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

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

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Freedom

What is ‘freedom’? The question may seem to be very simple but do we really know the answer or ever try to understand its true meaning. Most of us believe that ‘freedom’ means able to do whatever one feels like doing, without any shackles or restrictions. The essential nature of a human being is to be absolutely free but whether it’s a correct approach?

Freedom is the foundation of a happy life. If ‘freedom’ means living life as per one’s own choice without any restrain, everyone is exercising his free will but somehow does not appear to be satisfied and happy. People seem or rather pretend to be happy but the truth is far from the reality. Why is it so that in this era of technological advancements where almost everything has become possible upon a touch of a button, the mind is far away from serenity? Despite sitting amidst a mountain of wealth and prosperity, man lives a life of worry, anxiety and dissatisfaction.

Over the years there has been a continuous evolution of human life. This life is often referred to as *anubhav dhara*, stream of experiences. If the experiences in life are good, life is good and if the experiences are bad, the life seems to be bad. Experience occurs when an individual, subject, has a contact with the world. With technological advancements the emphasis has shifted on improving the objects and there is today a race to enjoy more and more of these worldly objects so as to have a satisfied and a happy life. As the sense objects of the world are attractive and alluring, the individual falls prey and gets indulgent. Getting intoxicated with the pleasure arising from such indulgence is the next step of the downfall. After this, the journey of the demise of a human being starts. The indulgence increases day by day until one loses one’s energy, health and all. Uncontrolled and excessive indulgence in sensual enjoyments leads to sorrow and misery. **This is not freedom but a licentious enjoyment.**

Contrary to the unrestricted enjoyment, one can be disciplined and enjoy the world in a better way. Intelligent self restrain increases the enjoyment. Such an intelligent self restrain makes human being free. He does not entangle himself with the material objects and in fact enjoys a sustained and a long lasting happiness without any dependence on the world.

Religion is a medium whereby a person attains freedom. Religion warns human beings to be disciplined and regulates their lives so that they are not victimized by the senses and do not develop a sense of monotony but rather enjoy life to the fullest.

Lord Krishna says to Arjuna in verse 62 and 63 of the Chapter 2 of Bhagwad Geeta that “Thinking about sense objects brings an attachment towards them. Attachment breeds desire, and desire leads to anger, which in turn leads to delusion. When you are deluded, you lose your memory and with the loss of memory, the power or discrimination is destroyed; with the destruction of discrimination, your Self itself is lost.”

If we indulge in sense gratification without exercising our choice of action, it is a bondage and not freedom. Man becomes slave to his senses. To be free we need to practice intelligent self restraint where mind is not lingering on the object of desire.

Not doing what you feel like doing is freedom. Swami Chinmayananda.

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Editorial

Times of Election

India is a federal union of states with twenty nine states and seven union territories. Being the largest democracy in the world, elections are held every six months in one or the other part of the nation. The latest are the Delhi elections. Though Delhi elections may not be geographically huge, it has a larger significance on the overall national politics being the capital of the country and also considering the amount of media attention it generates.

The political parties have touched a new low as far as the campaign in the elections is concerned. It was always believed if we have good and educated politicians, the quality of politics in the country would improve. Going by the Delhi example, this appears to be a distinct possibility. Out of the two chief ministerial candidates of the two prominent rivals, one was former IRS officer and the other was former IPS officer but we have seen the attacks on each other to the extent of name calling like "chor" and "opportunist" to gain political score. As have been the experiences, the mudslinging has become the order of the day without which no elections look possible. We are expecting only from the politicians to behave good when values have weakened in the society.

It is not just the campaign that surprises the public. The common man with basic understanding is also wondering how the parties would fulfill their poll promises. Both the leading parties have made the promise and want the control of the Delhi police. Let's assume, the centre agrees to hand it over. But will Delhi be able to bear the annual cost of over Rs 5,000 crore to run this police force, when its overall budget is just Rs 36,700 crore. It is unlikely the centre will both hand over control of the police and the money to run it. Then one of the parties have talked about creating over 3,000 mohalla sabhas in order to devolve decision-making to the bottom of the pyramid. But can the state do this without consulting its municipal bodies, all of which are in control of the rival political party? Much talked about and ridiculed is the promise of two lakh toilets and 500 schools to hospitals. Even for a while if legal hurdle of land acquisition is set aside and even finance is not considered, the newly elected government will have to build 110 toilets every day to get it completed in its term of five years.

The reason why the common citizen is disassociating himself with the election process is the offensive, derogatory and negative campaigns. Also when the promises of these kinds are being made, every person understands it is simply to woo voters without any intention and capability of fulfilling them. However at the end of the day the only positive that emerges is we have a democracy giving us the right to choose. One who was abused as a chaiwala can become the Prime Minister of the country. One who sat on the streets of Jantar Mantar can become the Chief Minister of Delhi. Whatever happens on the result day Delhi and India win with a hope something would change for the better in the life of a common man.

Namaste,

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From the President

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Dear Esteemed Readers,

Recently we celebrated the 66th Republic day. On 26th January, 1950, the constitution of India came in to existence and India became a sovereign state. The country finally realised the dream of the numerous freedom fighters who fought and sacrificed their lives for the independence of the nation. Even though, decades have passed since the Indian Constitution came into effect but the Republic Day, each year reminds us of the 'Indianhood' that runs in our blood. Most of the members of the Association may be aware that 26th January is also remembered for one more reason. It is the birth date of one of our Past President Late Shri C.F. Patel, a courageous professional who worked very hard for the betterment of the profession, members and for the Association. The dates like 26thJanuary give us the opportunity to express our gratitude and pay tribute to great leaders who have brought the nation and the profession forward. These occasions keep us always reminded that we too have to stand amidst the crowd and do something extraordinary for the nation and profession so that our next generation takes pride and remembers us for our deeds for years to come. Someone has rightly said that **"No candle loses its light while lighting another candle. So never stop sharing and helping others because it makes your life more meaningful"**

Normally the month of February is eagerly awaited by the professionals like chartered accountants, economists, industrialists for the announcements of the Finance Minister in the Union Budget. By the time the February issue of the Journal reaches your desk, the countdown for the budget would have begun. The Modi Government will present its first full and perhaps the most crucial budget on 28th February in the backdrop of emerging recovery in the economy. People did not expect much from Finance Minister when he presented the first budget in July 2014. He had a very less time and thus the first budget was a continuation of reforms initiated by the previous government rather than any significant change from previous policies. The honeymoon period is over now and the Government would try to come out with big bang reforms with populist measures. There is lot of expectation by the markets for measures to revive growth.

Recently Finance minister hinted to leave more money in the hands of the consumer to increase demand and growth. He also stated that the Government was not in favour of raising revenue by imposing higher taxes. The Government has raised income tax exemption limit from Rs. 2 lacs to 2.5 lacs in the last budget and it would not be surprising if the taxpayers in the country gets further relief in one form or the other. Now it is the time for the Government to announce its policies to transform India with Mantra of "Sabka Saath, Sabka Vikas". Nonetheless with Budget 2015-16 around the corner, to get the economy fully back on track, the Government will have to keep up the pace of efforts for the improvement of investor sentiment, climate for doing business by removing bottlenecks, employment generation and containing inflation.

The Budget Meeting to discuss the Finance Bill is one of the most important events of the Association, held every year immediately after the Budget is presented in the Parliament. However, this year it would be a second budget meet and I consider myself fortunate to get an extra opportunity to organize the big program again as a President. The budget meeting is organized jointly with Ahmedabad Branch of WIRC of ICAI on 4th March 2015 at Tagore Hall.

The Association organized blood donation camp on 17th January 2015 where many members came forward to donate blood. I am pleased to inform the members that on Cricket team of CAA won the match against Income Tax Bar Association played on 1st February 2015. Congratulations to the members of Cricket Team CAA. This was the last match of the cricket season this year at CAA. For cricket fans World cup 2015 is starting from 14th February. I wish Team India best of luck for winning the cricket world cup.

With regards,

CA. Shailesh C. Shah
President

Limited Liability Partnership, An Overview

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The economy has been growing at a rapid pace in the last couple of decades with the adoption of reforms by successive Governments. The growth in the economy has also led to a demand for simplification of procedures and reducing complexities in the conduct of businesses in India, Keeping in view the demand from the various sectors, especially the SME sector, the Government of India enacted the Limited Liability Partnership Act, 2008, which came into effect from 1st April, 2009 with the notification of the Limited Liability Partnership Rules, 2009.

The concept of Limited Liability Partnership although new for India has been prevalent in many countries like Canada, Australia, United States of America, China, Germany, Japan and Greece to name a few. At present more than 10000 LLPs have been registered in India.

The LLP is a midway between a Partnership firm and a Company formed under the Companies Act. It has the features of both company as well as LLP.

A LLP can be formed for carrying on any business, trade, manufacturing or providing services (including professional services).

- **Salient Features of LLP**

  Minimum Procedural Compliances

  There are minimum compliances to be complied with under LLP Act. It is difficult for SMEs to manage all compliance under the Companies Act, especially the additional compliances under the Companies Act, 2013 with regard to Share Certificate, Minutes, Board Meeting, AGM, declarations, appointment and removal of directors and auditors, related party transactions etc.

  Limited Liability

  The liability of the partners is limited to the extent of their capital contribution. Unlike in the case of a partnership firm under the Indian Partnership Act, 1932, there is also no concept of joint and several liabilities of the partners. The partners act as agents of the LLP and not the other partners. The concept of limited liability shall not however hold good in relation to partners who are involved in fraud and misrepresentation and also for the liabilities due on account of income taxes on winding of the LLP as per Section 167C of the Income Tax Act, 1961.

  Number of Partners

  The LLP shall have minimum 2 (two) partners, one of whom has to be a resident in India and there is no upward limit regarding number of partners.

  Separate Legal Entity and Perpetual Succession

  As LLP is a body corporate and it can sue and be sued in its own name. It can own properties in its own name. A LLP is a juristic person and its existence is not dependent on the partners. However when all but one partner dies then the remaining partner has six months time to introduce new partner, failing which, the LLP may be wound up. Further in case all the partners die and there are no provisions of nominating legal heirs for admission to the partnership in the event of death, then Tribunal shall wind up the LLP on its own.

  LLP Agreement

  The LLP agreement regulates the working of a LLP as it contains the main objects, rules and regulations of the functioning the LLP similar to the Partnership Deed in case of a Partnership Firm and MOA and AOA in case of a Company, it has the flexibility to change from time to time after following due procedure laid down in the Act. In case no agreement is entered into, the provisions of the First schedule to the LLP Act will become applicable.

Taxation

LLP shall be taxed as partnership firm under the provisions of the Income Tax Act, 1961. There is also no concept of Dividend Distribution Tax. Thus it helps avoiding double taxation.

Assignment of Rights

The rights of a partner to the share of the profits and losses of the LLP and to receive distributions in accordance with the LLP agreement are assignable either wholly or in part.

Audit

Audit of accounts is mandatory only in case the turnover of the LLP exceeds 40 Lakhs or the capital contribution exceeds 25 lakhs.

- **Partners**

The following persons can be partners in a LLP:

- Individuals
- Limited Liability Partnerships
- Indian Companies
- Foreign Limited Liability Partnerships
- Foreign Companies

Disqualifications of a Partner ;

- A person of unsound mind.
- A person declared insolvent
- A person applied for insolvency

Designated Partners

The LLP Act has introduced the concept of Designated Partners who shall be responsible for ensuring all statutory compliances of the LLP viz filing returns, documents, etc., with the Registrar, etc., and such act as may be provided in LLP Agreement.

The designated partners are also mandated by the Income Tax Act, 1961 to sign the returns of the LLP

Number of Designated Partners

The LLP shall have at least two partners as Designated Partners (DP) (at least one designated partner shall be a person resident in India).

Qualifications of a Designated Partner

Only individuals can be designated partners. At least one of them shall be a resident in India.

If bodies corporate are partners in LLP, they can nominate an Individual as Designated Partner.

The term ‘resident in India’ means a person who has stayed in India for a period not less than 182 days during the immediately preceding one year.

If at any time there are less than two designated partners, then all the partners shall be deemed to be Designated Partners.

Disqualifications of a Designated Partner

The persons with following disqualification are not eligible to be appointed as designated partners:

- is an un-discharged insolvent, or has at any time within the preceding 5 years adjudged insolvent;
- suspends or has at any time within the preceding 5 years suspended payment to his creditors and has not at any time within the preceding 5 years made a composition with the creditors;
- is or has been convicted by a Court of any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than six months.

Appointment / Cessation / Change of Designated Partners

Designated partners shall be appointed or changed in accordance with the procedures laid down in the LLP Agreement.

If any vacancy of designated partner arises, LLP may appoint designated partner within 30 days of a vacancy arising for any reason, as per the procedure laid in the LLP Agreement.

Consent to become Designated Partner

An individual who agrees to become designated partner (except in case of designated partners at the time of incorporation) has to give consent in Form 9 to the LLP.

Intimation of Appointment, Resignation or Change

LLP shall file with the Registrar the particulars of any new appointment, resignation or change of designated partners in Form 4. This Form has to be filed within 30 days from the date of the appointment, resignation or change.

Duties of Designated Partner

The designated partner shall be responsible for all the statutory compliances stated under the LLP Act, including filing any document, return, statement, etc. and shall be personally liable for penalties imposed on LLP for any contravention of the provisions relating to compliance, etc.

Fines and Penalties

In case LLP having less than one resident designated partners at any time, then LLP and partners shall be liable to fine, which shall not be less than Rs. 10,000/- but not exceeding Rs 5 lakh.

■ Admission, Resignation, Removal of Partner and Transfer of Interest

Admission

A new partner may be introduced with the consent of all the existing partners, except where otherwise stated in the LLP Agreement.

Cessation of Partner

Any partner may cease to be partner as under:

- In accordance with provision of LLP Agreement.
- Upon partner becoming disqualified in accordance with LLP Act, 2008.
- Upon Death of partner.
- Upon giving 30 days notice of intention of retirement to other partners

Expulsion of Partner

No majority of the partners can expel a partner unless a power to do so has been conferred by express agreement between the partners. In other words if the LLP agreement specifically allows expulsion or removal of a partner, the partners can remove or expel any partner as per the provision of the agreement.

Intimation of Admission, Cessation or Expulsion

When a person is admitted as new partner or a person ceases to be a partner on account of retirement, death, expulsion or otherwise, the LLP has to intimate the ROC by filing Form 4, within 30 days from the date of such admission and / or cessation.

LLP Agreement also needs to be modified to incorporate the changes in constitution and Form 3 also needs to be filed.

Transfer / Assignment of Partners' Rights

Any partner can freely transfer and / or assign his right to share the profits and losses and to receive distribution in accordance with the LLP agreement.

The transfer and / or assignment of the rights by the partner shall not amount to dissociation of the partner or a dissolution and winding up of the LLP.

The transfer and / or assignment of the right does not, by itself, entitle the transferee to participate in the management or conduct of the activities of the LLP. Moreover the transferee is also restrained from accessing information concerning the transactions of the LLP.

- **Contribution**

Contribution is the capital contribution of the partners introduced at the time of incorporation or additionally brought in subsequent to the incorporation.

Mode of Contribution

- Contribution may be in Tangible or Intangible Form.
- Nature and value of contributions to be stated in accounts.
- In case of Non Cash contributions, Needs to be valued by Practising Chartered Accountant, Cost Accountant or a Valuer from the approved panel

- **Limited Liability Partnership Agreement**

Limited Liability Partnership Agreement regulates the functioning of the LLP, it provides the basic framework in which the LLP will function and it determines the rights and duties of the partners towards each other and their rights and duties in relation to the LLP. The LLP agreement can be entered into prior to incorporation or subsequent to incorporation of LLP. It should be in writing.

Definition of a LLP Agreement

Section 2 (1) (o) defines LLP Agreement as

"Limited liability partnership agreement" means any written agreement between the partners of the limited liability partnership or between the limited liability partnership and its partners which determines the mutual rights and duties of the partners and their rights and duties in relation to that limited liability partnership."

Features of an Agreement

The LLP agreement being the sole document which regulates the functioning of the LLP, should be drafted after taking into consideration all the aspects of the purpose of the formation of the LLP. It should ideally include

- Objects
- Registered Address
- Contribution
- Mode of Contribution
- Changes in Contribution
- Sharing of Profit and / or Loss
- Remuneration
- Designated Partners and their Rights and Obligations.
- Rights and Obligations of Partners.
- Management of LLP
- Admission, Retirement, Expulsion or death of Partner.
- Assignment of Financial Interest.
- Meetings and minutes.
- Loans from Partners, if any.
- Non-Compete Clause, if any.
- Banking, Accounts and Audit.
- Restrictions on Partners
- Amendments to Agreement
- Indemnity Clause
- Winding up
- Resolution of Disputes

Due care to be taken to include all relevant points, in order to enable the orderly function of the LLP and to ensure transparency in the working of the LLP and to avoid ambiguities amongst the partners.

Ratification of the Agreement

The partners have to enter into a partnership agreement in writing. The agreement can be entered into prior to date of incorporation or subsequent to date of incorporation (not later than 30 days from date of incorporation). In case the LLP agreement is entered into before the incorporation of the LLP. The partners have to ratify this agreement after incorporation of the LLP and have to file the agreement with resolution for ratification.

Amendment to the Agreement

Any change in particulars mentioned in LLP Agreement can be effected (other than change in constitution) by means of supplementary agreement provided LLP Agreement so provides for making changes through supplementary agreement.

Filing of Agreement

LLP agreement (duly ratified, in case it is entered prior to incorporation) and changes to it have to be filed with the Registrar in Form 3 within 30 days from the date of incorporation, or the date of such amendment.

First Schedule

If LLP Agreement is silent on any of the matters covered in the First Schedule, then provision of the First Schedule shall apply in relation to those matters. The First Schedule shall also apply, in the absence of an agreement.

- All partners entitled to share equally in the Capital and Profits/losses.
- Indemnity Clause.
- All Partners entitled to take part in management.
- No partner entitled to remuneration.
- No new partner can be introduced without consent of all partners.
- All decisions with majority of partners consent.
- Minutes to be recorded within 30 days and all decisions recorded.
- Render True Accounts.
- Non-Compete Clause.
- Partners cannot be expelled by majority unless prior agreed.
- Disputes to be referred to Arbitration under Arbitration and Conciliation Act, 1996.

Stamp Duty on Agreement

The Stamp duty applicable to Instrument of Partnership depending on the place of incorporation, shall apply to LLP Agreement. In case an immovable property is introduced by the partners as their capital contribution, then stamp duty rates applicable to conveyance of immovable properties shall apply.

■ Commencement of Business

LLP can commence business immediately on obtaining the Certificate of Incorporation.

■ Accounts and Audit

Accounts

Maintenance of Books of Account

The LLP Act has not prescribed any books of account; however, The LLP shall maintain proper books of account as may be necessary in view of the affairs of the LLP for each year of its existence on cash basis or accrual basis. The account books are to be maintained at its registered office and shall be preserved for period of 8 years.

Records to be Maintained

The books of account shall be kept in such a manner which depicts the following:

- The financial position of LLP.
- Enable the preparation of Statement of Account and Solvency which complies requirement of the Act
- Particulars of all sums received and expended.
- Recording of Asset and Liabilities of LLP.
- Statement of cost of goods purchased, Inventories, work in progress, finished goods and cost of goods sold.
- Any other matter as may be decided by the partners.

Filing of Statement of Accounts and Solvency

The LLP is required to prepare a Statement of Account and Solvency for the financial year as at the last day of the financial year, within 6 months from the end of the financial year in Form No. 8. It shall be filed within 30 days of the end of six months of the financial year to which financial statement relates. However, LLP incorporated on or after 1st October may opt to close its accounts on 31st March immediately following the financial year in which it was incorporated and hence are entitled to exercise the option of filing the first Statement of Accounts and Solvency after the end of the financial year immediately following the year in which it is incorporated.

The Statement of Accounts and Solvency shall be counter signed by a chartered accountant in case the turnover exceeds ‘ 40 lakhs.

Annual Return

- Time Limit

  The LLP is required to file its Annual Return in Form No. 11 with the Registrar within 60 days from the end of the financial year.

- Certificate by Compan Secretary

  The Annual Return shall be accompanied by a certificate from a company secretary that he has verified the particulars including the book and records of the LLP and found them to be true and correct. The certification from CS is required in the following cases :

  Contribution is in excess of Rs. 25 lakhs;

  OR

  Turnover in excess of Rs. 40 lakhs.

Penalty

Any LLP which fails to file Annual Return shall be punishable with fine, which shall not be less than Rs. 25,000/ but not exceeding Rs. 5,00,000/ .

Every Designated Partner of the LLP shall be punishable with fine, which shall not be less than Rs. 10,000/ but not exceeding Rs. 1,00,000/ .

Statutory Audit

The accounts are to be audited if turnover of LLP exceeds Rs. 40 lakhs or Contribution exceeds Rs. 25 lakhs.

An audit shall be conducted only by practicing Chartered Accountants.

■ **Charge on Assets**

LLP can mortgage its assets and create a charge on its assets, subject to the provisions of the LLP agreement.

The charge can be created or discharged by filling in Form 8.

