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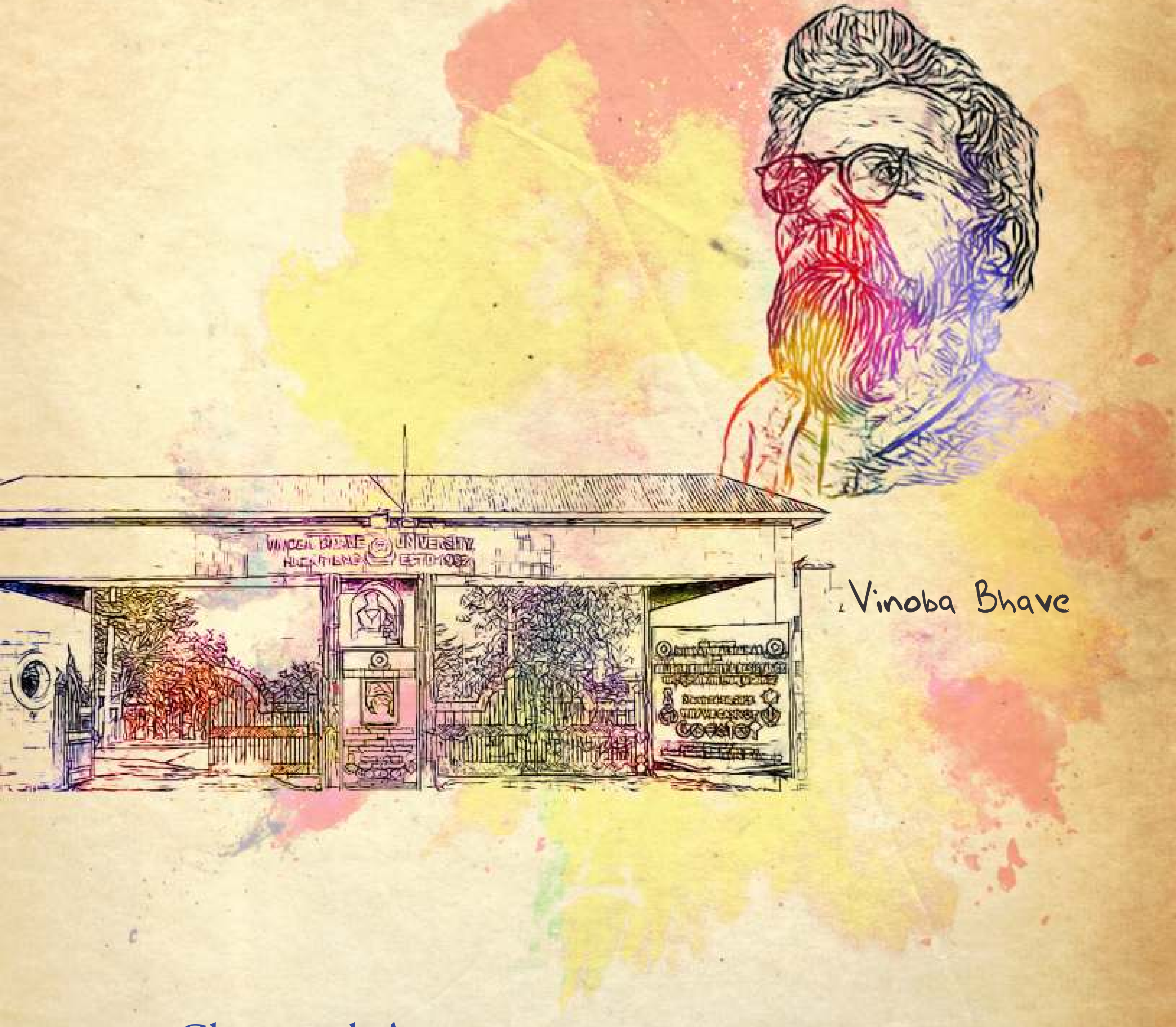

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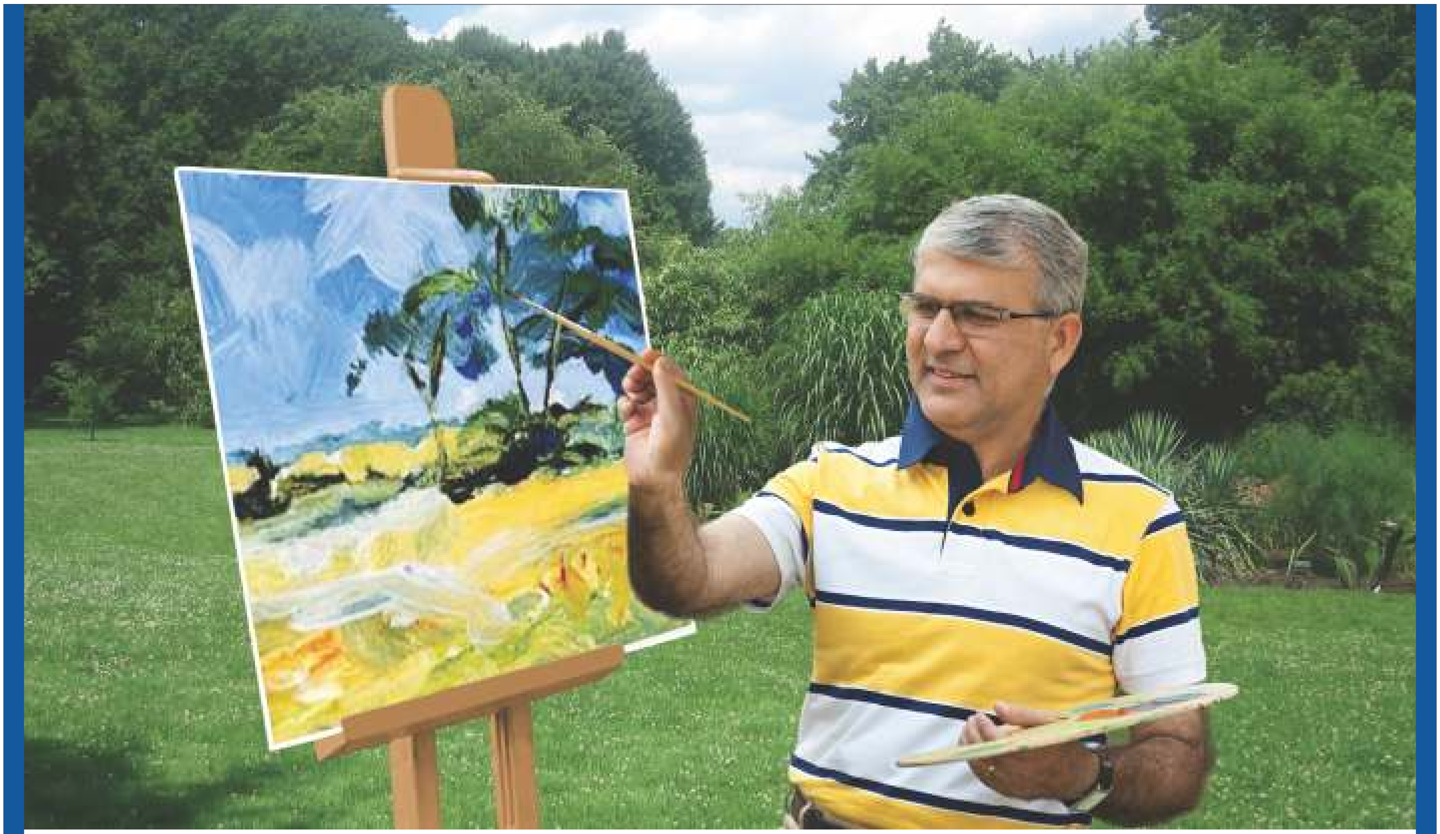

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CONTENTS

To Begin with

MananaM - *I Love You*........ *CA. Keyur Thakkar* 687

Editorial - *Change is in the Air*........ *CA. Ashok Kataria* 688

From the President........ *CA. Raju Shah*........689

Articles

Reassessment Proceedings........ *CA. Chandrakant K. Thakkar*........*690*

Agriculture Sector under the Net of GST........ *CA. Bihari B. Shah*........*693*

Direct Taxes

From the Courts........ *CA. C.R. Sharedalal &*
CA. Jayesh Sharedalal........ 696

Tribunal News........ *CA. Yogesh G. Shah &*
CA. Aparna Parelkar........ 700

Unreported Judgements........ *CA. Sanjay R. Shah*........706

Controversies........ *CA. Kaushik D. Shah*........*710*

Judicial Analysis........ *Adv. Tushar P. Hemani*........*712*

FEMA & International Taxation

Budget 2017 - Transfer Pricing Developments........ *CA. Dhinal A. Shah &*
CA. Sagar Shah........717

FEMA Updates........ *CA. Savan Godiawala*........720

Indirect Taxes

Service Tax

Recent Judgements........ *CA. Ashwin H. Shah*........722

Value Added Tax

Judgements and Updates .... *CA. Bihari B. Shah*........*724*

Corporate Law & Others

Mergers and Acquisition Corner........ *CA. Kush Desai*........727

Corporate Law Update........ *CA. Naveen Mandovara*........730

Allied Laws Corner........ *Adv. Ankit Talsania*........735

From the Government .... *CA. Kunal A. Shah*........744

Association News........ *CA. Dilip U. Jodhani &*
CA. Riken J Patel........746

ACAJ Crossword Contest........748

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Published By

CA. Ashok Kataria,
on behalf of Chartered Accountants Association, Ahmedabad, 1st Floor, C. U. Shah Chambers, Near Gujarat Vidhyapith, Ashram Road, Ahmedabad - 380 014.
Phone : 91 79 27544232

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Mobile : 98252 62512 E-mail : pratikshaprinter@yahoo.co.in

CA. Keyur Thakkar
tkeyur@hotmail.com

I Love You

The mother loves her kid even before he is born. She is the one who feels the gift of God and immediately starts bestowing her love much before she has even seen her child. When she feels the baby inside, love automatically flourishes within.

The father loves kid by inculcating orderliness and discipline. His love leads to upliftment and progress.

Extra special is sister's love. She gives a lot more than she gets. She is the one who is more than happy to make her sibling happy.

When an individual himself / herself says I love you to someone special, I comes first and that manifests little bit of possessiveness which ultimately encompasses the partner as well. Love is such a word, one falls in love with the word itself. Love is a process of a flower bud blossoming into a beautiful fragrant flower.

Love is a smell that keeps you spellbound. When love is in the air, the art develops, the momentum plays its own music, the beauty starts glowing, the stars shine, the sunshine has a soothing effect and the moonlight engrosses and overwhelms you.

There is no distinction between love and true love. It cannot be love unless it is true. It is an eternal truth. Instead of just uttering from the heart, I love you; more important is to express that my heart is there for you.

In anger, the person shouts because the other heart is at a distance, but when in love, even a slightest of whisper or gesture communicates the message.

