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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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EMOTIONAL JOY AND SORROW

We commonly become emotional, either in times of sorrow e.g. at being separated from a loved one, at experiencing failure in an external event, on hearing a negative news, etc. or in times of joy e.g. when our child or spouse or even pet performs a warm act, while watching a movie, etc. While we have always believed that it is absolutely normal or natural to become emotional and some of us even believe that it is good to let go of our emotions and crying once in a while makes us lighter and stronger; on a spiritual level, becoming emotional comes under the realm of dependencies and dependencies always weaken us. This is because when we become emotional, instead of influencing our self on our own, we allow something or someone outside our self to influence us. We bring that something or someone or some event outside our self, inside, in front of the eye of our mind, attach our self to it, and lose our self in it, i.e. we let the image hijack our internal world in a way, as we become subservient to it. As a result, our thoughts, feelings, emotions, words, actions are influenced in a big way by the image. This is a spiritual definition of becoming emotional. Passing on the remote control of my internal world to the outer world in this way is a sign of a not so strong internal self.

So what does one do instead? Instead of creating images of external events and people inside our minds and being influenced by them, we still watch these scenes, but instead of losing our self in them and taking from them, we contribute to them by giving them our internal energy, but at the same time make sure that while doing that, we are detached from them and not over-involved emotionally. Internal energy is given in the form of appreciation and love if it's a positive scene and power, compassion and co-operation if it's a negative scene, so as to help the scene to be corrected or resurrected. This is influencing instead of being influenced. This is a more empowering experience. In this way, we regain the control over our inner world and rise above such emotional dependencies.

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A LIGHT OF LIFE

Divinity is present within us. Through the art of connecting with our innate qualities and using them in our interactions with different individuals of society, we come to realise divinity that lies within us. This is the root of religious striving. For attainment of a wondrous life of authenticity, we should be able to overcome ordinary desires and temptations. To Achieve good we have to renounce evil. To realize divinity which is our real goal, we need to go within, beyond the externally material driven world.

It is possible to concentrate our mind on the goal of spiritual progress and perform duties of our life simultaneously. For this we don't need to renounce the world but turn to spirit, raise our level of consciousness and lift the quality of our thoughts.

How do we develop and strengthen an attitude of helping others to the best of our abilities? We should have the understanding that notwithstanding their outward shape, complexion, caste, religion, people have within themselves a huge source of divinity. Even the people who are unaware of their inner beauty should be regarded; we should wish them well and strive for their welfare. A man who claims to love God and godliness cannot hate his brother or neighbour because he looks at the goodness and divinity present deep within each soul. If we can have a sense of love and brotherhood for all living beings, it amounts to our faith and trust in God.

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Editorial

Budget 2015, an Opportunity Missed

After almost a span of 30 years, the government at the centre is a majority government of a single political party. It was the aspirations of the *aam aadmi* that voted BJP and NDA to power with a huge mandate. It is only because the middle class and the lower income group of the country voted for the BJP, there was a change in the union government. This class of the country had many expectations from the union budget but somehow there is a feeling that the Finance Minister has not been able to offer anything to all those who constitute a very large segment of the population. There is no doubt that when the Modi government presented its first budget last year, various positive measures and incentives like increasing the threshold limit, raising the limit of investments u/s 80 C and limit of interest of housing loan, impacting the general tax payers were announced. However, this time around the same tax payer is finding nothing for himself in the budget and has a feeling of being left out and let down by the government he voted for.

The Modi government had an opportunity to make big bang announcements to bring back reforms on track along with meeting some of the ever pending expectations of public at large, considering the political advantage of numbers it has in the lower house. The government has however missed this opportunity. The previous NDA government led by Atal Bihari Vajpayee could not raise the minimum limit of income not chargeable to tax for five consecutive years which did not go well the voters and the government was thrown out of power.

Apart from not giving anything to the taxpayer in direct taxes, the rate of service tax has been increased from 12% to 14%. Many of us were excited when the PM Modi launched the Swachh Bharat Abhiyan and nominated various people. Now the finance minister has nominated almost all of us to contribute to the Swachhh Bharat Abhiyan by proposing to levy additional 2% cess called Swachh Bharat Cess making the effective rate of service tax 16%. This is going to be a very huge burden on the middle class of the country. Almost every person is now availing basic services like telephone, mobile, internet connection and TV cable connection. Raising the rate of service tax to the extent of 16% is definitely going to hurt the pocket of every individual.

The budget has become a non happening event for professionals since last few years. The speech of the Finance Minster hardly specifies anything and most of the important changes are revealed by the Finance Bill. The majority of changes that are brought in now a days are mainly procedural in nature or are the proposals to override the decisions of the Supreme Court and High Courts.

One important announcement made by the Finance Minster in his budget speech was that now DTC may not see the light of the day. Though the DTC may not come into effect, the government may try to make amendments in the Income-tax Act in line of the important provisions of the Direct Tax Code. One important change proposed this time regarding determination of residential status of the company on the concept of place of effective management where key management and commercial decisions are taken is based on the provisions of the DTC. Many such changes may be expected in future and though we may not see the law called the Direct Tax Code, its provisions may be part of the Income Tax Act, 1961.

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From the President

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Dear Esteemed Readers,

The Honorable Finance Minister Shri Arun Jaitley presented the Union Budget 2015-16 on Feb 28, 2015 trying to strike a balance between economic growth and fiscal discipline, crucial for channelizing the government's resources to achieve the double digit economic growth rate.

With the Indian economy progressing towards 8% growth rate alongwith highly optimistic general sentiment and buoyant mood of investors and business community, there were high expectations that the first full budget of the NDA government will contain some "big-bang" measures covering not only the financial statements of income and expenditure but some spectacular reform measures. In other words, the studiously cultivated image of the Modi government was expected to have its expression in the budget.

The wish-list has been large. So much so, despite addressing a very wide range of issues, the budget fell somewhat short of expectations, at least from the point of view of those expecting a 'dream budget'. However, even though the budget does not have big bang reforms but overall it seems to be positive, growth oriented and puts forth realistic roadmap to attain sustainable economic growth. Budget statement 2015 requires to be admired for both, its width of vision and depth of detail. It focuses on providing impetus to the Make in India vision by giving clarity on taxes, definitive measures to ease of doing business in India and encouraging domestic and foreign direct investment. Further, innovative financing measures such as infrastructure bond, creation of mudra bank for MSME sector also augurs well for Make in India. The effort to promote technology-based entrepreneurship is laudable in this Budget – this would be a big boost to the graduates of the engineering and technology institutions of the country. The initiative to make technology as an integral element of entrepreneurship is also consistent with the "Make in India" policy focus of the Government.

The Budget lays a path for the future; however, the execution of the various policies pronounced will determine the true merits of this Budget. Clearly, India is moving towards a more global tax structure, both in terms of GST, and, in terms of direct taxes. The reduction in Corporate tax rate is the most important announcement of this Budget, and one hopes this is the first step in India forming a globally competitive tax policy and environment. The upward changes in the rates of Excise Duty and Service Tax, as also, the elimination of exemptions are clearly indicating a move towards the implementation of GST.

There are certain legislative changes in Indirect taxes, which point to a regime of lower penalties consonant with the scheme of a more friendly tax administration. The measures to curb black money will facilitate the GST regime when introduced on 1st April 2016, besides bringing a larger amount of tax into the exchequer. The two years deference of GAAR will be welcomed. Hopefully, in this period, the credibility of the new tax administrative system will be enhanced and restored.

At the Association, the program on Technical Aspects of the Finance Bill – 2015 by Shri Saurabh Soparkar was held jointly with Ahmedabad Branch of WIRC of ICAI which was very well received by all the members. Like every year, budget booklet covering important amendments relating to Income tax and Service tax was also released. I am pleased to inform you that this time also more than 12000 copies of the booklet in Gujarati and English were sold. An open house with Income Tax Department was held jointly with Gujarat Chamber of Commerce and other Professional Association where many issues which we face in our day to day practice were discussed and strong representation was made to resolve them with a very positive response from the Income Tax Department.

Before I conclude I wish all of you happy new financial year in advance.

With regards,
CA. Shailesh C. Shah
President

Cancellation of Registration of Public Charitable Trust

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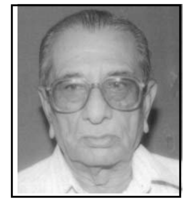

Introduction

After amendment to Sec. 2(15) of the I.T. Act, by the Finance Act 2008 with effect from I.T.A.Y. 2009-10 whereby proviso was inserted, number of cases are found in which the Department has cancelled the registration granted u/s. 12AA(1) of the Act to the various Charitable Trusts in the country. In almost all the cases appellate authorities have knocked off such orders cancelling the registration by holding that power of cancellation of such registration as provided u/s 12AA(3) do not enable income tax authorities to cancel the registration in the circumstances and facts of the relevant cases.

The Act

On the subject, following three sections of the I.T. Act are relevant. They provide as under:-

Section 2(15):

Charitable Purpose includes relief of the poor, education, medical relief, preservation of environment including watersheds, forests and wildlife and preservation of monuments or places or objects of artistic or historic interest, and advancement of any other object of general public utility:

Provided that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity.

Provided further that the first proviso shall not apply if the aggregate value of the receipts from the activities referred to therein is twenty- five lakh rupees or less in the previous year;

Section 12AA(1):

(1) The Principal Commissioner or Commissioner, on receipt of an application for registration of a trust or institution made under clause (a) or clause (aa) of sub-section (1) of section 12A, shall –

(a) Call for such documents or information from the trust or institution as he thinks necessary in order to satisfy himself about the genuineness of activities of the trust or institution and may also make such inquiries as he may deem necessary in this behalf; and

(b) After satisfying himself about the objects of the trust or institution and the genuineness of its activities, he –

(i) Shall pass an order in writing registering the trust or institution;

(ii) Shall, if he is not so satisfied, pass an order in writing refusing to register the trust or institution,

and a copy of such order shall be sent to the applicant :

Section 12AA(3):

Where a trust or an institution has been granted registration under clause (b) of sub section (1) or has obtained registration at any time under section 12A as it stood before its amendment by the Finance (No. 2) Act, 1996 (33of 1996) and subsequently the Principal Commissioner or Commissioner is satisfied that the activities of such trust or institution are not genuine or are not being carried out in accordance with the objects of trust or institution, as the case may be, he shall pass an order in writing cancelling the registration of such trust or institution:

Provided that no order under this sub section shall be passed unless such trust or institution has been given a reasonable opportunity of being heard.

Reasons For Cancellation

Department has cancelled the registration by giving the reason for cancellation viz. Assessee's activities are falling outside the expression "Charitable Purpose" u/s. 2(15) of the Act as amended from I.T.A.Y. 2009-10. In most of the cancellation orders the reasoning given is on the following lines.

In view of amended provisions of Sec. 2(15), it is seen that assessee's activities can no longer be regarded as charitable activities, especially the proviso Sec. 2(15) is violated by the assessees and hence it cannot be regarded as a charitable trust engaged in charitable purposes, after considering the nature of activities, the sources of income, the activities on which expenditure was made, surplus generated, existence of profit motive, commercial exploitation of assets, fees and charges collected, nature of other income and other activities.

Sec. 12 AA(3) and reasons as above :

Power given u/s.12AA(3) to the Department is to be utilized in the following circumstances only.:-

(a) If the Department is satisfied that the activities of such trust are not genuine.

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

In almost all cases, none of the above two contingencies arise so as to enable the Department to invoke the power of cancellation given u/s. 12AA(3).

The satisfaction of the Department that the objects of the Trust are compliant with the definition of "Charitable purpose" contained in Sec. 2(15) of the Act. is not a condition prescribed in Sec. 12AA(3) of the Act, which envisages cancellation of registration, whereas, the same is one of the factors on which the Department is required to be satisfied at the time of grant of registration.

It can be said that a statutory authority has no power, jurisdiction or discretion to go beyond the statutory provisions. No power can be assumed in the absence of any specific provisions. Accordingly it can be assumed that Sec. 12AA(3) permits cancellation of registration granted to a trust only if the Department is satisfied that the activities of the trust are not genuine or are not being carried out in accordance with the stated objects thereof and the registration cannot be cancelled merely by reviewing the objects of the Trust.

Further, if the Department is taking support, for cancellation, holding that the activities of the assessee do not qualify to fall within the meaning of Charitable purpose as per the proviso to Section 2(15) inserted with effect from 01-04-2009, such holding cannot be the basis to invoke Sec. 12AA(3) so as to cancel the registration already granted to the assessee u/s. 12AA(1) of the Act.

Department's power to cancel the registration u/s. 12AA(3) is confined to the examination as to whether the activities of the trust are genuine or that the same are not being carried out in accordance with the stated objects.

Activities of the trust can be examined in the appropriate proceedings and not in the proceedings for cancellation of registration as limited powers are available u/s. 12AA(3). It may be permissible to the Department to examine other issues, than above, in the assessment proceedings and not in the proceedings u/s. 12AA(3).

Power u/s. 12AA(1) and u/s. 12AA(3) :

To sum up and to compare the provisions of Section 12AA(1) for grant of registration and Section 12AA(3) for cancellation of registration, it can be said that :

Grant of registration u/s. 12(AA)(1) requires satisfaction about the objects of the trust as well as genuineness of activities. For the cancellation of registration u/s. 12AA(3), all that is required is satisfaction as to whether the activities of the trust are genuine or not and whether the activities are being carried on in accordance with the objects of the trust. Thus for a valid ground for cancellation would be that even if the trust is genuine one i.e. the objects are genuine, if the activities are not

contd. on page no. 726

CA as a Business Advisor - Some thoughts to share

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Profession of Chartered Accountant and Need of Entrepreneurs:

Chartered Accountant (CA) profession, by and large, from the inception of The Chartered Accountants Act, 1949, is believed to render services in the field of auditing, taxation and allied laws. Basically the role of CA has been to conduct audit of financial statements and issue audit report to opine on true and fair view of state of affairs and of profit / loss reflected in the financial statements along with the other matters as prescribed under the relevant laws. After inception of Income Tax Act, the role gradually increased to direct taxes namely Income Tax. The role involves filing of returns, handling assessment proceedings till Tribunal level, advisory services for tax planning. The role under Income Tax Act has expanded further with the introduction of carrying out audit u/s 44AB of the Income Tax Act, 1961. These two areas namely audit and direct taxes, for years and decades were believed to be the core competence of CA profession. In both the areas the pronouncements and statutory compliances have emerged a lot. The span of more than seven decades has seen considerable changes in the attestation functions and statutory requirements. Though the requirements to express opinion on true and fair view of state of affairs of financial statements and other matters have remained same, the process of conducting audit and reporting requirements have under gone substantial changes. Since the issuance of Accounting Standard 1 in the year 1979, the number of Accounting Standard issued till the year 1995 were 15. Accounting Standard 16 was issued in the year 2000. Therefore the pace of changes till the year 2000 was not frequent. Year 2001 onwards were the years of rapid changes. The pace at which the accounting standards have been issued was very frequent. Due to opening of the economy, the numbers of Accounting Standards reached to 32 in no time. Not only there was increase in the compliance to Accounting Standards but simultaneously there were introductions of Standards of Auditing, Standards on Internal Audit, Auditing Pronouncements, and Guidance Notes and so on. There was a time when the feeling was whether CA profession will be able to cope up with so many changes and with such a high pace. During this time ICAI has really done a commendable job in satisfying the needs of the economy as well as maintaining the degree of professional competence amongst the members. ICAI has not only ensured guidance by way of publications to meet requirements of industry and comply with the government regulations but also taken an initiative to enhance the professional skills, independence and integrity of its members. Due to economic growth and WTO requirements, Indian business has reached beyond India. Lots of foreign funds have entered Indian economy. These entail requirement of preparing the financial statements as per Indian Generally Accepted Accounting Principles (GAAP) and US GAAP. Majority of corporate houses have attracted foreign funds and to satisfy the needs of the foreign investors and foreign regulators the financial statements of Indian corporate requires to be converted as per US GAAP. Many CAs have till date not even fully learned and implemented the requirements of newly issued accounting standards, guidance notes, Indian GAAP and US GAAP etc. Before we fully equip ourselves with all these, we come across the entirely new dimension and radical changes in form of International Financial Reporting Standard (IFRS). Parallel to this, due to emergence of technology, the method of book keeping has also made significant progress which in turn has compelled CA to change the method of conducting audit of books of account. Process of ticking vouchers, checking postings and calculations, preparing trial balances and financial statements have been replaced by system based qualitative audit. The audit plan has included checking of transaction trial, risk and control mechanism, system trails, authorisation process etc. The process has eliminated the manual intervention and therefore CA is expected to be geared up to adopt technological aspects.

On the other hand, provisions of direct tax have been simplified over a period of time. The era of high taxation has gone. The tools of so called tax planning have been reduced drastically with gradual revision and simplification of various provisions of law. For quite a few years, the amendments in finance bills were found to be procedural and administrative in nature. A fundamental change was expected through the Direct Tax Code which also is testing political will. The process of covering more and more citizens of India under income tax net has resulted in higher revenue to the exchequer with resultant reduction in effective tax rates. The land mark tax planning tool supported by judgements of apex courts have been done away with the amendments in law either prospectively and retrospectively. Invariably it has been observed that loss to the revenue because of efficient tax planning is followed by amendment in law, majority being retrospective in nature. In a nutshell, the regulators are slowly and surely progressing towards cutting down all tax planning tools before one can really take benefit of that. Here also, emergence of technology has played a vital role. The process of filing electronic returns has achieved unprecedented success. We must give full marks to the administrators for implementing paperless and user friendly process of filing returns and issuing refunds. The only drawback is that during the process of electronic filing and paper less returns, obtaining tax audit report under section 44AB of the Income Tax Act, 1961 has to some extent lost its importance. In a given case, wicked intentions may put CA in to difficult situation. However, considering the seriousness of the issue in tax audit cases, the loop hole is plugged by introduction of certifying the electronic submission of documents through digital signature of CA. There is also gradual increase in general awareness about the basic tax requirements. The era of filing tax returns by corporate through tax desk has already been started. The time is not far where small tax payers won't need services of CA specifically for basic tax requirements.

Apart from Audit and Income Tax, compliance to the requirements of International Taxation, Service Tax and Value Added Tax is believed to be an emerging field. The enormous increase in the international transactions tells us that International Taxation will be the order of the day and the emergence of Goods and Service Tax, which is presently testing political will, requires services of CA. But in between, enactment of the new legislation, The Companies Act, 2013 is having far reaching consequences on all the companies incorporated in India. Both CA and the entrepreneurs need to closely examine the implications and likely steps that will be required to be taken to comply with the various requirements of the new legislation.

With the development of economic scenario, CA firm also have to increase their strength of completing the given assignment. The strength not only in terms of sharpening the professional skills but also relative infrastructure facilities such as office space comprising of all facilities, human resources, equipments, library, communication etc. Even a small proprietary firm is considered to be a stumbling block for growth. With the rapid changes in all the fields, proprietorship firms or small partnership firms are facing a limitation of providing all qualitative services to the clients under one roof and therefore need arises for consolidation of CA firms or establishing network amongst CA firms. Words like 'Mergers' and 'Acquisitions' have become more acceptable in the CA profession.

Summarising the above it seems that the compliance and attestation functions have seen a sea wide change over a period of time and therefore in this process the importance of services of CA have assumed a greater role. Everyone has witnessed that even with rapid pace of changes in all relevant laws, CA has stood tall and performed their duties with excellence. There is no doubt that CA fraternity has matched with the expectation of the economy with maintaining higher degree of professional competence, integrity and independence. The scenario of rapid change is going to prevail and therefore CAs will also have to make them equally competent and capable.

However, if we look at the economic scenario and business environment, Indian Economy has grown steadily during last decade. Forecast for nearest future seems to be rock steady. Indian Economy has already tested the world's worst financial turmoil. India amongst the other emerging countries believes to be a hot destination. Flow of money around the world is coming for investment in Indian economy. Indian companies, particularly big industrial groups, are growing even faster. While this is not enough as the world economy has grown up to the extent that every one realised that world has become one village for each and every thing one is doing be it may be business, service, profession, consumer and so on. The present scenario is the best environment after independence which the industrialists want to en-cash. Really, a golden opportunity is ahead of Indian enterprises to grow bigger and larger. However, not everyone is growing with the same pace. Large players have started showing their presence in the retail segment. They have started catering to end users and gradually bridge the gap. The dominance of large players can be felt in most of the sectors. The market share of most of the sectors has been controlled by very few equally strong players. Any sector whether manufacturing or services are presently lead by top three groups. The Rule of Three, a concept suggested by a Boston Consulting Group Consultant, says that in any mature market, there will be only three profitable players and the rest will have to be niche players with less than 5 % market share and focused on specialised offerings. It suggests that if you are not one of three in the market leaders, you should consider an exit or seek a super niche that is extremely profitable. The Rule of Three have told whether you should stay in the industry or exit or change strategy and therefore over the years, every sector has gone through a consolidation where some players have got extinct.

At the same time business process are becoming very complex and competitive. Industrial growth has been counted both on top line as well bottom line. Small and Medium Enterprises (SMEs) are facing difficulty in top line growth as well as squeezing margins due to presence of large players coupled with constraint of available resources. For SMEs to make the business more profitable it is indeed essential to utilize the available resources most effectively and efficiently. To achieve desired growth is most important. In this situation one is always thinking about the ways and means of improving business and efficiency in resource utilization.

With this era of economic development and world as a global village, the entrepreneurs have grown faster. Their mind set has reached to different level. No more are the days where entrepreneur consider tax and statutory compliance a hurdle of growing a business. The tax and statutory compliances are considered manageable as part and parcel of business. What is relevant is the value addition to the business. Entrepreneurs are more concerned about the ways and means of adding value to the business.

This leads us to think about how we can join hands with the entrepreneurs and provide services which add value to the business.

Conjoint reading of both the situations gives me a feeling that on one side CA profession has loaded with bundled of statutory compliances, resulted in to continuance increase in value of resources to be utilised. The requirements of infrastructure and quality human resources have become need of the hour. Considerable time, energy and cost have built in compliance and attestation functions. On the other hand, the entrepreneurs have also encountered business competitions. Every business has become competitive and margins are getting squeezed. The small and medium enterprises are feeling the heat and are also fighting for survival against the large players. Business decisions are generally taken on the basis of above considerations rather than taxes and statutory compliances. Therefore, though CA is bundled with statutory compliances and incremental cost of resources, the purpose of entrepreneur is not getting satisfied. The attestation and compliance services, though important, but become procedural aspects for the entrepreneur. The entrepreneurs want services which can add value to the business. Though attestation and compliance functions are important, the same are not adding value to the business, unable to meet the expectations of business houses. Therefore this has become vicious circle as far as CA is concerned. The interests of both have never been balanced. Following picture summarised the position :

Entrepreneurs

Attestation functions are procedural aspects
No Value Addition for the business
Lack of Interest by Management

Bundle of Statutory Compliances
Matching of Resources Utilized and Fees
Professional Satisfaction

Chartered Accountants

Therefore, it is inevitable for us to think about balancing the position. This reconciliation can be possible as follows:

1. Find out the areas is which entrepreneur is interested. Naturally it should be related to business only.
2. Identify areas for evaluating business control process.
3. The areas should be such that it should provide insight to the entrepreneur about how to improve the business control process.
4. For implementation, the strategy should take in to consideration the objectives, resources and tolerance of risk by the management.
5. It may not be necessary that each entrepreneur requires every area for implementation and therefore the areas for evaluation should be such that it can apply in totality, in specific or in combination of two or more options depending upon the need of the management.

