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Financial Year : April to March

Professional Awards

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

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

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We keep talking about peace in every conference, every World Peace Meet and in every other gathering but can world peace ever be a reality? Every state, every government, every non-governmental organization, every other human being is talking about a world order of peace. An average citizen on the street is not only concerned about food, clothing and shelter, but also about experiencing peace. How much have all the Nobel laureates, put together, been able to contribute for real, on-the-ground, identifiable, quantifiable world peace?

Yes, it is possible !

The entire seed of creating a world order of peace lies in a single thought. It is famously quoted – "Mind your thoughts, they become words; mind your words, they become actions; mind your actions, they become habits; mind your habits, they become your character; mind your character, it becomes your destiny". This powerful immemorial quote is indeed a derivation of profound depth. The thoughts are powerful elements of communication, with literally 'wings' in them. In terms of quantum physics or in meta-physical terms, thoughts are photons of energy transmittable from mind to mind (consciousness to consciousness) in a matter of fraction of a second. This has been proved as recently as November, 2014 in an experiment conducted at University of Washington in Seattle where neuro-scientists described a direct brain-to-brain interface between humans who co-operatively played a simple video game. Earlier in 2014, a company in Barcelona (Spain) called Starlab described transmitting short words like 'hola' and 'ciao' between the brains of individuals sitting thousands of miles apart in India and France which proved for the first time to the world that telepathy exists.

If we continuously harbour powerful focused positive thoughts laden with images of peace, practise a purposeful peaceful life and promulgate it to the people around us, we can become instruments of transmitting 'vibrations' of peace (read, photons of energy laden with peaceful thoughts) to our immediate environment. These vibrations have the effect of being reproduced into the minds (read, consciousness) of people receiving them. If people receiving them repeatedly think, wonder and ponder upon the thoughts so received, their minds are going to reverberate with thoughts containing ideas and images of a peaceful nature. Imagine all this happening in the minds of depressed, aggressive, violent or even criminal behaviour-prone persons. Such repeated vibrations are going to bring some form of change in their thinking and behaviour over time. A change in behaviour is very likely going to lead to a change in habits of such individuals.....that too for the better.

Consequentially, their kith and kin who interact with such persons on a daily basis are definitely going to recognise and appreciate a perceptible change in their character. The character is the ultimate element in determining the destiny of a person. If character is lost, everything is lost. If character is peace-preserved, everything is peace-preserved.

History is witness to the fact that for decades, negotiations as well as wars have been going on between governments to contain genocide, conflicts and disputes in order to attain a state of peace among the masses. History is also witness to the results of such efforts; while a few issues might have been resolved, more deadly and unimaginable ones (terrorist states) have cropped up and are threatening the very existence of mankind. So, nothing seems to have worked. The requirement now is to re-establish the world peace through powerful, purposeful vibration of peace, love and kindness. As a beginning, we need to initiate with a single peaceful thought, for that is the seed of world peace.

The seed of world peace is sown in the mind. We need to water it and let this seed germinate and make ourselves peaceful before attempting to make the world so. If we are at peace, the world is at peace. We are what we think.

Is World Peace Really Possible ?

Editorial

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Elections and beyond

The process of elections to the Regional and Central Councils of the Institute is almost complete baring the procedural aspect of official declaration of results and appointment of President, Vice President of the Institute and office bearers of the regional councils. It is surprising that in an organisation where every president talks of modernisation and adaption of information technology with the changing times, its own election system, with hardly about two lac voters takes more than two months to complete the process. At times where everything is system driven, the Institute itself appears to be lagging behind. Whether all the sermons from Presidents and Vice Presidents during their felicitation all across the country to adopt modern technology in our professional practise have only an objective standpoint? As far as the elections results are concerned it's hearting that there are three representatives in the regional council and one at the central council from Ahmedabad.

As a practising professional in Ahmedabad, the natural area of attention during these days is Branch elections. It is always argued and canvassed that any election is good and should be accepted as a part of democratic process. Without an iota of doubt, elections are necessary and healthy sign of democracy to elect representatives, however the other view could be, in a city with few thousand voters, we are not open to each other's views and cannot come to a consensus so as to avoid elections, at least at the branch level. Well, there are cannot be a straight solutions and answers to whether there should be elections at the branch level or not. Amazingly, it is learnt that there are more than twenty candidates are in fray for the eight member branch executive committee. It is more hearting than wondering that there are so many enthusiasts to work for the profession!

The central government has announced raft measures with the 19 point action plan including tax waiver for three years, ending inspector raj and a mega fund to help the Start-ups. The measures from the government will boost the small and medium enterprises incorporated or registered in India for a period less than five years with turnover upto Rs. 25 crores, working for innovation, development, deployment or commercialisation of new products, processes or services driven by technology or intellectual property. Such start-ups will enjoy a three year income tax holiday, tax exemption on capital gains with specified investments and credit guarantee. Such initiatives from the government will increase the ease of doing business in the country. For a practising chartered accountant there could be a great professional opportunities coming as the investments in these start increase and the complete policy of the government unfolds.

Though the government is trying hard to gain investors' confidence, there still remains an uncertainty over GST. The manner in which the parliament is functioning, the indications are not clear. Just a couple of years back, the new Companies Act was thrust upon and existing companies at one go, without giving any breathing time. It will be very unfortunate, if the government all of a sudden, comes out with the GST expecting overnight implementation. The only hope is that the government will act in a prudent manner, take business community along and come out with a law that will truly ease the manner of doing business, including that for the start-ups.

Pranams,
CA. Ashok Kataria

From the President

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The results of ICAI elections are out and I heartily congratulate all the winners to Central and Regional Council from Ahmedabad . It is heartening to note that all the winners are members of our Association and most of them are also actively involved in various committees. And this is not for this year. Most of them have always been at the forefront of the activities of CA Association. The only President elected from Ahmedabad till date is also our Past President and what more, even today he is our main friend, philosopher and guide. I hope we have one or more future Presidents from among the present elected members!

Ahmedabad Branch elections are also round the corner, and I once again earnestly request all the members of CAA to vote. This is the second Branch election in which there will be preferential voting and I feel that we all must not only vote in large numbers, but should also give the maximum number of preferences -maximum 8- so that the best candidates are elected as per the system. And once again I sincerely request you to take time out to go out and vote as your vote is much more valuable than you will believe . Who knows, in your absence, the wrong candidates may get elected and then we all would feel sorry for the next three years.

Coming to more mundane issues, CAA has been very active on the Representations front. This, I believe, is one of the most important functions of CAA. You might be aware that the local branches of ICAI are discouraged by ICAI to make representations locally so as "a premier Association of members, we are duty bound to take the lead as far as representations to the authorities in the state are concerned. I must put it on record that our Legal and Representation Committee is making sterling efforts in this directions. My sincere thanks and congratulations to the Chairman CA Satyapal Sadhwani and CA. Ajit Shah and their Committee members for their untiring efforts. All the representations made recently are being printed in the CAA Journal for the reference of members.

I will also take this opportunity to request members to write in to us about any issue affecting the profession at large where we as CAA can represent the issues before the concerned authorities. And I am sure that there would be many more such issues where the public at large or a particular trade is affected by some issue. A request to refrain from making individual cases the subject matter of the suggested representations as that is not the prime objective of CAA.

These days cricket is played round the year across the world, so the traditional concept of a cricket season is less relevant these days. But, in keeping with our tradition, the CAA cricket season has started. In the first match-traditionally played between President's XI and the Secretary's XI this year we had a record number of registrations. As a result we had to play two matches to accommodate all the members who had registered. I personally see this as a very positive development, and next year we will definitely see an even larger participation from the young members.

"At the AGM I had promised the members that this year we plan to bring out a number of books on professional issues. I am very glad to report to you that two Publications have already been brought out and a few more are in the pipeline. And as promised, the books are completely free of charge for the members. A request to all the members who have not yet got these books collected to do the same at the earliest. Suggestions for topics on which we can bring out publication are also welcome. I look forward to your response on the issue.

CA. Yamal Vyas
President

Professional Tax - At a Glance

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In this article, trying to cover some background & facts about Professional Tax that can help to understand its basics. It was first levied in India in the year 1949 and the power to levy such tax has been given to the states by way of Clause (2) of Article 276 of the constitution of India. It is a tax which is levied by the state on the income earned by way of profession, trade, calling or employment. As states have been empowered to levy and collect this tax, different states levy Professional tax as per the slab structure. The Professional Tax is source of revenue for the State Governments to aid the welfare and development schemes.

When tax was first introduced in India, the maximum limit on the tax to be collected was Rs. 250. However the limit was raised to Rs. 2500 from Rs. 250 in the year 1988. The maximum Professional Tax that can be levied by any State is Rs 2500. It is also payable by members of staff employed, including private companies. It is deducted by the employer every month and paid to government. It is a mandatory to pay professional tax. Any amount paid as a Professional Tax to the state Government is allowed as deduction under section 16 of the Income Tax Act. In case of Salaries and Wage earners, the Professional Tax is liable to deduct by the Employer from the Salary/Wages and Employer is liable to deposit the same with the State Government. In rest of the cases of other class of Individuals, this tax is to be paid by person himself. Professional Tax in India is collected by the State Governments and every person liable to pay this tax (either on his own behalf or on behalf of the employee) shall apply for registration in the prescribed form with the prescribed authority.

From the Financial Year 2015-16 some states have made some alteration in rates which has been updated in this article.

Andhra Pradesh

Monthly Salary	Professional Tax Levied (P.M)
Up to Rs 15,000/-	Nil
Rs 15,001-Rs 20,000/-	Rs 150
Rs 20,001/- or Above	Rs 200

Assam

Monthly Salary	Professional Tax Levied (P.M)
Up to Rs 10,000/-	Nil
Rs 10,001- Rs 14,999/-	Rs 150
Rs 15,000- Rs 24,999/-	Rs 180
Rs 25,000/- or Above	*Rs 208 & 212

*Professional Tax is payable @Rs 208 for first 11 months and Rs 212 in the last month.

Bihar

Monthly Salary	Professional Tax Levied (P.M)
Up to Rs 25,000/-	Nil
Rs 25,001-Rs 41,666/-	Rs 83.33
Rs 41,667-Rs 83,333/-	Rs 166.67
Rs 83,334/- or Above	Rs 208.33

Chattisgarh

Monthly Salary	Professional Tax Levied (P.M)
Up to Rs 12,500/-	Nil
Rs 12,501-Rs 16,667/-	Rs 150
Rs 16,668-Rs 20,833/-	Rs 180
Rs 20,834-Rs 25,000/-	Rs 190
Rs 25,001/- or Above	Rs 200

Gujarat

Monthly Salary	Professional Tax Levied (P.M)
Up to Rs 5,999/-	Nil
Rs 6,000-Rs 8,999/-	Rs 80
Rs 9,000-Rs 11,999/-	Rs 150
Rs 12,000/- or Above	Rs 200

Jharkhand

Monthly Salary	Professional Tax Levied (P.M)
Up to Rs 25,000/-	Nil
Rs 25,001-Rs 41,666/-	Rs 100
Rs 41,667-Rs 66,666/-	Rs 150
Rs 66,666-Rs 83,333/-	Rs 175
Rs 83,334/- or Above	*Rs 208

*Professional Tax is payable @Rs 208 for first 11 months and Rs 212 in the last month.

Karnataka

Monthly Salary	Professional Tax Levied (P.M)
Up to Rs 15,000/-	Nil
Rs 15,001/- or Above	Rs 200

Kerala

Monthly Salary	Professional Tax Levied (P.M)
Up to Rs 1,999/-	Nil
Rs 2,000- Rs 2,999/-	Rs 20(120)
Rs 3,000- Rs 4,999/-	Rs 30(180)
Rs 5,000- Rs 7,499/-	Rs 50(300)
Rs 7,500- Rs 9,999/-	Rs 75(450)
Rs 10,000- Rs 12,499/-	Rs 100(600)
Rs 12,500- Rs 16,666/-	Rs 125(750)
Rs 16,667- Rs 20,833/-	Rs 166(1000)
Rs 20,834/- or Above	Rs 208(1250)

Payable Semi Annually. In bracket Professional Tax payable Semi Annually is mentioned.

Madhya Pradesh

Monthly Salary	Professional Tax Levied (P.M)
Up to Rs 12,500/-	Nil
Rs 12,501-Rs 14,999/-	Rs 125
Above Rs 15,000/-	*Rs 208 & Rs 212

*Madhya Pradesh levies Professional Tax @ Rs 208 for 11 months and Rs 212 for the last month.

Maharashtra

Monthly Salary	Professional Tax Levied (P.M)
Up to Rs 7,500/-	Nil
Rs 7,501-Rs 10,000/-	Rs 175
Above Rs 10,001/-	*Rs 200 & Rs 300

*Maharashtra Government levies Professional Tax @ Rs 200 for 11 months and Rs 300 for the last month.
**Women who earn Salary up to Rs 10,000/- per month are exempted from paying Professional Tax.

Meghalaya

Monthly Salary	Professional Tax Levied (P.M)
Up to Rs 4,166/-	Nil
Rs 4,167- Rs 6,250/-	Rs 16.50
Rs 6,251- Rs 8,333/-	Rs 25
Rs 8,334- Rs 12,500/-	Rs 41.50
Rs 12,501- Rs 16,666/-	Rs 62.50
Rs 16,667- Rs 20,833/-	Rs 83.33
Rs 20,834- Rs 25,000/-	Rs 104.16
Rs 25,001/- Rs 29,166/-	Rs 125
Rs 29,167/-Rs 33,333/-	Rs 150
Rs 33,334/- Rs 37500/-	Rs 175
Rs 37,501/- Rs 41,666/-	Rs 200
Above Rs 41,667/-	*Rs 208

*Professional Tax is payable @Rs 208 for first 11 months and Rs 212 in the last month.

Orissa

Monthly Salary	Professional Tax Levied (P.M)
Up to Rs 13,304/-	Nil
Rs 13,305- Rs 25,000/-	Rs 125
Rs 25,001/- or Above	*Rs 200 & Rs 300

*Professional Tax will be payable @ Rs 200 for first 11 months and Rs 300 in the last month.

Tamil Nadu

Monthly Salary	Professional Tax Levied (P.M)
Up to Rs 3,500/-	Nil
Rs 3,501-Rs 5,000/-	Rs 16.66(100)
Rs 5,001-Rs 9,000/-	Rs 40 (235)
Rs 9,001-Rs 10,000/-	Rs 85(510)
Rs 10,001-Rs 12,500/-	Rs 126.67(760)
Above Rs 12,501/-	Rs182.50 (1095)

Collectible Semi- Annually. In bracket Professional Tax payable Semi Annually is mentioned.

Tripura

Monthly Salary	Professional Tax Levied (P.M)
Up to Rs 5,000/-	Nil
Rs 5,001- Rs 7,000/-	Rs 70 (420)
Rs 7,001- Rs 9,000/-	Rs 120(720)
Rs 9,001- Rs 12,000/-	Rs 140(840)
Rs 12,001- Rs 15,000/-	Rs 190(1140)
Rs 15,001/- or Above	Rs 249(208)

Collectible Semi-Annually. Amount given in bracket is the Professional Tax payable Semi Annually.

West Bengal

Monthly Salary	Professional Tax Levied (P.M)
Up to Rs 8,500/-	Nil
Rs 8,501-Rs 10,000/-	Rs 90
Rs 10,001-Rs 15,000/-	Rs 110
Rs 15,001-Rs 25,000/-	Rs 130
Rs 25,001-Rs 40,000/-	Rs 150
Above Rs 40,001/-	Rs 200

States and Union Territories where Professional Tax is Not Applicable

Arunachal Pradesh	Himachal Pradesh
Andaman & Nicobar	Jammu & Kashmir
Chandigarh	Lakshadweep
Dadra & Nagar Havelli	Nagaland
Daman & Diu	Punjab
Delhi	Rajasthan
Goa	Uttaranchal
Haryana	Uttar Pradesh

Exemption from Paying Professional Tax (As per the Act) :

Any person suffering from permanent physical disability (including blindness)

Parents or Guardian of any person who is suffering from mental retardation.

Persons who has completed the age of 65 years(60 years in case of Karnataka)

Parents or guardians of a child suffering from physical disability as specified.

Various type of Professional Tax Forms (Gujarat) :

Form Name	Description
Form 1	Employers Registration
Form 3	Application for the Certificate of Enrolment/Revision of Certificate of Enrolment.
Form 4-A	Declaration to be furnished by An Employee to His Employer or Employers

Form 5	Return of Tax payable by an Employer
Form 5-A	Return of Tax payable by an Employer
From 5AA	Return of Tax payable by an Employer
Form 5-B	Application For Permission to File Consolidated Return
Form 5-C	Application For Grant Permission to File Consolidated Return
Form 5-CC	Application For Grant Permission to File Consolidated Return

FAQ on Professional Tax (Gujarat) :

Some frequently asked questions for Individuals, Professionals, Companies, Firm and VAT dealers (Enrolment Certificate Holders) are as under:

1. What is the Designated Authority?

A Designated Authority is the authority which levies and collects the tax from a person liable to pay professional tax.

2. To which designated authority a person has to approach for compliance of professional tax matters?

Govt. of Gujarat has notified the jurisdictions of following designated authorities in whose office, a person falling under entry 2 to 10 of Schedule 1 may approach. 1. District Panchayat:- Area of District Panchayat. 2. Municipality:- Area of Municipality. 3. Municipal Corporation:- Area of Municipal Corporation.

State Government:- All other area not covered under a Panchayat, Municipality or Municipal Corporation.

3. Which categories of professionals, traders are liable to pay tax under this Act ?

All registered partnership firms, all factory owners, all shops or establishment owners (if the shop has employed on an average five employees per day during the year), all businesses covered under the definition of 'dealer' defined in the Gujarat Value Added Tax Act, 2003 whose annual turnover is more than Rs. 2.50 lakhs, all transport permit holders, money lenders, petrol pump owners, all limited companies, all banks, all district or state level co-operative societies, estate agents, brokers, building contractors, video parlors, video libraries, members of associations registered under Forward Contract Act, members of stock exchange, other professionals, like Legal Consultants, Solicitors, Doctors, Insurance Agents, Chartered Accountants etc.

4. Is it compulsory for the professionals enumerated in Schedule 1 to get enrolled?

Yes, A person already enrolled need not apply for enrolment again.

5. In which office one should get enrolled himself?

At any City Civic Centre or at the Zonal Profession tax office.

6. Is there any time limit for compulsory enrolment?

Enrolment should be done within 60 days from the date on which liability has arisen.

7. What Documents are required to get enrolment?

Documents(copies) related to commencement of business, VAT registration certificate, PAN

card, copy of registration of shops and establishment, copy of ROC, and last three years challans copy and property tax bill are to be submitted.

8. What are the rates?

The rates of tax per annum are fixed by the relevant designated authority. The rates are subject to the maximum rates mentioned in Schedule 1, and minimum rates fixed by the State Government for each of the entries No.2 to 10 by notification. However, till the designated authority fixes its rates of tax within these limits, the professional will have to pay the tax at the minimum rate of tax fixed by the Government. (See the website www.commercialtax.gujarat.gov.in or www.egovamc.com for the rates.)

9. What is the method of payment?

At Ahmedabad, payment can be made at any City Civic Centre by cash or a cheque/Demand Draft in Favour of "Municipal Commissioner Ahmedabad" payable at Ahmedabad or ONLINE Payment.

10. Is there any special form for application for enrolment?

Form No.3 appended to the Profession Tax Rules is the application form for the enrolment.

11. Where could these forms be obtained from?

From the relevant profession tax office or the web site www.egovamc.com or at any City Civic Centre.

12. Do you have to enrol for each place of branch separately?

Yes, each branch is deemed as separate assessee under the Act.

13. What if enrolment is not obtained within time limit?

You are liable to pay penalty at the rate of Rs.10/-per day.

14. What if the places of business of a professional are spread over more than one designated authority's jurisdiction?

You should enrol and pay tax at each designated authority under which your branch is located

15. When the tax is required to be paid?

Tax is required to be paid annually during month of September of every year in case you are enrolled before 31 st August, and in other cases within one month from the date of enrolment.

16. What if the person falls under more than one category of the schedule.

The details of all the categories has to be filled up in Form-3 and the HIGHEST RATE applicable shall be paid.

17. What if any professional does not pay this tax?

Designated authority has power to recover such amount from the assets of the defaulter. It can also attach bank account of such defaulter. Lastly, prosecution case (police case) can also be filed under the provisions of the Act.

NOTE:For rules, legal clarifications and amendments of the above information, refer to the Gujarat State Taxes on Profession ,Trades and callings and Employments Act of 1976 along with amendment.

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Glimpses of Supreme Court Rulings

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31 Evidence Act – A compact Disc (CD) is 'Document' :

Word "document" is defined in Section 3 of the Indian Evidence Act, 1872, as under: -

"Document' means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

Illustration

A writing is a document; Words printed, lithographed or photographed are documents; A map or plan is a document; An inscription on a metal plate or stone is a document; A caricature is a document."

In view of the definition of 'document' in Evidence Act, and the law laid down by this Court, as discussed above, we hold that the compact disc is also a document.

