109 CTR 463 (Bom), CIT V/s Institute of Banking Personnel Selection 264 ITR – 110 (Bom), CIT V/s Society of Sister of St. Anne 146 ITR 28 (Kar), CIT V/s Seth Manilal Ramchhoddas Vishram Bhavan Trust 198 ITR 598(Guj) and CIT V/s Market Committee, Pipali 330 ITR 16 (P&H)

(ii) By amendment of Section 10(23C) and 11, from A.Y. 2015-16, it is now provided that depreciation will not be allowed in computing the income of the Trust or Institution in respect of an asset, where cost of acquisition has already been claimed as deduction by way of application of income in the current or any earlier year. It may be noted that this amendment will over rule all the above decisions of various High Courts.

(iii) Logic for the above amendment is given in the Explanatory Memorandum as under:

"The existing scheme of section 11 as well as section 10(23C) provides exemption in respect of income when it is applied to acquire a capital assets. Subsequently, while computing the income for purposes of these sections, notional deduction by way of depreciation etc. is claimed and such amount of notional deduction remains to be applied for charitable purpose.

Therefore, double benefit is claimed by the trusts and institutions under the existing law. The provisions need to be rationalized to ensure that double benefit is not claimed and such notional amount does not get excluded from the condition of application of income for charitable purpose."

It will be noticed that this logic is quite opposite to the well settled law as interpreted by various High Courts.

(iv) The effect of the above amendment will be that all the Trusts/Institutions which will be affected by this amendment will have to maintain two separate records of Capital Assets as under:

(a) WDV of Capital Assets in respect of which depreciation as well as deduction by way of application of income is claimed upto A.Y. 2014-15.

(b) WDV of Capital Assets in respect of which deduction by way of application of income has not been claimed upto A.Y. 2014-15 but only depreciation is claimed and allowed.

It may be noted that from A.Y. 2015-16 depreciation will not be allowed in respect of WDV of Capital Assets as stated in (a) above. As regards WDV of Capital Assets as stated in (b) above, depreciation can be claimed in A.Y. 2015-16 even after the above amendment.

3 **Section 10 (23C):** The existing section 10(23C)(iiiab) and (iiiac) grants exemption to educational institutions, universities and hospitals that satisfy certain conditions and which are wholly or substantially financed by the Government. The term "substantially financed by the Government" is not defined and hence resulted in litigation (Refer CIT vs. Indian Institute of Management 196 Taxman 276 (Kar). It is now clarified that if the Government grant to such institutions exceeds the prescribed percentage of the total receipts, (including voluntary contributions), then it will be considered as being substantially financed by the Government.

4 **Section 12A- Registration of Trust:** Section 12A has been amended w.e.f. 01.10.2014. At present a trust or an institution can claim exemption only from the year in which the application for registration under section 12AA has been made. As such, registration can be obtained only prospectively and this causes genuine hardship to several charitable organizations. It is now provided that the benefit of sections 11 and 12 will be available to such trusts for all pending assessments on the date of such registration, provided the objects and activities of such trusts in these earlier years are the same as those on the basis of which registration has been granted. It is also provided that no action for reopening assessment under section 147 shall be taken by the Assessing Officer merely on the ground of non-registration. Accordingly, completed assessments in which benefit under section 11 has been granted, will not be adversely affected on account of non-registration. It may be noted that such benefit will not be available to trusts where the registration was earlier refused or was cancelled.

5 **Section 12AA – Power to CIT to cancel Registration:** (i) The amendment made in section 12AA, w.e.f. 01.10.2014, giving additional power to the CIT to cancel Registration of a Trust will create great hardships to the trusts. At present, for non-compliance with some of the requirements of section 11,12 or 13 the trust is liable to pay tax for that year. Now, the amendment in section 12AA empowering CIT to cancel Registration of the trust for such non-compliance will mean that a trust which has been complying with these provisions for several years in the past and also in subsequent years will loose exemption in that year and also in subsequent years. This is a very harsh and uncharitable provision and will lead to unending litigation in which trustees will have to spend trust funds which they would have utilized for charitable purpose. Surprisingly, none of the Public Trusts or institutions have seriously opposed this amendment before it was passed in the Parliament.

(ii) Briefly stated the amendment in section 12AA is as under.

At present registration of a trust / institution once granted, can be cancelled only under following two circumstances:

(a) The activities of the trust are not genuine; or

(b) The activities are not being carried out in accordance with the objects of the trust.

Now, the Commissioner has also been given power to cancel registration besides the above two circumstances, if it is noticed that the trust has not complied with the provisions of sections 11, 12 or 13 in the following manner.

(a) Income does not ensure for the benefit of the public;

(b) Income is applied for the benefit of any religious community or caste (In case of a trust established on or after 01.04.1962);

(c) Income is applied for the benefit of persons specified in Section 13(3) i.e. related parties;

(d) Funds of the Trust/ Institution are invested in prohibited modes i.e. there is non-compliance with Section 11(5) or 13.

It is however provided that registration will not be cancelled if the trust/ institution proves that there was reasonable cause for breaching any of the above conditions.

(iii) It is true that the Trustees can file appeal against the order of CIT to ITA Tribunal when such registration is cancelled. But this will invite litigation in which trust money will have to be spent.

(iv) It may be noted that this additional power given to CIT raises several issues which have not been considered while making the above amendments.

Some of these issues are as under:

(a) Whether the above amendment applies to assessments made after 1/10/2014 or will apply to assessments made prior to that date in which there was non-compliance with Sections 11 or 13 and the Trust/Institution has been denied exemption u/s 11. If this additional power to cancel registration can be exercised in respect of assessments made prior to 1/10/2014, it will mean that this amendment is retroactive

(b) Compliance with sections 11,12 or 13 raises several issues of interpretation. Therefore, a question will arise as to at what stage the CIT will exercise this additional power to cancel registration. In other words, whether he will cancel registration when any adverse assessment order for a particular year is passed by the A.O. or when the entire appellate proceedings, in which the order is challenged, are completed. If registration is cancelled when the adverse assessment order is passed, whether the original order granting registration will be automatically revived if the Trust/Institution ultimately succeeds in the appeal.

(c) Whether cancellation of registration as a result of this amendment will be for the year in which there is non-compliance with sections 11, 12 or 13. If this is not the case, the trust will not be able to claim exemption u/s 11 in subsequent years for which assessments are pending although all the conditions of sections 11 or 13 are complied with.

(d) If the registration is cancelled for non-compliance with sections 11 to 13 in one year, whether the CIT can consider granting registration in subsequent years when the trust is complying with these provisions.

(e) If registration is cancelled, say for A.Y. 2013-14, whether the income of the trust / institution will be computed u/s 11 or after applying all the other provisions of the Income tax Act for computation of total income.

(f) If registration is cancelled in the case of a trust holding certificate u/s 80 G, what will be the position of persons who have given donations and claimed deduction u/s 80G, in that year and in subsequent years, including years after cancellation of registration. It may be noted that there is no corresponding amendment in section 80G where by CIT can cancel certificate given under the section.

(v) Considering all these issues, it appears that when the trust is required to pay tax in the year when provisions of Sections 11 or 13 are not complied with, this additional power to CIT to cancel registration of the trust should not have

been given. There is a grave danger of unhealthy practices being adopted by those dealing with assessments of Charitable Trusts.

6 The effect of the above additional power, if exercised by the CIT, will be felt in the following cases which are only illustrative.

(i) If the trust / institution has let and a part of the premises to a relative of a trustee at a rent which according to A.O is below the market rate. This is disputed by the trust / institution in appeal as the exemption is denied u/s 11.

(ii) If the trust/ institution has claimed exemption for a donation received as corpus donation but it is not able to obtain letter of confirmation from the Donor before the date of assessment. The A.O treats the donation as income u/s 12 and denies exemption u/s 11 as the income applied, according to him, is below 85% of income of the Trust. The matter is disputed in appeal as the trustees have received the confirmation letter after the date of the assessment order.

(iii) A trustee has given interest free loan to the trust / institution to meet its immediate needs without obtaining permission of Charity Commissioner. In spite of the fact that application before Charity Commissioner is pending consideration on the date of passing the assessment order the A.O denies exemption u/s 11.

The appeal against this order is pending.

(iv) The A.O has denied exemption u/s 11 on the ground that Form 10 for accumulation of income was not filed before due date but was filed during the course of assessment proceedings. Appeal against this assessment is pending.

7 **Section 115-BBC - Anonymous Donations:** The existing provisions of section 115BBC provide for levy of tax at the rate of 30% in the case of Trust / Institution, being university, hospital, charitable organization, etc. on the amount of aggregate anonymous donations exceeding five per cent of the total donations received by the trust / institution or one lakh rupees, whichever is higher. This section is amended from A.Y. 2015-16 to provide that the incometax payable shall be the aggregate of the amount of income-tax calculated at the rate of thirty per cent on such aggregate of anonymous donations received and the amount of income-tax with which the trust / institution would have been chargeable had its total income been reduced by the aggregate of such anonymous donations. This amendment is to rationalize the provisions of the section.

8 From the above discussion it will be noticed that while some of the amendments relating to charitable trusts are beneficial, the amendment giving additional power to CIT to cancel registration u/s 12AA if the trust / institution does not comply with requirements u/s 11 or 13 is disturbing. Those dealing with matters relating to taxation of Charitable or Religious Trusts know how difficult it is to obtain registration u/s 12AA. If such registration is cancelled on the ground of non-compliance with the requirement of Sec. 11 or 13 in one year, it will be difficult to get registration once again. This amendment will end up in unending litigation in which public trust movies, which would have been spent for charitable purposes, will have to be spent. There is also a danger of some persons using unethical means to ensure that Registration u/s 12 AA is not cancelled. Considering all these aspects, this particular amendment in section 12AA needs to be withdrawn by the Government.

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Analysis of Major Changes Made in Tax Audit Report

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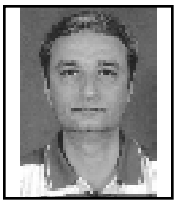

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Introduction

CBDT has through its Notification No: 33/2014 dated 25th July, 2014 amended the Income Tax Rules, 1962 to revise Tax Audit Report forms. In revised tax audit reports, number of clauses in Form 3CD is increased from 32 to 41 and many existing clauses are revised drastically. Initially, it is made applicable for A.Y.2014-15 only with no extension of time, because of which there was a cause of concern in our fraternity and many representations were made to CBDT as well as to the Finance Ministry. When we are putting up our pen to write this article, one ray of happiness has come from CBDT extending time limit to obtain and furnish tax audit report for the current year u/s 44AB from 30th September, 2014 to 30th November, 2014. Immediately on receiving such notification, the discussions started regarding the due date for filing of return of income. CBDT has also provided online schema covering the changes made to upload revised tax audit reports. In the back drop of this, let us analyse the changes made.

Changes made in Form 3CA/3CB

1) In clause 1(a), earlier only *year* ending date was required to be mentioned while in the revised 3CA/3CB *period* starting date and ending date needs to be mentioned. The only reason we can conclude for this change is to clearly accommodate situations like starting up new business of profession, amalgamation and demerger etc.

2) In clause 3, while commenting as to whether particulars given in annexed Form 3CD are true and correct, there is a specific reference to examination of books of account and other relevant documents, which was not there in earlier form 3CA.

3) The words *"subject to following observations or qualification, if any"* have been added in the opinion paragraph of Form 3CA/3CB. It has created practical difficulties as regards to Form 3CB. In form 3CB, under clause 3(a) itself the tax auditor is required to state any observations/comments/discrepancies/ inconsistencies if any. Again in the revised form 3CB, the observations/qualifications, if any are required to be mentioned in clause 5 i.e. in opinion paragraph.

4) Earlier Form 3CA/3CB was required to be signed by a Chartered Accountant within the meaning of the Chartered Accountants Act, 1949 or by a person who, in relation to any State, is, by virtue of the provisions of sub-section (2) of section 226 of the Companies Act, 1956 (1 of 1956), entitled to be appointed to act as an auditor of companies registered in that State. As per revised tax audit reports, it is required to be signed by person eligible to sign the report as per the provisions of Section 44AB of the Income Tax Act, 1961. In our opinion, the intention behind this change is to allow other professionals such as company secretaries, cost accountants, advocates etc. to carry out tax audit in future by amending definition of accountant u/s 288. The same is already proposed under the Direct Tax Code which is warning sign for the Chartered Accountants in practice.

5) Stamp and seal of the signatory is now mandatorily required in the revised tax audit reports which was not required earlier.

Changes made in Form 3CD

1) Clause 4: Disclosure of liability and registration under indirect taxes:

This is the new clause added under the revised tax audit report which requires reporting as to whether the assessee is liable to pay any indirect taxes; if yes then registration number or any identification number allotted for the same is required to be furnished in respect of all the Indirect Tax provisions. The intention behind such change is to easily cross confirm certain information with other taxing authorities. Though this change looks simple, it can extend liability of the tax auditor to a great extent as there is a risk that assessee may have been liable to pay any indirect tax but may not have been registered under the same and may not have paid such tax. For this, tax auditor should reasonably satisfy himself that wherever the assessee is liable to pay any indirect taxes by checking books of accounts and by obtaining knowledge of client's business, and if yes, then whether it has taken registration for the same and disclosed accordingly in form 3CD. Registration number need to be traced from the registration letter / license issued by the relevant authorities. There may be multiple registration numbers applicable for one assessee due to different services / units etc. In such a case, the registration details of all such services / units should be disclosed. In addition, the tax auditor should also obtain representation from the assessee regarding all the applicable indirect tax laws.

2) Clause 8: Relevant Clause of Section 44AB under which the audit has been conducted:

Sub-clauses of section 44AB covers various circumstances under which tax audit needs to be carried out. Those are as follows:

- a person carrying on business fulfilling criteria of turnover
- a person carrying on profession fulfilling criteria of turnover
- a person carrying on business if profits and gains are deemed u/s 44AE, 44BB and 44BBB and person has claimed such income to be lower than the profits or gains so deemed to be the profits and gains of the business
- a person carrying on business if profits and gains are deemed u/s 44AD and person has claimed such income to be lower than the profits or gains so deemed to be the profits and gains of the business

3) Clause 11(b): Address at which books of accounts are kept:

Under this clause, disclosure is to be made regarding list of books of accounts and address at which the books of accounts are kept. Tax Auditor should be very careful that accurate reporting under such clause is made based on address given under this clause as the department may use it for conducting search and survey.

While reporting under such clause, problem would also arise in the following particular scenarios:

- Assessee operating at multi-location and books of accounts are maintained at different locations.
- When books of account can be accessible from head office of the company in SAP / ERP software while related supporting vouchers are maintained at different locations.

In all such cases, it is worthwhile to note the definition of books of account as per section 2(12A) of the Income Tax Act. Books of account includes ledgers, day-books, cash books, account-books and other books, whether kept in the written form or as print-outs of data stored in a floppy, disc, tape or any other form of electro-magnetic data storage devices. The definition includes books of account but does not include supporting vouchers or invoices. Accordingly, it may be concluded that if books of account are kept and can be examined from a single location through

SAP system or other electronic system, details of each location need not be separately stated. However, in cases where books of account are not kept at one location and cannot be examined from a single location, details of books of account at respective locations should be separately stated.

4) Clause 11(c): List of books of account and nature of *relevant documents* examined:

In this clause, change is made to also disclose along with books of account, other relevant documents examined by the tax auditor. What do the term "relevant documents" mean would depend upon the professional judgment of the tax auditor, till the time the term is clarified by ICAI in its Guidance Note. Generally, the tax auditor during his audit procedures examines various other documents to derive his opinion but not all such documents are required to be disclosed under this clause and relevancy & importance of the documents examined should be taken into account while making disclosure under this clause. Here are some of the items which may be considered as relevant documents to be disclosed.

- Document Regarding Constitution of the assessee. i.e. MOA/AOA in case of Companies, partnership deed in case of Partnership firm/LLP etc.
- Registration Certificate/Other Relevant Documents under Indirect Tax laws
- Financial Statements & Auditor's Report in case the statutory audit has been carried out by the person other than the tax auditor
- Minutes of Board Meetings, Director's reports etc. in case of company to check whether there is any change in the nature of business
- Evidence regarding shareholding pattern during the year in case of company
- Excise / Service Tax Returns
- Stamp duty valuation in case any land or building or both has been transferred during previous year
- Challans relating to payment of contributions received by the employees
- TDS / TCS Returns
- Payment proof of items covered u/s 43B
- Income Tax Return of the immediately preceding Previous Year
- Proof for Claiming Deductions under Chapter VIA or III
- Proof Regarding Dividend & Dividend Distribution tax payment
- Cost / Excise / Service Tax Audit Report
- Assessment Orders passed by the taxing authorities under the act other than Income Tax Act, 1961 and Wealth Tax Act, 1957

5) Clause 17: Land or Building or both are transferred during the previous year for a consideration less than value adopted or assessed or assessable by any authority of a State Government referred to in section 43CA or 50C:

In this clause, when land or building or both have been transferred during the previous year at the consideration which is less than the rate adopted for stamp duty valuation, then amount of such consideration and stamp duty value needs to be reported. For this clause, whenever land or building or both are transferred during previous year, tax auditor should obtain and verify evidence regarding stamp duty valuation of such land / building or both.

6) Clause 21(b): Amounts inadmissible under section 40(a) :

Changes are made under this clause to report sub clause wise amount inadmissible u/s 40(a). However, sub-clause (ii) of section 40(a) has not been included in revised 3CD which

requires disallowance of any sum paid on account of any rate or tax levied on the profits or gains of any business or profession. Hence, question arises as to whether disallowance relating to provision of income tax and deferred tax should be reported or not. *On a conservative basis, tax auditor can disclose disallowance under sub-clause (ii) in manual tax audit report physically signed by it but the same will not be possible while uploading tax audit report in utility as utility does not contain the box under which disallowance can be made u/s 40(a)(ii).*

7) Clause 21(d): Disallowance / deemed income under section 40A(3):

Earlier, the tax auditor was required to state whether he has obtained the certificate from the assessee as to whether payments were made by account payee cheques drawn on a bank or account payee bank draft, as the case may be u/s 40A(3) and based on that he was required to report amount inadmissible u/s 40A(3) read with Rule 6DD. As per revised tax audit report, the tax auditor is required to report amount inadmissible u/s 40A (3) based on examination of books of account and other relevant documents / evidence. In addition, as per revised tax audit report, tax auditor is also required to report deemed income u/s 40A (3A) which was not required earlier.

8) Clause 28 & 29: Receipt of share and issue of shares by a company:

These are the new clauses added by revised tax audit reports. As per clause 28, where in previous year the assessee received shares of the company not being a company in which public are substantially interested, without consideration or for inadequate consideration as per section 56(2)(viia), then details of the same need to be furnished. As per clause 29, where the assessee has during previous year received consideration for issue of shares which exceeds its fair market value as per section 56(2)(viib), then details of the same need to be furnished. Where such transactions have been incurred during the previous year, the tax auditor should verify as to calculations are made as per Rule 11 & 11UA of the Income Tax Rules.