Through this an attempt can be made to recognize the areas for evaluation to test the business standing. While not a definitive, applying this test to business will at least allow the management to know where the business stands and provide some insight as to how a business must be improved. Each strategy should be evaluated based on the goals, objectives, resources, and tolerance for risk of the organisation. These areas can be evaluated either in total or combination of such areas or specific / single area depending upon the need of the management. This evaluation procedure includes evaluation of existing Internal Control System and Identification of areas of weakness and how the same can be strengthened

On the above premises, following areas of providing business solutions are available to practicing CAs:

- Creating Business Intelligence
- Preparation and Implementation of Business plan
- Exploring new business opportunity through franchising
- Organization SWOT
- Effectiveness of Strategic Planning and Co-ordination between Marketing, Production, Procurement and Finance Portfolio
- Effective use of resources like Man, Machine, Money and Material
- Verification of Costing Methods
- Assessment of Net Realization Per Product
- Financial Management by effective management of debt
- Assessment of Working Capital Management
- Capacity utilization, extent of utilization and scope for maximizing capacity utilization

- Level of Computerization
- Assessment of Staffing

Role Play :

Each and every organisation can do basic analysis about areas of its business control process. But the more intelligent organisations will not restrict themselves to basic analysis. Such organisation always come forward and go beyond the generally adopted rules. Present scenario requires the organisation to assess in quick time what they are doing, where they are heading and what are the constraints. Organisation now days require to review and evaluate each area of business on a day to day basis and with different aspects. No organisation can afford to have systems and resources which are unreviewed and unchanged for a longer period of time. Even the method of review requires changes from time to time. The above mentioned areas are just illustrative. Each area shall be applied to the business control process depending upon the size of the organization. Each time is a best time to evaluate business. The organization must develop the capabilities to review and analyse the business control process on continuance basis. This capability can be developed in house or by outside agencies possessing experience and expertise of different industry and management. Considering the present scenario, in times to come CA professional can play a significant role in evaluating business control processes. However, one must be careful about the fact that observations must be supported by tentative impact on business. The impact, whether financial or non financial, must be in relation to and keeping in view the nature and size of the business as well as the resources utilized by the organisation. Observations based on above have value to the management and in real sense termed as providing business solutions.

Skills Set and Approach:

Before we proceed further, it is inevitable to understand the skills set required for carrying out the assignment or task allotted to us. Broadly speaking, as discussed earlier, CA is expected to perform attestation functions and statutory compliances. Given an opportunity, CA can always submit his observations regarding matters pertaining / concerning the business control processes. In light of these facts, the requirement of skills set for providing business solutions assumes greater importance. Without having desired skills set the given assignment may not be completed as desired and therefore we may end up as failure. In addition to the existing skills set, each CA needs to possess analytical ability, linking one number with others, a reasonable forecasting ability, financial and accounting aspects, regulatory compliances etc. Following are the special skills sets required:

- Understand the business of the client – its scale and resources utilized vis a vis value addition
- Skills to deal with the Management
- Managerial Skill
- Leadership Skill
- Presentation Skill

While providing business solutions one needs to believe in setting up higher standard of deliverables under challenging and competitive business environment. The main thrust should be on Implementation, Organizing and Monitoring various Processes, Transactions and Systems involved under competitive business environment. One needs to understand the client's needs from a grass root level and provide comprehensive and customized solutions.

The process of strengthening should involve three stages viz. Advisory, Implementation and Monitoring. For strengthening various processes, transactions and system involved in the business, it first starts with recommendations based on in-depth review. Subsequent to the review, the recommendations needs to be implemented and after implementation it requires monitoring on a continuance basis. Constant monitoring ultimately reveals need for further strengthening. With this approach process of service should be designed as follows:

- Carry out in-depth review of various processes, transactions and system involved in the business
- To advice and recommend best possible solutions

- To provide strategy and clearly laid out action plan for implementation
- To facilitate during the entire process of implementation

- To provide mechanism and check list for monitoring
- To provide tool for finding out further area of strengthening
- To facilitate monitoring process

To strengthen effectiveness of the deliverables, it is important that we understand the business of the entrepreneur. Understanding business entails knowledge of industry and sector in which the entrepreneur carrying out his business. The scale at which the business is actually performing compared to the size of the industry, the market share, resources utilised etc. The core objective of assessing the value addition to the business must be measured in congruence with the business scale, market share and resources utilised. Any exercise not fulfilling this relationship will be futile and will not qualify as adding value to the business.

Having understood and gained knowledge about entrepreneur's business, the industry and sector, it is important that it requires discussion with the management. This entails skill sets to deal with the management. While dealing with the management, one need to ensure that you talk, present and advise keeping in mind the nature and size of the business and the functional capabilities of the management. We must take the cognisance of the functional capabilities such as planning, organising, staffing, directing, co-ordinating, reporting and budgeting. The internal organisational policies and the views of the management in performing the above tasks are the key for determining the functional capabilities. We will have to keep in mind that each business, each management, each segment is different having its own uniqueness and therefore we need to develop customised / tailor made solutions while dealing with the management.

Generally, it has been seen that the Professionals review the processes and provide their recommendations or suggestions. Adding value to the business should not be restricted to review and provide suggestions but it must extend to actual implementation and monitoring. To perform the task of implementation and monitoring, it is inevitable that we must possess the managerial skill and leadership skill since the task involves taking work from others, guide others, motivate them to carry out the given task etc. All these require the art of leading and managing personnel.

At the end, the above skills will not have effectiveness unless we possess the skills of communication as well as presentation. Excellent work done without being communicated or presented in desired manner may not end in a fashion which we want. On the contrary, many times it happens that excellent communication or presentation smoothens the process of implementation and monitoring apart from further strengthening it. Therefore, the skill of communication and presentation will also be a key to success.

To conclude, I believe, "In seeking to gain grounds you should bear in mind that people will trust you not because of your charisma, your charm, or your vision, but because they have concluded that your professional skill will advance their interests and therefore one need to understand the people you work with and to know their interests."

* * *

Goods and Service Tax - An Introduction

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Introduction

Vat was introduced in all over country in 2006 and GST is the logical conclusion of the successful introduction and imposition of Value added Tax in India. In its standard format GST is a single tax replacing all the indirect taxes and collected by a single authority but in our country the system of Governance is Federal and both centre and states have the power to collect indirect taxes in one form or another. Hence a formula is developed to introduce a compromised GST with the consent of the States hence we can call it Indian format of GST. First it was referred in 2006 in the Budget speech of the FM that GST will be introduced in India from 1st. April 2010 but later for one or other reasons it was postponed from year to year and it is evident from this delay that it is not easy for the lawmakers to introduce GST in our country and now since 2016 is declared as GST introduction year, let us see what is Indian format of the GST and further what is the basic characteristics of India GST, the problems associated with it and further what is the possibility that the 2016 deadline will be met.

1. Is Indian GST is Dual Tax

The reference of GST was first made in Indian Budget in 2006 by **Mr. P Chidambaram** as a single centralized indirect Tax in which tax is to be collected by centre and then it is to be distributed between centre and States. This was the standard format of Goods and service Tax.

In our country states have also right to collect indirect taxes on sale of goods hence this "single centralized" form of GST was rejected by the states at the initial stage itself.

Hence a compromise is made on Dual GST in this respect in which both states and centre will impose and collect tax on a single transaction of sale and service in the form of State Goods and service tax "SGST" and Central Goods and service tax "CGST".

Hence this Compromised format of Dual GST is going to be introduced in our country.

EXAMPLE OF DUAL FORMAT OF GST

If X of Mumbai sells Goods to Y of Mumbai for Rs. 10 Lakhs and suppose the rate of Tax under SGST is 12% and CGST is 14% then X will collect and deposit Rs. 1.20 Lakhs as SGST and Rs.1.40 Lakhs as CGST from Y.

If Y of Mumbai sells the same Goods to Z of Mumbai for Rs. 10.50 Lakhs then he will collect a sum of Rs. 1.26 Lakhs as SGST and Rs. 1.47 as the CGST. Now he will deposit Rs. 6000.00 as SGST (Rs. 1.26 collected from Z – Rs.1.20 input credit from his purchases from X) and Rs. 7000.00 as CGST (Rs.1.47 Collected from Z – Rs. 1.40 Lakhs input credit from his purchases from X).

Now you can cross check the total tax collected by State is Rs. 1.26 Lakhs i.e. 12% of Rs. 10.50 Lakhs and by centre is Rs. 1.47 Lakhs i.e. 14% of Rs. 10.50 Lakhs. Rs. 10.50 is the cost to the consumer and he has paid Rs.1.26 Lakhs as SGST and Rs. 1.47 as CGST which was collected and deposited by X and Y at different stage of sales. It is also clear from this example that the input credit of SGST can be taken against the SGST and input credit of CGST can be taken against the CGST.

EX-1

2. Goods and Service Tax and Constitutional Amendment

A constitutional amendment bill with respect to the GST is introduced and passed in Lok Sabha recently and this is the first concrete step from the Government side regarding introduction of the Goods and Service Tax. Let us first see why this constitutional amendment is required and how it will finally be cleared.

Goods and Service Tax is practically an extension of the Existing VAT system in which both the central and state will charge indirect tax on Goods and Services. At present central has the power to tax services and further has the power to tax goods and manufacturing stage. States has the power to tax Goods up to the stage of sales but not have the power to tax services. Hence constitutional amendments is required to give powers to the Centre to tax goods up to the stage of sale and further to give powers to states to tax services.

Now see how this constitutional amendment will be cleared to make a way for sending it to the president for assent:-

1. It has to be cleared from both the houses of the parliament by at least half of the members of the total strength of the members in each house of parliament (Loksabha and Rajya sabha) and further two third numbers of members present for the voting in each house of parliament..
2. Further this amendment has to be ratified by 50% of the total numbers of the state assemblies. This ratification by the state assemblies is required before sending the bill to the president for assent.

After this constitutional amendment the path for GST will be clear and then Central Government will have to prepare a Model draft of GST Act with the help of empowered committee of states and then states will form their own Act on this line.

That will be the basic foundation of GST in India.

3. GST and VAT

Vat was introduced in our country in 2005 and 2006 in almost all the states and Goods and Service Tax is the logical extension of the VAT. Vat will be converted in SGST along with taxing the Services also at the state level and it will be called **"State Goods and Service tax"**.

Practically all the state indirect taxes will be covered by GST and will be merged with SGST but still there are some differences between states and centre about Entry tax. Some of the states are imposing entry tax in lieu of octroi and giving the revenue from entry tax to the Local bodies hence they are against this proposal. If this is accepted then it will certainly further distort the already compromised GST.

At present all the states are covered by VAT hence it they will not have any procedural problem in converting the VAT into SGST.

4. GST and Central Excise

Central excise is a very important indirect tax in the country and it is a central tax .It is applicable on the manufacturing stage of the goods and in GST regime it will be scrapped and CGST will come into force which is destination based tax on selling stage .

Here at present taxing the sale of goods is sole right of the states and centre cannot tax the sale of goods. To give power to Central Government to tax the sale of goods the much talked GST amendment bill is there which we have already discussed above. This bill will also give power to states to tax services

5. Threshold limit under GST

Threshold Limit Under GST-The threshold limit under central excise is 1.50 Crore and in service tax it is Rs.10 Lakhs. Further in case of Vat the limit in most of the states is also Rs.10 Lakhs but in some of the states it is still Rs. 5 Lakhs. Now the question is what will be the minimum limit of turnover where dealers will start paying tax and this is called threshold limit and how much it has importance under GST At present the proposed thresholdlimitunderGSTisRs.10Lakhsunder both the formats i.e. SGST and CGST though there was a demand of higher Threshold for CGST considering the present central excise limit of 1.50 Crores but accepting that will hamper the centre's plan to generate expected revenue under GST since the gap of 1.40 crore is very big.

Generally it is called that GST will make a financially strong Centre than state and this is based on two reasons. First is threshold and second one is the fact that now centre will get the tax up to selling stage instead of manufacturing stage which it is getting under Central Excise.

6. GST and CST - Central Sales Tax Act

When Vat was introduced in India in 2006 the CST was considered as the biggest hurdle and it was promised that CST will be reduced by 1% every year and ultimately it will be abolished. After reducing from 4 to 3 and 3 to 2% this promise was not followed and since last several years it is there with 2%. The practical problems attached with C forms are the result of this broken promise.

Now what will happen with CST in GST may be a question. In GST there will be no place for CST hence manufacturing states which are generating huge revenue in this respect will lose the same. There will be a mechanism in GST to control the trade between two states and that mechanism will be called IGST- Interstate Goods and Service Tax and through this mechanism ultimate tax will go to the consumer state. IGST will not be a another (Third Tax) but it will be a complex mechanism that will ensure that one part of tax is received by Centre and other part of tax to consumer state and that will make GST a perfect destination based tax.

7. GST and IGST Model to Monitor Interstate Transactions

A new model is developed under proposed GST to monitor the interstate trade of Goods and Services and this is called IGST. Let me clear first thing it will not replace the existing CST and there will be long awaited goodbye to Central Sales Tax in the GST regime.

Now it should also be noted that IGST will not be a Tax in addition to the SGST and CGST so one should not be presumed that IGST is a third tax but it is only a mechanism to monitor the interstate trade of Goods and services and further to ensure that the ultimate SGST is gone to the consumer state since the GST is a destination based tax.

Let us try to understand this IGST mechanism step by step:-

1. Dealer of the selling state will collect IGST from the purchaser on Interstate Transaction and the rate of IGST will be the combined rate of SGST and CGST, Say if the rate of SGST is 12% and CGST is 14% then the rate of IGST will be 26%.
2. While depositing the IGST the seller will take credit of SGST and CGST paid by him on purchase of such Goods or services within the state.
3. The selling state will transfer the amount of input credit of SGST taken by the selling dealer against the IGST to the centre. This will ensure that selling state will not get any revenue out of this transaction.
4. The interstate buyer shall take credit of IGST against his liability of SGST / CGST or IGST. For this purpose the total amount of IGST will be bifurcated in two parts SGST and CGST.
5. Now come to the mechanism of transferring the SGST to the consumer state in which the central agency will transfer the amount of input credit of IGST used by selling dealer of consumer state while paying his liability of SGST.

This whole mechanism will be known as a system of monitoring the interstate trade of Goods and services and will be called IGST. It is interstate Goods and service tax and also mentioned as integrated Goods and service tax in the discussion paper issued by the Empowered committee of the state Finance Ministers.

The Branch and stock transfer will also be governed with this model.

8. The Importance of RNR-Revenue Neutral Rate

The basic question which generally asked in case of GST is that what will be the rate of tax. There will be two rates. One for states i.e. rate of SGST and second one is for centre i.e. rate of CGST.

The Law makers want to fix a rate where Government can get at least the same tax which both states and centre are getting under the present set up i.e. under **VAT/CENTRAL EXCISE/ SERVICE TAX** etc.

This is called RNR and getting exact that rate is practically very difficult since multiplicity of taxes and cascading effect will not be there under GST.

At present there are news items about 27% rates but still not sure. Moderately if go for 12% for states and 12% for centre then it comes to 24%. It may be 24 or 27 but both rates are very much high compared to other GST countries. .

Whatever may be the rate trade industry and consumers will find it too high but even in that case Government will get same revenue, it is uncertain.

The rate of tax will play a major role in the success of GST but it will not be easy task for lawmakers to ascertain and fix it.

9. GST and Petroleum Products

The petroleum products were kept out of the scheme of VAT and it is likely or you may take it sure that these will be kept out of GST also. It means state and centre will continue to tax these products which includes diesel and petrol also as per the existing system of taxation. No input credit will be received on the tax paid on these products and further these products will not get any input credit for goods and services used by them The decision to keep petroleum products out of GST will be conscious and combined decision of centre and state though it is widely publicized that states are more keen on it.

The tax in form of Central excise and Vat form major part of indirect tax collections of centre and states and both of them don't want to disturb this favorable equation and if this will happen then it will further distort the already compromised and distorted format of Indian Dual GST .

10. Why Centre is so eager on GST

State VAT was imposed throughout India in 2006 and at that time Centre and State were on the same side of the table under the leadership of Empowered Committee of State Finance Ministers. In terms of state revenue VAT was considered as Highly Successful.

GST is the next step and centre is very keen on it instead of states. Why? The reason is very clear but not widely discussed. States are not clear about revenue generation from GST but see there is one point which is sure that centre will certainly get higher revenue from the GST.

At present the central indirect tax is collected in the form of Central excise and it is chargeable on manufacturing stage but in GST it will be replaced by CGST which will chargeable up to last selling stage. That will be a biggest boost to the central revenue.

Further at present the threshold for central excise is Rs.150 Lakhs which will be reduced to Rs.10 Lakhs under GST. These two points are the main reasons why centre is so keen on GST.

11. States still have apprehensions

States are not sure about the revenue receipts from the GST so there first point is compensation from the loss of revenue from GST. The second point of disagreement on Entry tax and some of the states want Entry Tax to be kept out of the scope of GST. The third point of disagreement is taxation of petroleum products and it seems that there are still differences between the states and the centre with respect to the proposed GST.

The States and Centre will sort out these matters but this will also include some more compromises on the standard form of the GST.

12. Will GST be in 2016

We have been promised in 2006 that GST will be introduced in 2010 but after that GST was extended from year to year. Now it is declared that GST will be introduced in 2016 but till date the constitution bill is cleared only in one house of the parliament and it is still to be cleared in the upper house (Rajya Sabha). After that it has to be ratified from the half of the state assemblies. This will be first step towards introduction of the GST in India.

After that Goods and service Tax acts and rules are to be framed by the centre and each of the states. Some time will also be required for sorting out the issues still to be settled between the States and the Centre.

At present we are running in 2015 hence practically almost one year is left and in my opinion it is not enough, hence if we take that everything is going on very well then 1st April 2017 will be the suitable date for introduction of Goods and service tax in India.

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Glimpses of Supreme Court Rulings

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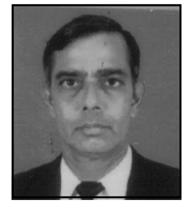

38 Interest on enhanced compensation:

Interest earned enhanced compensation, is treated as a accretion to the value and therefore, part of the enhanced compensation or consideration making it exigible to tax. Said interest on enhanced compensation had to be taxed on receipt basis, which means it would be taxed in the year in which it is received. It would mean that converse position *i.e*. spread over of this interest on accrual basis is not permissible. In view of the above discussion, these appeals is allowed in part and set aside that portion of the impugned judgment of the High Court whereby spread over of the interest received under section 28 of the 1894 Act, on the enhanced income is allowed with the direction that it would be taxed in the year in which such interest on enhanced compensation was received

[CIT vs. Govindbhai Mamaiya (367 ITR 498)]

39 Prevention of Corruption :

Where no case of prejudice or miscarriage of justice by reason of investigation by Sub-Inspector of Police was made out, permission granted by Magistrate to investigate complaint against income-tax authority by Sub-inspector was allowable.

The only ground taken by the respondent in quashing the petition before High Court is that as per the provisions of section 17, no officer below the rank of Inspector of Police is authorized by the Government to investigate the case without permission of the Court. Further, section 17 does not confer any power to the Court to grant permission to Sub-Inspector of Police to investigate the case. Hence, order passed by the Magistrate permitting the Sub-Inspector of Police to investigate the case is without jurisdiction and against the mandatory provisions of section17 as well as article 21 of the Constitution of India. It is clear that in the case of investigation under the Delhi Special Police Establishment Act, an officer below the rank of Inspector cannot investigate without the order of a competent Magistrate. In the instant case, order of the Special Judge was obtained by filing an application. That order shows that it was passed on request and in the interest of justice, investigation pursuant to such order did not suffer from want of jurisdiction and hence, in the facts of the case, the High Court erred in law in interfering with such investigation more so when it was already completed. The question raised by the respondent is well answered by this Court in a number of decisions rendered in a different perspective. The matter of investigation by an officer not authorized by law has been held to be irregular. Indisputably, by the order of the Magistrate investigation was conducted by Sub-Inspector, CBI who, after completion of investigation, submitted charge-sheet. It was only during the trial, objection was raised by the respondent that the order passed by the Magistrate permitting Sub-Inspector, CBI to investigate is without jurisdiction. Consequently, the investigation conducted by the officer is vitiated in law. Curiously enough the respondent has not made out a case that by reason of investigation conducted by the Sub- Inspector a serious prejudice and miscarriage of justice has been caused. It is well settled that invalidity of investigation does not vitiate the result unless a miscarriage of justice has been caused thereby. As noticed, on the basis of the permission accorded by the Magistrate, the Sub-Inspector, CBI proceeded with the investigation and finally submitted charge-sheet. It was only after that, said order of Magistrate was questioned by the respondent by filing a criminal petition in the High Court. The Single Judge, appreciating the submission made by the appellant, held that since the special court without assigning any reason permitted Sub-Inspector of Police to investigate the matter, the order is not in accordance with law and disposed of the petition giving liberty to the prosecution to file a fresh petition before the court seeking permission to get the matter investigated by a competent officer. The High Court erred in overlooking the gist of order of Special Judge permitting the Sub-Inspector to investigate. Further, having regard to the fact that no case of prejudice or miscarriage of justice by reason of investigation by the Sub-Inspector of Police is made out, the order of the High Court cannot be sustained in law. For the reasons stated above, these appeals are allowed and the order passed by the High Court is set aside.

[Union of India vs. T. Nathumuni (229 Taxman 129)]

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From the Courts

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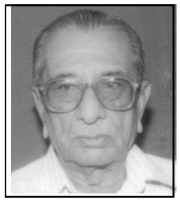

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Rejection of books of account and applicability of Section 68.

C.I.T. V/s. Dulla Ram, Labour Contractor, Kotkapura (2014) 222 Taxman 24 (Mag) P & H.

Issue :

When once books are rejected, can addition be made by invoking Sec. 68?

Held :

An A.O., may, while considering a return of income, inspect the account books and, if satisfied that account books do not reflect the true income of an assessee, reject the same. Account books once rejected are ruled out of consideration and cannot be pressed into service whether by the asseessee or the revenue.

Thus, when account books are rejected, it would follow, as a necessary corollary, that entries in the account books whether suspicious or not cannot be relied upon by the revenue or the asseesee.

To hold otherwise, would, in essence render, account books valid for certain purposes and invalid for others a course impressible in law.

The A.O. rejected the account books in their entirety and thereafter proceeded to assess income by applying a flat rate of profit of 10 percent. After applying a flat rate of profit of 10 percent, the A.O. added a certain amount to the income of the assessee on the basis of certain 'entries' deemed to be suspicious.

High court held that the CIT(A) as well as the Tribunal have rightly held that as books of account were rejected in their entirety, the A.O. could not rely upon any entry in the books of account for making an addition. A bare reading of Sec. 68 would reveal that it would not apply to a situation when account books have been rejected.

In view of the above, revenue's appeal was dismissed.

79

Expenditure u/s. 37(1) : Income need not arise.

CIT v/s. Bazzar Décor (India) P. Ltd. (2014) 364 ITR 389 (P & H)

Issue :

For allowability of expenses u/s. 37(1), is it necessary that such expenditure should result in income?

Held:

The essential requirements for allowing deduction u/s.37(1) of the I.T. Act. 1961, are :

(a) The expenditure should not be in the nature described in Sec. 30 to Sec.36 ;

(b) It should have been incurred in the accounting year ;

(c) It should be in respect of the business carried on by the assessee and the profits of which are to be computed and assessed ;

(d) It should not be of personal nature;

(e) It should have been laid out or expended wholly and exclusively for the purpose of such business; and

(f) It should not be in the nature of capital expenditure.

