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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.

Published By

CA. Ashok Kataria,
on behalf of Chartered Accountants Association, Ahmedabad, 1st Floor, C. U. Shah Chambers, Near Gujarat Vidhyapith, Ashram Road, Ahmedabad - 380 014.
Phone : 91 79 27544232
Fax : 91 79 27545442

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CA. Keyur Thakkar
tkeyur@hotmail.com

Coming out of Difficulty

In this voyage of life, generally there is a smooth sailing. The vehicle one drives seems under optimum control. The roads and the overall environment are providing excellent path and all expected convenience. One feels that this is the gala time of life. One's own endeavors to get ahead in this voyage could be a part of a race, but when there is that inner feel of God's touch, it turns into Grace. That eternal feel of happiness becomes the way of life. One feels the fragrance of spring in life and virtually walks on the rose petals.

Uncertainty and change is an unavoidable and immortal truth of life, an inevitable part of the journey. All of a sudden, an unforeseen speed breaker brings down one's life vehicle. An unimagined situation happens which is so difficult to digest. Sudden unexpected storm shatters the beauty of one's spring of life. It could be the loss of near and dear one, unthinkable betrayal or anything completely never thought of or any unfavorable situation.

People try to console you, try to help you to come out of that difficulty. But as it is rightly said, "No one can save us or No one may, if one doesn't have the willingness to walk on the path on one's OWN". People can help only to re-balance your vehicle, but to cross over the speedbreaker; one has to start again the vehicle to move on in the life journey.

In tough times, one may get upset with God. One may start loosing the Faith in the Infinite Intelligence. But all that one need, to get over the difficulty is to develop a positive approach towards it, to align oneself with the Infinity. **When God solves your problems, you get faith in his abilities but when God doesn't solve your problems, it means he has faith in your abilities.** Pain and sufferings come to awaken one's greatest Self, to make one understand the perfect lyrics of lifesong and ultimately to make one strive to become a better and stronger person.

God's magnificient effluence is the panacea for many tough times. One gets closer to God, One's OWNSELF, during the difficulties. The Inner power and utmost faith in God keeps one alive. One lets the difficulty feel that it's difficult to stay here. Through the tough times, He/She attains more serenity and divineness. One feels that I need to be happy with my luck and that let one feel lucky. At the end, one who experiences and gets over difficulties are the chosen and closest of God. Remember, God's wish and human efforts together can conquer any fault in one's stars.

D ifficulty

I bet

F rom this point

I am going to set

C lassic example of

U surping with

L ove and

T ender care

Y ou gonna feel difficult.

"Life doesn't listen to your logic. It doesn't bother about your logic. Life has its own logic. It moves in its own way. You have to listen to the life" - OSHO

Editorial

Religion, whether cause or solution to the Terrorism

Over the period of last one month, two incidents have sent a shock wave across the globe. On December, 16, 2014, a group of militants entered the Army Public School in Peshawar, Pakistan and mercilessly gunned down about 150 students and teachers. The attack on innocent school children has horrified the world and is considered to be the deadliest terror attack in Pakistan's history.

In another brutal and barbaric incident, gunmen shot dead more than 12 people in Paris when they attacked French Satirical magazine Charlie Hebdo. Four of magazine's well known cartoonist, including its editor, were killed in the attack. The masked attackers opened fire with assault rifles and exchanged shots with police in the street outside before escaping. This attack on media house is also believed to be the deadliest in France since 1961.

These two attacks within a period of less than 30 days are seen as attacks on humanity and freedom of expression. Every nation of the world has condemned the attacks and expressed solidarity. A question arises, why each and every nation in the world is finding it difficult to attain peach and harmony? Why every human being is becoming so intolerant that he is not able to come to the terms of life by accepting people as they are and in the process of trying to change things to his order killing innocent people?

The only reason that people are not able to accept each other in the way they are is their ignorance. People all over the world are clamouring for peace today. Governments are adopting ways and means to explore the possibilities of finding peace. In pursuance of this, they have set up World Organizations and Institutions. Little do they realize that peace and contentment cannot be brought about merely by regulating the outward conduct of the nations or resetting the external pattern of things. At best, they may achieve a temporary cessation of overt hostility, but internally there still remains bitterness and enmity. When any person is not at peace within, will always be a cause of disruption and destruction to the society.

It's unfortunate that such attacks, quite often, are associated to some colour or religion. If we truly understand the meaning of religion we would appreciate that only religion can help in stopping such incidents. It is only when persons are not able to understand their religion; they are causing such barbaric havoc all over the world. According to a verse in the Quran, killing of an innocent human being is like killing the entire humankind. In the light of this verse it can be said that the incident of Peshawar school attack was equivalent to killing entire humankind 150 times over. Without a doubt there cannot be a crime more heinous than this, against the scriptures, where people fail to understand in its entirety.

The true purpose of any religion is to allow a human being to evolve. The solution, therefore, lies in the well conceived rehabilitation of the individual personality, since individuals form the society and the nation. If the individual undergoes an inner transformation and begins to entertain feelings of love and affection for others, then there is bound to be peaceful and healthy coexistence in the world. Religion helps to bring about this transformation in individuals. Without such personality reconstruction, no external plan or scheme can succeed in establishing peace in the world.

Namaste,

CA. Ashok Kataria
ackatariaco@yahoo.co.in

From the President

CA. Shailesh C. Shah
sckshah@yahoo.com

Dear Esteemed Readers,

Happy new year to all of you.

December and January are the months of recognition of citizen's contribution to the nation for the Government of India. The President's Office on 24th December 2014 announced the Bharat Ratna, **India's highest civilian honour** to Pandit Madan Mohan Malaviya (posthumously), a **freedom fighter and founder of Benaras Hindu University** and to the former Prime Minister Atal Bihari Vajpayee. Bharat Ratna being conferred on Pt. Madan Mohan Malaviya and Atal Bihari Vajpayee is a matter of great delight. Country's highest honour to these illustrious stalwarts is a fitting recognition of their service to the Nation. Pt. Madan Mohan Malaviya is remembered as a phenomenal scholar and freedom fighter who lit the spark of national consciousness among people wheras Atal *ji* is one of the tallest political leaders Independent Indian has seen. His contribution to India is invaluable.

The month of January also marks the home coming of Mahatma Gandhi. Pravasi Bharatiya Divas (PBD) is celebrated on 9th January every year to mark the contribution of Overseas Indian community in the development of India. January 9 was chosen as the day to celebrate this occasion since it was on this day in 1915 when Mahatma Gandhi, the greatest Pravasi, returned to India from South Africa, led India's freedom struggle and changed the lives of Indians forever. This year the occasion is more important as it marks the 100 years of Gandhi's home coming. As the moment is special there could not be a better time to highlight Gandhian thought and principles not just in India but among the global community as well. In fact, the initiative to commemorate Gandhiji's return to India from South Africa would truly be a tribute if it is helpful in giving the right signal and direction to go back the Gandhian values and principles. All State Governments along with the Union Government are trying to en-cash upon the upcoming Pravasi Bharatiya Divas to woo NRI and PIO entrepreneurs to invest in six flagship programs, including Digital India, Make in India, Clean Ganga Campaign, Swacchh Bharat and skills development initiative. Let's hope that such programs not just make things appear good but truly make India a prosperous nation.

At the Association, in our role of helping the Government and also in furtherance of our duty of proper representations to rationalize tax laws, we have submitted a well-thought out Pre-Budget Memorandum to the Ministry of Finance for Union Budget 2015-16. The Memorandum has been prepared after incorporating suggestions received from members. The cricket season at the Association has arrived. The first match between President XI and Secretary XI was won by Secretary XI. The second match was played between CA Association and Baroda Branch of WIRC of ICAI at Motera Stadium on 4th January 2015. I heartily congratulate Team CAA on victory by 33 runs and also for retaining the rotating trophy. The third match of the Association is to be held against IT Bar Association Ahmedabad on 1st February 2015. I wish Team CAA a great game and hope that they continue with their winning streak. On 11th January the Association has, for the first time, organized cricket tournament with tennis ball so as to enable senior members participate, apart from the regular cricket matches that are held over the years. Other than cricket, the activities at the Association were a buzz that included programs like Study circle on VAT Audit and Brain Trust Meeting on Controversial issues under Income Tax.

I also wish all members and their family a very happy and safe Uttarayan.

With regards

CA. Shailesh C. Shah
President

Sections 40(a)(ia) and 201(1) : Amendments by Finance Act, 2012, Whether apply retrospectively?

CA. Jayesh C. Sharedalal
jcs@crsharedalalco.com

1. Introduction:

Section 40(a)(ia) is a rigorous provision in Income Tax Act. If an assessee is hit by the said section he may end up paying substantial income tax and his liquidity may be in jeopardy. This section is of recent origin and was brought on statute in the year 2005. However the shackles of the section have been loosed by way of introduction of 'provisos' from time to time. One such 'proviso' was inserted by Finance Act, 2012 and made applicable from 01-04-2013 i.e. ITAY 2013-14. A question arises whether the said 'proviso' applies retrospectively. In other words in the on-going scrutiny assessments or appellate proceedings can the assessee plead that the assessee should get the benefit of this proviso?

2. 'Proviso' inserted by Finance Act 2012:

Finance Act, 2012 amended section 40(a)(ia) and section 201(1) by inserting proviso to the effect that if the payee has paid the income tax on the sum on which the payer ought to have deducted TDS but not deducted it, then the payer of the sum would not be held as an assessee in default u/s 201(1). For the purposes of Section 40(a)(ia) the TDS would be deemed to have deposited on the date of filing of return of income by the payee and consequently no addition can be made u/s 40(a)(ia).

The following procedure has been laid down u/s 201(1) and 40(a)(ia) for giving effect to the amendments made by Finance Act 2012.

(a) The payee should file his return of income u/s 139.

(b) The payee should declare such sum on which no TDS has been deducted by deductor, in his return of income.

(c) The payee should pay the amount of Income Tax due on such sum declared in the return of income.

(d) The payee should furnish the certificate in Form No. 26A obtained from Chartered Accountant, declaring the above mentioned facts.

3. Whether the 'Proviso' inserted by Finance Act 2012 is retrospective?

The insertion of 'proviso' in section 40(a)(ia) by Finance Act, 2012 w.e.f. 1- 4-2013, may be interpreted to mean that this amended provision will apply for and from assessment year 2013-14 and not to earlier assessment years. The other view could be that the amendment brought out by the Finance Act, 2012 w.e.f 1-4-2013 in Section 40(a)(ia) of the Act is curative in nature and it will apply retrospectively w.e.f. 01-04-2005.

To decide this issue, we have to go to the history of the provisions of Section 40(a)(ia), which was inserted by Finance (No. 2) Act, 2004 w.e.f. 1-4-2005 as under:-

*"**Amount not deductible**.*

40. Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or professions",-

(a) .....

*(ia) any interest, commission or brokerage, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under **Chapter XVII-B** and such tax has not been deducted or, after deduction, has not been paid during the previous year, or in the subsequent year before the expiry of the time prescribed under subsection (1) of section 200:*

***Provided** that where in respect of any such sum, tax has been deducted in any subsequent year or, has been deducted in the previous year but paid in any subsequent year after the expiry of the time prescribed under sub-section (1) of section 200, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.*

Explanation:- *For the purposes of this sub-clause:-*

(i) "commission or brokerage" shall have the same meaning as in clause (i) of the explanation to section 194H;

(ii) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (11) of section 9;

(iii) "professional services" shall have the same meaning as in clause (a) of the explanation to section 194J;

(iv) "work" shall have the same meaning as in explanation-III to section 194C;"

Subsequently, in sub-clause (ia) the words, 'rent and royalty' has been inserted by the Taxation Laws (Amendment) Act, 2006 w.r.e.f. 1-4-2006 and similarly in Explanation sub-clause (v) & (vi) were inserted as under:-

"(v) "rent" shall have the same meaning as in clause (i) to the explanation to section 194-1;

(vi) "royalty" shall have the same meaning as in explanation 2 to clause (vi) of sub-section (1) of section 9;"

Thereafter the section was amended by the Finance Act, 2008, and by the Finance Act, 2010 w.e.f. 1-4-2010 making changes which have been held by courts to be applicable retrospectively.

Thereafter, by the Finance Act, 2012 the following "Proviso" has been inserted in sub-clause (ia) w.e.f. 1-4-2013 as under:-

"Provided further where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing return of income by the resident payee referred to in the said proviso."

One will find from the above provision of Section 40(a)(ia) of the Act, amended by Finance Act, 2012, that the payment of expenses as specified in this provision, on which tax is deductible at source under Chapter XVII-B of the Act and the assessee has not deducted the tax but the deductee has shown such sum as an income in his return of income u/s 139 and also paid the amount of tax due on such sum, then it is deemed to be considered as if the same is deducted by assessee and paid by him before the due date of return of income u/s 139. It means that the expenses related to the same will be allowed while computing the income chargeable under the head 'profits and gains of business or profession'.

While bringing this amendment by Finance Bill, 2012, the object was explained in Notes On Clauses and the relevant Clause-11 was explained as under [342 ITR 153(St.)]:-

NOTES ON CLAUSES

"Clause 11 of the Bill seeks to amend section 40 of the Income-tax Act relating to amounts not deductible.

It is proposed to insert a new proviso to sub-clause (ia) of clause (a) to the aforesaid section 40 so as to provide that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purposes of this sub-clause, it shall be deemed that the assesseee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso."

A new proviso has also been inserted to Ses. 201(1) by the Finance Act, 2012 w.e.f. 1-7-2012.

Further, while bringing this amendment by Finance Bill, 2012, the object was explained in Notes On Clauses and the relevant Clause-77 was explained as under [342 ITR 196(St.)]:-

"Clause 77 of the Bill seeks to amend section 201 of the Income-tax Act relating to consequences of failure to deduct or pay.

It is proposed to insert a new proviso in sub-section (1) of the aforesaid section 201 so as to provide that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident-

(i) Has furnished his return of income under section 139;

(ii) Has taken into account such sum for computing income in such return of income; and

(iii) Has paid the tax due on the income declared by him in such return of income,

And the person furnishes a certificate to this effect from an accountant in such form as may be prescribed."

Furthermore, both the above Amendments were explained in Memorandum Explaining the provision in Finance Bill, 2012 as under [342 ITR 260(St.)]:-

"E. RATIONALIZATION OF TAX DEDUCTION AT SOURCE (TDS) AND TAX COLLECTION AT SOURCE (TCS) PROVISIONS

I. Deemed date of payment of tax by the resident payee

Under the existing provisions of Chapter XVII-B of the Income-tax Act, a person is required to deduct tax on certain specified payments at the specified rates if the payment exceeds specified threshold. In case of non-deduction of tax in accordance with the provisions of this Chapter, he is deemed to be an assessee in default under section 201(1) in respect of the amount of such non-deduction.

However, section 191 of the Act provides that a person shall be deemed to be assessee in default in respect of non/short deduction of tax only in cases where the payee has also failed to pay the tax directly. Therefore, ***the deductor cannot be treated as assessee in default in respect of non/short deduction of tax if the payee has discharged his tax liability.***

The payer is liable to pay interest under section 201(1A) on the amount of non/short deduction of tax from the date on which such tax was deductible to the date on which the payee has discharged his tax liability directly. As there is no one-to-one correlation between the tax to be deducted by the payer and the tax paid by the payee, there is lack of clarity as to when it can be said that payer has paid the taxes directly. Also, there is no clarity on the issue of the cut-off date, i.e. the date on which it can be said that the payee has discharged his tax liability.

In order to provide clarity regarding discharge of tax liability by the resident payee on payment of any sum received by him without deduction of tax, it proposed to amend section 201 to provide that the payer who fails to deduct the whole or any part of the tax on the payment made to a resident payee shall not be an asssessee in default in respect of such tax in such resident payee-

(i) has furnished his return of income under section 139;

(ii) has taken into account such for computing income in such return of income; and

(iii) has paid the tax due on the income declared by him in such return of income,

and the payer furnishes a certificate to this effect from an accountant in such form as may be prescribed.

The date of payment of taxes by the resident payee shall be deemed to be the date on which return has been furnished by the payer.

It is also proposed to provide that where the payer fails to deduct the whole or any part of the tax on the payment made to a resident and is not deemed to be an assessee in default under section 201 (1) on account of payment of taxes by such resident, the interest under section 201(1A)(i) shall be payable from the date on which such tax was deductible to the date of furnishing of return of income by such resident payee.

Amendments on similar lines are also proposed to be made in the provisions of section 206C relating to TCS for clarifying the deemed date of discharge of tax liability by the buyer or licensee or lessee."

II. Disallowance of business expenditure on account of non-deduction of tax on payment to resident payee

A related issue to the above is the disallowance under section 40(a)(ia) of certain business expenditure like interest, commission, brokerage, professional fee, etc. due to non-deduction tax. It has been provided that in case the tax is deducted in subsequent previous year, the expenditure shall be allowed in that subsequent previous year of deduction.

In order to rationalise the provisions of disallowance** on account of non-deduction of tax from the payments made to a resident payee, **it is proposed to amed section 40(a)(ia) to provide that where an** assessee makes payment of the nature specified in the said section to a resident payee without deduction of tax and **is not deemed to be an assessee in default under section 201 (1) on account of payment of taxes

by the payee, *then, for the purpose of allowing deduction of such sum, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee.*

These ***beneficial provisions*** *are proposed to be applicable only in the case of resident payee.*"

It is clearly mentioned in Memorandum Explaining the Provisions of Finance Bill, 2012 that the amendment is a 'Beneficial provision'. A beneficial amendment in Section of the Act may be defined as an amendment to remove hardship caused to the taxpayers, which made the provision unworkable or unjust in a specific situation, and is of beneficial nature and, therefore, has to be treated as retrospective.

Supreme Court : Hindustan Coca cola Beverages P. Ltd. vs. CIT

Supreme Court decision in the case of Hindustan Coca cola Beverages P. Ltd. vs. CIT (293 ITR 226) as per which, no interest u/s 201(1A) and penalty u/s 271C can be levied when the tax has been deposited by the deductee in case of non deduction of TDS by deductor. The relevant para of the said decision is reproduced as under:-

"…. It is required to note that the Department conceded before the Tribunal that the recovery could not once again be made from the tax deductor where the payee included the income on which tax was alleged to have been short deducted in its taxable income and paid taxes thereon. There is no dispute whatsoever that Pradeep Oil Corporation had already paid the taxes due on its income received from the appellant and had received refund from the tax Department. The Tribunal came to the right conclusion that the tax once again could not be recovered from the appellant (deductor - assessee) since the tax has already been paid by the recipient of income.

……..

Be that as it may, Circular No. 275/201/95-IT(B) dated January 29,1997, issued by the Central Board of Direct Taxes, in our considered opinion, should put an end to the controversy. The circular declares "no demand visualized under section 201(1) of the Income - tax Act should be enforced after the tax deductor has satisfied the officer-in-charge of TDS, that taxes due have been paid by the deductee - assessee. However, this will not alter the liability to charge interest under section 201(1A) of the Act till the date of payment of taxes by the deductee - assessee or the liability for penalty under section 271C of the Income - tax Act."

What is the hardship removed?

It is apparent that that Section 40(a)(ia) as amended by the Finance Act, 2012 w.e.f 1-4-2013, is remedial in nature, designed to eliminate unintended consequences which may cause undue hardship to the taxpayers and which make the provision unworkable or unjust in a specific situation, and is of beneficial nature and, therefore, has to be treated as retrospective with effect from 1st April, 2005, the date on which section 40(a)(ia) has been inserted by the Finance Act, 2012.

As before the amendment it was the case that on one side deductor has not deducted and paid the TDS on such sum which has been paid to deductee and on the other side, the deductee has paid the tax on such sum on which TDS has not been deducted by deductor. Now, for claiming the expenditure as allowable, deductor has to deduct and pay TDS. It means that the tax which was due from the deductee is already received by the government.

The intension of Government is not to collect the double tax on the same amount. This amendment has been brought in for removing the double taxation effect on the same sum, which causes undue hardship to the deductor.

A beneficial provision is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act and this view has been held in Keshavlal Jethalal Shah v. Mohanalal Bhagwandas, [AIR 1968 SC 1336, 1339]. Further Hon'ble apex court in the case of CIT v. Podar Cement Pvt. Ltd., (1997) 226 ITR 625, 652 (SC) settled that if a statute is curative or merely beneficial of the previous law, retrospective operation is generally intended. Further more in similar circumstances, Hon'ble apex court in the case of Allied Motors (P). Ltd. v CIT (1977) 224 ITR 677,687 (SC) held that the amendment will not serve its object in such a situation unless it is construed as retrospective. The Hon'ble apex court held as under:-

"The departmental understanding also appears to be that section 43B, the proviso and Explanation 2 have to be read together as expressing the true intention of section 43B. Explanation 2 has been expressly made

retrospective. The first proviso, however, cannot be isolated from Explanation 2 and the main body of section 43B. Without the first proviso, Explanation 2 would not obviate the hardship or the unintended consequences of section 43B. The proviso supplies an obvious, omission. But for this proviso the ambit of section 43B becomes unduly wide bringing within its scope those payments, which were not intended to be prohibited from the category of permissible deductions.

