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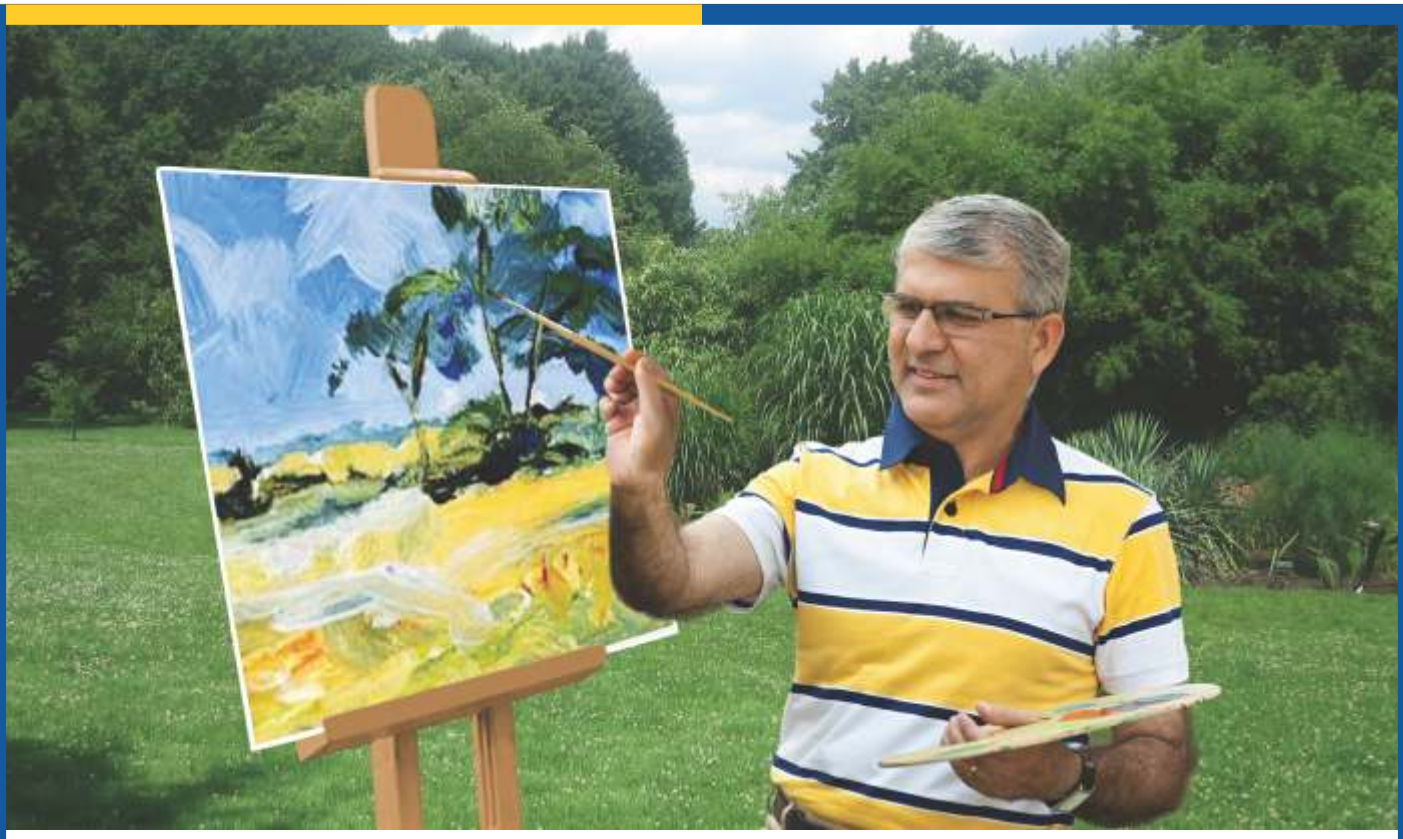

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The Piecemeal Living

From the moment we are born, Mother Nature readily starts bestowing its grace upon us. Everything necessary for a smooth and healthy start of life is readily made available to us. All necessities are being taken care of with an utmost ease as if Somebody is perfectly executing a well designed plan. From the very first breath, enlivening sunlight, mother's feed, nature's warmth and all other essentials are provided without hassle. All things are beautifully and perfectly placed as if Someone has meticulously worked out our grand entry on this magnificent stage called world. Has it ever been heard that a baby is born with an anxiety of the source for his first breath? No, because all things generally necessary for a good, healthy, and sustainable living are adequately provided.

A question arises that if all is so skillfully worked out for us, why mankind is in a state of despair. Why many of us are living life in piecemeal instead of enjoying it to the fullest? The answer to this is simple. As we grow, ignorance creeps in. Everything that is made available in abundance is neglected and attention shifts from "haves" to "have nots". The feeling of being in a state of emptiness sets in; unaware of the fact that one is full in all respects. The irony is that we want more and more, not knowing that we already have plenty. The appreciation for having this beautiful life, fresh air, sound sleep, good family, caring friends has lost its way to gadgets, big cars, foreign holidays. Materialistic pleasures have taken over 'true happiness'.

Today, one is not able to control **'desires'**. Craving for material objects is affecting prudent decision making in other words – prudent living. All actions are performed in selfish interests. There is emphasis on wealth than values. Wealth is accumulating but man is decaying. Luxury is preferred over necessities and priorities are changing. Until a generation back, it was observed that the entire family saved on all fronts to first own a house before anything else. Instances today are easily observed where even the learned professionals are found of preferring a car over a house. Availability of easy finances to meet indulgences in cars, phones or holidays is changing our priorities. We are forgetting that it is easy to borrow for comforts, but takes a lot to repay. It is not just the money that gets repaid in installments but life itself gets into **'installment mode',** piecemeal living".

It is easy to get out of this type of life. As a commerce student and accounting professional one has studied the principle of accounting for personal accounts – **Debit the Receiver – Credit the Giver**. From the very first day of our birth, there have been innumerable receipts in various forms from the world. Someone, above in heavens, is debiting the account of every receiver for every single grabbing from the world. What would be the position of our account if we only receive and do not pay back in some form? There would be no credits in the account and one would depart indebted – which should not be the case.

The first step for repaying our debt is to start acknowledging the fact that God has been kind to grant us all that is necessary. It is only when we begin counting our blessings; we will be overwhelmed with gratitude for all that has been bestowed upon us – this would generate a feeling of **abundance** which would impel us to share with others, and get our account credited in Lord's books of account and make live us life to its fullest potentials. I would conclude by saying:

Without any bounds, it is Lord's grace,
All in plenty for mankind to embrace,
But mean is the world, thus lacking in His praise,
And searching for more in a strange race.
Forever let down with an attitude to seize,
Beautiful gifted life though, living in a piece,
Just a shift in view to see all's there
Abundance on offer for a life of flair.

Editorial

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The Budget 2017-18

The Finance Minister presented the Union Budget 2017-18 in the Loksabha on 1-2-2017. It was a historic budget because the Modi government brought in with it some important administrative changes. The Railway Budget got merged with the Union Budget and then instead of presenting it on the last day of February; it was done on the first day of the month. What significance it serves, only time will tell but these small changes indicate we have a government that takes decisions.

Cash less economy is the order of the day as per the speech of the finance minister which is backed by the proposals in the Finance Bill. The government wants nothing to be done "off the record" and thus various measures are introduced to curb cash transactions. Restriction on making cash expenditure in excess of Rs. 10000, presumptive profits in businesses to be computed at 6% instead of 8% of where sales is effected through banking channel, prohibition of all transactions in excess of Rs. 3 lacs in cash, disentitlement of deduction u/s 80G where donation made in cash in excess of Rs. 2000 and restriction for political parties to accept amount of more than Rs. 2000 in cash are various such measures where finance minister has laid the road as far as the functioning in the economy is concerned in the days to come.

There are some very good proposals introduced in the Finance Bill, however following are some issues that need further clarifications and consideration of the finance minister:

- New section 56(2)(x) is introduced where any person receives any sum or asset without or inadequate consideration shall be chargeable to tax. The corresponding amendment in the definition of income u/s 2(24) is forgotten.

- A proviso is proposed in section 44AB to exclude audit for assessees whose turnover does not exceed Rs. 2 crore opting section 44AD. So far so good, but what about the applicability of TDS provisions in case of individuals and HUFs. Relevant TDS sections (except 194C) talk of the liability to deduct tax if turnover exceeds Rs. 1 crore. Do we now have a situation where and individual or HUF having turnover between 1 crore to 2 crore, offering 8% or 6% of profits, as may be applicable, would not be required to maintain books of accounts but still liable to deduct TDS from payments like interest, rent, commission and professional fees.

- In case of Joint Development agreement the payment of capital gain taxes arising on such transfer to the developer have been differed till the project gets completed however there is no corresponding change in the definition of transfer. In such a case, how would the exemption provisions of capital gain apply?

The Finance Minister gave some interesting numbers in his speech:

- We have only 7781 companies out of total 13.94 who earn more than Rs. 10 Crores

- In whole of India, only 1.72 lakh people earn income more than Rs. 50 lacs

These are some of the astonishing figures putting a question mark on the integrity of the tax payers in the country. Let's hope the nation one day will be a tax compliant nation and the administration will be more tax payers' friendly.

CA. Ashok Kataria

From the President

CA. Raju Shah
shahmars@gmail.com

Respected seniors and dear professional colleagues,

It's well said by Leonardo da Vinci "I have been impressed with the urgency of doing. Knowing is not enough; we must apply. Being willing is not enough; we must do." So action is most important than willing to do.

Strength means power or caliber. Strength is needed to perform tasks efficiently with great energy. It is very well said "Only one who devotes himself to a cause with his whole strength and soul can be a true master." For this reason, mastery demands all of a person. So my dear friends, be a good example but never do it because you feel it is expected of you, do it because you want to do it and along with all your heart, to give your best in everything you do say and think. The greater your desire, the easier it will be to fulfill it.

The International Study tour from 5th January, 2017 to 13th January, 2017 at "Magical Thailand-Krabi (2N), Phuket (3N) and Bangkok (2N) total 7 days has been a grand success. I am sure all participants will cherish the memories for their life time.

As part of sports activity we played a Cricket match on 28/01/2017 with IT Bar Association at Ahmedabad University Ground. It was a very good match with great sportsmanship demonstrated by both the teams and I am happy to inform you that CA Association won the match.

Next Cricket match is to be played on 18/02/2017 with Baroda Branch of WIRC of ICAI at Railway Cricket Ground, Sabarmati, Ahmedabad. All are invited to cheer up the players.

A memorable programme was arranged under aegis of C. F. Patel Memorial Full day Seminar on 10th February, 2017 at Hotel Hyatt Regency. The topics were Latest Useful Income tax Judgments by CA. N C Hegde-CCM, Mumbai, Recent issues of Assessment with specific reference to Limited Scrutiny Notice by CA. Jayesh C Sharedalal, Search, Survey, Sec. 68, Sec. 69. Sec. 115BBE in Present Scenario by CA. Deepak R. Shah and PMLA / Benami Property Act / RERA by Adv. Tushar Hemani. The programme was very well attended and appreciated by one and all. My compliments to CA. Nirav Choksi, Chairman of C F Patel Memorial Programme for wonderful event at a prestigious venue.

It is my pleasure to inform you that Special Event Committee supported and participated in the program of Ratnatrayi Trust '5 Pillars of Happiness', talk by P. P. Acharya Bhagawant Shrimad Vijay Ratnasundersurishwarji on 12/02/2017, Sunday, at newly opened Ahmedabad Municipal Corporation Auditorium Hall, Opp. Kensville Gold Academy, B/h. Rajpath Club, Bopal Road, Thaltej, Ahmedabad. My compliments to CA. Devang Doctor chairman of Special Event Committee and CA. Jainik Vakil, Co-ordinator of the programme.

> "Success is about creating benefit for all and enjoying the process. If you focus on this & adopt this definition, success is yours."
>
> **Kelly Kim**

For us feedback is the most important guide to improve the performance. Please send your feedback regularly.

With best regards,

CA. Raju Shah
President

Penalty - Provisions under Income Tax Act, 1961

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The levy of penalty for concealment or furnishing of inaccurate particulars of income under the existing provision of section 271(1)(c) of Income Tax Act, 1961 has always been a matter of litigation between the revenue authorities and the taxpayers. The discretion regarding quantum of penalty led to corruption. The scope of such provision was always a subject matter of litigation since tax authorities always levied penalty whenever there was an addition or disallowance made by the Assessing Officer, may because of pressure of higher authorities even in case where there was no prima facia case against the taxpayer. With a view to reduce the litigation and the remove the discretion of tax authority, the Finance Act, 2016 has inserted new provision in the form of new Section 270A and 270AA in the Act which will replace the existing provision of Section 271(1)(c).

At the outset, it is clarified that the new provision of section 270A and 270AA will apply to cases pertaining to Assessment Years 2017-18 onwards and existing provision of Section 271(1)(c) will continue to be applicable to all cases up to Assessment Years 2016-17 which is apparent from the insertion of sub-section (7) in section 271. Further, the new section will not be applicable to cases where assessment is made in pursuance of search u/s.132 in view of clause (e) of sub section (6) of section 270A and consequently, in such cases, the penalty would be levied under the existing provision of section 271. It may also be noted that assessment made u/s.153C is outside the scope of section 271AAB and therefore in such cases, the penalty would, henceforth, be levied as per the new scheme.

Under the new scheme, the penalty matters are categorised in two parts – (1) under reporting of income and (2) misreporting of income. Under reported income has been defined in Section270A(2) which is to be read with section (8) & (9) of this section. With a view to remove the discretion of the Assessing Officer, a fixed percentage of the amount of penalty would be imposed under the new scheme. Hence penalty for under reported income will be @ fixed rate of **50% of the tax payable on unreported income while it will be @ 200% of the tax payable on the misreported income** as against 100% to 300% of concealed income under the existing provision of section 271. This is a welcome step in the proposed legislation.

The **under - reported income** has been defined in sub –section (2) section 270A. According to this provision, a person shall be considered to have unreported his income where.

a) The assessed income is greater than the income processed u/s.143(1)(a).

b) The income assessed is greater than the maximum amount not chargeable to tax, where non return is filed by the assessee.

c) Where the income reassessed is greater that the income assessed or reassessed immediately before such assessment.

d) Where the deemed total income assessed or reassessed as per the provision of section 115JB/115JC is grater that the deemed total income determined u/s.143(1)(a).

e) Where the deemed total income assessed under the provision of section 115JB/115JC is greater than the maximum amount not chargeable to tax, where no return is filed by the assessee.

f) Where the amount of deemed total income reassessed as per the provisions of section 115JB and 115JC is greater than the deemed total income assessed or reassessed immediately before such reassessment.

g) Where the income assessed or reassessed has the effect of reducing the loss or converting such loss into income.

However, in order to **avoid litigation** between the tax authorities and the taxpayers, the Act also provides for exclusion of certain amounts from the scope of the expression "Unreported income". Such exclusion are enumerated in sub section (6) which are narrated below.

a) The additions or disallowances in respect of which assesse offers a bona fide explanation to the satisfaction of the tax authority and proves that he had disclosed all material fact to substantiate the explanation;

b) The additions or disallowance determined on estimate basis, if the account maintained by assessee are correct and complete to the satisfaction of tax authority but the method employed is such that the income cannot properly be deducted therefrom;

c) The additions or disallowances determined on estimate basis, where the assessee had, suo motto, made a lower amount of disallowance on the same issue in computation of income but had disclosed all material facts in respect of such additions or disallowances;

d) The amount of addition made in conformity of arm's length price determined by TPO if the assessee had maintained information and documents as prescribed u/s.92D of the Act and declared the international transactions and disclosed all material facts relating to such transactions;

e) The amount of undisclosed income referred to in section 271AAB.

The **computation** of unreported income is provided in sub section (3) in two parts. **First part** refers to the situation where the income is being assessed for the first time either u/s.143 or 147- **(a)** where the return is furnished, the unreported income will be difference between the amount of income assessed and the amount income determined u/s.143(1)(a); **(b)** where no return is filed by assesse (i) in case of company, firm and local authority, it will be entire income assessed and (ii) in case of other entities, it will be the difference between the income assessee and the maximum amount not chargeable to tax.

Second part refers to the situation other than the mentioned above. In such case, it will be the difference between the amount of income reassessed and the amount of income assessed, reassessed or recomputed in a **preceding order**. Further, a proviso is added to such provision which provides a formula for determining the unreported income where the income is assessed as per deeming provision of section 115JB/115JC.

Where, as a result of the assessment or reassessment, the loss returned by the assessee is reduced or converted into positive income, the unreported income will be the difference between the loss claimed and the income or loss as the case may be assessed or reassessed.

The **expression "a preceding order"** referred to earlier is explained to mean an order during the course of which penalty proceeding had been initiated.

Misreporting of Income has been defined in sub section (8) & (9) of section 270A. combined reading of these sub section reveals that misreporting of income will be where under-reported income is because of following circumstances.

a) Misrepresentation or suppression of facts;

b) Failure to record investment in the books of account;

c) Claim of expenditure not substantiated by any evidence;

d) Recording of false entry in the books of account;

e) Failure to record my receipt in the books of account having a bearing on the total income;

f) Failure to report any international transection or deemed international transection or any specified domestic transection to which provision of chapter X applies;

For the purpose of levy of penalty, the **amount of tax payable** on under reported income as per sub-section(10) shall be computed as under.

(a) Where no return of income has been furnished and the total income has been assessed for the first time, the amount of tax calculated on the

under-reported income as increased by the maximum amount not chargeable to tax as if it were the total income

(b) Where the total income determined under 143(1)(a) or assessed, reassessed or recomputed in a preceding order is a loss, the amount of tax calculated on the under-reported income as if it were the total income

(c) In any other case determined in accordance with the formula –

(X-Y)

Where

X = the amount of tax calculated on the under-reported income as increased by the total income determined under 143(1)(a) or total income assessed, reassessed or recomputed in a preceding order as if it were the total income; and

Y = the amount of tax calculated on the total income determined under 143(1)(a) or total income assessed, reassessed or recomputed in a preceding order

Sub section (12) provides that such penalty shall be imposed by the tax authority by an order in writing.

Immunity from penalty and prosecution

Before analysing the entire scheme, it would be appropriate to refer to the provision of section 270AA which provides for immunity from levy of penalty u/s.270A and prosecution u/s.276C of the Act. According to this scheme, an assessee shall be granted such immunity if following conditions are satisfied.

a) Tax and interest payable as specified in the notice of demand in pursuance of order of assessment or reassessment has been paid within the time specified in such notice of demand;

and

b) No appeal is filed against the order of assessment or reassessment.

The **procedure** specified is simple which state that assessee is required to file an application in the prescribed form within one month from the end of the month in which such order of assessment or reassessment is received by the assessee. The assessing officer, if condition fulfilled, shall grant immunity from imposition of penalty u/s.270A and prosecution u/s.276C provided the penalty is not initiated under the circumstances mentioned in sub section (9). The A.O. shall pass an order within one month from the end of the moth in which such application is received.

In other words, such immunity is not available where either (i) penalty initiated in respect of misreporting of income, or (ii) tax and interest as per demand notice is not paid within the time specified in the demand notice, or (iii) application is not made in the prescribed from within one months from the end of the months in which order of assessment or reassessment is received by the assessee.

If the A.O. decides to reject the application, he shall give an opportunity to the assessee of being heard before rejection.

Analysis

The **distinction and similarity** between the existing provision and the new scheme –

- Under the **existing provisions**, the tax authority has to **record his satisfaction** the assessment proceeding to the effect the assessee had concealed the particulars of income or furnished inaccurate particulars of income. Failure to record such satisfaction rendered the penalty order as nullity. **Under the new scheme**, there is no such statutory requirement. Mere initiation of penal proceeding would sufficient which may be by issuing direction in the order or by issue of penalty notice.
- Under the **existing provisions**, the tax authority has to prove the fact that assessee has concealed the particulars of income or furnished the inaccurate particulars of income. **Under the new scheme**, there is no such requirement in case of under reporting of income since difference between the assessed income and income determined u/s. 143(1)(a) is presumed to be under

reporting of income or difference between the assessed income and maximum amount not chargeable to tax, where no return filed is filed by the assessee. However, in case of Misreporting ofIncome, the tax authority will have to prove or demonstrate that case of assessee falls within the criteria mentioned in sub – section (9).

- Under the **existing provisions,** there is a discretion with the AO to impose penalty between 100% to 300% of the tax but **under the new scheme,** the AO has no such discretion. He is required to impose penalty at flat rate of 50% of tax payable on unreported income and 200% of tax payable on misreported income.
- Under the existing as well as new scheme, no penalty order can be passed without giving an opportunity of being heard in view of the provision of section 274.
- The limitation period specified in section 275 will apply to order passed under both the scheme.
- The **right of appeal** is available under section 246A under both the scheme. Though there appears to be an inadvertent mistake in not making specific amendment in Section 246A but hopefully will be there in the said section. *It may be pointed out that the existing clause (q) of section 246A permits the right to appeal against any penalty order passed under any section falling under chapter XXI.* Since penalty orders under the new provisions falls under chapter XXI, right to appeal is not lost even if no specific amendments is made in section 246A.

  Whether penalty proceedings can be initiated after completion of assessment proceeding?

  In my view, the answer is no for the reason given hereafter.

- Thought there is no specific provision to this effect, the inference can be drawn from the explanation below sub section (3) which refers to initiation of penalty under sub section (1) of section 270A.
- Since for availing the immunity u/s.270AA, the assessee is required to make an application within 30 days from the end of month in which the order of assessment is received, he must be aware from such order that penalty proceeding u/s.270A has been initiated or not.
- Further, immunity u/s.270AA is available only in case of under reporting of income. Hence A.O must demonstrate whether penalty is initiated for under reporting of income or misreporting of income. This can be done only through initiating the same in the assessment order or by issuing the notice.
- Section 274 provides that no order of penalty can be passed without providing an opportunity of being heard to the assessee.
- **Last but the most important** reason is that section 275 provides the period of limitation according to section 275(1)(c), no penalty order can be passed after the expiry of financial year in which the proceeding, in the course of which action for imposition for penalty has been initiated, are completed OR 6 months from the end of the month in which action for imposition of penalty is initiated, whichever is later. Similar language is there is section 275(1)(a).*So unless the penalty proceedings are initiated in the course of assessment proceedings, the period of limitation cannot be worked out.*

It is the **settled view** that provisions should be interpreted in such manner which makes the provision workable rather than to frustrate. Therefore, in view of the reasons given above, it is **opined** that penalty proceeding must be initiated in the course of assessment proceeding itself.

Computation of Penalty .