Love is like oxygen passing through a ventilator giving enormous strength to survive.

It's not necessary that people in love always live together but even at distance they breathe together. To move on with life under any circumstances and make oneself and the surroundings happy in life is the power of love.

The aura of a person in love is like the fragrances of sandalwood.

It's easy falling in love. What is tough is to rise in love. One cannot define love but can only feel it, express it and live it. We would be living in a beautiful world when we rise to love everything around us as God's own manifestation and loving it as nothing else but the God.

Editorial

ackatariaco@yahoo.co.in

Change is in the Air

In the recently concluded elections in five states of India, BJP managed to bag four states except Punjab where Congress came to power against the 10 years of incumbent SAD and BJP led coalition government. However, the much talked about and debated state was the state of Uttar Pradesh, where the Bharatiya Janta Party with its allies received an unprecedented mandate and won 325 out of the 403 seats. Even the top BJP leaders including the prime minister and the party president would not have imagined such a thumping majority of crossing the 4/5th mark.

Uttar Pradesh and its politics has always been a major player in deciding the road map of governance of the nation. The maximum seats in LokSabha and RajyaSabha come from Uttar Pradesh. In 2014 general elections, after almost over a period of three decades we had a majority government without any support of the coalition partners. However, in RajyaSabha, the equation is different. The government still does not have the numbers. It still cannot bring in the major bills and proposals because of lack of support in the house. The present state results may not provide the majority but would increase the tally of the ruling government in the Upper House to a greater extent in the next two years.

With this change in the balance of power in the RajyaSabha, the government would now be able to initiate much needed reforms. The expectations from the market and general public are very high. This was evident in the manner in which the stock market reacted and opened after the announcement of results of the state elections. One of the positives that has emerged out of the results of the state election that none of the regional parties has been able to come to power in any of the states. Over the years, it has been these regional parties that have been playing a spoil spot as far as the development of the country was concerned. It is regional parties who brought in the politics of compulsions and governance with compromises over a period of last thirty years.

After demonetization, the bigger and major happening in waiting is the implementation of GST. It is now almost certain that we as chartered accountants have got to be ready and the date is 1-7-2017. The date is not far, we all need to gear up to accept the challenge. As we have witnessed a sudden change in the politics of the country, we would be going through the similar transformation as far as our professional practice is concerned. The emphasis would shift on GST, generating enormous professional opportunity for the chartered accountants.

Let's analyse and assess the situation. How the implementation of this new levy would affect us and the manner of our practise. It's time to look forward and accept all that is coming in the days ahead otherwise we would also be left only wondering how a sudden storm left us behind like it happened in Uttar Pradesh for all political rivals of the BJP.

CA. Ashok Kataria

From the President

CA. Raju Shah
shahmars@gmail.com

Respected seniors and dear professional colleagues,

"Life is full of challenges, seen and unseen, so to look and feel great, you must hold your head up each day and project your inner confidence."

In the country, since last one month media and all political persons are busy with the assembly elections in 5 states. Again BJP made history by winning 325 seats in UP and 77 seats in Uttarakhand. Except in Punjab in all states the BJP will be the ruling party. It seems that the BJP is marching ahead for a "Congress Mukt Bharat". Irrespective of the political rivalry and related statements, the results in the five states will boost the economy starting with the stock markets.

One more bolder step by present government is Loksabha passed the **Enemy Property Bill 2016**. It guards against the claims of succession or transfer of the properties left by people who migrated to Pakistan and China after wars. The Bill seeks to amend the Enemy Property Act, 1968, to vest all rights, titles and interests in enemy property in the Custodian. It also declares transfer of enemy property by the enemy, conducted under the Act, to be void.

As far as the activities at the Association are concerned, we played a cricket match on 18/02/2017 with Baroda Branch of WIRC of ICAI at Sabarmati Railway Ground, Ahmedabad. It was a very good competitive match where both the teams exhibited great sportsmanship and I am happy to inform you that CA Association won the match. Cricket is a global phenomenon that brings people together in a spirit of passionate competition and mutual respect. We have been enjoying T-10 Cricket Tournament with Tennis Ball since last two years. To continue the tradition and to unwind and enjoy, Sports Committee of the Association has organized 3rd **T-10 Tennis Ball Cricket Tournament** on 18/03/2017 at Adani Shantigram Cricket Ground, Nr. Vaishnodevi Circle, Ahmedabad. All are requested to come and cheer up the teams.

The Picnic Committee announced a **one-day picnic for members** and their family at "**Suryam Repose**" on Sunday, 19th March, 2017. The picnic for the members of the Association is arranged after a long time. We have got very good response and the registration was full within no time.

"Take up one idea. Make that one idea your life—think of it, dream of it, live on that idea. Let the brain, muscles, nerves, every part of your body, be full of that idea, and just leave every other idea alone. This is the way to success." *Swami Vivekananda*

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

With best regards,
CA. Raju Shah
President

Reassessment Proceedings

CA. Chandrakant K. Thakkar
ckthakkar06@gmail.com

1. Introduction :

The issue of notice u/s 148 for reopening of assessment has become a routine feature and the AO will play second inning and assessee has to pass through a cumbersome process once again and it leads to litigation and lot of time consuming job on the part of the assessee. It is to be noted that the notice under section cannot be issued at the whims of the Assessing officer. It requires set procedures to be followed and a satisfaction is to be arrived by AO and other Authorising officer i.e JCIT or CIT as the case may be whereby they have to arrive at conclusion with some evidence/ material that income has escaped assessment and some new material has come in the hands of AO.

2. Relevant Provisions for Reassessment:

(A) Section 148 for Issue of Notice where Income has Escaped Assessment:

The brief summary of said provision is as under.

- Before making reassessment or recomputation under section 147, the AO has to serve notice under section 148 of Income Tax Act,1961.
- The notice should ask to file Return of income for particular assessment year within specified time.
- Notice should include period as prescribed in Section 149.
- The assessment or reassessment has to be completed within time limit prescribed under Section 153(2).
- On receipt of return of income filed for doing reassessment under section 143(3) r.w.s 147 of I T Act,1961 or if return not filed to do assessment under section 144, the AO has to issue notice u/s 143(2) of I T Act,1961.
- As per provisions of section 148(2), AO has to record reasons before issuing notice under section 148.

(B) Section 147 for Assessment for Income Escaping Assessment:

The brief summary of said provision is as under.

- The AO has reason to believe that any income chargeable to tax has escaped assessment.
- The assessment shall be subject to provisions of section 148 to 153 of Income Tax Act,1961.
- In following circumstances, AO can do reassessment.

(a) Where no return of income has been furnished by the assessee where his income chargeable to tax was in excess of taxable limit.

(b) Where return of income has been furnished but no assessment was made.

(c) Where assessment has been done under section 143(3) with conditions as laid down in first proviso to section 147.

(d) Where assessee was supposed to file report under section 92E for any international transaction with associate enterprise.

(e) Where assessment has been made but:

- Income chargeable to tax has been under assessed.

- Such income has been assessed at too low a rate.
- Excessive relief under the Income Tax Act has been allowed or claimed.
- Excessive loss or depreciation has been claimed.
- Where on account of information available under section 133C(2) by AO, by which AO notices that income exceeds taxable limit or assessee has under stated the income or has claimed excessive loss, deduction, allowance, relief in the return of income filed.
- Where a person is found to have any asset including financial interest in any entity located outside India.

3. Procure for Reassessment:

It is not that AO can do any assessment or issue notice for reassessment as per his/her whims. Due to number of decisions including decision of Honorable Supreme court, the set procedure is to be followed by AO before issuing notice and for completion of assessment under section 143(3) r.w.s 147 of Income Tax Act,1961 which are discussed herein below.

(a) Procedure to be followed on Receipt of Notice u/s 148.

GKN Driveshafts (India) Ltd. vs ITO (2002) 125 Taxmann 963 (SC).

Above decision is a land mark decision by Hon. Apex court in the matter of reassessment of income wherein following procedure has been laid down for completing assessment u/s 143(3) read with section 147 of Income Tax Act,1961. This decision is considered as mini Bible on Section 147 of Income Tax Act,1961. The decision can be summarized as under.

- On receipt of notice u/s 148, file Return of income against said notice.
- After filing Return of income, ask for reasons recorded by AO for issuing notice u/s148.
- The AO has to furnish reasons recorded to assessee within reasonable time.
- On receipt of reasons recorded, you can file objections to reasons recorded.
- The AO is duty bound to dispose off the objections by passing a speaking order before proceeding with assessment.
- The writ petition if any is to be filed, should be filed after completing above procedure and not prior to that.

(b) Notice issued u/s 148 is without Application of mind or proper satisfaction of Escapement of Income is not valid.

If we see the provisions of section 148 it has been categorically mentioned that AO has reason to believe that income has escaped assessment, he can issue notice u/s 148 which means he cannot arbitrarily allowed to issue notice u/s 148 and can play second inning of assessment. On the basis of availability of new material and on arriving at reasonable satisfaction if he is of the opinion that income has escaped assessment, he can issue notice u/s 148. If he issues notice without application of mind and without satisfaction of escapement of income, he cannot issue notice u/s 148 and if he issues notice u/s 148 in a casual manner, the notice is invalid in the eyes of the law and assessment framed u/s 143(3) read with section 147 is bad in law and is required to be quashed. Even assessee can file writ petition in court of law against such invalid notice. The decisions given herein below support the contention of invalid notice.

- Prakriya Pharmachem vs vs ITO, Ward-7 (2016) 66 taxmann.com 149 (Gujarat)

  In above case AO in reasons recorded had stated that he is aware of transaction of gift of shares but he has not mentioned anything about how he is satisfied or how there is reason to believe that income has escaped assessment, notice is not valid in the eyes of law.

- Nirmal Bang Securities P. Ltd vs ACIT, Central Circle 41, Mumbai (2016) 67 taxmann.com 57 (Bombay).
- R P Suvarna vs ITO -18(3)(3)- Mumbai, (2016) 68 taxmann.com 14 (Mumbai-Tribunal).

(c) Letter written by assessee saying that return filed u/s 139 be treated as return filed against Notice u/s 148 is valid in the eyes of law.

It is general practice that the assessee writes a letter that Return of Income filed u/s 139 vide acknowledgement number so and so dated so and so in circle/ward so and so be treated as Return filed against notice u/s 148 of Income Tax Act,1961. However, some AOs do not consider said as valid filing of Return of Income and then they deny for providing reasons recorded referring decision of Apex court in the case of GKN Driveshaft India Ltd. (Supra) and issue notice to complete the assessment u/s 144 of Income Tax Act,1961 as valid Return of Income has not been filed by assessee. All these threats are given at a time when assessment is on the verge of getting time barred and hence, assessee is not having reasons on hand, entire procedure as referred in GKN Driveshaft India Ltd. by Apex court is not completed and hence, he cannot file writ petition in the High Court. However, one should refer following decisions wherein it has been held that letter written by assessee stating that Return filed u/s 139 be treated as return of income filed against notice issued u/s 148 is valid in the eyes of law and AO cannot proceed for best judgement assessment u/s 144 and he is supposed to furnish reasons recorded after receipt of such letter written by assessee. The decisions relied upon for above contention are as under.

