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CONTENTS

To Begin with

Mananam

Who am I ? .... CA. Pradip Modi 199

Editorial

Vyapam - A Big Scar .... CA. Ashok Kataria 200

From the President .... CA. Yamal A. Vyas 201

Articles

Research and Development Expense - Taxation and Other Related Issues .... CA. Chandrakant K. Thakkar 202

Analysis of Draft Scheme of proposed Rules for Computation of Arm's Length Price .... CA. Kush Paresh Desai 212

Section 14A Disallowance .... CA. Hersh Jani 218

Direct Taxes

Glimpses of Supreme Court Rulings .... Adv. Samir N. Divatia 222

From the Courts .... CA. C.R. Sharedalal & CA. Jayesh Sharedalal 223

Tribunal News .... CA. Yogesh G. Shah & CA. Aparna Parelkar 226

Controversies .... CA. Kaushik D. Shah 230

Judicial Analysis .... Adv. Tushar P. Hemani 234

FEMA & International Taxation

Overview of Action Plan 15 of BEPS Project - Developing a Multilateral Instrument to modify Bilateral Tax Treaties .... CA. Dhinal A. Shah & CA. Sagar Shah 236

FEMA Updates .... CA. Savan Godiawala 239

Indirect Taxes

Service Tax

Service Tax Decoded .... CA. Punit R. Prajapati 242

Recent Judgements .... CA. Ashwin H. Shah 245

Value Added Tax

From the Courts .... CA. Priyam R. Shah 248

Updates and Tribunal Judgements .... CA. Bihari B. Shah 250

Corporate Law & Others

Corporate Law Update .... CA. Naveen Mandovara 253

Allied Law Corner .... Adv. Ankit Talsani 260

From Published Accounts .... CA. Pamil H. Shah 263

From the Government .... CA. Kunal A. Shah 265

Association News .... CA. Nirav R. Choksi & CA. Dilip U. Jodhani 267

ACAJ Crossword Contest 268

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

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MananaM

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Who am I ?

"Talk to yourself once in a day. Otherwise you may miss meeting an excellent person in the world" – Swami Vivekanand

When we wake up in the morning, first thing we look at the smart phone for messages, whatsapp and email even before we hold toothbrush in hand. This is reality of life. We have hardly any time to remember our parents and ancestors, who have given us this beautiful life in this ever pleasant universe. I am not writing about any orthodox belief or rituals but certainly emphasizing the rich legacy of our nation. If we think for a while how each organ of your body is vital to make a complete body, similarly one needs to introspect on daily basis that how he is connected to the universe? I am a firm believer of theory that universe is well connected to each other and some Mighty strength has created it. It is not an outcome of Big Bang theory, which explains that universe has come up out of explosion etc.

It is noticed that everything has a reason to exist, and not just exist but with balance. One cannot find out any imperfection in the universal existence. Everyone is connected to one another and everything is happening for a reason. We are a small molecule of the universe interwoven to nature. Listen carefully and with patience to yourself, you will realize that you are a part of sequential chain of this universe.

There is enough revelation in nature for self realization but we are not focused or we are ignoring the fact of life under the garb of materialistic life style. Look at the species of ocean creatures, birds, small insects, animals etc. Each and every creature is a creation of fathomless forces. Everything is in tandem. Look at the birth and death cycle. In whole of universe soul comes from unknown place and physical body gets developed over a period of time in each creature. Body remains on this earth and soul goes off to unknown place. Why can't we think on this? We are human beings and in a better position to think upon.

One should ask repetitively to himself, who am I? Your body is not you. Beyond body is mind and intellect. Are we making any effort to think beyond this body, mind and intellect to reach up to our true identity? Ignorance is the biggest hurdle in self realization. Therefore, when someone is performing any action without knowledge, he is afraid of the result. Hence knowledge is a powerful axe to cut the ignorance. Ignorance is the root cause of fear and unhappiness .Once it is known who I am, through actions as a duty without depending on the fruits of my action, own self merges into Supreme Power for eternal happiness. One should love nature, animal, birds, wind and sun. In the present materialistic life, I think we have lost the importance of knowing who am I? We are running after money, luxury and comfort and with less importance to bliss within us. Money can be an instrument of achieving comfort or pleasure but not permanent happiness. When someone has earned enormous money, his mind is still working for what is next? But when someone has discovered who is he, he stops thinking beyond this. Knowing who am I, is Supreme. Love nature, birds, animals and leave cruelty .In a busy life one needs to spare some time to introspect daily to discover his true identity till dual existence is not vanished.

Editorial

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Vyapam - A Big Scar

It has been a little over a year when centre of power shifted from Congress led UPA government to the BJP led NDA government at New Delhi. One of the considerable reasons for the downfall of the UPA regime was the number of scams unearthed during its tenure coupled with complete inability of the central leadership to properly handle it by holding the culprit accountable. After a series of scams, the people of the country saw a ray of hope in the leadership of Narendra Modi and elected him as the Prime Minister of the country.

In the initial period of one year, the new government has been performing well, specifically in some of the areas like controlling inflation, foreign policy and internal security. However, the recent development in case of Lalit Modi and Vayapam Scam is definitely not helping the reputation of the government or the confidence reposed by the public in the leadership of the Prime Minister. The Chief Minister of a state and the foreign minister of the country have been allegedly associated with Lalit Modi, a person wanted for violating the law in the country. When two big names viz. Ms. Sushma Swaraj and Vasundara Raje are involved, propriety demands whether these people be occupying their posts? Unfortunately, the prime minister who was often seen vocal before being voted to power on such issues seems to be a mute spectator. Whether his silence is making him any different from his predecessor?

Vyapam is a huge scam in the state of Madhya Pradesh and a scar on the standing of the government, centre and state. The scam is an admission and recruitment scam involving politicians, senior officials and businessmen. Madhya Pradesh Professional Examination Board (MPPEB), popularly known by its Hindi acronym “Vyapam” (Vyavsayik Pariksha Mandal) is responsible for conducting several entrance tests in the state. The tricks used by those involved in the scam are nothing short of Bollywood Masala movie that included, impersonation of exam candidates, copying, manipulation of records & answer sheets and leaking of answer keys. The magnitude and the after effect of unearthing of the scam are so grave that it has resulted in mysterious deaths of about 50 people during the course of investigation. Calling Vyapam ‘A Deadly Scam’ would be proper phrase than just referring it like any other scam. The scam involving collusion among exam candidates, government officials and middlemen where undeserving candidates have been offered high marks in the exams, in exchange for kickbacks has reached up to the office of the Governor and Chief Minsiter of the state. Where on one hand the STF has found evidence against the state Governor, the opposition party is alleging that the investigators are shielding the Chief Minister of the state.

As a citizen one wonders, is this the reason why governments are elected? In the largest democracy of the world things do not appear to be in order where people are dying of unnatural death during the course of investigation. Scams like Vyapam are a big blot on the nation, not just affecting the confidence and integrity of people but causing threat to their life. Governments are changing but the scenario around!!

Namaste,

CA. Ashok Kataria

From the President

CA. Yamal A. Vyas
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This year 2015 has been unique in one way. And not in a very pleasant way. This year CBDT has not been able to bring out the relevant forms for filing of Income Tax returns by various entities till the middle of July as, I write this.

The time limit for filing returns due in July has been extended, and there are expectations that the time limit for completing Tax Audits may also be extended. Now this has created unnecessary pressure on the business community and in turn the Chartered Accountants.

One hopes that such avoidable delays - the Union Budget is presented in Parliament in end of February so the Forms can be ready by April every year - do not happen in future.

The unpleasant part aside, there are a lot of positive developments in the economy. Constant fall in crude prices, inflation coming under control, stock market in a buoyant phase, all point to the fact that 'Achhe din ' are in fact here.

There are all indications that the economy is on an uptrend, and with China facing serious issues on the economic front India will surely emerge as the fastest growing large economy globally this year and for many years to come.

As we CAs are an integral and important part of the economy we all can look forward to rapid growth in our professional endeavours also. My best wishes to you all for good days ahead.

CAA is also gearing up to help our young members grow professionally. Recently we have initiated a six part series of interactive programmes especially for the members who have entered the profession in last few years.

In this programme, our young but relatively senior and experienced faculties interact with the participants on very basic and practical issues generally encountered by new professionals in their Practice.The programme is only mid way as I write this, but I can say with confidence that it is a hit, and we are already planning a second series .

The members who participate in the Annual Residential Refresher Course (RRC) every year know that the RRC is a unique combination of work and play, if I may say so. There are serious study sessions, taken by Senior Faculties, where there are detailed discussions on various issues of professional importance. Along with that we also have fun, frolic and camaraderie. This year the RRC is at Devigarh, near Udaipur, and we all are looking forward to the same.

Those of you who are not participating this year, or those members who have not attended any RRC, I strongly recommend to them that they must attend next year's RRC. I will venture to say with confidence that if they do it once, they will become regular participants. Especially the young members.

The May 2015 CA Final Examination results are out, and as per one estimate, more than 100 youngsters from Ahmedabad and surrounding areas have become CAs. I earnestly request our members that if someone in their circle- Articled Assistant, family member, acquaintance- has qualified in May, kindly make him /her a member of the Association. I assure them through your medium that they will never regret the decision. Not only that, they will hugely benefit from their CAA membership in their professional career at every stage.

I am happy to announce that there has been a good response from members about out save paper project, as about 300 out of more than 1500 members have opted for the paper copy. We presume that the rest want to opt for the e journal. Let me clarify that we shall indeed be equally happy to send you a paper copy whenever you wish to opt for it. So if you opt for an e copy today, your right and prerogative to get the paper copy will always remain with you. Just send an email or make a phone call and the mode of delivery of the Journal shall be changed for you.

CA. Yamal A. Vyas
President

Research and Development Expense - Taxation and Other Related Issues

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1. Introduction:

Research and development activity is very much necessary for survival of any industry in the era of fast changing world and hence, it is said that R & D is an investment in a Company's future. R & D is nothing but thinking out of box. Companies those do not spend efficiently and sufficiently on R & D in this phase are often said to be "eating the seed corn"- that is, when their current product lines become outdated and overtaken by their competitors, they will not have viable successors in the pipeline. We have witnessed the position of company like Nokia in hand set industry. A number one company had to go for sell when survival was a question mark due to introduction of smart phones in the market. It is not that industries only spent on R & D activity, Indian Government and almost all state governments are also spending on R & D activity. Indian Government intends to spend double the amount on R & D by spending 2% of GDP by 2017 from present level of spending of 1% of GDP. Even state governments give grants, subsidies etc. for R & D activity carried out by industrial organizations and Research Institutes. If we see the list of ten best R & D companies, then list includes names like **IBM, General Electric, DuPont, 3M, Toyoto, Google, Apple, Microsoft, Genetech and Dow Chemicals.** If we see the list of 10 companies spending highest on R & D, none of the Indian company comes in the said list. Entire business community, law makers, bureaucrats , IITs, IIMs, Research Institutes etc. should think seriously to find out the reasons for such low spending by Indian industry on R & D and to bring sea change on mentality of industrialists, law makers and all other agencies/Institutes involved with R & D activities. In my humble opinion the reasons include mind set of not to spend on R & D, Not treating said expenses as an investment, non availability of funds from banks/financial institutions for R & D activities, fear of failure, instinct to think out of box, absence of private equity funding for R & D which recently has started by TATAs, Infosys founder promoters etc. How much is reasonable amount to spend on R & D activities is dependent on the technology area and how fast the market is moving. Industries like Pharmaceutical, I. T, Telecommunication, space, automobile and automobile components, FMCG, defense, aviation etc. requires huge expense on R & D. If we see the amount of spending by good companies on R & D by such industries, range is between 2 %to 15% of the gross revenue and not profits.

2. Ministries and Department involved in giving approvals for Benefits, Deductions, Exemptions under Direct and Indirect Taxes for R & D Expense/Activity.

- Ministry of Finance.
- Ministry of Chemicals.
- Ministry of Commerce.
- Ministry of Science and Technology.
- Ministry of Heavy Industries.
- Ministry of Shipping, Road transport, Highways.
- Ministry of Statistics and Program Implementation.
- Ministry of Steel.
- Ministry of Environment.
- Department of Industrial Development.
- Department of Telecommunication.
- Department of Bio Technology.
- Department of Food processing.

- Indian Council of Agriculture Research.
- Council of Scientific and Industrial Research.
- Indian Council of Medical Research.
- Defence Research & Development Organisation.
- Department of Atomic Energy.
- Department of Space.

All departments and all ministries are not involved for each type of product or industry. All depends on product and industry involved and accordingly some ministries and some departments are involved in approval of exemptions, deductions etc. under direct tax and indirect taxes and also for deciding grants and subsidies.

3. Benefits available for R & D Expense/ Activity

- 200% of expense of revenue nature or capital nature (Excluding Land & Building) available as deduction under Income tax Act for approved in house R & D for industries like Bio Technology, Manufacturing of Drugs, Pharmaceuticals, Electronic Equipment, Computers, Telecommunication Equipments, Chemicals, Aircrafts & Helicopters, Automobiles, Automobile Components etc.
- Duty free import of specified goods.
- Commercial R & D Companies eligible for 10 years of tax holiday.
- Excise duty waiver for 3 years, custom duty exemption, state subsidy etc.
- Weighted deduction of 200% to the sponsor of sponsored Research programs in Universities, IITs and approved national laboratories. (S. 35(2AA))
- Exemption from price control of drugs for drugs developed through indigenous technology.
- Soft loans, Grants, subsidy etc.

4. Deductions under Income Tax Act for R & D Expense:

We as Chartered Accountants are more interested in knowing deductions available under Income Tax Act for R & D expense incurred by the assessee. As I do not have much knowledge of Indirect taxes like Excise Duty, Custom Duty, VAT, Service tax etc. I have discussed the deductions available under Income Tax Act for R & D Expenses incurred by the assessee**.**

S.35 Expenditure on Scientific Research:

i. The provisions of section 35(1)(i) are summarized as under.

- Expenditure is available to any assessee.
- Expenditure should not be capital in nature.
- The expenditure should be incurred before the commencement of business.
- The expenditure should be in the form of salary to an employee engaged in such scientific research or
- The expenditure on purchase of materials used in such scientific research.
- The expenditure should have been incurred within three years immediately preceding the commencement of business.
- The expenditure shall be allowed to the extent it is certified by the prescribed authority to have been laid out or expended on such scientific research.
- It will be deemed to be expenditure of previous year though spent before commencement of business in last three years.

ii. The provisions of section 35(1)(ii) are summarized as under.

- Expenditure is available to any assessee.

- The deduction shall be 175% of any sum paid to a scientific research association which has as its object the undertaking of scientific research or to a university, college or other institution to be used for scientific research.
- Such association or a university, college or other institution should be approved, in accordance with the guidelines, in the manner and subject to such conditions as may be prescribed.
- Such association or a university, college or other institution is specified by notification in the official Gazette, by the Central Government.

iii. The provisions of section 35(1)(iia) are summarized as under.

- Expenditure is available to any assessee.
- The deduction shall be 125% of any sum paid to a company to be used by it for scientific research.
- Such company should be registered in India, it has main object being scientific research and development and
- Such company is approved by the prescribed authority in the prescribed manner.

iv. The provisions of section 35(1)(iii) are summarized as under.

- Expenditure is available to any assessee.
- The deduction shall be 125% of any sum paid to a research association which has as its object undertaking of research for social science or statistical research or to a university, college or other institution to be used for social science or statistical research.
- Such association, university, college or other institution should be approved in accordance with the guidelines, in the manner and subject to conditions as may be prescribed.
- Such association or a university, college or other institution is specified by notification in the official Gazette, by the Central Government.

v. Explanation to section 35(1)(iii) states that any deduction to which assessee is entitled for sum paid to Such association or a university, college or other institution to which clause (ii) or clause (iii) of section 35 applies, shall not be denied merely on the ground that the approval granted to such association, university, college or other institution referred to in clause (ii) or clause (iii) of section 35 has been withdrawn.

vi. Research association, university, college or other institution referred to in section 35(1)(ii) or 35(1)(iii) has to make an application in form no. 3CF as per rule 6(2) to Central Government for grant of approval. Central Government before granting approval may call for such documents including audited accounts or other information as it thinks necessary to satisfy the genuineness of the activities of the association, university, college or other institution and the Central Government may make such inquiries as it deem fit.

vii. The notification issued by the Central Government for section 35(1)(ii) and 35(1)(iii) shall not have effect for more than 3 assessment years.

viii. The application made for approval u/s 35(1)(ii) or 35(1)(iii) shall be issued or an order rejecting the application shall be passed within 12 months from the end of the month in which an application was received by the Central Government.

ix. The provisions of section 35(2) are summarized as under.

- The deduction is available to any assessee for capital expenditure incurred on scientific research related to business carried on by the assessee.

- The deductibility of expense is provided in section 35(1)(iv) subject to provisions of section 35(2) of I T Act, 1961.
- The entire capital expenditure is allowed as deduction u/s 35(2)(ia) of I T Act, 1961.
- It is to be noted that for capital expenditure incurred on acquisition of land is not deductible expense under this section.
- Vide Explanation to section 35(2), it has been provided that such capital expenditure incurred before the commencement of business, the aggregate of the expenditure so incurred within the three years immediately preceding the commencement of the business shall be treated as expenditure incurred in the previous year by deeming provision.
- It is also to be noted that when deduction of capital expense is made under this section, depreciation u/s 32 will not be allowed.

x. The provisions of section 35(2AA) are summarized as under.

- The deduction is available to any assessee.
- The deduction is available for sum paid to National Laboratory or a university or an IIT or a specified person with a specific direction that the said sum shall be used for scientific research undertaken under a programme approved in this behalf by the prescribed authority.
- The deduction shall be 200% of the sum paid.
- When deduction is claimed under this section, claim should not be made for such expense under any other section of Income Tax Act.
- Such deduction shall not be denied merely on the ground that subsequent to payment of such sum by the assessee, the approval granted to such laboratory or specified person has been withdrawn.
- Similarly such deduction shall not be denied merely on the ground that subsequent to payment of such sum by the assessee, the programme undertaken by the National Laboratory, University, IIT or specified person has been withdrawn.
- National Laboratory has been defined in Explanation 2 to Section 35(2AA) of I T Act, 1961.
- For this section, University shall have same meaning as is in Explanation to clause (ix) of section 47.
- For this section IIT shall have same meaning as "Institute" in clause (g) of section 3 of the Institutes of Technology Act, 1961.
- For this section "Specified person" means person as is approved by the prescribed authority.

xi. The provisions of section 35(2AB) are summarized as under.

- The deduction is available to company assessee only.
- The deduction is available to a company engaged in the business of manufacturing or production of any article or thing which are not enumerated in the list of the eleventh schedule.
- The expenditure should be incurred on scientific research where such expenditure should not include cost of any land or building.
- The expenses should have been incurred on in house research and development facility of the company.

- Such facility should be approved by the prescribed authority.
- The deduction shall be 200% of the expenses incurred on scientific research and development expenses both of revenue and capital nature but capital expenditure should not include expense for land or building.
- It is clarified by Explanation to said section that for the purpose of this clause, "expenditure on scientific research and development", in relation to drugs and pharmaceuticals, the expenditure incurred for clinical trials of drugs, obtaining approval from any regulatory authority under the Central, State or Provincial Act and filing an application for a patent under the Patents Act, 1970.
- If deduction is claimed U/s 35(2AB) no deduction shall be claimed under any other section of the Income tax Act including depreciation on fixed assets.
- Such deduction would be available only if company enters into an agreement with the prescribed authority for co-operation in such research and development facility and for audit of accounts maintained for said facility.
- As per current provisions, the deduction under said section shall be allowed for expenses incurred till 31-03-2017.
- The deduction shall not be allowed to a company approved under section 35(1)(iia)(C) of IT Act, 1961 in respect of expenditure referred to in clause (1) which is incurred after 31-03-2008.

xii. List of Items included in Eleventh Schedule:

The items included in Eleventh schedule on research and development facility of such items the expense u/s 35(2AB) is not allowed consists items as:

- Beer, wine and other alcoholic spirits.
- Tobacco and tobacco preparations such as Cigars, cheroots, Cigarettes, biris, smoking mixtures for pipes and cigarettes, chewing tobacco and snuff
- Cosmetic and toilet preparations
- Tooth paste, dental cream, tooth powder and soap
- Aerated water in the manufacturing of which blended flavoring concentrates in any form are used where blended flavoring concentrates shall include synthetic essences in any form.
- Confectionery and chocolates
- Gramophones, record players and gramophone records
- Projectors
- Photographic apparatus and goods.
- Office machines and apparatus such as type writers, calculating machines, cash registering machines, cheque writing machines, intercom machines and teleprinters. Here office machines and apparatus include all machines and apparatus used in offices, shops, factories, workshops, educational institutions, railway stations, hotels and restaurants for doing office work but does not include computers.
- Steel furniture whether made partly or wholly of steel.
- Safes, strong boxes, cash and deed boxes and strong room doors.
- Latex foam sponge and polyurethane foam.
- Crown corks or other fittings of cork rubber, polyethylene or any other material.

- Pilfer-proof caps for packaging or other fittings of cork, rubber, polyethylene or any other material.

xiii. Other Compliances to be made to get deduction u/s 35(2AB):

- Separate set of books of accounts are required to be maintained for Research and Development facility.
- Such books are required to be audited by CA and said CA has to include following major items in the certificate to be issued by him.
- The separate accounts for the R & D centre approved by DSIR u/s 35(2AB) should be maintained.
- The accounts should be satisfactorily maintained.
- The expenditure certified by CA should be in accordance with DSIR guidelines.
- The entity should extend full co-operation in carrying out the audit of the accounts of R & D centre.
- "X "amount of capital expenditure and "Y" amount of revenue expenditure has been incurred for R & D Facility.
- Expenditure certified in this certificate should tally with Note on Scientific Research and Development expenses certified in Notes on Accounts of audited Balance sheet and Profit and loss account.
- It is also to be certified that the amount of research and development expense as certified in certificate does not include following expenses.
  - Expenditure on outsourced R & D Activities.
  - Expenditure purely related to market research, sales promotion, and quality control, Testing, commercial production, style changes, routine data collection or activities of like nature.
  - Lease rent for research farms or research labs.
  - Capitalized expenditure of intangible nature.
  - Expenditure on fountain seeds multiplication, demonstration crops and grow out tests etc. beyond breeder seed development.
  - Foreign patent filing expenditure.
  - Consultancy expenditure, retainer ship, contract manpower/labor.
  - Building maintenance, municipal taxes and rental charges paid.
  - Any interest component on loans for R & D.
  - Clinical trial activities carried out outside the approved facilities.
  - Contract research expenses duly certified by chartered accountant.
  - Expenditure on any payments made to members of the Board of directors or any other part time employees working for R & D.

xiv. DSIR (Department of Scientific and Industrial Research) Guidelines for Approval in Form 3CM :

To avail the deduction u/s 35(2AB), the Company is supposed to follow the guidelines issued by DSIR from time to time. Most of the items of allow ability of expense u/s 35(2AB) as enumerated in said guidelines are part of certificate of CA wherein he certifies that the figure of expenditure for R & D Certified does not include some of the expenses, the list of which has been given in Para herein above and most of the conditions as enumerated in section 35(2AB) also forms part of DSIR guidelines and hence, said issues have not been discussed in this Para to

avoid duplication. The other issues forming part of guidelines are as under.