In the case of Goodyear India Ltd. v. State of Haryana *(1991) 188 ITR 402, this court said that the rule of reasonable construction must be applied while construing a statute. A Literal construction should be avoided if it defeats the manifest object and purpose of the Act.*

Therefore, in the well known words of Judge Learned Hand, one cannot make a fortress out of the dictionary; and should remember that statutes have some purpose and object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning. In the case of R.B. Jodha Mal Kuthiala v. CIT *(1971) 82 ITR 570, this court said that one should apply the rule of reasonable interpretation. A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation, so that a reasonable interpretation can be given to the section as a whole.*

This view has been accepted by a number of High Courts. In the case of CIT v. Chandulal Venichand *(1984) 209 ITR 7, the Gujarat High Court has held that the first proviso to section 43B is retrospective and sales tax for the last quarter paid before the filing of the return for the assessment year is deductible. This decision deals with assessment year 1984-85. The Calcutta High Court in the case of* CIT v. Sri Jagannath Steel Corporation *(1991) 191 ITR 676, has taken a similar view holding that the statutory liability for sales tax actually discharged after the expiry of the accounting year in compliance with the relevant statute is entitled to deduction under section 43B. The High Court has held the amendment to be clarificatory and, therefore, retrospective. The Gujarat High Court in the above case held the amendment to be curative and explanatory and hence retrospective. The Patna High Court has also held the amendment inserting the first provisos to be explanatory in the case of* Jamshedpur Motor Accessories Stores v. Union of India *(1991) 189 ITR 70. It has held the amendment inserting first proviso to be retrospective. The special leave petition from this decision of the Patna High Court was dismissed (see [1991] 191 ITR (St.)8). The view of the Delhi High Court, therefore, that the first proviso to section 43B will be available only prospectively does not appear to be correct. As observed by G.P. Singh in his* Principles of Statutory Interpretation, *43B will be available only prospectively does not appear to be correct. As observed by G.P. Singh in his Principles of Statutory Interpretation, 4th Edn., page 291.* "It is well settled that if a statute is curative or merely declaratory of the previous law, retrospective operation is generally intended." *In act the amendment would not serve its subject in such a situation, unless it is construed as retrospective. The view, therefore, taken by the Delhi High Court cannot be sustained."*

Based on the above analogy, in my view the amendment brought out in Section 40(a)(ia) of the Act by Finance Act 2012 is beneficial and when an amendment is beneficial in nature, the presumption against its retrospective application is not permissible.

4. Recent decisions: [Copies available on CAA website www.caa-ahm.org]

Rajeev kumar Agarwal v. JCIT : [45 taxman.com 555 (Agra)]

[ITA Nos.337 & 338/Agra/2013. ITAYs: 2006-07 & 2007-08**]**

"8. With the benefit of this guidance from Hon'ble Delhi High Court, in view of legislative amendments made from time to time, which throw light on what was actually sought to be achieved by this legal provision, and in the light of the above analysis of the scheme of the law, we are of the considered view that section 40(a)(ia) cannot be seen as intended to be a penal provision to punish the lapses of non deduction of tax at source from payments for expenditure- particularly when the recipients have taken into account income embedded in these payments, paid due taxes thereon and filed income tax returns in accordance with the law. As a corollary

to this proposition, in our considered view, declining deduction in respect of expenditure relating to the payments of this nature cannot be treated as an "intended consequence" of Section 40(a)(ia). If it is not an intended consequence i.e. if it is an unintended consequence, even going by Bharti Shipyard decision *(su ra)* " removing unintended consequences to make the provisions workable has to be treated as retrospective notwithstanding the fact that the amendment has been given effect prospectively". Revenue, thus, does not derive any advantage from special bench decision in the case Bharti Shipyard *(supra).*

9. On a conceptual note, primary justification for such a disallowance is that such a denial of deduction is to compensate for the loss of revenue by corresponding income not being taken into account in computation of taxable income in the hands of the recipients of the payments. Such a policy motivated deduction restrictions should, therefore, not come into play when an assessee is able to establish that there is no actual loss of revenue. This disallowance does deincentivize not deducting tax at source, when such tax deductions are due, but, so far as the legal framework is concerned, this provision is not for the purpose of penalizing for the tax deduction at source lapses. There are separate penal provisions to that effect. Deincentivizing a lapse and punishing a lapse are two different things and have distinctly different, and sometimes mutually exclusive, connotations. When we appreciate the object of scheme of section 40(a)(ia), as on the statute, and to examine whether or not, on a "fair, just and equitable" interpretation of law- as is the guidance from Hon'ble Delhi High Court on interpretation of this legal provision, in our humble understanding, it could not be an "intended consequence" to disallow the expenditure, due to non deduction of tax at source, even in a situation in which corresponding income is brought to tax in the hands of the recipient. The scheme of Section 40(a)(ia), as we see it, is aimed at ensuring that an expenditure should not be allowed as deduction in the hands of an assessee in a situation in which income embedded in such expenditure has remained untaxed due to tax withholding lapses by the assessee. It is not, in our considered view, a penalty for tax withholding lapse but it is a sort of compensatory deduction restriction for an income going untaxed due to tax withholding lapse. The penalty for tax withholding lapse *per se*is separately provided for in Section 271 C, and, section 40(a)(ia) does not add to the same. The provisions of Section 40(a)(ia), as they existed prior to insertion of second proviso thereto, went much beyond the obvious intentions of the lawmakers and created undue hardships even in cases in which the assessee's tax withholding lapses did not result in any loss to the exchequer. Now that the legislature has been compassionate enough to cure these shortcomings of provision, and thus obviate the unintended hardships, such an amendment in law, in view of the well settled legal position to the effect that a curative amendment to avoid unintended consequences is to be treated as retrospective in nature even though it may not state so specifically, the insertion of second proviso must be given retrospective effect from the point of time when the related legal provision was introduced. In view of these discussions, as also for the detailed reasons set out earlier, we cannot subscribe to the view that it could have been an "intended consequence" to punish the assessees for non deduction of tax at source by declining the deduction in respect of related payments, even when the corresponding income is duly brought to tax. That will be going much beyond the obvious intention of the section. Accordingly, we hold that the insertion of second proviso to Section 40(a)(ia) is declaratory and curative in nature and it has retrospective effect from 1st April, 2005, being the date from which sub clause (ia) of section 40(a) was inserted by the Finance (No. 2) Act, 2004.

M/s Bansidhar Construction v. ITO Ward 9(2), Ahmedabad

[ITA 907/Ahd/2011 IATY 2007-08**]**

With respect to two cases namely Amrishbhai Pancholi (Rs. 50,000) and in Geo Dynamic (Rs. 31,427), we find that CIT(A) has noted that TDS was not deposited by the Assessee. We find that

the Co-ordinate Bench in the case of Rajiv Kr. Agarwal vs. ACIT (supra) has held as under:-

Section 40(a)(ia) of the Income-tax Act, 1961 - Business disallowance - Interest, etc., paid to resident without deduction of tax at source (Second proviso) - Assessment year 2006-07 - Whether insertion of second proviso to section 40(a)(ia) with effect from 1-4-2013 is declaratory and curative in nature and it has retrospective effect from 1-4-2005, being date from which sub-clause (ia) of section 40(a) was inserted by Finance (No. 2) Act, 2004 - Held, yes [Para 9] [In favour of assessee]

8. In the present case before us, the ld. A.R. has not placed any material on record to demonstrate that the 2 payees, namely Amrishbhai Pancholi and Geo Dyanmic had offered the amounts received from Assessee as its income and has paid the tax on such income. Further, we find that the decision of the Co-ordinate Bench was not available before A.O and CIT(A). We therefore feel that the issue where the Assessee has not deducted TDS but the payee has paid the taxes needs to be re-examined by the A.O in the light of the aforesaid decision of Agra Tribunal and therefore set aside the issue to the file of A.O for him to decide the issue in the light of decision of Agra Tribunal and in accordance with law. Needless to state, that A.O shall grant adequate opportunity of hearing to the Assessee. We thus partly allow this ground of Assessee for statistical purposes."

In the following decisions also it has been held that the proviso inserted by Finance Act 2012 is retrospectively applicable.

Shri G.Shankar, V. ACIT

[ITA No.1832/Bang/2013(Assessment year: 2005-06)]

DCIT, Circle 1, Udipi v. Ananda Markala

[2014] 48 taxmann.com 402 (Bangalore - Trib.)

So far as section 201(1) is concerned, Finance Act 2012 has simultaneously inserted 'Proviso' to the above effect. Said amendment has been held to be retrospectively applicable in the following decision:

M/s. Bharti Auto Products v. CIT- II, Rajkot [ITA Nos. 391 &392/Rjt/2011: ITAYs 2009-10 & 2010-11]

[(2013)157 TTJ (Rajkot) (SB) 1]

"45 ……..Keeping in view the fact that the first proviso to sub-section (6A) of section 206C not only seeks to rationalize the provisions relating to collection of tax at source but is also beneficial in nature in that it seeks to provide relief to the collectors of tax at source from the consequences flowing from non/short collection of tax at source after ensuring that the interest of the Revenue is well protected, we have no hesitation to hold that the said proviso would apply retrospectively and therefore to both the assessment years under appeal. We therefore direct the assessee to appear before the Assessing Officer along with relevant documents as stipulated by the first proviso to subsection (6A) of section 206C within two months of the date on which this order is pronounced upon which the AO shall examine the claim of the assessee in the light of the said provisions and pass appropriate order accordingly in conformity with law after giving reasonable opportunity of hearing to the assessee. Thus the issue raised in additional ground no. 3 stands restored to the file of the AO with the aforesaid observations."

5. Course of Action:

Assessee's who have failed to deduct TDS should obtain certificate from Payee in Form No. 26A. This form is a certificate containing various details of payee about the filing of return of income by it / him, inclusion of amount paid by payer without TDS in computing its / his income, and payment of income tax thereon. The form has to be certified by a chartered accountant. This form should be filed during the course of assessment / appellate proceedings of the payer along with the claim for not invoking section 40(a)(ia) for non deduction of income tax (TDS).

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Brief analysis on levy of penalty u/s 271(1)(c), 271AAA and 271AAB of the Income Tax Act, 1961.

Advocate Tej Shah
shah-tej@hotmail.com

1. The framers of the statute while ensuring the collection of tax from the assessees, were mindful of having a watch dog in the name of "*penalty*" so that such assessees give their *fair share* to the exchequer. The purpose of introducing penalty provisions was to make sure that not only does the assessee display a true and fair picture of his income and expenses, but also that if he fails to do so, an extra sum of money may be recovered to deter him from doing so.

2. With this background, we now move ahead to the major sections for levy of penalty which we routinely deal with, i.e. penalty u/s 271(1)(c) and u/s 271AAA. Section 271AAB is relatively new. We will also go through various case laws which aid in interpreting the penalty provisions under different circumstances.

   Section 271(1)(c) reads as under,

   "271 (1) If the Assessing Officer or the Commissioner (Appeals) or the Commissioner in the course of any proceedings under this Act, is satisfied that any person—

   (c) has concealed the particulars of his income or furnished inaccurate particulars of such income, or

   he may direct that such person shall pay by way of penalty,

   (iii) in the cases referred to in clause (c) in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income.

   Therefore the two important limbs of levying penalty under the above section are that the assessee must have either ***concealed the particulars*** of his income or ***furnished inaccurate particulars*** of such income. The AO should firstly record his satisfaction in the assessment order itself which finds such concealment or inaccurate particulars of income as held by the Hon'ble SC in ***Varkey Chacko (203 ITR 885).*** The AO must imperatively mention in the notice as to whether penalty is being levied for having concealed the particulars of income or furnishing inaccurate particulars of such income, failing which the order levying penalty will be held to be illegal as held by the Hon'ble Gujarat High Court in ***Manu Engineering Works (122 ITR 306)*** and ***New Sorathia Eng. Co. (282 ITR 642).***

3. What tantamounts to ***concealment of particulars of income*** or ***furnishing inaccurate particulars of income*** has always remained a subject matter of controversy between the tax payer and the department. No straight jacket formula can be laid for inferring so, but if the assessee either fails to disclose the primary particulars or furnishes those particulars in an inaccurate fashion, the same attracts penalty. For instance, if the assessee makes a claim for deduction of expenditure or suppresses the income earned which on the face of it is illegal, penalty is leviable.

4. However if the assessee after disclosing the primary facts claims something as genuine as per his interpretation but which is not allowable as per the department, penalty is not leviable. A mere making of a claim which is not sustainable in law itself will not amount to furnishing inaccurate particulars of income – ***Reliance Petroproducts (322 ITR 158).*** The Hon'ble SC has gone to the extent of saying that even if the assessee acting under a bonafide belief as to a particular claim being false in nature, but which was later retracted

by filing a revised return, the same does not attract penalty – ***Price Waterhouse Coopers P. Ltd. (348 ITR 306)*** and ***Ms. Sania Mirza (219 Taxmann 133).*** A return cannot be false unless there is an element of deliberateness in it. If there was an omission to include a certain item in return of turnover on a *bona fide* belief that it was not taxable, the return was not false – ***Cement Marketing Co. of India Ltd (124 ITR 15).*** Although recently the Hon'ble SC in ***Mak Data (358 ITR 593)*** has held that the question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income. If the assessee fails to offer any cogent explanation and merely offers the income to buy peace, penalty is leviable.

5. Therefore the gist is that once primary facts necessary for computation of income are disclosed and the claim in the eyes of the assessee is based on a cogent explanation and interpretation of the prevailing statute, then penalty cannot be levied in view of the above judgments. However that does not give right to the assessee from claiming something absolutely untenable in the eyes of law. It is the duty of every tax payer to fully and truly disclose the particulars in such a manner so as to enable the AO to quantify the taxable income.

6. Moving ahead, we find there are 7 explanations to the above section. However we will be discussing only Explanations 1, 5 and 5A as they are more in application and dispute.

7. **Explanation 1** reads as under:

Where in respect of any facts material to the computation of the total income of any person under this Act,—

(A) such person fails to offer an explanation or offers an explanation which is found by the [Assessing] Officer or the [Commissioner (Appeals)] [or the Commissioner] to be false, or

(B) such person offers an explanation which he is not able to substantiate [and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him],

then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed.

The onus of proving that there is no concealment lies with the assessee once the AO records primary reasons for concealment in view of the deeming provisions of Explanation 1. A claim unsubstantiated without a cogent explanation would invite the wrath of the AO in the form of penalty. Therefore not only has the assessee to offer an explanation, but the same has to be backed by a potent explanation which led the assessee to make such a claim which is allowable in the eyes of law. A glaring fact which emerges out is that Explanation 1 can be applied only to cases involving '*concealment of income*' and not in cases involving '*furnishing inaccurate particulars of income*'. The reason for the same is the deeming fiction provided in the concluding para says, "*be deemed to represent the income in respect of which* ***particulars have been concealed***". The words '*inaccurate particulars have been filed*' have no mention and therefore it cannot be applied to those cases. However no case law on this particular aspect has been out yet. But it can nonetheless be contended.

8. **Explanation 5** reads as under:-

Where in the course of a [search initiated under section 132 before the 1st day of June, 2007], the assessee is found to be the owner of any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income,—

(a) for any previous year which has ended before the date of the search, but the

return of income for such year has not been furnished before the said date or, where such return has been furnished before the said date, such income has not been declared therein ; or

(b) for any previous year which is to end on or after the date of the search,

then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income, [unless,—

(1) such income is, or the transactions resulting in such income are recorded,—

(i) in a case falling under clause (a), before the date of the search ; and

(ii) in a case falling under clause (b), on or before such date,

in the books of account, if any, maintained by him for any source of income or such income is otherwise disclosed to the [Chief Commissioner or Commissioner] before the said date ; or

(2) he, in the course of the search, makes a statement under sub-section (4) of section 132 that any money, bullion, jewellery or other valuable article or thing found in his possession or under his control, has been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of time specified in sub-section (1) of section 139, and also specifies in the statement the manner in which such income has been derived and pays the tax, together with interest, if any, in respect of such income.]

Therefore the mandate of Explanation 5 is that

Firstly there has to be a search at the premises of the assessee. - If the search action is taken at some other assessee's premise, and consequent to the same the assessee is issued a notice either u/s 153C or 148, Explanation 5 ab initio will not apply – ***M.N. Rajaraman (2009) 109 ITD 362.***

Secondly the assessee is found to be the owner of any money, bullion, jewellery or other valuable article or thing. - If what is found during search is not money, bullion, jewellery or other valuable article or thing, then Explanation 5 will not apply. For example, if certain documents are found suggestive of any undisclosed income or some undisclosed books of accounts – ***Vrajlal T. Gala [2013] 33 taxmann.com 620.***

If the above conditions are satisfied, only then penalty is leviable as per clauses (a) and (b).

a) This clause has been divided into 2 parts. The former refers to, "*for any previous year which has ended before the date of search, but the return of income for such year has not been furnished before the said date*" and the latter refers to, "*where such return has been furnished before the said date, such income has not been declared therein*" or

b) For any previous year which is to end on or after the date of the search,

In such cases, regardless of the fact that such income is declared in any return filed on or after the date of search, penalty shall be imposed.

However there are exceptions to the above clauses. If the assessee carves out ***any of the*** exceptions, then penalty shall not be imposed. These exceptions read as under:

(1) Such income is, or the transactions resulting in such income are recorded,-

(i) In a case falling under clause (a), before the date of the search; and

(ii) In a case falling under clause (b), on or before such date,

in the books of accounts or such income is disclosed to the Chief Commisioner/ Commissioner before the said date; or

(2) He, in the course of the search, makes a statement u/s 132(4) that any money, bullion.. found in his possession has been acquired out of his income which has not

been disclosed so far in his return of income to be furnished before the expiry of time specified in 139(1), and also specifies the manner in which such income is derived and pays the tax with interest in respect of such income.

Let us take a hypothetical example to understand clauses (a) and (b) of the explanation and the exemptions available. A search action takes place on the premises of an assessee on 4th July, 2010. Therefore F.Y. 2009-10 (i.e. A.Y. 2010-11) has ended before the date of search, whereas F.Y. 2010-11 (i.e. A.Y. 2011-12) is yet to end after the date of search. Hence the former situation would be governed under clause (a) whereas the latter situation would be governed by clause (b).

Under clause (a) if the return is yet not furnished then he can claim exemption from penalty in either of the ways, i.e. -

i) If the assessee has recorded such transactions in the books of account; or
ii) Such income is disclosed to the Chief Commissioner /Commissioner; or
iii) He in the course of search… pays the tax, together with interest, if any in respect of such income.

Under clause (a) if the return is furnished but such income is not declared, then he can claim exemption in the following way, i.e. –

i) He in the course of search… pays the tax, together with interest, if any in respect of such income.

Under clause (b) he can claim exemption from penalty in either of the ways, i.e. –

i) If the assessee has recorded such transactions in the books of account; or
ii) Such income is disclosed to the Chief Commissioner /Commissioner; or
iii) He in the course of search… see sub-section 2.

Some of the important judgments on this aspect:

i) Radha Kishan Goel (278 ITR 454) - "*Even if the manner of deriving such income has not been disclosed in the statement made u/s 132(4), penalty is not leviable*". This has been followed by the Hon'ble Gujarat High court in ***Mahendra C. Shah (299 ITR 305)***.

ii) S.D.V. Chandru (266 ITR 175) – "*In respect of earlier years which have ended before the date of search, if the assessee has disclosed in the statement made u/s 132(4), penalty is not leviable.*" This view is affirmed by the Kolkatta ITAT in ***CIT v/s Avinash Ch. Gupta [2011] (44 SOT 85)***.

iii) CIT v/s Kanhaiyalal (299 ITR 19) - If the disclosure of the asset has been made, then the assessee cannot be prohibited from showing that the income related to any one or more of the previous years before the date of the search, at the pain of the immunity conferred by clause (2) of *x anat n5* being taken away. However the Hon'ble Ahmedabad ITAT in **Kirit Dahyabhai Patel** takes a view contrary to the aforesaid.

iv) Prem Arora [2012] 24 taxmann.com 260 (Delhi) – Original return of income of income u/s 139 cannot be considered for the purpose of levying penalty for search assessments u/s 153A. Concealment of income has to be seen with reference to additional income brought to tax over and above income returned by assessee in response to notice issued under section 153A and, therefore, once returned income under section 153A is accepted by Assessing Officer, it can neither be a case of concealment of income nor furnishing of inaccurate particulars of such income

Therefore by and large courts throughout have taken a view that even if the income which is the subject matter of dispute has not been disclosed in the original return of income, and when such income is unearthed during search and if the assessee discloses such income in his statement recorded u/s 132(4) and pays the tax together with interest, immunity should be granted from levying penalty.

Explanation 5A reads as under:

Where, in the course of a search initiated under section 132 on or after the 1st day of June, 2007, the assessee is found to be the owner of—

(i) any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income for any previous year; or

(ii) any income based on any entry in any books of account or other documents or transactions and he claims that such entry in the books of account or other documents or transactions represents his income (wholly or in part) for any previous year,

which has ended before the date of search and,—

(a) where the return of income for such previous year has been furnished before the said date but such income has not been declared therein; or

(b) the due date for filing the return of income for such previous year has expired but the assessee has not filed the return,

then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.]

What transpires is that now even *books of accounts, documents and transactions* have been included within the ambit which was absent in the previous explanation.

The sine qua non for levying penalty under this explanation amongst other things is

i) The previous year must have ended before the date of search. If the previous year is still pending as on the date of search, explanation 5A cannot be invoked and penalty cannot be levied u/s 271 (i)(c) – ***Dy. CIT v/s Satish M. Patel (I.T.A No. 256 (Ahd) of 2012 dated 20-07-2012)*** which was followed by ***Dineshkumar Ambalal Patel 2013 (35 taxmann.com 180)***;

ii) Return of income too must have been furnished before the date of search and such income has not been declared; and

iii) Due date for filing the return of income for such previous year should have expired but the assessee has not filed the return. However it has not been mentioned as to whether return should be considered as filed u/s 139(1) or 139(4). Therefore I would take a view that the extended time limit u/s 139(4) can come to the rescue of the assessee if he misses the former one – ***Gope M. Rochlani [2014] 49 taxmann.com 46.***

A situation may arise wherein search takes place after the previous year has ended but the due date of filing of return of income u/s 139(1) has not yet expired. In such a case, the provisions of S. 271AAA will apply.