- Ms. Amita Batra vs DCIT (2005) 142 Taxmann 83 (Delhi) (MAG.)/85 TTJ 92 (Delhi).
- **V. R.Sreekumar V. ITO, ward 2(4), Trichura (2012) 21 Taxmann.com 545 (Coch.) (TM) IT Appeal No. 70 of 2009.**
- **Hon. Rajasthan High Court in the case of TiwariKanhaiyalal V CIT (1985) 154 ITR 109, (1984) 19 Taxmann 497.**
- **The special Bench of the ITAT, Delhi in the case of Raj Kumar Chawla V ITO (2005) 277 ITR 225.**

(d) Change of opinion is not allowed for Reassessment.

If assessee has furnished information during assessment proceedings u/s 143(3) and subsequently either same AO or another AO due to changed opinion feels that income has escaped assessment, notice u/s 148 in such circumstances of changed opinion is not valid which has been upheld in following decisions.

- Deputy Director of Income Tax, Circle (1)(1) , International Taxation, New Delhi vs Americom Asia Pacific LLC. (2016) 69 taxmann.com 51 (Delhi Tribunal).
- Loyalty Solutions & Research Pvt Ltd. vs DCIT, Circle (1)(1), Bangalore. (2016) 67 taxmann.com 232 (Karnataka).
- CIT, Bangalore vs Chaitanya Properties Pvt. Ltd. (2016) 67 taxmann.com 201 (Karnataka).
- Allied Strips Ltd vs ACIT, Central Circle-15, (2016) 69 taxmann.com 444 (Delhi).

contd. to page 699

Agriculture Sector under the Net of GST

CA. Bihari B. Shah
biharishah@yahoo.com.

[1] Introduction:

Under Fiscal statutes like levy of Sales Tax or Service Tax, the identification of person, who will be liable to pay tax is one of the essential requirements for validity of such statute. The said principle will equally apply under Goods and Services Tax (GST) Law also.

As on to-day, GST law has not come into force nor the final provisions are in our hands. This article is prepared with reference to November 2016 version of Model GST Law (MGL) available in public domain.

Agriculture Sector plays an important role in Indian economy. The contribution in total G.D.P. of agriculture sector is about 18%. Most of the population of villages of India is depending upon agriculture and allied activities. The special treatment is enjoyed by the agriculture sector under direct tax. No income tax is applicable on the income of the sole agriculture produce, even no capital gain tax is also leviable on the transaction of sale/purchase of agriculture land subject to certain conditions.

Under the Vat Regime also, many agriculture commodities are exempt and under the Central Excise Act and Service Tax the exemption is given to basic agriculture products.

GST the tax on supply of goods and services with provision of Cenvat Credit. The model GST Law (Revised) is released by the G.S.T. Council on 26th Nov. 2016 and in this law the provision in respect of agriculture products under GST remained unchanged.

Before we touch the provisions applicable to Agriculture sector, it is necessary to understand the tax liability under GST.

[2] Person Liable to Tax:

Unless the person is covered by the scope of person liable to tax i.e. unless person is taxable person, such person cannot be made liable for payment of tax. In other words, if a person can prove that he is not covered within the scope of "Taxable Person" he cannot be made liable to pay tax. Identifying the person within the scope of person liable to tax is one of the essential parts of charging provision.

Under current Vat regime, such persons are known or called as "dealers". In GST era they will be referred to as "Taxable Person". In other words, they are person liable to tax.

The following persons shall not be liable to registration –

[a] Any person engaged exclusively in the business of supplying goods and/or services that are not liable to tax or are wholly exempt from tax under this Act.

[b] An agriculturist, for the purpose of agriculture.

[3] Subject Matter of Taxation : "Goods & Services".

GST is levied on goods and services. Hence, where "supply" constitutes aspect of the taxation, goods and services becomes subject matter of taxation. The definition of 'goods' and 'services' is contained in section 2(49) and section 2(92) of the Act as under.

"Goods" means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply.

"Service" means anything other than goods.

Explanation – 1 – Services include transaction in money but does not include money & securities.

Explanation – 2 – Services does not include transaction in money other than an activity to the use of money or its conversion by cash or ny any other mode, from one form, currency ordenomination to another form, currency or denomination for which a separate consideration is charged.

[4] Meaning and Scope of Supply: (In short)

3(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 or furtherance of business;

[b] importation of services, for a consideration whether or not in the course or furtherance of business, and

[c] a supply specified in Schedule I, made or agreed to be made without a consideration.

(2) Schedule II, in respect of mattersw mentioned therein, shall apply for determining what is, or is to be treated as a supply of goods or a supply of services.

(3) Notwithstanding anything contained in sub-section (1)

[a] activities or transactions specified in Schedule III; 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.

5(i) **What is Agriculture under GST?**

According to sub-section (2) to section 8 of Revised GST Law, taxable person is liable for payment of tax (i.e. GST) on supply of goods and/or services. Section 10 defines taxable person as, a person who is registered or liable to be registered under Schedule V of GST Act. However, according to Clause 2(b) of Schedule V to GST, an agriculturist, for the purpose of agriculture shall not be liable for registration and subsequently becomes a non-taxable person and will not be liable for the payment of GST.

Giving the land on crop sharing basis is the common practice of agriculture in India. But that will not be treated as land cultivated personally and will be subject to GST.

[ii] **Various Definitions (Revised GST Law):**

[a] **Agriculturist: [Section 2(8)]**

means as person who cultivates land personally for the purpose of agriculture.

[b] **Agriculture [Section 2(7)]:**

"agriculture" with all its grammatical variations and cognate expressions includes floriculture, horticulture, sericulture, the raising of crops, grass or garden produce and also grazing, but does not include dairy farming, poultry farming, stock breeding, the mere cutting of wood or grass, gathering of fruit, raising of man-made forest or rearing of seedlings or plants.

[c] **To cultivate Personally:**

"to cultivate personally" means to carry on any agricultural operation on one's own account –

[a] by one's own labour; or

[b] by the labour of one's family; or

[c] by servants on wages payable in cash or kind [(but not in crop share)] or by hired labour under one's personal supervision or

the personal supervision of any member of one's family;

Explanation 1 – A widow or a minor or a person who is subject to any physical or mental disability or is a serving member of the armed forces of the Union, shall be deemed to cultivate land personally if it is cultivated by her or his servants or by hired labour.

Explanation – 2 – In the case of a Hindu Undivided Family, land shall be deemed to be cultivated personally, if it is cultivated by any member of such family.

[6] **Following Activities will be taxable under GST:**

[i] Contract Farming – The Contract farming involves agricultural process between buyer and farm producer under the agreement. Here person who is buying from agriculturist will be liable to GST on subsequent sale.

[ii] Crop Sharing System – In India mostly agricultural activity is made on crop sharing. Person who does not want to cultivate the farm by his own labour and then he delivers the agriculture process on the crop sharing basis. Looking to the definition of Tax Free agricultural activity, this will not fall in exemption and therefore such activity will be in the net of GST.

[iii] Dairy Product – The business of Dairy Farming includes milk production, preparation of allied products from milk has been expanded in Indias on high level. India ranks first in term of milk production and 19% of the world production is carried out in India. In the definition under GST Act, Dairy Farming is excluded and therefore it is likely that dairy products such as Milk, Butter Milk, Curd, Butter will be under the net of GST. Under the Vat Act milk etc. is not subject to the element of tax.

[iv] Units of Food Processing – Food Processing Unit like tomato ketchup, tomato chips, potato chips are being manufactured through a process of machine and therefore such product will be subject to GST.

[v] Farm Labour supply, fimugation, grading, packing, leasing of agro machinery, warehouse services, cold storage services, transportation are likely to be under the GST net.

[vi] Poultry & Stock Breeding –Under the Vat Act and CST Act, stock breeding is not taxable. Poultry Porducts are also not taxable, however, looking to the definition of agriculture it seems that product like egg, meat, flesh of poultry and sea food perhaps will be subject to GST.

[vii]Frozen Foods – Frozen foods below -9.5 degree C will change the form and will be likely to be subject to GST.

[viii] Plant Raising in Green House – Most of the agriculturist buys the plant from nurseries and looking to the definition of agriculture concept of seed for plant raising will be subject to GST.

[ix] Cutting Wood: Looking to the definition of agricultural cutting wood or grass will be liable to GST.

[x] Other activities done by the agriculturist not fall in the exempted definition will be liable to GST.

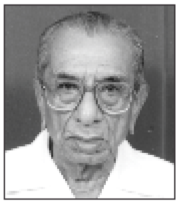
[7] **Conclusion:**

It is understood from various definitions that direct agriculture to the extent of agriculturist are not taxable but allied agricultural activities as mentioned above may likely to come under the net of GST.

We hope that GST Council should think to allocate lower slab rate for the allied agricultural activities within the net of GST.

***

From the Courts



CA. C. R. Sharedalal
jcs@crsharedalalco.com

CA. Jayesh C. Sharedalal
jcs@crsharedalalco.com

92 Whether it is necessary to keep addresses of cash sales customers

R.B. Jessaram Fatehchand (Sugar Dept) v/s. CIT
(1970) 75 ITR 33 (Bom)

Issue :

If record of addresses are not kept in respect of cash sales, whether books of account can be rejected on this account?

Held :

"The reason given by the Income Tax Officer for rejecting the book result shown by the assessee's accounts or for not accepting the cash transactions as genuine cannot be accepted as good and sufficient unless there was an obligation on the part of the assessee to keep a record of the addresses of the cash customers. It could not, therefore, be said that the failure on his part to maintain the addresses was a suspicious circumstance giving rise to a doubt about the genuineness of the transactions entered into by the assessee.

In the case of a cash transaction where delivery of goods is taken against cash payment, it is hardly necessary for the seller to bother about the name and address of the purchaser. In our opinion, therefore, the rejection of the results of the assessee's cash book by the Income Tax Officer was not at all justified".

Note : Above decision is important in respect of cash deposits in Bank Account out of cash sales. There is no obligation in the I.T. Act to keep addresses in respect of cash sales.

93 Applicability of Sec. 14A : Interest free funds and interest bearing loan : Presumption :

CIT v/s. Max India Ltd. (No.2)
(2016) 388 ITR 81 (P & H)

Issue :

In respect of applicability of provisions of Sec. 14A, how the presumption would work when there are interest free funds available and interest bearing loans?

Held :

If there be interest free funds available to an assessee sufficient to meet its investments and at the same time the assessee had raised a loan it can be presumed that the investments were from the interest free funds available. The principle therefore would be that if there are funds available both interest free and over draft or loans taken, then a presumption would arise that investments would be out of the interest free funds generated or available with the company, if the interest fee funds were sufficient to meet the investments. There is no reason to restrict the presumption to cases where funds from different sources are mixed in a common pool. The rationale for the presumption is that an assessee would utilize its funds prudently ensuring that it derives the greatest financial advantage. While it is only a presumption, it is one which is in the assessee's favour.