- Secretary, DSIR has been designated as the prescribed authority for approval of facility u/s 35(2AB).
- The company should have well defined R & D program.
- The in house R & D centre is located in a separate earmarked area/building and has exclusive R & D manpower of its own.
- The company should have valid permits/ licenses, if these are required from statutory authorities for operations and for setting R & D centre in-house and said permits/ licenses should be renewed from time to time.
- The accounts of the R & D Centre should be audited by statutory auditors of the company.
- The accounts duly audited by statutory auditors for R & D Centre should be furnished to The Secretary, DSIR on or before 31st October of the succeeding year.
- Assets acquired and products if any emanating out of R & D work done in approved facility, shall not be disposed off without approval of Secretary DSIR.
- To the extent of sale of product or fixed asset of R & D Centre, the deduction claimed should be reduced from R & D Expenditure claimed u/s 35(2AB) in the year in which sales realization accrues.
- Expenditure which is directly identifiable with approved R & D facility shall be eligible for the weighted deduction.
- However, expenditure in R &D facility on utilities which are supplied from a common source may be admissible, provided they are metered/ measured and are certified by CA.
- Expenditure on manpower from other than R & D centre, such as manufacturing, quality control, tool room etc shall not be eligible for weighted deduction.
- Capital expenditure on R & D, eligible for weighted deduction will include only plant and equipment or any other tangible item other than land & building. Capital expenditure of intangible nature will not be eligible for deduction.
- Grants/ Gifts, donations, presents and payments obtained by the company for sponsored research in the approved in house R & D Centre shall be shown as credit of R & D accounts for claiming deduction u/s 35(2AB).
- The expenditure eligible should be necessarily reported in the audited financial statement prepared for the purpose of published annual report.
- Approval is considered from the date of approval.

xv. Controversies for Deduction Allowable u/s. 35(2AB):

In view of the number of restrictions on allow ability of deduction u/s 35(2AB) of I T Act,1961, it was difficult to get the deduction for genuine expenditure incurred for research and development and some companies had claimed the deduction though it was ineligible either under section or in DSIR guidelines or under both. However, Honorable courts and Honorable ITATs in few cases have taken lenient and pragmatic view and have allowed the deduction though the same is not allowable as per provisions of section 35(2AB) or DSIR guidelines or both. Few such decisions for few of such expenses have been discussed herein below on perusal of the same, we can derive some principles and can get claim of weighted deduction for expenditure though not allowable as per parameters discussed herein above but still can be claimed from principles emerging out of decisions enumerated herein below.

(A) Clinical Trials Activity Carried out outside the approved facility.

As per Section 35(2AB) and DSIR guidelines, the expenditure in the nature of clinical trials carried out outside approved R & D facility is not eligible for deduction u/s 35(2AB). However, in the case of Cadila Healthcare Ltd. Vs Addl. CIT, Range-1, Ahmedabad as reported in (2013) 29 taxmann.com 229 (Ahmedabad Tribunal), it was held that it is not possible to have all clinical trials within approved R & D Facility and hence, such expenses would be eligible for weighted deduction u/s 35(2AB). The said decision was challenged by the department in Gujarat High Court. Honorable Gujarat High court affirmed the view of Ahmedabad Tribunal. The decision of Honorable Gujarat High Court in the case of Cadila Healthcare Ltd. is reported in (2013) 31 Taxmann.com 300(Gujarat). Hence, principle which emerges out of this decision is possibility of doing all clinical trials in approved facility. The Honorable Gujarat High court has taken pragmatic view and has considered the genuine difficulty faced by the pharmaceutical industry and has given a verdict in favor of assessee.

(B) Professional Fees, Registration Fees and Other Charges for Filing and Registration of Patents outside India.

As per Section 35(2AB) and DSIR guidelines, the expenditure in the nature of professional fees, registration fees and other charges for filing and registration of patents outside India is not eligible for deduction u/s 35(2AB). However, Honorable Income Tax Tribunal Mumbai, in the case of USV Ltd. Vs DCIT Central Circle -32, Mumbai in ITA No. 4517 & 5582 as reported in 24 Taxmann.com 218 has held that such expense is eligible for deduction u/s 35(2AB) of I T Act,1961. The Hon. Mumbai ITAT again took pragmatic view and allowed such expense as weighted deduction U/s 35(2AB) though section itself and DSIR guidelines does not allow deduction u/s 35(2AB).

Considering the above two decisions, I am of the strong opinion that even in following type of expenses, the deduction u/s 35(2AB) should be claimed even though the same may not be eligible either as per said section or as per DSIR guidelines or as per both.

(C) Remuneration paid to Directors directly involved with Research & Development Activity.

It is to be noted that the Director of the company who is technically qualified having vast experience in the field of Research and development, having various patents to his/their names, genuinely involved into Research and development activity, whose names are written in application filed with DSIR, without whose knowledge, guidance and vision it is not possible to run R & D department or facility then why such expense should not be allowed. At the most department can verify time devoted for R & D Activity through a record maintained for devotion of time and cost allocated based on time devoted, then there should not be any issue in allowance of said expense eligible for deduction u/s 35(2AB) of I. T. Act, 1961. It is also to be noted that reasonableness of directors remuneration is always viewed from reasonableness of expense vide section 40A(2)(b) of I. T. Act, 1961 and by company law where provisions of company law decides the

reasonableness of remuneration payable to directors of the company and hence, there is no room that illegitimate claim will be made for directors remuneration u/s 35(2AB) of I. T. Act, 1961. Secondly section 35(2AB) does not restrict said expenses and it is nowhere mentioned in the said section that the allow ability of expenditure u/s 35(2AB) shall be as per DSIR guidelines. Under such circumstances, in my humble opinion, DSIR guidelines cannot override the provisions of law and hence, said expense should be eligible for deduction u/s 35(2AB) of I. T. Act, 1961.

(D) Capitalized Expenditure of Intangible Nature.

It is to be noted that as per AS-26, the expenses incurred on R & D which is of revenue nature like patent registration fees, consultancy fees for patents etc. are to be capitalized as expenses of Intangible nature. In this case, though I do not want said expenses to be capitalized, I have to capitalize the same as per AS-26. However, such expenses are claimed as revenue expenses in Return of income filed but as DSIR guidelines say that capitalized expenses of intangible nature will not be eligible for weighted deduction, it will lead to unnecessary litigation. In my humble opinion, in this case, contention should be taken that though as per books, said expense is of capital nature, it is claimed as revenue expense under Income Tax Act and hence, the same should be eligible for deduction u/s 35(2AB) of I T Act,1961.

(E) Salary paid to Staff directly involved with R & D not possessing Diploma/ degree in Engineering/ Science Discipline.

As per DSIR guidelines, salary paid to staff directly involved with R &D activity but who does not possess Diploma or Degree in Engineering or degree in science discipline. In my humble opinion, to expect that R & D activity can be carried on by staff possessing such degrees only is insult to people like promoter director of companies like IBM, Face book, Apple etc. where the promoter directors had innovated product like application software Microsoft office, software like face book and handset like Apple and such people if employed in any company then salary paid to such employees are not eligible for deduction u/s 35(2AB) of I. T. Act, 1961. To assume that degree of any particular branch can only be involved in R & D Activity and others cannot have capacity to involve in R & D activity is injustice to people who have devoted their major life in R & D, have patents to their name but salary paid to them is not eligible for deduction cannot be the intention of legislature and hence, section is silent on non allow ability of such expense u/s 35(2AB) and in my humble opinion, DSIR guidelines cannot override the provisions of law. Such stand can be taken for some other expenses which are restricted for eligibility of deduction u/s 35(2AB) vide DSIR guidelines.

5. Expectations of Industry for R & D Expenses :

As such spending on R & D by Indian industries is very less as compared to companies in developed countries. There are certain genuine reasons for less spending on R & D also. The industry expects that:

· Funds should be easily and speedily available for Research and development activity.

- Funds should be available at cheaper rates.
- As research and development activity does not yield fast, gestation period should be considered for repayment of loan and long period's moratorium should be allowed in case of loans given for R & D activity.
- Funding should be available for purchase of technical knowhow also in the same manner as stated herein above.
- Grants/ subsidies should be available without delay and with least hassles.
- Private equity fund should play active role in funding the research oriented companies more specifically to first generation entrepreneurs.
- More incubation centers should be available so as to provide funds, guidance and facilities for R & D to first generation entrepreneurs.
- Laws relating to IPR should be stringent and justice should be available quickly for infringement of IPRs.
- Fees for registration of IPR should be reasonable and process of registration should be fast.
- Funding for registration of IPRs should be available at cheaper rates with least hassles.
- Guidance for registration of IPRs domestically and internationally should be available so that the same can be registered at least cost as professional fees for registration of IPRs in foreign countries are very high.
- When such companies which spends high on R & D but do not get eligible deduction under direct taxes and indirect taxes for which they are entitled due to guidelines of DSIR as discussed herein above or due to bureaucratic approach and not understanding of difficulties placed by persons involved in R & D activities. Such persons have to devote more time in compliance of lengthy and complicated procedures which take away their time which they were supposed to devote for R & D activities.

6. Conclusion :

The Research and development activity is key for growth of any economy. It saves spending of foreign currency by reducing imports, spending less on technical knowhow fees, royalty payments etc. It adds to GDP of economy by producing more in country and leads to higher employment generation. It also gives better realization of products due to less competition for innovative products. It also generates earning in foreign currency which is helpful in improving balance of payment position of country. What are the expectations of people involved in R & D activities are enumerated herein above and all state governments and Central Government should do their best to encourage R & D Activities which is going to give more revenue by way of direct and indirect taxes in future due to innovation of new products. It is noticed that due to non availability of such facilities as expected by people involved in R & D activities, most of the people who have expertise and passion for research go to developed countries where they get better facilities, cheap and immediate funding by way of equity and/ or borrowings and better environment by way of less procedures and more facilities. Our ministers speak more on research and development but do very less to solve their problems. If more attention is not given to overcome some of the problems faced by people engaged in research and development activities, our imports will increase, our balance of payment position would be adversely affected, unemployment would increase and GDP growth would also be affected adversely.

* * *

Analysis of Draft Scheme of proposed Rules for Computation of Arm's Length Price

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Introduction

Since introduction of the concept "Transfer Pricing" in the year 2001, many controversial legal issues have been raised every year mainly due to subjective nature of provisions. Computation of Arm's length price (ALP) is subjective matter and the same can be changed drastically based on selection or non-selection of one or the other factors. This has led to numerous disputes, impacting foreign investors' sentiments and extra ordinary rise in compliance costs to the assessees and administrative cost to the government. After substantial capital investments in infrastructure, availability of cheap labour, allowance of Foreign Direct Investments in many areas and announcement of "Make in India" drive, India is witnessing an increasing trend in foreign investments and in such circumstances taxpayers and investors have expressed the need for some mechanism to reduce long lasting litigations and thereby enhance stability in transfer pricing legislations. Hence, introduction of range concept and use of multiple year data through announcement by Hon'ble the Finance Minister while presenting budget in the Year 2014 and subsequent release of draft rules are revolutionary steps to reduce long lasting litigations and to bring the Indian Transfer Pricing regime in line with the best practices followed by developed countries. These steps of the government and the Central Board of Direct Taxes ("CBDT" or "the board") are welcomed by the taxpayers as they promote more transparency and provide certainty in computation of ALP.

Computation of Alp-existing Provisions

Existing provisions of Section 92C of the Income Tax Act, 1961 *(Before amendment by the Finance Act (No.2) 2014)* provide for computation of ALP in relation to an international transaction or a specified domestic transaction by any of the following methods being the most appropriate method having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribed namely.

- Comparable Uncontrolled Price Method (CUP)
- Resale Price Method (RSP)*
- Cost Plus Method (RPM)*
- Profit Split Method (PSM)
- Transactional Net Margin Method (TNMM)*
- Such other method as may be prescribed by the Board

(* Methods linked with profit margin)

Where more than one price is determined by the most appropriate method, the ALP shall be taken to be the arithmetical mean of such prices.

In addition, if the variation between the ALP so determined as above and price at which the international transaction or a specified domestic transaction has actually been undertaken does not exceed such percentage, (not exceeding 3%) of the later, as may be notified by the government in the Official Gazette, the price at which the transaction has actually taken place shall be deemed to be the ALP.

Challenges faced in Computation of ALP through Existing Provisions

Usage of Arithmetical Mean Concept in Comparable:

Existing provisions relating to arithmetical mean are *"too mean to be good"* as rightly quoted by Mr.Rahul K Mitra and Mr.Soumitra K Chakraborty in their article written on "Fundamental reforms needed for Indian Transfer Pricing Regulations".

Concept of adopting arithmetical mean has been criticized heavily by industry and tax payer worldwide mainly due to its lack of statistical and economic rationale. If we look at the statistical characteristics, arithmetical mean is prone to extreme values or outliers, which are not representative of the rest of the data and such extreme value or outlier may be because of abnormal business conditions in that particular outlier which distorts average of the whole data set. Arithmetical mean does not eliminate any abnormal fluctuations of any one of comparable and dilutes transfer pricing policy followed by a taxpayer. There are chances that some comparables have undue fluctuations as business conditions are pretty different all over the world.

Let us understand the same with the following example.

X Ltd has entered into international transactions with X Inc., the associated enterprise, during the year. It has computed ALP as per Transactional Net Margin Method, being the most appropriate Method in its case. It has earned net profit margin from sales transactions entered into with X Inc. at 11%. For computation of ALP, data of the following four comparable companies are available, which deal with the similar product as of X Ltd and operate under similar business conditions.

Enterprise	A Ltd	B Ltd	C Ltd	D Ltd
Net Profit Margin Earned	10%	10.25%	12.60%	25.55%

As per existing provisions, if more than one price is determined by the most appropriate method, arithmetic mean of such price needs to be taken. Hence, arithmetic mean of the above margins is as below.

Arithmetic Mean = $\frac{10+10.25+12.60+25.55}{4}$

= 14.60%

All the above companies are Indian concerns who deal with independent sales distributors and sales are made on short term contracts, while sale transactions made by X Ltd with X Inc. an associated enterprise are based on long term contract with the focus of capturing international market. Thus there is a difference in transactional structure and hence it is appropriate to give comparability adjustment on account of such difference at 1% based on available facts and details.

Hence the adjusted ALP would be 14.60%-1%= 13.60% and after reducing 3% as per second proviso to section 92C, Arm’s length Net Margin comes to 13.19%. Since, the net margin earned with the associated enterprise is only 11%, the transactions are not entered into at Arm’s length price and accordingly adjustment in ALP needs to be made.

From the above example, it can be concluded that due to unduly high net profit margin of D Ltd, the arm’s length margin has increased substantially. If we ignore such comparable, arm’s length margin comes to 10.95% ({10+10.25+12.60}/3) which is lower net margin earned from transactions with the associated enterprise.

Use of Single Year Data

Another big challenge in existing transfer pricing provisions can be traced to the insistence on using only single year data thereby discouraging usage of multiple year data in computing ALP. As this regard, currentprovisions of *Sub-rule 4 of Rule 10B* are stated as below.

The data to be used in analyzing the comparability of an uncontrolled transaction with an international transaction or specified domestic transaction shall be the data relating to the financial year in which the international transaction or specified domestic transaction entered into.

Provided that data relating to a period not being more than two years prior to such financial year may also be considered if such data reveals facts which could have an influence on the determination of transfer price in relation to the transactions being compared.

From reading of above line, it is very clear that existing intention of legislature was to use only the

data relating to current financial year. However, there are practical difficulties in getting current year data from comparable entities while computation of ALP. In addition such difficulties get amplified at the time of assessment, when an assessing officer possesses enough and accurate comparable data to compute ALP himself.

In addition, it is not even fair to take only single year data for comparison. Every business passes through an Economic Business Cycle which is generally of 3 to 5 years depending upon nature and type of a business. There are chances that comparable entities are passing through a stage of a business cycle where there may be undue fluctuations in their financial performances. Taking such data for comparison and computing ALP would completely distort Transfer Pricing policy followed by an assessee.

Amendments made by the Finance Act (No. 2) 2014

To mitigate such challenges, praiseworthy reforms are made in transfer pricing regulations through Finance Act (No. 2) of 2014. Honorable the Finance Minister, Shri Arun Jaitley while presenting the Finance Bill (No.2) of 2014 on 10th July, 2014 has conveyed following lines in relation with transfer pricing reforms.

14. *Transfer Pricing is a major area of litigation for both resident and nonresident taxpayers. I have proposed certain changes in the Transfer Pricing regulations, which I would spell out in Part-B of my speech.*

204. *In order to reduce litigation on transfer pricing issues, I propose to make certain changes in Transfer Pricing regulations.*

(1) *An Advance Pricing Agreement (APA) scheme………*

(2) *In order to align Transfer Pricing regulations in India with the best available practices, I propose to introduce range concept for determination of arm's length price. However, the arithmetic mean concept will continue to apply where number of comparable is inadequate. The relevant data is under analysis and appropriate rules will be prescribed.*

(3) *As per existing provisions of Transfer Pricing Regulations, only one year data is allowed to be used for comparable analysis with some exception. I propose to amend the regulations to allow use of multiple year data.*

Necessary legislative amendments to give effect to the above proposals including those relating to the Authority for Advance Rulings and Income-tax Settlement Commission will be moved in the current session of the Parliament.

Pursuant to above announcements, the amendment was also made in Section 92C of the Income Tax, 1961 by inserting 3rd proviso mentioned as below.

Provided also that where more than one price is determined by the most appropriate method, the arm's length price in relation to an international transaction or specified domestic transaction undertaken on or after the 1st day of April, 2014 shall be computed in such a manner as may be prescribed and accordingly the first and second proviso shall not apply.

New Draft Scheme of the Proposed Rules for Computation of ALP

In line with announcements made in the budget speech and consequential amendments made in the Income Tax Act, 1961, Central Board of Direct Taxes has come out with Draft scheme of the proposed Rules for computation of Arm's Length Price (ALP)on 21st May, 2015. CBDT intends to introduce the mechanism through the amendment of Income Tax Rules.

Provisions contained in such scheme are enumerated below.

A. Adoption of the Range Concept

i. The "Range" concept shall be used only in case the method used for determination of ALP is Transactional Net Margin Method (TNMM), Resale Price Method (RPM) or Cost Plus Method (CPM).

ii. The following steps would be required to construct the range: -

a) A minimum of 9 entities are required to be selected as comparable entities of the tested party, based on the similarity of their functions, assets and risks (FAR) with that of the tested party;

b) 3-year data of these 9 entities (or more) would be considered and the weighted average of such 3-year data of each company would be used to construct the data set. In certain circumstances, data of 2 out of 3 years could also be used. Thus, the data set or series would have a minimum of 9 data points;

c) For calculating the weighted average, the numerator and denominator of the chosen Profit Level Indicator (PLI) would be aggregated for all the years for every comparable entity and the margin would be computed thereafter; and

d) The data points lying within the 40th to 60th percentile of the data set of series would constitute the range.

iii. If the transfer price of the tested party falls outside the range as constructed above, the median of the range would be taken as ALP and adjustment to transfer price shall be made. If the transfer price is within the range no adjustment shall be made. There shall not be two different data sets – one for testing and one for making adjustments.

B. Use of Multiple Year Data

i. The multiple year data would be used only in case determination of ALP is by Transactional Net Margin Method (TNMM), Resale Price Method (RPM) or Cost Plus Method (CPM);

ii. The multiple year data should comprise three years including the current year i.e. (year in which transaction has been undertaken) and its use for above mentioned methods shall be mandatory;

iii. In case of non-availability of data for 3 years for any of the following reasons: -

· Data of the current year of the comparables may not be available on the databases at the time of filing of returns of income by taxpayers;

· A comparable may fail to clear a quantitative filter in any one out of the three years; and

· A comparable may have commenced operations only in the last two years or may have closed down operations during the current year.

the use of data of two out of relevant three years shall be permitted.

iv. The data of the current year, however, can be used during the transfer pricing audit by both the taxpayer and the department if it becomes available at the time of audit.

C. Continued use of Arithmetic Mean

In cases where the "range" concept does not apply, the arithmetic mean concept shall continue to apply in the same manner as it applied before the amendment to section 92C (2) by the Finance (No. 2) Act 2014 along with benefit of tolerance range. Further, in cases where multiple year data is to be used, the same would apply whether "range" concept is used or arithmetic mean is used for determining the ALP. Therefore, in such cases the arithmetic mean of the multiple year data of comparable will be considered for computation of ALP.

Analysis of the Scheme

· The 'range' concept shall be used only in case the method used for determination of ALP is Transactional Net Margin Method (TNMM), Resale Price Method (RSM) or Cost Plus Method (CPM). Those are the methods in which profit margin earned by an assessee is taken into account. Such concept cannot be

used if the method used in computation of ALP is Comparable Uncontrolled Price Method (CUP) or Profit Split Method (PSM). In future, the Government should introduce methodology to apply 'range' concept to these methods as well.

· Minimum 9 entities are required to be selected for using 'range' concept. If there are not sufficient comparable data available then 'range' concept cannot be applied and ALP has to be computed by the arithmetic mean.

· Following is an example to understand the method prescribed for computation of ALP using 'range' concept.

X Ltd, the pharmaceutical company has entered into international transaction of sale of drugs with the associated enterprise X Inc. during Financial Year 2014-15 on which it has earned profit margin of 11%

Profit margin data of 3 years of following nine comparable pharmaceutical companies selling similar drugs and having similar functions, assets and risks as of X Ltd is tabulated below.

Comparable Enterprises Profit Margins in %	**A Ltd**	**B Ltd**	**C Ltd**	**D Ltd**	**E Ltd**	**F Ltd**	**G Ltd**	**H Ltd**	**I Ltd**
Year 2012-13	9.90	9.00	10.15	10.85	11.10	9.95	11.15	8.85	10.30
Year 2013-14	10.15	9.95	12.00	11.15	11.25	10.58	12.45	10.07	11.78
Year 2014-15	10.50	9.70	11.90	13.10	11.18	10.90	14.00	10.63	12.90

Since how weight is to be given is not expressly mentioned, for simplicity weight 1 is given to profit margin of the financial Year 2012-13, 2 to the financial Year 2013-14 and 3 to the financial year 2014-15 and then weighted average profit margin of 3 years of each company is calculated below. (Though practically, weight is given based on total profit and total sales incurred for all the years in foreign countries)

Profit Margin*Weight	**A Ltd**	**B Ltd**	**C Ltd**	**D Ltd**	**E Ltd**	**F Ltd**	**G Ltd**	**H Ltd**	**I Ltd**
Year 2012-13*Weight 1	9.90	9.00	10.15	10.85	11.10	9.95	11.15	8.85	10.30
Year 2013-14*Weight 2	20.30	19.90	24.00	22.30	22.50	21.16	24.90	20.14	23.56
Year 2014-15*Weight 3	31.50	29.10	35.70	39.30	33.54	32.70	42.00	31.89	38.70
Total	61.70	58.00	69.85	72.45	67.14	63.81	78.05	60.88	72.56
Weight	6	6	6	6	6	6	6	6	6
Data Set=Total/Weight	10.28	9.67	11.64	12.08	11.19	10.64	13.01	10.15	12.09

Data points lying within 40th to 60th percentile of data set would constitute the range.