[Shamsher Singh Verma Vs State of Haryana (CRIMINAL APPEAL NO. 1525 of 2015/ S.L.P. (Crl.) No. 9151 of 2015) (Date: 24-11-2015)]

32 Maintainability - Alternative remedy :

It is to be reiterated that writ petition under article 226 is not the proper proceedings for adjudication of such disputes relating to contractual disputes. It is settled law that when an alternative and equally efficacious remedies open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not affect the jurisdiction of the court to issue a writ, but ordinarily that would be a good ground in refusing to exercise the discretion under article 226. It is true that many matters could be decided after referring to the contentions raised in the affidavits and counter affidavits, but that would hardly be a ground for exercise of extraordinary jurisdiction under article 226 of the Constitution in case of alleged breach of contract. Such seriously disputed questions or rival claims of the parties with regard to breach of contract are to be investigated and determined on the basis of evidence which may be led by the parties in a properly instituted a civil suit rather than by a court exercising prerogative of issuing writs.

The High Court is not deprived of its jurisdiction to entertain a petition under article 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under article 226 the high court has jurisdiction to try issues both of the fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of the complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try in the writ jurisdiction, or for analogous reasons.

The following legal principles emerge as to the maintainability of a writ petition:

(a) in an appropriate case, a writ petition as against a state or an instrumentality of a state arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable

[State of Kerala and Others vs. M. K. Jose (9 SCC 433)(2015)]

33 Precedents:

Coordinate Bench – Conflict between two prior decisions of coordinate benches – Courses open to a coordinate bench sitting subsequent to such conflicting decisions – of the two prior coordinate Benches, the latter of the two erroneously interpreting the earlier of the two – Position of law clarified herein, and prior most coordinate Bench followed – constitution of India, Article – 141

[VedicaProcon Pvt. Ltd. Vs. Balleshwar Greens Pvt. Ltd. (10 SCC 94)(2015)]

34 Continuation of suit against person on whom interest in suit property devolves:

Under Rule 10 order 22 of the civil procedure code, when there has been a devolution of interest during the dependency of a suit, the suit may, by leave of the court, be continued by or against persons upon whom such interest has devolved and this entitles the person who has acquired an interest in the subject matter of the litigation by an assignment or creation or devolution of interest pendente lite order suited or any other person interested, to apply to the court for you to continue the suit. But it does not follow that it is obligatory upon them to do so. If a party does not ask for leave, he takes the obvious risk that the suit may not be properly conducted by the plaintiff on record, and yet, as pointed out by Their Lordships of the Judicial Committee in *MotiLal vs. Karrab-Ul-Din* he will be bound by the result of the litigation even though he's not represented at the hearing unless it is shown that the litigation was not properly conducted by the original party or he colluded with the adversary. It is also plain that if the person who has acquired an interest by devolution, obtains leave to carry on the suit, the suit in his hands is not a new suit, four, as Lord Kingsdown of the Judicial Committee 's said in *Prannath Roy Chowdryvs Rookea Begum*, a cause of action is not prolonged by mere transfer of the title. It is the old suit carried on at his instance and he is bound by all proceedings up to the stage when he obtains leave to carry on the proceedings.

Family and personal laws – Hindu Law - joint family/joint family property - property if had become/was part of common hotchpotch - income received from undivided ancestral property utilized by a member (father D-1) for construction of a house, though vacant plot of land therefore purchased by D-1 from self-acquired funds (salary) - further, one of the sons (plaintiff's husband) gives certain amount to father D-1 utilized the same in construction work – Held, taking all the facts into consideration, the same amounted to putting suit house in common hotchpotch of joint family property – Hence suit house constituted a joint family property.

[KirpalKaur vs. Jitender Pal Sing and Others (9 SCC 356)(2015)]

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From the Courts

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57 Compensation under Motor Vehicles Act. on Vehicular accident is not income. Court of its own motion v/s. H.P. State Co. op. Bank Ltd. (2015) 276 CTR 264 (HP)

Issue:

Whether compensation under Motor Vehicles Act, to a person is taxable and also T.D. is to be made from interest on such compensation.

Held:

While going through the provisions of S. 2(31), 2(42), 6 and 194A, one comes to the inescapable conclusion that the mandate of the said provisions does not apply to the accident claim cases and the compensation awarded under the Motor Vehicles Act cannot be taxable income. The compensation is awarded in lieu of death of a person or bodily injury suffered in a vehicular accident, which is damage and not income. The purpose of granting compensation under the Motor Vehicles Act is to ameliorate the sufferings of the victims so that they may be saved from social evils and starvation, and that the victims get some sort of help as early as possible. It is just to save them from sufferings, agony and to rehabilitate them. One wonders how and under what provisions of law the IT authorities have treated the amount awarded or interest accrued on term deposits made in Motor Accident Claims cases as income. Therefore, the Circular No. 8 of 2011, dt. 14th Oct., 2011 is against the concept and provisions referred to hereinabove and runs contrary to the mandate of granting compensation.

58 Mismatching of TDS with Form No. 26AS : Rakeshkumar Gupta v/s. Union Bank of India (2015) 276 CTR 379 (All).

Issue :

What is the duty of Assessing Officer to grant refund when there is mismatching of TDS as per Form No. 26AS?

Held :

When the assessment was processed and a refund of Rs.43,740/- was issued, no intimation was given by the Department as to why the balance TDS amount could not be credited in favour of the assessee. The AO was under a duty to verify whether or not the deductor had made the payment of the TDS in the Government account. The assessee has suffered a tax deduction at source, but has not been given due credit inspite of the fact that he has been issued a TDS certificate by a Government department. There is a presumption that the deductor has deposited TDS amount in the Government account especially when the deductor is a Government department. By denying the benefit of TDS to the petitioner because of the fault of the deductor, causes not only harassment and inconvenience, but also makes the assessee feel cheated.

The Revenue have denied refunding the TDS on the ground that the refund would only be granted when the TDS matches with the details mentioned in Form 26AS. Since the mismatching is not attributable to the assessee and the fault solely lay with the deductor, a case has been made out for grant of a mandamus for refund of the TDS amount. The assessee has also made out a case for payment of interest since the delay in refunding the amount was attributable solely with the IT Department and there is no fault on the part of the assessee. A writ of mandamus is issued commanding AO to refund

an amount of Rs.1,88,631/- along with interest as per the law within three weeks from the date of the production of a certified copy of this order. In the circumstances of the case, AO will also pay cost of Rs.25,000/- to the assessee within the same period.

59 Cardinal principle of Taxation : Income Cannot be taxed twice C.I.T. v/s. Nagarjuna Fertilizers and Chemicals Ltd. (2015) 373 ITR 252 (T & AP)

Issue :

What is the cardinal principle of taxation of income? Can income be taxed twice?

Held:

One of the cardinal principles of taxation is that no amount shall be brought under the purview of taxation, unless there is specific legislative sanction for it. If one takes into account the complex and complicated scheme under the Income-tax, 1961, it is evident that Parliament has taken every precaution to ensure that no amount is subjected to taxation twice, unless the relevant provision specifically permits it. There is nothing in the Act which permits interest on corporate deposits, to be taxed twice.

From a perusal of the Explanation to section 115J, it becomes clear that notwithstanding the freedom given to an assessee to state its book profit in its annual report submitted as part of its obligation under the Companies Act, 1956, it is kept under an obligation to be truthful. The book profit is liable to be increased or decreased, depending upon the factors that are mentioned in the Explanation. One central theme that runs through the provision is that the profit and loss shall be with reference to the relevant previous year.

60 Depreciation on machinery used for trial run: CIT v/s. Escorts Tractors Ltd. (2015) 230 Taxman 584 (Delhi)

Issue:

Whether depreciation on machinery installed and used for trial run only and not for production is allowable?

Held:

The machine was handed over to the production department for the purpose of trial two days before the end of the previous year. The revenue qualifies its stand by stating that the same was not for the purpose of production and manufacture. It is not the stand of the revenue that the machine was not installed for trial purpose. Given the finding of the Tribunal it must be inferred and accepted that the machine was installed. Once the machine is installed, it is fit to be used for manufacturing and production. The trial run was to ensure that the machine was working in perfect condition following the installation and could be used henceforth for production and manufacturing purposes.

Section 32 does not contemplate that manufacturing or production should have actually commenced nor does it contemplate that the assets should be used for the whole of the assessment year. The requirement under section 32(1) is "owned by assessee" which suggest that the assessee should be the owner in the previous year in question. The second requirement is that the machine should have been used. The purpose of Section 32 is to give due regard to the wear and tear suffered by the assets used by the assessee so that net income is duly arrived.

If plant and machinery is kept ready for use, that would be enough to grant depreciation.

61 Deduction u/s. 80 from the Source of income v/s. Gross Total Income: CIT v/s. Premier Explosives Ltd. (2015) 373 ITR 177 (T & AP)

Issue:

Deduction u/s. 80 HH and 80I can be claimed from one source of income when in another source there is loss.

Held:

In its return for the assessment year 1993-94, the assessee disclosed income from various sources including those referable to sections 80HH and 80-I of the Act. In the return, it sought to claim

deductions from the incomes covered by respective sections, separately. While in respect of one source of income it incurred losses, in respect of others, it earned profits. The deductions sought to be made by the assessee were from the activity that yielded profits. The Assessing Officer, however, insisted that the deductions must be from the combined income from both the categories. That in turn virtually neutralized the income derived from one source, by the loss incurred in the other source. Hence, the occasion to make any deduction did not exist. The Commissioner (Appeals) allowed the claim of the assessee and this was upheld by the Tribunal. On appeal to the High Court.

Held, dismissing the appeal, that the deduction under sections 80HH and 80-I could be claimed with respect to each unit, separately.

62 Tax Recovery : Liability of Garnishee : Uttar Pradesh Carbon & Chemicals Ltd. v/s. T.R.O. (2015) 230 Taxman 639 (Allahbad)

Issue:

Whether tax can be collected from Garnishee, when he refuses of any liability to pay any amount to the assessee from whom the tax was due?

Held:

Provision of Sec.226(3) are applicable to admitted liability only.

When a person submits affidavit that no amount is due to be paid to the assessee in whose case the demand is due, department cannot recover any amount from such person who files affidavit.

If on inquiry it is found that the affidavit was not correct, then Sec.226 (3)(vi) provides to recover the amount from such person who files affidavit. Hence power u/s.226 (3)(vi) is for finding out genuineness of the affidavit and not recovery.

Hence, when the Garnishee once files the affidavit to department, subject to above, department cannot recover the amount from the Garnishee.

63 Interest on refund of self assessment tax is to be granted : Stock Holding Corporation of India Ltd. v/s. N.C. Tiwari (CIT) (2015) 373 ITR 282 (Bom)

Issue:

Is asessee entitled to interest on refund of tax paid on self assessment u/s.140A?

Held:

Circular No.549, dated October 31, 1989, makes it clear that if refund is out of any tax other than out of advance tax or tax deducted at source, interest shall be payable from the date of payment of tax till the date of the grant of refund. The circular even remotely did not suggest that interest is not payable by the Department on self-assessment tax. Moreover, the amount paid under section 140A on self-assessment is an amount payable as and by way of the tax after noticing that there is likely to be shortfall in the taxes already paid. Thus, this payment is considered to be a tax under the provision. The amount paid by the assessee as tax on self-assessment would not stand covered by section 244A(1)(a) as it is neither payment of tax by way of advance tax or by way of tax deducted at source. Thus, the tax paid on self-assessment would fall under section 244(1)(b), i.e., a residuary clause covering refunds of amount not falling under section 244A(1). Section 244A makes it clear that refund of any amount that become due to any assessee under the Act will entitle the assessee to interest. The amount on which the refund was claimed was originally paid as tax on self-assessment under section 140A and evidence of the tax paid in the form of challan was enclosed to the return. In fact when the Assessing Officer passed the assessment order he accepted the entire amount paid as tax on self-assessment as a payment of tax. When any refund becomes due to an assessee out of tax paid, it becomes so only after holding that it is not the tax payable. Thus, the contention that the amount paid as tax on self-assessment was not tax and, therefore, no interest could be granted on refund of such amounts which were not tax could not be sustained.

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Tribunal News

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48 ITO Vs. Skill Infrastructure Ltd. 70 SOT 186 (MUM)/62 taxmann.com 33 (Mumbai)

Assessment Years: 2004-05 to 2006-07
Order Dated: 29th July, 2015

Basic Facts

The assessee company entered into an agreement with a UK company (Appledore)to perform certain consultancy services viz to undertake evaluation of business opportunities in India. The assessee made payment for said services but had not deducted tax at source on said payment on the ground that article 13 was not applicable as the services rendered by Appledore were consultancy services and did not make available any technical knowledge, skills etc. The AO opined that payment for the services fell under the category 'Fees for technical services' and since the beneficiary was supposed to carry out global market survey to determine demand for repairs and the short/medium/long term business prospects in India, the services provided by consultant Appledore made available technical knowledge/plan or design to the assessee. The AO computed the tax u/s 201(1) and also interest u/s 201(1A) for all the assessment years under consideration. The CIT(A) was convinced that services which are commercial in nature did not fall under FTS and thus there was no need to deduct withholding tax on the payment.

Issue

Whether since these services were neither geared to nor did they 'make available' any technical knowledge, skill or experience to assessee or consisted of development and transfer of a technical man or technical design to assessee, payments made by assessee for these services were not taxable as per article 13?

Held

Services can be said to 'make available' technical knowledge etc., where such technical knowledge is transferred to the person utilizing the service and such person is able to make use of the technical knowledge, etc. by himself in his business or for his own benefits and without recourse to the performance of service in the future. Appledore had merely provided services for global market survey to determine demand for repairs, conversions, new builds and to determine the short/medium/long-term business prospects in India and to determine a strategy for manning and training personnel, an estimation of cash flows and capital requirements, financial structure and payback period and provide report for the same. These services by Appledore were not given towards imparting any technical knowledge or experience to the assessee that could be used by the assessee independently in its business and without recourse to Appledore. These services were neither geared to nor did they make available any technical knowledge, skill or experience to the assessee or consisted of development and transfer of technical man or technical design to the assessee. Considering the aforementioned services in totality, Appledore is not responsible for preparation of any design, diagram etc., for the assessee and accordingly it was held that services provided by Appledore do not involved development and transfer of technical man or design to the assessee. Accordingly, the payment made by the assessee to Appledore for services do not qualify as FTS under the provisions of Indo-UK treaty.

49 Tamchikusuk Vs. ACIT 155 ITD 276/ 60Taxmann.com360 (Guwahati) Assessment Year: 2006-07 Order Dated: May 15, 2015

Basic Facts

The assessee was belonging to a scheduled tribe in the Arunachal Pradesh and was engaged in the business of carrying out contract works for construction of fencing and roads along Indo-Bangladesh border in the State of Meghalaya and Tripura. He claimed his income as exempt u/s 10(26) being the income accrued and arisen in the State of Arunachal Pradesh and Tripura. During the assessment proceedings, the AO notices that the assessee had not deducted tax at source from the payments on account of carriage inward transportation charges etc., on which provisions of section 194C were applicable. These amounts were disallowed u/s 40(a)(ia). On appeal CIT(A) confirmed the disallowance observing that even if the income computed in the normal course of accounting was exempt the assessee was required to deduct tax on payment which attracted TDS provisions.

Issue

Whether where taxable income of assessee is exempt under section 10(26), disallowance made under section 40(a)(ia) will be tax neutral inasmuch as whatever is income arrived at after making these disallowances is exempt under section 10(26)?

Held

All that Section 40 does is to restrict the scope of deductions under sections 30 to 38, which, in turn, may result in determining higher income chargeable under the head business income. However, in a situation in which the business income, so determined, itself is not includible in the income chargeable to tax, such disallowances do not really matter at all.Such disallowance are thus completely tax neutral in asmuch as whatever is the income arrived at after making these disallowance is exempt under section 10(26). The revenue had contended that section 40(a)(ia) is penal in nature and is a result of the lapses committed by the assessee in complying with his tax deduction at source obligations and therefore to be involved in this case whether or not the ultimate amount of income is exempt from tax u/s 10(26). The Tribunal did not uphold this contention of the revenue but held that this disallowance does deincentivize lapses in deduction of tax at source, when such tax deductions are due, but, so far as the legal framework is concerned, this provision is not for the purpose of penalizing for the tax deduction at source lapses. Deincentivizing a lapse and punishing a lapse are two different things and have distinctly different, and mutually exclusive, connotations and repercussions. There are separate specific penal provisions to that effect, such as contained in Section 271C read with 273B of the Income Tax Act, and there cannot even be multiple penalties for the same lapse. When there is a specific penal provisions for a lapse, which have not been invoked on the facts of this case, there cannot be any occasion to invoke section 40(a)(ia) on this case and treat the amount disallowable under that section as income of the assessee on standalone basis. Such a course of action is wholly devoid of any legal, or even rational, basis. Grievances of the assessee are upheld and the Assessing Officer is directed to delete the impugned disallowances, or rather additions, under section 40(a)(ia) of the Act.

50 Adani Power Ltd. Vs. ACIT 155 ITD 239/61Taxmann.com355 (Ahmedabad) Assessment Year: 2008-09 Order Dated: July 27, 2015

Basic Facts

The facts of the case are that the assessee is a Limited Company which is engaged in the business of developing, operating, maintenance of Power Projects and sale of power. Admittedly, during the year under consideration, the assessee-company's projects were under implementation and has not started any commercial activities. The assessee received certain amount as share capital as well as loan for purposes of setting up the power generation plants. The assessee deposited surplus fund in FDRs and Government securities. In the return of income,

the assessee offered interest income to tax. The AO completed assessment treating interest as revenue income liable to tax. In appellate proceedings, the assessee raised an objection relating to chargeability of interest income which was claimed to be capital receipt. The CIT(A) confirmed the AO's order.

Issue

Whether since interest received related to period prior to commencement of business, it was in nature of capital receipt and was required to be set off against pre-operative expenses?

Held

The Tribunal held that share capital as well as loans were raised for the specific purpose of setting up of the power generation plants. The business of the assessee has not commenced and therefore the interest received in the period prior to commencement of business was in the nature of capital receipt and hence was required to be set off against the pre-operative expenses. The assessee has already set off the interest income against the preoperative expenses which is titled as 'project development expenditure'. In view of the above it was held that interest income in question was a capital receipt not chargeable to tax during the year under consideration. While arriving to the above conclusion the Tribunal has applied the ratio of the decision of the Delhi High Court in case of Indian Oil Panipat Power Consortium Ltd.315 ITR 255.

51 DCIT Vs. B.A. Research India Ltd. 155 ITD 151/61Taxmann.com57(Ahmedabad) Assessment Years: 2008-09 & 2009-10 Order Dated: July 31, 2015

Basic Facts

The assessee was engaged in the business of clinical testing of drugs and formulations on human beings. It claimed deduction u/s 80IB(8A) by projecting itself to be an entity engaged in research and development. The AO accepted assessee's claim. The CIT was of the opinion that the assessee was only a contract research organization without any transfer of the technology developed. He thus taking a view that the assessee was not eligible for deduction under section 80IB(8A) passed a revisional order setting aside the assessment .

Issue

Whether once DSIR, which was an expert body, granted approval to assessee by specifically declaring as a research and Development company eligible for deduction u/s 80-IB(8A), revenue authorities could not decline assessee's claim for deduction in assessment or revisional proceedings?

Held

The DSIR granted approval to the assessee for AY 2007-08 to 2009-10 by specifically declaring it as a research and development company u/s 80IB(8A) read with provisions of rules 18D and 18DA of the Income Tax Rules. The approval was extended two time thereafter upto AY 2015-16. The Addl. CIT applied to the DSIR for revoking assessee's approval on 17-1-2013. The said authority declined this relief. In its order the DSIR clearly stated that assessee's activity was covered as a company in commercial research and development. The tribunal held that once the revenue sought for revoking assessee's approval u/s 80IB(8A) to the DSIR which stands refused, it cannot turn backward and question the assessee's status as an entity engaged in research and development be it in section 263 proceedings or in a regular assessment framed under section 143(3). It was accordingly held that the assessee is entitled for deduction u/s 80IB(8A) in both the assessment years. The commissioner's order passed under section 263 was reversed on merits.

52 Raymond Ltd. Vs DCIT 173 TTJ 572 (Mum) Assessment Year 1994-95, Order dated 1st September 2015

Basic Facts

The tax payable as per return of income after deduction of TDS & Advance tax was Rs.4.01 lacs whereas the assessee had paid by way of self assessment tax Rs.265 lacs. The appeal arises out of order of the CIT(A) denying assessee claim for

interest on self-assessment tax which is now refundable on account of order giving effect to CIT(A)'s order.

Issue

Whether the interest arising on refund of self-assessment tax be covered under section 244A(1)(a) of the Income Tax Act,1961?

Held

The self -assessment tax i.e. the tax paid on self-assessment by the assessee, is of the same species as advance tax, required to be paid by the assessee by estimating his current income, applying the current rate of tax thereon. Payment of self assessmen tax is only to make good the shortfall in the payment of advance tax, which is pegged at 100% of tax due i.e. as per the assessee's own estimate. The self –assessment tax is only a payment of tax paid in discharge of an obligation under the Act. The refund of the self-assessment tax shall attract concomitant interest i.e. from the date of payment of tax to that of its refund.