■ **Income Tax Provisions**

* LLP is included in the definition of the firm in the Income Tax Act, 1961 and accordingly income tax of LLP shall be in line with that of a firm. Accordingly, profit will be taxed in the hands of LLP and not in the hands of partners.
* Partners Shares to be exempt u/s 10 (2A).
* The provisions of the Wealth Tax Act, 1957 applicable to a partnership firm apply to a LLP.
* The Income Tax Returns shall be signed by the Designated Partner duly authorized by the LLP.
* Partners entitled to remuneration subject to limits specified in Section 40(b).
* The liability of the partners shall be joint and several in case of tax dues outstanding on winding up of LLP.
* Conversion of a partnership firm established under Indian Partnership Act, 1932 to LLP shall not attract any capital gain tax liability.
* Conversion of Private companies and unlisted Public companies to LLP shall not attract capital gain tax liability in the hands

of LLP and shareholder subject to compliance of the provisions of Sec. 47(xiiib) of Income tax Act, 1961

- No Tax on conversion of Firm to LLP if all partners continue to be partners in LLP and all rights and obligations are the same
- Provisions of Section 47(xiiib) of the Income tax Act,1961, to be applicable in case of Conversion of Private Limited and Unlisted Company to LLP, as under:

* All the assets and liabilities of the company immediately before the conversion become the assets and liabilities of the LLP.
* All the shareholders of the company immediately before the conversion become the partners of the LLP and their capital contribution and profit sharing ratio in the LLP are in the same proportion as their shareholding in the company on the date of conversion.
* The shareholders of the company do not receive any consideration or benefit, directly or indirectly, in any form or manner, other than by way of share in profit and capital contribution in the LLP.
* The aggregate of the profit sharing ratio of the shareholders of the company in the LLP shall not be less than 50%, at any time during the period of five years from the date of conversion.
* The total sales, turnover or gross receipts in business of the company, in any of the three previous years preceding the previous year in which the conversion takes place does not exceed Rs. 60 Lakhs
* No amount is paid, either directly or indirectly, to any partner out of balance of accumulated profit standing in the accounts of the company on the date of conversion for a period of three years from the date of conversion.
* Conversion of Company within compliance of Section 47(xiiib) of the Income tax Act,1961 shall permit the following:
    · Carry forward of losses and depreciation allowances.
    · Opening WDV of resultant LLP for the purpose of depreciation shall be closing WDV of firm or company as the case may be.
    · Cost of acquisition of assets of successor LLP shall be cost of acquisition to pre-decessor company.
    · Carry over of unutilized MAT credit u/s 115JAA shall not be allowed.
* Non compliance of any of the provisions of the Section 47(xiiib) of Income tax Act, 1961 shall attract tax liability in the hand of resultant LLP and / or shareholder in the year of default [S. 47A (4) of Income Tax Act, 1961].

■ Merger and Winding up of LLP

The provisions relating to mergers and amalgamations are governed by the provisions of Rule 35 of the LLP Rules & Section 58 of the LLP Act

The LLP can be wound up by following the procedure laid down in the LLP (Winding up and Dissolution) Rules, 2010.

■ Foreign Direct Investment in LLP

Foreign Direct Investment (FDI) in LLP will be allowed, through the Government approval route, in those sectors / activities where 100% FDI is allowed, through the automatic route and there are no FDI linked performance related conditions.

Restrictions relating to FDI linked performance related conditions, would apply in sectors, where conditions like minimum capitalisation, etc. are prescribed like development of Townships, NBFC, even though 100% FDI is allowed under automatic route.

FDI would not be allowed in LLPs operating in agricultural / plantation activities, print media or real estate business.

LLPs with FDI will not be eligible to make any downstream investments, which mean LLP having FDI, cannot make further investment in LLP or companies engaged in any business, even though 100% FDI is allowed under those sectors.

Conversion to LLP

Existing Partnership firms registered under Indian Partnership Act, 1932 and unlisted companies (both private and public) can be converted into LLP in accordance with the provisions of the Second, Third and Fourth Schedules appended to the Act.

Conversion of Firm into LLP

The Second Schedule states the guidelines for conversion of a Partnership Firm to LLP.

- All partners of the Firm to be partners of LLP.
- Form 17 to be filed along with Form 2
- LLP to inform ROF about Conversion within 15 days.
- All Assets, Liabilities and all rights and obligations to be transferred to LLP.
- Statement of Conversion to be mentioned in all Correspondence of LLP for twelve months.
- All pending proceedings against firm to be continue against LLP.
- Partners continue to be liable for liabilities before conversion.
- All existing Agreements and Contracts to continue as if of the LLP

Conversion of Private Limited and Unlisted Limited Companies into LLP

The Third Schedule states the guidelines for conversion of a Private Limited Company to LLP.

The Third Schedule states the guidelines for conversion of a Private Limited Company to LLP.

- All shareholders of the Company to be partners of LLP.
- No Security interest in the existing Assets should be subsisting.
- Form 18 to be filed along with Form 2
- LLP to inform ROC about Conversion within 15 days.
- All Assets, Liabilities and all rights and obligations to be transferred to LLP.
- Statement of Conversion to be mentioned in all Correspondence of LLP for twelve months.
- All existing Agreements and Contracts to continue as if of the LLP.
- All pending proceedings against firm to be continue against LLP.

LLP and Liability of Partners

* Every partner is agent of LLP and not of other partners unlike Indian Partnership Act, 1932 which provides that partners are mutual agent of each other. Hence the partner's liability in normal case restricted to his contribution and shall not be unlimited and joint and several.
* LLP shall not be bound by anything done by the partner where he has no authority to act for the LLP in doing a particular act.
* LLP can be held liable, as a result of wrongful act or omission on the part of a partner in the normal course of business of LLP or with its authority.
* A partner shall be personally liable for his own wrongful act or omission but shall not be personally liable for the wrongful act or omission of any other partner of LLP.
* The liability of LLP and the partners shall be unlimited, in the case of partners, who have knowledge of any act done with intent to defraud creditors or any other persons or done with fraudulent purposes.

Summary

A LLP can be a very useful medium of doing business especially for the SME sector, however, the choice of whether to opt for an LLP would depend on various factors like nature of business, future expansions, FDI requirements to name a few.

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Obtaining Trade Mark and Patent : Filing Tips & Strategies

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Most of the people and more so, the common man, believes in himself so much that he ends being more than just wise. Saving money is just one aspect of it. He has that earnest to learn and keep on discovering new things along that path and sail through in whatever wrongs that he might have committed through that path because he is not an expert and just a common man. All of us, would sincerely wish it worked that way, but more often it does not, especially where the filing of patents and trademarks are concerned. Nothing can be undone here, and if you wish to do so, you end up spending more after your applications or ruining it. That is because the filing of trademarks and patents is a wee bit uncommon and more so technical and expertise oriented. Small things matter here in a big way.

Trade Marks

The filing process of trademark and patents is both complex and mind consuming, but filing of patents is much more demanding. The filing of trademark application is not easy but if you ask a patent & trademark attorney, he would find the trademark filing procedure simple to handle. This is an admission that no one can refuse. As we all know, the power that a trademark owner is blessed with in the form of intellectual property right. But, the route to being a registered proprietor of a trademark differs in every case. It all boils down to the issues involved, the trademark itself, the use of it, the manner of its application, the disputes concerned with the trademark if any and other bits. It are these factors that would decide whether your application is in for a smooth ride or a bumpy one.

Trademark is more than just stationery. It speaks volumes about all the hard work that the owner has put in to his business and brought a certain goodwill and reputation to be associated with the trademark. It is not less than a reward for the owner that the consumer would identify the trademark for a certain quality of products. Should the owner not decide to protect his trademark by registering it, he is just getting an inch closer to let it get manipulated and counterfeited in the market. Counterfeiting or manipulation then results in to a lot of chaos in the market which in turn tarnishes the image of the trademark and hampers its growth in its industry as the consumers would feel unsafe while purchasing it. Therefore, the owner has to continuously invest in the Intellectual Property protection by not only getting it registered but also keeping a check on the market for possible chaotic situations. However, having said so, getting the protection of trademark is as much important as filing a trademark application. While doing so, the applicant should seek professional support from the trademark attorney as at times the technical jargons or the nitty-gritties of the procedure can be a lot to handle for the ordinary applicant. It is best to entrust a trademark attorney for the protection of your trademark filing, trademark asset and its prosecution.

In trademarks, what you sow is what you get. The finances that are involved behind filing and prosecuting a trademark are far less than correcting an incorrect application. We all have experienced that the applicants have made numerous applications which have not taken off, abandoned or pending for office objections which is beyond their expertise to prosecute. Moreover, by engaging a trademark attorney much later in the application stage rather than from the start, would be a double whammy for the applicant as far as the finances of the application are concerned. If the applicant is not able to pursue the trademark authority to guide his application, then it would be improper of him to pursue the matter further, as the sole objective of the authority is to analyze and not guide the applications. If that would be the case than the work on both the sides would slow down as the analytical wing of the authority would be guiding the applications at the same time. Debating whether those applications can be considered fructuous or infructuous would be a different issue altogether and should be best avoided here!

The most significant aspect of the trademark application is the use, though is voluntary to do so up till five years and three months from the grant. But let's face it, use of a trademark regionally or nationally is very crucial and is most of the times considered trivial and over looked resulting in the grant of trademarks outside their area of application and later bearing the brunt of bad in law intended applications. Hence, identifying the area of use is most crucial for a trademark and should be applied only in that manner, in order to completely secure the application and its grant from further rectifications. A half hearted trademark application is as much a curse to the applicant as a incorrect and a wrong application. The intentions of the applicant may be bonafide and best but, the fact is that a trademark application is much more than the applicant's intentions and feelings. It's all about channelizing the efforts and finances involved in the best way to get a smooth, hassle-free, strong and time bound registration. After all, your trademark is your identity and nobody including your own self should make a mess out of it. Making the right choices while filing your trademark application is extremely important and professional expertise is one thing that nobody should every shy off to take it.

Patents

Patents mostly deals with science, technology and lot of substance which would help making lives easier. The power of trademarks and patents is entirely different. While trademark is much more commercial and sought after amongst the rights of intellectual property, patent is the most rewarding amongst those rights. If out in to practice in a proper manner, than patents can keep on rewarding you for at least two decades and in a number of cases for a life time. It would be incorrect to say here that patent being complex is a myth. In fact, it cannot be more true. An ordinary applicant cannot get away with is application of patent unless he seeks professional expertise and support. When the applicant has taken the trouble to invent something after the time and effort that has gone in to it, it would be only unwise of the applicant to blow it all away by making an application with lot of flaws and improper drafts.

Mostly the patents observe first to file and therefore, will stick to it while discussing the tips and strategies of filing and obtaining patents here. The evidence on your hand won't be able to come to your rescue and therefore, being the first one to file before your competitors has become a bit of a concern. Being the first to file guarantees that your chances of being granted an invention are bright but, the applicant should not lose his way in his quickness to file the application. In the hurry of filing a time bound application, the applicant must not lose sight of having a precise, complete and justifiable draft of his invention which he claims to be granted as a patent. Hence, time is of as much importance as the draft of invention. Having said that, the way out of securing your first to file date with the authority is to file provisional application. This application will include only a description of your invention but nothing in specific as far as the claim of the patent is concerned. This strategy will help you preserve the criteria of the filing date and most of the pharmaceutical companies have been doing so to fall in to the bracket of first to file. But, it has it's disadvantages. The strategy can boomerang in cases where the inventor may not be able to complete some criterias of his invention in the window period. This situation then gives rise to multiple problems in the filing of the claims for the invention, examination reports and thus, the entire procedure of the grant of patent goes for a toss and the complications and objections that may arise will worsen the case of the applicant even more before the authority. The provisional application is also a double edged sword because if the description of the invention in the provisional application is incomplete or improper than the applicant's rights would remain unprotected.

The inventor in first to invent system should be wary of his actions in the grace period. The acts of the inventor applicant in the grace period should not become a curse on his application. He should remain aloof from making publications or disclosures in the grace period because doing so would risen the chances of those being concluded in a later patent application which the inventor cannot then use a prior art against it. Thus, there is a questionable pause at this moment as to how much protection is available to the inventor applicants in favor of their applications who bank on the grace period to rely on their publications which are previous to their applications. The answer to that question and the tip if it is seen as so would be that it is of lot of significance that the application of patent be filed at the earliest possible date and to avoid any public disclosure before it.

The scientists, researchers and the attorneys have to closely work together to have proper and complete patent application. When scientists, researchers and the attorneys work together in co-operation and as a team than the time limits and deadlines in the procedure of the application can be met and the shortfalls and other time bound objections can be best avoided. When there is smooth internal communication between the scientists, researchers and the attorneys, the claims of the inventor can be put forth in the best manner before the authority. Firms, organizations and companies with large employee base should explore selective and talented employees in the process that builds up to the application and take the maximum benefit by inducting their views in various disclosures during the entire process. This will in turn boost their morale and result in the employees being encouraged to help the company to file more patents.

The company and attorney have to mutually decide while considering the Patent Budget and the legalities that which would be the suitable jurisdictions to churn out the best value out of the patents at hand. The company should always be in sync with the patent filing strategy and the business strategy. Also the company should always keep in mind the finance while preparing the filing strategy of patents. The inventor/company should also enforce upon his attorney to perform in-depth due diligence which can be instrumental in giving the inventor fair chance in being successful with his application. Patents are being termed as the top money making machine in and beyond Intellectual Property Rights as their value can now even surpass the value of most physical assets of the company. Patent is a right which has no definite boundaries and the theory is vary popularly known as monetizing patents. Moreover, the value of patents is forming great significance with various communities. Many patents that are registered by various start ups are being acquired by long term players in record breaking deals.

Be it trademark or patents, risk assessment of these rights is very necessary. Pre-planning is the key to be included at the prime while chalking out the filing strategy for trademarks and patents. It definitely helps in curbing various foreseeable objections and obstacles that may prop up during the process. And lastly, applicant should also analyze his current trademark and/or patent portfolio if any which would also help in designing the strategy for the proposed applications at hand.

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Glimpses of Supreme Court Rulings

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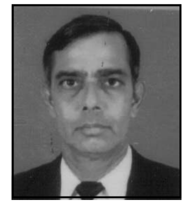

34 Warrant of authorization – Validity:

The provision contained in Sec.132(1) of the Income-tax Act, 1961, enables the competent authority to direct the issue of a warrant of authorization to conduct a search and seizer operation on the basis of formation of an opinion which a reasonable and prudent man would form for arriving at a conclusion to issue a warrant. It is done by way of an interim measure. The search and seizure is not confiscation. The articles that are seized are the subject of enquiry by the competent authority after affording an opportunity of being heard to the person from whose custody they have been seized. The terms used are 'reason to believe'. Reasons can be recorded on the file and the court can scrutinize the file and find out whether the authority has appropriately recorded the reasons for forming of an opinion that there are reasons to believe to conduct search and seizure.

[Union of India and others vs. Agarwal Iron Industries (370 ITR 180)]

35 Production of additional evidence – CPC, 1908 – Or.41 R.27(1)(b):

The general principle incorporated in Rule 27(1) of Order 41 is that the parties to an appeal are not entitled to produce additional evidence (oral or documentary) in the appellate court to cure a lacuna or fill up a gap in a case. The exceptions to that principle are enumerated thereunder in clauses (a),(aa) and (b). Clause (b) says that if the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, it may allow such document to be produced or witness to be examined. The requirement or need is that of the appellate court bearing in mind that the interest of justice is paramount. If it feels that pronouncing a judgment in the absence of such evidence would result in a defective and to pronounce an effective judgment admission of such evidence is necessary, clause (b) enables it to adopt that course. Invocation of clause (b) does not depend upon the vigilance or negligence of the parties for it is not meant for them. It is for the appellate to resort to it when on a consideration of the material or record it feels that admission of additional evidence is necessary to pronounce a satisfactory judgment in the case. The Board of Revenue erred in declining to admit additional evidence that would throw light on the germane issue.

[Wadi vs. Amilal and others (2015) (1 SCC 677)]

36 Estoppel – Evidence Act, 1872 – Sec.115:

When it does not arise? Where two people with the same source of information assert the same truth or agree to assert the same falsehood at the same time, neither can be estopped against the other.

[Bhagwati Vanaspati Traders vs. Sr. Superintendent of post offices, meerut (2015) (1 SCC 617)]

37 Corporate Laws – SICA or RDDB – Which act would prevail over the other in case of conflict:

Parliament must be deemed to have had knowledge of the ealier law i.e. Sick Industrial Companies Act (SICA), enacted in 1985, while enacting the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. It is with a view to prevent a clash of procedure, and the possibility of

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From the Courts

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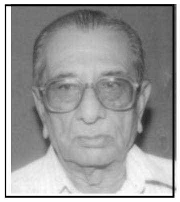

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71 Reopening: Principle of Consistency: High Court decision binding on I.T. authorities under its jurisdiction

Aroni Commercials Ltd. v/s. Deputy CIT (2014) 362 ITR 403 (Bom) : (2014) 267 CTR (Bom) 228

Issue :

Whether the decision of High Court is binding to lower authorities in the state? Can A.O. proceed before four weeks after rejecting objections of assessee.

Held:

The primary requirement to reopen any assessment is a reason to believe that income chargeable to tax has escaped assessment. The reason should be based on tangible material. Tangible material would mean factual material and not inference or opinion on material already in existence and considered during the assessment proceedings. Once a query is raised during the original assessment proceedings and the assessee has replied to it, - it follows that the query raised was a subject of consideration of the A.O. while completing the assessment. It is not necessary that the assessment order should contain reference or discussion to disclose his satisfaction in respect of query raised. The reasons for reopening an assessment have to be tested or examined only on the basis of the reasons recorded at the time of issuing a notice u/s. 148 of the I.T. Act. 1961, seeking to reopen an assessment. These reasons cannot be improved upon, or supplemented much less substituted by affidavit or oral submissions.

Though the principle of res - judicata is not applicable to tax matters as each year is separate and distinct, nevertheless when facts are identical from year to year, there has to be uniformity and consistency in treatment.

It is axiomatic that the law declared by the High Court is binding on all authorities functioning within the jurisdiction of the Court. It is not open to the A.O. to feign ignorance of the law declared by the Court and pass orders in defiance of it. The Bombay High Court in Asian Paints V/s. Deputy C.I.T. (2008) 296 ITR 90 (Bom) has clearly laid down that when an assessment is sought to be reopened u/s. 148 of the Act. and the objection of the assessee have been overruled by the A.O., then in such a case the A.O. will not proceed further in the matter, for a period of four weeks from the date of receipt of the order rejecting the objections of the assessee.

In the instant case order u/s. 143(3) /147 passed within four weeks of the date of service of order rejecting objections of assessee was invalid, as the assessee had moved the Court in the matter.

72 PPF Account and immunity from attachment

Dineshchandra Bhailalhai Gandhi v/s. TRO (2014) 362 ITR 380 (Guj) : (2014) 267 CTR (Guj) 243

Issue :

Whether amount lying in PPF account can be attached by IT Dept?

Held:

(i) Rule 10 of the Second Schedule to the I.T. Act. 1961 provides that, all such property as by the code of Civil Procedure, 1908, are exempt from attachment and sale in execution of a decree of a civil court shall be exempt from attachment and sale under this Schedule. Proviso to section 60(1) of Code of Civil Procedure contains list of properties which shall not be liable to attachment or sale which interalia covers in clause (K a). "(K a) all deposits and other sums in or derived from any fund to which the Public Provident Fund Act. 1968 (23 of 1968) for the time being applies in so far as they are declared by the said Act, as not to be liable to attachment."

(ii) Therefore, any amount lying in the PPF account of a subscriber is immune from attachment and sale for recovery of the income tax dues. As long as an amount remains invested in a PPF account of an individual, the same would be immune from attachment from recovery of the tax dues. The situation may change as and when such amount is withdrawn and paid over to the subscriber.

(iii) CBDT circular dated: 7-11-1990 clarifying that "Section 9 of the Public Provident Fund applies only to attachment under a decree/ order of a Court of Law and not to attachment by the Income Tax Authorities is contrary to the above statutory provisions."

73 Addition on estimation of electricity consumption not valid

C.I.T. v/s. Aaras Agro Products (2014) 222 Taxman 60 (Mag) (Guj)

Issue :

Whether addition can be made on estimation of electricity consumption without any unrecorded purchases being found?

Held :

Assessee was engaged in business of manufacturing and trading of Castor Oil. Assessee filed its return declaring certain taxable income. In course of assessment, A.O. opined that average consumption of electricity per quintal exceeded and, therefore, there was unaccounted – production of castor oil. He thus, made addition on account of unaccounted purchase and gross profit on unaccounted sales. Tribunal was of the view that once books had been prepared on basis of bills and vouchers and there was no allegation that either purchase of raw – material or production was found unrecorded, there was no reason for an addition, that too on presumption. Tribunal further opined that some variations during few months in electricity consumption could not be a valid ground for making impugned addition. Tribunal thus deleted addition made by the A.O. Finding recorded by Tribunal being a finding of fact no substantial question of law arises.

74 Interpretation of Statutes: Interest on excess tax deposited

Union of India Through Director of IT v/s. Tata Chemicals Ltd. (2014) 267 CTR 89 (SC): (2014) 363 ITR 0658 (SC)

Issue :

How the law should be interpreted vis-a-vis and interest on refund of excess tax deposited?

Held:

While deciding the issue of interest on excess tax deposited and allowing interest u/s. 244 A, Supreme Court has laid down as follows:

It is cardinal principle of interpretation of Statutes that the words of a statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning unless such construction leads to some absurdity or unless there is something in the context or in the object of the statute to the contrary. The golden rule is that the words of a statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of a statute are clear, plain and unambiguous, then the Courts are bound to give effect to that meaning irrespective of the consequences. It is said that words themselves best declare the intention of the law giver. The Courts have adhered to the principle that efforts should be made to give meaning to each and every word used by the legislature and it is not sound principle of construction to brush aside words in a statute as being in apposite surpluses, if they can have proper application in circumstances conceivable within the contemplation of the Statute.

75 Section 32 : Meaning of "Ownership" C.I.T. v/s. Jawahar Kala Kendra (2014) 362 ITR 515 (Raj) : (2014) 222 Taxman 0222 (Raj)

Issue :

How the meaning "ownership" for the purpose of Sec. 32 is to be construed for availing depreciation?