94 Same Business : Criteria

CIT v/s. Max India Ltd. (No.1)
388 ITR 74 (P & H)

Issue :

What is criteria for deciding whether the new business is the same business or a different business for allowance of expenditure on setting up new business?

Held :

While determining whether two or more lines of businesses of the assessee are the same "business" or "different businesses", regard must be had to the common management of the main business and other lines of businesses, unity of trading organization, common employees, common administration, a common fund and a common place of business. For evaluating the "same business", the test of unity of control and not the nature of business is to be applied.

The Commissioner (Appeals) after appreciating the evidence produced on record had observed that various businesses carried on by the assessee including health care constituted the same business of the assessee. The Appellate Tribunal was right in law in allowing the expenses for setting up new business and fee paid of Rs. 6,70,78,483 treating them as revenue in nature.

95 Sec. 158BC : Time limit of Notice : Meaning of (1) Not less than fifteen days and (2) within fifteen days.

CIT v/s. Amit K. Jain Alias Anil K. Jain (2016) 388 ITR 113 (Guj)

Issue :

What is the difference in the words in Sec. 158BC:

(1) Not less than fifteen days.

and

(2) Within fifteen days.

Held :

In making a block assessment under section 158BC of the Income Tax Act, 1961, notice is mandatory. The authority who is issuing a notice must be aware of the Act and must construe the provision strictly. The words "not less than fifteen days means, clear fifteen days which is the requirement under law.

Held that while block assessment was to be made, the Assessing Officer had knowledge about the statutory provision and while issuing notice he should have mentioned in it about his source of power and should have referred to the time which is required to be given for the purpose of filing of return under section 158BC of the Act. The words mentioned in the notice were "within fifteen days" whereas the provision mandates the time of "not less than fifteen days". The notice was not valid.

96 Payment of Bonus : Sec. 36(1)(ii), Sec. 43B(b) and Sec. 40A(9)

Shasun Chemicals And Drugs Ltd. v/s. CIT (2016) 388 ITR 1 (SC)

Issue :

Payment of Bonus and Sec. 36(1)(ii), Sec. 43B(6) and Sec. 40A(9). How to be interpreted?

Held :

Under section 36(1)(ii) of the Income Tax Act, 1961 expenditure incurred on account of payment of bonus to employees is allowable as business expenditure. Section 43B, however, mandates that certain deductions would be allowed only on actual payment. Section 40A(9) deals with deductions in respect of the amount paid by the assessee as an employer towards the setting up or formation of or as contribution to, any fund, trust, company. etc. The condition is that such sum has to be paid for the purpose and to the extent provided by or under clause (ii) or clause (iva) or (v) of sub-section (1) of section 36. However, the payment of bonus is not covered by any of the clauses of sub-section (1) of section 36 but is allowable as deduction under clause (ii) of sub section (1) of section 36. Therefore, section 40A(9) has no application. The provisions of section 43B are also not applicable in as much as clause (b) of section 43B refers to sums payable by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees. Thus, this provision also does not mention bonus. Section 36 enumerates various kinds of expenses which are allowable as deduction while computing the business income under section 28 of the Act. The amount paid by way of bonus is one such expenditure which is allowable under clause (ii) of sub section (1) of section 36.

That there was no dispute that the amount representing bonus was paid by the assessee to its employees within the stipulated time. The embargo specified under section 43B or section 40A(9) of the Act would not come in the way of the assessee. Therefore, the High Court was wrong in disallowing this expenditure as deduction while computing the business income of the assessee and the decision of the Tribunal was correct.

97 Sec. 263 Erroneous and prejudicial to the interests of the Revenue.

CIT & Anr. v/s. Saravana Developers (2016) 289 CTR 550 (Kar)

Issue :

For the purpose of Sec. 263 how the words "erroneous and prejudicial to the interests of the revenue" are to be interpreted?

Held :

The CIT proceeded to initiate proceedings under S. 263 only on the ground that the AO has not assigned any reasons for accepting the valuation of the work in progress declared by the assessee. As per the materials placed before the Tribunal in the records pertaining to the assessment year in question, a detailed examination is made by the Tribunal. Tribunal is of the view that the AO has applied his mind before accepting the figure declared by the assessee in the work in progress report. Such an order cannot be held to be erroneous and prejudicial to the interests of the Revenue. It is not a case of 'lack of inquiry'. Further inquiry ordered by the CIT would amount to fishing/rowing inquiry in the matter already concluded.

98 Notice u/s 158 BC in search case when no incriminating material is found :

Dr. Gautam Sen v/s. Chief CIT and Ors. (2016) 289 CTR 478 (Bom)

Issue :

Can assessment proceedings be taken when no incriminating material is found during search proceedings ?

Held :

From the appraisal report also, it is clear as day light that no incriminating documents were found during the course of search nor was it found that the assessee was in any manner involved in the bank account with his name in the bank. Thus, it appears that the Revenue took search and seizure proceeding in respect of the assessee on account of mistaken identity. In any case the appraisal report would indicate that no notice under S. 158BC could be issued to the assessee as the condition precedent issue notice under S. 158BC. Viz. undisclosed income found during the search proceedings, is not satisfied.

Action on the part of the Revenue to issue the impugned notice ignoring the appraisal report is highly deplorable. We live in a county governed by laws. The officers of the I.T. Department are obliged to proceed in accordance with the statutory provisions and not on their whim and fancy. The officers hold power in trust and must ensure that no citizen is harassed by sending him notices, when on the basis on its own record, such notices are not sustainable. The IT Department would adopt a standard operating procedure which would provide for appropriate safeguards before issuing notices under Chapter XIV-B. This alone would ensure that officers of the Revenue act in terms of the mandate provided in the Act.

Counsel for the Revenue informed that the Revenue seeks to press the impugned notice and seek dismissal of the present petition. In the above view, this is the fit case where costs should be awarded to the assessee. The Revenue i.e. the jurisdictional Chief CIT is directed to pay the costs of Rs. 20,000/- to the assessee within four weeks from today.

99 Interpretation of Statues

IVRCL-JL (JV) v/s. Asstt. CIT (2016) 386 ITR 564 (T & AP)

Issue :

How the Rules and Provisions to be interpreted?

Held :

It is settled law that Rules made under the Act should be interpreted in conformity with the provisions of the Act.

It is a fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. It is to be construed harmoniously with the main enactment.

100 Validity of Notice u/s 271(1)(c)
CIT v/s. SSA's Emerald Meadows
SLP (C) No. 23272 of 2016
386 ITR Supreme Court Reporter @ P13 (Part 4)

Issue :

When notice is not specific, whether the same is valid ?

Held :

Hon. Supreme Court in the case has dismissed the special leave petition against the judgment of Karnataka High Court , holding that the notice issued by Assessing Officer u/s 274 read with section 271(1)(c) of the I.T. Act, 1961 was bad in law as it did not specify under which limb of section 271(1)(c) the penalty proceedings had been initiated i.e. whether for concealment of income or for furnishing inaccurate particular of income.

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contd. from page 692

- Swati Saurin Shah vs ITO Ward 5(2)(4), (2016) 70 taxmann.com 72 (Gujarat).
- R P Suvarna vs ITO -18(3)(3)- Mumbai, (2016) 68 taxmann.com 14 (Mumbai-Tribunal).
- Alcatel Lucent France vs Assistant Director of Income Tax (2016) 69 taxmann.com 379 (Delhi).

(e) If AO of X Circle /ward has issued Notice u/s 148, AO of another Circle/ward cannot do Assessment or AO doing Original Assessment only has jurisdiction to issue Notice u/s 148.

Dushyantkumar Jain vs DC IT, (2016) 66 taxmann.com 126 (Delhi)

(f) Where Information received by AO is subject to litigation, Assessment is to be stayed till finality of said litigation.

In Raghuveer Metal Industries Ltd. vs ACIT (2016) 69 taxmann.com 30 (Rajasthan), it was held that the notice u/s 148 was issued based on search by Excise department alleging clandestine removal of goods but assessee had challenged said matter with tribunal. It was held that till finality by tribunal reassessment proceedings should be stayed.

The above decision was given by Hon. Rajasthan High Court relying on the decisions of Bhupen Champaklal Dalal (2001) 248 ITR 830/ 116 Taxman 746 (SC) and Kund Kund Pravachan Sansthan Vs Union of India (MP High Court) wherein it was held that where underlying proceedings have not reached finality, reassessment proceedings needs to be stayed. So far as limitation period for completion of reassessment proceedings are concerned, Explanation -1(ii) to Section 153, excludes period stayed by an order of injunction of any court in computing period of limitation.

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Tribunal News

CA. Yogesh G. Shah
yshah@deloitte.com

CA. Aparna Parelkar
aparelkar@deloitte.com

61 ACIT Vs. BSR & Company

72Taxmann.com 12/182 TTJ 544 (Mum)
Assessment Year: 2008-09
Order Dated: 08th July 2016

Basic Facts

The AO in this case observed that the assessee had made payments to various entities on account of professional fees outside India without deducting tax at source thereon. On being required to show cause by the AO as to why the aforesaid payments of professional fees outside India should not be disallowed under section 40(a)(i) of the Act, the assessee, explained that the payments were made to various non-residents and these payments were not in the nature of income chargeable to tax in India and therefore it was not required to deduct tax at source thereon in terms of section 195 of the Act. The AO, however, did not accept the explanations put forth by the assessee. The assessment was completed wherein disallowance under section 40(a)(i) was made in respect of payment so made without deduction of tax at source. Aggrieved by the assessment order, the assessee preferred an appeal before the learned CIT (A). The learned CIT (A) held in favour of the assessee and hence department is in appeal.

Issue

Whether payment made for services rendered outside India was taxable in India and assessee was liable to deduct tax at source on the same.

Held

It is seen that the payments have been made to seven different entities based in four different countries. In respect of payments made to US entities, the same have been made in respect of professional services rendered in relation to taxation services and audit services, which have been rendered by these entities outside India. The Revenue had contended that such services were in the nature of 'fees for technical services' (FTS) and liable to tax in India. The Tribunal found that there was no material to establish that any technical knowledge, skill, etc. have been made available to the assessee in order to establish that it falls within the purview of Article 12 of the Indo-USA DTAA. It was also found that the non-residents recipients did not have any permanent establishment (PE) in India. In respect of payments made to UK entities the tribunal notes that they also did not have any PE in India and that these entities were eligible for the benefit of Article 15 of the Indo-UK DTAA dealing with independent personal services. Accordingly the Tribunal held that in the factual circumstances of the case the amounts paid by the assessee to non-resident parties in USA as well as the non-resident entities in UK for rendering of professional services cannot be held to be eligible to tax in India, so as to require deduction of tax at source thereon and therefore invoking of the provisions of section 40(a)(i) of the Act to disallow the same was not sustainable. The same ratio was held to be applicable in respect of the payment made by the assessee to Ireland entity for audit services. The tribunal further held that said services cannot be construed as managerial or technical services so as to be governed by Article 13 of India-Ireland DTAA as contended by Revenue. They were clearly in the nature of independent personal services coming within the purview of Article-14 of the India-Ireland DTAA and therefore in the absence of any fixed place of business of the recipient, the said payments/income is not eligible to tax in India. In respect of payment to Indonesia entity for audit services, the tribunal found that the DTAA with Indonesia did not cover Fees for Technical services but the payment was covered under Article 14 and in absence of any fixed place of business of the recipient, even this payment was held not liable to tax in India.