As per the Tribunal the payment under section 140A is to be made after the close of the year, on the basis of the assess's own return for the year as prepared. The payment made in excess of that required to be paid u/s 140A cannot therefore be regarded as payment made thereunder and thus as payment of self assessment tax. The same does not fall under any other provision as well. Being not chargeable under section 4(1) it cannot be regarded as payment of tax, which cannot be so merely for the reason that the assessee has chosen to pay it. The same simply represents the deposit, made on an ad hoc basis, without any basis in fact or in law. The said excess assumes the character of tax upon processing of the assessee's return or on making the assessment for the relevant year. Prior to such processing the AO has no power to refund the amount. It is only on the processing of the return of income, mandatory in all cases, setting off the said payment against the assessee's tax liability for the year i.e. by regarding it as paid towards tax, that the same assumes the character of a tax paid; entitled to refund u/s 143(1)r.w.s 237. Even so it would be tax paid on processing (or assessment) and not as self-assessment tax. Accordingly such excess would be entitled to interest under section 244A from the date of processing of the return and not from the date of payment of tax.

53 Fleurette Marine Novelle Hatam *v.* ITO(International Taxation)70 SOT203/61 Taxmann.com 362 (Mumbai)

Assessment Year 2009-10, Order dated 19th August 2015

Basic Facts

The assesse filed his return wherein he computed long-term capital gain on transfer of tenancy rights. The assessee's claim was that provisions of section 50C were not applicable to surrender of tenancy rights. The computation of the assessee was not accepted by the AO who was of the firm belief that provisions of section 50C were clearly applicable and therefore the Stamp duty value should have been taken by the assessee as full value of consideration. The AO thus recomputed long-term capital gain on surrender of tenancy right and made the impugned addition. The CIT(A) accepted assessee's claim. He however opined that since the tenancy rights were also capital asset, capital gains had to be worked out by considering report of DVO.

Issue

Whether provisions of Sec. 50C are applicable in the case of surrender of tenancy right?

Held:

A perusal of section 50C suggests that it is only for the limited purpose of computing capital gain in respect of sale of land and building, only when such sale takes place, stamp duty value has to be substituted for the sale consideration, if the sale consideration is less than the stamp duty value. In case of the surrender of tenancy right, provisions of section 50C would not apply. Accordingly it was held that provisions of section 50C are not applicable on the transfer of tenancy right. Thus the ground of the assesse was allowed.

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Controversies

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Issue: Whether loss from an exempt source can be set-off for the purpose of capital gains?

Proposition:

It is proposed that long-term capital loss on sale of equity shares which is subject to securities transaction tax(STT) is possible to be set-off against long-term capital gain on sale of any asset as per the provisions of the Act .

View against the Proposition:

It is a settled law if the income from any source is exempt from tax for any reason, then loss arising from said source shall not be considered in computation of total income. Let me refer to section 70 and section 71 which read as under:

Section 70 of the Act contains provisions relating to set-off of loss from one source against the income from another source under the same head of income, whereas section 71 of the Act encompasses set-off of loss from another head. In the instant case, section 70 was more relevant since the assessee had set-off losses arising from transfer of one asset against the income by way of capital gains from transfer of another asset (both losses and income fall within the same head, i.e. Capital Gains.)The relevant sub-section (3) under the section 70 of the Act states that where result of the computation made for any assessment year under section 48 to 55 in respect of any capital asset (other than a short-term capital asset) is a loss, the assessee shall be entitled to have the amount of such loss set off against the income, if any, as arrived at under a similar computation made for the assessment year in respect of any other capital asset not being the short-term capital asset.

It is decided by Madras High Court in the case of **CIT v. S.S. Thiyagrajan 129 ITR 115** that loss from a source, the income from which is exempt under section 10 cannot be set-off against taxable income. It is submitted that as per the decision of their Lordships of Madras High Court, loss from a source income from which is exempt under section 10 cannot be set-off against the taxable income. However, loss from a source income from which enjoys 100% tax holiday is eligible for set-off against taxable income. It was held by their Lordships of Madras High Court that the provision of Section 70 and 71 relating to set-off of loss from one head against income from another contemplate loss from a source, the income from which is liable to tax. If income from a source is altogether exempt from tax, loss from that source cannot be set off against the income from a different source or income under a different head. However, if the entire source is exempt or is considered not to be included while computing the total income then the profit/loss resulting from such a source does not enter into the computation at all. However, if a part of the source is exempt by virtue of particular provision of the Act for providing benefit to the assessee, then it cannot be held that the entire source will not enter into computation of total income.

Let me now refer to the decision of Mumbai ITAT in the case of Schrader Duncan Ltd. [2012] 50 SOT 68, the issue involved there was, whether the loss on transfer of capital asset being units in US 64 Scheme of Unit Trust of India can be allowed and entitled to carry forward the same for set off of in subsequent assessment years, when the income arising from such transfer of unit is exempt u/s. 10(33). The Tribunal held that the source both capital gain and capital loss on sale of units US 64 is itself excluded and not only the income arising from capital gain. The Hon'ble Tribunal have noted the history of US64 scheme and purpose for which

scheme was launched. In this context transfer of US64 scheme the tribunal held that the provision were not meant to enable the assessee to claim loss by indexation for set off against other capital gain chargeable to tax.

View in favour of the assessee:

The definition of capital asset as provided in section 2(14) of the Act does not provide any exclusion for equity shares and other securities which are exempt under section 10(38).Section 45 which is the charging section for capital gains arising on transfer of capital asset. Section 47 prescribes certain transactions that are not considered as transfers and therefore such transactions do not result in taxable capital gains. And the mode of computation has been mentioned in section 48. However, nothing has been mentioned in section 45 to 48 that capital gains/ loss are to be excluded as section 10(38) of the Act exempts the income arising from transfer of long-term capital asset being securities.

It is held in the case of **Royal Calcutta Turf Club V. CIT 144 ITR 709** that although in computing income certain incomes are not included under section 10, it would depend on a particular case whether it is the income from a certain source which would not enter into the computation of the total income or it is the source of income itself is specifically excluded by the legislature and in such a case one must look to the specific exclusion that has been made. In the instant case their Lordships of Calcutta High court held that exemption under the section in dispute merely excluded income derived from the specified business and not the entire business from the operation of the Act.

The Hon'ble High Court was besieged with the following question

"Whether under s.10(27) read with s.70 of the I.T. Act, 1961, was the assessee entitled to set off the loss on the two heads, namely, Broodmares Account and the Pig Account, against its income of other sources under the head "Business""

Their Lordships after analyzing the provisions of section 70 and section 10(27) observed in the following manner:

"In this case it is important to bear in mind that set-off is being claimed under Section 70 of the 1961 Act which permits set off of any income falling under any head of income other than the capital gain which is a loss, the assessee shall be entitled to have the amount of such loss set off against his income from any other source under the same head. We have noticed that in the instant case the exclusion has been conceded in computing the business income or the source of income from the head of business and in computing that business income, the loss from one particular source, that is, broodmares account and the pig account, had been excluded contrary to the submission of the assessee. The assessee wanted these losses to be set off. The Revenue contends that as the sources of the income are not to be included in view of the provisions of Clause (27) of s. 10 of the 1961 Act, the loss suffered from this source could also not merit the exclusion. Under the I.T. Act, there are certain incomes which do not enter into the computation of the total income at all. In this connection we have to bear in mind the scheme of the charging section which provides that the incomes shall be charged and s. 4 of the Act provides that the Central Act enacts that the incomes shall be charged for any assessment year and in accordance with and subject to the provisions of the 1961 Act in respect of the total income of the previous year or years or whatever the case may be. The scheme of "total income" has been explained by s. 5 of the Act which provides that subject to the provisions of the Act, the total income of the previous year of a person who is a resident includes all income from whatever source it is derived. In computing the total income, certain incomes are not included under s. 10 of the Act. It depends on the particular case where certain income, in respect of which the Act is made inapplicable to the scheme of the Act, and in such a case, the profit and loss resulting from such a source do not enter into the computation at

all. But there are other sources which for certain economic reasons are not included or excluded by the will of the Legislature. In such a case we must look to the specific exclusion that has been made. The question is in this case whether s. 10(27) is a source which does not enter into the computation at all or is a source the income in respect of which is excluded in the computation of total income. How this question will have to be viewed, has been looked into by the Supreme Court in several decisions to some of which our attention was drawn."

After discussing the various decisions of the Hon'ble Supreme Court specifically the decision of in the case of *Karamchand Premchand Ltd.* (*supra*), the Hon'ble High Court came to the following conclusion:

"cl.(27) of s.10 excludes in express terms only "any income derived from a business of live-stock breeding or poultry or dairy farming. It does not exclude the business of livestock breeding or poultry or dairy farming from the operation of the Act. Therefore, the losses suffered by the assessee in the broodmares account and in the pig account were admissible deductions in computing its total income"

Summation

Section 10(38) of the Act provides for exemption of positive income only. Therefore, losses shall not come within the purview of the said section. The set-off of LTCL has been clearly provided in section 70 and 71 of the Act, wherein Legislation has not put any embargo to exclude LTCL from sale of shares to be set-off against LTCG arising on account of sale of other capital asset. In fact none of the provisions of the Act creates an embargo on allowing LTCL from STT paid shares/mutual funds to be set-off against the LTCG from other assets and section 70(3) is an enabling provision to set – off such losses. Section 10(38) excludes in express terms only the income arising from transfer of long-term capital asset being equity shares or equity fund which is chargeable to STT, which is part of source of income and not the entire source of income from capital gains arising from transfer of shares.

It is interesting to refer to the decision of Hon'ble ITAT Mumbai Bench 'D' in the case of Raptakos Brett & CO. Ltd. reported in [2015] 58 taxmann.com 115. It is to be noted that as per this decision the gain is not taxable while losses will have the benefit of set off against other taxable gains. This may sound surprising but the Hon'ble ITAT has clearly given verdict on the same. However, this decision also brings out distinction between exemption of entire source of income and exemption of part of the source of income. According to Hon'ble ITAT the exemption of part of an income from the source is required to be included and the set off cannot be denied.

The Hon'ble ITAT clearly laid down that the concept of income including loss will apply only when the entire source is exempt and not where only one particular stream of income falling within a source is falling within exempted provisions. The whole genre of income under 'capital gain' on transfer of shares is a source, which is taxable under the Act. If an equity share is sold within the period of twelve months, then it is chargeable to tax and only if it falls within definition of long-term capital asset and further fulfills the conditions mentioned in sub-section (38) of section 10 then only such portion of income is treated as exempt.

Finally the Hon'ble ITAT concluded that section 10(38) excludes in expressed terms only income arising from transfer of long-term capital asset being equity share or equity fund which is chargeable to STT and not the entire source of income from capital gains arising from transfer of shares and accordingly, long-term capital loss on sale of shares would be allowed to be set off against long-term capital gain on sale of land in accordance with section 70(3).

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Judicial Analysis

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Recent decisions on reopening.

Adani Developers Pvt. Ltd. vs. ITO (SCA No. 5440 of 2015, dated 30/11/2015)

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7. Having heard learned counsel for the parties and having perused the documents on record, we find that the law on the subject is sufficiently clear. It is by now well settled by series of judgments that exercise of issuing notice for reopening by the Assessing Officer has to be based on reasons for reopening to be recorded by him. Such reasons have to reflect his belief that income chargeable to tax has escaped assessment. As Assessing Officer he is exercising quasi-judicial functions. As an authority exercising such quasi-judicial function, his discretion cannot be governed by any outside or external agency, not even by a higher authority. In case of ***Adani Exports*** (supra), Division Bench of this Court, referring to the decision of the Supreme Court in case of ***Indian and Eastern Newspaper Society v. CIT reported in 119 ITR 996,*** observed as under:

"..... The ratio fully governs the present case and the record illuminates the failure of the AO to adhere to this principle while issuing notice under s. 148 *in the present case. It is true that satisfaction of the AO for the purpose of reopening is subjective in character and the scope of judicial review is limited. When the reasons recorded show a nexus between the formation of belief and the escapement of income, a further enquiry about the adequacy or sufficiency of the material to reach such belief is not open to be scrutinized. However, it is always open to question existence of such belief on the ground that what has been stated is not correct state of affairs existing on record. Undoubtedly, in the face of record, burden lies, and heavily lies, on the petitioner who challenges it. If the petitioner is able to demonstrate that in fact the AO did not have any reason to believe or did not hold such belief in good faith or the belief which is projected in papers is not belief held by him in fact, the exercise of authority conferred on such person would be ultra vires the provisions of law and would be abuse of such authority. As the aforesaid decision of the Supreme Court indicates that though audit objection may serve as information, the basis of which the ITO can act, ultimate action must depend directly and solely on the formation of belief by the ITO on his own where such information passed on to him by the audit that income has escaped assessment. In the present case, by scrupulously analyzing the audit objection in great detail, the AO has demonstrably shown to have held the belief prior to the issuance of notice as well as after the issuance of notice that the original assessment was not erroneous and so far as he was concerned, he did not believe at any time that income has escaped assessment on account of erroneous computation of benefit under s. 80HHC. He has been consistent in his submission of his report to the superior officers. The mere fact that as a subordinate officer he added the suggestion that if his view is not accepted, remedial actions may be taken cannot be said to be belief held by him. He has no authority to surrender or abdicate his function to his superiors, nor the superiors can arrogate to themselves such authority. It needs hardly to be stated that in such circumstances conclusion is irresistible that the belief that income has escaped assessment was not held at all by the officer having jurisdiction to issue notice and*

recording under the office note on 8th February, 1997 that he has reason to believe is a mere pretence to give validity to the exercise of power. In other words, it was a colorable exercise of jurisdiction by the AO by recording reasons for holding a belief which in fact demonstrably he did not held that income of assessee has escaped assessment due to erroneous computation of deduction under s. 80HHC, for the reasons stated by the audit. The reason is not far to seek. "

8. This view flowing from the judgment of the Supreme Court in case of ***Indian & Eastern Newspaper Society*** (supra) and elaborated by this Court in ***Adani Exports*** (supra) has been consistently followed by this Court.

9. We are not unmindful of the decision of the Supreme Court in case of ***P.V.S. Beedies Pvt. Ltd.*** (supra) where a distinction has been drawn in a case wherein it was held and observed as under:

"We are of the view that both the Tribunal and the High Court were in error in holding that the information given by internal audit party could not be treated as information within the meaning of Section 147(b) of the Income Tax Act. The audit party has merely pointed out a fact which has been overlooked by the Income Tax Officer in the assessment. The fact that the recognition granted to this charitable trust had expired on 22-9-1992 was not noticed by the Income Tax Officer. This is not a case of information on a question of law. The dispute as to whether reopening is permissible after audit party expresses an opinion on a question of law is now being considered by a larger Bench of this Court. There can be no dispute that the audit party is entitled to point out a factual error or omission in the assessment. Reopening of the case on the basis of a factual error pointed out by the audit party is permissible under law. In view of that we hold that reopening of the case under Section 147(b) in the facts of this case was on the basis of factual information given by the internal audit party and was valid in law. The judgment under appeal is set aside to this extent. "

10. In view of such legal position, it will be necessary for us to examine in the present case whether reopening of assessment is ordered by the Assessing Officer on the basis of the belief that he found that the income chargeable to tax had escaped the assessment, or whether he acted solely upon the directives of the audit party.

11. It is undisputed that the entire issue arose upon scrutiny by the internal audit party. On 24.09.2013, the audit party wrote to the Assessing Officer in which following three issues were raised:

(1) disallowance under section 41-A of the Act,

(2) excess claim of depreciation, and

(3) interest earned from associated concern.

The audit party outlined its objections on these three counts.

12. In response to such communication, the Assessing Officer replied to the audit party on 03.12.2013 and contended in no uncertain terms giving detailed reasons that he did not agree to any of the audit objections cited in such communication dated 24.09.2013, except in case of excess claim of depreciation. With respect to this, he pointed out that the assessee has disallowed depreciation of Rs.2,43,512 instead of 2,88,369 in computation of income and the assessee has stated that by mistake it had disallowed the amount pertaining assessment year 2009-2010 instead of 2010-2011. It was concluded on this issue that:

"*on verification of the reply of the assessee and facts of the case, it is seen that the mistake is being apparent from the record and disallowance of depreciation should be made of Rs.2,88,369 instead of Rs.2,43,512.*

Therefore, such mistake may be rectified by passing order under section 154 of the I.T.Act".

12.1 In the concluding portion of the said communication, the Assessing Officer stated as under:

"*In view of the above, the audit objection raised by the internal audit party on various issues is not acceptable, except the issue of excess claim of depreciation. Reply dated 12.11.2013 of the assessee along with enclosure is attached for kind perusal,,*"

12.2 Despite such clear stand by the Assessing Officer, the audit party once again wrote on 14.2.2014 and stated as under:

"2. In this connection, the AO vide above referred letter dated 03.12.2013 has stated that looking to the facts of the case and reply of the assessee, on issue (I) a, b, c (non-deduction of the TDS), no further verification is required. In this regard, I am directed to state that the AO's reply is acceptable with regard to issue (1)(b) & (c) of this report. As regard the reply submitted in respect of issue (1) (a) regarding non-deduction of TDS from interest payment of Rs.18,95,27,072/- made to IFCI Ltd., the same is not acceptable due to the following reasons:

(i) IFCI Ltd. ceases to fall under the category provided in section 194A3(iii)(b) following its Repeal Act in 1993 and since then is a public limited company.

(ii) The A.O. has accepted the assessee company's submission which is relied on an opinion given by a Chartered Accountant vide letter dated 15.05.2007. The said opinion is relied on clause 5 & 6 of the IFCI Repeal Act 1993. However, from the said clause definite interpretation cannot be drawn that TDS was not required to be made from interest payments made to this company.

3. I am further directed to state that the A.O.'s report with regard to point No.(1)(b) & © of the report is accepted in view of details submitted & are hence treated as dropped. On issue (ii), AO has stated that the mistake in respect of excess depreciation allowed may be rectified by passing order u/s 154 of the I.T.Act. On issue (III) regarding interest earned from associate concern, the reply submitted in the A.O's report is not acceptable as the assessee has not been able to prove that earning such interest was the company's normal business activity or the interest earned was incidental to the business activity carried out by the assessee company or was inextricably linked to the project.

4. I am, therefore, directed to request you to kindly direct the AO to take appropriate action and submit an action taken report on finalization of the proceedings, with supporting evidences through proper channel, i.e. forward the same along with comments of the Addl./Jt.CIT, Range-1, Ahmedabad and the administrative CIT as required under per Para IV (4) (viii) of Instruction No.3/2007, to this office for consideration of the objections to

treated as settled/dropped or otherwise."

13. Learned counsel for the revenue pointed out from original records that in response to such letter of the audit party, the Assessing Officer had replied on 20.02.2014 (a copy of which is taken on record). Perusal of such letter shows that, in the first portion the Assessing Officer has recorded the stand of the audit party on different contentious issues. After reproducing the contents of the letter of the audit party dated 14.02.2014 at length, his response was confined to the following expression:

"*In view of above, the internal audit party has not accepted the reply on the above-said issues, except the issue mentioned in (10(b) & (c)"*

He thereafter referring to the three remedies of rectification, reopening of assessment and revision, in the concluding portion of the said letter, stated as under:

"Considering the facts of the case, the most suitable remedial action, in my opinion, would be reopening of assessment u/s.147 of the IT Act. Therefore, necessary approval for the same may kindly be granted, if deemed fit."

14. Bare perusal of the correspondence reveals that the assessment was completed and, upon scrutiny, the internal audit party found certain errors. These errors were highlighted and pointed out to the Assessing Officer for his consideration. The Assessing Officer in his letter dated 03.12.2013 in no uncertain terms wrote back to the audit party stating that he did not agree to most of the objections of the audit party. He agreed to a limited extent of the excess claim of depreciation which the assessee had pointed out was a mistaken claim and agreed for rectification. The Assessing Officer, therefore, believed that this was the only ground which merited consideration and that too by way of exercising the power of rectification. This was abundantly clear and quite indisputably emerges from his letter dated 03.12.2013. Despite the clear stand of the Assessing Officer, the audit party persisted with the issues. On 14.02.2014, the audit party did not accept the view of the Assessing Officer and, as noted above, directed the Assessing Officer to take appropriate action and submit an action taken report on finalization of the proceedings, with supporting evidences through proper channel. This was a clear directive to the Assessing Officer not only to initiate action but also to finalize the same and report finalization with supporting evidences. As if this much was not enough to hold that the Assessing Officer was being controlled by the audit party, his letter dated 20.02.2014 to the audit party left no possibility of any doubt. In such letter, he recorded the objection of the audit party at length and finally meekly stated that, in view of the above, the internal audit party has not accepted the reply on the said issues and ultimately proceeded to record that the most suitable remedial action in such case would be to reopen the assessment under section 147 of the Act which is contrary to his earlier view where on a limited ground of depreciation he had advocated measures of rectification.