Held :

Prior to the constitution of the assessee society the entity was managed by the Government of Rajasthan. On its constitution as a society, all the assets and liabilities were transferred and incorporated in the books of the assesses - society. In respect of the assets, claim for depreciation was made and allowed for assessment year 2005-06 and 2006-07. However, for assessment year 2007-08 the A.O. disallowed the claim on the ground that there was no evidence to prove the change of ownership of the building from the Government of Rajasthan to the assessee – society and in the records, the title still continue to be with the State of Rajasthan.

High Court on the above facts held that :

The Supreme Court in Mysore Minerals Ltd. V/s. C.I.T. (1999) 239 ITR 775 (SC) considered the concept of the term "own," "ownership" and "owners" and observed that the intention of the Legislature in enacting Sec. 32 of the I.T. Act. 1961 would be best fulfilled by allowing deduction in respect of depreciation to the person in whom for the time being rests the dominion over the building and who is entitled to use it in his own right and is using the building for the purposes of his business or profession.

76 Interest on refund ACIT v/s. Kerala Transport Co. (2014) 222 Taxman 149 (Kerala) : (2014) 270 CTR (Ker) 214

Issue :

Whether assessee is entitled to refund in case it was paid against demand or all other excess payments refunded?

Held :

Single Judge has held as under:

The learned Single Judge found that it is clear from Sec. 244 A (1) (b) and the explanation that the department cannot dispute that the assessee is entitled to interest on refund of all payments of tax in excess of actual tax – found due. It is found that if any self – assessed tax paid and adjusted against the demand, was later found to be refunded, then the assessee will be entitled to get interest under Section 244 A (1) (b) of the Act, on such tax adjusted against demand. Accordingly, assessee's writ petition was allowed.

Department carried the matter before Divisional Bench, in which it is held as under:-

The argument is that going by the Explanation to Section 244 A (1) (b) the liability to pay interest is only in respect of the tax paid after the demand is made u/s. 156 of the Act. We do not think that such a differentiation can be made to the aforesaid provision and Explanation does not give a different meaning at all. Any amount due to the assessee under the Act mentioned in Sec. 244(1) clearly takes in all forms of refund, either self assessed tax or tax paid as per notice u/s. 156 of the Act. As far as the explanation is concerned it only indicates the date on which the interest is liable to be paid. That being the position, we do not think that there is any illegality or perversity in the judgment of the learned Single Judge.

Note :

Explanation to sec, 244 A (1) (b) reads as under:

For the purposes of this clause, "date of payment of tax or penalty" means the date on and from which the tax or penalty specified in the notice of demand issued u/s. 156 is paid in excess of such demand.

77 Jobbing and Speculation Business CIT v/s. Ram Kishan Gupta (2014) 222 Taxman 164 (All) : (2014) 361 ITR 387 (All)

Issue :

Whether jobbing is speculative transaction?

Held:

Assessee's loss from "jobbing" was treated as speculative.

Assessee claimed that transactions which were settled otherwise than by actual delivery of shares are fully covered by proviso (c) to Sec. 43 (5) of the Act. The assessee also pleaded that he was asked to deposit turnover fee of jobbing to the Sebi. Delivery has been effected on net basis as per the Stock Exchange guidelines; and hence there was no question of speculation loss.

On above submission, Tribunal held that entire business was non- speculative in nature.

High Court held as under:

"We are thus of the view that the order of the Tribunal following the appeal of the assessee is to be upheld although confined to the ground that the losses suffered by the assessee cannot be termed to be speculative loss by virtue of proviso (c) to Sec. 43(5). Hence Revenue's appeal was dismissed".

Note: Sec. 43(5) Proviso (c) reads as under :-

"A contract entered into by a member of a forward market or a stock exchange in the course of any transaction in the nature of jobbing or arbitrage to guard against loss which may arise in the ordinary course of his business as such member."

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contradictory orders in regard to the same entity and its properties, and in particular, to preserve the steps already taken for reconstruction of a sick company in relation to the properties of such sick company, which may be charged as security with the banks or financial institutions, that Parliament has specifically enacted sub-section (2) to Sec.34 of the RDDB Act. Indeed, the question as to which Act shall prevail must be considered with respect to the purpose of the two enactments; which of the two Acts is the general or special; which is later. It must also be considered whether they can be harmoniously construed.

Normally the latter of the two would prevail on the principle that the legislature was aware that it had enacted the earlier Act and yet chose to enact the subsequent Act with a non obstante clause. In this case, however, the express intendment of Parliament in the non obstante clause of the RDDB Act does not permit the Court to take that view. Though the RDDB Act is the later enactment, Sec.34(2) thereof specifically provides that the provisions of the Act or the Rules made thereunder shall be in addition to, and not in derogation of, the other laws mentioned therein including SICA.

[KSL and Industries Ltd. Vs. Arihant Threads Ltd. and others (2015)(1SCC 166)]

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Do not wait for anybody or anything.
Do whatever you can. Build your hope on none.

Swami Vivekananda

Tribunal News

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Jaimin Jewellery Exports (P.) Ltd. v. ACIT 151ITD357 (Mum)
Assessment year: 2009-10 Order Dated: 12th February, 2014

Basic Facts

The assessee was engaged in the business of import of rough diamond and export of polished diamonds. The assessee entered into forward contract with banks to safeguard against exchange fluctuation and booked a loss on account of loss on foreign currency fluctuations. The AO treated it as a speculative loss. He stated that the said speculative transaction did not fall within the exclusive clauses of section 43(5) and loss on such speculative transaction could not be set off against profit and gains of business, but from that of speculative transaction only. Thus, AO made addition on that amount. On appeal, the Commissioner upheld the order of the AO.

Issue

Whether foreign exchange loss incurred by assessee on account of entering into forward contracts with banks for purpose of hedging loss in connection with his import/export business of diamonds could be held to be a speculative loss?

Held

The Tribunal referred to the guidelines issued by the Reserve Bank of India relating to general principles to be observed for forward foreign exchange contracts and found that that the banks have been permitted to enter into such contracts after thorough verification of documentary evidences, etc. about the genuineness of the underlying foreign currency exposure and the need of hedging of the loss. Further the maturity of the hedge should not exceed the maturity of the underlying transaction. So in view of the underlying risk in import export business due to currency rate fluctuations, the Reserve Bank of India has not only defined but has also allowed the forward contracts relating to foreign exchange derivatives for hedging of such anticipated losses. Even in case of contracts covering export transactions, there is no restriction of rebooking and such contracts may be cancelled, rebooked or rolled over at ongoing rates.

Accordingly in case of import/export business, where the transactions are demonetarized in the foreign currencies and for the purpose of hedging of the anticipated loss resulting from such import-export business and not otherwise, if the assessee enters into a forward contract in foreign exchange, then such forward contracts are to be treated as integral part or incidental to the business of export/ import and cannot be said to be the speculative contracts attracting the provisions of section 43(5). The foreign exchange loss incurred by the assessee on account of entering into forward contracts with the banks for the purpose of hedging the loss in connection with his import/export business of diamonds cannot be held to be a speculative loss rather a business loss which can be set off against profit and gains of business. But the assessee will have to satisfactorily prove that the maturity of the hedge did not exceed the maturity of the underlying transaction and further to explain the requirement/ necessity for premature cancellation of such forward contracts or that such cancellations or re-bookings were done to minimize the anticipated future losses from such transactions. The issue was therefore restored back to the file of the AO to decide the same accordingly after giving proper opportunity to the assessee to represent its case.

62 ITO v. Amity International School 150 ITD 704 (Del)

Assessment Year: 2009-10Order dated: 27th June, 2014

Basic Facts

The assessee filed an e-TDS statement. The AO analyzed such statement and revealed defaults on account of non-payment of TDS on the amount deducted, non/low deduction at prescribed rates and late payment of taxes.

The AO on the basis of justification report held the assessee in default and accordingly directed to pay an amount inclusive of interest.

On appeal, the CIT(A) noted that the assessee in fact had furnished the correction statement before the AO, but, the AO did not accept said statement because the assessee's corrections were not accepted by the NSDL.Further, against the observation of the AO in his order that there was short deduction of tax of 18 persons working with the assessee, the CIT(A) observed that the assessee had in fact furnished copies of 25 challans in support of its contention that there were in fact no short deduction of tax. Therefore, taking into consideration all the aforementioned facts, the CIT(A) directed the AO to verify the assessee's claim and allow credit of the same.The department is in appeal against setting aside of the issue to AO for verification.

Issue

Whether section 251 empowers CIT(A) to remit case back to AO instead of deciding it?

Held

The order appealed before the CIT(A) was passed by the AO under section 201 and that the CIT(A) has been empowered by section 251 (1)(c) to pass such orders as he thinks fit while deciding such an appeal. In the instant case the CIT(A) has observed that the appellant had filed correction statement and furnished relevant documents of TDS to prove its claim before him and he has also taken note of the fact that the AO has not accepted the said document because the appellant's correction statement were not accepted by the NSDL. When the CIT(A) adjudicates an appeal preferred against an order passed under section 201, he draws his power from sub-section (1)(c) of section 251, which entails him to pass any order as he thinks fit and there is no restriction in the said power and therefore he has powers to even set aside the said order impugned before him. However, it is found that in the instant case, the CIT(A) has not set aside the AO's order whereas he has remitted the case back to the file of AO to verify documents produced before him which was filed by the assessee to substantiate its claim and to allow the credit as per law. Therefore, there was no infirmity whatsoever in the direction passed by the CIT(A) and therefore there was no merit in the said appeal preferred by the revenue.

63 Jaguar Enterprises v. DCIT 151 ITD 376 (Del)

Assessment Year: 2008-09 Order dated: 3rd July, 2014

Basic Facts

The assessee is a customs clearing agent. During the year under consideration, the assessee made payments of Godown rent on behalf of its client. The client had reimbursed these expenses after deducting tax at source. The assessee did not offer to tax the amount declared as Reimbursement of expenses included in gross receipts as per TDS certificates. The AO charged 8% profit on reimbursement of 'Godown rent' and accordingly made addition to the total income. The CIT(A) held that there was no income element in this payment of godown rent. He, however, held that the assessee was required to deduct tax at source u/s 194-I of the Act on such payment. Since no tax was deducted at source on it, he made enhancement of income with the equal amount by making disallowance u/s 40(a)(ia) of the Act. The assessee is agitating the above disallowance in the present appeal.

Issue

Whether the provisions of section 40(a)(ia), are applicable to godown rent paid by assessee on behalf of client?

Held

In the instant case, it was found that so far as godown rent is concerned, the assessee merely acted as an intermediary between its customers, being the ultimate importers on one hand and the godown owners on the other. From the invoices raised by Container Corporation of India for the charge of godown rent, it can be seen that the assessee nowhere figures in them inasmuch as only the name of importers are depicted on them.It as an admitted position that the business of the assessee is of custom clearing agent. In that view of the matter, the remuneration allowed by its customers as per the terms of the contracts, is its income. Similarly, expenditure incurred by the assessee for earning such income in his own right and without any obligation or instruction from the clients, is his expenditure. These income and expenses find place on the credit and debit sides of its Profit and loss account. These items of income and expenditure earned/incurred by the assessee in his own capacity, are either includible in the total income or qualify for deduction as per law.The assessee did not claim any deduction for godown rent which was paid by it on behalf of its customers and got reimbursement as such. Neither any expenditure was claimed towards payment of godown rent nor any income was offered on this account. The transaction of actually paying godown rent was for and on behalf of its customers. It was for these customers to claim deduction for the payment of godown rent etc. in their accounts. The godown rent was otherwise not eligible for deduction under any of the sections 30 to 38 of the Act in the hands of the assessee and further the assessee has neither claimed such deduction nor is it lawfully entitled to the same, the natural corollary which follows is that there can be no question of making disallowance u/s 40(a)(ia) of the Act in this regard.Hence the CIT(A) was not justified in making disallowance of the amount of godown rent u/s 40(a)(ia) of the Act as the same was not claimed or allowed as deduction by the assessee.

64 Mindtech (India) Ltd v. ITO [2014] 151 ITD 251 (Bang)

Assessment Year: 2003-04 Order dated: 4th July, 2014

Basic Facts

The assessee is a company engaged in the business of providing software development services. It is a STP unit, which comes under the purview of section 10A scheme. In the return of income originally filed for the year under consideration, the loss was shown by the assessee in its STP unit and after setting off such loss against the interest income earned during the year under consideration, the total income was declared at NIL. The AO allowed the claim of the assessee in the original assessment but he then reopened the assessment u/s 147. In the assessment completed u/s. 143(3) r.w.s. 147 the AO disallowed the set off of 10A unit against interest income and brought to tax the interest income under the head 'income from other source'. On appeal, the CIT(A) upheld the order of the AO on the basis of the decision of the Karnataka High Court in case of CIT v. Yokogawa India Ltd. [2012] 341 ITR 385/21 taxmann.com 154, wherein it was held that section 10A being an exemption provision, income of the 10A unit has to be excluded at source itself before arriving at the gross total income and since this income is not to be included in the income of the assessee at all, there is no occasion to set off the losses of the assessee in respect of its other business against the profits of the exempted unit.

Issue

Whether Loss in section 10A unit can be set off against income from other source?

Held

The assessee has strongly relied on the CBDT Circular No. 07/DV/2013 issued on 16-7-2013, in support of its case and contended that the said Circular, issued by the CBDT after the judgment of the High Court of Karnataka in the case of Yokogawa India Ltd. [2012] 341 TR 385/21 taxmann.com 154 as well as the decision of the Tribunal in the case of Karle International (P.) Ltd. v. Asstt. CIT [2013] 140 ITD 261/29 taxmann.com

9 (Bang.), is beneficial to it and the same therefore, is binding on the revenue authorities. Hon'ble ITAT relying on the various judgments of the Apex court held that the benevolent Circulars issued by the CBDT are binding on the revenue authorities and having regard to the undisputed position that the Circular dated 16.7.2013 issued by the CBDT is beneficial to the assessee on the issue involved in the present case, relating to set off of the loss of 10A unit claimed by the assessee against income from other sources, held that the effect of the said Circular is required to be given, as the same is binding on the revenue authorities. Accordingly, the relevant grounds of the assessee's appeal on this issue were accordingly treated as allowed.

65 **Mitsubishi Corporation India (P) Ltd. v. DCIT [2014] 166 TTJ 385 (Del) Assessment Year: 2007-08 Order dated: 21st October, 2014**

Basic Facts

During relevant year, the assessee made payment to its parent company in Japan for purchase of goods.The AO was of the view that since these vendors had a permanent establishment in India and that the assessee had an obligation to deduct tax at source from the payments made to these non-resident vendors, and, since the assessee has failed to discharge these tax withholding obligations, those payments could not be allowed as a deduction in computation of business income. The DRP set aside objection raised by the assessee.

Issue

Whether since s. 40(a)(i) does not have an exclusion clause similar to second provision to s.40(a)(ia) so far as payments made to non-residents without deduction of applicable tax at source are concerned, there is an element of discrimination in terms of article 24(3) of India-Japan DTAA?

Held

In the present case, there is a situation in which payment has been made to a non-resident taxpayer but the said non-resident taxpayer has taken into account the receipts in question in his business income and has already filed his Income-tax return under section 139(1), a copy of which is also produced by the revenue in support of his contention that the recipient non-resident indeed had a tax liability in respect of these amounts. No disallowance can be made in respect of payment made to a resident assessee, even without applicable deduction of tax at source, as long as related payments are taken into account by the recipients in computation of their income, and taxes in respect of such income are duly paid and related Income-tax returns are duly filed by the resident recipients under section 139(1). However, as section 40(a)(i) does not have an exclusion clause similar to second proviso to section 40(a)(ia), so far as payments made to non-residents, without deduction of applicable tax deduction at source, are concerned, such payments will be disallowable even in a situation, as is the admitted factual position in this case, even when the non-resident recipient has taken into account such payments in computation of his income, has paid taxes on the same and duly filed, under section 139(1), related Income-tax return.

It is also elementary that so far examining discrimination to the non-resident Japanese taxpayers is concerned, the right comparator will be a resident Indian taxpayer.While examining the issue of deduction parity, one has to examine the position of deductibility in respect of a similar payment, i.e. without deduction of tax at source, made to a resident Indian taxpayer. To this extent, in the light of the legal position prevailing as on now, there is indeed an element of discrimination, in terms of Article 24(3) of the India Japan DTAA, in the deductibility of payments made to resident entities vis-à-vis non-resident Japanese entities. Clearly, therefore, it will be contrary to the scheme of the tax treaties in question that if rigour of disallowance of a payment, on account of non-deduction of tax at source from the related payment, is to be relaxed in the situations in which the resident recipient has taken the said amount into account in computation of income, paid taxes on the income so computed and filed, under section 139(1), related Income-tax return, and yet the rigour of disallowance in respect of payments made, without appropriate deduction of tax at source, to the non-residents are concerned, is not relaxed in the cases in which the non-resident recipient has taken such receipts into account in computation of income, paid taxes on the income so computed and filed, under section 139(1), related Income-tax return. Article 24(3) of the India Japan DTAA requires similar relaxation in respect of the rigour of disallowance for payments made to the Japanese entities.

Accordingly, the relaxation under second proviso to section 40(a)(ia) is to be read into section 40(a)(i) as well and it is required to be treated as retrospective in effect in the same manner as second proviso to section 40(a)(i) has been treated. Such an interpretation will lead to the deduction parity as envisaged in Article 24(3) of Indo Japan DTAA which, subject to the exception asset out therein which are admittedly not applicable on the facts of this case, provides that, 'interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned Contracting State'.When one interprets these words in the present context, it follows that the payments made by an Indian enterprise to a resident of Japan shall be deductible, in the assessment of India enterprise, under the same conditions as if the payments were made to the Indian residents. Any deviations from this non-discrimination principle are to be read down in view of clear mandate of section 90(2).In view of the above discussions, second proviso to section 40(a)(ia) is also required to be read into section 40(a)(i), in the cases where related payments are made to the tax residents of Japan, as long as the Japanese tax residents have taken into account the payments made to them by Indian residents, without deduction of tax at source, in their computation of income, paid interest thereon and have filed returns, under section 139(1), in India and in such a case, the payments so made by the Indian enterprise cannot be disallowed in their hands.

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Hughes Systique India (P.) Ltd. v. DCIT [2014] 151 ITD 208 (Del)
Assessment Year: 2009-10 Order dated: 29th August, 2014

Basic Facts

The assessee was incorporated in India in 2005 and is engaged in the business of development of systems and applications software. It is a subsidiary of Hughes Systique Maurities Pvt. Ltd. During the year under consideration, the assessee paid "Management fees" to M/s Hughes Systique Corporationi.e. AE for rendering 'Payroll and related services'. These services were rendered by the AE in USA in respect of the assessee's employees sent there on secondment basis. These services were basically for processing and arranging work permits for the assessee's seconded employees. Processing of payroll of such seconded employees; and Crediting of monthly salaries through money transfer to the accounts of the seconded employees' bank accounts etc. The AO considered such payment as 'Fees for technical services' in terms of Explanation 2 to sec. 9(1)(vii) of the Act and made a disallowance under section 40(a)(i) on the basis that no deduction of tax at source was made by the assessee from such payment to foreign AE. The view taken by the AO was echoed by the DRP. The assessee is aggrieved against such addition.

Issue

Whether the services rendered by assessee's AE located abroad in respect of 'payroll and related services' to employees sent by assessee in USA on secondment basis, are Fees for Technical Services.

Held

On a bare perusal of the nature of 'Payroll and related services'it is evident that the assessee made payment to its AE on account of 'Managerial services' as has also been acknowledged by the AO in the assessment order. As the amount paid is in the nature of 'Managerial services', it is covered within the meaning of 'Fees for technical services'

contd. on page no. 657

Unreported Judgements

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In this issue we are giving gist of an important decision of Ahmedabad ITAT in the case of Tarun V. Shah in the context of Section 263 and Section 10A & 10B of the Act. We hope readers would find it useful.

In the Income Tax Appellate Tribunal
"D" Bench, Ahmedabad

Before Shri Mukul Kr. Shrawat, Judicial Member and
Shri Anil chaturvedi Accountant Member

ITA No.925/Ahd/2014
A.Y.2009-10

Shri Tarun V. Shah	**Vs**	**Commissioner of**
Prop. MP Advisors,		**IncomeTax-I,**
203 Alkapuri Arcade,		**Baroda.**
BWing,R.C. Dutt Road,		
Baroda.		
PAN: AJKPS 9542A		
(Appellant)		(Respondent)

Revenue by : Shri VimalenduVerma,CIT-D.R.
Assessee(s) by : Shri Milin Mehta, A.R

Date of Hearing : 02/01/2015
Date of Pronouncement : 16/01/2015

<u>Gist Only</u>

Facts :

i) In this case, an assessment was made u/s.143(3) dated 17.11.2011.The assessee in individual capacity is earning income from data processing. Facts of the case have revealed that the assessee is engaged in the business of export of internet enabled services, mainly for data processing pertaining to medical and pharmaceuticals Companies. A return of income was filed at Rs.10,38,260/-, wherein claimed a deduction of Rs.3,26,27,651/- u/s.10B of IT Act. The assessment was completed on the same income as declared by the assessee. In the assessment order, the AO has mentioned that the audit report and Form No.56G was filed. At this juncture, it is also worth to mention that apart from these few observations the AO has not discussed anything in the assessment order pertaining to the claim of deduction u/s.10B of IT Act.

ii) The CIT issued notice u/s 263 on the ground that the assesse was granted approval as a 100% EOU by the Director, Software Technology Parks of India (STPI), Gandhinagar for Computer Software and Information Technology enabled services. He further mentioned in the notice that STPI is a society formed under the Software Technology Park Scheme for granting permissions to units engaged in computer software and enabled services.