The Tribunal further held that even if the services by the aforesaid entities are in the nature of FTS and are rendered and utilized in India so as to be taxable in terms of section 9(1)(vii) of the Act, even then the disallowance is not warranted. The requirement of rendering services in India in order to attract section 9(1)(vii) of the Act was removed by insertion of Explanation by the Finance Act, 2010 with retrospective effect from 1/4/1976. Such retrospective amendment would be determinative of the tax liability in the hands of the recipients of income. The impugned income was not subject to tax deduction at source in India as per the prevailing legal position. Taxability of a sum in the hands of recipient, on account of a subsequent retrospective amendment would not expose the assessee-payer to an impossible situation of requiring deduction of tax at source on the date of payment.Therefore, on this count also the Tribunal held that the assessee cannot be held to be in default in not deducting tax at source so as to trigger the disallowance under section 40(a)(i) of the Act.

62

Stempeutics Research P. Ltd. Vs. JDIT 75 Taxmann.com 240/ 161 ITD 677 (Bang)
Assessment Years: 2011-12 & 2012-13
Order Dated: 16th September 2016

Basic Facts

The assessee is a research driven company formed with a mandate of R&D and manufacturing of Therapeutic Product based on stem cells. 'SRM, Malaysia' is a subsidiary of assessee and based at Malaysia. This subsidiary is a stem cell research company engaged in development and manufacturing of product based on stem cells. Research activity which are not being carried out in India are done at SRM, Malaysia. A Product Development Agreement (PDA) was entered into between the assessee and the Cipla Ltd. for carrying assessee's research activity at all the units both the assessee and its Malaysian subsidiary. In consideration the assessee would grant M/s. Cipla Ltd., the exclusive right to purchase all its products. Malaysia subsidiary carried out clinic trial and R&D on behalf of the assessee and expenses incurred towards research activity of clinical trial and R&D are reimbursed by the assessee. The AO held that the payment by the assessee to its subsidiary is Fees for Technical Services (FTS) and therefore chargeable to tax in India on gross basis and, consequently, the assessee was under obligation to deduct tax at source under Section 195 failing which the assessee is liable as assessee-in-default under Section 201(1) and 201(1A) of the Act. Aggrieved, the assessee preferred an appeal with the CIT(A). The CIT(A) upheld the order of the AO.

Issue

Whether the reimbursement of expenses by the assessee to its subsidiary company for conducting clinical trials & R&D was Fees for Technical services as per DTAA and assessee would be liable to deduct tax at source under section 195?

Held

There is no dispute that as per the MOU between the parties, the cost of R & D as well as clinical trials undertaken by the assessee and its Malaysian subsidiary was to be borne by Cipla and in turn outcome of the R & D as well as clinical trials will be belonging to Cipla. Thus, the outcome product of the R & D as well as clinical trials would not belong to the assessee or its subsidiary but Cipla had the right over the same. Therefore, Cipla has right to acquire the outcome in the shape of technical information, technology documentation, know how and/process involved in all clinical R&D. Though the assessee has reimbursed the expenses to its subsidiary however in case the payment is considered as tax for technical services then the element of profit becomes irrelevant as the gross payment is taxable. The definition of Fees for Technical Services (FTS) of the Indo-Malaysia DTAA provides under article 13(3) that the term 'fees for technical services' means payment of any kind in consideration for the rendering of any managerial, technical or consultancy services including the provision of services by technical or other personnel but does not include payments for services mentioned in article 14 and article 15 of this agreement. Thus, it is clear under article 13(3) of DTAA in question there is no clause of make available and the terms FTS means payment of any kind in consideration for rendering of managerial, technical or consultancy services/provision for services by technical or other personnel. Conducting clinical trials & R&D is clearly a service which is technical in nature therefore providing the outcome of the research to Cipla through the assessee clearly falls under the ambit of the term FTS as per the article 13 of the DTAA between India & Malaysia.

The tribunal accordingly upheld the order of the CIT(A).

63

ACIT Vs. Zydus Infrastructure Pvt. Ltd. 72 taxmann.com 199/161 ITD 611 (Ahd)
Assessment Year: 2009-10
Order Dated: 21st July, 2016

Basic Facts

The assessee is a private limited company engaged in the business of development, operation and maintenance of Pharma Special Economic Zone (SEZ). Assessee claimed expenditure on account of computer software as revenue expenditure, but AO while scrutinizing these expenses was of the view that expenditure incurred onpurchase of software was basically a license fees and is capital in nature subject to 25% depreciation. The CIT(A) held thatsoftware license expenditure which are valid for long term but are part and parcel of the computer system and are eligible for 60% depreciation. Aggrieved by the CIT(A)'s ruling, revenue is in appeal.

Issue

Whether expenditure incurred on software licence valid for long term is eligible for depreciation @ 60%?

Held

The Hon'ble ITAT held that the treatment of the software by the AO as intangible asset and allowing depreciation @ 25% is not justified as the computer software hasbeen grouped as eligible to rate of depreciation @ 60% and, therefore, AO should have allowed the depreciation @ 60% in place of 25% allowedby him. The Hon'ble ITAT further held that software application which are having validity for long term period are basically system software onwhich computer hardware runs and it is impossible to use computerwithout having such software installed on it and, therefore, suchlicensed software are subject to depreciation @ 60%. Thus, Revenue's ground was dismissed.

64

Raja Shekhar Swaminathan Iyer vs. DCIT 73 taxmann.com 228/160 ITD 638 (Mum).
Assessment Year: 2009-10
Order Dated: 27th July 2016

Basic Facts

The assessee claimed interest under section 244A however since the refund determined was less than 10 per of gross tax, the same was denied by the AO. On appeal, the CITA(A)affirmed the order of the AO. Aggrieved, the assessee is before the ITAT.

Issue

Even when refund determined was less than 10 per cent of gross tax, whether assessee would be entitled to interest under section 244A on amount of refund for period of delay?

Held

Before the Tribunal the assessee fairly accepted that in case amount of refund is less than 10% of the gross tax as determined in sub-section 143(1), then, no interest is payable to the assessee. But, if the amount payable to the assessee is withheld by the department beyond that date and that too without any reasons attributable on the part of the assessee, then amount of interest should be granted to the assessee for the period during which amount is withheld by the department beyond the date of passing of order u/s 143(1). The Tribunal observed that the provisions with regard to deduction of tax at source by the payers are quite stringent. The payers are bound to deduct the tax at source from the payments made to the payees irrespective of the facts whether any amount of tax would be payable by the payee on its income or not. Further, it is very difficult to estimate the exact amount of taxable income in view of uncertainties in life and business coupled with complex provisions of law and various deductions and exemptions as may be available to an assessee, and therefore, assessee is at times required to pay advance tax purely on estimate basis. Under these circumstances, the assessee under stringent provisions of the law ends up in paying more amounts of tax then he is liable to pay in a particular assessment year. On the top of that, there is no provision under the income tax law which permits an assessee to set off the extra amount of tax paid by an assessee in a particular year against the amount payable in the subsequent year at the time of filing of return for subsequent year. Under these circumstances, the revenue is expected and obliged under the law to return the excess amount collected from the assessee as per the earliest occasion while framing order/intimation under section 143(1). The state is not expected to enjoy unjust enrichment at the cost of the tax payers. Article 265 of Constitution of India clearly says that no tax can be collected except with the authority of law. Under these circumstances, various courts have time and again issued strict instructions and guidance to the revenue authorities to refund the amount of excess tax collected from the assessee on its earlier convenience. It is further noted that the Central Board of Direct Taxes had also come out with various instruction to avoid undue hardship to the tax payers. With these observations the Tribunal held that there was no proper justification on the part of the revenue to withhold the amount of refund beyond the date of issuance of intimation/order under section 143(1). Upto the date of passing order/ intimation under section 143(1), no interest shall be payable by the department to the assessee because of clear provisions of law on the statute in this regard, but for the period of delay in issuing the refund after the date of passing of the order under section 143(1), the assessee is entitled for interest and revenue is liable to pay it to the assessee. Thus, the AO was accordingly directed to grant the interest under section 244A for the period falling between the date of passing of order under section 143(1) and actual date of granting of refund, at the rate of interest as would have been applicable if the refund amount would have been for an amount more than 10 per cent of the gross tax.

65

Orchid Pharma Ltd. [2016] 162 ITD 303 (Chennai)
Assessment Year: 2011-12
Order Dated: 29th November 2016

Basic Facts

The assessee is a global pharmaceutical company. It entered into distribution channel arrangements with certain entities namely Northstar and Actavis (herein after referred as ‘DPs’), which were in a position to market the assessee’s products. In percentage terms the exports through this distribution partner channel worked out to under 5 per cent of total sales and under 6 per cent of total exports.

The Transfer Pricing Officer relying upon findings of the settlement commission was of the view that the assessee and its distribution partners were associated enterprises under section 92A(2)(i). It was observed that that selling price were determined exclusively by the distribution channel partners and the assessee had no control or influence over the matter. It was also noted that these distribution channel partners exercise substantial control, in the form of management committees and executive committees etc. in as much as even sourcing of raw material is subject to approval by suchcommittees. This influence was not only on the existing products but also on what products the assessee is to develop in future.

On the other hand the assessee argued that it had not been established that there was any participation at enterprise level and only influence at transaction level had been attempted to be established. It further argued that the prices and other conditions were not influenced by the DPs. It argued that the quantum of sales (%) had no relevance as long as the other limb of the clause (viz. ‘influence’ on prices and other conditions) was satisfied and the final place (at which the goods are sold to the end customers) is exclusively decided by the DPs.

Issue

Whether two enterprises can be treated as associated enterprise in a situation in which the conditions, set out in section 92A(1) are clearly not fulfilled, even if the conditions under one of the clauses of section 92A(2) are fulfilled?

Held

Section 92A(1), which refers to the participation in management, control or capital of the other enterprises, extend only to such extent as covered by section 92A(2). In other words, even when it is an admitted situation that the assessee has participated in control, capital or management of the other enterprise, the assessee will not be treated as an AE of the other enterprise unless the conditions set out in one of the clauses of section 92A(2) are satisfied. It is in this sense that both the limbs of section 92A are required to be read together. In this case wordings of section 92A(2) are admittedly satisfied, but the mandate of section 92A(1) is not satisfied in as much as the scale of inter se business relations between the two enterprises is so insignificant, at less than 5 per cent of entire sales, that there is no element of de facto control over the other enterprise so as hold that two enterprises are associated enterprises.