Hence 40th Percentile of above Data set is P_{40}= 10.746% &

60th Percentile of above Data set is P_{60}= 11.551%

Hence the range constituted is 10.746% to 11.551%.

Since profit margin earned by X Ltd from international sales transactions entered into with the associated enterprise X Inc. is 11%, it falls in the range and hence the profit margin is at Arm's length and no adjustments need to be made in transfer price.

If we compute ALP as per old provisions taking into account profit margins of comparable companies only for the Year 2014-15, the arithmetic mean of profit margins for the Year 2014-15 of above nine comparable companies comes to 11.65%.Considering existing +/- 3% adjustment criteria, the range comes to 11.30% to 11.99%, since net profit margin of X Ltd is 11%, the transfer price is not Arm's length price and adjustment needs to be made in transaction price.

(Author's Note: The above example is to understand the method prescribed in the draft scheme based interpretation, however the CBDT should clarify the method prescribed with detailed guidelines and examples so as to remove possible ambiguities which may be created due to different interpretations)

Thus it is evident from the above calculation that introduction of 'range' concept is indeed beneficial in computation of ALP. Instead of 40th to 60th percentile, the government can also introduce inter quartile range concept which is the internationally accepted principle and which is also supported by OECD transfer pricing guidelines.

In addition, there may be practical difficulties in getting data of 9 comparable entities having similar functions, assets and risks. Requirement of number of comparables can be somewhat reduced to 5 or 3 or different minimum number of comparables can be prescribed for different industries based on availability of data.

- It has also been mentioned that if the transfer price of the entity falls outside the range as constructed above, the median of the range would be taken as ALP and adjustment to transfer price shall be made. There shall not be two different data sets- one for testing and one for making adjustments. This line suggests that basic data used in computation of ALP and for construction of the range should only be used in making adjustment to transfer price if it falls outside the range. Adjustment cannot be made using different sets of data.

- The scheme permits usage of 3 years data including current year if methods used in calculation of ALP is TNMM, RPM or CPM. Hence, multiple year data cannot be used if method adopted is either CUP or PSM. Though the government has encouraged using multiple year data in the draft scheme, it still has limited the same only to 3 years. As mentioned above, general business cycle of any business is of 5 to 7 years and hence to remove any undue fluctuations; usage of at least 5 years data should be encouraged.

Conclusion

Introduced in 2001, Indian Transfer Pricing was until now called "a new born baby", but with proactive reforms suggested recently, it seems to be entering its "teen" phase. The new government has very well understood that unlike other laws, laws relating to transfer pricing by passes geographical limits and have global impact. We have very well observed in the recent past that any undue harassment to tax payers by amendments including retrospective amendments in the Act involving international transactions leave very harmful impact on sentiments of foreign investors and flow of Foreign Direct Investment in India gets terribly impaired. The Indian Income Tax authorities usually take an aggressive stand on transfer pricing issues due to which foreign investors feel lack of legal stability and business friendly environment in India. In such situation, new amendments and mechanism proposed by the government in transfer pricing laws regarding use of 'range' concept, use of multiple year data and roll back mechanism in Advance Pricing Agreements truly symbolize the government's trustworthy intentions to reduce long lasting litigations and to provide certainty. It is just the beginning and if the government takes into account valuable suggestions received by stake holders from all the over the world and to align the Indian transfer pricing regime as per the best practices available in the World, definitely, "Achhe Din" would follow.

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Section 14A Disallowance

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Introduction:

Section 14A has been inserted by the Finance Act, 2001 w.e.f 1.4.1962. The rationale behind insertion of this section was, expenditure which has a bearing on exempt income should not be considered in the computation of total income as otherwise this would result in double advantage to the assessee. For example when agricultural income itself is exempt from taxation, there is no justification to consider expenditure on agricultural activities in the computation of total income. The scope of section 14A has always been a mystery and subject matter of litigation between the tax payers and the tax collectors. Controversy has always emerged by decisions of various Tribunal Benches on this subject. In order to resolve those controversies, special benches of the Tribunal were constituted which resolved certain disputes between the parties. Subsequently, High Courts were also a part in solving such controversies and disputes. An attempt has been made to point out in this article few of the disputes and the actions taken by the honorable judges in this regards.

Section 14A:

Let us first go through the provisions of this section. Section 14A provides that in computing the total income of an assessee, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of total income under the Act. Subsequently, a proviso was added by Finance Act 2002 with retrospective effect from 11.5.2001. It provides that this section shall not empower the Assessing Officer (AO) either to reassess or pass an order enhancing the assessment or reducing the refund already made or otherwise increasing the liability of the assessee for any assessment year beginning on or before 1st day of April 2001. Sub sections 2 & 3 were inserted by Finance Act 2006 w.e.f. 1.4.2007. Sub section (2) empowers the AO to determine the amount of expenditure incurred in relation to such income which does not form part of total income in accordance with the method as may be prescribed. Such power is to be exercised if the AO, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of the expenditure mentioned in sub section (1). Sub section (3) provides that provisions of sub section (2) shall also apply where assessee claims that no expenditure had been incurred in relation to income not forming part of total income. By virtue of the powers conferred under sub section (2), Rule 8D was inserted by gazette notification dated 24.3.2008 which prescribes the method for computing the expenditure incurred in relation to the income not forming part of total income.

Rule 8D:

This rule was inserted by the IT (Fifth Amdt) Rules, 2008, w.e.f 24-03-2008. This rule provides an aid to the AO to find out the correct expenditure in connection to the exempt income where, he is not satisfied with the correctness of the claim of expenditure made by the assessee or where no expenditure has been claimed to be related to the exempt income. The rule provides a condition for aggregation of all the three type of expenditures mentioned below:

a. Whole of the expenditure directly related to the income which does not form part of total income.

b. Apportionment of expenditure by way of interest which is not directly attributable to any particular income or receipt.

c. An amount equal to one-half percent of the average of the value of investment, income from which does not form part of the total income, as appearing in the balance sheet of the assessee, on the first and the last day of the previous year.

Applicability of Section in absence of Exempt Income:

It is to be understood that for disallowance of expenses the existence of income is not necessary. Merely because no income was received during the year from investments, it cannot be a ground for claiming exclusion from the provisions of section 14A when the income even if received is not taxable at all.**[Insaallah Investments Ltd. Vs. ITO (2008) 23 SOT 130 (Del)].** Also refer to the **Circular No. 5/2014 Dt. 11/02/2014**.

If the expenditure is incurred in relation to income which does not form part of total income, it has to suffer disallowance irrespective of the fact whether any income is earned by the assessee or not. Section 14A does not envisage any such exception. When prior to introduction of Sec 14A, an expenditure both under sections 36 and 57 was allowable to an assessee without any requirement of earning or receipt of income, such condition cannot be imported when it comes for disallowance of the same expenditure u/s 14A.

All expenses connected with the exempt income have to be disallowed under section 14A regardless of whether they are direct or indirect, fixed or variable and managerial or financial in accordance with law

Where the assessing officer wants to disallow expenditure incurred for earning the exempted income, he has to pin-point the particular expenditure, which he alleged to be incurred for earning such exempted income. He has no authority to artificially attribute or apportion a part of the expenditure which is otherwise incurred for the purpose of the assessee's business. Not only incurring of the expense but also its relationship with the exempted income must be clear and capable of being ascertained.

In case of Karnavati Petrochem Pvt Ltd (ITA No: 2228/AHD/2012) Ahmedabad Bench has taken a view that when no nexus is proved between the amounts incurred and tax free income earned, the disallowance as per the Rule 8D is not justified. Addition on account of estimated administrative expenses can be done. Also refer ITA No:305/ MDS/2013, DCIT Vs. M/s.Allied Investments Housing Pvt Ltd.

However very recently a contrary view has been taken by Delhi High Court in case of **CIT Vs.Holcim India P.Ltd (2014 90 CCH 0081 Del),** Income exempt under Section 10 in a particular assessment year, may not have been exempt earlier and can become taxable in future years. Further, whether income earned in a subsequent year would or would not be taxable, may depend upon the nature of transaction entered into in the subsequent assessment year. It is an undisputed position that respondent assessee is an investment company and had invested by purchasing a substantial number of shares and thereby securing right to management. Possibility of sale of shares by private placement etc. cannot be ruled out and is not an improbability. Dividend may or may not be declared. Dividend is declared by the company and strictly in legal sense, a shareholder has no control and cannot insist on payment of dividend. Hence Where no dividend income was earned by assessee , disallowance u/s 14A is not warranted.

ITAT bench Bangalore, in an unreported judgement has held that section 14A disallowance cannot be invoked when there was no exempt income in previous year. Hon. judges declines to accept Revenue's reliance on CBDT circular No. 5 of 2014 dtd Feb 11,2014 and held that "The Board circular which is contrary to the Hon'ble High Court's decisions cannot therefore be the basis to sustain the disallowance made by the Revenue authorities";

A favorable view has been taken by Mumbai High court in case of **Reliance Industries Ltd, [2010] 8 TAXMANN.COM 218 (BOM)** that incurrence of administrative expenditure is not at all required for earning dividend income. The AO has to find out from the fact of the case that actually certain expenditure has been incurred

Section 14A vis a vis Section 36

Disallowance would be justified u/s 14A even if the expenditure incurred in relation to income not forming part of total income is otherwise allowable u/s 36(1)(iii)/57(iii). In case where expenditure is incurred by the assessee as an investor in shares,

the disallowance under this section would be justified since the income arising in form of dividend would not form of total income.

It can be stated that where the assessee is in the business of purchase and sale of shares, once the purchase and sale of shares is held to be a business activity, the interest paid thereon has to be treated as business expenses and no disallowance can be made u/s.14A**. Zaveri Virjibhai Mandalia Vs.ACIT [(2012) 33 CCH 592 AhdTrib]**

It was held that, the expression "in relation to" in sub section (1) would encompass direct as well as indirect expenditure and therefore disallowance in respect of both the expenditure would be justified.

[I.T.O V. Daga Capital Management (P) Ltd 117 ITD 169 (SB)]

Godrej & Boyce vs. DCIT (Bombay High Court)(2010)

This is an important decision on the validity of the provisions and the retrospective applicability of section 14A (2), section 14A (3) of the Act and Rule 8D. While on the constitutional validity of section 14A(2), section 14A(3) and Rule 8D, the Bombay HC has ruled against the taxpayer, it has nevertheless held that the power of the AO to apply Rule 8D is not automatic and the AO is bound to give an opportunity to the taxpayer to prove the correctness of his claim. It is only where the AO is not satisfied with the claim of the taxpayer can he apply Rule 8D after recording reasons. This decision is welcome in so far as retrospective applicability of Rule 8D is concerned as it overrides the decision of the Special Bench of the Tribunal in the case of Daga Capital Management Private Limited, which held that Rule 8D was applicable retrospectively. The same conclusion is also applied in case **Birla Corporation Ltd. 43 Taxmann.com 276 (Calcutta) [2014]**

Even prior to Assessment Year 2008-09, when Rule 8D was not applicable, the Assessing Officer has to enforce the provisions of sub section (1) of Section 14A. For that purpose, the Assessing Officer is duty bound to determine the expenditure which has been incurred in relation to income which does not form part of the total income under the Act. The Assessing Officer must adopt a reasonable basis or method consistent with all the relevant facts and circumstances after furnishing a reasonable opportunity to the assessee to place all germane material on the record.

Section 10(2A)

By virtue of sec 10 (2A) shares income is not included /includible in total income of the assessee partner. In other words it does not form part of total income of partner and therefore expenditure incurred in earning that income would not be allowable. However, if a partner gets bonus, commission, remuneration, interest from the firm which is allowed as deduction and the partner has a source of income under the head 'business' against which expenditure incurred by the partner, i.e interest paid on borrowed capital can be claimed as deduction.

[A.H.Baldota V. Asstt. CIT (2007) 103 TTJ (Mum Trib) 517]

When capital contribution is made by the partner for the purpose of earning interest and share income both the payment of interest would be allowable as deduction u/s. 36 and section 14A would not come in to play since interest income is taxed as Business Income by virtue of section 28 (v). But if it was solely for earning share income from the firm or if there is no interest income from capital contribution made to firm than the same would be disallowed u/s. 14A.

This was laid down by the **Kerala High Court in the case of CIT v. Popular Vehicles & Services Ltd. 228 CTR 346** where a corporate assessee was partner in a firm exclusively to earn share of profit with no interest income and it had paid interest on borrowings for investment as capital the payment of interest was held not allowable under section 14A.

In the case **Reliance Utilities & Power Ltd** (ITA No 1398 of 2008-order dated 9.1.2009 of Hon'ble Bombay High Court), the assessee made investment of Rs.389.60 crs in shares on which tax free dividend income was received. It was the case of the assessee that there were sufficient funds available in the form of share capital (180crs),

reserve & surplus (215crs) for making investment in shares. On the other hand, case of revenue was that share capital and reserves etc. had already been invested in acquiring in fixed assets. The Tribunal found force in the contention of assessee. On appeal, the Hon'ble high court observed that there was no evidence to show that share capital, reserves etc. were invested in fixed assets and therefore finding of fact recorded by tribunal was to be accepted. However, it is pertinent to note the observations of the Hon'ble court in para 10

"If there be interest free funds available to an assessee sufficient to meet its investments and at the same time the assessee had raised a loan it can be presumed that the investments were from the interest free funds available."

Similar view has been taken by the Hon'ble Calcutta High Court in the case of **Britannia Industries** 280 ITR 525

In case of **CIT V Hero Cycles**, 323 ITR 518 Punjab & Haryana High court has held that the contention of the revenue that directly or indirectly some expenditure is always incurred which must be disallowed u/s 14A cannot be accepted. Disallowance u/s 14A requires a finding of incurring of expenditure. If it is found that for earning exempted income no expenditure has been incurred, disallowance u/s 14A cannot stand. Hence nexus for incurrence of expenditure with the exempted income has to be primarily proved. Based on the above decision a similar view was taken by ITAT Mumbai in case of **Pawankumar Parmeshwarlal vs. ACIT** and **DCIT vs. Jindal Photo Ltd. (ITAT Delhi)**

The jurisdictional high court has very recently in case of **Gujarat Power Corporation Ltd [2014] 44 taxmann.com 359** held that where assessee did not invest borrowed funds for earning tax-free income, no part of interest paid on borrowed funds could be disallowed under section 14A. The onus to prove that borrowed funds have not been invested shall be on the assessee.

<u>Applicability in case of Shares held as Stock In Trade</u>:

When assessee had not retained shares as stock with intention of earning dividend income but such income was incidental to business of sale of shares, no notional expenditure could be deducted by invoking section 14A. (ITA No: 848/Ahd/2012). (ITA No: 2449/Ahd/2008). However contrary has been taken by many tribunals.

Important Issues:

1. Disallowing expenditure by ½% of the average of the value of investment as per Rule 8D seems arbitrary and not equitable. In a case where there is no income at all but only loss is incurred, this ad hoc addition to income by way of disallowance under the notification would cause unwarranted hardship.
2. AO not to have suo motto right to resort to Rule 8D.
3. Prescribed method is retrospective or Prospective: The "Prescribed method" was announced by notification dated 24-3-2008, hence applicable from A.Y 08-09. Provisions of sub section (2) & (3) being in the nature of procedural law are applicable retrospectively.
4. Rule extends to disallowing other expenses or indirect expenses except in case of interest.
5. Whether addition on account of applying section 14A attracts penalty under section 271 (1)(c) : Only when there is concealment of income or the particulars of income furnished are inaccurate, the provisions of this section is attracted.
6. Depreciation is not expenditure but an allowance and hence not to be considered for calculation under rule 8D.
7. Incurrence of expenditure is not at all required for earning exempt income.

As could be seen from the above discussions a few issues need to be addressed by the law makers to avoid litigation. The disallowance of assumed indirect expenses on a percentage basis would nullify the exemption itself. I hope the above discussion has covered all the major issues and the readers would be satisfied and appreciate the efforts put in preparing the article.

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Glimpses of Supreme Court Rulings

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10 Right to disclaim depreciation in its entirety:

It has been the consistent view of the Courts that unabsorbed depreciation allowance should be allowed before the unabsorbed investment allowance. To put it differently, unabsorbed depreciation is to be given precedence and is allowed to be set off first. Some of the High Courts had earlier taken the view that this would be so even if the assessee had not claimed the unabsorbed depreciation. It is the necessary consequence of the scheme of various provisions of the Act. Section 32A, which deals with investment allowance, was inserted by the Finance Act, 1976 with effect from 1-4-1976. According to Circular No. 202 dated 5-7-1976 issued by CBDT [(1976) 105 ITR St 17], the combined effect of the provisions of sections 32, 32A, 33, 33A and 72 is that in a case where there are allowances in the nature of depreciation allowance, investment allowance, development rebate, development allowance and losses, such allowances and losses would be deductible in the order given below, in cases where the profits are insufficient to absorb all of them:

(i) Current depreciation (section 32(1))
(ii) Carried forward losses of earlier years (section 72(1))
(iii) Unabsorbed depreciation of earlier years (section 32(2))
(iv) Unabsorbed development rebate of earlier years (section 33(2)(ii)
(v) Current development rebate (section 33(2)(i))
(vi) Unabsorbed development allowance of earlier years (section 3A(2)(ii))
(vii) Current development allowance (section 33A(2)(ii))
(viii) Unabsorbed investment allowance of earlier years (section 32A(3)(ii))
(ix) Current investment allowance (section 33A(3)(i))

It emerges from sub-section (3) of section 32A that unabsorbed investment allowance takes precedence over current investment allowance. [Para 15]

There is no provision by which depreciation could be fictionally deemed to have been claimed and granted and it is to be specifically claimed by the assessee. Further, when claiming of depreciation is a privilege given to the assessee, it cannot be turned into a disadvantage even when the assessee does not claim the depreciation. Therefore, option in this behalf rests with the assessee.[Para 16]

In the instant case, the assessee in fact claimed the depreciation allowance insofar as it pertained to the current year. At the same time, it did not want to claim the set off of the unabsorbed depreciation allowance of the previous years. In such situation, the question is as to whether it is open to the assessee to invoke the provisions of section 32 by claiming depreciation of the current year, but at the same time choose not to make a claim of set off of unabsorbed depreciation allowance of the previous years. By legal fiction unabsorbed depreciation becomes depreciation of the year in question and gets added to the depreciation of the current year. If that be so, is it the right of the assessee to partly invoke the provisions of section 32 when it comes to depreciation of the current year and still claim that it has right not to claim unabsorbed depreciation allowance? On a plain reading of section 32, it does not appear to be the position. Once the entire depreciation, namely, unabsorbed depreciation allowance of the previous year gets merged into the depreciation of the current year, it would become an integral part thereof. Legal fiction makes it one whole thereby making it possible to the assessee to claim set off of unabsorbed carried forward depreciation as well. A fortiorari, bifurcation thereof with option to claim depreciation of current year

contd. on page no. 225

From the Courts

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22

Disallowance of interest u/s. 14 A

C.I.T. V/s. Lakhani Marketing Industries (2014) 272 CTR 215 (P&H) : 111 DTR 0149 (P & H)

Issue :

Whether interest can be disallowed u/s. 14A when there is no tax free income?

Held :

Question was whether CIT (A) and ITAT were right in allowing deduction of interest liability out of other income and the claim of the revenue to disallow u/s. 14A was not correct.

C.I.T. (A) held as under :-

It was incumbant on the A.O. to establish a nexus between the expenditure incurred and the income which was exempt under the Act.

On appeal by Revenue, ITAT held that :

From the reading of Sec. 14A of the Act, it is clear that before any disallowance the following conditions are to exist:-

(a) There must be income taxable under the Act.

(b) This income must not form part of the total income under the Act.

(c) There must be expenditure incurred by the assessee.

(d) The expenditure must have a relation to the income which does not form part of the total income under the Act.

High Court held in favour of the assessee by observing that:

Disallowance u/s.14A requires finding of incurring of expenditure, when it is found that for earning exempted income no expenditure has been incurred, disallowance u/s. 14A cannot be made.

Also See. :

(1) CIT V/s. Holcim India (P) Ltd. (2014) 272 CTR 282 (Del.)

(2) CIT V/s. Shivam Motors (P) Ltd. (2014) 272 CTR 277(All).

(3) CIT V/s. Torrent Power Ltd. (2014) 272 CTR 270 (Guj.)

(4) CIT V.s. Corrtech Energy (P) Ltd. (2014) 272 CTR 262 (Guj.) : 223 Taxman 0130

23

Power to allow claim not made in the Return of Income.

C.I.T. V/s. Sam Global Securities Ltd. (2014) 272 CTR 290 (Del) : 360 ITR 0682 (Del)

Issue :

Can an assessee claim reduction of income otherwise than a revised return?

Held :

Assessee had not claimed exemption under Sec. 10(35) and the business loss in its return. During the course of the assessment proceedings, assessee filed revised computation of income claiming that dividend from the units of the mutual fund was exempt u/s.10(35), and loss on sale of units was a business loss and not speculation loss. A.O. rejected the said claims, interalia, on the ground that the assessee had not filed a revised return within the time allowed u/s. 139(5).

On appeal CIT(A) held that though the dividend was exempt and it was not speculation loss, the assessee had not filed revised return & hence the claim was not allowable.

Tribunal allowed the claim of the assessee.

High Court held that :

Tribunal was justified in reversing the said finding after referring to the factual matrix. Tribunal has

power to allow a claim which is not made in the return. Hence no interference is warranted with order passed by the Tribunal.

24 Sec. 179 when can be invoked ?:

Suresh Narain Bhatnagar V/s. I.T.O. (2014) 227 Taxman 193 (Guj.) (Mag.) : 367 ITR 0254(Guj)

Issue :

What procedure the ITO is required to follow before issuing notice to Director u/s. 179?

Held :

Provisions of Sec.179 can be invoked when any tax due from private company cannot be recovered from such company and, therefore, where A.O. did not make any efforts for recovery of tax dues from company, question of inquiring with petitioner as a director of company to pay up said amount would not arise.

25 Effect of income of impermissible deposits of a Charitable Trust : C.I.T. V/s. Fr. Mullers Charitable Institution. (2014) 227 Taxman 369 (SC)

Issue :

When a Charitable Trust has earned income from impermissible deposits, whether total denial of exemption would be permissible?

Held :

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

Special leave petition filed by the Department against the order of the High Court was dismissed by the Supreme Court.

26 Levy of Interest u/s. 234A, 234B and 234C: Requirement

C.I.T. V/s. Oswal Exports (2014) 369 ITR 630 (All)

Issue :

What is the pre-requisite when interest u/s. 234A, 234B and 234C is levied?

Held :

If the interest is leviable u/s. 234-A, 234-B or Section 234-C of the Act, such levy of interest is mandatory and compensatory in nature but in order to levy interest under these sections, the A.O. is specifically required to mention the specific section of charging interest, failing which, no interest could be levied under those sections.

(Ranchi Club V/s. C.I.T. (1996) 222 ITR 44 (SC) followed)

27 State as litigant : Duty thereof

CIT V/s. Larsen & Toubro Ltd. (2014) 272 CTR 336 (Bom) : 366 ITR 0502 (Bom)

Issue :

How the State should act as a litigant to file appeals before High Court?