Explanation -2 (iv) to section 10B of the Act envisages deduction to a 100% EOU approved by the "Board". In assessee's case, the approval was not for an undertaking by the Board as envisaged in section 10B, but for a unit by the society. Further, STPI unit is approved by the Director of STPI under the Ministry of Communication & Information Technology and not by Development Commissioner under Ministry of Commerce and Industries as mentioned in the CBDT instruction dated 9/3/2009. In view of the facts, CIT held an opinion that there is an under assessment to the extent of Rs.3,26,27,651/- while granting deduction to the assesse u/s 10B. The assesse replied to the show cause notice. However, CIT passed an order u/s 263 on the ground that AO has not verified the approval of STPI and without applying his mind he has passed the impugned order. The assessee had in the mean while also alternatively taken a ground before Commissioner that if the deduction is not permissible u/s 10B, he is fulfilling the conditions to get deduction u/s 10A in respect of the same unit and therefore the same should be granted to him u/s 10A of the Act. However, CIT also rejected this argument on the ground that the contentions of the assese is flawed as it would otherwise render one of the sections as superfluous. The CIT ultimately set-aside the order of the AO and directed AO to pass a fresh order by disallowing deduction u/s 10B of the Act. He has also directed AO to examine the case for other years and initiated proceedings for examining the case after giving assesse an opportunity of hearing.

Contentions before Hon'ble Tribunal

On an appeal from the order of the CIT u/s 263, before Tribunal the assessee took following contentions :

i) All the relevant details in respect of claim of deduction u/s 10B were furnished to AO;

ii) In the past such claim was allowed by the department u/s 10B;

iii) Reliance was placed on Delhi High Court decision in the case of Regency Creations Ltd. [ITA No. 69/2008 dated 30/11/2012] and also Valiant Communication Ltd. [ITA No. 2002 of 2010 dated 4/1/2013]. In both these decisions, the Court had directed the AO to look into the alternative claim for benefit u/s 10A and grant the same if the conditions are fulfilled; and

iv) The assese had already filed Chartered Accountant's Certificate in Form No. 56 G, though section 10A envisages certificate in Form No. 56 F, the contents of both the Forms are similar and therefore only on the ground that Form No.56F is not filed, assessee should notlose the benefit u/s 10A.

The DR relied on the order of CIT u/s 263.

Held :

The Hon'ble Tribunal after considering the contentions of both the parties, held as under:

"We have heard both the sides at some length. We have also perused the compilation filed before us in the light of the orders of the Revenue Authorities. As far as the first plank of argument of learned Sr.D.R. is concerned, we find force that in a situation when the admitted factual position was that the order of the AO was a cryptic order without considering the substantial claim of exemption u/ s.10B of Rs.3,26,27,651/- then in our humble opinion such an order can be reviewed by learned Commissioner u/s.263 of IT Act. Although certain notices u/s.143(2)/142(1) were issued but we have found that the issue was not examined in the light of the provisions of Section 10B, Explanation 2(iv) of IT Act by the AO. Facts have revealed that the assessee was granted approval as 100% export oriented unit (EOU) by the Director of the Software Technology Parks of India (STPI) Gandhinagar for IT enabled services. Learned Commissioner has therefore raised objection that STPI was not competent to grant such approval being simply a Society and the approval was required to be granted by Development Commissioner under Ministry of Chemicals and Industry as prescribed in one of the CBDT instruction dated 9th March, 2009. Due to these reasons, we hereby hold that the order passed u/s.263 of IT Act is an order sustainable in the eyes of law.

However, we uphold the order u/s.263 for a limited purpose that the claim of deduction u/s.10B was allowed by AO without proper investigation. But simultaneously we are also of the view that learned Commissioner has exceeded the jurisdiction by unilaterally directing the AO to pass a fresh order by disallowing the claim u/s.10B of IT Act. According to us, learned Commissioner could have examined both the aspects of the issue that whether the assessee is entitled for the exemption as prescribed u/s.10A of IT Act, especially under the circumstances when this legal argument was raised before him. According to us, learned Commissioner could have referred the issue of alternate claim of *exemption u/s.10A back to the AO to be decided afresh after considering the provisions of the Act in the light of the evidences filed. We have formed this opinion on the basis of the two judgments pronounced by Hon'ble Delhi High Court in the case of Valiant Communications Ltd. (supra) and Regency Creation Ltd. (supra), relevant portions already reproduced above. In these two cases Hon'ble Court was of the view that in all fairness if the assessee has claimed a benefit u/s.10B but it pertained to Section 10A then the AO should pass an appropriate order as to whether the benefit u/s.10A could be granted after considering the facts and circumstances in the light of the provisions of the Act. Respectfully following the decisions, we hereby modify the directions of learned Commissioner that instead of disallowing the claim of deduction u/s.10B, the AO is hereby directed to examine the alternate legal claim of the assessee and thereupon pass an appropriate assessment order. Resultantly, the grounds raised by the assessee are hereby partly allowed.*

In the result, the Appeal of the Assessee is partly allowed as directed above."

In the result, though the order u/s 263 was up held by the Tribunal. AO was directed to examine the alternate legal claim of the assesse u/s 10A of the Act by making modifications in the directions of CIT u/s 263 of the Act.

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as per Expl. 2 to section 9(1)(vii) of the Act. Further more, as per the provisions of section 90(2), when a DTAA has been entered into between India and another country for granting a relief of tax, then the provisions of this Act or the DTAA, whichever are more beneficial to the assessee shall apply. Accordingly, it is necessary to examine the DTAA between India and USA. In this regard, it is pertinent to note that whereas sub-section (vii) of section 9(1) deals with 'Fees for technical services' under the Act, its parallel is Article 12 of the DTAA which deals with 'Fees for included services', which term has been defined in para 4 of Article 12. As per the sub-para (b) of para 4 of article 12, it can be seen that these are to 'make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.' The above services, on a broader perspective, can be designated as technical or consultancy services. In sharp contrast to Explanation 2 to section 9(1)(vii), the managerial services are absent as per article 12(4) of the DTAA. As it is not the case of the AO that either the foreign AE carried on business in India through a permanent establishment or such payment was attributable to any permanent establishment, obviously the operation of article 7, dealing with 'Business profits', has to be ruled out. Once the amount does not fall within the four corners of article 12 of the DTAA and further article 7 has no application for the reasons discussed, the natural corollary which follows is that the amount is not chargeable to tax in the hands of the foreign AE as per the DTAA. As noticed above that the provisions of the DTAA or the Act, whichever are more beneficial to the assessee, are to be applied. Albeit the amount is chargeable to tax as per section 9(1)(vii) of the Act in the hands of the foreign AE on standalone basis, but going by article 12(4) of the DTAA, it is clear that the payment cannot be considered as 'fees for included services' so as to be charged to tax in the hands of foreign AE. Since the payment is not chargeable to tax the impugned order is, therefore, reversed to this extent and the disallowance made under section 40(a)(i) is directed to be deleted.

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Controversies

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Whether waiver of loan taken for acquiring Fixed Asset is taxable under the Income Tax Act, 1961? (An update)

Issue:

X Ltd acquired Fixed Asset and for the purpose obtained term loan of Rs. 5 crores in A.Y. 2001-02. However company went into financial difficulties and hence CDR was negotiated with the bank and the loan of Rs. 3 crores was waived and interest of Rs. 50 lacs were waived in A.Y. 2011-12. The waiver of interest was credited by the Assessee in P & L a/c while waiver of loan of Rs. 3 crores was credited to Capital Reserve. The AO was of the view that the waiver of loan is taxable u/s 5 or u/s 41(1) or u/s 28(iv).

Proposition:

It is submitted that waiver of loan is capital receipt not liable to tax under any of the section mentioned by the AO.

View Against the proposition:

It is submitted ed that the Hon'ble High Court of Bombay in the case of **Solid Containers Ltd. Vs. DCIT Mumbai (2009) 178 taxman 192** has dealt with exactly the similar issue and has given its decision in the favour of department and against the assessee.

The Hon'ble High Court of Bombay has given its decision after considering the decision of Hon'ble Supreme court in the case of **CIT vs. TV Sundram Iyengar & Sons Ltd., 88 Taxman 429.** The issue in this referred case of **Solid Container Ltd. Vs DCIT** was that the assessee had taken a loan from one party during the previous year for business purpose which was written back in the relevant assessment year as a result of consent terms arrived at between the party and the assessee. The assessee claimed that the said loan was the capital receipt and was not claimed as deduction form the taxable income as expenses and therefore would not come u/s. 41(1). The AO rejected the contention of the assessee on the ground that credit balance written back was income of the assessee in view of the fact that it was again directly arising out of business activity of the assesseee and was liable to tax u/s 28 of the Act. On appeal, the CIT(A) upheld the order of the AO. On second appeal the Tribunal in view of decision of Hon'ble Supreme Court in the case of CIT Vs TV Sundram Iyengar & Sons Ltd. confirmed the order of the CIT(A). The matter went to the Hon'ble High Court of Bombay. The Hon'ble High Court of Bombay decided the issue in the favour of the Department and against the assessee. As per the Hon'ble High Court of Bombay, the Hon'ble Supreme Court in the case of **Sundram Iyengar & Sons Ltd.** (supra) has held that if an amount is received in the course of a trading transaction, even though it is not taxable in the year of receipt as being of capital character, yet the amount changes its character when the amount becomes the assessee's own money because of limitation or by any other statutory or contractual right. The Hon'ble Supreme Court was of the view that when such a thing happens/ common sense demands that the amount should be treated as income of the assessee. The Hon'ble Supreme Court has further held that in view of this settled position of law and the facts of the instant case, no question of law, much less substantial question of law, arose for consideration in the instant appeal and therefore same was to be dismissed in limine. The Hon'ble High Court of Bombay in its decision in the case of Solid Container Ltd. (supra) has incorporated the decision of Hon'ble Supreme Court.

For reference, the decision of Hon'ble Supreme Court in the case of **CIT Vs TV Sundram lyengar & Sons Ltd.** is reproduced hereunder:"

" The principle laid down by Atkinson, J. applies in full force to the facts of this case. If a common sense view of the matter is taken, the assessee, because of the trading operation, had become richer by the amount which it transferred to its profit and loss account. The moneys had arisen out of ordinary trading transactions. Although the amount received originally was not of income nature, the amounts remained with the assessee for a long period unclaimed by the trade parties. By lapse of time, the claim of the deposit became time-barred and the amount attained a totally different quality. It became a definite trade surplus, Atkinson, J. pointed out that in Morley's case (supra) no trading asset was created. Mere change of method of book-keeping had taken place. But, where a new asset came into being automatically by operation of law, common sense demanded that the amount should be entered in the profit and loss account for the year and be treated as taxable income. In other words, the principle appears to be that if an amount is received in course of a trading transaction, even though it is not taxable in the year of receipt as being of capital character, the amount changes its character when the amount becomes the assessee's own money because of limitation or by any other statutory or contractual right. When such a thing happens, common sense demands that the amount should be treated as income of the assessee.

In the present case, the money was received by the assessee in course of carrying on his business. Although it was treated as deposit and was of capital nature, at the point of time, it was received, by efflux of time the money has become the assessee's own money. What remains after adjustment of the deposits has not been claimed by the customers. The claims of the customers have become barred by limitation. The assessee itself has treated the money as its own money and taken the amount to its profit and loss account. There is no explanation from the assessee why the surplus money was taken to its profit and loss account even if it was somebody else's money. In fact, as Atkinson, J. pointed out that what the assessee did was the common sense way of dealing with the amounts." (p.437) (of Taxman)"

After considering the above decision of Hon'ble Supreme Court in the case of **TV Sundram Iyengar & Sons Ltd.**, the Hon'ble Bombay High Court has given its decision in the case of **Solid Containers Ltd. Vs DCIT** and the same is also reproduced hereunder for reference:

"The present appellant can hardly drive any advantage from the case of Mahindra & Mahindra Ltd. (supra). As in that case a clear finding was recorded that the assessee continued to pay interest at the rate of 6 per cent for a period of 70 years and the agreement for purchase of toolings was entered into much prior to the approval of loan arrangement given by the Reserve Bank of India. Therefore, the loan agreement, in its entirety, was not obliterated by such waiver. Secondly, the purchase consideration related to capital assets. The toolings were in the nature of dies and the assessee was a manufacturer of heavy vehicles. The import was that of plant and machinery and the waiver could not constitute business, The facts of the present case are entirely different inasmuch as it was a loan taken for trading activity and ultimately, upon waiver the amount was retained in business by the assessee. Thus, the principle stated by the Supreme Court in the case of T.V.Sundaram Iyengar & Sons Ltd. (supra) would be squarely applicable to the facts of the present case. The amount which initially did not fall within the scope of the provisions rendering it liable to tax subsequently have become the assessee's income being part of the trading of the assessee. Similar view was also taken by a Bench of Madras High Court in the case of **CIT v. Aries Advertising (P.) Ltd. [2002] 255 ITR 510** . The court took the view that the assessee because of trading operation became richer by the amount which had been transferred and/or retained in the Profit and Loss Account of the assessee.

In view of the above settled position of law and the facts of the present case, we are of the considered view that no question of law much less substantial question of law arises for consideration in the present appeal. Appeal dismissed in limine."

View in Favour of the proposition:

It is submitted in the following cases, it has been clearly held that except for the interest, the principal amount remitted is not taxable.

- **i CIT vs. Phoolchand Jivram 131 ITR 37 (Delhi)**
- **ii Chetan Chemicals Ltd. 267 ITR 770 (Guj.) (Jurisdictional High Court)**
- **iii CIT vs. Toosha International Ltd. (2009) 176 Taxman 187 (Delhi)**
- **iv Mahindra & Mahindra Ltd. vs.CIT (2003) 231 ITR 501 (Bombay)**

Let me now refer to the decision of their lordships of Gujarat High Court in the case of Chetan Chemicals Ltd. which reads as under:

" On a reading of the provisions, it is apparent that before the section can be invoked, it is necessary that an allowance or a deduction has been granted during the course of assessment for any year in respect of loss, expenditure or trading liability which is incurred by the assessee, and subsequently during any previous year the assessee obtains, whether in cash or in any other manner, any amount in respect of such trading liability by way of remission or cessation of such liability. In that case, either the amount obtained by the assessee or the value of the benefit accruing to the assessee can be deemed to be the profits and gains of business or profession and can be brought to tax as income of the previous year in which such amount or benefit is obtained. In the facts of the case on hand," without entering into the aspect as to whether the liability to repay the loans would be a trading liability or not it is an admitted position that there has been no disallowance or deduction in any of the preceding years and hence, there is no question of applying the provisions as such."

Summation:

Recently I.T. Dept. has started unsettling the settled issue that the waiver of loan cannot be taxed u/s. 41(1) nor u/s. 28 of the I.T. Act, 1961.

1] is only the benefit of a cessation or remission of liability received by an assessee in respect of an expenditure claimed as a deduction in the past. When an assessee takes a loan, there is no question of claiming any expenditure as deduction. So, the provisions of section 41 [1] does not come in to play, when the loan is subsequently waived by the lender.

The issue that survives is whether the benefit of the loan waiver can be taxed as business income u\s 28 [1][iv]. Section 28 [1][iv] subjects to tax as business income 'the value of any benefit or perquisite, whether convertible in to money or not, arising from business or the exercise of profession.

2] In CIT v. T.V. Sundaram Iyengar and Sons P. Ltd. [1996] 222 ITR 344 (SC) where unclaimed balances in deposits received by customers not claimed by them was credited to the profit and loss account, from such amount was held liable to tax, since these claims were barred by limitation by taking what the Supreme Court called "a common sense view of the matter" on the ground that though it did not have the character of income at the time of receipt, the lapse of time made it a "definite trade surplus". Only a few cases were discussed and the Supreme Court was more led by its own decision in Punjab Distilling Industries Ltd. v. CIT [1959] 35 ITR 519 (SC), which, however, related to a case of bottle deposit and could have, therefore, been distinguished, since the depositor was eligible for return of deposit only where the bottles, which were containers were returned.

3] Where the loan borrowed for purchase of capital asset was waived, the amount was sought to be assessed under section 41(1) in Fidelity Textiles P. Ltd. v. Asst. CIT [2008] 305 ITR (AT) 97 (Chennai). Though loan amount was not allowed as a deduction, the argument was that it could be taxable even independently of section 41(1). It was decided that since the loan was for acquiring a capital asset, it could only be a capital receipt. The purpose of loan is, however, immaterial, since waiver of loan would not have been otherwise been assessable, but the decision that it cannot be taxed accords with law. Since a loan amount on waiver does not have the character of income, as it has not been allowed as a deduction as held in Coastal Corporation v. Jt. CIT[2008] 307 ITR (AT) 78 (Visakhapatnam).

4] It is established law that section 41(1) is intended to neutralize a liability, which had been allowed as a deduction in the computation of an assessee's income, where such liability does not become payable either due to remission on the part of the creditor or the liability itself otherwise ceases. The assessee had made a journal entry adjusting investments by Rs.50 lakhs by a provision for contingencies at the time of takeover of assets consequent on a scheme of arrangement approved by the court. But later it was squared up, as it was no longer necessary. When the amount of Rs.50 lakhs had not been charged to the profit and loss account, the question of any liability ,when the contingency did not materialize and the provision was treated as no longer required, section 41(1) could have no application as was decided in CIT v. SIEL Holdings Ltd. [2012] 348 ITR 447 (Delhi).

5] Section 41(1), would have application only in respect of an amount, which had been allowed as a deduction on cessation of liability. This established law was followed in Asst. CIT v. Rollatainers Ltd. [2011] 7 ITR (Trib) 665 (Delhi). The Assessing Officer in this case had taken the view that the assessee had not established that no interest income had been allowed in computation of income for earlier years. Such matters are not decided with reference to mere burden of proof, when the records of the Assessing Officer himself would indicate the correct position one way or the other. It cannot be said that the Assessing Officer had no responsibility in the matter. When the Commissioner (Appeals) found that there was no scope for disallowance after examining the facts, the Tribunal cannot interfere with such decision, as was decided in this case.

6] In CIT v. Chetan Chemicals Pvt. Ltd. [2004] 267 ITR 770 (Guj.), the High Court held, that section 41(1) cannot rope in remission of liability, which has not been allowed as a deduction. Where remission was not only interest, but also principal amount of borrowing, it made an observation, that the asessee was not in money lending business, so that the question of the principal amount being considered for assessment cannot arise. Probably, the impression is that for money lending, money is stock-in-trade, so that even the principal amount waived could be treated as income. But such an inference does not readily follow, because such waiver, whether of principal amount of interest would still be a windfall, which could be treated as income only if it could be deemed as income under section 41(1) of the Act. Language of section 41(1) does not make an exception for money lending business, so that it should make no difference whether the assessee was in money lending business or otherwise.

Referring to the above decisions, the Delhi High Court in the case of Logitronics P. Ltd. vs. CIT[2011] 333 ITR 386, 402 {Del}has held that the question whether waiver of loan is income or not depends on whether loan was used for capital or revenue purposes. If the loan was taken for acquiring a capital asset, the waiver thereof would not amount to any income exigible to tax u/s 28(iv) or 41(1).On the other hand, if the loan was taken for a trading purpose and was treated as such from the very beginning in the books of account, its waiver would result in income more so when it was transferred to the P&L A/c in view of Sundaram Iyengar 222 ITR 344 (SC).

Let me now refer to the decision of their lordships of Bombay High Court in the case of CIT vs. Xylon Holding Pvt. Ltd., I.T. Appeal no. 3704 of 2010 decided on 13.9.12. Their lordships of Bombay High Court held as under :

We have considered the submissions. The issue arising in this case stand covered by the decision of this Court in the matter of Mahindra & Mahindra (supra). The decision of this court in the matter of Solid Containers (supra) is on completely different facts and inapplicable to this case. In the matter of

contd. on page no. 667

Judicial Analysis

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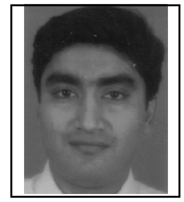

Meaning of the term "Month" under the Income Tax Act

CIT *v.* Arvind Mills Ltd. [2011] 16 taxmann.com 291 (Guj.)

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9. Considering the controversy involved, we frame following substantial questions of law for consideration.

"Whether in facts and in circumstances of the case the Appellate Tribunal was right in law in reversing the orders passed by the CIT (Appeals) and thereby holding that the assessee was entitled to interest under Section 244A of the Act for both the months when the tax was paid and when the tax refundable was adjusted irrespective of the period between such events?"

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25. Section 3(35) of General Clauses Act reads as under,

"3(35) "month" shall mean a month reckoned according to the British calender;"

26. From the above statutory provisions, it can be seen that Section 244A provides for payment of interest where refund of any amount becomes due to the assessee under the said Act. In such a case the assessee is entitled to receive in addition to the refund amount, simple interest at the prescribed rate. Clause (b) of section (1) of Section 244A of the Act in particular provides that such interest shall be calculated at the rate of one-half per cent for every month or part of a month comprised in the period or periods from the date or, as the case may be, dates of payment of the tax or penalty to the date on which the refund is granted. In the other words, interest at the prescribed rate is to be paid to the assessee on the refund of tax paid for every month or part of a month comprised in the period from the date of payment of the tax to the date on which refund is granted.

27. Rule 119(A) of the said Rules further clarifies that in calculating the interest payable by the Government to the assessee under any provision of the act where interest is to be calculated for every month or part of a month comprised in a period, every fraction of month shall be deemed to be full month and the interest so calculated.

28. By reading of Section (1) of Section 244A of the Act with Rule 119(A) of the said Rules would bring about situation when an assessee who has paid the tax and such tax is to be refunded, the assessee is to be paid interest at the prescribed rate for every month or part of a month comprising the period from the date of payment of the tax to the date on which the refund is granted. If such period is a fraction of a month, the same shall be deemed to be a full month and the interest shall be calculated for the entire month accordingly. In other words while calculating the period for grant of interest, if there is any fraction of a month, such fraction shall be ignored and instead, the assessee shall be paid interest for the full month.