The provision nowhere envisage that the expenditure should be admissible only when such expenditure results in earning of income.

80

Tests for Agriculture Land

[Note : Though the below decision is old, it is thought fit to take it here since it may be useful to readers].

CIT v/s. Siddharth J. Desai (1983) 139 ITR 628 (Guj.)

Issue :

What are the tests which can be applied to decide whether the land is agricultural land or not?

Held :

Gujarat High Court has laid down following 13 tests for the above purpose. The same are approved by Supreme Court in Sarifabibi Mohmed Ibrahim v/s. C.I.T. (1993) 204 ITR 631.

(1) Whether the land was classified in the revenue records as an agricultural land and whether it was subject to the payment of land revenue?

(2) Whether the land was actually or ordinarily used for agricultural purposes at or about the relevant time?

(3) Whether such user of the land was for a long period or whether it was of a temporary character or by any of a stopgap arrangement?

(4) Whether the income derived from the agricultural operations carried on in the land bore any rational proportion to the investment made in purchasing the land?

(5) Whether the permission under section 65 of the Bombay Land Revenue Code was obtained for the non-agricultural use of the land? If so, when and by whom (the vendor or the vendee)? Whether such permission was in respect of the whole or a portion of the land ? If the permission was in respect of a portion of the land and if it was obtained in the past, what was the nature of the user of the said portion of the land on the material date?

(6) Whether the land, on the relevant date, had ceased to be put to agricultural use ? If so, whether it was put to an alternative use ? Whether such user and/or alternative user was of a permanent or temporary nature ?

(7) Whether the land, though entered in revenue records, had never been actually used for agriculture, that is, it had never been ploughed or tilled ? Whether the owner meant or intended to use it for agricultural purpose ?

(8) Whether the land was situated in a developed area ? Whether its physical characteristics, surrounding situation and use of the lands in the adjoining area were such as would indicate that the land was agricultural?

(9) Whether the land itself was developed by plotting and providing roads and other facilities?

(10) Whether there were any previous sales of portions of the land for non-agricultural use ?

(11) Whether permission under section 63 of the Bombay Tenancy and Agricultural Lands Act, 1948, was obtained because the sale or intended sale was in favour of a non-agriculturist ? If so, whether the sale or intended sale to such non-agriculturist was for non-agricultural or agricultural user ?

(12) Whether the land was sold on yardage or an acreage basis ?

(13) Whether an agriculturist would purchase the land for agricultural purposes at the price at which the land was sold and whether the owner would have ever sold the land valuing it as a property yielding agricultural produce on the basis of its yield ?

81 Weightage of opinion of Institute of Chartered Accountants of India.

CIT V/s. Punjab Stainless Steel Industries (2014) 364 ITR 144 (SC)

Issue :

What weightage or consideration is to be given to the opinion of Institute of Chartered Accountants of India on interpretation of certain words?

Held:

The question was whether the value of scrap was to be included in turnover or not.

On this issue Supreme Court has held as under :-

When a recognized body of accountants such as the Institute of Chartered Accountants of India, after due deliberation and consideration publishes certain material for its members, one can rely upon it. The meaning given by the Institute clearly denotes that in normal accounting parlance the word “turnover” would mean “total sales”. The sales would definitely not include scrap which is either to be deducted from the cost of raw material or is to be shown separately under a different head. There is no reason not to accept the meaning of the term “turnover” given by a body of accountants having statutory recognition.

If all accountants, auditors, businessmen, manufacturers, normally interpret term “turnover” as sale proceeds of the commodity in which the business unit is dealing, there is no reason to take a different view.

82 Interest on investment in shares : Allowable

Shri Satyasai Properties and Investment P. Ltd. (2014) 224 Taxman 29(Cal)

Issue :
Whether interest on investment in shares is allowable?

Held :
The expenditure on account of interest was a proper expenditure allowable u/s. 57. The reason which found favour both with the A.O. and the Tribunal was that the investment was not for the purpose of earning dividend. It could not be followed as to how can it be said that earning of dividend can be the sole motive or the sole source for the purpose of making income from other sources. What is an income from other sources has not been put into any straight jacket formula. Even the Legislature has not attempted to define the words expressly. Income from other sources is a very wide term. The Legislature has advisedly expressed “without prejudice to the generality of the provision.” Therefore, there was no reason why a proper expenditure should have been disallowed only because the investment was not made for the purpose of earning dividend. There is no finding that the investment was made otherwise than for the purpose of making an income. Therefore, both the Tribunal and A.O. were wrong in disallowing the expenditure. Accordingly, the question is answered in the negative and in favour of the assessee.

[Note : Readers may note that there is no discussion of applicability of Sec. 14A].

83 Capital Gain : Date of Transfer

Sanjeev Lal V/s. C.I.T. (2014) 269 CTR SC (1) (2014) 365 ITR SC(389)

Issue :
Whether for considering investment in new property for availing benefit of tax on capital gain how the meaning of transfer is to be constructed for deciding the date of transfer?

Held :
Facts are as under :-

(1) Date of Sale Agreement	27-12-2002
(2) Date of Registration of Sale Deed	24-09-2004
(3) Investment in new house	30-04-2003

Department’s view was that the purchase of new property was beyond – prior to one year and hence benefit of investment is not available.

In the matter Supreme Court has held as under :-

Assessee having executed an agreement to sell on 27-12-2002 for transferring the residential house and received earnest money. Some right in respect of said property stood transferred in favour of the vendee at that stage itself in view of the definition of the term ‘transfer’ in Sec. 2 (47), even though the sale deed could not be executed owing to pendency of litigation, and the sale deed was registered only on 24-09-2004, and, therefore, it cannot be held that purchase of another house by the assessee on 30-04-2003 was more than one year prior to the rate on which the transfer in respect of the residential house had been effected and consequently, assessee is entitled to exemption u/s. 54.

84 Charitable Trust : Investment in shares: Denial of exemption limited to Dividend Income and not full.

CIT V/s. Working Women’s Forum (2014) 365 ITR 353 (Mad.)

Issue :
Whether investment in shares by a Charitable Trust would result in denial of exemption in entirety?

Held :
The Trust was a Public Charitable Trust. It invested a sum of Rs.20,000/- in the shares of a Company. A.O. held that since Sec. 13(1)(d) recognizes investment in specified assets, failure to invest in such specified assets would disentitle the assessee for exemption. Hence exemption was denied u/s.11 and 12. CIT & I.T.A.T. held that only such part of income which was in violation of Sec. 13(1)(d) could be brought to tax at the maximum marginal rate and the entire of the income of the assessee could not be denied exemption.

On Appeal to High Court.

It was held that the denial of exemption should only be to the extent of income which was in violation of section 13(1)(d) and not the total denial of exemption u/s.11.

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Tribunal News

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DCIT v. Winsome Yarns Ltd. 166TTJ17 (CHD)
Assessment year: 2007-08 Order Dated: 28th August, 2014

Basic Facts

The assessee had originally purchased an industrial plot through auction. The auction was conducted by sale committee appointed by Court on winding upon of a company Punwire.The said sale was challenged before the company Judge by Sun Group. The company Judge allowed the application of Sun Group and directed the assessee-company to deliver back the possession of this industrial shed.The assessee challenged said order before the High Court and the High Court allowed the appeal of the assessee and confirmed the sale. The Sun Group and the employees union took up the matter before the Supreme Court where Sun Group offered to pay more consideration and the employee union also submitted that sale of the plot to Sun Group would be more beneficial to the employee's union. Considering these facts the Supreme Court set aside the sale on receipt of compensation by the assessee from Sun Group.According to the AO the said amount was received in extinguishment of its rights which as per the provisions of section 2(47)(ii) is a capital asset and the capital gain arising thereon would be taxable as per provisions of section 45.According to the AO if the gain could not be treated as short-term capital gain then same could be said to be in the form of compensation by way of interest given to the assessee by the Supreme Court for depriving the rights of the assessee in property. In that case receipt would be treated as interest income and would be taxable as revenue receipt. The CIT (A), however, taking a view that amount of compensation was in the nature of capital receipt, deleted the addition made by the Assessing Officer.

Issue

Whether where assessee had acquired an industrial shed for running a manufacturing business but said sale was set aside by Supreme Court, since assessee was clearly deprived of making future profits by surrendering its profit making structure or capital asset, was compensation received against such surrender to be treated as capital receipt not liable to tax?

Held

A perusal of order of Supreme Court would clearly show that sale in favour of assessee was clearly set aside. The term set aside would also include 'cancel', 'annul' and therefore in the present case what has happened is that by setting aside the same the Supreme Court has cancelled the original sale made to the assessee-company.Thereafter the Supreme Court has directed the Official Liquidator to issue fresh NOC to enable the Sun Group to transfer the property. This clearly shows that the Supreme Court clearly cancelled the earlier sale otherwise the Court could have asked the assessee-company to transfer the property to Sun group. If sale itself is set aside by a Court then it can be said that the assessee never acquired any interest in such property. No doubt extinguishment is also covered in the definition of transfer under section 2(47)(ii). However, extinguishment would normally connote a situation where an asset goes out of existence.However, when the asset never comes into existence then such asset cannot be extinguished. Therefore there is no extinguishment in the present case because the said property purchased through auction by assessee-company never came into existence because of the order of the Supreme Court through which sale itself was set aside. In view of above, it was held that surplus arising on account of compensation received by the assessee cannot be assessed under the head 'capital gain' because no asset came into existence with the assessee. Coming to the second aspect regarding taxability of the amount as compensation, it is well settled that if amount is received as compensation in relation to surrender of profit making structure then such compensation is to be treated as capital receipt. In the instant case, the assessee had acquired an industrial shed for running a manufacturing business and sale was set aside by the Supreme Court, since assessee was clearly deprived of making future profits by surrendering this profit making structure or capital asset, compensation received against such surrender was to be treated as capital receipt. In the result, appeal of the revenue is dismissed.

68 **Siemens Healthcare Diagnostics Ltd. v. ACIT 152 ITD 155(Ahd)**
Assessment Year: 2008-09 Order dated: 19th September, 2014

Basic Facts

The assessee was engaged in the business of trading of diagnostic instruments and consumables manufactured by its associated enterprises. The assessee entered into international transactions representing purchase of goods from the associated enterprises. It followed a unique business model, wherein diagnostic instruments were sold to customers on lease basis and depreciation on such instruments was recorded by the assessee. In second business model, instruments were rented and used by the customers but capitalized in the books of the assessee as 'Fixed Asset'. As depreciation was almost three times higher in the case of the assessee as compared to comparable company, for the purpose of 'like to like' comparison, an adjustment in respect of depreciation cost while computing margin of the assessee and comparable companies was claimed by the assessee.However, the TPO had given no finding on the variation in the amount of depreciation as well as effect of variation in two different methods of providing depreciation employed in the two cases and he made T.P. addition.The DRP had also not recorded any finding in respect of the claim of the assessee and confirmed the action of the TPO.

Issue

Whether where assessee claimed for a suitable adjustment regarding its claim of depreciation as there was huge difference in amount of depreciation between assessee company and chosen comparable case, TPO ought have to have provided findings on variation?

Held

Tribunal held that in the above facts and circumstances, it shall be fair and in the interest of justice to restore the matter back to the file of the Transfer Pricing Officer for proper verification of the claim of the assessee regarding huge difference in the amount of depreciation between the assessee company and the chosen comparable case and also the difference in method of providing of depreciation in the two companies. If the methods of depreciation adopted by the two companies are different, then the net margins arrived at are not strictly comparable unless suitable adjustment is made in the amount of depreciation so as to adopt depreciation under the same method in the two cases. Therefore, the TPO is directed to take into consideration the difference in the method of providing depreciation in the case of the assessee and the chosen comparable case and if the methods are different, then to make suitable adjustment for the same as per law.

69 **DCIT v. E. India Biz. Com (P.) Ltd. 151 ITD 722 (Delhi)**
Assessment Year: 2007-08 Order dated: 2nd July, 2014

Basic Facts

The assessee is a company having main objectives in the business to introduce, develop, promote and market services, packages and products relating to e-commerce, communication and realize consultancy income thereof. For the year under consideration, the main source of the company was through rendering consultancy services related to logistic commerce, communication information, education, entertainment technologies and other services related thereto. The assessee has shown nil receipt for the year under consideration. However, it has debited expenses against the consultancy services which included expenses on account of portal and web charges. The AO disallowed whole of these portal and web. The CIT(A) granted the relief to the assessee against which the Revenue is in appeal to the Hon'ble ITAT.

Issue

Whether web and portal charges were allowable as revenue expenditure?

Held

The Tribunal held that just because a particular expenditure may result in an enduring benefit would not make such an expenditure of a capital nature.What is to be seen is what is the real intent and purpose of the expenditure and as to whether there is any accretion to the fixed capital of the assessee. In the case of expenditure on a website, there is no change in the fixed capital of the assessee. Although the website may provide an enduring benefit to an assessee, the intent and purpose behind the purpose for a website is not to create an asset but only to provide a means for disseminating the information about the assessee. The advance of technology and the wide spread use of the internet has provided a very powerful medium to companies to publicise their activities to a larger spectrum of people at a much lower cost. Website enables companies to do what the printed brochures did but in a much more efficient manner as well as in a much shorter period of time and covering a much larger set of people worldwide. Accordingly the expenditure was held to be of revenue nature.

Similar view was also taken by the Hon'ble Delhi High Court in the case of Indian Visit.com (P.) Ltd. on which the Tribunal had relied on.

70

Shree Nashik Panchvati Panjrapole vs. DIT (Exemption) 165 TTJ 478 (Mum)

Assessment Year: 2009-10 Order dated: 26th March, 2014

Basic Facts

The assessee-trust was established for cow breeding and protection of cows and oxen. It was granted registration under section 12AA. During relevant year, the DIT(E) found that income of assessee from sale of milk was far in excess of Rs.10 lakh.The DIT(E) thus, opined that assessee was doing regular activities which were in the nature of business by way of sale of milk, and was directly hit by the proviso to section 2(15). Accordingly, the DIT(E) having invoked provisions of section 12AA(3), cancelled the registration granted to assessee-trust. The ld. Counsel of the assessee explained that non-procurement of milk from cows lead to the death of the cows which would be against the main object of the institution. The milk so procured is given daily free of charge with snacks to the children who visit the premises of the organization. Thereafter the milk is distributed to poor patients in hospital freely and also distributed to hospitals/schools/balmandirs etc. and the balance milk is sold at the subsidized rates to general public who come and stand in long queue for it so that the poor and needy who stand in the queue with a container get the milk at subsidized rates. Accordingly, the DIT(E) has grossly erred in applying the proviso to Sec. 2(15) of the Act.

Issue

Whether assessee could not be said to be carrying on any business, trade or commerce within meaning of proviso to section 2(15) and, thus, impugned order cancelling registration deserved, to be set aside?

Held

The bone of contention is the 7th object of the trust under the head "General Public Utility" which inter alia provides (a) to give milk free of charge or on payment to children charitable institutions (b) to provide at reasonable rates, milk and milk products to public in general with a view to promote, maintain or improve the health of public. In pursuance of these object, the Trust is selling milk at subsidized rates which in the opinion of the DIT (E) amounts to carrying on of a business activity.All that has to be decided now is whether the activity of the sale of milk constitutes carrying on of any activity in the nature of trade, commerce or business, which activities the trust is carrying on prior to the amendment brought by Finance Act, 1983. The fundamental or dominant function of the Trust is to provide asylum for old, maimed, sick, dry, weak, disabled and stray animals and birds, more particularly cows and other such milk cattle and to bring about improvement in breeding cattle for the beneficial promotion, upkeep, maintenance and propagation of cows. Thus the dominant object is to run Panjrapole and the activities related to it. The milk left after distributing it free of charge to children, hospitals, schools, Balmandir, Mahila Anathashram etc. is distributed to general public at large at a very nominal rate.The impugned trust would not loose its character of charitable purpose merely because some profits arises from the activity of the sale of milk. Such activity cannot be carried on in such a manner that it does not result in any profit. It be indeed be difficult for persons in-charge of a trust or institution to carry on the activity such that the expenditure balances the income and there is no resulting profit.That would not only be difficult on practical realization but would also reflect unsound principle of management.The test for carrying on of any activity in the nature of trade, commerce or business as mentioned in the first proviso to section 2(15) would be satisfied if profit making is not the real object. After considering the entire facts in totality, the Hon'ble ITAT held that there was no material which suggest that the assessee-trust was conducting its affairs solely on commercial lines with a motive to earn profit. There is also no material brought on record which could suggest that the assessee-trust has deviated from its objects which it has been pursuing for last 130 years. The proviso to section 2(15) is not applicable on the facts of the case and the assessee deserves continuance of registration under section 12AA. Accordingly, the order of the DIT(E) was set aside with a direction for the continuance of the registration.

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Reuters Transaction Service Ltd. v. DDIT165 TTJ 320 (Mum)

Assessment Year: 2008-09 & 2009-10
Order dated: 18th July, 2014

Basic Facts

The assessee was a company incorporated under the laws of England and was a tax resident of United Kingdom. The assessee was engaged in the business of providing electronic deal matching systems enabling authorized dealers in foreign exchange such as banks, etc. to effect deals in spot foreign exchange with other foreign exchange dealers. In order to provide the service and access to the foreign exchange deal matching system, the assessee also entered into agreements with its Indian subsidiary namely RIPL. The Indian clients could avail the services of the assessee only through the equipment's and connectivity provided by the assessee itself though its Indian subsidiary namely RIPL. The AO held that the revenue received by the assessee was in the nature of 'Royalty' as well as Fee for Technical Services (FTS) which was subjected to tax in India under the provisions of Act as well as DTAA. The CIT(A) confirmed the order of the Assessing Officer.

Issue

Whether where assessee a UK based company allowed clients to use its software and computer system to have access to its portal it amounted to imparting of information concerning technical, industrial, commercial or scientific equipment work & the payment made in respect of same constitute 'royalty' taxable in terms of article 13(3) of India-UK DTAA?

Held

The assessee is facilitating its clients to use its system and application programming interface which is subscriber interface for use with the related services including Autoquote service. The assessee is also providing the equipment's with pre-loaded software to its subscribers and network used for provision of the services. The assessee grants subscriber limited license of software to install and use at the site. Hardware/software and related documentation supplied by the assessee's group concern also includes the assessee's application programming interface (API). Therefore, the subscriber/user can view, manipulate and create the derived data from information for their individual use. The information is made available by the assessee through its system and other equipment's installed at the site of the subscriber to facilitate the connectivity with the assessee's system/router located in Geneva. The system which is a complex, commercial device/ apparatus provides a gateway for processing request of the clients and makes available the matching counter request and thereby ensures the transactions of purchase and sale of foreign exchange between the two counter parts of the clients. The payments made by Indian clients/subscribers to the assessee for use and right to use of such equipment and information for processing their request of purchase and sale of foreign exchange constitute royalty. Further the entire system of the assessee including the equipment's and connectivity facility is provided at the site of the subscriber. Therefore, the assessee is providing the service in the form of information and solution to the need of the subscribers by providing the matching party.As per the terms and conditions stipulated in the agreement the Indian clients/subscribers accept the individual non-transferable and non-exclusive license to use the licensed software programme for the purpose of carrying out the purchase and sale of foreign exchange. Thus, what is granted under the agreement is license to use the software for internal business of Indian clients. Further, the assessee also permitted the Indian clients to sub-license the software with prior permission of assessee.It is pertinent to note that its not the license to use the software alone but the assessee has made available the computer system along with the software. The Indian clients are paying for use and right to use of equipment (scientific, commercial) along with software for which license was granted by assessee. It is clear from the terms and conditions of the agreement and arrangement between parties that the Indian clients are not permitted to access the portal of the assessee from any other computer system other than the computer provided by the assessee and by use of software provided in the said computer system.Therefore, it is not a case of simplicitor payment for access to the portal by use of normal computer and internal facility but the access is given only by use of computer system and software system provided by the assessee under license. Indian clients make use of the copyright software along with computer system to have access to the requisite information and data on this portal hoisting on the server of the assessee.Accordingly, by allowing the use of software and computer system to have access to the portal of the assessee for finding relevant information and matching their request for purchase and sale of foreign exchange, it amounted to imparting of information concerning technical, industrial, commercial or scientific equipment work and payment made in respect of same would constitute royalty. Once the receipt in question has been decided as royalty in nature then there is no need to go into the question of assessee having PE in India. Para 6 of article 13 can be pressed into service only in the case when the existence of PE of a non-resident is not in dispute. In the case in hand the assessee has not come up with the claim that the services rendered to the Indian banks are through its PE. Rather the assessee has vehemently contended that it has no PE in India. In these facts and circumstances, the provision of para 6 of article 13 cannot be invoked in case when the receipt is found as royalty in terms of article 13(3) of the DTAA and assessee has not admitted any PE in India. In the result appeal of the assessee is dismissed.

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AWB India (P) Ltd. v. Deputy Commissioner of Income Tax (2014) 166 TTJ 521 (DEL)

Assessment Year: 2008-09 Order Dated: 13th October, 2014

Basic Facts - I

The assessee is engaged in the business of trading in food grains. The assessee had disclosed gain on commodity derivatives after adjusting unrealized loss. It was explained by the assessee that the said amount represents loss on open positions in trading transactions of commodity derivatives. The assessee explained, in substance, that once a loss can be reasonably estimated, as was in the position of the case, such a loss is to be provided for in the books of accounts and in support of this contention, the assessee also relied on various landmark judgments and accounting practices, including accounting standards. The AO however, did not consider any of these arguments and disallowed the unrealized loss on commodity derivatives. The DRP also upheld the order of the AO.

Issue - I

Whether when the assessee claims for unrealized loss is allowable?

Held - I

It is only elementary that principle of conservatism, on one hand, requires all anticipated losses to be accounted for at the point of time when such losses can be reasonably estimated, and, on the other hand, yet it defers accounting for all anticipated profits to be accounted at the stage when these profits are realized. This principle, which is the conceptual foundation for the stock valuation at cost price or market price- whichever is lower, is duly recognized by Hon'ble Supreme Court in the case of Chainrup Sampathram. It is for this reason that while anticipated profit for forward contracts are not taken into account but anticipated losses are duly taken into account in computation of business profits. The Hon'ble ITAT in view of the above discussion held that it is clear that even when loss has not yet crystallized, a deduction is to be granted in respect of a reasonably anticipated loss. It is altogether a different issue that since these provisions for anticipated losses are reversed in the beginning of the next year, these deductions are completely tax neutral and the impact is confined to the timing of deduction. In such a situation, there cannot be a double deduction of the same loss- first one at the end of this accounting period and second one at the point of time when the transaction is finally settled. It was finally held that as the assessee has reversed this provision in the beginning of next year and thus effectively adjusted this loss against loss or profit finally realized in commodity derivatives, no objection can made for this claim. For this limited verification, therefore, the matter was restored to the file of the AO.

Basic Facts – II

The assessee is a part of AWB group Australia. One of the international transactions that the assessee entered into with its AEs was payment for 'management services'.On an analysis of the details of the payments made under this head, the TPO was of the view that the benefit of some of the services availed under the head 'management services' was not commensurate with the payments made for the same. He was also of the view that as against the use of TNMM by the assessee in benchmarking the right course of action will be to follow CUP method because the value under CUP method will be best indicator of the value of these services.The TPO also considered that certain services were not rendered by the AE or were worthless. In respect of these cases TNMM was rejected and CUP was applied- though, even under CUP method, value assigned was 'Nil' as, in the opinion of the TPO, these services were worthless. The AO proposed to make disallowance in respect of payments for the above services, arm's length value of which was taken at 'zero'. On appeal, the DRP confirmed the stand so taken by the TPO.