Though sub section (2) defines the scope of the expression "under reported income" sub section (3) provides the procedure for computing such income. It is explained as under-

a) Where the income has been assessed for the first time in response to the return filed, it will mean the difference between the amount of income assessed and the amount of income determined u/s.143(1)(a). Such assessment may be u/s.143(3) or u/s.147. Thus, under reported income would not include the amount of adjustment made in determining the income u/

s.143(1)(a).**For example**, assessee files a return declaring income of Rs.10 lakhs but income is determining at Rs.12 lakhs u/s 143(1)(a) and income is assessed at Rs.13 lakhs u/s.143(3)/147. In such case under reported income would be Rs.1 lakh and not Rs.3 lakh.

b) Where no return is filed by the assessee, the computation is in two parts i.e. (i) where the assesse is a company, firm or local authority, it will mean entire amount of income assessed and (ii) in case of other assesses, it will mean the difference between the amount of income assessed and the maximum amount not chargeable to tax.

c) Where the income is assessed as a result of reassessment or re-computation (not being assessed for the first time), it will mean the difference between the amount of income re-assessed or re-computed and the amount of income assessed, re-assessed or re-computed in a preceding order. The preceding order has been defined as the order passed immediately preceding the order during the course of which penalty proceeding is initiated. Such preceding order may be as a result of assessment made u/s.143 or 147 or as a result of direction of appellate/revisionary authority or tribunal or court as the case may be.

d) Where the income is assessed by way of deemed assessment u/s.115JB/115JC, it will mean the amount determined as per the formula given in the proviso to sub-section 3(ii) of section 270A. This formula is similar to formula provided in the existing provision of Explanation 4 to section 271(1)(c).

e) Where as a result of assessment/reassessment, the loss is reduced or loss is converted into income, it will mean the **difference** between the amount of loss claimed by the assessee and the income or loss assessed or reassessed. For example, where returned loss is 15 Lakhs assessed income is 5 lakhs, the unreported income will be 20 lakhs.

However, under reported income shall not include the amount of income referred to in sub-section (6) of this section.

What is the scope of sub-section (6) ?

This is an important aspects which needs to be elaborated. This sub section encompasses the circumstances where penalty in respect of under reporting of income cannot be levied. The income relatable to such circumstances shall be excluded from the computation of unreported income. Thus, it will reduce the litigation between the taxpayer and the revenue authorities. Such circumstances are discussed below-

a) First situation is where any addition or disallowance is made by the A.O but assessee has made offered an explanation which is bona fide to the satisfaction of tax authority AND has disclosed all the material facts to substantiate the explanation. **For example,** take a case of cash credit. If the assessee has furnished all material facts i.e. name and address of the creditors, his PAN, copy of ITR, ward where he assessed, confirmation from creditor, copies of bank statement etc. but the addition is made by simply because the creditor could not be produced or not responded in response to summons. As per the judicial opinions, it cannot be said that explanation of assessee was not bona fide. Hence it will not constitute under reporting of income since all material facts are disclosed.

However some litigation cannot be ruled out as the A.O may not be satisfied with the explanation of the assessee and in the such case the Appellant authority/Tribunal is likely to accept the case of assessee in view of settled legal position. There are various other situations which may fall under this category but all such cases cannot be discussed at this stage. It may be pointed out that this clause, being general one, will be applicable to any kind of addition or disallowance made by A.O. Whether a case would fall under this category or not would depend on the facts of each case.

b) Second situation is where the accounts of the assessee are correct and complete as per the accounting system but the method employee in such that income cannot properly be deduced

there from and as result thereof the addition is made on estimate basis. **For example,** GP rate is enhanced on estimated basis merely on the grounds that it is lower than the other assessees in the same trade or because of non maintenance of stock register etc. such addition shall not be considered in computing the unreported income.

However, this category would not be include where books of account are rejected on the ground that the same are not correct and complete to the satisfaction of AO. **For example**, non –recording of purchase/sales bogus purchases; under recording of closing stock, manipulation in entries etc. In such cases, penalty can be levied.

c) **Third situation** is where some disallowance is made by the assessee of his own but the A.O. enhances the same on estimate basis provided all material facts are disclosed by the assessee. **For example,** some disallowance is made by the assessee u/s.14A but the AO not being satisfied enhances the same even though all material facts are disclosed by the assessee. In such cases, it will not amount to under reported income.

d) **Fourth situation** is where the assessee had maintained information and documents prescribed under section 92D, disclosed the international transactions under Chapter X and also disclosed all material facts relating to such transactions but addition is made in conformity with the arm's length price determined by TPO. Thus merely because addition is made on the basis of TPO's order, it will not amount to under reported income. This will really reduce the litigation.

e) **The last situation** is where penalty u/s.271AAB. S.271AAB applies where additions are made in case of a person in whose case search is initiated u/s.132.

Scope of the expression "misreporting of income"

"Misreporting of income" is considered to be more stringent as compared to " under reported income" since penalty in case of misreporting of income is to be imposed @ 200% of the tax payable as against 50% in case of under reported income. It is to be noted that it is not an independent expression. A combined reading of sub-section (8) & (9) shows that it is the under reported income which is to be treated as misreporting of income if under reported income is in consequences of item specified under subsection (9). So firstly, under reported income is to be computed and then AO has to give a finding that such under reported income is in consequences of the items specified under sub section (9). So if any addition or disallowance does not fall within the scope of "under-reported income" then question of treating the same as misreporting of income does not arise.

Thus, in my opinion, the **onus** is on the revenue to prove that under reported income is in consequence of the circumstances mentioned is sub section (9). Let us have a look at these items.

- The **first item** in sub section (9) is misrepresentation of suppression of facts which involves the elements of *mensrea* i.e the guilty mind on the part of assessee. This aspect will always be a subject matter of litigation.
- The **second item** is failure to record investment in the books of account while the **fifth item** refers to failure to record receipt in the books of account which has a bearing on the total income. Such facts can be proved by AO just by referring to books of account of the assessee. But there may be cases where assessee does not make books of account even though such receipt are revenue receipts. For example, assessees filling u/s.44AD or 44ADA are not required to maintain books of account. In such cases, this sub section would become inapplicable.
- **The third item** in the list refers to claim of assessee regarding expenditure not substantiated by any evidences. The word "any" is important which can be read as **no evidence**. So where evidences has been filed by the assesse, it will not be a case of misreporting of income merely because it is not believed by the tax authority. This aspect of the matter shall be a matter of litigation.

- **Fourth item** refers to recording of false entry in the books of account. The word " false" also involves mensrea on the part of assessee. Hence, onus will be on revenue to prove the *mensrea* on the part of assessee.
- **The fifth and last item** is failure of report international transaction or specified domestic transaction.

How the penalty is to be computed ?

As already stated, sub section (7) provides that penalty shall be computed @ 50% of the tax payable on under reported income and 200% of tax payable in case of under reported income falling under sub section (9) i.e. misreported income. Tax payable is to be computed as per the provision of sub section (10) of section 270AFor example, an individual declaring income of Rs.6 lakhs [which is also the income determined in a return processed under section 143(1)(a)] is assessed at Rs.8 lakhs. In such case, under reported income would be Rs.2 lakhs [i.e., the difference between the income assessed and income determined in a return processed under section 143(1)(a)]and the tax payable on under-reported income and penalty would be computed as follows:

Tax on under reported income of Rs 2 lakhs plus total income of Rs 6 lakhs determined under section 143(1)(a)	
First Rs 2,50,000 = Nil	
Next Rs 2,50,000 – Rs 5,00,000 =	Rs 25,000
Balance Rs. 3,00,000 = Rs.60,000	
Plus EC & SHEC@3%	87,550
Less: Tax on Total income of Rs 6,00,000 determined in a return processed under section 143(1)(a)	46,350
Tax payable on Under-reported income	41,200
Penalty leviable @50% of tax payable	20,600

If such income falls under subsection (9) then penalty would be Rs.82,400/-. However if such assessee had not filed the return at all for any reason then, under reported income will amount to Rs.5.5 lakhs (Rs.8 lakhs – Rs.2.5 lakhs) on which tax payable would be the amount of tax calculated on under-reported income as increased by the basic exemption limit i.e, tax calculated on Rs8 lakhs (Rs5.5 lakhs plus Rs 2.5 lakhs) which would be Rs87,550on which penalty would be Rs.43,775/ and if such income falls under sub section (9) then penalty would be Rs.1,75,100/-.

In my opinion, the provisions are too harsh and drastic in those case where an assessee fails to file the return for bona fide reasons beyond his control. **For example**, a firm earned income of Rs.50 lakhs during a year in respect of which TDS and advance tax are fully paid as per law. However, it fails to file the return due to bonafide unavoidable circumstances. The assessment is completed assessing the income at Rs.52 lakhs even u/s.144. In such case, the entire amount of Rs.52 lakhs will be treated as under reported income as per sub section (3). The tax payable on such assessed income will be Rs.16.068 lakhs including of education cess on which penalty of Rs.8.034 lakhs will be imposed even though the entire tax is already paid. On the contrary, had it filed the return, the under reported income would only be Rs.2 lakhs on which tax payable would be tax on under-reported income of Rs 2 lakhs plus total income of Rs 50 lakhs (Rs 16.068 lakhs) less tax on total income of Rs 50 lakhs declared or determined u/s 143(1)(a) (Rs 15.45 lakhs)i.e, Rs.61,800 /- only and penalty would be only Rs.30,900 /-.

Let us also take a case of an individual contractor whose total gross receipt is Rs.1.5 crs on which tax is deducted u/s.194C which comes to Rs.1.5 lakhs but fails to file the return for some *bona fide* unavoidable circumstances. The income is finally assessed at Rs.15 lakhs.

(Rs.12 lakhs u/s.44AD + Rs.3 lakhs u/s.69). the under reported income would be Rs.12.5 lakhs (RS.15 lakhs – Rs.2.5 lakhs) on which tax payable would be Rs.3.75 lakhs (being 30%) and consequently, penalty amount would be Rs.1,87,500/-. Had he filed the return declaring income of Rs.12 lakhs u/s.44AD, the under reported income would have been Rs.3 lakhs only on which

Tax payable would have been only Rs.90,000/- and penalty of Rs.45,000/- only.

It appears that penalty, in such cases, is mainly for late filling of return rather than for under reported income. **In my opinion, suitable amendment needs to be made in this behalf.** In order to avoid hardship, the only option with the assessee is avail the immunity by paying tax and interest in accordance with the provision of section 270AA.

Amendments in section 271AA

Sub section (2) has been inserted in this section. According to this amendments, if there is failure to furnish information and the documents as required u/s.92D(4) on the part of assessee then it shall be liable to pay penalty of Rs5 lakh.

So, the assessee has to be very careful in this regard.

The Taxation Laws (Second Amendment) Act, 2016 has amended the penalty provisions in respect of survey, search and seizure cases. The existing slab for penalty of 10%, 20% & 60% of income levied under section 271AAB has been rationalised to penalty of minimum 30% of income, if the income is admitted and taxes are paid. Otherwise a penalty @60% of income shall be levied but effective penalty is much higher in case of Survey conducted during A.Y. 2017-18 and for the search cases after 15th December 2016 i.e. after Hon'ble President of India gave the assent to The Taxation Laws (Second Amendment) Act, 2016.

New Provisions- Heavy Penalties:

The Govt. came with an announcement of Demonetization on 8th November 2016. On 9th November 2016 itself I had expressed my strong view that persons having undisclosed Income in form of old currency notes of Rs. 500 and Rs. 1000, if deposits in the Bank Account and offers the same under the head "Income from other Sources", than strictly according to Section 270A of the Act cannot be levied. The intellectual mind was arguing that if an assesse deposits old currency notes and discloses Income, pays advance tax and offers the same as Income in return of Income, than the Assessed Income and Returned Income being same, there cannot be any question of penalty u/s. 271(1) (c) or 270A of the Act. However the heart was refusing to accept this argument on the ground that those who offered the Income under disclosure scheme and paid the Income Tax at 45% cannot be at disadvantage as compared to such assesses who did not avail the benefit of disclosure scheme and now desire to convert unaccounted income by paying tax at just 30%.

Fortunately for honest assessees and unfortunately for Tax dodgers, the Govt. came out with an amendment of levying heavy penalties on all such Tax evaders who did not come out honestly under Income Disclosure Scheme.

Gist of the specific amended provisions of Income Tax Act vide the Taxation Laws (Second Amendment) Act, 2016.

Particulars	Existing Provisions	Amended Provisions
General provision for penalty	PENALTY (Section 270A) Under-reporting - @50% of tax Misreporting - @200% of tax (Under-reporting/ Misreporting income is normally difference between returned income and assessed income)	No changes made
Provisions for taxation & penalty of unexplained credit, investment, cash and other assets (i.e. *Section 68,69, 69A,69B,69C & 69D)	Tax (Section 115BBE) Flat rate of tax @30% + surcharge + cess (No expense, deductions, set-off is allowed)	**Tax (Section 115BBE)** Flat rate of tax @60% + surcharge @25% of tax (i.e. 15% of such income). +Cess @ 3% of Tax and Surcharge. So total incidence of tax is 77.25% approx. (No expense, deductions, set-off is allowed) **Penalty (Section 271AAC)** If Assessing Officer determines income referred to in section 115BBE, penalty @10% of tax payable in addition to tax (including surcharge) of 75% i.e. 83.25%.
Penalty for search seizure cases	Penalty (271AAB) (i) 10% of income, if admitted, returned and taxes are paid (ii) 20% of income, if not admitted but returned and taxes are paid (iii) 60% of income in any other case	Penalty (271AAB) (i) 30% of income, if admitted, returned and taxes are paid (ii) 60% of income in any other case.

Important:

Therefore, it is extremely important to note that survey conducted u/s. 133A of the Act anytime during 01/04/2016 to 31/03/2017 i.e. relevant AY. 2017-18 and in case of search u/s 132 of the act conducted after 15th December 2016, higher rate of Tax and penalty as mentioned below shall be leviable. Therefore one has to be careful for disclosing the Income in consequence of Survey, in as much as if disclosed or assessed u/s. 68, 69A,69B,69C and 69D than higher rate of Tax will be applicable. If assesse discloses as higher sale proceeds or under other heads and not under aforesaid sections, and if AO does not accept the same and makes addition under any one of such sections, than huge Pandora Box of litigations may open.

However the penalties applicable for A.Y 2017-18 are extremely harsh and heavy. The whole idea is that all dishonest assessees or persons having taxable Income but not declared so far should have declared Income under Income Disclosure Scheme which was upto 30th September, 2016 and for balance, left out or still having not declared must declared the Income under Pradhan Mantri Garib Kalyan Yojna,2016 or else face heavy penalties.

At the end, I feel that increased litigation may take place even if number of cases selected for scrutiny are less. Particularly for cases of searches involving high Income and heavy tax it would be advisable to approach Hon'ble Settlement Commission. Undoubtedly whether in a particular case Income have been concealed or inaccurate particulars are filed or not would remain matters of litigation. The idea of ease to pay to Tax and easy Income Tax structure and compliance may not be fulfilled to that extent.

Penalty Chart on Undisclosed Income

Sr No.	Particulars	Total Tax with Penalty
1	***Income declared under Pradhan Mantri GaribKalyanYojana, 2016*** 25% of income declared to be deposited in interest free bonds for 4 years	**49.90%** [30 (30% tax rate) + 9.90 (Surcharge 33% of tax i.e 30) + 10 (Penalty 10 % of income declared)]
2	Unexplained income is disclosed voluntarily in ITR	**77.25%**[60 (60% tax rate) + 15 (Surcharge 25% of tax i.e 60) + 2.25 (Edu. Cess 3% of 75 i.e. Tax 60+ Surcharge 15)]
3	Unexplained income is disclosed voluntarily in ITR but advance tax is not paid on or before March, 31 , 2017	**83.25%** [60 (60% tax rate) + 15 (Surcharge 25% of tax i.e 60) + 2.25 (Edu. Cess 3% of 75 i.e. Tax 60+ Surcharge 15) + 6 (Penalty 10% of tax)]
4	Income disclosed in ITR but treated as unexplained by Tax Officer	**83.25%** [60 (60% tax rate) + 15 (Surcharge 25% of tax i.e 60) + 2.25 (Edu. Cess 3% of 75 i.e. Tax 60+ Surcharge 15) + 6 (Penalty 10% of tax)]
5	Income admitted after search and declared in ITR	**107.25%**[60 (60% tax rate) + 15 (Surcharge 25% of tax i.e 60) + 2.25 (Edu. Cess 3% of 75 i.e. Tax 60+ Surcharge 15) + 30 (Penalty 30% of Undisclosed income)]
6	Income not admitted after search and / or not declared in ITR	**137.25%**[60 (60% tax rate) + 15 (Surcharge 25% of tax i.e 60) + 2.25 (Edu. Cess 3% of 75 i.e. Tax 60+ Surcharge 15) + 60 (Penalty 60% of Undisclosed income)]

❊❊❊

Crowd Funding in Practice

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This article has a reference to our article Crowdfunding - A Mode of Risk Financing in the previous issue.

Indian Scenario

Crowd funding is relatively a new concept in India and the usage of Internet for raising funds is even less. There are 15+ crowd funding platforms (CFPs)operating in India.

Following are few of the well-known CFPs in India-

- Catapooolt - http://www.crowdfundinsider.com/
- Ignite Intent – http://www.igniteintent.com/
- Ketto - http://ketto.org/
- Pick A Venture - http://signup.pikaventure.com/
- Start 51 - http://www.start51.com/
- Wishberry - https://www.wishberry.in/
- Fundlined-www.fundlined.com

Apart from the local players, many global CFPs have also launched their local platforms for India e.g. Grow VC - http://india.growvc.com/ and Indiegogo- http://www.indiegogo.com. This means, the initiator has various options for launching his/her idea and same way the investor has various options to select the right idea and the CFP based on his/her preferences.

There are many other Indian CFPs, but definitely Ketto, Wishberry, Catapooolt, Ignite Intent and start51.com are among the most active ones. For this, a study was carried out for understanding their operations on the basis of following parameters:-

- What is the online platform
- How does it Works
- Founders
- The Catch
- The Cost
- Funds Raised
- Types of Projects/Campaigns
- Campaign Page

I. KETTO (www.ketto.org)

What is it?

Ketto is a crowd funding platform for individuals and NGOs to raise funds for a cause they would like to support. This platform allows NGOs to put up their projects or causes and raise grants for the same. Grants can be raised via fundraisers that can be started by any member of the platform including individuals who support the organization's work or cause.

The primary focus is on causes / projects of NGOs supporting children, disabled, education, health and sanitation and women empowerment.

How does it work?

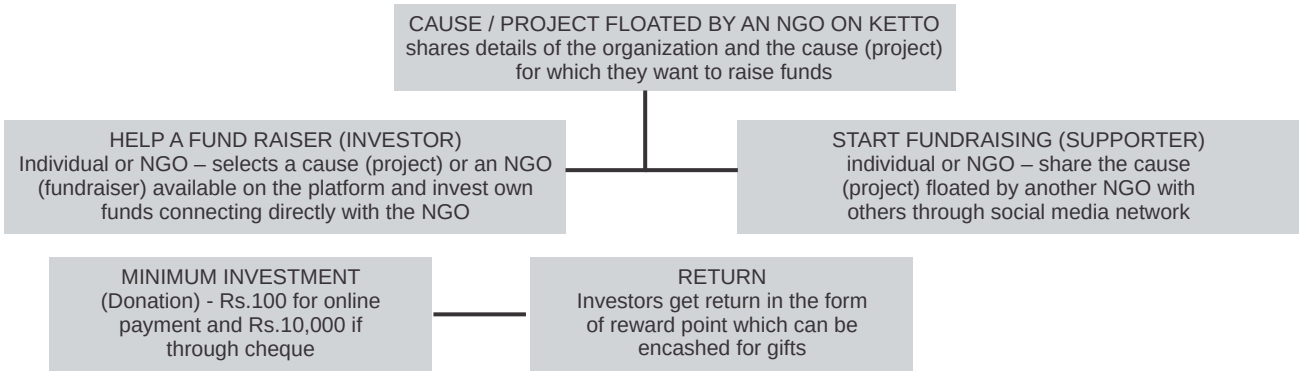

Fig. 1 – Working of Ketto

Founders

It was founded on 15 August 2012 by Varun Sheth along with Zaheer Adenwala and bollywood actor Kunal Kapoor. It is a Mumbai based crowdfunding platform focusing mainly in social domain. Varun Sheth is the CEO and all the founders had the ideology of involving young people to do some social good. Kunal kapoor said in an interview that a lot of people want to give back to society these days and the one of best ways to do it is through technology.

The Catch

Each campaign is screened for accountability before letting any NGO float it through Ketto. The platform also gives feedback on the utilization of the contribution made by the investors.

Google, London Business School, Dasra Social Impact etc. are the major partners supporting Ketto.

The Cost

Ketto does not charge any commission allowing maximum amount of money to be donated to the Project of the NGO. Tax receipt is generated on donations made to any Project on ketto.org.

A nominal fee is charged by the payment gateway provider which is 3-4% depending on the mode of payment.

Minimum contributions are Rs 100 if online and Rs 10,000 if cheque can be donated.

Total Funds Raised

The platform has raised USD 6 million for 10,000 projects / campaigns. The highest funds raised from ongoing campaigns include funds raised for sending Shiva Keshavan to the Winter Olympics.

Types of Campaigns (10 major categories)

Children	Education	Women Empowerment	Health & Sanitation	Disabled
Gender Equality	Education to underserved Girls	Wear pink to work a day-Support Breast Cancer	Give Shelter to stray animals	Old/Blind/ handicapped Animals
Freedom from malnutrition	Community Learning Centers	Safer motherhood in sundarban Islands.	Malnutrition Reduction	People with disabilities
Sponsorship for marginalized children	Teach for India-Sponsor a fellow	Women's Cancer Initiative-Tata memorial Hospital	Immediate relief for cyclone victims	
Nutritious lunch for slum children	Model primary schools in sunderbans	Stop Violence against women	A meal a day	
	Special Care Center School	Seizing opportunities for Women	Community Care Centers	

Table 1 : Types of campaign

Campaign page

Each Campaign page has all details in terms of campaign name, goal of project in terms of funds, name and no of contributors, money raised till now, days left, and videos and audios of the campaign.

II. Wish berry-Go Fund You! The Crowd is waiting **(**www.wishberry.in)

What it is?

It is a bigger platform than ketto where any individual or an organization can raise small or large amount for their projects. It is also said that wish berry is made for India Kick starter-like crowdfunding platform.

How does it Work?

Wish berrygives a platform for projects which are creative and out of the box. Also only those projects will be funded which are well-defined. A well-defined project has a specific outcome to be achieved in a specific time period. e.g., making a film, publishing a book, building an app or a game, or even climbing the seven peaks.

Also the projects must of one of the 8 defined categories: arts, performing arts, events, design, technology, publishing, film and video and food. Each category further consists of multiple sub-categories. For e.g., design projects could include graphic design, product design, or even architecture and publishing projects could include books, comics, etc. Furthermore, projects must have a time bound, quantifiable goal and cannot be open ended. For e.g., you can crowd fund a 30-page comic book but you can't crowd fund a cure for cancer.

They do not allow the following types of projects: Political, medical and religious, general donations to NGOs, operational expenses like rent or salaries, capital expenses like real estate, heavy machinery, equity capital or debt capital (i.e., offering shares or interest payments)

You can raise any amount through crowd funding. However, large amounts require a large number of funders, for which your idea needs to have mass appeal and your team, needs to have the PR skills to reach the masses. However, most projects on Wish berry have successfully raise anywhere between Rs. 5 to 10 lakhs. Crowd funding is not a short process, it can easily take 3 to 6 months, including a month of preparation (rewards, pitch video, PR) and a maximum of 100 days to raise the funds.