29. So much is clearly emerging from the plain language used in the statutory provisions noticed by us. The case of the assessee however is that the word 'month' should be considered as per British Calender as defined in Section 3(35) of the General Clauses Act and accordingly if there is a fraction of a month on either side of the events i.e. payment of tax or refund thereof, both fractions should be considered as full months and for both months the assessee must be held entitled to receive interest.

30. First and foremost it is not in dispute that term month has not been defined in the Act. Ordinarily, therefore, the definition of term month contained in General Clause Act would be a useful guide in the present case also. However, Section 3 of the General Clauses Act which is a definition section itself starts with rider i.e. "In this Act, in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context ...." Therefore if there is anything repugnant in Section 244A of the Act, the definition contained in Section 3(35) of the General Clauses Act would not be useful. We may also note that the decisions sought to be relied on by learned counsel for the respondents with respect to applicability or otherwise of the definition of the term 'month' contained in Section 3(35) of the General Clause Act was examined in the background of the provisions contained in Section 271(1)(a) of the Act.

31. Word 'month' is described in Webster's Third New International Dictionary (unabridged) as a measure of time corresponding or nearly corresponding to the period of time moon's revolution or as one of the twelve portions into which the year is divided in the Gregorian calender as also a period of time about the length of a lunar month but not necessarily coinciding with a calender month. The same dictionary also explains term 'calender month' as one of the months as named in the 'calender' or the period from a day of one month to the corresponding day of the next month if such exists or if not to the last day of the next month.

32. In 'Judicial Officer's Law Lexicon' by Justice C.K.Thakker term calender month is explained as under:

"A period of time consisting of 30 days in April, June, September and November; of 31 days in the remainder of the months, except February, which consists of 28 days, except in leap-year, when the intercalary day is added, making 29 days.

33. In Judicial Dictionary by Aiyar's, the term 'calender month' is described as a legal and technical term in computation the time by calender months, the time must be reckoned by looking at calender and by not computing test.

34. Black' s Law Dictionary describes the term 'month' as one of the twelve periods of time in which the calender is divided, any time period approximating 30 days.

35. In Law. Lexicon by T.P.Mukherjee [5th Edition], it is stated "the word 'month' would in its ordinary acceptance, mean a 'calender month' and not a 'lunar month'.

36. What is to be ascertained in the present case is as to which definition of term 'month' shall have to be adopted for Section 244A(1) of the Act. In other words the question is, should the definition of term "month" be adopted from General Clauses Act, or not. This exercise shall have to be done on the basis of relevant statutory provisions and the intention of the legislature to provide interest to the assessee whose tax paid is found refundable at a later date.

37. To our mind the words appearing in sub-section (1) of Section 244A "comprised in a period" are significant. In clause (b) of section 244A(1) it is provided that the interest shall be calculated at the prescribed rate for every month or of part of a month comprised in the period from the date the tax is paid to the date on which refund is granted. Similarly, in Rule 119(A) of the Rules, in clause-b thereof, it is provided that every month or part of a month comprised in a period, fraction of a month shall be deemed to be a full month. Therefore, in order to ascertain for how many months assessee would be entitled to receive interest, the number of months comprised in the period shall have to be found out. In this context, the term 'month' in our opinion, must be given the ordinary sense of the term i.e. 30 days of period and not the British calender month as defined under Section 3(35) of the General Clauses Act.

38. We are of the opinion that the definition contained in Section 3(35) of the General Clauses Act defining the term 'month' cannot be adopted for the purpose of sub-section (1) of Section 244A of the Act. Such importation of the definition would lead to anomalous situation. For example, the assessee who pays tax on 1st January of a particular year and is granted refund on 28th of February of the same year, would be entitled to receive interest for two months. If the contention of the assessee in the present case is accepted, in a case where the assessee pays tax on 31st January and is granted refund on 1st February of the same year, shall also be entitled to interest for two full months. This would be so because the assessee contends that for the purpose of sub-section (1) of Section 244A the term 'month' should be understood as British Calender month and since Rule 119(A) of the Rules provides for ignoring a fraction of month and granting interest for the full month instead, the assessee in the second example given above should receive interest for month of January as well as for the month of February. To our mind such interpretation would only lead to anomalous situation and should therefore be avoided.

39. As already noted earlier, various decisions cited before us adopting the definition of term month contained in section 3(35) of the Act were rendered in the background of penal provisions contained in Section 271(1)(a) of the Act. The said provision prescribes penalty for non-filing or late filing of returns and the penalty is to be calculated on every month of such default. Under this background various Courts were of the opinion that the term 'month' must be understood as defined under Section 3(35) of the General Clauses Act. The Courts were of the opinion that there is nothing repugnant in Section 271(1)(a) of the Act so as to reject the applicability thereof. In the present case, however, we find that there are inbuilt indications why the term month must not be understood as British calender month. Any other interpretation as already observed would lead to anomalous situation.

40. Before closing we may also notice the decision of the Bombay High Court in the case of *Asian Paints Ltd.* (*supra*) which was arising in the background of controversy whether the tax calculated by an authorized agent of the Central Government would be sufficient to complete the tax payment or whether any delay on the part of such authorized agent to credit such amount to the account of Central Government would be relevant factor for calculating interest under Section 244A of the Act. It was the case wherein the assessee deposited a cheque for the amount of tax demanded with authorized agent of Central Government on 29th December, 2003 and account of assessee was debited to that extent on 30th December, 2003 but credited to the Central Government account only on 1st January, 2004. The question was can the tax be said to have been paid on 30th December or on 1st January. Of course after holding that the tax was paid on 31st December 2003, the High Court further went out to observe that as per the Rule 119(A)(b) of the said Rules, upon refund, the assessee had to be granted interest for the entire period of December, 2003. We cannot, however, read such observation as the ratio of the decision of the Court. What was the controversy and what was decided by the Court was the actual date of payment of the tax i.e. 30th December, 2003 when the assessee's account was debited and not 1st January, 2004 when such amount was credited to the account of the Central Government. Any further observation regarding the eligibility of the assessee to receive interest for full month of December, 2003 must, therefore, be understood as passing remarks. This issue was not be debated before the Bench and the observations made hereinabove cannot be understood as ratio of the decision.

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KesharwaniZardaBhandar*v.* CIT{ [2013] 30 taxmann.com 387 (Allahabad)}

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2. The Income-tax Appellate Tribunal has referred the following questions of law to be considered by the court under section 256(1) of the Income-tax Act, 1961 ("the Act") :

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(*v*) Whether 'one month' means calender month, of 30 days in law, and whether under the provisions of the Income-tax Act for the charge of interest under section 139(8), the amount deposited prior to March 31, 1979, as advance tax but after the due date cannot be considered for the purposes of the computation of interest.

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16. On question No. (iv) we find that the charging interest for four months was a clear error of law on the facts of the case in which the Assessing Officer had failed to take into account that the return was due to be filed by July 31, 1979. Whereas it was filed on December 31, 1979, by taking the month to mean a period of 30 days, interest was to be required to be charged for five months and not for four months. The jurisdictional High Court in *Laxmi Rattan Cotton Mills Co. Ltd.* (*supra*) had clearly held that the word "month" is to be taken to mean a period of 30 days and thus the delay for charging interest was of five months and not of four months. The mistake, therefore, was obvious and apparent to on the record and was rectifiable mistake for which proceedings under section 154 could be taken.

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CIT *v.* Laxmi Rattan Cotton Mills Co. Ltd. [1974] 97 ITR 285 (ALL.)

C.S.P. Singh, J.— The Income-tax Appellate Tribunal, Allahabad, has under section 256(1) of the Income-tax Act, 1961, referred the following two questions for our opinion:

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that the word 'month' occurring in section 271(1)(*a*)(*i*) referred to English calendar month?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that the penalty should be calculated with reference to the tax found due on the date of the completion of the assessment after deducting, *inter alia*, taxes paid by the assessee as advance tax and tax as per provisional assessment?"

The assessee did not file his return for the assessment year 1958-59 by November 15, 1958, up to which date the Income-tax Officer had allowed time. The return was filed on February 18, 1959 after about three months of the expiry of that date. After the assessment had been completed on April 1, 1962, the Income-tax Officer initiated penalty proceedings under section 271(1)(*a*) of the Income-tax Act, 1961, and after giving an opportunity to the assessee, imposed a penalty of Rs. 1,00,348.

The assessee, thereafter, filed an appeal before the Appellate Assistant Commissioner. The appellate authority rejected the contention of the assessee that the penalty under the new Act could not be imposed for a default committed under the old Act. On merits, the Appellate Assistant Commissioner concluded that there was no reasonable cause for the default, but it accepted the assessee's contention that the period of default should be counted from the date up to which the assessee was allowed time to file its return. Thereafter, the Appellate Assistant Commissioner worked out the period of default to be of three months and three days, and held that the assessee was liable to penalty under section 271(1)(*a*)(*i*) of the Act for a default of three months, at the rate of 6% (3×2 of the total tax). Two appeals were thereafter filed, one by the department and the other by the assessse. The appeal filed by the department was dismissed, inasmuch as the Tribunal took the view that the appeal had been filed by the department in the penalty matter only as it has not accepted the decision of the Appellate Assistant Commissioner in the quantum appeal, and the department's appeal to the Tribunal in that quantum matter had already been dismissed.

In respect of two questions which have been referred to us, it was urged by the assessee that inasmuch as the word "month" had not been defined in the Act, the meaning given to that word in section 3(35) of the General Clauses Act should be adopted, and the word "month" should be taken to be the English calendar month, and as such the period of default committed by the assessee would be of only two months, inasmuch as a part of November and a part of February in which default occurred was not for the whole calendar month, and had as such to be excluded. As regards the amount of penalty that could be imposed for the default, it was contended that while computing "the tax payable" on which the penalty had to be imposed, the advance tax and the taxes paid as per provisional assessment had to be deducted, and the penalty had to be worked out on the basis of this reduced amount. The Tribunal held that the word "month" occurring in section 271(1)(*a*)(*i*) of the Act meant a full calendar month, and inasmuch as the assessee was in default for only two full calendar months, *i.e.*, December and January, the penalty could be levied only in respect of two months' default. It also held that inasmuch as the penalty is imposable under section 271(1)(*a*) of the Act, on the basis "of tax, if any, payable" and not on the total amount of tax, the penalty that was imposable on the assessee was to be calculated with reference to tax found due on the date of the completion of the assessment, subject to its final computation by the appellate authorities.

Inasmuch as the answer to the question referred depends on the interpretation to be put on section 271(1)(*a*)(*i*) of the Act, we are extracting that section:—

"In the cases referred to in clause (*a*), in addition to the amount of the tax, if any, payable by him, a sum equal to two per cent. of the tax for every month during which the default continued, but not exceeding in the aggregate fifty per cent. of the tax."

We propose to answer the second question first. This question now stands concluded by the decision of the Supreme Court in Civil Appeal No. 497 of 1970 decided on January 29, 1973 (*Commissioner of Income-tax* v. *Vegetable Products Ltd.* [1973] 88 ITR 192) ,wherein it has been held that the penalty leviable has to be calculated after deducting amounts of tax already paid, and not with reference to the gross tax assessed.

Coming now to the first question, section 271(1)(*a*)(*i*) of the Act is a penal provision, and in the event of the default contemplated by this section, an assessee becomes liable to payment of penalty at the rate of 2% of the tax for "every month during which the default continued". The word "month" has not been defined in the Act. The Tribunal has, however, taken this word to mean "a calendar month" by referring to section 3(35) of the General Clauses Act, which defines "a month" as meaning a month reckoned according to the English calendar month. This definition, however, in view of the opening part of section 3 of the General Clauses Act, can be read into a statute provided there is nothing repugnant in the subject or context of the statute. It as such has to be seen whether the meaning given in the General Clauses Act to the word "month" is repugnant to the context. It is settled that the word "month" is normally understood to mean "a lunar month", *i.e.*, a period of thirty days. (See *Simpson* v. *Margitson*[1847] 11 QB 23, 31, *Ryalls*v. *R.* [1848] 11 QB 781, 798, *Rogers* v. *Kingston-upon-Hull Dock Co.* [1864] 4 New Rep. 494, 496, *Schiller* v. *Peterson & Co. Ltd.* [1924] 1 Ch. 394, 420, 421 (CA), *Phips (P.)& Co.* (*Northampton and Towcester Breweries*) *Ltd.* v. *Rogers* [1925] 1 KB 14, 26, 27 (CA) and *South British Fire and Marine Insurance Co.* v. *BrojoNathShaha*[1909] ILR 36 Cal. 516 [FB]. Although these cases do not deal with the interpretation to be put on the word "month" as occurring in a statute, and relate to cases relating to contract, they throw light on the meaning of the word as commonly understood. This court in the case of *MisriLal*v. *Jwala Prasad* [1962] ILR 1 All. 761 has, however, taken the view that, in some cases, the word "month", as occuring in a statute, may be taken to mean a period of thirty days. On an examination of the scheme and purpose of this section, we are of the view that the word “month” as occurring in this sub-section must be taken to mean a period of thirty days. This provision was enacted for the purpose of imposing a penalty on an assessee who had not filed his return during the prescribed time, and was enacted to serve as a deterrent for such lapses. The penalty is imposable for every month during which the default continues. If the meaning ascribed to this word in the General Clauses Act is adopted, it may in some cases lead to a defaulting assessee escaping penalty altogether, in spite of default. To take an illustration: Let us assume that time is given to an assessee up to the 30th of January in a particular year for filing a return and he defaults. He, thereafter, files his return on the 27th February. If the word “month” occurring in the section is taken to mean a full calendar month, the assessee in such a case would not be liable for any amount of penalty. Such a result is not contemplated by the language of the sub-section, for the sub-section in clear and unambiguous terms makes every assessee liable for penalty during the period of default. In the circumstances, it is not appropriate to import the meaning of the word “month” given in the General Clauses Act in the sub-section, for it does not fit in with the context and scheme of the section, and results in some cases in setting at naught the purpose of the enactment. We are thus of the view that the Tribunal was not right in holding that the word “month” occurring in this sub-section refers to the English calendar month.

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contd. from page 661

Solid Containers (supra) the assessee therein had taken a loan for business purpose. In view of the consent terms arrived at, the amount of loan taken was waived by the lender. The case of the assessee therein was that the loan was a capital receipt and has not been claimed as deduction from the taxable income in the earlier years and would not come within the purview of Section 41(1) of the Act. However, this Court by placing reliance upon the decision of the Apex Court in the matter of CIT v. T.V. Sundaram Iyengar and Sons Ltd. 222 ITR 344 held that the loan was received by the assessee for carrying on its business and therefore, not a loan taken for the purchase of capital assets Consequently, the decision of this Court in the matter of Mahindra and Mahindra Limited (supra) was distinguished as in the said case the loan was taken for the purchase of capital assets and not for trading activities as in the case of Solid Containers Limited (supra). In view of the above, the decision of this Court in the matter of Solid containers Limited (supra) will have no application to the facts of the present case and the matter stands covered by the decision of this Court in the matter of Mahindra & Mahindra Limited (supra). The alternative submission that the amount of loan written off would be taxable under Section 28(iv) of the Act also came up for consideration before this Court in the matter of Mahindra & Mahindra Limited (supra) and it was held therein that Section 28(iv) of the Act would apply only when a benefit or perquisite is received in kind and has no application where benefit is received in cash or money.

In view of this appeal being covered by the decision of this Court in the matter of Mahindra & Mahindra Ltd. (Supra), no substantial question of law arises and both the questions are dismissed.

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Overview of BEPS projectand Capsulization of Action Plan 13- Revised TP Documentation

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1. *Emergence of Base Erosion and Profit Shifting ('BEPS') project*

"BEPS relates to a loss of substantial corporate tax revenue because of planning aimed at eroding the taxable base and/or shifting profits to locations where they are subject to a more favourable tax treatment."
OECD report 'Addressing BEPS', released February 2013

The OECD, in a singe sentence, has succinctly defined the concept of BEPS and identified the concern of governments and tax administrations globally.

Evidently, the pace of integration of national economies and markets in recent years has increased substantially and in such an increasingly interconnected world, domestic tax laws of countries have not always kept pace with global corporations and the rise of the digital economy, leaving gaps that can be exploited to generate double non-taxation. This has ultimately encouraged the tax planners to identify and exploit legal arbitrage opportunities within the boundaries of acceptable tax planning.

Eventually,this has opened up opportunities for Multinational Enterprises ('MNEs') to greatly minimise their tax burden which has ultimately impacted the following stakeholders of all countries the most:

(i) Governments - *Governments have to cope with less revenue and a higher cost to ensure compliance. In developing countries, the lack of tax revenue leads to critical under-funding of public investment that could have helped to promote the economic growth.*

(ii) Domestic companies/ businesses - *Corporations that operate only in domestic markets, including family-owned businesses or new innovative companies, have difficulty competing with MNEs that have the ability to shift their profits across borders to avoid or reduce tax and thereby fair competition is harmed.*

(iii) Individual taxpayers - *When tax rules permit businesses to reduce their tax burden by shifting their income away from jurisdictions where income producing activities are conducted, other taxpayers in that jurisdiction bear a greater share of the burden.*

In nutshell, BEPS connotes to tax planning strategies that MNEs use to exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax jurisdictions where there is little or no economic activity, resulting in little or no overall corporate tax being paid.BEPS is of major significance for developing countries due to their heavy reliance on corporate income tax, particularly from MNEs.

Apprehending an exigency to tackle the BEPS issue, G-20[1] summit held at St. Petersburg in 2012, leaders from different economies of the world, directed the Organization for Economic Co-operation and Development (OECD) to frame guidelines in relation to this growing issue of BEPS. The core objective of framing such rules is to call for the radical changes to the current tax and law mechanism and adoption of consensus-based approaches, including anti-abuse provisions, designed to prevent and counter BEPS.

Pursuant to the request from G-20 leaders and recognising the importance of borderless digital economy, the OECD initiated the BEPS project wherein it had proposed to develop a new set of standards which will specificallyprovide countries with domestic and international instruments that will better align rights to tax with economicactivity and to prevent BEPS.

Considering the same, the OECD had identified the 15 specific Action plans required necessary to equip the Governments with domestic and international instruments to prevent corporations from paying little or no taxes. Additionally, combined all the 15 Action Plans, this will give countries the tools they need to ensure that profits are taxed where economic activities generating the profits are performed and where value is created, while at the same time give business greater certainty by reducing disputes over the application of international tax rules, and standardising requirements.

We have capsulized below a brief objective of Action plans and their expected deliverable date:

	Action Plan	**Objective**	**Deadline**
1	Digital Economy	Identify the main difficulties that the digital economy poses for application of existing international tax rules and develop detailed mechanism to address these difficulties	Sep-14
2	Neutralise the Effects of Hybrid Mismatch Arrangements	Develop model treaty provisions and recommendations regarding the design of domestic rules to neutralize the effect of hybrid instruments and hybrid entities	Sep-14
3	Strengthen Controlled Foreign Company ('CFC') Rules	Develop recommendations regarding the design of CFC rules	Sep-15
4	Limit Base Erosion via Interest Deductions and other financial payments	Develop recommendations of rules to prevent base erosion through the use of interest expense and other such financial payments using related party arrangements	Sep-15/ Dec 15
5	Counter Harmful Tax Practices more effectively taking into account Transparency and substance	Improving transparency through spontaneous exchange on rulings related to preferential regimes and requiring substantial activity for any preferential regime	Sep-14/ Sep-15/ Dec-15
6	Prevent Treaty Abuse	Develop model treaty provisions recommendations regarding the design of domestic rules to prevent the granting of treaty benefits in inappropriate circumstances	Sep-14
7	Prevent the Artificial Avoidance of PE Status	Develop changes to the definition of PE to prevent the artificial avoidance of PE status, including through the use of commissionaire arrangements and the specific activity exemptions	Sep-15

8	Assure that Transfer Pricing ('TP') outcomes are in line with Value Creation: Intangibles	Develop rules to prevent BEPS by moving intangibles among group members and updating guidance on cost contribution arrangements	Sep-14/ Sep-15
9	Assure that TP Outcomes are in line with Value Creation: Risks and Capital	Develop rules to prevent BEPS by transferring risks among, or allocating excessive capital to, group members	Sep-15
10	Assure that TP Outcomes are in line with Value Creation: Other high risk transactions	Develop rules to prevent BEPS by engaging in transactions that would occur only very rarely between third parties	Sep-15
11	Establish Methodologies to Collect and Analyse Data on BEPS and the Action to Address it	Develop recommendations on the indicators of the scale and economic impact of BEPS and ensure tools are available to monitor and evaluate the effectiveness and economic impact of measures to address BEPS	Sep-15
12	Disclosure of Aggressive Tax Planning Arrangements	Develop recommendations regarding the design of mandatory disclosure rules for aggressive or abusive transactions, arrangements, or structures	Sep-15
13	Re-examine TP Documentation	Develop rules regarding TP documentation to enhance transparency, including a requirement that multinational entities provide all information on global allocation of income, economic activity, and taxes paid among countries in a common template	Sep-14
14	Make Dispute Resolution Mechanisms More Effective	Develop solutions to address obstacles that prevent countries from solving treaty-related disputes under MAP	Sep-15
15	Develop a Multilateral Instrument	Analyse tax and public international law issues related to the development of a multilateral instrument to enable implementation of BEPS measures and amend existing bilateral treaties	Sep-14/ Sep-15

2. *BEPS 2014 deliverables*

The OECD, in September 2014, released the first set of measures and reports on 7 Action plans (highlighted in **Bold** above). We will provide detailed insights of all the reports published by the OECD over the next several months.