15. This is a clear case where reopening of the assessment is under the directives of the audit party. The Assessing Officer has not acted merely on the opinion supplied by the audit party. He held a firm belief that there was no possibility of any further scrutiny on the count that income chargeable to tax escaped assessment. He so stated to the audit party in writing. The audit party did not accept his stand and virtually directed him to act further. Even while so accepting the dictates of the audit party, the Assessing Officer did not record any of his independent reasons. His only reason was that his reply has not been accepted by the audit party. As held by the Supreme Court and this Court in a number of judgments in such a situation, reopening of assessment would simply not be permissible. The notice of reopening is clearly bad in law. The contention

that the Assessing Officer himself had also agreed to an error in allowing the claim of depreciation and therefore on that count at least notice must be saved cannot be accepted. The Assessing Officer believed that there is possibility of correction by exercising the power of rectification. In fact, on this count, even the audit party agreed to the view of the Assessing Officer. If that be so, we simply fail to understand how the Assessing Officer later on could change his opinion and form a belief that the entire assessment requires reopening on this count. In fact, as noted, the assessee itself had agreed to the apparent error which can be rectified.

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DCIT vs. Digvijay Finlease Limited (ITA No.2402/Ahd/2011, dated 09/12/2015)

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4. So far as the adjudication on correctness of reassessment proceedings are concerned, the relevant material facts are like this. It is a case in which original assessment proceedings under section 143(3) of the Act were completed on 30.11.2007 but the reassessment was reopened, on 29.01.2010, on the following ground :-

"Reasons recorded for the Notice u/s. 148 of the I.T. Act

The assessee company filed its return of income on 30.10.2005 declaring total income of Rs.12,77,650/-. The income included short term capital gain of Rs.42,61,060/-. The case was selected for scrutiny and the assessment was finalized u/s. 143(3) of the Act on 30.11.2007 determining the taxable income at Rs.13,27,630/- on which tax was computed at Rs.1,38,803/- i.e. at the rate of tax applicable to 'Short Term Capital Gain'.

As per Supreme Court decision in the case of N.R.M. Plantations Pvt. Ltd. Vs. CIT (2000) 250 ITR 521, even the surplus on sale of an asset by an investment company is liable to be treated as normal 'business income', since the company is engaged in finance and investment. It has also been judicially held by various courts that income arising from frequent and voluminous purchase and sale of shares with a motive of profit is liable to be treated as an income under the head "profits and gains of business or profession".

The Certificate of the Auditors in Form 3CD revealed that the assessee is a "Finance & Investment' Company. Therefore, the income derived by it from purchase and sales of equity share/mutual fund etc. was in the nature of "profits and gains of business of profession" and cannot be treated as 'capital gain' in view of the decision quoted above. Thus, income which is taxed under the head 'capital gain' is to be taxed under the head 'business income' in view of the above discussion. Therefore, the undersigned has reasons to believe that the income chargeable to tax for the year under consideration has escaped assessment (under correct head of income) as per the provisions of section 147 of the I.T. ct. Therefore, a notice u/s. 148 of the I.T. Act is being issued for re-assessment u/s. 147 of the I.T. Act."

5. For the sake of completeness, it may be mentioned that this is second reopening of assessment, inasmuch as a notice under section 148 of the Act was issued, earlier on 25.05.2009, on the ground that a wrong claim under section 35D, for Rs.51,942/-, was allowed in the original assessment proceedings. In the course of reassessment proceedings that is before us, assessee did object but without any success. The matter was carried in appeal before the ld. CIT(A) but that did not yield any results either. Learned CIT(A) rejected this grievance by observing as follows :-

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6. The assessee is not satisfied and has raised this issue by way of petition u/r. 27 of the Appellate Tribunal Rules.

7. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of applicable legal position.

8. It is well settled in law that reasons, as recorded for reopening the reassessment, are to be examined on a standalone basis. Nothing can be added to the reasons so recorded, nor anything can be deleted from the reasons so recorded. Hon'ble Bombay High Court, in the case of Hindustan Lever limited vs. R.B. Wadkar [(2004) 268 ITR 332], has, inter alia, observed that "……..... It is needless to mention that the reasons are required to be read as they were recorded by the AO. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn on the basis of reasons not recorded. It is for the A.O. to disclose and open his mind through the reasons recorded by him. He has to speak through the reasons." Their Lordships added that "The reasons recorded should be self-explanatory and should not keep the assessee guessing for reasons. Reasons provide link between conclusion and the evidence….....". Therefore, the reasons are to be examined only on the basis of the reasons as recorded. The next important point is that even though reasons, as recorded, may not necessarily prove escapement of income at the stage of recording the reasons, such reasons must point out to an income escaping assessment and not merely need of an inquiry which may result in detection of an income escaping assessment. Undoubtedly, at the stage of recording the reasons for reopening the assessment, all that is necessary is the formation of prima facie belief that an income has escaped the assessment and it is not necessary that the fact of income having escaped assessment is proved to the hilt. What is, however, necessary is that there must be something which indicates, even if not establishes, the escapement of income from assessment. It is only on this basis that the Assessing Officer can form the belief that an income has escaped assessment. Merely because some further investigations have not been carried out, which, if made, could have led to detection to an income escaping assessment, cannot be reason enough to hold the view that income has escaped assessment.

9. In this light, let us revert to the reasons recorded for reopening assessment. The reliance placed on Hon'ble Supreme Court's judgment in the case of NRM Plantations Pvt. Ltd. Vs. CIT [(2000) 250 ITR 521 (SC)], is wholly misplaced in the context of what constitutes business income, in contradistinction to capital gains, because this judicial precedent deals with the question as to what constitutes 'undistributed income' under section 104, as it then existed, of the Income Tax Act, 1961. This section is not even remotely connected with what constitutes business income vis-à-vis capital gains, and is no longer on statute. By no stretch of logic, this decision can be seen in support of the proposition that gains on sale of shares constitutes business income and not capital gains. As for the reference to the income from frequent sale of shares being held to be in the nature, as there is not even a whisper to suggest that there are frequent sale and purchase of shares in this case, it does not also lead to the suggestion that income has escaped assessment. Unlike a case of revision in which lack of enquiry can be a reason enough in some cases to invoke the revision powers, an assessment can be reopened only when there is a suggestion, at least prima facie, that income has escaped assessment. That is not the case here. In the light of these discussions, as also bearing in mind entirety of the case, we hold that the reassessment proceedings were indeed vitiated in law. We, therefore, quash the reassessment itself.

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FEMA Updates

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43 No fresh permission/ renewal of permission to LOs of foreign law firms- Supreme Court's directions

The Hon'ble Supreme Court vide its interim orders dated July 4, 2012 and September 14, 2015, passed in the case of the Bar Council of India vs A.K. Balaji &Ors., has directed RBI not to grant any permission to any foreign law firm, on or after the date of the said interim order, for opening of Liaison Office (LO) in India. Hence, no foreign law firm shall be permitted to open any LO in India till further orders/notification in this regard. However, foreign law firms which have been granted permission prior to the date of interim order for opening LOs in India may be allowed to continue provided such permission is still in force. No fresh permission/ renewal of permission shall be granted by RBI/AD banks respectively till the policy is reviewed based on, among others, final disposal of the matter by the Hon'ble Supreme Court.

For Full Text refer to A.P. (DIR Series) Circular No. 23 dated 29October 2015

https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10092

44 Subscription to National Pension System by Non-Resident Indians (NRIs)

With a view to enabling NRIs' access to old age income security, it has now been decided, in consultation with the Government of India, to enable National Pension System (NPS) as an investment option for NRIs under FEMA, 1999. Accordingly, NRIs may subscribe to the NPS governed and administered by the Pension Fund Regulatory and Development Authority (PFRDA), provided such subscriptions are made through normal banking channels and the person is eligible to invest as per the provisions of the PFRDA Act.

The subscription amounts shall be paid by the NRIs either by inward remittance through normal banking channels or out of funds held in their NRE/ FCNR/NRO account. There shall be no restriction on repatriation of the annuity/ accumulated savings.

For Full Text refer to A.P. (DIR Series) Circular No. 24 dated 29October 2015

https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10093

45 Risk Management & Inter-Bank Dealings: Relaxation of facilities for residents for hedging of foreign currency borrowings

Under the existing guidelines, residents having a long term foreign currency liability in terms of Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000, FEMA 3/2000-RB, dated May 3, 2000, as amended from time to time and rules, regulations and directions issued thereunder, are permitted to hedge exchange rate and/or interest rate risk exposure thereof by undertaking a foreign currency-INR swap to move from a foreign currency liability to a rupee liability with an AD Cat-I bank subject to the operational guidelines, terms and conditions as mentioned in the above circular.

With a view to facilitating hedging of long term foreign currency borrowings by residents, it has been decided to permit them to enter in to FCY-INR swaps with Multilateral or International

Financial Institutions (MFI/IFI) in which Government of India is a shareholding member subject.

For Full Text refer to A.P. (DIR Series) Circular No. 28 dated 5November 2015

https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10114

46 Import of Goods into India – Evidence of Import

An importer has to submit as evidence of import, (a) the exchange control copy of the Bill of Entry for home consumption; (b) the exchange control copy of the Bill of Entry for warehousing, in the case of 100% Export Oriented Units (EOUs); or (c) Customs Assessment Certificate or Postal Appraisal Form as declared by the importer to the Customs Authorities.

With the establishment of Free Trade Warehousing Zones / SEZ Unit warehouses, imported goods can be stored therein, for re-export / re-selling purposes for which Customs Authorities issue Ex-Bond Bill of Entry. AD banks are advised to consider the Bill of Entry issued by Customs Authorities named as Ex-Bond Bill of Entry or by any other similar nomenclature, as evidence for physical import of goods.

For Full Text refer to A.P. (DIR Series) Circular No. 29 dated 26November 2015

https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10142

47 Advance Remittance for Import of aircrafts /helicopters / other aviation related purchases

AD Category I banks could allow advance remittance, without bank guarantee or an unconditional, irrevocable standby letter of credit up to USD 50 million, in the case of import of aircrafts/ helicopters/ other aviation related purchases by scheduled air transport operators permitted by the Director General of Civil Aviation (DGCA), after ensuring that the requisite approval of the Ministry of Civil Aviation (MoCA)/ DGCA / other agencies in terms of the extant Foreign Trade Policy, had been obtained by the company for import.

For Full Text refer to A.P. (DIR Series) Circular No. 30 dated 26November 2015

https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10143

48 Investment by Foreign Portfolio Investors (FPI) in Corporate Bonds

Earlier it was notified that all future investments by Foreign Portfolio Investors (FPI) in NCDs/bonds shall be required to be made in securities with a minimum residual maturity of three years.On a review, it has been decided to permit FPI to acquire NCDs/bonds, which are under default, either fully or partly, in the repayment of principal on maturity or principal installment in the case of amortizing bond. The revised maturity period of such NCDs/ bonds, restructured based on negotiations with the issuing Indian company, should be three years or more.

For Full Text refer to A.P. (DIR Series) Circular No. 31 dated 26November 2015

https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10147

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Service Tax Decoded

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Technical Issues for Construction Industry

Registration at early stage of project: In construction projects, it may happen that builders/ developers starts incurring cost at earlier period and at that time there is no booking or receipts from the buyers and hence no liability to pay service tax. At this stage builders/developers pays service tax to person from whom they avail the services, for example service tax paid on architect's fee. It may happen that by the time builder/developer starts paying service tax, time limit available for taking credit has lapsed. Further, in some cases, department disputes regarding eligibility of CENVAT credit pertaining to period prior to registration. Though, this stand is not legally valid but undue litigation can be avoided if registration is obtained at starting of the project. Further, even if no service tax is payable by the builder/developers on their output services, they may need to pay service tax on reverse charge mechanism like on freight etc. Hence, considering all such situations, it is highly advisable for builders/developers that they obtain registration at early stage of their scheme.

Category of contractors working on labour only basis: Many contractors are actually undertakes activity of construction only on labour basis and they do not provide any goods, for example RCC Contractors, Masonry Work Contractor, Plaster Contractor etc. on labour. Their remuneration is fixed on their performance say on per cubic meter of work. Such contractors are also required to pay service tax under the category of construction (may be it commercial or residential) and not as supplier of manpower or any other category of service.

Cancellation of Bookings: Cancellation of booking is common in construction industry. Service tax is required to be paid on advance and by the time booking got cancelled, it might happen that service tax on such advances has been already paid. Now, if booking is cancelled, there is no provision of service and there is no need to pay service tax but service tax is already paid at this stage. In such situation builder can adjust the excess of service tax paid on such cancelled booking against his other liability of service tax as provided in Rule 6(3) of the Service Tax Rules, 1994.

In terms of this rule, where an assessee has issued an invoice, or received any payment, against a service to be provided which is not so provided by him either wholly or partially for any reason, or where the amount of invoice is renegotiated due to deficient provision of service or any terms contained in a contract, the assessee may take the credit of such excess service tax paid by him. However, to avail benefit of this rule, builder shall have refunded the payment or part thereof, so received for the service provided to the person from whom it was received or has issued a credit note for the value of the service not so provided to the person to whom such an invoice had been issued.

Hence, adjustment of such tax, paid on cancellation of booking, against other liability is possible and it should be made sure that either money is refunded or credit note is issued by the builder before the adjustment is done.

Some time, it may happen that booking is cancelled at very later stage of the project, say for example, after receiving completion certificate and at that time builder/developer has no outstanding liability of service tax and adjustment of excess tax paid on cancellation of booking, by builder against his other service tax liability is not possible. In such cases, application of refund is required to be made.

Issuance of Invoice is Mandatory: In residential and commercial schemes, some time builders do not issue invoices on person who has booked the unit in their scheme. However, in terms of Rule 4A of the Service Tax Rules, 1994, every person providing taxable service shall issue an invoice. Further, such invoice is required to be issued within 30 days of completion of service (refer discussion

on Point of taxation) or date of receipt whichever is earlier.

Further, following details shall be contained in invoice issued by the builder/developer.

- Signature of service provider (i.e. builder/ developer).
- Serial number of invoice.
- The name, address and the registration number of builder/developer.
- The name and address of the person receiving taxable service.
- Description and value of taxable service provided or agreed to be provided.
- The service tax payable thereon.

Construction industry is not an exception to it and builders are also required to issue invoices on buyers of the unit.

Builders/developers are generally issues receipt for payment received from the buyers of the units. It will be enough if above stated details are also included in such receipts and other procedures in Rule 4A are followed. Thus, builders can issue a single document like "Receipt cum Invoice for Service Tax".

Responsibility of Builders/Developers if contractors are not paying service tax: Many contractors and sub-contractors in infrastructure projects or residential and commercial construction projects are not registered or not paying service tax even though they are liable to pay service tax. This may because of lack of knowledge, financial problems, unorganized operations or any other reason. In such case service recipient, i.e. builder/ developer is not liable to pay service tax which is payable by such contractors or sub-contractors.

However, in some cases, builders/developers are liable to pay service tax on services provided by contractors and sub-contractors under Reverse Charge Mechanism. (refer discussion on Reverse Charge Mechanism). In such case builders/ developers are required to pay service tax on such service irrespective of the fact that such contractors are discharging service tax liability payable by them or not.

Collection of service tax from buyers separately on each instalment: If agreed price between buyers and builders are exclusive of service tax, buyers are required to pay service tax over and above the agreed price. Buyers pays amount in instalments and in many cases it runs in years. Now, builders have two options first they collects amount of service tax over and above on each agreed instalment with instalment itself. Another option is that the builder collects his instalment only and considers this amount as inclusive of tax and pay service tax accordingly and at time of final payment, he collects service tax on total contract value. If second option is availed, working capital of builder equal to total amount of service tax (3.5% or 4.2 % of total project value) will be blocked and will be realized only at the end of the project.

Delayed or Non Payment of Service Tax - Safety Nets Available: It may happen that builder/ developer has not paid his service tax liability for any reason. Fear of litigation and payment of penalty becomes hurdle in regularizing the payment of service tax. For such situations, various safety nets are provided under the Finance Act, 1994 through which builder/developer can make payment with interest and save the penalty or pay reduced penalty of 0%, 10%, 15% etc. and avoid the undue litigation and heat of penalties. Examples of such provisions are Section 73(3), Proviso to Section 76(1), second proviso to Section 78(1) etc.

Maintenance Deposit, Advance Maintenance, Share Certificate Charges for Maintenance Society: Till the time entire complex is sold, builder maintains the complex through society. For such maintenance for a particular period, builder collects advance maintenance from buyers.

Builder may collects this fund on his own name and can keeps this fund in separate account and transfer the same amount when society is formed. Builder is not required to pay service tax on the same as he has just collected the money on behalf of the society. Service tax may be payable by the society and that too subject to exemption if any.

However, to avoid any undue litigation in future, it is advisable that builder collects such amount directly in the name of society and directly deposits the same in the bank account of the society. Similarly, Maintenance Deposits, Share Certificate

Charges etc. for the society should also be separately collected and that too directly in the name of society.

Difference Between Income Recognised in Profit & Loss Account and Value of Services on which service tax paid: Generally, Profit & Loss Account is being prepared on accrual basis and Service Tax is also payable on accrual basis. However, while preparing Profit & Loss Account, Accounting Standard 7 on Construction Contracts is required to be followed and income is ascertained accordingly. As required under Accounting Standard 7, income from construction contracts is to be booked in Profit & Loss Account as revenue which is based on certain events.

However, even if service tax is also required to be discharged on accrual, service tax is required to be paid, in accordance with the provisions for the Point of Taxation Rules, 2011 (refer discussion on Point of Taxation Rules, 2011). Thus, service tax law has its own set of rules which are to be followed for levy of service tax.

Accounting Standard 7 and the Point of Taxation Rules, 2011 are on different grounds. However, to determine the liability of the service tax, the Point of Taxation Rules, 2011 is to be followed and mere booking of income in accordance with the Accounting Standard 7, in a Profit & Loss Account for particular year, will not result in payment of service tax in that particular year.

Reconciliation with Advances/Instalments due for Booking: Generally, to check that whether service tax is paid properly for the period, assessable value offered for service tax for that period can be reconciled with income stated in Profit & Loss Account. However, in construction contracts, till the time sale deed is executed, such amount is parked as Advances in Balance Sheet and not as income in Profit & Loss Account. Thus, to check that whether service tax liability is properly discharged or not, assessable value offered for service tax should be reconciled with the total advances received during the period or instalments due during the period.

Proper Classification is necessary: Even after introduction of Negative List, where services are made taxable generally, it is necessary to classify services in proper category of service available within service tax law. In construction industry, classification may affect the liability of service tax in various ways as stated in following cases.

a. If classification of service is under the category of "Works Contract Service" service tax is to be discharged on 40% of value (i.e. @ 5.6% at present rate, as provided under Rule 2A(ii) of the Service Tax (Determination of Value) Rules, 2006. If classification is under Construction Services, abatement of 70%/75% is available as provided under Notification No. 26/2012-ST and service tax at the rate 3.5%/ 4.2% is required to be paid. Thus, merely due to wrong selection of category, one may end up paying service tax at higher rate.

b. Many exemptions are available to one category of service but not in another category of services. Some exemptions are provided to Construction Services but not available to supply of manpower services. In such a case, if service provider is registered under supply of manpower service, he may face undue litigation in future.

c. In many services related to construction, Reverses Charge Mechanism (RCM) is applicable. Such RCM is applicable based on category of service. For example, if service is classified as Works Contract Service, RCM is applicable and service recipient is liable to pay service tax. However, if service is of Construction Services, RCM is not applicable. Similarly, RCM is applicable in the case of Supply of Manpower Services but not in the case of Construction Services. Thus, wrong classification from the end of the contractor or sub-contractor may put builder/developer in undue litigation.

Thus, it is necessary that category of the service is properly determined after considering terms of the actual contract and actual activity to be undertaken by the service provider. Further, proper category should be determined in advance and registration should be obtained or amended for such service and payment should be made in respective accounting code.

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Service Tax - Recent Judgements

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40 Tata Steel Ltd. *v.* Commissioner of Service Tax [2015] 63 taxmann.com 247 (Mumbai - CESTAT) CESTAT, Mumbai Bench

Facts:-

Assessee took loan from various foreign banks for the purpose of financing its international acquisitions and capital expenditures, (10 non-resident Banks as Mandated Lead Arrangers and 6 other foreign banks). The assessee also hired Standard Chartered Bank as the Agent of the other finance parties. The assessee paid loan arrangement fees/agency fees to the lender banks as well as Standard Chartered Bank.

Held:-

It was held that the arrangement fees/agency fees is a service in relation to 'lending' and falls under 'Banking and Other Financial Services' is liable to service tax under reverse charge in hands of the assessee-borrower. Even if funds are used outside India, the services are consumed/used in India and are taxable under Section 66A read with section 65(12) for period on or after 18-4-2006. The demand was confirmed with interest and penalties, along with extended period.

41 Reliant Advertising *v.* Commissioner, Central Excise [2015] 63 taxmann.com 111 (Punjab & Haryana) High Court of Punjab and Haryana

Facts: -

Assessee did not pay service tax on commission received on advertisements. Department argued that assessee was : (a) receiving requisitions for arranging advertisements either directly by an advertiser or from another advertising agency, (b) passing on advertisement material with or without value addition; and therefore, assessee was liable to service tax. Assessee argued that sale of advertisement space in print media is not liable to service tax

Held:-

It was held that herein the assessee admitted that it used to get 15 per cent commission from newspapers on gross business with them and used to collect service tax on this commission from clients. Since assessee had understated turnover in ST-3 returns, hence, service tax was rightly demanded.

42 Mistair Health & Hygiene Pvt Ltd vs. CCE, Pune – II 2015 (40) STR 148 (Tri – Mumbai)

Facts:-

The department in this case sought to levy service tax on manufacture of alcohol based medicament on the ground that exemption is not available as goods being non-excisable.