9) Clause 31: Taking or accepting loan or deposit (Section 269SS/T):

Reporting under this clause has remained the same except that requirement of stating whether the certificate has been obtained certificate from the assessee regarding taking or accepting loan or deposit, or repayment of the same through an account payee cheque or an account payee bank draft has been done away with. In addition, it is worthwhile to mention here the amendment made by the Finance Act, 2014 which states that acceptance or repayment by use of electronic clearing system through a bank account is a valid mode of acceptance and repayment under section 269SS / 269T (w.e.f. 1st April, 2015).

10) Clause 34: Disclosure regarding TDS and TCS:

Earlier, it was required to report whether the assessee has complied with the provisions regarding tax deduction and payment thereof to the Central Government and any default was to be reported. Reporting under the revised tax audit report has been made very much in detail. The tax auditor is now required to make assessment regarding TDS / TCS provisions of the assessee rather than auditing. Under clause 34, details regarding provisions of TDS / TCS need to be given in three sub-clauses as mentioned hereunder:

- Under clause 34(a), if the assessee is required to deduct or collect tax, then details need to be given in the prescribed table regarding such deduction or collection. Question arises, as to whether party-wise details need to be given from which tax has been deducted or collected. If so, the disclosure under this clause would be very long in case of assessee having large operations. However in column 1 of the prescribed table, TAN number of the assessee which is required to deduct or

collect the tax is required to be mentioned. Based on that, we may conclude that section-wise nature of payment made / amount received and tax deducted / collected thereon may be disclosed under this clause and party-wise disclosure may not be required. For example, total payment made for contract services and total tax deducted u/s 194C thereon, or total payment made of fees for technical or professional services and total tax deducted u/s 194J thereon may be disclosed along with other details as per table prescribed.

- Under clause 34(b), disclosure needs to be made whether the assessee has furnished the statement of tax deducted or collected (TDS / TCS Return) within prescribed time and if not, details to be given in the prescribed table. It is also required to be reported as to whether such statement includes all the transactions regarding TDS / TCS.
- Under clause 34(c), if the assessee is liable to pay interest u/s 201(1A) of 206C(7), then details regarding interest payable as per such sections and actual interest paid need to be disclosed.

11) Clause 36: Dividend Distribution Tax u/s 115-O:

Under this clause, changes are made to also report reduction in the amount of dividend on which Dividend Distribution tax needs to be paid, of the following amounts.

- Under Section 115-O(1A)(i)

  dividend received by the domestic subsidiary company if such company has paid tax under this section or of the dividend received by the foreign subsidiary if the tax is payable by domestic company u/s 115BBD on such dividend.

- Under Section 115-O(1A)(i)

  Reduction of dividend of the amount if any, paid to any person for, or on behalf of, the New Pension Scheme

12) Clause 37,38,39-Other Audits:

Under this clause, disclosure should be made regarding if cost audit, excise audit and service tax audit has been carried out. If yes, then any disagreement or qualification reported / identified by such auditors needs to be disclosed.

13) Clause 41: Demand Raised or refunds issued under any tax laws other than Income Tax Act, 1961 or the Wealth Tax Act, 1957:

Under this clause, if there is any demand raised or refund issued during the previous year under any tax laws other than Income Tax Act, 1961 or the Wealth Tax Act, 1957 is to be reported. Verifying completeness of the disclosure made under this clause may be difficult for the tax auditor in case the client does not give all the required information regarding demands issued. If the assessee is a company, then tax auditor may cross verify disclosure made regarding contingent liabilities in the financial statements to check whether all the demands raised against the company and shown as contingent liabilities are disclosed under this clause. Other way to check the completeness is to get legal confirmation regarding all the demands raised against the assessee from the legal counsel of the assessee. Again, how much practical this procedure can be in the case of small assessee needs to be thought upon. Refunds issued and received by the assessee can be directly traced from the books of account. However, question arises as to whether refund acknowledged by the taxing authorities to be paid before 31st March but received later on should be reported or not. Can refund acknowledged by the taxing authority be considered as refund issued or it should be considered as issued only when received by the assessee? In this regard, if we take reference of clause 16(b), it may be concluded that in case refund acknowledged by taxing authorities before the year-end but

contd. on page no. 358

Glimpses of Supreme Court Rulings

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21 Service Law – Employer – employee relationship:

The schools are established by NALCO and NALCO is also providing necessary infrastructure. It has also given adequate financial support in as much as deficit, after meeting the expenses from the tuition fee and other incomes received by the schools, is met by NALCO. NALCO has placed staff quarters at the disposal of the schools which are allotted to the employees of the schools. Employees of the schools are also accorded some other benefits like recreation club facilities, etc. However, the poser is as to whether these features are sufficient to make the staff of the schools employees of NALCO.

In order to determine the existence of employer-employee relationship, the correct approach would be to consider as to whether there is complete control and supervision of NALCO.

The schools have their own Managing Committees who not only recruit teaching and other staff and appoint them, but all other decisions in respect of their service conditions are also taken by the Managing Committees. These range from pay fixation, seniority, grant of leave, promotion, disciplinary action, retirement, termination etc. It, thus becomes clear that day-to-day control over the staff is that of the Managing Committees. These Managing Committees are having statutory status as they are registered under the Societies Registration Act. Hence, Submission that Managing Committees do not have their own independent legal entities is liable to be rejected.

Merely because the schools are set up by NALCO or they have agreed to take care of the financial deficits for the running of the schools, are not the conclusive factors to determine employer-employee relationship. The exercise undertaken by the High Court was in the nature of piercing the veil and commenting that real control vests with NALCO. Whether the arrangement/contract is sham or camouflage is a disputed question of fact. In the present case, the writ petitions were filed and it was not a case where industrial disputes were raised by these employees.

No doubt, there may be some element of control of NALCO because of the reason that its officials are nominated to the Managing Committees of the schools. Such provisions are made to ensure that schools run smoothly and properly by the society. It also becomes necessary to ensure that the money is appropriately spent. However, this kind of 'remote control' would not make NALCO the employer of these workers. This only shows that since NALCO is shouldering and meeting the financial deficits, it wants to ensure that money is spent for rightful purposes.

[National Aluminium Company Ltd. and others vs. Ananta Kishore Rout and others (2014) (6 SCC 756)]

22 Criminal trial – Examination – Cross-examination:

It is a settled legal proposition that in case the question is not put to the witness in cross-examination who could furnish explanation on a particular issue, the correctness or legality of the said fact/ issue could not be raised.

[Mahavir Singh vs. State of Haryana (2014)(6 SCC 716)]

* * *

From the Courts

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36 Sec. 263 : Erroneous : Meaning of Director of Income Tax v/s. Jyoti Foundation (2013) 219 Taxman 105 (Delhi) (Mag) : (2013) 357 ITR 388 (Del)

Issue:

When can the order of the A.O. be said to be 'erroneous" and what is the duty of CIT/DIT?

Held:

Revisionary power u/s 263 is conferred by the Act on the CIT/DIT where an order passed by the lower authority is erroneous and prejudicial to the interest of the revenue. Orders which are passed without inquiry or investigation are treated as erroneous and prejudicial to the interest of the revenue, but orders which are passed after inquiry/investigation on the question/issue are not per se or normally treated as erroneous and prejudicial to the interest of the revenue simply because the revisionary authority feels and opines that further inquiry/investigation was required or deeper or further scrutiny should be undertaken.

In the Instant case, inquires were certainly conducted by the A.O. It is not a case of no inquiry. The order u/s 263 itself records that the Director felt that the inquiries are not sufficient and further inquiries or details should have been called. However, in such cases, as observed in the case of ITO v/s. D.G. Highway Projects Ltd. (2012) 343 ITR 329 the inquiry should have been conducted by the CIT/DIT himself to record finding that the assessment order was erroneous. He should not have set aside the order and directed the A.O. to conduct the said inquiry.

37 See. 147 : Meaning of "After a period of four years".

Fateh Chand Charitable Trust v/s. CIT (2013) 219 Taxman 172 (Allahabad) : (2013) 357 ITR 604 (All)

Issue :

What is the meaning of "after a period of four years" in Sec. 147?

Held :

It was contended by the assessee that the instant case was within the proviso to Sec. 147 and as the proceeding was initiated after a period of four years from the end of the assessment year 2006-07, the proceeding was bad. The said argument is misconceived and proceeds on the wrong footing that four years period from the end of the assessment year 2006-07 will come to an end on 31-03-2010. The phrase used in the proviso is 'after the expiry of four years from the end of the relevant assessment year'. Clearly it postulates that the starting up of four years period will be from the end of the assessment year, i.e. for the assessment year 2006-07, the assessment will expire on 31-03-2007 and four years period from that date expires on 31-03-2011. Admittedly the impugned notice is dated 19-04-2010 and it is within the period of four years from the end of the assessment year 2006-07 and is clearly within time.

38 Penalty : See. 271(1)(c) : Expl. 5 : Manner

CIT v/s. Sidh Nath Goel (2013) 359 ITR 481 (All)

Issue :

Meaning of "Manner" in Sec. 271(1)(c) Explanation 5 for claiming immunity from penalty.

Held :

To the extent the assessee makes a clean breast of his undisclosed income represented by assets found to be in possession of the assessee he is not deemed to have concealed his income or concealed the particulars thereof. The explanation is not confined to physical possession but extends to other forms of possession.

In the instant case a note book was found in which details of expenses of renovation of residence were written. The assessee stated that he had made the expenditure out of business income but had not noted in his books of account. According to the note book, the total came to Rs. 5,39,300/- which the assessee admitted to be undisclosed income of the financial year 1991-92 and on which he was ready to pay the tax. The statement was made during the course of search and the assessee was ready to make payment of tax. No further details was required nor was any further explanation be given as to how and in what manner and in which year or years the undisclosed income was earned and as to why the tax was not paid on such undisclosed income.

39 Difference in stock disclosed to Bank : No Penalty : CIT v/s. Sachidanand Pulse Mills (2013) 219 Taxman 153 (Guj) (Mag)

Issue :

When assessee disclosed higher stock to Bank to avail higher credit, whether penalty can be levied?

Held :

The assessee availed overdraft facility for the purpose of accommodating existing bank balances against hypothecation of stock. He provided stock statements to bank in support of it.

During assessment proceedings, the A.O. found difference in stock between stock statements given to bank by the assessee and stock as per the books of account. Accordingly, he imposed penalty u/s 271(1)(c).

CIT (A) dismissed assessee's appeal.

I.T.A.T. deleted the penalty on the ground that no – concealment of income was found.

On appeal to the High Court it was held that :

It was found that there was as such no concealment by the assessee and considering the case on behalf of the assessee that the stock statement given to the bank was purely for the purpose of accommodating existing bank finances and the assessee was required to submit bank statement showing a particular value of the stock in order to continuously enjoy overdraft facility and whatever was submitted before the bank was disclosed before the authority, and, therefore, as such there was no concealment. The Tribunal rightly deleted the penalty imposed under section 271(1)(c).

40 Purchase from open market : Only profit element to be added : CIT v/s. Satyanarayan P. Rathi (2013) 219 Taxman 149 (Guj) (Mag) : (2013) 351 ITR 150 (Guj)

Issue :

When purchases were made of which the sellers were not identified, whether full value of purchases to be added ?

Held :

Assessing Officer made addition of entire amount of purchases on ground that concerned suppliers had never supplied goods as named by assessee. CIT(A) as well as Tribunal having found that though purchases were not made from parties from whom assessee claimed but such materials were purchased from open market incurring cash payment and bills were procured from various sources held that only profit element at rate of 12.5% was to be added as income of assessee. Whether present case being one of only purchase but not from disclosed sources it would be only profit element embodied in such purchase which could be added in income of assessee and thus, rightly so done by CIT(A) and Tribunal.

41 Builder : Deposit for booking is not income : The same will be income on transfer of property. CIT v/s. Shivalik Buildwell (P) Ltd. (2014) 220 Taxman 3 (Guj) (Mag)

Issue :

When the income will arise in case of builder who received money for booking?

Held :

Assessee was a builder and developer. It received certain amount as advance from different parties. A.O. added said amount as assessee's taxable income. Tribunal set aside addition made by A.O. holding that assessee being a developer of project, profit in its case would arise only on transfer of title of property and, therefore, receipts of any advance or booking amount could not be treated as trading receipt of year under consideration. Hence order passed by Tribunal was upheld by the High Court.

42 Sec. 45 : Retiring Partner taking only money : Section not applicable : CIT v/s. Dynamic Enterprises (2013) 359 ITR 83 (Kam) (FB)

Issue :

When retiring partners are paid only money, whether provision of Sec. 45(4) is applicable?

Held :

(1) After the retirement of partners, the partnership continued to exist and the business was carried on by the remaining partners. What was given to the retiring partners was cash representing the value of their share in the partnership. No capital asset was transferred on the date of retirement. In the absence of transfer of any capital asset in favour of retiring partners no profit or gain arose in the hands of the firm.

(2) The property belonged to the firm. It did not belong to the partners. When the retiring partners took cash and retired, they were not relinquishing their interest in the immovable property. Therefore there was no transfer of a capital asset as such; no capital gains or profit arose in the hands of the firm. Therefore Sec. 45(4) had no application to the facts of this case.

(3) The firm did not transfer any right in the capital asset in favour of the retiring partners. The firm did not cease to hold the property and consequently, the right to the property was not extinguished.

(4) When a retiring partner takes only money towards the value of his share and when there is no distribution of capital asset/assets among the partners there is no transfer of a capital asset, and consequently, no tax on profits or gains was payable u/s 45(4).

* * *

Computers are inhuman because once programmed and working smoothly, they are completely honest.

Isaac Asimov

Wisdom is something that has to be discovered by each one, and it is not the result of knowledge.

J.Krishnamurti

Add

Tribunal News

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31 ACIT V. Nandlal Tolani Charitable Trust 149 ITD 357 (Mum) Assessment year: 2004-05 Order Dated: 30th September, 2013

Basic Facts

The assessee is a charitable trust registered under the Bombay Public Trust Act, engaged in charitable objects, as promotion of education, medical relief, and for other objects of general public nature. The assessee had received donation from another charitable trust, TEF. Subsequently assessee also gave certain amount of donation to TEF towards its corpus. The AO opined that it was a clear case of round tripping and thus only an eye-wash. Further the donation to TEF was again towards the corpus of the donee- fund so that it was not liable to be spent for the latters objects. According to the AO the same would not therefore be regarded as an application of income for charitable purposes. He accordingly added amount donated by the assesse as its taxable income. The CIT(A) held in favour of the assesse.

Issue

Whether donation made by one charitable trust to another charitable trust would entitle donor trust to claim exemption qua application of income under section 11(1) even if donation is towards corpus of donee-fund ?

Held

The Hon'ble ITAT held that the donation by one charitable trust to another would entitle the donor fund to claim exemption qua application of income under section 11(1). It would make no difference if the donation is towards the corpus of the done- fund so that it is only the income therefrom and not the donation sum itself that is liable to be spent for or utilized for the charitable purposes of the recipient. The word 'application' has a wider connotation than the word 'spent' so that an application of income of the donor trust could not be denied. Again the corpus fund may not necessarily be invested in specified securities but could also be towards capital expenditure which again qualifies as an application of income. The objections thus raised by the revenue were held not maintainable.

32 LSG Sky Chef (INDIA) (P) Ltd. vs. DCIT 163 TTJ 808 (Mum)) Assessment year: 2009-10 Order dated: 27th March, 2014

Basic Facts

In the assessment completed under section 143(3) there was short grant of TDS even though the assessee had furnished the original TDS certificates before the AO. It had also given, the party (deductor) wise details of the total tax deducted and had also submitted that the entire income on which the tax stands deducted stands booked as its income for the relevant year. The assessee has hence done all that was within its mean to claim credit in respect of tax deducted on its income. Inspite of this there was a short credit for tax deducted at source. The CIT(A) had given directions to the AO to grant credit in accordance with the tax deducted and deposited by the deductors in the name of the assesse and in accordance with the CBDT's circulars/ instructions and guidelines. Aggrieved by these directions the assesse was in appeal before the ITAT

Issue

Whether the assessee can be held responsible for any discrepancy in Form 26AS or for the non-matching of TDS reflected therein with the assessee's claim ?

Held

The Hon'ble ITAT held that though Form 26AS [r/w r.31AB and ss. 203AA and 206C(5)] represents a part of a wholesome procedure designed by the Revenue for accounting of TDS (and TCS), the burden of proving as to why the said Form (statement) does not reflect the details of the entire tax deducted at source for and on behalf of a deductee cannot be placed on an assessee-deductee. The Assessee by furnishing the TDS certificate/s bearing the full details of the tax deducted at source, credit for which is being claimed has discharged the primary onus on it towards claiming credit in its respect. He accordingly cannot be burdened any further in the matter. The Revenue is fully entitled to conduct proper verification in the matter and satisfy itself with regard to the veracity of the assessee's claim, but cannot deny the assessee credit in respect of TDS without specifying any infirmity in its claims. Form 26AS is a statement generated at the end of the Revenue, and the assessee cannot be in any manner held responsible for any discrepancy therein or for the non-matching of TDS reflected therein with the assessee's claim. The plea that the deductor may have specified a wrong TAN, so that the TDS may stand reflected in the account of another deductee, is no reason or ground for not allowing credit for the TDS in the hands of the proper deductee. The Revenue is obliged to grant the assessee credit for the TDS of which he is able to satisfactorily prove to the AO the factum of deduction of tax at source and its deposit to the credit of the Central Government, subject of course to the conditions of ss.198 and 199.

(Note: Recently Gujarat High Court in case of Sumit Devendra Rajani V ACIT SCA No.2349 of 2014, order dated 23rd June 2014 has also given similar findings - covered in unreported judgements of August, 2014 issue of ACA Journal).

33 Ushodaya Enterprises Ltd. vs. ACIT 149 ITD 352 (Hyd)
Assessment Year: 2002-03 and 2003-04
Order Dated: 31st October, 2013

Basic Facts

The assessee had claimed depreciation at 60 per cent on 'computers' and computer accessories. AO held that every equipment which runs with the help of computer cannot be said to be a computer. He, therefore, held all these items were to be allowed depreciation at the normal rate of 25 per cent as is applicable to 'plant and machinery'. The AO further held the software purchased by the assessee are versions and depreciation on the software is allowable at 25 per cent only which is applicable for the block 'plant and machinery'. On further appeal, CIT(A) upheld the decision of AO in restricting the depreciation on those components to 25 percent.