In this article, we have provided below detailed study of the content of Action plan 13 ie Re-examine TP Documentation:

3. Action Plan 13 - Re-examine TP Documentation

3.1 Background

Over the years, many countries have adopted their respective TP documentation rules and requirements which haveled to steady increase in the volume and complexity of international intragroup trade and thus, has increased the TP scrutiny undertaken by the tax authorities. Also, the tax administrations find the TP documentation to be informative and not adequate for tax enforcement and risk assessment.

To tackle this issue globally, the OECD recognises the need ofenhancing transparency for taxadministrations by providing them with adequate information to conductTP risk assessments and examinations. The Action plan 13 provides revised standards for TP documentation and a templatefor Country-by-Country ('CbC') reporting of income, earnings, taxes paid and certainmeasures of economic activity.The revised TP documentation will consist of a Master file, Local file and CbC report, briefly summarized as under:

Master file – Thiswill include standardised information of a MNE and its group members located in different jurisdictions. The information contained in the Master file will be related to the global business operations and TP policies which will also include information on intangibles and inter-company financial activities.

Local file – Thiswill provide detailed information on intercompany transactions from TP perspective i.e. transactions between the MNE and its foreign affiliates. This will facilitate compliance with arm's length principle governed under the respective country specific TP regulations.

CbC report – Thiswill contain information relating to the global allocation of the MNE's income and taxes paid together with certain economic indicators. It also requires MNE's to report their total employment, capital, retained earnings and tangible assets in each tax jurisdiction.

3.2 Objective

The revised TP documentation has been framed keeping in mind the following three key objectives:

i. To ensure that taxpayers give appropriate consideration to TP requirementsin establishing prices and other conditions for transactions between AEsand in reporting the income derived from such transactions in their tax returns;

ii. To provide tax administrations with the information necessary to conduct an informed TP risk assessment;

iii. To provide tax administrations with useful information to employ when conducting a thorough audit of the TP practices of entities subject to their tax jurisdiction, although it may be necessary to supplement the documentation with additional information as the audit progresses.

Manifestly, the principal aim of the Action Plan 13 is to introduce consistent documentation and access to information to ensure all relevant tax authorities have access to the same information about a groups' value chain and the resulting tax consequences.

3.3 Developments

The development of Action plan 13 through years has been briefly depicted below:

- **19 July 2013**–The OECD released an action plan on BEPS
- **3 October 2013 –** Memorandum on TP documentation and CbC report
- **12-13 November 2013-** Public consultation was held
- **30 January 2014-**Discussion draft on TP documentation and CbC reportissued
- **23 February 2014-** Comments on draft was submitted to the OECD
- **24 March 2014-** Private/special consultation meeting was held
- **19 May 2014-** Public consultation was held
- **16 September 2014-** Final framework and template issued

The OECD is yet to come up with the implementation plan,identifying the most appropriate means of filing the requiredinformation with and disseminating it to tax administrations,which is expected to be out over the nextseveral months.

3.4 Contents

In order to achieve the objectives stated above and to provide adequate information to the tax administrations, countries are required to adopt a standardised approach to TP documentation. For this, a three tiered structure has been developed consisting of a master file, a local file and a CbC report.

Master File
High level information about the MNC's business, TP policies and agreements with tax authorities in a single document available to all tax authorities where the MNC has operations.
Local File
Detailed information about the local business including related party payments and receipts for products, services, royalties, interest etc.
Country by Country Report
High level information about the jurisdictional allocation of profits, revenues, employees and assets.

This three-tiered approach has been explained in detail below:

i. Master file

The master file provides an overview of the MNE group's business, its overall TP policies, and its global allocation of income and economic activityin order to assist tax administrations in evaluating the presence of significant TP risks. The information required in the master file provides a "blueprint"of the MNE group and contains relevant information that can be grouped in the following five categories:

a) Organisational structure

A chart providing the MNE's legal and ownership structure and geographical location of the operating entities.

b) Description of MNE's business

A general description of MNE's business which will include:

· Important drivers of business profit;

· A description of the supply chain for the group's five largest product/services by turnover plus any other product/service amounting to more than 5 percent of the group turnover;

· A list and brief description of important service arrangements between members of the MNE group other than R&D services;

· A description of the main geographical market for the group's products/services;

· A brief written functional analysis describing the principal contributions to value creation by individual entities within the group;

· A description of important business restructuring transactions, acquisitions and divestitures occurring during the fiscal year.

c) MNE's intangibles

· A general description of the MNE's overall strategy for the development, ownership and exploitation of intangibles;

· A list of important intangibles of the group and entities which legally own them;

· A list of important agreements among identified AEs related to intangibles;

· A general description of the group's TP policies related to R&D and intangibles;

· A general description of any important transfers of interests in intangibles among AEs.

d) MNE's intercompany financial activities

· A general description of financing arrangement of the group with both related and unrelated entities;

· Identification of any members of the MNE group that provide a central financing function for the group;

· A general description of the MNE's general TP policies related to financing arrangements.

e) MNE's financial and tax position

- MNE's annual consolidated financial statement;
- A list and brief description of the MNE group's existing unilateral Advance Pricing Agreements (APAs) and other tax rulings related to allocation of income.

ii. Local file

The local file provides more detailed information relating to specific intercompany transactions. The information required in thelocal file should supplement themaster file and help in assessing whether the tax payer has complied with the arm's length principle in its respective tax jurisdictions. The following information should be contained in the local file:

a) Local entity

- A description of the management structure of the local entity, a local organisation chart, and a description of the individuals to whom local management reports;
- A detailed description of the business strategy;
- Details of business restructurings and/or intangible transfers; and
- Key competitors.

b) Controlled transactions

- Description of material controlled transactions and context in which they take place;
- The amount of intra-group payments and receipts for each category of controlled transactions involving the local entity;
- An identification of AEs involved in each category of controlled transactions and the relationship amongst them;
- Material intercompany agreements;
- Detailed comparability and functional analysis of the taxpayer and relevant AEs;
- Most appropriate TP method and the party selected as the tested party and reason for such selection;
- A summary of important assumptions made in applying the TP methodology;
- A list and description of selected comparable uncontrolled transactions (internal or external) and information on relevant financial indicators relied upon for TP analysis;
- A description of any comparability adjustments performed;
- Description of the reasons for concluding that relevant transactions were priced on an arm's length basis based on the application of the selected TP method;
- Unilateral and bilateral/multilateral APAs and other tax rulings related to the controlled transactions.

c) Financial information

- Local entity's financial statements;
- Reconciliation to show how financial data used in applying the TP method ties to the financial statements;
- Summary schedules of relevant financial data for comparables used in the analysis and the sources from which that data was obtained.

Importantly to note that where a requirement of thelocal file can be fully satisfied by a specific cross-reference to informationcontained in the master file, such a cross-reference should suffice.

iii. CbC report

The CbC report requires aggregate tax jurisdictionwideinformation relating to the global allocation of the income, the taxespaid, and certain indicators of the location of economic activity among taxjurisdictions in which the MNE group operates.

The CbC report also requires alisting of all the constituent entities for which financial information isreported, including the tax jurisdiction of incorporation, where differentfrom the tax jurisdiction of residence, as well as the nature of the mainbusiness activities carried out by them.Following are the information required to be given in the CbC template:

- Turnover, showing separately related party and third party sales but excluding dividends received;

- Profit/ (Loss) before tax;
- Cash tax paid (including withholding taxes suffered in other jurisdictions);
- Current year tax accrual (excluding deferred tax and provisions for uncertain tax liabilities);
- Stated capital;
- Accumulated earnings, as of the end of the reporting year;
- Number of full-time equivalent employees;
- Net book value of tangible assets excluding cash and cash equivalents

The ultimate parent of an MNE group is required to complete a template on a tax jurisdiction by tax jurisdiction basis. A separate line should be included for all constituent entities deemed by the reporting MNE not to resident in any jurisdiction for tax purposes.

Importantly to note that the CbC report will be helpful for high-level TP risk assessment purposes and may also be used by taxadministrations in evaluating other BEPS related risks. However, the report clearly indicate that the informationin the CbC report should not be used as a substitute for a detailed TP analysis of individual transactions and prices based on a full functional analysis and a full comparability analysis.It also voice that the information in the CbC report on its own does not constituteconclusive evidence that transfer prices are or are not appropriate and hence, it shouldnot be used by tax administrations to propose TP adjustmentsbased on a global formulary apportionment of income.

3.5 Timeline

As is evident, different practices are being followed by different countries regarding the timing of preparation of documentation as well as amount of time given to taxpayers to respond to specific tax administration requests for documentation and other audit related information requests. Accordingly, the guidance report suggeststhe following timeline to be considered for the proposed three reports:

- **Local file**: no later than due date for return
- **Master file**: updated by tax return due date for ultimate parent of MNE
- **CbC report**: May be extended to one year following last day of fiscal year of ultimate parent of MNE

3.6 Way Forward

Manifestly, the content of the various documents reflects a sincere effort to balance tax administration information needs, concerns about in appropriate use of the information and the compliance costs and burdens imposed on MNEs. However, emerging economies including India have voiced to strike that balance in a different way by requiring reporting in the CbC report of additional transactional data regarding related party interest payments, royalty payments and especially related party service fees. Emerging economies have stated that they need such information to performrisk assessment as they find it challenging to obtain information on the global operations of an MNE group head quartered elsewhere.

Considering all the development, MNEs that do not prepare their TP documentation on a global basis, this new approach will require a substantial change and even if they do prepare their documentation on a global basis, the new guidance is likely to require the compilation and explanation of substantially more information than current requirement.

MNEs are also likely to find that it is necessary to prepare or coordinate their documentation centrally to ensure that the CbC template, master file and local file provide consistent information about their global and local operations and TP policies. There is a need to implement new procedures to locate, collect, store, validate and assemble the information and this may require MNEs to increase the resources devoted to TP compliance and the collection of data for the CbC template.

(Footnote)

[1] G20 is an international forum for the governments and central bank governors from 20 major economies. The members of the G20 are Argentina, Australia, Brazil, Canada, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, the United Kingdom, the United States and the European Union (EU)

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FEMA Updates

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48 Foreign Exchange Management (Deposit) Regulations, 2000 - Exemption thereof

It has been observed that Authorised Dealer banks are frequently coming across cases related to opening of accounts for multilateral organisations, of which India is a member nation.

With the objective of bringing all the multilateral organisations at par, for opening of accounts in India, it has been decided to include in the exemptions, laid down in Foreign Exchange Management (Deposit) Regulation, 2000, issued vide Notification No. FEMA 5/2000-RB dated May 3, 2000 (as amended from time to time), deposits held in accounts maintained with an authorised dealer by any multilateral organization of which India is a member nation, and its subsidiary/affiliate bodies in India, and its or their officials in India.

For full text please refer A.P. (DIR Series) Circular No.51

http://rbi.org.in/scripts/BS_Circular Index Display.aspx?Id=9418

49 Overseas Direct Investments by Indian Party – Rationalization / Liberalization

In order to grant more flexibility to the Indian party, it has been decided to further liberalize certain regulations:

(i) Creation of charge on shares of JV / WOS / step down subsidiary (SDS) in favour of domestic / overseas lender

It has been decided that the designated AD bank may permit creation of charge / pledge on the shares of the JV / WOS / SDS (irrespective of the level) of an Indian party in favour of a domestic or overseas lender for securing the funded and / or non-funded facility to be availed of by the Indian party or by its group companies / sister concerns / associate concerns or by any of its JV / WOS / SDS (irrespective of the level) under the automatic route subject to certainconditions.

(ii) Creation of charge on the domestic assets in favour of overseas lenders to the JV / WOS / step down subsidiary

It has been decided that the designated AD bank may permit creation of charge (by way of pledge, hypothecation, mortgage, or otherwise) on the domestic assets of an Indian party (or its group companies / sister concerns / associate concerns including the individual promoters / directors) in favour of an overseas lender for securing the funded and / or non-funded facility to be availed of by the JV / WOS / SDS (irrespective of the level) of the Indian party under the automatic route subject to certain conditions.

(iii) Creation of charge on overseas assets in favour of domestic lender

It has been decided that the designated AD bank may permit creation of charge (by way of hypothecation, mortgage, or otherwise) on the overseas assets (excluding the shares) of the JV / WOS / SDS (irrespective of the level) of an Indian party in favour of a domestic lender for securing the funded and / or non-funded facility to be availed of by the Indian party or by its group companies / sister concerns / associate concerns or by any of its overseas JV / WOS / SDS (irrespective of the level) under the automatic route subject to certain conditions.

For full text please refer A.P. (DIR Series) Circular No.54

http://rbi.org.in/scripts/BS_Circular Index Display.aspx?Id=9432

50 Security for External Commercial Borrowings

Relating to creation of charge over securities for External Commercial Borrowings (ECB), it has been decided that AD Category-I banks may allow creation of charge on immovable assets, movable assets, financial securities and issue of corporate and / or personal guarantees in favour of overseas lender / security trustee, to secure the ECB to be raised / raised by the borrower, subject to satisfying themselves as per provisions of the circular / regulation.

3. Once aforesaid stipulations are met, the AD Category-I bank may permit creation of charge on immovable assets, movable assets, financial securities and issue of corporate and / or personal guarantees, during the currency of the ECB with security co-terminating with underlying ECB, subject to conditions in regard to (a) creation of charge on immovable assets, (b)creation of charge onmovable assets,(c) creation of charge over Financial Securities, and (d) Issue of Corporate or Personal Guarantee

For full text please refer A.P. (DIR Series) Circular No. 55

http://rbi.org.in/scripts/BS_Circular Index Display.aspx?Id=9443

51 Non-resident guarantee for non-fund based facilities entered between two resident entities

It is clarified that under the provisions of aforesaid Circular, residents that are subsidiaries of multinational companies can also hedge their foreign currency exposure through permissible derivative contracts executed with an AD Category – I bank in India on the strength of guarantee of its non-resident group entity.

For full text please refer A.P. (DIR Series) Circular No. 56

http://rbi.org.in/scripts/BS_CircularIndexDisplay.aspx?Id=9457

52 Risk Management and Inter Bank Dealings: Hedging under Past Performance Route- Liberalisation of Documentation Requirements in the OTC market

In order to further rationalise the documentation process for exporters and importers relating to hedging of probable exposures based on past performance, the extant guidelines in this regard have been revised as follows:

a) In terms of paragraph (2)(g)(ii) of section B contained in the annex to the circular, importers and exporters are required to furnish a quarterly declaration, as per Appendix M, duly certified by the Statutory Auditor, to the AD Category I banks regarding amounts booked with other AD Category I banks under this facility. It has now been decided that importers and exporters shall, henceforth, be required to furnish a quarterly declaration to the same effect as per the format in Annex I to this circular signed by the Chief Financial Officer (CFO) and the Company Secretary (CS). In the absence of a CS, the Chief Executive Officer (CEO) or the Chief Operating Officer (COO) shall co-sign the undertaking along with the CFO.

   It has now been decided that, henceforth, AD Category I banks may permit aggregate outstanding contracts in excess of 50 per cent of the eligible limit on being satisfied about the genuine requirements of their customers after examination of a document as per format prescribed in Annex II

c) As part of the annual audit exercise, the Statutory Auditor shall also certify the following:

   i. The amounts booked with AD Category-I banks under this facility; and

   ii. All guidelines have been adhered to while utilizing this facility over the past financial year.

For full text please refer A.P. (DIR Series) Circular No.58

http://rbi.org.in/scripts/BS_Circular Index Display.aspx?Id=9481

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Service Tax Decoded

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Exemption to Small Service Providers-PART I

Revenue collections from the Small Service Providers may be meager compare to administration cost for the collection. Even, small service provider can't be expected to comply with complicated provisions of the law. Due to such reasons, threshold exemption has been provided to service provider, through Notification No. 33/2012-ST dated 20th June, 2012 (herein after referred as "the Notification") for taxable services of aggregate value not exceeding ten lakh rupees in any financial year. Provisions and intricacies of this notification are discussed here with help of examples and case laws. Some issues may seem silly but discussed herein for beginners and clarity on fundamentals of the related law.

1. **Is the basic/threshold exemption is available once in the life time or Rs. 10 Lakh every year?**

   - Paragraph 1 of the Notification No. 33/2012-ST clearly states that exemption is available for taxable services of aggregate value not exceeding ten lakh rupees in **any financial year**. Thus, threshold exemption of Rs. 10 Lakh is available in each year subject to other provisions of the notification.

2. **Mr. Fresh CA is providing taxable services but eligible for threshold exemption of Rs. 10 Lakh for the year 2014-15 and hence he is not collecting the service tax. Is Mr. Fresh CA required to have service tax registration?**

   - Section 69 of the Finance Act, 1994 states that person liable to pay service tax shall make an application for registration. As Mr. Fresh CA is not the person liable to pay service tax, he is not required to have registration.

3. **Based on the invoices issued for taxable services provided during the following financial years, guide whether exemption is available to the service provider or not?**

Financial Year	Aggregate Value of Taxable Services
2012-13	**Rs. 8 Lakh**
2013-14	**Rs. 11 Lakh**
2014-15	**Rs. 2 Lakh**
2015-16	**Rs. 500 Lakh**

   - In terms of Paragraph 2(viii) of the Notification, basic exemption is available subject to condition that the aggregate value of taxable services rendered by a provider of taxable service from one or more premises, does not exceed ten lakh rupees **in the preceding financial year**. Thus, eligibility of current financial year depends on the aggregate value of taxable services of preceding financial year.
   - In the year 2012-13, such value is below Rs. 10 Lakh and hence basic exemption of Rs. 10L is available in the year 2013-14. For the year 2013-14 exemption is available only upto Rs. 10 Lakh and service tax is to be paid on Rs. 1 Lakh.
   - In the year 2013-14, such value is above Rs. 10 Lakh and in terms of Paragraph 2(viii) of the Notification, assessee is not eligible to have any basic exemption in the year 2014-15 and required to pay service tax on Rs. 2 Lakh despite the fact that his

value for the year 2014-15 is quite below Rs. 10 Lakh.

- In the year 2014-15, aggregate value is below Rs. 10 Lakh and hence, exemption is available in the year 2015-16 upto Rs. 10 Lakh. Such basic exemption is available even if aggregate value of taxable services in the year 2015-16 (Rs. 500 Lakh) is quite above Rs. 10 Lakh.

4. Shree Saraswati Education Trust is having commercial property rented out in respect of education which is exempt from service tax. Per annum rent of such property is Rs. 32 Lakh. W.e.f. 01-04-2013, exemption to such services is withdrawn vide Notification No. 3/2013-ST. Is basic exemption as provided under the Notification No. 33/2012-ST is available to Shree Sarswati Education Trust for the year 2013-14?

- In terms of Paragraph 2(viii) of the Notification, basic exemption is available subject to condition that the **aggregate value of taxable services** rendered by a provider of taxable service from one or more premises, does not exceed ten lakh rupees in the preceding financial year. In terms of Explanation (B) to the Notification, services which are exempt from the whole of service tax shall not be included in such "aggregate value of taxable services".

- During the year 2012-13 services of renting of immovable property provided by such educational institution were exempt from the whole of the service tax in terms of Entry 9 of the Notification No. 25/2012-ST. Hence, such value shall not be included for Rs. 10 Lakh for the preceding year i.e. 2012-13. As such value is below Rs. 10 Lakh in the preceding year, basic exemption is available in the year 2013-14.

- When any service is made taxable for the first time or exemption is withdrawn, basic exemption can be availed for the first Rs. 10 Lakh subject to other provision of the Notification.

5. Mr. AB Sheikh has issued invoices of Rs. 12 Lakh during the financial year 2014-15 but has received Rs. 8 Lakh against such services during the year 2014-15 and rest of amount is still outstanding till 31-03-2015. Is Mr. AB Sheikh required to have registration as his invoices have crossed Rs. 9 Lakh?

- Any provider of taxable service whose aggregate value of taxable service in a financial year exceeds nine lakh rupees shall make an application for registration within a period of thirty days of exceeding the aggregate value of taxable services of rupees nine lakh. It is required under Rule 3(2) of the Service Tax (Registration of Special Category of Persons) Rules, 2005. However, in terms of Rule 2(b) of the said rule "aggregate value of taxable service" means the sum total of **first consecutive payments received during the financial year** towards gross amount as prescribed under section 67 of the Finance Act, 1994. Hence, for registration at Rs. 9 Lakh, only payment received is to be considered. As Mr. AB Sheikh has not yet received Rs. 9 Lakh for taxable services, he is not required to obtain service tax registration under Rule 3(2) of the Service Tax (Registration of Special Category of Persons) Rules, 2005.

- As Mr. AB Sheikh is also not required to pay service tax until he receives payment towards taxable services, he is also not person liable to pay service tax and hence not required to have registration under Section 69(1) of the Finance Act, 1994.

- However, as basic exemption is available only upto invoices raised for Rs. 10 Lakh, Mr. AB Sheikh will be required to pay service tax on value of Rs. 2 Lakh as and when it will be received. Hence, if he wants to collect the service tax from its clients on Rs. 2 Lakh, it is highly advisable that he should obtain the registration, charge the service tax from its clients and issue invoices with service tax registration number stated thereon.

6. M/s. Credit Loving Co. doesn't want to take benefit for basic exemption and wants to collect and pay service tax. Is it compulsory to have exemption or assessee can opt not to avail the exemption?

- Paragraph 2(i) of the Notification No. 33/ 2012-ST clearly states that the provider of the service has the option not to avail the exemption and can opt to pay service tax.

- If assessee is not paying service tax, he is not eligible to take CENVAT Credit and utilize the same for its output liability of service tax. Hence, service tax paid by him on his input services, inputs and capital goods become cost for him. A small service provider may reduce its cost if credit is available to him and his clients are ready to pay service tax over and above agreed price. In such a situation, he may not opt to avail the exemption but to pay service tax.