Held:-

The Tribunal held that said medicines are manufactured as per provisions of drugs and cosmetics act and rules made there under liable to excise duty , albeit by state government. It was further held that the issue stands settled in decision in 2010 (18) STR 768 (Tri-Mumbai) and 2010 (19) STR 515 (Tri-Mumbai), hence order of levy of service tax is to be set aside.

43 Vodafone Essar Ltd. *v.* Commissioner of Service Tax, Mumbai[2015] 63 taxmann.com 295 (Mumbai - CESTAT) CESTAT, Mumbai Bench

Facts:-

Assessee distributed pre-paid SIM cards/vouchers to its dealers and paid service tax on sums collected from dealers. Instead of paying commission, assessee provided some pre-paid SIM/vouchers, free of cost. Department demanded service tax on cards/vouchers given free to distributors. Assessee argued that since no sum was collected from dealers, no service tax was payable.

Held:-

It was held that there was no provision in section 67 and rules to tax free supply of cards/vouchers to distributors. Further it was held that explanation to rule 5(1) providing for taxation based on sums paid by subscribers, is applicable only from 1-3-2011 and thus, only sums collected from dealers were liable to service tax and free services were not taxable. Hence, demand was set aside.

44 Reliance Infratel Ltd vs. CST, Mumbai-II 2015 (39) STR 829 (Tri-Mumbai)

Facts:-

Assessee has given a loan by way of inter corporate deposit to subsidiary. Department held that advance is towards consideration for service and hence liable to service tax.

Held:-

It was held by Tribunal that master service agreement is not leading to conclusion that amount received is in nature of advances for services to be rendered and hence not liable to service tax.

45 The Commissioner of Central Excise and Service Tax vs. M/s Tamilnadu Petroproducts Ltd (2015) - TIOL 2600) (Madras - HC)

Facts:-

A manufacturer assessee wrongly paid service tax on a non taxable service and claimed cenvat credit of the same. The department argued that if tax was paid wrongly and or paid in excess, the only course open was to claim refund and not to make use of cenvat credit. Tribunal ordered in favour of the assessee and the department is in appeal.

Held:-

It was held by the High Court that if the assessee had paid the tax that he was not liable to pay and is entitled to certain credits, the availing of the said benefit cannot be termed as illegal and accordingly dismissed the revenue appeal.

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VAT - Judgements and Updates

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Statute Updates
Value Added Tax (VAT)

[I] **Important Judgments:**

[1] In case of Shree Labh Enterprise Hon. Gujarat Tribunal additional on Account of Stock difference and loose notes - partly allowed.

Issue:

[1] During the assessment proceedings the Ld. A. O. has made an addition in relation to details found in loose notes as well as difference in stocks.

Held:

The appellant is a Partnership Firm engaged in the business of resale of laminated sheets, sun mica sheets, plywood etc. having its place of business at Rajkot. The appellant is duly registered as a dealer under the Gujarat Vat Act. The premises of the appellant were visited / searched on 11.07.2013. During the course of search, the authorities have found loose notes wherein transactions worth Rs. 1,84,000/- were recorded. The stock as per books on the date of search was Rs. 5,94,862/- whereas the physical stock was found of Rs. 2,43,062/-. According to the authorities, there was also a stock difference of Rs. 3,51,800/-. The search was concluded by issuing notices in Form No. 301 and 309 proposing provisional assessment on the aforesaid issues as also levy of penalty.

It is also the case of the appellant that during the course of assessment proceedings, the authorized representative of the appellant appeared and made relevant submissions. In relation to loose notes, it was submitted that for the said transactions, the bills were not prepared till the date of search as the payment was not received. It was further submitted that the appellant was following the said practice since long period and that it is not unaccounted or concealed sales. Once the payment is received, it would be duly recorded in the books of accounts. With regard to stock difference, the appellant contended before the assessing officer that according to the practice adopted, the bills are prepared at the end of every month and therefore, the said stock difference was bound to come. It was further submitted that it is not on account of any concealed/ unaccounted sales and once the bills are entered at the end of the month, the difference would be negligible. It was further submitted that the appellant is engaged in such a business wherein most of the items are generally sold on sale or return basis and therefore, the above practice is required to be adopted. Considering the peculiar nature of the business of the appellant, it was requested that the issues raised may be dropped. The above submissions of the appellant were, however, not found favour with the assessing officer and he accordingly assessed the above transactions to tax vide an assessment order dated 19.08.2013 by making 100% enhancement. On the above transactions, the assessing officer has levied the tax @ 15% and penalty @ 150% of the tax under section 34(7) of the Act. The total dues were therefore raised against the appellant to the extent of Rs. 4,01,850/- which were duly paid by the appellant.

The learned Advocate for the appellant has submitted that the orders passed by the learned Deputy Commissioner and the Assessing Officer are absolutely bad in law, outside jurisdiction, contrary to provisions of the Act/ Rules and settled legal position. These orders

are also in complete breach of principles of natural justice and fair play action. He has therefore submitted that the orders deserve to be quashed and set aside. The learned Advocate for the appellant has further submitted that the learned Deputy Commissioner has erred in confirming the action of the assessing officer of twice levying the tax on the same transactions. The Ld. Advocate for the appellant has submitted that even if it is assumed that the appellant had affected sales through loose notes i.e. without issuing bill/invoice, then the stock difference is bound to come and therefore, both loose notes and stock difference cannot be taxed simultaneously. In other words, one has consequential effect on the other and both are not two separate transactions inviting separate liability of tax. He has therefore submitted that both the authorities below have failed to appreciate that the assessment of stock difference deserves to be deleted at least to the extent of Rs. 1,84,000/- being transactions alleged to have been affected through loose notes.

The Tribunal has considered the rival submissions and the facts of the case. The Tribunal has also gone through the orders passed by the authorities below and the documents produced before this Tribunal. It appears from the record that the assessing officer has levied the tax twice on the very same transactions. The A. O. has levied the tax on transactions of sales on loose notes and also levied the tax on stock difference. Both, loose notes and stock difference could not have been taxed simultaneously. In the loose notes found during the course of search, the transactions worth Rs. 1,84,000/- were recorded.

The explanation given by the appellant is not found to be satisfactory. The goods were sent for approval by quoting the sale price of goods on estimated basis and when the actual sale takes place, the transactions were recorded in the books of accounts, invoices were prepared and the loose notes were destroyed. In the present case, no sales invoices were issued nor the transactions were recorded and hence, it can certainly, be believed that the appellant has affected sales outside the books of accounts. Thus, the tax was rightly levied by the assessing officer on these transactions worth Rs. 1,84,000/- recorded in the loose notes. The Advocate for the appellant is, however, right in contending before the Tribunal that this amount of Rs. 1,84,000/- is required to be deducted from the amount of stock difference and only thereafter, the tax is leviable on the balance amount of the stock difference. The Tribunal therefore, hold that the assessment of stock difference is reduced to the extent of Rs. 1,84,000/- being the transactions affected through loose notes.

Order – This appeal is partly allowed. The tax levied on the transactions affected through loose notes is hereby confirmed and the addition made to the extent of 50% is also confirmed. However, the amount of Rs. 1,84,000/- is directed to be reduced from the amount of stock difference and the tax be levied on the reduced amount as aforesaid. The penalty is reduced to 25% of the tax. The appellant is also entitled to get cum tax benefit and lastly, the appellant is entitled to get interest on the refund which became due and payable to the appellant as a result of the order passed by the learned First Appellate Authority or by this Tribunal.

[2] **Determination u/s. 80 of the GVAT Act in case of Radhe Enterprise:**

Issue:

Whether Printing Ink is industrial input or not?

Decision:

M/s. Radhe Enterprise, Ahmedabad (hereinafter referred to as "the applicant"), a registered dealer under the Gujarat Value Added Tax Act, 2003 having Tin No. 24092502683 has posed question for determination under section 80 of the GVAT Act, 2003 as under.

"What is the rate of tax on (1) Printing Ink (2) Make Up Solvent / Make Up Additive / Make Up Cartridge (3) Wash Solution?"

The applicant is registered under GVAT Act, 2003 and engaged in the field of trading of Printing Materials for Batch Coding Printer. The details of the product is as under.

[i] **Printing Ink:**

Printing Ink is used for printing batch code, mfg date, expiry date on various products like Food Packaging, Plastic Bottles, Cans etc. through batch coding printer.

Product Specifications are as under.

1. Printing Ink is in liquid form
2. Printing Ink is mixture of various chemicals
3. Printing Ink is manufactured through the mixture of various chemicals.
4. Selling quantity of the said product fall between 825 ml to 1200 ml.

[ii] **Make up Solvent / Make up Additive / Make up Cartridge:**

Make up solvent is used to dilute the ink as per requirements of printer. The ratio of its use is approximately 1:4 i.e. to use 1000ml of printing ink will approximately require 4000ml of make up solvent. Make up solvent can be used only with printing ink. There is no separate use of make up solvent.

Product specifications are as under.

1. Make up solvent is in liquid form.
2. Make up solvent is mixture of various chemicals.
3. Make up solvent is manufactured through the mixture of various chemicals.
4. Selling quantity of the said product fall between 825ml to 1200ml.

[iii] **Wash Solution:**

Wash solution is used to clean the Batch Coding Printer to remove unwanted dots, spots, blurs etc.

Product specifications are as under.

1. Wash solution is in liquid form.
2. Wash solution is mixture of various chemicals.
3. Wash solution is manufactured through the mixture of various chemicals.
4. Selling quantity of the said product fall between 825ml to 1200ml.

The applicant has orally submitted the HSN code under the Central Excise Tariff Act is Printing Ink – 32151990, Make up Solvent / Make up Additive / Make up Cartridge – 32159090, Wash Solution – 38140020.

Upon careful observation and study of the invoice and product image of the items and perusing the HS code under the Central Excise Tariff Act, the products under question are determined as under.

The word and description of Entry-136 of the Industrial Inputs and Chapter heading 32.15 under the Central Excise Tariff Act is different. Therefore except printing ink, writing ink and drawing ink, nothing more should be covered by Entry-136.

Printing Ink under query is used for batch coding printer and is therefore industrial input and taxable @ 4% + 1% under Entry – 136 of Notification under Entry 42A of Schedule-II of the GVAT Act, 2003.

Solvent and wash solution is not covered by any entry and are therefore taxable @ 12.5% + 2.5%.

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Business Valuation

Academic Refresher

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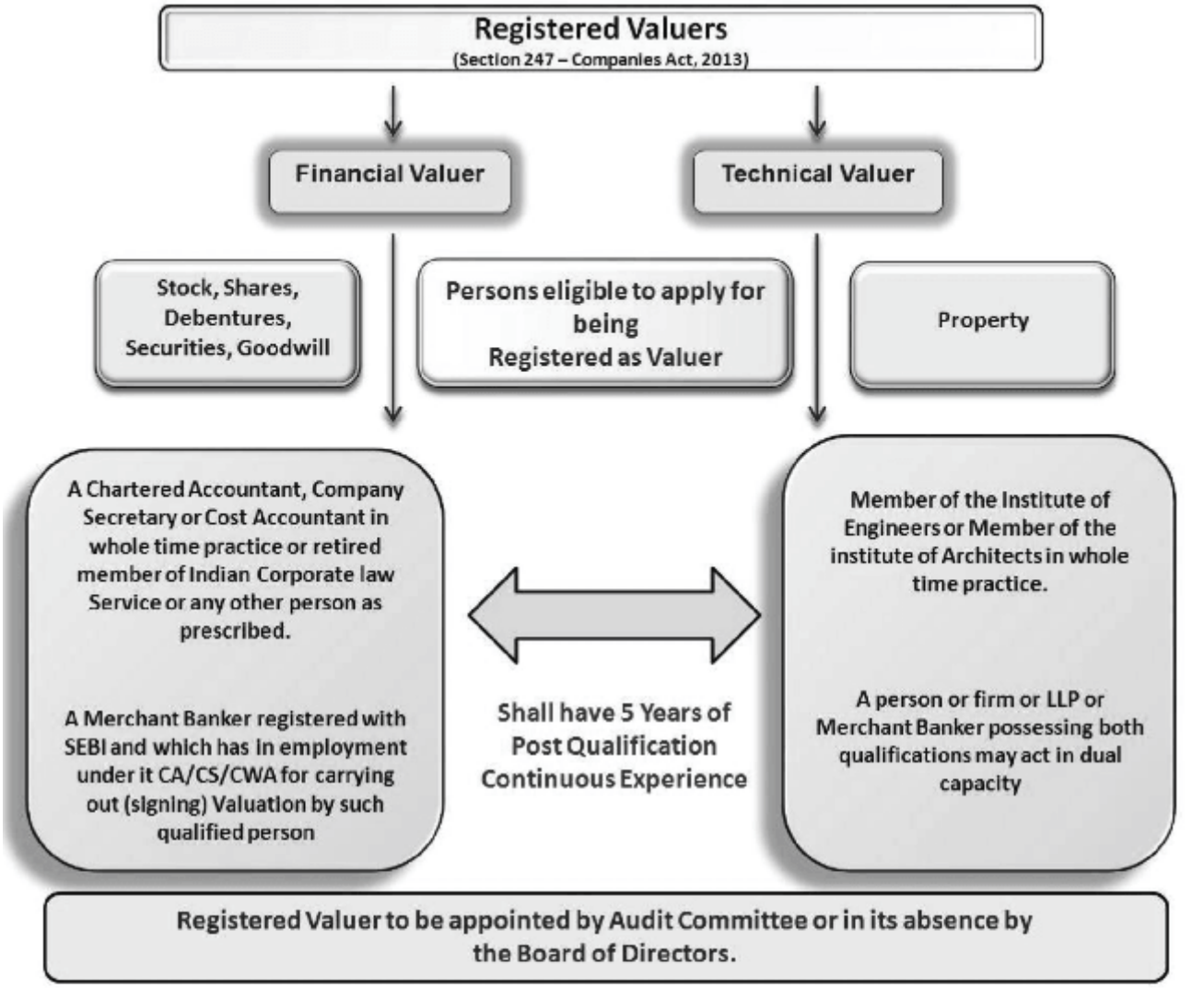
REGULATORY VALUATIONS IN INDIA			
AUTHORITY	**WHEN**	**PRESCRIBED METHODOLOGIES**	**VALUATION TO BE DONE BY**
Reserve Bank of India	Inbound Investment	DCF	CA/MB
	Buy Back of shares issued under FDI policy	Arm's length price	CA/MB
	Outbound Investment	Valuer Discretion	5MN$ - MB, otherwise CA / MB
Income Tax	Applicability of Sec -56 (Rule 11UA) of Income Tax Act, 1961	**Quoted Shares & Securities :** lowest price/ transaction value recorded on stock exchange	
		Unquoted equity shares : Minimum value - NAV (when Sec 56 (2) (vii) / Sec 56 (2) (vii) (a) is applicable) and Maximum value will be DCF (when Sec 56 (2) (vii) (b) is applicable).	CA / MB
		Unquoted shares & securities other than equity shares : Price it would fetch if sold in open market	CA / MB
	ESOP Tax	Valuer Discretion	MB
SEBI	ESOP Accounting	Option -Pricing Modal	
	Takeover Code / Delisting - Infrequently traded	Only parameters Prescribed Return on Net Worth, EPS, NAV via-a-via Induatry Average	CA/MB
	Takeover Code / Delisting - frequently traded	Based on Market Place	
Stock Exchanges	Preferential Allotment to Other	Based on 26 weeks / 2weeks Market Price	
	Preferential Allotment to Promoters / their relatives for consideration other than cash	Valuer Discretion	CA/MB
Companies Act, 2013	any property, stock, share, debenture, securities or goodwill or any other assets or the net worth of the Company or its liabilities	As per Valuation Rules Prescribed	Registered Valuer



Responsibilities

... Valuer to make impartial, true and fair valuation
... Exercise due diligence
... Valuation to be done as per rules
... Not undertake valuation if directly or indirectly interested

Upon contravention

... Fine – 25,000 to 1,00,000

With intention to defraud

... Imprisonment up to 1 year and
... Fine – 1,00,000 to 5,00,000

... Additionally upon contravention, to refund remuneration received and also liable for damages

CAHOZEFA NATALWALA
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As per the provisions of Companies Act, 2013, all valuations under the Act will be carried out by a Registered Valuer. The below mentioned sections specifies valuation requirement under the Act.

Sections	Details
Section 62(1)(c)	For Valuing further Issue of Shares
Section 192(2)	For Valuing Assets involved in Arrangement of Non Cash transactions involving Directors
Section 230(2)(c)(v)	For Valuing Shares, Property and Assets of the company under a Scheme of Corporate Debt Restructuring
Section230(3)	Under a Scheme of Compromise/Arrangement, along with the notice of creditors/ shareholders meeting, a copy of Valuation Report, if any shall be accompanied
Section 232(2)(d)	The report of the expert with regard to valuation, if any would be circulated for meeting of creditors/members
Section 232(3)(h)	Where under a Scheme of Compromise/Arrangement the transferor company is a listed company and the transferee company is an unlisted company, for exit opportunity to the shareholders of transferor company, valuation may be required to be made by the Tribunal
Section 236(2)	For Valuing Equity Shares held by Minority Shareholders
Section 260(2)(c)	For preparing Valuation report in respect of Shares and Assets to arrive at the Reserve Price for Company Administrator
Section 281(1)	For Valuing Assets for submission of report by Liquidator
Section 305(2)(d)	For report on the Assets of the company for preparation of declaration of solvency under voluntary winding up
Section319 (3)(b)	For Valuing the interest of any dissenting member of the transferor company who did not vote in favour of the special resolution, as may be required by the Company Liquidator

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Corporate Law Update

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MCA Updates:

1. Relaxation of additional fees and extension of last date of filing of Form MGT-7 (Annual Return) and AOC-4 (Financial Statement) under the Companies Act, 2013- reg.

The MCA has relaxed the additional fees payable on e-forms AOC 4, AOC (CFS) AOC-4 XBRL and e- Form MGT-7 up to 30.12.2015, wherever the additional fee is applicable.

[F. No. 01/3412013 CL-V dated 30th November, 2015]

2. Companies (Audit and Auditors) Amendment Rules, 2015:

"13. Reporting of frauds by auditor and other matters:

(1) If an auditor of a company, in the course of the performance of his duties as statutory auditor, has reason to believe that an offence of fraud, which involves or is expected to involve individually an amount of rupees one crore or above, is being or has been committed against the company by its officers or employees, the auditor shall report the matter to the Central Government.

(2) The auditor shall report the matter to the Central Government as under:-

a) the auditor shall report the matter to the Board or the Audit Committee, as the case may be, immediately but not later than two days of his knowledge of the fraud, seeking their reply or observations within forty-five days;

b) on receipt of such reply or observations, the auditor shall forward his report and the reply or observations of the Board or the Audit Committee along with his comments (on such reply or observations of the Board or the Audit Committee) to the Central Government within fifteen days from the date of receipt of such reply or observations;

c) in case the auditor fails to get any reply or observations from the Board or the Audit Committee within the stipulated period of forty-five days, he shall forward his report to the Central Government along with a note containing the details of his report that was earlier forwarded to the Board or the Audit Committee for which he has not received any reply or observations;

d) the report shall be sent to the Secretary, Ministry of Corporate Affairs in a sealed cover by Registered Post with Acknowledgement Due or by Speed Post followed by an e-mail in confirmation of the same;

e) the report shall be on the letter-head of the auditor containing postal address, e-mail address and contact telephone number or mobile number and be signed by the auditor with his seal and shall indicate his Membership Number; and

f) the report shall be in the form of a statement as specified in Form ADT-4.

(3) In case of a fraud involving lesser than the amount specified in sub-rule (1), the auditor shall report the matter to Audit Committee constituted under section 177

or to the Board immediately but not later than two days of his knowledge of the fraud and he shall report the matter specifying the following:-

a. Nature of Fraud with description;

b. Approximate amount involved; and

c. Parties involved.

(4) The following details of each of the fraud reported to the Audit Committee or the Board under sub-rule (3) during the year shall be disclosed in the Board's Report:-

a) Nature of Fraud with description;

b) Approximate Amount involved;

c) Parties involved, if remedial action not taken; and

d) Remedial actions taken.

(5) The provision of this rule shall also apply, mutatis mutandis, to a Cost Auditor and a Secretarial Auditor during the performance of his duties under section 148 and section 204 respectively.";

(ii) In the principal rules, after rule 14 and before FORM NO. ADT-1, insert the word "Annexure";

(iii) In the principal rules, in Form No. ADT-4,- (A) in line 3, for the word, figures and brackets "rule 13(4)", the word, figures, letter and brackets "rule 13(2)(f)" shall be substituted; and (B) in line 25, in item No. (10), for the word, figures and brackets "rule 13(1)", the word, figures, letter and brackets "rule 13(2)(a)" shall be substituted.

[F. No. 1/33/2013-CL-V dated 14th December, 2015]

3. Commencement of section 13 & 14 of the Companies (Amendment) Act, 2015:

The MCA has appointed the 14th day of December, 2015 as the date on which the provisions of section 13 and 14 of the said Act shall come into force.