S. 271AAA reads as under:

(1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1st day of June, 2007 [43][but before the 1st day of July, 2012], the assessee shall pay by way of penalty, in addition to tax, if any, payable by him, a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year.

(2) Nothing contained in sub-section (1) shall apply if the assessee,—

(i) in the course of the search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived;

(ii) substantiates the manner in which the undisclosed income was derived; and

(iii) pays the tax, together with interest, if any, in respect of the undisclosed income.

(3) No penalty under the provisions of clause (c) of sub-section (1) of section 271 shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1).

(4) The provisions of sections 274 and 275 shall, so far as may be, apply in relation to the penalty referred to in this section.

Explanation.—For the purposes of this section,—

(a) "undisclosed income" means—

(i) any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under section 132, which has—

(A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or

(B) otherwise not been disclosed to the Chief Commissioner or Commissioner before the date of search; or

(ii) any income of the specified previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted;

(b) "specified previous year" means the previous year—

(i) which has ended before the date of search, but the date of filing the return of income under sub-section (1) of section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the said date; or

(ii) in which search was conducted.]

This section starts with a non obstance clause. Penalty in cases of undisclosed income found during the course of search was dealt by Explanations 5 (where search before 1st June, 2007) and 5A (where search after 1st June, 2007). However from 1st June, 2007 the same will be dealt by either Explanation 5 or S. 271AAA as per the facts of the case.

The sine qua non for invoking this section is that:

i) Search should have taken place after 1st June, 2007 but before 1st July, 2012.

ii) The previous year would be the one which has either ended on the date of search where the date of filing of return u/s 139(1) has not expired; ***or*** the year in which the search is conducted.

iii) Any money, bullion… etc. as mentioned above has been found and not been recorded in the books of accounts; ***or*** not disclosed to the Commissioner or Chief Commissioner before the date of search; ***or*** not disclosed in the statement recorded u/s 132(4).

Therefore if an assessee in a case

i) where the previous year has ended, admits and substantiates during the course of search u/s 132(4) the manner of earning the undisclosed income and pays the tax alongwith interest; or

ii) where the previous year is pending, either, has recorded the undisclosed income in the regular books of accounts maintained by him or discloses such undisclosed income to the Commissioner or the Chief Commissioner; ***or*** admits and substantiates during the course of search u/s 132(4) the manner of earning the undisclosed income and pays the tax alongwith interest.

If the assessee discloses the undisclosed income found during the course of search u/s 132(4), explains the manner of deriving such income and pays the amount of tax alongwith interest then no penalty under this section can be levied.

Some authorities on this aspect:

a) **Sita Ram Gupta ([2014] 48 taxmann.com 327). Concrete Developers [2013] 34 taxmann.com 62.** - There is no specific format /procedure prescribed in the Act for specifying and substantiating an undisclosed income. If the statement of the assessee, specifying the manner in which the undisclosed income was derived (eg. the source of such undisclosed income), did not face any rebuttal or rejection at the hands of the Assessing Officer, then penalty cannot be levied.

b) **Neerat Singal [2013] 37 taxmann.com 189** - When authorized officer had not raised any query during course of recording of statement u/s 132(4) about the manner in which undisclosed income had been derived and about its substantiation, Assessing Officer was not justified in imposing penalty u/s 271AAA.

c) **A.N. Annamalaisamy (HUF) [2013] 38 taxmann.com 440 –** Where the additional amount of undisclosed income which was not disclosed during the filing of return but the same was disclosed by way of revised return which was filed before completing assessment, and the assessee had paid the tax alongwith interest alongwith the manner of earning such undisclosed income, no penalty can be levied.

Section 271AAA applies in cases where the previous year has ended or pending as on the date of search whereas Explanation 5A applies only in cases where the previous year has ended as on the date of search. But what would apply in a case where the previous year has ended on the date of search is dealt in the following manner:

S. 271AAB reads as under:

(1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1st day of July, 2012, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him,—

(a) a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year, if such assessee—

(i) in the course of the search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived;

(ii) substantiates the manner in which the undisclosed income was derived; and

(iii) on or before the specified date—

(A) pays the tax, together with interest, if any, in respect of the undisclosed income; and

(B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;

(b) a sum computed at the rate of twenty per cent of the undisclosed income of the specified previous year, if such assessee—

(i) in the course of the search, in a statement under sub-section (4) of section 132, does not admit the undisclosed income; and

(ii) on or before the specified date—

(A) declares such income in the return of income furnished for the specified previous year; and

(B) pays the tax, together with interest, if any, in respect of the undisclosed income;

(c) a sum which shall not be less than thirty per cent but which shall not exceed ninety per cent of the undisclosed income of the specified previous year, if it is not covered by the provisions of clauses (a) and (b).

(2) No penalty under the provisions of clause (c) of sub-section (1) of section 271 shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1).

(3) The provisions of sections 274 and 275 shall, as far as may be, apply in relation to the penalty referred to in this section.

Explanation.—For the purposes of this section,—

(a) "specified date" means the due date of furnishing of return of income under sub-section (1) of section 139 or the date on which the period specified in the notice issued under section 153A for furnishing of return of income expires, as the case may be;

(b) "specified previous year" means the previous year—

(i) which has ended before the date of search, but the date of furnishing the return of income under sub-section (1) of section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the date of search; or

(ii) in which search was conducted;

(c) "undisclosed income" means—

(i) any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under section 132, which has—

(A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or

(B) otherwise not been disclosed to the [Principal Chief Commissioner or] Chief Commissioner or [Principal Commissioner or] Commissioner before the date of search; or

(ii) any income of the specified previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted.]

Sub Section (1) to this section deals with 3 circumstances under which penalty is leviable at the rates of 10%, 20% and 30 to 90% under clauses (a), (b), and (c) respectively. We will not be dealing with clauses (a) and (b) as they are very clear. As far as clause (c) is concerned it deals with all cases other than those falling under clauses (a) and (b). Those shall mean to include cases in which the assessee in a statement under sub-section (4) of section 132, does not admit the undisclosed income; does not substantiate the manner in which the undisclosed income was derived; and also does not on or before the specified date declare such income in the return of income furnished for the specified previous year and pay the tax along with interest in respect of the undisclosed income.

It is worthwhile to note that if the assessment for a previous year which is pending or has ended before the date of search, penalty under this section will be levied only to the extent of the "*undisclosed income*" found during the course of search as defined above. In cases of any other income unearthed during final assessment proceedings and not by way of search, penalty will not be levied under this section but the provisions of S. 271(i)(c) will apply.

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Glimpses of Supreme Court Rulings

Advocate Samir N. Divatia
sndivatia@yahoo.com.

30 National Tax Tribunal:

The newly created court/tribunal would have to be established in consonance with the salient characteristics and standards of the court which is sought to be substituted. This would mean that the newly constituted court/tribunal will be deemed to be invalidly constituted, till its members are appointed in the same manner, and till its members are entitled to the same conditions of service as were available to the Judges of the court sought to be substituted. Thus, Sections 5,6,7,8 and 13 of the NTT Act are illegal and unconstitutional on the basis of the parameters laid down by the decisions of the constitution benches of the Supreme Court and on the basis of recognised constitutional conventions referable to the Constitutions framed on the Westminster model of Government. In the absence of the aforesaid provisions of the NTT Act which are held to be unconstitutional, the remaining provisions are rendered otiose and worthless, and as such, the provisions of the NTT Act as a whole, are hereby set aside.

The jurisdiction to decide substantial questions of law vests under our Constitution, only with the High Courts and the Supreme Court, and cannot be vested in any other body as a core constitutional value would be impaired thereby. Hence, the National Tax Tribunal Act is unconstitutional, being the ultimate encroachment on the exclusive domain of the superior courts of record in India.

[Madras Bar Association vs. Union of India and another (2014) 10 SCC 1)]

31 Section 13 r.w.s. 11 – Denial of exemption(sub-section (1)(d)):

High Court by impugned order held that in case of a charitable trust, it was only income from investment or deposit which had been made in violation of Sec.11(5) that was liable to taxed and that violation u/s 13(1)(d) does not tantamount to denial of exemption u/s 11 on total income of assessee-trust.

[CIT vs. Fr. Mullers Charitable Institutions (2014) (227 Taxman 369)]

32 Business Expenditure – Allowability of Illegal payments:

Assessee entered into a contract with foreign company for import of furnace oil – It got performed contractual obligations arising from said contract executed through its sister concern, against payment of certain consideration – Assessee claimed said payment as commission – High Court by impugned order held that though assessee got contract executed through its sister concern, but subsequent purchases from sister concern of very furnace oil, its storage and consequent sale were in complete breach of Solvent, Raffinate & Slop (Acquisition, safe, storage & preservation of Use in automobiles) – Order,2000 and, thus, any deduction u/s 37(1) could not be allowed to assessee for said payment – whether Special Leave Petition filed by assessee against impugned order was to be dismissed.

[Overseas Trading & Shipping Co. (p) Ltd. Vs. Asst. CIT (2014) (227 Taxman 370)]

33 Service of notice:

High Court by impugned order held that since notice u/s 143(2) had been served upon assessee on very next working day as due date being Sunday, there was sufficient compliance of first proviso to Sec.143(2) and notice was valid – whether SLP filed by assessee against impugned order was to be dismissed – Held yes.

[Gujarat State Plastic Manuf. Association vs. Dy. DIT, Ahmedabad (2014) (227 Taxman 380)]

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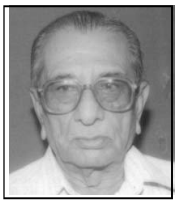
From the Courts

CA. C. R. Sharedalal
jcs@crsharedalalco.com



CA. Jayesh C. Sharedalal
jcs@crsharedalalco.com

64 Capital Gain: Long Term: Date of Purchase how to be considered: Mrs. Madhu Kaul v/s CI.T. (2014) 363 ITR 54 (P&H)

Issue:

How the date of purchase of a flat is to be considered – date of allotment or any other date?

Held :

Assessee had sold the flat on July, 5, 1989.

The flat was allotted to the asessee on June, 7, 1986, by a letter- conveyed to the assessee on June 30, 1986. The assessee paid the first installment on July, 4, 1986, there by conferring a right upon the assessee to hold a flat, which was later identified and possession was delivered on a later date. The mere fact that possession was delivered later did not detract from the fact that the allotee was conferred a right to hold the property on issuance of an allotment letter. The payment of the balance installments, identification of particular flat and delivery of possession were – consequential acts, that related back to and arose from the rights conferred by the allotment letter.

65 Peak Theory explained C.I.T. v/s. Fertilizer Traders (2014) 222 Taxman 162 (All) (Mag) : 98 DTR (All) 323

Issue :

How the peak theory is to be considered.

Held :

The peak theory is defined in the Sampath I Yangon's Law of Income Tax, Vol. 3, 9th Edition, Page 3547. Accordingly where a single credit or number of credits appear in the books in the account of any particular person side by side with a number of debits, they should all be arranged in serial order; that a credit following a debit entry should be treated as referable to the latter to the extent possible and that, not the aggregate but only the "peak" of the credit should be treated as own. To give a simple example, suppose there are credits in the assessee's books of account of Rs.5000 each 18th October, 1990 and again on 5th November 1990 but there is a debit by way of repayment shown on 27th October, 1990, the explain will be that the credit appearing on 5th November, 1990 has or could have come out of the withdrawal/repayment on 27th October, 1990. This plea is generally accepted as it is logical and acceptable (Whether the creditor is a genuine party or not), provided there is nothing in the material on record to show that a particular withdrawal/repayment could not have been available on the date of subsequent credit.

A refinement or extension of the plea occurs when the credit appears not in the same account but in accounts of different persons. Even then, if the genuineness of all the persons is disbelieved and all the credits appearing in the different accounts are to be held to be the assessee's own money, the assessee will be entitled to set-off and a determination of the peak credit after arranging all the credits in the chronological order.

66 Burden of Proof C.I.T. v/s. Chanakya Developers (2014) 222 Taxman 164 (Guj.) (Mag.)

Issue :

Whether Supply of address and PA No. Of persons booking flat is sufficient discharge of burden on the part of the assessee?

Held :

Assessee received certain amount from four persons on account of booking of flats. In order to establish genuineness of transactions, assessee supplied address and PAN of concerned persons to Assessing Officer. Assessing Officer, however, rejected assessee's explanation and added said amount to its taxable income. Tribunal opined that since assessee had discharged primary onus cast on it, Assessing Officer should have made inquiry u/s.133 (6). In absence of any inquiry, Tribunal deleted impugned addition.

High Court held that no substantial question of law arises from Tribunal's Order.

67 Application of Section 41(1) CIT v/s. Bhogilal Ramjibhai Atara (2014) 222 Taxman 313 (Guj.)

Issue :

How the provisions of Sec.41 (1) can be applied?

Held :

Sec. 41 (1) would apply in a case when there has been remission or cessation of liability during the year under consideration subject to the conditions contained in the statute being fulfilled. Additionally such cessation or remission has to be during the previous year relevant to the assessment year under consideration.

In the instant case both elements are missing. There was nothing on record to suggest that there was remission or cessation of liability that too during the previous year relevant to the assessment year 2007-08. It is undoubtedly a curious case. Even the liability itself seems under serious doubt. The A.O. undertook the exercise to verify the records of the so called creditors. Many of them were not found at all in the given address. Some of them stated that they had no dealing with the assessee. In one or two cases, the response was that they had no dealing with the assessee nor did they know him. Of course, these inquiries were made exparte and in that view of the matter, the assessee would be allowed to contest such findings. Nevertheless, even if such facts were established through bi parte inquiries the liability as it stands perhaps holds that there was no cessation or remission of liability. Therefore, the amount in question cannot be added back as a deemed income u/s. 41(1).

This is one of the strange cases, where even if the debt itself is found to be non-genuine from the very inception at least in terms of Sec.41 (1) there is no cure for it. Therefore, the appeal filled by the revenue was liable to be dismissal.

68 Discretionary Trust : Meaning of : Right of Beneficiary C.W.T. v/s. Estate of Late HMM Vikramsinhji of Gondal (2014) 363 ITR 679 (SC)

Issue :

What is the meaning of Discretionary Trust and what are the rights of the beneficiaries?

Held :

On the subject, Supreme Court has held as under:

A discretionary trust is one which gives a beneficiary no right to any part of the income of the trust property, but vests in the trustees a discretionary power to pay him, or apply for his benefit, such part of the income as they think fit. The trustees must exercise their discretion as and when the income becomes available, but if they fail to distribute in due time, the power is not extinguished, so that they can distribute later. They have no power to bind themselves for the future. The beneficiary thus has no more than a hope that the discretion will be exercised in his favour.

69 Applicability of Sec. 14A : Claim of exempt income is a must CIT v/s. Corrtech Energy (P) Ltd. (2014) 223 Taxman 130 (Guj.)

Issue :

A claim of exempt income is a prerequisite for applicability of Sec. 14A?

Held :

Assessee invested certain borrowed money in shares. A.O. disallowed amount by applying Rule 8 D.

CIT(A) confirmed the disallowance observing that the assessee made investment in shares which would result into tax free dividends.

Tribunal held that the assessee had not claimed any exempted income in this year. In such a situation Sec.14A could have no application. The Tribunal deleted the addition made u/s. 14 A.

On appeal to High Court, it is held that :-

Section 14A(1) provides that for the purpose of computing total income under Chapter IV, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act. In the instant case, the Tribunal has recorded the finding of fact that the assessee did not make any claim for exemption of any income from payment of tax. It was on this basis that the Tribunal held that disallowance u/s.14A could not be made. In the process Tribunal relied on the decision of Division Bench of Punjab and Haryana High Court in case of CIT v/s. Winsom Textile Industries Ltd. (2009) 319 ITR 204 in which also the Court had observed that when the assessee did not make any claim for exemption, Section 14-A could have no application.

Thus, no Question of law arose.

70 Charitable v/s. Commercial Activity. Director of Income Tax v/s. Sabarmati Ashram Gaushala Trust (2014) 223 Taxman 43 (Guj.)

Issue :

When aims and objects were charitable and profit earned was incidental the trust would lose exemption u/s.11?

Held :

Assessee was registered with object of breeding cattle and to improve quality of cows and Oxen. It generated considerable income from activity of milk production and sale. A.O. denied benefit of exemption u/s.11 on ground that it was earning profit over years and activities were commercial in nature, CIT(A) confirmed the same.

Tribunal reversed decision of revenue authorities holding that assessee was entitled to exemption u/s.11 and since aims and objects of assessee trust were chartiable and profit earned from said activities were incidental in nature, it was not hit by Sec.2 (15).

High Court held that :

Objects of trust clearly established that same were for general public utility and profit making was neither aim nor object of trust. Merely because while carrying out activities for purpose of achieving objects of trust certain incidental surpluses were generated, would not render activity in nature of trade, commerce of business. Accordingly order of Tribunal was upheld.

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Tribunal News

CA. Yogesh G. Shah
yshah@deloitte.com

CA. Aparna Parelkar
aparelkar@deloitte.com

55 Gujarat Pipavav Port Ltd. v. DCIT 166TTJ159 (RAJ.)
Assessment year: 2006-07 & 2007-08
Order Dated: 23rd August, 2013

Basic Facts

The assessee-company carried on the business of developing, constructing, operating and maintaining the port on Build, Own, Operate, Transfer (BOOT) basis. Assessee entered into two agreements with Gujarat Maritime Board (GMB). First agreement was lease and possession agreement by which assessee was granted the right to use the foreshore land and waterfront abutting against monthly rent and second was 'concession agreement by which assessee was granted right to use waterfront against payment of charges to be computed on basis of actual throughputs achieved in the month.The assessee made payment to GMB as wharfage charge and deducted tax therefrom under section 194J being in the nature of royalty. The AO held that such payments were in nature of rent as defined in section 194-I and, therefore, the assessee was required to deduct tax at source under section 194-I and not under section 194J. The AO treated the assessee as assessee in default and levied penalty under section 201(1) in addition to interest under section 201(1A). On appeal, the Commissioner (Appeals) upheld the order of the AO.

Issue

Whether Wharfage charges paid by assessee under "lease and possession agreement" for lease of premises granting the assessee right to use the foreshore land and waterfront can be considered as royalty under section 194J(c)?

Held

The term 'rent' is defined in Explanation (i) to section 194-I as any payment, by whatever name called, under any lease, sub-lease, tenancy or 'any other agreement' for the use of (either separately or together) any, inter alia, land, or building or land appurtenant to a building. It is, thus, clear that the term 'rent' also includes any payment made under any agreement for the use of, either separately or together, any land or building. Keeping in view the aforesaid definition of 'rent', on careful perusal of both the agreements, namely, the lease & possession agreement, and the concession agreement, it is clear that the impugned payment shown by the assessee in its books of account as wharfage is, in substance, nothing but payment made for using the land together with structure on the margin or shore of navigable waters alongside of which vessels were brought for the sake of being conveniently loaded or unloaded. Waterfronts are part of land and, therefore, any payment in lieu of its use would squarely fall under the definition of rent as given in section 194-I (i). Hence, the CIT(A) has correctly appreciated the factual and legal aspects of the case. His order in this behalf is, therefore, confirmed. Apropos the applicability of section 194J to the impugned payments, it was submitted by the assessee that impugned payments were in the nature of 'royalty' under section 194J(c). On perusal of the definition of 'royalty' as given in Explanation 2 to clause (vi) of section 9(1), it is clear that the scope of royalty is limited to consideration paid for transfer of certain rights in respect of patent, invention, model, design, secret formula or process or trademark or similar property, etc. The impugned sum paid by the assessee does not fall under any of the clauses of Explanation 2 to clause (vi) of sub-section (1) of section 9. The assessee also could not establish as to how the impugned payments made by the assessee fell under Explanation 2 to clause (vi) of sub-section (1) of section 194J. In this view of the matter, there was no basis with the assessee for deducting tax at source under section 194J. The CIT(A) has rightly held that the assessee was required -to deduct tax at source under section 194-I.

56 A.P. State Warehousing Corporation v. DCIT 150 ITD 485 (Hyd) Assessment Year: 2007-08Order dated: 24th January, 2014

Basic Facts

The assessee was carrying on the business of taking godowns on lease from private parties and letting them to Food Corporation of India on guarantee. It stored food-grains belonging to FCI, mainly in godowns and handled and transported such foodgrains under its supervision by hiring men and material wherever necessary. It claimed exemption under section 80-IB(11A). Claim of the assessee for relief under section 80-IB(11A) had been disallowed by the AO mainly on the ground that the activities of the assessee did not constitute an 'integrated' activity and assessee having been incorporated in 1958, and in the absence of anything on record to substantiate that the assessee had taken up any new activity of handling and transportation of food grains subsequent to 2002, assessee was not entitled for relief under section 80-IB(11A), since relief under said section is available only for five years from 'initial year'.The CIT(A) upheld the action of the AO denying the relief claimed by the assessee under section 80-IB(11A).

Issue

Whether each new godown constructed for storage of food grains is an undertaking and eligible for section 80-IB relief?