Issue

Whether depreciation claimed at 60 percent on printers, scanners, modems, switches, hubs, cables/cards and software etc. were to be disallowed as these devices were used along with computer and their functions were integrated with computer?

Held

The Tribunal held that functions of the computer as one composite unit is for performing logical, arithmetical or memory functions etc., but it is not the only equipment which performs such functions that can be called as 'computer'. All the input and output devices which in fact support in the receipt of input and outflow of the output are also part of the 'computer'. Further, when a particular hardware or software is used along with a computer and when their functions are integrated with a computer or in other words when the device is used as part of the computer in its functions, even though it may be having user on standalone basis, but still then such hardware or software would be termed as a 'computer'. In applying the aforesaid ratio to the

facts of the present case, it can be seen that the revenue authorities have not disputed the fact that the items on which the assessee has claimed depreciation at the rate of 60% by treating them as 'computer' are being used as input or output device of the computers. However, the departmental authorities have negatived the claim of the assessee solely on the reasoning that every peripheral device connected to the computer cannot form part of the computer. However, such view of the revenue authorities cannot be the correct proposition of law. The Tribunal also referred to the ratio laid down by the Hon'ble Special Bench in case of Datacraft India Ltd. that any device when they are used along with computer and when their functions are integrated with the computer comes within the ambit of the expression 'computer'.

34 GE Energy Parts Inc. vs. ADIT (International Taxation) 163 TTJ 697 (Del)

Assessment Year: 2001-02 Order Date: 4th July, 2014

Basic Facts

The assessee-company, a non-resident company, belonged to GE group. It had a branch office in India. A survey was conducted in case of assessee-company. In the course of survey, it was found that assessee-company was carrying out sales activities in India on behalf of GE group for which the business head were generally expats, who were appointed to head Indian operations with the support staff provided by an Indian company 'GEIIPL'. On the basis of analysis of various documents found during the course of survey, in the form of agreements/purchase orders/copies of contracts, the AO opined that there was active involvement of the employees of Indian company and expats in the conclusion of contract on behalf of such non-resident GE Group entities. Therefore, it was concluded that GEIPL also constituted the agent, other than an agent of independent status, of the non- resident GE Group entities. This resulted into the creation of the dependent agent PE as per the provision of tax treaties and business connection as per the provisions of Explanation 2 to section 9(1)(i). The revenue's case was that for proper adjudication of issue relating to existence of PE, it was necessary that entire information regarding employees be available before the Tribunal. The revenue thus sought to file additional evidence in the form of LinkedIn Profile of employees which contained information on person's education, details of employment, a summary of person's job profile etc. The assessee raised various objections to proposed submission of additional evidence by revenue authorities.

Issue

Whether since LinkedIn Profile had considerable bearing on subject matter of appeal, merely because it was available in public domain and was not referred to by AO earlier, can department be prevented from bringing that information on record before Tribunal?

Held

Tribunal held that merely because the LinkedIn profiles was available in public domain and was not referred to by AO earlier, department could not be prevented from bringing that information on record so as to arrive at the correct factual finding on the issue regarding PE. This cannot be said to be a case of inordinate delay because the AO had drawn an adverse inference on account of non-furnishing of information by assessee and when assessee is trying to take mileage out of its conduct, the department is bringing on record additional evidence in the form of LinkedIn profile of employees to demonstrate that the conclusion drawn by department was fully justified. Further, it would be travesty of justice to ignore the additional evidence at admission stage only before arriving at a correct finding of fact. As a matter of fact, assessee should have no complaints in getting the relevant information being brought on record from the appreciation of which correct factual finding can be arrived at. In the present case, LinkedIn profiles

sought to be filed by the department has considerable bearing on the subject matter of appeal and therefore, it should be admitted. The assessee can rebut the information contained in LinkedIn profiles by bringing on record contrary facts to dislodge the claims made in LinkedIn profiles. The assessee's contention that linkedIn profiles is an hearsay evidence and has no probative value was rejected on the ground that it is the employee who himself has given all the relevant details and the same relate to him. These details are akin to admission made by a person. No third party is involved in creating of this LinkedIn profiles.

35 Hyper Quality (P.) Ltd. VS. ACIT 149 ITD 277 (Del) Assessment Year: 2007-08 Order Dated: 11th April, 2014

Basic Facts

The assessee company was a captive service provider engaged in providing back office support services to its AE in USA which was providing call evaluation and monitoring services to other call centers. During the course of the assessment proceedings, the TPO objected to the ALP worked out on the Profit Split Method (PSM) and proposed to apply Transactional Net Margin Method (TNMM). The assessee in its reply provided consolidated financials and the justification of the ALP adopted by it. Ignoring the same the TPO adopted TNMM without valid reasons. TPO also erred in evaluating FAR (Functions performed, Assets employed and Risk assumed) analysis which had been summarily confirmed by DRP. Assessee filed its objections before the Dispute Resolution Panel (DRP-I), which issued deletions of some additions and directed re-computation of Arm's length pricing based on the ALP submitted by the assessee.

Issue

Whether TP adjustment made to ALP was not justified as assessee earned profits in India in contrast to losses incurred by its NR AEs continuously?

Held

Assessee is a captive service provider to its AE in US who is providing call evaluation and monitoring services to other call centers. The assessee's business is experimental and new in this line and has therefore the hardship to penetrate the market and create demand for its service. This is the reason for thin business and lack of demand has resulted in no other players venturing into this kind of business. Thus there is no other company in the market which can be compared with the assessee company in terms of its business functionality. In the absence of an appropriate comparable to benchmark the financial result that too to a 10A exempt company has resulted in futile exercise and arbitrary TP adjustments. The TNMM, which warrants external benchmarking at net profit level, will not be an appropriate method, considering the fact that there is no other company in India which is into the line of business of the assessee company. Besides the new line of business involves unique intangibles used by the AE such that independent evaluation of performance is not possible. Since the service of the assessee and its AE are coined together as a service delivery to end clients. In such a situation the net outcome should be a subject matter of tax apportionment in India. Rule 10B of the Income Tax rule is very clear in this regard. Since the AE in conjunction with the assessee are yet to earn any profits and AE is still in the stage of accumulating losses while the assessee company is earning profit, the TP report submitted by assessee was self-explanatory. It is in this perspective that section 92(3) was enacted to chapter X of the Income tax Act, for making the Transfer Pricing Report not applicable in case the transaction amongst the Multi National Enterprise has resulted in higher taxable profit. The assessee by its submission demonstrated that it bills the AE at total cost plus 11 per cent. Thus the ALP adopted by the assessee is Operating Profit to Total Cost (OP/TC).

The TPO has adopted Operating cost to Operating Expenses (OP/OE). The DRP on submission by the assessee has directed the TPO to revisit the case of the assessee and re compute the ALP accordingly. The TPO has failed to follow the direction of the DRP while passing its final order. Thus, the TP adjustments made to assessees ALP is not justified in view of following reasons:

- Assessee furnished its split financials along with AE. Whereas the assessee has earned profit in India, its AE has continuously sustained losses. Thus with no element of profit in the hands of the AE, in all fairness there is no case of shifting of profits, practicable or probable.
- AE is resident in USA which has a higher tax rate in India, therefore, we see little commercial prudence to shift profit out of India.
- The Far has not been properly evaluated by TPO and DRP.
- Proper justifications for applying TNM method have not been assigned by lower authorities.
- No objective justifications are provided by lower authorities as to why and how, Profit Split method applied by assessee in the above peculiarities of business was not an appropriate method.

36 ADIT V Antwerp Diamond Bank NV 163 TTJ 175 (Mum) Assessment Year: 2004-05 Order dated: 14th March 2014

Basic Facts

The assesse is a bank incorporated in Beligum and is a tax resident of Belgium. The assesse is operating through branch in India and has claimed treaty benefit under the Indo- Belgium DTAA. The assesse had claimed data processing cost paid to the head as reimbursement of expenses incurred by the head office. The head office has acquired main banking application and had allowed the branch to use it accessible through server located at Belgium. The branch reimburses the head office the cost of the data processing on pro rate basis for the use of the said resources. On the basis of the details furnished in the assessment proceedings, the AO held that the assesse was providing services to the Indian Branch which is in the nature of 'royalty' as defined in sub-cl. (iv) of Expln.2 to s.9(1)(vi) as well as DTAA. He therefore held that the assesse was required to deduct tax at source and disallowed the entire payment under section 40(a)(i) of the Act. The CIT(A) held in favour of the assesse.

Issue

Whether data processing cost paid by the assesse were not in nature of royalty ?

Held

The Tribunal held that if the assesse is claiming the application of the DTAA, then the definition and scope of 'royalty' given in the domestic law, in the present case section 9(1)(vi) should not be read into or looked upon. The character of payment towards royalty depends upon the independent 'use' or the 'right to use' of the computer software which is a kind of copyright. In the present case the payment made by the branch is not for 'use' of or 'right to use' of software which is being exclusively done by the head office only installed in Belgium. The branch does not have any independent right to use or control over the mainframe of the computer software installed in Belgium but it simply sends the data to the head office for getting it processed. In so far as the branch is concerned, it is only reimbursing the cost of processing of such data to the head office which has been allocated on pro rata basis. Such reimbursement of payment does not fall within the ambit of definition of royalty within the art 12(3)(a). Consequently there was no requirement of deducting tax from the payment made by the branch to the head office and provisions of section 40(a)(i) is not applicable.

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Add

Unreported Judgements

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In this issue we are giving gist of Ahmedabad Income Tax Appellate tribunal decision in case of Omnibus Industrial Development Corporation of Daman &Div in which assessee was allowed deduction of 20% of the amount transferred out of its profits to the development reserve as the same was a condition precedent for obtaining license for doing liquor business in that union territory. We hope readers would find the same useful.

In the Income Tax Appellate Tribunal "D" Bench, Ahmedabad
Before Shri Mukul Kr. Shrawat, Judicial Member and
Shri N.S. Saini, Accountant Member
ITA NO. 3128/ Ahd / 2010
(Assessment Year 2007-08)

Asst. Commissioner of Income Tax Vapi Circle , Vapi	Vs. Omnibus Industrial Development Corporation of Daman & Diu & Dadra Nagar Haveli Ltd Nani Daman (U.T. of Daman &Div) PAN : AAACO 3361K
Appellant	Respondent

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

Date of Hearing : 05/08/2014
Date of Pronouncement : 08/08/2014
Gist only

Facts :

(i) The brief facts of the case are that during the year under consideration, the assessee filed return of income declaring total income of Rs. 1,25,48,070/- on 26-10-2007. The Assessing Officer completed the assessment u/s 143(3) of the Act on 30-12-2009 determining the total income of the assessee at Rs.1,58,75,330/- wherein he made disallowance / additions of certain amounts including an amount of Rs.32,82,437/- on account of licence charges paid. The assessee explained to the Assessing Officer that the assessee had incurred amount of Rs.32,82,437/- being licence charges debited as per direction from administration of Daman & Diu and Dadra & Nagar Haveli. The assessee had received the order from the Secretariat of Daman directing the assessee to transfer an amount equal to 20% of the gross profit earned from liquor trade as a step to meet future development expenses. This transfer of amount is to be compulsorily met in order to meet industrial promotion development / maintenance and social and tourism related project as may be identified and conveyed to OIDC by the Administration of Daman from time to time. The assessee also filed a copy of letter from the Finance department of Daman & Diu and Dadra & Nagar Haveli Secretariat before the Assessing Officer. It was submitted that the assessee has to spend earmarked fund for the specified purpose to meet corporate social responsibility. Therefore, the same was rightly claimed as legal expenditure which is charged by the Government Administration.

(ii) The Assessing Officer treated transfer of such amount as application of income and did not allow deduction for the same.

(iii) On appeal CIT(A) decided the issue in favour of the assessee. Department filed second appeal before Tribunal. Before Tribunal the assessee produced letter dated 23-01-2000 addressed to MD of the assessee company while granting license to the assessee company which read as under :

"Administration of Daman & Diu and Dadra& Nagar Haveli is pleased to order that the grant / continuation/ renewal of licence to sell liquor in the Union Territories by OIDC shall be subject to the condition that OIDC creates a development Reserve by earmarking 20% of gross profit generated from the liquor trade. This development Reserve shall be used for spending on Industrial Promotion and development / maintenance of social & tourism related projects as may be identified and conveyed to OIDC by the Administration from time to time."

Reliance was also placed on the S.C. decision in case of Sri Venkata Satyanarayan Rice Mill Contractors Co. Vs. CIT in Civil Appeal No.5623-5624.

Held :

The Tribunal after considering facts of the case held as under :

"9. We have heard the rival submissions and perused the orders of lower authorities and material available on record. In the instant case, the assessee claimed deduction of Rs. 32,82,437/- on account of licence charges paid. The Assessing Officer disallowed the same by observing that it was not licence charges but was expenditure incurred by the assessee on specific direction of the Government. As a mechanism, 20% of gross profit of IMFL business is credited to the development reserve and was debited in the profit and loss account and hence it was application of income and not a charge against the income of the assessee. Further, the Assessing Officer observed that it was gathered by him that there are quite a few licence holders of the same item in Daman and so such charges are imposed on them. He was of the view that the expenses claimed are towards welfare measures of normal citizens and are in the nature of donation or welfare expenses which cannot be allowed as revenue expenditure incidental to the business of the assessee as it was not incurred wholly and exclusively for the business of the assessee."

"12. On the other hand, the Authorised Representative of the assessee submitted that 20% of the gross profit earned on IMFL was required by the assessee to be incurred as expenditure on industrial promotion and development / maintenance of social and tourism related projects a may be identified and conveyed to the assessee by the Administrator of Daman & Diu and Dadra &Nagar Haveli. Thus, this was an expenditure incurred for the purposes of obtaining licence for doing liquor business and hence was incidental to and incurred wholly and exclusively for the purposes of business of the assessee and allowable u/s 37(1) of the Act. Further, it was his submission that in the immediately succeeding Assessment Years 2009-10 and 2010-11, such expenditure has been allowed by the Assessing Officer in an assessment made u/s 143(3) of the Act. Therefore, it was his submission that as there was no change in facts, the expenditure should be allowed to the assessee.

13 We find that the assessee filed a letter dated 23-01-2000 bearing No.FIN/GEN/2000-01/541 from Deputy Secretary (Finance), Administrator of Daman & Diu and Dadra & Nagar Haveli wherein it has been stated that under the grant / continuation / renewal of licence to sell liquor in the Union Territories by the assessee , the assessee shall be subject to the condition that it creates a development reserve by earmarking 20% of gross profit generated from the liquor trade which shall be used for spending on Industrial Promotion and Development / Maintenance of social & tourism related projects as may be identified and conveyed to the assessee by the Administrator of Daman & Diu and Dadra & Nagar Haveli from time to time. From the above condition, it is seen that it is an expenditure incurred by the assessee for obtaining a licence for doing liquor business and hence it is an expenditure incurred wholly and exclusively for the purposes of business of the assessee and hence allowable u/s 37(1) of the Act. Further, the assessee has relied on the decision of the Hon'ble Supreme Court in the case of Sri Venkata Satyanarayana Rice Mill Contractors Co. Vs. Commissioner of Income Tax (supra) wherein it has been held as under :

" Any contribution made by an assessee to a public welfare fund which is directly connected or related with the carrying on of the assessee's business or which results in the benefit to the assessee's business has to be regarded as an allowable deduction u/s 37(1)."

No contrary decision was cited by the Departmental Representative during the course of hearing. Hence in our considered opinion, the expenditure claimed as licence charges is expenditure incurred for the purposes of business of the assessee and hence we confirm the order of the commissioner of Income Tax (Appeals) and dismiss the ground of appeal of the Revenue.

14. In the result, the appeal of the Revenue is dismissed."

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Controversies

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Issue:

Whether the unutilized balance of deduction u/s. 80IA can be carried forward and set off against the Profits of the assessee in the subsequent year?

Proposition:

Assessee company which is in to "Textiles" business have setup the "Windmills" for power generation to meet captive consumption requirements as well as for commercial purposes. The windmills have started generating profits, which is entitled for deduction u/s. 80IA after 7 assessment years following the assessment year in which it started generating power. The profits of the eligible undertaking, i.e. windmills in the year in which it attained profitability were Rs. 2 Crores, whereas the Gross Total Income in the relevant year was only to the tune of Rs. 1 Crore. Since, the Gross Total Income has exceeded the deduction u/s. 80IA, deduction available for that year was reduced only to Rs. 1 Crore. However, the questions pose before the assesse was to whether the unutilized balance u/s 80IA i.e. Rs. 1crore can be carried forward and set off against the GTI of subsequent year(s)?

Views against the proposition:

To dwelve upon on the issue, let us analyse Sec. 80IA (5), which reads as under vis-à-vis losses and carry forward of deduction.

Analysis of Sec. 80-IA(5):

"Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of Ss.(1) apply shall for the purpose of determining the quantum of deduction under that sub-section for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made." (Emphasis supplied).

Notional brought forward of loss of the earlier years u/s.80-IA(5):

This is an important issue in determining the eligible profit of the windmill and the available period of deduction u/s.80-IA. The provisions of S. 80-IA(5) are analyzed accepting that the notional loss is to be set off and that the provisions of S. 80-IA (5) are not redundant.

The Income-tax Act provides for deduction of 100% of income of a windmill u/s.80-IA for a period of ten consecutive years out of fifteen years. The possible interpretation is that the loss of the undertaking of the windmill from the year in which it starts generating electricity is to be notionally carried forward for setting off against the profits from windmill in the subsequent years and only after the entire loss is absorbed by the income from windmill, deduction u/s.80IA is available.

Double deduction not possible

Where an amount of profits and gains of an industrial undertaking, is claimed and allowed as deduction under section 80-IA, the profits to that extent shall not qualify for deduction for any assessment year under any other provision of Chapter VIA and in no case shall exceed the eligible profit of the industrial undertaking, as the case may be. Further, it is expressly mentioned in the provisions of section 80-IA that deduction claimed in the current year is available in the current year.

Essential rule governing deduction

The pivotal rule has to be kept in mind while calculating deduction under sections 80C to 80U (which includes 80-IA, too):

The aggregate amount of deduction under sections 80C to 80U cannot exceed gross total income (after excluding long-term capital gains, short-term capital gains under section 111A, winnings from lottery, races, etc. and incomes referred to in sections 115A, 115AB, 115AC, 115AD, 115BBA and 115D). Further Section 80AB provides that for the purpose of calculating the deductions specified in sections 80HH to 80TT, the net income as computed in accordance with the provisions of the Act (before making any deduction under Chapter VIA, i.e, sections 80C to 80U) shall alone be regarded as the income which is received by the assesse and which is included in his gross total income. Accordingly, the deductions specified in the aforesaid sections will be calculated with reference to the net income as computed in accordance with the provisions of the Act (viz, after deducting expenses under sections 30 to 43B and 57 and after adjusting losses but before making any deduction under sections 80C to 80U) and not with reference to the gross amount of such income, subject, however, to the other requirements of the respective sections.