Issue – II

Whether all that TPO can verify is that the payment made to the AE was at arms length and cannot question the commercially expedient of the transaction?

Held - II

The Hon'ble ITAT held that the pre-condition for use of CUP method is availability of the price of the same product and service in uncontrolled conditions. It is on this basis that ALP of the product or service can be ascertained. Therefore, unless the TPO can identify a comparable uncontrollable case in which such services are rendered and find out consideration for the same, the CUP method cannot have any application. Moreover, it is not the job of TPO to decide whether a business enterprise should have incurred a particular expense or not.A business enterprise incurs the expenditure on the basis of what is commercially expedient and what is not commercially expedient.As for the services being useless it is a call taken by the assessee whether the services are commercially expedient or not and all that the TPO can see is at what price similar services, whatever be the worth of such services, are actually rendered in the uncontrolled conditions. As for the evidence for each of the service stated in the agreement, it is not even necessary that each of the service, which is specifically stated in the agreement, is rendered in every financial period. The actual use of services depends on whether or not use of such services was warranted by the business situations whereas payments under contracts are made for all such services as the user may require during the period covered. As long as agreement is not found to be a sham agreement, the value of the services covered under the agreement cannot be taken as 'nil' just because these services were not actually required by the assessee. In any case, based on the material on record, the tribunal was satisfied that the services were actually rendered under the agreement and these services did justify the impugned payments. Also, in absence of prerequisites for application of CUP methodit was not open to the TPO to disregard the TNMM employed by the assessee. Thus, under these circumstances, the TPO's impugned action did not meet with tribunal's judicial approval. The AO was directed to delete the impugned ALP adjustment.

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Controversies

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Interest on loan taken for acquiring fixed assets

Issue:

The Assessee is an existing manufacturing company. It obtains term loan from bank for acquiring plant and machinery. Important dates are as under:

1. Date of invoice – 01/01/2011
2. Disbursement of loan – 15/01/2011
3. Installation of plant and machinery – 25/01/2011
4. Date of put to use – 01/03/2011

The A.O. is of the view that interest pertaining to period between disbursement of loan i.e., 15/01/2011 and the date of actual put to use of plant and machinery i.e., 01/03/2011 is required to be disallowed as per the provisions of proviso to section 36(1)(iii) of the I.T. Act, 1961.

Proposition:

It is submitted that interest paid on loan taken for acquiring fixed asset cannot be disallowed. The proviso to section 36(1)(iii) will be applied only when there is substantial period of time between the loan obtained and the asset being put to use. Even otherwise, it is submitted that if the situation is not covered by section 36(1)(iii) such deduction is permissible u/s 37(1) as the interest expenditure is wholly and exclusively incurred for the purpose of business.

View against the proposition:

When the asset is acquired out of borrowed funds, interest on the term loan is required to be capitalized from the date of disbursement of loan till such date on which the plant and machinery is put to use in the business of the assessee company.

Section 36(1)(iii) of the I.T.Act provides for the allowability of expenditure incurred on account of interest on borrowed capital for the purpose of business. As such, if any interest expenditure is incurred for the purpose of the profits and gains of the business, then the same is an allowable expenditure out of profits and gains of business. However, proviso to section 36(1)(iii) states as under:

"*Provided that any amount of interest paid, in respect of capital borrowed for acquisition of an asset for extension of existing business or profession (whether capitalized in the books of account or not); for any period beginning from the date on which such asset was first put to use, shall not be allowed as deduction.*"

It is submitted that when assessee acquired plant and machinery during the year by obtaining term loan, the interest expenditure on such term loan is required to be capitalized till the date on which such asset is actually put to use. Such interest cannot be treated as revenue expenditure even if the interest for such period is written off to profit and loss account.

View in favor of the assessee:

The expression "purpose of business" is comprehensive enough to cover expenditure of revenue nature as well as of capital nature because both the types of expenditure can be incurred for the business purposes. Therefore, even if a borrowing is made for incurring an expenditure of capital nature, it remains borrowing for the purpose of business.

Calico Dyeing & Printing Works vs. CIT (1958) 34 ITR 265 (Bom).

Addl. CIT vs Laxmi Agents Pvt. Ltd. (1980) 125 ITR 227 (Guj.)

CIT vs. Granulated Fertilizers & Feeds Pvt. Ltd. (1982) 137 ITR 715 (Guj)

CIT vs. Alembic Glass Industries Ltd. (1976) 103 ITR 715 (Guj)

CIT vs. Shah Theatres Pvt. Ltd. (1987) 169 ITR 499 (Raj).

CIT vs. TaralDevelpoment Corp. (1994) 205 ITR 421 (All)

ITO vs. Reliable Chemicals (1982) 4 TTJ (Bom) 497

What sub-clause (iii) emphasizes is the user of the capital and not the user of the asset which comes into existence as a result of the utilization of the borrowed capital.

Calico Dyeing & Printing Works Ltd. Vs. CIT (1958) 34 ITR 265 (Bom)

CIT vs. Insotex Pvt Ltd. (1984) 150 ITR 195

Let me now refer to the effect of amendment by which proviso is added to section 36(1)(iii).

This section has been amended w.e.f 1st April, 2004 by insertion of a proviso to it. According to the said proviso, no deduction will be allowed in respect of any amount of interest paid in respect of capital borrowed for acquisition of an asset for the period beginning from the date on which capital is borrowed for the acquisition of asset till the date on which the asset acquired by using such borrowed capital is first put to use. However, let me now refer to Accounting Standard 16 (AS 16) on Accounting for Borrowing Cost.

- AS-16 deals with the accounting treatment of borrowing cost in relation to the <u>Qualifying Assets</u>
- A <u>Qualifying Asset</u> (QA) is an asset that necessarily takes a substantial period of time to get ready for its intended use.
- In Para 3 of AS-16, Borrowing Costs are described to include interest and other costs incurred by an enterprise in connection with the borrowing of funds
- Para 6 of AS-16 provides for recognition of Borrowing Costs as: "Borrowing costs that are directly attributable to the acquisition, construction or production of a <u>qualifying asset</u> should be capitalized as part of the cost of that asset. The amount of borrowing cost eligible for capitalization should be determined in accordance with this statement. Other borrowing costs should be recognized as an expense in the period in which they are incurred."

Following are the three important issues relevant in the context of a QA

a) Commencement of capitalization

b) Suspension of capitalization and

c) Cessation of capitalization

According to Para 14 of AS-16, the capitalization of borrowing costs, as part of the cost of a <u>qualifying asset</u>, should commence when all the following conditions are satisfied

a) Expenditure for the acquisition, construction or production of a <u>qualifying asset</u> is being incurred

b) Borrowing costs are being incurred and

c) Activities that are necessary to prepare the asset for its intended use or sale are in progress.

From the above mandate of Accounting Standard, it is very clear that the borrowing cost has to be treated as revenue expenditure in the year in which same are incurred except where the borrowing is directly connected with acquisition, construction or production of a <u>qualifying asset.</u> As per the Accounting Standard, the <u>qualifying asset</u> is an asset that necessarily takes a substantial period of time to get ready for its intended use. When the asset is ready for use, it is no more a <u>qualifying asset</u> and hence the interest cost cannot be capitalized to the cost of fixed asset.

<u>Summation:</u>

It is submitted that there is always a short time lag between the disbursement of loan and asset being put to use in a manufacturing concern. If the time lag is substantially long, then only the question of disallowance of interest arises. When the asset is acquired, it is also necessary that the view can be taken that the asset is ready for use. Actual user will take place after the trials have been taken and looking to the facts of the case it can be observed that the time period for disbursement of loan and actual user is very short which is practical and imperative in respect of every asset in a manufacturing organization.

As per the mandate of Accounting Standard 16 (AS-16) on Accounting for Borrowing Cost, it is specifically provided that interest can be capitalized only in respect of "qualifying asset". And it states that a qualifying asset is an asset that necessarily takes a substantial period of time to get ready for its intended use. Assets which are ready for the intended use when acquired are not qualifying assetand hence the assessee cannot capitalize interest to the cost of qualifying asset and the same has to be written off to the profit and loss account and the deduction u/s 36(1)(iii) cannot be denied. If it is not done, there would be breach of As-16 which will make the financial statement untrue and unfair. The time lag in our case between the loan disbursed and the asset used is very short and hence it is not possible to capitalize the cost of interest.

It is further submitted that in my opinion assessee is otherwise entitled to deduction of such interest u/s 37(1) as such situation is not covered by section 36(1)(iii). As per section 37(1), any expenditure incurred wholly and exclusively for the purpose of business is required to be allowed as deduction u/s 37(1).

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contd. from page 703

genuine and the same are not being carried on in accordance with the objects of the trust, this will offer a good ground for cancellation of registration.

Thus, in every case, grant of registration as well as cancellation of registration rests on the Department's finding to be given on the parameters given in Section 12AA(1) and Section 12AA(3), as the case may be.

Income:

Registration of the trust under the I.T. Act, confers certain benefits of taxation under the provisions of the Act. The conditions, under which the income of the trust would be exempted under the provisions of the Act, are clearly laid down under Section 11 as well as Section 12 of the Act. Section 11 of the Act, specifically points out the - circumstances under which income of the trust is not to be included in the total income. So too, Sec. 12 of the Act, on the income derived from property held for Charitable or religious purposes.

Thus, when the assessee is in receipt of income from activities, which fits with Section 11 and 12 of the Act, as well as income which is not exempt, would not go for cancellation of registration u/s. 12AA(3) of the Act, on the sole ground that the assessee is in receipt of income which does not qualify for exemption straight away by it self.

All that ultimately would arise in such cases is the question of considering whether Section 11 of the Act, would at all apply to exempt these income. These are matters of assessment and has nothing to do with the genuineness of the activity or the activities not in conformity with the objects of the trust. It seems that object of the insertion of first proviso to Sec. 2(15) of the Act, was only to curtail trust which under the garb of 'General Public Utility" carry on business or commercial activity only to escape the liability under the Act, thereby gain unmerited exemption under Section 11 of the Act. Hence this amendment to Sec. 2(15) cannot be taken support for cancellation of registration of the trust already granted u/s. 12AA(1).

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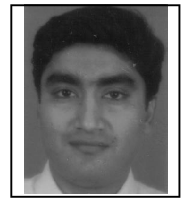
Judicial Analysis



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Gujarat High Court lays down important Principles of Law under the VAT Act which can also be useful under the Income Tax Act.

Futura Ceramics Pvt. Ltd. Vs. State of Gujarat (SCA No. 6500 of 2012, dated 20th December, 2012)

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The petitioner has challenged the impugned order passed in re-assessment proceedings on the ground that only on the basis of show cause notice issued by the Excise Department, additions are made. Counsel submitted that this would be wholly impermissible. On the other hand, Department has contended that the order is appealable and this Court therefore, should not interfered at this stage in the present case.

We may reproduce entire order of re-assessment which is rather brief and reads as under :-

"The regular assessment under section 34 of Gujarat Value Added Tax Act of the Trader is completed on 2/6/2009. At place of business of Trader is of Trader Inspection of place was held on 17/1/2008 by Directorate General of Central Excise Department, Ahmedabad. Regarding this inspection show cause notice was given vide No. F. No. DGCEI/AZU/12 (4) 131/2008-09 dated 19.10.2010. Show cause notice in inquiry and statement obtained in context of inquiry and on perusing evidences, in assessment year 2006-07 you have shown Rs. 5,97,82,816/= sell less in turn over of total taxable sell. In this regard on 12/3/2010 show cause notice was given to you. Regarding above show cause Notice your written submission dated 23/3/2012 considered. In your case at the time of assessment in taxable turn over of sell turnover stated in above show cause is not included. Therefore, from here by taking decision of re-assessment under Section 35 of the Gujarat Value Added Tax order is passed. Order of assessment and notice of demand to be served to Trader."

From the above, it can be seen that the assessment which was previously concluded was re-opened on the premise that during the Excise raid, it was revealed that the petitioner had clandestinely removed goods without payment of excise duty. The Sales Tax Department, therefore, formed a belief that the value of goods plus excise duty evaded should form part of the turnover of the assessee for the purpose of tax under the Value Added Tax Act.

It may be that the raid carried out by the Excise duty and the material collected during such proceedings culminating into issuance of a show cause notice for recovery of unpaid excise duty and penalty in a given case sufficient to re-open previously closed assessment. In this case, however, we are not called upon to judge this issue and would therefore not give any definite opinion. The question, however, is whether on a mere show cause issued by the Excise Department, the Sales tax Department can make additions for the purpose of collecting tax under the Gujarat Value Added Tax Act without any further inquiry. If the Assistant Commissioner of Commercial Tax has utilized the material collected by the Excise Department; including the statements of the petitioner and other relevant witnesses and had come to an independent opinion that there was in fact evasion of excise duty by clandestine removal of goods, he would have been justified inmaking additions for the purpose of VAT Act. In the present case, however, no such exercise was undertaken. All that theAssessing Officer did was to rely on the show cause notice issued by the Excise Department. Nowhere did he conclude that there was a case of clandestine removal of goods without payment of tax under the VAT Act. Merely because the Excise Department issued a show cause notice, that cannot be aground to presume and conclude that there was evasion of excise duty implying thereby that there was also evasion of tax under the VAT Act. It is not even the case of the Department that such show cause notice proceedings has culminated intoany final order against the petitioner. We wonder what would happen to the order of re-assessment, if ultimately the Excise Department were to drop the proceedings without levying anyduty or penalty from the petitioner.All in all, the Asstt. Commissioner has acted in a mechanical manner and passed final order of assessmentmerely on the premise that the Excise Department has issueda show cause notice alleging clandestine removal of the goods. Such order, therefore, cannot be sustained and is accordingly quashed. When the order is ex facie illegal and wholly untenable in law, mere availability of alternative remedy would not preclude us from interfering at this stage in a writ petition.

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Ravi Electronics vs. Asst. Commercial Tax Commissioner (SCA No. 3832 of 2012, dated 26th December, 2012)

In all these writ petitions, the petitioners have challenged Notices issued by the competent officer of the Sales Tax Department of the State of Gujarat for the purpose of reopening of previously closed assessments. Such notices are challenged on two grounds – Firstly, that the same were time barred, and further that the authority issuing such notices had no reason to believe that the dealer has concealed any sales, or purchases, or provided inaccurate and incorrect declaration or return. In other words, the second limb of the argument of the petitioners is that the notices for reopening are invalid for want of necessary satisfaction required under the law.

We have recorded facts as arising in Special Civil Application No. 3832 of 2012 for the purpose of deciding these writ petitions. The petitioner is a Dealer and duly registered under the Gujarat Value Added Tax Act, 2003 [“VAT Act” for short]. For the Financial Year 200304, the petitioner had filed its return under the then prevailing Gujarat Sales Tax Act, 1969 [“Sales Tax Act” for short]. Long thereafter, the Sales Tax Officer issued impugned notice dated 5th March 2012 indicating that for the period between 1st April 2003 to 31st March 2004, he proposed to reopen the assessment and that therefore, the petitioner should remain present with all accounts and documents. In such notice, he indicated that turnover of Rs. 24.07 lakhs [rounded off] had escaped assessment. Though alongwith such notice, no reasons why officer intended to reopen the assessment were supplied, from the affidavit in reply dated 23rd April 2012 filed by the respondents, we gather that according to the authorities, the petitioner had not produced “D” form either alongwith returns filed or even thereafter. This appears to be the principle reason why the assessment previously farmed is sought to be reopened.

We may notice that the Sales Tax Act contained certain provisions permitting reassessment under certain circumstances. Section 44 of the Act in particular clothed the Commissioner with the power of reassessment when the turnover had escaped assessment. If such escapement of assessment was for the reason of the dealer having concealed the sales or purchases, or any material particulars relating thereto, or knowingly furnished incorrect declaration or returns, the limitation for reopening such assessment was eight years from the end of the period to which such turnover related. In other cases, shorter period of limitation of five years was prescribed under the said Act. To some of the provisions pertaining to assessment and reassessment contained in the Sales Tax Act, we would advert to at a later stage. At this stage, we may notice that the Legislature framed the Gujarat Value Added Tax Act (“VAT Act” for short) and in the process, repealed the Gujarat Sales Tax Act, 1969. The Gujarat Value Added Tax Act, 2003 was introduced with effect from 1st April 2006. In the VAT Act also, powers of the Commissioner to carry out reassessment were preserved, however, with significant changes. Under Section 35 of the VAT Act, the Commissioner now has the power to reassess the turnover of any dealer where he has a reason to believe that the whole, or any part of the taxable turnover of such dealer has escaped assessment, or he has been under assessed, or has been assessed at a rate lower than the rate at which it is assessable, or wrongly been allowed any deduction therefrom, or wrongly been allowed any credit. Subsection (2) of Section 35 of the VAT Act, however, provides that no order shall be made under subsection (1) after the expiry of five years from the end of the year in respect of which or part of which the tax is assessable.

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The Gujarat Sales Tax Act, 1969 was replaced by the Gujarat Value Added Tax Act, 2003 with effect from 1st April 2006. In the VAT Act, Chapter V pertains to Returns, Payment of Tax, Assessment, Recovery of Tax and Refund. Here also, similar provisions have been made for filing of returns and scrutiny of such returns. Section 35 pertains to turnover escaping assessment and reads as under:"

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From the above it can be seen that in the successor Act also, provision for reassessment of previously closed assessment was retained. This, however, came with significant changes. Firstly, the graded time limit of eight years for cases of concealment of material particulars etc. and five years for rest of the cases was done away with. Uniformly, for all cases an outer time limit of five years was prescribed. More importantly, such time limit pertains not for issuance of notice for reassessment but for passing of final order on turnover escaping assessment.

The central question is whether such modified time limit would apply to all cases which were not instituted by the time the Sales Tax Act was repealed and the VAT Act was enacted. Section 100 of the VAT Act provides for "Repeal and Savings" and reads as under:

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It is undoubtedly true that the provisions containing period of limitation are construed as procedural in nature, and therefore, any changes made in the statute regarding the period of limitation is ordinarily applied to all pending and future cases. In other words, amendments in the period of limitation are ordinarily considered retrospective in nature.

In case of C. Beepathuma &Ors. vs. Velasari Shankaranarayana Kadamboliathaya & Ors., reported in AIR 1965 SC 241, it was observed that there is no doubt that the law of limitation is a procedural law and the provisions existing on the date of the suit would apply to it.

One well recognized exception, however, is when in the earlier statute, as per the previous statutory provision, a cause had become barred by limitation, the same would not be revived by amendments, providing for larger period of limitation. In case of J.P Jani, Income Tax Officer, Circle IV, WardG, Ahmedabad & Anr. vs. Induprasad Devshanker Bhatt [Supra], the Supreme Court considered the effect of introduction of Income Tax Act, 1961 replacing the old IncomeTax Act, 1922, on the power of reopening of assessment. When it was found that such right in the old law was barred by limitation, introduction of Section 148 of the Income Tax Act, 1961 providing longer period of limitation cannot be resorted to for reopening the assessment. In case of S.S Gadgil v. Messrs.Lal& Company, reported in AIR 1965 SC 171 also, the Apex Court held that when the period of one year for issuing notice had expired, subsequent amendment enlarging the period of limitation would not revive the cause.

Statute of limitation is thus ordinarily made applicable with retrospective effect to apply to legal proceedings brought to the Court after the operation of such amendments, even for causes which might have accrued earlier. In cases where the cause had become barred by limitation by the time longer period of limitation is prescribed by amendment would however not be revived. There would still be some doubt whether, if the statute provides for shorter period of limitation by amendment, the same would have an effect of extinguishing right of action subsisting on the date of such amendment. Had this been the only angle, we would have further probed the legal position in this respect. In the present case, however, the situation is somewhat different. It is not a simple case of a statutory provision being amended by a subsequent legislation providing for a shorter period of limitation, as compared to the earlier statute. This is a case where the entire machinery provision has undergone significant changes.

To recall, in the Sales Tax Act, 1969, reopening of assessment was permissible when the Commissioner had a reason to believe that any turnover of sales, or turnover of purchases of goods chargeable to tax has escaped assessment, or has been underassessed, or assessed at a lower rate. In such cases, if there was any element of concealment of sales, etc., he could issue a notice for reassessment of the escaped turnover within eight years from the end of the period to which such turnover related. In other cases, he could issue such a notice within five years from the said date and not later. The entire Sales Tax Act was repealed by the VAT Act. In the VAT Act, provision for reassessment made significant changes. Under Section 35(1), reassessment is permissible in cases of escapement of assessment or underassessment, or application of lower rate, etc. Subsection (2) of Section 35 of the VAT Act, however, provides that no order shall be made under subsection (1) after the expiry of five years from the end of the year in respect of which or part of which the tax is assessable.

Two significant changes thus in the old Act and the successor Act are that distinction between the cases of concealment of particulars, etc. providing for larger period of eight years of limitation and in other cases of five years was completely done away in the later Act. Secondly, the point of reference was shifted from the issuance of notice within the time prescribed to passing of the final order of reassessment.

This is thus not a plain case of period of limitation being substituted by the successor Act. This is a case where entire machinery is replaced by a new provision, making significant changes in the Legislative approach. We have therefore to ascertain the legislative intent to gather to what extent the previous provision was sought to be saved. In this context, one shall have to necessarily rely on and refer to Section 100 of the VAT Act which makes "Repeal & Savings" provisions.

It is well recognized that upon repeal of the Statute, all actions pending on the date of repeal do not survive. To obviate such unpleasant consequences, the successor statute ordinarily provides for "Repeal & Savings" clauses. In any case, Section 6 of the General Clauses Act contains a plenary provision of saving an action taken under the repealed statute, unless different intention appears.

In case of State of Punjab v. Mohar Singh Pratap Singh [Supra], the Apex Court observed that whenever there is a repeal of an enactment, the consequences laid down in Section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal, there is scarcely any room for expression of a contrary opinion. But, when the repeal is followed by a fresh legislation on the same subject, the Court would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. The line of inquiry would be not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them.

In case of Keshavan Madhava Menon v. State of Bombay, reported in AIR 1951 SC 128, the Constitution Bench of the Supreme Court in the context of effect of Article 13 (1) of the Constitution held that the same can have no retrospective operation but is wholly prospective. If an act was done before the commencement of the Constitution in contravention of the provisions of any law which after the constitution become void, with respect to the exercise of any of the fundamental right, the inconsistent law is not wiped out so far as the past act is concerned.

In case of Gujraj Singh etc. vs. The State Transport Appellate Tribunal &Ors., reported in AIR 1997 SC 412, the Apex Court held and observed that effect of repeal of the Act would be that the repealed Act stands completely obliterated from the record of the Parliament; except for actions past and closed or those which are saved. It was observed as under:

> "23. Whenever an Act is repealed it must be considered; except as to transactions past and closed, as if it had never existed. The effect thereof is to obliterate the Act completely from the record of the Parliament as if it had never been passed it, it never existed except for the purpose of those actions which were commenced, prosecuted and concluded while it was existing law. Legal fiction is one which is

> not an actual reality and which the law recognizes and the Court accepts as a reality. Therefore, in case of legal fiction the Court believes something to exist which in reality does not exist. It is nothing but a presumption of the existence of the state of affairs which in actuality is non-existent. The effect of such a legal fiction is that a position which otherwise would not obtain is deemed to obtain under the circumstances. Therefore, when section 217 (1) of the Act repealed Act 4 of 1993 w.e.f July 1, 1989, the law in Act 4 of 1939 in effect came to be non-existent except as regards the transactions, past and closed are saved."

