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	Amount in `		
	Basic	S-Tax	Total
Life Membership	7500/-	927/-	8427/-
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Professional Awards

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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I'm never Gonna Die

Primarily, it gives a feeling of ego when we read the title. However, looking it from a different perspective, **e** – effective **go** – move in life, can enable to attain this.

Right from our childhood and also while studying we are taught that what's there in the name of a person? If we put a thought and try to recollect the people who have had made impact in the world, many names will surface on the sea of our mind. Who can disagree that Mother Teresas, Swami Vivekanandas, Mahatma Gandhis and Steve Jobs' of the world never died? In order to remain alive as an immortal soul even after death, one requires great perseveration, a selfless dedication to rise as a phoenix from any difficulty for the service of mankind even after falling again and again.

Where I am going to live after disappearance of physic? Well, I am going to find address in people's heart. I will be so near to all that all will cherish as dear to me.

I will be a shining star which will pass on little light even in darkest time.

I will be available in the colors of leaves to fulfill achievable desires of the world.

I will be the clear water to let you feel profoundness of life.

I will accompany the first ray from sun to enlighten light in life.

I will be the innocent smile on the face to make your soul feel happy.

I will be the rainbow to fill your life with all the colors to make you feel bliss.

I will be the calm moonlight to make you free from all the worries of the world.

In order to attain this immortality, one has to strive. It is not just visualization, but attempts are required to crystallize this scenario.

While living, I feel that this life time is too short to cherish each and every moment and to take part in this wonderful voyage. Even then I need to dance with the rhythm of God. I need to accept what the divine power has bestowed upon me with a sweet nod.

When I ask someone 'How are you?'; I need to actually listen to the reply. I need to absorb and understand what he wants to say. Only then I can be a good listener and deliver better.

Why worry and hurry on an ongoing basis. Life is a gift of God in a box with different compartments, I need to open in a gentle way and feel the magic every moment and what each compartment has in store for me.

In a smallest of example I say, if nothing else I can do, I will be alive in your hearts by this communication to wish you all healthy and happy life always.

Don't be the same, be better!

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Editorial

Judging the Judgements

The judgement on Salman Khan's hit-and-run case was delivered by the Mumbai Sessions Court after almost 13 years. The Court held that the star actor was under the influence of alcohol and he fled away from the spot after the accident. Amidst a high voltage drama the court pronounced him guilty and sentenced him to five years of rigorous imprisonment. However, within no time the actor was a free bird again. The Mumbai High Court suspended the five-year sentence impended upon him and granted the bail until the next hearing of the case.

The order of immediate bail after the conviction became the matter of debates and discussions in the social media. Some made mockery of the judicial system, some expressed anger, many endorsed the view of 'might is right' and some appreciated the fact that it was a right given to a person to appeal in higher courts. Somehow or the other, it was found that everyone was 'judging the judgement'. This was a complete converse to the view against the judiciary unlike a little while back when the system was largely applauded after the important decision of the Supreme Court.

On 24th March 2015, the Supreme Court in a landmark judgement struck down Section 66A of the Information Technology Act in its entirety calling it unconstitutional. The court held that "It is clear that section 66A arbitrarily, excessively and disproportionately invades the right of free speech and upsets the balance between such right and the reasonable restrictions that may be imposed". This was a landmark decree and a big victory of freedom of expression.

There seems an interesting relationship in the two diverse pronouncements. The Supreme Court grants absolute freedom of speech and expression by striking down the section 66A of the Information Technology Act. The same freedom is used to express the views on the social media without any restriction. The expressions go to such an extent that the judicial system in the country is doubted, that has granted and restored the right of speech and expression.

Recently the Prime Minister of the country Narendra Modi made an important remark inviting much criticism that courts in the country may be under the influence of perceptions created by the media. The observation may not be appealing at the first instance and may jolt one's faith in the courts of the country. The larger point in question is are we not being driven by the perceptions created around us failing to appreciate the principles of justice and in turn completely undermining it.

The theme of the Journal for the year is leading chartered accountants who have made their mark in fields other than the Profession.

Namaste,
CA. Ashok Kataria
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To the Editor

I am very much enlightened and delighted to read your above article (Operation Rahat-National Glory). The soldiers and persons who took part in this work at the cost of their lives are appreciated by you in proper perspective. You have nicely used this space in highlighting the positive matter of the nation and will surely enthusiast if the persons connected to the captioned mission come through this editorial. You have rightly said that media are not accustomed to cover such positive matter. They are shy of such good things to cover.

CA. Ajit. J. Shah (M. No. 7760)

From the President

CA. Yamal A. Vyas
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The task of President of Chartered Accountants Association Ahmedabad has never been easy. But, as I sit down to write my first communication to members, the mood is sombre. Not just because of the heat, but also because of the challenges that stare us in the face. Slowly, after CPE hours became mandatory, the ICAI branches became active and institutions like CAA, who do not give CPE hours, faced disinterest of members in their programme. We have grown inspite of this fact, but not 15 years into CPE, some problems are assuming serious proportions.

Membership is in issue which deserves our serious attention. As I had mentioned in my address at the AGM, in year 2000, Ahmedabad Branch of ICAI had 2300 registered members and CAA had 1000. In 15 years, the membership of Ahmedabad Branch has grown to about 8200 and CAA membership is languishing at less than 1400. It means that only 400 of the last 6000 members of Ahmedabad have cared to become members of the CAA.

This has also had another effect. Today only 30 per cent our members are below the age of 40 years. In the Branch or ICAI as a whole, I am sure this figure is close to 60 per cent. This demographic imbalance is equally alarming. We all seriously need to do something about this, or, in coming years, we may have a problem of survival. And none of us would even contemplate CAA falling into bad times even in our dreams. I request all our esteemed members to treat this as a wake up call, and devote a few hours of your valuable time to bring in new members to CAA.

And I have a simple solution to this problem. But for that we all have to chip in. **To start with, I suggest every member should make one member in the next three months**. My limited survey indicates that most members have a close relative CA who is not a member of CAA. These members, who know what CAA is, can be the best ambassadors for this purpose.

To all Past Presidents still active in the profession, my request is for 25 members each. For that, however, I shall meet them personally and request their co operation. A related problem is that of low membership in our Mutual Benefit Scheme.

This scheme is perhaps the best activity of the Association. **And today we have about 500 members of the CAA who are not members of the MBS. Many of such members may not be eligible to become members of the MBS because of the age factor, but for the rest, we shall be shortly declaring a scheme of reduction in penalty for existing CAA members and I strongly urge those members to take advantage of this opportunity.**

MBS is such a noble cause in which we all contribute in a small way to the family of a deceased member. This is a form of insurance in which a social cause is also fulfilled, and I wish that in a few years we should be in a position to give Rs. 10 lacs to the family of a deceased member - thrice the amount that we are able to give at present.

For the year we have chalked out a busy schedule of events. May, being vacation month, is kept light. June will see a flurry of Study Circle and Brain Trust programmes. In August the 42nd RRC will be held at Devigarh Palace Resort. Do register for the RRC.

This year we are planning a number of cultural programmes, sports events and yes, a few Special Events - for which we have a separate committee this year. Watch this space.

CA. Yamal Vyas
President

An Epiphany on Reopening u/s 148

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If Assessee is taxed under'MAT' to 'MAT' - No Escapement, No Reopening

The AO is empowered to assess or reassess the total income of the Assessee by **reopening the Assessment,** invoking the provisions of section 148 of the Act. The authors have visualized in-depth manifestation with respect to the jurisdiction of the AO in reopening the Assessments of the 'Companies' where even after the reopening the ultimate tax liability of that company **remains the same** as per the (1) return of income, (2) Assessment u/s 143(3) and (3) Assessment u/s 143(3) r.w.s. 147 of the Act.The detailed analysis reads as follows:-

Existence of conditions stipulated in section 147 is a sine qua non for initiation of reopening proceedings under section 148 of the income tax act. There has to be some sort of escapement of income in order to attract the provisions of section 147 and 148 of the income tax act.

Pertinent to note, when –

1) the Assessee is ultimately liable to pay taxes on book profit u/s 115JB of the Act as per return of income / assessment u/s 143(3) (as the case may be); and

2) simultaneously there is any kind of escapement noted by the AO **with reference to normal taxable income**, but still the Assessee has ultimate liability to taxes on book profits u/s 115JB as disclosed in return only,

Then there is no escapement of income at all with respect to the deemed total income as per the NON OBSTANTE provisions of section 115JB of the act. **This act is being explained in detail herein under -**

Example:-

Following is the summary of the total income of the Assessee **ABC Ltd**, as per the return filed, as per assessment made under section 143(3) and as per assessment made under section 143(3) r.w.s. 147 of the act:-

Particulars	**As per the return filed (`)**	**As per assessment made under section 143(3) (`)**	**As per assessment made under section 143(3) r.w.s. 147 (`)**	**Remarks**
Taxable income as per the provisions of the act	10,00,000	20,00,000	30,00,000	Only addition made to normal taxable income as per provisions of IT Act
Book profit as per the provisions of 115JB	2,00,00,000	2,00,00,000	2,00,00,000	Book profits remained constant in Return, assessment u/s 143(3) as well as in Re-assessment u/s 143(3) r.w.s. 147 of the Act.
Final Total income after considering the provisions of section 115JB	2,00,00,000	2,00,00,000	2,00,00,000	**'No change' whatsoever in Total Income of the Assessee**

On perusal of the above summary, one will appreciate that the deemed total income (on which the Assessee has the ultimate liability to pay taxes) for the year, is the income as determined under the provisions of 115JB of the act.

The relevant provisions of the income tax act, in support of the above facts as well as above contention are being reproduced hereunder in their chronological order:-

· Provisions of section 115JB

Section - 115JB, Income-tax Act, 1961-2014

*[**Special provision for payment of tax by certain companies.115JB.**(1) tw t stand ng anyt ng contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, [2012], is less than [eighteen and one-half per cent] of its book profit, [such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of [eighteen and one-half per cent]].*

Analysis and applicability of a provision to the facts of the case are summarized as under:-

Particulars	**As per the return filed**	**As per assessment made under section 143(3)**	**As per assessment made under section 143(3) r.w.s. 147**	**Remarks**
Tax payable as per the provisions of the Act @ 30%	3,00,000	6,00,000	9,00,000	Taxes Payable for the AY under consideration is same as per Return, as per assessment u/s 143(3) as well as in Re-assessment u/s 143(3) r.w.s. 147 of the Act.
18.50 % Book profit as per the provisions of 115JB	37,00,000	37,00,000	37,00,000	
Whichever is higher	37,00,000	37,00,000	37,00,000	
Deemed Total Income as per 115JB	**2,00,00,000**	**2,00,00,000**	**2,00,00,000**	**No escapement of Income at all**

On perusal of the unambiguous language of provisions of section 115JB it is very clear that there cannot be two 'incomes' for the very same assessment year. Either it can be "total income as computed under this Act" or "the book profit" for the relevant assessment year, based on the higher tax payable in comparison to both, also the same shall be deemed as the "total income" of the Assessee. **Therefore, the escapement of income needs to be considered on the basis of such "total income" of the Assessee**.

Accordingly it is evident that even after making the assessment under section 143(3) r.w.s. 147 of the Act the total income of the Assessee remains at the same level as it was assessed as under the original assessment under section 143(3) of the act or as disclosed in the return filed. **This undisputed fact proves and establishes that there was no escapement of income at all what so ever in nature.**

- Provisions of section 147

Section - 147, Income-tax Act, 1961-2014

[Income escaping assessment.

147. *If the [Assessing] Officer [has reason to believe] that any* ***income chargeable to tax has escaped*** *assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :*

Analysis and applicability / non-applicability of a provision to the facts of the case are summarized as under:-

On perusal of the provision of section 147, it can be appreciated that in order to trigger this provision there has to be a reason to believe with respect to some sort of any income chargeable to tax which has escaped the assessment. **'Escapement of income'** is the precondition that has to be fulfilled before initiating the proceedings under section 148 of the act.

It is tried hereby to prove and establish that in the above facts, there can be no escapement of income within the meaning of explanation 2 to section 147 of the act:-

As per explanation 2 to section 147 where the assessment has been completed under section 143(3) of the act, in following circumstances the income shall deemed to be escaped the assessment:-

Explanation 2.—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :—

(c) where an assessment has been made, but—	
Conditions as per the explanation 2	**Remarks of the appellant**
(i) income chargeable to tax has been under assessed ; or	As explained herein above, the total income remains the same as per the original assessment order u/s 143(3) and assessment order u/s 143(3) r.w.s. 147 of the Act. - **Hence this condition not fulfilled.**
(ii) such income has been assessed at too low a rate ; or	It is apparent that the total income has been assessed the at the very same rate as specified in section 115JB in the original assessment order u/s 143(3) and also in assessment order u/s 143(3) r.w.s. 147 of the Act. - **Hence this condition not fulfilled.**
(iii) such income has been made the subject of excessive relief under this Act ; or	No specific relief has been given to the Assessee in the original assessment order u/s 143(3) which has been withdrawn in assessment order u/s 143(3) r.w.s. 147 of the Act. - **Hence this condition not fulfilled.**
(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed;]	No excessive loss or depreciation allowance or any other allowance has been computed in the original assessment order u/s 143(3) which has been withdrawn in assessment order u/s 143(3) r.w.s. 147 of the Act. - **Hence this condition not fulfilled.**

Accordingly, on perusal of the above analytical table one will appreciate that in the facts of the above case there cannot be any **escapement of income whatsoever in nature** hence the entire exercise of reopening the assessment under section 148 of the act, under similar circumstances is contrary to the provisions of the income tax act and bad in law.

• Provisions of section 271(1)(c) – explanation 4 thereof

Section - 271, Income-tax Act, 1961-2014

[Failure to furnish returns, comply with notices, concealment of income, etc.

Explanation 4.—For the purposes of clause (iii) of this sub-section, the expression "the amount of tax sought to be evaded",—

(c) in any other case, means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished.]

Analysis and applicability of a provision to the facts of the case are summarized as under:-

Provisions of the Explanation 4 of section 271 are referred and reproduced herein above only for the purpose of importing the ratio of said explanation to the reopening proceedings under section 148 of the Act.

As per words of the above reproduced explanation, no penalty under section 271(1)(c) is leviable in respect of any addition made to the income computed as per the provisions of the Act, when the Assessee has to pay tax on the deemed the total income i.e. book profits u/s 115JB of the act. When the Assessee total income remains at the same level of the book profit u/s 115JB as disclosed in the return of income, then any addition made by the assessing officer to the income calculated as per the provisions of the Act shall not be subject to the penal provisions u/s 271(1)(c) of the Act.

Above contention is duly supported by the binding judicial pronouncement of the Hon'ble Apex Court of India in the case of **CIT vs. M/S NALWA SONS INVESTMENT LTD** in Special Leave Petition to Appeal (Civil) No(s).18564/2011 dated 04/05/2012. Relevant extract of the said judgment is reproduced herein below:

25. Judgment in the case of Gold Coins (supra), obviously, does not deal with such a situation. What is held by the Supreme Court in that case is that even if in the income tax return filed by the assessee losses are shown, penalty can still be imposed in a case where on setting off the concealed income against any loss incurred by the assessee under other head of income or brought forward from earlier years, the total income is reduced to a figure lower than the concealed income or even a minus figure. The court was of the opinion that "the tax sought to be evaded? will mean the tax chargeable not as if it were the total income. ***Once, we apply this rationale to Explanation 4 given by the Supreme Court, in the present case, it will be difficult to sustain the penalty proceedings. Reason is simple. No doubt, there was concealment but that had its repercussions only when the assessment was done under the normal procedure.*** *The assessment as per the normal procedure was, however, not acted upon. On the contrary, it is the deemed income assessed under Section 115 JB of the Act which has become the basis of assessment as it was higher of the two. Tax is thus paid on the income assessed under Section 115 JB of the Act.*

Hence, when the computation was made under Section 115 JB of the Act, the aforesaid concealment had no role to play and was totally irrelevant. ***Therefore, the concealment did not lead to tax evasion at all.***

This fact in itself, indicates that even after making the assessment under section 147 technically there was no escapement of income at all therefore the entire exercise of reopening the assessment under section 148 and consequently making the assessment u/s 143(3) r.w.s. 147 of the act would be bad in law and deserves to be quashed.

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Glimpses of Supreme Court Rulings

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4 The matching principle – mercantile system of accounting:

The disallowance of deduction on the ground that the debentures were issued for a period of five years was clearly not tenable. Two methods of payment of interest were stipulated in the debentures issued. By allowing only 1/5 of the upfront payment actually incurred, though the entire amount of interest was actually incurred in the very first year, the AO, in fact, treated both the methods of payment at par, which was clearly unsustainable. By doing so, the AO, in fact, tempered with the terms of issue, which was beyond his domain. When the interest was actually incurred by the assessee which followed the mercantile system of accounting, on the application of section 36(1)(iii), on the incurring of interest, the assessee would be a entitled to deduction of full amount in the assessment year in which it is paid. The AO did not dispute that the non convertible debentures were issued and money raised for business purposes nor even the genuineness of the clause relating to upfront payment of interest in the first year itself as per the option to be exercised by the debentures holder or that interest had, in fact, been 'paid' during the year of accounting. Since the assessee followed the mercantile system of accounting, the amount of interest could be claimed as deduction even if it was not actually paid but simply will 'incurred'. In this case, the interest was actually paid as well in the assessment year in which it was claimed. In order to be entitled to deduction of these amount, the only aspect which needed examination was whether or not the provisions of section 36(1)(iii) read with section 43(2) of the Act were satisfied. Once these were satisfied, there was no question of denying the entire deduction in the year in which such amount was actually paid or incurred.

The assessee did not seek to spread this expenditure over a period of five years as in its return, it had claimed the entire interest paid up front as deductible expenditure in the same year. When this course action was permissible in law to the assessee as it was in consonance with the provisions of the Act which permit the assessee to claim the expenditure in the year in which it was incurred, the fact that a different treatment was given in the books of accounts could not be a factor which would bar the assessee from claiming the entire expenditure as of deduction. Once a return in that manner was filed, the AO was bound to carry out the assessment applying the provisions of the Act and not go beyond the return. There is no estoppel against the statute and the Act enables and entitles the assessee to claim the entire expenditure in the matter it is claimed. Therefore the assessee was entitled to deduction of the entire expenditure in the year in which the amount was actually paid.

[Taparia Tools Ltd. Vs. Jt. CIT (372 ITR 605)]

5 Exemption - Tests – Educational Institution:

The law common to sub-clauses (iiiad) and (vi) of section 10(23C) of the income tax Act,1961, may be summed up as follows:

(1) Where an educational institution carries on the activity of education primarily for educating persons, the fact that it makes a surplus does not lead to the conclusion that it ceases to exist solely for educational purposes and becomes an institution for the purpose of making profit.