7. For the year 2014-15 M/s. Credit Loving Co. is eligible to take benefit of basic exemption limit, but has collected service tax from its clients and paid the service tax. Now, its new customer, M/s. NO Credit Ltd. is not ready to pay service tax over and above the price agreed. Can M/s. Credit Loving Co. opt to avail basic exemption for services provided to M/s. NO Credit Ltd?

- Although, basic exemption is optional, option not to avail exemption once exercised in a financial year, shall not be withdrawn during the remaining part of such financial year [Para 2(i) of the Notification]. As for the year 2014-15 M/ s. Credit Loving Co. has opt not to avail the exemption, now, benefit of the basic exemption is not available to them during the rest of the period of the year 2014-15. Hence, M/s. Credit Loving Co. will have to pay service tax on services provided to M/s. No Credit Ltd.

8. M/s. Knowledge Outsource Ltd., Bangalore has provided services worth of Rs. 50 Lakh to the clients located in USA and place of provision is located outside taxable territory. M/s. Knowledge Outsource Ltd. is now going to supply services of Rs. 8 Lakh to its customer located in India. Is basic exemption available to M/s. Knowledge Outsource Ltd. for the services provided to Indian customer?

- Exemption has been provided to the "taxable services" of aggregate value not exceeding ten lakh rupees. Explanation (B) to the Notification defines the "aggregate value" to be the sum total of value of "taxable services" charged in the first consecutive invoices issued during the financial year.

- Section 65B(52) defines the "taxable services" as any services on which service tax is leviable under Section 66B. As place of provision is outside taxable territory, service tax is not leviable in terms of Section 66B on services provided taxable territory and such services are not "taxable services". Hence, for determination of aggregate value of Rs. 10 Lakh, Rs. 50 Lakh is not to be considered and basic exemption is available to M/s. Knowledge

Outsource Ltd. for services of Rs. 8 Lakh provided to Indian customer.

9. **M/s. Loyal & Techno Ltd. is providing services of construction of road. During the year 2014-15 they have provided exempt services of construction of public roads to the Government of India for Rs. 500 Lakh. They are also constructing a private road for a factory for Rs. 6 Lakh. Is basic exemption is available to M/s. Loyal & Techno Ltd for the year 2014-15?**

   - In terms of Explanation (B) to the Notification, "aggregate value" means the sum total of value of taxable services charged in the first consecutive invoices issued during a financial year but does not include value charged in invoices issued towards such services **which are exempt** from **whole of service tax** leviable thereon under section 66B of the Finance Act, 1994 **under any other notification.**

   - As services of construction of public road is exempt from whole of the tax leviable thereon under section 66B of the Act under Notification No. 25/2012-ST, it is to be excluded from the aggregate value. As after such exclusion, aggregate value is below Rs. 10 Lakh, benefit of basic exemption is available to M/s. Loyal & Techno Ltd. subject to other conditions of Notification No. 33/2012-ST.

10. **Mr. Maganlal Champaklal, a Management Consultant has provided consultation services of Rs. 8 lakh during the financial year 2014-15. He is also a partner in a partnership firm to which his office is rented out. At end of the year, it is decided that he will be given Rs. 3 Lakh as rent for the office. What will be the service tax related consequences?**

   - In terms of Paragraph 2(vii) of the Notification, where a taxable service provider provides one or more taxable services, the exemption provided under this notification shall apply to the aggregate value of all such taxable services. Thus, it is clear that if a person is providing more than one taxable services, value of all such services shall be considered for determination of eligibility of the exemption and exemption of Rs. 10 Lakh is not available to each services separately.

   - Hence, Mr. Management Consultant can avail exemption only upto Rs. 10 Lakh in aggregate for both services and will required to pay service tax on Rs. 1 Lakh (Rs. 8 Lakh+ Rs.3 Lakh less Rs. 10 Lakh).

   - Further, he will not be eligible to have any basic exemption for the next year i.e. year 2015-16.

11. **M/s. Multi Branch Co. has two branches one at Ahmedabad and another at Surat. Both branches are registered with service tax department with different service tax registration numbers. For the year 2013-14, Ahmedabad Branch has provided services of Rs. 7 Lakh and Surat Branch has provided services of Rs. 4 Lakh. Can M/s. Multi Branch Co. avail exemption for each branch for the year 2014-15?**

   - In terms of Paragraph 2(viii) of the Notification, basic exemption in the financial year 2014-15 is available only if the aggregate value of taxable services rendered by a provider of taxable service from one or more premises, does not exceed ten lakh rupees in the preceding financial year. As in preceding financial year i.e. in 2013-14 such value is Rs. 11 Lakh, basic exemption to M/s. Multi Branch Co. is not available for the year 2014-15. Basic exemption is available per person and not to each branch of a person or per registration.

12. M/s. Maxean Services is a proprietary concern and has provided manpower services to its clients and services are subject to reverse charge mechanism. For the year 2013-14, they have provided service below Rs. 10 Lakh. For the year 2014-15, aggregate value of taxable services is Rs. 12 Lakh but out of this amount, on Rs. 8 Lakh service recipient is liable to pay service tax and on Rs. 4 Lakh M/s. Maxean Services is required to pay service tax. Is basic exemption is available to M/s. Maxean Services for the year 2014-15?

- Exemption is provided to taxable services of aggregate value not exceeding Rs. 10 Lakh where aggregate value means the sum total of **value of taxable services charged** in the first consecutive invoices issued in the financial year. Although on value of Rs. 8 Lakh, tax is payable by the service recipient, it doesn't alter the fact that this amount is for "taxable services" and "charged" by the service provider. Hence, M/s. Maxean Services can take exemption but only upto Rs. 10 Lakh and on rest of Rs. 2 Lakh they need to pay service tax subject to reverse charge mechanism.

13. In above example, will it make any difference if M/s. Maxean Services is a Goods Transport Agency and out of Rs. 12 Lakh, on Rs. 8 Lakh entire service tax is to be paid by the service recipient and on Rs. 4 Lakh, M/s. Maxean Services is required to pay service tax under normal charge?

- Specific provision has been made for the valuation of Rs. 10 Lakh in the case of Goods Transport Agency. Paragraph 3 of the Notification clearly prescribes that the value on which service tax is payable by the service recipient shall not be included for the determining aggregate value not exceeding ten lakh rupees. Hence, in this situation basic exemption is available to M/s. Maxean Services and they don't need to pay any service tax.

14. For the year 2014-15, M/s. ABC Pvt. Ltd. is a trading concern and required to pay service tax under reverse charge mechanism on Rs. 1000 paid to Advocate and Rs. 1250 paid for works contract for repair of computer. Is any threshold exemption available to them?

- Proviso (ii) to paragraph 1 of the Notification clearly says that nothing containing in that notification shall apply to such value of taxable services in respect of which service tax shall be paid under reverse charge mechanism. Hence, Notification No. 33/2012-ST is not applicable in such a case.

- Legal service provided by an advocate or firm of advocates to a business entity which has turnover up to Rs. 10 Lakh in preceding financial year is exempt from tax. [Entry No. 6(b)(iii) of Notification No. 25/2012-ST]. Term turnover is not defined therein and we need to rely on the trade parlance and value of goods also needs to be considered. Further, such a turnover of preceding year is to be looked into. Hence, if M/s. ABC Pvt. Ltd. has turnover of goods and services below Rs. 10 Lakh in the Financial Year 2013-14, they don't need to pay service tax under reverse charge on Rs. 1000 paid to advocate in the year 2014-15. Otherwise they need to pay service tax on such payment.

- No such basic exemption is available for any other services covered under reverse charge mechanism. And hence, assessee needs to pay service tax under reverse charge on Rs. 1250 paid for works contract for repairing of computer. Thus, for payment of service tax of Rs. 108.15 (Rs. 1250*70%*12.36%), one has to get registration, has to file the service tax returns, comply with the other provisions of the law.

to be continued.....

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Service Tax - Recent Judgements

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46 Delhi Transport Corporation vs. CST (2014) 36 STR 693

Liability to pay service tax

Facts:-

Appellants (State Government undertaking) entered into an agreement for providing of sale or time for advertisement service. The appellants argued that the service tax would be borne by the service recipient of service and therefore failed to register and pay tax and file service tax returns.

Held:-

The Tribunal held that any private agreement cannot transfer the legislative mandated liability from the appellants (service providers) to the service recipient (advertisers) and hence the appellants are liable to pay service tax.

47 Religare Securities vs. CST (2014) 36 STR 937 (Tri. Del)

Delayed payment charges received by stock brokers

Facts:-

Assessee (stock broker) recovered delayed payment charges form its customers. Whether liable to service tax on the said delayed payment charges received?

Held:-

It was held that delayed payment received after raising separate debit notes cannot be a consideration received for providing stock broking services and accordingly would not be liable for service tax.

48 CCCE & ST vs. Magham Pullaiah 2014 (36) STR 1257 (AP)

Whether billing activity carried out by ordinary clerks in the firm of Practising chartered accountants who have not even completed SSLC.

Facts:-

Chartered Accountants were carrying on the activity of billing in terms of the contract entered into by them with APCPDCL/AP Transco. The revenue has proceeded to cover the said activity under the activity of practising chartered accountants. The Appellants contend that this is clerical activity which is not done by professionals but it is done by staff who have not even passed SSLC.

Held:-

It was held that it is a mere billing activity and such type of contracts are given to others also who are not Chartered Accountants. Further it was held that this issue has already been decided by this Bench in large number of appeals of CAs wherein it has been held that the activity carried out by ordinary clerks who have not even completed SSLC is not part of the CAs activity and accordingly appeal is allowed.

49 Commissioner of Service Tax, Bangalore v. Bangalore Metropolitan Transport Corporation [2015] 53 taxmann.com 204 (SC)

Activity of providing bus/transport facility – whether falls under the categaory of renting of cabs.

Facts:-

Assessee was engaged in transport of passengers under stage carriage permits. Assessee also provided

contd. on page no. 688

VAT - Recent Judgements and Updates

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Statute Updates

[I] **Important Judgments:**

[1] Hon. GVAT Tribunal in case of M/s. Always Latest Boutique v/s. State of Gujarat.

Issue:

The Registration Certificate of the appellant was cancelled on account of non-filing of return as per GVAT Act, restored thereafter.

Facts:

The appellant has preferred an appeal against such cancellation order and the appellant was directed to remain present on 31.5.2013. Though the appellant was present on that date and made a written submission and submitted all pending returns by paying the tax with interest, however, the appeal was dismissed but registration not restorated at the first stage. On further appeal, the Hon. Tribunal restored the registration with a view to set an example for passing unjust order by the appellate authority and without taking into consideration the written submission. The appellant is awarded the cost of Rs. 2000/- from the department.

Held:

It is the case of the appellant that the Commercial Tax Officer (3), Gandhidham vide his order dated 10.10.2012 has cancelled the registration certificate of the appellant w.e.f. 1.7.2011on the ground that the appellant has failed to furnish the returns required u/s. 29 of the Vat Act. The Learned Advocate appearing for the appellant has submitted that being aggrieved by the said order, the appellant has filed first appeal before the Ld. Deputy Commissioner of Commercial Tax. The Ld. Deputy Commissioner fixed the hearing of the appeal on 31.5.2013. The appellant remained present before him on that date and filed written submissions. The appellant has also pointed out in the said written submissions that he has filed all returns and made payment of tax, interest as well as penalty. He has also relied on the decision of the Hon. Tribunal in the case of M/s. Sai Trading Company vs. State of Gujarat (SA No.139 of 2010 decided on 6.8.2010).

In this decision, this Tribunal has taken the view that the assessing officer has not given any reason while cancelling the registration and cyclostyle order was passed. This order was quashed and set aside. The Ld. Advocate for the appellant further submitted that before cancellation of registration no show cause notice was issued to the appellant and hence the order passed by the assessing officer is contrary to the principles of natural justice. The Ld. Advocate for the appellant has further submitted that when the returns were filed and tax, interest as well as penalty are paid by the appellant, the registration should have been restored. In support of this submission, he relied on the decision of this Tribunal in the case of M/s. Color Concept vs. State of Gujarat, 2010 GSTB 204. He has further submitted that the appellant has given the last date of hearing on 22.1.2014 and without giving any other date, the order was passed after three months in April 2014. Lastly he has submitted that that the appellant is a small businessman and business of the appellant is tax free cotton as well as readymade garments/ The owner of the business is housewife and the father-in-law of the lady is of 85 years old. Since the part time accountant was engaged, the accounts could not be prepared in time and because of that the returns were delayed. Despite this fact, the appellant has filed all the returns and tax, interest as well as penalty were paid, he has therefore submitted that these appeals should be admitted and registration certificate of the appellant may be restored.

The Hon. Tribunal has observed that the Ld. Deputy Commissioner should have properly checked his record before making any adverse remarks or comments against the appellant or before dismissing appeal on the ground which is not at all tenable. He should have thoroughly checked his record. The Tribunal is of the view that the Ld. Deputy Commissioner has passed the impugned order in undue haste and for the reasons best known to him which was ultimately resulted into the denial of justice to the appellant. The Tribunal therefore allows the appeal and considering the merits of the matter and further considering the fact that the appellant has filed all returns and paid tax, interest we well as penalty, directs the registering authority to restore the registration certificate forthwith. To set an example to pass just and proper orders after verifying the record and with necessary reasons which the Tribunal has not found in the impugned order of the Ld. Deputy Commissioner, the Tribunal awards the cost of Rs. 2000/- to the appellant which shall be paid by the department to the appellant within one month from the 5th day of Sept. 2014. It is open for the department to recover this amount from the pocket of the concerned officer as it was only because of his fault, the appellant had to suffer in this case.

Order:

The appeal is allowed. The registering authority is directed to restore the registration certificate of the appellant forthwith. The appellant is awarded cost of Rs. 2000/- which shall be paid by the department to the appellant within one month from the date of pronouncement of the order.

[2] Hon. Supreme Court in case of State of Punjab & Ors Vs. Nokia India Pvt. Ltd.

Issue:

Whether the Battery charger of the Mobile Phone is an accessory or a part of the Phone?

Facts:

The Hon. Supreme Court has decided that the Battery charger of the Mobile Phone is an accessory and not a part of the phone and the tax is charged as an accessory of the mobile phone. Important paragraphs are reproduced hereunder for the benefit of the readers.

These appeals have been preferred by the appellant – State of Punjab & Ors. against the impugned order dated 17th Nov. 2010 passed by the High Court of Punjab and Haryana at Chandigarh. By the impugned orders the division bench of High Court allowed the appeals preferred by the respondent – assessee and held that the cell phone battery charger is sold as composite package along with cell phone, and hence said charger cannot be excluded from the Entry for concessional rate of tax which applies to cell phones and parts thereof.

The factual matrix of the case is that the respondent M/s. Nokia India Pvt. Ltd. (hereinafter referred to as the Company) is a dealer registered under the Punjab Value Added Tax Act, 2005 (hereinafter referred to as the Act) in the District Mohali and is doing the business of sale of cell phones and their accessories. During the year 2005-06, the company has made a sale of Rs. 10,72,679 pieces of cell phones with battery chargers and had paid the tax @ of 4% on the sale value of battery chargers, the rate at which the tax on the sale of cell phone was paid. The value of each of the battery charger if separately taken was to be Rs. 120/- per piece as quoted by the respondent - Company itself, it comes to Rs. 12,87,21,480/-. The scrutiny proceedings were initiated under section 26 of the Act, 2005 read with rules 36 and 43 of the Punjab Value Added Tax Rules 2005 by issuing notice to the respondent separately for the Asst. Years 2005-06 & 2006-07. The Assessing Authority had held that the battery charger was an accessory chargeable to tax @ 12.5%. The difference of 8.5% was calculated and it came to Rs. 1,09,41,325/-. Interest u/s. 32(1) was charged on the said amount amounting to Rs. 21,25,491/-. Further penalty u/s. 53 of the Act @ 2% per month was imposed amounting to Rs. 85,01,964/- p thus the total demand for the asst. year 2005-06 was raised to Rs. 2,15,68,780/-.

The Assessing Authority vide detailed common order dated 2nd March 2009 held that the battery charger being a separate item was liable to be taxed at general rate i.e. 12.5% and not at concessional rate applicable to the cell phones inter alia on the premise that the respondents were selling more than one product which were exigible in different rate of tax in a single pack and had themselves admitted the battery charger as a separate commodity was liable to payment of tax @ 12.5% applicable to the goods in residuary schedule F to the Act. The Assessing Authority further observed that even according to Entry 60 of Schedule B, the product included is only the cellular phone and not accessories thereof.

The Hon. Supreme Court heard rival contentions on behalf of the parties and perused the record.

Schedule 'B' of the Act contains list of goods taxable @ 4%. Cell phone is mentioned in the said schedule and it finds further place at Sr. No. 6(g) under Entry 60 and is thereby liable to be charged @ 4%.

On behalf of the State it was rightly argued that when Entry 60(6)(g) of Schedule B of the Act does not mention accessories for the purpose of taxing the item/product @ 4%, they need to be charged @ 12.5% as per Schedule F. It was contended that the battery chargers are not covered under Entry 60(6)(g) and even otherwise there is no mention of the charger in HMS Code 8525.20.17 under the Excise Act and therefore, charger is liable to be taxed @ 12.5%.

In view of the above facts, the Hon. Supreme Court finds that the Assessing Authority, Appellate Authority and the Tribunal rightly held that the mobile/cell phone charger is an accessory to cell phone and is not a part of the cell phone. The Hon. Supreme Court further holds that the battery charger cannot be held to be a composite part of the cell phone but is an independent product which can be sold separately, without selling the cell phone. The Hon. High Court failed to appreciate the aforesaid fact and wrongly held that the battery charger is a part of the cell phone.

In view of the finding recorded above, the Hon. Supreme Court has no other option but to set aside the impugned orders dated 17th Nov. 2010 in Vat Appeal Nos. 54 & 55 (O&M) of 2010 passed by the High Court of Punjab and Haryana at Chandigarh. The order passed by the Tribunal is affirmed. The appeals are allowed. No costs.

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Business Valuation

Approaches to Valuation

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The Income Approach
(EVA - Economic Value Added Method)

A successful performance measure evaluates how well an organization performs in relation to its objectives. Since the primary objective of commercial organizations is normally assumed to be the maximization of the wealth of its shareholders, it follows that performance measures should evaluate this. In practice, many organizations use profit-based measures as the primary measure of their financial performance. Two problems relating to profit in this area are:

- Profit ignores the cost of equity capital. Companies only generate wealth when they generate a return in excess of the return required by providers of capital – both equity and debt. In financial statements, the calculation of profit does take into account the cost of debt finance, but ignores the cost of equity finance.
- Profits calculated in accordance with accounting standards do not truly reflect the wealth that has been created, and are subject to manipulation by accountants.

Economic Value Added or EVA is a performance measurement system that aims to overcome these two weaknesses. EVA was developed by the US consulting firm Stern Stewart & Co, and it has gained widespread use among many well-known companies such as Siemens, Coca Cola and Herman Miller.

The concept behind EVA is that shareholder value is created by maximizing "economic profit" or the returns to the shareholders after taking a "charge" for the capital investment of the company. If the returns are negative after taking a charge for invested capital, then the company is destroying value. **Economic Value Added measures the rupee surplus value created by a firm on its existing investment.**

Economic Value Added = (Return on Capital Invested – Cost of Capital) x (Capital Invested)

OR

Economic Value Added = After tax operating income – (Cost of Capital) x (Capital Invested)

Where:

After tax operation profit = NOPAT

Cost of Capital = the firms weighted average cost of capital

Capital invested = equity plus long-term debt of the company at the start of the period.

NOPAT means net operating profit after tax. This profit figure shows profits before taking out the cost of interest. The cost of interest is included in the finance charge that is deducted from NOPAT when calculating EVA.

<u>The concept of Economic Value Added</u>

Most financial analysts understand that conventional accounting-based measures of company performance, such as net profit, return on equity, and earnings per share, usually do not tell the complete story. The limitations of accounting-based measurement are recognized in valuation analysis, which measures performance based on cash flow. The concept of economic profits extends cash flow-based performance measurement by taking into consideration the cost of capital.

Company A and Company B are identical except that Company A uses equipment by multi shift utilization of equipments that is fully functional but is also older and fully depreciated, while Company B uses equipment that was acquired last year for Rs. 10 lacs and is being depreciated over a five-year period in straight line. The operating performance of both companies is the same except for depreciation and interest expense (table 1). Using traditional accounting based performance measures, Company A's net profit margin and return on equity would be higher than Company B's measures (table 2). Does this mean that Company A is creating more value for its shareholders than Company B is creating for its shareholders? Probably not. If financial performance is measured in terms of gross cash flow (it is usually debt free net cash flow but this quickly illustrates the concept), Company B actually may have more cash flow when the tax effects of depreciation are considered (table 3).

Table 1	**Operating Performance**	
	Company A	**Company B**
Revenue	1000000	1000000
Cost of Goods Sold	500000	500000
Gross Margin	**500000**	**500000**
Administration & Selling expenses	200000	200000
Interest expenses	16000	40000
Depreciation	0	200000
Profit before tax	**284000**	**60000**
Tax @ 33%	93720	19800
Net Income	**190280**	**40200**

Now assume that Company A has invested capital of Rs. 10 lacs in form of 20 percent debt and 80 percent equity. Also assume that Company B has invested capital of 10 lacs and is invested as 50 percent debt and 50 percent equity. Each company has a pretax cost of debt of 14 percent and a cost of equity of 20 percent to its shareholders (see table 4 and 5). (For illustrative purposes, we have assumed equal costs of equity even though Company B probably has higher equity costs due to its higher debt. However, Company B's overall cost of capital would still be lower.) What is the economic profit of each company?

In this example, the economic profit of each company is derived by subtracting the cost of invested capital from its cash flow. As shown in table 6, Company B generates Rs. 93000/- in economic profit compared to Rs. 12000/- generated by Company A.