Provisions of Set off and carry forward of Losses

The provisions of set off and carry forward of losses are enunciated via Sections 70 to 74A. It refers to the set of and carry forward of losses and nowhere does not lay down any emphasis on the profits (unclaimed profits and lapsed in the current year) to be carried forward and set off in the subsequent year(s).

Considering the above argument and taking in to account the fact that neither provisions pertaining to 'deductions from gross total income' nor 'set off any carry forward of losses' entail any covenant conditions as to carry forward of unutilized deduction which can be available to assesse on the count of unavailability of claiming the deduction owing to restriction of the said deduction to the tune of GTI.

Further, deductions under Chapter VIA needs to be construed in a very stricter connotation and cannot be then given a wider interpretation than what has been expressly not stated therein under those provisions.

Views in favour of proposition:

Deeming fiction u/s. 80-IA

The Legislature has consciously used different and contrasting expressions in the different sub-sections of S. 80-IA. Ss.(2) inter alia, speaks of any 'ten consecutive assessment years' out of fifteen years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility or starts providing telecommunication service or develops or generates power.

The fiction u/s.80-IA(5) to the effect that "as if such eligible business was the only source of income of the assessee during the previous year relevant to the initial assessment year and every subsequent year" is to be confined to ten consecutive years beginning from the initial assessment year and to every subsequent year. The word 'during' connotes a period of time. Fiction U/ss.(5) operates in the 'initial assessment year' i.e., the year of option and runs for ten consecutive years. Without the option, there is no initial assessment year for S. 80-IA.

The fiction in Ss.(5) is limited to assuming that, during the previous year relevant to the initial assessment year, the eligible business is the only source of income. The provision looks forward to a period of ten years from the initial assessment year (year of option). The fiction does not look backwards to the year beginning, referred to in Ss.(2). In construing a fiction, it is impermissible to invoke a further fiction or enlarge the same. [AIR 1966 SC 870; AIR 1963 SC 448 1996 (2) SCC 449].

Hence, the intention to spell the block of 10 out of 15 consecutive assessment years has to be read in

line with the cumulative trench of profits and allowability as such therein and cannot be given a narrow and mellowed way of interpretation. The unexpired portion of deduction which could have been available to the assessee as deduction u/s. 80IA can in lieu of aggregate deduction criteria prescribed u/s. 80-IA be still available to be set off as a deduction in the subsequent year (s) subject to threshold of GTI.

Summation

The captioned query on carry forward of unexpired portion of deduction u/s. 80-IA as can not squarely and expressly be covered by any provisions of the Income Tax Act, 1961 and hence will not be prudent to take it as a carry forward deduction in the next year(s) as per the arguments stated over here.

Although, all the conditions mentioned in various provisions of the Sections of the Act including Section 80IA/80IB of the Act are intended to be mandatory in nature i.e. to be complied in strict and literal manner. However, especially in respect of these beneficial sections, Hon'ble Courts on several issues have stated that the conditions mentioned in the sections are not mandatory but are suggestive in nature and a contrary view on the subject matter can be possible but it will always be subject to litigation.

The question arises whether relief u/s 80IA is available to power industries?

Incentives deduction is available under section 80IA for manufacturing units. In the case of power generation for captive consumption, the fact that generators were operated by the assessee itself was found to be not a disqualification for eligibility. It was so held in West Coast Paper Mills Limited V/S Asst. CIT(2006) 286 ITR (AT) 252 (Mumbai). In similar case, where work is done on job work basis, it has been held that where such job work is under supervision and control of the assesse, manufacture will be deemed to have been carried out by the assesse.

Let me now refer to the correct position of Law. It is very clear that loss of eligible units will go to reduce gross total income, but it will not go to reduce the profits of eligible units to the extent of available gross total income.

Where the assessee has two eligible units, one of which has suffered loss and the other profit, both eligible for deduction under the same section, can the relief be limited to the net amount as between them was the issue posed before the Tribunal in Meera Cotton and Synthetic Mills P.Limited V/S Asst CIT (2009) 318 ITR (AT) 64 (Mumbai). It was decided that the relief for the profit of the eligible units cannot be reduced by setting off the loss in the other. It can be limited only by the available gross total income. The decision is consistent with law settled by the Supreme Court itself in CIT v/s Canara Workshops P.Ltd (1986) 161 ITR 320 (SC). The department had relied upon the decision in Synco Industries Ltd v/s Assessing Officer (2008) 299 ITR 144 (SC). But this decision was distinguished by the tribunal by pointing out, that it was a case for computation of gross total income and not in working the eligible profits of an eligible undertaking.

In reckoning eligible profits for relief under Chapter VI-A, unabsorbed depreciation and unabsorbed losses in respect of the eligible undertaking, whether adjusted against other income of the assesse or not, would go to reduce the eligible profit. This law was followed in Modi Nagar Paper Mills Limited v/s Deputy CIT (2011) 330 ITR 405 (All) following the decision of the Supreme Court in Synco Industries Limited v/s Assessing Officer (2008) 299 ITR 444.

Finally let me conclude with reference to the provisions of Incentive deduction that prima facia it appears if in a particular year deduction is not absorbed as is referred to in this column then there is no provision for the carry forward of the balance of such deduction. Every year the incentive deduction will have to be computed and claimed.

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Judicial Analysis

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Disallowance u/s 14A cannot be added back to the 'book profit' while computing MAT u/s 115JB of the Act.

Reliance Petroproducts Pvt. Ltd. vs. ACIT (ITA 2324/Ahd/2009)

xxx…

5. When the matter was carried before the first appellate authority, the ld.CIT(A) has affirmed the finding of the Assessing Officer, however, he has also quoted that the computation for regular assessment is a different issue, whereas while computing the book profit only certain aspects can be adjusted as per Explanation to section 115JB and no other adjustment in respect of any allowance or disallowance made during the computation normal income can be considered for the computation of the book profit for the purpose of section 115JB of the I.T.Act. Although this observation was made by the Learned CIT(Appeals) in paragraph No. 2.3.1, but the view was taken in favour of the Revenue, therefore the assessee being aggrieved is now in appeal. With this brief background, our attention was drawn on a decision of ITAT Delhi Bench "C" pronounced in the case of Goetze (India) Ltd. reported at [2009]32 SOT 101 (Delhi), wherein paragraph No.4.6, it was held as under:-

   xxx…

6. Respectfully following the aforementioned orders as also the decision of Hon'ble Apex Court in the case of Apollo Tyres Ltd.vs. CIT reported at [2002]255 ITR 273(SC) duly referred in the cited precedents, we hereby direct the Assessing Officer not to make any adjustment in respect of disallowance made u/s.14A of the I.T.Act while computing the book profit u/s.115JB of the I.T.Act. We order accordingly and the substantial ground is hereby allowed.

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Atul Ltd. vs. ACIT (ITA 8/Ahd/2013)

xxx…

The second ground of appeal of revenue is against deleting the positive adjustment of Rs.3,25,92,000/- to book profit u/s. 115JB. The Ld. A.O. observed that there was a disallowance u/s. 14A which was adjusted in MAT income computed u/s. 115JB and income determined in MAT by increasing disallowance made u/s. 14A at Rs.36,41,54,090/-. The Ld. CIT(Appeal) deleted the addition by following the Hon. ITAT, Ahmedabad Bench decision in case of Reliance Petro Products Pvt. Ltd vs. ACIT order dated 13.07.2012 in ITA No. 2324/Ahd/2009 wherein the issue was decided by following the Apex Court order in case of Apollo Tyres Ltd. Vs. CIT 255 ITR 273 (SC) 2005. The Ld. CIT DR relied upon the order of the Ld. A.O. at the outset, Ld. Consul relied upon the order of the Hon. ITAT bench in case of Reliance Petro Products Pvt. Ltd. (Supra) and requested to upheld the order of the CIT(Appeal). The Coordinate bench decided the identical issue in case of Reliance Petro Products Pvt. Ltd. in favour of the assessee by following the decision of the Hon. High Court in case of Apollo Tyres Ltd. Respectfully, following the decision of Apex Court on this issue, we upheld the order of the CIT (Appeals) and dismissed the appeal of the revenue.

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DCIT vs. Alembic Ltd. (ITA 1928/Ahd/2010)

xxx…

16. Ground no.5 is against allowing disallowance made by the Assessing Officer u/s. 14A computing profit u/s. 115JB. The A.O.

observed that disallowance made u/s. 14A is required to be added back in computing of book profit u/s. 115JB as per clause (f) of Explanation 1 of sub-Section 2 of Section 115JB at Rs. 14,91,000/-. When ld. CIT(A) deleted the addition u/s. 14A and allowed the appeal in favour of the assessee, therefore, this issue was accordingly, not in existence. Thus, it was treated to be allowed in favour of the assessee. Ld. Sr. D.R. vehemently relied in Clause (f) of Explanation 1 of sub-Section 2 of 115JB. As per this clause, the book profit u/s. 115JB is to be increased by expenditure relatable to any income of exempted u/s. 10. At the outset, ld. A.R. argued that no actual expenditure was debited in the p&l account relating to earning of the exempt income. He relied upon in case of M/s. Essar Teleholdings Ltd. vs. DCIT in ITA No. 3850/Mum/2010 for A.Y. 2005-06, for relating to earning of exempt income. Therefore, provisions of Section 14A cannot be imported into while computing the book profit u/s. 115JB of the Act inasmuch as Clause (f) of Explanation to Section 115JB refers to the amount debited to the p&l account, which can be added back to the book profit while computing book profit u/s. 115JB of the Act. He further relied upon in case of Goetze(India) Limited, 32 SOT 101 (Delhi ITAT) &Quippo Telecom Infrastructure Limited in ITA No. 4931/Del/2010.

17. We have heard the rival contentions and perused the material on record. As this issue has been set aside to the A.O. for re-computation of disallowance u/s. 14A, however, for making adjustment u/s. 115JB, the ITAT, Mumbai Bench in case of M/s. Essar Teleholdings Limited (supra) held that Provisions of sub-Section 2 & 3 of Section 14B cannot be imported into Clause (f) of the Explanation to Section 115JB of the Act. As per Clause (f) of Explanation 1 to Section 115JB refers to amount debited to the p&l account, which can be added back to the book profit while computing the book profit u/s. 115JB. Similar views have been taken by the ITAT, Delhi Bench in case of Goetze(India) Ltd. (supra). Therefore, we held that adjustment made by the A.O. is not as per law. Accordingly, we dismiss the Revenue's appeal on this ground.

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Quippo Telecom Infrastructure Ltd. vs. ACIT (ITA No. 4931/Del/2010)

xxx…

9. Ground No.2 is directed against the CIT(A)'s order in confirming the AO's action in making addition of Rs.19,58,253/- being expenditure incurred to earn exempt income while computing book profit under sec. 115JB of the Act.

10. We have heard both the parties and have carefully perused the material on record.

11. In the present case, the AO has also made addition of Rs.19,58,253/- on account of alleged expenditure incurred to earn exempt income while computing book profit u/s 115JB of the Act. The AO's action has been confirmed by the CIT(A). Both the authorities have applied Rule 8D of the Income-tax Rules while computing the amount of expenditure disallowable u/s 14A of the Act. As already held above, the provisions of Rule 8D are not applicable to the present assessment year under consideration. Therefore, disallowance of expenditure by applying Rule 8D is not justified. Further, no actual expenditure was debited in the profit & loss account relating to the earning of exempt income. Therefore, the provision of section 14A cannot be imported into while computing the book profit u/s 115JB of the Act inasmuch as clause (f) of Explanation to sec. 115JB refers to the amount debited to the profit & loss account which can be added back to the book profit while computing book profit u/s 115JB of the Act. In this connection, reliance can be placed upon the decision of ITAT Delhi Bench in the case of Goetze (India) Ltd. Vs. CIT (2009) 32 SOT 101 (Del), wherein it has been held that provisions of sub-sec. (2) & (3) of section 14A cannot be imported into clause (f) of the Explanation to sec. 115JA of the Act.

In this view of the matter, we therefore, delete the disallowance of expenses confirmed by the CIT(A) while computing book profit under sec. 115JB of the Act. In other words, no addition to the book profit shall be made on account of alleged expenditure incurred to earn exempt income while computing income u/s 115JB of the Act. Thus, this ground No.2 is decided in favour of the assessee.

xxx…

Goetze (India) Ltd. vs CIT [32 SOT101 (Delhi)]

xxx…

4.6 We have considered the facts of the case and rival submissions. We may at the outset consider the provisions contained in cl. (f) of the Expln. to s. 115JA and sub-s. (1) of s. 14A of the Act. Under the aforesaid cl. (f), the amount of expenditure relatable to any income to which any of the provisions of Chapter III applies has to be added to the book profit. Under the provision contained in s. 14A, no deduction is to be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act. Since we are dealing with the issue of expenditure relating to dividend income, a matter falling under Chapter III, it becomes clear on perusal of these two provisions that they are similar in nature. Clause (f) uses the words "expenditure relatable to any income", while s. 14A uses the words "expenditure incurred by the assessee in relation to income". These words have the same meaning. We may also add here that s. 14A contains two more sub-sections, sub-s. (2) and sub-s. (3), which do not find a place in the cl. (f). Therefore, insofar as computation of adjusted book profit is concemed, provisions of sub-s. (2) and sub-s. (3) of s. 14A cannot be imported into cl. (f).

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contd. from page 339

Analysis of Major Changes made in Tax Audit Reports

received later on may be disclosed under this clause on prudent basis. In such cases, the tax auditor should examine relevant orders issued by various taxing authorities to determine whether any refund has been acknowledged. The tax auditor should take representation from the assessee regarding completeness of the disclosure made under this clause.

In revised tax audit report, Annexure to form 3CD has been removed. Such annexure was based on old Schedule VI while for the companies, Schedule VI was revised from the year 2011-12, due to which additional workings were needed to be made to arrive at figures to be disclosed. To that extent, a little pain has been reduced.

To conclude, we will say that for better assessment, the department has entrusted the professionals to fulfill additional responsibilities by revising tax audit reports. Some of the changes are needed taking into account the amendments made in the Income Tax Act, 1961 while some changes can be easily known to the department. Since there are responsibilities involved, certainly efforts of our profession would increase drastically but as against this, there are chances that fees for the same would not proportionally increase. It would be typically a case where the client takes auditing process as compulsion by the law only and not for value addition. In such a case, we will have to put our efforts in such a way that client is bound to feel the value addition along with the legal compliance. In addition, the Institute is under process of preparing revised Guidance Note on Tax Audit to cover changes made and may soon come out with the same. Hence, it is also advisable to wait till such Guidance Note comes out and hopefully it will clarify much confusion and guide us as to how the disclosures should be made in revised Tax Audit Reports.

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FEMA Updates

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

It was to increase the limit to USD 125,000 per financial year (April-March) from USD 75,000. Accordingly resident individuals have been allowed to remit up to USD 125,000 per financial year, under the Scheme, for any permitted current or capital account transaction or a combination of both. Further, it is clarified that the Scheme can now be used for acquisition of immovable property outside India.

For Full Text refer to A.P. (DIR Series) Circular No. 5 @ http://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=9110&Mode=0

28 Foreign Direct Investment – Reporting under FDI Scheme

The Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce and Industry, Government of India has, vide Press Note 4 (2014 Series) dated June 26, 2014 decided to switch over to the National Industrial Classification 2008 (NIC 2008) from the NIC 1987 version, for the purpose of classification of activities under the industrial classification system.

Accordingly Indian companies are required to report the NIC Codes in the FCGPR and FCTRS forms as per the NIC 2008 version, henceforth.

It has also been decided to introduce a uniform State and District code list for reporting of details of foreign direct investment by Indian companies in Form FCGPR.

For full text refer to: A.P. (DIR Series) Circular No. 6 @ http://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=9111&Mode=0

29 Recognising E-Aadhaar as an 'Officially Valid Document' under Prevention of Money Laundering Act (PMLA), 2002 and PML Rules with reference to Money Changing Activities and Money Transfer Service Scheme

The above mentioned circular lists officially valid documents for customer identification.

Physical Aadhaar card/ letter issued by the Unique Identification Authority of India (UIDAI) containing details of name, address and Aadhaar number may be accepted as an 'Officially Valid Document'. If the address provided by the customer is same as that on the Aadhaar letter, it may be accepted as a proof of both identity and address.

In order to reduce the risk of identity fraud, document forgery and have paperless KYC verification, UIDAI has launched its e-KYC service. Accordingly, it has been decided to accept e-KYC service as a valid process for KYC verification under Prevention of Money Laundering (Maintenance of Records) Rules, 2005. Further, the information containing demographic details and photographs made available from UIDAI as a result of e-KYC process ("which is in an electronic form and accessible so as to be usable for a subsequent reference") may be treated as an 'Officially Valid Document' under PML Rules. In this connection, it is advised that while using e-KYC service of UIDAI, the individual user has to authorize the UIDAI, by explicit consent, to release her or his identity/address through biometric authentication to the Authorised Persons. The UIDAI then transfers the data of the individual comprising name, age, gender, and photograph of the individual, electronically, to the Authorised Person, which may be accepted as a valid process for KYC verification.

The broad operational instructions to Authorised Persons on Aadhaar e-KYC service are enclosed as Annexure to this circular.

Further, it is clarified that, Authorised Persons may accept e-Aadhaar downloaded from UIDAI website as an officially valid document subject to the following:

a) If the prospective customer knows only his/her Aadhaar number, the Authorised Person may print the prospective customer's e-Aadhaar letter directly from the UIDAI portal; or adopt e-KYC procedure as mentioned above.

b) If the prospective customer carries a copy of the e-Aadhaar downloaded elsewhere, the Authorised Person may print the prospective customer's e-Aadhaar letter directly from the UIDAI portal; or adopt e-KYC procedure as mentioned above; or confirm identity and address of the resident through simple authentication service of UIDAI.

For full text refer to: A.P. (DIR Series) Circular No. 9 @ http://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=9115&Mode=0

10 @ http://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=9116&Mode=0

30 Export of Goods and Services – Project Exports

In order to further liberalise and simplify the procedure of deferred payment terms in case of export of goods or services or in execution of a turnkey project or a civil construction contract requiring prior approval of the approving authority in terms of Foreign Exchange Management (Export of Goods and Services) Regulations, 2000, it has been decided as under:

i) The structure of Working Group (consisting of representatives from Exim bank, ECGC & RBI), which has hitherto been permitted to consider project exports and deferred service exports proposals for contracts exceeding USD 100 Million in value will now be dispensed with. The AD banks / Exim Bank can now consider awarding post-award approvals without any monetary limit and permit subsequent changes in the terms of post award approval within the relevant FEMA guidelines / regulations. Project and service exporters may accordingly approach AD banks / Exim Bank based on their commercial judgement. The respective AD bank / Exim Bank should monitor the projects for which post-award approval has been granted by them; and

ii) The stipulation of time limit of 30 days for the exporter undertaking Project Exports and Service contracts abroad to submit form DPX1/ PEX-1 /TCS-1 to the Approving Authority (AA) for seeking post award approval will not apply henceforth.