[F. No. 1/6 /2015-CL. V dated 14th December, 2015]

4. Companies (Meetings of board and its powers) Second Amendment Rules, 2015:

(i) After rule 6 in the Companies (Meetings of Board and its Powers) Rules, 2O14, the following rule shall be inserted, namely:-

"**6A. Omnibus approval for related party transactions on annual basis.-**

All related party transactions shall require approval of the Audit Committee and the Audit Committee may make omnibus approval for related party transactions proposed to be entered into by the company subject to the following conditions, namely:-

1. The Audit Committee shall, after obtaining approval of the Board of Directors, specify the criteria for making the omnibus approval which shall include the following, namely:-

a. maximum value of the transactions, in aggregate, which can be allowed under the omnibus route in a year;

b. the maximum value per transaction which can be allowed;

c. extent and manner of disclosures to be made to the Audit the time of seeking omnibus approval;

d. review, at such intervals as the Audit Committee may deem fit, transaction entered into by the company pursuant to each of omnibus approval made

e. transactions which cannot be subject to the omnibus approval by the Audit Committee

2. The Audit Committee shall consider the following factors while specifying the criteria for making omnibus approval, namely: -

a. repetitiveness of the transactions (in past or in future);

b. justification for the need of omnibus approval.

3. The Audit Committee shall satisfy itself for transactions of repetitive nature and that such approval is in the interest of the company.

4. The omnibus approval shall contain or indicate the following: -

a. name of the related parties:

b. nature and duration of the transaction;

c. maximum amount of transaction that can be entered into;

d. the indicative base price or current contracted price and the formula for variation in the price, if any; and

e. any other information relevant or important for the Audit Committee to take a decision on the proposed transaction:

Provided that where the need for related party transaction cannot be foreseen and aforesaid details are not available, audit committee may make omnibus approval for such transactions subject to their value not exceeding rupees one crore per transaction.

5. Omnibus approval shall be valid for a period not exceeding one financial year and shall require fresh approval after the expiry of such financial year.

6. Omnibus approval shall not be made for transactions disposing of the undertaking of the company.

7. Any other conditions as the Audit Committee may deem fit."

(ii) Rule 10 shall be omitted;

(iii) In rule 15, in sub-rule (3), for the words "special resolution", wherever they occur, the word "resolution" shall be substituted.

[F. No. 1/32/2013-CL-V-Part dated 14th December, 2015]

SEBI Updates:

1. Timelines for Compliance with various provisions of Securities Laws by Commodity Derivatives Exchanges:

Major timelines are as tabled hereunder:

Sr. No.	Particulars	Timeline
1	Corporatization and Demutualization by Regional Commodity Derivatives Exchanges	Within 3 years
2	Transfer the functions of Clearing and Settlement of a trade to a separate clearing corporation	Within 3 years
3	Having a Net Worth of at least INR 100 crore: a) National Commodity Derivative Exchange b) Regional Commodity Derivative Exchange	 5th May, 2017 Within 3 years
4	Compliance with the shareholding limits specified under SECC Regulations, 2012: a) National Commodity Derivative Exchange b) Regional Commodity Derivative Exchange	 5th May, 2019 Within 3 years
5	Segregation of Regulatory Departments in accordance with the SECC Circular	Within 6 months

6	Constitution of Oversight Committees	Within 3 months
7	Constitution of Advisory & other statutory Committees: a) National Commodity Derivative Exchange b) Regional Commodity Derivative Exchange	 Within 1 year Within 3 years
8	Disclosure & Corporate Governance Norms: a) National Commodity Derivative Exchange b) Regional Commodity Derivative Exchange	 Immediately Within 3 years
9	Dematerialization of Securities: a) National Commodity Derivative Exchange b) Regional Commodity Derivative Exchange	 Within 6 months Within 3 years

[CIR/CDMRD/DEA/03/2015 dated 26th November, 2015]

2. Format for statements/reports to be submitted to Stock Exchange(s) by listed entity which has listed its securitized debt instruments:

In compliance with the Regulation 82(3) of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, a listed entity shall submit statements/reports to stock exchange within seven days from the end of the month/ actual payment date, either by itself or through the servicer, on a monthly basis in the format as specified by the Board from time to time.

Accordingly, such format has been prescribed by the SEBI (effective from 01st December, 2015), which requires the listed entity to provide pool level, tranche level and loan level details.

For details please refer the following link: http://www.sebi.gov.in/cms/sebi_data/attachdocs/1448856847341.pdf

[CIR/IMD/DF1/ 10 /2015 dated 27th November, 2015]

3. Format for financial results for listed entities which have listed their debt securities and/ or non-cumulative redeemable preference shares:

In compliance with the Regulations 52 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, various disclosures to be filed by the listed entities under various provisions contained therein, in the formats as specified (effective from 01st December, 2015) by the SEBI, details of which are as under:

Sr. No.	Particulars	Ann. No.
1	Format for submitting the half yearly financial results by companies other than banks and NBFCs.	**I**
2	Format for submitting the half yearly financial results by banks and NBFCs	**II**
3	Format for submitting the half yearly financial results by companies other than Banks and NBFCs eligible for alternative format	**III**
4	Format for the limited review report for companies other than banks and NBFCs	**IV**
5	Format for the limited review report for Banks and NBFCs	**V**

[CIR/IMD/DF1/9 /2015 dated 27th November, 2015]

For details please refer the following link:

http://www.sebi.gov.in/cms/sebi_data/attachdocs/1448620165250.pdf

4. Non-compliance with certain provisions of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 and Standard Operating Procedure for suspension and revocation of trading of specified securities.

Following is the uniform fine structure for non-compliance with Listing Regulations regarding non-submission of certain periodic reports:

Regulation	Fine payable for 1st non-compliance	Fine Payable for each subsequent and consecutive non-compliance
Regulation 27 (2) Non submission of the Corporate governance compliance report within the period provided under this regulation.	Rs. 1,000 per day of non-compliance till the date of compliance.	Rs. 2,000 per day of non-compliance till the date of compliance.
Regulation 31 Non submission of the Shareholding pattern within the period prescribed under this regulation.	Rs. 1,000 per day of non-compliance till the date of compliance and If non-compliance continues for more than 15 days, additional fine of 0.1 % of paid up capital* of the entity or Rs. 1 crore, whichever is less.	Rs. 2,000 per day of non-compliance till the date of compliance and If non-compliance continues for more than 15 days, additional fine of 0.1 % of paid up capital* of the entity or Rs. 1 crore, whichever is less.
Regulation 33 Non submission of the financial results within the period prescribed under this regulation.	Rs. 5,000 per day of non-compliance till the date of compliance and If non-compliance continues for more than 15 days, additional fine of 0.1 % of Paid Up capital* of the entity or Rs. 1crore, whichever is less.	Rs. 10,000 per day of non-compliance till the date of compliance and If non-compliance continues for more than 15 days, additional fine of 0.1 % of Paid up capital* of the entity or Rs. 1 crore, whichever is less.
Regulation 34 Non-submission of the Annual Report within the period prescribed under this regulation.	If non-compliance continues for more than 5 days, Rs. 1,000 per day till the date of compliance.	Rs. 2,000 per day of non-compliance till the date of compliance.

**Paid up capital as on first day of the financial year in which the non-compliance occurs.*

The SEBI has also prescribed the Standard Operating Procedure (SOP) for suspension and revocation of suspension of trading of specified securities, which shall be effective from 01st December, 2015.

[CIR/CFD/CMD/12/2015 dated 30th November, 2015]

For details please refer the following link:

http://www.sebi.gov.in/cms/sebi_data/attachdocs/1448885765200.pdf

5. Disclosure of holding of specified securities and Holding of specified securities in dematerialized form:

The SEBI has prescribed the manner of representation of holding of specified securities, which consists of 4 tables showing the shareholding pattern of the promoter and promoter group, public shareholders and non promoter-non public shareholders. It has also prescribed the manner of calculation of such shareholdings. This shall be effective from 01.12.2015.

[CIR/CFD/CMD/13/2015 dated 30th November, 2015]

For details please refer the following link:

http://www.sebi.gov.in/cms/sebi_data/attachdocs/1448885798277.pdf

6. Manner of achieving minimum public shareholding:

With effect from 01st December, 2015, in order to achieve the minimum level of public shareholding specified in Rule 19(2)(b) and/or Rule 19A of the Securities Contracts (Regulation) Rules, 1957, the Listed Entity shall adopt any of the following methods:

- Issuance of shares to public through prospectus;
- Offer for sale of shares held by promoters to public through prospectus;
- Sale of shares held by promoters through the secondary market in terms of SEBI circular CIR/MRD/DP/05/2012 dated February 1, 2012;
- Institutional Placement Programme (IPP) in terms of Chapter VIIIA of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009;
- Rights Issue to public shareholders, with promoter/promoter group shareholders forgoing their entitlement to equity shares, that may arise from such issue;
- Bonus Issues to public shareholders, with promoter/promoter group shareholders forgoing their entitlement to equity shares, that may arise from such issue;
- Any other method as may be approved by SEBI on a case to case basis.

[CIR/CFD/CMD/14/2015 dated 30th November, 2015]

7. Facility for Basic Services Demat Account (BSDA):

In order to facilitate the eligible individuals to avail the benefits of Basic Services Demat Account ("BSDA"), DPs are advised to convert all such eligible demat accounts into BSDA unless such Beneficial Owners (BOs) specifically opt to continue to avail the facility of a regular demat account.

The DPs shall assess the eligibility of the BOs at the end of the current billing cycle and convert eligible demat accounts into BSDA.

[CIR/MRD/DP/ 20 /2015 dated 11th December, 2015]

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Allied Laws Corner

Adv. Ankit Talsania
ankittalsania@gmail.com

Prevention of Money Laundering Act

Recently Madras High Court in case of C.Chellamuthu *v.*Deputy Director, Prevention of Money Laundering Act, Directorate of Enforcement, Mumbai. [64 taxmann.com 96 (Madras)] decided two important issues of PMLA as under:

(a) Section 5 of Money Laundering Act does not restrict that property in hands of persons involved in Money Laundering alone can be attached pending confiscation, and therefore, provisional attachment of property is not restricted in hands of accused persons alone.

(b) However, once a person proves his genuine transaction of purchase of untainted property, the only course of action in the hands of the Adjudicating Authority is to attach sale proceeds in the hands of the vendor of accused and not property in the hands of genuine legitimate bonafide purchaser without knowledge.

A. Facts of the case :

1. One Mr.R. Manoharan projected himself as proprietor of M/s. Bhagavathi Textiles Mills. He produced bogus and fabricated documents in connivance of one S. Arivarasu, the then Business Development Manager of M/s. Global Trade Finance Limited, Coimbatore, availed loan facilities to the tune of Rupees Fifteen Crores. On coming to know of this fraud, one B. Surendran, Vice President and Branch Head of M/s. SBI Global Factors Limited, Coimbatore lodged a complaint against the said R. Manoharan, Proprietor of M/s. Bhagavathi Textiles Mills, G. Srinivasan, S. Arivarasu and others. The said complaint was registered on 07.10.2010 in FIR No.RC.09(E)2010-BS& FC/BLR under Sections 120-B r/w. Sections 420, 467 and 471 of IPC and Section 13(2) r/w. Section 13(1)(d) of the Prevention of Corruption Act, 1988. After investigation by concerned Police, CBI, BS & FC Bangalore, filed charge sheet in C.S.No.6 of 2011 dated 26.07.2011, before the Court of Special Judge, CBI against R. Manoharan, Proprietor of non-existent M/s. Bhagavathi Textiles Mills, G. Srinivasan, S. Arivarasu, K. Vignesh and others for the offences committed under Sections 120(B) r/w. Sections 420,467,468 and 471 of IPC and Section 13 (2) r/w Section 13(1)(d) of Prevention of Corruption Act, 1988 before the Court of Special Judge, CBI cases, Coimbatore.

2. In the investigation, one G. Srinivasan was found to be main accused and he only availed the loan projecting R. Manoharan as Proprietor of M/s. Bhagavathi Textiles Mills Limited. After availing the loan, he purchased about 165 acres of land in Pudukkottai Village from One K. Gunasekaran, G. Selvarani, R. Sivkumar, Shri Chinnakkannu in the names of his Benamies viz., K. Vignesh, P. Venkatachalapathy and P. Rajendran. The sale deeds were registered as Document Nos.853 to 855 of 2008, dated 12.06.2008 and Document No.1344 of 2008, dated 02.09.2008 and Document No.1559 of 2009 dated 09.09.2009. These three persons, as per instructions of G. Srinivasan appointed

one P.Ayyappan, as their power of attorney, registered as Document Nos.137 and 138 of 2009, dated 07.09.2009 and Document No.807/ 2009, dated 12.09.2009 and Document No.186 of 2009, dated 22.09.2009. All the four power of attorneys were registered in the office of Sub Registrar of Assurances, Chathirapatti.

3. The said P. Ayyappan, Power of Attorney of these persons sold this 165 acres to one Gunaseelan, S/o. Kuppusami Gounder, by four sale deeds registered as Document Nos. 187 to 190 of 2010. The said Gunaseelan sold the entire 165 acres to the appellants, by four sale deeds and registered as Document Nos.379 to 382 of 2010. The said 165 acres was purchased by G. Srinivasan in Benami names from and out of monies obtained by fraud. Hence, the said property is proceeds of crime.

4. The Directorate of Enforcement initiated proceedings, on the basis of FIR dated 07.10.2010 and CBI letter dated 19.11.2010. An Enforcement case Information Report (ECIR) Vide F.No.ECIR/06/CZ/PMLA/2011 was registered on 03.01.2011, by Directorate of Enforcement, Chennai. The statements of G. Srinivasan, P. Manoharan, K. Vignesh, P. Venkatachalapathy, P. Rajendiran, R. Ayyappan, K. Gunaseelan, the appellants and others were recorded under Sections 50(2) and 50 (3) of Prevention of Money Laundering Act, 2002 (herein after referred as PMLA, 2002).

5. During investigation G.Srinivasan admitted on 29.09.2011 that R.Manoharan is looking after his all financial transaction and other activities. In his statement he stated that in the name of M/s. Bhagavathi Textile Mills by submitting bogus bills and documents he obtained Rupees Fifteen Crores as loan. He utilized the said amount to purchase the lands referred to above and also movie rights etc., R.Manoharan, in his statement corroborated this statement of G. Srinivasan. P. Venkatachalapathy, P. Rajendiran and K. Vignesh in their statement stated that the lands referred to above belonged to G. Srinivasan and they are Benami owners. As per the instructions of G. Srinivasan, they executed power of attorney appointing P. Ayyappan as their power agent. They did not receive any money from G. Srinivasan and did not pay any money to G. Srinivasan or anybody else.

6. G. Srinivasan filed a complaint against P. Ayyappan, Gunaseelan and appellants, which was registered as FIR No.57/11, dated 30.08.2011, by District Crime Branch, Dindigul, alleging that P.Ayyappan and his men, came to his office at Udumalpet and took all the documents and forced him to give power to P.Ayyappan, with regard to 165 Acres at Chathirappatti Village. K.Vignesh, P. Venkatachalapathy and P.Rajendiran also gave power to Ayyappan who using the power sold the lands to Gunaseelan. The said Gunaseelan in turn sold the property to the appellants.

7. The Deputy Director of Prevention of Money Laundering Act, Directorate of Enforcement, respondent herein considering all the materials before him held that there are reasons to believe that property measuring 165 acres in the hands of appellants is part of proceeds of crime as defined under Section 2(1)(u) of Provision of Money Laundering Act and is involved in the offence of Money Laundering and is liable for adjudication and confiscation in terms of Section 8 of

PMLA, 2002 . The properties are liable to attachment under Chapter III of PMLA, 2002. If the properties are not attached will frustrate further proceedings under the Act and by order dated 10.05.2012, ordered Provisional Attachment of the properties.

8. The respondent filed a complaint under Section 5(5) of the PMLA, 2002 against the appellants and G. Srinivasan, viz., [original complaint] OC No.144/2012. As per Section 5(2) the respondent sent copies of attachment order to appellants and to adjudicating authority.

9. According to the respondent, the said G. Srinivasan involved in scheduled offences in terms of Sections 2(7) of PMLA and the properties are involved in offence of Money Laundering under Section 3 of PMLA, 2002 and prayed to, Adjudicating Authority to confirm the attachment of properties, made under Sub Section 1 of Section 5 of PMLA, 2002.

10. The appellants filed replies denying all the averments and complaints made by respondent in the complaint. They contended that they are agriculturists. They purchased the property from and out of their agricultural income from Gunaseelan by registered sale deeds after satisfying themselves. They purchased the property without having knowledge that the property bought by them was proceeds of crime. They are bonafide purchasers and the sale consideration paid by them was earned through legal activities like selling lands etc. The sale considerations were paid through the bank, received from purchasers of agricultural products through bank and paid to vendor. The sale consideration was paid through legal source of income through agricultural operations and transactions were carried out through bank and hence, they are bonafide purchasers of the land for value. The respondent attached the property under misconception that property would fall under the provisions of Section 2(u) of the said Act.

11. The Adjudicating Authority considering the contentions of appellants and respondent and relying on the judgment of Bombay High Court in the case of *Mr. Radha Mohan Lakhotia* v. *Deputy Director, PMLA, Department of Revenue* 2010(5) Bom CR 625, held that property represent the proceeds of crime and are involved in Money Laundering and consequently up-held and confirmed the attachment of the properties.

12. The appellants challenged the order of adjudicating authority dated 07.09.2012 by filing 7 appeals before Appellate Tribunal, Prevention of Money Laundering Act at New Delhi. The Tribunal by the judgment dated 05.09.2014 dismissed all the appeals.

13. Against the said order, the appellants have filed the Civil Miscellaneous Appeals.

B. Issues arose before the Madras High Court for its consideration :

1. Whether the property in the hands of persons prosecuted for criminal offences and/or scheduled offence alone can be attached;

2. Whether the property in the hands of subsequent bona fide purchaser without knowledge of crime purchased by legal consideration can be attached.

3. Whether property purchased bona fide with legal sale consideration looses the character of proceeds of crime and the sale proceeds in the hands of vendor only can be attached.

C. Whether the property in the hands of persons prosecuted for criminal offences and/or scheduled offence alone can be attached :

1. The Madras High Court referred to relevant Sections 2,3,4 and 5 of the PML Act, which are reproduced hereunder for ready reference :

"2(p) :- "money-laundering" has the meaning assigned to it in section 3;

2(s) "person" includes:-

(i) an individual,

(ii) a Hindu undivided family,

(iii) a company,

(iv) a firm,

(v) an association of persons or a body of individuals, whether incorporated or not,

(vi) every artificial juridical person, not falling within any of the preceding sub-clauses, and

(vii) any agency, offence or branch owned or controlled by any of the above persons mentioned in the preceding sub-clauses;

2(u) "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property.

Section 3 Offence of money-laundering - Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected [proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming] it as untainted property shall be guilty of offence of money-laundering.

Section 4 Punishment for money-laundering - Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine

***Provided** that where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the provisions of this section shall have effect as if for the words "which may extend to seven years", the words "which may extend to ten years" had been substituted.*

Section 5 Attachment of property involved in money-laundering - Whether the Director or any other officer not below the rank of Deputy Director authorized by the Director for the purposes of this section, has reason to believe (there as on for such belief to be recorded in writing), on the basis of material in his possession, that-

2. After referring to above quoted provisions of the PML Act, the Hon'ble Madras High Court held that ***"there is no restriction in respect of person in possession of proceeds of crime. Section 5 does not restrict that property in the hands of persons involved in Money Laundering alone can be attached pending confiscation. This issue was considered by two Division Benches of Bombay High Court and Andhra Pradesh High Court referred to above. Both the Courts after elaborately considering this issue referring to relevant Sections of Act referred to above held that proceeds of crime in the hands of persons not involved in Money Laundering or accused of criminal offence can also be attached. Both the Courts have held that person referred to in Section 5 is not restricted to a person accused of crime***

or involved in Money Laundering. The judgments squarely apply to facts of this case. For the reasons stated above, the provisional attachment of property is not restricted in the hands of accused persons alone."

D. Whether the property in the hands of subsequent bona fide purchaser without knowledge of crime purchased by legal consideration can be attached and whether the property purchase bona fide with legal sale consideration losses the character of proceeds of crime and the sale proceeds in the hands of vendor only can be attached.

1. As per the Sections 23 and 24 of PMLA, 2002, there is a presumption that property in the hands of Appellants is proceeds of crime. But the appellants have a right to rebutt the said presumption.

2. The said sections read as follows:—

"23. Presumption in inter-connected transactions Where money-laundering involves two or more inter-connected transactions and one or more such transactions is or are proved to be involved in money-laundering, then for the purposes of adjudication or confiscation (under section 8 or for the trial of the money-laundering offence, it shall unless otherwise proved to the satisfaction of the Adjudicating Authority or the Special Court), be presumed that the remaining transactions form part of such inter-connected transaction.

24. Burden of proof

In any proceeding relating to proceeds of crime under this Act,

(a) in the case of a person charged with the offence of money-laundering under Section 3, the Authority or Court shall, unless the contrary is proved, presume that such proceeds of crime are involved in money-laundering; and

(b) in the case of any other person the Authority or Court, may presume that such proceeds of crime are involved in money-laundering.