Held :

The State is expected to act as a model litigant. It must set the example for the public to follow and we hope that this order acts as a reminder for all concerned to at least now take remedial steps and measures. It is therefore that despite the persuasive skills of Mr. Sureshkumar who fervently pleaded not to pass any order imposing costs, that we are constrained to impose costs.

The Revenue Officers must realize that just like other powers an executive power conferred in them is in the nature of trust. They hold office as trustees of the public at large. They deal with public revenue and that cannot be wasted in such frivolous litigation. We, therefore dismiss these appeals with costs quantified at Rs.1,00,000/- each. Costs shall be paid to the Maharashtra State Legal Services Authority, Mumbai, within a period of four weeks from today.

It would be open for the superior/competent authority to recover the costs personally from the officer responsible and equally take disciplinary action against him if the power to decide about filing such

appeals is abused or the decision making authority is utilized to harass innocent assesses. Every case must be dealt with on its merit and no routine exercise ought to be undertaken merely because the revenue impact is higher or the status of financial position of the assessee is influential and strong. That cannot be the only yardstick or criteria.

28 Reopening after four years: Sanction of Higher Officer is mandatory

C.I.T. V/s. H.M. Constructions (2014) 227 Taxman 229 (Karnataka) (Mag).

Issue :

For reopening of an assessment after four years whether sanction of higher officer is mandatory?

Held :

Having regard to the scheme of the provisions contained in Section 147 and 151, it is clear as crystal that if the assessment is reopened after expiry of the four years from the end of relevant assessment year, no notice under Section 148 shall be issued unless the Chief CIT. or C.I.T. is satisfied on the reasons recorded by the A.O. that it is a fit case for issuance of such notice.

The provisions contained in Section 151 are indubitably mandatory in nature and since compliance thereof was either not made or could be established by the revenue, benefit will have to be given to the assessee. Thus there is no reason to interfere with the finding recorded by the Tribunal.

In the result Revenue's appeal fails and is a dismissed as such.

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contd. from page 222

only and contending at the same time that portion of unabsorbed carried forward depreciation is not to be thrusted upon him as it is not claimed, would not be permissible.[Para 19]

[Seshasayee Paper & Boards Ltd. v. Dy. CIT (374 ITR 619) (2015)]

11 Writ – Scope of interference by Court:

That the High Court was wrong in saying that when the satisfaction recorded is justiciable, the documents pertaining to such satisfaction may not be immune and if appropriate prayer is made, the inspection of such documents may be required to be allowed. The High Court had committed a serious error in reproducing in great detail the contents of the satisfaction notes containing the reasons for the satisfaction arrived at by the authorities under the Act. This was highly premature having the potential of conferring an undue advantage to the assessee thereby frustrating the endeavor of the Department, even if the High Court were eventually not to intervene in favour of the assessee.

[Director General of Income-tax (Investigation) and others V/s Spacewood furnishers Pvt. Ltd. and others (374 ITR 595)(2015)

12 Writ – Scope of interference in contractual matters:

There is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when a monetary claim is raised. At the same time, a discretion lies with the High Court which under certain circumstances, it can refuse to exercise. Under the following circumstances, 'normally', the court would not exercise such a discretion : (a) the court may not examine the issue unless the action has some public law character attached to it ;(b) whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration; (c) if there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination ; and (d) money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.

[Joshi Technologies International Inc. Vs. UOI (374 ITR 322) (2015)]

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Tribunal News

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19 Critical Art & Media Practices vs. DIT(Exemption) 170 TTJ 401 (Mum) Assessment Year: 2012-13 Order dated: 11th March, 2015

Basic Facts

The DIT(E) had rejected the application for registration under section 12A of the Income tax Act of the assessee on the ground that the assessee trust has charitable as well as non-charitable objects such as hosting of artists-in-residence programmes for international artists and raising funds for organizing trips, seminars and conferences within and outside the country etc. The objects of the assessee trust were not merely confined to the territories comprising in India but also extended to and encompass the whole world. According to him any activities carried out by the applicant trust in pursuit of aforesaid objects would involve application of funds of the trust outside India which renders it ineligible for exemption.He therefore held that the objects of the trust contravene the provisions of section 11 of the Act wherein it has been specifically provided that the application of income of the trust has to be within India, therefore, the applicant trust would not be entitled to registration under section 12AA of the Act. Aggrieved by the order of the Learned DIT(E), the assessee is in appeal before Hon'ble ITAT.

Issue

Whether though as per provisions of section 11, income which is applied towards charitable activities in India only will be eligible for exemption, as per provisions of section 11(1)(c) income applied outside India is also eligible for exemption, if activities tend to promote international welfare in which India is interested and approval has been granted by CBDT for such application of income?

Held

A careful reading of the main provision of Section 2(15) reveals that for the purpose or activity to be charitable in nature, there is no condition that such an activity should be performed 'in India' only. Hence, the charity as per the provisions of the Act is not confined or limited to the boundaries of India only. If the activities of a trust fall within the domain of definition e.g. relief to the poor, education, medical relief or advancement of any other object of general public utility etc., then it is to be treated as a charitable trust. As per the provision of the clause (c) of Section 11(1), the income applied outside India for the purpose of promoting the international welfare in which India is interested is also exempt, subject to the condition of approval by the Board.For the purpose of grant of registration, the application of income in India is not a pre-condition, if its activities otherwise fall in the definition of 'charitable activities'. However, so far as the computation of income or the relief under the Income-tax Act is concerned, the Act has restricted the exemption from inclusion in total income to the extent such an income is applied in India.In the present case, the objects of the trust suggest that the trust has been formed to promote art and culture of India within India and globally which fall in the definition of 'any other object of general public utility' and, hence, included in the definition of 'charitable purposes'. However, so far as the application of income outside India, as claimed to have been applied to promote international welfare in which India is interested is concerned, it is to be proved with necessary evidences and also subject to approval of the Board for entitlement of exemption from tax on such income. However, the registration cannot be refused on the ground that the income is applied for charitable purposes outside India.

20 Johnson & Johnson Ltd. vs. ACIT170 TTJ 422 (Mum) Assessment Year: 2009-10 Order dated: 31st October, 2014

Basic Facts

The assessee filed the stay application seeking stay from collection of outstanding demand. Upon

hearing the submissions of both the parties the Tribunal noticed that most of the issues as stated before the Tribunal have been decided in favour of the assessee in the orders passed by the Tribunal in assessee's own cases for earlier years and therefore it was a fit case for granting stay. Accordingly, the demand was stayed till the disposal of the appeal by the Tribunal and the AO was directed not to make any adjustment. Despite a specific direction by the Bench the AO decided to adopt an innovative method of collecting the revenue by utter disregard of the Tribunal order and obtained a consent letter from the assessee and collected taxes during the subsistence of the said order.

Issue

Whether neither the assessee nor the revenue has the right to flout the decision of the Tribunal and whether being an officer functioning under the Government of India it is AO's obligation to follow the directions of the superior authority?

Held

The AO has followed an innovative method of collecting taxes despite specific directions of the Bench. The AO was called upon by the Tribunal and he tendered an unconditional apology for his conduct and submitted that it was collected with the consent given by the assessee. Thereupon the Representative of the assessee had no other alternative but to admit that he has given the consent letter. The tribunal clarified that neither the assessee nor the Revenue has the right to flout the decision of the Tribunal and being an officer functioning under the Government of India it is his obligation to follow the directions of the superior authority and even if there is consent he should not have collected the amount. The Hon'ble ITAT held that this practice of AO was not acceptable and it directed the Chief CIT to issue a letter to all the concerned AOs not to adopt this kind of approach of obtaining consent letters and to respect the order passed by the Tribunal as otherwise the Tribunal would be constrained to view the conduct of the Department adversely. Thus,with these observations the assessee was granted stay of collection of outstanding demand for a further period of six months and the AO was directed to refund the amount with interest.

21 Honda Motors & Scooters India (P) Ltd. v. ACIT 170 TTJ 273 (Del) Assessment year: 2006-07 Order dated: 13th April, 2015

Basic Facts

The assessee was a deemed public limited company which was incorporated in India as a subsidiary of Honda, Japan. It was engaged in the business of manufacture and sale of motorcycles and scooters in India.The assessee had made international transaction of purchase of fixed asset from its AE. The same was shown as ALP under the TNMM. The TPO proposed the transfer pricing adjustment on this score by considering the value of the transaction and then applying the differential profit rate of 7.12% on such value. In other words, the addition has been made on the value of international transaction of the purchase of fixed assets.The assessee contended that the TPO was not justified in proposing the transfer pricing adjusting with respect to the value of purchase of fixed assets. It was argued that only the depreciation element of such adjusted value of the international transaction of purchase of fixed assets would call for adjustment to the operating profits.

Issue

Whether an increase in value of fixed assets after application of ALP, being a capital transaction in itself, will not give rise to any addition towards transfer pricing adjustment, but depreciation on such assets, being a revenue offshoot of capital transaction, will be required to be recomputed on such revised value?

Held

On perusal of the meaning of an 'international transaction' as per Section 92B read with its explanation, it is abundantly clear that the purchase of fixed asset is also an international transaction. The Tribunal held that there cannot be any transfer pricing adjustment for the difference in the value of such international transaction and its ALP since section 92 is not a charging but a procedural provision for recomputing the income arising from an international transaction having regard to its ALP. Before applying the mandate of this provision, it is of utmost importance that there should be some existing income

chargeable to tax, which is sought to be recomputed having regard to its ALP. But if there is an international transaction in the capital field, which does not otherwise give rise to any income in itself, then even though its ALP may be computed in consonance with the provisions, no adjustment can be made for the difference between the declared value and the ALP of such international transaction. The computation of ALP is necessary because of the impact of such a transaction of capital nature on the transactions of its revenue offshoots. In the present context, the international transaction of purchase of fixed assets is required to be benchmarked as per the most appropriate method. The application of the ALP, if required, will give rise to the recomputation of the revised value of the purchase of fixed assets. Such an increase in the value of the fixed assets, being a capital transaction in itself, will not give rise to any addition towards transfer pricing adjustment, but the depreciation on such assets, being a revenue offshoot of the capital transaction, will be required to be recomputed on such revised value.Thus, the matter was set aside to TPO for the determination of the ALP of the international transaction of purchase of fixed assets and was directed that the depreciation on such fixed assets be computed on the adjusted value, if permissible, as per the relevant provisions.

22 Mahindra Forgings Ltd. Vs. ADIT (International Taxation) 153 ITD 388 (Pune)

Assessment Year: 2008-09 Order dated: 27th February, 2014

Basic Facts

The assessee-company was engaged in manufacturing of forgings for the automotive industry. It bought forge and similar machines from various parties located abroad. The assessee intended that heavy machinery needed to be properly erected, considering technical aspects of installation. The assessee thus agreed for separate consideration for transport/travel of the machines. The assessee also ordered the parties to supervise erection/installation of the heavy machines. For said purpose the assessee agreed to pay separate consideration for the technicians assigned by supplier. The Assessing Officer held that the assessee ought to have made TDS u/s 195 on the payments other than machinery cost considering the same to be covered under section 9(1)(vii). The CIT(A) confirmed the order of the Assessing Officer.

Issue

Whether so far as installation charges were concerned, since said charges formed integral part of purchase price itself, was it not obligatory on part of assessee to deduct tax at source while making said payments?

Held

The supervision of installation/erection of machinery is an activity which relates to sale of machinery and is of specific nature, i.e., hyper technical and its supervision of installation/erection of machinery was also hyper technical. The machines purchased are complex equipments and hence, could not be installed by any ordinary technical person. This is the reason the only machinery seller was given the contract of erection and installation supervision in these transactions. Such erection/installation of highly complex machines is not comparable to ordinary transactions of sale of modular furniture just because two separate agreements are reached, one for purchase-sale transaction and another for installation/erection and other related services. The principle of 'inextricable nexus' does not change. In this view, it is opined that supervision of installation/erection of machinery activity carried by non-resident relates to sale of machinery in such large contract. The installation charges form integral part of purchase price of machinery. In such a situation, it remains unaffected as to whether these installation charges are embedded in the cost of purchase price or, are charged separately. Thus, it was not obligatory on the part of assessee to deduct the tax at source.

23 DCIT Vs. Gupta Overseas 153 ITD 357 (Agra)

Assessment Year: 2008-09 Order dated: 4th February, 2014

Basic Facts

During the year under consideration, the assessee company made payment for 'design and development' to a concern owned by a Belgium

national/resident of Belgium. She had been paid for providing assessee samples and sketches, etc. to enable assessee to get information in respect of fashion trends in Europe.The AO held that the assessee was under an obligation to deduct tax at source from these payments, as required under section 195 r.w.s. 9(1)(vii) of the Act, and that the assessee having failed to comply with these tax withholding requirements, these payments were rendered ineligible for business deduction in view of the provisions of Section 40(a)(i) of the Act. On appeal to CIT (A), it held that payments made by the assessee in the nature of design and development charges is nothing but payments made on purchases of commercial information, by way of sample, drawing, photograph, design of shoes etc., from foreign parties outside India, and hence these payments are not taxable in India as not being in the nature of Fess for Technical Services, and, therefore, there is no obligation on the assessee to deduct tax at source on such payments.

Issue

Whether services for which payment in question had been made, were also clearly in nature of consultancy, even if not technical services, amount paid was very well covered by scope of article 12(3)(b) of India Belgian tax treaty, and assessee ought to have deducted tax from same?

Held

In this matter, the tribunal referred to Article 12- Royalties and Fees for Technical Services,of the Indo Belgian Tax Treaty according to which payment of any kind made to any person, "other than …….any individual for independent personal services as mentioned in Article 14 of the Treaty, in consideration for services of a managerial, technical or consultancy nature" is covered by the scope of fees for technical services. In the present case, the payment is not made to an individual. The fact that the entity to which payment has been made is owned by an individual, even if that be so, does not, take that outside the ambit of article 12(3)(b). The services, for which the payment in question has been made, are also clearly in the nature of consultancy, even if not technical, services. On these facts, it was held that the amount paid was very well covered by the scope of article 12(3)(b) of India Belgian tax treaty, and the assessee ought to have deducted tax from the same.

24 Rajya Krishi Utpadan Mandi Parishad Vs. ITO 153 ITD 101 (Lucknow) Assessment Year: 2001-02 to 2003-04 & 2006-07 Order dated: 22nd April, 2014

Basic Facts

The assessee filed its return claiming income as exempt by virtue of it being a local authority under section 10(20). The AO rejected the assessee's claim and raised certain amount of tax. Against assessment order, the assessee filed appeal before the CIT(A). During pendency of appeal, assessee filed an application for stay of demand. The CIT(A) rejected assessee's application. The assessee filed appeal to the Tribunal against the CIT(A)'s order rejecting stay of demand. In view of difference of opinion between the Members of the Tribunal the matter was referred to the TM.

Issue

Whether order passed by Commissioner (Appeals) on application seeking stay of demand is appealable before Tribunal?

Held

The power to grant stay of collection of tax is an inherent and incidental power of the appellate authority for the effective exercise of appellate powers. In the instant case, the regular appeal of the assessee is pending before the CIT(A), i.e., the first appellate authority at the time of passing of order on stay petitions so, he has the power to grant stay. However, no appeal is pending before the Tribunal and there is no specific express power with the Tribunal to entertain and dispose of such appeals, so the Tribunal cannot grant the stay of collection of tax by entertaining the appeals against orders of the CIT(A) for stay of recovery. In other words, the Tribunal cannot interfere with the order passed by the CIT(A) in his inherent and incidental power of its appellate jurisdiction. Accordingly it was held that appeal filed by the assessee against the order of the CIT(A) rejecting stay of demand is not maintainable.

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Controversies

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Set-up of business vs. Commencement of business and deduction of expenses.

Issue:

X ltd. is a company engaged in the business of development of industrial park. It has obtained certificate of incorporation, certificate of commencement of business, acquired land and applied for necessary permission from the Government Authorities. It has claimed that its business is set up and hence it is entitled to deduction of all expenses. The AO is of the view that since the industrial park is not developed, business is not set up and hence the expenses cannot be allowed as deduction.

Proposition:

It is proposed that when land is acquired, compound wall is constructed, project report is prepared, applications are made to appropriate authorities and competent directors are appointed. Business is set up and is ready to commence and hence expenses will be allowed as deduction. It is not necessary that actual business of development of industrial park should have commenced.

View Against the Proposition:

It is submitted that merely taking land on lease, obtaining certificate of commencement of business cannot be treated as setting up business/ commencement of business. Let me now refer to very useful and important decisions with regard to setting up of business vs. commencement of business.

In the case of *joint commissioner of Income-tax vs. Sardar Sarovar Narmada Nigam Ltd, ITAT Ahmedabad Bench 'B' [2005] 96 Itd 321 (Ahd)*, the Hon'ble ITAT laid following principles for the determination of setting up of business:

(a) There is a clear distinction between commencement of a business and the setting up of the business as there may be an interval between setting up of business and commencement of business.

(b) The question as to when the business can be said to have been set up and commenced will depend of facts and circumstances of each case and not on the accounting treatment of books of accounts of the assessee.

(c) It is only when the unit has been put into such a shape that it can start functioning as a business or a manufacturing organization that it can be said that the unit has been set up.

(d) The assessee can be said to have set up its business from the date when one of the essential categories of its business activities is started and it is not necessary that all categories of its business activities must start either simultaneously or that the last stage must start before it can be said that the business was set up.

(e) Expenses incurred during the preparatory stage prior to setting up of business would not qualify for deduction. However the expenses incurred during the intervening period between setting up of the business and the commencement of the business would be permissible deduction however, long the intervening period may be.

In the case of *Breeze Construction (P) Ltd Vs. ITO, Ward 3(1) – Delhi Bench 'A' [2012] 21 Taxmann.com 114 (Delhi)* it is held that Section 36(1)(iii) of the Income-tax Act, 1961 – Interest on borrowed capital – Assessment year 2001-08 – Assessee company took on lease a plot of land for running hotel business – For taking that plot of land, assessee took loan from its holding company and claimed deduction of interest paid – Whether since during relevant assessment year assessee company had merely taken land on lease, by no stretch of imagination it could be treated as commencement/

setting up of its hotel business – Held yes – whether, therefore, Assessing officer was justified in rejecting assessee's claim in view of proviso to section 36(1)(iii) – Held, yes.

In the case of *Interlink Petroleum Ltd. V. DCIT – Ahmedabad Bench 'c' [2004] 4 SOT 802* (Ahd) the Hon'ble ITAT Ahmedabad laid down various principles as under:

(a) There is a clear distinction between a person commencing and person setting up of the business. There may be an interval between setting up of business and the commencement of the business.

(b) When a business is established and is ready to commence then it would be said that the business is set up.

(c) The expenses incurred during the intervening period between setting up of business and commencement of business would be permissible as deduction. However, expenses incurred during the preparatory stage prior to setting up of business would not qualify for deduction

(d) The assessee can be said to have set up its business from the date when one of the essential categorizes of its business activities is started and it is not necessary that all categories of its business activities must start either simultaneously or that the last stage must start before it can be said that the business was set up.

(e) The question as to when business can be said to have been commenced will depend upon facts and circumstances of each case. The test to be applied is as to when a businessman would regard a businessman as being setup and/or commenced and the approach must be from a common sense point of view.

In case of *Maharashtra Airport Development Co. Ltd. vs. Maharashtra Airport Development Co. Ltd. [2013] 35 Taxmann.com 591 (Mumbai –Trib.)* it was held that Section 37(1) of the Income-tax Act, 1961 – Business expenditure – Allowability of [Commencement of Business operations] – Assessment year 2005-06 – whether, where assessee had only acquired land and appointed consultants for various business purposes, but had neither obtained environmental clearance nor favorable feasibility reports nor obtained approved plans of development, it could not held as 'Set up' and commencement of business operations with respect to business of development of airport infrastructure.

Section 56 of the Income-tax Act, 1961 – Income from other sources – Chargeable as [Interest] – Assessment year 2005-06 – whether Interest income, arising out of surplus funds not required immediately for business purpose and deposited in bank for short period is assessable as income from other sources and not business income.

In the case of *ALD Automotive (P.) Ltd V. DCIT Circle 15(1) Mumbai (2014) 45 taxmann.com 530 (Mumbai – Trib,* it was held that Section 37(1) of the Income-tax Act, 1961 – Business expenditure – Allowability of [Setting up of business] – Assessment year 2005-06 – whether, where state of preparedness of company was clearly in setting up stage – Held, yes – whether, where expenses were incurred by assessee prior to setting up of business, assessee's claim of allowance of business, assessee's claim of allowance of business loss during said period was not maintainable.

Thus, from the above referred case laws it is very clear that set up before the set up of business cannot be treated as business is ready to commence and hence the expenses will not be allowed as deduction.

View in Favour of the Proposition:

It is submitted that when certificate of commencement of business is obtained, land is acquired, resolution is passed by the BOD, applications/license has been applied from the Government Authorities and when MOU is also entered into by the company, the business is set up. It has been held by the Hon. Bombay High Court in the case of Vegetable products of India ltd. that when business is set up, it is ready to commence and actual commencement is not necessary for the purpose of deduction of expenses.

It is submitted that it is important to consider the decisions regarding the concept of ready to

commence business vs. actual commencement of business. This distinction is clearly spelt out in the following decisions.

In case of *E-Funds International DHC 162 Taxman 1,* Assessee was engaged in the business of development of software and IT enabled services. It was claimed by the assessee that since necessary infrastructure was set and technical employees to render IT services were employed hence business is set up. The claim of the assessee was accepted. In this case also, land is acquired, compound wall is constructed and competent expert directors are appointed for the purpose of the project and hence business is set up.

In case of *Neil Automation 120 Taxman 205,* Assessee was engaged in the business of distribution of software. The Hon. ITAT held that business is set up when assessee started approaching prospective customers and supplied quotations of software. In our case assessee approached Government of Gujarat, obtained leasehold land and entered into MOU with Government of Gujarat and hence business is set up.

In case of *Hughes Escorts FHC-213 CTR 45 & DEL ITAT – 106 TTJ 1065,* Assessee was engaged in Telecommunication Business (where VSAT equipment was necessarily required for effective communication). The assessee claimed that business is set up when letter of intent from prospective customer Bank of America for VSAT purchase was obtained (July 1994). The claim of the assessee was accepted. In our case also the company entered into MOU with state authorities of Government and also the project development agreement which goes to conclusively show that the intent of the company is established and hence business is set up.

In case of *Western India Sea Products Guj HC – 199 ITR 777,* Assessee was engaged in the Business of marine processing industry. The Hon. Jurisdictional High Court of Gujarat held that acquiring a godown in the month of August in anticipation of arrival of fish in October held to be date of setting up.

In case of *Mad HC in club Resorts 287 ITR 552*, the assessee was engaged in project execution and opened a project office in India. The assessee argued that business is set up when letter of intent was received though RBI approval was not received. The claim of the assessee was accepted by their lordships of Madras High Court. In this case it is submitted that business is set up when MOU is entered into with the Government of and lease agreement with GIDC for possession of land.

Let me refer the case of *Gujarat HC in Hotel Alankar 133 ITR 866,* the assessee was engaged in boarding and lodging house and assessee claimed that the business is set up when hotel building was acquired. The claim of the assessee was accepted by their lordships of High Court of Gujarat. In our case also the business is set up when land is acquired, compound wall is constructed, and project agreement is entered into.