Held

The assessee owns premises accommodating godowns at different places all over the State. In each area, it either constructs or offers an investor to construct new godowns, which the corporation takes on lease. Each unit is an undertaking because food-grains are stored and handled and transported thereto and therefrom. It may be noted that there is no restriction in section 80-IB that an existing business unit cannot set up new undertakings to carry on the integrated business of handling, storage and transportation of food grains. The godowns where this business is to be carried on need not be owned by the assessee. Since each new godown is an undertaking in itself, assessee is entitled for such relief under Section 80-IB(11A) for five years in respect of each such undertaking from the 'initial year' in which it was set up.As regards the eligibility of the activity of the assessee to the relief under section 80-IB(11A), it is worthwhile to refer to the intention of the Legislature in introducing section 80-IB(11A).It is evident that the insertion of sub-section (11A) is intended to encourage building of storage capacities, by providing that any undertaking engaged in integrated bulk handling, storage and transportation would be allowed hundred per cent deduction for the first five years and thirty per cent deduction for the next five years. Thus, Section 80-IB(11A) is applicable to income derived from the integrated business of handling, storage and transportation of foodgrains. A perusal of the activities of the assessee in association with the Food Corporation of India, clearly indicated that it was engaged in the integrated business of handling, storage and transportation of food grains. The fact that the assessee had been carrying on similar business would not disentitle the assessee from claiming relief under section 80-IB(11A), in respect of the new warehouses put to use after the introduction of section 80-IB(11A), i.e. on or after 1-4-2001. The assessee has furnished in the paper-book list of new godowns, which have been put to use by the assessee after 1-4-2001. Therefore, the assessee was entitled to deduction under section 80-IB(11A), in respect of income derived from new undertakings, i.e., warehouses, set up and operated from 1.4.2001 for storage, handling and transportation of food grains. Accordingly, the impugned orders of the Commissioner (Appeals) were set aside on this issue for all the three years and the matter remitted to the file of the AO, with a direction to verify the claim of the assessee for deduction under section 80-IA(11A) in respect of new undertakings set up after 2001, and allow the same in accordance with law, and after giving due opportunity of hearing to the assessee.

57 Jai Surgicals Ltd. v. ACIT 150 ITD 60 (Del).
Assessment Year: 2009-10 Order dated: 26th June, 2014

Basic Facts

The assessee is engaged in the business of manufacture and export of surgical blades. The assessee entered into transactions of payment of job work charges to a related party, viz. , M/s Razormed Inc. during the financial year relevant to assessment year under consideration without obtaining prior approval of the Central Government in accordance with the provisions of section 297 of the Companies Act, 1956. The AO opined that as there was no prior approval to the job charges paid to M/s Razormed Inc., it was an offence and is prohibited by law and accordingly, it triggered the Explanation to section 37(1) of the Act. This led to the addition of job work charges. The CIT(A) echoed the assessment order on this issue.

Issue

Whether offence or prohibition under law should be judged with 'purpose' of expenditure on a standalone basis divorced from fulfilment or otherwise of procedural formalities attached with and necessary for incurring of such expenditure?

Held

The assessee made payment for getting the job work done from its related concern, which is otherwise neither an offence nor prohibited by law, but committed a breach by not obtaining the necessary approval from the Central Government in time. Thus, on one hand the payment is otherwise for a lawful purpose, but the legality of the transaction has been shadowed by not obtaining prior approval from the Central Government. The Hon'ble ITAT held that explanation to section 37(1), which is a deeming provision, it is amply borne out that it talks of disallowing any expenditure incurred by an assessee for 'any purpose' which is either an offence or prohibited by law. So what is contemplated for disallowance is an 'expenditure' incurred 'for any purpose which is either an offence or which is prohibited by law'. In simple words, the investigation should be carried out to see the object and consideration for the expenditure incurred. If the purpose of the expenditure is either an offence or is prohibited by law, then it would suffer disallowance. It means that the offence or prohibition under law should be judged with the 'purpose' of the expenditure on a standalone basis divorced from the fulfilment or otherwise of the procedural formalities attached with and necessary for the incurring of such expenditure. When the language of the Explanation is crystal clear and does not encompass the incurring of expenses for a lawful purpose, such as the job charges, within its ambit, it is wholly impermissible to import a further requirement in the language of the Explanation to make the otherwise lawful purpose as unlawful for lack of the prior approval of the Central Government. Since such expenditure in itself is neither an offence nor prohibited by any law and there is a valid and lawful quid pro quo for the same, the view canvassed in the CIT(A)'s was rejected by Tribunal.

58 Director (Finance) Secretariat, Shipping Corpn. of India Ltd. v. ITO [2014] 150 ITD 516
Assessment Year: 2004-05 to 2006-07 Order dated: 30th May, 2014

Basic Facts

The assessee Shipping Corporation of India Limited was a Government of India Enterprise which was engaged in the business of shipping. It owned around 90 ships which were plied all over the world. In the course of its business, assessee also hired ships to meet capacity requirements where exigencies arose and such ships were taken on charter from the non-resident owners of the ships, registered outside India. The AO held that no tax was deducted by the assessee from the payments made to the non-resident entities towards hire/time charter charges during the relevant three assessment years. The hire/time charter charges paid by the assessee to the non-resident entities being in the nature of royalty (equipment royalty taking ship as an equipment), assessee was required to deduct tax

at source from the said payment. Accordingly, he treated the assessee as assessee in default and charged interest under section 201(1).On appeal the CIT(A) held that the payments was not royalty but held that provisions of section 44B would be applicable. The CIT(A) directed the AO to consider the relevant DTAA and allow appropriate relief. The AO determined 7.5 per cent of the gross amount as income of the shipowners liable to tax in India as per the provisions of section 44B and treated assessee as the assessee in default under section 201(1) to that extent. He also levied interest under section 201(1A) on the amount so determined.On appeal to CIT(A) he dismissed the appeal. The assessee is in appeal to the Tribunal.

Issue

Whether no order under section 201(1)/201(1A) can be passed when revenue has not taken any action against payee and further time limit for taking action against payee under section 147 has also expired?

Held

The Tribunal following the Special Bench of the ITAT in the case of Mahindra & Mahindra v. Dy. CIT [2009] 30 SOT 374 (Mum.) held that no order under section 201(1)/201(1A) can be passed where the revenue has not taken any action against the payee and further the time limit for taking action against the payee under section 147 has already expired. The question of treating the person responsible for paying the income as the assessee in default by way of passing the order under section 201(1) is inter alia tied with the tax liability of the payee on such sum and if the liability of the payee to tax does not exist or though the income is chargeable to tax but the liability of the payee to tax has not been determined by passing any order in his hands and further the time limit for taking action on the payee under any provision has also passed out, the payee cannot be charged on such income and consequently the person responsible for paying the income cannot be treated as the assessee in default.

59 JCDECAUX Advertising India (P) Ltd. Vs. DCIT 166 TTJ 121 (Del) Assessment Year: 2007-08 Order dated: 8th September, 2014

Basic Facts

The assessee was incorporated in April, 2005 to carry on the business of out of home advertisement, consisting of street furniture, bill boards and transportation. The assessee was awarded its first contract by New Delhi Municipal Corporation (NDMC) in March, 2006 for construction of 197 Bus Queue Corporation (BQSs) on Build-Operate-Transfer (BOT) basis. As per this contract, the assessee was required to undertake preliminary investigations, study , design , finance, construct, operate and maintain BQSs at its own cost. In consideration, the assessee was allowed to commercially exploit the space allotted in these BQSs by means of display of advertisement etc., for a period of 15 years. The expenditure incurred &claimed by the assessee as deductible was accepted by AO as revenue expenditure but he refused to allow deduction on the ground that the business of the assessee had not commenced. The AO held that the business would commence only when the BQSs would be ready for providing space for advertisement to the assessee, being the very reason for which the assessee company entered into an agreement with the NDMC. The CIT(A) upheld the assessment order.

Issue

Whether all the revenue expenses incurred during the year are eligible for deduction?

Held

The assessee was given contract in the preceding year. Not only that, the assessee started the execution of contract in the preceding year itself by taking steps, such as, entering into manufacturing agreement with a third person for manufacture and installation of BQSs on making advance payment. It can be said that the project of NDMC for construction of BQSs was not set up, but in so far as the assessee is concerned, it had certainly commenced its business with the execution of

contract awarded by NDMC. The authorities below have tagged the setting up of business with the provision of space for advertisement by NDMC. This is certainly post commencement business stage of assessee. Such an event would mark the generation of actual income on commencement of business and cannot be construed as the setting up of business. The assessee's business was set-up when it prepared itself for undertaking the activity of building BQSs on receipt of contract from NDMC. It cannot be related to the completion of construction of BQSs. As the setting up of the business was over in the preceding year, at the maximum, entering into manufacturing agreement for manufacture and installation of BQSs on 30th March, 2006, not only the business of the assessee was set up but had also commenced in the instant year. As section 3 r.w.s. 4 refers to the starting of previous year from the date of setting up of a new business, there is no hesitation in holding that the business stood already set-up in the preceding year and as such there can be no question of canvassing a view that the business would be set up in a subsequent year when BQSs would be ready for providing space to the assessee for advertisement. Thus, the Hon'ble ITAT accepted the assessee's claim that the business was set up in the preceding year. Accordingly, all the revenue expenses incurred during the year become eligible for deduction.

60 DDIT v. JC Bamford Excavators Ltd. [2014] 150 ITD 553 (Del) Assessment Year: 2006-07 Order dated: 14th March, 2014

Basic Facts

The assessee is a flagship company of JCB in UK which owns, develops and manufactures excavators sold under the JCB brand name. It entered into a Technology Transfer Agreement (TTA) &an International Personnel Assignment Agreement (IPAA)with its wholly owned subsidiary JCB India Ltd. The assessee received royalties/fees for technical services from JCB India which was offered for taxation at the rate of 15% as per DTAA. In terms of TTA read with IPAA, assessee also sent its personnel to the plant of JCB India for solving problems relating to the licensed products. The assessee had send eight employees 'on deputation to JCB India' and seven employees frequently visited India mainly for reviewing the business of JCB India. In view of the deputation of these eight persons for a period of 90 days during the previous year relevant to the assessment year under consideration, the AO held that they constituted services P.E of the assessee (named as JCB India) in India in terms of Article 5(2)(k)(i) of the DTAA. AO held that it carried on the business in India and royalties/fees for technical services received from JCB India was effectively connected with such service PE and considered the same as 'Business Profits' under article 7 of the DTAA. The CIT(A) held that since eight persons became the employees of JCB India on their deputation, the assessee did not have any PE in India. Resultantly, it was held that there could be no computation of income as per article 7 of the DTAA.

Issue

Whether JCB India constituted the assessee's service PE in India?

Held

A close look at the prescription of article 5(2)(k)(i) divulges the requirement of a cumulative fulfilment of the following requisites as a sine qua non for constituting a PE of a resident of one State in the other State. The first essential is of furnishing services including managerial services. The eight employees sent on deputation to JCB India were basically engaged in managing the overall operations of JCB India including the quality control.The first condition thus stands satisfied. The second essential is that the services should be other than those taxable under Article 13. As the entire case of the AO rests on the foundation that the consideration for such services is 'taxable' under article 7, which is definitely 'other than Article 13', this condition is also fully satisfied. The third essential that such services should be rendered within the other contracting state is also fully satisfied. The fourth essential states that such services should be rendered by the enterprise of the first state through its employees or other personnel. The question which arises here is that whether these eight persons were the employees of the assessee

contd. on page no. 615

Unreported Judgements

CA. Sanjay R. Shah
sarshah@deloitte.com

In this issue we are giving gist of an important decision of Hon'ble Gujarat High Court in the case of **Santokben Sarmanbhai Jadeja v/s ITO**, wherein the Hon'ble High Court held that in case of an identical issue if the department has accepted the position and has not gone in further appeal, then in succeeding year also on the identical issue, they cannot come in appeal before Hon'ble Court.

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 1768 of 2005

With

TAX APPEAL NO. 1769 of 2005

TO

TAX APPEAL NO. 1770 of 2005

HONOURABLE MR. JUSTICE K.S. JHAVERI

and

HONOURABLE MR. JUSTICE K.J. THAKER

SANTOKBEN SARMANBHAI JADEJA since deceased Thro' her legal heir

BHOJABHAI S. JADEJA …. Appellant(s)

Versus

INCOME TAX OFFICER…..Opponent(s)

Appearance :

MR. RK PATEL, ADVOCATE for the Appellant(s) No.1

MR. PRANAV G. DESAI, ADVOCATE for the Opponent(s) No.1

Gist

Question

In all the three Tax Appeals in the questions were as under:

Tax Appeal No. 1768 of 2005

"Whether the Tribunal's conclusion in upholding the addition towards yield to the extent of Rs.2,12,000/- in the returned figure of agricultural income is on justifiable basis ?

Tax Appeal No. 1769 of 2005

"Whether the Tribunal's conclusion in upholding the addition towards yield to the extent of Rs.3,41,000/- in the returned figure of agricultural income is on justifiable basis ?

Tax Appeal No. 1770 of 2005

"Whether the Tribunal's conclusion in upholding the addition towards yield to the extent of Rs.3,36,000/- in the returned figure of agricultural income is on justifiable basis ?

Facts

The assessee has filed return of income on 17/06/1997 declaring total income of Rs.9,607/- and net agricultural income of Rs.6,96,573/-. As there was escapement of the income, notice u/s 148 of the Act was issued,in response to which the assessee said that her return of income filed in original assessment be considered as filed pursuant to u/s 148 notice.

Thereafter, assessment order was passed disallowing agricultural income and treating it as income from other sources. Thereafter, the matter

went upto Tribunal, which partly allowed appeal of the assessee. The assessee thereafter went in appeal before Hon'ble High Court and contended that in the earlier assessment year the income was considered as agricultural income, but for only this year the same was not so considered. The assessee also relied on the Hon'ble Supreme Court decision in the case of **CIT v/s Excel Industries Ltd. 358 ITR 295.** It also relied on the identical issue decided by the Hon'ble Gujarat High Court in Tax Appeal No. 347 of 2002 and contended that since in the earlier year the income was considered as agricultural income, the same has to be considered as agricultural income also in the above three appeal for Assessment Years 1994-95, 1995-96 and 1996-97 .

Held

The Hon'ble Gujarat High Court quoted the following paragraphs from the decision of Hon'ble Gujarat High Court in tax Appeal No.347 of 2002:

"7. Heard the learned advocates appearing for the parties and considered the submissions. Learned advocate Mr. Karia for the respondent – assessee has pointed out the observations made by the Tribunal in para 4.2, which reads as under :

"4.2 On the basis of the entry in the Depreciation Table, the learned counsel contended that E Boats are required to be treated as machinery spare parts and not item of inventory (stock-in-trade) as contended by the AO. The learned counsel further stated that in AY 1996-97 a similar show cause notice was issued by the AO to the assessee company as to why an addition on account of closing stock of the E-boats should not be made as made in earlier asstt. year viz. AYs 1992-93 to 1995-96. The respondent company submitted a detailed reply dated 17/12/1998 a copy whereof has been placed at page 145 to 149 wherein it was explained that no addition is required to be made on account of closing stock of E-Boats and on the contrary the respondent company would get deduction which would entitle them to have income tax refund. The AO after considering the detailed reply so submitted by the assessee dropped the proposal of making the addition on account of closing stock of E-Boats for AY 1996-97. The learned counsel contended that no such addition made in AY 1997-98 also."

"8. In that view of the matter, considering the finding recorded by the Tribunal, we concur with the view taken by the Tribunal and in view of fact that the earlier decision of the same assessee was accepted by the Department, and therefore, only on that ground, the present appeals are deserve to be dismissed. In the peculiar facts and circumstances of the case, it may not be treated as precedent. The question in all these Tax Appeals is answered against the Department and in favour of the assessee. All these Tax Appeals are dismissed."

The Hon'ble High Court, therefore, held that since in the earlier year the income was assessed as agricultural income which was accepted by the department, for these years also they should have considered as agricultural income and hence the additions made were deleted.

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Controversies

CA. Kaushik D. Shah
dshahco@gmail.com.

Whether amount paid for compounding of offence is hit by explanation to section 37(1) of the Income Tax Act, 1961 and hence cannot be allowed as deduction while computing business income?

Issue :

The assessee M/s. XYZ Construction Co. Pvt. Ltd. paid compounding fees for regularizing construction of building which was made in violation of Building Regulations. The AO is of the opinion that compounding fees paid cannot be allowed as deduction since it is covered by the explanation to section 37(1) of the Income Tax Act, 1961.

Proposition :

It is submitted the compounding fees is paid only for violation of administrative regulations which gets relaxed on payment of compounding fees. It is also submitted that such payment is not against violation of law. The fact that the matter is compounded does not mean that there is admission of violation. It is further submitted that such payment is at the most for the breach of regulation under the relevant laws and not laws themselves. In these circumstances, compounding fees paid in my opinion is not hit by explanation to section 37(1) of the I.T. Act, 1961 hence the same has to be allowed as deduction.

View against the Proposition :

Let me refer to explanation to section 37(1) of the I.T. Act, 1961.

1] Prior to insertion of Explanation to section 37(1) by Finance (No.2) Act, 1998, the Courts including the Hon'ble Apex Court have on various occasions been called upon to answer the question, as to whether fines and penalties paid by the assessee could be allowed as a deduction while computing the income of the assessee and the Courts have consistently held that any expense which is paid by way of penalty for breach of law cannot be said to be an amount expended wholly and exclusively for the purposes of business – Haji Aziz & Abdul Shakoor Brothers vs. CIT [(1961) 41 ITR 350 (SC)]. However, in Pranav Construction Co. vs. ACIT [(1988) 61 TTJ (Mum.) 145] the Hon'ble Mumbai Tribunal held that payment of extortion monies and hafta by the assessee, a builder to anti social elements was an allowable business expenditure as strong circumstantial evidences were available to prove the genuineness of the payments made by the assesseee.

In order to put the matter beyond reasonable doubt and to disallow any expenditure incurred by the asessee for any purpose which is an offence or which is prohibited by law Explanation to sub-section (1) of 37 of the Act was inserted by the Finance (No. 2) Act, 1998, with retrospective effect form 1-4-1962 which read as under :

37(1)……

Explanation :

"For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure."

The intention and the reason for the insertion of the Explanation was explained by the Central Board of Direct Taxes in Circular No.772, dated 23.12.1998 [(1999) 235 ITR (St.) 35] in the following words :

"20 Disallowance of illegal expenses.—

20.1 Section 37 of the Income-tax Act is amended to provide that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purposes of business or profession and no deduction or allowance

shall be made in respect of such expenditure. This amendment will result in disallowance of the claims made by certain assesses in respect of payments on account of protection money, extortion, hafta, bribes, etc., as business expenditure. It is well decided that unlawful expenditure is not an allowable deduction in computation of income."

Thus, the Explanation was inserted with the intention to curb, rather than to act as a deterrent against, any one carrying on a profession, occupation or business in any illegal or illegitimate manner. Now, after insertion of Explanation any penalty/ fine or any expenditure incurred which is prohibited by law (Extortion money, hafta, bribes, etc.) cannot be considered as an expenditure wholly and exclusively incurred for the purpose of business. It is also against public policy to allow the deduction of expenditure incurred under one statute which is in violation of provisions of another statute.

Gareden Silk Mills Ltd. v/s. Asstt. CIT (2005) 2 SOT 856 (Ahd)

Assessee company took over business of a partnership firm – Department had launched prosecution proceedings against partners of erstwhile firm who were now directors of assessee – Assessee paid compounding fees to CBDT and claimed same as expenditure under section 37(1) – Since prosecution was launched against partners of erstwhile firm, it was their personal responsibility to face such prosecution and, therefore, deduction under section 37(1) – being also hit by Explanation to section 37(1), was not allowable.

Payments made to Municipal Corporation for regularizing unauthorized construction carried out without obtaining necessary permission from the Municipal Corporation were held to be penal in nature and hit by the provisions of Explanation to section 37(1) of the Act, Millennia Developers (P) Ltd. vs. Dy. CIT (2010) 322 ITR 401 (Karn)]. Similar view is also taken by Hon'ble Mumbai Tribunal in the case of Radhavallabh Silk Mills (P) Ltd. vs. Dy. CIT [(2007) 12 SOT 423 (Mum.)]

In CIT vs. Mamta Enterprise (266 ITR 356), by invoking Explanation to section 37, compounding fees for regularizing construction of building, the Court held that compounding process cannot wash away sin of violation. The person would still be an offender of law and hence compounding charges paid still be treated as payment for infraction of law not deductible as expense in view of Explanation to section 37. The Delhi High Court decision in Loke Nath (Supra) was distinguished being decision pertaining to period prior to insertion of Explanation.

View in favour of the Proposition:

The decision of the Hon'ble Apex Court in the case of Haji Aziz & Abdul Shakoor Brothers (supra) together with the Explanation to section 37(1) of the Act cannot be read as laying down an inflexible rule of law that in all eventualities with regard to deductibility of fines and penalties, before invoking the provisions of Explanation to section 37(1) of the Act, the assessing officer is required to examine the scheme of the provision of the relevant statute providing for payment of such levies, notwithstanding the nomenclature of the levy given by the statute, in order to find out whether the payment made by the assessee is compensatory or penal in nature. Where the amount paid by the assessee is only compensatory in nature that is to compensate the Government for any delay in payment of taxes, filing of belated returns, etc. then such payments are allowable under section 37(1) of the Act as there is no infraction of law by the assessee. On the other hand where the payment made by the assessee is partly compensatory and partly penal in nature the assessing officer has to bifurcate the compensatory and penal component of the payment made and the provisions of Explanation could be invoked only with respect to the component which is penal in nature Prakash Cotton Mills (P) Ltd. vs. CIT [(1993) 201 ITR 684 (SC)] and CIT vs. Ahmedabad Cotton Mfg. Co. Ltd [(1994) 205 ITR 163 (SC)].

Following the decision of Prakash Cotton Mills (P) Ltd. (supra), recently, the Hon'ble Himachal Pradesh High Court in the case of , CIT vs. H.P. State Forest Corporation [(2010) 320 ITR 170 (H.P.)] held that interest paid by the assessee under section 17A of the H.P. Sales Tax Act though called as penalty was not payable as and by way of penalty but the same

was by way of compensation to compensate the State for delay in payment as such the same was allowable under section 37(1) of the Act. The Court further in the judgement observed that taxing statutes normally have two imposts for delayed payments made by the assessee. One is the imposition of interest, which is automatic, the second is the imposition of penalty for which not only notice is required and thereupon if the assessee gives valid reasons for not depositing the tax in time penalty need not be imposed, such payments are penal in nature and not allowable in terms of Explanation to section 37(1) of the Act. On the other hand where the payment of interest is automatic for the delayed period, the imposition is compensatory in nature and allowable under the Act.