3. The Hon'ble Madras High Court observed that "In the present case, one G. Srinivasan is accused of having played fraud and obtained a loan of Rs. 15,00,00,000/- by producing bogus and fabricated documents. From and out of the said amount, the property in question was purchased by him in the names of his Benamies. One Ayyappan was appointed as their Power Agent. One Gunaseelan purchased the property through the Power Agent Ayyappan. The said Gunaseelan was examined and his statement was recorded Under Section 50 of the Act. He had stated that he purchased the property for cultivation. He developed the property but geologist gave opinion that property will not yield proper income. In the circumstances, he sold the property to appellants. The respondent has not produced any document or material to disprove the statement of Gunaseelan. ***There is nothing on record to show that the transaction in favour of the said Gunaseelan, is not genuine. It is not the case of respondent that the said Gunaseelan is a Benami or employee of G. Srinivasan and that Gunaseelan did not pay any amount as sale consideration or the sale consideration paid by Gunaseelan was not legitimate money. There is no material to show nexus and link of Gunaseelan with G.Srinivasan and his Benamies. In the absence of any verification or investigation by respondent with regard to***

genuineness or otherwise of the purchase by Gunaseelan; whether he was connected with G.Srinivasan or the sale consideration is legitimate or not the property in the hands of Gunaseelan cannot be termed as proceeds of crime.

4. Further, the appellants have given statements under Section 50 of the Act. They have categorically stated that they possess agricultural lands, cultivate Gloriosa Superba seeds and sell the same and derive considerable income. They have named the persons to whom they have sold the Gloriosa Superba seeds and produced Bank statements. Some of the Appellants have stated that they sold their lands and borrowed monies to purchase the property in question. There is nothing on record to show that the respondent had verified these statements. Especially, the respondent has not verified the Bank statement produced by the Appellants to ascertain the genuineness of the same and whether the money deposited came from genuine purchasers or from the persons involved in fraud and Money Laundering. The respondent does not allege that Appellants are Benamies of G. Srinivasan or no sale consideration passed to the vendor.

5. The Hon'ble Madras High Court further held that "Considering the materials on record and judgments reported in 2010 (5) Bom CR 625 (*supra*) and [2011] 164 Comp Cas 146 (AP) (*supra*), I hold that appellants have rebutted the presumption that the property in question is proceeds of crime. The respondent failed to prove any nexus or link of Appellants with G. Srinivasan and his benamies. ***Once a person proves that his purchase is genuine and the property in his hand is untainted property, the only course open to the respondent is to attach sale proceeds in the hands of vendor of the appellants and not the property in the hands of genuine legitimate bona fide purchaser without knowledge.***

6. Before the Adjudicating Authority it was admitted by complainant that appellants had no knowledge that properties in the hands of their vendor was proceeds of crime. It was also not disputed by complainant that the appellants did not have financial capacity to buy properties.

7. In the present case, ***the respondent failed to prove that the appellants did not have sufficient financial capacity to buy the property or that the money paid by them as sale consideration was not legitimate money derived by agricultural activities. No material was produced to show that the appellants are close relatives of person, who involved in criminal activities and the person, who sent monies to purchase the property did not possess financial capacity to provide such huge amounts and that they are not genuine purchasers of agricultural products of appellants. The respondent has not made any such investigation and has not produced any such material.*** Further, the Appellate Authority in fact considered the additional documents produced before it, but rejected the same on the ground that Appellants have not given any valid reasons for not filing the same before the Adjudicating Authority. Having considered the Additional documents, the appellate authority failed to give any finding on merits after verifying with the concerned Bank.

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From Published Accounts

CA. Pamil H. Shah
pamil_shah@yahoo.com

AS – 16 Borrowing Costs
Notes to Financial Statements for the year ended 31 March, 2015

Hindustan Media Venture Limited

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

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

Indian Oil Corporation Limited

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

Hove Services Limited

Borrowing Cost attributable to acquisition and construction of qualifying assets are capitalized as a part of the cost such assets up to the date when such assets are ready for its intended use. Other borrowing costs are charged to statement of Profit and Loss.

KPR Mill Limited

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

Triveni Turbine Limited

Borrowing Cost that are attributable acquisition of qualifying assets are capitalized upto the period such assets are ready for their intended use. All other borrowing costs are charged in the statement of profit and loss.

Claris Lifesciences Limited

Borrowing costs consist of interest and other costs that the Group incurs in connection with the borrowing of funds and exchange differences arising from foreign currency borrowing to the extent that they are regarded as an adjustment to interest costs.

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

contd. on page no. 575

From the Government

CA. Kunal A. Shah
cakashah@gmail.com

Income Tax

1) **Amendments in rule 37BB – Furnishing of information for payment to a non-resident, not being a company, or to a foreign company**

The CBDT hereby amends Rule 37BB (requiring furnishing of information in Forms 15CA & 15CB while making foreign remittances u/s 195) which are as follows:-

- Exempts reporting requirements for foreign remittances not exceeding Rs. 5 lakhs during the financial year;
- Revised Form 15CA now seeks residential status of remitter;
- List of payments which do not require submission of Forms 15CA & 15CB has been expanded from 28 to 33 including payments for imports.
- Amended Form 15CA inserts new Part C for furnishing details as per accountant's certificate in Form 15CB, which was earlier included under Part B of old Form 15CA;
- Revised Form 15CA also inserts new Part D which is to be filled up if remittance is not chargeable to tax under the Act;
- No major change in Accountant's certification in Form 15CB
- The amended rules will become applicable from 01/04/2016

(For full text refer Notification no. 93, dated 16/12/2015)

2) **Circular regarding allowability of employer's contribution to funds for the welfare of employees in terms of section 43B(b) of the Income Tax Act.**

The settled position regarding allowability of employer's contribution to funds for the welfare of employees in terms of sec 43B(b) of the Income Tax Act is that if the assessee deposits any sum payable by it by way of tax, duty, cess or fee by whatever name called under any law for the time being in force, or any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees, on or before the 'due date' applicable in his case for furnishing the return of income under sec 139(1) of the Act, no disallowance can be made u/s 43B of the Act. ***(Circular No. 22, dated 17/12/2015)***

3) **Circular regarding Income Tax deduction from salaries during financial year 2015-16 u/s 192 of the Income Tax Act,1961.**

The present Circular contains the rates of deduction of income-tax from the payment of income chargeable under the head "Salaries" during the financial year 2015-16 and explains certain related provisions of the Act and Income-tax Rules, 1962 (hereinafter the Rules).

(For full text refer Circular no. 20, dated 02/12/2015)

Service Tax

1) Due Date for payment of Service Tax extended

The Central Government hereby amends the Service Tax Rules, 1994 by extending the date of ST payment for the assessees in the State of Tamil Nadu and Union Territory of Puducherry (except Yanam and Mahe) for the month of November, 2015 to 20.12.2015

(Notification No. 26 and 27 dated 09/12/2015 and 18/12/2015 respectively)

2) Clarification regarding leviability of service tax in respect of Seed Testing with effect from 01.07.2012

It is hereby clarified that all testing and ancillary activities to testing such as seed certification, technical inspection, technical testing, analysis, tagging of seeds, rendered during testing of seeds, are covered within the meaning of 'testing' as mentioned in sub-clause (i) of clause (d) of section 66D of the Finance Act, 1994**.(Negative List of Services)** Therefore, such services are not liable to Service Tax under section 66B of the Finance Act, 1994.

(For full text refer Circular No.189, dated 26/11/2015)

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contd. from page 573

Reliance Industries Limited

Borrowing costs include exchange differences arising from foreign currency borrowings to the extent they are regarded as an adjustment to the interest cost. Borrowing costs that are attributable to the acquisition or construction of qualifying assets are capitalized as part of the cost of such assets. A qualifying asset is one that necessarily takes substantial period of time to get ready for its intended use. All other borrowing costs are charged to the Profit and Loss Statement in the period in which they are incurred.

VRL Logistics Limited

Borrowing costs attributable to the acquisition and construction of qualifying assets are capitalized as part of the cost of such assets up to the date such assets are ready for their intended use. Other borrowing costs are treated as revenue expenditure.

Chemfab Alkalis Limited

Eligible borrowing costs are capitalized as part of qualifying fixed assets. Other borrowing costs are expensed.

Oberoi Realty Limited

Borrowing costs that are directly attributable to the acquisition / construction of qualifying assets or for long - term project development are capitalized as part of their costs.

Borrowing costs are considered as part of the asset cost when the activities that are necessary to prepare the assets for their intended use are in progress.

Other borrowing costs are recognised as an expense, in the period in which they are incurred

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Association News

CA. Nirav R. Choksi
Hon. Secretary

CA. Dilip U. Jodhani
Hon. Secretary

Forthcoming Programmes

Date	Time	Programmes	Speaker	Venue
24.01.2016	8.30 a.m.	Cricket Match C. A. Association v/s Baroda Branch of WIRC of ICAI		Baroda

Glimpses of Event gone by:

International Study Tour held on 15th December to 22nd December 2015 at Bali, Indonesia

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Administration of Gujarat Public Trust Act, 1950 and Societies Registration Act

By Regd. Speed Post

To,
Shri Pradeepsinh B. Jadeja
Law Minister, Government of Gujarat,
3rd Floor, Swarnim Sankul – 2,
New Sachivalay,
Gandhinagar-382010

Respected Sir,

Sub : Issues relating to administration of Gujarat Public Trust Act, 1950 and Societies Registration Act

A) Our Association

Chartered Accountants Association, Ahmedabad (CAA) is a voluntary and Non Profit organization having an immense repute, carrying on the activities of imparting technical guidance to Chartered Accountants and engaged in research activities in the fields of accounting, tax & allied laws, since 1949. It has always been an endeavor on the part of CAA to ensure that its members keep pace with fast changing times in terms of knowledge and professional competency. Besides, it conducts the lectures of importance to business community & society at large.

It has dedicated membership of more than 1400 Chartered Accountants from all over Gujarat and India. The main object of the CAA is to disseminate professional education not only among the fraternity of Chartered Accountants but to educate the public at large. The Legal & Representation Committee of CAA arranges regular interaction with various Government Authorities to provide feedback on work of administration as a measure to enhance its efficiency and effectiveness.

B) Issues & Suggestions

The CAA hereby brings to your kind attention certain emergent issues and suggests measures to improve the administration of Gujarat Public Trust Act, 1950 as well as Societies Registration Act, concerning the public at large & number of charitable trusts/societies all over Gujarat.

Thanks and Regards,

Yours Sincerely,

For, Chartered Accountants Association, Ahmedabad

CA. Yamal A. Vyas	CA. S.K. Sadhwani	CA. Ajit C. Shah
President	***Chairman, L & R Committee***	***Convener, L & R Committee***

Encl: Issues & Suggestions

Dated: 31st December, 2015 at Ahmedabad

Copy to: Charity Commissioner (Gujarat),
Shanti Sadan Road, Mirzapur,
Ahmedabad – 380 001

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CHARTERED ACCOUNTANTS ASSOCIATION, AHMEDABAD
Turn Transform Transcend
1ST Floor, C. U. Shah Chambers, Near Gujarat Vidhyapith,
Ashram Road, Ahmedabad – 380 014.
Ph.: +91 79 2754 4232, 2754 5442
Mail : caahmedabad@gmail.com Web : www.caa-ahm.org

Issues & Suggestions relating to administration of Gujarat Public Trust Act, 1950 & Societies Registration Act

1. Notice of demand for payment of contribution

As per provisions of section 58 of the Gujarat Public Trust Act, 1950 r.w. rule 32 of the Bombay Public Trusts (Gujarat) Rules, 1961, every public trust other than trust set up for the purpose of advancement and propagation of secular education or medical relief or veterinary treatment shall pay annually contribution @ 2% of its gross annual income.

The computation of amount of contribution payable is to be worked out as per "Schedule IX-C – Statement of income liable to contribution" which is required to be determined and certified by the auditor of the Trust.

When the Schedule IX-C – Statement of income liable to contribution, duly certified by the auditor of trust, is filed before the office of Charity Commissioner, it has been the practice of department to issue demand notice for higher amount, ignoring the calculations certified by the auditors in accordance with provisions of law.

Issues:

i) The notice of demand does not provide any basis or calculations for working of the higher amount of contribution payable.

ii) The notice of demand requires the deposit of contribution within 1 month. Contrary to this, the notice provides for 15 days time, to file the objections before the office of the Dy. Charity Commissioner and objections are not accepted without deposit of contribution, for which 30 days time limit is provided, which is impracticable.

iii) Even the public trusts registered for purpose of advancement and propagation of secular education or exclusively for the purpose of medical relief or veterinary treatment of animals which are expressly exempt from payment of contribution are not spared from requirement of payment of contribution, and sent notice of demand for payment of contribution.

iv) The orders passed by the learned Asst./Dy. Charity Commissioner rejecting the objections against demand notice are non-speaking, mechanical and without assigning any reasons. One line rejection order reads as under:

"આથી આ ફાળા વાંદા અરજ નં. ૨૬૨૨૦૧૪ "નામંજુર" કરવામાં આવે છે. આ હુકમની અરજદારને જાણ કરવી."

Suggestions:

i) It is suggested that the statement of income liable for contribution as certified by auditor shall be accepted. In cases where there is apparent mistake in calculation of contribution, show cause notice proposing to make additions in the amount of contribution payable shall be issued by the office of Dy. Charity Commissioner before raising the demand.

ii) The rate of contribution @ 2% of gross annual income subject to maximum cap of Rs. 50000/- is very exorbitant, even more than the amount of filing fee which is required to be paid by the corporates, registered with profit motive, to Ministry of Corporate Affairs on filing of annual accounts/annual return. The maximum rate for filing fee payable to the Ministry of Corporate Affairs in case of company having a nominal share capital of Rs. 1 crore or more is Rs. 600/-.

2. Dual registration of societies

There is no national regulatory body or framework governing the NPO sector in India unlike United Kingdom. The definition of NPO includes the public charitable trusts, societies and non-profit making companies. These NPOs can be registered under separate set of laws:

(a) The Gujarat Public Trust Act, 1950

(b) The Societies Registration Act, 1860

(c) Section 8 under Companies Act, 2013

These NPOs must necessarily operate within the meaning and scope of relevant Acts under which it is registered.

In state of Gujarat, if NPO is registered as a society, then it is obligatory to register the same under the Public Trusts Act also. There is no express provision in the Gujarat Public Trust Act, 1950, mandating the registration of such societies under Gujarat Public Trust Act, 1950. However, inference is drawn from the definition of public trust as provided in section 2(13) which reads as under:

"*Public Trust means an express or constructive trust for either a public religious or charitable purpose or both includes a temple, a math, a wakf, [a dharmada] or any other religious or charitable endowment and a society formed either for a religious or charitable purpose or for both and registered under The Societies Registration Act, 1860.*"

Therefore, societies registered for charitable or religious purposes or for both, are mandated to be registered as a public trust also.

Now, the definition of charitable purpose as provided in section 9 of the Gujarat Public Trust Act, 1950 reads as under:

"*A charitable purpose includes-*

(1) relief of poverty or distress,

(2) education,

(3) medical relief, and

(4) the advancement of any other object of general public utility but does not include a purpose which relates –

(a) exclusively to sports, or

(b) exclusively to religious teaching or worship"

Issues:

i) The requirement of dual registration of societies registered under The Societies Registration Act, 1860 results into following major legal issues which are required to be resolved:

There is fundamental difference between constitution of society and creation of trust, as follows:

a) Essential elements for creation:

- There are certain essential elements for creating a trust, viz., an author of trust, the trustees, beneficiaries, trust property and objects of the trust. All the above essential components should form part of a valid trust.
- The association does not have all components of trust such as there is no divesting of property by settler, the beneficiaries are members of association, there is no trust property, there is no settling of movable and immovable property.
- Society is a voluntary association of individuals for common ends, especially an organized group working together & periodically meeting for common interest, belief or profession such as promotion of sports, art, literary, scientific purpose or for diffusion of any other useful knowledge.

b) Main instrument:

- Main instrument of trust is trust deed executed on non-judicial stamp paper.
- Main instrument of society is Memorandum of Association and Articles of Association, which need not to be executed on stamp paper.

c) Irrevocability:

- The Trust is generally irrevocable.
- The Society may be wound up if $3/5^{th}$ of members of general body so resolve.

d) Separate set of Acts:

- The primary law governing the creation, administration & control of the trust is the Gujarat Public Trusts Act, 1950 while the creation, administration & control of the society is governed by the Societies Registration Act, 1860.
- Separate requirements are prescribed under both the set of laws relating to inspection of documents, new appointments, period of office, disqualification of trustees/governing body members/working committee members, provisions relating to Audit and accounts and disclosures therein, filing of change reports, etc.

ii) The dual registration requirement not only enhances the burden of compliances on the trustees under both the Acts i.e. Public Trust Act and Societies Registration Act, but also duplicates the administrative burden on authorities.

iii) Even though the definition of charitable purpose does not include societies registered exclusively for promotion of sports or for religious teaching, such societies are also compulsorily required to seek registration under Trust Act.

Suggestions:

i) The requirements and applicability of the provisions of the Gujarat Public Trust Act, 1950 cannot be imported & applied to the administration & control of the societies in absence of similar requirements contained in specific statute applicable to the societies. It is suggested that the requirements of dual registration of societies shall be obviated when there is special Act applicable to these societies.

ii) Alternatively, it is suggested to abolish the Societies Registration Act. For registration of Societies established to promote science, literature, etc., separate set of provisions may be incorporated in The Public Trust Act itself, dealing with incorporation & management of such societies, on the analogy of Sec. 8 of Companies Act, 2013 dealing with the registration of charitable or non-profit making companies.

3. Alteration of Constitution of Societies

As per the provisions of The Societies Registration Act (as applicable to Gujarat), a society may by a special resolution, passed by a majority of not less than 3/5th of total membership of the society, alter its Memorandum of Association.

Issues:

The above provision is virtually impracticable and non workable. Imagine the society having membership of thousands of members spread over various geographical locations. Would it be possible for the society to secure the attendance of 100% members and seek the approval of 3/5th of the total members (i.e. 60% of total members on the roll)? Considering the experience hardly few members attend the meeting in societies.

Suggestions:

In view of the above impracticability it is proposed, that the above provision may be amended as under:

A society may by a special resolution passed by a majority of not less than **3/5th of total members of the society present at the meeting**, alter the Memorandum of Association. This provision would be on similar lines as in the Companies Act, 2013, a special resolution, wherever required by law, can be passed by **3/4th of the share holders present at the meeting.**

4. Change Reports in respect of any entry in Register of Trust

If there is any change in respect of any entry in the register of public trust, trustees are required to report change in the prescribed form 3 to Asst./Dy. Charity Commissioner within 90 days. The change may be relating to the name of the trust, name and address of trustees and managers, objects of the trust, movable and immovable properties of the trust, and average annual income or expenditure of the trust. The Asst./ Dy. Charity Commissioner after holding an inquiry, if he is satisfied that change has occurred in entries, shall record the findings to that effect.

Issues:

i) It has been observed that due to the increase in the volume of work and various vacant posts there has been inordinate delay in approving change reports causing extreme difficulties for the trustees. The time limit for disposing thereof has to be prescribed.

ii) Due to delay in updation of entries in register of the trusts, the main purpose of the office of Registrar to keep documents in public domain for the benefit of inspection of public at large is defeated.

Suggestions:

It is suggested that with the increase in number of trusts registered, the organization of office of Charity Commissioner needs to be strengthened by sanctioning adequate posts, providing infrastructure and state of art technology, to keep pace with changing time to ensure swift registration of trust and grant of approval and inspection of the documents for benefit of public at large.

5. Vacant posts and delay in Registration of Trust and other approvals

i) For removing malpractices and defects in administration and to have proper control over management, The Gujarat Public Trust Act, 1950 was enacted, which invested very vide powers to the Chief Charity Commissioner to grant registration, to have supervision and control over administration of public trusts, to grant sanction for alienation of property and bar to jurisdiction of civil courts and other quasi judicial powers.

ii) In Gujarat, there are very large no. of public trusts for religious and charitable purposes. The inspection of entries of public trust register and other documents is allowed to the parties interested as permitted by Asst./Dy. Charity Commissioner.

Issues:

It is observed that on overall basis more than 53% of sanctioned posts including several critical posts of Dy. Charity Commissioner, Asst. Charity Commissioner, Jt.Charity Commissioner & Addl. Charity Commissioner are lying vacant, resulting in inordinate delay in granting registration, approval of change reports, updation of entries in register and thus, defeating the purpose of enactment.

Suggestions:

It is requested that immediate steps shall be taken to fill-in the vacant posts with the regular incumbency for swift disposal of work.

6. Registration of Trust

As per the provisions contained in law, the trustee of the public trust is required to make an application for registration of trust within 3 months of creation. The application shall be in the form of Schedule II, it shall contain following particulars:

i) name of the public trust

ii) the mode of succession to the office of the trustee

iii) the list of trust property (movable & immovable) along with its approximate value and

iv) the gross average annual income of the trust property estimated……

In addition to above particulars, the application shall contain following particulars

a) Documents creating the trust

b) Objects of the trust.

c) Sources of income of the trust.

d) Particulars of encumbrances, if any, on trust property.

e) Particulars of the scheme, if any, relating to the trust.

f) Particulars of title deeds pertaining to trust property and names of the trustees in possession thereof.