In a situation in which the conditions, with respect to a set of enterprises, set out in section 92A(1) are clearly not fulfilled, even if the conditions under one of the clauses of section 92A(2) are fulfilled, such enterprises cannot be treated as associated enterprise under section 92A. In the given case there is a situation in which condition under section 92A(2)(i) is clearly satisfied on the facts of this case, the scale of commercial relationship is so insignificant vis-à-vis total business operations of the assessee that there is admittedly no participation in control by one of the enterprise over the other enterprise so as to satisfy the mandate of section 92A(1). Accordingly the DPs cannot be considered to be associated enterprises of the assessee.

Further, the Hon'ble ITAT has held that there is an in advertent omission, with respect to threshold for application of section 92A(2)(i).

66 Nagarjuna Fertilizers & Chemicals Ltd. Vs. ACIT [2016] 78 Taxmann.com 264 (Hyderabad)

Assessment Years: 2011-12 and 2012-13
order Dated: 13th February 2017

Basic Facts

The assessee had made certain payments in the nature of fees for technical services to non-residents during the assessment years 2011-12 and 2012-13. Some payments were made to non-residents in jurisdictions with which India did not have any Double Taxation Avoidance Agreement '(DTAA'). In such cases, the taxpayer deducted tax at source @ 20% under section 206AA as the non-residents did not furnish Permanent Account Number ('PAN'). Some payments were made to non-residents in jurisdictions with which India had DTAA. In such cases, even though the non-residents did not furnish PAN, tax was deducted at the lower rates prescribed under the DTAA. The TDS returns were processed and the assessee was held to be liable to deduct tax at source @ 20% in cases where PAN of the payees were not furnished. Accordingly, intimations under section 200A and demand notices under section 156 of the Income-tax Act, 1961 ('Act') were issued to the assessee. Against the said intimations, the assessee filed an appeal before the CIT(A). The CIT(A) relying on the decision of the Bangalore Tribunal in the case of Bosch Limited (115 TTJ 354) held that section 206AA of the Act, starting with a non-obstante clause, will override all other sections of the Act and therefore, the assessee either has to obtain and furnish PAN of the deductee or deduct tax at source at the higher rate of 20%.

There were conflicting decisions of the Bangalore Tribunal in the case of Bosch Limited (supra) and the Pune Tribunal in the case of Serum Institute of India Limited (68 SOT 254) and certain other reasons given in the referral order, a Special Bench was constituted to decide the issue.

Issue

Whether on the facts and circumstances of the case, provisions of section 206AA of the Act will have an overriding effect for all other provisions of the Act, and that being the case, assessee is required to deduct tax at the rate - prescribed therein in case of persons having taxable income in India, including non-residents, who do not furnish their PAN?

Held

The Tribunal rejected the argument of the tax department that DTAA does not provide rates for deduction of tax at source and hence, the rates under the Act needs to be considered for deduction of tax at source. It held that as per the provisions of section 195(1) read with section 2(37A) of the Act rates in force includes the rate of tax specified in the relevant DTAA. Relying on the decision of the Hon'ble Karnataka High Court in the case of Smt. A. Kowsalya Bai (346 ITR 156), the Tribunal held that the provisions of section 206AA are required to be read down so as to make them inapplicable in the cases of concerned non-resident payees who were not under an obligation to obtain the PAN. The Tribunal relying on the following decisions held that the legal position is abundantly clear that whenever there is a conflict between the provisions of the DTAA and the Act, the provisions of DTAA will prevail and override even the charging provisions under the Act:

Azadi Bachao Andolan (Supreme Court) (263 ITR 706)

P.V.A.L. Kulandagan Chettiar (Supreme Court) (267 ITR 654)

Sanofi Pasteur Holdings SA (Andhra Pradesh) (354 ITR 316)

Relying on the Supreme Court decisions in the case of Eli Lilly & Co. (India) (P.) Ltd. (312 ITR 225) and GE India Technology Cen. (P.) Ltd. (327 ITR 456), the machinery provisions dealing with tax deduction at source have to be read in conformity with the charging provisions. The provisions for deduction of tax at source and the charging provisions of the Act form one single integral inseparable code and, therefore, the provisions of TDS cannot be independent of the charging provisions. Accordingly, it was held that the DTAA provisions which override the charging provisions of the Act by virtue of section 90(2) would also override the machinery provisions of section 206AA irrespective of non-obstante clause contained therein and the same is required to be restricted to that extent and read down to give effect to the relevant provisions of the DTAA. The Tribunal also accepted the contention of the taxpayer that if the statute wanted the provisions of section 206AA to override the provisions of DTAA then it would have specifically amended section 90 by inserting a provision to that effect. The basis for the said argument was that in spite of the provisions of General Anti-Avoidance Rule ('GAAR') having a non-obstante clause, section 90 was amended to provide specifically that notwithstanding the provisions of section 90(2), provisions of GAAR shall apply even if such provisions are not beneficial to the taxpayer. The Tribunal rejected the reliance placed by the tax department on the Bangalore Tribunal decision of Bosch Limited (115 TTJ 354) stating that the said decision has not discussed the above aspects such as overriding effect of the DTAA provisions or the limited effect of the non-obstante clause contained in section 206AA, etc. The Tribunal affirms the rulings of the Pune Tribunal in the case of Serum Institute of India Limited (68 SOT 254) and thus, provides that section 206AA of the Act cannot override the provisions of section 90(2) of the Act.

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Unreported Judgements

CA. Sanjay R. Shah
sarshah@deloitte.com

In this issue we are giving gist of a very important decision of Hon'ble Gujarat High Court in Tax Appeal No. 824 of 2016 in the case of Principal Commissioner of Income Tax v/s IDMC Limited delivered by the Hon'ble Gujarat High Court on 25/01/2017. The issue decided by the Hon'ble High Court is in respect of additional depreciation u/s 32 (1)(iia) of the Income Tax Act, wherein the words used are "Acquired and Installed". The issue which fell for consideration before Hon'ble High Court was that in the facts of the case when the machineries were acquired prior to 31/03/2005 and were installed after 31/03/2005, whether the claim of the appellant to get additional depreciation in A.Y. 2006-07 was admissible claim.

The Hon'ble High Court after dealing extensively with the jurisprudence regarding interpretation of statutes held that the assessee cannot be denied benefit of additional depreciation in the assessment year 2006-07 when the assets were installed and commissioned.

We hope the readers would find the same useful.

In the High Court of Gujarat Ahmedabad
Tax Appeal No. 824 of 2016

Pr. Commssioner of Income Tax Vadodara -2.
……. Appellant(s)
v/s
M/s IDMC Limted …. Opponent(s)

Appearance :
Mr. K. M. Parikh, Advocate for the Appellant(s) No. 1
Mr. Manish J. Shah, Advocate for the Opponent (s) No. 1

Coram : Honourable Mr. Justice M. R. Shah
and
Honourable Mr. Justice B.N. Karia

Date : 25/01/2017

Gist only

(A) Question before Hon'ble Gujarat High Court :

"Whether on the facts and circumstances of the case and in law, the Tribunal was justified in law in allowing additional depreciation claim of Rs.2,18,50,976/- @ 20% under section 32 (1)(iia) of the Income-Tax Act, 1961 on the machinery purchased before 31st March 2005, but installed after 31st March, 2005"?

(B) Facts of the case :

1.0 The assessee is mainly engaged in the business of fabrication and manufacturing of equipment / poly-film rolls used in dairy, pharmaceuticals, beverages and other industries. The concerned A.Y. is 2006-07. The assessee claimed additional depreciation u/s 32(1)(iia) of Rs.2,18,50,976/- @ 20% on newly purchased Flexo Printing machinery of Rs.10,92,54,880/-. The said machinery were purchased on 12/2/2004 i.e. in the previous year relevant to A.Y. 2004-05. However, the said machinery was installed on 15/4/2005 relevant for A.Y. 2006-07 as there was accident to the machines while being transported and some damaged parts were to be replaced.

The original assessment was made u/s 143(3), where such additional depreciation was allowed by A.O. However, due to the Revenue Audit objection, the same was sought to be disallowed by resorting to reopening of the assessment u/s 147. The department accordingly withdrew the allowance of additional depreciation claimed by the assessee in the reassessment proceedings.

2.0 In the first appeal before CIT(A), the assessee lost. In further appeal to Tribunal, the Tribunal allowed the claim of the assessee mainly relying on the decision of Hon'ble Supreme Court in the case of Bajaj Tempo Ltd. v/s CIT 196 ITR 188 and Calcutta High Court decision in the case of CIT v/s Surama Tubes (P) Ltd. 201 ITR 124. The department carried the matter in further appeal to Hon'ble Gujarat High Court.

(C) Contentions before Hon'ble High Court:

1.0 The Departmental Counsel mainly relied on the language of section 32 (1)(iia) and contended that when the machinery were purchased before 31/3/2005, but installed after 31/3/2005 the conditions for claiming additional depreciation u/s 32(1)(iia) were not satisfied. According to Department Counsel, the assets are required to be installed and used in the same year. He further contended that the relief granting provision in the tax matters are required to be interpreted **strictly and literally.**

2.0 On the other hand, Counsel for the assessee contended that the Tribunal decision is very well reasoned and the facts of the case are squarely covered by the decision of Hon'ble Calcutta High Court in the case of Surama Tubes (P) Ltd. The Counsel for the assessee also took the Hon'ble Judges through the objectives for grant of additional depreciation u/s 32(1)(iia) and also pleaded that considering the objective behind the enactment of section 32(1)(iia) liberal and purposive interpretation should be adopted. He also pointed out that the machinery was purchased on 12/2/2004. However certain damaged parts of machinery were required to be replaced, which were done on 13/12/2004 and thereafter the machinery were installed on 15/4/2005, i.e. after 31/3/2005. It is submitted that if the contention of the revenue is accepted, the assessee will never get additional depreciation either in the previous A.Y. or for the year under consideration, i.e. either in A.Y. 2005-06 or 2006-07. It was submitted that such interpretation will defeat the purpose of object of enactment of section 32(1)(iia). He relied on several decisions of Hon'ble Supreme Court and High Courts to support his views.

(D) Decision:

1.0 The Hon'ble Gujarat High Court after reproducing provisions of section 32, 32 (1)(iia), etc. decided as under:[Page 10 of the decision]

"The purpose and object of section 32(1)(iia) of the IT Act seems to be to give a boost to the manufacturing sector by allowing the deduction of a further sum equal to 20% (prior to amendment – 15%) of the actual cost of such machinery or plant acquired and installed. Therefore, underlying object and purpose is to encourage the industries by permitting the assessee setting up the new undertaking / installation of new plant and machinery to claim the benefit of additional depreciation. Keeping in mind the above object and purpose the question posed for consideration of this Court is required to be considered.