(2) The predominant object test must be applied - the purpose of education should not be submerged by a profit-making motive.

(3) A distinction must be drawn between the making of a surplus and an institution being carried on 'for profit'. No inference arises that merely because imparting education results in making a profit, it becomes an activity for profit.

(4) If after making expenditure, a surplus arises incidentally from the activity carried on by the educational institution, it will not cease to be one existing solely for educational purposes.

(5) The ultimate test is whether on an overall view of the matter in the assessment year in question in the object is to make profit as opposed to educating persons.

These tests would all apply to determine whether an educational institution exists solely for educational purposes and not for the purposes of profit.

[Queen's Educational Society vs. CIT (372 ITR 699)]

6 Dissolution – Recovery in respect of income earned prior to dissolution of firm but received after dissolution:

Under section 26(4) read with section 27 as they stood prior to the amendment in the year 1997 with retrospective effect from April 1, 1975, any some received after discontinuance of business by a firm was deemed to be the income of the recipient and charged to tax accordingly, if such sum would have been included in the total income of the person who carried on the business had to such sum been received before such discontinuance. Section 27 spoke of income of a firm which was dissolved as opposed to a firm whose business had been discontinued. With respect to such income, every person who was, at the time of discontinuance or dissolution, a partner of such firm was liable to be jointly or severally assessed on such income as also to pay tax, penalty etc. The legislature amended section 26(4) in 1997 retrospectively, that is, with effect from April 1, 1975. In the amended section 26(4) two changes were made. Whereas in the original provision, no express reference was made to a dissolved firm, both were now added. By the Explanation, which is for the removal of doubts, the legislature declares that where before dissolution of a firm, full payment is not received in respect of income that has been earned pre-dissolution, then notwithstanding such dissolution, the income will be deemed to be the income of the firm in the year in which it is received or receivable and the firm shall be deemed to be in existence for such year for the purposes of assessment. By these amendment, a deeming fiction was introduced by the explanation with the retrospective effect from 1975 and instead of such income being taxed at the hands of the 'recipient', it is now taxed in the hands of the dissolved firm.

[Asst. Commissioner of Agricultural Income-tax and others vs. Netley 'B' Estate and others (372 ITR 590)]

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However, the reopening u/s 147 would be valid under following two situations:-

a) When any escapement is with reference to any 'Book Profit' within the meaning of section 115JB; or

b) When any escapement with reference to normal taxable income is of such extent which results into higher tax then the taxes paid by the Assessee on 'Book Profit' u/s 115JB

Same logic would be applicable in the cases of Limited Liability Partnership Firms which are taxed under AMT to AMT (Alternate Minimum Tax).

To sum up, it is stated that the ratio as laid down by the Hon'ble Apex court under the background of penalty u/s 271(1)(c) would squarely applicable to the reopening proceedings u/s 148 as well and accordingly when there is no variation in the deemed total income u/s 115JB then the same should not be subject to the reopening of assessment u/s 148 of the act.

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From the Courts

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8 Cash Credit : Burden of Proof: Transactions through Bank :

CIT V/s. Saileshkumar Rasiklal Mehta (2014) 224 Taxman 212 (Guj.) (Mag)

Issue :

When all the transactions are through Bank, whether provisions of 68 can be invoked to treat the same as cash credit?

Held :

A.O. made additions on account of unexplained cash credit in the hands of assessee. It was found that all transactions were routed through banking channels and assessee had fully explained sources of income. The A.O. was not justified in treating same as undisclosed income and making addition u/s. 68 of the I.T. Act.

9 Creation of goodwill account :

C.I.T. V/s. Agro Chemicals (2014) 226 Taxman 202 (Karnataka) (Mag)

Issue :

When appropriate amount is credited to partners' accounts on account of valuation of goodwill determined, whether provisions of section 45 would be attracted when amounts are paid to retiring partners?

Held :

Assets of the partnership firm were revalued and first time goodwill determined and was credited to accounts of four partners in accordance with profit sharing ratio. Thereafter, two partners retired and were paid actual amount due to them as per books. No portion of goodwill was transferred to retiring partners and – goodwill remained with firm. Since retiring partners did not acquire any right in property there was no transfer of capital asset and Section 45 was not attracted.

10 Income under head Sec. 56 : Expense u/s. 36 (1)(iii)/57.

C.I.T. V/s. Darashaw & Co. P. Ltd. (2014) 226 Taxman 193 (Bombay) (Mag).

Issue :

Whether expenses u/s. 57 can be allowed from the income under the head "other sources", when there is no income?

Held :

Department's contention is that the expenditure u/s.57(iii) can be allowed only if there is income under the head.

Court took support of the case viz. C.I.T. V/s. Rajendraprasad Moody (1978). 115 ITR 519 (S.C.) in which it was held that :

How expenditure which is otherwise a proper expenditure can cease to be as such merely because there is no receipt of income. Sec. 57 (iii) does not require that the purpose must be fulfilled, so as to be expenditure qualified for deduction. The language of Sec. 57 (iii) does not admit of a construction that the expenditure shall be debited only if any income is made or earned.

11 Notice u/s. 143(2) is compulsory

C.I.T. v/s. Alstom T & D India Ltd. (2014) 226 Taxman 103 (Mad) (Mag)

Issue :

Whether notice u/s. 143(2) is mandatory before passing order even in u/s. 148 proceedings.

Held :

Assessee had requested the A.O. to treat the return already filed as one in response to Sec.148 proceedings, further proceedings regarding compliance of the procedure u/s. 143(2) is mandatory in nature. Since there was no notice issued u/s. 143(2), Tribunal was right in holding that reassessment framed u/s. 143(3), read with Sec. 147, was invalid.

12 Expenditure of Construction of building on leasehold land is revenue expenditure.

CIT V/s. Smt. S. Premlata (2014) 367 ITR 298 (T & AP)

Issue :

Whether expenditure incurred for construction of building on leasehold land is revenue – expenditure?

Held :

The expenditure incurred in relation to an enduring property must be by the one, who has rights of ownership vis-a-vis the property. It hardly needs any mention that the construction of a building needs investment of funds. What makes the difference is that if the expenditure is incurred by the owner, it needs to be treated as capitalized expenditure, whereas if the expenditure incurred by a person, who is not vested with the rights of ownership it tends to become revenue expenditure.

13 Change of opinion in next year by A.O. and notice on the opinion of Audit Party not valid

Jagran Prakashan Ltd. V/s. C.I.T. (2014) 367 ITR 534 (All).

Issue :

Can A.O. change his opinion in the next year on the same facts and whether notice issued on the opinion of Audit party is valid?

Held :

Once the A.O. has made an assessment on the primary facts and documents placed before him, the A.O. cannot at another point of time form another opinion on the same primary facts and arrive at a conclusion that he had committed an error or come to a conclusion that he has how reason to believe that income had escaped – assessment and reopen the assessment proceedings. Further, on the basis of audit party report notice u/s.148 cannot be issued as such audit party report cannot be ungraded as "information" within the meaning of sec. 147(b).

14 TDS : Deductor not paying TDS. Still on the strength of Form No. 16-A credit available to deductee

Sumit Devendra Rajani V/s. ACIT (2014) 271 CTR 89 (Guj.).

Issue :

Credit of tax deducted can be granted to deductee on the strength of Form No. 16A even if the tax is not deposited by deductor?

Held :

When the deductor who is liable to deduct tax at source under Chapter XVII deducts the TDS and issues Form No.16 A the assessee deductee shall be entitled to credit of the same. Credit cannot be denied solely on the ground that such credit does not appear on ITD system of the Department and/ or same does not match with the ITD system of the Department. Assuming that in a given case the deductor after deducting the TDS may not have deposited with the Department, in such situation the Department is to recover the said amount from the deductor and assessee deductee cannot be denied the credit of the same.

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Tribunal News

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7 Bank of Tokyo Mitsubishi UFJ Ltd. v. ADIT 152 ITD 796 (Del) Assessment Year: 2007-08 & 2008-09 Order dated: 19th September, 2014

Basic Facts

The assessee was a bank incorporated in Japan. In the relevant assessment year, the assessee was engaged in wholesome banking operations in India, mainly catering to the requirement of Japan based corporate and individual clients. The assessee had attached a note with the return of income that the provisions of section 115JB were not applicable to it. It was claimed that assessee was subject to tax in India on the income earned by its PE in India and that, such profits earned by the PE in India were included and incorporated in global accounts prepared by the Head Office in Japan. The assessee also submitted that the profits of the PE of the assessee, i.e., Indian branches had to be computed under article 7 of the treaty and computation of book profits under section 115JB had no application at all. The AO having rejected assessee's explanation, computed the book profits earned by assessee-bank by applying provisions of section 115JB. The DRP confirmed assessment order.

Issue

Whether MAT provisions are applicable to foreign companies ?

Held

The assessee had prepared its accounts as per the requirements of Banking Regulation Act and while filing the return of income, though it had computed the book profits as per the provisions of section 115JB also, but had given a note that the provisions of section 115JB were not applicable. It is also not disputed that profit and loss account of assessee had not been prepared as per Part II & III of Schedule VI to the Companies Act. The MAT provisions were brought in to bring within the tax net the zero tax companies. In Finance Bill, 2000, the Finance Minister, inter alia, proposed that the MAT be levied at the revised rate of 7.5 per cent of book profits as determined under the Companies Act instead of the existing effective rate of 10.5 per cent. This makes the intention of Legislature very clear that the MAT provisions are applicable only to domestic companies and not to the foreign companies. The Tribunal referred to the various decisions of Authority of Advance Ruling on which the department had relied but held that those decision have only persuasive value and are not binding on them. The Tribunal further found that consistent view has been taken by various coordinate benches that section 115JB is not applicable in case of banking company. As per the Tribunal even if for the sake of argument revenue's contention regarding applicability of section 115JB to assessee-bank is accepted still in view of the provisions of section 90(2), the assessee's claim for lower impost of tax was to be accepted because the provisions of section 115JB were subordinate to section 90(2) and had no overriding effect on the said section. In view of the above, the assessee's appeal was allowed for the reason that assessee had computed its taxable income as per article 7(3) of the DTAA.

8 DCIT v. Famy Care Ltd. 67 SOT 85 (Mum) Assessment Year: 2009-10 Order dated: 26th November, 2014

Basic Facts

The assessee-company claimed research and development expenditure under section 35(2AB), relating to its in-house division. It claimed weighted deduction under section 35(2AB) @ 150 per cent of the capital expenses and revenue expenses. The AO disallowed the deduction claimed by holding that the assessee did not submit the approval from

the prescribed authority. On appeal, the CIT(A) allowed the deduction.

Issue

Whether assessee could be denied deduction under section 35(2AB) merely on ground that prescribed authority did not submit form No. 3CL for granting approval under section 35(2AB) in time to Income-Tax Department?

Held

The prescribed authority approved in-house research and development facility under section 35(2AB) on 04-03-2009 for a period from 19-10-2007 to 31-3- 2010. This approval was produced before the AO during assessment proceedings i.e. before framing the assessment on 30-12-2011. The prescribed authority sent form no. 3CL to the Income-tax Department on 22-11-2010 (Assessment year 2008-09) in accordance with section 35(2AB)(4) read with Rule 6(7A)(b) of the Rules. If the section 35(2AB)(1) is analyzed then the deduction shall be allowed of a sum equal to two times of the expenditure so incurred and the prescribed authority is to submit its report of such approval/facility to the Director General in a prescribed form within specified time. The assessee made application for such approval on 11-12-2007 with the prescribed authority and such approval was granted on 04-03-2009, therefore, the assessee cannot be denied the claimed of deduction under section 35(2AB) merely on the ground that the prescribed authority did not submit form no. 3CL in time to the Income-tax Department. The assessee cannot be penalized for the fault, if any, of the Department. The AO cannot be expected to be too technical because, it was beyond the control of the assessee to direct the authority to submit the prescribed Form no. 3CL to the Department. Section 35(2AB) nowhere suggest that the date of approval of research and development facility will be cut off date for eligibility of weighted deduction under this section on expenses incurred from that date onwards; Once facility is approved, entire expenditure so incurred on development of research and development facility has to be allowed for such weighted deduction under section 35(2AB) and thus it would be sufficient to hold that assessee has fulfilled the conditions as laid down in the section. In view of above, appeal of revenue is dismissed.

9 DCIT v. SAHARA INDIA COMMERCIAL CORPORATION LTD. [2015] 67 SOT 318 (Lucknow)

Assessment year: 2003-04 to 2007-08

Order dated: 17th December, 2014

Basic Facts

The assessee is engaged in the business of real estate development, construction and media activities etc. It had entered into a business arrangement with M/s Sahara Airlines Ltd. (SAL) for giving publicity to its business. As per the agreement SAL was required to display the logo of the assessee on both sides of the aircraft, tickets, boarding passes, baggage tags, newspapers, hoardings, etc. and that the brochures of the appellant provided by them would be distributed by M/s Sahara Airlines Ltd. with its tickets. The AO contended that the act of publicizing assessee's business would come under preview of advertisement and therefore the payment would be subject to TDS u/s 194C. Consequently, the AO treated assessee as an assessee-in-default under section 201(1) and levied penalty on it under section 271C. On appeal, the CIT(A) re-examined the issue in the light of various Circulars, relevant provisions, judgments referred to by the assessee and formed a view that 'advertisement' and 'publicity' are not the same and the payments made are not for the advertisement. Therefore, the assessee was not in default in respect of short/non-deduction of tax.

Issue

Whether payment made by assessee to SAL for printing assessee's logo on boarding card, ticket, baggage tag etc. was for publicity of its activities or is it in the character of 'advertisement' as mentioned u/s 194C?

Held

On perusal of the agreement it was found that the assessee has made its intention very clear that it wanted publicity of its activities in order to promote their business. In clause (2) of the agreement, the

assessee has also made it clear that logo should also be used in publicity materials and advertisement in newspapers, hoardings, etc. It was also observed that in the summary of copies of accounts along with the exact narration of accounting entries with regard to the impugned payments, the assessee itself has treated these expenses to be advertisement expenses till the end of financial year 2003-04. Also, in the revised agreement the parties to the agreement has used the terminology as "revision of advertisement – Tariff for publicity".Relying on the judgements and the interpretations given in various dictionaries, the Hon'ble ITAT held that "advertisement" includes publicity, but vice-versa may not be possible. But whenever publicity of a brand or logo brings commercial benefit either apparent or hidden, it will assume the character of "advertisement". It is very hard to believe that a businessman would publicize his logo or brand without visualizing any commercial benefit out of it. In the instant case, it is found in the opening Para of the agreement that the parties to the agreement have agreed that it was executed to give extensive publicity to the activities of the assessee in order to promote their business & SAL was required to display the logo of the assessee on both sides of the aircraft, tickets, boarding passes, baggage tags, newspapers, hoardings etc. Therefore, the only inference can be drawn from the agreement and the revised agreement that it was executed for the purpose of "advertisement" of the logo of the assessee. This inference is also fortified by the treatment given by the assessee in its books of account. Therefore, the Tribunal held that the assessee has agreed for advertisement of its logo for which it is required to deduct TDS under section 194C of the Act.

On the issue whether the provisions of Section 201(1) can be invoked or not it was held by the Hon'ble ITAT that if it is established that the recipient, SAL had filed all its returns for these years declaring loss in all the impugned assessment years, provisions of section 201(1) cannot be invoked and the assessee cannot be held to be an assessee in default.

10 Tata Motors European Technical Cenre Plc. v. ACIT (Mum) 153 ITD 73
Assessment year: 2008-09 and 2009-10
Order dated: 22nd December, 2014

Basic Facts

The assessee TMETC was a UK based company. It was wholly owned subsidiary of Tata Motors Ltd ('TML'), India. It was providing design and engineering services for automobiles to the TML.For rendering these services, assessee sent its employees to India by deputing engineers and technical personnel at TML's factory/establishment. Thus, the assessee had a service PE in India.The PE did not have any independent business in India and it did not enter into any contract with outside party in India.Considering these factors and FAR analysis which was effected by demographic and economic factors in UK, assessee selected four overseas comparables located in UK to benchmark ALP of transactions with its AE, TML.The TPO disagreed with selection of foreign comparables based in UK on the ground that since PE of assessee was located in India and carrying out its business within the Indian territory, assessee had to be treated as a business entity in India. Thus, it made transfer-pricing adjustment by selecting Indian comparables. On appeal, the DRP rejected the assessee's contention and upheld the order of the TPO.

Issue

Whether the assessee was justified in carrying out comparative analysis on the basis of UK based comparables, rather than by selecting Indian comparables?

Held

If the tested party itself is foreign based and the services rendered by it is very specific, for which the Indian comparables are not available or functionally not comparable then, it cannot be held that foreign comparables cannot be selected for bench marking the Arm's Length Price or margin. Indian Transfer Pricing Regulation does not puts any fetters on selection of foreign comparables, if conditions are as such, that the Indian comparables do not stand the test of comparability with the tested

party. The blanket assumption by the TPO and DRP that foreign comparables cannot be accepted at all, is not correct. In the instant case, the tested party is TMETC, whose operating profit is to be benchmarked by carrying out functional analysis of its controlled transactions for which reliable data for its comparability is available in the country where it is located, then such comparables has to be taken into account for carrying out the comparability analysis for the purpose of Transfer Pricing and benchmarking the Arm's Length Price. The PE in India is a service PE, having no establishment in India, nor incurring any costs, deployed any assets, therefore, cannot be held that it is an independent Indian enterprise. Therefore TPO and DRP were not correct in holding that UK comparables cannot be taken into consideration for the purposes of comparative analysis and benchmarking the assessee's margin. Accordingly, under the facts and circumstances of the case, the foreign comparables i.e. UK comparables can be taken into account for carrying out FAR analysis and benchmarking the Arm's Length margin of the assessee's transactions with its AE and the selection of the Indian comparables by the TPO were held not acceptable. The TPO was directed to carry out comparability analysis or FAR analysis in respect of UK comparables chosen by the assessee.He was further directed to search for other comprables if those selected by assessee do not stand the test of comparability. In that case, for the search of comparability assessee was to provide necessary assistance to the TPO. With this direction, the matter of transfer pricing adjustment was restored back to the file of the TPO/Assessing Officer.

11 Navi Mumbai Sez (P.) Ltd. v. ACIT152 ITD 828 (Mum)

Assessment year: 2008-09 Order dated: 22nd December, 2014

Facts

The assessee has claimed the expenses incurred for increase of share capital as revenue expenses. The revenue authorities rejected assessee's claim holding that expenditure in question was capital in nature.