Founders

It is founded by Anshulika Dubey and Priyanka Agarwal; young entrepreneurs who was inspired by kick starter model and got the idea while writing a Mckinsey report on 'Social media in the social sector', that Anshulika came across crowdfunding platforms like Crowdrise and Kickstarter. These platforms were creating quite a buzz in the US, with their disruptive, 'democratised' funding route. The duo found that quite exciting and were impressed how people came together as a community and funded other people's ambitions and dreams with real money.

Currently it has a team of four members including co-founders. It has outsourced technology, accounting and marketing aspects.

The Catch

Wishberry does not allow projects that are in the idea stage. Before approving a campaign, it conducts multiple background checks on the project owner/campaigner-asks for referrals, thoroughly check the projects work in progress, interview the team members personally, etc.

Also at the same time give all relevant information to funders on the campaign page. If it feels the content is inadequate we do not let the campaigners launch their projects for funding.

So this increases the chances of success for both the parties.

The Cost

1) Upfront fee of Rs. 2,500 to be paid online as soon your campaign request is approved.

2) Transaction fees of 10% of the funds raised on Wish berry (this is inclusive of any payment gateway charges)

3) All charges are subject to a 12.36% of service tax. And this amount is levied on the fee and NOT on the total amount raised!

Minimum Contribution is Rs 50 and Maximum Rs 50,000**.**

Total Funds Raised

The platform has supported 325 campaigns by helping them to raise USD 1.3 million . Major one includes the Punyakoti - a Sanskrit animated movie, Heavy Metal cooking Show Headbanger's Kitchen

Types of Campaigns

Ongoing Campaigns

- Film
- Improving school sanitation
- Design

Campaign Page

Each campaign page has following details:-

Target amount, days left, total funds raised up till now, number of shares, reward for contributors, about the project, why am I crowd funding, why should you believe in me, how will the money be used, dream team-name & qualification, contributors-total, number and average.

III. CATAPOOOLT (www.Catapooolt.com)

Punch Line- Catalyzing Creativity by pooling people.

What is it?

It is a bigger platform for anyone to bring up their ideas, talk about the change that they wish to make happen and then they connect with the crowd(communities) to get what every idea needs to be successful - funds and engagement. They are open to projects across the world and especially from Asia. Catapooolt does three things for any idea- Empower, Embrace and Engage...to together build a new world of hope and possibilities. CATAPOOOLT is a brand owned by Starting Blocks Media Ventures Pvt. Ltd. It was founded by a bunch of guys (who actually pioneered crowd funding in India as well as distribution for Indie films) who share an ever growing thirst for great ideas and global experts in their chosen fields.

How does it work?

The process consists of three stages:-

- Create: For those who want their dreams to be catapooolted!
- Contribute : For those who aspire to be good-at-heart - and make these dreams come true
- Celebrate: For each one for being part of Catapooolt!

They gave a platform that simply does not aim to provide only funding for your project but also assist you crowd source talent, resources as well as locations for your creative enterprise.

The platform revolves around creators and contributors. Creators are the owners of the project. Their personality, professional history and passion for the project are the major factors influencing a projects contribution. Contributors are the better half of creators. The Contributor is one – who passionately connects with the project and is willing to contribute – maybe in terms of funds, or even sharing his talent, resources…or anything that he will like to 'adopt' your dream and make it, his or hers.

Founders

Angel backed startup accelerator Venture Nursery along-with Calcutta Angels, ah! Angels and few others individual investor has recently invested undisclosed amount in Mumbai based crowd funding platform Catapoolt.

Launched in 2013, Catapoolt is founded by Satish Kataria. Catapoolt focuses on creative projects and enables them to engage with communities to raise funds and resources. Catapoolt is a graduate of Venture Nursery's season 3 program.

Team comprises of Key executives 1) Satish Kataria, 13 years of fund management experience, pioneer of crowd funding in India, 2) Yogesh Karikurve – 10 years exp. In film marketing funding and dist.3) Dipti D'Cunha – film consultant, Soham Sengupta Media and entertainment – regional cinema, music, art, books & others.

The Catch

They not only give funding but also assist you crowd source talent, resources as well as locations for your creative enterprise. It is supported by strong domain leaders – who would be happy to render their support to various projects under specific domains-movie and audio visual media advisors and also other advisors.

Also through its innovative rewards, strong tie-ups, strong marketing and PR initiatives constantly works towards increasing the contributor's base.

The Cost

The platform charges 15% of the total fund raised as charges. In addition, the costs of any specific project related merchandise that you may want Catapooolt to offer will be charged in addition to the above fees. This fee won't be charged if the reward is procured and sent by you to the contributor.

Total Funds Raised

The platform has raised USD 150 lac + for 40+ projects.

Minimum contribution is Rs 500 and it should be 80% of the requirements. It has 1000+ contributors.

Types of Campaigns

Catapooolt is broadly looking at taking in projects in the broad areas of Movies, books, Music and startups or to put it more simply anything that comes under Media & Entertainment. Movies include feature films, short films, documentaries, T.V series etc. Art Includes performing arts like theatre, art events, books, games etc. as well.

Movie - Cutthroat based on the book – The great Indian Butterfly raised Rs.10 lac + for pre-production exp. – film budget Rs.100 lac

It also allows political contributions as there is an ongoing campaign to contribute to AAP.

Campaign Page

Each campaign has been given a separate page mentioning details about the progress of the project goal in terms of % of amount funded, days left, details about the project and the owner of the project, why you should fund, project updates, list of contributors and also list of rewards and perks on different amounts of money.

IV. IGNITE INTENT-(www.igniteintent.com)

Punch Line-Where Ideas get life

What is it?

Launched in April 2012, it is an Indian crowd funding platform for creative, innovative and brave ideas. It is a portal where individuals can showcase their talents and show the world what they believe in and get funded. It is a team who value new ideas and innovations. They help the ideas and innovations to grow bigger and better through their expertise, networking and reach.

It is associated crowdsourcing.org - a global neutral organization dedicated solely to crowdsourcing and crowd-funding. As one of the most influential and credible authorities in the crowdsourcing space, crowdsourcing.org is recognized worldwide for its intellectual capital, crowdsourcing and crowd-funding practice expertise and unbiased thought leadership.

How does it work?

INTENT is a project uploaded on Ignite Intent. Intent is your idea, your creativity and your passion. Anyone with Intent can get live on Ignite Intent. They provide a great way for

artists, teachers, filmmakers, business startups, musicians, designers, housewives, sports persons, journalists, researchers, writers, programmers, apps developers, IT professionals, explorers, dancers, curators, performers and others to bring their Intents, projects, events, and dreams to life. One, who funds INTENT, is a brave IGNITER. Igniters are those special breed of society who have guts to stand up and back people with creative and brilliant ideas and passion.

Every Ignite Intent project raises funds in return of rewards. Rewards may be tangible as well as intangible. (Experiences, rememberals and cool stuff).

For instance, a mention in the credit of film, a very small role in film, early release of product to backers, VIP tickets, dinner with owners and team, and the right to choose the bands invited to festival.

Founders

It was founded by Rinkesh Shah, who is an MBA from Narsee Monjee Institute of Management Studies, Ex Tata Consultancy services and Infosys employee. He heads the business development side of the portal. His Marwari upbringing also made him choose business over a regular job and setting up his own venture ensured he gets the requisite exposure.

Ignite Intent is also backed by a team of experienced advisors and outsourcing partners including experienced individuals like Jubin Joshi, their marketing advisor from Canada and Nikunj Shah, IT advisor among others.

The Catch

It's absolutely free to upload projects on Ignite Intent. Also project creators keep 100% ownership of their work.The project creators can decide the amount to raise depending both on how much is required to set up the project and on what one can realistically raise. Also Ignite takes only those projects that have a credible origin- like an existing project at IIT-B or the Electric Racing Car project.

So it is wonderful for college students to fund their projects.

The Cost

It is a free platform apart from payment charges.

Type of Campaigns

There are campaigns for everyone and for all areas. Ignite Intent has funded four engineering students' multiprocessor multitalented robot project with various sensors and Punexpress, an online grocery store in Pune. Right now Ignite Intent has funded 81 per cent of the Indian Institute of Technology (IIT) Mumbai's electric racing car and is working on Adhora (The Obscure), a Bengali movie wherein people can contribute as little as Rs 10 to support the film.

Campaign Page

All details related to campaign are mentioned in a separate campaign page-intent creator, posted on which date, funds raised, number of ignitors, days left, details about the project-why fund us, what's the impact, what you get etc.

V. START 51(www.start51.com)

What is it?

It offers new creative fund platform to transform unique ideas into reality. It aims to offer the crowd direct financial support from contributors. It is an initiative to support projects from all industry verticals that meets their project guidelines. It is a platform for projects that are created from films to games, music to technology; art to design.Start51.com adds life to creative ideas and projects which are full of ambition and innovation with direct support of contributors.

How it Works?

There are varieties of creative projects for collecting contribution on start51.com at any given moment. All projects are independent and are created by common persons. The persons may be film makers, musicians, artistes or designers. On start51.com they have complete control and responsibility over their projects. Profit is built over weeks by shooting their videos and brainstorming what reward to offer to contributors and making project pages. Once the project is prepared and approved, then the creator launches these projects and shares it with their social network. The project creator will set a financial target and will have 51 days to collect contribution. If people do like the project, then they will come forward to contribute to make it a reality. If the project succeeds and reaches its target within the stipulated time, the project creator gets the entire amount of contribution collected and if the projects falls short, then the funds collected are returned to the contributors. Start51.com is all or nothing model for fund raising.

It also has standardized project guidelines. Every project has to meet the project guidelines.

Founders

The parent firm Start Online Services Private Limitedis based in Ahmedabad and is working to add life to ideas by making the side better, finance new projects to share with start51.com and part of helping the world creation.

The Catch

The project creator keeps 100% ownership and takes 100% responsibility also of his work. The idea of Start51.com is to support projects to come into life and not looking to its financial profits.

The Cost

Start51.com applies 5% fee to the contribution collected once the project is successfully funded. The contribution so received will be securely processed by M/s. Citrus Payment Solutions Private Limited. The project process fees works out to roughly 1.25% to 2.5%.

Types of Campaigns

It can be used to fund any creative idea from the fields like dance, design, fashion, film, art, comic, games, music, food, theatre, technology, photography and publishing are the different fields in which start51.com support creative projects. A project on start51.com has a clear goal like making work of art, writing a book, record an album. A project has to have a start and end; eventually be completed and something produced out of it. Start51.com do not support "fund my-life" projects, charity or "gift-me" projects.

It also gives details of campaigns in terms of recently successful, todays popular projects, overall most contributed projects, recently launched projects, ending soon projects and ended projects.

Campaign Page

The campaigns information is displayed category wise. Under that respective category page, each campaign gives details like title of campaign, by whom it is created, a video on campaign, details about project, updates on projects, number and name of contributors with their photos and also rewards details.

The portal is very transparent in terms of giving all details of the projects along with success rate for each project. Also all the projects have been categorized further into successfully contributed projects and unsuccessfully contributed projects.

Key Findings:

- Ketto is the only platform dedicated to social causes and to ensure positive funding response from the crowd, it takes support from various celebrities.
- Rest others give relatively more emphasis on innovative and creative projects.

- For this, Ketto has adopted donation based model whereas other CFPs have adopted reward based model.
- Whereas most CFPs have domestic focus, Catapooolt has domestic as well as global orientation.
- Ketto by having a social cause focus does not charge any fees from the initiator and Ignite Intent with a commercial focus also does not charge any fees as it supports projects floated by college students.
- Ketto is the only platform that has received foreign grant
- Wishberry has floated the highest number of campaigns so far, may be because it offers the longest period to the initiators to keep their projects floated. It also has the largest pool of contributors who collectively contributed the most.
- Catapooolt and Start51 assist not only in fundraising but also offer advice to the initiators.

It is further observed that each CFP as well as each project is unique by itself. With the built-in focus group and purpose, the CFP offers support to the initiator in terms of promotion of the idea, approaching the crowd as well as providing advisory services. Whereas each project within the ambits of the CFP, defines its purpose, fund target, duration and rewards the ultimate onus lies on the initiator.

Conclusion

The study concludes that the primary focus of the platforms under study is fundraising for either social cause based or creative based projects. This supports the operations and strategies adopted by them.

- Business model in all CFPs is either reward based or donation based
- An investor can contribute as low as Rs.50
- Minimum amount permitted to float a project for fundraising is as low as Rs.1,000
- Further, these CFPs either do not charge anything or charge a nominal amount from the initiator.

Crowd funding is in nascent stage in India. It will take time to increase the awareness and change the mindset of people. In a way it is not a new concept in India. For ages, donations have been taken to build temples, cash covers are taken at marriages, and religious festivals are celebrated through contributions. But fund raising through contributions from public through internet based platforms is relatively an innovative concept.

Crowd funding is not a fundraising method that replaces all the traditional funding techniques but it is best to think it as simply a new method of obtaining funding and should be evaluated in light of other alternatives that are available to the initiator. While looking forward, crowdfunding has a bright future as internet penetration and e-commerce success will pave the way for crowdfunding. This will help CFPs to float equity based and lending based campaigns.

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From the Courts

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82 Social Welfare legislation prevails over Taxation legislation
Managing Director Tamil Nadu State Transport Corporation (Salem) Ltd v. Chinnadurai.(2016) 385 ITR 656 (Mad)

Issue :

Which law should prevail when there is a conflict between a social welfare legislation and a taxation legislation?

Held :

If there is a conflict between social welfare legislation and a taxation legislation, then, the social welfare legislation should prevail since it sub serves larger public interest. The Motor Vehicles Act, 1988 is one such legislation which has been passed with a benevolent intention for compensating the accident victims who have suffered bodily disablement or loss of life and the Income-tax Act which is primarily intended for tax collection by the State cannot put spokes in the effective and efficacious enforcement of the Motor Vehicles Act. The Income Tax Department had issued a circular dated October 14, 2011 whereby deduction of income tax has been ordered on the award amount and the interest accrued on the deposits made under the order of the court in motor accident cases. Taking a serious view of this circular, the Division Bench of the Himachal Pradesh High Court took suo moto cognizance of the matter and considered it as a public interest litigation in the judgment reported in Court on its Motion v/s. H.P. State Co-Operative Bank Ltd. 2014 SCC Online HP 4273 and quashed the circular.

The compensation awarded by the Motor Accident Claims Tribunal or the interest accruing thereon cannot be subjected to deduction of tax at source since the compensation and the interest awarded therein do not fall under the term "income" as defined under the Income Tax Act, 1961.

83 Conditions for applicability of Sec. 2(22)(e)
CIT v/s. Subrata Roy
(2016) 385 ITR 547 (All)

Issue:

What are the conditions to be fulfilled for application of Sec. 2(22)(e) i.e. deemed dividend?

Held:

For a dividend to arise under section 2(22)(e) the following conditions should be fulfilled : (i) the company must be a company, shares of which are closely held : (ii) money (not money's worth) should be paid by the company (iii) the money must form a part of the assets of the company; (iv) it may be paid either by way of advance or loan or it may be "any payment" (v)(a) the payee must be a shareholder of the company having substantial interest in the company, or (b) the payee must be a person who is acting on behalf of or for the individual benefit of such shareholder. The expression "person who has a substantial interest in the company" is defined in section 2(32) as meaning "a person who is the beneficial owner of shares, not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits, carrying not less than twenty per cent. Of the voting power". If these conditions are fulfilled, then a dividend would arise to the extent to which the company possesses accumulated profits. Further, from the assessment year 1988-89 onwards the provisions of section 2(22) (e) have undergone modification by the Finance Act, 1987. Accordingly, it also includes advances or loans made to any concern in which such shareholder is a member or partner and in which he has a substantial interest.

84 Sec. 245 : Adjustment of Refund not automatic : Prior notice necessary Sangam Theatre P. Ltd. v/s CIT (2016) 386 ITR 23 (Delhi)

Issue :

Whether adjustment of refund against demand is automatic without notice to Assessee?

Held :

The mandatory requirement of section 245 of the Income tax Act, 1961, is that a prior intimation must be given to the assessee if a refund is proposed to be adjusted against the arrears of tax.

Contrary to the mandate of section 245 of the Act, without any prior order or prior intimation to the assesssee, an adjustment of the refund against the arrears of tax was made. After making such adjustment, an attempt was made to justify the adjustment by seeking to infer an expost facto consent of the assessee to such adjustment. Such course was legally impermissible for the Department to adopt.

85 Binding nature of instructions by CBDT : To what extent? Tata Teleservices Ltd v/s. CBDT (2016) 386 ITR 30 (Delhi)

Issue:

To what extent the instructions issued by CBDT are binding to the Officers and to Assessee?

Held:

Section 199 of the Income Tax Act, 1961, enables the Central Board of Direct taxes to issue: "such orders, instructions and directions" to the income tax authorities "for the proper administration of this Act". However, this power of the Central Board of Direct Taxes is hedged in by certain limitations. One such limitation is provided in a proviso to section 119(1) of the Act. The other limitation is under section 119(2) of the Act where it is mentioned that the direction or instructions issued by the Central Board of Direct Taxes should not be "prejudicial to assessee". Circulars, Orders and instructions issued by the Central Board of Direct Taxes under section 119 of the Act, to the extent they are beneficial to assessee are binding on the Department. If they are prejudicial to the tax payer, they cannot prevail over the statute, which does not envisage such harsher measure.

86 Capital Gain of Depreciable asset and Relief u/s 54E CIT v/s. V.S. Dempo Company Ltd. (2016) 387 ITR 354 (SC)

Issue:

Whether relief u/s 54E is available on the capital gain on transfer of deprecation asset when the asset was held for more than thirty six months?

Held:

Section 50 of the Income Tax Act, 1931 which is a special provision for computing capital gains in the case of depreciable assets is restricted for the purposes of section 48 or section 49 of the Act as specifically stated therein. The fiction created in sub sections (1) and (2) of section 50 has limited application to the context of mode of computation of capital gains contained in sections 48 and 49 and would have nothing to do with the exemption that is provided in a totally different provision, i.e. section 54E of the Act. Section 54E does not make any distinction between depreciable assets and non depreciable assets and, therefore, the exemption available to the depreciable asset under section 54E cannot be denied by referring to the fiction created under section 50.

That the Gujarat High Court as well as Gauhati High Court have also taken the same view in the following cases :

(1) CIT v/s. Polestar Industries [2014] 221 Taxman 423 (Guj);

(2) CIT v/s. Assam Petroleum Industries P. Ltd. [2003] 262 ITR 587 (Gauhati);

That against the aforesaid judgments no appeal has been filed.

87 Interpretation of Fiscal Statute : To be constructed strictly
Ashok Kumar Sethi v/s. Deputy CIT
(2016) 387 ITR 375 (Mad)

Issue :

How are the fiscal statutes to be construed and interpreted?

Held :

The principles of law have been settled that the fiscal statute should be construed strictly as applicable only to taxing provisions such as surcharge provisions or a provision imposing penalty. Any liberal construction of the statute cannot be permissible under law.

It is well settled that in the matter of interpretation of taxing statutes, courts would not be justified in interpreting some other expressions, which the legislation thought to omit. Casus omissus cannot be supplied by the court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if a literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the Legislature.

88 Sec. 263 Provisions : Notice v/s. Reasonable opportunity : Erroneous : Prejudicial to the interest of revenue : Meaning thereof.
CIT v/s. Satish Kumar Keshri
(2016) 387 ITR 447 (Patna)

Issue :

(1) Whether a notice should be given to the assessee before invoking power u/s 263?

(2) Whether reasonable opportunity is to be given to assessee before passing order u/s 263?

(3) When a order can be said to be erroneous for invoking Sec. 263?

Held:

In order to exercise jurisdiction under section 263 of the Income Tax Act, 1961, the Commissioner is not required to issue any notice at all and therefore the contents of the notice per se are immaterial. However, section 263 makes it mandatory before passing any order under the section to give the assessee an opportunity of being heard. Such opportunity of being heard would lose all its significance unless the assessee is made to understand the case that he has to meet.

Held dismissing the appeal, that at no point of time was it made clear to the assessee as to the points that he had to meet. Thus it could not be said that a reasonable opportunity was granted to the assessee by the Commissioner during the course of proceedings under section 263. Even on the merits the Assessing Officer before passing his order had taken into account two vital documents, namely, the survey report and valuer's report, and after discussing the two documents he had passed the order which showed the application of mind by him. The Tribunal also noted that when the documentary evidence under reference had been obtained by no less an authority than the Additional Director (Investigation) and when such a report had been passed on to the Assessing Officer he was bound to adopt it and such action of the Assessing Officer could not be said to be erroneous even if the order may be prejudicial to the interests of the Revenue. The Tribunal was justified in cancelling the order of revision.

89 Importance of heading of section : Importance of statement of third person in making assessment.
Principle CIT v/s. Saumya Construction P. Ltd.
(2016) 387 ITR 529 (Guj)

Issue :

(1) What is the importance of heading of section?

(2) What is the weight to be given to a statement made by a third person?

Held :

(1) Section 153A of the Income Tax Act, 1961 bears the heading "Assessment in case of search or requisition". It is well settled that the heading of the section can be regarded as a key to the interpretation of the operative portion of the section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthens that meaning. The trigger point for exercise of powers under section 153A is a search under section 132 or a requisition under section 132A of the Act. The assessment should be connected with something found during the search or requisition. i.e. incriminating material which reveals undisclosed income. Where an assessment has been framed earlier and no assessment or reassessment was pending on the date of initiation of search under section 132 or making of requisition under section 132A, while computing the total income of the assessee under section 153A of the Act, addition or disallowance can be made only on the basis of the incriminating material found during the search or requisition.

(2) It was not the case of the Revenue that any incriminating material in respect of the assessment year under consideration was found during the course of search. When the notice came to be issued under section 153A of the Act, the assessee filed its return of income. Much later, when the time limit for framing the assessment as provided under section 153 was about to expire, the notice had been issued seeking to make the proposed addition of Rs. 11,05,51,000 not on the basis of material which was found during the course of search, but on the basis of a statement of another person. The Tribunal was correct in deleting the addition.

90 Taxability of income from Non performing Assets of a Co-operative Bank

Principal CIT v/s. Shri Mahila Seva Sahkari Bank Ltd.
(2016) 289 CTR 225 (Guj)

Issue:

To what extent the alleged income from non performing assets of a Co-operative Bank are taxable?

Held:

In view of the mandate of the RBI Guidelines the assessee Co-operative Bank cannot recognize income from NPAs on accrual basis but can book such income only when it is actually received.Insofar as income recognition is concerned, it would be the RBI Directions which would prevail in view of the provisions of a 45Q of the RBI Act and S. 145 would have no role to play, hence, the AO has to follow the RBI Directions.

91 Non filing of Return of Income or non obtaining PAN does not give jurisdiction to reopen u/s 147/148.

General Electoral Trust v/s. ITO
(2016) 289 CTR 284 (Bom)

Issue:

Whether mere non filing of Return of Income or non obtaining P.A. Number gives authority u/s 147/148 to reopen assessment?