The Hon'ble Mumbai Tribunal in the case of, Goldcrest Capital Market Ltd. vs. ITO (2010) 2 ITR (Tib.) 355 (Mum.)] While allowing the amount paid by the member of the National Stock Exchange ("NSE") to the Stock Exchange for violation of regulations of the Exchange, held that members of NSE are bound to abide by the rules, regulations and bye-laws of the NSE However, such rules, regulations and bye-laws can be considered as regulations for controlling the internal, inter se, obligations and rights of the members of the NSE which every member of NSE would be obliged to follow. A violation thereof cannot be treated as violation of a statutory law or rule.

Summation :

In many statutes, law itself provides for compounding of offence and on payment of compounding fees, person is discharged from offence committed. Issue may arise on coverage or otherwise of amount paid for compounding of offence within the scope of Explanation.

Now, in pre-amendment era, the preponderant view of the Courts was that the moment compounding of offence is accomplished, the effect is that the person is placed in the position of an innocent person as if he had never committed crime. For instance, in the case of CIT v/s. Loke Nath & Co. 147 ITR 624 the Delhi High Court allowed deduction of compounding fees paid for regularizing construction of building which was made in violation of building regulations. In Nanhmool Jyoti Prasad (123 ITR 269), the Allahabad High Court allowed deduction of fine paid by the assessee to avoid confiscation of goods imported without proper licence. According to the Court, effect of payment of fine is that import got regularized.

Compounding fees paid to municipal corporation became an issue in CIT v. Mamta Enterprises [2004] 266 356 (Karn.). One would have thought that the description of the amount as compounding fee and the fact that the fee was paid only for violation of administrative regulations, which themselves were relaxed on payment of compounding fees, should not have militated against the deduction on the basis of guidelines laid down by the Supreme Court in Prakash Cotton Mills P. Ltd. v. CIT [1993] 201 ITR 684 (SC). The Supreme Court in the light of the earlier precedent in Mahalakshmi Sugar Mills Co. v. CIT [1980] 123 ITR 429 (SC), required consideration, whether the impost is compensatory in nature, so as to be deductible. Where it has composite nature, both compensatory as well as penal, the authorities are obliged to bifurcate the two components and allow what is compensatory. Compounding fees are ordinarily understood as being totally compensatory. It is essentially a nature of civil liability. The High Court, however, was led by precedents relating to penalties and fines following the decision in Haji Aziz and Abdul Shakoor Brothers v. CIT [1961] 229 ITR 534 (SC). The word "compound" even in a legal sense indicates settlement by mutual concessions and is understood to abate a liability. Compounding is also understood as condonation subject to a pecuniary payment. Payment by way of compounding fees should ordinarily be treated as allowable, if it is in the course of a business, because any offence capable of being settled in money terms cannot be treated on par with violation of law. In view of the multiplicity of laws, it is becoming more and more difficult for a citizen not to tread on some rule or regulation of which he may not be aware. It is for this reason that minor offences are made subject matter of compounding fees. Finally it is submitted that the compounding fees paid is allowable as deduction while computing business income not withstanding explanation to sec. 37(1).

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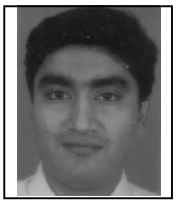
Judicial Analysis



Advocate Tushar Hemani
tusharhemani@gmail.com

Recent decisions on Agricultural Income

CIT vs. Dhirajlal B. Vadalia [Tax Appeal Nos. 1291 to 1299 of 2006, (Guj HC]

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2.1 While admitting these appeals on 27.06.2007, this Court has framed the following substantial question of law:

"Whether on facts and circumstances of the case the Income Tax Appellate Tribunal was right in law and on facts in holding that the activity of growing roses, chikkus is an agricultural income exempt from tax?"

3. The facts of the present case are that during the course of assessment proceedings, the Assessing Officer observed that the income from nursery was not allowable as exempt income since the same could not be treated as agricultural income. Against the said order of assessment, the assessee preferred appeals before the CIT(A) which were allowed, against which, the Revenue preferred appeals before ITAT which came to be dismissed and the order of CIT(A) was upheld. Against the said order of ITAT, the Revenue has preferred the present Tax Appeals.

4. Heard the learned advocates appearing for the parties and considered the submissions. The Tribunal vide impugned order has observed that no material whatsoever has been brought by the revenue on record to disbelieve the contention of the assessee about the cultivation of roses whereas the assessee has produced photograph in support of his contention that he cultivated roses. The Tribunal observed that in fact the revenue has not disputed the fact that the assessee had developed various varieties of roses and made substantial investments in his activity. The Tribunal has considered the decisions in the case of CIT vs. Soundarya Nursery (241 ITR 530) wherein the decision in the case of CIT vs. Raja Benoy Kumar Sahas Roy (32 ITR 466) was considered.

5. An identical issue also came up for consideration before this Court in Income Tax Reference No. 40 of 2000 with Tax Appeal No. 24 of 2003, where this Court vide judgement and order dated 11.11.2014 has observed as under:

"8. Considering the decisions cited hereinabove, we come to the conclusion that a careful reading of the above clearly shows that unless the assessee has carried out the basic operations upon the land i.e., tilling of the land, sowing of the seeds planting, etc. requiring the expenditure of human skill and labour upon the land, it cannot be said that the income earned by the assessee is agricultural income. Further, it is also clear that subsequent operations would also be agricultural operations if taken in conjunction with basic operations. However, subsequent operations by itself would not be considered as agricultural operations. Hence, if any income is earned by carrying out the subsequent operations without carrying out the basic operations then such income would not be considered as agricultural income. The gist of the decisions cited hereinabove further declares that the nature of the product is irrelevant. The agricultural product would not only include products for sustenance of human being but also products of utility for a trade and commerce.

9. In the present case, the plants have been grown on land owned by the assessee. The assessee during the course of growing and nurturing the plants on the land carried out

certain functions such as tilling the soil, weeding, watering, manuringetc and finally the plants are made ready for sale. It goes without saying that all this involves human skill and effort. When plants are established in the soil only then they are shifted in suitable containers or appropriate place in land.

11. Once the assessee had shown that the agricultural operations were carried out then income from the sale of agricultural produce would amount to agricultural income. The judgment of Allahabad High Court in the case of Maharaja Vibhuti (supra) is distinguishable in as much as in that case necessary facts were not on the record for reaching a particular conclusion. In the said judgement the Bench referred to two types of nurseries- one which may be maintained by a farmer as an aid or necessary adjunct to the primary process of agriculture while the other one which may be maintained and run as a business quite independently of agriculture. After such discussion, they went on to mention that there was no discussion of the type of nursery involved. In view of the same, the answer to the question was given in negative. Hence, that case does not help the Revenue.

13. Therefore on the facts of the case as well as on the basis of the judicial pronouncements detailed above, we have no hesitation in holding that the sale proceeds from the business of nursery carried on by the assessee constitute income from agriculture. Therefore the question of law framed in the reference and the tax appeal is answered against the Revenue and in favour of the assessee.

Reference and appeal stand disposed off accordingly."

6. In that view of the matter, no elaborate reasons are required and we answer the question in favour of the assessee and against the Revenue.

The present Tax Appeals are dismissed accordingly.

DCIT vs. Best Roses Biotech (P.) Ltd. 17 taxmann.com 56 (Ahd.)

Conclusion

6. *Nature of Land in question:* We have carefully heard both the sides at some length. We have also thoroughly perused the orders of authorities below in the light of compilation filed and the case laws cited. Copy of the lease agreement is placed before us through which the lease period was effective from 01-10-2002. The lessee, the assessee, was required to pay to the lessor a sum of Rs. 25 lakh as refundable deposited. The Lessee has agreed to pay a sum of Rs. 6 lakh as annual rent. There were three block of land parcel having area 2 - 46 - 86; 3 - 19 - 70; 3 - 07 - 56 hector. The assessee had shown profit on sale of rose flowers and claimed the income as exempt u/s.10(1) of the Act. Certain facts were narrated by the Assessing Officer that the agricultural land was acquired from the agriculturists on lease for a period of 25 years. Therefore it was not in dispute that the land in question is an agricultural land and not a commercial land, and that it belonged to agriculturists, as many as, nine in numbers. Vide lease agreement it was also verified that the property in question happened to be holding the character of agricultural land. Revenue has not disputed these facts but raised objection primarily in respect of the operation carried out by the assessee that whether an agriculture operation or not.

6.1 *Activity in question :* The company had developed a green house for the establishment of a floriculture project. The company had grown good quality of rose flowers and also exported them abroad. It was explained that for the plantation of roses a very well treated soil is required. The quality of the soil is therefore tested. Manures are mixed for preparing a base for growing the rose plants. The company has installed a proper drainage system. Certain operations such as mixing of soil and watering

of plants through drainage are explained. Then the activity of pruning and bending of growing plants carried out to get best size of rose buds. It has also been explained that pest control is also required. Insecticides are sprinkled to save the plants from any disease. From the facts as emerged from the compilation filed we have gathered that within green house the floriculture activity comprises of growing of rose by deploying hydroponics technique for the farming of best quality roses. It is stated that the assessee has deployed a budding technical plant. Further it was explained that root stocks were brought from the market and placed in the green house. The plantation and the generation of sapling was nothing but agricultural activity. The mother plant is otherwise reared on earth. For rearing of mother plant human labour is involved. The tilling of soil, watering and other primary agricultural activity is the basic requirement for the growing of the rose plants. Subsequently the saplings are planted on plastic trays, which were kept at the height 2-3 ft. placed on MS stand. It was explained that the purpose of growing the rose plants at a height is primarily to avoid the pest and to develop in a controlled atmosphere. By this method, the rose plant is protected from climate, pest, as well as other disease, to minimize the possibility of damage. The drainage system for watering the plants with the help of dipper is required. The watering of rose plants are also a technical method to avoid excessive watering so that the roots of the rose plants should not get damaged. The commercial green house*i.e.* "bent canopy" is used for various benefits so that the sun-light and the humidity level both can be maintained. For meeting the international demand, it is explained, that the assessee-company adopted best measure to ensure best quality of rose.

6.2 *Conditions of Agriculture operation* - From the side of the respondent-assessee there was detailed discussion about the growing of rose plants and other connected agricultural operation carried out by the assessee. However, the objection of the Revenue was that the rose plants were not grown on the land, therefore the generation of income was not directly connected with the operation of land. Somehow we are not agreeing with the said proposition of the Revenue-department because on due consideration of the activity as explained to us, it is not justifiable to say that the growing of rose plants at all is not connected with the utilization of land. It is not in dispute that the agricultural land was acquired by the assessee from agriculturists. It is also not in dispute that mother plants are always been grown on the agricultural land.

As far as ingredients of basic operation is concerned the assessee's case is that the technology deployed is (i) use of soil and operation on soil (ii) use of particular soil type contents i.e. coco peat, manure, etc. present in the soil, (iii) drainage system as over watering harms the roots as well as quality (iv) bending shoots for maximizing the quality of roses, and (v) pest and diseases control for providing protection to roses. Therefore we hold that the activity which is connected with the land cultivation , such as ploughing of field, leveling of field, sowing of seed in the ploughed and leveled field, growing of plants, as case the may be, plantation, manuring, watering, weeding-out of weeds, so and so forth. These agriculture operations are said to be 'basic cultivation activity' and thereafter an agriculturist has to perform 'subsequent agriculture operation', namely tending of grown plants, pruning, cutting or shaping and finally harvesting of crop. We have to clarify, as held by few honourable courts as well, that the subsequent operations ought to be a continuation of basic Agriculture operation. The fundamental requirement is that it should remain connected with the basic agriculture operation.

6.3 *Connected evidences* - In support of the above factual background respondent assessee has placed vehement reliance on several certificates issued by other government agencies, copies placed before us, listed below:-

- National Bank for Agriculture and Rural Development (NABARD)
- Agricultural and Processed Food Products Export Development Authority (APEDA), Ministry of Commerce, Govt. of India.
- Gujarat Agro Industries Corporation Ltd.
- Navsari Agricultural University
- Additional Director of Horticulture (Fruits & Floriculture)
- Department of Horticulture, Gujarat State, Gandhinagar
- Certificate from Collector, Navsari

These certificates have thus certified that the green house floriculture units are eligible for benefits in respect of electricity tariff which are otherwise available to mainstream agricultural activities. The National Bank for Agricultural and Rural Development has stated that the assessee's unit is an integrated EOU, where the entire range of activities from growing of flowers to packing, pre-cooling, cooling, transportation in reefer vans and eventual export is an undividable process which requires uninterrupted power supply and the growing of flowers is like any other agriculture pursuit. The Collector has also issued no objection in respect of extension of facilities which would otherwise available for any agricultural activity and directed that the floriculture activity is a part of mainstream agricultural activity. Rather in a letter, issued by Horticulture Commissioner it was expressed that it is not known as to how this doubt has arisen that floriculture is not a horticultural activity and that the activity is an agricultural activity. Growing of flowers or ornamental plants is floriculture similar to Olericulture (growing of vegetable) and Poraology (growing of fruits).

6.4 *An amendment in the Act* - At this juncture, we may refer the amendment which took place in Section 2(1A) by an insertion of *Explanation* (iii) which reads as under:-

"[(1A)] "agricultural income" means -

(*a*) any rent or revenue derived from land which is situated in India and is used for agricultural purposes;

(*b*) any income derived from such land by -

(*i*) agriculture; or

(*ii*) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market; or

(*iii*) the sale by a cultivator or receiver of rent-in-kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in paragraph (ii) of this sub-clause;

Explanation 1 - For the removal of doubts, it is hereby declared that revenue derived from land shall not include and shall be deemed never to have included any income arising from the transfer of any land referred to in item (a) or item (b) of sub-clause (iii) of clause (14) of this section.

Explanation 2 - For the removal of doubts, it is hereby declared that income derived from any building or land referred to in sub-clause (c) arising from the use of such building or land for any purpose (including letting for residential purpose or for the purpose of any business or profession) other than agriculture falling under sub-clause (a) or sub-clause (b) shall not be agricultural income.

Explanation 3 - For the purposes of this clause, any income derived from saplings or seedlings grown in a nursery shall be deemed to be agricultural income; (relevant portions high-lighted)

6.5 After insertion of Expl. 3 by the Finance Act, 2008 which is effective from 01-04-2009, the CBDT has issued a Circular No.1 of 2009

dated 27th March, 2009, wherein it was clarified as under:-

"4.1 "Agricultural income" is defined in sub-section (1A) of section 2 of the Act to mean, *inter alia*, income derived from land which is situated in India and is used for agricultural purposes. Such agricultural income is exempt from tax under sub-section (1) of section 10 of the Income-tax Act, 1961. It has been held by judicial authorities that whether income from nursery operations constitutes agricultural income or not, will depend on the facts of each case. If the nursery is maintained by carrying out basic operations on land and subsequent operations are carried out in continuation of the basic operations, then income from such nursery would be agricultural income not liable to tax under section 10. However, if the nursery is maintained independently without resorting to basic operations on land, then income from such nursery would not be agricultural income and would be liable to be included in the total income.

4.2 With a view to giving finality to the issue, an *Explanation* in section 2 of the Income-tax Act, has been inserted providing that any income derived from saplings or seedlings grown in a nursery shall be deemed to be agricultural income. Accordingly, irrespective of whether the basic operation have been carried out on land, such income will be treated as agricultural income, thus qualifying for exemption under sub-section (1) of section 10 of the Act.

4.3 *Applicability :* This amendment has been made applicable with effect from 1st April, 2009 and shall accordingly apply for assessment year 2009-10 and subsequent assessment years."

Though the applicability of the said *Explanation* is effective from assessment year 2009-10 but the intention about the eligibility can be adjudged. With this legal back ground we therefore hold that 'basic/ primary agriculture activity' and 'subsequent/ secondary agriculture operations' thus constitute an integrated agriculture activity. Primary as well Secondary agriculture activity both carried out conjointly thus comprehend "Agriculture operation". So a nexus is needed between agriculture land with agriculture operation to treat an income as Agriculture income. On these parameters, in our humble opinion, one has to examine the facts of such cases so as to decide whether alleged agriculture activity do fall within the operations discussed hereinabove to hold as Agriculture Income to qualify for deduction u/s 10(1) of the Act. This aspect of availability of exemption to nursery has been duly considered in the case of *Soundarya Nursery* (*supra*), wherein it was held that the plants sold by the assessee-company in pots could be said to be a result of primary as well as subsequent operation comprehended within the terms "agriculture". Thus, it was held that the income generated from growing of plants in pots and sale of seeds is an agricultural income. Likewise, in the case of *Soundarya Nursery* (*supra*) the legal proposition laid down was that where sale proceeds of plants raised in nursery on land belonging to assessee constitute nothing but agricultural income, it was clarified that by perusing clauses (a) and (b) the definition of agricultural income in Section 2(1A), it is clear that income must be derived from land which is used for agricultural purpose. By referring *(Raja Bahadur) Kamakhaya Narain Singh* (*supra*), it was commented though it must always be difficult to draw the land, yet, unless there is some measures of cultivation of the land, some expenditure of skilled or labour upon it, it can be said to be used for agricultural purposes. The decision of *CIT* v. *Jyotikana Chowdhurani* [1957] 32 ITR 705 (SC) has also been discussed.

Case- laws

7. Certain decisions as cited from the side of the Revenue are in the context of business activity

not connected with the land operation or not connected with the basic agricultural operation. In fact, that is the distinction which has to be kept in mind while adjudicating upon the issue of assessability of income as agricultural income. If in the primary sense, the agricultural operation denotes cultivation of a field or tilling of land or sowing of seeds or any other activity of cultivation of plant on agricultural land then such activity is nothing but an agricultural activity. If rearing of plant is connected with the exploration of land then such activity is held as an agricultural activity. Even the decision of *Proagro Seeds Co. Ltd.* (*supra*) as cited from the side of the Revenue has clearly drawn the distinction. It was found that in the absence of basic agricultural operation, the income earned was not an agricultural income. Therefore in the light of the specific facts of that case, a view was taken; but those facts were peculiar in nature, applicable to that appeal only. That view of the Hon'ble court must not be generalized, but the guidelines depicted are to be regarded.

7.1 Before we conclude, it is worth to place on record a decision of ITAT Pune Bench pronounced in the case of *K F Bio Plants (P.) Ltd.* (*supra*) wherein one of us *i.e.* Judicial Member is the co-signatory and the issue was squarely identical due to the fact that in that appeal as well the income was from floriculture activity. The said assessee was also selling flowers and plants outside India. The plants, bulbs, tubers and seedlings were stated to be planted in the soil and it was explained that such activity was normal agricultural activity like planting, cutting, weeding, tilling and watering etc. In that case the plants were grown in the green house and nurtured by giving requisites nourishment, light, humidity etc. Facts and the circumstances under which the flowers are cultivated in that appeal being almost identical hence a strong reliance is placed on the Pune Bench decision. Further reliance has also be placed on the decision of *Soundraya Nursery* (*supra*) in which as well the decision was based upon the facts pertaining to primary as well as subsequent operation, held comprehend with in 'Agriculture'. Likewise, the decision of *Green Gold Tree Farmers (P.) Ltd.* (*supra*) also applies for the legal proposition that where measures of cultivation of land were taken, expenditure is incurred on human labour and skill to cultivate the land then in it's root sense the activity is 'Agriculture activity'.

7.2 In fact assessee's activity has already been endorsed as an agriculture activity by several other connected authorities certifying it as an agricultural operation. After an elaborate discussion of the facts as well as law pronounced by several courts, as also the decisions now cited from the side of the Revenue, it is finally held that considering the advancement of technology and the use of the advanced equipment in cultivation; coupled with the conventional cultivation method, put together, made the operation carried out by the assessee was agricultural operation in nature. Respectfully placing reliance on this decision as also the few decisions cited hereinabove, we are of the considered view that the income in question cannot be included in total income being within the ambits of the provisions of Section 10(1) of the Act. The view taken by Ld. CIT(A) is hereby affirmed and this ground of Revenue's appeal is dismissed.

ITO vs. Ashwin D. Mehta (HUF) [Tax Appeal Nos. 386 & 391 of 2000, (Guj HC)]

xxx..

1.1 The following substantial question of law was raised while admitting the appeals on 15.11.2000:

"1. Whether the Appellate Tribunal is right in law and on facts in directing the Assessing Officer to accept the agricultural income declared and not to consider any part of the same as income from other sources?

2. Whether the decision of the Tribunal is dehors the record and hence perverse?"

3. The brief facts of the case are that during the course of assessment proceedings, the Assessing Officer had held that the agricultural land owned by the assessee was about 8 acres only and as such the assessee could not have earned huge agricultural income from the sale of vegetables and other agricultural produce. The Assessing Officer accordingly made an addition as assessee's income from other sources which according to the AO was introduced in the books of account as agricultural income not liable to tax. On appeal, the CIT(Appeals) deleted the addition.

4. On appeal before the Tribunal by the revenue, by the impugned order, Tribunal dismissed the appeals and upheld the findings of CIT(A). Being aggrieved and dissatisfied with the impugned order passed by the Tribunal, the revenue has preferred the present Tax Appeals for consideration of the aforesaid substantial questions of law.