In case of *Bang ITAT in Swire Holdings 6 SOT 621*, assessee was engaged into real estate business. Assessee claimed that business is set up when money was advanced for purchase of property. The Honorable ITAT upheld assessee's contention.

Summation:

It is submitted that, the company is awaiting various approvals from State Authorities for constructing various units/incubation centers etc. for Industrial Parks.

The company got incorporated and further, there are following evidences to prove that the business is set up.

1. Resolution of BOD regarding commencement of business.
2. A certificate of Commencement of business.
3. MOU with Government.

Hence the company has set up its business which can be seen from the facts that the company has constructed compound wall for the project and has applied for various approvals from the State Government Authorities.

Recently, the Delhi High Court in the case of Dhoomketu Builders & Development Private Limited1 (the taxpayer) upheld the decision of Delhi Bench of Income-tax Appellate Tribunal which has acknowledged the distinction between the commencement of a business and setting up of a

business and applied the test laid down by the Bombay High Court in the case of Western India Vegetable Products Ltd.

1. **Issue before the High Court**

   Whether the act of depositing earnest money while participating in the tender and the act of borrowing monies be construed as acts constituting setting up of the business of real estate development?

2. **Tax department's contention**

   Until the taxpayer actually acquires any land for the purpose of carrying on its business as per the objects clause of memorandum of association, the business cannot be said to have been set up within the meaning of Section 3 of the Act.

3. **Taxpayer's contentions**

   The business was set up the moment the taxpayer took steps to participate in the tender on 29 November 2005 and deposited the earnest money and it is irrelevant that it was not successful in acquiring the land.

   The setting up of the business could be either simultaneous with or anterior to the commencement of the business and in this case the moment the taxpayer borrowed money and deposited them with NGEF Ltd. and thus participated in the tender, it had taken the steps that constitute the setting up of the business.

4. **High Court's ruling**

   The decision of the Tribunal is based on the relevant tests that have been handed down judicially for the purpose of ascertaining as to when a business can be said to have been set-up.

The question as to when a business can be said to have been set-up is a question of fact to be ascertained on the facts and circumstances of each case and considering the nature and type of the particular business and no universal test or formula applicable to all types of business can be laid down.

The tax department's contention that the tax auditors of the taxpayer have pointed out that the taxpayer is yet to commence its business is irrelevant because of the distinction between the commencement of the business and setting-up of business as laid down by various judicial precedents, more so by Bombay High Court.

Since the Tribunal has taken the note of the distinction between the commencements of a business and setting up of a business and applied the test laid down by the Bombay High Court, there is no substantial question of law arises out of the order of the Tribunal.

Further I would like to submit that in the case of CIT vs. ESPN Software India (P) Ltd. ref no. ITA No. 516/2007, their lordships of Delhi High Court held as under:

A finding regarding the date when a business was set up is a finding of fact. Here in the present case, there is a finding of fact given by two statutory authorities below that Assessee was ready to commence its business on 15th August, 1995 when it acquired license to distribute in India through Cable Television Systems, Satellite Master Antenna System and DTH etc. The relevant findings of the Tribunal in this regard as under :- "The Assessee in the present case as one of its business activity distribution of T.V. programmes in the area of sports, entertainment etc. in furtherance of this objects referred to above it obtained the license from ESPN Inc. to distribute ESPN Channel Services. This was rightly held by the commissioner of Income Tax (A) to be the point of time when the business of the Assessee has been set up. By virtue of the license it could discharge one of its objects as set out in the Memorandum of Association of the Company. This was the activity, which was first in point of time and which must necessarily precede all other activities and on this activity being done, the business of the Assessee, would be deemed to have been set up."

Thus, when there is reference to object clause of Memorandum of Association for starting industrial park, assessee acquired land, applied for various approvals from Government Authorities and entered into MOU with Govt. the business of the company is set up and hence ready to commence and I submit that all the expenses must be allowed as deduction.

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Judicial Analysis

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Reassessment order without passing a separate speaking order disposing off the objections, is bad in law and required to be quashed.

General Motors India Ltd. Vs DCIT (354 ITR 244)(Guj)

From the aforesaid discussion, we are of the considered opinion that the writ petition under Article 226 of the Constitution of India is maintainable where no order has been passed by the Assessing Officer deciding the objection filed by the assessee under section148 of the Act and assessment order has been passed or the order deciding an objection under section 148 of the Act has not been communicated to the assessee and assessment order has been passed or the objection filed under section 148 has been decided along with the assessment order. If the objection under section 148 has been rejected without there being any tangible material available with the Assessing Officer to form an opinion that there is escapement of income from assessment and in the absence of reasons having direct link with the formation of the belief, the writ court under article 226 can quash the notice issued under section 148 of the Act. The writ petition filed by the petitioner is maintainable. The Assessing Officer is mandated to decide the objection to the notice under section 148 and supply or communicate it to the assessee. The assessee gets an opportunity to challenge the order in a writ petition. Thereafter, the Assessing Officer may pass the reassessment order. We hold that it was not open to the Assessing Officer to decide the objection to notice under section 148 by a composite assessment order. The Assessing Officer was required to, first decide the objection of the assessee filed under section 148 and serve a copy of the order on the assessee. And after giving some reasonable time to the assessee for challenging his order, it was open to him to pass an assessment order. This was not done by the Assessing Officer, therefore, the order on the objection to the notice under section 148 and the assessment order passed under the Act deserves to be quashed.

Darshan Associated vs. ACIT – ITA 1221/Ahd/ 2011

We find that, in the instant case, it is not in dispute that the assessee filed his objections against the issuance of notice u/s 148 of the Act vide his letter dated 11.11.2009 which was received by the office of the Assessing Officer on 16.11.2009. Thereafter, the Assessing Officer passed the impugned re-assessment order on 19.11.2009, disposing off the objections to re-assessment proceedings of the assessee in the order itself. Thus, these facts show that the objections raised by the assessee against the issuance of notice u/s 148 of the Act were not disposed off by the Assessing Officer by passing a speaking order thereon and allowing reasonable time to the assessee after communicating the fate of the objections before proceeding with the reassessment. The Hon'ble Gujarat High Court in the case of General Motors India P. Ltd v. DCIT (supra) has held as under:-

xxx..

Therefore, respectfully following the above decision of the Hon'ble Jurisdictional High Court, we are of the considered view that the impugned order of re-assessment passed by the Assessing Officer without disposing off the objections raised by the assessee against the issuance of notice u/s 148 by a separate order is liable to be quashed. We order accordingly. Thus, this ground of appeal of the assessee is allowed.

Bharuch Enviro Infrastructure Ltd. Vs. DCIT – ITA 731-2/Ahd/2007

We have heard the rival submissions and perused the material on record.It is an undisputed fact that the reasons for re-opening of assessment u/s.147 of the Act was recorded on 31.03.2005 and the same were communicated to the Assessee by ACIT vide letter dated 09.01.2006. In response to the notice for reopening, Assessee vide its letter dated 11.01.2006 had objected to initiation of re-assessment. Before us, ld.A.R. submitted that that the Assessee's objection to reassessment proceedings were not passed by a separate order

but were disposed by the A.O in the assessment order dated 22.03.2006 passed u/s. 143(3) r.w.s.147 of the Act and this fact has not been controverted by Revenue. We find that the Hon'ble Gujarat High Court in the case of General Motors India Pvt. Ltd. (supra) has held as under:-

xxx…

Before us, Revenue has not brought any contrary binding decision of Hon'ble Apex Court or Hon'ble jurisdictional High Court in support of its contention that the order disposing of the objections of the Assessee to reassessment proceedings along with the assessment order is in order and therefore valid as per law. We therefore, respect fully following the aforesaid decision of Hon'ble Gujarat High Court in the case of General Motor India Pvt. Ltd. (supra) quash the assessment order dated 22.03.2006. Since the re-assessment itself has been quashed, the grounds raised on merits are not decided. In the result, the appeal of Assessee is allowed.

ACIT vs. M/s. Sagar Developers – ITA No.1538/ Ahd/2011

We have heard the rival submissions and perused the orders of the lower authorities and material available on record. In the instant case, the respondent assessee in terms of Rule 27 of the Income Tax Appellate Tribunal Rules, 1963 supported the order of CIT(A) on the ground that the impugned assessment order was bad in law as the reassessment was made without disposing off the objections raised by the assessee against the initiation of reassessment proceedings by a separate order. We find that, in the instant case, it is not in dispute that the assessee filed his objections against the issuance of notice u/s 148 of the Act vide his letter dated 11.11.2009 which was received by the office of the Assessing Officer on 16.11.2009. Thereafter, the Assessing Officer passed the impugned re-assessment order on 20.11.2009, disposing off the objections to re-assessment proceedings of the assessee in the order itself. Thus, these facts show that the objections raised by the assessee against the issuance of notice u/s 148 of the Act were not disposed off by the Assessing Officer by passing a speaking order thereon and allowing reasonable time to the assessee after communicating the fate of the objections before proceeding with the re-assessment. The Hon'ble Gujarat High Court in the case of General Motors India P. Ltd v. DCIT (supra) has held as under:-

xxx…

8. Therefore, respectfully following the above decision of the Hon'ble Jurisdictional High Court, we are of the considered view that the impugned order of re-assessment passed by the Assessing Officer without disposing off the objections raised by the assessee against the issuance of notice u/s 148 by a separate order is liable to be quashed. We order accordingly. Thus, this ground of appeal of the Revenue is dismissed.

ACIT vs. ShriRajnikant B. Desai – ITA No.1567/Ahd/2011

After considering the rival submissions and going through the material available on record carefully, we find that the AO has made the reassessment without disposing of the objections of the assessee. An identical issue came up before the Tribunal and the Tribunal, in a recent decision in the case of ACIT, Cen.Cir.-2,

Baroda vs. M/s Sagar Developers vide order dated 10/04/2015 in ITA No.1538/Ahd/2011 for AY 2002-03 the Tribunal has decided the issue by observing as under :-

xxx…

Nothing contrary has been brought to our knowledge on behalf of Revenue. Facts being similar so, respectfully following the above order of the Tribunal and in view of the decision of the Hon'ble Gujarat High Court in the case General Motors India P. Ltd. vs.DCIT 354 ITR 0244 (Guj), and in view of the decision of Hon'ble Supreme Court in the case of CIT vs. Kelvinator of India Ltd.(supra) we are of the view that ld. CIT(A) has rightly annulled the assessment order. We find no infirmity in the order of ld. CIT(A). Therefore, the grounds raised by the Revenue in this appeal, have become in fructuous and hence dismissed. The appeal filed by the Revenue is dismissed. Since we are deciding the matter on preliminary issue we are refraining to comment on merit of the issue at hand. However, revenue is at liberty to raise the issue on merit as and when required to do so.

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Overview of Action Plan 15 of BEPS Project - Developing a Multilateral Instrument to modify Bilateral Tax Treaties

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In continuation to our series of detailed analysis of Action Plans of Base Erosion and Profit Shifting ('BEPS') project, in this article, we now have detailed below analysis of Action Plan 15 ie. Develop a multilateral instrument for amending bilateral treaties.

A. *Background*

Action Plan 15 has been initiated primarily to call for a report to "Analyse the tax and public international law issues related to the development of a multilateral instrument to enable jurisdictions that wish to do so to implement measures developed in the course of the work on BEPS and amend bilateral tax treaties."

Basis output of the report, interested countries will develop a multilateral instrument designed to provide an innovative approach to international tax matters, reflecting the rapidly evolving nature of the global economy and the need to adapt quickly to this evolution.

B. *Overview of the Report*

The report states that, the main objective of a multilateral instrument is to modify existing bilateral tax treaties which have revealed weaknesses that create opportunity of double non-taxation. These bilateral tax treaties are proposed to be modified in a synchronised and efficient manner to implement the tax treaty measures developed during the BEPS project, by recognizing the practical limitations of bilateral tax treaties.

The report not only explores the technical feasibility of a multilateral hard law approach and its consequences on the current tax treaty system but also identifies the issues arising from the development of such an instrument and provides an analysis of the international tax, public international law, and political issues that arise from such an approach. For reader's understanding, we have given below detailed analysis of the report:

(i) *Desirability of a Multilateral Instrument*

The Report begins with an examination of the desirability of a multilateral instrument and have identified below key reasons for which a multilateral instrument is desirable:

- It facilitates ease in implementation of the treaty-related BEPS output given the long process for individual bilateral treaty negotiations;
- It allow developing countries that face hardships in concluding or renegotiating treaties to fully benefit from the BEPS Action Plan 15;
- It result in easier way to address multilateral issues compared to bilateral treaties;
- Treaty negotiators will be focused on a single document therefore increasing consistency and continuing the reliability of the international tax treaty network; and
- It provides assurance that all countries are simultaneously determined to tackle BEPS issue.

For all the aforementioned reasons, the Report considers that such an instrument is desirable but that, in order to create a level playing field, broad participation to the multilateral instrument needs to be achieved.

(ii) Feasibility of a Multilateral Instrument

The Report goes on to examine feasibility of a multilateral instrument and have identified the following obstacles and solutions for such obstacles.

The key obstacle which report has identified is selection of one of the following three alternatives for executing multilateral instrument:

(i) a "self-standing instrument" which would wholly supersede existing treaties;

(ii) an instrument that would merely operates a set of protocols amending each of the existing bilateral treaties specifically, and

(iii) an instrument that would coexist with bilateral treaties,

The report states that only the third option appeared to preserve tax sovereignty and achieve an efficient outcome as it would amend a limited number of provisions commonly found in bilateral tax treaties and, where not already included in those treaties, would add new anti-BEPS measures.

(iii) Technical challenges

The report further recognizes technical challenges that may arise on interaction between a multilateral instrument and bilateral tax treaties. It provides following possible solutions to such technical challenges:

- Potential conflicts that may arise between new multilaterally agreed provisions and similar provisions included in existing bilateral tax treaties could be resolved through the inclusion on specific "compatibility" clause in the multilateral instrument;
- Variations in the wording of similar provisions of existing bilateral treaties can be addressed through explanatory report providing interpretative guidance
- Express mechanisms and procedures could be developed into the instrument to ensure expeditious amendment in the future
- Other technical issues such as language and translation can be easily addressed through careful drafting of the instrument

The Report notes that these challenges may be resolved by the application of current best practices in treaty-making. Further, countries can be provided liberty to opt-out, opt-in or choose between the alternative provisions with respect to other issues covered by the multilateral instrument.

(iv) Scope of the Multilateral Instrument

The Report lists some of the treaty related measures to be developed in the BEPS project that are multilateral in nature and would be more effective if implemented by a multilateral instrument. Few of these treaty related measures include:

i. addressing multilateral mutual agreement procedure;

ii. dual resident structures;

iii. hybrid mismatch arrangements;

iv. triangular cases involving a permanent establishment (PE) in third states; and

v. treaty abuse.

The Report suggests that some or all of the above could be part of a set of core provisions to which all parties to the multilateral instrument should adhere. Other outputs of the BEPS project that are more bilateral in nature would require that more flexibility be granted to contracting parties in order to tailor their level of commitment towards other parties.

Finally, the Report indicates that the instrument could also be used for a wider range of BEPS related issues, such as rules regarding the confidentiality of information obtained by tax administrations (thereby facilitating the implementation of the country by country reporting template developed under Action 13 for example), a multilateral interest expense allocation agreement, or new dispute resolution mechanisms to avoid the potential for unilateral and uncoordinated responses to BEPS resulting in double taxation.

While the precise content of a multilateral instrument can only be defined once outputs of the BEPS project have been finalized, the Report concludes that the scope of the multilateral instrument should at this stage only include agreed treat based outputs of the BEPS project in order to ensure that it can be put in place within a reasonable timeframe. The instrument could then be used to host additional multilaterally agreed provisions in the future and should thus be viewed as dynamic.

C. *International Conference*

The Report recommends convening an International Conference to develop and negotiate the multilateral instrument in 2015. Once the recommendations for BEPS related treaty measures are finalized, they can be considered by the International Conference and included in the Multilateral Instrument.

In addition to implementing BEPS-related treaty measures, the International Conference would reflect on whether further protocols or similar multilateral instrument could be used in the future to foster a more effective international tax environment.

D. *Conclusion*

The multilateral instrument contemplated under Action Plan 15 is likely to be an important element of the OECD's efforts to maintain momentum and to achieve success in a timely manner. However, as a practical matter, role of any multilateral instrument and the impact such an instrument may have on businesses are unclear at this stage. Moreover, the appetite of countries to sign up to a multilateral instrument approach also is unclear.

Important to note that development of a multilateral instrument is a novel approach to international taxation that can potentially accelerate the implementation of a number of BEPS treaty measures. However, with the development of any new instrument, success or failure will depend largely on the number of signatory countries that will participate in the development of the multilateral instrument and the potential impact it will have on businesses.

Considering the importance of this Action Plan, Global businesses will want to continue to monitor developments for the same.

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FEMA Updates

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20 Rupee Drawing Arrangement - Increase in trade related remittance limit

The Reserve Bank of India has decided to increase the limit of trade transactions of Rupee/Foreign Currency Vostro Accounts of Non-resident Exchange Houses from the existing Rs. 5,00,000/- (Rupees Five Lakh only) per transaction to Rs. 15,00,000/- (Rupees Fifteen Lakh only) per transaction, with immediate effect. Further more, AD banks can now regularize payments exceeding the prescribed limit under RDA if they are satisfied with the bonafide of the transaction, and comply with the prescribed requirements

For Full Text refer to A.P. (DIR Series) Circular No. 102

https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=9730

21 External Commercial Borrowings (ECB) denominated in Indian Rupees (INR) – Mobilization of INR

Recognized non-resident ECB lenders may extend loans in Indian Rupees subject to, inter alia, the lender mobilizing Indian Rupees through a swap undertaken with an AD Cat-I bank in India. To facilitate ECB lending denominated in INR by overseas lenders, such lenders may enter into swap transactions with their overseas bank which shall, in turn, enter into a back-to-back swap transaction with any AD Cat-I bank in India as per the procedure prescribed.

For Full Text refer to A.P. (DIR Series) Circular No. 103

https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=9731

22 Rationalisation under LRS for Current and Capital Account Transactions

I. Liberalised Remittance Scheme (LRS) for resident individuals- increase in the limit from USD 125,000 to USD 250,000 and rationalisation of current account transactions

II. Remittance facilities for persons other than individuals Limit and Facilities under LRS

AD banks may now allow remittances by a resident individual up to USD 250,000 per financial year for any permitted current or capital account transaction or a combination of both. If an individual has already remitted any amount under the LRS, then the applicable limit for such an individual would be reduced from the present limit of USD 250,000 for the financial year by the amount already remitted. The permissible capital account transactions by an individual under LRS are:

i) opening of foreign currency account abroad with a bank;

ii) purchase of property abroad;

iii) making investments abroad;

iv) setting up Wholly owned subsidiaries and Joint Ventures abroad;

v) extending loans including loans in Indian Rupees to Non-resident Indians (NRIs) who are relatives as defined in Companies Act, 2013.

Further, to facilitate ease of transactions, all the facilities (including private/business visits) for release of exchange/remittances for current account transactions available to resident individuals under Para 1 of Schedule III to the Foreign Exchange

Management (Current Account Transactions) Rules, 2000, as amended from time to time, shall now be subsumed under the overall limit of USD 250,000. However, for item numbers as mentioned at (iv)[emigration], (vii)[expenses in connection with medical treatment abroad] and (viii)[studies abroad] in Para 1 of Schedule III provided at Annex 1, individuals may avail of exchange facility for an amount in excess of the overall limit prescribed under the LRS, if it is so required by a country of emigration, medical institute offering treatment or the university respectively.

As hitherto, the Scheme cannot be made use for making remittances for any prohibited or illegal activities such as margin trading, lottery, etc.

Remittance Procedure

Requirements to be complied with by the remitter

The resident individual seeking to make the remittances should furnish an application cum declaration in the format indicated in Annex 2 to the AD/ full fledged money changer (FFMC) concerned regarding the purpose of the remittances and declaration to the effect that the funds belong to the remitter and will not be used for the prohibited purposes referred to in Para 4 above. Resident individuals can also purchase foreign exchange from a full fledged money changer (FFMC) for private/business visits. Foreign exchange thus purchased from an FFMC should also be reckoned within the overall LRS limit USD 250,000 and declared accordingly in the application-cum-declaration form submitted to the AD bank.

Requirements to be complied with by the Authorised Persons

5.2 While allowing the facility to resident individuals, Authorised Persons, including AD Category II and FFMCs, are required to ensure that the; 'Know Your Customer'; guidelines and the Anti-Money Laundering Rules in force have been complied with while allowing the transactions.

Requirements to be complied with by the Authorised Dealers

It is clarified that banks should not extend any kind of funded and non-funded facilities to resident individuals to facilitate capital account remittances under the Scheme.

The applicants should have maintained the bank account with the bank for a minimum period of one year prior to the remittance for capital account transactions. If the applicant seeking to make the remittances is a new customer of the bank, Authorised Dealers should carry out due diligence on the operations and maintenance of the account.

No part of the foreign exchange of USD 250,000 shall be used for remittance directly or indirectly to countries notified as non-cooperative countries and territories by the Financial Action Task Force (FATF) from time to time and communicated by the Reserve Bank of India to all concerned.

Reporting of the transactions

Authorised Dealers may arrange to furnish on a monthly basis information on the number of applicants and total amount remitted under LRS to the Chief General Manager, External Payment Division, Foreign Exchange Department, Reserve Bank of India, Central Office, Mumbai - 400001 through Online Return Filing System (ORFS) only.

Facilities for persons other than individuals

Persons other than individuals can make remittances for

i. Donations for educational institutions;

ii. Commissions to agents abroad for sale of residential flats/commercial plots in India;

iii. Remittances for consultancy services and

iv. Remittances for reimbursement of pre-incorporation expenses within the limit and conditions laid down therein.

While making the above remittances, such persons shall submit to the concerned AD branch a

declaration to the effect that the limits and conditions relating to the remittances have been complied with.

For Full Text refer to A.P. (DIR Series) Circular No. 106

https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=9756

23 Subscription to chit funds by Non-Resident Indian on non-repatriation basis

The following revised terms and conditions are required to be complied with for a Non-Resident Indian to subscribe to chit funds, without limit, on non-repatriation basis:

i. The Registrar of Chits or an officer authorized by the State Government in accordance with the provisions of the Chit Fund Act in consultation with the State Government concerned, may permit any chit fund to accept subscription from Non-Resident Indians on non-repatriation basis;

ii. The subscription to the chit funds shall be brought in through normal banking channels, including through an account maintained with a bank in India.

For Full Text refer to A.P. (DIR Series) Circular No. 107

https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=9780

24 External Commercial Borrowings (ECB) for low cost affordable housing projects

Eligible borrowers can now continue using External Commercial Borrowings (ECB) for low cost affordable housing proects, under the approval route, subject to conditions initially stipulated in to A.P. (DIR Series) Circular No. 61 dated December 17, 2012 and A.P. (DIR Series) Circular No. 113 dated June 24, 2013 for the financial year 2015-16. The directions contained in this circular have been issued under Sections 10(4) and 11(1) of the Foreign Exchange Management Act, 1999 (42 of 1999) and are without prejudice to permissions / approvals required, if any, under any other law.