Held:

Mere non filing of Return of Income does not give jurisdiction to the AO to reopen the assessment unless the person concerned has total income which is assessable under the Act exceeding maximum amount which is not chargeable to income tax. This is provided in Expln. 2 to S.147. This is for the reason that in terms of S. 139(1) the obligation to file a return of income is only when the total income of a person exceeds the maximum amount not chargeable to tax. So also the obligation to obtain PAN only arises on the income being in excess of the maximum amount not chargeable to tax. Therefore, non filing of return of income and/or not obtaining of PAN does not ipso facto give jurisdiction to reopen an assessment under S. 147/148. Prima facie the jurisdiction even in case of non filing of return of income to issue notice of

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Tribunal News

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54 Gifford & Partners Ltd. Vs. DDIT 68 Taxmann.com 142/181 TTJ 849 (Kolkata)

Assessment Year: 2005-06 & 2007-08
Order Dated: 06th April 2016

Basic Facts

The assessee a foreign company incorporated in United Kingdom. It was engaged in the business of providing consultancy services for execution of projects. It had entered into contract with GRSE, a government company, for modernize of its existing shipyard. The scope of services required the personnel from assessee's office to visit the shipyard located in India carry out study of the existing design, plan and facilities and scope for modernisation. The data so collected was sent to UK where experts provided consultancy services. The assessee filed a return in India disclosing profits arising from execution of contract with GSRE as arising from its PE in India. In the course of assessment proceedings the assessee raised a plea that it did not have PE in India as per the provisions laid down in Section 92F(iiia) as well as the provisions of Article 5 of the India-UK DTAA. Further, it contended that its services did not 'make-available' any technical knowledge, experience, skill, know-how or processes or consist of development and transfer of a technical plan or technical design. Hence, the said services do not constitute as FTS as per Article 13 of the India-UK DTAA. Therefore, tax ought to have been levied at 20% on the Gross receipt of the Assessee under the provisions of section 115A of the Act. The AO however, rejected the contentions of the assessee and held that the payment was in the nature of FTS and that the assessee had a PE in India during the years under consideration. Hence, he held that the consideration for the services is taxable in India under Article 7 of the India-UK DTAA. The DRP set aside the objections raised by the assessee.

Issue

Whether, in view of fact that presence of assessee's personnel in India was only in connection with agreement for modernisation of shipyard of GRSE but assessee did not carry on any other business through its fixed place in India, it was to be concluded that no PE of assessee existed in India during relevant assessment year?

Whether in view of above, assessee's tax liability in India was to be computed in accordance with provisions of section 115A at rate of 20 percent of gross receipts?

Held

Based on the nature of services, the Tribunal held that the it would be covered by definition of fees for Technical Services as given in Section 9(1)(vii)(b) r/w explanation 2 to the Act. The Tribunal then examined the applicability of the DTAA between India and UK. The Tribunal noted from the agreement between assessee and GRSE that all plans, drawings, specifications, designs, reports and other documents prepared by the consultant in performing the services shall become and remain exclusive property of GRSE. Tribunal therefore held that the requirements of cl. (c) of Article 13(4) of the DTAA between India and UK were satisfied and hence, India has right to tax the income.

The Tribunal then examined the existence of PE of the Assessee. The Tribunal noted that the presence of the assessee in India during the previous year was only in connection with the agreement for modernization of shipyard of GRSE. The assessee had not carried on any other business in India. It therefore held that the provision of office space

inside the GRSE cannot be said to be a fixed place of business through which the business of the assessee is carried on in India. It was not enough that the assessee has a fixed place of business in India but the assessee should carry on business in India through that fixed place of business. This requirement of Article 5(1) of the DTAA was not satisfied in the present case. The Tribunal further held that the fact that the assessee filed a return of income including all receipts from the from the contract with GRSE cannot be basis to come to the conclusion that there was admission by the assesee that it had a PE in India. Existence of PE has to be established on the basis of evidence and by application of the requirements contemplated in DTAA.

On the question whether the Assessee can make a claim in assessment proceedings without filing revised return of income, the tribunal, held in favour of the assessee based on the decision of the Hon'ble Punjab and Haryana High Court in the case of Ramco International.

Regarding the tax on the fees for technical services, the tribunal held that as per Article 132(2) of the DTAA taxation has to be in accordance with the Act. The Assessee would be entitled to the benefit of the provisions of section 115A of the Act and be taxed at 20% of the Gross receipts. It is also held that tax liability borne by GRSE will need to be grossed up for arriving at Gross receipts of the Assessee and after such grossing up such receipts have to be taxed at 20%.

55 Canara Bank Vs. JCIT [2016] 182 TTJ 203 (Bangalore)
Assessment Year: 2005-06 to 2008-09
Order Dated: 30th March, 2016

Basic Facts

The assessee-bank is a Government of India undertaking and is engaged in the business of banking.During the course of assessment proceedings, AO noticed that the assessee-bank earned income exempt from tax.The assessee-bank contended that no expenditure was incurred for earning above exempt income which did not form part of the total income.Therefore, AO proposed disallowance under the provisions of sec.14A of the Act .AO estimated 5% of the exempt income as expenditure and disallowed the same under the provisions of sec.14A of the Act. On appeal, the CIT(A) applying law laid down by the Hon'ble jurisdictional High Court in the case of Maharashtra Apex Corporation vs. CIT(286 ITR 585) held that no notional expenditure can be attributed to exempt income and deleted the addition. Being aggrieved, revenue is in appeal.

Issue

Whether section 14A can be applied where exempt income was earned from securities held as stock in trade?

Held

The Hon'ble ITAT held that the Sub-rule(1) of rule 8Dstates that, the AO having regard to accounts of the assessee and not being satisfied with the correctness of the claim of expenditure made by the assessee or claim that no expenditure was incurred in relation to income which does not form part of the total income can go on to determine disallowance under sub-rule (2) to rule 8D of the IT Rules. Sub-rule (2) does not come into operation until and unless specific condition in sub-rule (1) is satisfied as held by the Hon'ble High Court of Karnataka in the case of Maxopp Investment Ltd. vs. CIT(347 ITR 272), and Bombay High Court in Godrej & Boyce Mfg. Co.Ltd. vs. DCIT(328 ITR 81). The Hon'ble ITAT held that the AO had not given any finding as to how the claim of the assessee-bank that no expenditure was incurred to earn exempt income was incorrect. In the absence of such finding, resort cannot be had to the provisions of sub-rule(2) of rule 8D. Further, the ITAT relying on the decision of Hon'ble Bombay High Court in the case of India Advantage Securities Ltd. held that provisions of sec.14A have no application in case assets are held as stock-in-trade. Therefore, provisions of sec.14A cannot be applied in the present case. Revenue's appeal was dismissed.

56 Elitecore Technologies (P.) Ltd. Vs. DCIT [2017] 77 Taxmann.com 149 (Ahmedabad) Assessment Year: 2009-10 Order Dated: 3rd January 2017

Basic Facts

The assessee is a company engaged in the business of software developments and products. During the relevant previous year, the assessee was liable to tax under section 115JB and accordingly, tax liability, under MAT provisions, was computed. During the course of the scrutiny assessment proceedings, the AO noted that the assessee has claimed a foreign tax credit of Rs 11,12,907. This credit was in respect of the taxes withheld abroad, i.e. in Singapore and Indonesia. The AO, however, was of the view that the tax credit is to be allowed only to the extent corresponding income that has suffered tax in India, and that the extent to which income has suffered tax in India in respect of these receipts is to be computed by reference to the actual MAT liability being divided in the same ratio as the ratio of corresponding foreign receipts to the overall turnover of the assessee. It was contended by the assessee that the tax credit is available in respect of 'profit or income' which is taxed in both the countries as a result of resident country will allow tax credit which should not exceed the India tax . It was also pointed out that none of these tax treaties prescribe the manner, as adopted by the AO, of deriving the net income, or, for that purpose, any method of computing the net income. It was also submitted that the related article state that tax credit will be available for "profit or income" which has been subjected to tax in both the countries, and that the profit, in this context, denotes income less all related allowable expenditure. The CIT(A) upheld the order of the AO.

Issue

Where assessee-company receives certain amount from its foreign customers after deduction of tax at source, what is the manner in which the quantum of income eligible which is required to be treated as taxed in both countries be determined& what is the manner in which the eligible tax credit is to be computed.

Held

The Tribunal noted that the Treaty between India and both the countries involved state that the foreign tax credit shall not exceed the part of the income as computed before the deduction is given, which is attributable as the case may be to the income which may be taxed in that other state" but there is little guidance on who to compute such income. UN Model Convention commentary (2011 update @ page 333) states that "Normally the basis of calculation of income tax is total net income, i.e. gross income less allowable deductions. Therefore, it is the gross income derived from the source state less any allowable deductions (specific or proportional) connected with such income which is to be exempted." Accordingly as per Tribunal it was not right approach to take into account the gross receipts as was contended by the assessee for the purpose of computing admissible tax credit. The tribunal further held that there was also no logic in allocating a share , in proportion of turnover of all the costs borne by the assessee to these earnings- as was done by the AO. As per the Tribunal, when the income in respect of such foreign operations is not separately computed, it is to be done on a reasonable basis and what would constitute reasonable basis will be the basis which is based on sound reasoning.

The Tribunal then analysied the working prepared by the assesee giving the profitability of each of the transaction which gave rise to the foreign tax credit. The Tribunal found that the AO had not found any infirmities in the profitability computed by the assessee. The tribunal therefore approved the stand taken by the assessee of computing profitability of each of the transactions. But the Tribunal added that this decision cannot be the authority for general proposition that only marginal or incremental cost incurred in respect of foreign income should be taken into account and the overheads cannot be allocated thereto.

After determining the income in above manner which was doubly taxed the tribunal held that the

tax attributable to this income should be determined by apportioning the actual tax paid under MAT provisions in the same ratio as double taxed profit to the overall profits. The Tribunal accordingly determined tax credit for each of the country.

57 Gajanan Constructions Vs. DCIT [2017] 73 Taxmann.com 380 (Pune)
Assessment Year: 2013-14,2014-15 & 2015-16
Order Dated: 23rd September,2016

Basic Facts

The assessee was required to deduct tax at source and file quarterly TDS returns intimating the tax deducted at source from various payments made in each of the quarter. Admittedly, in the present set of appeals, TDS returns were filed belatedly. The AO while processing the TDS returns issued intimation to the respective assessee under section 200A of the Act and levied late filing fees under section 234E of the Act Aggrieved by the said intimation the assessee filed an application under section 154 of the Act also. However, the same were dismissed by the respective AOs. The CIT(A) dismissed the appeal of assessee as not maintainable and even on merits.

Issue

Whether any appeal is maintainable against intimation issued under section 200A and/or order passed under section 154 read with section 200A by AO in charging fees under section 234E?

Held

The provisions of section 234E were inserted by the Finance Act, 2012, under which the provision was made for levy of fees for late furnishing TDS/ TCS statements. However, power enabling the AO to charge/levy the fee under section 234E while processing the TDS returns/statements filed by a person did not exist when section 234E was inserted by the Finance Act, 2012. The power to charge fees under the provisions of section 234E while processing the TDS statements, was dwelled upon by the Legislature by way of insertion of clause (c) to section 200A(1) by the Finance Act, 2015 with effect from 1-6-2015. Accordingly, it was held that where the AO has processed the TDS statements filed by the deductor, which admittedly, were filed belatedly but before insertion of clause (c) to section 200A(1) with effect from 1-6-2015, then in such cases, the AO is not empowered to charge fees under section 234E while processing the TDS returns filed by the deductor.

In Memorandum explaining the Finance Bill, 2015, the heading was rationalization of provisions relating to Tax Deduction at Source (TDS) and Tax Collection at Source (TCS). The said memorandum categorically recognized that under the existing provisions of the Act, after processing of TDS statements, an intimation is generated specifying the amount payable or refundable. It was further noted that this intimation generated after processing TDS statement is (i) subject to rectification under section 154; (ii) appealable under section 246A; and (iii) deemed as notice of payment under section 156. Thus, the Legislature recognizes that a deductor who has filed his statement of tax deducted at source, which in turn, has been processed by the AO and intimation is generated under which, if any amount is found to be payable, then such intimation generated after processing of TDS returns is subject to rectification under section 154 of the Act and/or is also appealable under section 246A, since the demand issued by the AO is deemed to be a notice of payment under section 156. Since the intimation in question issued by the AO was appealable order under section 246A(1)(a), therefore, the CIT(A) should have examined the legality of adjustment made under intimation issued under section 200A . The CIT(A) has rejected the present set of appeals on the surmise that first of all, no appeal is provided against the intimation issued under section 200A. Vis-à-vis the first issue of maintainability of appeal against the intimation issued under section 200A, it is held that such intimation issued by the AO after processing the TDS returns is appealable. The demand raised by way of charging of fees under section 234E is under section 156 and any demand raised under section 156 is appealable under section 246A(1)(a) and (c). Accordingly, the findings of CIT(A) in this regard were reversed.

58 **Karnataka State Industrial Infrastructure Development Corporation Ltd. Vs. DCIT [2017] 76 taxmann.com 360 (Bangalore - Trib.)**
Assessment Year: 2008-09 & 2010-11
Order Dated: DECEMBER 9, 2016

Basic Facts

The assesse was required to pay tax as per MAT provisions of the Act. While computing book profit, the assesse claimed indexed cost of acquisition for purpose of computing capital gains exempt u/s 10(38) which was denied by AO. The CIT(A) upheld the order of the CIT(A).

Issue

Whether assessee is entitled to benefit of indexation while calculating long term capital gain under section 10(38) which is to be considered for purpose of computing book profit under section 115JB ?

Held

The term 'any income' used in sub-section (38) of section 10 of the Act refers to only the amount of long term capital gains computed under the provisions of section 48 which means that the benefit of indexation of cost of acquisition should be given to the assessee while computing long term capital gain for the purpose of section 115JB of the Act.

The ITAT also applied the ratio of Jurisdictional Karnataka High Court in case of M.S.R. & Sons Investment Ltd. and allowed the ground of the assesse.

59 **Dell International Services India (P.) Ltd. Vs. DCIT, LTU [2016] 73 taxmann.com 24 (Bangalore - Trib.)**
Assessment Year: 2006-07
Order Dated: 22 July 2016

Basic Facts

The assessee was 100 per cent subsidiary of Dell International Inc. USA. It was engaged in the business of rendering IT enabled services ('ITES') and software development services to its AEs located in US and Non-US countries. It filed its return of income for the relevant year declaring total loss of Rs. 14.66 crores.

The TPO passed order under section 92CA proposing TP adjustment in relation to the international transactions of the assessee under the provisions of section 92C. The DRP disposed of the objections filed by the assessee-company and upheld the order of the TPO.

The assessee opted for mechanism of mutual agreement procedure pursuant to Article 25 of the India-US Double Tax Avoidance Agreement with respect to TP adjustment made to revenue earned by the assessee from its call centre and share services segment from its US tax resident AEs. Subsequently, the assessee-company had accepted the terms mutually agreed between two countries with respect to mark up on cost to be earned by the assessee for the services rendered to its US tax resident AEs. The assessee-company also filed consent letter with concerned authorities accepting the terms of MAP.

Issue

Where after taking FAR analysis of non-US transactions, if it was found that factors influencing price were similar between US AEs and non-US AE transactions, same price fixed under MAP in respect of US AEs could be adopted for non-US AE transactions also?

Held

The Hon'ble ITAT held that the issue can be decided only by the TPO after undertaking FAR analysis of non-US transactions with a view to find out whether there is any distinction in the factors influencing the price between US and non-US transactions. The Hon'ble ITAT observed that in the instant case, no attempt has been made by the assessee to bring out the similarities of the factors that influenced the price between US and non-US transactions. In the absence of this analysis, comparability may not be in terms of the provisions of rule 10B(1)(2) of the IT Rules, 1962. Therefore, the matter be restored to the file of the TPO/AO for fresh analysis on the lines between US and non-US transactions and if it is found that factors influencing the price are similar between US and non-US transaction, the price adopted for US transactions may be adopted for non-US transactions also.

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Unreported Judgements

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In this issue we are giving full text of the decision of Hon'ble Gujarat High Court in the case of Gujarat State Civil Supplies Corporation Limited in a Writ Petition in respect of stay against recovery, which was refused by the Principal Commissioner of Income Tax who had insisted for payment of 15% of the disputed tax demand in spite of the fact that in the earlier years similar issue was decided in favour of the assessee by the Hon'ble Gujarat High Court.

The Hon'ble High Court granted full stay without insisting for deposit of any amount since the issue was in the earlier year decided in favour of the assessee.

The same may be helpful to the readers.

In the High Court of Gujarat at Ahmedabad
Special Civil Application No. 17022 of 2016

Gujarat State Civil Supplies Corporation Limited....Petitioner(s)
Versus
Deputy Commissioner of Income Tax Gandhinagar Circle & 1....Respondent(s)

Appearance:
Mr. Manish J. Shah, Advocate for the Petitioner(s) No. 1

Corram : Honourable Mr. Justice Akil Kureshi
and
Honourable Mr. Justice A. J. Shastri
Date : 10/10/2016
Oral Order
(Per : Honourable Mr. Justice Akil Kureshi)

1. The petitioner Gujarat

   State Civil Supplies

   Corporation, is a State owned Corporation. For the assessment year 2013-14, the Assessing Officer passed an order of assessment dated 03.03.2016 adding a sum of Rs.119.21 crores (rounded off) as the income of the assessee and raised corresponding tax demand of Rs.52.68 crores. The case of the petitioner is that the said sum of Rs.119.21 crores though presented, the difference between purchase and sale prices of different commodities distributed by the Civil Supplies Corporation, did not represent its income.

   The Corporation would receive only a sum of Rs.73.82 lakhs by way of commission from the Government which would be its income, which could be its gross income which can be subjected to tax. The amount of Rs.119.21 crores was treated as a loan from the Government, on which, the assessee would also pay interest till the period of retention.

2. Identical issue had arisen in the earlier assessment years concerning this very assessee. One such issue traveled to the High Court concerning the assessment year 2002-03 in Tax Appeal No.1643 of 2009.

   High Court had by its decision dated 15.03.2011 upheld the view of the Tribunal, in which, the Tribunal had held that the amount was merely a receipt in the hands of the assessee and not its income.

3. In background of such facts, the petitioner has preferred appeal against the order of assessment.

   Pending such appeal, the petitioner prayed for stay against the recovery. The Principal Commissioner by the impugned order dated 08.09.2016, granted stay on the condition of depositing 15% of the disputed tax amount.

4. Counsel for the petitioner submitted that in view of the fact that the issue has been decided in favour of the assessee upto the High Court level, entire tax demand should have been stayed unconditionally. In fact, this is what the Principal Commissioner had in the earlier assessment years done. Without any reasons, the Commissioner imposed a condition of depositing 15% of the tax.

5. **NOTICE**, returnable on 21.11.2016. Impugned order dated 08.09.2016 is stayed. Direct service is permitted.

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Controversies

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Whether disallowance made u/s. 14A read with Rule 8D can be added to the Book Profit u/s. 115JB of the I.T. Act, 1961.

The applicability of the provision of Section 14A read with Rule 8D of the Rules to Clause (f) of Explanation to Section 115JB of the Act while computing adjusted book profit has been a matter of debate.

Issue:

When addition is made u/s. 14A read with Rule 8D to the total income, question arises whether book profit u/s. 115JB is required to be recomputed by adding the sum disallowed u/s. 14A being adjustment as per Explanation 1(f) to Section 115JB of the Act.

We must refer to provisions of Section 115JB, Explanation 1 (f) to Section 115JB, Provisions of Section 14A and Rule 8D of Income Tax Rules.

Proposition:

It is submitted that Provisions of Sub-section 2 & 3 of Section 14A cannot be imported into clause (f) of the Explanation to Section 115JB of the Act. As per Clause (f) of Explanation 1 to Section 115JB refers to amount debited to the P & L Account, which can be added back to the book profit while computing the book profit u/s. 115JB.

View against the Proposition:

1. The provision of Section 115JB of the Act read with Explanation 1(f) provides that the amount of expenditure relatable to income, to which Section 10 applies, should be added to the profit as per the P & L account.

2. There is no prohibition to adopt the disallowance made by the AO u/s. 14A of the Act read with Rule 8D of the Rules, while computing total income under the normal provisions of the Act. The argument of the taxpayer that section 14A of the Act is very specific and is applicable only for the purpose of computing total income under Chapter IV of the Act cannot be accepted.

3. The argument that Section 115JB appears in Chapter XIIB of the Act dealing with specific provision relating to certain companies and therefore the provisions of Section 14A read with Rule 8D of the Rules cannot be applied while making an addition to the net profit u/s. 115JB of the Act cannot be accepted.

4. The argument that only direct expenditure attributable to earning of income which does not form part of the total income under the Act can be added under clause (f) of Explanation 1 below Section 115JB of the Act, cannot be accepted.

5. There is no difference between the expression "expenditure relatable" and the expression "expenditure incurred by the assessee in relation to both the expressions means that whatever expenditures are incurred to earn income which does not form part of the total income under the Act, both direct and indirect expenditure, have to be disallowed.

6. There is no basis for the argument u/s. 115JB of the Act that it is only direct expenses that are contemplated as capable of being added to the profits as per the profit and loss account under

clause (f) to Explanation 1 to section 115JB(2) of the Act.

7. Accordingly, the disallowance u/s. 14A will be applicable while arriving at the book profits u/s. 115JB(2) of the Act read with Explanation 1(f) thereto.

Let me now refer to the decision of Hon. ITAT Mumbai Bench in the case of DCIT vs. Viraj Profiles Ltd. the Hon. Tribunal took the view that disallowance u/s. 14A is required to be added to the book profit u/s. 115JB of the Act. The Hon. Tribunal held as under:

We have observed that Section 115JB starts with non-obstante clause ''Notwithstanding anything contained in any other provision in this act…" meaning thereby that the Section 115JB shall be applicable notwithstanding anything contained in any other provision of the Act and shall have over-riding effect upon other provisions of the Act. The Section 115JB stipulates payment of Minimum Alternate tax based upon the book profit computed as per provisions of Section 115JB (2). Book Profit shall be computed as per Section 115JB (2) which stipulate that Book Profit means net profit as shown in Profit and Loss Account prepared for financial year in accordance with Part II and III of Schedule VI to the Companies Act,1956, also complying with other conditions as stipulated in Section 115JB(2) . Such book profit has to be increased by item Nos. (a) to (k) of the said Explanation 1 to Section 115JB of the Act if they are debited to the Profit and Loss Account and from such profit item Nos. (i) to (viii) of the Explanation are to be reduced. The figure arrived at after the above exercise is the book profit of the assessee for the relevant previous years. The explanation 1 to clause (f) to Section 115JB (2) stipulate that amount of expenditure relatable to any exempt income, other than Section 10(38), is liable to be added back to net profit shown in Profit and Loss Account if the amount refer to therein is debited to Profit and Loss Account.