Issue

Whether where assessee has incurred certain expenditure for increase in share capital and in view of fact that entire incremental share capital was used for purchase of trading stock, expenditure in question was to be allowed as revenue expenditure?

Held

On perusal of the Balance sheet of the assessee, the Tribunal was found that the increase in the share capital has been fully utilized only in the purchase of trading stock. The Tribunal further observed that in the present day scenario, the authorized/paid up capital is not static and can also be reduced as per provisions of the Companies Act. Considering the judicial analysis and in the light of the factual matrix of the balance sheet, on understanding of the law and the facts of the case the ITAT allowed the plea raised by the assessee and directed the AO to treat the expenditure as revenue expenditure. Thus, where assessee incurred certain expenditure for increase in share capital, in view of fact that entire incremental share capital was used for purchase of trading stock, expenditure in question was to be allowed as revenue expenditure.

12 Linklaters & Paines V. DCIT66 SOT 109 (Mum)

Assessment year: 1996-97 Order dated: 7th May, 2014

Basic Facts

The assessee was a UK based partnership firm engaged in rendering legal services. The assessee claimed that it did not have any Permanent Establishment (PE) in India under provisions of article 5(2)(k) on ground it was "rendering" services in India, but as per article 5(2)(k) of DTAA, it is necessary to "furnish" services in India. Despite of the claim of the assessee, the AO held that the assessee had a permanent establishment in India under Article 5(2)(k) of the Tax Treaty between India and the U.K. The Ld. CIT(A) also upheld the decision of AO.

contd. on page no. 77

Unreported Judgements

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In this issue we are giving gist of an important decision rendered by the Hon'ble Income Tax Appellate Tribunal, Ahmedabad Bench in the matter of H.K. Dave Limited as an agent of Tramp Shipping Ltd., UK in the context of assessment u/s 172 (4) of the Act, wherein following questions came to be decided:

i) Whether income from freight by the shipping companies, which arrived at Indian Port belongs to the charterer or owner of the ship?

ii) Whether the benefit of treaty can be given on the basis of the ownership of the ship or on the basis of agreement between the charterer and owner of the ship?

iii) Whether any time limit applies to assessment u/s 172(4) prior to amendment w.e.f. 1/4/2007?

Gist of the decision is attached.

IN THE INCOME TAX APPELLATE TRIBUNAL

AHMEDABAD "A" BENCH, AHMEDABAD

[Coram : Pramod Kumar AM and S.S. Godara JM]

ITA No.1049/Ahd/2006
Assessment Year : 2001-02)

H.K. Dave Limited
As Agent of Tramp Shipping Limited, UK
Plot No.51, Param, Behind Satyanarayana Road
……Appellant
Bhavnagar [PAN : AAACH5397L]

Vs.

Tax recovery Officer

Range-1, Bhavnagar ……..Respondent

Appearances by :

Tushar P. Hemani, for the appellant
Dinesh Singh, for the respondent

Dates of the hearing the appeal : April 29 and 30, 2015
Date of pronouncing the order : May 01, 2015.

Gist only

(A) **Facts of the Case:**

i) The assessee is a company engaged in the business of rendering services in respect of port and income tax clearances to the foreign vessels touching various ports in Gujarat. On 23/10/2001, assessee had requested the Tax Recovery Officer [TRO], Bhavnagar Range-1, Bhavnagar for the issuance of income tax clearance certificate in respect of M.V. Stove Campbell which had arrived at Pipavav Port carrying cement in bulk under the agency of M/s Tramp Shipping Ltd. UK, London.

ii) The TRO has granted a certificate treating the income as exempt under DTAA between India and UK.

iii) Subsequently, TRO noticed that the tax liability was of the charterer i.e. H.C. Trading International Inc, Bahamas and since Bahamas did not have any DTAA with India , the assessee was not entitled to any relief u/s 90 of the Act . It was in this back drop that the assessee was required to show cause as to why the relief granted u/s 90 on the basis of Indo UK DTAA be not withdrawn.

iv) The appellant submitted before AO that exemption under DTAA is available on the basis of the flag of the country of ship and to the owner of the ship and since in this case the owner is situated in UK, who is the beneficiary of the freight, treaty benefit is available to assessee u/s 90 of the Act.

In any case, since the ship is under Norway flag which is also under treaty benefits due toDTAA with Norway such income is exempt in India.

v) The AO did not accept the contentions. He also noted that under the charter party agreement, the tax is payable by the charterer i.e. H.C. Trading International Inc, Bahamas with which no DTAA is existence and therefore relief u/s 90 already granted at the time of issue of NOC is withdrawn. AO also rejected assessee's further submission that by way of subsequent amendment the responsibility of paying tax was assigned to Tramp Shipping Limited was by way of amendment of 20/10/2004 and was not in existence on the date of issue of NOC and hence cannot be taken cognizance of.

vi) The appellant filed appeal before CIT(A), but without any success.

vii) The appellant, therefore, filed appeal before Hon'ble Tribunal raising several grounds challenging the order of CIT(A) upholding the order of TRO and also challenging the Act of CIT(A) in invoking provisions of section 172 r.w. section 163 of the Act and also challenging the power of TRO to pass an order u/s 172 (4) on 29/3/2005 after he had already passed an order u/s 172(6) on 23/10/2001.

(B) **Rival Contentions**

Rival contentions were advanced which are as mentioned in the facts of the case earlier. The Bench, after considering the same held as under:

(C) **Held :**

"8. In our considered view, it was wholly erroneous on the part of the authorities below to determine the eligibility of treaty benefits on the basis of the domicile of the person liable to pay income tax dues, and, of course, to determine the person liable to pay the income tax on the basis of an agreement between the owner and the charterer. Under article 1 of the India UK Double Taxation Avoidance Agreement [(1994) 206 ITR (Statue) 235; Indo UK tax treaty, in short], "shall apply to persons who are residents of one or both of the Contracting States", and the expression "resident of a contracting state", under article 4(1), means "any person who, under the law of that State, is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of a similar nature". Clearly, therefore, it is the fact of taxability under a statue, rather than contractual liability under a business agreement, which determines the eligibility for treaty benefits. In any event, it is only elementary that a statutory liability cannot be shifted or avoided on the ground that the person, who has the statutory obligation to make payment of that liability, has assigned this obligation to someone else. It does not, therefore, really matter as to whether, under the charter party agreement, the owner was liable to pay tax or whether the charterer was liable to pay the tax. What really, therefore, matters is as to who was chargeable to tax in respect of such an income. In this light, let us turn to the facts of this case. The present taxability is under section 172, which, for ready reference and as it exists today, is reproduced below:"

Thereafter, the Hon'ble Tribunal reproduced section 172 of Income Tax Act and thereafter in para-9 observed as under:

"9. As evident from a plain reading of Section 172(1), which highlights the fact that the provisions of Section 172 apply "for the purpose of the levy and recovery of tax in the case of any ship, belonging to or chartered by, a nonresident, which carries passengers, livestock, mail or goods (emphasis by underlining supplied by us) shipped at a port in India", shows that the taxability under section 172 is qua a ship

and not qua the enterprise owning or using it under a charter agreement. Section 172(4) then refers to the payment of the tax liability by the master of the ship which again shows that the taxability under section 172 is qua the ship rather than qua owner of charterer of the ship. What is thus clear is that the scheme of taxation 172 lays emphasis the tax object, i.e. the activity which is to be taxed, and not the tax subject, i.e. the person who is to be taxed. Therefore, when a person assumes liability, by filing return under section 172(3) in respect of tax liability under section 172(2), such a liability is qua the taxability of income in respect of the amount paid or payable on account of carriage of passengers, livestock, mail or goods on the ship. The scheme of this Section, in our humble understanding, does not allow such a person to choose being accountable in respect of a particular person, in respect of owner of the ship or in respect of charterer of the ship. If he assumes the liability under section 172(3), it is in respect of the income earned by the activities of the ship. The assessee's claim that he is only responsible for the tax liability of the owner, and not the charterer, is only to be stated and rejected. Having said that, we may also point out that the Assessing Officer himself has assessed the UK based company, i.e. owner of the ship and not the charterer of the ship. By implication, thus, he accepts that the income was earned by the UK based company, and, if that be so, the provisions of Article 9(1) of the Indo UK tax treaty unambiguously provides that "income of an enterprise of a Contracting State (i.e. Tramp Shipping Ltd UK) from the operation of ships in international traffic shall be taxable only in that State (i.e. UK)". In this view of the matter, and in view of the fact that it has not been the case of any of the authorities below that the income belonged to the charterer based in Bahamas and not the owner based in UK, we are unable to see any legally sustainablereasons to decline the benefit of Article 9 to the assesse before us. The grievance of the assessee must, therefore, be upheld.

10. *However, before parting with the matter, we may also deal with an interesting legal issue raised by the learned counsel. We have noted that, as pointed out by Shri Hemani, the assessment under section 172(4) was framed on 29th March 2005, whereas the ship had left Indian port on 29th October 2001. The assessment was thus framed almost three years after the end of the relevant previous year. Undoubtedly, as at the relevant point of time, there was no time prescribed under the statue for framing the assessment under section 172(4) and the provisions of Section 172(4A), which set this time limit as nine months from the end of the financial year in which return under section 172(3) is filed, came into effect from 1st April 2007, but that does not mean that in the absence of this time limit under section 172(4A), the assessment under section 172(4) could have been done at any point of time. As held by Hon'ble Bombay High Court, in the case of Director of Income Tax (International Taxation) Vs Mahindra & Mahindra Limited [(2014) 365 ITR 560 (Bom)], even when a legal provision, such as contained in section 201, does not prescribe any limitation period, the revenue authorities will have to exercise the powers in that regard within a reasonable time, and the Tribunal is quite justified, in principle, in deciding what would constitute a reasonable time limit. It is thus clear that even when the statute did not prescribe a time limit for completing assessment under section 172(4), we have to hold that such assessments could be framed only within a reasonable time. We have also noted that, subsequently with effect from 1st April 2007, the statute itself has considered the*

period of none months from the end of the financial year, in which return under section 172(3) is filed, as reasonable time limit within which assessment order under section 172(4) is to be framed. When this time limit is statutorily treated as a reasonable time limit for the returns filed after 1st April, 2007, in our considered view, this time limit can also be treated as a reasonable time limit for the returned filed prior to 1st April 2007 as well. We do so. Viewed in this perspective, the impugned order under section 172(4) was indeed barred by limitation. For this reason also, the assessee must succeed in this appeal.

11. In the result, the appeal is allowed. Pronounced in the open court today on 1st May, 2015."

(D) As a result, the Hon'ble tribunal held that -

i) The tax liability u/s 172 applies qua ship and not qua the enterprise owning or using it under a charter agreement.

ii) Such statutory liability cannot be transferred by an agreement to the contrary.

iii) Since the income belongs to the owner based in UK the benefits of Article 9(1) of the Indo UK tax treaty were available to the assessee.

iv) Even if prior to 1/4/2007, statute did not prescribe a time limit for completing assessment u/s 172(4), reasonable time limit of nine months will apply to the returns filed prior to 1/4/2007 for the purpose of making assessment u/s 172(4) of the Act.

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contd. from page 73

Issue

Whether assessee did have a PE in India in terms of article 5(2)(k)?

Held

The unresolved dispute is on the connotations of "furnishing of services' which according to the assessee could not be so construed as to cover 'rendering of services' by such professionals as lawyers. The Tribunal found no merit in the plea of the hyper technical suggestion that professional services can only be 'rendered' and not 'furnished and the connotations of furnishing of services cannot be extended to rendering of services. The connotation of 'rendering' also extend to 'to give or make available; provide' and 'to furnish; to state; to deliver, as to render an account, to render judgement.' Similarly one of the usage of expression 'furnish' also referes to 'to furnish one with knowledge or principles'. The expressions 'rendering' and 'furnishing' are somewhat interchangeable in normal course of business, and it will be too pedantic and hyper technical an approach to narrow down the meaning of the expression 'furnishing' to exclude rendering of professional services. The Tribunal further held that a treaty is to be interpreted in good faith on the basis of general expectations of the parties and in accordance with the ordinary meaning given to the treaty in the context and in the light of its objects and purpose. According to the Tribunal interpretation canvassed by the assessee did not fit this approach to treaty interpretation. The Tribunal found that Article 14 (corresponding to article 15 of India-UK tax treaty) of the OECD Model Convention, which deals with the taxability of professional services in the source country, was deleted from the OECD Model Convention on the ground that 'there is no intended difference between the concepts of permanent establishment, as used in article 7, and fixed base as used in article 14…' It was thus clear that professional services are also covered by Article 5, as evident from the OECD Model Convention Commentary.

It was accordingly held that professional services are not beyond the scope of article 5, existence of which is sine qua non for any taxability under article 7. In that view of the matter, the contention that professional service could not be covered by the provisions of article 5(2)(k) was rejected.

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Controversies

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EMBEZZLEMENT LOSS

Whether loss on account of embezzlement by an employee can be allowed as deduction while computing business income?

Issue

When embezzlement takes place in a business organization it is allowable as a business loss.

Proposition

Loss caused due to embezzlement by employee or agent is allowable as deduction. However, there is no specific section allowing such deduction and hence it is proposed that the loss caused to the employer by the embezzlement by the employee is incidental to business and the same is allowable as deduction.

View against the proposition

It is submitted that there is no provision in the Income tax Act for deduction of embezzlement loss. It can not be claimed as expenditure incurred for the purpose of business. However, the Hon Madras High Court in the case of Gothamchand Galada vs. CIT (1961) 42 ITR 418, has laid down exclusive tests for allowability of the said loss.

"The test to apply in deciding whether a loss sustained by a businessman, when an employee of his embezzled funds left in the charge of that employee, constitutes a trading loss of the business of the employer is whether the loss was incidental to the carrying on of that business. Was the employment of the employee in the normal course of that business and was it a normal incidental of the conduct of that business? Was the entrustment of the funds of the employer to that employee in the normal course of the conduct of that business? Was the loss caused to the employer by the embezzlement by the employee incidental to that entrustment? These questions have to be answered from the view point of a prudent man of business. If these tests are satisfied then the loss would be a trading loss."

Thus, as per this decision it is very clear that he assessee will have to prove that the embezzlement loss is in the normal course of business and it is normal incidental of the conduct of that business. The entrustment of the funds of the employer to the employee must be in the normal course of the conduct of that business. It is debatable whether when employee drawing salary of Rs. 10,000/- is handed over blank signed cheques is normal conduct of the business? In my opinion it is not and hence it can not be claimed as normal trading loss.

Further it is submitted that if embezzlement is done by the partner of the partnership firm then also the loss can not be claimed as incidental to the carrying on the business. Further if the funds are made available to an agent and embezzlement loss is caused which is not normal incidence of the business then also such loss can not be allowed as deduction.

It is further submitted that if no proceeding have been initiated against the defaulting employee then the assessee will have to establish that the embezzlement loss have been incurred by leading strong evidences.

The assessee should have made necessary attempt to recover the loss from the persons concerned and had failed or he has not made such attempt because it was useless in view of the financial position of the person concerned. But where, the assessee did

not make attempt to recover the amount and the financial position of the person was not bad, the amount cannot be allowed to be deducted as loss. [CIT vs. Ashwani Kumar Liladhar (1997) 143 CTR 449 (All)].

View in favor of the Assessee

Loss caused due to embezzlement by employee or agent is allowable as deduction. It has been held by the hon'ble Supreme Court in the case of Badridas Daga vs. CIT 34 ITR 10, as follows:

"A business especially such as is calculated to yield taxable profits has to be carried on through agents, cashiers, clerks and peons. If employment of agents is incidental to the carrying on of business, it must logically follow that losses which are incidental to such employment are also incidental to the carrying on of the business. Human nature being what it is, is impossible to rule out the possibility of an employee taking advantage of his position as such employee and misappropriating the funds of his employer, and the loss arising from such misappropriation must be held to arise out of the carrying on of business and to be incidental to it."

Summation

Is it the year in which deduction for loss on account of embezzlement is the year in which took place, or it was discovered, or it was quantified? Courts have not taken a uniform view on the matter. It is agreed that embezzlement in the course of business is deductible, as decided in Badridas Daga vs. CIT [1958] 34 ITR 10 (SC), though there is no specific provision in law for allowing the same. The year in which the amount could be allowed is generally taken to be the year in which embezzlement took place. In Associated Banking Corporation of India Ltd. Vs. CIT [1965] 56 ITR 1 (SC), it was pointed out that embezzlement results in trading loss, when the embezzlement takes place, whether the employer was aware or not. It is in this context that it was decided in Shitla Prasad Shyamlal vs. CIT [1991] 188 ITR 514 (All) that deduction need not await final outcome of the criminal proceedings taken against the embezzler.

In the case of Bombay Forgings Pvt. Ltd. Vs. CIT 206 ITR 562 where it was pointed out that the quantification at the time of preparation of final accounts can be taken as the basis and be allowed in the year of embezzlement. Where the extent of embezzlement was not ascertainable during the year, the claim in the year in which it was ascertained by the Chartered Accountant after examination of accounts and receipt of report by the assessee was not accepted, as the Tribunal found that it should have been claimed in the earlier year, when the embezzlement took place. With respect this decision does not appear to have laid down the correct position of law. It is submitted that Loss due to embezzlement does not necessarily arise the moment embezzlement takes place. If the assesse detects or become aware of the loss later, then it is only on such detection that the loss can be said to have incurred. Also, in case the proceedings for recovery of the amount are initiated, the loss "matures" only when there is reasonable cause to conclude that the amount cannot be recovered. It is also useful to refer to the decision of their lordships in the case of Dinesh Mills Ltd. vs. CIT 254 ITR 673, where it was decided that the embezzlement loss claimed shall be admissible if it is not possible to recover the loss from the person responsible for the same.

However, the CBDT Circular No. 35-D (XLVII-20) of 1965, F.No. 10/48/65 – IT (AI), dated 24.11.1965 directs the assessing officer to allow loss arising due to embezzlement by employees in the year in which it was discovered.

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Judicial Analysis

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Property Income vs. Business Income.

Chennai Properties & Investments Ltd. Vs. CIT Civil Appeal No. 4494 of 2004 dated 09/04/2015. (SC)

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The appellant-assessee is a company incorporated under the Indian Companies Act. Its main objective, as stated in the Memorandum of Association, is to acquire the properties in the city of Madras (now Chennai) and to let out those properties. The assessee had rented out such properties and the rental income received therefrom was shown as income from business in the return filed by the assessee.

The assessing officer, however, refuse to tax the same as business income. According to the assessing officer, since the income was received from letting out of the properties, it was in the nature of rental income. He, thus, held that it would be treated as income from house property and taxed the same accordingly under that Head.

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We have heard the learned counsel for the parties on the aforesaid issue. Before we narrate the legal principle that needs to be applied to give the answer to the aforesaid question, we would like to recapitulate some seminal features of the present case.