The revised Memorandum of Instructions on Project and Service Exports (PEM) is enclosed to this circular.

For full text refer to: A.P. (DIR Series) Cir. No. 11 @ http://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=9125&Mode=0

31 Foreign investment in India by SEBI registered Long term investors in Government dated Securities

It has been decided to enhance the investment limit in government securities available to FIIs/QFIs/FPIs by USD 5 billion by correspondingly reducing the amount available to long term investor from USD 10 billion to USD 5 billion within the overall limit of USD 30 billion. The incremental investment limit of USD 5 billion shall be required to be invested in government bonds with a minimum residual maturity of three years. Further, all future investment against the limit vacated when the current investment by an FII/QFI/FPI runs off either through sale or redemption shall also be required to be made in government bonds with a minimum residual maturity of three years. It is, however, clarified that there will be no lock-in period and FIIs/QFIs/FPIs shall be free to sell the securities (including that are presently held with less than three years of residual maturity) to the domestic investors.

contd. on page no. 372

Service Tax Decoded

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Return Filing and Practical Issues

Levy of tax is followed by assessment. Delegated authorities assess the tax, for example, in Property Tax, concerned department assess the tax and raise the demand. However, many times, liability to assess the tax is being cast upon the tax payer and he is required to assess the tax and pay on his own. For examples, for Income Tax, Service Tax, Central Excise, Customs, Value Added Tax etc., a person liable to pay tax is also required to assess the tax also. It is called self assessment. Self assessment is not a facility but a liability and a burden on the tax payers. If tax payer fails to assess the tax properly, penalties may be levied.

In service tax, a tax payer is required to self assess the tax liability. Section 70(1) of the Finance Act, 1994 (The Act) requires that every person liable to pay the service tax shall himself assess the tax due on the services provided by him. For this purpose, he himself is required to classify his service, ascertain valuation of the service, determine the point of taxation, determine the place of provision, determine availability of CENVAT credit etc. within the four corners of the law.

Filing of the periodical return is one of the important ingredients of the self assessment system. Tax liability, which is self assessed is being conveyed to the concerned department through filing of periodical returns. Tax payer is also required to make self assessment declaration in the return. Section 70(1) of the Act, also requires that a person liable to make payment shall furnish to the Superintendent of the Central Excise, a return in such form and in such manner and at such frequency as may be prescribed.

Service tax return is to be filed in Form ST-3, half yearly and within 25th of the month following the particular half-year. Form ST-3 is required to be submitted electronically [Rule 7 of the Service Tax Rules, 1994 (the Rules)]. If return is delayed, Late Fee upto Rs. 20000/- is also required to be paid [Section 70(1) of the Act read with Rule 7B of the Rules].

Besides a return under Section 70(1), some other periodical returns are also required to be filed in special circumstances. Details of periodical returns are as follows.

Sr.	Person	Form	Reference	Due Date
1	Every person liable to pay Service Tax	ST-3	Section 70(1) of the Finance Act, 94 1994 and Rule 7 of the Service Tax Rules, 1994	25th October/25th April
2	Input Service Distributer	ST-3	Rule 4 of Service Tax (Registration of Special Category of Persons Rule), 2005 and 9(10) of CENVAT Credit Rules, 2004	30th April/ 31st October
3	Large Tax Payer	ST-3	Rule 10 of Service Tax Rules, 1994	25th October/25th April
4	Provider of Output Service availing CENVAT Credit	ST-3 (no specific form prescribed)	Rule 9(9) of CENVAT Credit Rules, 2004	30th April/ 31st October
5	Person opted for Provisional Assessment	ST-3A	Rule 6(4),(5) and (6) of Service Tax Rules, 1994, -Statement (Memorandum of Provisional Deposit)	25th October/ 25th April
6	Person Exporting Goods and paying Commission to person located outside India (not applicable for the period commencing 1-10-2014)	EXP4	Notification No 42/2012 - Service Tax	15th October/ 15th April

Practical Issues relating to filing of returns in service tax law are discussed below.

Issue 1.

Does an assessee need to submit any additional information if he is filing the ST-3 Return for the first time after registration with Service Tax Department?

- In terms of Rule 5(2) of the Rules, every assessee shall furnish a list in duplicate, of
- · All the records prepared or maintained by the assessee for accounting of transactions in regard to providing of any service, receipt or procurement of input service and payment thereof, receipt, purchase, manufacture etc. of Inputs and Capital Goods, other activities, such as manufacture and sale of goods.
- · All other financial records maintained in normal course of business.
- At present, ACES system doesn't support online filing of such information along with ST-3 return. Hence, it is to be filed manually.
- Residual penalty upto Rs. 10000/- under Section 77(2) of the Act may be imposed if such list is not submitted.

Issue 2.

Does one need to file physical signed copy of ST-3 return after filing the same online through website www.ACES.gov.in?

- In Para V of the Circular No. 956/17/2011-CX Dated 28-09-2011 it is clarified that wherever the returns are submitted through ACES there will not be any requirement to submit signed hard copy separately.

Issue 3.

Mr. Hopeful has obtained service tax registration but has neither provided any taxable service nor received any amount towards taxable service during the period. Is Mr. Hopeful requires to file the ST-3 return?

- As per Section 70 of the Act, **person liable to pay service tax** is required to furnish the return. As per Rule 7 of the Service Tax Rules, 1994, every assessee shall submit the return. However, as per Section 65B(12), assessee means person liable to pay tax and his agent. As, Mr. Hopeful is not a "person liable to pay service tax", he is not require to file the return.
- In para 6.1 of the Circular No. 97/8/2007-S.T., Dated 23-8-2007 issued by the CBEC it has been clarified that person who are not liable to pay service tax (because of an exemption including turnover based exemption), are not required to file ST-3 return.
- However, as per Para 4.9 of the FAQs issued by DGST, 5th Edition, September, 2010, return filing is compulsory even if no taxable service is provided or received or no payment is received during a particular half year.
- Considering the provisions of the law, my opinion is that Mr. Hopeful is not required to file the return. However, to avoid the undue litigation and as abundant precaution, return may be filed in such situation.

Issue 4.

Mr. Fresh CA has obtained service tax registration, has provided taxable services and received amount towards taxable services during the period April, 2014 to September, 2014. However, Mr. Fresh CA has availed threshold exemption of Rs. 10 Lacs as provided under Notification No. 33/2012-ST and not required to pay service tax. Is Mr. Fresh CA required to file ST-3 return for the period April, 2014 to September, 2014?

- Please refer the discussion in forgoing issue. Opinion is the same.

Issue 5.

Mr. ACA has obtained service tax registration, provided taxable services, charged service tax in invoices but has not received any amount during the period April, 2014 to September, 2014. As his turnover of taxable services is below Rs. 50 Lacs, he is not liable to pay service tax during the above period. Is Mr. ACA liable to

file ST-3 return for the period April, 2014 to September, 2014?

- In terms of Section 70 of the Act, 'person liable to pay service tax' is required to file the return. However, the term 'person liable to pay service tax' is not defined. Hence, it may be argued that Mr. ACA is also a 'person liable to pay service tax' as he has charged the service tax in invoices. Hence, it is highly advisable that Mr. ACA should file the return.

Issue 6.

Mr. BeSahara does not have money to pay service tax but doesn't want to delay his service tax return. Can he do so?

- Earlier, in old ST-3 format specific clause (Clause 4C) was made available for the details of amount of service tax payable but not paid as on the last day of the period for which return is filed. This clause is discontinued in new ST-3 format. Section 70 states that person liable to pay service tax shall himself assess the tax due and shall furnish the return but it really doesn't stipulate any condition for payment before filing of return.
- Similarly, Rule 7 of Service Tax Rules, 1994 provides that every assessee shall submit return. It also doesn't stipulate any condition for payment before filing of return.
- However, format of ST-3 return, as prescribed under the Rules, requires a declaration to effect that the assessee has assessed and ***"paid"*** the service tax. [Part K, Clause (b)]. Unless this declaration is made, no returns can be filed. Hence, it requires payment of tax before filing of return and Mr. BeSahara can't file return unless he has paid the service tax.
- A rule prescribed under a particular law can't override the provision of the law. Similarly, a Format prescribed under a particular rule, can't travel beyond the boundaries of the rule. Thus, such a provision (assuming that it a provision), may be held *ultra virus* and validity of this may be challenged in the court of law.

Issue 7.

What are the major consequences of late filing of a return?

- Late filing fees upto Rs. 20000/- under Rule 7C of the Rules, read with Section 70 of the Act is required to be paid for delayed return.
- Show Cause Notice as provided in Section 73 may be issued within 18 months/Five years from the relevant date where service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded. Where return is filed, date of filing of the return is the relevant date. Hence, due to delay in return, time limit granted to the department for issuance of Show Cause Notice also gets extended.

Issue 8.

What are the major consequences of non filing of return?

- Besides, requisition of information, issuance of Show Cause Notice etc. following crucial proceeding may be initiated.
- Best Judgment Assessment under Section 72.
- Penalty of Rs. 10000/- under section 77(2) for each return.

Issue 9.

M/s. LastMinute Ltd. has uploaded his service tax return using Excel Utility on 25-10-2014. Due to minor error, system has rejected this return on 26-10-2014, M/s. LastMinute Ltd. has corrected the same and submitted the same again on the 26-10-2014. Is M/s. LastMinute Ltd. is required to pay Late Filing Fee?

- ST-3 return may be furnished in two ways. First, data may be filled in the online form available after log in into the www.aces.gov.in (ACES system), if there is an error, system will not allow to submit the return unless error is corrected and once the data is corrected, return will be accepted immediately by the system.
- Another way is to use Excel Utility provided by the system. In this method, data will be filled in the excel utility, XML file will be generated by

the utility and that XML file will be uploaded in the ACES system. Once the file is uploaded, status "UPLOADED" will be given. After that system scrutinise the data and if found proper accept the return and then the status will be "FILED". System may take more than a day for such verfication. It may happen that the system rejects the uploaded data and one need to upload the corrected data again. Unless the system has accepted the data, return is not filed.

- In this issue, the system has not accepted the return which was uploaded on 25th October and the date of filing of return is 26th October, which is beyond the period granted for filing the return. Hence, in such a situation Late Fee is also required to be paid.
- CBEC has through Para (i) (1) of the Circular No. 956/17/2011 Dated 28-09-2011 clarified that *in case a return is "rejected" by the application, the date of uploading of the rejected return will not be considered as the date of filing, rather the date of uploading of the successfully "filed", return (after the assessee carries out necessary corrections and uploads it again) will be considered as the actual date of filing.*
- Hence, it is highly advisable that if service tax return is being filed using Excel Utility, one should not wait for uploading the returns till last date.

Issue 10.

For the period April, 2014 to September, 2014, Mr. Lazy Small has service tax liability of Rs. 61.80 only which is discharged within due dates. His return is delayed by 230 days. Is he required to pay Late Fee of Rs. 20000/- as provided under Rule 7B of the Rules or is liability of late fee can be limited to service tax?

- In terms of Rule 7B of the Rules, if return is furnished after the date prescribed for submission of such return, the person liable to furnish the said return shall pay the late fees. Thus, payment of late fees is mandatory and automatic.
- In terms of third proviso to the said rule, where the gross amount of service tax payable is nil, the Central Excise Officer may, on being satisfied that there is sufficient reason for not filing the return, reduce or waive the penalty. Hence, if Central Excise Officer wants to reduce/waive the late fee, service tax payable should be nil. In any other case, no such power to reduce/waive the late fee is prescribed. Even, benefit of reasonable cause, as provided under Section 80 of the Act, is not applicable to the late fee payable under Section 70 of the Act. Thus, even if there is strong reasonable cause is available, for example of death of partner, Central Excise Officer doesn't have power to waive the late fee if service tax payable is not nil.
- Hence, Mr. Lazy Small is required to late fee of Rs. 20000/- even if his service tax liability is Rs. 61.80 only.

Issue 11.

Is it compulsory to pay Late Fee before filing of return? Can department refuse to accept the return if Late Fee is not paid at the time of filing the return?

- There is no provision in the law which provide that such late fee should be paid on or before filing of the return. Hence, Late Fee may be paid after filing of return.
- It is clarified at Para No. 6.4 of the Circular No. 97/8/2007-ST Dated 23-08-2007 that "*mere non-submission of evidence of payment of late fee along with the return is, however, not a ground for refusal to allow filing of the return*". Hence, department can't refuse to accept the return merely because late fee is not paid.
- However, it is worth noting that payment of late fee is compulsory and automatic. If not paid along with filing of return, in future, department will take follow up for payment, will write letters, intimation is to be given, client and consultant's time and energy will be wasted. Hence, it is highly advisable that such late fee is paid along with the return.
- Further, Para 6.4 of Circular No. 97/8/2007-S.T., dated 23-8-2007 clarifies that *the appropriate late fees should be paid at the time of filing the*

return, without waiting for any communication or notice from the department.

Issue 12.

Mr. No-Knowledge was not required to file the ST-3 Return. However, he has filed the "Nil" ST-3 return belatedly on a letter received from the department. Is Mr. No-Knowledge required to Pay Late fee?

- In terms of Rule 7C of the Rules, where the return prescribed under Rule 7 is furnished after the date prescribed for submission of such return, ***"the person liable to furnish the said return"*** shall pay the late fee. As Mr. No-Knowledge is not the person required to file the return, he is not required to pay the late fee even if return is submitted belatedly.
- Above propositions also upheld by Hon'ble CESTAT, Kolkata in the case of Suchak Marketing Private Ltd. V. CST Kolkata [2013 (30) STR 593 (Tri.- Kolkata)].

Issue 13.

Mr. Lazy has filed the service tax return with prescribed Late Fee. Now, Central Excise Officer wants to impose a penalty of Rs. 200 per day under Section 77(1)(c) for delay in furnishing information. Is Mr. Lazy required to pay penalty?

- In terms of second proviso to Rule 7C of the Rules, where the assessee has paid the amount as prescribed under Rule 7C, the proceedings, if any, in respect of such delayed submission of return shall be deemed to be concluded. Hence, once the late fee as prescribed in the Rule 7C has been paid, no other penalty is to be levied.

Issue 14.

Mr. Careless has erred in filing ST-3 Return. Can he correct it? How?

- In terms of Rule 7B of the Rules, an assessee may submit a revised return, in Form ST-3, to correct a mistake or omission, within a period of ninety days from the date of submission of the return under Rule 7. Hence, Mr. Careless can revise his ST-3 return within 90 days of the submission of original return.
- It is worth noting that there is no provision in service tax law to revise the return after 90 days from filing of the original return. Even ACES system doesn't accept the return after 90 days. In such a situation it is highly advised that error may be communicated to the concerned range office in writing as soon as discovered.

Issue 15.

Mr. Super-Lazy has not filed his returns for last three years. Is there any time limit to file a belated return?

- There is no time limit provided in the service tax related law which restrict the filing of belated return. Hence, belated return may be furnished at any time. However, it is worth noting that time limit issuance of Show Cause Notice depends on relevant date which will be extended due to filing of delayed return.

Issue 16.

Mr. Lazy-Careless has filed ST-3 return belatedly. Now, he wants to file a revised return. Can he do so?

- A return filed belatedly is also a return filed under Rule 7 of the Rules. Hence, belated return can also be revised in terms of Rule 7B of the Rules.

Issue 17.

M/s. Super-Careless Pvt. Ltd. has filed return and had discovered certain mistakes and has revised it. Now, once again M/s. Super-Careless Pvt. Ltd. has found another mistake or omission in revised ST-3. They want to revise ST-3 once again. Can they do so?

- There is no restriction in the law that the return may be revised only once and not thereafter. It seems that it may be revised any number of times. However, ACES system doesn't allow revision of the return again, once revised return is revised. It is an arbitrary action by the ACES system and contradictory to the law.

Issue 18.

A Service Provider is registered as service provider but not registered as recipient of legal service received from an Advocate. Service Provider has discharged service tax liability under reverse charge mechanism but Registration Certificate is not amended. Can he file his return and disdose the liability as service recipient or has to wait till registration certificate got amended?

- At present, ACES system accepts the return containing details for a category of service even if it is not included in the registration certificate. Hence, ST-3 return is not required to be delayed pending amendment in the registration certificate. However, it is advisable that the registration certificate should be amended.

- It is worth mentioning that in terms of Rule 4(5A) of the Rules, where there is any change in any information or details furnished by the assessee, such a change shall be intimated within a period of thirty days of such change. Hence, assessee is duty bound to make necessary amendment within thirty days.

Issue 19.

M/s. QUARTER BASE is a partnership firm and required to make payment quarterly and required to disclose figures quarterly in ST-3 returns. However, while filing the ST-3 returns, ACES system shows monthly data filling in the return. Why it is so and what is the remedy?

- It seems that during the data migration to ACES system, for number of assessee status for constitution is wrongly uploaded in the new system as "other" instead of proprietary concern or partnership firm or company etc. as the case may be, and such assessees are considered by ACES system as other and not Proprietor or Partnership Firm. Due to this system force the assessee to provide the data on monthly basis.

- Legally individuals and partnership firms may provide the data on monthly basis. All such assessees are required to amend their registration for proper constitution despite having no fault on their part.

- Earlier, it has been noticed that some of the returns filed using excel utility were rejected due to the fact that their constitution status as available in the data base and as selected in the ST-3 return utility was not matching. To avoid such undue hardship in future, it is advised that the registration certificates should be amended.

Issue 20.

M/s. TAX-NOTAX is paying service tax on taxable services and also providing some exempt services. Is M/s. TAX-NOTAX is required to show details of exempt services in their ST-3 returns?

- Yes. ST-3 return specifically requires disclosure of exempt services also. Specific provisions are made in the ST-3 returns in this behalf.

- Not only the value of exemption but also a Notification Number, with clause if any, is also required to be disclosed. In the case where exemption is optional, department may argue that assessee has never opted for the exemption.

- Where such a disclosure is not made and if exemption availed is legally not available, it has been held that non disclosure of exemption amounts to suppression of facts.

- For the purpose of CENVAT Credit, Trading of Goods is also an exempted services and value thereof, as provided in the CENVAT Credit Rules, 2004 is required to be disclosed in the return.