Table 2		**Returns**
	Company A	**Company B**
Net income Margin	19.03%	4.02%
Return on equity	23.79%	8.04%

Table 3		**Gross Cashflow**
	Company A	**Company B**
Net income	190280	40200
Plus : Depreciation	0	200000
Gross Cashflow	**190280**	**240200**

As a further demonstration of how conventional accounting measures may distort measures of return, Company A's net income is Rs. 190280/- compared to Company B's net income of Rs. 40200/-. Yet Company B generates much greater economic value addition (economic profit) than Company A. Company B is creating more value for its shareholders, even though its operating performance is identical to Company A. Traditional accounting measures are limited in measuring shareholder value creation. Economic profit may be a much better measure of value creation.

Table 4	**Invested Capital & Returns**	
	Company A	**Company B**
Equity	800000	500000
Debt	200000	500000
Total invested capital	**1000000**	**1000000**
Cost of equity @ 20%	160000	100000
Cost of Debt @ 8%	18760	46900
Total cost of Debt	**178760**	**146900**

(Cost of Debt = '(Debt X Debt cost %) X (1-tax rate))

Table 5 Weighted Average Cost of Capital

	Company A	Company B
Equity (80% x 20%) & (50% x 20%)	16.00%	10.00%
Debt (20% x 9.38%) & (50% x 9.38%)	1.88%	4.69%
	17.88%	**14.69%**
Rounded	**18.00%**	**15.00%**

Table 6 Economic Profit

	Company A	Company B
Gross Cashflow	190280	240200
Less: Cost of Capital	178760	146900
Economic Profit	**11520**	**93300**
Rounded	**12000**	**93000**

One of the primary goals of management in most companies is to create shareholder value. The idea of creating shareholder value seems simple enough; however, in practice, it may be difficult to implement. One difficulty is that standard accounting measures may not adequately measure the returns to shareholders. Valuation analysts should be skilled enough to assist management with the design and implementation of value creation strategies. Analysts can expand traditional valuation methodologies to incorporate the concept of economic profits to analyze, model and measure how value is created. Analysts can be indispensable not only in measuring what the value is today, but in assessing how to increase value tomorrow.

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buses on per Km. to : (a) factories for transport of their employees, (b) schools and college for transport of students, (c) individuals for special functions, etc. Department opined that provision of buses to factories, industries, etc. and at request of individuals for special functions etc amounts to rendering of rent-a-cab service.

Held:-

It was held that (a) rent-a-cab scheme operator means "any person" "engaged in business of renting of cabs" and since business undertaken by assessee was to provide bus/transport facility to citizens of Bangalore city, it could not be regarded as engaged in business of "renting of cabs"; (b) since charges were recovered on per Km. basis and passengers were picked up from various points and dropped at destination, as in case of stage carriage, there was no "renting of cabs"; (c) in any case, since issue is highly debatable, extended period of limitation is not invocable. On appeal to Supreme Court it was held that civil appeal was dismissed as there was no merit.

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Obituary

We deeply mourn the sad demise of two senior members of the Association. **CA. Kantilal M. Shah** left for heavenly abode on 09-01-2015 and **CA. Dineshbhai P. Patel** on 27-01-2015. May the departed souls rest in peace.

Corporate Law Update

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MCA Updates:

1. **Companies (Cost Records and Audit) Amendment Rules, 2015:**

   - Rule 2 of Companies (Cost Records and Audit) Rules, 2014 has been amended to insert the definition of "**Central Excise Tariff Act Heading**".
   - Rule 3 of Companies (Cost Records and Audit) Rules, 2014 has been substituted and replaced stating the criteria for the ***applicability of Cost Records.***

Rule 3	*Specified Class of Companies*	*Total turnover from all goods or services in immediately preceding financial year*
[A]	*Regulated Sectors*	*Rs. 35 crores or more*
[B]	*Non-Regulated Sectors*	

This shall not be applicable to the foreign companies having only liason office in India as well as the small and micro enterprises).

- Rule 4 of Companies (Cost Records and Audit) Rules, 2014 has been substituted and replaced stating the ***applicability of Cost Audit to the specified class of Companies***.

Rule 4	*Specified Class of Companies*	*Total turnover product(s) or service(s) covered under Cost Accounting Records in immediately preceding financial year*	*Total turnover from all goods or services in immediately preceding financial year*
[A]	*Regulated Sectors*	*Rs. 25 Crores or more*	*Rs. 50 Crores or more*
[B]	*Non-Regulated Sectors*	*Rs. 35 Crores or more*	*Rs. 100 Crores or more*

Provided that the Cost Audit shall not be applicable to a Company, if: a) Its revenues in foreign exchange from exports exceeds 75% of its total revenue ORb) Which is operating from an SEZ.

- **Contents of Annexure have been replaced by Form CRA-1 (Particulars relating to the Items of Costs to be included in the Books of Accounts) & CRA-3 (Form of Cost Audit Report).**

For detailed text of the same, please visit the following link:

http://www.mca.gov.in/Ministry/pdf/Amendment_Rules_01012014.pdf

[F. No. 01/40/2013-CL-V) Notification dated December 31, 2014]

2. **Companies (Accounts) Amendment Rules, 2015.**

   In the Companies (Accounts) Rules, 2014:

   1) after rule 2, following rule shall be inserted, namely:

   "2A. ***Notice of address at which books of account are to be maintained:*** *For the purposes of the first proviso to sub-section (l) of section 128, the notice regarding address at which books of account may be kept shall be in Form AOC-5."*

2) in rule 6, after the third proviso, the following proviso shall be inserted, namely:

"Provided also that nothing in this rule shall apply in respect of consolidation of financial statement by a company having subsidiary or subsidiaries incorporated outside India only for the financial year commencing on or after 01st April, 2014."

[F. No. 01/19/2013-CL-V Part) Notification dated January 16, 2015]

3. Companies (Appointment and Qualification of Directors) Amendment Rules, 2015.

In the Companies (Appointment and Qualification of Directors) Rules, 2014, in Rule 16, the following proviso is inserted:

"*Provided that in case a company has already filed Form DIR-12 with the Registrar under Rule 15, a foreign director of such company resigning from his office may authorize in writing a practicing chartered accountant or cost accountant or company secretary in practice or any other resident director of the company to sign Form DIR-11 and file the same on his behalf intimating the reasons for the resignation..*

[F. No. 01/9/2013-CL.V (Part-II) Notification dated January 19, 2015]

4. Companies (Corporate Social Responsibility Policy) Amendment Rules, 2015.

In the Companies (Corporate Social Responsibility Policy) Rules, 2014, in Rule 4, in sub rule (2):

(i) for the words "established by the company or its holding or subsidiary or associate " company under section 8 of the Act or otherwise", the words "established under section 8 of the Act by the company, either singly or along with its holding or subsidiary or associate company, or along with any other company or holding or subsidiary or associate company of such other company, or otherwise" shall be substituted;

(ii) in the proviso, in clause (i). for the words "not established by the company or its ' holding or subsidiary or associate company' "it", the words "not established by the company, either singly or along with its holding or subsidiary or associate company, or along with any other company or holding or subsidiary or associate company of such other company" shall be substituted'

[F. No. 01/18/2013-CL-V-Part) Notification dated January 19, 2015]

SEBI Updates:

5. Single Registration for Depository Participants:

The existing requirement of obtaining certificate of initial registration to act as a participant and subsequently permanent registration to continue to act as a participant for each depository has been done away with.

Henceforth, one certificate of initial registration and subsequently permanent registration through any depository shall be required after commencement of the

Securities and Exchange Board of India (Depositories and Participants) (Amendment) Regulations, 2014.

[CIR/ MIRSD/5/ 2014 dated 30th December, 2014]

6. Registration for the purpose of Foreign Accounts Tax Compliance Act

(FATCA):

As per the FAQ published on the US Internal Revenue Service (IRS) website, Foreign Financial Institutions (FFIs) in Model 1 jurisdictions need to register with the US IRS and obtain a Global Intermediary Identification Number (GIIN) before January 01, 2015, or at the earliest, in order to avoid withholding. The FFIs who have registered but have not obtained a GIIN should indicate to the withholding agents that the GIIN is applied for.

[CIR/MIRSD/6/2014 dated December 30, 2014]

7. Risk Management Policy at the Depositories:

Depositories are advised to:

- Establish a clear, comprehensive and well documented risk management framework.
- Put in place mechanism to implement the Risk Management Framework through a Risk Management Group/Committee which shall be headed by a Chief Risk Officer (CRO).
- Implement the provisions of this circular within three months from the date of this circular.

[CIR/MRD/DP/1/2015 dated January 12, 2015]

8. Index based market-wide circuit breaker mechanism:

- NSE and BSE shall compute their market-wide index (NIFTY and SENSEX respectively) after every trade in the index constituent stocks and shall check for breach of market-wide circuit breaker limits after every such computation of the market-wide index.
- In the event of breach of market-wide circuit breaker limit, stock exchange shall stop matching of orders in order to bring about a trading halt as mandated vide SEBI circular dated June 28, 2001. All unmatched orders present in the system shall thereupon be purged by the stock exchange.
- BSE and NSE shall implement suitable mechanism to ensure that all messages related to market-wide index circuit breakers are given higher priority over other messages. Further, the systems (including the network) for computation of market-wide index, checking for breach of circuit breaker limits and initiating message to stop matching of executable order and acceptance of fresh orders, shall not be used for any other purposes.
- BSE and NSE shall include in the scope of their annual system audit a review of its index based market-wide circuit breaker mechanism with the view to identify improvements.

[CIR/MRD/DP/02/2015 dated January 12, 2015]

9. SEBI (Prohibition of Insider Trading) Regulations, 2015:

The SEBI has come out with the **SEBI (Prohibition of Insider Trading) Regulations, 2015,** to put in place a framework for prohibition of insider trading in securities and to strengthen the legal framework thereof.

For detailed text of the same, please visit the following link:

http://www.sebi.gov.in/cms/sebi_data/attachdocs/1421319519608.pdf

These regulations shall come into force on the one hundred and twentieth day from the date of its publication in the Official Gazette.

[Notification No. LAD-NRO/GN/2014-15/21/85 dated 15th January, 2015]

Latest Judgments:

1. SEBI's Exit order in respect of the BANGALORE STOCK EXCHANGE LIMITED ("BgSE") [**WTM/RKA/MRD/165/2014**]:

Facts of the case:

In terms of clause 2.2 of the Exit Circular, 2012, a stock exchange, where the annual trading turnover on its platform is less than Rs. 1,000 crore, can apply to SEBI for voluntary surrender of recognition and exit, at any time before the expiry of two years from the date of issuance of the said Circular.

contd. on page no. 693

From Published Accounts

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AS –28 Impairment of Assets

Notes Forming Parts of the Financial Statements Annual Report 2013-14

KPR Mill Limited

The carrying values of assets / cash generating units at each balance sheet date are reviewed for impairment. If any indication of impairment exists, the recoverable amount of such assets is estimated and impairment exceeds their recoverable amount. The recoverable amount is the greater of the net selling price and their value in use. Value in use is arrived at by discounting the future Cash flows to their present value based on an appropriate discount factor. When there is indication earlier accounting periods no longer exists or may have decreased, such reversal of impairment loss is recognised in the Statement of profit and Loss, except in case of revalued assets.

Manugraph India Limited

Cash generating unit / fixed assets / investments are assessed for impairment at balance sheet date based on external Sources of information. Impairment losses, if any, are recognised as an expense in the statement of profit and loss. Impairment loss in respect of assets sold / scrapped are reversed and consequent profit or loss on such sale is accounted. Impairment loss, if any, is provided to the extent, the Carrying amount of assets value in use is the present value of estimated future Cash flows expected to arise from the Counting use of an asset and from its disposal at the end of its useful life. Depreciation charged on assets impaired is adjusted in future period over its remaining useful life.

Patel Engineering Limited

An Assets is treated as impaired when the carrying cost of assets exceeds its recoverable value. An impairment loss is charged to profit and loss account in the year in which identified as Impaired. The impairment loss recognised in prior accounting periods is reversed if there has been a change in the estimate of recoverable amount.

Bajaj Corporation Limited

The carrying amount of assets are reviewed at each balance sheet date, if there is any indication of impairment based on internal / external factors. An asset is impaired when the carrying amount of the asset exceeds the recoverable amount. An impairment loss is charged to the statement of Profit and loss for the year in which an asset is identified as impaired.

CMC Limited

The carrying values of assets / cash generating units at each balance Sheet date are reviewed for impairment. If any indication of the impairment exists, the recoverable amount of such assets is estimated and impairment is recognised, if the carrying amount of these assets exceeds there recoverable amount. The recoverable amount is greater of the net selling price and their value in use. Value in use is arrived at by discounting the future cash flows to their present value based on an appropriate discount factor. When there is indication that an impairment loss recognised for an assets in earlier accounting period no longer exists or may have decreased, such reversal of impairment loss is recognised in the statement of profit and loss, except in case of revalued assets.

Adani Power Limited

The carrying values of assets / cash generating units are reviewed for the impairment at each balance sheet date. If any indication of the impairment exists, the recoverable amount is estimated. The recoverable amount is greater of the net selling price and their value in use. Value in use is arrived at by discounting the future cash flows to their present value based on an appropriate discount factor. An asset is treated as impaired when the carrying cost of the assets exceeds its recoverable value. An impairment loss is charged to the statement of Profit and Loss in the period in which as assets is identified as impaired. The impairment loss, if any, recognised in prior accounting periods is reversed if has been a change in the estimate of recoverable amount.

Indian Oil Corporation Limited

As At each balance sheet date, the carrying amount of cash generating units / assets is treated for impairment so as to determine:

(a) The provision for the impairment loss, if any, required; or

(b) The reversal, if any, required of impairment loss recognised in previous periods.

Impairment loss is recognised when the carrying amount of an asset exceeds recoverable amount.

Ankit Metal & Power Limited

At each Balance Sheet date the company assesses whether there is any indication that assets may be impaired. If any such indication exists, the company estimates the recoverable amount. If the carrying amount of the assets exceeds its recoverable amount, an impairment loss is recognised in the accounts to the extent the carrying amount exceeds the recoverable amount.

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contd. from page 691

The shareholders of BgSE in its Annual General Body Meeting held on September 21, 2013 passed the resolution for exit through voluntary surrender of recognition as per the Exit Circular, 2012.

Conclusion:

The BgSE was allowed to exit as a Stock Exchange with immediate effect with the directions of complying with tax obligations, undertakings given to SEBI, consequential conditions of Exit Circular, 2012 etc.

2. SEBI's Exit order in respect of the Ludhiana Stock Exchange Limited ("LSE") [WTM/RKA/MRD/166/2014]:

Facts of the case:

In terms of clause 2.2 of the Exit Circular, 2012, a stock exchange, where the annual trading turnover on its platform is less than Rs. 1,000 crore, can apply to SEBI for voluntary surrender of recognition and exit, at any time before the expiry of two years from the date of issuance of the said Circular.

The shareholders of LSE in its Annual General Body Meeting held on 15th July, 2013 passed the resolution for exit through voluntary surrender of recognition as per the Exit Circular, 2012.

Conclusion:

The LSE was allowed to exit as a Stock Exchange with immediate effect with the directions of complying with tax obligations, undertakings given to SEBI, consequential conditions of Exit Circular, 2012 etc.

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From the Government

CA. Kunal A. Shah
cakashah@gmail.com

Income Tax

1) Instruction regarding applicability of sec 143(1D) of the Income Tax Act,1961

CBDT hereby clarifies that the processing of a return cannot be undertaken after notice has been issued sub-section (2) of section 143 of the IT Act.

(For full text refer Instruction No.01/2015 dated 13/01/2015)

2) Notification regarding

The Central Government hereby specifies the Reliance Retirement Fund set up by the Reliance Mutual Fund registered under the SEBI as a pension fund for the purposes of clause (xiv) of sub-section (2) of section 80C of the income tax act for the assessment year 2015-16 and subsequent assessment years.

This notification shall come into force from the date of its publication in the Official Gazette.

(For full text refer Notification No. 90, dated 23/12/2014)

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Congratulations

CA. Anuj Sharedalal

for participating in the Half Century race (50 KMs) in Arvind Sabarmati Cyclothon Amdavad 2015 held on 25th January, 2015. He completed the race in 1 hour and 23 minutes and stood 3rd in the Mens 18-45 years category.

Association News

CA. Abhishek J. Jain
Hon. Secretary

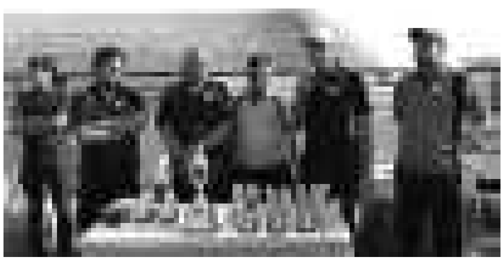
CA. Nirav R. Choksi
Hon. Secretary

Forthcoming Programmes

Date/Day	Time	Programmes	Speaker	Venue
19.02.2015 Thursday	3.30 p.m. to 5.30 p.m	Study Course on Companies Act - 2013	CA. Krishnakant & CA. Kaushik C. Patel	At the Office of the Association
21.02.2015 Saturday	10.00 a.m. to 12.30 p.m.	Study Course on Companies Act - 2013	CA. Kaushik C. Patel	At the Office of the Association
04.03.2015 Wednesday	5.30 p.m. to 7.00 p.m.	Budget Meeting	Shri Saurabh Soparkar	Tagore Hall, Paldi, Ahmedabad
21.03.2015 Saturday	9.00 a.m. to 12.30 p.m.	4th Brain Trust Meeting on Deeming Fiction under Income Tax Act	Adv. Kapil Goel	ATMAHall, Ashram Road, Ahmedabad

Glimpses of events gone by:

1. On 11th January 2015, a First T-10 Tennis Ball Cricket Tournament was held at Adani Shantigram Cricket Stadium, Nr. Vaisnodevi Circle, S. G. Highway, Ahmedabad.

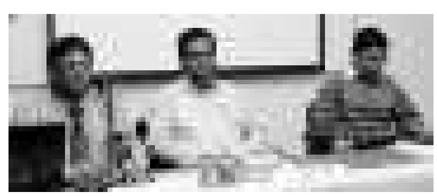


Presentation Ceremony

Champion Team Manubhai & Shah Celebrating their Victory

2. On 17th January 2015, a Blood Donation camp was held at the premises of the Association.

3. On 29th January 2015, Seventh Study Circle Meeting of Association was held on the topic of **Limited Liability Partnership - A way forward**, at H. K. College of Commerce, Ashram Road, Ahmedabad.



L-R. President, CA. Shailesh Shah, Faculty, CA. Pradip Modi and Chairman of the study circle meeting CA. Mehul Shah.

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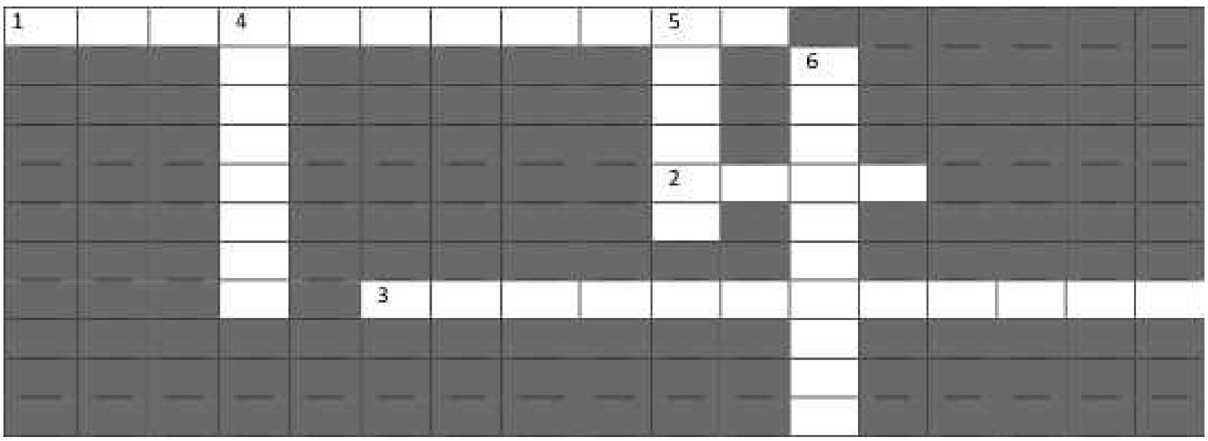
ACAJ Crossword Contest # 10

Across

1. Team CAA defeated Baroda Branch of WIRC in a cricket match by ____________ runs.
2. The assessee is entitled to set off and determine the ____ credit after arranging all the credits in the account in chronological order.
3. If the purpose of the expenditure is either an offence or is prohibited by law, then it would suffer _____________.

Down

4. _________ helps to bring about transformation in individuals.
5. For applicability of section 14A, a claim of _______ income is a prerequisite.
6. Providing training in computer related matters is a ___________ training institute.



Notes:

1. The Crossword puzzle is based on previous issue of ACA Journal.
2. Three lucky winners on the basis of a draw will be awarded prizes.
3. The contest is open only for the members of Chartered Accountants Association and no member is allowed to submit more than one entry.
4. Members may submit their reply either physically at the office of the Association or by email at caaahmedabad@gmail.com on or before 28/02/2015.
5. The decision of Journal Committee shall be final and binding.

Winners of ACAJ Crossword Contest # 9	
1.	CA. Arun Kothari
2.	CA. Shirish Bhatt
3.	CA.Dharmendra Bharwad

ACAJ Crossword Contest # 9 - Solution

Across

1. Longterm
2. Make in India
3. Zero

Down

4. Happy
5. Transfer
6. Wealth Tax

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