From the above what emerges is that ordinarily period of limitation is considered as a procedural provision and any change in the period of limitation by an amendment in the Act or by enactment of a new statute repealing the original one, is made applicable also retrospectively. This is of course subject to the exception that if under the repealed provision, the cause of action had become time barred as per the period of limitation prescribed any subsequent change or extension in period of limitation would not revive such a cause. Another area where the Courts have taken slightly different view is where in the successor statute, a shorter period of limitation is prescribed and by virtue of the existing provisions of the earlier Act, the limitation has not yet expired but by application of the shorter period of limitation prescribed in the successor Act, the cause would stand barred by limitation. In such cases, the question would arise whether the period of limitation of the successor Act should be applied thereby taking away the right of the party to file proceedings for asserting his right.

Had the effect of VAT Act been only to modify the period of limitation, the different set of considerations would apply. In the present case, however, the entire provision for reopening of previously closed assessment has undergone significant changes. In the predecessor Act ie., the Gujarat Sales Tax Act, 1969, reassessment was permitted by issuance of a notice within eight years, if the same was based on any suppression, etc. For other class of cases, such notice could be issued within five years from the relevant date. In the successor Act ie., the Gujarat Value Added Tax Act, 2003, the period that is prescribed is uniformly of five years obliterating any distinction between the reopening being based on misrepresentation, etc., or for any other reason, of a case of turnover escaping assessment. More significantly the terminal point was shifted from issuing of notice to passing of the final order. In other words under the VAT Act, it was not enough to issue notice for reassessment within five years but that the entire reassessment had to be completed within the said period.

Thus, the replaced statute did not only make changes in the period of limitation but made significant other changes as well. In that view of the matter, it would be of considerable importance for us to ascertain what the repeal and savings provision of the VAT Act provides. Under subsection (1) of Section 100 of the VAT Act, as already noted, the Sales Tax Act was repealed Proviso to Section 100 of the VAT Act however makes certain provisions for saving and provides that such repeal shall not affect the previous operation of the said Act or any right, title, obligation or liability already acquired, accrued or incurred there under and subject thereto, anything done or any action taken including any appointment, notification, notice, order, rule, form or certificate in exercise of any powers conferred by or under the said Act shall be deemed to have been done or taken in exercise of the powers conferred by or under the VAT Act.

In the present case, it would therefore be necessary to ascertain for ourselves whether it can be stated that by the time VAT Act was enacted, the petitioners had under the Sales Tax Act acquired, accrued or incurred any obligation or liabilities. If the case of the petitioners fall within such expression, the Department would be justified in pursuing such cases under the VAT Act with reference to period of limitation contained in the Sales Tax Act despite repeal of the Sales Tax Act.

We may recall that the petitioners had filed the returns at the relevant time under the Sales Tax Act. Such returns were also processed as per the provisions of the said Act. Till the Sales Tax Act was repealed by the VAT Act, no further action was taken by the Department. To be precise, no notices for reopening such assessment were issued till the Sales Tax Act was repealed. It is true that the Sales Tax Act permitted period of eight years from the end of the period to which such turnover related for issuance of notice of reassessment, if the Commissioner had reason to believe that the dealer had concealed such sales or any material particulars thereof or knowingly furnished incorrect declaration or returns. However, in our opinion, mere right to issue notice within the said period cannot be equated with accrual or incurring of any obligation or liability. If notices were already issued, it may have been possible for the Department to contend that the assesses having already been visited with such notices, their liability to be so reassessed having already accrued, any repeal of the Sales Tax Act would not obliterate such liabilities by virtue of proviso to subsection (1) of Section 100 of the VAT Act.

In case of Kanaiya Ram &Ors.Vs. Rajender K. Kumar &Ors. Reported in AIR 1985 SC 371, the Apex Court had an occasion to interpret the term "acquiring of " or "accrual of " a right. It was the case wherein the original landholder had purportedly made an oral sale of the land in favour of his near relatives. Such sale not being registered, did not create any right or title in favour of the transferees. The tenant of the land filed application under Section 18 of the T. P. Act for purchase of their holdings. Application of the tenant was allowed by the Assistant Collector but the said order was reversed in appeal. In the meantime, the landlord had expired. His legal representatives filed a suit for declaration of title and for the declaration that the transfer was benami. Such suit was decreed. In that context, the Supreme Court observed that when the tenant made an application under Section 18, he had a mere "hope of " or "expectation of liberty to apply for acquiring a right" and not a "right acquired or accrued". It was observed that ever since the leading case of Abbot Vs. Minister for Lands, 1895 AC 425 that a mere right to take advantage of the provisions of an Act is not an "accrued right".

In case of Hunger Ford Investment Trust Limited V. Haridas Mundhra & Ors., reported in AIR 1972 SC 1826, the Apex Court once again had an occasioned to consider what is an "accrued" or "acquired" right. It was observed that : "

> 19. "We do not think that the appellant had an accrued right for the rescission of the contract or the decree for specific performance under Section 35 of the Specific Relief Act, 1877, when the Act was repealed by the Specific Relief Act, 1963, on March 1, 1964. It may be recalled that the decree in suit NO. 600 of 1961 was passed on February 25, 1964 and that the application for rescission of the decree was filed on March 21, 1967. Section 35 of the Specific Relief Act, 1877, so far a it is material for the purpose of this case provided that where a decree for specific performance of a contract of sale or of a contract to take a lease has been made and the purchaser or lessee makes default in payment of the purchase money, which the Court has ordered him to pay, the decree may be rescinded as regards the party in default either by a suit or by an application. The right to rescind the decree under the section can arise only if the purchaser makes default in paying the purchase money ordered to be paid under the decree. Before the lapse of a reasonable time from the date of the decree, the appellant could have no right to have the decree rescinded on the ground of default of the purchaser. To put it in other words, the right of the appellant to have the decree rescinded was dependent upon the default of the purchaser in paying the purchase money. Such a default had not occurred when the Specific Relief Act, 1877, was repealed, as a reasonable time for the performance of the obligation under the decree had not elapsed from the date of the decree. The more important reason why there

was no default in this case was that the execution of the decree in suit No.600 of 1961 was stayed by orders of the trial and appellate Court till August 26, 1964. We, therefore, agree with the finding of the Division Bench that appellant had not accrued right on the date of the repeal to file an application under Section 35 of the Specific Relief Act, 1877, which was saved under Section 6 of the General Clauses Act 1897. The mere right to take advantage of the provisions of an Act is not an accrued right (See Abbott v. The Minister for Lands, 1895 AC 425)".

From the above, it can be seen that a mere right to take advantage of the provisions of a Act is not an "accrued right ". In the present case, it may be that when the Sales Tax Act was in operation, it was open for the authorities to reopen an assessment previously framed within eight years from the end of the period to which the escaped turnover related, if the commissioner had reason to believe that the dealer had concealed such sales, etc. However, mere right to issue such a notice to reopen the assessment cannot be equated with any accrued or acquired right. Correspondingly, it cannot be said that in absence of any notice having been issued, the assessees had any obligation or liability which they acquired, accrued or incurred for being subjected to reopening of the assessment as per the old provisions. Their cases therefore were, necessarily in absence of any notices having been issued when the Sales Tax was in operation to be governed by the provisions made for such purpose in the successor Act i.e. the VAT Act. We are fortified in our view by the decision of with this view in case of Kumagai Skanska Hcc Itochu Group Vs. The Commissioner of Value Added Tax & Another decided on 22.05.2012, wherein the Devision Bench of Delhi High Court was considering the effect of enactment of Delhi Value Added Tax Act, 2004 replacing the Delhi Sales Tax Act, 1975. In such Successor Act also, similar provisions of repeal and savings were made. The Court was confronted directly with the issue of effect of shorter period of limitation prescribed in the successor Act for taking orders of assessment in revision. It was held and observed as under :

26. "First of all, once the provisions of Section 46 of the Delhi Sales Tax Act, 1975 were repealed and replaced by the provisions of Section 74A of the DVAT Act qua revision, it would be the latter provision which would apply on and from 01.04.2005. Secondly, the power of revision under Section 46 of the Delhi Sales Tax Act, 1975 and that under Section 74A of the DVAT Act do not co-exist. Because, the two cannot have simultaneous existence. The death of one (Section 46 of the Delhi Sales Tax Act, 1975) has ushered in the birth of the other (Section 74A of the DVAT Act). Thirdly, in view of Section 106(2) and (3) of the DVAT Act as interpreted by the Full Bench, an order of assessment passed under the Delhi Sales Tax Act, 1975 shall be deemed to be an order under the DVAT Act. Thus, after the repeal of the Delhi Sales Tax Act, 1975 and introduction of the DVAT Act, it is the power of revision encapsulated in Section 74A thereof which holds the field. It the power of revisions invoked, it has to be under Section 74A of the DVAT Act and in terms thereof. The provisions of Section 46 cannot be applied to post 01.04.2005 revisions".. ... . "Sixthly, the legislature consciously altered the limitation clause insofar as the power of revision is concerned. Having expressly provided for a different scheme in Section 74A(2)(b), it could not have been the intention of the legislature to continue the operation of the proviso to Section 46 of the Delhi Sales Tax Act, 1975".

Considering the discussion above, we hold that in the present group of cases for reopening the assessment, provisions contained in the VAT Act and in particular Section 35 thereof, would apply. Admittedly, when such provisions do not permit reopening beyond the period of five years from the end of the period to which the sales relate, and admittedly when no notices much less final orders were passed, the action of the authorities must be held to be lacking jurisdiction. All the cases of reassessment are, therefore, declared invalid.

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Overview of Action Plan 2 of BEPS Project – Neutralising the effects of Hybrid Mismatch Arrangements ('HMAs')

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In continuation to our previous article on overview of Base Erosion and Profit Shifting ('BEPS') and detailed analysis of Action Plan 13,in this article, we now have capsulized below a detailed overview of Action Plan 2 of BEPS Project ie Neutralising the effects of Hybrid Mismatch Arrangements.

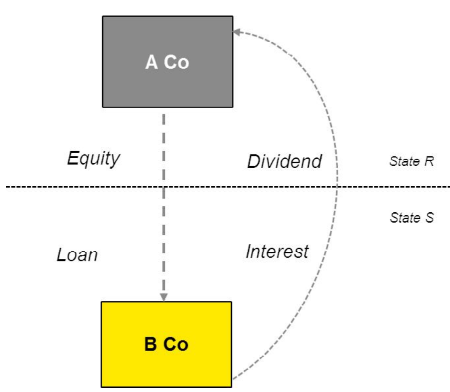
1. *Background*

A Hybrid Mismatch Arrangement ('HMAs') is an arrangement that

- Exploits a difference in the tax treatment of an entity or instrument
- Under the laws of two or more tax jurisdictions
- To produce a mismatch in tax outcomes in different jurisdictions
- Thereby reduce the aggregate tax burden of the parties to the arrangement.

HMAs can be understood as arrangements which are characterised differently by different countries resulting in a tax benefit to either one or all of the parties to the arrangement. The use of hybrid arrangements in international tax planning has created tremendous opportunities and provided an ability to tax payers to create substantial tax benefits.

For better understanding, let us consider a simple example,



A borrower ie B Co borrows an 'X' amount of sum from group company ie A Co and the transaction is structure in such a way that

- *this instrument is considered as debt in the country of the Borrower and thereby entitling him to a deduction of the interest*
- *this instrument is considered as equity in the country of the Lender/ Investor and thereby an exemption would apply to the dividend.*

In nutshell, this has resulted into a situation of non-taxation of income in country of the lender whereas the borrower has very well availed deduction in its home country.

In nutshell, HMAs can be used to achieve double non-taxation including long-term tax deferral. They reduce the collective tax base of countries around the world even if it may sometimes be difficult to determine which individual country has lost the tax revenue.The growing significance of such HMAs has attracted the attention of the revenue authorities worldwide who regard such benefits as artificial and illegal.

2. *Objectives*

The OECD has recognised the effects and impact of such arrangements on the erosion of tax base of countries and thereby initiated the Action plan 2 of the BEPS project to develop model treaty provisions and recommendations regarding the design of domestic rules to neutralise the effect of hybrid instruments and entities.

Following are the key objectives of developing recommendations under the Action Plan 2:

i. To neutralise mismatch and put an end to multiple deductions for a single expense, deductions in one country without corresponding taxation in another or the generation of multiple foreign tax credits for one amount of foreign tax paid;

ii. To align the tax treatment of an instrument or entity with the tax outcomes in the counterparty jurisdiction but otherwise do not disturb the tax or commercial outcomes;

iii. To avoid double taxation and to ensure that the mismatch is eliminated even where not all the jurisdictions adopt the rules;

iv. To ensure that certain entities are not unduly benefited through treaty provisions;

v. To enhance transparency and reduce the compliance costs for the taxpayers as well as the tax authorities.

3. *Summary of Recommendations*

To neutralise the effect of HMAs, the recommendations of the Report have been divided into the following two parts:

Part I- Recommendations for Domestic Laws

It contains recommendations for domestic law to address mismatches in tax outcomes where they arise in respect of payments made under a hybrid financial instrument or payments made to or by a hybrid entity.

Part II- Recommendations on Treaty issues

It contains recommendations on changes to the OECD Model Tax Convention to be made to ensure that hybrid instruments and entities are not unduly used to obtain treaty benefits and to address treaty issues that may arise from the recommended domestic law changes.

It is worthwhile to note that once these recommendations translated into domestic law and tax treaties, the same will neutralise mismatches and put an end to multiple deductions for a single expense, deductions in one country without corresponding taxation in another or the generation of multiple foreign tax credits for one amount of foreign tax paid.

4. *Applicability*

Hybrid Mismatch Report limits the scope of the recommended rules by using the "bottom up approach." More specifically, the recommended rules would apply to hybrid arrangements involving

1. Related parties (threshold of 25%);

Two persons will be considered as related if

- they are in the same control group; or
- the first person has a 25% or greater investment in the second person; or
- there is a third person that holds a 25% or greater investment in both.

2. Members of the same controlled group (whether or not related);

Two persons are in the Same Control Group if:

- they are consolidated for accounting purposes;
- the first person has an investment that provides that person with effective control of the second person or there is a third person that holds investments which provides that person with effective control over both persons;
- the first person has a 50% or greater investment in the second person or there is a third person that holds a 50% or greater investment in both; or
- they can be regarded as associated enterprises under Article 9

3. Certain "structured arrangements"(even if between unrelated parties)

Structured Arrangement is any arrangement where the hybrid mismatch is priced into the terms of the arrangement or the facts and circumstances (including the terms) of the arrangement indicate that it has been designed to produce a hybrid mismatch.

5. *Detailed analysisof Recommendations*

In order to achieve the aforementioned objectives, the recommendations have been divided into two parts, the same has been discussed in detail as under:

Part 1- Recommendations for domestic rules

i. Action Plan 2 calls for following rules to be incorporated in domestic rules to adjust the tax outcomes in one jurisdiction to align them with the tax consequences in another:

   a) deny a deduction for a payment that is also deductible in another jurisdiction;

   b) prevent exemption or non-recognition for payments that are deductible by the payer; and

   c) deny a deduction for a payment that is not includible in ordinary income by the recipient

ii. The recommendations in general are targeted at following types of payments:

   a) Deduction/no inclusion outcome or the "D/NI outcome"- payments that are deductible under the rules of one jurisdiction but are not included in income under the laws of the other jurisdiction.

   To neutralize arrangements that will yield a D/NI outcome, the Report makes the following 5 recommendations as under:

   1) The first recommendation is to follow the following key two rules:

      - **Primary rule** – to deny the payer a deduction for a payment under a hybrid financial instrument to the extent of the D/NI outcome.

      - **Defensive rule**–to include the consideration as ordinary income of the payee to the extent of the D/NI outcome. Defensive rule to be appliedonly if the payer jurisdiction does not have a rule in place to eliminate the mismatch.

   2) The second recommendation is to deny the dividend exemption (or other types of dividend relief granted to relieve economic double taxation) for dividend payments that are deductible to the payer.

   3) The third recommendation refers to disregarded payments that are defined as a payment that is deductible under the laws of the payer jurisdiction but is not recognized under the laws of the payee's jurisdiction.

      The recommended rule calls for denying a deduction for such a payment to the extent that it gives rise to the D/NI outcome. Under the recommended defensive rule, the payee jurisdiction would require such payment to be included in ordinary income

   4) The fourth recommendation is to neutralize D/NI outcomes arising from payments made to a hybrid payee, which is usually a so-called reverse hybrid. The rule recommends to deny a deduction for any payment to the extent it gives rise to D/NI outcome, provided such payment is made to a reverse hybrid entity.

   5) The fifth recommendation is aimed at improving the CFC or other offshore tax regimes that do not specifically contemplate payments to a reverse hybrid and considering those regimes in relation to imported mismatch arrangements.

b) ***Double deduction outcome, or "D/D outcome"-*** payments that give rise to multiple deductions in different jurisdictions on the same expenditure.

To neutralize arrangements that will yield a D/D outcome, the Report recommended the following two key rules:

- **Primary response rule-** to deny a deduction for the investor on that payment to the extent that it gives rise to a DD outcome.
- **Defensive rule-** the payer jurisdiction would deny a deduction for such payment to the extent it gives rise to a DD outcome.

c) ***Arrangements that produce indirect D/NI outcomes***

Once a HMA has been entered into between two jurisdictions without effective hybrid mismatch rules, it is a relatively simple matter to shift the effect of that mismatch into a third jurisdiction (through the use of an ordinary loan, for example). Therefore in order to protect the integrity of the recommendations, this Report further recommends that a payer jurisdiction to deny a deduction for a payment where the payee sets the payment off against expenditure under a hybrid mismatch arrangement (i.e. the payment is made under an imported mismatch arrangement that results in an indirect D/NI outcome).

<u>Part II- Recommendations on treaty issues</u>

Part II of the Report contains following recommendations on changes to the OECD Model Tax Convention to be incorporated to ensure that hybrid instruments and entities are not unduly used to obtain treaty benefits and to address treaty issues that may arise from the recommended domestic law changes:

i. ***Dual-resident entities:***

The Report has recommended revising Article 4(3) to the OECD Model Tax Convention in a way to effect that the residence of a dual resident entity should be determined mutually by the competent authorities of the relevant jurisdictions and that in the absence of an agreement, the dual resident entity cannot claim treaty benefits from any of the jurisdictions involved.

Further, the Report also states that treaty changes alone would not effectively mitigate BEPS concerns associated with dual resident entities and accordingly recommends changes to domestic law in way to deny residency of an entity under domestic law if the entity is treaty as resident in another jurisdiction under the applicable income tax treaty.

ii. ***Transparententities:***

This recommendation focuses on transparent entities which un duly benefit from treaty provisions. In this regard,the Report recommends anamendment to Article 1(2) of the OECD Model Tax Convention to include arule on fiscally transparent entities whereby income derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the taxlaw of one of the Contracting States will be considered to be income of a resident only to the extent that the income is treated, for purposesof taxation by that State, as the income of a resident of that State.

iii. ***Potential conflicts between the recommendations contained in the Report and theprovisions of the OECD Model Tax Convention.***

The Report also analyses the possibility for potential conflicts between the recommendations contained in the Report and the provisions of the OECD Model Tax

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NRI Hybrid Accounts - Tax Exempt ?

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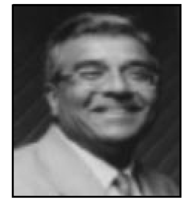

For time immemorial Indian Banks have been enjoying trust and confidence of Non Resident Indians [NRIs] which is being reflected in ever increasing volume of Non Resident External (NRE) Rupee Deposits and Non Resident Foreign Currency Deposits (FCNR) across branches in India and on its part Indian government has also encouraged NRIs by offering total Income Tax exemption for interest earned on these Rupee and Foreign currency deposits by extending specific tax-shelter under Section 10(4)(ii) for NRE interest and Section 10(15)(iv)(fa) of Income Tax Act, 1961(IT Act) for interest earned on FCNR deposits .

These plain vanilla exemptions have been glamourised and modified to earn better interest rates for NRIs for many years by few innovative Bankers and generously followed by the entire Banking community which have serious issues questioning the basic fundamentals of tax exemptions being erroneously advised and propagated by Banks and followed in good faith by NRIs at large.

It would however be appropriate to summarily review the basic exemptions of NRE and FCNR deposit interest so as to distinguish the erroneous view propagated.

I. Tax Exemption for NRE Accounts:

1. Non Resident External accounts are Rupee deposit accounts which are fully repatriable.
2. Required to be created out of foreign exchange remittance from abroad or transfer from NRE or FCNR accounts, NRE accounts can be maintained as savings accounts as also fixed deposits.
3. Interest earned thereof is exempt under Section 10(4)(ii) of IT Act.

"Section 10: In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included—

(4) (ii) in the case of an individual, any income by way of interest on moneys standing to his credit in a Non-Resident (External) Account in any bank in India in accordance with [the Foreign Exchange Management Act, 1999 (42 of 1999)], and the rules made thereunder. Provided that such individual is a person resident outside India as defined in clause (q) of section 228 of the said Act or is a person who has been permitted by the Reserve Bank of India to maintain the aforesaid Account."

4. Indian citizen and Person of Indian Origin (PIO) being eligible to maintain these accounts can earn tax free interest provided the account is maintained under and as per the provisions of Foreign Exchange Management Act, 1999(FEMA) and the NRI is covered by definition of Person Residing Outside India "(PROI) under Section 2(w) r.t.w. Section 2(v) of Foreign Exchange Management Act, 1999 (FEMA).
5. Simply speaking a PROI is an Indian citizen or PIO permanently residing outside India.

II. Tax Exemption for FCNR Accounts :

1. NRIs being Indian citizen or PIO can maintain FCNR fixed deposits in USD ;GBP;JY;Euro;CAD and AUD.
2. Such deposits can be created out of from foreign exchange remittance from abroad or transfer from NRE or FCNR account.

3. Tax exemption is granted for interest earned in FCNR deposit vide Section 10(15)(iv)(fa) of IT Act.

   "Section 10: In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included—

   (iv)(fa): interest payable by a scheduled bank to a non-resident or to a person who is not ordinarily resident within the meaning of sub-section (6)† of section 6] on deposits in foreign currency where the acceptance of such deposits by the bank is approved by the Reserve Bank of India.

   [Explanation.—For the purposes of this item, the expression "scheduled bank" means the State Bank of India constituted under the State Bank of India Act, 1955 (23 of 1955), a subsidiary bank as defined in the State Bank of India (Subsi-diary Banks) Act, 1959 (38 of 1959), a corresponding new bank constituted under section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970), or under section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 (40 of 1980), or any other bank being a bank included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934), but does not include a co-operative bank;]"

4. This exemption is applicable to Non Resident or Resident but Not Ordinarily Resident (R but NOR) as defined under IT Act. The section also requires that acceptance of deposits is approved by Reserve Bank of India (RBI).

5. ITS another story that Banks literally never examine residential status of an NRI being Non Resident or Resident but Not Ordinarily Resident (R but NOR) under the IT Act and eligibility for exemption of interest as also placement of deposit .

III. <u>Dicey Hybrid High Yield Deposits:</u>

1. The path walked so far was simple and straight jacketed till few innovative Bankers wanting to attract substantial fixed deposits and thereby strengthen the deposit book thought of hybrid options and chose to exploit arbitrage opportunities created by differential gain of better interest rates of one currency bank deposits coupled with advantageous forward contact rate.