Further perusal of Section 14A of the Act provides that it mandates disallowance of expenditure 'in relation' to the income which does not form part of the total income under the Act while clause (f) in explanation1 to Section 115JB (2) of the Act mandates disallowance of expenditure 'relatable' to the income to which Section 10 (other than Section 10(38) of the Act) or Section 11 or Section 12 of the Act applies. The close perusal of the both the above provisions reveals that more or less similar language is used in both the afore-stated provisions. The dividend income is declared on the share investment which is exempt u/s 10(33) (not Section 10(38)). We also note that the clause (f) to explanation 1 to Section 115JB (2) requires expenditure relatable to the exempt income to be disallowed provided the same is debited to Profit and Loss Account while Section14A(2) mandates that if the AO is not satisfied with the correctness of the claim of the assessee with regard to the expenditure incurred by the assessee in relation to the income which does not form part of the total income , then disallowance shall be computed in accordance with the prescribed method. Rule 8D of Income Tax Rules, 1962 prescribes the method for computing disallowance of expenditure in relation to earning of exempt income. The said Rule 8D of Income Tax Act, 1961 is a machinery provision to compute disallowance of expenditure u/s 14 in relation to the income which does not form part of the total income and is held to be applicable w.e.f. assessment year 2008-09 as held by Hon'ble Bombay High Court in Godrej and Boyce Manufacturing Limited ITA No. 626 of 2010 & WP no. 758 of 2010(Bom.) decision. The impugned assessment year under appeal in present case is also assessment year 2008-09 and hence Section 14A read with Rule 8D of Income Tax Rules ,1962 is applicable."

It is further submitted that Mumbai Tribunal in the case of ITO vs. RBK Share Broking (P.) Ltd. (2013) 159 TTJ 16(Mum) and in the case of Dabur India Ltd. vs. ACIT (2013) 145 ITD 175 (Mum) held

that expenditure incurred to earn exempt income will be disallowed u/s. 14A and also in-computing MAT Profit while computing MAT profits.

Recently, the Bangalore Bench of the Income Tax Appellate Tribunal (the Tribunal) in the case of Sobha Developers Vs. DCIT(ITA No. 1410/Bang/ 2013)(Bang)-Taxsutra.com(the taxpayer) held that disallowance u/s. 14A read with rule 8D of the Income Tax Rules, 1962 (the rules) is applicable while computing book profits u/s. 115JB of the income tax Act, 1961.

View in Favour of Proposition:

It is submitted that when no expenditure is debited to p& l Account and disallowance u/s. 14A is on account of deeming fiction i.e. by applying the formula when some expenditure is disallowed u/s 14A there is no case for making adjustment in the book profit as provided u/s. 115JB of the Act.

The Delhi Tribunal in the case of Quippo Telecom Infrastructure Ltd. has held that disallowance u/s. 14A of the Act cannot be made while computing the book profit u/s. 115JB of the Act since no actual expenditure was debited in the P & L Account relating to the earning of exempt income. The clause (f) of Explanation to Section 115JB refers to the amount debited to the P & L Account which can be added back to the book profit while computing book profit u/s. 115JB of the Act.

Further, the Delhi Tribunal in the case of Goetze (India) Ltd. has held that provisions of sub-section (2) and sub-section (3) of section 14A cannot be imported into clause (f) of Explanation to Section 115JA wile computing adjusted book profit.

Recently, Ahmedabad Tribunal in the case of DCIT Vs. Alembic Ltd. in ITA No. 1928/Ahd/2010 and CO No. 204/Ahd/2010, dated 27/03/2014 for A.Y. 2007-08, relying on the Mumbai Tribunal in the case of M/s. Essar Technologies Ltd. vs. DCIT in ITA No. 3850/Mum/2010 held that provisions of sub-section 2 & 3 of section 14A cannot be imported into clause (f) of the Explanation to Section 115JB of the Act.

Following authorities have also taken the same view.

(a) ACIT vs. Spray Engineering Devises Ltd. 53 SOT 70 (Chan.) (A.Y. 2008-09)

(b) Reliance Petroproducts Pvt. Ltd. vs. ACIT in ITA No. 2324/Ahd/2009, dated 13/07/2012

(c) Atul Ltd. vs. ACIT in ITA No. 8.Ahd/2013, dated 11/10/2013

Let me now refer to the decision in the case of MindaSai Ltd. vs. ITO (2015) 167 TTJ 689 (Delhi) (Trib.), in this case the Hon. Tribunal held that the adjustment had to meet tests of law and what is considered to be Expenditure relatable to exempt income for the purpose of Section 14A cannot be subjected to adjustment of book profit u/s. 115JB of the Act. There is no provision under the law to make such adjustment. Fact that assessee may have accepted disallowance affects that disallowance only and nothing more. It dose not clothe such an adjustment in computing book profit u/s. 115JB with legality.

Summation:

At the outset let me deal with in issue of company earning dividend income and claiming exempt u/s. 14A read with Rule 8D of I.T Rules. It is submitted that in case of exempt income there is no question of invoking section 14A of the Act. In the case of DCIT vs. Viraj Profiles Ltd. ITAT Mumbai Bench with respect misdirected itself by holding that even in respect of exempt income provision of section 14A applies, in fact the Hon. ITAT held as under:

"The revenue has issued circular no. 5/2014 dated 11/02/2014 that even in case of absence of exempt income, Section 14A disallowance shall be mad in case the assessee has made investments which are capable of yielding exempt income even though

there might not be an actual receipt of exempt income.

We are also guided by the decision of Special Bench, Delhi Tribunal in the case of Cheminvest Ltd. (2009) 121 ITD 318 (SB) in which the question, whether disallowance u/s. 14A of the Income Tax Act can be made in a year in which no exempt income has been earned or received by the assessee, is answered affirmatively against the assessee and in favour of the revenue."

However, the Hon. ITAT has missed the bus by not referring to various judgments i.e. Shivam Motors P. Ltd. (TS-6147-HC-2014 (Allahabad)-O), CIT VsCorrtech Energy Pvt. Ltd. (TS-5307-HC-2014 (Gujarat)-O), Cheminvest Ltd. vs. CIT (TS-5471-HC-2015(Delhi)-O), CIT vs. Delite Enterprise (TS-6069-HC-2009(Bombay)-O), CIT vs. Lakhani Marketing (TS-5697-HC-2009(Punjab and Haryana)-O), CIT vs. Winsome Textiles Industries Ltd. (TS-5697-HC-2009)Punjab & Haryana)-O)- wherein it has been held that when there is no exempt income and no claim for exemption, Section 14A read with Rule 8D have no application and no disallowance can be made.

With respect to the re-computation of the book profit u/s. 115JB by adding disallowance u/s. 14A it is submitted that as observed in Apollo Tyres Ltd. vs. CIT 255 ITR 273(SC) by Apex court that where P & L account has been prepared in accordance with part II and III of schedule VI to the Companies Act, 1956 and which has been scrutinized and certified by the statutory auditors and relevant authorities, the AO has no power to scrutinize the net profit and loss account except to the extent provided in the explanation to Section 115JB. Same view has been reiterated by Ho'ble Bombay High Court in Kinetic Motor Co. Ltd. vs. DCIT wherein it has been held that there is no scope for the AO to make adjustment to Book Profits beyond what was authorized by the definition in Explanation 1 to Section 115JB.

It is submitted that the term book profit has been defined as the net profit as per P & L Account as adjusted in accordance with the statutory additions and statutory deductions as provided. The AO cannot go beyond the net profit as shown in the P & L Account except to the extent provided in the explanation to Section 115JB and hence the CIT (A) held that the AO while computing Book Profit u/s. 115JB cannot make disallowance u/s. 14A as such disallowance are not covered by the exceptions as provided in the explanation to section 115JB.

To conclude this most important controversy, let me now refer to the decision of DCIT, Circlr 1(1), Baroda vs. Alembic Ltd. ITA No. 1928/Ahd/2010. The Hon. Tribunal held as under:

"We have heard the rival contentions and perused the material on record. As this issue has been set aside to the AO for re-computation of disallowance u/s. 14A, however, for making adjustment u/s. 115JB, the ITAT, Mumbai Bench in case of M/s. EssarTeleholdings Ltd. (supra) held that Provisions of sub-section 2 & 3 of section 14A cannot be imported into Clause (f) of the Explanation to Section 115JB which refers to amount debited to the P & L Account, which can be added back to the book profit while computing the book profit u/s. 115JB. Similar views have been taken by the ITAT, Delhi Bench in case of Goetze (India) Ltd. (supra). Therefore, we hold that adjustment made by the AO is not as per law. Accordingly, we dismiss the Revenue's appeal on this ground."

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Judicial Analysis

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Initiation of Penalty u/s 271(1)(c) without specifying whether the same is being initiated for 'furnishing of inaccurate particulars of income' or for 'concealment of income' is illegal.

CIT vs Shri Samson Perinchery (Income Tax Appeal No. 1154 of 2014, dated 05/01/2017) (Bombay High Court)

xxx…

3 The impugned order of the Tribunal deleted the penalty imposed upon the Respondent Assessee. This by holding that the initiation of penalty under Section 271 (1)(c) of the Act by Assessing Officer was for furnishing inaccurate particulars of income while the order imposing penalty is for concealment of income. The impugned order holds that the concealment of income and furnishing inaccurate particulars of income carry different connotations. Therefore, the Assessing Officer should be clear as to which of the two limbs under which penalty is imposable, has been contravened or indicate that both have been contravened while initiating penalty proceedings. It cannot be that the initiation would be only on one limb i.e. for furnishing inaccurate particulars of income while imposition of penalty on the other limb i.e. concealment of income. Further, the Tribunal also noted that notice issued under Section 274 of the Act is in a standard proforma, without having striked out irrelevant clauses therein. This indicates nonapplication of mind on the part of the Assessing Officer while issuing the penalty notice.

4 The impugned order relied upon the following extract of Karnataka High Court's decision in CIT v/s. Manjunath Cotton and Ginning Factory 359 ITR 565 to delete the penalty:

xxx…

5 The grievance of the Revenue before us is that there is no difference between furnishing of inaccurate particulars of income and concealment of income. Thus, distinction drawn by the impugned order is between Tweedledum and Tweedledee. In the above view, the deletion of the penalty, is unjustified.

6 The above submission on the part of the Revenue is in the face of the decision of the Supreme Court in Ashok Pai v/s. CIT 292 ITR 11 [relied upon in ManjunathCotton & Ginning Factory (supra)] – wherein it is observed that concealment of income and furnishing of inaccurate particulars of income in Section 271(1)(c) of the Act, carry different meanings/ connotations. Therefore, the satisfaction of the Assessing Officer with regard to only one of the two breaches mentioned under Section 271(1)(c) of the Act, for initiation of penalty proceedings will not warrant/ permit penalty being imposed for the other breach. This is more so, as an Assessee would respond to the ground on which the penalty has been initiated/notice issued. It must, therefore, follow that the order imposing penalty has to be made only on the ground of which the penalty proceedings has been initiated, and it cannot be on a fresh ground of which the Assessee has no notice.

7 Therefore, the issue herein stands concluded in favour of the Respondent Assessee by the decision of the Karnataka High Court in the case of Manjunath Cotton and Ginning Factory (supra). Nothing has been shown to us in the present facts which would warrant our taking a view different from the Karnataka High Court in the case of Manjunath Cotton and Ginning Factory (supra).

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CIT v. SSA'S Emerald Meadows [2016] 73 taxmann.com 248 (SC)

1. Delay condoned.

2. We do not find any merit in this petition. The special leave petition is, accordingly, dismissed.

3. Pending application, if any, stands disposed of.

CIT v. SSA'S Emerald Meadows [2016] 73 taxmann.com 241 (Karnataka)

3. The Tribunal has allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under Section 274 read with Section 271(1)(c) of the Income Tax Act, 1961 (for short 'the Act') to be bad in law as it did not specify which limb of Section 271(1)(c) of the Act, the penalty proceedings had been initiated i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income. The Tribunal, while allowing the appeal of the assessee, has relied on the decision of the Division Bench of this Court rendered in the case of CIT v. Manjunatha Cotton & Ginning Factory [2013] 359 ITR 565/218 Taxman 423/35 taxmann.com 250 (Kar.).

4. In our view, since the matter is covered by judgment of the Division Bench of this Court, we are of the opinion, no substantial question of law arises in this appeal for determination by this Court. The appeal is accordingly dismissed.

CIT v. Manjunatha Cotton & Ginning Factory [2013] 35 taxmann.com 250 (Karnataka)

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Conclusion

63. In the light of what is stated above, what emerges is as under:

(a) Penalty under Section 271(l)(c) is a civil liability.

(b) Mensrea is not an essential element for imposing penalty for breach of civil obligations or liabilities.

(c) Wilful concealment is not an essential ingredient for attracting civil liability.

(d) Existence of conditions stipulated in Section 271(l)(c) is a sine qua non for initiation of penalty proceedings under Section 271.

(e) The existence of such conditions should be discernible from the Assessment Order or order of the Appellate Authority or Revisional Authority.

(f) Even if there is no specific finding regarding the existence of the conditions mentioned in Section 271(l)(c), at least the facts set out in Explanation 1(A) & (B) it should be discernible from the said order which would by a legal fiction constitute concealment because of deeming provision.

(g) Even if these conditions do not exist in the assessment order passed, at least, a direction to initiate proceedings under Section 271(l)(c) is a sine qua non for the Assessment Officer to initiate the proceedings because of the deeming provision contained in Section 1(B).

(h) The said deeming provisions are not applicable to the orders passed by the Commissioner of Appeals and the Commissioner.

(i) The imposition of penalty is not automatic.

(j) Imposition of penalty even if the tax liability is admitted is not automatic.

(k) Even if the assessee has not challenged the order of assessment levying tax and interest and has paid tax and interest that by itself would not be sufficient for the authorities either to initiate penalty proceedings or impose penalty, unless it is discernible from

the assessment order that, it is on account of such unearthing or enquiry concluded by authorities it has resulted in payment of such tax or such tax liability came to be admitted and if not it would have escaped from tax net and as opined by the Assessing Officer in the assessment order.

(l) Only when no explanation is offered or the explanation offered is found to be false or when the assessee fails to prove that the explanation offered is not bonafide, an order imposing penalty could be passed.

(m) If the explanation offered, even though not substantiated by the assessee, but is found to be bonafide and all facts relating to the same and material to the computation of his total income have been disclosed by him, no penalty could be imposed.

(n) The direction referred to in Explanation IB to Section 271 of the Act should be clear and without any ambiguity.

(o) If the Assessing Officer has not recorded any satisfaction or has not issued any direction to initiate penalty proceedings, in appeal, if the appellate authority records satisfaction, then the penalty proceedings have to be initiated by the appellate authority and not the Assessing Authority.

(p) Notice under Section 274 of the Act should specifically state the grounds mentioned in Section 271(l)(c), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income

(q) Sending printed form where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law.

(r) The assessee should know the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee.

(s) Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law.

(t) The penalty proceedings are distinct from the assessment proceedings. The proceedings for imposition of penalty though emanate from proceedings of assessment, it is independent and separate aspect of the proceedings.

(u) The findings recorded in the assessment proceedings insofar as "concealment of income" and "furnishing of incorrect particulars" would not operate as res judicata in the penalty proceedings. It is open to the assessee to contest the said proceedings on merits. However, the validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings. The assessment or reassessment cannot be declared as invalid in the penalty proceedings.

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New SorathiaEngg. Co*v. CIT [2006] 155 TAXMAN 513 (GUJ.)

xxx…

9. It is an admitted position that the decision of this court in the case of CIT v. Manu Engg. Works [1980] 122 ITR 306 had been pressed into service on behalf of the applicant-Revenue (assessee ?) before the Tribunal. As can be seen from the impugned order of the Tribunal dated 28-4-1994, though the Tribunal had set out the citation in the list of authorities reproduced in paragraph No. 5 of its impugned order no finding as such is recorded on the said issue. In such circumstances, it could be stated that the Tribunal has not adjudicated upon the said contention, or it could be stated that once the contention was raised and recorded by the Tribunal it is deemed to have been rejected in the absence of any specific finding.

10. In the facts of the present case the subtle difference between the two stages would not matter. It is nobody's case and it is not possible to contend, that the Tribunal was not bound by a decision of the jurisdictional High Court, especially when its attention was invited to the said decision. Therefore, whether the Tribunal has recorded any finding or not becomes immaterial. In the facts as are available on the record it is apparent that the ratio of a decision of this court in the case of CIT v. Manu Engg. Works [1980] 122 ITR 306 , applies on all fours.

11. In the case of CIT v. Manu Engg. Works [1980] 122 ITR 306, this is what is laid down by this court :

"...We find from the order of the Inspecting Assistant Commissioner, in the penalty proceedings, that is, the final conclusion as expressed in para 4 of the order : 'I am of the opinion that it will have to be said that the assessee had concealed its income and/or that it had furnished inaccurate particulars of such income'. Now, the language of 'and/or' may be proper in issuing a notice as to penalty order or framing of charge in a criminal case or a quasi-criminal case, but it was incumbent upon the Inspecting Assistant Commissioner to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee. No such clear-cut finding was reached by the Inspecting Assistant Commissioner and, on that ground alone, the order of penalty passed by the Inspecting Assistant Commissioner was liable to be struck down." (p. 310)

12. The penalty order and the order of the Commissioner (Appeals) show that no clear-cut finding has been reached. The Tribunal has failed to appreciate this legal issue. Applying the ratio to the facts of the case it is apparent that the order of penalty cannot be sustained and the Tribunal could not have sustained the same. The Tribunal having failed to take into consideration and deal with the decision of the jurisdictional High Court it would constitute an error in law which goes to the very basis of the controversy involved and hence, the impugned order of the Tribunal cannot be upheld.

xxx…

CIT v. Manu Engineering Works [1980] 122 ITR 306 (Gujarat)

xxx…

Thereafter, at the instance of the revenue, the question hereinabove set out has been referred to us for our opinion. It may be pointed out that this very Bench has, in CIT v. Royal Motor Car Co. [1977] 107 ITR 753, held on the point of jurisdiction of the IAC to pass the order of penalty in view of the amendment in s. 274 by the Amendment Act, that it was well-settled law that every litigant had a vested right in the procedural law so far as the substance was concerned and if the substantive question of jurisdiction was to be affected by a new amendment the legislature must say so either in express terms or by necessary implication. The Division Bench in CIT v. Royal Motor Car Co. [1977] 107 ITR 753 , relying on the decision of the Privy Council in Colonial Sugar Refining Company v. Irving [1905] AC 369, held that the principle had been well recognised that though the right of appeal was a procedural right, it was a vested right. The Division Bench held that the IAC whose power was affected by the Amend. Act would continue to have jurisdiction in matters which were then pending before him, since the Amend. Act of 1970, neither in express words nor by necessary implication, had indicated that the jurisdiction of the IAC, even in pending matters, i.e., matters which were already referred to him, was to be affected. Since there is no such clear indication nor the necessary implication that the jurisdiction of the IAC was affected in pending matters, it follows that the jurisdiction of the IAC under the unamended s. 274 would continue and,

therefore, he had jurisdiction to dispose of the penalty proceedings against the assessee-firm.

In CIT v. Balabhai and Co., ITR No. 63, 1975, decided on August 4, 1977, by a Division Bench of this High Court consisting of J.B. Mehta and P.D. Desai JJ. (since reported in [1980] 122 ITR 301 supra) the decision in CIT v. Royal Motor Car Co. [1977] 107 ITR 753 (Guj.)was followed.

Thus, it is obvious that so far as the position in law is concerned, the Tribunal's view cannot be upheld and it must be held that the view taken by the Tribunal regarding the result brought about by the Amending Act of 1970, so far as jurisdiction of the IAC was concerned, was not correct.

However, the final order passed by the Tribunal in the appeal before it can be sustained on a different ground which also affects the jurisdiction of the IAC. We find from the order of the IAC, in the penalty proceedings, that is, the final conclusion as expressed in para. 4 of the order: "I am of the opinion that it will have to be said that the assessee had concealed its income and/or that it had furnished inaccurate particulars of such income". Now, the language of "and/or" may be proper in issuing a notice as to penalty order or framing of charge in a criminal case or a quasi-criminal case, but it was incumbent upon the IAC to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee. No such clear-cut finding was reached by the IAC and, on that ground alone, the order of penalty passed by the IAC was liable to be struck down.

We may also point out that so far as the order of the AAC in matters under appeal was concerned, he had not directed any penalty proceedings, though it was before him in the course of the appeal that the question of double debiting of the opening stock in the profit and loss account to the extent of Rs. 25,770 was brought to the notice of the department. It is surprising that, though the AAC did not recommend levying of any penalty in view of the change in the whole basis of assessment, yet the IAC treated the non-disclosure of the double debiting of Rs. 25,770 in the P & L a/c for the relevant year as concealment of income and/or furnishing of inaccurate particulars. The case before us is very much like the case in CIT v. LakhdhirLalji[1972] 85 ITR 77 (Guj.). In that case also, the appeal before the AAC had proceeded on a different basis altogether from the basis which was adopted by the ITO and the penalty proceedings were initiated by the ITO on the basis of the facts found by him. Under these circumstances, it was observed by the Division Bench (headnote):

"Under the circumstances, it could not be said that the assessee had been given a reasonable opportunity of being heard before the order imposing the penalty was passed. The very basis for the penalty proceedings against the assessee initiated by the Income-tax Officer disappeared when the Appellate Assistant Commissioner held that there was no suppression of income by the assessee. The conclusion of the Tribunal that the Inspecting Assistant Commissioner had no jurisdiction to impose a penalty under section 271(1)(c) for concealment of income was correct."

In the instant case also, we hold that the IAC had no jurisdiction to pass the order that he did in view of the facts that we have just now pointed out. Hence, though we come to the same conclusion as the Tribunal, namely, that the IAC had no jurisdiction to impose the penalty, our reasons for coming to that conclusion are different from the reasons of both the members of the Tribunal. We, therefore, answer the question in the affirmative, that is, in favour of the assessee and against the revenue, though our reasons are different from the reasons which appealed to the Tribunal. The Commissioner will pay the costs of this reference to the assessee.

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Amendment to India - Singapore Tax Treaty

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1. Background

In this article, we have summarized key amendments proposed to the existing Double Tax Avoidance Agreement (DTAA) entered into between India and Singapore in 1994 (1994 DTAA) as amended by a protocol dated 18 July 2005 (2005 Protocol) and the second protocol dated 1 September 2011. The third protocol to amend the 1994 DTAA was signed on 30 December 2016 (the 2016 Protocol) followed by official announcements made by the Government of India (GOI) and the Government of the Republic of Singapore (GOS).

To recollect, in terms of the 2005 Protocol, it was agreed that the benefit of taxation of capital gains, from sale of shares only in the country of residence of the alienator (i.e. exemption from taxation in source country), will remain in force so long as similar treatment is accorded in the India-Mauritius DTAA.

With the amendment of India-Mauritius DTAA on 10 May 2016, the amendment to India-Singapore DTAA was eagerly awaited. The 2016 Protocol, as expected, is on lines similar to the amendments made to India-Mauritius DTAA. Also, it aligns with India's philosophy of providing for source-based taxation of capital gains from sale of shares of a company resident in India as also reflected by the recently amended India-Cyprus DTAA.

The 2016 Protocol provides for source-based taxation of capital gains arising from transfer of shares with effect from 1 April 2017. Shares acquired on or before 31 March 2017 are grandfathered and continue to qualify for source tax exemption subject to fulfilment of conditions in the modified Limitation of Benefits (Modified LOB) provisions of the 2016 Protocol.

Along the lines of amended India-Mauritius DTAA, transitory provisions for reduced taxation by the source country (taxation at 50% of domestic tax rates) on capital gains from alienation of shares has also been provided for a limited period from 1 April 2017 to 31 March 2019 subject to fulfilment of Modified LOB conditions. Broadly, in relation to transitory relief, modified LOB looks at expenditure test for a period of 12 months preceding the date on which gains arise as compared to the period of 24 months comprising two blocks of 12 months each, which continue to apply for grandfathered investments.