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Service Tax - Recent Judgements

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22 **34 STR 610 Arvind Mills Ltd. Vs. Comm. Of ST, Ahmedabad (Tri-Ahmedabad)**

The activity of supplying qualified/skilled employees to group companies does not amount to service in the nature of "manpower recruitment and supply agency services"

Facts:-

Appellant supplied qualified /skilled employees to its subsidiary/group companies. Service Tax department alleged that the transaction was covered under manpower recruitment and supply agency services.

Held:-

Ahmedabad Tribunal held that there was no allegation or findings about supplying of employees to any concern other than its own group companies. Also the employees did not work under the direction , supervision and control of the group companies but completed the work as directed by the appellants. Further Tribunal also relied on the decision in the case of Paramount Communication Ltd, wherein it was observed that in case the personnel works for two sister concerns, the rendition of services was by the personnel to both the companies and it was not a case of one company providing services to another and accordingly the appeal was allowed.

23 **34 STR 778 JCT Electronics Ltd vs. Comm of Ex. & ST., Vadodara (Tri-Ahmedabad)**

Adjustment of excess service tax paid in next subsequent month/quarter.

Facts:-

The appellant paid excess service tax which was adjusted by them after a long time in subsequent month or quarter. The appellant also contested that such service tax adjustment was appropriate vide Rule 6(4A) and 6(4B) of the service tax rules, 1994. Service tax department argued that such adjustment could be made in the next month or next quarter provided intimation was filed to the department within 15 days of such adjustment and accordingly imposed penalties u/s 76 and 77 of the act. The appellants argued that they have adjusted their own money and hence, penalty was unwarranted in the present case.

Held:-

The Tribunal held that under the service tax rules the phrase used is subsequent month or quarter and not subsequent months and quarters. Further it held that the appellant had neither fulfilled all the conditions as required under the said rules. However, since the appellants had a bonafide belief with respect to adjustment of excess service tax paid, the penalties were set aside.

24 **46 taxmann.com 97 Mallika Jeyabalan vs. CCE, Madurai. (Chennai-CESTAT)**

Training given relating to various procedures and statutory compliances to be made in relation to export of goods qualifies as "vocational training" and is exempt under notification no. 24/2004

Facts:-

The appellant was providing training relating to various procedures and statutory compliances to be made in relation to export of goods and claimed exemption by contending that it would qualify to be vocational training relying upon the decision of Ashu Export Promoters 9p) Ltd v. CST (2012) 34 STT 47,(Delhi – CESTAT) and Wigan & Leigh College (India) Ltd v. Jt. CST (2008) 12 STT 157 (Bang – CESTAT). While department agrued that vocational training would only cover courses with specific syllabus and approved by government and

hence the said activity would be liable to service tax under the category of commercial training and coaching.

Held:-

The Tribunal held that the decisions relied upon by the appellant will apply to the training impugned in this case also and hence granted waiver and stayed collection of all the dues arising from the impugned order.

25 **34 STR 383 Marine Container Services (South) P. Ltd. Vs. CCE (ST) Tirunveli (Tri- Chennai)**

In case of margins earned by a steamer agent by booking space on shipping line through another steamer agent , there is no liability of service tax on the said margin earned.

Facts:-

Appellant was steamer agent of a particular shipping line and was paying service tax on the services rendered to the said shipping line. Appellant also makes booking arrangements through another steamer agent for the customers who comes to them for booking space on a different shipping line and charges the customers an extra amount over and above that was paid to another steamer agent. Service tax department demanded service tax on the said margin amount under "steamer agent service".

Held:-

The Tribunal held that there is no evidence that services were rendered to a shipping line and payment received from shipping line for booking of space through another agent and therefore demand under steamer agent's service is not maintainable.

26 **34 STR 850 Nandganj Sihori Sugar Co. Ltd vs. CCE, (Tribunal – Delhi)Transportation of goods from its collection centre to its factory, whether liable to service tax under the category of goods transport agency services (GTA)**

Facts:-

The appellant has availed services of transportation of sugarcane from its collection centre to its factory. The transporters did not issued any consignment notes but issued fortnightly bills to the appellants. The department argued and demanded service tax from the appellant on the grounds that it had availed goods transport agency (GTA) services.

Held:-

Tribunal held that in case of GTA service the agency not only undertakes the service of transportation of goods but also undertakes delivery of goods to the consignee and temporary storage of goods till its delivery to the consignee. It was further held that the bills issued are not the consignment notes as required in terms of rule 4B of the service tax rules and therefore the track owners cannot be considered as goods transport agency . In the present case the activity is merely of transportation of goods in motor vehicle and accordingly no service tax is payable by the appellants as a recipient of goods transport agency services.

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Do not be afraid of a small beginning, great things come afterwards. Be courageous. Do not try to lead your brethren, but serve them. The brutal mania for leading has sunk many a great ships in the waters of life. Take care especially of that, i.e. be unselfish even unto death, and work.

Swami Vivekananda

VAT Demystified

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What is meant by "Goods" under VAT Act.

1. Introduction:

Entry 54 of List II of the Seventh Schedule read with Article 246(3) of the Constitution gives the States power to make laws with respect to "taxes on the sale or purchase of goods other than newspapers subject to the provisions of Entry 92(A) of List I".

Article 246(3) reads as under:

Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in the Constitution, referred to as the "State List").

Article 366(12) reads as under:

"goods" includes all material, commodities and articles

Article 366(29)(d) reads as under:

a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.

2. Definition of Goods under Gujarat VAT Act:

Sec 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.*

3. Classification of goods:

3.1. Existing Goods :

These are the goods which are owned or possessed by the seller at the time of sale. Only existing goods can be the subject of a sale. The existing goods may be:

a. **Specific Goods**: These are goods which are *identified and agreed upon* at the time of a contract of sale is made.

b. **Ascertained Goods**: Though commonly used as similar in meaning to *specific* goods, these are the goods which become ascertained subsequent to the formation of a contract of sale.

c. **Unascertained or Generic Goods**: These are the goods which are not identified and agreed upon at the time of contract of sale. They are defined only by description and may form part of a lot.

3.2. Future Goods:

These are the goods which a seller *does not possess* at the time of the contract of sale but which will be acquired or manufactured or produced by him after the making of the contract of sale.

Such type of contract is known as an agreement to sell, and in such case sale will be complete only when actual goods are acquired or manufactured or produced.

3.3. Contingent Goods:

Though a type of future goods, these are the goods the *acquisition* of which by the seller *depends upon a contingency*, which may or may not happen.

4. Different items whether are 'goods' - interpreted by courts.

4.1 Lottery Tickets:

This classical concept of sale was held to apply to the entry in the legislative list. There have to be three essential components to constitute a transaction of sale before tax could be imposed- namely, (i) an agreement to transfer title (ii) supported by consideration, and (iii) an actual transfer of title in the goods. In the absence of any one of these elements it was held that there is no sale of goods.

Lottery tickets are not 'goods'. Lottery ticket has no value itself. It is a mere piece of paper. Its value lies in the fact that it represents a chance or right to a conditional benefit of winning a prize of a greater value than the consideration paid for the transfer of that chance. It is nothing more than a token or evidence of this right. Lottery ticket is merely evidence of the right to participate in the draw and therefore goods, the transfer of which was sale. To extend that the lottery ticket evidenced the right to claim the prize, it was not goods but an actionable claim and therefore not 'goods' under the Sales Tax Laws. A transfer of it was consequently not a sale. Ref: Sun Rise Associates 3 VST 151 (SC)

4.2 Sim Cards:

The issue which arose for consideration before the Hon'ble Supreme court in the case of IDEA Mobile Communication Ltd. v/s Commissioner of Central Excise and Customs Cochin reported in 43 VST 1(SC), whether the value of SIM cards sold by the appellant to their mobile subscribers is to be included in taxable service for levy of sevice tax or whether it is taxable as sale of goods under Sales Tax Act.

It was held that the amount received by the cellular telephone company from its subscribers towards the SIM card will form part of the taxable value for levy of service tax. The SIM cards are never sold as goods independent from the service provided. They are considered part and parcel of the services provided and the dominant position of the transasction is to provide services and not to sell the material, i.e SIM cards which on its own but without the service would hardly have any value at all. It was established from the records and facts of the case that the value of SIM cards formed part of the activation charges as no activation is possible without a valid functioning of SIM card and the value of the taxable service is calculated on gross total amount received by the operator from the subscribers, and there is no element of sale involved.

4.3 Computer Software:

4.3.1 Hon'ble Supreme Court has decided what is meant by Goods under Customs Act in the case of In *Associated Cement Companies Ltd. v/s Commissioner of Customs [2001] 124 STC 59 (SC)*, and has held that :

Any movable article brought into India by a passenger as part of his baggage makes him liable to pay customs duty as per the Customs Tariff Act, 1975. The definition of "goods" in section 2(22) of the Customs Act, 1962, includes in sub-clause (c) baggage and in sub-clause (e) "any other kind of movable property". In effect the definition is so worded that all tangible movable articles will be goods for the purposes of the Act under the residuary clause (e). Whether a movable article comes as part of a baggage or is imported into the country in any other manner, for the purpose of the Customs Act, the provisions of section 12 of the Customs Act would be attracted.

Any media, whether in the form of books or computer disks or cassettes, which contains information technology or ideas, would necessarily be regarded as goods under these provisions of the Act. These items are movable goods and would be covered by section 2(22)(e). Whenever any goods or movables or tangible articles are imported into India customs duty is payable. For the purpose of attracting duty it is immaterial what are the types of goods that are imported or

what is contained in them or recorded thereon. The contents are relevant only for the purpose of valuation.

"Computer programs are the product of an intellectual process, but once implanted in a medium are widely distributed to computer owners. An analogy can be drawn to a compact disc recording of an orchestral rendition. The music is produced by the artistry of musicians and in itself is not a 'goods', but when transferred to a laser-readable disc becomes a readily marketable commodity.

Similarly, a computer program, may be copyrightable as intellectual property, does not alter the fact that once in the form of a floppy disc or other medium, the program is tangible, movable and available in the market place. The fact that some programs may be tailored for specific purposes need not alter their status as 'goods' because the 'Code' definition includes 'specifically manufactured goods."

4.3.2 In *Tata Consultancy Services v/s State of Andhra Pradesh [2004] 137 STC 620 (SC)* the hon'ble Supreme Court held that the term "goods", for the purposes of sales tax, cannot be given a narrow meaning. It has been held that properties which are capable of being abstracted, consumed and used and/or transmitted, transferred, delivered, stored or possessed, etc., are "goods" for the purposes of sales tax. In India the test, to determine whether a property is "goods", for purposes of sales tax, is not whether the property is tangible or intangible or incorporeal. **The test is whether the concerned item is capable of abstraction consumption and use and whether it can be transmitted, transferred, delivered, stored, possessed, etc.** Admittedly in the case of software, both canned and uncanned, all of these are possible.

Hence it was held that software programs contain these characteristics and are hence goods.

4.4 Electro Magnetic Waves:

The question before the Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Ltd. v. Union of India 145 STC 91(SC) was whether electro magnetic waves are Goods within the meaning of article 366(29A)(d)* of the Constitution of India.

Three Judge Bench of the Supreme Court Hon'ble Court held that, Electro magnetic waves are neither abstracted nor are they consumed in the sense that they are not extinguished by their user. They are not delivered, stored or possessed nor are they marketable. They are merely the medium of communication. What is transmitted is not an electro magnetic wave but the signal through such means. The signals are generated by the subscribers themselves. In telecommunication what is transmitted is the message by means of the telegraph. No part of the telegraph itself is transferable or deliverable to the subscribers.

The second reason is more basic. A subscriber to a telephone service could not have intended to purchase or obtain any right to use 'electromagnetic waves' or 'radio frequencies' when a telephone connection is obtained Nor does the subscriber intend to use any portion of the wiring, the cable, the satellite, the telephone exchange etc. At the most the concept of a sale in a subscriber's mind would be limited to the use of any other goods, incorporeal or corporeal is given to him with the telephone connection.

We cannot anticipate what may be achieved by scientific and technological advancements in future. No one has argued that at present electromagnetic waves are abstract table or are capable or delivery. It would, therefore, appear that an electromagnetic wave (or radio frequency, as contended by one of the counsel for the respondents) does not fulfill the parameters applied by the Supreme Court in the case of Tata Consultancy (supra) for determining whether they are goods, right to

use of which would be a sale for the purpose of Article 366 (29-A)(d).

Hon'ble court further held that the electromagnetic waves are not 'goods' within the meaning of the word either in Article 366(12)* or in the state Legislations.

4.5 Whether purchase of Flat after BU Permission liable for VAT?

The question before advance ruling authority U/s 80 of GVAT Act in the case of Dr. Asha Semson Choudhry and Nirajsingh RamchandraSinghThakur order dtd: 16-7-2014 was whether buyer who acquires flat after BU (building use) permission or after occupancy certificate is required to pay VAT to the developer or to the builder?

Hon'ble Joint Commissioner of Commercial tax (Legal) has held that such sale is sale of immovable property and it is not covered within the definition of 'goods' defined under section 2(13) of GVAT Act,. therefore not liable to tax under the Act.

5. Conclusion

Whether a particular item is 'Goods' or not depends on facts of each case and such things become very important under excise law where intermediate product is produced during the process of manufacturing and is capable of being marketable as such.

Under the Vat law also areas of dispute is in case of intangible goods i.e copy right, trade mark, brand name, know how etc. as the same are 'goods' and covered by entry 41 of Schedule II of Gujarat VAT Act, under such circumstance it is always advisable to go for advance ruling, by which one can avoid future litigation.

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contd. from page 360

For full text refer to: A.P. (DIR Series) Circular No. 13 @ http://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=9128&Mode=0

32 External Commercial Borrowing (ECB) Policy — Review of all-in-cost ceiling

It has been decided that the all-in-cost ceiling as specified under paragraph 2 of A.P. (DIR Series) Circular No. 99 dated March 30, 2012 (also mentioned hereunder) will continue to be applicable till December 31, 2014 and is subject to review thereafter. All other aspects of ECB policy remain unchanged.

Average Maturity Period	All-in-cost over 6 month LIBOR*
Three years and up to five years	350 bps
More than five years	500 bps

* for the respective currency of borrowing or applicable benchmark

For full text refer to: A.P. (DIR Series) Circular No. 17 @ http://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=9139&Mode=0

33 Liberalised Remittance Scheme for resident individuals-clarification

The requirement of post facto reporting stipulated in terms of A.P. (DIR Series) Circular No.32 dated September 04, 2013, (Sr. no. 4 of Annexure to the Circular) stands withdrawn.

For Full Text refer to A.P. (DIR Series) Circular No. 19

http://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=9161&Mode=0

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VAT - Recent Judgements and Updates

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Important Judgments:

[1] Important judgment delivered by the Hon. Madhya Pradesh High Court in case of Shree Ram Agro Ltd. on Input Tax Credit allowability on Entry Tax paid on raw material, used in the manufacturing of taxable goods and no proportionate disallowance on by-product is to be made on tax free goods.

Issue:

The dealer has purchased the cotton seeds by paying the Entry Tax on it and after production of oil cake, no disallowance has been made on the by-product of d-oiled cake. (D.O.C)

Facts:

When taxable and tax free goods are simultaneously manufactured, the dealer would be entitled to input tax credit of the total tax paid on the purchase and this cannot be reduced on pro-rata basis.

This appeal has been admitted for considering the following substantial question of law.

"Whether input tax credit of taxes paid on the purchase of cotton seed used in the manufacture of cotton seed oil can be denied proportionately merely because during the process of manufacture a by-product in the form of cotton seed cake is also produced, so when taxable and tax free goods are simultaneously manufactured, the appellant dealer would be entitled to input tax credit of total tax paid on purchase and the same cannot be reduced on pro rata basis?"

The question of imposing liability on proportionate basis and denying the entire set-off with regard to the credit available on the purchase of raw material has been considered by this court in the case of Ruchi Soya Industries Ltd v. State of M.P. [2013] 70 VST 40 (MP); [2014] 24 STJ 235 (MP) and the Division Bench of this court after considering various judgments of the Supreme Court.

"From the aforesaid finding of the Hon. Supreme Court, it is clear that manufacturer is eligible to the benefit of set-off on the entire amount of tax paid on purchase of raw material and principle of apportionment could not be invoked. In the facts and circumstances of the present case, the judgment of the Hon. Supreme Court is applicable because the DOC, a by-product is tax free and another by-product sludge and main product oil are taxable. Hence, the authority cannot apportion the tax liability after deducting the percentage of proportionate manufacture of DOC, which has been done in the present case."

From the aforesaid analysis of law, it is clear that the manufacturer is eligible for the benefit of set-off on the entire amount of tax paid on purchase of raw material and the principle of proportionate liability has been found to be unsustainable.

In view of the above, this appeal is allowed. The question raised is answered by holding that on the purchase made by the manufacturer with regard to raw material, he is entitled to the benefit of set-off on the entire amount of tax and the principle of apportionment cannot be invoked.

[2] The Important judgment delivered by the Gujarat High Court in case of Shri Anilkumar v. State of Gujarat on the Penalty levied for taking no registration on bonafide belief. Penalty confirmed.

Issue:

Gujarat Value Added Tax Act, 2003 – Sec. 41 – Requirement to get registration in case of a dealer is liable to pay tax – Ground for not getting registration was bonafide error – Assistant Commissioner imposed penalty with interest – Explanation that error was bonafide that dealer did not get registration – No interference called for – Insistence of personal hearing no basis to challenge the order of penalty – Petition dismissed.

Facts:

Brief facts are that the petitioner was based in Rajasthan and was engaged in industrial and commercial construction activities. The petitioner for and was awarded a tender issued by the Western Railway, Ahmedabad for construction of minor bridge.

For execution of such work, the petitioner started purchasing goods from the registered dealer in the State of Gujarat. As per his own say, with awarding of this contract, the petitioner's business in Gujarat gradually increased and he shifted his base from Rajasthan to Gujarat in April 2008. All along, however, the petitioner never applied for and was therefore obviously not granted any registration under the Vat Act. Admittedly, if the petitioner wanted to take the credit of the Vat paid goods from the sellers, such registration was required. As a consequence of the petitioner's failure to obtain the registration, the petitioner was unable to get the credit. To assess the petitioner's liability for Vat, proceedings were initiated and are informed that the Assistant Commissioner confirmed the total tax demand of Rs. 41,81,169/- and permitted deduction of Rs. 6,68,242/- which was the tax deducted by the Western Railway at source. The Asst. Commissioner imposed penalty equal to the amount of tax and also demanded interest of Rs. 15,29,085/-. The order of the Asst. Commissioner is under challenge before the Gujarat Value Added Tax Tribunal. At this stage, the petitioner applied to the State Government under application dated 4th Feb. 2010 and requested for remission of the tax and penalty under section 41(1) of the Act.

On this application, the State Government passed impugned order dated 8th Oct. 201. In such order, it was conveyed to the petitioner that under the Vat Act, any dealer who is liable to pay tax is required to obtain registration. The petitioner had not obtained registration for the period for which he had asked for remission, his application therefore is rejected.