[5.1] It is the case on behalf of the Revenue that the language used in section 32(1)(iia) of the IT Act is that a further

sum equal to 20% of actual cost of any new machinery or plant ***acquired and installed****after 31st Day of March 2005 by the assessee engaged in the business of manufacturing or production of any article or thing, is allowed as deduction as further depreciation. Therefore, it is the case on behalf of the Revenue that on literal interpretation of the provision of Section 32(1)(iia) of the IT Act, while framing the deduction as further depreciation under Section 32(1)(iia) of the IT Act, the assessee must have acquired and installed new plant and machinery on which the additional depreciation is claimed after 31.03.2005. It is the case on behalf of the Revenue that in the present case as the plant and machinery was acquired / purchased before 31.03.2005, the assessee is not entitled to the additional depreciation under Section 32(1)(iia) of the IT Act. On the other hand it is the case on behalf of the assessee that the provision of section 32(1)(iia) of the IT Act is required to be construed purposefully and literally (sic. liberally) so as to achieve the object and purpose of the additional depreciation allowable under Section 32(1) (iia) of the IT Act.*

[6.0] At this stage few decisions of the Hon'ble Supreme Court relied upon by the learned Counsel appearing on behalf of the assessee are required to be referred to and considered.

[6.1] In the case of R.B. Jodha Mal Kuthiala (Supra) the Hon'ble Supreme Court has observed that it is true that equitable considerations are irrelevant in interpreting tax laws. But, those laws, like all other laws, have to be interpreted reasonably and in consonance with justice.

[6.2] In the case of Shree Sajjan Mills Ltd. (Supra), the Hon'ble Supreme Court has observed that the principle that fiscal statutes shall be strictly construed does not rule out the application of the principles of reasonable construction to give effect to the purpose or intention of any particular provision as apparent from the scheme of the IT Act, with the assistance of such external aids as are permissible under the law.

[6.3] While interpreting section 127A of the IT Act, in the case of Administrator Municipal Corporation, Bilaspur (Supra), the Hon'ble Supreme Court has observed that the mechanical approach to construction is altogether out of step with the modern positive approach. The modern approach is to have a purposeful construction that is to effectuate the object and purpose of the IT Act. Thereafter it is observed and held that section 127A, must therefore, receive a purposeful construction as any other construction would render proviso nugatory and defeat the object of the IT Act.

[6.4] In the case of Deepak Maharaj (Supra), it is observed and held as under:

"Normally Courts should be slow to pronounce the legislature to have been mistaken in its constantly manifested opinion upon a matter resting wholly within its will and take its plain ordinary grammatical meaning of the words of the enactment as affording

the best guide, but to winch up the legislative intent, it is permissible for courts to take into account of the ostensible purpose and object and the real legislative intent. Otherwise, a bare mechanical interpretation of the words and application of the legislative intent devoid of concept of purpose and object will render the legislature inane."

"In given circumstances, it is permissible for Courts to have functional approaches and look into the legislative intention and sometimes it may be even necessary to go behind the words and enactment and take other factors into consideration to give effect to the legislative intention and to the purpose and spirit of the enactment so that no absurdity or practical inconvenience may result and the legislative exercise and its scope and object may not become futile."

2.0 Thereafter, the Hon'ble High Court also referred to similar such views of the Hon'ble Supreme Court in the case of K.P. Varghese v/s ITO 131 ITR 597, CIT v/s J.H. Gotla 156 ITR 323, CWS (India) Ltd. v/s CIT 208 ITR 649, CIT v/s Texttool Co. Ltd. 263 CTR 257, Sanjeev Lal v/s CIT 365 ITR 389 and held as under:

"[7.0] Applying law laid down by the Hon'ble Supreme Court in the aforesaid decisions to the facts of the case on hand, if the submission on behalf of the Revenue is accepted, in that case it will lead to an absurd and unjust result and the purpose and object of granting the additional depreciation will be frustrated. If the contention on behalf of the Revenue is accepted, in that case, the assessee shall never get the additional depreciation as provided under Section 32(1)(iia) of the IT Act. In the facts and circumstances of the case, the twin conditions of the acquired and installed shall never be satisfied in a year and therefore, the assessee shall never get any depreciation. The purpose and object of granting additional depreciation under Section 32(1)(iia) of the IT Act is stated hereinabove i.e. to encourage the industries by permitting the assessee setting up the new undertaking / installation of new plant and machinery and to give a boost to the manufacturing sector by allowing additional depreciation deduction. Thus, as rightly held by the learned ITAT the provision of section 32(1)(iia) of the IT Act is required to be interpreted reasonably and purposively as the strict and literal reading of section 32(1)(iia) of the IT Act will lead to an absurd result denying the additional depreciation to the assessee though admittedly the assessee has installed new plant and machinery. Under the circumstances, no error has been committed by the learned ITAT in allowing the additional depreciation at the rate of 20% on the plant and machinery installed by the assessee after 31st Day of March 2005 i.e. the year under consideration. No substantial question of law arise.

[8.0] In view of the above and for the reasons stated above, present Tax Appeal deserves to be dismissed and is, accordingly, dismissed. The question of law is answered against the Revenue and in favour of the assessee."

Accordingly, department's appeal was dismissed.

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Controversies

CA. Kaushik D. Shah
dshahco@gmail.com.

Issue

When there are number of transactions of purchase and sale of shares, whether profit or loss should be treated as Business Income or Capital Gain?

Proposition

The magnitude and frequencies and the ratio of sales to purchase is not decisive as to whether a particular holding of shares is by way of investment or it is adventure in the nature of trade. If the intention is to obtain a capital asset, the purchases and subsequent sales of shares to realize higher gain cannot be regarded as trading operations and the surplus has to be taxed as capital gains.

It is important to note that intention at the time of purchase is very relevant to decide whether surplus is required to be taxed as capital gain or as business income. However, if the intention is to hold the shares as investment and not as stock-in-trade and assesse also show such surplus in the return of income as capital gain then it has to be taxed as capital gain.

View against the Proposition

The surplus realized on the sale of shares would be capital, if the assessee is an ordinary investor realizing his holding; but it would be revenue, if he deals with them as an adventure in the nature of trade. The fact that the original purchase was made with the intention to resell at an enhanced price could be obtained by itself is not enough, but in conjunction with the conduct of the assessee and other circumstances it may invest his character of the transaction. For eg. , an assessee may invest his capital in shares with the intention to resell them, if in future their sale may bring in higher price. Such an investment, though motivated by a possibility of enhanced value, does not render the investment a transaction in the nature of trade. The test often applied is whether the assessee has made his shares and securities the stock-in-trade of business – *Raja Bahadur Kamkakhya Narain Singh v.*CIT (1970)77 ITR 253(SC).

View in favour of the Proposition

In order to determine whether one is a dealer in shares or an investor, the real question is not whether the transaction of buying and selling the shares lacks the element of trading but whether the later stage of the whole operations shows that the first step – purchase of shares – is not taken as, or in course of, a trading transaction. The fact that purchase of shares was motivated by a possibility of enhanced value, will not necessarily render the investment, a transaction in the nature of trade – CIT v. H. Holck Larsen (1986) 160 ITR 67 (SC).

Element of carrying on of business must be present. When an owner of an ordinary investment chooses to realize it and obtains a higher price for it than when he originally acquired it, the enhanced price is not a profit assessable to income-tax, but an act done in what is truly the carrying on of a business, the amount recovered as appreciation will be assessable – Raja Bahadur Visheshwar Singh v. CIT (1961) 41 ITR 685 (SC).

Thus, it is very clear that the frequency of transactions is not a relevant factor to decide whether the transactions are on capital account or are on trading account? There has to be a systematic business activity and also the intention to carry on the business and also financing of such transactions, which will decide whether the result of the transaction should be taxed as business income or capital gain.

Summation

Let me refer to circular of CBDT dated 29th February 2016 , it has been clarified that where the assessee itself irrespective of the period of holding the listed shares and securities opts to treat them as stock in trade the income arising from the transfer of such shares/securities would be treated as its business income.

When shares are disclosed in the balance sheet as investment and surplus is declared as capital gain then this circular squarely applies and such surplus has to be taxed as capital gain.

Let me now refer to the decision of honorable ITAT reported in ABCAUS Case Law Citation: 937 2016(06) ITAT. The honorable ITAT held as under "It is undisputed fact that the assessee had disclosed these transactions as investment in the return during the year under consideration. It is also a fact that the assessee was in investment in shares from 2000-01 to till date and in all the years, he has disclosed short term/ long term capital gain on account of investment in shares which has been accepted by the department. The Id Assessing Officer as well as Id CIT (A) has considered the various decisions on which they came to conclusion that these transactions are business transactions but latest circular issued by the CBDT No. 6/2016 dated 29/2/2016 and F.No. 225/12/2016/ITA.II dated 02/5/2016 has set guidelines to assess the share trading income from other sources. The share trading is not a main business of the assessee but he made investment in part time individually with his own fund without any assistance of the man power or office, which itself shows that the intention of the assessee was to invest in shares to gain in the return. After considering both sides, we have considered view that the assessee was in investment of shares not share trading.

Now let me refer to the decision ITAT Mumbai "B" Bench in the case of Manish Ajmera v. ITO 25(2)(2).ITA No. 5700/Mum/2013.A.Y 2010-11 decided on 26.08.2016. The honorable tribunal heeled as under in Para 4 "Revenue Authorities were not having any advantage of this circular and this Circular in Clause 3A has squarely mentioned that where assessee itself irrespective of the period of holding the listed shares and services, opts to treat them as stock-in-trade, the income arising from transfer of such shares/securities would be treated as its business income, driving spirit of a circular which is binding on Revenue Authorities, we direct the Assessing Officer to treat the income in question as Short Term Capital Gain instead of business made by the Assessing Officer.

Now I would like to refer to the recent decision of the lordships of Gujarat High Court in the case of Deepaben Amitbhai Shah v. Deputy Commissioner of Income –tax reported (2016) 72 taxmann.com 202 (Gujarat). The lordships have in Para 9 of their order has followed the circular no. 6 of 2016 dated 29.2.2016 and heeled that if the assessee has declared capital gain on sale of shares than the same has to be taxed as capital gain and not as business income.

Lastly, I would like to rely on the decision of Bombay High Court in the case of Godavari Saraf v. CIT (1978) 113 ITR 589. Where, it has been held that when there is only decision of one High Court (not jurisdictional High Court) Tribunal is bound to follow it on the reason of judicial discipline.