For Full Text refer to A.P. (DIR Series) CircularNo. 108

https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=9781

25 External Commercial Borrowings (ECB) for Civil Aviation Sector

Airline companies can now continue raising working capital through External Commercial Borrowings (ECB) as a permissible end-use, under the approval route, subject to conditions initially stipulated in A.P. (DIR Series) Circular No. 113 dated April 24, 2012 till March 31, 2016. The directions contained in this circular have been issued under Sections 10(4) and 11(1) of the Foreign Exchange Management Act, 1999 (42 of 1999) and are without prejudice to permissions / approvals required, if any, under any other law.

For Full Text refer to A.P. (DIR Series) Circular No. 109

https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=9782

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> Say, "I can do everything." "Even if poison of a snake is powerless if you can firmly deny it.
>
> **Swami Vivekananda**

Service Tax Decoded

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From the time of independence of India, taxation of a composite contract, comprising supply of goods and services, is subject to disputes and an issue, prone to litigation. India is a Federal Democracy, where two governments (Central Government and State Government) function simultaneously. The Constitution of India has segregated duties of each Government and also segregated powers of each Government and hence power to collect tax is also bifurcated between each Government. Central Government or a Parliament is not empowered to levy tax on items where State Government has power to levy tax. State Government is empowered to levy tax on sale of goods. Central Government has power to levy tax on any item on which State Government has no exclusive power to levy tax and thus Central Government can levy tax on services. However, in a Works Contract, both elements namely supply of goods and provision of service, are involved and both Governments can levy taxes on such contract. As none of the Government is ready to let go his slightest share of revenue, valuation of the works contract has become complex. Frequent changes in law and various changes in interpretation by courts, including Supreme Court, has made it very difficult to ascertain the tax liability.

Taxation of service tax on services involved in such contract is depended on taxation of local Value Added Tax/Sales Tax (VAT) involved in. Further, each State has different law for VAT and as taxation of service tax is depended on taxation of local VAT. It may happen that the same transaction may be taxed or valued for service tax purpose differently in different States.

Further, valuation of such contracts is also not easy. Many a time, it is practically impossible to separate the value of goods and services or keep records for goods and services. In such case, assessee ends up paying taxes (VAT and Service Tax) on value which is more than the value of contract itself. In such cases, it is necessary to understand the basic provisions related to works contract provided in service tax related law.

Following issues are discussed here below for discussing intricacies of service tax related law.

1. M/s. LNT Infrastructure Ltd. (LNT) is awarded a contract from National Highway Authority (NHA) for construction of a public road for Rs. 100 Cror which includes material and labour. Activities to be performed are broadly as under.

(Rs. in Crores)

Sr.	Activity	Value of Services	Material + Service	Probable Total Costing
1	Surveying	1.00		1.00
2	Site Formation and Clearance	5.00		5.00
3	Leveling of Land	10.00		10.00
4	Laying of Stones for Base	8.00		8.00
5	Supplying Miscellaneous Labour	8.00		8.00
6	Supply of Crane/Heavy Machinery	7.50		7.50
7	Internal Audit for Project	0.50		0.50
8	Marking on Road		6.00	6.00
9	Signboards Alongside a Road		4.00	4.00
10	Laying of Final Layer of Road		40.00	40.00
Total Costing		**40.00**	**50.00**	**90.00**

M/s. LNT is going to award sub-contracts for above activities to different sub-contractors. Activity No. 1 to 7 (Service only contracts) are being awarded to M/s. ABC Engineering, internal audit (Activity at Sr. No. 7) to be performed by Mr. BIG CA and Activity No. 8 to 10 (Works contracts) are being awarded to M/s. XYZ Engineering. Please discuss.

I. Is M/s. XYZ Engineering required to pay service tax or can claim any exemption?

II. Can Mr. BIG CA ask for the exemption as his services are being exclusively for construction of road i.e. exempt services?

III. Is M/s. ABC Engineering required to pay service tax or can claim any exemption?

IV. What is the liability of service tax M/s. LNT is practically paying on exempt services of construction of road?

Ans.:

I. In terms of Entry No. 13(a) of the Notification No. 25/2012-ST, services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of a road is exempt from service tax. Hence, services provided by main contractor, M/s LNT Infrastructure Ltd. (LNT) is exempt service tax. Further, in terms of Entry No. 29(h) of the Notification No. 25/2012-ST service by a sub-contractor, in his capacity as sub-contractor, providing services by way of works contract to another contractor providing works contract services which are exempt. M/s. XYZ Engineering (XYZ) is working as sub-contractor of LNT, contract between LNT and XYZ is a works contract, contract between LNT and NHA is also a works contracts and services provided by LNT to NHA is exempt. As all conditions specified in Entry No. 29(h) of the Notification No. 25/2012-ST are satisfied, services provided by XYZ to LNT is exempt from service tax.

II. Services provided by Big CA is not covered under works contract and hence can't be covered Entry No. 29(h) of the Notification No. 25/2012-ST. Even if services are exclusively used by the principal contractor for providing exempt services, such input services do not become exempt automatically.

III. M/s. ABC Engineering (ABC) has undertaken various activities which are integral part of the construction of road. However, contract between ABC and LNT is not a works contract as transfer of property in goods is not involved and hence services provided by ABC is not exempt under Entry No. 29(h) of the Notification No. 25/2012-ST.

In terms of Section 65F(1) of the Finance Act, 1994 reference to a service (main service) shall not include reference to a service which is used for providing main service. Thus, services provided by ABC are to be classified independently without reference to main service i.e. construction of road. Services provided by ABC may be classified under Survey Service, Site Formation Service, Manpower Services etc. and not exemption is provided to such services. However, if looking at the terms of the contract, if services provided by ABC can be classified as construction of road, ABC can claim the exemption under Entry No. 13(a) of the Notification No. 25/2012-ST.

IV. Even if Government intends to exempt the construction of road, major amount (40% in this case) is subject to service tax by way tax on services provided by sub-contractor to main contractor. Main contractor, i.e. LNT is not required to pay service tax and hence can't take credit of tax paid by ABC and can't pass on the burden of tax to final consumer and hence such tax becomes it cost and has to consider this amount as cost while quoting rates for the contract.

2. M/s. Metal Craft is engaged in supply, erection and installation of Aluminum windows. For a works contract of Rs. 300 Lakhs, they have paid local VAT on Rs. 250.00 Lakhs i.e. on actual value of property in Aluminum Panels and Glass transferred in execution of works contract and has paid service tax @ 14% on rest of Rs. 50 Lakhs for installation. Based on the cost sheet, Central Excise Officer is having opinion that at

around 40% of total contract is pertaining to services and M/s. Metal Craft should pay service tax on Rs. 120 Lakh. Is contention of the Central Excise Officer correct?

Ans.:

In terms of Explanation (c) to Clause (i) of Rule 2A of The Service Tax (Determination of Value) Rules, 2006, if value added tax or sales tax is paid on actual value, that value is to be adopted as value of goods involved in execution of works contract for the purpose of payment of service tax also. There is no condition that such goods should be valued at market value. As M/s. Metal Craft has paid value added tax or sales tax on actual value of goods i.e. on Rs. 250 Lakh, that value is also to be adopted for valuation of works contract for service tax purpose. Thus, contention of the Central Excise Officer is not correct.

3. In the above example, suppose, local VAT is paid on Rs. 150 Lakh only, in this case, does M/s. Metal Craft has option to pay service tax on 40% of the value as provided under Rule 2A(ii) of the Service Tax (Determination of Value) Rules, 2006?

Ans:

In terms of Rule 2A(ii) of the Service Tax (Determination of Value) Rules, 2006, the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable, in case of original works, on forty per cent of the total amount charged for the works contract. However, reference to Rule 2A(ii) can be made where separate value as prescribed under Rule 2A(i) is not determined. In this case, as M/s. Metal Craft has determined the separate value for the property involved in execution of works contract, they do not have an option to pay service tax on 40% of total value of the contract as provided under Rule 2A(ii).

4. M/s. Everest Cooling Company is providing services of supply, installation and erection of Central Air Conditioning Systems with material. They have maintained proper records from which they can ascertain proper value of the material involved in the execution of the works contract. They have opted to pay local VAT on composition scheme and paying VAT at reduced rate on entire value of the contract. However, for payment of service tax, they want to opt for separate value and pay service tax only on the service portion of the contract which will be determined after deducting the actual value of the material as per records they have maintained. Is M/s. Everest Cooling Company has option to go for such valuation or they are bound adopt composition rate for service tax as provided under Rule 2A(ii) of the Service Tax (Determination of Value) Rules, 2006?

Ans.:

In terms of Rule 2A(ii) of the Service Tax (Determination of Value) Rules, 2006, where the separate value has not been determined as provided under clause (i) of Rule 2A, the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable as provided in Rule 2A(ii) i.e. 40%/70% of total value of the contract. In terms of Rule 2A(i), separate value is to be determined may be based on valuation adopted for value added tax/sales tax or may be based on records maintained by the person liable to pay service tax. Rule 2A(i) does not stipulate that separate valuation to be arrived only from valuation adopted for value added tax/sales tax (VAT).

Explanation (c) to Rule 2A(i) reads that if actual value is offered for VAT, the same value should be adopted for service tax also. It doesn’t stipulate that if VAT is not paid on actual value, pay service tax on composition scheme.

CBEC has vide Para 9.2 of the Circular Dated 22-05-2007 from F. No. B1/16/2007-TRU, clarified that wherever the service provider maintains records, the value of services shall be the gross amount charged for the works contract less the value of transfer of property in goods involved in the execution of the works contract.

contd. on page no. 247

Service Tax - Recent Judgements

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15 Services provided by charitable organisations to their respective members would not be liable to service tax owing to principle of mutuality [2014] 47 taxmann.com 6 (New Delhi - CESTAT) CESTAT, NEW DELHI BENCH Federation of Indian Chambers of Commerce & Industry vs. CST, Delhi 2015 (38) STR 529 (Tri-Del)

Facts:- Services provided by FICCI & ECSEPC to their non-members is not covered by Club or Association's Services prior to amendment by Finance Act, 2011 and for period thereafter, demand cannot be enforced, as show-cause notice did not list out charge in view of amendment in law FICCI & ECSEPC, who are engaged in public service, are 'charitable' in nature and, therefore, their services will not fall under Club or Association's Services

Held:- It was held by ITAT that FICCI and ECSEPC are institutions having public service objectives and of a charitable nature - Hence, FICCI and ECSEPC are outside scope of club or association services . It was further held that in view of decision in Ranchi Club Ltd. v. Chief CCE & ST[2012] 36 STT 64/22 taxmann.com 217 (Jharkhand), on application of principle of mutuality, services provided by assessee (FICCI and ECSEPC) to their respective members would not fall under Club or Association service nor consideration by way of subscription/fee or otherwise received therefore be liable to service tax.

16 Whether services relating to conceptualizing, devising, development, modification etc. liable to service tax under the category of Management Consultancy Service

[2015] 38 STR 625 Jubiliant Enpro (P) Ltd. vs. CCE, Noida 2015 (Tri.-Del.)

Facts:- The appellant in this case provided advices relating to conceptualising, devising, development, modification, rectification or upgradation of working system of companies and also on commercial aspects, current developments, import and export policy of India, potential problems and solutions, marketing strategies, alter about potential misuse of IPRs, economic and political scenarios.

Held:- It was held by the Tribunal that these services are predominantly advisory and executory and directly connected with and useful for management of companies, hence liable to service tax as Management Consultancy Service.

17 Business Support Service [2015] 38 STR 606 Mettur Thermal Power Station vs. CCE(ST) Salem (Tri- Chennai)

Facts:- Here in this case the department sought demand of service tax on service charges collected from cement and asbestos sheet companies for disposal of fly ash on the ground that the said service charges are for providing infrastructure, water, lightning, road maintenance etc.

Held:- It was held that activity of collection and removal of fly ash as per rate of Tamil Nadu Government does not constitute infrastructural support service under business support service. The consideration is received for sale of fly ash and not for any services provided notwithstanding name under which it is collected.

18 Reverse Charge – Input of service [2015] 37 STR 358 Kingfisher Airlines P. Ltd. vs. CST (Tri.-Mum.)

Facts:-

Appellant and Indian company received loan from overseas lender. Insurance guarantee fee was paid by the overseas lender in respect of loan granted. Department argued that the service tax will be charged under reverse charge mechanism.

Held:- It was held that lender is the recipient of service and not the appellant though he may be the beneficiary. Hence reverse charge not applicable to the appellant as he is not the recipient of service.

19 Market Research Service - Cenvat Credit [2015] 38 STR 488 Kirloskar Enbara Pumps Ltd vs. CCE, Kolhapur 2015

Facts:- Appellant provided market research services to companies abroad and claimed refund of amount debited in cenvat credit account.

Held:- It was held that market research services provided to companies abroad is to be treated as export of service. In respect of refund claimed of amount paid through debit in CENVAT credit account it is held that, the question of unjust enrichment does not arise in case of export of service.

20 [2015] 56 taxmann.com 259 (Karnataka) High Court of Karnataka Commissioner of Central Excise and Service Tax v/s. Jacobs Engineering UK. Ltd.

A foreign company having no business establishment or operations in India, cannot be asked to pay service tax on services provided by it to Indian recipient merely because of a visit of its officers in India in course of providing service

Facts:- Assessee was situated in United Kingdom and having no office or branch in India. Assessee provided consultancy services to MCFL of India. Department argued that since officers of assessee-company had visited MCFL's Plant at Mangalore (India), hence, assessee was liable to service tax in India. Assessee argued that : (a) services provided from outside India and received in India could be taxed under section 66A only in hands of service recipient from 18-4-2006; (b) since assessee had no branch or establishment in India, it could not be liable to service tax

Held:- It was held that Service tax extends to whole of India (except State of Jammu and Kashmir); hence, tax liability cannot be imposed on a person or company situated outside India and having no business establishment or operations in India. Mere visit of officers of assessee-company at MCFL's plant at Mangalore (India) cannot lead to service tax, in view of fact that assessee has no branch or office in India.

21 Where there was practice of contractors to pay service tax on full value, separate confirmation of demand against sub-contractors would be unjustified, even if Cenvat credit rules may require otherwise; any such demand would be barred by principle of revenue neutrality [2015] 58 taxmann.com 154 (New Delhi - CESTAT) CESTAT, NEW DELHI BENCH DNS Contractor v. Commissioner of Central Excise, Delhi-I

Facts:- Assessee, a sub-contractor, did not pay service tax on services provided to main contractor, as full service tax had been paid by main contractor. Department argued that after introduction of CENVAT Credit Rules, 2004, all persons are liable to pay service tax on services provided by them with Cenvat credit benefit, if any.

Department argued that Tribunal cannot set aside demand on sub-contractors contrary to mandate of CENVAT Credit Rules, 2004 and cannot takeaway powers of Legislation

Held:- During relevant period, there was practice of contractors to pay service tax on full value; hence, separate confirmation of demand against sub-contractors would be unjustified, even if Cenvat credit rules may require otherwise - Where : (a) principal contractor has paid tax on entire value, (b) Revenue has already earned its share of tax whether coming from main contractor or from sub-contractor; (c) earlier clarifications of Board and judgments of Tribunal also favoured sub-contractors; (d) concept of service tax was still not clear; (e) this was a general practice/pattern in industry; (f) ex-chequer cannot be enriched on account of double taxation and (g) entire situation is revenue neutral; hence, demand was set aside. Matter was remanded to verify whether main contractor had paid tax on full value

No provisions of rules stand introduced by Tribunal in Cenvat Credit Rules. Only based upon interpretation of provisions of Cenvat Credit Rules

as also equity in tax as also on issue of revenue neutrality, demand was set aside.

22 Marriage is a social institution that existed much before religions came into being; hence, marriage is a social function and cannot be held as a religious function and services relating to thereto are taxable under Mandap Keeper's services

[2015] 57 taxmann.com 170 (Mumbai - CESTAT) - Commissioner of Central Excise, Pune-II v. Central Panchayat.

Facts:- Assessee rented out its hall for conducting marriages. Department argued that since marriage is a 'social function', it amounted to 'Mandap Keeper Services' Assessee argued that : (a) marriage is a religious function and not social function and therefore, activity was not taxable; and (b) Explanation added by Finance Act, 2007 providing that 'marriage' is a social function cannot be considered as retrospective.

Held:- It was held that Marriage is a social institution that existed much before religions came into being and, therefore, marriage cannot be held as a religious function. Law itself recognizes registered marriage as a legally valid form of marriage and there is no religious sanctity attached to such registered marriages. Therefore, mode of conducting marriages either by following religious rituals or otherwise does not make marriage a 'religious function'. Marriage is a 'social function' and insertion of Explanation by Finance Act, 2007 was by way of abundant caution. Therefore, service was held payable subject to cum-tax benefit, as service tax was not collected separately

Where assessee has not collected service tax separately and service is held to be taxable, assessee is entitled to cum-tax benefit .

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contd. from page 244

Service Tax Decoded

Thus, even if assessee has opted for composition scheme for payment of VAT, assessee may keep proper records and find out the separate values of goods and services and he is not forced to go for the composition valuation (40%/70%) for payment of service tax as provided under Rule 2A(ii) of the Service Tax (Determination of Value) Rules, 2006.

5. Shri Shamji Damji is a land owner and Shamji Development Pvt. Ltd. (SDPL) is a company developing residential construction on the land owned by Shri Shamji Damji. Separate value for land and construction is decided. Should SDPL opt to pay service tax under construction services if;

I. Value of land is required to be paid directly by the buyers to Land Owner and only value of construction is to be paid to SDPL?

II. SDPL is authorized to collect the money pertaining to Land, from buyer, in terms of Development Agreement between Shri Shamji Damji and SDPL?

Ans.:

I. In terms of Entry No. 12 of Notification No. 26/2012-ST, abatement in value of construction service is available only if value of land is included in amount charged. As amount charged by the SDPL does not comprise value of land, abetment of 70%/75% is not available to SDPL and SDPL should not opt for payment of service tax under Construction Service. In such a case, it will be better if SDPL pays service tax under Execution of Works Contract Services and adopt the valuation as provided in the Service Tax (Determination of Value) Rules, 2006 and pay service tax on 40% of the value of the construction excluding value of land.

II. If, in terms of Development Agreement between Shri Shamji Damji and SDPL, SDPL is authorized to collect the money pertaining to Land, from buyer, SDPL have an option to go for payment of service tax under Construction Service. In this case, SDPL can pay service tax on 30%/25% (after abatement) on total price of the unit, including value of the land.

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VAT - From the Courts

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8

Generation of Electricity is Manufacturing

Odisha Power Generation Corporation Ltd.V/s. State of Odisha & Another reported in (2015) 81 VST 138 (Orissa)

Background of the case:

The petitioner – dealer was engaged in business of generation of electricity and distribution thereof in the State of Odisha. It used coal as its primary or only raw material in its thermal power plant for manufacture of electricity and its certificate of registration under the Orissa Value Added Tax Act, 2004 and the Orissa Entry Tax Act, 1999 authorised it to purchase coal as raw material for generation of electricity. The dealer brought coal into the local area for manufacture of electricity and furnished declaration in form E-15 to its seller and paid entry tax thereon at the rate of 0.5 percent. On that basis, it was entitled to the benefit of concessional levy of entry tax in terms of rule 3 of the Orissa Entry Tax Rules, 1999. The assessing authority denied the concessional rate of entry tax on coal, distinguishing the decision of the court in Bhusan Power & Steel Limited Vs. State of Orissa (2012) 56 VST 50 (Orissa) holding that coal is a raw material for the purpose of generating electricity on the ground that such finding of the court was obiter dicta and the judgment having been challenged before the Supreme Court, the ratio decided in that case had no application to the present case. On a writ petition:

Held, allowing the petition, (i) that in view of the definition of "manufacture" as provided in Sec. 2(28) of the 2004 Act read with rule 2(1)(c) of the 1999 Rules and section 2(1) of the 1999 Act, the activity of generating electricity in a thermal power plant by using coal would qualify as a manufacturing activity.

9

Whether hydraulic excavator is machinery or motor vehicle ? Interpretation of taxing statute.

Commissioner of Commercial Tax V/s ANAND TYRES (2015) 81 VST 183 (A11)

Background of the case:

The dealer, imported "hydraulic excavator" and claimed that the said item is not a machinery under entry 2 of the schedule , but is a motor vehicle under entry 13. The claim of the dealer was rejected by Assistant Commissioner holding that disputed item is a machinery, hence is taxable at two per cent, imposed entry tax. The dealer preferred appeal before Joint Commissioner and in order commissioner held that the disputed item is governed by entry " motor vehicle of all kinds". The Revenue preferred second appeal which has been dismissed by Tribunal.

The term "machinery" is a wide term. It derives its meaning no doubt from the term "machine" but its scope is wider than the term "machine". The term "Machinery" includes something more than "machines" and in general it can be said to include : (i) machines of a particular kind or machines in general (ii) the working parts of a machine, and (iii) the means or system by which something is kept in action or a desired result is obtained. The general consensus in the context of "machinery" is that it is a device used for a particular purpose or result which takes energy in any form but results in combined functioning to achieve the work which otherwise may not be possible by human physical efforts or power, i.e. without help of such devices. The supply of power could be either by natural forces or human or animal energy or electronic energy or any other type of energy.

A "hydraulic excavator" would satisfy the meaning of term "machinery" in the wider sense and, therefore, it would be a machinery. However, where the Legislature in its wisdom has used or classified more items which though in a wider sense, are within the ambit of term "machinery" have been mentioned separately, and if that particular item, even if machinery, is governed by the separate narrower entry, then that specific separate entry shall prevail. In other words "machinery" is a general

item and when some kinds of machinery are separately mentioned, they would become "special entry" and shall prevail over the general one.

The term "Machinery" is a genus and "motor vehicle" is a species. Motor vehicle in the wider sense may specify the term "machine" and "machinery" but when a special entry is provided in the same salute differently then, the items which would specify the definition of "motor vehicle" will have governed by that entry and not by "machine" and "machinery".

A "hydraulic excavator" is a "machine" but since it is used for carrying goods like stone boulders, from one place to another and also for excavation, despite being a machine in the wider sense, it also satisfied the term "motor vehicle". It would be governed by entry 13 of the Schedule to the Uttar Pradesh Tax on Entry of Goods into Local Areas Act, 2007 for the reason that the Legislature has provided that motor Vehicles of all kinds are included there in excluding specifically only a tractor which otherwise would have been included in the term. An excavator would be governed by the entry and cannot transported by the excavator would make no difference for the reason that Legislature has used the term "motor Vehicle" in a very wide manner by providing that all kind of motor vehicles would be governed by entry 13 of the Schedule attached to the Act.

10 Whether discount is required to be deducted from Sale price for calculation of VAT liability?

MRF Limited V.s. Commissioner of Trade and Taxes (2015) 81 VST 461 (Delhi).

Background of the case:

While admitting these appeals, the following questions of law were formulated for consideration:

1) Whether the VAT Tribunal fell into error in holding that the discounts on sales were not deductible?