2. A real instance of an offer of betterment of US% deposit of 3 years annual interest rate of 2.37% beaten by Hybrid NRE deposit wedded to forward contract of conversion of maturity value of NRE deposit at predetermined INR to US$ conversion rate resulting in a better annual return of 3.14% will simplify the issue and aid understanding.

3.

I.	FCNR Deposit	3Years
	FCNR Deposit Amount - US$	$80,000
	FCNR Deposit Interest Rate	2.30%
	Deposit Maturity Amount - US$	$85,758
	Net Annual Yield - US$	**$ 2.37%**
II.	NRI-Pro FCY Deposit (INR to US$)	
	US$ equivalent	$80,000
	NRE Deposit Amt. INR - Rs.	5,000,000
	NRE Deposit Rate	8.90%
	Deposit Maturity Amt.Rs.	6,511,116
	3 Yrs.Forward Rate INR/US$	74.29
	Amount in US$ after 3 Yrs. net	$87,625
	Net Yield - US$	**$ 3.14%**

4. Explanations :

.01 Herein Banks creates a higher yield by a simple mechanism of converting US$ into Indian rupees; creating an NRE deposit for 3 years at interest rate of 8.9%.

.02 Said deposit of Rs. 50,00,000/- with interest will accumulate maturity amount of Rs. 65,11,116/-.

.03 Bank will simultaneously offer forward contract of conversion of the maturity amount into US$ after 3 years at rate of INR 74.29 per US$.

.04 Thus maturity of Rs. 65,11,116/- after 3 years will convert into US$ 87,645 at conversion rate of forward contract of Rs.74.29 per US$.

.05 This will result in better annualised yield of US$ 3.14% as comapared to plain vanilla FCNR US$ deposit yield of 2.37% offered.

5. NOW whereas plain vanilla US$ deposit of 3 years would have resulted in an accumulated balance in US$ 85,758 and annualised yield of US$ 2.37% per year this HYBRID deposit grew to US$ 87,645 and resulted in a 33% higher annualised yield of US$ 3.14%.

IV. <u>Simple tax querries - Replies simply missing:</u>

There are simple logical tax related questions which in all probability doesnot have any replies by the Bankers at large and which require serious corrective action. :

1. Simple language of the relevant Sections clearly convey that in the said example interest earned on NRE deposit at 8.9% i.e. Rs. 15,11,116/- is exempt under Section 10(4)(ii) of the IT Act.

2. Now say after 3 years if the US$ rate is Rs. 80 the NRI depositor would have converted said amount of Rs. 65,11,116/- and received US$ 81,389.

3. AS SUCH on account of the forward contract the NRI is converting said amount of Rs. 65,11,116/- at prefixed better forward contract rate of Rs. 74.29 .

4. AND BY VIRTUE of this forward contract conversion of higher amount of US$ 87,625 results in additional income of US$ 6256 which in Indian rupee terms would amount to Rs. 5,00,480/- at Rs. 80 per US$.

5. THIS additional gain of Rs.500,480/- is attributed to forward contract of purchase of US$ at a predetermined rate of Rs. 74.29 instead of actual market rate of Rs. 80/- and as such is a speculative gain or other income.

6. AND FOR SURE this is not interest earned on NRE account exempt from tax under Section 10(4)(ii) NOR interest from FCNR account exempt under Section 10(15)(iv)(fa) of the IT Act.

7. Simply speaking this is a speculative gain and not interest earned in NRE account or FCNR deposit which alone is exempt from tax under the IT Act.

8. And further SCRUTINY opens a Pandora s Box for contravention of provisions of IT Act, 1961.

9. LEGALLY and technically Banks , say may be even out of ignorance but for sure are wrongly canvassing tax exemption for this speculative gain and NRIs squarely guided by Banks at large are ignorantly and innocently evading income tax payable on this speculative gain and also the requirement of filing tax returns under IT Act.

7. AND unfortunately Banks on their part also are seriously contravening the provisions of Tax Deduction at Source of Section 195 of IT Act which require Banks to deduct tax at source at the rate of 30% on this payment of speculative gain

and comply with the provisions and formalities of TDS regime.

V. Conclusion :

1. NRIs and Banks are greatly respected in the corridors of Income Tax Department and their tax exemptions are viewed withpurity and to some extent even untouchability.

2. OftenNRIslookforwardtotheirIndian Banker as a Friend, Philosopher and Guide and take Banker's word as FINAL not only in relation to Banking matters but also tax and foreign exchange provisions applicable to Bank accounts .

   And it is but natural for a Banker to earn respect and confidence of NRIs which results into acceptance of Bankers word as FINAL on all these matters . Bankers often gather information and venture into offering advice on various legal issues related to FEMA and Taxation without serious understanding of facts and thought provocation of legal provisions.

   BUT in this INSTANCE it's not only a Banker's name and goodwill that is at stake butalsotheconfidenceofNRIsatlarge in the entire Indian Banking Community is at a serious and larger stake as only few instances of Tax Officer's Tax evasion notice may create irreparable heat and dust amongst NRIs across the globe which will take many years to cool.

   It would therefore be absolutely fair that the Bankers take a serious view of the matterandavailanexpertopinionofsenior Chartered Accountants ASAP and follow the Law in absolute WORDS & SPIRIT.

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contd. from page 738

Convention. With respect to the rule providing for the denial of deductions, the Report notes that treaties do not govern whethera payment is deductible. Such decision is left to the domestic laws and therefore the rule recommended would not infringe any treaty provision.

6. Way forward

The Report indicates that the OECD would continue its work on Action Plan 2 to address certain substantive and implementation issues. In this regard, the OECD would develop guidance on how the rules would operate in practice, including practical examples. The Report also notes that there are specific areas where the recommended domestic law rules may need further refinement.

Considering the proposed rules and mechanism, the greater challenge would be for various countries to be able to achieve this by way of amendment to tax treaties as well as to their domestic tax laws which would require significant co-ordination to achieve the intended objective. Also, post incorporation of such recommendations in domestic tax laws, as observed by the OECD, co-ordination amongst the countries involved in such hybrid arrangements would be required to avoid double taxation by way of both countries applying the recommended rule. To achieve such effective co-ordination amongst multiple countries would be a great challenge.

Given all the above, the recommendations and steps taken by the OECD are steps towards the right path of preventing tax avoidance and protecting the tax base of each country. However, the recommendations are at a very nascent stage and would need to be developed after taking into account the practical challenges that may arise.

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FEMA Updates

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53 Overseas Direct Investments by proprietorship concern / unregistered partnership firm in India - Review

Following revised terms and conditions are required to be complied with for considering the proposal of ODI, by a proprietorship concern / unregistered partnership firm in India, by the Reserve Bank under the approval route:

a. The proprietorship concern / unregistered partnership firm in India is classified as 'Status Holder' as per the Foreign Trade Policy issued by the Ministry of Commerce and Industry, Govt. of India from time to time;

b. The firm in India has a proven track record, i.e., the export outstanding does not exceed 10% of the average export realisation of the preceding three years and a consistently high export performance;

c. The Authorised Dealer bank is satisfied on aspects of compliance, business etc.;

d. The firm in India has not come under the adverse notice of any Government agency and does not appear in the exporters' caution list or in the list of defaulters to the banking system in India; and

e. The amount of proposed investment outside India does not exceed 10 per cent of the average of last three years' export realisation or 200 per cent of the net owned funds of the proprietorship concern / unregistered partnership firm in India, whichever is lower.

For Full Text refer to A.P. (DIR Series) Circular No. 59

http://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=9504&Mode=0

54 Foreign Direct Investment (FDI) in India – Review of FDI policy –Sector Specific conditions- Construction Development

Accordingly, effective December 3, 2014 100% FDI under automatic route shall be permitted in construction development sector subject to the conditions specified in the Press Note 10 (2014 Series) dated December 3, 2014.

A copy of Press Note No.10 (2014 Series) dated December 3, 2014 issued in this regard by DIPP, Ministry of Commerce & Industry, Government of India is appended to this circular.

For Full Text refer to A.P. (DIR Series) Circular No. 60

http://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=9506&Mode=0

55 Depository Receipts Scheme

A new scheme called 'Depository Receipts Scheme, 2014' (DR Scheme, 2014) for investments under ADR/GDR have been notified by the Central Government effective from December 15, 2014 which provides for repeal of extant guidelines for Foreign Currency Convertible Bonds and Ordinary Shares (Through Depositary Receipt Mechanism) Scheme, 1993 except to the extent relating to foreign currency convertible bonds.

The salient features of the new scheme are:

- The securities in which a person resident outside India is allowed to invest under Schedule 1, 2, 2A, 3, 5 and 8 of Notification No. FEMA. 20/ 2000-RB dated 3rd May 2000 shall be eligible securities for issue of Depository Receipts in terms of DR Scheme 2014;
- A person will be eligible to issue or transfer eligible securities to a foreign depository for the purpose of issuance of depository receipts as provided in DR Scheme 2014.
- The aggregate of eligible securities which may be issued or transferred to foreign depositories, along with eligible securities already held by persons resident outside India, shall not exceed the limit on foreign holding of such eligible securities under the extant FEMA regulations, as amended from time to time.

- The eligible securities shall not be issued to a foreign depository for the purpose of issuing depository receipts at a price less than the price applicable to a corresponding mode of issue of such securities to domestic investors under FEMA, 1999.
- It is to be noted that if the issuance of the depository receipts adds to the capital of a company, the issue of shares and utilisation of the proceeds shall have to comply with the relevant conditions laid down in the Regulations framed and Directions issued under FEMA, 1999.
- The domestic custodian shall report the issue/ transfer of sponsored/unsponsored depository receipts as per DR Scheme 2014 in 'Form DRR' as given in Annex within 30 days of close of the issue/ program.

For Full Text refer to A.P. (DIR Series) Circular No. 61

http://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=9507&Mode=0

56 Foreign Exchange Management (Foreign Currency Accounts by a Person Resident in India) Regulations, 2000 – Remittance of salary

Under Foreign Exchange Management (Foreign Currency Account by a person resident in India) Regulation, 2000, it has been clarified that the facility available to an employee of a company under Regulation 7(8) of Notification No. FEMA 10 (as amended from time to time) shall also be available to an employee who is deputed to a group company in India. In addition, the term 'company' referred to in the said regulation will include 'Limited Liability Partnership' as defined in the LLP Act, 2008.

For Full Text refer to A.P. (DIR Series) Circular No. 62

http://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=9509&Mode=0

57 Export and Import of Indian Currency

With a view to mitigating the hardship of individuals visiting from India to Nepal or Bhutan, it has now been decided that, an individual may carry to Nepal or Bhutan, currency notes of Reserve Bank of India denominations above Rs.100/-, i.e. currency notes of Rs.500/- and/or Rs.1000/- denominations, subject to a limit of Rs.25000/-.

For Full Text refer to A.P. (DIR Series) Circular No. 63

http://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=9510&Mode=0

58 External Commercial Borrowings (ECB) Policy – Simplification of Procedure

As a measure of simplification of the existing procedure for rescheduling / restructuring of ECBs and in supersession of aforesaid provisions, it has been decided to delegate powers to the designated AD Category-I banks to allow:

i. Changes / modifications (irrespective of the number of occasions) in the draw-down and repayment schedules of the ECB whether associated with change in the average maturity period or not and / or with changes (increase/ decrease) in the all-in-cost.

ii. Reduction in the amount of ECB (irrespective of the number of occasions) along with any changes in draw-down and repayment schedules, average maturity period and all-in-cost.

iii. Increase in all-in-cost of ECB, irrespective of the number of occasions.

This measure is subject to the designated AD Category-I bank ensuring the following:

i. Revised average maturity period and / or all-in-cost is / are in conformity with the applicable ceilings / guidelines; and

ii. The changes are effected during the tenure of the ECB.

It has also been decided to delegate powers to the designated AD Category-I banks to permit changes in the name of the lender of ECB after satisfying themselves with the bonafides of the transactions and ensuring that the ECB continues to be in compliance with applicable guidelines.

For Full Text refer to A.P. (DIR Series) Circular No. 64

http://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=9511&Mode=0

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Service Tax - Budget Decoded

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1. Rate of Service Tax is proposed to be increased from 12.36% to 14%. Further, Swachh Bharat Cess of 2% of value of services will be levied. Education Cess (EC) and Secondary & Higher Education Cess (SHEC) will be subsumed in the service tax.

Analysis:

I. Above amendments will come into force from the date to be notified after enactment of the Finance Bill, 2015.

II. If both amendments will be made applicable, effective rate of service tax will be 16%.

III. Some services are subject to specific rate as provided in Rule 6 of the Service Tax Rules, 1994 for example air ticket booking by travel agent, life insurance etc. It is also proposed to increase that specified rates in consequence to increase in the main rate of service tax.

IV. Generally, cess is being levied on amount of tax. However, wordings of Clause 117 of the Finance Bill, 2015 clearly state that 2% will be levied on value of services.

V. As said by Hon'ble Finance Minister in his budget speech, Education Cess and Secondary & Higher Education Cess will be **subsumed** in the service tax. As such cesses are being subsumed in service tax (and not being abolished), balance of the Education Cess and Secondary & Higher Education Cess should be allowed to be carried forwarded and adjusted against the service tax of 14%. However, some clarity from department is needed.

VI. It may happen that when new rate of service tax will be made applicable, some services were provided but the payment of the same is not received. Or it may happen that advance has been received, service tax has been paid but services are yet to be provided. In such cases, liability should be ascertained in terms of Rule 4 of the Point of Taxation Rules, 2011.

VII. Proposal to impose Swachh Bharat Cess is limited to service tax. There is no proposal to levy such cess for other taxes like Central Excise.

2. Under Section 66D(j) "admission to entertainment event or access to amusement facility" is a service under Negative List and hence not subject to service tax. Now, such entry is proposed to be omitted and made liable to service tax.

Analysis:

I. "Admission to entertainment event" and "access to amusement facility" are two different services. Access to amusement facility has been made fully taxable. Although "admission to entertainment event" has been made taxable, some exemptions are provided as discussed below.

II. New entry No. 47 has been introduced in the Mega Exemption Notification No. 25/2012-ST which grants exemptions to services by way of right to admission to certain events as follows.

Events	Condition
Exhibition of cinematographic film, circus, dance, or theatrical performance including drama or ballet and recognised sporting event	Exempt without any condition
Award function, concert, pageant, musical performance or unrecognised sporting event	consideration for admission is not more than Rs 500 per person

III. As above entries are subject to state levy, constitutional validity of the levy of service tax on such activity is doubtful and it may and will be challenged in the court of law and will be subject to judicial approval.

3. In the case of Intercontinental Consultants & Technocrats Pvt. Ltd. Hon'ble Delhi High Court has struck down the Rule 5(1) of the Service Tax (Determination of Value) Rules, 2006 which provides addition of reimbursement of expenses in the value of service, on the ground that it is *ultra vires* of section 67 as section 67 is limited to amount charged. To overturn this decision, section 67 is being amended to include reimbursement in value for levy of service. (w.e.f. enactment of the Finance Bill, 2015)

4. New sub section (1B) to Section 73 is being inserted to provide that if amount of service tax payable has been self-assessed in service tax return but not paid in full or in part, the same may be directly recovered, along with interest, without issuance of show cause notice as provided under section 73(1).

Analysis:

I. This amendment is applicable from the enactment of the Finance Bill, 2015.

II. Similar provision is already there in Rule 6(6A) of the Service Tax Rules, 1994. W.e.f. enactment of the Finance Bill, 2015, it is proposed to be withdrawn. It means that now this provision has been given statutory backing.

III. In terms of Declaration (c) in Park K (Self Assessment) of the service tax return (ST-3), as prescribed under the Service Tax Rules, 1994, it is compulsory to declare that assessee has paid tax and interest. Unless such declaration is made, ACES system doesn't allow filing of return. Is it means that returns can't be filed unless tax has been paid? Legally there is no such provision in the Finance Act, 1994 or rules made or notifications issued there under. Thus, doubt was prevailing. Now, as this new provision of section 73(1B) is introduced in the statue, its implied meaning is that service tax return can be filed even if service tax is not paid. It may be helpful to save rigorous late fee of Rs. 20000 per return.

5. At present, services provided by Government or Local Authority are in Negative List except service by Department of Post, services in relation to aircraft or vessel, transportation of goods and passengers and **support services**. Instead of support services, any services provided by Government to business entities will be out of Negative List and thus will be taxable.

Analysis:

I. Above amendment will come into effect from a date to be notified after enactment of the Finance Bill, 2015.

II. Services provided by the Government are in Negative List and hence not subject to service tax. However, it is proposed to tax any services provided by the Government to a Business Entity.

III. Further, it is also being provided that if any service is provided by the Government and recipient is a Business Entity, such business entity, being recipient of the services is liable to service tax under Reverse Charge Mechanism.

IV. After enactment of such proposal, business entities, receiving number of services from the Government and Local Authority will require to pay service tax under reveres charge mechanism. This will have huge impact. For example, a chartered accountant paying company search related fees to Ministry of Corporate Affairs (MCA) for verification of documents, filed with Registrar of the Company, related to any company may be covered under new proposal and being recipient of service, a chartered accountant shall pay service tax.

V. Further, no threshold limit has been provided. Thus, even if service of Rs. 1 has been received from the Government or Local Authority, recipient is required to have registration, pay service tax and file returns.

6. W.e.f. 1st April, 2015 some important exemptions are being withdrawn. Details of the same are as follows.

I. Services **provided to the Government**, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of:

- a civil structure or any other original works meant **predominantly for use other than for commerce**, industry, or any other business or profession.

- a structure predominantly for use as **an educational, clinical and art or cultural establishment.** .

- **a residential complex** predominantly meant for self-use or the use of their employees or other persons specified in the Explanation 1 to clause 44 of section 65B of the said Act.

II. Services by way of construction, erection, commissioning, or installation of original works pertaining to an **airport and port.**

III. Services by a performing artist in folk or classical art forms of music, dance, or theatre if consideration charged is more than Rs. 1 lakh. If the amount charged is not more than Rs. 1 lakh, it is still exempt and if services are provided as brand ambassador it is not subject to exemption irrespective of amount charged.

7. At present, under section 73(4A), where during the course of any audit, investigation or verification, it is found that any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, but the true and complete details of transactions are available in the specified records, penalty upto 25% is payable if assessee pays service tax and interest before service of show cause notice. This section is being omitted w.e.f. enactment of the Finance Bill, 2015.

I. Department was interpreting the same as compulsory penalty for service tax found unpaid during the audit investigation etc. and forcing assessee to pay penalty under this section.

II. As discussed in the later paragraphs, penalties in the service tax have been reduced substantially and hence, it seems that due to that, this provision has been omitted.

8. At present, in the case not involving fraud etc, penalty under section 76 for failure to pay service tax is leviable based on period of delay and maximum penalty payable under this section is 50% of service tax payable. **This section is being replaced to provide no penalty or lower penalty of only 10% of service tax.**

Analysis:

I. As it is clear from the drafting of new section 76, 10% is the maximum limit and hence, in genuine case, penalty may be reduced below 10% also.

II. Lots of revenue has been stuck in the litigation. One of the major reasons for the litigation in service tax is a penalty also. Due to heavy penalties, assessee prefer litigations to avoid the penalties. Further, numbers of service providers don't prefer to regularize their non payment due to the heat of the penalties. Now, this problem is addressed in the way which is very beneficial to the assessee. **Acche Din Aagaye.**

III. It being provided that if service tax and interest is paid within 30 days from the date of service of show cause notice, no penalty shall be payable. It is a great relief. Even if you have not agreed to the demand at initial stage, you can pay the same even after issuance of notice and still can avoid the penalties.

IV. It is also being provided that if service tax and interest is paid within 30 days of the date of receipt of the order determining service tax payable, penalty shall be reduced to 25% of penalty imposed in the order. So, don't worry if you have missed the first bus, Hon'ble Finance Minister has provided you another one.

V. As the maximum penalty is 10% of the service tax and if tax is paid within 30 days of order it is just 25% of the penalty, one will end up paying meager penalty of **2.5%** of the service tax. Bolo, Achhe Din hai ke nahi?

VI. Now, quantum of penalty is not based on period of delay.

VII. If one is paying service tax and interest, it doesn't mean that he is forgoing his right to appeal. He can pay demand under protest, take benefit of the lower penalties, avoid heat of high interest of 30% p.a. and still can fight his case for the justice.

VIII. W.e.f. enactment of the Finance Bill, 2015.

9. In the case involving fraud etc, penalty under section 78 for failure to pay service tax is upto 100% of service tax payable. This section is being replaced to provide the lower penalty of only 15% of service tax if service tax and interest is paid within 30 days from the date of service of notice. It is also being provided that if service tax and interest is paid within 30 days of the date of receipt of order determining service tax payable, penalty shall be reduced to 25% of service tax determined in the said order. (w.e.f. enactment of the Finance Bill, 2015)

10. It is also being provided that the changes proposed in section 76 and 78 shall apply to the cases where either no notice is served or notice is served but no order has been issued before commencement of the Finance Bill, 2015 (proposed new section 78B).

Analysis:

I. If show cause notice is not issued till the date of enactment of the Finance Bill, 2015, benefit of the new section will be available.

II. Even if notice is issued on or before that date but order is not passed, benefit of new sections will be available if payment of service tax and interest is paid within 30 days of passing the order.

III. Thus, benefits of lower penalties are also extended in clear terms to demand pertaining to period prior to enactment of the Finance Bill, 2015 also. Really "Achhe Din".

11. At present, section 80 provides that if there is reasonable cause, penalties under section 76 and 77 shall not be imposed. Benefit of this section is being withdrawn w.e.f. date of enactment of the Finance Bill, 2015. However, as discussed in earlier paragraph, quantum of penalty under section 76 may be reduced in genuine cases.

12. In matter involving rebate of service tax, appeal against order of the Commissioner (Appeal) lie before Tribunal at present. It is being provided that now remedy against such

order will be Revision by Central Government as provided under Section 35EE of the Central Excise Act, 1944. All appeal filed after enactment of Finance Bill, 2012 and pending before tribunal on enactment of Finance Bill, 2015 shall be transferred to Revision Authority.

Abatements (amendments in Notification No. 26/2012-ST w.e.f. 01-04-2015)

13. For Transport of Goods and Passengers by Rail abatement of 70% is available without any condition. However, it is proposed that such exemption will be subject to condition that CENVAT Credit for Capital Inputs, Capital Goods and Input Services has not been taken.

14. At present, abatement of 60% is available for services of Transport of Passengers by air for all classes. It is proposed to reduce the abatement to 40% for other than economy class. For economy class there is no change in abatement. Thus, air travel in class other than economy will be costlier.

15. For Goods Transportation Agency Services, abatement of 75% is available and at present effective rate of service tax is 3.09%. However, it is proposed to reduce the abatement to 70%. Thus, once the new rate of service tax (i.e.14%) and Swachh Bharat Cess (i.e. 2%) both will be made applicable, service tax @ 4.8% will be payable on Goods Transportation Services.

16. Abatement for Transport of Goods in a Vessel is increased from 60% to 70%.

<u>Reverse Charge Mechanism</u>

17. Exemptions to services by mutual fund agent to mutual fund or asset management company and services by distributor to a mutual fund or asset management company are being withdrawn. However, such services will be subject to full reverse charge mechanism and service recipient will be required to pay service tax on such services received. This amendment will come into force from 01-04-2015.