The application is required to be signed by person who shall subscribe on solemn affirmation before the Asst./Dy. Charity Commissioner, a justice of the Peace, a Magistrate or before any officer of court competent to administer oaths under section 139 of the Code of Civil Procedure, 1908, that the facts mentioned in the said application are true to the best of his information and belief along with requisite fees.

In other words, any one trustee who is authorized by Board of Trustees can submit the application and supported verification on solemn affirmation and oath.

In the case of Companies Act, 2013 and Limited Liability Partnership Act, 2008 almost there are similar requirements to file information with regard to creation of company and LLP along with supportive documents creating the company or LLP, which is to be digitally signed by authorized partner or director and along with counter certification by Company Secretary, Cost Accountant and Chartered Accountant. The consent of all partners/directors is required to be given.

Issues:

In practice it is observed that for incorporation of trust or society, field offices are requiring affidavits of all the trustees. In addition to above, consent of all the trustees is required. There is practical difficulty because all trustees may not be residing in one city or state. Despite the authority is given to one of the trustees to make necessary correction or amendments in the application as suggested by the office of Charity Commissioner, offices are insisting for fresh affidavits of all the trustees. This practice is not only contrary to the requirements of law but also an unnecessary burden on trustees resulting into delay in registration of trust.

Suggestions:

i) Generally none of the laws either Companies Act, 2013 or Limited Liability Partnership Act, 2008 prescribe the requirements of filing of affidavits of persons executing documents when their consent is filed.

ii) It is requested that suitable guidelines or instructions shall be issued to all the field offices to follow uniformity in procedures obviating the requirements of affidavits of all trustees who have already subscribed to trust document and consented for registration of trust.

7. Computerization

Issues:

In Gujarat, at present, more than 2.00 lakhs, public trusts are registered under the Gujarat Public Trust Act, 1950. However the records relating to administration and control of public trust are not computerized due to manual filing and processing of data. This results into inordinate delay into registration of trust, approval of change reports and non-updation of records.

Suggestions:

It is felt that there is urgent need to computerize the office of charity commissioner to facilitate the registration of new trust, inspection of documents, filing of change reports and for grant of compliance and online approvals as well as taking the online certified copies on the model of Ministry of Corporate Affairs, wherein mca21.gov.in successfully regulates the Companies Act, 2013, Limited Liability Partnership Act, 2008 and other allied Acts and also handles volume of lacs of companies all over India.

The MCA site is gateway to all the services guidance and other corporate affairs related information and it is possible to incorporate and register the company & LLP at the click of mouse maximum within two to three weeks by sitting anywhere in India.

8. Appearance by Chartered Accountants as Authorized Representative

Issues:

At present Chartered Accountants are not allowed to appear as an Authorized Representative in the office of the Charity Commissioner due to the latest decision of the High Court. It is submitted that the

office of the Charity Commissioner is quasi judicial and not court. The Chartered Accountants are qualified professionals entitled to attend before the Income Tax Authorities, Appellate Tribunal, Excise Authorities, VAT Authorities and various other quasi judicial authorities other than court.

Suggestions:

It is suggested that law shall be amended suitably to specifically provide for definition of Authorized Representative which shall also include Chartered Accountants in practice, on the similar lines of Income Tax & VAT Law.

9. Premises and physical infrastructure

At present, building, furniture and facilities in the office of Charity Commissioner and other field offices are very old and without adequate sanitation standards. It is important to note that so many social and religious leaders & professionals are visiting such premises to serve the cause of charity. It is requested that the building and furniture in the offices of Charity Commissioner needs renovation incorporating latest state of art facilities.

10. Grievance Redressal Mechanism

The Grievance Redressal Mechanism of an organization is the gauge to measure its efficiency and effectiveness as it provides important feedback on the working and improvement of the administration. Recently **our beloved Prime Minister Shri Narendra Modi has given top most priority to PRAGATI programme for redressal of public grievances and to respond and attend to public grievances on top priority.** The charity organization may be directed to dispose off the public grievances pending with them so as to reduce the pendency to nil and it is suggested that officers should observe every Wednesday as a meetingless day in their offices when all the officers above a specified level should be available at their desks from 1000 hrs. to 1300 hrs. to receive and hear public grievances and officers of rank Asst./Dy. Secretary shall be designated as a Grievance Officer to deal with every grievance in a fair, objective and just manner and issue reasoned speaking reply for every grievance rejected.

11. Constitution of Advisory Committee

At present, there is regular practice in Central Government Departments for constitution of Advisory Committee to have regular interactions with various associations and other professional bodies, as a measure to enhance its efficiency & effectiveness and to provide feedback on work of administration.

On similar lines it is suggested that Advisory Committee shall be constituted by the office of Charity Commissioner. Advisory Committee shall comprise the officials from legal department and office of Charity Commissioner as well as nominated members from professional bodies viz. Chartered Accountants Association, Abad and All Gujarat Federation of Tax Consultants and reputed NGOs.

Thanks and Regards,

Yours Sincerely,

For, Chartered Accountants Association, Ahmedabad

CA. Yamal A. Vyas	CA. S.K. Sadhwani	CA. Ajit C. Shah
President	***Chairman, L & R Committee***	***Convener, L & R Committee***

Dated: 31st December, 2015 at Ahmedabad

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Pre-Budget Memorandum

By Regd. Speed Post

19th December, 2015

To,
Mr. Arun Jaitly
The Hon'ble Finance Minister
Government of India
North Block Secretariat,
New Delhi – 110 001

Respected Sir,

Sub : Pre Budget Memorandum – Direct Taxes, F.Y. 2016-17

Sir, we appreciate the steps taken by the Finance Ministry as a part of Prime Minister's promise to provide ***Good Governance*** and ***Open & Accountable Administration*** by making tax laws simpler & tax payer friendly. Keeping pace with that avowed objective, it is absolutely essential that with gaining of experience, tax laws are not only revenue oriented, but also easy to administer without causing hardship to tax payer & burdening the judicial process of the country.

In light of above, we submit Pre-Budget Memorandum-Direct Taxes for F.Y. 2016-17 for your kind consideration.

Thanking You,

Yours Truly,

For, Chartered Accountants Association, Ahmedabad

CA. Yamal A. Vyas	CA. S.K. Sadhwani	CA. Ajit C. Shah
President	***Chairman, L & R Committee***	***Convener, L & R Committee***
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ALL GUJARAT FEDERATION OF TAX CONSULTANTS

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Ph.: +91 79 2754 4232, 2754 5442
Mail : caahmedabad@gmail.com Web : www.caa-ahm.org

PRE-BUDGET MEMORANDUM – DIRECT TAXES F.Y.2016-17

1. Suggestion to increase revenue & enhance taxpayer base

The vast majority of Indian population, deriving agriculture income as well as non agriculture income out of savings/assets generated from agriculture income, has wrong impression that being agriculturist whole of their income is exempt from Income Tax.

In metro cities, several agriculture lands are converted into non agriculture lands and subsequently sold for development purpose. The agriculturist who owns land is under wrong impression that his profit/ capital gain on sale of agriculture land converted into non agriculture land is also exempt.

Under existing law, individual non agriculturist is required to furnish return of income, if his total income exceeds exemption limit. It is suggested that section 139(1) shall be suitably amended so as to include every person in receipt of agriculture income exceeding specified limit or having agriculture land holding beyond specified limits, shall be mandated to file Income Tax Return. Even though, the agriculture income shall continue to be exempt, this measure will bring on record, the disclosure about taxable income other than agriculture income and asset creation out of non agriculture income, which is hitherto not disclosed under disguise of agriculture income.

2. Need of providing open & accountable administration to strengthen confidence of public at large by prescribing timelines of *Citizen's Charter* in the I. T. Act

Under present system, vast penalties are imposable on the assessees for even innocent breach of law such as delay in compliance of notices/summons. Penalties are also being imposed mechanically by passing non-speaking orders for technical & venial breaches of law. The judicial decisions of the Higher Legal forms are not followed by authorities, causing lot of hardships to the assessee, which not only burdens the legal system of the country but also erodes the confidence of taxpaying community at large.

There is immediate need to incorporate, in the Income Tax Law itself, the concept of accountability on the part of administration for insubordination to the instructions of Higher Authorities or decisions of Higher Judicial Forums, for making of hi-pitched additions subsequently deleted in appeals or for non adherence to time limits for passing rectification orders or appeal effect orders without any justified reason.

At present though timelines are prescribed in *citizens charter,* but in the absence of legislative backing and accountability on the part of administration, result into mushrooming of grievances & unproductive work.

There is immediate requirement to codify the timelines prescribed in the *Citizens Charter* in I. T. Act itself.

3. Need to strengthen I. T. Dept. Machinery/Processing System

Experience indicates that department is still in process of streamlining online processes. The huge paper demands are surviving due to any of the following reasons:

- Non credit/posting of self assessment tax deposited by the assessee at AO level;
- Non giving of effect to the order of appellate authority;
- Non disposal of the pending rectification applications;
- Lack of coordination & poor communication of records between CPC & AST;
- Delay in processing of e-filed returns by CPC & AST except few small refund cases

There is emergent need to strengthen the I. T. processing system along with prescribed time limits for processing of returns by CPC & AST in order to ascertain the correct state of affairs of o/s demand. Remedial measures are needed for streamlining communication of data files between CPC & AST for faster processing of I. T. returns and rectification applications to display the correct outstanding demand & addressing taxpayers' grievances.

4. Raising the threshold for TDS on interest - Section 194A

Section 194A(3) provides for non deduction of tax at source in case of interest paid by banking company does not exceed Rs. 10000/-. In other cases, the threshold is Rs. 5000/-. The said limit has not been changed since Finance Act, 2007 when the basic exemption limit was Rs. 110000/- and Inflation Index was 551. It is suggested that with the increase in the basic exemption limit to Rs. 250000/- and inflation index to 1081, there is a need to enhance the threshold for non deduction of TDS on interest to Rs.25000/- in case of banking company and Rs. 15000/- in case of other assesses.

This will go long way in reducing the TDS compliance work on small assesses and eliminate unproductive work in processing small refunds due to TDS on interest. This measure will also reduce the volume of grievance petitions for non receipt of small refunds.

5. Expenditure in cash in excess of Rs. 20000 – section 40A(3) & Rule DD and mode of acceptance & repayment of loans or deposits- section 269SS & 269T

A limit of Rs. 20000/- in respect of expenditure u/s 40A(3) and for acceptance/repayments of loan/deposit u/s 269SS/269T respectively, were fixed long back. According to current price index and voluminous trend of business, trade, industry, a relook is needed for revisions of these limits. We, therefore, suggest this limit should be enhanced to Rs. 50000/-.

Old rule 6DD(j) may be introduced to provide exceptions for allowance of genuine business transactions paid in cash if identity of payee is established.

6. Filing of annual TDS returns by small TDS deductors

Assessees having annual TDS deposit liability below specified threshold, say Rs. 100000/- p.a. shall be mandated to file TDS returns annually instead of quarterly. Even though they may be required to

deposit TDS on monthly basis. This measure will, to a great extent, reduce the compliance cost on small assesses and processing burden on the part of Department.

7. Raising of threshold prescribed under section 92BA and Rule 10D(2)

The threshold limit specified u/s 92BA, where aggregate of specified domestic transactions entered into by the assessee exceed Rs.20 crores, shall be enhanced to not less than 50 crores to reduce the burden of compliance on small assesses.

The present threshold for relaxation from the requirement for maintenance of Information & documents under Rule 10D(2) is Re. 1 crore in case of International transaction. It is suggested that the said threshold be increased to Rs. 10 crores.

8. Search & Seizure-section 132B, adjustment of seized cash

Necessary amendment should be brought in section 132B of the Act regarding adjustment of seized cash against existing tax liability of assessee if assessee makes specific requests, to bring clarity. This would help in early realization of tax, avoid litigation and save the assessee from burden of mandatory interest charged under section 234B and 234C. Further amendment is also needed in the Act which may allow assessee to adjust its seized cash against tax liability when, it is filing settlement application before the settlement commission under chapter XIX A.

9. Fee of default in furnishing statements u/s 234E

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

The implementation of Section 234E has caused a great hardship for tax deducting/collecting public at large. The small deductors are also not spared for venial procedural lapse due to reasonable cause.

The levy of fee of Rs. 200 per day for each day of default is very stringent on the small taxpaying public considering the nature of default being procedural, without any loss of revenue to the exchequer.

The levy also seems to be unjust considering the discrimination in the time period allowed to file quarterly statements to government deductors and non-government deductors.

It has been surprisingly found that various government deductors viz. CPC (TDS), Various IT Departments at Ahmedabad and Gujarat, High Courts etc. did not file the TDS statements on or before the prescribed dates thereby attracting the levy of fees u/s. 234E of the Act. However, the CBDT has vide a circular No. 07/2014 F. No. 275/27/2013-IT(B) dated 04th March, 2014 extended the due date for filing return for FY 2012-13 (Q2 to Q4) and FY 2013-14 (Q1 to Q3) only to the government deductors.

The automatic levy of fee u/s 234E has also raised the litigations. When the TDS has been deposited and compensatory interest is paid, penalizing the small assesses for delay in uploading of TDS returns is causing lot of heart burns to the small deductors and irks the feeling of tax payer friendly regime.

10. Carry forward and set off of losses in the case of certain companies - u/s 79

As per the provision contained in section 79 of the Act, carry forward and set off of loss is denied in case of companies where public are not substantially interested, when shares carrying not less than 51% of the voting power were not beneficially held by same set of beneficial owners on the last day of the year in which loss was incurred and in the year in which loss is to be set off.

It is requested that in the present era of globalization, cross mergers & acquisitions the set off of loss shall not be denied merely on the ground of dilution of 51% shareholding if management of the company continues to remain with same set of people. Therefore it is suggested that the condition of holding 51% of voting power by the same set of beneficial owners needs to be removed or diluted substantially.

11. Amendment of Section 2(22)(e) – Deemed Dividend

The deeming fiction contained in section 2(22)(e) providing for taxing of loans & advances given to a shareholder, being a beneficial owner of shares holding not less than 10% of voting power in a closely held company, to the extent of accumulated profits, has caused lot of heart burns in the minds of small assessees & avoidable litigation, as the courts have held that even if loans/advances are granted and repaid immediately within few days of advancing, are also hit by section 2(22)(e). which was never intended by Legislature.

Suitable amendments should be made in the deeming fiction to attract taxation of the major amount of long term loans only, say exceeding Rs. 10/- lacs, for a period of more than one year, to invoke deeming fiction u/s 2(22)(e). This amendment will avoid unintended hardship to the small assessees/companies and to a greater extent curb the litigation also.

12. Revision of revisionary Powers of the Commissioner of Income Tax u/s 263

Wide powers of revision have been granted to the Commissioner of Income Tax particularly, with the insertion of Explanation 2 to section 263 w.e.f. 01.06.2015 whereby, deeming fiction of erroneous order is incorporated, if in the opinion of commissioner order is passed without making inquiries/ verification by Assessing Officer. This entails very vast subjective powers to the Commissioner and may open pandora of unnecessary litigation.

The present CBDT instruction that, in cases audit objection is not dropped, directs that the remedial measures shall be taken either by revision of order under section 263 or reassessment under section 147 has also resulted into lot of revisions based on audit objections dragging assessee into fresh proceedings before commissioners and further proceedings before Tribunal. In several cases revisions are initiated based on just apprehensions without recording the reasons or findings.

It is suggested that the suitable amendments shall be incorporated in section 263 to provide for recording of the findings leading to the reasonable belief that the order is erroneous and prejudicial to the revenue. Unless expected loss of tax to the revenue is not less than Rs. 100000/- no revision shall be permitted. In such cases reopening should be made on the lines of section 148 read with section 149, by AO.

CA. Durgesh Buch	**CA. K. D. Shah**	**CA. Yamal Vyas**	**CA. S. K. Sadhwani**
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Request to nominate representatives of Trade & Professional Bodies

Dt. 22nd December, 2015

To,
Dr. Hasmukh Adhia
Hon. Revenue Secretary,
Ministry of Finance,
Govt. of India,
128-A/ North Block, Secretaiat,
New Delhi - 110001

Respected Sir,

Ref : Instruction No. 17/2015 dt. 9th November, 2015

Re : Constitution of Local Committees to deal with Taxpayers Grievances from High Pitched Scrutiny Assessments- Request to nominate representatives of Trade & Professional Bodies

We appreciate our beloved Prime Minister's promise to provide transparent system based good governance, accountable administration, & futuristic institutions for inclusive and sustainable development. Keeping pace with avowed objective we appreciate the series of steps taken by Finance Ministry in that direction to make the administration pro-people and effective.

Recently The Department of Revenue (CBDT) has issued above referred instruction to curb the tendency to frame high-pitched and unreasonable assessment orders and advised for constitution of Local Committee in each Prin. CCIT region across the country. The Committee is also authorized to co-opt other members, if necessary.

In order to make the committee more broad based, balanced, independent and pro-people we hereby request to afford adequate representation to the nominees of the Trade & Professional bodies in each of Prin. CCIT region.

In Gujarat region, on behalf of the following two leading professional associations representing the tax professionals and chartered accountants atleast one member from each association shall be nominated on the Local Committee. Brief backgrounds of both the associations follows:

About *All Gujarat Federation of Tax Consultants (AGFTC)*

AGFTC founded in 1992 is the first & only Apex Regional body of Tax Advocates and Chartered Accountants of Gujarat, having individual membership strength of + 1100 as well 24 institutional membership with representation from all the districts of Gujarat. The prime objective of the AGFTC is to render services not only to the tax professionals but also educate the tax payers at large and to act as a catalyst between tax payers & tax administration. AGFTC organizes seminars and lectures on tax advocacy in mofussil regions across the Gujarat. AGFTC regularly organizes *Open House* with tax authorities to redress grievances of tax payers as an attempt to provide an open and accountable tax administration. Federation believes that honest tax payer and accountable administration together can build the strong India.

About *Chartered Accountants Association, Ahmedabad (CAA)*

CAA is a voluntary and non-profit organization having an immense repute, carrying on the activities of imparting technical guidance to Chartered Accountants and engaged in research activities in the field of accounting and taxation laws since 1949.

It has dedicated membership of more than 1400 Chartered Accountants from all over Gujarat and India. The main objective of Association is to disseminate professional education not only among the fraternity of Chartered Accountants but also to educate the public at large. It has always been an endeavor on the part of our association to ensure that its members keep pace with fast changing times in terms of knowledge and professional competency.

Sir, assuring you of our best co-operation.

Thanks & Regards

Yours Truly,

Sd/-	**Sd/-**	**Sd/-**	**Sd/-**
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Copies To :

1) ***Hon. Chairman***

Central Board of Direct Taxes,

North Block, New Delhi – 110 001

2) ***Principal Chief Commissioner of Income Tax, Gujarat (CCA)***

Aayakar Bhavan,

Ashram Road,

Ahmedabad-380009

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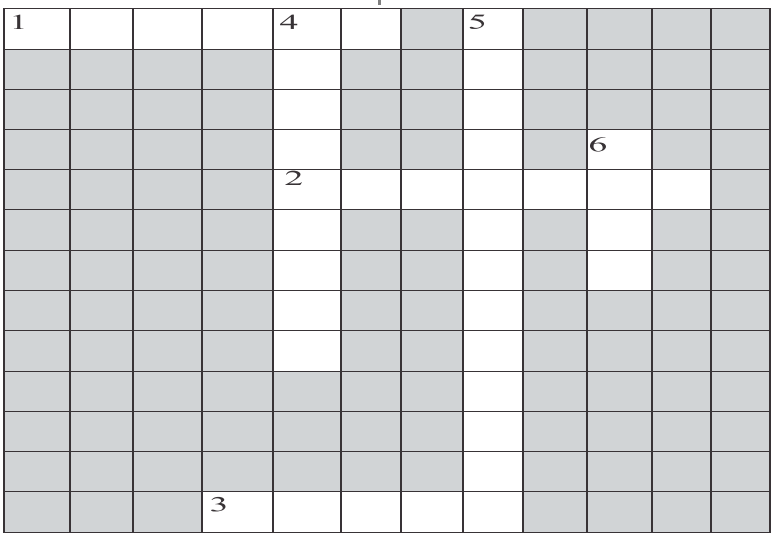
ACAJ Crossword Contest # 20

Across

1. Swachh Bharat Cess is leviable on all taxable services, other than services which are fully _____.
2. Booking rights or rights to purchase the apartment or rights to obtain title to the apartment are also _____ assets that can be transferred.
3. The expression 'manager' and consequently 'managerial service' has a definite _____ element attached to it.

Down

4. Mahatma Gandhi says an ounce of practice is more than tons of _____.
5. The word "reason" in the phrase "reason to believe" would mean cause or _____.
6. As per Sec. 43(2) of the Income Tax Act, even if the amount is "incurred", according to the method of accounting, the sum would be treated as _____.



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 25/01/2016.
5. The decision of Journal Committee shall be final and binding.

Winners of ACAJ Crossword Contest # 19
1. CA. Shailesh Sheth
2. CA. Mohan Akalkotkar

ACAJ Crossword Contest # 19 - Solution

Across

1. Escapement
2. Bali
3. Invoice

Down

4. Refund
5. Karma
6. Principal

❊ ❊ ❊