The Memorandum of Association of the appellant-company which is placed on record mentions main objects as well as incidental or ancillary objects in clause III. (A) and (B) respectively. The main object of the appellant company is to acquire and hold the properties known as "Chennai House" and "Firhavin Estate" both in Chennai and to let out those properties as well as make advances upon the security of lands and buildings or other properties or any interest therein. What we emphasise is that holding the aforesaid properties and earning income by letting out those properties is the main objective of the company. It may further be recorded that in the return that was filed, entire income which accrued and was assessed in the said return was from letting out of these properties. It is so recorded and accepted by the assessing officer himself in his order.

It transpires that the return of a total income of Rs.244030 was filed for the assessment year in question that is assessment year 1983-1984 and the entire income was through letting out of the aforesaid two properties namely, "Chennai House" and "Firhavin Estate". Thus, there is no other income of the assessee except the income from letting out of these two properties. We have to decide the issue keeping in mind the aforesaid aspects.

With this background, we first refer to the judgment of this Court in East India Housing and Land Development Trust Ltd.'s case which has been relied upon by the High Court. That was a case where the company was incorporated with the object of buying and developing landed properties and promoting and developing markets. Thus, the main objective of the company was to develop the landed properties into markets. It so happened that some shops and stalls, which were developed by it, had been rented out and income was derived from the renting of the said shops and stalls. In those facts, the question arose for consideration was: whether the rental income that is received was to be treated as income from the house property or the income from the business. This court while holding that the income shall be treated as income from the house property, rested its decision in the context of the main objective of the company and took note of the fact that letting out of the property was not the object

of the company at all. The court was therefore, of the opinion that the character of that income which was from the house property had not altered because it was received by the company formed with the object of developing and setting up properties.

Before we refer to the Constitution Bench judgment in the case of Sultan Brothers (P) Ltd. , we would be well advised to discuss the law laid down authoritatively and succinctly by this Court in ' Karanpura Development Co. Ltd. v. Commissioner of Income Tax, West Bengal' [44 ITR 362 (SC)]. That was also a case where the company, which was the assessee, was formed with the object, inter alia, of acquiring and disposing of the underground coal mining rights in certain coal fields and it had restricted its activities to acquiring coal mining leases over large areas, developing them as coal fields and then sub-leasing them to collieries and other companies. Thus, in the said case, the leasing out of the coal fields to the collieries

and other companies was the business of the assessee. The income which was received from letting out of those mining leases was shown as business income. Department took the position that it is to be treated as income from the house property. It would be thus, clear that in similar circumstances, identical issue arose before the Court. This Court first discussed the scheme of the Income Tax Act and particularly six heads under which income can be categorised / classified. It was pointed out that before income, profits or gains can be brought to computation, they have to be assigned to one or the other head. These heads are in a sense exclusive of one another and income which falls within one head cannot be assigned to, or taxed under, another head. Thereafter, the Court pointed out that the deciding factor is not the ownership of land or leases but the nature of the activity of the assessee and the nature of the operations in relation to them. It was highlighted and stressed that the objects of the company must also be kept in view to interpret the activities. In support of the aforesaid proposition, number of judgments of other jurisdictions, i.e. Privy Counsel, House of Lords in England and US Courts were taken note of. The position in law, ultimately, is summed up in the following words: -

> "As has been already pointed out in connection with the other two cases where there is a letting out of premises and collection of rents the assessment on property basis may be correct but not so, where the letting or sub-letting is part of a trading operation. The diving line is difficult to find; but in the case of a company with its professed objects and the manner of its activities and the nature of its dealings with its property, it is possible to say on which side the operations fall and to what head the income is to be assigned."

After applying the aforesaid principle to the facts, which were there before the Court, it came to the conclusion that income had to be treated as income from business and not as income from house property. We are ofthe opinion that the aforesaid judgment in Karanpura Development Co. Ltd.'s case squarely applies to the facts of the present case. No doubt in Sultan Brothers (P) Ltd.'s case, Constitution Bench judgment of this Court has clarified that merely an entry in the object clause showing aparticular object would not be the determinative factor toarrive at an conclusion whether the income is to be treated as income from business and such a question would dependupon the circumstances of each case, viz., whether a particular business is letting or not. This is so stated in the following words: -

> "We think each case has to be looked at froma businessman's point of view to find out whether the letting was the doing of a business or the exploitation of his property by an owner. We do not further think that a thing can by its very nature be a commercial asset. A commercial asset is only an asset used in a business and nothing else, andbusiness may be carried on with practically allthings. Therefore, it is not possible to say that a particular activity is business because it is concerned with an asset with which trade is commonly carried on. We

find nothing in the cases referred, to support the proposition that certain assets are commercial assets in their very nature."

We are conscious of the aforesaid dictalaid down in the Constitution Bench judgment. It is for this reason, wehave, at the beginning of this judgment, stated the circumstances of the present case from which we arrive at irresistible conclusion that in this case, letting of the properties is in fact is the business of the assessee. The assessee therefore, rightly disclosed the income under the Head Income from Business. It cannot be treated as 'income from the house property'. We, accordingly, allow this appeal and set aside the judgment of the High Court and restore that of the Income Tax Appellate Tribunal. No orders as to costs.

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CIT *v.* Tirupati Organisers (P.) Ltd. [2013] 34 taxmann.com 155 (Gujarat)

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3. The main issue that the Revenue argued before us was with respect to addition of Rs. 1.55 Crores [rounded off] made by the Assessing Officer as income from house property.

4. For the Assessment Year 2006-07, the assessee had filed its return of income on 29th December 2006 which was taken in scrutiny. The Assessing Officer framed assessment on 7th October 2008 determining total income at Rs. 1.69 Crores [rounded off] . Out of such amount, a sum of Rs. 1.55 Crores represented what the Assessing Officer treated as the assessee's income from house property. The Assessing Officer found that the assessee company had entered into a joint business agreement ["JBA" for short] with three other parties in which the assessee had to provide infrastructure; including electrical installations, lifts, plant and machinery, security systems, canteen, house keeping, etc. Assessee also had undertaken responsibility for operation and maintenance of such facilities and to provide skilled work force and manufacturing expertise for diamond processing. In turn, the assessee would receive a guaranteed monthly amount of Rs. 6,00,000/ = or rupee one per inward carat of diamond. The Assessing Officer was of the opinion that the income generated in the process would be the assessee's income from house property and not business income. He was of the opinion that the assessee company was supplying building and such other infrastructural facilities for which purpose, the assessee would be receiving guaranteed amount in the nature of rent, which would be revised from time to time. The assessee Company was not entitled to any share in the profit nor would bear any loss in the business. On such basis, the Assessing Officer made the addition. Assessee carried the matter in appeal. CIT (A) deleted the addition, making following observations :-

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5. Revenue thereupon approached the Tribunal. Tribunal dismissed the Revenue's appeal principally relying on its own decision in case of *ACIT* v. *Vardhman Infrastructure Private Limited.*

6. Learned counsel for the Revenue submitted that the case of *Vardhman Infrastructure Private Limited* (*Supra*) was not carried in appeal in view low tax effect. In the present Tax Appeal, he contended that the Tribunal committed a serious error in confirming the decision of CIT (A). He relied on the decision of Apex Court in case of *Shambhu Investment (P.) Ltd.* v. *CIT* [2003] 263 ITR 143/129 Taxman 70 (SC).

7. We, however, find that the CIT (A) as well as the Tribunal have correctly appreciated the facts on record. The assessee did not supply solely the house property with or without furnishings. It supplied various requirements of the joint venture business; such as, infrastructure, machinery, security systems, canteen and house-keeping. The assessee also undertook the responsibility of operation and maintenance of such services and also to provide skilled work force for processing the diamonds. In

turn, the agreement assured a minimum return of Rs. 6,00,000/= to the assessee, or return at the rate of rupee one per inward carat; whichever was higher. It, therefore, cannot be stated that the assessee was not in the business through joint venture of processing of the diamonds. Merely because such agreement envisaged assured return to the assessee, in lieu of either profit or loss to be shared from the joint venture, would not take away the fact that the assessee was engaged in the business.

8. CIT (A) has noted salient features of the agreement in question. For example, he noted that the assessee received amounts under the agreement not only for the use of infrastructure but also for its operation and maintenance and for providing various other services. The assessee was carrying on activities in an organized manner and such purpose on daily basis, was employing a large number of workers. More significantly, the user had no right of occupancy. They had only limited access to the use of space for the purpose of business and that too in respect of certain activities. At all times, the premises remained fully under the control of the assessee.

9. We notice that under some what similar background, when the Tribunal in case of *Saptarishi Services* had held the income to be his business income and not from the house property, this Court had dismissed the appeal holding that no question of law arises. In such case, the assessee had taken certain piece of land on lease and thereupon put up construction of a commercial building with an idea of having a business center. Different portions of the building were given on rent to third parties and the assessee treated the rent as service charges under the head, "income from business and profession". Assessee explained to the Assessing Officer that in addition to providing the premises, the assessee also provided several other facilitates; such as, services of lift, services of receptionists, secretarial services, data processing, conference room, etc. The Assessing Officer did not accept the contention and treated the income, derived from the house property. The Tribunal ultimately held in favour of the assessee and came to conclusion that,

", ..the director of *M/s. Saptarashi Services (P) Limited* are not related to the directors of M/s. Kohinoor Tabacco Products (P) Limited. The electricity charges from October 1, 1989 to March 31, 1990, were paid to M/s. MohanlalHargovandas who were one of the members of the service centre and M/s. Saptarshi Services (P) Limited reimbursed them later. The assessee is having EPABX machine which facilitates providing telephone services to the occupants of the service centre. Besides this, the assessee is providing various services to the occupants like services of lift, services of receptionists, secretarial services, data processing, conference room, etc. The object of the said complex is that facilities to be provided with the building. Thus the assessee is providing a working place along with the various facilities."

10. Against such decision, Revenue's appeal was dismissed by this Court.

11. The decision of Supreme Court in case of *Sambhu Investment (P) Limited* [*Supra*] was rendered in different facts-situation. In such case, the assessee was owner of immovable property. It occupied a portion thereof and let out the rest to be used as table space to occupants, with furniture and fixtures and lights and air-conditioners. For such purpose, tenants paid monthly rental; inclusive of charges. The High Court held that such income should be treated as "income from house property". The Apex Court upheld this judgment.

12. In the present case, the facts are vitally different. The assessee had not rented out property but had allowed its use thereof for the purpose of joint venture business. In addition to the space with proper infrastructural facilitates, it also provides various other facilitates to be used for the purpose of diamond processing.

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ACIT vs. Vardhman Infrastructure P. Ltd. (ITA No.976/Ahd/2009 with CO No.92/Ahd/2009, dated 07th March, 2012)

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3. The learned DR has relied on the order of the AO. He submitted that the decision of the Hon'ble Apex Court in the case of Shambhu Investment P. Ltd., 263 ITR 143 supports the case of the Revenue. He referred to the relevant parts of the assessment order in support of the case of the revenue. The learned counsel for the assessee submitted that it is the first year of the assessment in which the issue of assessability of income under the head "Business Income" or "Income from house property" has arisen. He submitted that the assessee is in the business of developing, operating and maintaining infrastructure for industries and installation of the machines to take care of the manufacturing process, and has provided services along with premises to five parties. He submitted that number of facilities such as, air conditioning, Housekeeping, conference rooms, training rooms, data entry and asset management systems, lift, electric installations, security, safe custody of rough diamonds and polished diamonds by providing safes, canteen facility and registration with PF, ESI and registration with various authorities under various statutes were provided by the assessee. He referred to the copy of joint business agreement between the assessee-company and Poonam Diamond one of the parties with whom the assessee has entered into joint business. He submitted that as per the decision of Hon'ble Supreme Court in Shambhu Investment (supra) income was assessable under the head "Income from Business". He relied on the order of the CIT(A).

4. We have considered rival submissions and perused the orders of the AO and the CIT(A). We have also perused the copy of the joint business agreement between the assessee and the Poonam Diamond, English transaction whereof has been filed in the compilation by the assessee. We find that the assessee has agreed to provide space for diamond business and also provided infrastructure facilities like electrical installation, canteens, house-keeping, security etc. Clause-3 of the agreement provides certain amount payable to the assessee-company as secured amount or Re.1/- per inward carat, whichever is higher. Thus, the amount payable to the assessee company was also depended on quantity of inward carat of diamonds. The assessee has converted its premises in such a way as to provide basic infrastructure facility for the business and has provided these services in an organized and continuous business. It is not a case where the assessee has let out its premises and has earned rental income simplicitor without providing any infrastructure facilities on commercial basis. The intention of the assessee of exploiting its infrastructure facilities provided by it in a commercial manner can be borne out in the facts of the case of the assessee. In these facts and circumstances of the case, we hold that there is no mistake in the order of the learned CIT(A) in holding that even applying ratio of Shambhu Investment (supra) the income of the appellant is to be assessed as business income since the intention of the appellant is to exploit property commercially. Accordingly, the order of the CIT(A) on this issue is confirmed and the grounds of the Revenue are dismissed.

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"The earth is enjoyed by heroes"— this is the unfailing truth. Be a hero. Always say, "I have no fear".

- Swami Vivekananda

Overview of Action Plan 5 of BEPS Project - Countering Harmful Tax Practices

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In continuation to our previous article on overview of Base Erosion and Profit Shifting ('BEPS'), detailed analysis of Action Plan 13, Action Plan 2 and Action Plan 1, in this article, we now have capsulized below a detailed overview of Action Plan 5 of BEPS Project ie. Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance.

1. Background

In 1990, the OECD had started its work on addressing harmful tax competition, resulting in a 1998 report, "Harmful Tax Competition: An Emerging Global Issue (the 1998 Report)". It also created a Forum on Harmful Tax Practices (FHTP) to take this work forward.

In the Action Plan under consideration ie Action Plan 5, the OECD builds on the conclusions of the 1998 Report and it further expands the role of the FHTP, by committing the FHTP to "revamp the work on harmful tax practices." The FHTP is asked to focus particularly on improving transparency, including compulsory spontaneous exchange on rulings related to preferential regimes~ requiring substantial activity for any preferential regime and evaluating preferential tax regimes in the BEPS Context.

2. Objectives of the Report

The FHTP, in this report, intends to revamp the work on harmful tax practices with a priority on improving transparency, including compulsory spontaneous exchange on rulings related to preferential regimes, and on requiring substantial activity for any preferential regime. In addition, a substantial activity factor is being developed for intellectual property (IP) regimes.

Considering the objective of, the FHTP has been asked to provide outputs on:

(1) A review of member country preferential regimes;

(2) A strategy to expand participation to Non-OECD member countries; and

(3) Consideration of revisions or additions to the existing framework to analyse whether regimes are harmful

The Report released on 16 September 2014 is an interim document that discusses the progress achieved so far, particularly with respect to the 1st of these three outputs. The second and third outputs have deadlines of September 2015 and December 2015, respectively.

3. Overview of preferential regime

The OECD uses the following approach as founded under the 1998 Report for determining whether a regime is a harmful preferential regime:

1. Identify preferential regimes
2. Identify whether regime is potentially harmful
3. Identify whether the regime is actually harmful.

3.1 What is a preferential regime?

In order for a regime to be considered preferential, it must offer some form of tax preference in comparison with the general tax rules in the relevant country. This would include reduced tax rates as well as reductions in the tax base or preferential terms for the payment or repayment of taxes. Even a small degree of preference is sufficient for the regime to be considered preferential. However, the inquiry does not focus on whether a regime is

preferential in comparison with other countries.

Preferential regimes designed to attract investment in plant, building, and equipment are outside the scope.

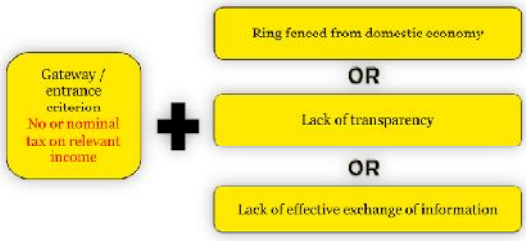
3.2 When does a preferential regime become ' potentially harmful'?

Once a regime has been identified as "preferential," four key factors and eight other factors are used to determine whether the preferential regime is potentially harmful.

The four key factors are:

1. The regime imposes no or low effective tax rates on income from geographically mobile financial and other service activities,
2. The regime is ring-fenced from the domestic economy,
3. The regime lacks transparency (e.g., the details of the regime or its application are not apparent, or there is inadequate regulatory supervision or financial disclosure),
4. There is no effective exchange of information with respect to the regime.

The first factor mentioned above i.e. no or low effective tax is a gateway criterion i.e. if this criterion is not met the regime will not be considered harmful. If the first factor is met, it only requires one of the remaining three key factors to bemet to have a regime characterized as potentially harmful. The same has been illustrated diagrammatically for the convenience of the readers:



The eight other factors generally help to spell out, in more detail, some of the principles and assumptions that should be considered in applying the key factors themselves. They are:

1. Artificial definition of the tax base
2. Failure to adhere to international transfer pricing principles
3. Foreign source income exempt from residence country taxation
4. Negotiable tax rate or tax base
5. Existence of secrecy provisions
6. Access to a wide network of tax treaties
7. Promotion of the regime as a tax minimization vehicle
8. Encouragement of operations or arrangements that are purely tax-driven and involve no substantial activities

3.3 What makes a potentially harmful regime "actually harmful"

The final step is to determine whether a "potentially" harmful regime, according to the factors described above, is "actually harmful" by analysing whether it has harmful economic effects.

This analysis primarily considers whether the regime results in a shift of activities from one country to the country providing the regime rather than generating new activities, whether the activities in the host country are commensurate with the amount of investment or income, and whether the preferential regime is the primary motivation for the location of an activity.

Consequence of finding a regime to be harmful

Considering the afore mentioned steps, if a regime is found to be harmful, the relevant country will be given the opportunity to abolish the regime or remove the features that create the harmful effect. Simultaneously, other countries may take defensive measures to counter the effects of the harmful regime.

Further, the report mandates countries to spontaneously exchange rulings on potentially harmful regimes with foreign tax authorities, without even considering that the regime is actually harmful or not.

4. Substantial Activity requirement

In the 1998 report, Substantial activity was already considered as one of the "other factors". This factor looks at whether a regime encourages purely tax driven operations or arrangements and states that many harmful preferential tax regimes are designed in a way that allows taxpayers to derive benefits from the regime while engaging in operations that are purely tax driven and involve no substantial activities.

The interim report states that going forward, the "substantial activity requirement" will be considered alongside the four key factors when determining whether a regime is potentially harmful which means that a regime, that meets the "no or low effective tax rates" test (key factor 1), will be considered harmful; if there is no substantial activity in the country granting the regime.