The appellant dealer was engaged in the business of manufacture and sale of tyres and tubes and marketed its products through various dealers. As a part of the marketing strategy for business promotion, the dealer adopted the policy of giving discounts to its dealer. One such discount was the "turnover discount", which was equal to one per cent of the product value in the invoice raised. The sale invoices issued invariably bore an endorsement "entitlement for one per cent Discount". Such discount, however, was given to the dealers once in a quarter, through "credit notes". The dealer's claim of deduction of "turnover discount" from the taxable turnover was rejected by the assessing authority primarily on the ground that revised returns had not been filed. The Additional Commissioner, on appeals, rejected the claims on the ground that the amount of discount was not known at the time of issuing the invoice, also observing that the discount allowed by the dealer did not result in the sale price being reduced and that such discount was similar to "bonus discount". The appeals preferred before the Tribunal were rejected, On appeals :

"Held , that the fact that the provision contained in sec. 2(m) of the Delhi Sales Tax Act does not conceive of any deduction other than "cash discount" from the sale price on which the turnover is to be computed is of no consequence, in as much as the effect of turnover discount, which is in the nature of a trade discount in accord with the prevailing practices of the trade, enters the calculation anterior to the computation of the sale price collected or collectible from the purchasers. In the scheme of turnover discount applied by the dealer each of its dealers would be entitled to one per cent rebate in the sale price irrespective of any particular sales target. It made no difference that the discount was calculated at quarterly basis and accorded through "credit notes". The credit notes issued pursuant to the understanding in the sale invoices declaring upfront the entitlement of the purchaser for such trade discount, would get effectuated by suitable adjustment in the payment of the sales price collected in their wake. The net effect apparently was of the price being correspondingly varied, the amount received or receivable, thus, not being inclusive of the discount allowed. Thus, the turnover for the assessment years in question was correctly computed by the dealer after deducting the turnover discount granted to its dealers and rightly so declared in the returns. The assessing authorities had unjustly denied the benefit of deduction on such account.

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VAT - Updates and Tribunal Judgements

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Statute Updates

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

[A] **Relief Scheme to Builders & Developers under the construction industry, extended upto 11th Aug. 2015:**

Vide Notification dated 26th May 2015 for the unregistered dealers or the dealers who have not paid the tax of their construction business, a relief scheme was announced on 14.10.2014 till 11th April 2015. After the date of relief is over, the department has started coercive steps on some builders through raid at their premises and collected some amount under the tax and penalty. On account of representation from civil works contractors and developers through their Association, the government has considered their request and the time of scheme is extended up to 11th August 2015. The main conditions are as under.

[i] Period of Extension is from 12.4.2014 to 11.8.2015.

[ii] Under the scheme, the dealer has to pay the total tax with interest on or before 11.8.2015 along with the application.

[iii] The conditions of remission of Interest and Penalty are as under.

[a] The interest will be levied @ 18% from 14.10.2014 till the date of payment and no remission will be given of the interest paid.

[b] The unregistered dealers who take the benefit of the scheme, they could not pay the interest as per the law. Under the circumstances, the interest is to be calculated @ 18% from 14.10.2014 ands that interest will be remitted against the proposed penalty i.e. the amount of penalty will be reduced to the extent of interest payable.

It is advisable that the benefit of scheme should be taken by the dealer who have not registered till date and thereafter option may be exercised for the composition scheme.

[B] **New Registration will be given within 24 Hours:**

Vide Notification dated 3.6.2015 issued by the Commissioner of Commercial Tax that for the dealer who has submitted required documents and papers with the application and complied with other terms, like deposit of challans etc., a registration certificate will be given within 24 hours of the verification of documents and spot visit of the place of business etc.

The Commercial Tax of Gujarat Government issued the guidelines for the registration on the website as under. The total guide line is reproduced hereunder for new registration with a view that the dealer prepared an application with all documents. The procedure of the registration is simple and easy.

Supporting Documents:

Form No. 101 is a format for application and available on web-site.

Dealer is required to fill in this Form No.101 along with photocopy of supporting documents.

List of supporting documents mandatory for submission.

[1] In case of Proprietorship:

[a] Proof of Ownership of Place of Business.

[b] Copy of Passport of Owner.

[c] Copy of Election Card of Owner.

[d] Copy of Registration Certificate issued by Custom and Central Excise Authority.

[e] Copy of Driving License of owner.

[f] Copy of last electricity bill of place of business.

[g] Copy of last bill of Property Tax of place of business or

[h] Copy of last telephone bill of place of business.

[2] In case of Private Limited or Public Limited Companies:

[a] Copy of the Registration Certificate issued by Registrar of Companies.

[b] Copy of Passport of a director.

[c] Copy of Election Card of a director.

[d] Copy of registration certificate issued by Custom and Central Excise Authority.

[e] Copy of driving license of a director.

[f] Copy of last electricity bill of place of business.

[g] Copy of last bill of Property Tax of place of business; or

[h] Copy of last Telephone Bill of place of business.

[3] In case of Partnership Firm, Hindu Undivided Family or in any other case:

[a] Copy of agreement.

[b] Copy of Passport of a Partner.

[c] Copy of Election Card of a Partner.

[d] Copy of Registration certificate issued by Custom and Central Excise Authority.

[e] Copy of driving license of a partner.

[f] Copy of last electricity bill of place of business.

[g] Copy of last bill of Property Tax of place of business or

[h] Copy of last Telephone Bill of place of business.

Registering authority will verify the documents and finding them satisfactory will generate Provisional Tin.

Registering authority will call dealer for physical verification of documents and order spot visit of business place.

After getting satisfactory spot-visit report, dealer shall be issued a registration certificate which the applicants' dealer can download at their end.

Registration authority is bound to approve or reject the application within 30 days.

If registration authority fails to decide on application within 30 days from the date of application, dealer shall get deemed registration automatically.

[II] **Important Judgment:**

[A] GVAT Tribunal in case of Gunjan Times.

Issue:

As per section 26(1)(d) of the Vat Act, if the dealer transferred the business from Proprietorship to Private Limited Co. whether new registration is to be taken or only amendment in the registration certificate is required?

Facts:

As per GVAT Tribunal in the above referred case only amendment in the Registration Certificate is required. The gist of the case is as under.

The appellant was a Proprietorship firm namely M/s. Gunjan Times engaged in the business of trading of watches and goggles. The appellant on dated 21.03.2012 along with other two persons incorporated a Pvt. Ltd. Co. in the name of M/s. Gunjan Times Pvt. Ltd. under the certificate of incorporation. The appellant as per the

provision contained in section 26(1)(a) made an application dated 30.04.13 for necessary amendment in the registration certificate. The appellant made an application as per Rule 8(1)(a) of the Gujarat Vat Rules in relation to the change in the ownership of the business along with the copies of Memorandum of Articles of Association of M/s. Gunjan Times Pvt. Ltd. However, the application for making amendment in the registration certificates was rejected by the Ld. Commercial Tax Officer. Accordingly, the appellant filed an appeal which was dismissed on the ground that M/s. Gunjan Times and M/s. Gunjan Times Pvt. Ltd. are separate legal entity and hence the amendment in the registration certificate cannot be granted. The appellant in the second appeal preferred against the order of the Appellate Authority and contended that the sub-clause (a) and (b) of section 26 very categorically provides that in case where registered dealer effects any change in ownership of business, shall give intimation of said change in the ownership to the assessing officer within 30 days. The appellant further submitted that the Appellate Authority has wrongly relied on the provision of section 51(2) which provides for fixing of liability of payment of tax in case of transfer of the business. The Hon'ble Tribunal after considering the facts of the case and submission made by both the parties has held that the appellant has not applied for cancellation of registration as neither the appellant has discounted its business nor absolutely transferred the business to the Pvt. Ltd. Co. The appellant has kept his interest in the business so transferred to the Pvt. Ltd. Co. and is also one of the Directors. Accordingly, the order of the Assessing Officer and Appellate Authority rejecting the application of amendment in the registration certificates are set aside.

[B] GVAT Tribunal in case of M/s. Shyam Plastic Machinery:

Issue:

Whether is it mandatory to produce the Bill of Lading for the claim of Form 'H'?

Facts:

Merely the absence of Bill of Lading, claim of Form 'H' cannot be rejected. The Hon'ble Tribunal in case of Shyam Plastic Machinery has decided that if the dealer has proved the export through various evidences, the claim of Form 'H' should not be rejected.

The gist of the judgment is as under.

The appellant was carrying the business of manufacturing and marketing of machinery and spares. The appellant was assessed for the period 1997-98 under the GST as well as CST Act. So far as the assessment under the CST Act is concerned, the appellant had sold goods in the course of interstate trade and commerce against form 'C' to the tune of Rs. 15,84,818/-. However, the appellant could not produce the C form of Rs. 1,56,000/-. The Ld. Assessing Officer without giving any reason, disallowed the claim of C form to the tune of Rs, 3,12,000/-The appellant has also sold the goods against Form H to the tune of Rs. 7,81,242/- and produced Form H along with the documents like transport receipts, invoices, packing verification report etc. The Ld. Assessing Officer has disallowed the claim of export against Form H without observing anything about the documents produced by the appellant. The first appeal was preferred in the office of the Ld. Dy. Commissioner of Commercial Tax, Appeal (2), Ahmedabad. The Ld. Appellate Authority has also not allowed the claim of export against Form H, as the appellant did not submit Bill of Lading. The claim

contd. on page no. 266

Corporate Law Update

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MCA Updates:

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

   Following Proviso in Rule 15 has been inserted:

   'Provided that no person shall be entitled under section 399 to inspect or obtain copies of resolutions referred to in clause (g) of sub-section (3) of section 117 of the Act."

   [F. No. 1/16/2013-CL-V dated 29th May, 2015]

2. **Companies (Registration of Charges) Amendment Rules, 2015:**

   In rule 3, in sub-rule (4), in clause (a), for the words "under the seal of the company", the words "under the seal, if any, of the company" shall be substituted.

   [F. No. 1/10/2013-CL-V dated 29th May, 2015]

3. **Companies (Incorporation) Second Amendment Rules, 2015:**

   Following changes have been made:

Rule 12 (Inserted)	Provided that in case pursuing of any of the objects of a company requires registration or approval from sectoral regulators such as Reserve Bank of India, SEBI, registration or approval, as the case may be, from such regulator shall be obtained by the company before pursuing such objects and a declaration in this behalf shall be submitted at the stage of incorporation of the company.
Rule 24	Omitted
Annexure	Existing e-form INC-13 (MOA for Section 8 Company) and INC-16 (Licence for Section 8 Company) have been replaced by the new INC-13 and INC-16.

   [F. No. 1/13/2013-CL-V dated 29th May, 2015]

4. **Companies (Declaration and Payment of Dividend) Second Amendment Rules, 2015:**

   In Rule 3, sub rule (5) shall be omitted.

   [F. No. 1/31/2013-CL-V-Part dated 29th May, 2015]

5. **Companies (Share Capital and Debentures) Second Amendment Rules, 2015:**

Rule 5 sub-rule (3)	For the words "issued under the seal" of the company, the words "issued under the seal, if any, of the company" shall be substituted.
Rule 5 sub-rule (3) [clause (b) sub-stituted]	The secretary or any person authorised by the Board for the purpose:Provided that in case a company does not have a common seat, the share certificate shall be signed by two directors or by a director and the Company Secretary, wherever the company has appointed a Company Secretary;Provided further that, if the composition of the Board permits of it, at least one of the aforesaid two directors shall be a person other than a managing director or a whole-time director;Provided also that, in case of a One Person Company, every share certificate shall be issued under the seal, if any, of the company, which shall be affixed in the presence of and signed by one director or a person authorised by

	the Board of Directors of the company for the purpose and the Company Secretary, or any other person authorised by the Board for the purpose, and in case the One Person Company does not have a common seal, the share Certificate Shall be signed by the persons in the presence of whom the seal is required to be affixed in this proviso.

[F. No. 1/4/2013-CL-V dated 29th May, 2015]

6. Exemptions to Government Companies under section 462 of Companies Act, 2013:

Various exemptions have been provided to the Government Companies and subsidiary of Government Companies.

For details please refer the following link:

http://www.mca.gov.in/Ministry/pdf/Exemptions_to_govt_companies_05062015.pdf

[F. No. 1/2/2014-CL.V dated 05th June, 2015]

7. Exemptions to Nidhi Companies under section 462 of Companies Act, 2013:

Various exemptions have been provided to the Nidhi Companies.

For details please refer the following link:

http://www.mca.gov.in/Ministry/pdf/Exemptions_to_nidhis_companies_05062015.pdf

[F. No. 2/11/2014-CL.V dated 05th June, 2015]

8. Exemptions to Private Companies under section 462 of Companies Act, 2013:

Following exemptions have been provided to the Private Companies.

Sr. No.	Chapter/Section/Sub-Section of Companies Act, 2013	Exceptions/Modifications/Adaptations	Effect of the amendment
1	Chapter I, sub- clause (viii) of clause 76 of section 2.	Shall not apply w. r. t. section 188.	Following shall not be treated as the Related Party:Any Company which is- a) A holding, subsidiary or an associate company of such company; or b) A subsidiary of a holding company to which it is also a subsidiary.
2	Chapter IV. Section 43 and section 47.	Shall not apply where Memorandum or Articles ofAssociation of the Private Company so provides.	Provisions of section 43, i.e. Kinds of Share Capital and section 47, i.e. Voting Rights, shall not apply to Private Companies, if so provided by MOA & AOA of the Company.
3	Chapter IV, sub-clause (i) of clause (a) of sub-section (1) and sub-section (2) of section 62.	Shall apply with following modifications:- In clause (a), in sub-clause (i) The following proviso shall be inserted, namely: Provided that notwithstanding anything contained in this sub-clause and sub section (2) of this section, in case ninety per cent. of the members of a private company have given their consent in writing or in electronic mode, the periods lesser than those specified in the said sub clause or sub-section shall apply	For further issue of share capital, the prescribed time frame of 15 to 30 days for duration of Offer Period and dispatching of notice at least three days before opening of issue, can be reduced if 90% of the members of the company give their consent in writing or in electronic mode.

4	Chapter IV, clause (b) of sub-section (1) of section 62.	In clause (b), for the words"special resolution", thewords "ordinary resolution"shall be substituted	For issuing further shares under the scheme of Employee Stock Option, an ordinary resolution will be a sufficient compliance.
5	Chapter IV, section 67	Shall not apply to privatecompanies - (a) in whose share capital no other body corporate has invested any money; (b) if the borrowings of such a company from banks or financial institutions or anybody corporate is less than twice its paid up share capital or fifty crore rupees, whichever is lower; and (c) such a company is not in default in repayment of such borrowings subsisting at the time of making transactions under this section.	A private limited company having a share capital can buy its own shares without having consequent reduction of share capital, if the prescribed conditions are fulfilled.
6	Chapter V, clauses (a) to (e) of subsection(2) of section 73.	Shall not apply to a privatecompany which accepts from its members monies not exceeding one hundred per cent of aggregate of thepaid up share capital and free reserves, and such company shall file the details of monies so accepted to the Registrar in such manner as may be specified.	The Private Company can accept deposits from its members up to 100% of the aggregate of the paid up share capital plus free reserves, and has to file such details with the Registrar in the prescribed manner.
7	Chapter VII, sections 101 to 107 and section 109.	Shall apply unless otherwise specified in respective sections or the articles of the company provide otherwise.	Provisions relating to: · Notice of Meeting, · Statement to be annexed to notice, · Quorum for Meetings, · Chairman of Meetings, · Proxies, · Restriction on Voting Rights, · Voting by show of hands and · Demand for Poll, shall apply unless otherwise specified in respective sections or the articles of the company provide otherwise.
8	Chapter VII, clause (g) of sub-section (3) of section 117.	Shall not apply	No need to file the following Board Resolutions by a Private Company : · To make calls on shareholders in respect of money unpaid on their shares. · To authorize buy-back of securities under section 68. · To issue securities, including debentures, whether in or outside India. · To borrow monies. · To invest the funds of the company. · To grant loans or give guarantee or provide security in respect of loans. · To approve financial statement and the Board's report. · To diversify the business of the company. · To approve amalgamation, merger or reconstruction. · To take over a company or acquire a controlling or substantial stake in another company.

			· To make political contributions. · To appoint or remove KMP. · To appoint internal auditors and secretarial auditor.
9	Chapter X, Clause (g) of sub-section (3) of section 141.	Shall apply with themodification that the words "other than one person companies, dormant companies, smallcompanies and private companies having paid-upshare capital less than oneHundred crore rupees" shall be inserted after the words "twenty companies".	Following types of companies shall not be counted in the limit of 20 companies for appointment of auditors: · One Person Companies, · Dormant Companies, · Small Companies and · Private Companies having paid up share capital less than One Hundred Crore Rupees.
10	Section 160, 162 and 180	Shall not apply.	Provisions relating to:· Right of persons other than retiring directors to stand for directorship, · Appointment of directors to be voted individually and · Restrictions on power of Board, shall not apply to Private Companies.
11	Chapter XII, sub-section (2) of section184.	Shall apply with the exception that interested director may participate in such meeting after disclosure of his interest.	Any interested Director can participate in the Board meeting after disclosing his interests in the meeting.
12	Chapter XII, section 185	Shall not apply to a privatecompany - (a) in whose share capital no other body corporate has invested any money; (b) if the borrowings of such a company from banks or financial institutions or any Body Corporate is less than twice of its paid up share capital or fifty crore rupees, whichever is lower; and (c) Such a company has no default in repayment of such borrowings subsisting at the time of making transactions under this section.	Private Companies can give Loan to Directors under section 185, if the company fulfils the conditions stated herein.
13	Chapter XII, second proviso to sub section (1) of section 188.	Shall not apply	Any member who is a related party with respect to any contract or arrangement can vote to approve such contract or arrangement.
14	Chapter XIII, sub-sections (4) and (5) of section 196.	Shall not apply	The terms and conditions for appointment and remuneration of Managing Director, Manager and Whole Time Director and approval of such appointment at the ensuing AGM and filing of return of appointment within 60 days shall not apply to private companies.

- The private companies, while complying with such exceptions, modifications and adaptations shall ensure that the interests of their shareholders are protected.
- These amendments shall be effective from the date of notification in the Official Gazette of India.

[F. No. 1/1/2014-CL.V dated 05th June, 2015]

9. Exemptions to Section 8 (Non-Profit) Companies under section 462 of Companies Act, 2013:
Following exemptions have been provided to the Section 8 (Non-Profit) Companies.

Sr. No.	Chapter/Section/Sub-Section of Companies Act, 2013	Exceptions/Modifications/Adaptations	Effect of the amendment
1	Clause (24) of section 2	Shall not apply	Section 2 (24), defining the meaning of Company Secretary or Secretary shall not apply.
2	Clause (68) of section 2	The requirement of minimum paid up share capital shall not apply	The private limited section 8 companies will not need to comply with the requirement of minimum paid up share capital.
3	Clause (71) of section 2	The requirement of minimum paid up share capital shall not apply	The public limited section 8 companies will not need to comply with the requirement of minimum paid up share capital.
4	Sub-section (2) of section 96	In sub section (2), after the proviso and before explanation, the following proviso shall be inserted, namely:- Provided further that the time, date and place of each annual general meeting are decided upon before-hand by the board of directors having regard to the directions, if any, given in this regard by the company in its general meeting.	The following proviso has been added to section 96(2), i.e. Annual General Meeting: Provided further that the time, date and place of each annual general meeting are decided upon before-hand by the board of directors having regard to the directions, if any, given in this regard by the company in its general meeting.
5	Sub-section (1) of section 101	In sub-section (1), for the words "twenty one days", the words "fourteen days" shall be substituted.	The notice of general meeting of Section 8 company will need minimum clear **fourteen days** notice rather than clear twenty one days.
6	Section 118.	The section shall not apply as a whole except that minutes may be recorded within thirty days of the conclusion of every meeting in case of companies where the articles of association provide for confirmation of minutes by circulation.	Section 8 company will not need to comply with the section 118, i.e. minutes of proceedings of general meeting, board meetings and other meeting and resolutions passed by postal ballot, except for the following provision- Minutes may be recorded within 30 days of the conclusion of every meeting in case of companies where the articles of association provide for confirmation of minutes by circulation.
7	Sub-section (1) of section 136.	In sub-section (1), for the words "twenty one days", the words "fourteen days" shall be substituted.	The copies of Audited financial statement, which are to be laid before a company in its general meeting shall be sent to all the persons having the right to receive, shall be sent to them **14 days** before the date of the meeting, instead of 21 days.
8	Sub-section (1) of section 149 and the first proviso to sub section (1)	Shall not apply.	Company will not need to comply with the regulations in section 149(1) regarding minimum and maximum no. of directors in the board, however, if applicable, they will have to appoint the Woman Director.
9	Sub-sections (4), (5),(6), (7), (8), (9), (10), (11), clause (i)	Shall not apply.	Section 149- Company to have Board of Directors, following sub sections shall not

	of subsection (12) and sub section (13) of section 149.		apply to a section 8 company- 149(4)- 149(5) - 149(6)- 149(7)- 149(8)- 149(9)- 149(10)- 149(11)- 149(12 (i)- 149(13)
10	Section 150.	Shall not apply.	Section 150, i.e. Manner of selection of Independent director and maintenance of databank of independent directors, shall not apply to section 8 companies.
11	Proviso to sub-section (5) of section 152.	Shall not apply.	The opinion of the board that the independent director fulfils conditions specified in the act for his appointment, which is required to be annexed to the explanatory statement of notice of general meeting, shall not apply to the section 8 companies.
12	Section 160.	Shall not apply to companies whose articles provide for election of directors by ballot.	The procedure given in section 160, i.e. The right of persons other than retiring directors to stand for directorship, shall not apply to those section 8 companies whose articles provide for election of directors by ballot.
13	Sub-section (1) of section 165.	Shall not apply.	The ceiling to the number of directorships a director can hold, i.e. 20, shall not apply to the section 8 companies.
14	Sub-section (1) of section 173.	Shall apply only to the extent that the Board of Directors, of such Companies shall hold at least one meeting within every six calendar months.	The requirement of board of directors to hold first board meeting within 30 days of its incorporation and minimum four meetings in every year in the manner prescribed shall not apply to the section 8 companies, except holding at least one meeting within every six calendar months
15	Sub-section (1) of section 174.	In sub-section (1),— (a) for the words “one-third of its total strength or two directors, whichever is higher”, the words “either eight members or twenty five per cent. of its totalstrength whichever is less” shall be substituted; (b) the following proviso shall be inserted, namely:-” Provided that the quorum shall not be less than two members”.	The requirement of quorum for meeting of Board, in section 174(1), the quorum shall be lower of 8 members or 25% of the total strength of directors, but in any case it shall not be less than 2 members.
16	Sub-section (2) of section 177.	The words “with independent directors forming a majority” shall be omitted.	In the composition of Audit committee the requirement of independent directors forming majority has been done away.

17	Section 178.	Shall not apply.	The section 8 companies are not required to constitute the Nomination and Remuneration Committee and Stakeholders Relationship Committee.
18	Section 179.	Matters referred to in clauses (d), (e) and (f) of sub-section (3) may be decided by the Board by circulation instead of at a meeting.	The board can decide the following matters by way of circulation instead of at a meeting: - To borrow monies. - To invest the funds of the companies. - To grant loans or give guarantee or provide security in respect of loans.
19	Sub-section (2) of section 184.	Shall apply only if the transaction with reference to section 188 on the basis of terms and conditions of the contract or arrangement exceeds one lakh rupees.	Directors are required to disclose the nature of concern or Interests in case of Related Party Transactions (with reference to section 188) of an amount exceeding One Lakh Rupees only.
20	Section 189.	Shall apply only if the transaction with reference to section 188 on the basis of terms and conditions of the contract or arrangement exceeds one lakh rupees.	Entry in register maintained for particulars of contracts and arrangements with reference to section 188 is required to be done only if the amount involved is exceeding One Lakh Rupees.