18. Similarly, exemption to service provided by selling or marketing agent of lottery tickets to a distributor or a selling agent is being withdrawn but such services will be subject to full reverse charge w.e.f. 01-04-2015.

19. At present, services provided by Government or Local Authority are in Negative List except service by Department of Post, services in relation to aircraft or vessel, transportation of goods and passengers and **support services**. Instead of support services, any services provided by Government to business entities will be out of Negative List and thus will be taxable. However, for such services service recipient i.e. business entity will be paying service tax under reverse charge mechanism. This amendment will be applicable from the date to be notified.

20. Aggregator is the person who owns and manages the website under brand name, through which potential customer connects with service providers. In relation to service provided involving aggregator, an aggregator will be required to pay full service tax w.e.f. 01-03-2015. Perhaps this may be the first instance where person other than service provider and recipient is made liable to pay service tax.

21. Services provided by Individual, HUF and Partnership Firms to a body corporate business entity, by way of Supply of Manpower and Security Services are subject to Partial Reverse Charge Mechanism wherein service provider is required to pay 25% and service recipient is required to pay 75% of service tax. W.e.f. 01-04-2015, such services are subject to Full Reverse Charge and hence entire tax is to be paid by service recipient only.

Registration

22. Order No. 01/2015-ST dated 28-02-2015 has been issued for the amendments in registration related procedure. Changes are applicable w.e.f. 01-03-2015.

Analysis:

1. Facility for temporary registration which is not based on PAN is no more available. Now, it is mandatory to have PAN before application for registration is made.
2. E-mail and **Mobile Number are made mandatory** for new applications. Existing registrants who have not submitted such information has to **amend their registration by 30-04-2015**.
3. Trust Based Registration **will be granted within 2 days** from the date of online application. This will be granted even if physical documents are not submitted.
4. Details of **Main Bank Account and Business Transaction Numbers** obtained from Government like Sales Tax, Excise, Import Export Code, Company Identification Number etc. are also required to be submitted along with physical papers.
5. **Photograph** of the person filing the application.
6. Self attested physical document to be submitted to concerned Division (not Range?) through **Registered Post or Speed Post** within 7 Days of the online filing the Form ST-1.
7. Registration Certificate downloaded from the website would be accepted as proof of registration. **Requirement of a signed copy of registration certificate is dispensed with**.
8. Deputy/Assistant Commissioner may revoke registration if incorrect information is furnished or physical documents are not submitted within 15 days of application.
9. Above procedure is only for single premise registration and not for centralised registration.

CENVAT Credit Rules

23. At present, CENVAT credit for Input and Input Services shall be taken within six months from the date of Invoice. This time limit is extended to one year w.e.f. 01-03-2015.

Analysis:

I. If credit of any invoices for which six moths were over and credit was lapsed, but still one year is not over, credit of such invoice may be taken after amendment of this provision.

24. At present, in the case of Partial Reverse Charge, credit for entire service tax paid may be availed only after payment to service provider. Now, w.e.f. 01-03-2015 it is provided that credit pertaining to service tax which is payable by service recipient himself, may be taken even if no payment is made to service provider.

25. Penalty under Rule 15 of the CENVAT Credit Rules, 2004 for wrong availed credit was equal to amount not exceeding service tax or duty payable on input services or inputs as the case may be. However, for non-payment of service tax, lower penalty is prescribed under Section 76. To remove this anomaly, penalty under Rule 15 has been linked to Section 76 of the Finance Act, 1994 w.e.f. 01-03-2015.

Other Amendments

26. The facility of Advance Ruling is being extended to resident partnership firms, LLP, Sole Proprietorship and One Person Company w.e.f. 01-03-2015.

27. A provision for issuing digitally signed invoices and option of maintaining of records in electronic form and their authentication by means of digital signatures are made available. The conditions and procedure in this regard shall be specified by the CBEC. (w.e.f. 01-03-2015)

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Service Tax - Recent Judgements

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[2015] 54 taxmann.com 150, Kalladikkode Service Co-operative Bank Ltd v. Union of India , High Court of Kerala

Where department had raised notice and assessee had paid service tax under protest along with challenging notice in writ, High Court directed department to complete adjudication and refund service tax, if demand is dropped.

Facts :-

Department issued notice demanding service tax from assessee, a cooperative society, under banking and other financial services Assessee : (i) replied to notice, (ii) paid service tax under protest and (iii) filed writ challenging notice on ground that assessee had not provided any taxable service and also on ground that department had not quantified service tax.

Held:-

It was held that adjudication is still to be finalized. In course of such adjudication exercise, if authority arrives at a finding that assessee is not liable to pay service tax, amount already paid shall be refunded within 1 month thereafter Writ petition was disposed.

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[2015] 53 taxmann.com 324, Green Environment Services Cooperative Society Ltd. v. Union of India, High Court of Gujarat

Since section 65(25aa) has been declared unconstitutional in Sports Club of Gujarat Ltd. v. Union of India [2013] 35 taxmann.com 557 (Guj.), levy of service tax on a cooperative society providing facility of maintaining a common effluent treatment plant to its members, is invalid.

Facts:-

Assessee, a cooperative society, was engaged in activity of maintaining a common effluent treatment plant and was providing facility thereof to its members through medium of cooperative society. Department demanded service tax from assessee initially under Business Auxiliary Services but later issued notice demanding service tax under Club and Association Services. Assessee argued that it was a case of self service and challenged levy of service tax as unconstitutional.

Held:-

It was held that since section 65(25aa) has been declared unconstitutional in Sports Club of Gujarat Ltd. v. Union of India [2013] 35 taxmann.com 557/ 40 STT 486 (Guj.), impugned order cannot be sustained. Even otherwise, since impugned services have been exempted from service tax retrospectively, there cannot be any service tax.

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[2015] 54 taxmann.com 244, National Building Construction Corporation Ltd. v. Commissioner of Central Excise & Service Tax, Raipur, CESTAT, New Delhi Bench

Service portion in works contract was liable to service tax even prior to 1-6-2007 under 'Commercial or Industrial Construction' or 'Construction of Complex' but said service portion is eligible for abatement and abatement cannot be denied merely because value of free supplies is not included in value of services.

Facts:-

Assessee was engaged in work of 'Engineering Procurement & Civil Construction of Main Power

contd. on page no. 754

VAT - Recent Judgements and Updates

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Statute Updates

[I] **Important Notifications:**

Important changes in the Tax Rates in the Budget of Gujarat State in respect of Gujarat Value Added Tax.

	Name of Item	Vat
[1]	Imitation Jewellery	5%
[2]	Oral Contraceptive Pills	Exempted fully
[3]	Aviation Turbine Fuel	5% when sold from cities other than Ahmedabad & Vadodara
[4]	Isabgul & Isabgul Husk	Fully Exempted
[5]	Cotton Roving purchased by Khadi Gramodhyog Board approved	Refund will be granted @ 5% Institutes
[6]	Technical Textile	5%

The above rates are inclusive of Addl. Tax and shall be applicable from the date of Notification.

[II] Important Judgments:

[1] M/s. Gujarat State Forest Development Corp. Ltd. vs. State of Gujarat. (GVAT Tribunal)

Issue:

[i] The revision order can only be passed by the upper authority but not by the Assessing Officer.

[ii] The validity of the cancellation order should be under the statute and complying prescribed procedures.

[iii] Statutory Notice should be given in Form No. 503.

[iv] The revision order will be time barred if it has not been done within the statutory time and in no case the time can be extended even by the Tribunal.

Held:

The Hon. Tribunal has considered the rival submission and the facts of the case. The Tribunal has also gone through the orders passed by the Learned Asst. Commissioner of Commercial Tax and the documents produced on record. The applicant has raised the issue relating to validity of the cancellation order itself. The show cause notice as well as the cancellation order clearly reveal that it is nowhere mentioned as to under which provision of the Act, Rules, Orders or Notification the Learned Asst. Commissioner has exercised his jurisdiction. Every statute mandates prescribed procedure for rectification, revision, reassessment etc. by describing specific format of the notices and other procedures including time limit for initiating such actions. While issuing show cause notice, the Learned Asst. Commissioner has given reference to Public Circular dated 7.3.2009 as well as the judgment of this Tribunal on 5.7.2013 in case of M/s. Khadi Gram Udhyog Development Trust. In this judgment, the Tribunal has interpreted that benefits under KVIC-2 are admissible only for partially unexpired period falling under the Vat regime. The Ld. Asst. Commissioner has earlier granted approval in KVIC-2 in May, 2009, when he found that the applicant was eligible for benefits by satisfying the eligibility criteria as per the

Notification dated 27.2.2009. Once he has already taken this decision and passed an order, it is not open for him to revise his own order under section 75 of the Act. The revisional jurisdiction in case of the Assessing Officer is exercised by the Ld. Deputy Commissioner or Joint Commissioner (Audit) or Dy. Commissioner/Joint Commissioner (Appeals) as these officers are of higher ranks vis-à-vis the Assessing Officer. Once any decision is taken by the higher authority, it is not open for a subordinate officer to take any contrary view. The position in law is well settled in this regard. The applicant has therefore, relied on the decision of Hon. High Court of Gujarat in case of M/s. RPG Life Sciences Ltd. vs. State of Gujarat 124 STC 157. Even this Tribunal has also taken the same view in the case of M/s. Montex Engineering Pvt. Ltd. vs. State of Gujarat (R.A. No. 133/2014 & Lupin Agro Chemical India Ltd. vs. State of Gujarat (R.A. No. 53/2006).

It is also found from the show cause notice that the same was issued in a plain format and not under prescribed form No. 503. Moreover, the revisional proceedings are required to be initiated within 3 years from the date of passing of the original order. In the present case, sanction has been given as per KVIC-2 in May, 2009 while show cause notice for cancellation has been issued in Nov. 2013. Hence the proceedings were initiated beyond the eligibility of 3 years and hence such proceedings cannot be held to be in accordance with law.

The impugned order cannot be said to be an order of rectification under section 79 of the Act. The prescribed time limit for initiating rectification proceedings is of 2 years from the date of communication of the order passed by the Assessing Officer to the person affected by such order. Admittedly in the present case, more than 4 years have passed and hence no rectification proceedings for the alleged mistake committed by the Assessing Officer while granting benefit in KVIC-2 Form are held to be maintainable.

From the forgoing discussion, the Hon. Tribunal is of the view that the impugned order passed by the Assessing Officer is neither a revisional order, nor rectification order. In either case the impugned order passed is barred by limitation. This Tribunal could have remanded this matter back to the Ld. Asst. Commissioner or to an appropriate authority to pass just and proper order after following the prescribed procedure and after giving an opportunity of being heard. However, by remanding the matter to the Ld. Asst. Commissioner, this Tribunal cannot extend the time limit which is otherwise expired. The impugned order being nullity on the ground of lack of jurisdiction and also it being barred by limitation, there is no sense in remanding this matter to the Ld. Asst. Commissioner. The Tribunal, therefore, quashes and set aside the impugned order on the ground that the Ld. Asst. Commissioner is not competent to revise or rectify his own order and that too, after the expiry of the prescribed time limit under the Act.

[2] **M/s. Hariom Quarry Works vs. State of Gujarat (GVAT Tribunal).**

Issue:

While dispatching the goods from one place to another place, all required documents should be given to the Transporter as per the law, otherwise, the Officer Incharge at the Check Post has a power to collect the tax as well as penalty.

Facts:

The goods of the appellant were dispatched from Gujarat to Rajasthan and at the check post of Shamalaji the vehicle is detained by the officer and asked for the necessary documents like Form No. 402, Invoice and Delivery Challan etc. On inquiry by the officer at check post, he has observed that the Form No. 402 was not obtained from the Vat Office but it was purchased from Bazaar. Moreover, in the invoices Bill No. was not printed but it was handwritten.

Looking to the above referred defects, the officer has detained the vehicle and assessed 5% tax and imposed the penalty @ 150% of the tax.

The appellant has paid the tax and penalty and thereafter the appellant has preferred the first appeal before the Appellate Officer stating that this was the first transaction of the appellant for Interstate Trade of his business and therefore he was not fully aware of the Provision of Law. He further argued that this is a technical mistake and therefore the penalty levied, should be deleted. The first Appellate Officer has dismissed the appeal and thereafter the appellant has preferred a further appeal before the Hon. Tribunal.

Held:

At the time of hearing of the appeal, the Hon. Tribunal has observed that the necessary requirements of the statutory forms as provided u/s. 68 of the GVAT Act should be strictly observed because the object of the Check Post is for the prevention of the evasion of tax and therefore Form No. 402 should be taken from the Vat Office.

However in respect of penalty, the Tribunal has reduced the penalty @ 50% and considering the facts that it was the first transaction of the appellant in Interstate Trade of his business.

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contd. from page 751

Plant, etc.' for BHEL. Steel required for construction had been supplied by BHEL to assessee free of cost and remaining materials had been procured/purchased by assessee . Department demanded service tax and denied 67 per cent abatement on ground that value of free supplies was not included in value of services

Held :-

It was held that service tax is payable and chargeable on service element of contract for construction of industrial and commercial complexes and contract for construction of residential complexes and in case of composite contract, service element should be bifurcated and ascertained and then taxed even prior to 1-6-2007. However, 67 per cent abatement is available and value of free supplies is not includible in gross amount charged under Notification No. 15/2004-ST or 1/2006-ST and hence, matter was remanded back for verification.

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[2015] 54 taxmann.com 284, Elmech Enterprises Ltd v. Commissioner of Central Exicse, Customs & Service Tax, CESTAT, Banglore Bench
Transmission and Distribution of electricity

Facts:-
Assessee acted as a sub-contractor and constructed electrical substations for Tadipudi Lift Irrigation Scheme on turnkey basis. Department demanded service tax. Assessee claimed exemption under notification no. 45/2010ST. Department denied said exemption on ground that when notification no.45/2010ST is read in harmony with notification No. 11/2010, it is clear that it exempts taxable service of transmission, provided by transmission company.

Held:-
It was held that Notification no.45/2010ST exempts all taxable services relating to transmission and distribution of electricity by a person to another person It is not limited only to taxable service of transmission by transmission company. Primafacie, assessee is eligible for benefit of notification. Hence, predeposit was waived.

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Business Valuation

Academic Refresher

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Approaches to Valuation
Income Approach

Certainty Equivalent Cash-Flow <u>versus</u> Risk Adjusted Rate of Return

While the most analysts (or valuers) adjust the discount rate for risk in DCF valuation, there are some who prefer to adjust the expected cash flows for risk.

There are some who consider the cash flows of an asset under a variety of scenarios, ranging from best case to catastrophic, assign probabilities to each one, take an expected value of the cash flows and consider it risk adjusted. While it is true that bad outcomes have been weighted in to arrive at this cash flow, it is still an expected cash flow and is not risk adjusted. To see why, assume that you were given a choice between two alternatives. In the first one, you are offered Rs. 95 with certainty and in the second, you will receive Rs.100 with probability 90% and only Rs. 50 the rest of the time. The expected value of both alternatives is Rs. 95 but risk-averse investors would pick the first investment with guaranteed cash flows over the second one.

Certainty cash flow = Expected cash flow / (1+ Risk premium in Risk adjusted discount rate)

Adjusting the discount rate for risk or replacing uncertain expected cash flows with certainty equivalents are alternative approaches to adjusting for risk, but do they yield different values, and if so, which one is more precise?

After all, adjusting the cash flow, using the certainty equivalent, and then discounting the cash flow at the risk free rate is equivalent to discounting the cash flow at a risk adjusted discount rate.

FAS 157 provides a very good example to show the relation between Certainty equivalent cash-flow and Risk adjusted rate of return while determining the value using discounted cash flow technique.

In making an investment decision, risk-averse market participants would consider the risk inherent in the expected cash flows. Portfolio theory distinguishes between two types of risk. The first is risk specific to a particular asset or liability, also referred to as unsystematic (diversifiable) risk. The second is general market risk, also referred to as systematic (non-diversifiable) risk. The systematic or non-diversifiable risk of an asset (or liability) refers to the amount by which the asset (or liability) increases the variance of a diversified portfolio when it is added to that portfolio. Portfolio theory holds that in a market in equilibrium, market participants will be compensated only for bearing the systematic or non-diversifiable risk inherent in the cash flows. (In markets that are inefficient or out of equilibrium, other forms of return or compensation might be available.)

***Certainty equivalent cash-flow (Method 1)** : of the expected present value technique adjusts the expected cash flows for the systematic (market) risk by subtracting a cash risk premium (risk-adjusted expected cash flows). These risk-adjusted expected cash flows represent a certainty-equivalent cash flow, which is discounted at a risk-free interest rate. A certainty-equivalent cash flow refers to an expected cash flow (as defined), adjusted for risk such that one is indifferent to trading a certain cash flow for an expected cash flow. For example, if one were willing to trade an expected cash flow of $1,200 for a certain cash flow of $1,000, the $1,000 is the certainty equivalent of the $1,200 (the $200 would represent the cash risk premium). In that case, one would be indifferent as to the asset held.*

***Risk adjusted rate of return (Method 2)** : of the expected present value technique adjusts for* *systematic (market) risk by adding a risk premium to the risk-free interest rate. Accordingly, the expected cash flows are discounted at a rate that corresponds to an expected rate associated with probability-weighted cash flows (expected rate of return). Models used for pricing risky assets, such as the Capital Asset Pricing Model, can be used to estimate the expected rate of return. Because the discount rate used in the discount rate adjustment technique is a rate of return relating to conditional cash flows, it likely will be higher than the discount rate used in Method 1 of the expected present value technique, which is an expected rate of return relating to expected or probability-weighted cash flows.*

To illustrate Methods 1 and 2, assume that an asset has expected cash flows of $780 in 1 year based on the possible cash flows and probabilities shown below. The applicable risk-free interest rate for cash flows with a 1-year horizon is 5 percent, and the systematic risk premium is 3 percent.

Possible Cash Flows	Probability	Probability-Weighted Cash Flows
$500	15%	$75
$800	60%	$480
$900	25%	$225

In this simple illustration, the expected cash flows ($780) represent the probability-weighted average of the 3 possible outcomes. In more realistic situations, there could be many possible outcomes. However, it is not always necessary to consider distributions of literally all possible cash flows using complex models and techniques to apply the expected present value technique. Rather, it should be possible to develop a limited number of discrete scenarios and probabilities that capture the array of possible cash flows. For example, a reporting entity might use realized cash flows for some relevant past period, adjusted for changes in circumstances occurring subsequently (for example, changes in external factors, including economic or market conditions, industry trends, and competition as well as changes in internal factors impacting the entity more specifically), considering the assumptions of market participants.

In theory, the present value (fair value) of the asset's cash flows is the same ($722) whether determined under Method 1 or Method 2, as indicated below. Specifically:

a. Under Method 1, the expected cash flows are adjusted for systematic (market) risk. In the absence of market data directly indicating the amount of the risk adjustment, such adjustment could be derived from an asset pricing model using the concept of certainty equivalents. For example, the risk adjustment (cash risk premium of $22) could be determined based on the systematic risk premium of 3 percent ($780 – [$780 (1.05/1.08)]), which results in risk-adjusted expected cash flows of $758 ($780 – $22). The $758 is the certainty equivalent of $780 and is discounted at the risk-free interest rate (5 percent). The present value (fair value) of the asset is $722 ($758/1.05).

b. Under Method 2, the expected cash flows are not adjusted for systematic (market) risk. Rather, the adjustment for that risk is included in the discount rate. Thus, the expected cash flows are discounted at an expected rate of return of 8 percent (the 5 percent risk free interest rate plus the 3 percent systematic risk premium). The present value (fair value) of the asset is $722 ($780/1.08).

When using an expected present value technique to measure fair value, either Method 1 or Method 2 could be used. The selection of Method 1 or Method 2 will depend on facts and circumstances specific to the asset or liability being measured, the extent to which sufficient data are available, and the judgments applied.

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Corporate Law Update

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MCA Updates:

1. **Extension of time for filing of Notice of appointment of the Cost Auditor in Form CRA-2.**

- In continuation to the General Circular No. 42/2014, the last date of filing of Form CRA-2 without any penalty/late fee has been extended up to 31st March, 2015.

  [GENERAL CIRCULAR No. 2/2015, dated February 11, 2015]

2. **The Companies (Removal of Difficulties) Order, 2015.**

   Following amendments have been made in the Companies Act, 2013:

   (a) in section 2, in clause (85), in sub-clause (i), for the word "or" occurring at the end, the word "***and***" shall be substituted; and

   (b) in section 186 of the said Act, in sub-section (11), in clause (b), after item

   (iii), the following item shall be inserted, namely:-

   "(iv) made by a banking company or an insurance company or a housing finance company, making acquisition of securities in the ordinary course of its business.".

- Now a company fulfilling both the criteria of prescribed paid up capital (presently, not exceeding Rs. 50 lacs) **AND** turnover (presently, not exceeding Rs. 20 Crores) shall be falling under the purview of small company.

- Exemption has been given to a banking company or an insurance company or a housing finance company for making acquisition of securities in its ordinary course of business.

  [[F. No. 1/ 13/2013-CL.V-Part]) Notification dated February 13th, 2015]

3. A High Level Committee of 6 members has been constituted by the MCA to suggest the measures for improved monitoring of the implementation of Corporate Social Responsibility Policies by the Companies under section 135 of The Companies Act, 2013.

4. **Companies (Indian Accounting Standards) Rules, 2015:**

   Companies (Indian Accounting Standards) Rules, 2015 shall come into force on 01st April, 2015:

   The accounting standards as specified in the **Annexure** to these rules to be called the Indian Accounting Standards (**Ind AS**) shall be the accounting standards applicable to classes of companies.

   The following class of Companies and their auditors shall comply with the specified Indian Accounting Standards (Ind AS) in preparation of their financial statements and audit along with comparative figures for the preceding F.Y.

Class of Companies	Timeline for Compliance	Types of Companies
Voluntary: Any Company	From F.Y. 2015-16	No threshold limit or criteria.
Mandatory:	From F.Y. 2016-17	i. Companies whose equity or debt securities are listed or are in the process of being listed on any stock exchange in India or outside India and having net worth of Rs. 500 Crore or more;

		ii. Companies other than those covered in the above clause and having net worth is Rs 500 crores or more;
		iii. Holding, subsidiary, joint venture and associate companies of the companies covered under above clause i & ii.
	From F.Y. 2017-18	i. Companies whose equity or debt securities are listed or are in the process of being listed on any stock exchange in India or outside India and having net worth of less than Rs. 500 Crore;
		ii. Companies other than those covered in the above clause and having net worth is between Rs 250 Crore to Rs. 500 Crore;
		iii. Holding, subsidiary, joint venture and associate companies of the companies covered under above clause i & ii. Provided that nothing stated above, except companies adopting Ind AS voluntarily, shall apply to companies whose securities are listed or are in the process of being listed on SME exchange as referred to in Chapter XB or on the Institutional Trading Platform without initial public offering in accordance with the provisions of Chapter XC of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009.

Explanations:

- Net worth shall be calculated in accordance with the stand-alone financial statements of the company as on 31st March, 2014 or the first audited financial statements for accounting period which ends after that date.
- Overseas subsidiary, associate, joint venture and other similar entities of an Indian company may prepare its standalone financial statements in accordance with the requirements of the specific jurisdiction.
- Standards in **Annexure** to these rules once required to be complied with in accordance with these rules, shall apply to both stand-alone financial statements and consolidated financial statements.
- Once the Indian Accounting Standards (Ind AS) are applied voluntarily, it shall be irrevocable.
- Companies to which Indian Accounting Standards (Ind AS) are applicable as specified in these rules shall prepare their first set of financial statements in accordance with the Indian Accounting Standards (Ind AS) effective at the end of its first Indian Accounting Standards (Ind AS) reporting period.