This is a significant change from the practice of the OECD to date. It will therefore be critically important how "substantial activity" is defined. Currently, very limited guidance on what constitutes "substantial activity" was included in the 1998 Report and the FHTP now is considering various approaches.

The FHTP is considering the following approaches in relation to ***"IP regimes"*** (i.e., regimes providing preferential tax treatment forincome arising from qualifying intellectual property):

- ***Value creation approach*** that would require taxpayers to undertake a set number of significant development activities in order to be entitled to an IP regime.
- ***Transfer pricing approach*** that would require a set level of important functions being assumed in the jurisdiction of the regime by the taxpayer thatintends to apply the regime. The taxpayer would have to be the legal owner of the assets giving rise to the tax benefits, use those assets, and bearthe economic risks of these assets.
- ***Nexus approach*** that links the benefits of the regime with the Research and Development (R&D) expenses incurred by the taxpayer.

While discussions about which approach to be adopted are ongoing, the Report suggests that the nexus approach could be considered as the most appropriate. Under this approach, benefits would only be granted in respect ofincome arising from IP where the actual R&D activity was undertaken by the taxpayer itself.Further, in case nexus approach is adopted, it can be anticipated that some regimes will not meet requirements setout in the reportand hence, these regimes would have to be amended or abolished. The FHTP will also provide guidance on grand fathering provisions also.

5. Improving Transparency

As mentioned above, lack of transparency is also one of the key factors in considering whether a regime is harmful or not. Considering the same, improving transparency has been denoted the second highest priority under Action Plan 5.

In this regard, the FHTP has focused on developing a framework for compulsory spontaneous exchange of tax-payer specific rulings in respect of preferential regimes. Such exchanges will be 'mechanical' based on the rules being considered by the OECD, rather than discretionary for tax authorities.

As per the report, information would have to be exchanged with any affected country. For transfer pricing rulings the framework foresees a two stage process. In the first stage certain sufficiently detailed information (as defined in the framework) should be exchanged, which

would then enable the receiving country todecide whether to request more details in a second stage. For other rulings it would be up to the sending country to determine what information wouldbe exchanged, provided it contains the minimum information that is defined in the framework (i.e., a summary of the ruling in English covering the mostimportant items).

Information would have to be exchanged at the latest within 3 months after the ruling has become available to the competent authority of the country granting the ruling.

6. Next Steps

The report released on 16 September 2014 is merely an interim report summarizing progress achieved so far. Going forward, the FHTP will complete its review of member countries' preferential regimes. This includes work on the substantial activity requirement and increased transparency. With regard to substantial activity, the work of the FHTP will consist of three stages:

As regards transparency, the FHTP will continue work on the application of the framework for compulsory spontaneous information exchange on rulings to member and associated countries' preferential regimes. The FHTP will also explore in what other ways transparency may be improved.

In addition, work on the second output will be initiated. That work requires the OECD to engage with other Non- OECD member countries on the basis of the existing framework. The deadline for the delivery of the second output is September 2015. Finally, the review of preferential regimes of associated countries will continue and the OECD will consider whether the criteria to determine if a regime is harmful need to be amended or revised.

7. Concluding Thoughts

The OECD has clarified that the work on harmful tax practices is not intended to promote the harmonization of taxes, tax structures or tax rates and rather, itis about reducing the role of taxation on the location of mobile financial and service activities, including intangibles. It wants to create a "level playing field" in which free and fair tax competition can take place by having countries agree to a set of common criteria and by promoting a cooperative framework. Accordingly, it is important that the OECD also engages with Non-OECD countries as any such level playing field should not belimited to OECD member countries.

Even though the OECD has been reviewing preferential tax regimes of its member countries for more than a decade, the new focus on substantial activity may result in more regimes being considered potentially harmful than was the case in the past and as a result, may trigger certain amendments being made to some tax regimes. At the same time, the OECD still needs to dedicate work to defining "substantial activity," particularly outside the IP context which may be more difficult to develop and agree on.

Finally, the framework for spontaneous exchange of rulings is another step in the OECD's push for more transparency and information exchange. Member countries will not only have to adapt their laws to be able to implement the framework, but will also have to adapt their systems to be able toprocess the information. Despite these legal and administrative issues, the OECD seems determined to move this forward as quickly as possible.

Overall, there are still a number of important open items and questions that the OECD will have to work on before the release of the final report in September 2015. However, the direction is clear and, while it may take time to implement any conclusions, the OECD's work is expected to have significant impact on the design of preferential tax regimes.

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FEMA Updates

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10 Risk Management and Inter-bank Dealings: Revised Guidelines relating to participation of Residents in the Exchange Traded Currency Derivatives (ETCD) market

Increase in position limits not requiring establishment of underlying exposure

Presently, domestic participants are allowed to take a long (bought) as well as short (sold) position upto USD 10 million per exchange. As a measure of further liberalisation, it has now been decided to increase the limit (long as well as short) in USD-INR pair upto USD 15 million per exchange. In addition, domestic participants shall be allowed to take long as well as short positions in EUR-INR, GBP-INR and JPY-INR pairs, all put together, upto USD 5 million equivalent per exchange. These limits shall be monitored by the exchanges and breaches, if any, may be reported. For the convenience of monitoring, exchanges may prescribe fixed limits for the contracts in currencies other than USD such that these limits are within the equivalent of USD 5 million.

Rationalisation of documentation requirements for both Importers and Exporters

At present, in terms of paragraphs (2) (b) (iii) and (2) (b) (v) respectively, of the above circular, market participants have to produce a certificate from the statutory auditors as indicated therein. As a measure of liberalisation in the ETCD market, it has now been decided that, instead of the statutory auditor's certificate, a signed undertaking to the same effect from the Chief Financial Officer (CFO) or the senior most functionary responsible for company's finance and accounts and the Company Secretary (CS) may be produced. In the absence of a CS, the Chief Executive Officer (CEO) or the Chief Operating Officer (COO) shall co-sign the undertaking along with the CFO.

Increase in eligible limit for Importers hedging contracted exposure

At present, importers are permitted to hedge their contracted exposures in the ETCD market upto 50 per cent of their eligible limit as defined in para (2)(b)(i) of the above circular. With a view to bringing at par both exporters and importers, it has now been decided to allow importers to take appropriate hedging positions up to 100 per cent of the eligible limit.

A matrix indicating the existing and the revised positions is annexed to the circular.

For full text refer to A.P.(DIR Series) Circular No. 90

https://rbi.org.in/Scripts/BS_Circular Index Display.aspx?Id=9629

11 Risk Management and Inter-bank Dealings: Revised Position Limits for Foreign Portfolio Investors (FPIs) in the Exchange Traded Currency Derivatives (ETCD) market

Increase in limits without establishing underlying exposure

Presently, FPIs can take position – both long (bought) as well as short(sold) – in foreign currency up to USD 10 million or equivalent per exchange . As a measure of further liberalisation, it has now been decided to increase the limit (long as well as short) for FPIs in USD-INR pair upto USD 15 million per exchange. In addition, FPIs shall be allowed to take long (bought) as well as short (sold) positions in EUR-INR, GBP-INR and JPY-INR pairs, all put together, upto USD 5 million equivalent per exchange. These limits shall be monitored by the exchanges and breaches, if any, may be reported. For the convenience of monitoring,

exchanges may prescribe fixed limits for the contracts in currencies other than USD such that these limits are within the equivalent of USD 5 million.

A.P.(DIR Series) Circular No. 91

https://rbi.org.in/Scripts/BS_Circular Index Display.aspx?Id=9630

12 Operational guidelines on International Financial Services Centre (IFSC)

In terms of the above Regulations, a financial institution or a branch of a financial institution set up in the IFSC and permitted / recognised as such by the Government or a Regulatory Authority shall be treated as person resident outside India. Therefore, their transaction with a person resident in India shall be treated as a transaction between a resident and non- resident and shall be subject to the provisions of Foreign Exchange Management Act, 1999 and the Rules/Regulations/Directions issued thereunder.

The financial transaction in this context shall mean making or receiving payment, drawing, issuing or negotiating any bills of exchange or promissory note, transferring any security or acknowledging any debt. Similarly, financial service shall mean any activity which a financial institution is permitted to carry on by the Respective Act of the Parliament or Government of India or any Regulatory Authority empowered to regulate the concerned financial institution.

A.P. (DIR Series) Circular No.92

https://rbi.org.in/Scripts/BS_Circular Index Display.aspx?Id=9632

13 Export of Goods and Services – Project Exports

Attention of authorized Dealers is invited to A. P. (DIR Series) Circular No. 11 dated July 22, 2014 in terms of which AD banks / Exim Bank have been permitted to consider according post-award approvals without any monetary limit and permit subsequent changes in the terms of post award approval within the relevant FEMA guidelines / regulations. Further, in terms of para B. 11 (i) of the revised Memorandum of instructions on Project and Service exports, Exim Bank in participation with commercial banks in India may extend Buyer's credit up to the limit of USD 20 million to foreign buyers in connection with export of goods on deferred payment terms and turn key projects from India.

With a view to further liberalising the procedure and as the Working Group structure has been dismantled, it has been decided to withdraw the limit of USD 20 million for Buyer's credit which may be extended to foreign buyers in connection with export of goods on deferred payment terms and turn key projects from India.

A.P.(DIR Series) Circular No.93

https://rbi.org.in/Scripts/BS_Circular Index Display.aspx?Id=9635

14 Foreign Direct Investment (FDI) in India – Review of FDI policy –Sector Specific conditions- Insurance sector

In terms of Schedule 1 to the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000, 26% Foreign Direct Investment (FDI) is permitted under Automatic route in Insurance sector subject to conditions.

The extant FDI policy for Insurance sector has since been reviewed and further liberalized. Accordingly, with immediate effect, FDI in Insurance sector shall be permitted up to 49% subject to the revised conditions specified in the Press Note 3 (2015 Series) dated March 2, 2015. Also, a new activity viz. "Other Insurance Intermediaries appointed under the provisions of Insurance Regulatory and Development Authority Act, 1999 (41 of 1999)" has been included within the definition of 'Insurance'.

A. P. (DIR Series) Circular No.94

https://rbi.org.in/Scripts/BS_Circular IndexDisplay.aspx?Id=9652

contd. on page no. 95

Service Tax Decoded

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JOB WORK

In modern days, outsourcing of business activities is very common. Business concern engaged in the business of processing goods on job work bases has to ascertain its tax liability which many a times is not so easy. As their activities and business are depended on the person for whom they are doing the job work, their tax liability may also be depended on the tax liability of that person. Further, liability of the service tax is depended on the liability of Excise Duty also. In this article, we will understand some basic principles and issues about taxability of the transactions entered on job work basis. Conceptual framework about levy of Excise Duty and Service Tax is summarized in a chart at end of the article.

1. M/s. Shambhu Plastic Industry (SPI) receives plastic granules from M/s. Nilkanth Furniture Pvt. Ltd. (NFPL) and melts them into the plastic parts for furniture. Plastic parts, made of the granules which were supplied by M/s. NFPL are being sent back to M/s. NFPL and M/s. SPI receives his processing charges from M/s. NFPL. M/s. NFPL is not paying excise duty on the furniture in which such parts are used and hence service tax department is asking service tax from M/s. SPI for processing charges they have charged from the M/s. NFPL. Is the service tax payable by M/s. SPI?

   - Process undertaken by the job-worker may be classified in two types. First such process amounts to manufacture and secondly process which doesn't amounts to manufacture. If process amounts to manufacture of goods, excise duty is being levied and if process doesn't amount to manufacture of goods, service tax is being levied.
   - Generally, if due to any process, a new product emerges which is known as separate product in market, such process amounts to manufacture. Here, as due to the process undertaken by the SPI, a new product plastic part is being emerged which has a separate identification in commercial parlance as compared to input plastic granules, such process amounts to manufacture and excise duty is to be levied.
   - Excise duty is to be levied on and paid by the manufacture of the goods who may not be necessarily owner of the goods. As SPI is the manufacturer of plastic parts, they are responsible for payment of excise duty irrespective of the fact that they are not the owner of the goods. Further, as Excise Duty is to be paid on value of the goods, Excise Duty is payable, not only on the job work charges of SPI but on total value of the goods.
   - In terms of Section 66D(f) of the Finance Act, 1994 any process amounting to manufacture or production of goods is a service in Negative List. As the service provided by SPI is a service in Negative List, service tax can't be levied on process undertaken by SPI.

2. M/s. Ashish Industries Ltd. (AIL) is polishing plastic parts sent by M/s. Harshukh Odhavji Furniture Ltd. (HOFL) and receives job work charges as consideration for polishing. Such parts are being used by the HOFL in its final products which are cleared on payment of Excise Duty. Can service tax be levied on the activities undertaken by the AIL? If service tax is payable, is there any exemption available to the AIL?

   - Section 65B(40) of the Finance Act, 1994 defines the term "process amounting to manufacture or production of goods" as process on which duties of excise are

leviable under Section 3 of the Central Excise Act, 1944. Hence, to decide whether any process amounts to manufacture or not for the purpose of levy of service tax, one need to ascertain whether process attracts excise duty or not.

- Generally, polishing of any goods doesn't change its identity. Products, before and after polishing are known as the same product in the commercial parlance and hence process undertaken by the AIL doesn't amount to manufacture. And activity of polishing undertaken by AIL is subject to levy of service tax.
- If AIL is paying service tax on the processing charges, HOFL will be able to take the CENVAT credit which means that the Government will not get any additional revenue. To avoid the cost of revenue collection, exemption has been provided under Entry No. 30(c) of the Notification No. 25/2012-ST which exempts the service of carrying out an intermediate production process as job work in relation to any goods on which appropriate duty is payable by the principle manufacturer. As Excise Duty on final product is payable by HOFL i.e. principle manufacturer, AIL can avail the exemption.
- Thus, tax liability of a job worker is depended on the tax liability of his principle manufacture.

3. In above example, suppose AIL wants to pay service tax and doesn't want to avail benefit of exemption provided through Entry No. 30(c) of the Notification No. 25/2012-ST, can they do so?
   - There is no provision for service tax which prohibits payment of service tax where services are exempt.
   - If AIL pays service tax, HOFL may take the credit of the service tax paid and thus there is no extra cost for HOFL. By paying service tax, AIL can avoid the undue litigation and pain to explaining eligibility for exemption to department.
4. In example no. 2, will it make any difference if HOFL is availing Small Scale Industry (SSI) exemption for Excise Duty and hence not liable to pay Excise Duty on its final product?
   - In terms of Entry No. 30(c) of the Notification No. 25/2012-ST the service of carrying out an intermediate production process as job work in relation to any goods on which **appropriate duty** is payable by the principle manufacturer is exempt. In terms of Paragraph 2(b) of the said notification "appropriate duty" means duty payable on manufacture or production under a Central Act or a State Act, but shall not include **'Nil'** rate of duty or duty **wholly exempt**.
   - In terms of SSI exemption Notification No. 8/2003-CE rate of duty is Nil and hence duty payable by HOFL is not "appropriate duty" and hence exemption granted under Entry No. 30(c) of the Notification No. 25/2012-ST is not available to AIL and AIL has to pay service tax.
   - Thus, taxability of a job worker depends upon taxability of principle manufacture.
5. M/s. INOCENT Engineering Works (INOCENT) is processing goods on behalf of M/s. EVADE India Private Ltd. (EIPL). Process undertaken by INOCENT doesn't amount to manufacture and is told by EIPL that goods processed by INOCENT is being used for manufacture of dutiable goods by EIPL and EIPL is paying Excise Duty on such finished goods. However, EIPL is evading the excise duty and has not paid the same. Can service tax department deny the exemption under Entry No. 30(c) of the Notification No. 25/2012-ST and ask INOCENT to pay service tax on processing charges received from EIPL?
   - In terms of Entry No. 30(c) of the Notification No. 25/2012-ST, such exemption is available where appropriate

duty is **payable** by the principle manufacture and not only in the case where duty is **paid** by the principle manufacture. Once, the principle manufacturer is liable to pay excise duty at appropriate rate, exemption provided under Entry No. 30(c) of Notification No. 25/2012-ST is available to the service provider.

- Hence, department can't ask service provider to pay service tax if he has acted upon the declaration of principle manufacture under *bona fide* belief.

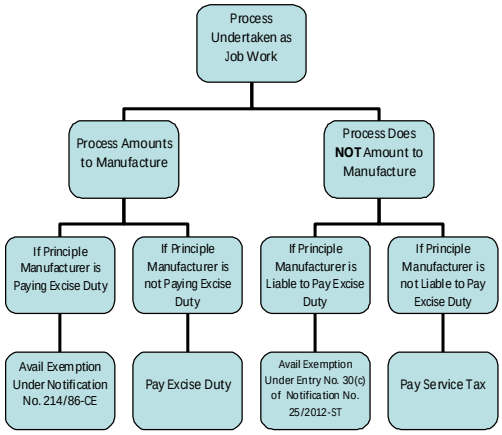
6. M/s. FinePack Pvt. Ltd. (FPPL) is packing Fountain Pen Ink which are manufactured by M/s. FineWrite Pvt. Ltd. (FWPL) and sent by FWPL to FPPL. After packing the same, FPPL sent back packed Fountain Pen Ink to FWPL which clears the packed Fountain Pen Ink without payment of excise duty. Is FPPL is required to pay service tax?

   - If process undertaken by FPPL amounts to manufacture, FPPL is liable to pay Excise Duty and once Excise Duty can be levied, service can't be levied.
   - In terms of Section 2(f) of the Central Excise Act, 1944, term "manufacture" include any process which, in relation to the goods specified in the Third Schedule to the said Act, involves **packing** or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer.
   - Fountain Pen Ink is included in the Third Schedule to the Central Excise Act, 1944 vide Entry No. 36A.
   - In terms of Section 2(f) of the Central Excise Act, 1944, process of packing of the Fountain Pen Ink amounts to manufacture. Once any process amounts to manufacture of any goods, it is a service in the Negative List in terms of Section 66D(f) and service tax can't be levied on the that process and hence service tax can't be demanded form FPPL.
   - Yes, Duty of Excise may be levied on the process undertaken by the FPPL.
   - Many processes which are not manufacture in general parlance, may amount to manufacture for levy of Excise Duty. Packing or Repacking Labelling or Re-labelling of Containers, Declaration or Alteration of retail sale price (MRP) may be considered as manufacture for many products and may attract Excise Duty.
   - Thus, a job worker need to ascertain whether process undertaken by him amounts to manufacture or not. For this purpose, provisions of the Central Excise Act, 1944 and rules made thereunder are to be referred. Whether any process amounts to manufacture or not is broadly a question of fact and law both and numbers of litigations are reaching to the apex court.