5. Mr.Sudhir Mehta, learned advocate appearing for the revenue has submitted that the Tribunal has erred in directing the AO to accept the agricultural income declared and not to consider any part of the same as income from other sources. He submitted that the Tribunal has not correctly appreciated the findings given by the AO in his assessment orders.

6. Mr. S.N. Divatia, learned advocate appearing for the assessee supported the impugned orders and submitted that the same having been passed in accordance with law does not call for any interference.

7. We have heard learned advocates for the parties and perused the records. The CIT(A) has observed that the assessee has given complete details about the income and also shown agricultural income in the books of accounts though the returns were not filed because the assessee was not having any income other than agricultural income. The CIT(A) has held that since the agricultural income has been accepted by the revenue and the AO has not been able to prove any other source of income out of which the assessee could have earned this income and the income declared by the assessee has to be accepted.

7.1 The Tribunal has upheld the view taken by the CIT(A) and observed further in para 7 that it cannot be said that there has been any violation of Rule 46A of I.T. Rules as alleged by the learned DR while arguing his case. The Tribunal has observed that out of about 15000 saplings of Eucalyptus trees/Nilgiri trees which were planted in 1982-83, it is quite reasonable to assume that atleast 5000 saplings of Eucalyptus trees/Nilgiri trees will grow into full trees in the year 1990-91 relating to AY 1991-92 which could be cut and sold because as per the certificate issued by the Range Forest Officer no permission is required for cutting and sale of Eucalyptus trees/Nilgiri trees.

7.2 In view of the aforesaid, we are of the opinion that the Tribunal as well as CIT(A) are justified in coming to the conclusion that there is no merit in the appeals filed by the Revenue. The assessee HUF owns fertile agricultural land having irrigation facilities from which agricultural income has been shown and accepted by the revenue in earlier years also and the fact of assessee having been alloted agricultural land and 15000 Eucalyptus trees/ Nilgiri trees in the year 1982-83 has been certified by Range Forest Officer. We are in complete agreement with the reasonings adopted and findings of fact arrived at by the lower authorities.

8. We, therefore, answer the questions raised in the present appeals in favour of the assessee and against the department - revenue. Appeals are dismissed accordingly.

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Withholding Taxes in respect of payments made to non-resident in the light of Instruction No. 2/2014

CA. Dhinal A. Shah
dhinal.shah@in.ey.com

The Central Board of Direct Taxes ('CBDT'), the apex administrative authority for the direct taxes in India, has issued Instruction No. 2/2014[1] to the Indian Tax Authorities on the issue of whether tax withholding is required on the whole sum being remitted to a non-resident ('NR') or only with reference to the portion of remittance representing the sum chargeable to tax in India under the Income Tax Laws.

Background

Presently under the Income Tax Laws, the tax deducted at source (TDS) provisions of Section 195(1) impose an obligation on any person responsible for paying ('payer') to any NR any interest or any other sum chargeable to tax in India, to deduct taxes therefrom at the rates in force. However in a situation where the payer is of the view that a part of the entire amount is not chargeable.

In a situation where the payer is of the view that a part only of the entire amount paid to the NR is chargeable to tax under the Income Tax Laws, the payer can make an application to the Tax Authorities under section 195(2), to determine the appropriate portion of such sum which is so chargeable and it may withhold tax in respect of the portion of the sum so determined as chargeable to tax.

If the payer fails to comply with above TDS obligations, the payer will be deemed to be an assessee-in-default under the Income Tax Laws and there is an exposure to interest and penalty levy on the payer.

There have been controversies in the past on:

a) Whether the withholding obligation is triggered on payments made to NRs if the sum is not chargeable to tax under the Income Tax Laws.

b) Whether, with regard to the transactions (such as those resulting in capital gains or trading receipts) where only the portion of total remittance represents chargeable gain, withholding is required with respect to the gross amount or only the chargeable portion as may represent the sum chargeable to tax.

These controversies led to a lot of confusion amongst the tax payers and the Income Tax Department. At this time, the Hon'ble Supreme Court in the case of **Transmission Corporation of Andhra Pradesh Limited v CIT**[2] came to the relief of the tax payers.

Hon'ble Supreme Court in this case held that the expression 'taxable income' used in S. 195(1) applies to any sum payable to the Non-Resident even if such a sum is a trading receipt in the hands of the payee, if the whole or part thereof is chargeable to tax under the Act. These provisions are not only limited to the sums which are of 'Pure Income' nature. Based on this judgment, it was rightly felt that TDS is required to be made u/s.195(1) only if the income is chargeable to tax (partly or wholly) under the Act and in cases where, the income itself is not chargeable to tax (Non-taxable income) question of making any TDS should not arise.

Ruling of Karnataka High Court (HC) in the case of Samsung Electronics and Others

The ruling of Hon'ble Supreme Court in the case of Transmission Corporation of Andhra Pradesh provided clarity that the obligation to withhold tax under the Income Tax Laws is only limited to the income chargeable to tax under the provisions of the Income Tax Act.

However, the decision of Karnataka HC in the case of **CIT v. Samsung Electronics Co. Ltd**[3] once again raised a controversy regarding the obligations to withhold tax when the income is not chargeable to tax under the provision of the Income Tax Act.

Facts of the case

- One of the Taxpayers in the litigation was engaged in the development, manufacture and export of computer software. The Taxpayer imported 'shrink-wrapped' computer software from outside India for use in its business. No tax was with held in respect of such payments on the ground the same cannot be treated as royalty either under the Income Tax Act or under the applicable Tax Treaty. However,the Tax Authority held such payments to be in the nature of royalty and subject to deduction of tax at source under the Income Tax Act.
- As the Taxpayers were under a bona fide belief that the payments made to non-residents were not chargeable to tax under the Income Tax Act or under an applicable Tax Treaty, the Taxpayers had not withheld tax on the payments nor had they applied for an order from the Tax Authority for not withholding tax.
- The ITAT ruled in the favour of the taxpayer holding that the payments made were not in the nature of royalty, based on the definition of 'royalty' under the Income Tax Act or under the relevant Tax Treaty and, hence, were not chargeable to tax under the Income Tax Act and no tax was required to be with held on the same.
- However the department filed an appeal against this order before the Karnataka HC

Contention of the Taxpayer

- For the purpose of with holding tax on payments made to non-residents, it needs to be first determined whether such payments are chargeable to tax under the ITL. Since the payments are made outside India and also otherwise not chargeable to tax under the ITL, there is no necessity to with hold tax on such payments.

Contention of the department

- The payments made to non-residents by the Taxpayers for the purchase of computer software for the purpose of resale are in the nature of royalty. It is not an outright sale of goods since the copyright in the computer software remains with the transferor company. Since the definition of 'royalty' under the ITL as well as under the applicable Tax Treaties is similar, the payments made to non-residents are taxable as royalty.
- The Taxpayers cannot contend that no income arises to the non-residents under the ITL with respect to the payments made to such non-residents for the purchase of computer software. The Taxpayers are liable to deduct tax at source on payments made to non-residents under the ITL

Ruling of the HC

- The Taxpayer's contentions that no income arises to the non-residents cannot be accepted in view of the decision of the Hon'ble Supreme Court (SC) in the case of *Transmission Corporation of A.P. Ltd. v CIT (supra)*, wherein the SC held that payments made to non-residents are subject to with holding tax unless the taxpayer obtains an order from the Tax Authority for determination of appropriate with holding tax rate. In the absence of such an order, the taxpayer is liable to with hold tax on the entire income paid to the non-resident.
- The SC in its decision in the case of Transmission Corporation of A.P. Ltd. had declared the legal position with respect to with holding tax on payments made to non-residents. The law declared by the SC is binding on all the High Courts in India.
- Under the provisions governing deduction of tax at source on payments made to non-residents, taxes have to be with held on any payment made to a non-resident which is in the nature of income.

Karnataka HC has relied upon the decision of the Hon'ble Supreme Court in the above case. However, the HC erred in interpreting the decision of the Hon'ble Supreme Court. A reading of the ruling of Hon'ble Supreme Court seems to suggest that the obligation to with hold tax under the Income Tax Act is limited only to income chargeable under

the provisions of the Income Tax Act. The Karnataka HC took a converse view that any remittance made to the NR would be subject to with holding tax under the Income Tax Act, regardless of its chargeability to tax in India, unless a specific application is made to the Tax Authority for determination of tax to be withheld under the Income Tax Act.

This decision again created confusion amongst the tax payers for withholding the taxes in case of the payments made to the non residents which are not chargeable to tax. To settle this controversy once and for all, Hon'ble Supreme Court in its landmark ruling in the case of **GE India Technology Centre Pvt. Ltd. v CIT**[4] held that with holding tax obligation in respect of payments to NRs apply only if the payments are chargeable to tax in India.

Ruling of Hon'ble Supreme Court in the case of GE India Technology Centre Pvt. Ltd.

Facts of the case

- One of the Taxpayers in the litigation was adistributor of imported pre-packaged, shrinkwrapped, standardized software from outside India for subsequent sale to customers in India.
- No tax was with held in respect of such payments on the ground that they did not constitute 'royalty', either under the Income Tax Act orunder the applicable Tax Treaty. However, the Tax Authority held such payments to be in the nature of 'royalty' and, hence, subject to with holding of tax under the Income Tax Act.
- The ITAT ruled in favour of the Taxpayers and held that the payments made were not in the nature of 'royalty' and, hence, not chargeable to tax under the Income Tax Act and that the payers were not liable to deduct tax at source.
- Aggrieved, the Tax Authority filed an appeal before the Karnataka HC. For the first time, the Tax Authority raised the contention that the payer is required to make an application to the Tax Authority for determining the amount on which taxes are required to be with held and if no such application is made then the payer is not relieved of its obligation to deduct TAS.
- The Karnataka HC accepted the Tax Authority'scontention by placing reliance on an earlier SC decision in the case of Transmission Corporation of A.P. Ltd. The HC held that, since the Taxpayers had not approached the Tax Authority for determining the quantum of amount taxable in India, taxes were required to be with held.
- Aggrieved, the Taxpayers filed a special leave petition before the SC to determine whether mere remittance to an NR, which is not chargeable to tax in India under the provisions of the Income Tax Act or the applicable Tax Treaty, mandates with holding of taxes.

Ruling of the Hon'ble Supreme Court

- The provisions of the Income Tax Act state that taxes will be with held on payments made to an NR when the remittance is a 'sum chargeable to tax' in India under the Income Tax Act. The said expression makes it clear that the payer is required to withhold taxonly when the payments made are chargeable to tax in India, wholly or partly. If the payments made are not taxable in the hands of the NR in India, the Tax Authority cannot initiate proceedings for collection of taxes and interest from the Taxpayers for not with holding any taxes.
- Further more, if the payer wants to with hold tax,not on the gross amount but on a lesser amount, on the footing that only a portion of the payment represents 'income chargeable to tax in India' then, it is necessary to make an application before the Tax Authority and obtain the order permitting with holding tax on the lesser amount. **Therefore, only in case the payer had a doubt about the proportion of income taxable in India, the Tax Authority needs to be approached. Conversely, if the payer has no doubt and believes that no part of the payment is chargeable to tax, with holding tax provisions do not apply.**

- The Hon'ble Supreme Court held that if the payer is fairly certain, then the payer can make its own determination of the chargeable amount and restrict its tax with holding obligation to the portion of amount chargeable to tax only. Accordingly the ruling of Karnataka HC in the case of Samsung Electronics was reversed.

Incidentally, without noticing the decision of Hon'ble Supreme Court in the case of GE India, in a subsequent decision in the case of **Chennai Metropolitan Water Supply and Sewerage Board**[5], the Madras HC ruled that, in the absence of a specific with holding certificate from the Tax Authority, the payer is obliged to withhold taxes on the entire amount of payment made to a NR recipient which was a loss making company.

In light of above judicial precedents, clarifications were being sought from the CBDT as to whether the tax is to be deducted on the whole sum being remitted to every NR or whether the tax deduction may be with respect to the portion representing the sum chargeable to tax, particularly if no application has been made by the payer to the Tax Authority to determine the sum on which tax is required to be withheld. It is pursuant to this that the Instruction No. 2/2014 has been issued by the CBDT.

Instruction No. 2 of 2014

The CBDT, after examining the matter in light of the decision of the issue [viz.,GE, Transmission Corporation and CMWSSB(supra)], has directed the subordinate Indian Tax Authority as follows:

- In a case where proceedings are initiated against the payer for failure to withhold taxes under the provision of the Income Tax Act,the Tax Authority shall determine the appropriate proportion of the sum chargeable to tax under the Income Tax Act to ascertain the tax liability with respect to which the payer shall be deemed to be an AID. By implication, the payer can be treated as an AID only in respect of such appropriate portion of the sum determined to be chargeable to tax.
- Furthermore, the appropriate proportion of the sum will depend on the facts and circumstances of each case.
- The appropriate portion needs to be determined by the Tax Authority after taking into account the nature of remittances, income component therein or any other fact relevant to such determination.

The instruction to the Indian Tax Authority is a welcome development for payers/tax deductors. This instruction clarifies that withholding tax liability of the payer is with reference to the sum chargeable to tax under the provisions of Income Tax Act. Furthermore, the consequences of default proceedings for non-withholding under the Act would be limited only to such tax liability.

Accordingly a payer cannot be treated as an assessee in default for non-withholding from payments which are not chargeable to tax under the Income Tax Act. This clarification is in line with the Hon'ble Supreme Court judgement in the case of GE India (supra).

Furthermore, in respect of remittances where only a certain portion may be chargeable to tax in India, payers may determine the withholding tax liability with reference to the chargeable portion of the remittance, if the payer is fairly certain about such determination.

However, considering the consequences of tax withholding default, the payer may prefer to be cautious and may continue to approach the Tax Authority where determination of chargeability or portion of the chargeable sum is not fairly certain.

(Footnotes)

[1]Instruction No. 2/2014 [F.No.500/33/2013-FTD-I],Dated26 February 2014

[2]239 ITR 587

[3]185 taxman 313

[4]327 ITR 456

[5]348 ITR 530

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FEMA Updates

CA. Savan A. Godiawala
sgodiawala@deloitte.com

43 External Commercial Borrowings (ECB) Policy – Parking of ECB proceeds

A.P. (DIR Series) Circular No. 52 dated November 23, 2011 relating to parking of proceeds of External Commercial Borrowings (ECB). Eligible ECB borrowers are required to bring ECB proceeds, meant for Rupee expenditure in India for permitted end uses, such as, local sourcing of capital goods, on-lending to Self-Help Groups or for micro credit, payment for spectrum allocation, etc., immediately for credit to their Rupee accounts with AD Category.

With a view to providing greater flexibility to the ECB borrowers in structuring draw down of ECB proceeds and utilisation of the same for permitted end uses, it has been decided to permit AD Category -I banks to allow eligible ECB borrowers to park ECB proceeds (both under the automatic and approval routes) in term deposits with AD Category- I banks in India for a maximum period of six months pending utilisation for permitted end uses. The amended ECB policy will come into force with immediate effect and is subject to review. All other aspects of ECB policy would remain unchanged.

For Full Text refer to A.P. (DIR Series) Circular No. 39

http://rbi.org.in/scripts/BS_Circular Index Display.aspx?Id=9346

44 Foreign Direct Investment (FDI) in India – Review of FDI policy –Sector Specific conditions

In accordance to the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000(the Principal Regulations) notified by the Reserve Bank vide Notification No. FEMA. 20/ 2000-RB dated 3rd May 2000, whereby description of sectors/activities wherein the entry norms, sectoral cap and other conditions for sectors/ activities in which FDI is permitted under Government route and Automatic route are specified.

- The Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce & Industry, Government of India has been updating/notifying the FDI policy through issue of Consolidated FDI Policy Circular. Government has notified the latest FDI policy changes vide Consolidated FDI Policy Circular of 2014 dated April 17. In order to bring uniformity in the sectoral classification/ conditionalities for FDI/foreign investment as under the Consolidated FDI Policy Circular with the FEMA Regulations, the position on Annex B of Schedule 1 to Notification No. FEMA. 20/2000-RB dated 3rd May 2000, has been suitably revised by amending the notification.

For Full Text refer to A.P. (DIR Series) Circular No. 45

http://www.rbi.org.in/scripts/BS_Circular Index Display.aspx?Id=9390

45 Foreign Direct Investment (FDI) in India – Review of FDI policy –Sector Specific conditions- Defence

- In accordance to the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 notified vide Notification No. FEMA 20/ 2000-RB dated May 3, 2000, as amended from time to time. Foreign Direct Investment (FDI) up to 26 per cent is permitted under Government

route in Defence industry subject to license under the Industries (Development & Regulation) Act, 1951. Proposals for FDI above 26 per cent would be subject to approval of Cabinet Committee on Security on case to case basis.

- Further, on a review, effective from August 26, 2014, foreign upto 49% under government route shall be permitted in defence sector subject to the conditions specified in the Press Note 7 (2014 Series) dated August 26, 2014
- Department of Industrial Policy and Promotion (DIPP) has now provided a list of defence items as finalised by Department of Defence Production, Ministry of Defence and has clarified that items not in the list would not require industrial license for defence purposes.
- The listed investee company engaged in defence sector, in accordance with the guidance provided by the Press Note 7 (2014 Series), shall immediately allocate limits for portfolio investment for RFPI, NRI (not exceeding 10%) and FVCI within the default portfolio investment limit of 24% being permitted now and approach Reserve Bank, Central Office, Foreign Investment Division, Mumbai.

For Full Text refer to A.P. (DIR Series) Circular No. 46

http://rbi.org.in/scripts/BS_Circular Index Display.aspx?Id=9391

46 Foreign Direct Investment (FDI) in India – Review of FDI policy – Sector Specific conditions- Railway Infrastructure

In accordance to the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 notified vide Notification No. FEMA 20/2000-RB dated May 3, 2000.

- In terms of Annex A of Schedule 1 to the Notification ibid, Foreign Direct Investment (FDI) is prohibited in activities / sectors not open to private sector investment e.g. Atomic Energy and Railway Transport (other than Mass Rapid Transport Systems).
- Department of Industrial Policy and Promotion (DIPP) has now permitted 100% FDI in railway Infrastructure sector under automatic route subject to conditions.
- FDI beyond 49 of the equity of the investee company in sensitive areas from security point of view will be brought before the Cabinet Committee on Security (CCS) for consideration on a case to case basis.

For Full Text refer to A.P. (DIR Series) Circular No. 47

http://www.rbi.org.in/scripts/BS_Circular Index Display.aspx? Id=9392

47 Overseas Investments by Alternative Investment Funds (AIF)

In accordance to Regulation 26 of Notification No. FEMA.120/RB-2004 dated July 7, 2004 [Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2004] (the Notification), the provisions under A.P.(DIR Series) Circulars No. 49 and 50 dated April 30, 2007 and May 04, 2007 respectively.

- It has been decided to permit an Indian Alternative Investment Fund (AIF), registered with Securities and Exchange Board of India (SEBI), to invest overseas in terms of the provisions issued under the A.P. (DIR Series) Circulars No. 49 and 50 dated April 30, 2007 and May 04, 2007 respectively.

For Full Text refer to A.P. (DIR Series) Circular No. 48

http://www.rbi.org.in/scripts/BS_Circular Index Display.aspx?Id=9396

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Service Tax Decoded

CA. Punit R. Prajapati
punitca@gmail.com

CENVAT Credit- Practical Issues

Credit is vital part in any Value Added Tax. A Value Added Tax can't be even imagined without credit of taxes paid on input goods and services. Basic concepts and fundamentals related to CENVAT Credit are discussed in October, 2014 issue of this journal. Now, practical issues are discussed to understand the intricacies of provisions of the CENVAT Credit Rules, 2004 (CCR).

1. Mr. FRESH CA has total turnover of Rs. 8 lacs during the year 2014-15. As his turnover is below threshold limit of Rs. 10 lacs as specified in Notification No. 33/2012-ST, he has availed exemption for small service provider. However, he has availed CENVAT Credit inadvertently which is not allowed in terms of above Notification. Can he still avail benefit of threshold exemption?

   View:

   CENVAT Credit is a substantial benefit and a substantial benefit granted by the law should not be taken away due to procedural violations. It is well settled law that if the CENVAT credit is taken but reversed without utilizing the same, it is as good as credit never taken. Hon'ble Supreme Court of India in the case of Chandrapur Magnet Wires P. Ltd. [1996 (81) E.L.T. 3 (S.C.)] upheld this principle. Hence, if CENVAT credit is taken inadvertently, but if reversed, it is as good as credit never taken and benefit of exemption notification wherein non-taking of CENVAT credit is a pre-condition should be available to the assessee.

   In the case of Cool Collections [2013 (30) S.T.R. 303 (Tri. - Del.)], assessee filed the refund claim for the service tax paid on ground that his turnover was below threshold limit and had reversed the CENVAT Credit taken. In this situation Hon'ble Tribunal held that credit taken is not utilized and reversed and hence assessee is entitled to benefit of exemption.

2. During December, 2014 Mr. GROWN CA realized that he is required to pay service tax w.e.f. 01-08-2014. He obtains registration on 25-12-2014 and wants to pay tax for the period 01-08-2014 to 30-11-2014. Central Excise Officer objects the CENVAT credit available upto the period 25-12-2014 on the ground that during the said period, Mr. GROWN CA was not registered with the service tax department. Is contention of the Central Excise Officer is correct?

   View:

   Registration is not a pre-condition for availing CENVAT credit. There is no rule in the CENVAT Credit Rules, 2004 which prohibit such credit and hence department can't argue that credit pertaining to the period before registration is not allowed. Now, this principle is well settled and many cases are delivered in favour of the assessee. Recently, in the case of mPortal India Wireless Solutions P. Ltd. [2012 (27) S.T.R. 134], Hon'ble Karnataka High Court held that in the absence of a statutory provision which prescribes that registration is mandatory and that if such registration is not made, the assessee is not entitled to the benefit of refund, benefit can't be denied on such ground. Recently, similar view has been taken in the case of BEICO Industries P. Ltd. [2014 (36) STR 551 Tri.-Ahd.].