· These amendments shall be effective from the date of notification in the Official Gazette of India.

[F. No. 1/2/2014-CL.I dated 05th June, 2015]

10. Extension of time for filing of Notice of appointment of the Cost Auditor for the F.Y, 2015-16 in Form CRA-2 and filing of Cost Audit report to the Central Government for the F.Y, 2014-15 in Form CRA-4.

- The additional fee on account of any delay beyond the prescribed period of 30 days from the date of Board Meeting, in which the appointment of the Auditor was made for filing of CRA-2 for the financial year starting on or after 1st April, 2015 is waived for all such filings till 30th June, 2015.
- Additional fees on delayed filing of form CRA-4 beyond the prescribed period of 30 days from the date of receipt of a copy of Cost Audit Report from the Cost Auditor for the Financial Year starting on or after 1st April, 2014 is also waived for all such filings till 31st August, 2015.

[File No./1/40/2013/CL-V, dated 12th June, 2015]

11. Clarification on repayment of deposits accepted by the companies before the commencement of the Companies Act, 2013 under section 74 of the said Act

- The Ministry has clarified that vide Removal of Difficulties (Second) Order [S.O. 1428 (E)] dated 2nd June, 2014 and Removal of Difficulties (Fourth) Order [S.O. 146O (E)] dated 6th June, 2014, the Company Law Board has been empowered to exercise the powers of National Company taw Tribunal under sub-section (4) of section 73 and subsection (2) of section 74 of the said Act, till the latter's constitution.
- Thus, a depositor is free to file an application under section 73(4) of the said Act, with the Company Law Board if the company fails to make repayment of deposits accepted by it.
- Further the company may also file application under section 74(2) of the said Act with the Company Law Board seeking extension of time in making the repayment of deposits accepted by it before the commencement of the provisions of the said Act
- Ministry has further clarified that the conditions subject to which a company would be deemed to have complied with the requirements laid down in Section 74(1)(b) of the Companies Act, 2013. Companies can repay deposits accepted prior to 1st April, 2014 in accordance with terms and conditions for which the deposits had been accepted. However, there is no bar on the Registrar of Companies for filing of prosecution against a company if such company fails to make repayment of deposits accepted by it under the provisions of the Companies Act, 1956 or Companies Act, 2013.

[File No./1/8/2013/CL-V, dated 18th June, 2015]

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Allied Laws Corner

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S.138 of the Negotiable Instrument Act, 1881 – Dishonour of cheque for insufficiency, etc. of funds in the accounts – Territorial Jurisdiction Amendments.

Recently the President of India promulgated the Negotiable Instruments (Amendment) Ordinance, 2015 on 15th June, 2015. The objective of the Ordinance is to amend the provisions of Negotiable Instruments Act, 1881 (hereinafter referred to as the "NI Act"), for speedy disposal of cases relating to dishonour of cheque. As per the provisions amended by such Ordinance now a cheque dishonour case under Section 138 of the NI Act will have to be filed in a court at a place as per the provisions of Section 142(2) of the Negotiable Instruments Act, which has been inserted by this new Ordinance, and even all pending cheque bouncing cases will also be transferred to the courts as per this new provision. This Ordinance has overruled the Apex Court decision in the case of ***Dashrath Rupsingh Rathod v. State of Maharashtra*, (2014) 9 SCC 129.**

Background :

The NI Act was amended by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 wherein a new Chapter XVII was incorporated for penalties in case of dishonour of cheques due to insufficiency of funds in the account of the drawer of the cheque. These provisions were incorporated with a view to encourage the culture of use of cheques and enhancing the credibility of the instrument.

Provisions of S.138 of the NI Act provides for the offence pertaining to dishonour of cheque for insufficiency, etc., of funds in the drawer's account on which the cheque is drawn for the discharge of any legally enforceable debt or other liability. As per S.138 of the NI Act, such person shall be deemed to have committed an offence and shall without prejudice to other provisions of the NI Act shall be punished with imprisonment for a term which may extend to two years or with fine which may extend to twice the amount of the cheque or with both.

***Dashrath Rupsingh Rathod v. State of Maharashtra*, (2014) 9 SCC 129 (Supreme Court) :** The Three Judges Bench of the Apex Court had held that a case relating to dishonour of cheque can be filed only in a Court which has the territorial jurisdiction over the place where the cheque is dishonoured by the bank on which it is drawn. Therefore, where a cheque is drawn by a company on its bank account situated at Chennai, and the cheque is bounced on account of insufficiency of funds, etc., the case can be filed only in a Chennai Court within whose jurisdiction the said bank is situated, even if the payee has presented the said cheque in his bank located in Ahmedabad.

Representation of issues arising out of decision of the Supreme Court in the case of *Dashrath Rupsingh Rathod v. State of Maharashtra*, (2014) 9 SCC 129: In pursuant to the said decision of the Supreme Court, representations were made to the Government by various stakeholders, including industry associations and financial institutions, expressing concerns about the wide impact this decision would have on the business interests as it will offer undue protection to defaulters at the

expense of the aggrieved complainant; will give rise to multiplicity of cases covering several cheques drawn on bank(s) at different places; and adhering to it is impracticable for a single window agency with customers spread all over India. For the simple reason that the payee of the cheque has to file the case at the place where the drawer of the cheque has a bank account. Thus, if the payee's registered office is at Ahmedabad and have a bank account in Ahmedabad, and it gets a cheque from different persons from their respective bank account at Chennai, Mumbai and Delhi, the payee will have to go to Chennai, Mumbai and Delhi to file the case in case of dishonour of cheques, even though the fault for cheque dishonour is that of the payers / drawers of the cheques.

Negotiable Instruments (Amendment) Ordinance, 2015 (6 of 2015) has now changed the Legal Position regarding Jurisdiction of Court in case of dishonour of cheque :

To address the difficulties faced by the payee or the lender of the money in filing the cases under Section 138 of the NI Act, because of which large number of cases were stuck, the jurisdiction for offence under Section 138 has been proposed to be clearly defined. Accordingly, the Negotiable Instruments (Amendment) Bill, 2015 ("the Bill") in Parliament was introduced in Lok Sabha on 6th May, 2015 and considered and passed by Lok Sabha on 13th May, 2015. However, since the Rajya Sabha was adjourned sine die on 13th May, 2015, the Bill could not be discussed and passed by that House and the Bill could not be enacted.

In view of the urgency to create a suitable legal framework for determination of the place of jurisdiction for trying cases of dishonour of cheques under section 138 of the NI Act, the Government decided to amend the law through the Negotiable instruments (Amendment) Ordinance, 2015.

On 15.06.2015, the President of India promulgated the Negotiable Instruments (Amendment) Ordinance, 2015.

The Supreme Court decision in the case of ***Dashrath Rupsingh Rathod v. State of Maharashtra*, (2014) 9 SCC 129** is overruled and now of no consequence on account of this Ordinance.

The Ordinance has made following amendments to the NI Act.

(a) A new sub-section (2) has been inserted in Section 142, which now lays down as under:

"(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction,—

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation.—For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account."

(b) A new Section 142A has been inserted in the Negotiable Instruments Act, 1881, has been inserted, which lays down as under:

"142A. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any judgment, decree, order or directions of any court, all cases arising out of section 138 which were pending in any court, whether filed before it, or transferred to it, before the commencement of the Negotiable Instruments (Amendment) Ordinance, 2015 shall be transferred to the court having jurisdiction under sub-section (2) of section 142 as if that sub-section had been in force at all material times.

(2) Notwithstanding anything contained in sub-section (2) of section 142 or sub-section (1), where the payee or the holder in due course, as the case may be, has filed a complaint against the drawer of a cheque in the court having jurisdiction under sub-section (2) of section 142 or the case has been transferred to that court under sub-section (1), and such complaint is pending in that court, all subsequent complaints arising out of section 138 against the same drawer shall be filed before the same court irrespective of whether those cheques were delivered for collection or presented for payment within the territorial jurisdiction of that court.

(3) If, on the date of the commencement of the Negotiable Instruments (Amendment) Ordinance, 2015, more than one prosecution filed by the same payee or holder in due course, as the case may be, against the same drawer of cheques is pending before different courts, upon the said fact having been brought to the notice of the court, such court shall transfer the case to the court having jurisdiction under sub-section (2) of section 142 before which the first case was filed and is pending, as if that sub-section had been in force at all material times."

As per this Ordinance, now a cheque dishonour case can be filed only in the court at the place where the bank in which the payee has account is located. Therefore, if the payee's registered office is at Ahmedabad and have a bank account in Ahmedabad, and it gets a cheque from different persons from their respective bank account at Chennai, Mumbai and Delhi, the payee will have to file a case in Ahmedabad Court having jurisdiction over the payee's bank located in Ahmedabad, instead of going to Chennai, Mumbai and Delhi to file the case in case of dishonour of cheques as per the overruled decision of the Supreme Court in the case of ***Dashrath Rupsingh Rathod v. State of Maharashtra*, (2014) 9 SCC 129.**

It is further provided that where a complaint has been filed against the drawer of a cheque in the Court having jurisdiction under the new scheme of jurisdiction, all subsequent complaints arising out of S.138 of the NI Act against the same drawer shall be filed before the same court, irrespective of whether those cheques were presented for payment within the territorial jurisdiction of that court. This amendment is made to ensure that the drawer of cheques is not harassed by filing multiple cheque dishonoured cases at different locations.

Conclusion:

These amendments in NI Act would help in ensuring that a fair trial of cases u/s 138 of the NI Act is conducted keeping in view of the interests of the complainant by clarifying the territorial jurisdiction for trying the cases for dishonour of cheques. The clarification of jurisdictional issues is desirable from the equity point of view as this would be in the interests of the complainant and would also ensure a fair trial. This would increase the credibility of the cheque as a financial instrument.

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From Published Accounts

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AS – 20 Earnings Per Share –

Notes to Financial Statements for the year ended 31st March, 2013

Infinite Computer Solutions (India) Limited

Basic earnings per share are calculated by dividing the net profit or loss for the quarter attributable to equity shareholders by the weighted average number of equity shares outstanding during the quarter.

For calculating diluted earnings per share, the net profit or loss for the quarter attributable to equity shareholders and the weighted average number of shares outstanding during the quarter are adjusted for the effects of all dilutive potential equity shares.

Godawari Power & Ispat

Basic earnings per share are calculated by dividing the net profit or loss for the period attributable to equity shareholders by weighted average number of equity shares outstanding during the period. The weighted average number of equity shares outstanding during the period are adjusted for events of bonus issue; bonus element in a right issue to existing shareholders.

For the purpose of calculating diluted earnings per share, the net profit or loss for the year attributable to equity shareholders and the weighted average number of shares outstanding during the year are adjusted for the effects of all dilutive potential equity shares.

Allsec Technologies Limited

The earnings considered in ascertaining the Company's earnings per share comprise the net profit or loss after tax attributable to equity share holders. The number of shares used in computing basic earnings per share is the weighted average number of shares outstanding during the year.

The number of shares used in computing diluted earnings per share comprises the weighted average number of shares considered for deriving basic earnings per share and also the weighted average number of shares, if any, which would have been issued on the conversion of all dilutive potential equity shares.

Kolte-Patil Developers Limited

The Company reports basic and diluted earnings per share in accordance with Accounting Standard – 20 'Earnings Per Share' issued by the Institute of Chartered Accountants of India on basic earnings per share is computed by dividing the net profit or loss for the period by the weighted average number of Equity shares outstanding during the period. Diluted earnings per share is computed by dividing the net profit or loss for the period by the weighted average number of equity shares outstanding during the period as adjusted for the effects of all diluted potential equity shares except where the results are anti-dilutive.

Reliance Communications Limited

In determining Earning per Share, the Company considers the net profit after tax and includes the post tax effect of any extraordinary/ exceptional item. The number of shares used in computing Basic

Earning per Share is the weighted average number of shares outstanding during the period. The number of shares used in computing Diluted Earning per Share comprises the weighted average shares considered for deriving Basic Earnings per Share and also the weighted average number of shares that could have been issued on the conversion of all dilutive potential equity shares unless the results would be anti - dilutive. Dilutive potential equity shares are deemed converted as of the beginning of the period, unless issued at a later date.

K.P.R. Mill Limited

Basic earnings per share is computed by dividing the profit / (loss) for the year by the weighted average number of equity shares outstanding during the year. Diluted earnings per share is computed by dividing the profit / (loss) for the year as adjusted for dividend, interest and other charges to expense or income (net of any attributable taxes) relating to the dilutive potential equity shares, by the weighted average number of equity shares considered for deriving basic earnings per share and the weighted average number of equity shares which could have been issued on the conversion of all dilutive potential equity shares. Potential equity shares are deemed to be dilutive only if their conversion to equity shares would decrease the net profit per share from continuing ordinary operations. Potential dilutive equity shares are deemed to be converted as at the beginning of the period, unless they have been issued at a later date. The dilutive potential equity shares are adjusted for the proceeds receivable had the shares been actually issued at fair value (i.e. average market value of the outstanding shares). Dilutive potential equity shares are determined independently for each period presented. The number of equity shares and potentially dilutive equity shares are adjusted for share splits / reverse share splits and bonus shares, as appropriate.

R.P.P. Infra Projects Limited

The Company reports basic and diluted earnings per share in accordance with Accounting Standard (AS20). Earnings per Share notified by the Companies (Accounting Standards) Rules, 2006. Basic earnings per equity shares are computed by dividing the net profit for the year attributable to the Equity Shareholders by the weighted average number of equity shares outstanding during the year. Diluted earnings per share is computed by dividing the net profit for the year adjusting for the effects of dilutive potential equity shares attributable to the Equity

Shareholders by the weighted average number of the equity shares and dilutive potential equity shares outstanding during the year except where the results are anti dilutive.

Oberoi Realty Limited

Basic earnings per share is calculated by dividing the net profit / (loss) for the year attributable to equity shareholders (after deducting preference dividends and attributable taxes) by weighted average number of equity shares outstanding during the year.

For the purpose of calculating diluted earnings per share, the net profit / (loss) for the year attributable to equity shareholders and the weighted average numbers of shares outstanding during the year are adjusted for the effects of all dilutive potential equity shares.

* * *

From the Government

CA. Kunal A. Shah
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Income Tax

1) **Notification regarding Electronic Verification Code (EVC) for electronically filed Income Tax Return**

CBDT has notified the procedures and modes of filing of return through Electronic Verification Code (EVC) ie. All the taxpayers in such case shall not be required to send the signed copy of ITR-V to CPC, Bengaluru except in case of persons whose accounts are required to be audited u/s 44AB; Political parties filing their return of income in ITR-7 and in case of Companies.

The taxpayers can generate EVC by any of the four modes specified as under:-

a) Through Net Banking;
b) Through Aadhaar Number;
c) Through ATM;
d) Through E-filing website of Income Tax Dept.

Note:- The EVC generated via Adhaar Card will be valid only for 10 minutes and in any other case , it will be valid for 72 hours.

(For full text refer Notification No.2, dated 13/07/2015)

2) **Circular regarding clarifications on Tax Compliance for Undisclosed Foreign Income and Assets**

With reference to the 'The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (Hereinafter referred to as 'the Act'), the board has vide this circular issued clarification on scope and procedure of the scheme in the form of question and answers.

(For full text refer Circular No. 13, dated 06/07/2015)

3) **Notification regarding Imposition of Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Rules,2015**

The CBDT with the approval of Central Government and vide this notification makes the rules relating to Black Money .

(For full text refer Notification No. 58, dated 02/07/2015)

4) **Notification regarding different due dates under the Black Money and Imposition of Tax Act, 2015**

In pursuance of section 59 of the said act ,the central government hereby appoints :-

i) the 30th day of September,2015 as the date on or before which a person may make a declaration in respect of an undisclosed asset located outside India;

ii) the 31st day of December,2015 as the date on or before which a person shall pay the tax and penalty in respect of the undisclosed asset located outside India so declared ***(Notification No.57, dated 01/07/2015)***

5) **Notification regarding new ITR forms**

CBDT hereby notifies new ITR 1,2,2A and 4S forms for AY 2015-16 and accordingly amends rule 12. These forms will substitute the previously notified ITR 1, 2 and 4S forms.

(For full text refer Notification no.49 dated 22nd June, 2015)

6) **Insertion of rule 51A in the Income Tax Rules – Nature of business relationship**

CBDT hereby amends the rules by inserting rule 51A after rule 51 , which reads as under:-

For the purposes of sub-clause (viii) of Explanation below sub-section (2) of section 288, the term "business relationship" shall be construed as any transaction entered into for a commercial purpose, other than,—

(i) commercial transactions which are in the nature of professional services permitted to be rendered by an auditor or audit firm under the Act and the Chartered Accountants Act, 1949 (38 of 1949) and the rules or the regulations made under those Acts;

(ii) commercial transactions which are in the ordinary course of business of the company at arm's length price - like sale of products or services to the auditor, as customer, in the ordinary course of business, by companies engaged in the business of telecommunications, airlines, hospitals, hotels and such other similar businesses. ***(Notification no. 50 dated 22nd June,2015)***

Service Tax

1) Circular regarding detailed manual scrutiny of service tax returns

The Board vide this circular laid down the procedure and the manner for carrying out the detailed scrutiny of ST-3 returns w.e.f. 01/08/2015. The detailed manual scrutiny of returns is to ensure the correctness of the assessment made by the assessee including checking of taxability of the service, the correctness of the value of taxable service in terms of section 67 of the Finance Act, 1994 and the effective rate of tax after taking into account the admissibility of an exemption notification, abatement, or exports, if any ensuring the correct availment/ utilization of Cenvat Credit on inputs, capital goods, and input services in terms of the Cenvat Credit Rules,2004 etc.

(For full text refer Circular No. 185, dated 30/06/2015)

2) Notification regarding digitally signed invoices in Central Excise & Service Tax

The Central Board of Excise and Customs vide this notification specifies the conditions, safeguards and procedures for issue of invoices, preserving records in electronic form and authentication of records and invoices by digital signatures.

(For full text refer Notification No. 18, dated 06/07/2015)

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contd. from page 252

of interstate sale against Form C was not allowed because of the defect in the registration certificate of the purchaser who has issued Form C. The appellant produced copy of amended copy of registration certificate and assessment order of the purchasing dealer in respect of which the claim of interstate sale against Form C was not allowed. However, the appellant was dismissed by the Appellate Authority and hence the appellant has filed a second appeal before the Hon'ble Tribunal. The appellant contended that the assessment order passed is well beyond the time limit specified in section 42 of the Act which requires to be set aside. The appellant also submitted that the Form H and other supporting documents like transport receipts, quality check report, packing record, invoices etc. were submitted and the appellant has also produced the copy of assessment order of the exporter in which the claim of export was accepted. The Hon'ble Tribunal considering the rival submissions made by the parties has held that the claim of export against Form H is admissible as per Rule 12(1) which provides for production Form H and other supporting documents. It is not mentioned in the said rule that the bill of lading is required to be produced. If upon production of other supporting documents which proves that the export has taken place, then the claim of export against Form H cannot be rejected merely in absence of Bill of Lading.

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Association News

CA. Nirav R. Choksi
Hon. Secretary

CA. Dilip U. Jodhani
Hon. Secretary

Forthcoming Programmes

Date/Day	Time	Programmes	Speaker	Venue
13/07/2015	4.30 pm to 7 pm	Lecture Series (LS) on following topics Excelling in Profession	CA C R Sharedalal & CA Sunil H Talati	CA Association Office
15/07/2015	4.30 pm to 7 pm	LS - Art of Business Development	CA Saumya Sheth	CA Association Office
20/07/2015	4.30 pm to 7 pm	LS - Income tax Assessments	CA Shivang Chokshi	CA Association Office
22/07/2015	4.30 pm to 7 pm	LS - Company Incorporation & Annual Compliances	CA Vikas Jain	CA Association Office
27/07/2015	4.30 pm to 7 pm	LS - Service tax aspects - Skill required and opprtunities available	CA Punit Prajapati	CA Association Office
29/07/2015	4.30 pm to 7 pm	LS - Intricacies of Detailed Project Report	CA Nesal Shah	CA Association Office
30/07/2015	5 pm to 7 pm	The Black Money (Undisclosed Foreign Income And Assets) and Imposition of Tax Act, 2015	CA Jayesh C Sharedalal	ATMA Hall, Ashram Road
Various Dates in August	4.30 pm to 7 pm	Lecture Series on various topics such as Tax Audit Report, TDS Returns, Business Valuation, Audit Documentation and Advance Excel	Various Speakers	CA Association Office
01.08.2015 to 04.08.2015	-	42nd Residential Refresher Course	CA Sunil Talati, CA Mukesh Khandwala, CA Rajni Shah, CA Jignesh Shah and CA Vikas Jain	Devigarh, By Lebua, Udaipur
18.08.2015	8 pm Onwards	Musical Programme	-	Tagore Hall, Paldi

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Congratulations

CA. Yamal Vyas, President of the Association has been nominated as a Central Council Member at the Institute of Company Secretaries of India and also as a Director on Board of Gujarat State Seeds Corporation Limited.

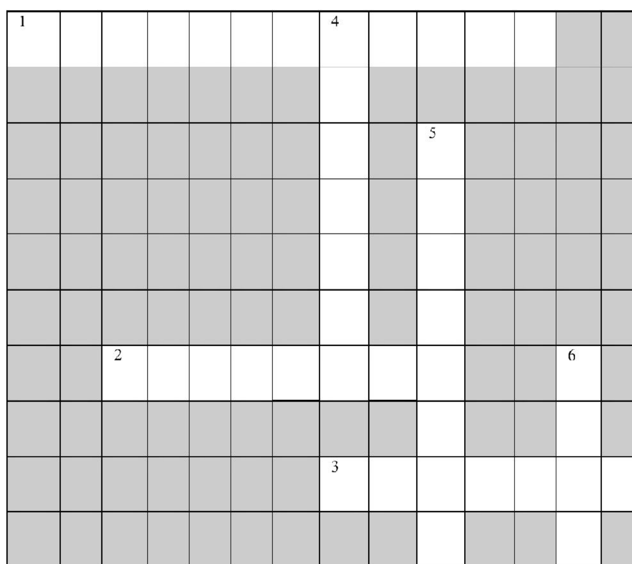
ACAJ Crossword Contest # 15

Across

1. Service tax interest payment is ____________ in nature and it does not partake the character of penalty.
2. W.e.f. 01-06-2014, Service Tax rate is ________ percent which is inclusive of Education cess and Secondary and Higher Education Cess.
3. We do not get what we do not _______.

Down

4. The expression _______ means something which is due to a person, but which is paid to him ahead of time when it is due to be paid.
5. ________ includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture.
6. Centre will compensate States for loss of revenue arising on account of implementation of the GST for a period up to ____ years.



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 05/08/2015.
5. The decision of Journal Committee shall be final and binding.

Winners of ACAJ Crossword Contest # 14

1. CA. Arun Kothari
2. CA. Dharmendra Bharwad

ACAJ Crossword Contest # 14 - Solution

Across

1. Transfer
2. Manufacture
3. Unconstitutional

Down

4. Escapement
5. Better
6. Deductee