7. What is the classification i.e. category for service tax payable on job work charges?

   - Production or processing of goods for, or on behalf of, the client is covered under Business Auxiliary Services (Accounting Code 0440225).

Job work related taxability is summarized in following chart.



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Service Tax - Recent Judgements

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5 Grey Worldwide Pvt Ltd vs. Commissioner of Service Tax [2015] 37 STR 597 (Tri- Mumbai)

Discounts and incentives received by advertising agency are not towards provision of services and hence service tax is not leviable.

Facts:-

Appellant an advertising agency placed advertisements in print/electronic media on behalf of the advertisers and received commission. Demand is on account of volume discount received from these media, write back of the amount in respect of payments not claimed by the print/ electronic media and the rate difference between the amount actually charged from the advertiser and the amount paid to the media.

Held:-

It was held that assessee is merely co-ordinating between media and advertiser and there is no contractual obligation for provision of service between both the parties and hence the amounts received are not liable to service tax.

6 Bank of India vs. CCE & ST, Indore , CESTAT NEW DELHI (2015) 22 CCHST 0224 Tri- Delhi)

Cenvat credit on rent-a-cab service

Facts:-

Appellant filed an appeal against Order-in-Appeal in terms of which service tax demand was confirmed on account of denial of cenvat credit on rent-a-cab service on ground that, said service was utilised by them for providing currency chest service which is not a taxable service and hence is exempted from paying service tax.

Held:-

It was held that cash chest service is not a taxable service under Finance Act, 1994. Indeed the currency chest is required and maintained for providing banking and financial services. It was further held that cash management including transport of cash to and from currency chest is relatable to providing banking and financial services and security services, rent-a-cab service (hiring security vans) are clearly required for such cash management/transfer and therefore they are clearly within ambit of input services.

In these circumstances, it was further held that the impugned services constitutes input service in respect of the appellants non-exempt output service. Accordingly, the impugned input credit is clearly admissible which makes the impugned demand unsustainable. For the same reason, the Revenues appeal also does not sustain. Accordingly, the appellants (M/s Bank of Indias) appeal is allowed and Revenues appeal is rejected.

7 K.G. Denim Ltd vs. Commissioner of Service Tax, Salem [2015] 37 STR 616 (Tri - Chennai)

Provision of services outside India

Facts:-

Appellant received service in respect of business exhibitions conducted abroad and in respect of technical inspection and certification services done abroad for which payments are made to parties located abroad. Whether there can be any service tax liability on recipient of service.

Held:-

It was held that these services were performed outside India and hence no service tax liability arises. Further it was held that both these services should

be considered to be within India if service provider was located abroad and service was performed in India.

8 Gujarat State Fertilizers & Chemicals Ltd. vs. CCE, Vadodara 2015 37 STR 1076 (Tri – Ahmedabad)

Transport of Goods through pipeline or conduit service

Facts:-

Appellant provided transportation of waste effluent material through pipeline for disposal.

Held:-

It was held that waste effluent is not goods as per Sale of Goods Act, 1930 and hence services cannot be made taxable under transportation of goods through pipeline or conduit service.

9 Maharashtra State Seed Certification Agency vs. C.C. & C.E., Nagpur 2015 37 STR 655 (Tri- Mumbai)

Technical Inspection and Certification Services

Facts:-

Appellant was an autonomous body registered under the Societies Registration Act, 1860 and was engaged in activities of technical inspection and certification work for which they charged fees and challenged that the said certification work was a statutory function and therefore no tax was leviable.

Held:-

It was held that the activities cannot be considered as mandatory and statutory function provided by a sovereign and or public authority and thus are chargeable to service tax under the Technical Inspection and Certification Services.

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contd. from page 90

15 Foreign Direct Investment (FDI) – Reporting under FDI Scheme on the e-Biz plat form

With reference to paragraph 5 of the said A.P. (DIR Series) circular, it is advised that financial aspects for using the Virtual Private Network (VPN) accounts obtained from National Informatics Centre (NIC) for accessing the e-Biz portal have now been finalised in consultation with Government of India, Department of Industrial Policy and Promotion (DIPP) and NIC. Among other details,

- the VPN account will be in the name of the individual users and will be coterminous with the lifetime of the Digital Signing (Class 2) certificates (which is for a maximum period of two years) issued by Institute for Development and Research in Banking Technology (IDRBT), Hyderabad;
- AD banks may kindly note to maintain appropriate records pertaining to the number of connections, amounts remitted to NICSI, etc. Reconciliation issues, if any, may be resolved by writing to NICSI at the above mentioned email address.

A.P. (DIR Series) Circular No. 95

https://rbi.org.in/Scripts/BS_Circular Index Display.aspx?Id=9672

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VAT - From the Courts

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1. Processing and Supply of Photographs, photo prints and photo negative, whether it is Services or Works Contracts?

State of Karnataka Vs. PRO Lab and Others (2015) 78 VST 451 (Supreme Court)

Background of the case:-

After the Forty-Sixth Amendment to the Constitution the State Legislature is empowered to levy sales tax on materials used even in those contracts **where the dominant intention of the contract is the rendering of a service**, which will amount to a works contract and the works contract which is indivisible by legal fiction, has been altered into a contract which is permitted to be bifurcated into two : one for "sale of goods" and other for 'services', thereby making goods component of the contract exigible to sale tax, while going into this exercise of divisibility, the dominant intention behind such a contract, namely, whether it was for sale of goods or for services, is rendered otiose or immaterial. Therefore, by virtue of clause (29A) of article 366, the State Legislature is now empowered to segregate the goods part of the works contract and impose sales tax thereupon.

On appeal challenging the legislative competence of the State Legislature to re-insert entry 25 of Schedule VI to the Karnataka Sales Tax Act, 1957 by the Karnataka Taxation Laws (Amendment) Act, 2004 with retrospective effect from July 1, 1989 when the provision was inserted by the amendment made in the year 1989 for the first time, on the grounds (i) that the state Government was not empowered to levy sales tax on the processing and supplying of photographs, photo prints and photo negatives which was predominantly in the nature of "Service" and the element of "goods" there in was minimal, and (ii) that the insertion of entry 25 with retrospective effect was violative of article 265 of the Constitution of India as subjecting dealer to such a tax from retrospective effect was confiscatory and, therefore, unconstitutional :

Held,

(i) that entry 25 of Sch. VI to the Karnataka Sales Tax Act, 1957 which makes that part of processing and supplying of photographs, photo prints and photo negative which has a "goods" component, exigible to sales tax, is constitutionally valid.

(ii) That entry 25 was inserted for the first time by amendment of the Act with effect from July 1, 1989. This amendment was subsequent to the Forty-sixth Constitution Amendment. However, the High Court declared that entry to be unconstitutional and the special leave petition was also dismissed because of the judgment in Rainbow Colour Lab Vs. State of Madhya Pradesh (2000) 118 STC 9(SC) which judgment was declared not good law in Associated Cement Companies Ltd. Vs. Commissioner of Customs(2001) 124 STC 59(SC). Thus the very basis on which entry 25 of Schedule VI was declared unconstitutional, had been found to be erroneous. In such circumstances, the Legislature would be justified in enacting the law from the date when such a law was passed originally. The Legislature was, otherwise, competent to pass amendments of this nature from retrospective effect.

(iii) That the High Court was not correct in invalidating entry 25 on the ground that the provision was already held unconstitutional

by the High Court in a case against which the special leave petition was also dismissed and in view of that decision, it was not permissible for the Legislature to re-enact that entry by applying a different legal principle.

Decision of the Karnataka High Court in Pro Lab Vs. State of Karnataka (2006) 144 STC 33 (Karnataka) reversed.

2. Signals of Television Channels sent to Home of Customer by using Set Top Box provided by dealer - Transfer of Right to use goods, Deemed Sale.

(1) Bharti Telemedia Ltd.(2) Tata Sky Ltd. Vs. State of Tripura and Others (2015) 79 VST 561 (Tripura High Court)

Background of the case:-

The petitioner – dealers provided direct-to-home service in India whereby means of satellite, signals of various television channels were sent to the home of the customer and the customer by using the set top box provided by the dealer was able to decode the signals and watch the programs on his television set. The question was whether the Department was entitled to levy value added tax u/s. 4(2) of the Tripura Value Added Tax Act, 2004 on the value of the set top boxes as valued by the dealers in their own books :

Held, that the contracts had been framed in such a manner as to show that the set top boxes remained the property of the dealers. The set top boxes always bore the logo and mark of the dealers and was not to be erased or effaced by the customers. The dealer had not sold the set top boxes to the customers. However, the right to use these goods, i.e. the set top boxes, had been transferred to the customers. The cost of the set top box was obviously included in the activation charges or the monthly subscription. Under the Act even where payment of the goods is made by way of deferred payment the goods can be subjected to tax. One of the most important elements of determining whether the right to use goods has been transferred or not is by ascertaining who has effective control over the goods. The set top boxes were in the total control of the customer. The dealers did not even have the power of entering the premises of the customer. Most importantly as per the terms of the agreement, the dealers were responsible for the functioning of the set top boxes only for a period of six months. The warranty was valid only for six months and if the set top box of a customer was spoiled after six months he would have to pay for repair or replacement thereof. This amounted to transfer of the right to use goods.

3. Sale of assets of Company in Liquidation by official liquidator, purchaser offering bid amount inclusive of all statutory levies cannot be made liable to pay tax, and Liquidator is dealer under the Act.

Assistant Commissioner, Ernakulam Vs. Hindustan Urban Infrastructure Ltd. and Others (2015) 78 VST 5 (Supreme Court)

Back Ground of the case:

The official liquidator of the company in liquidation is an officer of the court who for the purpose of discharging statutory obligations imposed under the Companies Act, 1956, merely steps into the shoes of the company in liquidation . Where notice is issued by the official Liquidator inviting lenders it is amply evident that the liquidator intends to conduct a transfer of the goods of the company in liquidation. Since the conduct of an auction sale involves transfer of goods, the official liquidator falls within the wide of clause (f) of section 2 (viii) of the Kerala General Sales Tax Act, 1963 defining "dealer". Therefore, the liability to pay sales tax will be on the Official liquidator in the same manner as the dealer, that is, the company in liquidation. U/s. 5 of the 1963 Act, the company in liquidation, as a dealer, will incur liability to pay sales tax at the point of

contd. on page no. 106

VAT - Updates and Tribunal Judgements

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Statute Updates
Value Added Tax (VAT)

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

Clarification regarding levying of Penalty u/s. 34(7) & 34(12) of the GVAT Act:

The office of the Commissioner of Commercial Taxes has given the clarification dated 9.3.2015 and as per the clarification penalty u/s. 34(7) & 34(12) cannot be levied independently. In case dealer accepts the liability of tax and interest through the affidavit and the payment is made, the maximum penalty under both the sections shall not be more than 20% of the tax.

In case of penalty is also to be levied under CST Act, the total penalty under all section including under CST shall not be more than 20% of the tax. This clarification shall remain in effect till six months from the date of issue i.e. 9th March 2015.

[II] **Important Judgments:**

[a] **The Hon'ble Tribunal delivered the judgment in case of Sayaji Mills Ltd. vs. Sales Tax Officer that transfer of entire business along with the liability of Debtors and Creditors is not a sale of goods under GST Act.**

Issue:

The entire business of M/s. Sayaji Mills Ltd. No. 1 along with immovable properties including machineries etc. are transferred to Keshariya Investment Ltd. Whether this transaction is a sale or not?

Held:

The entire business of M/s. Sayaji Mills Ltd. No. 1 along with the immovable properties including immovable machineries were transferred to Shree Keshariya Investment Ltd vide agreement dated 08.10.1972 and the tax was not paid as it was the sale of entire business and current assets which was not covered u/s. 2('12) of the GST Act. However, the Assessing Officer did not accept the contention of the appellant and the tax and penalty were levied in passing of the assessment order for the period 1973-74. The first appeal was decided in which the tax levied on sales turnover was upheld but it was held that the penalty u/s. 45(6) could not be levied for more than 18 months period. The Hon'ble Tribunal in the second appeal held that the company was not a dealer qua sale of the entire business occasion as a result of discontinuance of business and the sale of entire mill company to Shree Keshariya Investment Ltd. did not amount of sale of goods as defined u/s. 2(12) of the GST Act. At the instance of the state the question u/s. 69 was referred before the Hon'ble High Court that whether the Tribunal was justified in holding that the disputed transaction of transfer of business was not a sale of goods within the meaning of section 2(12) of the GST Act. The Hon'ble High Court held that the Tribunal is the final fact finding authority.

The transfer of business had occasion as a result of discontinuation of business which means the mills company had transferred its entire concern not as a going concern but the transfer was effected after the closer of concern and hence is not a sale of goods within the meaning of section 2(12) of the GST Act. The Hon'ble High Court referred earlier judgment of M/s. Sadhana Textile Mills Pvt. Ltd. 1992 GSTB 183, Accordingly, the question referred to the Hon'ble High Court was answered in favour of the dealer.

[b] **In case of Mehul Construction Co. vs. State of Gujarat, the Hon. Tribunal has held that if the company transferred any assets to a retiring Partner, on this transaction the vat is payable.**

Issue:

M/s./ Mehul Construction Co. was a Partnership Firm and on the retirement of a Partner, certain assets were transferred to the retiring partner and started the business under the proprietorship. Whether on this transaction the Vat is payable or not?

The other issue is if no opportunity is given to the appellant before the imposition of penalty, whether the penalty should be retained?

Held:

The tax was not paid in respect to the assets transferred to the retiring partner, who started the business under the proprietorship. Subsequently, the tax was paid along with the interest in respect to such transfer of asset. The assessing officer levied penalty @ 150% in respect to such tax liability. He also levied penalty of Rs. 10,000/- for not obtaining Vat Audit Report as provided in section 63 of the Vat Act. The amount of penalty levied @ 150% in respect to the tax assessed on transfer of asset was reduced to 30%in first appeal. However, the penalty levied for not obtaining Vat Audit Report was retained. The appellant contended before the Tribunal that the tax was paid along with the interest in respect to transfer of asset and no show cause notice was given. The Hon'ble Tribunal considering the facts of the case and relevant provision of section 63 held that no opportunity was given to the appellant before imposing penalty and hence the penalty retained @ 30% in respect to tax assessed on transfer of asset and penalty levied for not obtaining Vat Audit Report is set aside.

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"Never think there is anything impossible for the soul. It is the greatest heresy to think so. If there is sin, this is the only sin ? to say that you are weak, or others are weak".

- Swami Vivekananda

Business Valuation

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Approaches to Valuation
Market Approach
(Using the Multiples)

The concept of valuation using the Market approach is based on the assumption that if comparable Asset or property (or business) has fetched a certain price, then the subject asset or property (or business) will realize a price something near to it. What we need to do is to adjust the comparable asset or property (or business) to match in terms of risk, growth and its potentiality to generate cashflows.

No matter how carefully we construct our list of comparable firms, we will end up with firms that are different from the firm we are valuing. The differences may be small on some variables and large on others and we will have to control for these differences in a relative valuation. These differences are generally controlled by using subjective adjustments or using modified multiple.

Commonly used Multiples

Business can be valued based on the multiples like

- Earning multiples- (PAT, EBITDA, EBIT etc)
- Book value (or replacement value) multiple
- Revenue Multiples
- Business specific Multiple

Price to Earnings (P/E) Multiple

When it comes to valuing equity or ownership, the price/earnings ratio is one of the oldest and most frequently used metrics. Although a simple indicator to calculate, the P/E is actually quite difficult to interpret. It can be extremely informative in some situations, while at other times it is next to meaningless. As a result, valuers often misuse this term and place more value in the P/E than is warranted.

P/E Ratio = Market Value (OR Price) / Earnings

It may be based on trailing data (historical figure) or forward data (estimates) or average of both. The result will be different under each different choice.

Unlike net income, Both EBIT and EBITDA are independent of capital structure, so differences in capital structure among companies should not introduce bias when one is using the EBIT and EBITDA multiples to estimate total enterprise values. In other words, the appraiser should take care that the earnings used here to derive a multiple is proper in relation to price applied. For example, share price used with earnings per share is a right measure but if it is used with rate of return on capital then the measure is not correct one. Rate of return on capital can be applied with value of firm or business value.

Price to Book value (OR replacement value) multiple

This is also a widely used multiple to compare the equity value of the value of firm. The market capitalization is divided by the book value of capital to determine a multiple. The accounting estimate of book value is determined by accounting rules and is heavily influenced by the original price paid for assets and any accounting adjustments (such as depreciation) made since. Proposed buyer often look at the relationship between the price they pay for a business and the book value of equity (or net worth) as a measure of how over- or undervalued a business or assets are; The book figure being accounted on historical basis is easy to compare.

P/BV Ratio = Market Value / Book Value of Capital or Owners' fund

Sometimes, in order to give effect of current value of assets of the business, the balance sheet is redrafted with adjusted values and then the adjusted book value so arrived is used with market capitalization to derive a P/BV multiple.

Price to Revenue multiple

Both earnings and book value are accounting measures and are determined by accounting rules and principles. An alternative approach, which is

far less affected by accounting choices, is to use the ratio of the value of a business to the revenues it generates. The advantage of using revenue multiples, however, is that it becomes far easier to compare firms in different markets, with different accounting systems at work, than it is to compare earnings or book value multiples.

P/R Ratio = Market Value / Revenue

Business Specific Multiple

While earnings, book value and revenue multiples are multiples that can be computed for firms in any sector and across the entire market, there are some multiples that are specific to a sector. Like, valuing a call centre based on per seat criteria or a steel manufacturing business on the basis of per ton production. The caution here requires is to take care in analyzing the behavior of the entire sector or industry. If the price of particular sector is over valued then based on specific multiple we also tend to over cast the estimated value of target firm.

Steps to determine a value under market approach

1. Selection of similar public companies and transactions
2. Financial analysis and comparison
3. Selection and calculation of valuation multiples
4. Application to the company being valued
5. Final adjustments

Multiples are easy to use and intuitive; they are also easy to misuse. So, the question is - why is market valuation (relative valuation) so widely used? There are several reasons. For example, a valuation based upon a multiple and comparable firms can be completed with far fewer assumptions and far more quickly than a discounted cash flow valuation. A relative valuation is simpler to understand and easier to present to clients and customers than a discounted cash flow valuation. Also, a relative valuation is much more likely to reflect the current mood of the market, since it is an attempt to measure relative and not intrinsic value. The strengths of relative valuation are also its weaknesses. For example, the fact that multiples reflect the market mood also implies that using relative valuation to estimate the value of an asset can result in values that are too high, when the market is over valuing comparable firms, or too low, when it is under valuing these firms. Also, while there is scope for bias in any type of valuation, the lack of transparency regarding the underlying assumptions in relative valuations makes them particularly vulnerable to manipulation.