3. For the period October, 2014 to December, 2014, Mr. Dual Processor has provided two types of services as follows.

Sr.	Details	Service 1	Service 2
1	Output Service	Commercial Coaching and Training Services	Event Management Services
2	Service Tax Payable	Rs. 12 Lacs	Bill will be raised in January, 2015, hence for this period tax payable is Nil.
3	Input Services	Nil	Mandap Keeper Services **exclusively used for Event Management Service**
4	CENVAT Credit for above mentioned Input Service	Nil	Rs. 10 Lacs

Can Mr. Dual Processor, for payment of service tax on Service 1, utilize CENVAT credit of Rs. 10 Lacs for input services exclusively used for Service 2?

View: Once the credit is taken for the inputs, input services or capital goods, it becomes part and partial of credit pool. It loses its identity as credit of input or of input service or of capital goods. It becomes just a part of pool. Similarly, it loses its identity as credit of input service used for a particular output service. Once the credit is legally available and taken, it can be used for payment of service tax on any output service. Hence, credit pertaining to Mandap Keeper Services which is used for providing Event Management Services can be used to discharge service tax liability on Commercial Coaching and Training Services.

Rule 3(4)(e) of the CENVAT Credit Rules, 2004 clearly provides that the CENVAT credit may be utilized for payment service tax on **any** output service.

4. Discuss whether CENVAT Credit in following cases is properly availed or not.

Sr.	Nature of Credit	Date of Invoice	Date of Receipt of Invoice	Date of Payment to Supplier	Date of availing CENVAT Credit
1	Input Service	01-12-14	05-12-14	15-11-14	01-12-14
2	Input Service on which tax is payable under Partial Reverse Charge Mechanism	01-11-14	01-11-14	15-12-14 (Date of payment of Service Tax under RCM is 1-11-14)	01-11-14
3	Input Service on which tax is payable under Full Reverse Charge Mechanism	01-11-14	01-11-14	15-12-14 (Date of payment of Service Tax under RCM is 15-11-14)	15-11-14

View: In the terms of Rule 4(7) of the CCR CENVAT credit in respect of Input Service shall be allowed, on or after the day on which the invoice, bill or, as the case may be, challan referred in rule 9 is received. Hence, service recipient becomes eligible to take credit only if he has received the invoice. In the first case, as invoice is received on 5th December and service recipient becomes eligible to take credit only on 5th December and not before that date. Credit shall not be taken on 1st December.

In terms of the Second Proviso to Rule 4(7) of the CCR, if input service is covered under partial reverse charge mechanism, credit shall be allowed on or after the day on which payment is made of the value of input service and the service tax paid or payable as indicated in invoice, bill or challan referred to rule 9. Hence, in second case, credit shall be allowed only after the date when payment to service provider for his services and payment of service tax, to him and to government is made. Even if payment of service tax under partial reverse charge mechanism is made on 1st November, 2014, as payment to service provider is made on 15th December, 2014, credit shall not be allowed on or before 15th December, 2014.

Fortunately, w.e.f. 11th July, 2014 no such restriction is provided for the input services covered under Full Reverse Charge Mechanism. W.e.f. 11th July, 2014, First Proviso to Rule 4(7) of the CCR clearly provides that credit for such input service is allowed after the service tax is paid. In third case, as the service tax is paid on 15th November, 2014, credit may be taken on that day even if payment to supplier is made on 15th December, 2014.

5. M/s. Late Ltd. has come up with following invoices for availing CENVAT Credit as on 14-12-2014. Please guide them whether CENVAT credit is allowable or not? Can they take credit on 14-12-2014?

Sr.	Nature of Credit	Date of Invoice	Date of Receipt of Invoice	Date of Payment to Supplier	Date of availing CENVAT Credit
1	Input Services	01-02-14	02-02-14	01-02-14	Not yet taken
2	Capital Goods	01-02-14	02-02-14	01-02-14	Not yet taken
3	Input Service	01-07-14	01-07-14	10-11-14	01-07-14

View: w.e.f. 1st September, 2014, in the terms of sixth proviso to Rule 4(7) of the CCR, provider of output service shall not take CENVAT credit after six months of the date of issue of any of the documents specified in sub-rule(1) of the rule 9, generally invoice issued by provider of input service. In the first case, as period of six months from the date of invoice i.e. 1st February, 2014 is expired, credit may not be availed on 14th December, 2014.

Such limitation of six months is applicable in the case of input services and inputs and not in the case of Capital Goods. Hence, in second case, credit may be availed even after period of six months from the date of invoice.

In terms of the third proviso to Rule 4(7) of the CCR, except in the case of full reverse charge mechanism, if the payment of value of input service and the service tax as indicated in the invoice is not made within three months from the date of invoice, the service provider who has taken credit on such input service shall pay an amount equal to credit taken. Once the payment is made to supplier, credit may be taken again. Hence, in third case, credit is availed properly when availed but on completion of three months from the date of invoice, amount equal to such credit is to be paid and again on 10th November, 2014, credit of the same may be availed.

6. In terms of the Sixth Proviso to Rule 4(7), credit shall not be taken after 6 months from the date of Invoice. In terms of third proviso to Rule 4(7), if payment is not made to service provider, credit taken is required to be reversed and credit may be taken once payment is made to service provider. Mr. LAZY has made payment to his service provider after six month and by that time eligibility to take credit has ceased as provided under Rule 4(7). Is Mr. LAZY eligible to take CENVAT after period of 6 months from the date of invoice?

View: In terms of third proviso to Rule 4(7) of the CCR, if payment is not made to service

provider within three months from the date of invoice, credit if taken is required to be reversed. If payment is made after six months from the date of invoice, limitation of six months as provided in sixth proviso may debar service provider from taking credit (w.e.f. 1st September, 2014).

However, a favorable clarification is issued by the department recently on 19th November, 2014 vide Circular No. 990/14/2014-CX-8. CBEC has clarified that the limitation of six months would apply when the credit is taken for the first time on an eligible document. It would not apply for taking re-credit of amount reversed, after meeting the conditions prescribed in these rules.

However, it is worth noting that this clarification would come to rescue only if first time credit is taken within three months. If credit itself is not taken within three months and payment is not made for six months and thereafter on payment credit is taken, this clarification will not be helpful.

One doubt was also being raised that credit pertaining to amount of Retention Money being retained by the service recipient and not paid to service provider within six months will be lapsed or not? This reasoning adopted for circular can also be useful in such cases and credit will not be lapsed even if Retention Money is not paid within six months from the date of invoice.

7. In terms of sixth proviso to Rule 4(7), CENVAT credit shall not be taken after the six months from the date of invoice. Mr. ACCURATE has taken the credit within six months. Is Mr. ACCURATE also required to utilize the same within six month?

View: Limitation of six months is provided only for availing the credit and once the credit is properly taken it may be used at any time without any limitation period. There is no provision which bar utilization of such credit within specific period.

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contd. from page 593

or of JCB India. A cursory look at the contents of TTA makes it palpable that the assessee not only undertook to supply Know-How to JCB India, but also 'assistance' by means of 'engineering skills' to enable it to manufacture the licensed products to the standard of quality by incorporating such specification and features. Further it can be seen from the IPAA that the personnel to be provided by the assessee to JCB India were to act under the direction of JCB India. The assessee company was to be indemnified by JCB India for any and all claims, liabilities, costs and expenses resulting from or arising out of actions of these personnel while under their direction. The provision of IPAA make it manifest that on the termination of the expatriate posting, the personnel will have to report back to the parent company which will reemploy him. Further, if during such deputation certain disciplinary matters arise, those will be looked into by the Group Director and not individual company to which such personnel has been deputed (JCB India).Further, eight persons, who were sent on deputation to JCB India on secondment basis, continued to remain on the payroll of the assessee company and maintained their lien accordingly. The above narration of facts indicates that these eight persons continued to remain as the employees of the assessee despite their deputation to JCB India. The fifth and last essential is that the activities should continue for a period or periods aggregating more than ninety days within twelve-month period. There is no quarrel on the duration of stay of such personnel of the assessee which admittedly is more than ninety days within the twelve-months period. Thus, it is held that JCB India constituted a service P.E of the assessee in India.

The Tribunal further held that the amount of royalties or fees for technical services relating to the PE would assume the character of 'Business Profits on its arrival in Article 7.

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Service Tax - Recent Judgements

CA. Ashwin H. Shah
ashwinshah.ca@gmail.com

42 Commissioner of customs & central excise Meerut-I v. Doon Institute of Information & Technology (P) Ltd [2014] 45 taxmann.com 523 (High Court of Uttarakhand)

Whether Computer hardware/software training entailing employment or self-employment amounts to 'vocational training' ?

Facts:-

Assessee, providing training in computer related matters, claimed exemption as 'vocational training institute'.

Held :-

Tribunal opined that though computer training institute did not figure in Notification No. 24/2004-ST, since training in computer software and hardware was imparted to trainees to enable them to seek employment or to undertake self-employment, it was 'vocational training' and exempt under Notification No. 24/2004-ST. Further it was held that since skill pertaining to computer software and hardware is required to be acquired and once such a skill is acquired, it throws open door of an occupation relating to computer software and hardware, which entails employment or self-employment, therefore, assessee was a vocational training institute in terms of Notification No. 24/ 2004-S.T. till 15-6-2005, when concept of computer training institute was introduced and made ineligible for exemption.

43 Commissioner of Service Tax v. Vijay Travels (Guj High Court) [2014] 51 taxmann.com 72 (Gujarat)

'Rent-a-cab' service is defined as taxable service under the Statute and artificial distinction made of 'renting' & 'hiring' of the cab is not sustainable.

Facts:-

The assessee had entered into an agreement with Gujarat Secondary Education Board for supply of vehicles. The said contract was entered into by the assessee with GSEB for the purpose of transportation of papers/answer sheets, examiners, staff etc. The assessee also used its own cars and had taken vehicles on rent from other persons as well. The department found that the assessee had not been paying the service tax on value of taxable services rendered by them.

Held:-

The High Court held that if a person is in continuous occupation or employment and does not carry out any isolated act or transaction, such conduct and activity would amount to 'engaged in' business; therefore, if any person carries on continuous activity of renting of a cab, i.e. letting for use in case of maxi cab or motor vehicle, such renting out of a vehicle would invite taxable service.

44 Gujarat Borosil Limited Versus CCE&ST, Surat 2014 (36) STR 808 (Ahmedabad – Tribunal)

Reverse charge mechanism – Section 66A of the Finance Act 1994 – services received and consumed outside India – services for Foreign Currency Term Loan – Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 – Amount of tax paid with interest before issuance of SCN

Facts:-

Assessee is engaged in the manufacture of glass products and obtained a Foreign Currency Term Loan from the Bank of Baroda Global Syndication Centre through Bank of Baroda, and paid certain fees/ charges to foreign service providers for arrangement of ECBs (External Commercial Borrowings). On being pointed out by the officers of the Director General of Central Excise Intelligence (DGCEI) Ahmedabad that the appellant was liable to pay service tax on the fees/ charges paid to foreign service providers under reverse charge mechanism.

Held:-

According to rule 3, if the services specified therein are received by a recipient located in India for use in relation to business or commerce, then these services are deemed to have been provided from outside India and received in India. The Tribunal Held that for services specified in rule 3 of Import of Service Rules the place of consumption/receipt of service is immaterial, once the receipt of such service is located in India.

45 Commissioner of Central Excise, Kanpur v. Kunal Fabricators & Engineering Works [2014] 47 tasmann.com 151 (New Delhi – CESTAT)

Fabrication of steel storage tanks, dozers and settlers, steel structures, steel platforms, railing, foundation frames etc. and their erection and installation is not covered under Business Auxiliary Services

Facts:-

The assessee is registered with Service Tax Department for providing Business Auxiliary Service and payment of service on the goods transport agency. Department found that they had undertaken repair and maintenance job in respect of which no service-tax had been paid and beside this they had fabricated steel storage tanks, dozers and settlers, steel structures, steel platforms, railing, foundation frames etc. in their client's factory and had erected and installed the same, which was Business Auxiliary Service in respect of which no service-tax was paid. Department confirmed demand with interest and penalty.

Held:-It was held that the activity which has been treated by the Department as Business Auxiliary Service is fabrication of steel storage tanks, dozers and settlers, steel structures, steel platforms, railing, foundation frames etc. and their erection and installation in the factory. No sub-clause of section 65(19) was found which covers this activity. While fabrication of tanks and steel structures being manufactured is not production or processing not amounts to manufacture, the erection and installation of tanks, dozers, settlers, and steel structures is certainly not covered by any clause of section 65(19). Therefore, this activity of the assessee is not covered by the definition of Business Auxiliary Service and is not taxable.

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VAT - Recent Judgements and Updates

CA. Bihari B. Shah
biharishah@yahoo.com.

Statute Updates

[I] **Important Circulars/Notifications:**

[A] **The Date for obtaining Audit Report under section 63 of the GVAT Act is extended:**

The Commissioner of Commercial Tax vide Notification dated 21.10.2014 has extended the date for obtaining the Audit Report u/s. 63 of GVAT Act for the year 2013-2014 upto 31.01.2015.

[B] **Amendment in procedure of filing E-Return w.e.f. 15.10.2014:**

The Deputy Secretary to the Government has issued a Notification dated 15.10.2014 for amendment in Rules for filing the return as follows.

[i] Every dealer (except the dealer who has opted for Lump Sum payment of the tax u/s. 14, 14B, 14C, 14D i.e. small trader whose turnover is less than Rs. 75.00 Lacs per year and purchases have been made from the State of Gujarat, dealers doing the works contract business, dealers who are running Hotel & Restaurant, catering business) has to file a monthly return.

[ii] The dealer who is not manufacturer and not doing any purchase or sale through Interstate Transaction, also not dispatching goods to their outstation branches and consignment agent and the dealer who has not paid yearly tax more than Rs. 60,000/- has to file the return quarterly.

[iii] Every Regd. Dealer who has obtained the certificate of registration for the first time, shall furnish monthly return for first 12 months.

[iv] Those dealer who has filed the monthly return, shall furnish the information quarterly in Form No. 101C for the period ending 30th June, 30th Sept. 31st Dec. & 31st March along with the return in respect of top 10 commodities and the consolidated details of remaining commodities dealt with during that period.

[v] Every Regd. Dealer shall furnish the return along with the information in the Form to be appended with respective return by uploading on the website of the Finance Department and making filing of e-return compulsory.

[vi] Regarding Audit Report:

Every registered dealer who is required to obtain the audit report u/s. 63 shall within a period of thirty days from the date of obtaining such report, submit the following documents by uploading them on the website of the department as under.

[i] Audit report in Form 217

[ii] Scanned copy of the Statement of Particulars duly signed by the specified authority and its soft copy.

[iii] Scanned copies of the lists of all statutory Forms and its soft copy.

[iv] Scanned copies of Statutory Audit Report and Statement of observations, comments and notes obtained from Chartered Accountant – and

[v] An undertaking in a specified manner duly signed by the dealer or by a person referred to in section 65.

[II] **Important Judgments:**

[1] Agrimore Ltd. S.A. No.777 of 2011 decided on 09.04.2013 (GVAT Tribunal)

Issue:

Claim of R.D. Resale of machinery, A. C. Motor Car and Telephone System is held admissible. Set Off in respect to steam used as processing material is also held admissible to the appellant.

Facts:

The appellant sold machinery and other capital assets like A. C. Motor Car and Telephone System to M/s. Atulk Pharma which was purchased by the appellant from M/s. Cynemid Agro Ltd. vide deed of assignment dated 31.12.1999 for total consideration of Rs. 2,80,00,000/-. The R.D. resale claim of the appellant was disallowed. The claim of set off u/r. 42 in respect of purchase of steam was also disallowed in view of the Judgment of Hon. Tribunal delivered in case of M/s. Pandeshwara

Industries Ltd. The appellant in second round before the Hon. Tribunal contended that the details with regard to sale and purchase of machinery were submitted to the Ld. Appellate Authority. The Hon. Tribunal referred deed of assignment dated 31.12.1999 entered in to between the appellant and M/s. Cynemid Agro Ltd. vide where by the machinery and other assets were purchased for a total consideration of Rs. 2,80,00,000/-. The Hon. Tribunal observed that the purchase of machinery and other assets were from the registered dealer and hence the appellant was not liable to pay tax on sale of such machinery and other assets. As regard to the claim of set off in respect of steam, it is held that the decision in case of M/s. Pandeshwara Industries Ltd. has been reversed by the Hon. High Court in case of M/s. Ami Pigment. The appellant has used steam as processing material in the manufacture of taxable goods. The appellant is entitled to claim set off u/r 42 on purchase of steam.

[2] M/s. Shreenathji Oil Mills Misc. Application No. 13 of 2011 with S.A.No.12 of 2012 decided on 22.04.2013 (GVAT Tribunal)

Issue:

The department directed to pay cost of Rs. 5000/- for inordinate delay in giving effect to the order of the Hon. Tribunal. Second appeal filed for claiming interest on refund is dismissed by holding that the applicant is not entitled to interest on refund.

Facts:

Subsequent to the judgment dated 29.07.2002 of the Hon. Tribunal in R.A. No.118 of 1988, the department did not pass any order giving effect to the said judgment for a period of about nine years. The misc. application was filed on 28.07.2011 in which it was prayed to direct the department to pass order giving effect to the judgment of the Hon. Tribunal and further it was prayed for granting interest on refund. It was also prayed that there was contempt of court and claimed cost of Rs. 25,000/- from the department for unreasonable delay. Pursuant to the misc. application, the applicant was paid a refund of Rs. 45,350/- on 15.11.2011 by giving effect to judgment of the Hon. Tribunal dated 29.07.2002. The second appeal was filed claiming interest of Rs. 58,820/- admissible on the amount of refund of Rs. 45,350/- paid vide order dated 15.11.2011. The maintainability of the misc. application was contended by the department relying on the decision of the Hon. Tribunal delivered in case of M/s. Vikas Export Industries. The applicant contended before the Hon. Tribunal that in view of section 65(6) and in view of regulation 44 of the Tribunal, the Hon. Tribunal has inherent power of the court and in view of section 151 of the CPC, the misc. application is maintainable. The applicant relied on the judgment of Hon. Supreme Court in case of S. L. Kapoor AIR 1981 SC 136. The applicant relied on the following judgments.

[i] M/s. Sandwik Asia Ltd. 280 ITR 643 (SC)
[ii] M/s. Gujarat Flurochemcials Ltd. SCA No. 12855 of 1994 decided on 03.07.2007 (SC)
[iii] M/s. D. J. Wones 195 ITR 227 (GH)
[iv] M/s. Castall Corporation (P) Ltd. 7 VST 552 (Ker)
[v] M/s. Radhe Shyam Cotton Industries SCA No. 9864 of 2011 dated 18.11.2011 (GH)

The applicant in support to the contention that the appeal is continuous proceeding of assessment relied on judgment of the Hon. Tribunal in case of M/s. Rolex Cables SA No. 326 of 2004 decided on 11.09.2008. The Tribunal considering the submission of both sides and referring judgments relied by the applicant held that the applicant is not entitled to get interest on the amount of refund, because the department has paid interest within 90 days from the date of determination of the amount of refund on 15.11.2011. Accordingly, the second appeal filed claiming interest on the amount of refund is dismissed.

With regard to Misc. Application, the Hon. Tribunal observed that the department had paid refund on 15.11.2011and hence the question of directing of giving effect of the order of Hon. Tribunal dated 29.07.2002 does not arise. The Hon. Tribunal held that initiation of contempt proceeding also not arise, because the applicant has first time moved application on 13.06.2005 for giving effect of the order of the Tribunal. However, the Hon. Tribunal held that the department should pay cost of Rs. 5,000/- to the applicant as the applicant has to file this misc. application, because the department failed to give the effect to the judgment of the Tribunal for almost nine years.

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Business Valuation

Approaches to Valuation

CA. Hozefa Natalwala
researchbv@gmail.com

Academic Refresher: Income Approach

The Income Approach

(APV - Adjusted Present Vaule Method)

Many experts believe that the estimate value of business determined from using discounted cash flow method is not free from the limitations of using WACC as a discounting rate. It is rare that the debt equity ratio in the business remains constant. The better way is to find the value of firm ignoring the debt in capital and to add the tax benefit proposed on debt creation.

Technically, an APV valuation model looks similar to a standard DCF model. However, instead of WACC, cash flows would be discounted at the unlevered cost of equity, and tax shields at either the cost of debt or with the unlevered cost of equity.
APV and the standard DCF approaches should give the identical result if the capital structure remains stable.

Normal NPV calculation using DCF:

$$NPV = -investment + \frac{CF_1}{(1+WACC)} + \frac{CF_2}{(1+WACC)^2} + \cdots + \frac{CF_N}{(1+WACC)^N}$$

where, in a simple situation:

$$\text{WACC} = \left(\frac{\text{equity}}{\text{equity} + \text{debt}}\right)(\text{cost of equity}) + \left(\frac{\text{debt}}{\text{equity} + \text{debt}}\right)(\text{cost of debt})(1 - \text{tax rate})$$

Using debt for financing has a tax advantage because the interest payments are tax deductible. This tax deductibility is a source of value for the firm. In the normal NPV calculation using DFC method, this additional value is accounted for in the WACC.

However, in many cases the capital structure of the business may change over time. In other cases, the tax rate faced by the firm may be expected to change over time (as firm goes from loss to profit, or special tax subsidies expire etc.). In other cases, the firm may be able to obtain subsidized financing from a government agency for the project. In all of these circumstances, these types of things mean that the WACC for the business will change, and may even change each year of the business life. Incorporating these types of factors into a WACC calculation is possible, but very complicated. Under, DCF, the normal assumption is that the WACC is the same for each cashflow and each year of the business.