Learned Counsel of the petitioner assailed the said order contending that there is no requirement under section 41(1) of the Vat Act that a dealer must be registered before his request for remission can be accepted. The Learned Counsel for the petitioner submitted that the petitioner had made detailed grounds why remission should be granted. The state rejected such application without hearing the petitioner. He relied on the decision of Supreme Court in case of Shara India (Firm) v. Commissioner of Income Tax, Central, reported in 2008 (226) ELT 22(SC) to contend that even though section 41(1) of the Vat Act does not specifically provide for hearing, the same must be read into it.

The Hon. High Court does not find any illegality in the order passed by the State Government, which is challenged before High Court. Admitted facts are that the petitioner though was required to get registered under the Vat Act, since he was regularly involved in the purchase of goods for the purpose of execution of his works contract, he did not obtain such registration. The only ground made out before us for not obtaining such registration is the bona fide error on his part. The Western Railway had deducted tax at source which gave an impression to the petitioner that now he is not required to obtain registration, since tax is already deducted.

The explanation of the petitioner begs the question. Deduction of tax at source has no relevance to the requirement of registration by a dealer under the Vat Act. It is a statutory requirement and mere explanation that he was under bona fide impression that no such registration was necessary would not be sufficient.

The contention that there was a breach of natural justice also cannot be accepted. It was not a case where the Government without putting the petitioner to notice passed an order which resulted into adverse civil consequences. It was a case where the petitioner made a representation which was not accepted by the Government. The insistence on personal hearing also has no legal base. It is well settled that requirement of hearing as a part of natural justice does not in all cases include a right to personal hearing.

In the result, writ petition is dismissed.

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Business Valuation

Academic Refresher:
Approaches to Valuation
Asset Approach

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Intangible Assets and its Valuation

Intangible assets are something of value that cannot be seen, touched or physically measured, which are created through time and/or effort and that are identifiable as a separate asset, such as a brand, franchise, trademark, or patent. Just an opposite of tangible assets.

In the world of business today, things are not what they used to be. In the new economy, the most valuable assets have gone from tangible to intangible. Instead of plant and equipment, companies today compete on ideas and relationships. While intangible assets don't have the obvious physical value of a factory or equipment, they can prove very valuable for a firm and can be critical to its long-term success or failure. Although brand recognition is not a physical asset you can see or touch, its positive effects on bottom-line profits can prove extremely valuable to firms, for example- Coca Cola, whose brand strength drives global sales year after year.

Mr. Ágnes Horváth in his article "Non Quantitative measures in company valuation" summarizes factors determining the company value, started out from the fact that a company does not exist in complete isolation. There are several elements in the environment that contribute to its operation. These significant qualitative characteristics, which must not be discounted or must not be over looked, includes; dominant market size, company size and critical mass, employees'-management relations, strength of competition, technological capabilities and expertise, size of backlog, location of operations, strength of customer-vendor relationship, competence of management etc. It is essential to focus not only on factors closely related to the company operation, but on micro and macro factors as well. This all together give rise to goodwill of the business concern.

Goodwill is the most common and popular intangible asset in the world of business. It refers to the price or value above the market value of the identifiable assets of a company. When a business is bought, the price paid will often be above the market value of its infrastructure, equipment, inventory, etc. A business enterprise cultivates this intangible asset by establishing a strong business track record and by establishing many beneficial relationships, including those with customers, distributors, and suppliers. In addition, goodwill covers other valuable albeit intangible aspects of a business, such as its credit rating, location, reputation, and name. Goodwill also may manifest itself in the form of trademarks, manufacturing processes, and license rights.

In any event, goodwill reflects the buyer's perception that the business as a whole is worth more than the sum of the identifiable physical assets. On occasions, enterprises even sell their goodwill without the sale of other assets.

There are two primary forms of intangibles - legal intangibles (such as trade secrets (e.g., customer lists), copyrights, patents, trademarks, and goodwill) and competitive intangibles (such as knowledge activities (know-how, knowledge), collaboration activities, leverage activities, and structural activities). Legal intangibles generate legal property rights defensible in a court of law. Competitive intangibles, whilst legally non-ownable, directly impact effectiveness, productivity, wastage, and opportunity costs within an organization - and therefore costs, revenues, customer service, satisfaction, market value, and share price. Human capital is the primary source of competitive intangibles for organizations today. Competitive intangibles are the source from which competitive advantage flows, or is destroyed.

Below mentioned examples, though not exhaustive, provide a useful framework for the determination of intangible assets. They fall into five categories (as shown below).

Intangible Asset categories Examples include:

1. Marketing-related intangible assets : Trademarks, trade names, service marks, internet domain names, non-competition agreements.
2. Customer-related intangible assets : Customer lists, order or production backlogs, customer contracts and customer - relationships including non-contractual relationships.
3. Artistic-related intangible assets : Plays, books, magazines, newspapers, pictures, photographs.
4. Contract-based intangible assets : Licensing and royalty agreements, advertising, construction, service or supply agreements, lease agreements, franchise agreements, employment contracts.
5. Technology-based intangible assets : Patented technology, computer software, unpatented technology (know-how), databases, trade secrets such as secret formulas, processes and recipes.

Difficult questions about intangibles assets are to drive finance professionals and Accounting Standard Setters to develop new measurements, new reporting forms, new tools and techniques for an economy based on intangibles.

Valuation of intangible assets

While intangible assets play an increasingly important role in today's business world, it remains difficult to quantify its economic and monetary value. Companies with a large part of their value in intangible "assets," such as high-technology companies and companies with substantial research and development activities, may be particularly hard to value because such a small portion of their value lies in assets in place whereas a large portion derives from uncertain future growth opportunities. A further complication with such companies is that their high R&D expenses reduce current earnings even though R&D projects could be perceived as investments for the future; in such a case, current earnings may be a bad predictor of value.

Intangible assets are significantly more difficult to value than their tangible counterparts. Obviously, it is more difficult to determine the value of a trade secret than the value of office space. When it is time to sell assets, intangible assets, such as goodwill and patent, can cause real problem in the form of financial and legal obstacles if improperly valued. The "fair" value of an intangible asset is the amount that such asset can be bought, sold, or settled in a transaction between willing parties, not involving forced or liquidation sale. The method most often used in the valuation of intangible property determines the present value of the cash flows derived from using such property.

Intangible value is created when a company has above average return on assets (or equity), so that the value of the business (based on expected earnings or cash flow) exceeds the underlying net asset value.

- Consequently, intangible value is the amount by which the value of the business exceeds the value of the underlying, tangible assets. Intangible assets can be difficult to value individually with no guarantee of completeness.
- The most common technique for capturing total intangible value is an enterprise valuation to establish total asset value. The value of current and fixed assets is then deducted to arrive at the value of intangible assets.

Many times a business owner incurring specific expenses like research on value addition of a product, huge advertisement cost on initial startups for product publicity, extra amount paid on purchase of specific formula etc.; claim existence of intangible worth arisen due to these expenditures. The analyst should note that, in order for expenditure to qualify as an intangible asset, a business enterprise must expect benefits in the coming years and support that expectation with evidence. Expenditures such as those on advertising, for example, may promise future benefits, but the benefits are so uncertain and unpredictable that the business classify them as current expenses.

Methods for the Valuation of Intangibles

Acceptable methods for the valuation of identifiable intangible assets and intellectual property fall into three broad categories. They are market based, cost based, or based on estimates of past and future economic benefits.

In an ideal situation, a value analyst will always prefer to determine a market value by reference to

comparable market transactions. This is difficult enough when valuing assets such as bricks and mortar because it is never possible to find a transaction that is exactly comparable. In valuing an item of intellectual property, the search for a comparable market transaction becomes almost futile. This is not only due to lack of compatibility, but also because intellectual property is generally not developed to be sold and many sales are usually only a small part of a larger transaction and details are kept extremely confidential.

Cost-based methodologies, such as the "cost to create" or the "cost to replace" a given asset, assume that there is some relationship between cost and value and the approach has very little to commend itself other than ease of use. The method ignores changes in the time value of money and ignores maintenance.

The methods of valuation flowing from an estimate of past and future economic benefits (also referred to as the income methods) can be broken down in to four limbs; 1) capitalization of historic profits, 2) gross profit differential methods, 3) excess profits methods, and 4) the relief from royalty method.

1. The capitalization of historic profits arrives at the value of intangibles by multiplying the maintainable historic profitability of the asset by a multiple that has been assessed after scoring the relative strength of the intangible assets. For example, a multiple is arrived at after assessing a brand in the light of factors such as leadership, stability, market share, internationality, trend of profitability, marketing and advertising support and protection. While this capitalization process recognizes some of the factors which should be considered, it has major shortcomings, mostly associated with historic earning capability. The method pays little regard to the future.
2. Gross profit differential methods are often associated with trademark and brand valuation. These methods look at the differences in sale prices, adjusted for differences in marketing costs. That is the difference between the margin of the branded and/or patented product and an unbranded or generic product. This formula is used to drive out cash flows and calculate value. Finding generic equivalents for a patent and identifiable price differences is far more difficult than for a retail brand.
3. The excess profits method looks at the current value of the net tangible assets employed as the benchmark for an estimated rate of return. This is used to calculate the profits that are required in order to induce investors to invest into those net tangible assets. Any return over and above those profits required in order to induce investment is considered to be the excess return attributable to the intangible assets. While theoretically relying upon future economic benefits from the use of the asset, the method has difficulty in adjusting to alternative uses of the asset.
4. Relief from royalty considers what the purchaser could afford, or would be willing to pay, for a license of similar intangible asset. The royalty stream is then capitalized reflecting the risk and return relationship of investing in the asset.

Discounted cash flow ("DCF") analysis sits across the last three methodologies and is probably the most comprehensive of appraisal techniques. Potential profits and cash flows need to be assessed carefully and then restated to present value through use of a discount rate, or rates. The discount rate is used to calculate economic value and includes compensation for risk and for expected rates of inflation.

Real option or option pricing method is now a days getting more recognition for valuing the patent.

While some of the above methods are widely used by the financial community, it is important to note that valuation is an art more than a science and is an interdisciplinary study drawing upon law, economics, finance, accounting, and investment. It is rash to attempt any valuation adopting so-called industry/sector norms in ignorance of the fundamental theoretical framework of valuation. When undertaking an Intangible valuation, the context is all-important, and the value appraiser will need to take it into consideration to assign a realistic value to the asset.

Each method proceeds on different fundamental assumptions, which have greater or lesser relevance, and at times even no relevance to a given situation. Thus, the methods to be adopted for a particular valuation must be judiciously chosen.

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Corporate Law Update

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(A) MCA Updates:

1. Class of Companies for the purpose of second proviso to section 203(1) of the Companies Act, 2013:

The MCA has notified that the public companies having paid-up share capital of Rs. 100 crore or more and annual turnover of Rs. 1,000 crore or more, which are engaged in multiple businesses and have appointed Chief Executive Officer for each such business shall be the class of companies for the purposes of the second proviso to sub-section (1) of Section 203 of the said Act.

For the purposes of this notification, the paid-up share capital and the annual turnover shall be decided on the basis of the latest audited balance sheet.

[F. No. 1/5/2013-CL-V dated 25th July, 2014]

2. Companies (Removal of Difficulties) Sixth Order, 2014

To make harmonious interpretation, the MCA has inserted the word "or his relative" in section 2 of the Companies Act, 2013, in clause (76), in sub-clause (iv), after the word "manager".

W. e. f. 24/07/2014, the sub clause (iv) of Section 2(76) shall be read as under:

*"a private company in which a director or manager **or his relative** is a member or director"*

[F. No. 2/14/2014-CL.V dated 24th July, 2014]

3. Clarification with regard to applicability of provisions of section 139(5) and 139(7) of the Companies Act, 2013

The MCA has clarified that the Deemed Government Companies, (where ownership or control lies with two or more Government Companies or Corporations etc.) are covered under Section 139(5) and 97) of the Companies Act, 2013 and the responsibility rests with both, the Government concerned and the relevant company, for sending the information about the incorporation of a Company subject to audit by an auditor to be appointed by the C&AG for the purpose of appointing the first auditors under section 139(7).

The MCA has further clarified that it will primarily be the responsibility of the company concerned to intimate to the C&AG about its incorporation along with name, location of registered office, capital structure of such a company immediately on its incorporation.

Such company shall share such intimation to the relevant Government so that such Government may also send a suitable request to the C&AG.

[**General Circular No. 33/2014 dated 31st July, 2014**]

4. Company Law Settlement Scheme, 2014

In order to provide an opportunity to the defaulting Companies to enable them to make their defaults good by filing the annual statutory documents belatedly which were **due for filing till 30th June, 2014**, the Ministry has decided to condone the delay in filing of such annual documents with the ROC.

It further provides an opportunity to the inactive companies to get their companies declared as "Dormant Companies" by filing a simple application at reduced fees.

The salient features of the CLSS, 2014 are as under:

- **Filing Fees:** Normal filing fees plus 25% of actual additional filing fees payable on the date of filing of such belated document.
- Applicant Company has to withdraw the appeal filed against prosecution filed against notices/complaint for the offenses and furnish the proof of such withdrawal along with the application.
- E-form for filing application seeking immunity (**E-form CLSS-2014**) in respect of the belated documents under the scheme may be filed on or after 01/09/2014 but

before 3 months from the date of closure of the scheme.

- The scheme shall be applicable for filing the following e-forms only:
  - Form 20B;
  - Form 21A;
  - Form 23AC, 23ACA, (Normal & XBRL mode);
  - Form 66; and
  - Form 23B.
  - Under this scheme, the defaulting inactive companies may either complete the pending filings or may apply for striking off the name at the concessional rate of 25% of the filing fees by filing e-form FTE.

[**General Circular No. 34/2014 dated 12th August, 2014**]

5. Companies (Meetings of Board and its Powers) Second Amendment Rules, 2014.

Effective Date: They shall be effective from the date of their publication in the official gazette.

- In Clause (iv) of Rule 4(1), for the words **"Consideration of Accounts",** the words **"Consideration of financial statement including Consolidated financial statement, if any, to be approved by the Board u/s. 134(1) of the Act"** shall be substituted.
- For the purpose of first proviso to section 188(1), the threshold limits in Rule 15, for sub-rule (3), have been changed for taking the prior approval of the company by a special resolution and such revised limits are as mentioned herein below.

Sr. No.	Nature of Transaction	Threshold Limit
a	sale, purchase or supply of any goods or materials	- 10% of Turnover of the Company **OR** - Rs. 100 Crore, whichever is lower.
b	selling or otherwise disposing of, or buying, property of any kind	—Same as above—
c	leasing of property of any kind	- 10% of Net Worth **OR** - 10% of Turnover of the Company **OR** - Rs. 100 Crore, whichever is lower.
d	availing or rendering of any services	- 10% of Turnover of the Company **OR** - Rs. 50 Crore, whichever is lower.
e	appointment of any agent for purchase or sale of goods, materials, services or property	- 10% of Turnover of the Company **OR** - Rs. 100 Crore, whichever is lower. ***[w. r. t. Sr. No. (a) & (b)]*** - 10% of Turnover of the Company **OR** - Rs. 50 Crore, whichever is lower. ***[w. r. t. Sr. No. (d)]***
f	such related party's appointment to any office or place of profit in the company, its subsidiary company or associate company	Rs. 2.5 lacs p.m.
g	Remuneration for underwriting the subscription of any securities or derivatives thereof, of the company	Remuneration >1% of Net Worth of the Company.

Explanatory Statement pursuant to section 101 shall contain the followings:

- Name of the Related Party;
- Name of the Director or KMP who is related, if any;
- Nature of relationship;
- Nature, Material Terms, Monetary Value & particulars of the contract/arrangement;
- Any other relevant or important information for taking the decision on the proposed resolution.

[**F. No. 1/32/2013 CL-V-Part dated 14th August, 2014**]

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From Published Accounts

CA. Pamil H. Shah
pamil_shah@yahoo.com

AS –11 The Effects of Changes in Foreign Exchange Rates

Foreign Exchange Transactions – Annual Report 2013-14

Manugraph India Ltd.

i. Transactions denominated in foreign currency are recorded at the exchange rate on the date of transaction. The exchange gain/loss on settlement / negotiation during the year is recognised in the Statement of Profit and Loss.

ii. Foreign currency transactions remaining unsettled at the end of the year are converted at year-end rates. Gain or loss arising on account of transactions covered by forward contract is recognised over the period of contracts.

iii. Current assets and current liabilities at the end of the year are converted at the year end rate and the resultant gain or loss is accounted for in the Profit and Loss Account.

iv. The company has not used any derivative instrument except forward contracts which have been used for hedging its foreign currency exposure. The company does not undertake any speculative or trading activity through derivative instruments.

Bannari Amman Spinning Mills Ltd.

vii. The Foreign Currency transactions are recorded at the exchange rate prevailing on the date of the transaction. Foreign currency monetary items as at the Balance Sheet date are reported at the closing rate or at the rate at which it is likely to be realized from or required to be disbursed. Exchange differences arising on settlement / restatement of short-term foreign currency monetary assets and liabilities of the Company are recognized as income or expense in the Statement of Profit and Loss.

Bajaj Corp Ltd.

(i) Initial recognition

Foreign currency transactions are recorded in the reporting currency, by applying to the foreign currency amount the exchange rate between the reporting currency and the foreign currency at the date of the transaction.

(ii) Conversion

Foreign currency monetary items are reported using the closing exchange rate on the Balance Sheet date. Non-monetary items which are carried in terms of historical cost denominated in a foreign currency are reported using the exchange rate at the date of the transaction; and non-monetary items which are carried at fair value or other similar valuation denominated in a foreign currency are reported using the exchange rates that existed when the values were determined.

(iii) Exchange differences

Exchange difference arising on the settlement of monetary items at rates different from those at which they were initially recorded during the year, or reported in previous financial statements, are recognized as income or as expenses in the year in which they arise.

CMC Limited

Initial recognition

i. Company: Transactions in foreign currencies entered into by the Company are accounted at the exchange rates prevailing on the date of the transaction or at rates that closely approximate the rate at the date of the transaction.

ii. Integral foreign operations: Transactions in foreign currencies entered into by the

Company's integral foreign operations are accounted at the exchange rates prevailing on the date of the transaction or at rates that closely approximate the rate at the date of the transaction

iii. Non-integral foreign operations: Transactions of non-integral foreign operations are translated at the exchange rates prevailing on the date of the transaction or at rates that closely approximate the rate at the date of the transaction.