While using Relative approach for valuing a business, one must keep following in mind: When discussing a valuation based upon a multiple is to ensure that everyone in the discussion is using the same definition for that multiple. Like forward P/E must not be compared with trailing P/E. One of the key tests to run on a multiple is to examine whether the numerator and denominator are defined consistently. If the numerator for a multiple is an equity value, then the denominator should be an equity value as well. If the numerator is a firm value, then the denominator should be a firm value as well. To illustrate, while using P/E multiple the price per share will be used with earnings per share while EBITDA multiple is be used to value a firm since the numerator and denominator are both firm value measures.

When using a multiple, it is always useful to have a sense of what a high value, a low value or a typical value for that multiple is in the market. In other words, knowing the distributional characteristics of a multiple is a key part of using that multiple to identify under or over valued firms.

This decision of choosing appropriate multiple is also dependent on the judgment of the appraiser using best of his skills and experience considering all, including the fundamentals, type of industry, size of company, nature of transaction and of course, the purpose of valuation.

No one human can be predicted even to run the same company the same way as another would. Where, then, is comparability? Comparable value is just an appraisal term, Comparability evaluation of ''hard'' assets is a valuable determinant for business's factory, premises, raw material, and equipment and fixturing, but not for it's ''intangible'' portions.

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Corporate Law Update

CA. Naveen Mandovara
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MCA Updates:

1. Companies (Acceptance of Deposits) Amendment Rules, 2015:

Following amendments have been made w. e. f. 31st March, 2015:

(1) in rule 2, in sub-rule (l), in clause (c), -

(a) in sub-clause (vii), in Explanation (a), the following proviso shall be inserted, namely:-

"Provided that unless otherwise required under the Companies Act, 1956 (l of 1956) or the Securities and Exchange Board of India Act, 1992 (15 of 1992) or rules or regulations made thereunder to allot any share, stock, bond, or debenture within a specified period, if a company receives any amount by way of subscriptions to any shares, stock, bonds or debentures before the 1st April,2014 and disclosed in the balance sheet for the financial year ending on or before the 31st March, 2014 against which the allotment is pending on the 31st March, 2015, the company shall, by the **1st June 2015**, either return such amounts to the persons from whom these were received or allot shares, stock, bonds or debentures or comply with these rules."

(b) in sub-clause (xii), in item (b),-

(A) for the words "consideration for property", the words "consideration for an immovable property", shall be substituted;

(B) for the words "against the property", the words "against such property" shall be substituted;

(c) in sub-clause (xii), in the Explanation, for the words "referred to in the first proviso", the words "referred to in the proviso" shall be substituted;

(2) in rule 3, after sub-rule (7), the following sub-rule shall be inserted, namely:-

"(8) Every eligible company shall obtain, at least once in a year, credit rating for deposits accepted by it in the manner specified herein below and a copy of the rating shall be sent to the Registrar of companies along with the return of deposits in Form DPT-3;

	Name of the agency	**Minimum investment Grade Rating**
a)	The Credit Rating Information Services of India Ltd	FA- (FA Minus)
(b)	ICRA Ltd.	MA- (MA Minus)
(c)	Credit Analysis and Research Ltd.	CARE BBB(FD)
(d)	Fitch Ratings India Private Ltd.	tA-(ind)(FD)
(e)	Brickwork Ratings India Pvt Ltd.	BWR F A
(f)	SME Rating Agency of India Ltd.	SMERA A"

(3) in rule 5, in sub-rule (1), for the proviso, the following proviso shall be substituted, namely:-

"Provided that the companies may accept deposits without deposit insurance contract till the **31st March, 2016** or till the availability of a deposit insurance product, whichever is earlier."

(4) in Annexure, for Form DPT-3, a new form DPT-3 has been substituted.

[F. No. 1/8/2013–CL-V Notification dated March 31, 2015]

2. Delegation of Powers to Regional Directors:

The MCA has delegated the powers and functions vested in it under sub-section (5) of section 94 of the Companies Act, 2013 to the Regional Directors at Mumbai, Kolkata, Chennai, Noida, Ahmedabad, Hyderabad and Shillong.

[F. No. 1/6/2014–CL-V dated March 31, 2015]

3. Clarification under sub-section (7) of section 186 of the Companies Act, 2013:

The MCA has clarified that in cases where the effective yield (effective rate of return) on tax free bonds is greater than the prevailing yield of one year, three year, five year or ten year Government Security closest to the tenor of the loan, there is no violation of sub-section (7) of section 186 of the Companies Act, 2013.

[File No. 5/3/ 13-CL.V dated April 09, 2015]

4. Remuneration to managerial person under Schedule XIII of the Companies Act, 1956 - Clarification with regard to payment for period.

The provisions of Schedule XIII (sixth proviso to Para (C) of Section II of Part II) of the Companies Act, 1956 and as clarified vide Circular number 14/11/2O12-CL-VII dated 16th August, 2012, which allowed listed companies and their subsidiaries to pay remuneration, without approval of Central Government, in excess of limits specified in para II Para (C) of such Schedule if the managerial person met the conditions specified therein.

In the absence of such similar provisions in the Schedule V of the Companies Act, 2013, the MCA has clarified that a managerial person may continue to receive remuneration for his remaining term in accordance with terms and conditions approved by company as per relevant provisions of Schedule XIII of earlier Act even if the part of his/her tenure falls after 1st April, 2014.

[File No. 1/5/ 13-CL-V dated April 10, 2015]

5. Companies (Auditor's Report) Order, 20l5:

- Applicable to every company including a foreign company.

  Exceptions:

  i. a banking company;

  ii. an insurance company;

  iii. a company licensed to operate under section 8 of the Companies Act;

  iv. a One Person Company and a small company; and

  v. a private limited company with a paid up capital and reserves not more than rupees **fifty lakh** and which does not have loan outstanding exceeding rupees **twenty five lakh** from any bank or financial institution and does not have a turnover exceeding **rupees five crore** at any point of time during the financial year.

- The auditor's report on the account of a company to which this Order applies shall include a statement on the following matters, namely:-

  (i) a) whether the company is maintaining proper records showing full particulars, including quantitative details and situation of fixed assets;

  b) whether these fixed assets have been physically verified by the management at reasonable intervals; whether any material discrepancies were noticed on such verification and if so, whether the same have been

properly dealt with in the books of account;

(ii) (a) whether physical verification of inventory has been conducted at reasonable intervals by the management;

(b) are the procedures of physical verification of inventory followed by the management reasonable and adequate in relation to the size of the company and the nature of its business. If not, the inadequacies in such procedures should be reported;

(c) whether the company is maintaining proper records of inventory and whether any material discrepancies were noticed on physical verification and if so, whether the same have been properly dealt with in the books of account;

(iii) whether the company has granted any loans, secured or unsecured to companies, firms or other parties covered in the register maintained under section 189 of the Companies Act. If so,

(a) whether receipt of the principal amount and interest are also regular; and

(b) if overdue amount is more than rupees one lakh, whether reasonable steps have been taken by the company for recovery of the principal and interest;

(iv) is there an adequate internal control system commensurate with the size of the company and the nature of its business, for the purchase of inventory and fixed assets and for the sale of goods and services. Whether there is a continuing failure to correct major weaknesses in internal control system.

(v) in case the company has accepted deposits, whether the directives issued by the Reserve Bank of India and the provisions of sections 73 to 76 or any other relevant provisions of the Companies Act and the rules framed there under, where applicable, have been complied with? If not, the nature of contraventions should be stated; If an order has been passed by Company Law Board or National Company Law Tribunal or Reserve Bank of India or any court or any other tribunal, whether the same has been complied with or not?

(vi) where maintenance of cost records has been specified by the Central Government under sub-section (l) of section 148 of the Companies Act, whether such accounts and records have been made and maintained:

(vii)(a) is the company regular in depositing undisputed statutory dues including provident fund, employees' state insurance, income-tax, sales-tax, wealth tax, service tax, duty of customs, duty of excise, value added taxes cess and any other statutory dues with the appropriate authorities and if not, the extent of the arrears of outstanding statutory dues as at the last day of the financial year concerned for a period of more than six months from the date they became payable, shall be indicated by the auditor.

(b) in case dues of income tax or sales tax or wealth tax or service tax or duty of customs or duty of excise or value added tax or cess have not been deposited on account of any dispute, then the amounts involved and the forum where dispute is pending shall be

mentioned. (A mere representation to the concerned Department shall not constitute a dispute).

(c) whether the amount required to be transferred to investor education and protection fund in accordance with the relevant provisions of the Companies Act, 1956 (1 of 1956) and rules made thereunder has been transferred to such fund within time.

(viii) whether in case of a company which has been registered for a period not less than five years, its accumulated losses at the end of the financial year are not less than fifty per cent of its net worth and whether it has incurred cash losses in such financial year and in the immediately preceding financial year;

(ix) whether the company has defaulted in repayment of dues to a financial institution or bank or debenture holders? If yes, the period and amount of default to be reported:

(x) whether the company has given any guarantee for loans taken by others from bank or financial institutions, the terms and conditions whereof are prejudicial to the interest of the company;

(xi) whether term loans were applied for the purpose for which the loans were obtained;

(xii) whether any fraud on or by the company has been noticed or reported during the year; If yes, the nature and the amount involved is to be indicated.

- **Reasons to be stated for unfavorable or qualified answers:**

(1) Where, in the auditor's report, the answer to any of the (xii) questions referred to in the above paragraph is unfavorable or qualified, the auditor's report shall also state the reasons for such unfavorable or qualified answer, as the case may be.

(2) Where the auditor is unable to express any opinion in answer to a particular question, his report shall indicate such fact together with the reasons why it is not possible for him to give an answer to such question.

[(F. No. 17/45/2015-CL-V) dated April 10, 2015]

SEBI Updates:

6. Fine structure for non-compliance with the requirement of Clause 49(II)(A)(1) of Listing Agreement:

The SEBI has instructed the Stock Exchanges to impose the following fine on listed entities for non compliance with the requirement of Clause 49(II)(A)(1) of Listing Agreement (Appointment of Women Director):

Compliance Status	Fine Structure
Listed entities complying between April 1, 2015 to June 30, 2015	Rs. 50,000/-
Listed entities complying between July 1, 2015 and September 30, 2015	Rs. 50,000/- + Rs. 1000/- per day w.e.f July 1, 2015 till the date of compliance
Listed entities complying on or after October 1, 2015	Rs. 1,42,000/- + Rs. 5000/- per day from October 1, 2015 till the date of compliance.

For any non-compliance beyond September 30, 2015, SEBI may take any other action, against the non-compliant entities, their promoters and/or directors or issue such directions in accordance with law, as considered appropriate.

[CIR/CFD/CMD/1/2015 dated April 08, 2015]

7. Mechanism for acquisition of shares through Stock Exchange pursuant to Tender-Offers under Takeovers, Buy Back and Delisting:

Applicability:

a) All the offers for which Public Announcement is made on or after July 01, 2015.

b) All impending offers, acquirer/ promoter/ company shall have the option to follow this mechanism or the existing one.

c) In case an acquirer or any person acting in concert with the acquirer who proposes to acquire shares under the offer is not eligible to acquire shares through stock exchange due to operation of any other law, such offers would follow the existing 'tender offer method'.

d) In case of competing offers under Regulation 20 of the Takeover Regulations, in order to have a level playing field, in the event one of the acquirers is ineligible to acquire shares through stock exchange mechanism, then all acquirers shall follow the existing 'tender offer method'.

Annexure-1 to this circular describes the procedure for tendering and settlement of shares through Stock Exchange.

For details, please visit http://www.sebi.gov.in cms/sebi_data/attachdocs1428927142167.pdf

[CIR/CFD/POLICYCELL/1/2015 dated April 13, 2015]

8. Exclusively listed companies of De-recognized/Non operational/exited Stock Exchanges:

Subject to certain conditions, the SEBI has allowed a time line of eighteen months, within which exclusively listed companies of De-recognized/Non operational/exited Stock Exchanges, which are interested and eligible to migrate to the main boards of nationwide stock exchanges, shall obtain listing upon compliance with the listing requirements of the nation-wide stock exchange.

The provisions of this Circular are applicable to the exclusively listed companies of all de-recognized/non-operational stock exchanges exited/exiting (Compulsory or Voluntarily) in terms of exit circular dated May 30, 2012.

[CIR/MRD/DSA/05/2015 dated April 17, 2015]

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contd. from page 97

first sale as incurred by any other dealer under the Act. Under rule 54 of the Kerala General Sales Tax Rules, 1963, the liability to pay sales tax is borne by the official liquidator as a manager or receiver of the property of the company in liquidation. Therefore, the official liquidator is required to pay the tax payable on the sale of the assets of the company in liquidation.

Since the transaction in question is exigible to tax u/s. 5(1) of the 1963 Act, no liability to tax arises u/s. 5A of the Act.

From the definition of "dealer" under the 1963 Act, it is evident that the Legislature intended to provide for an inclusive criterion and broaden the ambit of the classification. The Legislature did not propose to restrict the scope of the term as perceived in common parlance. The company in liquidation, whose assets are sold by way of an auction, would be a "dealer" under the 1963 Act.

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From Published Accounts

CA. Pamil H. Shah
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AS – 19 Leases - Annual Report 2013-14

Oil India Limited

The company has signed a "participating Agreement" (PA) for the product pipeline in Sudan with ONGC Videsh Ltd (OVL) for 10% participating interest (balance 90% being with OVL) awarded by ministry of energy & Mining, Govt. of Sudan (GOS). The construction of the pipeline project was completed on 01-09-2005 and handed over to GOS under build, own, Lease and Transfer (BOLT) basis.

The "PA" entered into between OVL and the company is neither intended nor shall be constructed as creating a partnership or joint venture among the parties. Hence, accounting has not been done following "Joint Venture Accounting Policy" but the agreement for providing finance for the project in rupees to OVL and to share lease rentals receivable from Govt. of Sudan has been treated as "Finance Lease Activity" as envisaged under Accounting Standard (AS) 19 issued by the Institute of Charted Accountants of India and accordingly accounted for.

CMC Limited

Where the company as a lessor leases assets under finance leases, such amounts are recognized as receivables at an amount equal to the net investment in the lease and the finance income is recognised based on a constant rate of return on the outstanding net investment.

Assets leased by the company in its capacity as lessee where substantially all the risks and rewards of ownership vest in the company are classified as finance leases. Such leases are capitalised at the inception of the lease at the lower of the fair value and the present value of the minimum lease payments and a liability is created for an equivalent amount. Each lease rental paid is allocated between the liability and interest cost so as to obtain a constant periodic rate of interest cost so as to obtain a constant periodic rate of interest on the outstanding liability for each year.

Lease arrangements where the risks and rewards incidental to ownership of an asset substantially vest with the lessor are recognised as operating leases. Lease rentals under operating leases are recognised in the statement of profit and loss on a straight-line basis.

Adani Limited

Assets acquired on leases where a significant portion of risks and rewards incidental to ownership is retained by the lessor are classified as operating lease. Lease rentals under operating leases are recognised in the statement of Profit and Loss on a straight-line basis.

Hindustan Media Ventures Limited

Finance leases, which effectively transfer to the company substantially all the risks and benefits incidental to ownership of the leased item, are capitalized at the inception of the lease term at the lower of the fair value of the leased property and present value of the minimum lease payments. Lease payments are apportioned between the finance charges and reduction of the lease liability so as to achieve a constant rate of interest on the remaining balance of the liability. Finance charges are recognized as finance cost in the statement of profit

& loss. Lease management fees, legal charges and other initial direct costs of lease are capitalized.

A leased asset is depreciated on straight-line basis over the useful life of the asset or useful life envisaged in the schedule XIV of the Companies Act, 1956 whichever is lower. However, if there is no reasonable certainty that the company will obtain the ownership by the end of lease term, the capitalized leased assets are depreciated on straight-line basis over the shorter of the estimated useful life of the asset, the lease term or the useful life envisaged in the schedule XIV of the Companies Act, 1956.

Lease where the lessor effectively retains substantially all the risks and benefits of ownership of the leased items, are classified as Operating leases. Operating lease payments are recognized as an expense in the statement of profit and loss on straight line basis over the lease term.

South Indian Bank

Rental payments for premises taken on operating lease agreements are recognized as an expense in the profit and loss account over the lease term as the lease are cancelable.

Banari Amman Spinning Mills Ltd.

Lease arrangements where the risks and rewards incidental to ownership of an asset substantially vest with the lessor are recognised as operating leases. The lease rentals paid under such agreements are accounted in the profit and loss account.

ICICI Bank

Lease payments for assets taken on operating lease are recognised as an expense in the profit and loss account over the lease term on straight line basis.

Patel Engineering Ltd.

Lease rentals in respect of assets acquired under operating lease are charged to statement of profit and loss.

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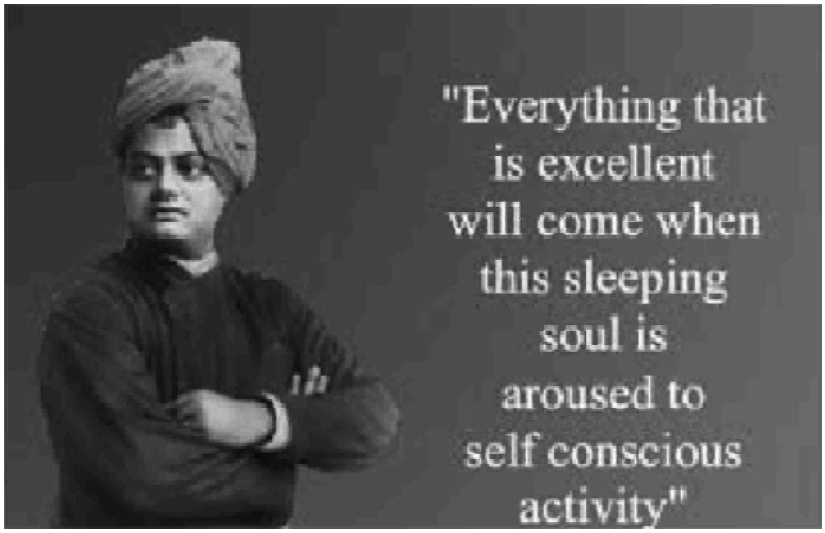

From the Government

CA. Kunal A. Shah
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Income Tax

1) Requirement of tax deduction at source in case of corporations whose income is exempted under Section I0(26BBB) of the Income-tax Act, 1961.

The CBDT hereby clarified that that since the corporations covered under Section 10(26BBB) satisfy the two conditions of Circular No. 412002 i.e. unconditional exemption of income under Section 10 and no statutory liability to file return of income under Section 139, any corporation whose income is exempted under Section 10(26BBB) of the Act will also be entitled to the benefit of the said Circular i.e there would be no requirement for tax deduction at source from the payments made to such corporations since their income is anyway exempted under the Act.