Further, in line with commitment made as part of Article 14 on dispute resolution mechanism of OECD's BEPS project, a provision has been inserted for providing co-relative adjustment in transfer pricing cases. The new provision explicitly provides priority to domestic anti-avoidance measures over the 1994 DTAA (read with its Protocols).

The 2016 Protocol will be effective once the requisite procedures for its ratification are completed by both the countries. However, irrespective of the completion of procedure, 2016 Protocol shall enter into force from 1 April 2017.

2. Detailed Discussion

A. Capital gains taxation

Capital gains arising from the transfer of shares in an Indian company, until now, were subject to tax only in the resident country (Singapore) under the 1994 DTAA (subject to conditions of LOB provision under the 2005 Protocol).

The 2016 Protocol now proposes to restrict this exemption to investments in shares in Indian company acquired up to 31 March 2017. The exemption will apply irrespective of the date of subsequent transfer of such shares and subject to fulfilment of conditions of the Modified LOB which, in this behalf, are at par with LOB conditions provided in 2005 Protocol.

Taxation rights are now provided to the State of residence of the company whose shares are alienated (source country - India) on gains from alienation of shares acquired on or after 1 April 2017.

Along the lines of India-Mauritius DTAA, the 2016 Protocol provides for a transitory provision for gains arising during a window period of 1 April 2017 to 31 March 2019 in respect of shares acquired on or after 1 April 2017. Such gains arising during the transitory period will be subjected to tax at 50% of the domestic tax rates as applicable in the source country, on fulfilment of the conditions of modified LOB provision.

B. Limitation of Benefits (LOB)

The LOB provision is an anti-abuse provision which lays down further conditions to be fulfilled for claiming capital gains exemption in the source Country under the 1994 DTAA (read with the 2005 Protocol).

The 2016 Protocol continues to provide that, on principles, exemption from source taxation in respect of grandfathered investments for shares acquired before 1 April 2017 will be subject to following LOB conditions:

- The exemption will not be available if the affairs of alienator were arranged with the primary purpose to take such advantage of exemption (Motive Test)
- The exemption will not be available to a shell or conduit company, being a legal entity with negligible or nil business operations or with no real and continuous business activities
- An entity can be regarded as a shell or conduit company in case its annual expenditure in Singapore is less than the threshold provided (i.e. SGD 200,000 in Singapore or INR 5 million in India), during each block of 12 months in the immediately preceding period of 24 months from the date on which the capital gain arise (Expenditure test)
- A company is deemed not to be a shell/ conduit company if it is listed on recognized stock exchange of the country or it does not meet the Expenditure test, as aforesaid.

For claiming the transitory relief of reduced taxation at 50% during the period 1 April 2017 to 31 March 2019, modified LOB is applicable. For transitory relief, all the above stated elements of the LOB are present except that the Expenditure test (as aforesaid) is required to be fulfilled only in the immediately preceding period of 12 months from the date on which the capital gain arises.

3. Entry into force

The 2016 Protocol will be effective in India and Singapore only after completion of the procedures in both the countries for bringing it into force. The 2016 Protocol shall come into effect on the later of date on which India and Singapore notify the same, failing which it shall come into effect from 1 April 2017.

4. Concluding remarks

Singapore has been a preferred holding company jurisdiction for investments into India and has contributed 16% of foreign direct

investment (FDI) in India from April 2000 to September 2016.

The 1994 DTAA was a subject matter of discussion for re-negotiation between the GOI and the GOS in the recent past, particularly after the amendment to India-Mauritius DTAA earlier 2016

As per GOI press release, the 2016 Protocol is in line with India's treaty policy to prevent double non-taxation, curb revenue loss as also to check the menace of black money through automatic exchange of information. This is reflected also in India's recently revised DTAAs with Mauritius and Cyprus and the joint declaration signed by India with Switzerland.

Along the lines of amended India-Mauritius DTAA, 2016 Protocol also grandfathers and continues to retain residence-based taxation in respect of shares acquired prior to 1 April 2017 while providing reduced taxation in transitory period of 1 April 2017 to 31 March 2019. However, both these reliefs are subject to compliance with the modified LOB conditions as applicable.

Source-based taxation in India will be in respect of shares of a company resident in India and will not extend to any other securities, including convertible or non-convertible debt instruments, derivatives or to shares of a foreign company which may derive value from Indian assets. Unlike the 2005 Protocol, the modified LOB conditions are not made applicable in respect of capital gains arising from transfer of assets other than shares of a company resident in India.

Further, 2016 protocol also states that the DTAA will not prevent a country from applying its domestic law and measures concerning the prevention of tax avoidance or tax evasion. GAAR provisions of Indian domestic law are to be operative from 1 April 2017 and while Indian Tax Laws (ITL) does specifically provide that domestic law provisions apply only to the extent they are beneficial compared to a tax treaty, GAAR can still be applied even if its application is not beneficial.

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reopening notice is a reasonable belief of the A.O. that income chargeable to tax has escaped assessment. The condition precedent for issuance of notice under Sec. 147/148 is no different in cases where no return of income has been filed. If cl. (a) of Expln. 2 to s. 147 is to be applied then it must be established that the income of the person to whom the notice is issued is in excess of the maximum amount not chargeable to tax. This could have been done by collecting information under S. 133B. The reasons in support do not indicate any reasonable belief that income chargeable to tax has escaped assessment nor does it hold that income of the assessee is in excess of the maximum amount chargeable to tax. It proceeds on the basis that all receipts are income. The reopening notice has to be tested by the terms recorded for issuing the notice and the order disposing of the objection cannot be the basis for sustaining the impugned notice. "No prejudice to the assessee", as contended by the Revenue, cannot be the basis for acquiring jurisdiction to issue a reopening notice. Prima facie the impugned notice was held to be without jurisdiction.

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FEMA Updates

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42 Purchase and sale of securities other than shares or convertible debentures of an Indian company by a person resident outside India

In terms of Schedule 5 to the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 (the Principal Regulations) notified vide Notification No. FEMA.20/2000-RB dated May 3, 2000, as amended from time to time, eligible investors, viz., SEBI registered Foreign Institutional Investors (FIIs), Qualified Foreign Investors (QFIs), registered Foreign Portfolio Investors (FPIs) and long term investors registered with SEBI, may purchase securities indicated in Schedule 5 on repatriation basis and subject to such terms and conditions as may be specified by the SEBI and the Reserve Bank from time to time.

With a view to providing flexibility in regard to the manner in which non-convertible debentures/bonds issued by Indian companies can be acquired by FPIs, it has now been decided to allow them to transact in such instruments either directly or in any manner as per the prevalent/approved market practice.

The directions contained in this circular have been issued under sections 10(4) and 11(1) of the Foreign Exchange Management Act, 1999 (42 of 1999) and are without prejudice to permissions / approvals, if any, required under any other law.

A.P. (DIR New Series) Circular No. 23, dated December 27, 2016

For Full Text refer to https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10800

43 Exchange facility to foreign citizens

A.P. (DIR Series) Circular No. 20 dated November 25, 2016 permits foreign citizens to exchange foreign exchange for Indian currency notes up to a limit of ₹ 5000/- per week till December 15, 2016 and extended up to December 31, 2016 vide A.P. (DIR Series) Circular No. 22 dated December 16, 2016.

On a review it has been decided that the instructions contained in the A.P. (DIR Series) Circular No. 20 dated November 25, 2016 shall continue to be in force till January 31, 2017.

A.P. (DIR New Series) Circular No. 24, dated January 03, 2017

For Full Text refer to https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10815

44 Evidence of Import under Import Data Processing and Monitoring System (IDPMS)

As per A.P. (DIR Series) Circular No. 05 dated October 06, 2016 read with Section 5 and Section 10 of the Foreign Exchange Management Act 1999 (42 of 1999), Government of India Notification No. G.S.R. 381(E) dated May 3, 2000 viz., Foreign Exchange Management (Current Account Transaction) Rules, 2000 on import of goods, FED Master Direction No. 17 dated January 1, 2016 on Import of Goods and Services and A.P. (DIR Series) Circular No. 9 dated August 24, 2000 which outlines the procedure, mode/manner of payment for imports and submission of related returns. Within the contours of the extant instructions on import of goods, specific attention is invited to the directions on Obligation of Purchaser of Foreign Exchange and submission of document as Evidence of Import.

Bill of Entry (BoE) data is received in IDPMS from Customs Department for EDI ports and from NSDL for SEZ on daily basis. BoE data for non-EDI ports are entered by AD Category – I bank of the importer on receipt of BoE (importer's copy) and then the bank uploads the data in IDPMS through "Manual BOE reporting" process. In order to enhance ease of doing business and reduce transaction costs, it has been decided to discontinue submission of hardcopy of Evidence of Import documents i.e. BoE, with effect from December 01, 2016, as it is available in IDPMS. The revised procedures are as set out below:

i. AD Category – I bank will enter BoE details (BoE number, port code and date) as received from the importer and download the BoE message data from "BOE Master" in IDPMS. Thereafter, match and settle the BoE data with Outward Remittance Message (ORM) associated with the payment for import as per the message format "BOE Settlement" in IDPMS. Multiple ORMs can be settled against single BoE and also multiple BoE(s) can be settled against one ORM.

ii. In respect of imports on 'Delivery against Acceptance' basis, on request of importer, AD Category – I bank shall verify the evidence of import from IDPMS at the time of effecting remittance of import bill.

iii. On settlement of ORM with evidence of import AD Category – I bank shall in all cases issue an acknowledgement slip to the importer containing the following particulars:

    a. importer's full name and address with code number ;

    b. number and date of BoE and the amount of import; and

    c. a recap advice on number and amount of BoE and ORM not settled for the importer.

iv. The importer needs to preserve the printed 'Importer copy' of BoE as evidence of import and acknowledgement slip for future use.

The extant instructions and guidelines for Evidence of Import in Lieu of Bill of Entry will apply mutatis mutandis. The evidence of import in lieu of BoE in permitted/approved conditions will be created and uploaded by AD Category – I bank of the importer in the form of BoE data as per message format "Manual BOE reporting" in IDPMS.

Follow-up for Evidence of Import : AD Category – I banks shall continue to follow up for outward remittance made for import (i.e. unsettled ORM) in terms of extant guidelines and instructions on the subject. In cases where relevant evidence of import data is not available in IDPMS on due dates against the ORM, AD Category – I bank shall follow up with the importer for submission of documentary evidence of import. Similarly, if BoE data is not settled against ORM within the prescribed period AD Category – I banks shall follow up with the importer in terms of extant instructions.

Verification and Preservation: Internal inspectors and IS auditors (including external auditors appointed by AD Category – I bank) should carry out verification and IS audit and assurance of the "BOE Settlement" process in IDPMS. Data and process followed by AD Category –I bank for "BOE Settlement" should be preserved in terms of the guidelines under Cyber Security Framework in the bank. However, in respect of cases which are under investigation by investigating agencies, the data, process and/or documents may be destroyed only after obtaining clearance from the investigating agency concerned.

A.P. (DIR New Series) Circular No. 27, dated January 12, 2017

For Full Text refer to https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10824

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Service Tax - Recent Judgements

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49 Marvel Vinyls Ltd. Vs. CCE Indore CESTAT, New Delhi [2016], Unreported

Facts:-

The appellant was engaged in the manufacture of PVC shipping. During the period from August 2013-February 2014 they availed the Cenvat Credit on service tax paid on input services received by them by way of "renting of motor vehicle" for transport of its employees from Gwalior to their factory and for their return journey. An exclusion clause was introduced w.e.f. 01.04.2011 in the definition of the 'Input Service'. The same reads as under:-

"[(b) Services provided by way of renting of a motor vehicle, in so far as they relate to a motor vehicle which is not a capital goods;"

Revenue proceeded to disallow the CENVAT credit on the ground that the same are specifically excluded from the definition of the Input Service. Revenue was of the view that the motor vehicle should be capital goods for the recipient of the service then only credit can be allowed.

Held:-

The Hon'ble CESTAT was of the view that services provided by way of renting of a motor vehicle do not stand excluded in totality. The exclusion clause is in respect of input services of renting of a motor vehicle, in so far as they relate to a motor vehicle which is not capital goods.

The contention of the department that it should be capital goods for recipient of the service is also found to be without any merit by the Hon'ble CESTAT. According to the Hon'ble CESTAT a person who is receiving the input services of renting of immovable property, can never avail cenvat credit of duty paid on the motor vehicles and as such motor vehicle can never be a capital good to the recipient of the said services. The motor vehicle will always be a capital good or otherwise for the person who is providing the services. For service provider falling under the category of renting of motor vehicle the motor vehicle would always be a capital good. As such the expression- "which is not a capital good appearing in the said exclusion clause would require examination vis-a-vis the service provider and not vis-a-vis the services recipient.'

Accordingly, the Hon'ble CESTAT held that the contention of the department that the motor vehicle are not capital goods for the services recipient cannot be appreciated in as much as motor vehicles are admittedly capital goods in terms of the Rule 2 (A) of Cenvat Credit Rules. Accordingly, credit was held to be admissible.

50 M/s R. K. Marbles Pvt. Ltd. VS. CCE Jaipur CESTAT, New Delhi [2016], Unreported

Facts:-

The appellant had paid Service Tax on (i) rent for office-cum-residence of Director, (ii) office-cum-guest house of the appellant and (iii) service of telephone installed therein.

Revenue proceeded to disallow the CENVAT credit on the ground that the same are not used in or in relation to manufacturing of the final product.

The appellant submitted that the building was hired by the appellant company and the appellant was paying rent out of company's account. A part of the building is used by the full time Director as office-cum-residence, the other part is used by the company as office cum guest house. Similarly, the charges for the telephone service installed in the said building, which was raised in the name of the company and paid by the appellant company only.

All these expenses are directly relatable to the business activity of the appellant.

Held:-

The credit on above services was denied only on the ground that the appellant failed to establish that the said building is also being used as office. On perusal of rent agreements produced it is seen that the agreement was entered into in the name of the company and the purpose of hiring of residence cum office for the Directors and also guest house cum office for the appellant company. Considering the above position, the Hon'ble CESTAT allowed the Cenvat Credit on these service.

51 C.C.E. Indore Vs. M/s. Arvind Singh Lal Singh CESTAT, New Delhi [2016], Unreported.

Facts:-

The assessee had agreement with various fertilizer companies. In terms of the agreement the assessee was to undertake following activities: -

(i) Unloading fertilizers from the wagons standing at the platform,

(ii) Loading into the truck from railway platform,

(iii) Transfer to local warehouses,

(iv) Unloading from trucks and stacking in the warehouses.

(v) Storage of the goods in the warehouse and

(vi) Transportation from the warehouse to other premises of the dealers or to another warehouse as directed by the supplier.

Revenue proceeded on the footing that the aforesaid activity is taxable under the category of "Cargo Handling Service".

The assessee argued that the aforesaid activity will come within the ambit of GTA service and not under "Cargo Handling Service".

Held:-

According to the CESTAT the activity undertaken by the assessee is one of transportation of the goods and the activities of unloading and loading are incidental to the main activity of transportation of goods. Such activity should be rightly classifiable under Goods Transport Agency Service and not under "Cargo Handling Service". Accordingly, the appeal filed by the department was dismissed.

52 Tech Mahindra Ltd. & others Vs. CCE,CESTAT-Mumbai [2016], Unreported.

Facts:-

Tech Mahindra Ltd. provides Information Technology Software Services to its overseas clients. These services are rendered through 'on-site' and 'off-shore' operations. Tech Mahindra deputes the employees from India for providing the onsite services abroad. Further, M/s. Tech Mahindra has also established branches outside India which help Tech Mahindra to provide the onsite services.

The Branches of Tech Mahindra act as a salary disburser for the staff from India to the client locations besides carrying out other assigned activities. The salaries so disbursed as well as other expenses of running the branch, are reimbursed by Tech Mahindra from India.

The Revenue sought to charge service tax on these reimbursements made by Tech Mahindra from India to its overseas branches under 'reverse charge' on the ground that Head office and branch office are distinct entities in view of the provisions of section 66A(2)/66B(44). The revenue also sought to tax the said reimbursement for the period post introduction of Negative List.

Held:-

The Hon'ble CESTAT allowed the appeal filed by the appellants holding that no service tax would be applicable on the amount reimbursed to the branches. The relevant observations of the CESTAT are as under:-

- Section 66A (2) has limited coverage to tax the transactions and it is not elastic enough to govern the corporate intercourse and commercial indivisibility of a headquarters and its branches. Therefore, any service rendered to other

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VAT - From the Courts

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21 Whether sale to Bombay high is Inter state sale? State of Gujarat v. Larsen and Tourbo Ltd. Reported in 96 VST 98 (Guj)

Background of the Case:

The respondent-company engaged in business of manufacturing engineering goods and execution of works contracts in different parts of the country had manufacturing division at Hajira near Surat in the State of Gujarat. The company had entered into contract with ONGC for the commission of turnkey projects at Bombay High which was situated in exclusive economic zone of the coast of India. When the question of charging sales tax came up for consideration before the Tribunal it was held that the transaction of works contract with ONGC was an export sale not liable to Central sales tax. On an appeal:

Held, dismissing the appeal, that the Bombay High situated at about 180 kms. from the shores of India was not part of the territory of India as stated in article 1 of the Constitution. As per section 7 of the Maritime Zones Act, it was part of Exclusive Economic Zone. Under article 297 of the Constitution, all lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf or the Exclusive Economic Zone of India would vest in the Union and be held for the purposes of the Union. However, this was not the same thing as to suggest that such areas of Exclusive Economic Zone formed part of the Indian territory. A perusal of the relevant provisions of the Maritime Zones Act, 1976, would show that for the limited purpose of extension and application of laws notified by the Central Government exclusive economic zone would be deemed to be a part of the territory of India and that the sovereign rights that the Union had over the exclusive economic zone, were for the limited purpose of exploration, exploitation, conservation and management of the natural resources. It was only by virtue of notification in official gazette that the Central Government might declare any area of the exclusive economic zone to be a designated area. Thus when the sale of goods took place at Bombay High, for which the goods moved from Hazira to Bombay High, such movement did not get covered within the expression "movement of goods from one State to another" contained in clause (a) of section 3 of the Central Sales Tax Act as Bombay High did not form part of any State of Union of India. Further admittedly, no notification had been issued by the Central Government extending all or any of the provisions of the Central Sales Tax Act to any of the designated areas, continental shelf or exclusive economic zone. Therefore the Department could not have demanded tax under the Central Sales Tax Act from the respondents on the sale which sale was completed at Bombay High. Therefore the Tribunal was justified in arriving at the conclusion that the transaction was not liable to Central sales tax.

22 Supply of food and beverages by incorporated club to its Permanent members amounts to sale? State of West Bengal and others V. Calcutta Club Limited 96 VST 20 (SC)

Background of the Case:

The assessee-club was an incorporated entity under the Companies Act, 1956. The club charged and paid sales tax when it sold products to non-members or guests who accompanied permanent members but when invoices were raised in respect of supply made in favour of permanent members, no sales tax was collected. The notice and the communication sent for personal hearing by the assessing authority in respect of supply of food and drinks by the club to its permanent members during

the quarter ending June 30, 2002, was assailed by the club before the West Bengal Taxation Tribunal praying for a declaration that it was not a "dealer" within the meaning of the Act as there was no sale of any goods in the form of food, refreshments, drinks, etc., by the club to its permanent members and hence, it was not liable to pay sales tax under the Act. The Tribunal held that the club was not exigible to tax under the Act. On a writ petition filed by the Revenue, the High Court upheld the view of the Tribunal. On appeal by the Revenue:

Held that, the controversy that had arisen in the case had to be authoritatively decided by a larger Bench in view of the law laid down in Cosmopolitan Club v. State of Tamil Nadu [2009] 19 VST 456 (SC) and Fateh Maidan Club v. Commercial Tax Officer [2008] 12 VST 598 (SC) because none of the judgments laid down that the doctrine of mutuality would apply or not but proceeded on that principle relying on the earlier judgments. As the position should be clear, the matter should be referred to a larger Bench framing the questions (i) whether the doctrine of mutuality was still applicable to incorporated clubs or any club after the insertion of article 366(29A) in the Constitution of India, (ii) whether the judgment of the court in Joint Commercial Tax Officer v. Young Men's Indian Association [1970] 26 STC 241 (SC) still held the field even after the Forty-sixth Amendment of the Constitution of India, and whether the decisions in Cosmopolitan Club [2009] 19 VST 456 (SC) and Fateh Maidan Club [2008] 12 VST 598 (SC) which remitted the matter applying the doctrine of mutuality after the Constitutional amendment could be treated to state the correct principle of law, and (iii) whether the Forty-sixth Amendment to the Constitution, by a deeming fiction provided that provision of food and beverages by incorporated clubs to their permanent members constituted sale liable to sales tax.

23 Brand Name
ACC Ltd v. Statae of Kerala reported in 96 VST Page 174.(SC)

The appellant-dealer entered into an agreement with Cochin Cement by which Cochin Cement manufactured cement with specified quality using the raw material supplied by the dealer. The entire cement manufactured by Cochin Cement was marketed by the dealer in its brand name. Rejecting the contention of the dealer that Cochin Cement was the brand name holder of the dealer and, therefore, the sale at its hands had to be treated as the first sale, the assessing authority assessed the dealer treating its sale as first sale under section 5(2) of the Kerala General Sales Tax Act, 1963 which provided that where goods were sold under a trade mark or brand name, the sale by the brand name holder or the trade mark holder within the State would be the first sale. The assessment was confirmed by the higher authorities and the High Court. On appeal:

Held (i) that in the decision in Cryptom Confectioneries Pvt. Ltd. v. State of Kerala [2014] 73 VST 498 (SC), section 5(2) was considered and a view had been expressed and, therefore, it could not be said that the provision had not been referred to or not considered. Hence, it was a binding precedent.

(ii) That the submission that the decision in Cryptom Confectioneries Pvt. Ltd. v. State of Kerala [2014] 73 VST 498 (SC), even if a binding precedent, required reconsideration as the relevant terms employed in section 5(2), had not been appositely considered could not be accepted. Section 5(2) was an expression of the legislative intention that the sales at the hands of the brand name holder and trade mark holder would be treated as the first sale. The agreement entered into between the parties was not remotely suggestive of the fact that Cochin Cement was a brand name holder or trade mark holder.

24 Whether Pest control activity can be termed as deemed sale?
State of Gujarat v. Bharat Pest Control reported in 97 VST 50(Guj)

Background of the case:

The assessee was engaged in the business of providing pest control service to various commercial establishments. The assessee was awarded a work

order by R for carrying out pest control services in the premises of the company. The Joint Commissioner upon an application under section 80 of the Gujarat Value Added Tax Act, 2003 held that the title in the pesticides passed to the purchaser and the transaction would fall within clause (b) of sub-section (23) of section-2 of the Act and be exigible to tax. The Tribunal reversed the decision of the Joint Commissioner holding that the activity of the assessee was only in the nature of service and no sale of goods was involved, that the pesticides and chemicals used by the assessee were for the purpose of treatment against pests and rodents and were consumed in the process of rendering service and that the title in the goods never passed to R since the goods ceased to exist. On appeal:

Held, dismissing the appeal, that the assessee was awarded the contract for pest control measures at the office of factory premises of the company. The contract would include complete treatment of pest control and rodent control, for which, the assessee would use the pesticides and chemicals of reputed companies. In essence therefore, this was a contract for carrying out the pest control service which would require special know-how and use of pesticides, in recommended measures. The concentration of the pesticides, the amount of usage, the places where these were to be applied and all other relevant aspects would be a matter of considerable technical expertise. The dominant purpose was to provide a composite pest control and rodent control service. The use of pesticides and chemicals was wholly incidental. There was no intention of sale of goods from the assessee to the company. The works contract for pest control did not involve sale and supply of goods as per section 2(13) and (23) of the Act. There was no transfer of property in goods making the transaction eligible to value added tax because the chemicals were consumed and were not present in a tangible form.