Measurement at the Balance Sheet date

i. Company: Foreign currency monetary items (other than derivative contracts) of the Company, outstanding at the balance sheet date are restated at the year-end rates. Non-monetary items of the Company are carried at historical cost.

ii. Integral foreign operations: Foreign currency monetary items (other than derivative contracts) of the Company's integral foreign operations outstanding at the balance sheet date are restated at the year-end rates. Non-monetary items of the Company's integral foreign operations are carried at historical cost.

iii. Non-integral foreign operations: All assets and liabilities of non-integral foreign operations are translated at the year-end rates.

Treatment of exchange differences

i. Company: Exchange differences arising on settlement / restatement of short-term foreign currency monetary assets and liabilities of the Company are recognised as income or expense in the Statement of Profit and Loss.

ii. Integral foreign operations: Exchange differences arising on settlement / restatement of short-term foreign currency monetary assets and liabilities of the Company's integral foreign operations are recognised as income or expense in the Statement of Profit and Loss.

iii. Non-integral foreign operations: The exchange differences relating to non-integral foreign operations are accumulated in a "Foreign currency translation reserve" until disposal of the operation, in which case the accumulated balance in "Foreign currency translation reserve" is recognised as income / expense in the same period in which the gain or loss on disposal is recognised.

Accounting of forward contracts

Premium / discount on forward exchange contracts, which are not intended for trading or speculation purposes, are amortised over the period of the contracts if such contracts relate to monetary items as at the Balance Sheet date.

Lumax Auto Technologies Limited

a) Transactions denominated in foreign currencies are recorded at the exchange rate prevailing on the date of the transaction or that approximates the actual rate at the date of the transaction.

b) Monetary items denominated in foreign currencies at the year end are restated at year end rates.

c) Non monetary foreign currency items are carried at cost.

d) Any income or expense on account of exchange difference either on settlement or on translation is recognized in the Statement of Profit and Loss account.

Adani Power Limited

i) Transactions denominated in foreign currencies are normally recorded at the exchange rates prevailing on the date of the transaction.

ii) Monetary items denominated in foreign currencies outstanding at the balance sheet date are restated at the rates prevailing on that date. The exchange differences arising on settlement / restatement of long term foreign currency monetary items are capitalized as part of the depreciable fixed assets to which the monetary item relates and depreciated over the remaining useful life of such assets. If such monetary items do not relate to acquisition of depreciable fixed assets, the exchange differences are

contd. on page no. 385

From the Government

CA. Kunal A. Shah
cakashah@gmail.com

Income Tax

1) Order relating to extension for furnishing tax audit report for AY 14-15.

The Central Board of Direct Taxes (CBDT) hereby extends the due date for obtaining and furnishing of the report of audit under section 44AB of the Act for Assessment Year 2014-15 in case of assessees who are not required to furnish report under section 92E of the Act from 30th day of September, 2014 to 30th November, 2014. It is further clarified that the tax audit report under section 44AB of the Act filed during the period from 1st April, 2014 to 24th July, 2014 in the pre-revised Forms shall be treated as valid tax audit report furnished under section 44AB of the Act. **(Refer Order, dated 20-08-2014)**

Service Tax

1) Notification relating to amendment in notification no. 25/2012 – Mega Exemption

The Central Government hereby makes the following amendments in notification no. 25/2012 :-

a) Insertion of entry "5A" after entry no "5":-

"5A. Services by a specified organisation in respect of a religious pilgrimage facilitated by the Ministry of External Affairs of the Government of India, under bilateral arrangement;";

b) Insertion of clause (zfa) after clause (zf) in para 2 relating to definitions:-

'(zfa) "specified organisation" shall mean:-

(a) Kumaon Mandal Vikas Nigam Limited, a Government of Uttarakhand Undertaking; or

(b) 'Committee' or 'State Committee' as defined in section 2 of the Haj Committee Act, 2002 35 of 2002);'.

(Notification No. 17/2014, dated 20/08/2014)

2) Notification relating to amendments in service tax rules, 1994

In the Service Tax Rules, 1994, after rule 10, the following rules shall be inserted, namely:-

11. Determination of rate of exchange.– The rate of exchange for determination of value of taxable service shall be the applicable rate of exchange as per the generally accepted accounting principles on the date when point of taxation arises in terms of the Point of Taxation Rules, 2011."

12. Power to issue supplementary instructions.– The Board or the Chief Commissioners of Central Excise may issue instructions for any incidental or supplemental matters for the implementation of the provisions of the Act.".

The aforesaid Service Tax (Second Amendment) Rules, 2014. shall come into force on the 1st day of October, 2014.

(Notification no. 19/2014, dated 25-08-2014)

* * *

Association News

CA. Abhishek J. Jain
Hon. Secretary

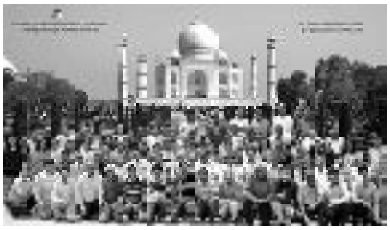
CA. Nirav R. Choksi
Hon. Secretary

6th Knowledge Clinic

6th Knowledge Clinic is scheduled to be held on Friday, 26th Septemeber 2014 at the Association's office from 3.30 pm to 4.30 pm. Members having queries on the subject of professional interest may send by email or by hand delivery on or before 19th September 2014.

Glimpses of events gone by:

A Group Photo at 41st RRC held at Jaypee Palace Hotel & Convention Centre, Agra from 2nd August 2014 to 6th August 2014.



On 9th August 2014, 2nd Brain Trust Committee Programme was held on the topic of "Issues in Tax Audit (Tax & Audit Perspective) at Atma Hall, Ashram Road, Ahmedabad.

(L to R CA. Abhishek J. Jain, CA. Kunal A. Shah, Speaker CA. Hardik Sutaria, CA. Shailesh C. Shah, Speaker CA. Sanjay R. Shah and CA. Ronak M. Khandwala)

On 14th August 2014, Entertainment Committee Programme - "ANTAKSHARI 2014" was held at Fire & Flames, Alpha One Mall, Ahmedabad.

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ITAT laments severe fall in standards of CA profession. Advices ICAI to take disciplinary proceedings against erring members & tackle issue on war footing

The assessee filed appeals for AY 1994-95 & 1996-97 which were delayed by 2984 days. In support of the application for condonation of delay, the assessee claimed that his CA, M/s Rajesh Rajeev Associates, had advised him that as he had already filed an appeal for AY 1993-94 on the same point, which was pending before the Tribunal, he need not file appeals for AYs 1994-95 & 1996-97 and, instead, he could, after adjudication of the appeal for AY 1993-94 by the Tribunal, move a rectification application before the AO to bring the assessment order in conformity with the decision of the Tribunal. The CA filed an affidavit in which he confirmed having given the said advice. In the condonation application, the assessee pleaded that he ought not to be made to suffer for the "incorrect" advice given by the CA. HELD by the Tribunal dismissing the application and the appeals:

(i) The advice given by the CA firm shows signs of deteriorating standards with some of the Chartered Accountants in profession, which needs to be stopped on war footing by the ICAI. The assessee is having connection with many tax professionals and, in all probabilities, the assessee might have had consultation with any one or more of them on the impugned problem. It is inconceivable that all the Chartered Accountants, whom the assessee might have had consultation or availed services, would have concurred with the view expressed by the above said C.A firm. If it is presumed for a moment that all the C.A.s have concurred with the said view, then it only shows that the C.A profession is losing its grip over the Income tax matters, which is another cause of concern for ICAI. The self study model coupled with '*on-site articled clerk training*' embedded in the Chartered Accountancy course aims to achieve high quality education and training through undergoing practical training, inculcating the habit of thinking, self introspection, application of mind, analytical ability etc. and they enable the C.A students to have strong grip over the subjects and also to attain expertise in them… In the recent past, the methodology of self study is given a go-by by some C.A students and they have started depending more and more on the Commercial Coaching Centers, who undertake coaching of various subjects in the class room model. We notice that the ICAI does not appear to have taken steps to contain mushrooming growth of such coaching institutes, which indulge in manufacturing of Chartered Accountants through class room model, which may ultimately have undesirable effect on the quality of Chartered Accountants, since the habit of thinking, introspection, application of mind is replaced by spoon-feeding, which kind of teaching discourages independent thinking. There should not be any controversy on the fact that the Chartered Accountants, till date, have occupied pioneer position vis-à-vis their counterparts in other parts of the World. They also contribute a lot to the building, sustenance and growth of our National economy. Any compromise on the quality of Chartered Accountants would not only affect our Country very badly, but is also expected to endanger the pioneer position enjoyed by the Indian C.A fraternity vis-à-vis their counter parts in other parts of the world. In our view, the ICAI should seriously take note of these alarming practices slowly emerging in our Country and should take appropriate corrective steps, lest the confidence reposed in C.A.s by the public should get diluted;

(ii) In this back ground, in our view, the above said C.A. firm would have given the letter as well as the affidavit only to accommodate the assessee herein. We would like to mention here that we have come to such a conclusion, since a qualified C.A. firm would not commit such kind of silly mistakes while giving expert professional advice. If the C.A. firm has so accommodated the assessee, without even

realising that it is detrimental to its reputation, then the conduct of the C.A. firm needs to be condemned strongly. In that case, we are of the view that the above said conduct of the C.A. firm not only denigrates its name/ reputation, but also badly affects the high standards, confidence, quality, prestige, reputation etc. enjoyed by the C.A. profession;

(iii) The advice claimed to have been given by M/s Rajesh Rajeev Associates, Chartered Accountants, if considered to have been really given, would create doubt about the efficacy of the CPE programmes, since such kind of advices is not expected from a Professional. Further these kind of advices claimed to have been given by a C.A firm clearly give signals that the CPE programmes might have failed to achieve the desired objectives with some of the Chartered Accountants. It is high time that the ICAI should take note of these practicalities and should take corrective steps in order to maintain/restore the high standards and quality expected from a C.A. professional. We have also expressed the view that the above said C.A firm might have given the affidavit only to accommodate the assessee, which conduct is also not expected from a Professional. If it is considered that the C.A firm has colluded with the assessee for giving such kind of affidavit, then it only warrants disciplinary action against them. Even, if it is considered that the said C.A. firm has really given such advices, then also it may require disciplinary action against them for giving such kind of advices, without proper verification of facts and without proper consideration of law. In our view, strict actions and fast disposal of disciplinary proceedings would not only instill discipline among the C.A fraternity, but also help curtail these kind of undesired practices adopted by some of the Chartered Accountants.

Vijay V Meghani vs. DCIT (ITAT Mumbai)

Source – www.itatonline.org

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contd. from page 381

From Published Accounts

accumulated in "Foreign Currency Monetary Item Translation Difference Account" and is amortised over the maturity period / up to the date of settlement of such monetary items, whichever is earlier and charged to the Statement of Profit and Loss. Exchange differences arising on settlement / restatement of short term foreign currency monetary items are recognized as income or expense in the Statement of Profit and Loss.

iii) Premium / discount on forward exchange contracts, which are not intended for trading or speculation purposes, are amortised over the period of the contracts if such contracts relate to monetary items as the balance sheet date.

iv) Non monetary foreign currency items are carried at cost.

Chemfab Allalis Limited

Transactions in foreign currencies are accounted at the exchange rates prevailing on the date of the transactions and the realized exchange loss/gain are dealt within the Statement of Profit and Loss.

Monetary assets and liabilities denominated in foreign currency are restated at the rates of exchange as on the Balance Sheet date and the exchange gain / loss is suitably dealt with in the Statement of Profit and Loss.

Premium/ discount on forward exchange contracts, which are not intended for trading or speculation purposes, are amortised over the period of the contracts if such contracts relate to monetary items as at the balance she

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Representation to keep the Appellate Proceeding relating to applicability of Section 234E in abeyance

16th August, 2014

To,

The Chief Commissioner of Income Tax – 1
Gujarat

Respected Sir,

Sub: Representation for keeping the appellate proceedings relating to applicability of Section 234E in abeyance.

1.0 INTRODUCTION

1.1 The Finance Act, 2012 has inserted Section 234E in the Income Tax Act, 1961 whereby fee of Rs. 200/- per day is levied for the default of the deductor/collector for failure to file TDS/ TCS Statement within the due date.

1.2 The constitutional validity of Section 234E has been challenged in different High Courts through various writ petitions.

1.3 The implementation of Section 234E is turning out to be a hardship for taxpaying or tax deducting/collecting public at large. The deductors are not being spared even for the slightest of the procedural lapse.

1.4 The levy of fee of Rs. 200 per day for each day of default is very stringent on the taxpaying public at large considering the nature of default being procedural in nature without any loss of revenue to the exchequer. The levy also seems to be unjust considering the discrimination in the time period allowed to file quarterly statements to government deductors and non-government deductors.

1.5 With the help of RTI machinery, it has been shockingly and surprisingly found that various government deductors viz. CPC (TDS), Various IT Departments at Ahmedabad and Gujarat, High Courts etc. did not file the TDS statements on or before the due date thereby attracting the levy of fees u/s. 234E of the Act. However, the CBDT has vide a circular No. 07/2014 F. No. 275/27/2013-IT(B) dated 04rth March, 2014 extended the due date for filing return for FY 2012-13 (Q2 to Q4) and FY 2013-14 (Q1 to Q3) only to the government deductors.

1.6 This circular definitely gives a big relief to government deductors of T.D.S/TCS but similar relief also expected/sought by other assessees. The issuance of such a circular definitely proves a fact that there were valid reasons why there was a delay in filing of the TDS statements. Issuance of such a circular in order to deliberately conceal the personal negligence of the government employees is highly discriminatory and throws light on the double standards adopted by the Board. The CBDT should also consider the practical difficulty faced by other assessees, those who are not government deductor and give a due relief to such other assessees at par with government deductors.

1.7 Morever, demand of late fee cannot be raised by way of processing of TDS statement, because Sec 200A(1) of the Act talks about TDS returns by a person deducting any tax, so it does not cover cases of tax deductible but not deducted at all. Further the provisions of Sec. 200A of the Act do not permit processing TDS statement for default in payment of late fee, except any arithmetical error, or incorrect claim, or default in payment of interest, any TDS payable or refundable etc.

1.8 The Kerela High Court has in the case of **Narath Mapila LP School Vs. UOI** has vide an interim order dated 18.12.2013 granted a stay on the proceedings u/s. 234E of the Act.

1.9 The Karnataka High Court has in the case of Adithya Bishop Solutions India P. Ltd. V. UOI stated that ***"Pending consideration of the grounds in the writ petition, it is desirable that enforcement of notices referred to above issued by the 4th respondent are stayed until further orders."***

1.10 Similarly, the Rajasthan High Court has in the case of Om Prakash Dhoot V. UOI directed that ***"notice should be issued to the CBDT and the UOI as to why the Petition should not be accepted. It has also been held that in the meanwhile, if any recovery is made from the Petitioner, that shall be subject to the final decision of the Writ Petition."***

2 MAJOR ISSUES

2.1 A few enlightened assessees have also filed a writ petition before the Honorable Gujarat High Court. Though the matter has already been taken on board by the Honorable High Court, the hearing has been adjourned up to October, 2014.

2.2 Varioius assessees who have been served with the notice for payment of fees u/s. 234E of the Income Tax Act, 1961 have preferred appeals before the Hon. CIT(A) XXI, Ahmedabad.

2.3 However, it has come to our notice that the CITs (A) have started rejecting the appeals and delivering the judgment against the assessees.

3 REPRESENTATION

3.1 It is clearly evident that the constitutional validity of Section 234E has been challenged before the High Courts and the Courts have even granted a stay on the recovery proceedings until the disposal of the writ petitions.

3.2 It is therefore sincerely requested that all the appellate proceedings which relate to the applicability of Section 234E of the Act be kept in abeyance till the disposal of the aforesaid writ petitions including the petition before the Honorable Gujarat High Court in order to protect the interest of the tax paying community at large.

Thanking you,
Yours truly,

CA Rajni Shah	**Shailesh C. Shah**
Chairman	**President**
Legal and Representation Committee Direct Taxes	C.A. Association, Ahmedabad

CC: CIT(A) – XXI, Ahmedabad.

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I Can

Can't is a word that is
Foe to ambition
An enemy ambush to
Shatter your will.
It's prey forever to
A man with a mission
And bows only to courage,
And patience, and skill.
So hate it with hatred that's
Deep and undying
For once it is welcomed,
It will break any man.
And whatever the goal you
Are seeking, keep trying,
And answer this demon by
Saying, "I Can!"

- Anonymous

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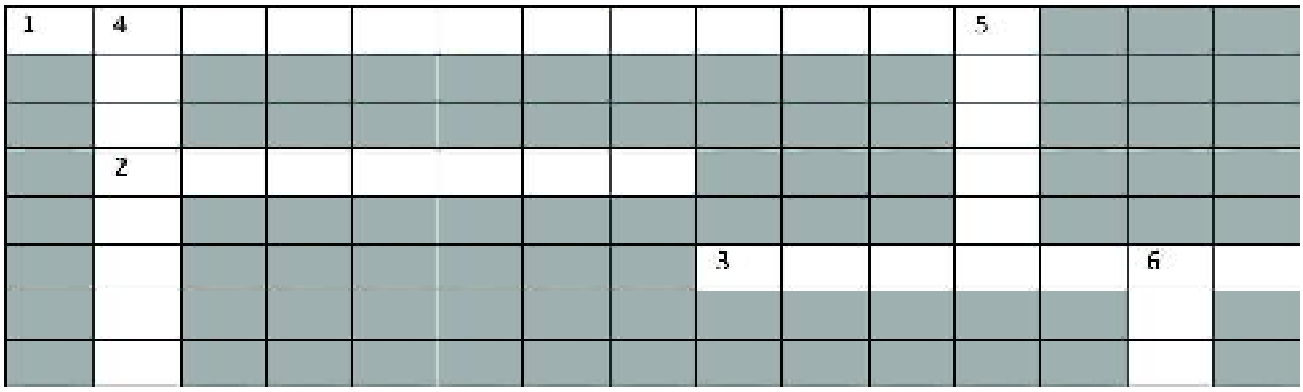
ACAJ Crossword Contest # 5

Across

1. _____ of Charity was founded by Mother Teressa.
2. Section 40(A)(2) cannot be applied when there is no _____ claimed.
3. _____ begins at home.

Down

4. "Cost to Create" value is basically from the view point of the buyer or the _____.
5. Under the RTI Act, generally the officer who is _____ in rank to the PIO is the First Appellate Authority.
6. Assessee is entitled to the credit of _____ for which form no. 16A is produced.



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 30/09/2014.
5. The decision of Journal Committee shall be final and binding.

Winners of ACAJ Crossword Contest # 4
1. CA. Akta Patel
2. CA. Mehul Shah
3. CA. Priyank Dave

ACAJ Crossword Contest # 4 - Solution

Across

1. Competent
2. Repatriate
3. Seven

Down

4. Happy
5. Yourself
6. Addition

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