These more complicated situations are more easily handled by using Adjusted Present Value (APV). APV is based on the following:

APV = NPV of business assuming it is all equity financed + NPV of financing effects

Essentially, APV breaks the total value of the business into parts:

One part is the value assuming no debt is used, and then you add on the extra value created from using debt in the capital structure.

In the *adjusted present value (APV)* approach, we separate the effects on value of debt financing from the value of the assets of a business. In contrast to the conventional approach, where the effects of debt financing are captured in the discount rate, the APV approach attempts to estimate the expected value of debt benefits and costs separately from the value of the operating assets. In general, using debt to fund a firm's operations creates tax benefits (because interest expenses are tax deductible) on the plus side

and increases bankruptcy risk (and expected bankruptcy costs) on the minus side.

In the adjusted present value approach, we estimate the value of the firm in three steps. We begin by estimating the value of the firm with no leverage. We then consider the present value of the interest tax savings generated by borrowing a given amount of money. Finally, we evaluate the effect of borrowing the amount on the probability that the firm will go bankrupt, and the expected cost of bankruptcy. Being no specific laws for bankruptcy, the third portion in not much used in India.

The value of the firm can also be written as the sum of the value of the un-levered firm and the effects (good and bad) of debt.

Firm Value = Un-levered Firm Value + PV of tax benefits of debt - Expected Bankruptcy Cost

In practice, normally bankruptcy cost is not considered while determining value as per this method. And so, the formula for calculating APV is,

V = EBIT (1 – t) / (Ke – g) + DT

Where,

EBIT (1 - t) = earnings before Interest but after tax

Ke = Cost of Equity

DT = tax savings on debts

g = growth rate

The benefit of APV is that it breaks the problem down into the value of the business itself (as business is financed with equity) and the value of the financing (whereas the effect of financing is taken account of in the WACC when calculating regular NPV in DCF). This makes APV flexible enough to cover many different types of real-world financing possibilities such as: tax rates that change each year, amount of debt increases or decrease each year, government agency subsidizes interest payments for a certain number of years, new debt must be issued at some future time and that will involve flotation costs, etc. In each of these cases the NPV of the business under 100% equity financing would remain the same, and the value of the specific financing arrangement would simply be calculated separately.

APV has generally applicability in transactions that involve a structured financing, like leveraged buyouts (LBOs), project financing and real estate financing.

Some people believe that APV is preferable from a managerial point of view as it shows directly the sources of value created by a business (i.e. how much is from running the actual business, how much is from the financing arrangements, how much value is created by a government subsidy etc.). However, note that calculating NPV based on an estimated WACC is still, by far, the most common business valuation approach used by firms.

As written by Prof. Pablo Fernández, APV, WACC and FLOWS TO EQUITY APPROACHES to firm Valuation, all these three methods of valuation (if used correctly) always yield the same result. In a article “Cost of Capital, Optimal capital structure, and value of Firm: An Empirical Study of Indian Companies”, the researcher Shri Raj S Dhankar and Shri Ajit S Boora, came on the conclusion that there is no significant relationship between change in capital structure and the value of a firm, at the micro level. This is because of the fact that the value of a firm is affected by a multiplicity of factors and capital structure is just one of them.

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Corporate Law Update

CA. Naveen Mandovara
naveenmandovara@gmail.com

Latest Judgments:

1. **SEBI's order in the matter of Yash Dream Real Estate Limited:**
[WTM/PS/53/WRO-II/RLO/DEC/ 2014]

Facts of the case:

The Company had issued Unsecured Optionally Fully Convertible Bonds (Unsecured OFCBs) to 45,005 persons and mobilized funds to the tune of 76,34,19,703. It had mobilized funds under its sixty eight (68) schemes. It was observed that the Board of Directors of Yash had approved the resolution to raise the funds by issuing OFCB on August 11, 2008. With this single resolution, the company had admittedly raised funds from 45,005 persons and the mobilization still continued.

The application form for the unsecured OFCBs as circulated by Yash does not contain the name of the person to whom it is issued; the same indicates that the issue is not a private placement. All mobilization of funds from fifty or more investors should be classified as a public issue requiring the company to make an application to list its securities.

The raising of funds from 45,005 persons by issue of unsecured OFCBs prima facie has to be construed as a public offer. Having made such public offer, the Company ought to have filed the Prospectus with RoC under Section 60 of the Companies Act, 1956. Consequentially, Yash has also prima facie not complied with the provisions of section 56(1) and 56(3) of the Companies Act, 1956, which refers to the matters that are to be stated in the prospectus and the documents (i.e., the memorandum containing salient features of the prospectus) that should accompany the application form inviting subscription.

Hence, the mobilization of funds by Yash through Unsecured Optionally Fully Convertible Bonds (Unsecured OFCBs), are prima facie in contravention of provisions of the SEBI Act, 1992, the Companies Act, 1956 read with the Companies Act, 2013, the SEBI (Issue of Capital & Disclosure Requirements) Regulations, 2009 and the Securities and Exchange Board of India (Debenture Trustee) Regulations, 1993.

The Company was required to comply with the followings:

1. Apply for and obtain the Listing Approval for the securities with a stock exchange.
2. If no approval is granted by the Stock Exchange, then repay the amounts to the investors/applicants.
3. Keeping the amounts in a separate bank account.
4. Issue the securities only in dematerialized form.

Conclusion:

SEBI was of the opinion that it should be imposed that:

a. directing them jointly and severally to refund the money collected through the issue of redeemable preference shares that are impugned in this Order, along with interest that is promised to the investors ;
b. directing them to not to issue prospectus or any offer document or issue advertisement for soliciting money from the public for the issue of securities, in any manner whatsoever, either directly or indirectly, for an appropriate period;
c. directions restraining them from accessing the securities market and prohibiting them from buying, selling or otherwise dealing in securities for an appropriate period;
d. directing them and other companies in which their directors hold substantial or controlling interest, to not to access the capital market for an appropriate period.

Time of 21 days was provided to the Company and its promoters and directors from the date of receipt of this Order, to file their reply, if any, to this Order.

2. **Vidarbha Industries Limited vs. SEBI [Appeal No. 386 of 2014]**:

Facts of the case:

The appellant (The Company) has failed to obtain the SCORES authentication done from SEBI (an online electronic system for resolution of investors grievances i.e., SCORES). In its reply to the show cause notice, appellant had contended that it is not a listed company and hence the requirements of circular dated April 17, 2013, were not applicable to the appellant. Further, the penalty of Rs. 2 lacs imposed on the Company was very high.

While investigating the matter, the SEBI revealed that some time in the past appellant had applied for delisting and thereafter no further steps were taken. As a result, it is not in dispute that the shares of appellant company still continue to be listed on the stock exchanges.

Conclusion:

Violation of SEBI circular for which penalty imposable under Section 15HB of SEBI Act is Rs. 1 lac per day or Rs. 1 crore whichever is less. Thus, in the present case, as against penalty of Rs. 1 crore imposable against the appellant, the AO of SEBI has imposed penalty of Rs. 2 lac which cannot be said to be arbitrary, excessive or unreasonable, hence, the appeal of the Company was dismissed.

3. **Posh Exports Private Ltd. vs. Registrar of Companies, New Delhi [Order of Hon'ble High Court of New Delhi in the matter of Co. Petition 207/2014]:**

Facts of the case:

The present petition was filed under Section 560(6) of the Companies Act, 1956 for restoration of the name of the company M/s Posh Exports (P) Ltd in the Register of the Registrar of Companies.

The Petitioner Company was incorporated on 12.05.1997, as a private limited company.

The Company had not filed the necessary documents with the Register of Companies and further decided to take steps in the present petition and seek revival of the company. When the documents i.e., Annual Returns and Balance Sheet, etc., were sought to be filed on website of the Ministry of Corporate Affairs, the Directors came to know that name of the Petitioner Company has been struck off for the failure to file requite statutory documents.

Further, the name of the Company was struck off vide notice dated 23.06.2007.

The Petitioner Company has filed its affidavit that the non-filing of the aforesaid Annual Return and the Balance Sheets was because the part time Accountant of the Petitioner Company, who was dealing with the aforesaid work, left the employment of the Petitioner Company.

In view of the Affidavit filed by the Petitioner Company, the Registrar of Companies does not have any objection with the restoration of the name of the company subject to the filing of all statutory documents i.e., Annual Returns from the years 1999 to 2013 and Balance Sheets as on 2000, 2003 to 2013 and also the other documents with the requisite fee as well as additional fee as applicable on the date of actual filing of the documents.

Conclusion:

The petition was allowed subject to payment of costs of Rs. 75,000/-, the name of the Petitioner Company was restored on the Register of the Registrar of Companies subject to the Company filling all the statutory documents and returns for the outstanding period along with the prescribed fees in accordance with the law.

4. **Objections by the creditor in the matter of Scheme of Amalgamation of Monarch Research and Brokerage Private Limited and Monarch Project and Finmarkets Limited with Networth Stock Broking Limited [High Court of Bombay]:**

Facts of the case:

The objector had filed a suit before the Small Causes Court and the same was decided by the Hon'ble Court. The transferee company preferred an appeal against the decree of the

Small Causes Court. The objector again filed a cross appeal against the same, but it was not served to the transferee company and as on the date of this case, the entire amount as adjudicated by the Small Causes Court was paid/adjusted/secured.

Conclusion:

Objections were rejected by the Hon'ble High Court of Bombay on the following grounds:

a. Where entire claim of objector-creditor had already been adjudicated and adjudicated amount had been fully adjusted/secured, objector would have no locus to raise any objection to scheme of amalgamation.
b. Merely because an enquiry of SEBI is pending against transferor companies, that fact would not by itself render a scheme unfair or unjust.
c. The company court, while considering a scheme of amalgamation, should not analyze accounts of companies in depth unless something manifestly illegal or mala fide is noticed.
d. After amalgamation, post merger net worth of transferee company would become much more healthier and stronger and various objections raised by objector did not make out any ground for declining sanction to scheme. Further, the overwhelming majority of shareholders had approved scheme and hence, the Scheme was not found to be unjust and unfair to objecting creditor nor did it adversely affect interest of other creditors, hence, the scheme was sanctioned.

5. Akriti Global Traders Ltd. vs. SEBI [Appeal No. 78 of 2014]

Facts of the case:

The appellant held 94,71,709 shares of SRS Real Infrastructure Limited ('SRS") representing 4.71% shares of the total equity shares issued by SRS. Pursuant to a scheme of amalgamation approved by the Delhi High Court the shareholders of SRS including appellant became entitled to receive additional shares of SRS. Accordingly, additional shares were received by appellant on two dates i.e. on February 14, 2013 and February 21, 2013. The percentage of shareholding increased to 8.15%.

The appellant made disclosures to BSE under regulation 29(1) of SAST Regulations, 2011, however, it was delayed by 120 days. Similarly, disclosures made under regulation 29(2), was delayed by 128 days. No disclosure was made to the company as provided under regulation 29(1),(2) and (3) of SAST Regulations, 2011. Adjudicating Officer (AO) after taking into consideration all mitigating factors imposed penalty of Rs. 4.5 lakhs upon appellant, as the appellant failed to made disclosures of same to relevant stock exchanges within the prescribed time limit.

The appellant filed the appeal to challenge the aforesaid order of AO.

Conclusion:

The appeal was dismissed on the following grounds:

a. Obligation to make disclosures under the provisions contained in SAST Regulations, 2011 as also under PIT Regulations, 1992 would arise as soon as there is acquisition of shares by a person in excess of the limits prescribed under the respective regulations and it is immaterial as to how the shares are acquired.
b. Penalty for violating regulation 29(1) at the rate of Rs.1 lakh per day would be more than Rs. 1 crore. Similarly, penalty for violating regulation 29(2) at the rate of Rs. 1 lakhs per day would be more than Rs. 1 crore. As against the above, after considering all mitigating factors, AO has imposed composite penalty of Rs.4.5 lakhs which cannot be said to be excessive or unreasonable.
c. Penal liability arises as soon as provisions under the regulations are violated and that penal liability is neither dependent upon intention of parties nor gains accrued from such delay.

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From Published Accounts

CA. Pamil H. Shah
pamil_shah@yahoo.com

AS –16 Borrowing Costs
Annual report 2013-14

Hindustan Media Venture Limited

Borrowing cost includes interest, amortization of ancillary costs incurred in connection with the arrangement of borrowings and exchange differences arising from foreign currency borrowings, other than arising on long term foreign currency monetary items, to the extent they are regarded as an adjustment to the interest cost.

Borrowing costs directly attributable to the acquisition, construction or production of an asset that necessarily takes a substantial period of time to get ready for its intended use or sale are capitalized as part of the respective asset. All the borrowing costs are expensed in the period they occur.

Adani Power Limited

Borrowing costs includes interest on borrowings and amortization of ancillary costs incurred for borrowings. Such costs to the extent not directly related to the acquisition of qualifying assets are charged to the Statement of Profit and Loss over the tenure of the borrowings. Borrowing costs that are attributable to construction / acquisition of qualifying assets are capitalized as part of the cost of such assets up to date the assets are ready for their intended use.

Indian Oil Corporation Limited

Borrowing costs that are attributable to the acquisition and construction of the qualifying assets are capitalized as part of the cost of such assets. A qualifying asset is one that necessarily takes substantial period of time to get ready for intended use. All other borrowing costs are charged to revenue.

K.P.R. Mill Limited

Borrowing costs include interest, amortization of ancillary costs incurred and exchange differences arising from foreign currency borrowings to the extent they are regarded as an adjustment to the interest cost. Costs in connection with the borrowing of funds to the extent not directly related to the acquisition of qualifying assets are charged to the Statement of Profit and Loss. Borrowing costs, allocated to and utilized for qualifying assets, pertaining to the period from commencement of activities relating to construction /development of the qualifying asset up to the date of capitalization of such asset are added to the cost of the assets. Capitalization of borrowing costs is suspended and charged to the Statement of Profit and Loss during extended periods when active development activity on the qualifying assets is interrupted.

Manugraph India Limited

Borrowing costs directly attributable to the acquisition or construction of qualifying assets are capitalized. Other borrowing costs are recognized as expenses in the period in which they are incurred. In determining the amount of borrowing costs eligible for capitalization during a period, any income earned on the temporary investment of those borrowings is deducted from the borrowing costs incurred.

Ankit Metal and Power Limited

a) Borrowing costs and its related expenses that are directly attributable to the acquisition, construction or production of a qualifying asset is capitalized as part of the cost of that asset. Other borrowing costs are recognized as an expense in the period in which they are incurred.
b) Net exchange gain/loss on foreign currency borrowings to the extent considered as an adjustment to interest cost attributable to the finance cost.

CMC Limited

Borrowing costs include interest; amortization of ancillary costs incurred and exchange differences arising from foreign currency borrowings to the extent they are regarded as an adjustment to the interest cost. Costs in connection with the borrowing of funds to the extent not directly related to the acquisition of qualifying assets are charged to the Statement of profit and Loss over the tenure of the loan. Borrowing costs, allocated to and utilized for qualifying assets, pertaining to the period from commencement of activities relating to construction

From the Government

CA. Kunal A. Shah
cakashah@gmail.com

Income Tax

1) Notification regarding amendment in Income tax rules

The CBDT hereby makes the following rules further to amend the Income-tax Rules, 1962. After rule 2BBA the rule 2BBB shall be inserted, which is enumerated as under:-

"2BBB.Percentage of Government Grant for considering university, hospital etc. as substantially financed by the Government for the purposes of clause (23C) of section 10. For the purposes of sub-clauses (iiiab) and (iiiac) of clause (23C) of section 10, any university or other educational institution, hospital or other institution referred therein, shall be considered as being substantially financed by the Government for any previous year, if the Government grant to such university or other educational institution, hospital or other institution exceeds fifty percent of the total receipts including any voluntary contributions, of such university or other educational institution, hospital or other institution, as the case may be, during the relevant previous year.".

(Notification No. 79, dated 12/12/2014) (They shall come into force from the date of their publication in the Official Gazette.)

2) Circular regarding income tax deduction from salaries during FY 2014-15

The said circular contains the rates of deduction of income-tax from the payment of income chargeable under the head "Salaries" during the financial year 2014-15 and explains certain related provisions of the Act and Income-tax Rules, 1962.

(For full text refer circular no. 17, dated 10/12/2014)

Service Tax

1) Circular regarding audit of the service tax assessees by the officers of Service Tax and Central Excise Commissionerates

Central Government hereby inserts clause (k) in sub-section (2) of section 94 which is reproduced below:-

"(k) imposition, on persons liable to pay service tax, for the proper levy and collection of tax, of duty of furnishing information, keeping records and the manner in which such records shall be verified."

(For full text refer circular no.181, dated 10/12/2014)

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contd. from page 625

From Published Accounts

/ development of the qualifying asset upto the date of capitalization of such asset are added to the cost of the assets. Capitalization of borrowing costs is suspended and charged to the Statement of profit and Loss during extended periods when active development activity on the qualifying assets is interrupted.

Nagarjune Fertilizers and Chemicals Limited

Borrowing costs that are attributable to the acquisition or construction of qualifying assets are capitalized as part of the cost of such assets. A qualifying asset is one that necessarily takes substantial period of time i.e. more than twelve months to get ready for its intended use. All other borrowing costs are charged to the Statement of Profit & Loss.

Archidply Industries Limited

Borrowing cost directly attributable to the acquisition or construction of qualifying asset is being capitalized. Other borrowing costs are recognized as expenses in the period in which they are incurred. In determining the amount of borrowing costs eligible for capitalization during a period, any income earned on the temporary investment of those borrowings is deducted from the borrowing costs incurred.

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Association News

CA. Abhishek J. Jain
Hon. Secretary

CA. Nirav R. Choksi
Hon. Secretary

Forthcoming Programmes

Date/Day	Time	Programmes	Venue
17.01.2015 Saturday	9:30 a.m. to 1 p.m.	Blood Donation Camp	At the office of the Association
01.02.2015 Sunday	8.00 a.m. to 1.00 p.m.	Cricket Match - CAA Ahmedabad Vs. IT Bar Association Ahmedabad	Sardar Patel Stadium, Navrangpura, Ahmedabad.

Glimpses of events gone by:

1. On 20th December 2014, a Cricket Match was held between President XI & Secretary XI at Sardar Patel Stadium, Navrangpura, Ahmedabad.

2. On 3rd January 2015, Brain Trust Meeting was held on the topic of "Controversial Issues under the Income Tax Act" at ATMA Hall, Ashram Road, Ahmedabad.

(L to R CA. Abhishek J. Jain, CA. Nirav R. Choksi, CA. Shailesh C. Shah, Speaker Shri Tushar Hemani-Advocate, CA. Kunal A. Shah, CA. Rutvij P. Shah, CA. Ronak M. Khandwala)

3. On 4th January 2015, a Cricket Match was held between CAA Ahmedabad & Baroda Branch of WIRC of ICAI at Motera Stadium, Ahmedabad.

CAA won the match. The Team celebrating after retaining the Rotating Trophy

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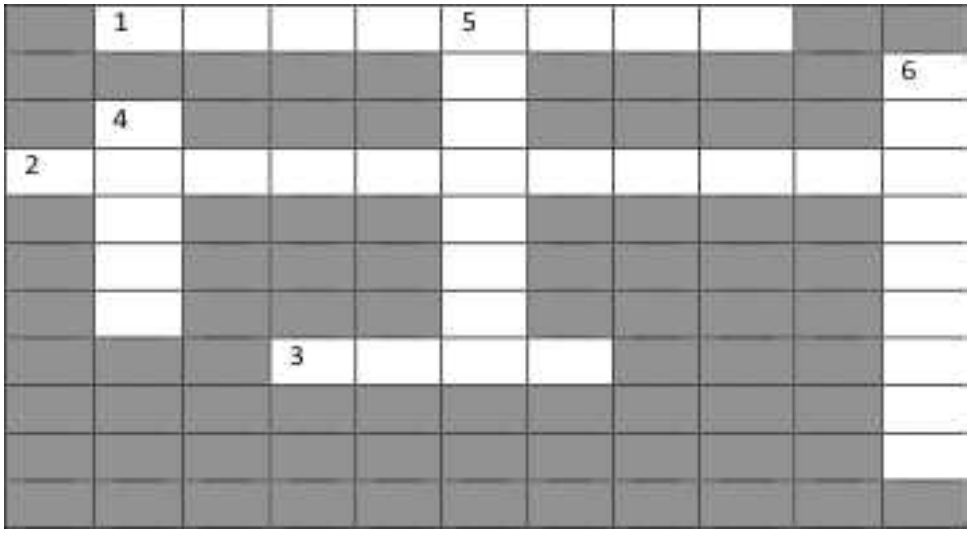
ACAJ Crossword Contest # 9

Across

1. Under section 54EC, assessee cannot be charged to capital gains when short term gain of _____ capital asset gets invested.
2. The slogan given by P.M. on the Independence Day.
3. Risk free return is the return expected by equity holder where default risk is _____.

Down

4. The ultimate goal of a human being is to be _____.
5. Section 54EC requires the assessee to make the investment within 6 months from the date of _____.
6. NRIs and returnee NRIs both are at par with residents and are liable to _____.



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 31/01/2015.
5. The decision of Journal Committee shall be final and binding.

Winners of ACAJ Crossword Contest # 8	
1.	CA. Naresh Patel
2.	CA. Ajit Shah
3.	CA. Gaurang Choksi

ACAJ Crossword Contest # 8 - Solution

Across

1. Sattvasamshuddhih
2. Deductor
3. Penalty

Down

4. Terminal
5. Mind
6. Employees

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