Exemptions:

· The insurance companies, banking companies and non-banking finance companies shall not be required to apply Indian Accounting Standards (Ind AS) for preparation of their financial statements either voluntarily or mandatorily.

Following 39 Ind AS have been notified:

Particulars	Description
Indian Accounting Standard (Ind AS) 101	First-time Adoption of Indian Accounting Standards
Indian Accounting Standard (Ind AS) 102	Share-based Payment
Indian Accounting Standard (Ind AS) 103	Business Combinations
Indian Accounting Standard (Ind AS) 104	Insurance Contracts
Indian Accounting Standard (Ind AS) 105	Non-current Assets Held for Sale and Discontinued Operations
Indian Accounting Standard (Ind AS) 106	Exploration for and Evaluation of Mineral Resources
Indian Accounting Standard (Ind AS) 107	Financial Instruments: Disclosures
Indian Accounting Standard (Ind AS) 108	Operating Segments
Indian Accounting Standard (Ind AS) 109	Financial Instruments
Indian Accounting Standard (Ind AS) 110	Consolidated Financial Statements
Indian Accounting Standard (Ind AS) 111	Joint Arrangements
Indian Accounting Standard (Ind AS) 112	Disclosure of Interests in Other Entities
Indian Accounting Standard (Ind AS) 113	Fair Value Measurement
Indian Accounting Standard (Ind AS) 114	Regulatory Deferral Accounts
Indian Accounting Standard (Ind AS) 115	Revenue from Contracts with Customers
Indian Accounting Standard (Ind AS) 1	Presentation of Financial Statements
Indian Accounting Standard (Ind AS) 2	Inventories
Indian Accounting Standard (Ind AS) 7	Statement of Cash Flows
Indian Accounting Standard (Ind AS) 8	Accounting Policies, Changes in Accounting Estimates and Errors
Indian Accounting Standard (Ind AS) 10	Events after the Reporting Period
Indian Accounting Standard (Ind AS) 12	Income Taxes
Indian Accounting Standard (Ind AS) 16	Property, Plant and Equipment
Indian Accounting Standard (Ind AS) 17	Leases
Indian Accounting Standard (Ind AS) 19	Employee Benefits
Indian Accounting Standard (Ind AS) 20	Accounting for Government Grants and Disclosure of Government Assistance
Indian Accounting Standard (Ind AS) 21	The Effects of Changes in Foreign Exchange Rates
Indian Accounting Standard (Ind AS) 23	Borrowing Costs
Indian Accounting Standard (Ind AS) 24	Related Party Disclosures
Indian Accounting Standard (Ind AS) 27	Separate Financial Statements
Indian Accounting Standard (Ind AS) 28	Investments in Associates and Joint Ventures
Indian Accounting Standard (Ind AS) 29	Financial Reporting in Hyperinflationary Economies
Indian Accounting Standard (Ind AS) 32	Financial Instruments: Presentation

Indian Accounting Standard (Ind AS) 33	Earnings per Share
Indian Accounting Standard (Ind AS) 34	Interim Financial Reporting
Indian Accounting Standard (Ind AS) 36	Impairment of Assets
Indian Accounting Standard (Ind AS) 37	Provisions, Contingent Liabilities and Contingent Assets
Indian Accounting Standard (Ind AS) 38	Intangible Assets
Indian Accounting Standard (Ind AS) 40	Investment Property
Indian Accounting Standard (Ind AS) 41	Agriculture

[File Number 01/01/2009/CL-V(Part) dated 16th February, 2015]

5. **Companies (Registration Offices and Fees) Amendment Rules, 2015:**

Following amendments have been made in the Companies (Registration Offices and Fees) Rules, 2014:

Following sub-rule has been inserted in the rule 10, after sub-rule (6):

"7. Any futher information or documents called for, in respect of application or e_form or document, filed electronically with the Ministry of corporate Affairs shall be furnished in form No. ***GNL 4*** *as an addendum."*

[F. No. 1/06/2013-CL.V-(Part I) dated February 24th, 2015]

Latest Judgments:

1. **SEBI's Exit order in respect of the BHUBANESWAR STOCK EXCHANGE LIMITED ("BhSE") [WTM/RKA/MRD/08/2014]:**

The BSE 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. **Purshottam Budhwani vs. SEBI: (Appeal No. 53 of 2013 decided on 15/01/2015 by the SAT)**

Facts of the case:

- It was alleged that the Appellant was "Key Operator" or "master account holder" and had opened a large number of demat accounts and bank accounts, which were in the names of non-existent persons or were benami and he acquired shares of various companies in IPOs of 13 companies during 2005, by making applications in benami names with each of the application being of such a value so as to make it eligible for allotment under the retail category. Subsequent to the allotment of shares in IPOs, shares from demat account of such benami/afferent allottees were transferred in the demat account of key operator/master account holder, before listing of such shares on stock exchanges. Key operators then transferred the shares through off market deals to certain entity referred to as "financier". In some cases key operator retained a portion of shares for himself and thereby earned gains illegally. The entire scheme was designed to corner shares from the quota reserved for retail investors in the IPOs of 13 companies and to make profit by selling the shares.
- The appellant alleged that the Show cause notice (SCN) issued by the SEBI stated very little and provided no details of transactions/dealings/events etc.
- Later on the Ld. A. O. issued another letter titled as "Supplementary Material" to the appellant giving details of allegations, transactions, violations, events etc.

Conclusion:

· SCN issued in garb of supplementary material letter, supplementary material letter having no legal sanction, but impugned order based substantially on supplementary material letter, non-application of mind by Ld. A.O. in entire proceedings, discrepancies in number of shares of various scrips available to Appellant compared to number shown in related case and so on and so forth, the impugned order was set aside and quashed by the Tribunal.

- Further, as the Appellant did indulge in violations of securities laws, as admitted by him, and played a key role in opening bank accounts, opening demat accounts, making thousand of benami applications in 13 IPOs and cornering lakhs of shares in violation of securities laws and made huge ill-gotten gains and in view of technicalities and non-application of mind by Ld.A.O., the case was remanded back to the Respondent for issuing a fresh SCN, incorporating all details of wrong doing and making allegations based on firm figures of shares obtained by Appellant, shares sold and shares retained by Appellant and that allegation should be based on violation of SEBI Act and Regulations made thereunder.

3. Share India Securities Ltd. vs. SEBI: (Appeal No. 29 of 2014 decided by the SAT):

Facts of the case:

- Rishabh Shares and Securities ("Rishabh") was registered as a sub-broker of M.G. Capital Services Ltd. on the NSE and SEBI noticed that Rishabh had traded on the BSE as a client of the appellant (Share India Securities Limited). Rishabh had maintained a running account with the appellant which was settled not by making payment into the bank account of Rishabh as required under SEBI circular dated August 27, 2003 but by making payment through M.G. Capital a sister concern of the appellant, with whom Rishabh had an account as a sub-broker of M.G. Capital.
- It was also noticed, that contrary to the claim of the appellant that Rishabh had traded as a client of the appellant, Rishabh had in fact traded on BSE on behalf of its clients as a sub-broker of the appellant. Since appellant had allowed Rishabh to trade on behalf of its clients on the BSE without Rishabh being registered as sub-broker of appellant for trading on BSE, it was considered that appellant had violated regulation 18B of the SEBI and a penalty of Rs. 5 lacs was imposed on the appellant.
- Running account between the appellant and Rishabh has already been closed.

Conclusion:

- In view of the decision of Delhi High Court in the case of NSE Member vs. Union of India reported in [2006] 70 SCL 151 (DELHI) it was ordered that since Rishabh was registered as sub-broker of M. G. Capital for trading on NSE, there was no need for Rishabh to obtain another certificate for the purpose of trading on BSE through the appellant.

  "According to Delhi High Court in the above referred case, Section 12(1) does not refer to any stock exchange at all. All it states is that a stock broker can do business in buying or selling securities only after getting a certificate of registration from the SEBI in accordance with the regulations made under the Act. The expression 'certificate' means only one certificate."

- Appeal was partly allowed by sustaining the penalty imposed under Section 15F(b) of SEBI Act and deleting the penalty of Rs. 5 lac imposed under Section 15HB of SEBI Act.

❇ ❇ ❇

From Published Accounts

CA. Pamil H. Shah
pamil_shah@yahoo.com

AS –13 Accounting for Investments

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

KPR Mill Limited

Long-term investments (excluding investment properties) and short term investments are carried individually at cost less provision for diminution, other than temporary, in the value of such investments. Current investments are carried individually, at the lower of the cost and fair value. Costs of investments include acquisition charges such as brokerage, fees and duties.

Investment properties are carried individually at cost less accumulated depreciation and impairment, if any. Investment properties are capitalised and depreciated (where applicable) in accordance with the policy stated for Fixed Assets. Impairment of investment property is determined in accordance with the policy stated for impairment of Assets.

Manugraph India Limited

I. Long term investments are stated at cost less provision for diminution other than temporary in nature, if any. Current investments are stated at lower of cost and fair value.

II. Investments that are readily realizable and intend to be held for not more than one year from the date, on which such investments are made, are classified as current investments. All other investments are classified as long-term investments.

Patel Engineering Limited

Current investments are carried at lower of cost or quoted/fair value. Long term investments are stated at cost. Permanent diminution, if any, is provided for.

Bajaj Corporation Limited

Investments, which are readily realizable and intend to be held for not more than one year from balance date, are classified as current investments. All other investments are classified as long term investments. Current investments are carried at lower of cost and fair value determined on an individual investment basis. Long-term investments are carried at cost of acquisition. However, provision for diminution in value is made to recognize a decline, other than temporary, in the value of the investments.

CMC Limited

Long-term investments are stated at cost, less provision for other than temporary diminution in the carrying value of each investment. Current investments comprising investments in mutual funds are stated at the lower of cost and fair value. Costs of investments include acquisition charges such as brokerage, fees, and duties.

Adani Power Limited

Long term investments are stated at cost. Provision of diminution in the value of the long-term investments made only if, such a decline is other than temporary, in the value of such investments. Current investments are carried at lower of cost or fair value.

Indian Oil Corporation Limited

6.1 Long term investments are valued at cost and provision for diminution in value, thereof is made, wherever such diminution is other than temporary.

6.2 Current investments are valued at lower of cost or fair market value.

Chemfab Alkalis Limited

Investments that are readily realizable and intend to be held for not more than one year from the date,

contd. on page no. 766

From the Government

CA. Kunal A. Shah
cakashah@gmail.com

Income Tax

1) **Notification regarding amendment in Commodities Transaction Rules, 2013**

   The Central Govt hereby amends the Commodities Transaction Rules, 2013 by substituting the sub-rule 3 in which the list of agricultural commodities has been prescribed.

   (For full text refer notification no. 13, dated 10/02/2015)

2) **Clarification regarding amounts not deductible under sub-clause (i) of clause (a) of section 40 of Income tax act.**

   CBDT vide this circular clarified that in cases where tax is not deducted at source u/s 195 of the IT Act, the Assessing Officer shall determine the appropriate portion of the sum chargeable to tax, as mentioned in sub-sec(1) of sec 195 to ascertain the tax-liability on which the deductor shall be deemed to be an assessee in default u/s 201 of the IT Act. It has been further clarified that such appropriate portion of the said sum will depend on the facts and circumstances of each case taking into account the nature of remittances, income component therein or any other fact relevant to determine such appropriate proportion.

   (For full text refer circular No. 3, dated 12/02/2015)

3) **Notification regarding deduction u/s 80C**

   The Central Govt hereby specifies the 'Sukanya Samriddhi Account' for the purposes of deduction u/s 80C of the Income Tax Act,1961.

   (Notification no 9 , dated 21/01/2015)

4) Circular regarding amendments at a glance along with explanatory notes to the provisions of finance (No.2) Act,2014

   (For full text refer circular no. 1, dated 21/01/2015)

Service Tax

1) **Procedure for Registration Simplified**

   The procedure for registration of service tax has been simplified vide order no. 01/2015 by prescribing documentation and time limits. W.e.f. 01/03/2015 the registration for single premises will be granted within two days of filing the application and on grant of the registration the applicant would also be enabled to electronically pay service tax.

   (For full text refer order no. 01/2015 , dated 28/02/2015)

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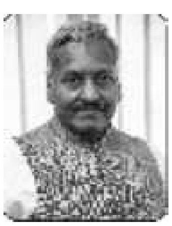
Congratulations

New Office Bearers of Ahmedabad Branch of WIRC of ICAI



CA. Amrish Patel
Chairman

CA. Vikash Jain
Vice Chairman

CA. Satyendra Jha
Secretary

CA. Chintan Patel
Treasurer

Representation on Section 234E of the Income Tax Act, 1961

11th March, 2015

To,
Shri Arun Jaitley,
Hon. Finance Minister,
Ministry of Finance
New Delhi.

Respected Sir,

Sub: Request for bringing back the *'Acche Din'* for tax deductors by streamlining the provisions of Section 234E of the Income Tax Act, 1961

1.0 Introduction & Background

1.1 According to the provisions of the Income Tax Act, 1961 every person who deducts or collects tax at source, is required to file a quarterly statement of the tax deducted on or before the 15th day from the end of quarter. (one month form the end of the quarter in case of Government Deductors).

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

1.3 Of late the Department has started to act aggressively to give effect to the provisions of the aforesaid section and the implementation of Section 234E is turning out to be a hardship for taxpaying or tax deducting/collecting public at large. The deductors are not being spared even for the slightest of the procedural lapse.

2.0 Major Issues

The provisions of Section 234E are stringent in nature

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

2.2 The provisions of Section 234E are extremely onerous inasmuch as the Assessing Officer has not been vested with any power to condone the delay in filing the TDS statements/returns belatedly due to a reasonable cause of failure.

2.3 Delay in filing of the quarterly TDS returns/ statements occurs due to reasonable causes such as:

a. The assessees are required to pay the tax deducted for a particular month on or before the 7th day of the next month. Accordingly, in case of the last month of the quarter, the tax has to be paid on or before the month following the quarter whereas the due date for filing the TDS return for the quarter would be the 15th day of that month. Once the assessee pays the tax on the 7th day of the month, the bank would upload the details of the challan within the next two days and thereafter, the assessee is left with mere 4-5 days for filing the TDS return. Within such a short time span the assessee is required to collect the data regarding the taxes deducted, verify the same and thereafter file the return.

b. Further, the assessees need to take the help of professionals in order to file their TDS return since many of the assessees including small traders and businessman lack knowledge and competence required for filing such returns.

c. Further, the data to be filled in the E-TDS returns needs to be verified in great detail so as to avoid corrections at a later stage.

Such reasonable causes ought to have been excluded from the purview of the provisions of section 234E.

Discriminatory treatment for the bureaucrats

2.4 We have gathered information based on which it has been shockingly and surprisingly found that various government deductors viz. CPC (TDS), Various Income tax Departments at Ahmedabad and Gujarat, High Courts etc. did not or could not file the TDS statements on or before the due date thereby attracting the levy of fees u/s. 234E of the Act. Many of TDS returns pertaining to Government Deductors and other deductors were filed after the due date which clearly proves the fact that there was genuine inconvenience faced at the time of filiing the TDS returns.

2.5 However, the CBDT, in order to save the skin of the Government deductors, has vide a circular No. 07/2014 F. No. 275/27/2013-IT(B) dated 04th March, 2014 extended the due date for filing return for FY 2012-13 (Q2 to Q4) and FY 2013-14 (Q1 to Q3) **only for the government deductors.**

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

2.7 Even in judicial cases, when a particular judge is interested in the matter, he would not deliver the judgment and would state 'Not Before Me'. However, in the present case the CBDT has allowed extention of time period to the Government deductors who are a part of the same machinery and thereby grossly abused its powers.

2.8 Further, whereas the due date for filing the quarterly TDS return for the other deductors is 15th day of the month following the quarter, the due date for filing the same returns is the end of the month following the quarter for the government deductors. This is a fit case for abuse of power. Such a special treatment is clearly evident of the fact that it is practically not possible for every assessee to file their TDS returns within such a short time span.

No power to levy fees while processing the statements u/s. 200A of the Act (Upto 01st June, 2015)

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

2.10 It is only the Finance Bill 2015 that has proposed to amend the said section so as to enable the computation of fee payable u/s.234E of the Act at the time of processing of the TDS statement u/s. 200A of the Act. Further, the proposed amendment will take effect from 01st June, 2015. This itself proves the fact that until 01st June, 2015 the Department had no powers to compute the fees payable u/s. 234E of the Act while processing the statements u/s. 200A of the Act and accordingly all those intimations which have been issued so far, levying fees u/s. 234E are null, void and bad in law.

Alternative Solution

2.11 The fundamental reason behind introducing the provisions of Section 234E is that timely returns are filed by the assessees and thereby timely tax credit is allowed to the deductees. However, it is to be noted that the tax credit is to be availed by the deductees after the end of the previous year, at the time of filing the return of income. In such a situation, it would not make much of a difference, should the TDS returns for first three Quarters are delayed from filing by a few days.

Writ Petitions before High Courts

2.12 Writ Petitions have been filed before various High Courts on the same issue. The Kerela High Court has in the case of **Narath Mapila LP School Vs. UOI** has vide an interim order dated 18.12.2013 granted a stay on the proceedings u/s. 234E of the Act.

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

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

2.15 Further, the decision of the Bombay High Court in the case of Rashmikant Kundaliya and Ors. Vs. UOI & Ors has been solely rendered in light of testing the constitutional validity of the provisions of Section 234E of the Act. Other grounds including the circular issued by the CBDT vide which the Government deductors get benefit by abusing the power, have not been taken into consideration, while delivering the said judgment.

3.0 **Representation**

3.1 Looking to the reasons cited *supra*, and looking to the fact that the power to levy the fees u/s. 234E has been given u/s. 200A only w.e.f. 01st June, 2015 all the notices issued prior to 01st June, 2015 which levy the said penalty should be quashed considering the same to null, void and bad in law.

3.2 Further, the benefit of extention of due date for filing the TDS returns, granted to the Government deductors should also be passed on to the other deductors since Law should be equal for all and such special and discriminatory treatment is not at all warranted. Similar to the Circular No. 07/2014 F. No. 275/27/2013-IT(B) dated 4th March 2014 issued by CBDT, a onetime immunity should also be given 'AAM JANTA'

3.3 Further, Section 234E levies fees @ Rs.200/- day of default provided it does not exceed the amount of tax deducted or collected. However, such a provision is quite harsh for the tax payers. Alternatively, a monetary ceiling limit ought to be introduced as prevalent in other taxation laws, say Rs. 10,000/-.

In light of the above, you are requested to streamline the provisions of Section 234E of the Income Tax Act, 1961 so as to avoid the genuine hardship occurring to the tax payers and bring back the *'Acche Din'* as promised to the people of the Nation.

Thanking you

Yours truly,

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

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contd. from page 762

From Published Accounts

on which such investments are made, are classified as current investments. All other investments are classified as long-term investments. Current investments are valued at lower of cost or fair market value. Long term investments are stated at cost of acquisition. Provision for diminution is made when such diminution is considered other then temporary in nature. Valuation is determined on the basis of each category of investments.

Hindustan Media Ventures Limited

Investments, which are readily realizable and intend to be held for not more than one year from the date on which such investments are made, are classified as current investments. All other investments are classified as long-term investments.

On initial recognition, all investments are measured at cost. The cost comprise purchase price and directly attributable acquisition charges such bas brokerage, fees and duties. If the investments is acquired, or partly acquired, by the issues of shares or other securities, the acquisition cost is the fair value of the securities issued.

Current investments are carried in the financial statements at lower of cost and fair value determined on an individual investment basis. Long-term investments are carried at cost. However, provision for diminution in value is made to recognize a decline other than temporary in the value of the investments.

On disposal of an investment, the difference between its carrying amount and net disposal proceeds is charged or credited to the Statement of profit and Loss.

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Association News

CA. Abhishek J. Jain
Hon. Secretary

CA. Nirav R. Choksi
Hon. Secretary

Glimpses of events gone by:

1. On 19th February, 2015 and 21st February, 2015 Study Course on Companies Act – 2013 was held, led by CA. Krishnakant Solanki and CA. Kaushik C. Patel, respectively.

2. On 27th February 2015, Study Circle Meeting was held on the topic of "Payments to Non-residents".

(L to R CA. Naishal H. Shah, Faculty CA. Nehal Sheth, CA. Shailesh C. Shah, CA. Mehul S. Shah and CA. Abhishek J. Jain)

3. On 4th March, 2015 a Budget Lecture Meeting by Shri Saurabh N. Soparkar, Sr. Advocate was held at the Tagore Hall, Paldi, Ahmedabad, jointly with Ahmedabad branch of WIRC of ICAI.

Cross section of Audience

Budget Booklet released by
Shri Saurabh N. Soparkar

***

Congratulations

Jinit Pragnesh Dharia son of CA. Pragnesh Dharia for having been conferred with the **Third Prize** at 20th **All India Elocution Competition organized by Institute of Chartered Accountants of India** held at Hyderabad on 28-01-2015

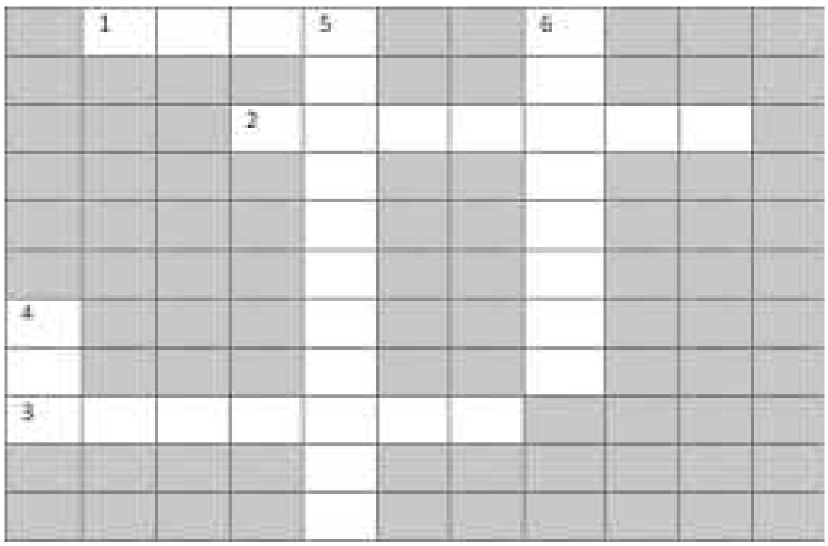
ACAJ Crossword Contest # 11

Across

1. Activity of providing bus or transport facility does not fall under the category of renting of __________.
2. In LLP, the liability of the partners is limited to the extent of their _______ contribution.
3. Not doing what you feel like doing is _______.

Down

4. Any amount lying in the ______ account is immune from attachment.
5. One of the primary goals of management in most companies is to create __________ value.
6. 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 ________ against the other.



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 05/04/2015.
5. The decision of Journal Committee shall be final and binding.

Winners of ACAJ Crossword Contest # 10

1. CA. Diti Vashi
2. CA. Manoj Ganatra
3. CA. K.S.Soni

ACAJ Crossword Contest # 10 - Solution

Across

1. Thirtythree
2. Peak
3. Disallowance

Down

4. Religion
5. Exempt
6. Vocational

❇ ❇ ❇