(For full text refer Circular No. 7, dated 23/04/2015)

Service Tax

1) Amendments in Notification No. 25,dated 20-06-2012

The Central Government hereby makes the following further amendments in the notification 25/2012-Service Tax-

(i) in entry 26, after item (o), the following items shall be inserted, namely:- "(p) Pradhan Mantri Suraksha Bima Yojna;"

(ii) in entry 26A, after item (d), the following items shall be inserted, namely:- "(e) Pradhan Mantri Jeevan Jyoti Bima Yojana; (f) Pradhan Mantri Jan Dhan Yogana;";

(iii) after entry 26A, the following entry shall be inserted, namely:- "26B Services by way of collection of contribution under Atal Pension Yojana (APY) **(For full text refer notification no.12, dated 30-04-2015)**

2) The Central Government vide this notification do hereby exempts the taxable services provided or agreed to be provided against a scrip by a person located in the taxable territory from the whole of the service tax leviable thereon under section 66B of the said Act subject to certain conditions . **This notification shall be applicable to the Service Exports from India Scheme duty credit scrip issued by the Regional Authority (For full text refer notification no. 11, dated 08/04/2015)**

3) The Central Government vide this notification do hereby exempts the taxable services provided or agreed to be provided against a scrip by a person located in the taxable territory from the whole of the service tax leviable thereon under section 66B of the said Act subject to certain conditions. **This notification shall be applicable to the Merchandise Exports from India Scheme duty credit scrip issued to an exporter by the Regional Authority (For full text refer notification no. 10, dated 08/04/2015)**

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Association News

CA. Nirav R. Choksi
Hon. Secretary

CA. Dilip U. Jodhani
Hon. Secretary

At the 64th Annual General Meeting

1 At the 64th Annual General Meeting of the members of the Association held on Saturday, 2nd May, 2015 at ICAI Bhawan, 123, Sardar Patel Colony, Naranpura, Ahmedabad, following Office Bearers and Executive Committee Members have been declared elected for the year 2015-2016.

Office Bearers

1	CA. Yamal A. Vyas	President
2	CA. Raju C. Shah	Vice - President
3	CA. Nirav R. Choksi	Hon. Secretary
4	CA. Dilip U. Jodhani	Hon. Secretary

Executive Committee Members

1 CA. Atul R. Shah	2 CA. Devang A. Doctor	3 CA. Jainik N. Vakil
4 CA. Kunal A. Shah	5 CA. Purushottam H. Khandelwal	6 CA. Bhupendra M. Shah
7 CA. Mukesh O. Parikh	8 CA. Rutvij P. Shah	9 CA. Shrenik A. Shah

Imm. Past President	CA. Shailesh C. Shah

List of Sub Committees

Sr. No.	Name of Sub Committee	Chairman	Convener	Members
1	Journal	CA. Ashok C. Kataria	CA. Pitamber S. Jagyasi	CA. Gaurang M. Choksi CA. Rajni M. Shah CA. Shailesh C. Shah CA. Jayesh C. Sharedalal
2	Residential Refresher Course	CA. Aniket S. Talati	CA. Anand Sharma	CA. Rinkesh Shah CA. Dilip U. Jodhani CA. Jainik N. Vakil CA. Sunil H. Talati
3	Brain Trust cum Study Circle	CA. Ganesh Nadar	CA. Rakesh Gupta	CA. Jignesh Parikh CA. Vishal Langalia CA. Shivang Chokshi CA. Atul R. Shah CA. Arvind Gaudana
4	Legal and Representation	CA. S. K. Sadhwani	CA. Ajit C. Shah	CA. Deepak R. Shah CA. Rohit K. Choksi CA. Sanjay R. Shah CA. Devang A. Doctor CA. Gaurang M. Choksi

Sr. No.	Name of Sub Committee	Chairman	Convener	Members
5	Information Technology	CA. Kandarp Trivedi	CA. Abhishek Jain	CA. Chintan M. Doshi CA. Anuj J. Sharedalal CA. Ashok C. Kataria CA. Shrenik Shah CA. Niren M. Nagri
6	Publication	CA. Rajni M. Shah CA. Jignesh Shah (Co-Chairman)	CA. Uday Shah CA. Manthan Khokhani (Co-Convenor)	CA. Shailesh C. Shah CA. Mukesh M. Khandwala CA. Naveen Mandora CA. Ashok C. Kataria CA. Sandip Parikh CA. Mukesh Dholakiya CA. Rutvij P. Shah CA. Jayesh C. Sharedalal
7	Cultural & Entertainment	CA. Nesal H. Shah	CA. Amar R. Gandhi	CA. Shitin S. Shah CA. Shreyansh Shah CA. Sujal Shah CA. Kunal Shah CA. C. H. Pamnani
8	Membership Development	CA. Purushottam H. Khandelwal	CA. Dinesh R. Garg	CA. Nitin M. Pathak CA. Dilip U. Jodhani CA. Durgesh V. Buch
9	Sports Committee	CA. Chintan M. Doshi	CA. Abhishek Jain	CA. Maulik S. Desai CA. Prakash B. Sheth CA. Shailesh C. Shah CA. Mukesh O. Parikh CA. Ajit C. Shah
10	Forum of Past Presidents	CA. Ashwin H. Shah	CA. Chandrakant H. Pamnani	CA. Shailesh C. Shah CA. Mukesh M. Khandwala CA. Bipinbhai M. Shah CA. Ajit C. Shah CA. Prakash B. Sheth
11	Constitution Amendment	CA. Mukesh M. Khandwala	CA. Gaurang M. Choksi	CA. Raju C. Shah CA. Bipinbhai M. Shah CA. Ajit C. Shah CA. Shailesh C. Shah CA. Jayesh C. Sharedalal
12	Special Events	CA. Devang Doctor	CA. Aniket Talati	CA. Vasant Patel CA. Bhupendra M. Shah CA. Durgesh V. Buch

The following prizes and Medals were distributed:

Best Article in Ahmedabad Chartered Accountants Journal

Sr. No.	Name of the Trophy	Name of the Recipient	Name of the Article published in the Journal
1	Shri Gatorbhai Patel Shiva Pharma Foudation Trophy for Best Article on Direct Taxes 2014-15	CA. Manthan Khokhani & CA. Jainee R. Shah	Exemption under the head Capital Gains - Few Beneficial Issue
2	Shri U. R. Shah Memorial Funds Trophy for Best Article on Allied Law 2014-15	CA. Kush Paresh Desai	Forensic Audit - Moving towards "True & Correct" Scenario
3	Champaben Chandulal Shah Memorial Trophy for Best Article on Direct Taxes 2014-15	CA. Anuj J. Sharedalal	Companies Act, 2013 - Provision relating to Depreciation

Best Study Circle Meeting Leader

Sr. No.	Name of the Trophy	Name of the Recipient	Name of the Study Circle Meeting
1	Shri Dwarkadas B. Shah Memorial Trophy for the Best Lead Study Circle Meeting 2014-15	CA. Punit Prajapati	Service Tax - Practical Issues

List of Students who have been Awarded MedalS/Prizes for the Year 2014

Sr.	Medal Name	Highest Mark in	PCC / Final C.A. Examination	Name of the Recipent Student
1	Avinash J. Budhdev Memorial CA Student Award (Cash Prize of Rs.11000/- each)	**Final Year Topper (Gujarat)**	**Final/May 2014** Roll No. 187393	Shristy Sureshkumar Saraf
			Final/Nov 2014 Roll No. 101510	Pooja Ramswaroop Pareek
2	Kantilal V. Patel Memorial Medal	**Best Student of the year 2014 (A'bad)**	**Final/May-Nov. 2014** Roll No. 101510	Pooja Ramswaroop Pareek
3	H. V. Vasa Memorial Medal	**Best Student (Ahmedabad)**	**Final/May 2014** Roll No. 102545	Manthan Sanjay Khokhani
			Final/Nov 2014 Roll No. 101510	Pooja Ramswaroop Pareek
4	A. M. Thaker Memorial Medal	**Best Lady Student (Ahmedabad)**	**Final/May 2014** Roll No. 100825	Dhruvi Ashit Shah
			Final/Nov 2014 Roll No. 101510	Pooja Ramswaroop Pareek
5	Chandulal M. Shah Memorial Medal	**Paper 1** Financial Reporting	**Final/May 2014** Roll No. 102949	Sushilkumar R. Thakkar
			Final/Nov 2014 Roll No. 100794	Jainam Kirtikumar Shah
6	VNS & BNS Social Welfare Medal	**Paper 2** Strategic Financial Management	**Final/May 2014** Roll No. 100897	Valay Dilipkumar Shah
			Final/Nov 2014 Roll No. 100794	Jainam Kirtikumar Shah

Sr.	Medal Name	Highest Mark in	PCC / Final C.A. Examination	Name of the Recipent Student
7	Dhirubhai B. Shah Memorial Medal	**Paper 3** Advanced Auditing and Professional Ethics	**Final/May 2014** Roll No. 100873	Himanshu D. Jain
			Final/Nov 2014 Roll No. 101510	Pooja Ramswaroop Pareek
8	Mansukhbhai J. Shah Medal	**Paper 4** Corporate and Allied Laws	**Final/May 2014** Roll No. 102173	Harsh Jayendrakumar Modi
			Final/Nov 2014 Roll No. 103479	Prachi Mahesh Agrawal
9	Madhuben Prafulbhai Trivedi Memorial Medal	**Paper 5** Advance Management Accounting	**Final/May 2014** Roll No. 100626	Kushal Vrajesh Parikh
			Final/Nov 2014 Roll No. 101654	Smit Sureshkumar Doshi
10	VNS & BNS Social Welfare Medal	**Paper 6** Information Systems Control & Audit	**Final/May 2014** Roll No. 102164	Nikhil Dayanand
			Final/Nov 2014 Roll No. 100563	Nikhilkumar B. Vekariya
11	A. M. Garg Memorial Medal	**Paper 7** Direct Taxes laws	**Final/May 2014** Roll No. 100840	Darshin Ketanbhai Haji
			Final/Nov 2014 Roll No. 101510	Pooja Ramswaroop Pareek
12	C. F. Patel Memorial Medal	**Paper 7** Direct Taxes laws	**Final/May 2014** Roll No. 100840	Darshin Ketanbhai Haji
			Final/Nov 2014 Roll No. 101510	Pooja Ramswaroop Pareek
13	Jagrutiben K. Shah Memorial Medal	**Paper 8** Indirect Taxes Laws	**FINAL / May 2014** Roll No. 102545	Manthan Sanjay Khokhani
			FINAL /Nov 2014 Roll No. 103596	Viralkumar P. Shah
14	Shri K. T. Thakore Memorial Medal	**Best Student of the year 2014 (Gujarat)**	**IPCE / May-Nov 2014**	Nikunj H. Kejariwal
15	B. S. Soni Memorial Medal	**Best Student (Ahmedabad)**	**IPCE / May 2014** Roll No.301770 Roll No. 302346	Anuj K. Thakkar Hardik Nilesh Khatri
			IPCE / Nov 2014 Roll No. 304718	Kalyani N. Mehta
16	Hasmukhbhai J. Patel Memorial Medal	**Paper -1** Accounting	**IPCE / May 2014** Roll No. 305213	Prakruti Paresh Shah
			IPCE / Nov 2014 Roll No. 304776	Arjun Atulkumar Mehta
17	Shri V. R. Shah Memorial Medal	**Paper -2** Best Student for the year 14 in A'bad for Business Law Ethics and Communication	**IPCE / May-Nov 2014** Roll No. 302330 (May 2014)	Madangopal S. Agrawal

Sr.	Medal Name	Highest Mark in	PCC / Final C.A. Examination	Name of the Recipent Student
18	Lalita Khanchand Tekwani Memorial Medal	**Paper 3** Cost Accounting & Financial Management	**IPCE / May 2014** Roll No. 301710	Meet D. Dhrangadhariya
			IPCE / Nov 2014 Roll No. 301556	Suhani S. Maheswari
19	VNS & BNS Social Welfare Medal	**Paper - 4** Taxation	**IPCE / May 2014** Roll No. 301770	Anuj K. Thakkar
			IPCE / Nov 2014 Roll No. 304718	Kalyani N. Mehta
20	Rameshchandra S. Shah Memorial Medal	**Paper -5** Advance Accounting	**IPCE / May 2014** Roll No. 302856	Nisarg Jignesh Modi
			IPCE / Nov 2014 Roll No. 304776	Arjun Atulkumar Mehta
21	Akshay Trivedi Memorial Medal	**Paper 6** Auditing & Assurance	**IPCE / May 2014** Roll No.302655	Purva Agrawal
			IPCE / Nov 2014 Roll No. 301856	Saumya Milanbhai Yagnik
22	Mansukhbhai S. Shah Memorial Medal	**Paper 7** Information Tech-nology & Strategic Management	**IPCE / May 2014** Roll No. 301993	Akshat Mukesh Shah
			IPCE / Nov 2014 Roll No. 302432	Apoorva Pradipbhai Parikh

3 **M/s. Kashiparekh & Associates, Chartered Accountants**, are appointed as Auditors of the Association for the financial year 2015-2016.

4 At the 27th Annual General Meeting of the members of the Mutual Benefit Scheme held on Saturday, 2nd May 2015 at ICAI Bhawan, 123, Sardar Patel Colony, Naranpura, Ahmedabad. **M/s. Kashiparekh & Associates, Chartered Accountants**, are appointed as Auditors of the Mutual Benefit Scheme for the financial year 2015-2016.

At the 1st Executive Committee Meeting

1 At the 1st Executive Committee Meeting held on 2nd May, 2015, three senior members of the Association namely (a) CA. Ajit C. Shah, (b) CA. Bipin M. Shah (c) CA. Durgesh V. Buch have been co opted as the members of the Executive Committee for the year 2015-2016.

2 **Forthcoming Programmes**

Date/Day	Time	Programmes	Speaker	Venue
05.06.2015 Friday	5 pm to 8 pm	Study Circle Meeting on "Recent Changes in Companies Act and Audit Reporting requirement"	Various Speakers	ATMA Hall, Ashram Road, Ahmedabad
01.08.2015 to 04.08.2015	-	42nd Residential Refresher Course	Various Speakers	Devigarh, By Lebua, Udaipur
13.08.2015 Thursday	8 pm Onwards	Musical Programme	-	Tagore Hall, Paldi, Ahmedabad

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GREEN INITIATIVE

Dear Members,

It is said that humans are the only creature in this world, who cut the trees, made paper from it and then wrote "Save Trees" on it.

In support to 'Green Initiative', since last few years the Association has discontinued the practice of sending printed circulars for its programmes and meetings. However, there are other areas also where paper can be saved. Chartered Accountants Association, Ahmedabad is publishing its monthly journal "Ahmedabad Chartered Accountants Journal" (ACAJ) since more than 37 years. This journal is sent to the members of the Association without any extra charges. The soft copy of the Journal is also sent to all members.

The Association in furtherance to support Green Initiatives shall henceforth, send the Journal through electronic mode to the members at their email address available in the records of the Association. Any member who is desirous of receiving the physical copy of the Journal may send his / her request by submitting the duly filled appended requisition slip at the office of the Association or by an email at caaahmedabad@gmail.com on or before 15th June 2015.

Incase you wish to change / update your e-mail ID, please send an e-mail at caaahmedabad@gmail.com.

Research shows that recycling about 50 kgs of newspaper saves one tree and approximately 324 litres of water is used to make 1 kg of paper. The environment impact of switching over from physical journal to soft journal would save about 50 tress and 7.75 lac litres of water annually. We hope that the members would support the Green Initiative which would not just save the cost but also the environment. Let's move towards the greener earth.

Thanking you,

With warm regards,

For **Chartered Accountants Association, Ahmedabad**

CA. Yamal A. Vyas	**CA. Nirav Choksi**
President	Hon. Secretary

To,
The Hon. Secretary,
Chartered Accountants Association, Ahmedabad.

I, _____ (name of the member), Membership No. _____ of Chartered Accountants Association, Ahmedabad, **opt for physical/hard copy** of the ACA Journal, henceforth.

Date

_____
(Signature of the Member)

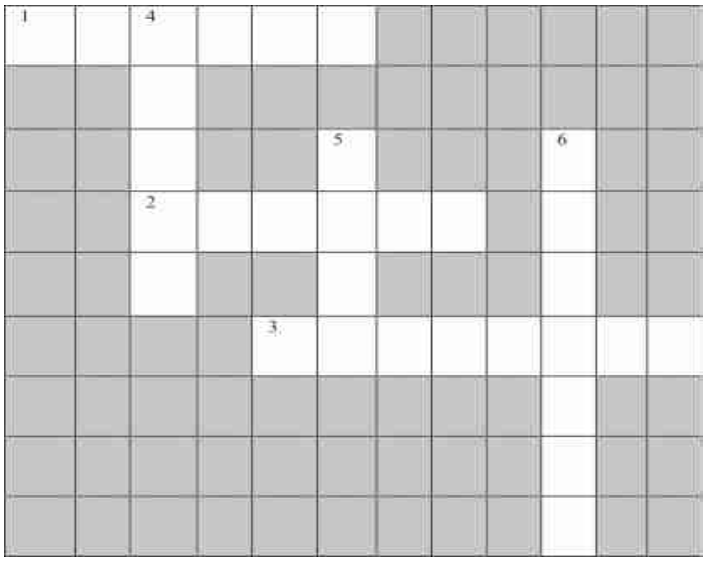
ACAJ Crossword Contest # 13

Across

1. The quoted _____ prices provide the most reliable measure of fair value.
2. Only human beings have the ability to choose their _____.
3. In terms of clause (h) of the Section 66E of the Finance Act, 1994 (the Act) only "service portion" in the execution of works contract is _____ service and not entire contract.

Down

4. India successfully accomplished 'Operation _____' rescuing more than 5600 people from Yemen.
5. As per Companies Act, 2013, the residual value of an asset shall not be more than ____ percent of the original cost of the asset.
6. As per the Delhi High Court , recording liability by way of _____ entries is outside the ambit of the provisions of Section 269SS.



Notes:

1. The Crossword puzzle is based on previous issue of ACA Journal.
2. Two 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 08/06/2015.
5. The decision of Journal Committee shall be final and binding.

Winners of ACAJ Crossword Contest # 12
1. CA. C. H. Pamnani
2. CA. Shirish Bhatt
3. CA. Ajit C. Shah

ACAJ Crossword Contest # 12 - Solution

Across

1. Goods and Service
2. Qualifying
3. Faith and Trust

Down

4. Swachhbharat
5. Total Sales
6. Revenue

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