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contracting party by a branch as a branch of the service provider would not be within the scope of Section 66A.

- Mere identification of service and legal fiction of separate establishment is not sufficient to tax the activities of the branch. The services have to be received by a recipient located in India for use in relation to business or commerce.
- When the transactions between the Branch and Head office located in the domestic territory are not taxable, the similar transactions cannot be taxed under Section 66A in case Branch and Head offices are located in two different tax jurisdictions.
- The transaction between the Branch and the Head office in India can be taxed under Section 66A if the services of the branch are used for the domestic operation by the Head office in India. In other words, the provisions of Section 66A cannot be applied to tax the export transactions of the Head office in India.
- The legal fiction created in Section 66A to treat the overseas Branch and Head office as two different persons was intended to prevent escapement from tax on the domestic services received by the primary establishment in India which could otherwise be deliberately routed through an overseas branch.
- The transfer of funds by gross outflow or by netted outflow is therefore, nothing but reimbursements and taxing such reimbursements would amount to taxing of transfer of funds which is not contemplated by Finance Act, 1994 whether before 1-7-2012 or after.

Hence, this decision has brought huge relief to the IT and Pharma Sector in India. By virtue of this decision, the reimbursements made by Head office in India to the overseas branch offices for the activities done by the branch offices abroad would not be liable to tax in India under reverse charge mechanism. The legal fiction created under Section 66A or 65B(44) of the Finance Act is only limited to tax those activities of Branch which are related to the local commercial or business activities of the head office in India.

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VAT - Judgements and Updates

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GST, VAT Judgments and Updates

Goods & Service Tax – Part - I:

Definition of supply in earlier and revised Model GST Law:

Before starting analyzing various changes, it is really imperative to equate the definition of supply under earlier Model GST Law and Revised Model GST Law.

Original Model GST Law (Hereinafter referred as Original Act)	Revised Model GST Law (Hereinafter referred as Revised Act)
[1] Supply includes –	[1] Supply includes -
[a] all forms of supply of goods and/or services such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course of furtherance of business;	[a] all forms of supply of goods and/or services such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course of furtherance of business;
[b] importation of service, whether or not for a consideration and whether or not in the course or furtherance of business; and	[2] importation of services, for a consideration whether or not in the course of furtherance of business; and
[c] a supply specified in schedule I, made or agreed to be made without a consideration.	[c] a supply specified in Schedule I, made or agreed to be made without a consideration.
[2] Schedule II, in respect of matters mentioned therein, shall apply for determining what is, or is to be treated as a supply of goods or a supply of services.	[2] Schedule II, in respect of matters mentioned therein, shall apply for determining what is, or is to be treated as a supply of goods or a supply of services.
[2A] Where a person acting as an agent who, for an agreed commission or brokerage, either supplies receives any goods and/or services on behalf of any principal, the transaction between such principal and agent shall be deemed to be a supply.	[3] Notwithstanding anything contained in sub-section (1).
[3] Subject to sub-section (2) the Central or a State Government may, upon recommendation of the Council, specify, by notification, the transactions that are to be treated as –	[a] activities or transactions specified in schedule III; or
[i] a supply of goods and not as a supply of services; or	[b] activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities as specified in Schedule IV, shall be treated neither as a supply of goods nor a supply of services.
[ii] a supply of services and not as a supply of goods; or	[4] Subject to sub-section(2) and sub-section (3), the Central or a State Government may, upon recommendation of the Council, specify, by notification, the transactions that are to be treated as –
[iii] neither a supply of goods nor a supply of services.	[a] a supply of goods and not as a supply of services; or
[4] Notwithstanding anything contained in sub-section (1), the supply of any branded service by an aggregator, as defined in section 43B, under a brand name or trade name owned by him shall be deemed to be a supply of the said service by the said aggregator.	[b] a supply of services and not as a supply of goods; or
	[c] neither a supply of goods nor a supply of services.
	[5] The tax liability on a composite or a mixed supply shall be determined in the following manner –
	[a] a composite supply comprising of two or more supplies, one of which is a principal supply, shall be treated as a supply of such principal supply;
	[b] a mixed supply comprising of two or more supplies shall be treated as supply of that particular supply which attracts the highest rate of tax.

Major changes in definition – An analysis:

Following are the major changes in the definition of Supply under Revised Act:

[A] Importation of Service must be for consideration subject to few exceptions

[B] Total refurbishment of Schedule I

[C] Removal principal, agent concept from sub-section (2A) & incorporation in Schedule I

[D] Insertion of New Schedule III & Insertion of New Schedule IV

]E] Exclusion of Concept aggregator and

[F] Insertion of Concept of Mixed Supply under sub-section (5) to section 3 of Revised Act.

[Courtesy: Article from GST cases].

VAT

Important Judgment:

Gujarat High Court in case of State of Gujarat v. Dresser Rand India Pvt. Ltd.

Issue:

[i] Whether Sales Tax can be levied on Performance Test/Inspection of Goods as the same is not a part of Sales Price?

[ii] Whether set-off on packing materials u/s. 44 of the Gujarat Sales Tax Rules was available when the value of packing materials included in the value of original goods sold?

Question [i] pertains to inclusion of inspection charges of the goods as part of the sale price and arises in the following background. The respondent assessee is a company engaged in the business of manufacturing compressors and parts and sale thereof. The assessee also sells some of its products through export sale. For the assessment year 2004-2005, the assessing officer noted that the assessee had a taxable turnover of Rs. 25.57 crores (rounded off) which included a sum of Rs. 3.71 lacs (rounded off) towards performance test/inspection charges. The assessing officer noted that such tests were being carried out in the premises of the assessee's factory itself and were pre-sale tests. In his opinion, in view of section 2(2) of the Gujarat Sales Tax Act, 1969 ("the Act" for short), such amount would be included as a part of the taxable turnover. The assessee opposed such addition on the ground that the test are being carried out by the third party agency at the instance of the purchaser for which the purchaser bears the cost. This amount, therefore, cannot be considered as a part of the sale consideration. The assessing officer, however, proceeded to add such amount upon which the assessee approached the Tribunal after failing before the Appellate Commissioner.

From the material on record, it emerges that the assessee had been awarded the works contract for supply and installation of machinery. The pre-sale inspection or performance testing though was done at the site of the factory of the assessee, it was being done at the instance of the purchaser for which the purchaser had separately paid and the inspection was being carried out by third party agency. Though the terms of the contract also referred to inspection as part of the sale consideration, the same when appreciated in connection with other conditions would show that such inspection was after installation inspection and did not refer to pre-sale inspection. In that view of the matter, the Tribunal was correct in concluding that the inspection for which the purchaser had paid and it was carried out by the third party agency was not the sale consideration. It would not matter that initially the amount may have been paid by the assessee which

was later on reimbursed by the purchaser. Section 2(29) of the Act defines sale price as under.

"2(29) 'sale price' means the amount of valuable consideration paid or payable to a dealer for any sale made including any sum charged for anything done by the dealer in respect of the goods at the time of or before delivery thereof, other than the cost of insurance for transit or of installation when such cost is separately charged and includes….."

It is not even the case of the Revenue that the instance falls under the "includes portion" of the definition which therefore we have not reproduced. If we thereafter refer to the main body of the definition, it provides that the sale price means the amount of valuable consideration paid or payable to a dealer for any sale made including any sum charged for anything done by the dealer in respect of the goods at the time of or before delivery thereof other than the cost of insurance for transit or of installation when it is separately charged. In the present case, the test performed for the inspection was neither done by the assessee nor was charged by the assessee and would therefore not be included in the expression "any some charged for anything done by the dealer in respect of the goods."

Rule 44 of the Sales Tax Act Rules refers to drawback, set-off or refund of the tax for the purchase of the goods sold in course of intra-state trade or commerce or of export out of the territory of India or transported to a place outside State of Gujarat. Subject to the conditions specified in Rule 44, this rule envisages set-off, drawback or refund of tax in respect of purchase of goods sold in course of intra-state trade or commerce or export out of the territory of India or transported to a place outside the State of Gujarat. In this context, the question arises whether the case on hand, the assessee had sold the packing material while selling the main product. In case of Raj Sheel (1989) 74 STC 379 (SC), the constitutional validity of section 6C of the Andhra Pradesh General Sales Tax Act, 1957 was challenged. The provision provided for a deeming fiction under which where goods packed in any materials are sold or purchased, the materials in which the goods are so packed would be deemed to have been sold or purchased along with the goods and tax would be leviable on such sale or purchase as applicable to the sale or purchase of goods themselves.

This judgment would therefore show that when there is no independent sale of packing material but the value of the packing material goes into determining the value of the goods sold, the deeming fiction provided under section 6C of the said Act would apply and even the value component of packing material would be taxed at the same rate as the goods themselves. Even on the other hand, on facts it is found that the packing material is sold separately from the sale of goods, the rate of tax on such packing material would be one prescribed for such packing material. In either side, there would be a sale of packing material either as a integrated part of the sale of principal goods or separately. As noted, Rule 44 of the Sales Tax Rules, 1970 envisages the drawback, set-off, or refund of tax at prescribed rates of purchase of goods sold in course of intra-state trade, etc.

In the present case, such conditions are satisfied and therefore rightly held by the Tribunal that the set-off would be available.

Both the questions are therefore answered in the negative and against the appellant and in favour of the assessee.

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Mergers and Acquisition Corner

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1. Big Basket Grofers explore merger[1]

Online grocers BigBasket and Grofers have held merger talks, though these discussions are preliminary and have moved slowly so far. If the deal goes through, it will be one of the most significant moves made towards bringing about consolidation in a cash-guzzling consumer internet economy, which has been heavily reliant on investor capital to grow in the recent years. Sources in the know said talks between the two parties, which started in November last year, will be brought up during BigBasket's board meeting scheduled for end of January. The next steps also hinge on BigBasket's financing round, which if done successfully may scupper the proposed deal. The Bengaluru-based grocery e-tailer has mandated investment bank Morgan Stanley for a $150million fund-raise, which is expected to close by April. Separately, people familiar with the goings-on said Grofer's heavyweight backers SoftBank and Tiger Global, ploughing fresh funds into the merged entity, could also be an important criterion for deciding the future course of talks. "If their fund-raise doesn't go too well, the merger is very likely to happen keeping in mind the $60-million cash that's in the bank for Grofers," said a source.

Grofers, which emerged as one of the hottest on-demand delivery startups amassing $130 million, most of it in 2015, had a tough last year as interest around the express delivery sector has waned perceptibly. In order to conserve cash, Grofers spent the whole of last year pruning its business and cutting costs, which stagnated its growth dramatically. Cost per delivery on the express model has been the big impediment for startups like Grofers, making the business unviable and in constant need for capital. Most players levy minimal charges, which do not cover full delivery cost for them, making their path to profitability a big challenge. Over the past year, Grofers has been attempting to change its model from a pure-play express delivery outfit to one where it's stocking inventory through distribution centres similar to BigBasket. It also went back to its merchants for facilitating deliveries to cut costs. BigBasket, which too launched a 90-minute express delivery service last year, saw its sales grow 231% to Rs 563 crore in the financial year ending March 2016.But net losses zoomed to Rs 277 crore from Rs 61 crore, on the back of increased marketing spends like signing Bollywood actors Shahrukh Khan as a brand ambassador, spiralling cost per delivery, and expenditure incurred on setting up warehouses. Its investors include Abraaj Capital, Ascent Capital, Zodius Capital, World Bank's IFC, Helion Venture Partners, Bessemer Venture Partners, among others. While BigBasket claims to be clocking an average of 50,000 daily orders out of which 25% is on its express platform, Grofers does around 10,000 average orders per day. In June last year, the Gurgaonbased Grofers launched scheduled deliveries, which it claims now make up almost 90% of its business with ondemand being the rest 10%.

Grofers founded by IITiansDhindsa and Saurabh Kumar in 2013, started off by doing deliveries for other merchants like a business-to-business venture but pivoted to a consumer-facing platform in late 2014, after which it received the bulk of its capital. Sequoia Capital was its first institutional investor. Grofers is not a distress seller even though worries about its business model have crept up of late. It'stechnology and customers may hold better

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Corporate Law Update

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MCA Updates:

1. Removal of name of company from the Registrar on suo-motu basis:-

(1) The Registrar of Companies may remove the name of a company from the Register of companies in terms of sub-section(1) of section 248 of the Act:

Provided that following categories of companies shall not be removed from the register of companies under this rule and rule 4, namely:

(i) Listed companies;

(ii) Companies that have been delisted due to non-compliance of listing regulations or listing agreement of any other statutory laws;

(iii) Vanishing companies;

(iv) Companies where inspection or investigation is ordered and being carried out or actions on such order are yet to be taken up or were completed but prosecutions arising out such inspection or investigation are pending in the Court;

(v) Companies where notices under section 234 of the Companies Act, 1956 (1 of 1956) or section 206 or section 207 of the Act have been issued by the Registrar or Inspector and reply thereto is pending or report under section 208 has not yet been submitted or follow up of instructions on report under section 208 is pending or where prosecution arising out of such inquiry or scrutiny, if any, is pending with the Court;

(vi) Companies against which any prosecution for an offence is pending in any court;

(vii) Companies whose application for compounding is pending before the competent authority for compounding the offences committed by the company or any of its officers in default;

(viii) Companies which have accepted public deposits which are either outstanding or the company is in default in payment of the same;

(ix) Companies having charges which are pending for satisfaction; and

(x) Companies registered under section 25 of the Companies Act, 1956 or section 8 of the Act.

Explanation:- For the purposes of clause (iii), the expression "vanishing company" means a company, registered under the Act or previous company law or any other law for the time being in force and listed with Stock Exchange has failed to file its returns with the Registrar of companies and Stock Exchange for a consecutive period of two years, and is not maintaining its registered office at the address notified with the Registrar of Companies or Stock Exchange and none of its directors are traceable.

(2) For the purpose of sub-rule (1), the Registrar shall give a notice in writing

Form STK-1 which shall be sent to all the directors of the company at the addresses available on record, by registered post with acknowledgement due of by speed post.

(3) The notice shall contain the reasons on which the name of company is to be removed from the register of companies and shall seek representations, if any against the proposed action from the company and its directors along with the copies of relevant documents, if any, within a period of thirty days from the date of the notice.

Application for removal of name of company;-

(1) An application for removal of name of the company under sub-section (2) of section 248 shall be made in Form STK-2 along with the fee of five thousand rupees.

(2) Every application under sub-rule (1) shall accompany a no objection certificate from appropriate Regulatory Authority concerned in respect of following companies, namely;-

(i) Companies which have conducted or conducting non-banking financial and investment activities as referred to in the Reserve bank of India Act, 1934 (2 of 1934) or rules and regulations thereunder;

(ii) Housing finance companies as referred to in the Housing Finance Companies (National Housing Bank) Directions, 2010 issued under the National Housing Bank Act, 1987 (53 of 1987);

(iii) Insurance companies as referred to in the Insurance Act, 1938 (4 of 1938) or rules and regulation thereunder;

(iv) Companies in the business of capital market intermediaries as referred to in the Securities and Exchange Board of India Act, 1992 (15 of 1992) or rules and regulations thereunder;

(v) Companies engaged in collective investment schemes as referred to in the Securities and Exchange Board of India Act, 1992 (15 of 1992) or rules and regulations thereunder;

(vi) Asset management companies as referred to in the Securities and Exchange Board of India Act, 1992 (15 of 1992) or rules and regulations thereunder;

(vii) Any other company which is regulated under any other law for the time being in force.

(3) The application in Forms STK 2 shall be accompanies by:-

(i) Indemnity bond duly notarized by every director in Form STK 3;

(ii) A statement of accounts containing assets and liabilities of the company made up to a day, not more than thirty days before the date of application and certified by a Chartered Accountant.

(iii) An affidavit in Form STK 4 by every director of the company;

(iv) A copy of special resolution duly certified by each of the directors of company or consent of seventy five percent of the members of the company in terms of paid up share capital as on the date of application;

(v) A statement regarding pending litigations, if any, involving the company.

Manner of filing of application:-

(1) The application in Form STK 2 shall be signed by director duly authorized by the Board in their behalf.

(2) Where the director concerned does not have a registered digital signature certificate, a physical copy of the form duly filled in shall be signed manually by the director duly authorized in that behalf and shall be attached with the Form STK 2 while uploading the form.

Form to be certified: The Form STK 2 shall be certified by a Chartered Accountant in whole time practice or Company Secretary in whole time Practice or Cost Accountant in whole time practice, as the case may be.

Manner of publication of notice:-

1) The notice under sub-section(1) or sub-section (2) of section 248 shall be in Form STK 5 or STK 6, as the case may be, and be-

(i) Placed on the official website of the Ministry of Corporate affairs on a separate link established on such website in this regard;

(ii) Published on the Official Gazette;

(iii) Published in English Language in a leading English newspaper and at least once in vernacular language in a leading vernacular language newspaper, both having wide circulation in the State in which the registered office of the Company is situated.

Provided that in case of any application made under sub-section (2) of section 248 of the Act, the company shall also place the application on its website, if any, till the disposal of the application.

2) The Registrar of Companies shall, simultaneously intimate the concerned regulatory authorities regulating the company, viz, the Income-tax authorities, central excise authorities, and service tax authorities, having jurisdiction over the company, about the proposed action of removal or striking off the names of such companies and seek objections, if any to be furnished within a period of thirty days from the date of issue of the letter of intimation and if no objections are received within thirty days from the respective authority, it shall be presumed that they have no objections to the proposed action of striking off or removal of name.

Manner of notarization, appostilisation or consularisation of indemnity bond and declaration in case of foreign nationals or non-resident Indians:-

For the purposes of these rules, if the person is foreign national or non-resident Indian, the indemnity bond and declaration shall be notarized or appostilised or consularised.

Notice of striking off and dissolution of Company:

The Registrar shall cause a notice under sub-section (5) of section248 of striking off the name of the company from the register of companies and its dissolution to be published in the Official Gazette in Form STK 7 and the same shall also be placed on the official website of the Ministry of Corporate Affairs.

Application or forms pending before Central Government:

Any application or pending proceeding for striking off or Form FTE filed with the Registrar of Companies prior to the commencement of these rules but not disposed of by such authority for want of any information or document shall, on its submission, to the satisfaction of the authority, be disposed of in accordance with the rules made under the Companies Act, 1956 (1 of 1956)

[File No. 1/28/2013-CL. V dated 26th December, 2016]

2. Companies (Incorporation) Fifth Amendment Rules, 2016:

The Companies (Incorporation) Fifth Amendment Rules, 2016 shall be applicable w. e. f. 01st day of January, 2017.

Under these rules, following changes have been made:

In the principal rules,

(a) In rule 4, in sub rule (2) for the words and figures such nomination in Form No. INC-2 along with consent of such nominee obtained in Form No. INC-3 the words and figures such nomination in Form No. INC-32 (SPICe) along with consent of such nominee obtained in Form No. INC-3 shall be substituted.

(b) In rule 10, for the words and figures Form No. INC-7 the words and figures Form No INC-7 of Form No INC-32 (SPICe) shall be substituted.

(c) In rule 12, for the words and figures Form No. INC-2 (for One Person Company) and Form No. INC-7 (Other than One Person company) the words and figures Form No. INC-7 (Part I company with more than seven subscribers) and Form No. INC-32 (SPICe) shall be substituted.

(d) Rule 36 shall be omitted.

(e) For rule 38, the following shall be substituted, namely:-

Simplified Performa for Incorporating Company Electronically (SPICe):

(1) The application for incorporation of a company under this rule shall be FORM No. INC-32 (SPICe) along with e-Memorandum of Association (e-MOA) in Form No. INC-33 and e-Articles of Association (e-AOA) in Form No. INC-34.

(2) For the purposes of sub-rule (1), the application for allotment of Director Identification Number upto three Directors, reservation of a name, incorporation of company and appointment of Directors of the proposed for **One Person Company, private company, public company and a company falling under section 8 of the Act,** shall be filed in **FORM No. INC-32 (SPICe)**, with the Registrar, within whose jurisdiction the registered office of the company is proposed to be situated along with fee of **rupees five hundred** in addition to the registration fee as specified in the Companies (Registration of Offices and Fees) Rules, 2014.

Provided that where an applicant has applied for reservation of a name under Rule 9 and which has been approved therein, he may fill the reserved name as proposed name of the company.

(3) For the purposes of filing SPICe Form, the particulars of maximum three directors shall be allowed to be filled in FORM No. INC-32 (SPICe), and allotment of Director Identification Number of maximum of three proposed directors not having approved Director Identification Number.

(4) The promoter or applicant of the proposed company shall propose only one name in FORM No. INC-32 (SPICe)

(5) The promoter or applicant of the proposed company shall prepare Memorandum of Association (e-MoA) in FORM No. INC-33 and Articles of Association (e-AoA) in FORM No. INC-34, in accordance with rule 13.

Provided that the subscribers and witness or witnesses shall affix their digital signatures to the e-MoA and e-AoA.

(6) For incorporation using application as provided in this rule, provisions of the sub-clause (i) of sub-section (5) of section 4 of the Act, rule 9, and clause (a) of sub-rule (1) of rule 16 to the extent of affixing recent photograph shall not apply.

(7) A Company using the provisions of this rule may furnish verification of its registered office under sub-section (2) of section 12 of the Act by filing FORM No. INC-32 (SPICe) in which case the company shall attach along with such FORM No. INC-32 (SPICe), any of the documents referred to in sub-rule (2) of rule 25.

(8) FORM No. INC-22 shall not be required to be filed in case the proposed company maintains its registered office at the given correspondence address.

(9) (a) Where the Registrar, on examining FORM No. INC-32 (SPICe), finds that it is necessary to call for further information or finds such application or document to be defective or incomplete in any respect, he shall give intimation to the applicant to remove the defects and re-submit the e-form within fifteen days from the date of such intimation given by Registrar.

(b) After the resubmission of the document, if the registrar still finds that the document is defective or incomplete in any respect he shall give one more opportunity of fifteen days to remove such defects or deficiencies.

Provided that the total period of re-submission of documents shall not exceed thirty days.

(10) The Certificate of Incorporation of Company shall be issued by the Registrar in Form No. INC-11.

Form No. INC-2 shall be omitted and Form No. INC-7 shall be substituted with the new Form No. INC-7.

[F. No. l/13/2013 CL-V dated 29th December, 2016]

3. Companies (Incorporation) Amendment Rules, 2017.

The Companies (Incorporation) Amendment Rules, 2017 shall be effective w. e. f. 30th day of January, 2017.

In the Companies (Incorporation) Rules, 2014 (hereinafter referred to as the principal rules) for rule 18, the following rule shall be substituted, namely:-

"18. The Certificate of Incorporation shall be issued by the Registrar in Form No.INC-11 and the Certificate of Incorporation shall mention permanent account number of the company where if it is issued by the Income-tax Department".

[F. No. 1/13/2013 CL-V-Part-I –Vol. II dated 25th January, 2017]

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Allied Laws Corner

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Sahara Diaries – Common Cause case

Recently, the Supreme Court in the case of **Common Cause (A Registered Society) vs. Union of India (popularly known as Sahara Diaries case**) reported in **77 taxmann.com 245** held that entries in loose papers / sheets are irrelevant and not admissible under Section 34 of the Evidence Act and such loose papers / sheets are not books of accounts and the entries therein are not sufficient to charge a person with a liability.

A. Averments raised in Interlocutory Applications filed in the Writ Petition:

1. It was averred that, Central Bureau of Investigation (in short 'the C.B.I.') conducted raid on the premises of Aditya Birla group industries in four cities on 15.10.2013, followed by another raid by the Income Tax Department on the very next day. The raid by the C.B.I. reportedly led to recovery of incriminating documents and unaccounted cash amounting to Rs.25 crores. Thereafter C.B.I. transferred the incriminating documents to the Income Tax Department. The laptop of Mr. Shubhendu Amitabh, Group Executive President was seized during the raid. **An E-mail dated 16.11.2012 containing a cryptic entry was also recovered from the said laptop referring to political functionaries. When Mr. Amitabh was questioned about the transactions, he stated that "these were purely personal notes. Not meant for SMS or e-mail transmission. And the first note is only to note for my knowledge and consumption – a business development at Gujarat Alkali Chemicals" it does not relate to any political functionary**. During investigation, top officials of the Birla Group admitted that large amounts of cash were routed by the Group through hawala. The Income Tax Department prepared a detailed appraisal report on the Hawala transactions. It was averred that the CBI did not take any concrete action and tried to protect the influential personalities named in the documents seized and to shield powerful corporate entities.
2. With respect to Sahara Group, it was averred that the Income Tax Department raided Sahara India Group offices in Delhi and Noida on 22.11.2014. During the raid, incriminating documents and cash amounting to Rs.135 crores had been seized. Certain documents have been filed in the form of printouts of the Excel sheet showing cash receipt of over Rs.115 crores and cash outflow of over Rs.113 crores during a short period of 10 months. The random log suggested that cash was transferred to several important public figures.
3. It was also averred that certain complaints to CBI, CBDT, CVC, SIT, Enforcement Directorate and Settlement Commissioner have been made but without avail. In spite of that, the Income Tax Settlement Commission gave immunity to the Sahara Group of Companies vide its order dated 11.11.2016.
4. It was submitted that though at this stage, it cannot be said conclusively that payments have been made, however, **a prima facie case has been made out to direct investigation on the basis of the materials recovered in the raids in question. It was argued that the order passed by the Settlement Commission**

cannot be said to be in accordance with law and is self contradictory and has been passed in haste. The finding recorded therein cannot be relied upon and it is the bounden duty of this Court to direct investigation as one whosoever high is not above law and this Court being the constitutional Court and the highest Court of the country should direct investigation into the material collected in the raids of two business groups. The investigation by special investigation Team should not be only ordered, but it should be monitored by this Court.

B. Arguments from the Counsel of the Union of India :

1. Shri Mukul Rohatgi, learned Attorney General for India and Mr. Tushar Mehta, learned ASG have submitted that **the material in question with respect to Sahara Group on the basis of which investigation is sought for, have been found by the Settlement Commission, in proceedings under Section 245D of the Income Tax Act, to be doubtful. The documents which have been filed by the Birla as well as Sahara Group are not in the form of account books maintained in regular course of business. They are random sheets and loose papers and their correctness and authenticity, even for the purpose of income mentioned therein have been found to be un-reliable having no evidentiary value, by the concerned authorities of income tax**. The documents of Birla Group are also the same. They are not in the form of regular books of account and are random and stray materials and thus the case of Birla also stands on the same footing.

2. Placing implicit reliance of the decision of this Court in **C.B.I. v. V.C. Shukla** (supra), it was submitted that it is open to any unscrupulous person to make any entry any time against anybody's name unilaterally on any sheet of paper or computer excel sheet. There being no further corroborative material with respect to the payment, no case is made out so as to direct an investigation, and that too against large number of persons named in the documents. Such entries have been held to be prima facie not even admissible in V.C. Shukla's case. He urged that in case investigation is ordered on the basis of such documents, it would be very dangerous and no constitutional functionary/officer can function independently, as per the constitutional imperatives. No case is made out on the basis of material which is not cognizable in law, to direct investigation.

C. Findings of the Hon'ble Supreme Court: the relevant extract of the finding is as under.

1. With respect to the kind of materials which have been placed on record, the Supreme Court in **V.C. Shukla's case** (supra) has dealt with the matter though at the stage of discharge when investigation had been completed but same is relevant for the purpose of decision of this case also. **The Supreme Court has considered the entries in Jain Hawala diaries, note books and file containing loose sheets of papers not in the form of "Books of Accounts" and has held that such entries in loose papers/sheets are irrelevant and not admissible under Section 34 of the Evidence Act, and that only where the entries are in the books of accounts regularly kept, depending on the nature of occupation, that those are admissible.**

2. It has further been laid down in V.C. Shukla (Supra) as to **the value of entries in the books of account, that such statement shall not alone be sufficient evidence to charge any person with liability, even if they are relevant and admissible, and that they are only corroborative evidence. It has been held even then independent evidence is**

necessary as to trustworthiness of those entries which is a requirement to fasten the liability.

3. The Supreme Court has further laid down in **V.C. Shukla** (Supra) that **meaning of account book would be spiral note book/ pad but not loose sheets**. The following extract being relevant is quoted hereinbelow:—

"14. In setting aside the order of the trial court, the High Court accepted the contention of the respondents that the documents were not admissible in evidence under Section 34 with the following words:

"An account presupposes the existence of two persons such as a seller and a purchaser, creditor and debtor. Admittedly, the alleged diaries in the present case are not records of the entries arising out of a contract. They do not contain the debits and credits. They can at the most be described as a memorandum kept by a person for his own benefit which will enable him to look into the same whenever the need arises to do so for his future purpose. Admittedly the said diaries were not being maintained on day-to-day basis in the course of business. There is no mention of the dates on which the alleged payments were made. In fact the entries there in are on monthly basis. Even the names of the persons whom the alleged payments were made do not find a mention in full. They have been shown in abbreviated form. Only certain 'letters' have been written against their names which are within the knowledge of only the scribe of the said diaries as to what they stand for and whom they refer to."

17. From a plain reading of the Section it is manifest that to make an entry relevant thereunder it must be shown that it has been made in a book, that book is a book of account and that book of account has been regularly kept in the course of business. From the above Section it is also manifest that even if the above requirements are fulfilled and the entry becomes admissible as relevant evidence, still, the statement made therein shall not alone be sufficient evidence to charge any person with liability. It is thus seen that while the first part of the section speaks of the relevancy of the entry as evidence, the second part speaks, in a negative way, of its evidentiary value for charging a person with a liability. It will, therefore, be necessary for us to first ascertain whether the entries in the documents, with which we are concerned, fulfill the requirements of the above section so as to be admissible in evidence and if this question is answered in the affirmative then only its probative value need be assessed.

18. "Book" ordinarily means a collection of sheets of paper or other material, blank, written, or printed, fastened or bound together so as to form a material whole. Loose sheets or scraps of paper cannot be termed as "book" for they can be easily detached and replaced. In dealing with the word "book" appearing in Section 34 in Mukundram v. Dayaram[1] a decision on which both sides have placed reliance, the Court observed:-

"In its ordinary sense it signifies a collection of sheets of paper bound together in a manner which cannot be disturbed or altered except by tearing apart. The binding is of a kind which is not intended to the moveable

in the sense of being undone and put together again. A collection of papers in a portfolio, or clip, or strung together on a piece of twine which is intended to be untied at will, would not, in ordinary English, be called a book. ... I think the term 'book' in Section 34 aforesaid may properly be taken to signify, ordinarily, a collection of sheets of paper bound together with the intention that such binding shall be permanent and the papers used collectively in one volume. It is easier however to say what is not a book for the purposes of Section 34, and I have no hesitation in holding that unbound sheets of paper, in whatever quantity, though filled up with one continuous account, are not a book of account within the purview of Section 34."

We must observe that the aforesaid approach is in accord with good reasoning and we are in full agreement with it. Applying the above tests it must be held that the two spiral note books (MR 68/91 and MR 71/91) and the two spiral pads (MR 69/91 and MR 70/91) are "books" within the meaning of Section 34, but not the loose sheets of papers contained in the two files (MRs 72/91 and 73/91).

20. Mr. Sibal, the learned counsel for the Jains, did not dispute that the spiral note books and the small pads are "books" within the meaning of Section 34. He, however, strongly disputed the admissibility of those books in evidence under the aforesaid section on the ground that they were neither books of account nor they were regularly kept in the course of business. he submitted that at best it could be said that those books were memoranda kept by a person for his own benefit. According to Mr. Sibal, in business parlance "account" means a formal statement of money transactions between parties arising out of contractual or fiduciary relationship. Since the books in question did not reflect any such relationship and, on the contrary, only contained entries of monies received from one set of persons and payment thereof to another set of persons it could not be said, by any stretch of imagination that they were books of account, argued Mr Sibal. He next contended that even if it was assumed for argument's sake that the above books were books of account relating to a business still they would not be admissible under Section 34 as they were not regularly kept. It was urged by him that the words "regularly kept" mean that the entries in the books were contemporaneously made at the time the transactions took place but a cursory glance of the books would show that the entries were made therein long after the purported transactions took place. In support of his contentions he also relied upon the dictionary meanings of the words 'account' and 'regularly kept'."

(Emphasis added by us)

4. With respect to evidentiary value of regular account book, the Supreme Court has laid down in V.C. Shukla, thus;

"37. In Beni v. Bisan Dayal it was observed that entries in books of account are not by themselves sufficient to charge any person with liability, the reason being that a man cannot be allowed to make evidence for himself by what he chooses to write in his own books behind the back of the parties. There must be independent evidence of the

transaction to which the entries relate and in absence of such evidence no relief can be given to the party who relies upon such entries to support his claim against another. In Hira Lal v. Ram Rakha the High Court, while negativing a contention that it having been proved that the books of account were regularly kept in the ordinary course of business and that, therefore, all entries therein should be considered to be relevant and to have been proved, said that the rule as laid down in Section 34 of the Act that entries in the books of account regularly kept in the course of business are relevant whenever they refer to a matter in which the Court has to enquire was subject to the salient proviso that such entries shall not alone be sufficient evidence to charge any person with liability. It is not, therefore, enough merely to prove that the books have been regularly kept in the course of business and the entries therein are correct. It is further incumbent upon the person relying upon those entries to prove that they were in accordance with facts."

5. **It is apparent from the aforesaid discussion that loose sheets of papers are wholly irrelevant as evidence being not admissible under Section 34 so as to constitute evidence with respect to the transactions mentioned therein being of no evidentiary value.** The entire prosecution based upon such entries which led to the investigation was quashed by this Court.

6. **We are constrained to observe that the Court has to be on guard while ordering investigation against any important constitutional functionary, officers or any person in the absence of some cogent legally cognizable material. When the material on the basis of which investigation is sought is itself irrelevant to constitute evidence and not admissible in evidence, we have apprehension whether it would be safe to even initiate investigation. In case we do so, the investigation can be ordered as against any person whosoever high in integrity on the basis of irrelevant or inadmissible entry falsely made, by any unscrupulous person or business house that too not kept in regular books of accounts but on random papers at any given point of time.** There has to be some relevant and admissible evidence and some cogent reason, which is prima facie reliable and that too, supported by some other circumstances pointing out that the particular third person against whom the allegations have been levelled was in fact involved in the matter or he has done some act during that period, which may have co-relations with the random entries. In case we do not insist for all these, the process of law can be abused against all and sundry very easily to achieve ulterior goals and then no democracy can survive in case investigations are lightly set in motion against important constitutional functionaries on the basis of fictitious entries, in absence of cogent and admissible material on record, lest liberty of an individual be compromised unnecessarily. We find the materials which have been placed on record either in the case of Birla or in the case of Sahara are not maintained in regular course of business and thus lack in required reliability to be made the foundation of a police investigation.

7. In case of Sahara, in addition we have the adjudication by the Income Tax Settlement Commission. The order has been placed on record along with I.A.No.4. **The Settlement Commission has observed that the scrutiny of entries on loose**

papers, computer prints, hard disk, pen drives etc. have revealed that the transactions noted on documents were not genuine and have no evidentiary value and that details in these loose papers, computer print outs, hard disk and pen drive etc. do not comply with the requirement of the Indian Evidence Act and are not admissible evidence. It further observed that the department has no evidence to prove that entries in these loose papers and electronic data were kept regularly during the course of business of the concerned business house and the fact that these entries were fabricated, non-genuine was proved. It held as well that the PCIT/DR have not been able to show and substantiate the nature and source of receipts as well as nature and reason of payments and have failed to prove evidentiary value of loose papers and electronic documents within the legal parameters. The Commission has also observed that Department has not been able to make out a clear case of taxing such income in the hands of the applicant firm on the basis of these documents.

8. It is apparent that the Commission has recorded a finding that transactions noted in the documents were not genuine and thus has not attached any evidentiary value to the pen drive, hard disk, computer loose papers, computer printouts.

9. Since it is not disputed that for entries relied on in these loose papers and electronic data were not regularly kept during course of business, such entries were discussed in the order dated 11.11.2016 passed in Sahara's case by the Settlement Commission and the documents have not been relied upon by the Commission against assessee, and thus such documents have no evidentiary value against third parties. On the basis of the materials which have been placed on record, we are of the considered opinion that no case is made out to direct investigation against any of the persons named in the Birla's documents or in the documents A-8, A-9 and A-10 etc. of Sahara.

10. This Court, in the decision of ***Lalita Kumari* v. *Government of Uttar Pradesh and others*, 2014(2) SCC 1** has laid down that when there is commission of offence apparent from the complaint and a cognizable offence is made out, investigation should normally be ordered and the falsity of the allegations can be ascertained during the course of investigation. **In our opinion, the decision of *Lalita Kumari* (*supra*) is of no help to the petitioner for seeking direction for an investigation from a Court on the basis of documents which are irrelevant, and per se not cognizable in law as piece of evidence and inadmissible in evidence and thus a roving inquiry cannot be ordered on such legally unsustainable material.**

11. In the case of ***State of Haryana and Others* v. *Bhajan Lal and others*, 1992 Supp (1) SCC 335**, this Court has laid down principles in regard to quashing the F.I.R. The Court can quash FIR also if situation warrant even before investigation takes place in certain circumstances. This Court has laid down thus:

"102** ** **

(1) Where the allegations made in the first information report of the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not

disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

12. Considering the aforesaid principles which have been laid down, we are of the opinion that **the materials in question are not good enough to constitute offences to direct the registration of F.I.R. and investigation therein**. The materials should qualify the test as per the aforesaid decision. The complaint should not be improbable and must show sufficient ground and commission of offence on the basis of which registration of a case can be ordered. **The materials in question are not only irrelevant but are also legally inadmissible under Section 34 of the Evidence Act, more so with respect to third parties and considering the explanation which have been made by the Birla Group and Sahara Group**, we are of the opinion that **it would not be legally justified, safe, just and proper to direct investigation**, keeping in view principles laid down in the cases of *Bhajan Lal and V.C. Shukla* (*supra*).

13. In view of the materials which have been placed on record and the peculiar facts and circumstances projected in the case, we find that no case is made out to direct the investigation as prayed for.

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From the Government

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Income Tax

1) Circular regarding clarifications on the Taxation and Investment Regime for Pradhan Mantri Garib Kalyan Yojana,2016.

The Taxation and Investment Regime for Pradhan Mantri Garib Kalyan Yojana, 2016 (hereinafter 'the Scheme') provides an opportunity to persons having undisclosed income in the form of cash or deposit in an account maintained with a specified entity to declare such income and pay tax, surcharge and penalty totaling in all to 49.9 per cent. of such declared income and make a mandatory deposit of not less than 25% of such income in the Pradhan Mantri Garib Kalyan Deposit Scheme, 2016. The Scheme has commenced on 17.12.2016 and shall remain open for declarations/deposit upto 31.03.2017.

Queries have been received from the stakeholders seeking further clarity on certain provisions of the Scheme. The Central Government has considered the queries and clarified vide this circular in the form of questions and answers.

(For questions and answers refer Circular No. 2, dated 18/01/2017)

2) Circular regarding clarifications on implementation of GAAR provisions under the Income Tax Act,1961

CBDT has clarified vide this circular on the implementation of GAAR provisions in the form of questions and answers.

(For questions and answers refer Circular No. 7, dated 27/01/2017)

Service Tax

1) **Notification regarding amendment in Mega Exemption Notification no. 25, dated 20/06/2012:-**

The Central Government hereby makes the following further amendments in the notification No.25/2012-Service Tax, dated the 20thJune, 2012, by inserting a entry 29 & entry no.34 , which reads as under:-

"in entry 29 (Services by the following persons in respective capacities), for item (g), the following item shall be substituted, namely "(g) business facilitator or a business correspondent to a banking company with respect to accounts in its rural area branch."

(ii) in entry 34 (Services received from a provider of service located in a non-taxable territory), for the proviso, the following proviso shall be substituted with effect from 22nd day of January, 2017, namely, "Provided that the exemption shall not apply to (i) online information and database access or retrieval services received by persons specified in clause (a); or (ii) services by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India;".

(Notification No. 01, dated 12/01/2017)

2) **Notification regarding amendment in Rule 2 sub-rule (1) of Service Tax Rules, 1994**

The Central Government hereby amends the sub-rule (1) of Rule 2 as under:-

(i) in clause (aa), the following proviso shall be inserted, namely:-

"Provided that aggregator shall not include such person who enables a potential customer to connect with persons providing services by way of renting of hotels, inns, guest houses, clubs, campsites or other commercial places meant for

residential or lodging purposes subject to following conditions, namely:-

(a) the person providing services by way of renting of hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes has a service tax registration under provision of these rules; and

(b) whole of the consideration for services provided by such service provider is received directly by such service provider and no amount, which forms part of the consideration of services of such service provider, is received by the aggregator directly from either recipient of the service or his representative."

(ii) in clause (d), in sub-clause(i), after item (EEB), the following item shall be inserted, namely:-

"(EEC) in relation to services provided or agreed to be provided by a person located in non- taxable territory to a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India, the person in India who complies with sections 29, 30 or 38 read with section 148 of the Customs Act, 1962 (52 of 1962) with respect to such goods;"

(Notification No. 02, dated 12/01/2017)

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contd. from page 668

value for hypermarket chains of Aditya Birla and Reliance, but not at the value the startup seeks, a person privy to the developments said.

2. Tata Steel to buy majority stake in Odisha port project[2]

Tata Steel Ltd said that it has signed a definitive agreement with Creative Port Development Pvt. Ltd (CPDPL) and their promoters for the proposed development of Subarnarekha port in Odisha. As per terms of the agreement, Tata Steel will acquire 51% equity stake in CPDPL, for which the outlay has been kept at approximately Rs.120 crore. The port development is envisaged through a wholly-owned subsidiary, Subarnarekha Port Pvt. Ltd (SPPL). "The investment to develop the Subarnarekha port will address the strategic needs of TataSteel in the future. The location of the proposed port makes it attractive to structurally enhance the competitive position of our Indian operations and we look forward to working together with the current promoters to make Subarnarekha a very efficient port in the future," said Koushik Chatterjee, Tata Steel's group executive director (finance and corporate) in a statement issued to the Bombay Stock Exchange. With eyeing growth in Kalinganagar, our offtake through Dhamra is also slated to increase, he added. CPDPL, promoted by Chennai-based Ramani Ramaswamy and Ramaswamy Rangarajan, had entered into a concession agreement with the Odisha government in January 2008 to develop the port as an all-weather deep draft facility. Of the various proposals for setting up ports in Odisha, Dhamra port, a joint venture between Tata Steel and Larsen & Toubro Ltd (now owned by Adani Group), and Gopalpur port are operational. Tata Steel's crude steel capacity during FY16 stood at 28 million tonne per annum and the company clocked a turnover of $17.69 billion.

1. http://timesofindia.indiatimes.com/business/india-business/bigbasket-grofers-explore-merger/articleshow/56583102.cms
2. http://www.vccircle.com/news/transportation/2017/01/25/tata-steel-buy-majority-stake-odisha-port-project?logintype=premium

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Association News

CA. Dilip U. Jodhani
Hon. Secretary

CA. Riken J. Patel
Hon. Secretary

Glimpses of the Past Events

Budget Speech Cross Section

CF Patel Memorial programme

Release of Budget book

Cricket Match with IT Bar Association

International RRC

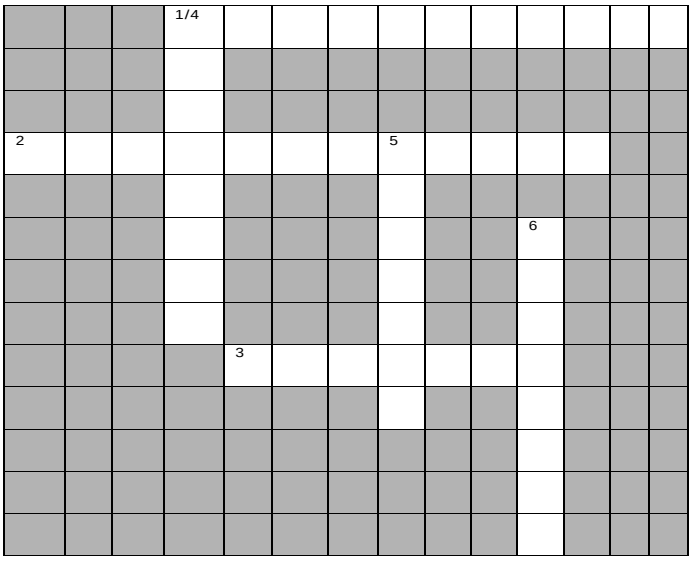
ACAJ Crossword Contest # 33

Across

1. As per the Benami Transactions (Prohibition) Amendment Act, 2016 the property which is subject matter of benami transaction can be _____ by the Central Government.
2. The intention of the _____ instrument as released by OECD is to enable all countries to meet the treaty-related minimum standards that were agreed as part of the final BEPS package.
3. BHIM is _____ based payments app developed by the National Payment Corporation of India (NPCI).

Down

4. It is well settled that if a circular issued by the Department favours an assessee then it should be so done even where such interpretation goes _____ to the legistative intent.
5. Any comment/criticism in its pure form is nothing but a _____ of that individual.
6. Crowd funding is based on the principle of crowd_____.



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 27/02/2017.
5. The decision of Journal Committee shall be final and binding.

Winners of ACAJ Crossword Contest # 32

1. CA. Ashwin Shah
2. CA. Gaurang Choksi

ACAJ Crossword Contest # 32- Solution

Across

1. Determinative
2. Partner
3. Happiness

Down

4. Digital
5. Sixty six
6. Natural

❊ ❊ ❊

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