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Judicial Analysis

Advocate Tushar Hemani
tusharhemani@gmail.com

Can Corporate Veil be lifted while applying the provisions of S. 179 of the Act? – Part I

Ajay Surendra Patel *v.* DCIT [2017] 78 taxmann.com 339 (Gujarat)

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12.3 Now, in the context of this situation if we examine the principle of lifting of corporate veil, it seems that the authority has rightly applied this principle. The principle of separate legal entity has been dealt with by a well recognized case of *Saloman* v. *Saloman& Co. Ltd.* wherein, it is accepted that when a company is incorporated, all dealings are with the company and all persons behind the company are disregarded, however important they may be. This means that there is veil drawn between the company and its members. It has been held that normally, this principle of corporate personality of a company is to be respected to. Howsoever, when the people start misusing this veil of corporate personality then it becomes necessary for the courts to pierced the corporate veil and look to the persons who are in fact the real beneficiaries and this well recognized principle of lifting of corporate veil or piercing the corporate veil is held to be well accepted in extraordinary circumstances which are reflecting from the background of case on hand. Though a defense is set up by the petitioner that everything has been done after his resignation but, upon examination it appears that in a relevant year when substantial transactions and the huge cash deposits have come, can be said to be during the tenure of the directorship of the petitioner.

13. This well recognized principle of corporate veil can be lifted if the company is used as a means to evade tax or to circumvent the tax obligation and in that case, an individual shareholder may also be liable to pay the income-tax. The Supreme Court in case of *JuggilalKamlapat* v. *Commissioner of Income Tax, U.P.*, reported in 1964 (52) ITR 811 has held that the Court is entitled to lift the mask of corporate entity if it is used for tax evasion or to circumvent the tax obligations and therefore, in such a situation, the person concerned can be held to be liable for income-tax. In case of *Commissioner of Income-tax* v. *Sri Meenakshi Mills, Madurai*, reported in AIR 1967 SC 819, has also spelt out the proposition that the Court is empowered to lift the corporate veil if the company is used as a means to circumvent the obligation.

13.1 There are series of cases in which for the purpose of protection of revenue, the authority as well as the Court is entitled to lift the corporate veil and see behind it and fix the liability of person concerned, howsoever he may be.

14. The law on the issue is aptly clear that section which is applicable is related to section 179 of the Act. By now judicial pronouncements have made it clear that concept of lifting or piercing the corporate veil to crack the corporate shell can be resorted to even in case of Public Limited Company. No doubt, the Courts have to cautiously deal with the said issue but, at the same time, there is no embargo not to lift the corporate veil. Some of the pronouncements on the issue are profitably to be referred to. A Division Bench of this Court in the case of *Dhaval N. Patel* v. *Commissioner of Income Tax* reported in 2014(184) Com. Case 367 after considering the law on the issue has observed in paragraph No.6 as under:

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15.1 In view of the aforesaid scenario which is prevailing on record related to the present Company, we are of considered opinion that such a huge tax evasion cannot be so lightly permitted on account of any hyper-technicality. The concept of lift or piercing of corporate veil, as sometimes referred to as cracking the corporate shell, is applied by the Courts sparingly. However, it is recognized that boundaries of such principle have not yet been defined and areas where such principle may have to be applied may expand. However, principally, the concept of corporate body being an independent entity enjoying existence independent of its directors is a well known principle. However, with ever developing world and expanding economic complexities, the Courts have refused to limit the scope and parameters or areas where corporate veil may have to be lifted. Two situations where such principle is consistently applied are one, where the Statute itself so permits and second, where due to glaring facts established on record, it is found that a complex web has been created only with a view to defraud the revenue interest of the State and if it is found that incorporation of an entity is only to create a smoke screen to defraud the revenue and shield the individual who behind the corporate veil is the real operator of the company and beneficiary of the fraud, the Courts cannot hesitate in ignoring the corporate status and strike at a real beneficiary of such complex design. The background of present fact is such that we are not hesitant in any way to apply this principle and are also in conformity with the decision of revenue in applying such a principle and pass a justified order.

16. A further proposition of law is also not possible to be ignored by the Court is that even in case of *Tata Engineering & Locomotive Co. Ltd.* as also in *Life Insurance Corporation* v. *Hari Das Mundhra*, reported in 1962 Law Suit (All) 30 as well as in *PNB Finance Ltd.* v. *Shital Prasad Jain*, reported in 1983 54 Company Cases 66 (Delhi), it has been held by all the Courts consistently that in a given case the Court may lift the corporate veil of a company where it appears that the company was formed only for some fraudulent purpose and to defraud the creditors or to avoid legal obligations. Now in the context of this proposition, if we look at and correlate the clauses contained in Memorandum of Association as well as Articles of Association and correspondingly, to the stand taken by the department, it appears that the company is engaged in altogether other business than the main object for which the company was set up and therefore, in view of settled position of law, if the company has travelled beyond the scope of the object of Memorandum of Association then such transaction has no legal sanctity and can be said to be void and therefore, this improper conduction of business de-hors the main object tantamount to be improper conduct of the company and for that very purpose, it is always open for the Court as well as for the authority to lift the corporate veil.

17. Similarly, the corporate veil can be lifted if it is found that the company is acting as an agent of shareholders though it has got legal entity. In a well known case of *Re F.G.Filims Ltd.*, a British company which was formed with 90% of shares held by American director. The said British company and an American company arranged to produce films in the name of the British company. The Board of Trade of Great Britain refused to register the firm as British firm by upholding that English company acted as the nominee or agent of the American company and this has taken place upon lifting of corporate veil. Therefore, this is also relevant case law for the subject on hand as the petitioner upon induction has brought share capital to the extent of 98.33% and the certificate of commencement of business was obtained after induction of the petitioner. Therefore, practically the company was to be used as lever to transact a business which is de-hors the Memorandum of Association. Therefore, these are the relevant circumstances in which it can safely be stated that authority has rightly exercised statutory powers to lift the corporate veil to examine behind it and fix the liability for protection of revenue of the department.

18. There is another well known principle which indicates that corporate veil can be lifted if the act of the company found to be ultra vires and as stated above, the Memorandum of Association is the yardstick for which only the company is incorporated or formulated and therefore, any act de-hors the object stipulated in Memorandum of Association can be said to be ultra vires and for that purpose, the directors of the company shall be personally liable for all such acts which are beyond the scope for which the company was set up. The corporate veil under the circumstance necessarily to be pierced and the members cannot be allowed to take shelter behind the corporate veil of the company. This proposition is fortified by a decision of the Supreme Court in case of *Dr. A. LakshmanaswamiMudaliar&Ors*. v. *Life Insurance Corporation of India &Anr.*, reported in AIR 1963 SC 1185. Relevant observations of the said decision are reproduced hereinafter:

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19. The aforesaid position prevailing on record takes us to another vital and important issue as to whether the authority was justified to treat the company akin to a private limited company while passing the order. Though it appears from the certificate of incorporation, the words 'private limited' are not used and therefore, it is to be treated as public limited company and therefore, contended to be treated beyond the scope of Section 179 of the Act. But on close look at the affairs of the company, the manner in which the affairs proceeded with, all indicate that in actual terms the company has not acted as a public limited company in true sense and for that purpose, if we analyze the record which indicates that the company was formed with a share capital of Rs.5 lacs only and within a short span of two and half months only, sizable amount has been brought by the petitioner alone and that too, to the extent of 98.33% and then, chronologically if we see the record the substratum of the company disappeared after the resignation of the petitioner. It is also revealing from the record that during the tenure of the petitioner, huge cash flow is deposited and practically use of cash flow deposit to be looked into substantially the company is used for object for which it has not been set up and most material aspect which is reflecting from the record is that there is no involvement of the public either in the share capital or in any form of asset and there is no share subscription issued from the public by the company in question. Therefore, practically the company appears to have systematically operated as if it is a private concern. On the contrary, a public limited company has to act more in responsible manner than private limited company.

20. Now in this context if we look at the distinction between private and the public limited company, some of the stinking points of distinction deserve to be considered and the main distinct feature is analyzed hereinafter looking to the definition of 'private limited company' as defined under Section 3(1)(iii) as also Section 3(1)(iv), it appears that authority has rightly examined the background of the company in question.

20.1 The difference between private and public company mainly is that a private company is a very suitable device for carrying on the business at a small scale level and can start with a minimum number of members with a minimum paid up capital of Rs.1 lac only. Being a private company, it has an element of some restrictions of transferability of shares as well as of number of members. It cannot issue prospectus and therefore, in view of the position being private company, can be exempted from certain operation of law and the term private limited is defined under Section 3(1)(b) as stated above and therefore, when in respect of privileges and exemptions when the private company is making a default in complying with those relevant provisions and the company then ceases to be entitled to privileges and exemption, the whole of the Act then apply as if it were not a private company and therefore, on the contrary being a public limited company, it has to stringently obey the relevant provisions of the law applicable and has to act with full diligence and therefore, simply because a word 'private' is missing from the certificate of incorporation but when it realizes that in fact, the company has been engineered and processed as if it is not a public limited company, the principle of lifting of corporate veil with more vigor would apply.

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27. The overall situation if we analyze in its true perspective then only one conclusion which can be arrived at is that the corporate veil to be lifted and rightly so by the authority. The reason itself is explanatory from the above mentioned circumstances which are emerging from the record and therefore, without much dwelling in it, since it has been pointed out either the Court is desisted from reiterating, however, in the decision in case of ***Pravinbhai M. Khemi***(*Supra*) in which the Division Bench of this Court has analyzed the entire scheme of Section 179 of the Act and has also analyzed the well recognized principle of lifting or piercing of corporate veil after considering the entire case law on Section 179 of the Act and therefore, the background of present case on hand necessitated this Court to take assistance from few of the observations made in the aforesaid decision which are reproduced hereinafter. In the said judgment, the Court has considered series of decisions on the issue of Section 179 of the Act and after considering all the relevant pronouncements of the Supreme Court, the Court has held that corporate veil can be lifted. Relevant observations based upon series of decisions are reproduced hereinafter :

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29. The aforesaid proposition of law on the issue of center of controversy of applicability of Section 179 of the Act takes us to the specific finding arrived at by the authority while passing the order in question. The authority, after examining the structure of the company in question i.e. M/s. Hirak Biotech Limited, has specifically found that the company – M/s. Hirak Boitech Limited was formed only to provide accommodation entries in the form of bogus share capital and share premium. It was also found specifically by the authority that though the summons were issued to other directors of the company, none have appeared including Mr.Pratik R. Shah, whose shelter is taken by present petitioner and therefore, it appears to the authority that on one hand, Mr.Pratik R. Shah has not appeared in the office and on the other hand, the present petitioner – Mr.Ajay S. Patel has brought an affidavit in his favour and therefore, it appears to the authority that there is a systematic design which rightly necessitated the authority to lift the corporate veil. It is also found by the authority that at the relevant point of time, the company was of one man show and substantially managed and controlled by petitioner and that conclusion is arrived at on the basis of materials on record which are indicated specifically that substantial cash flow and substantial increase in capital is only after induction of petitioner as a director and certificate of commencement of business was obtained by the company only after petitioner being joined in the company.

30. After analyzing the definition of 'public limited company' coupled with definition of 'private limited company' defined under Section 3 of the Companies Act, the entire affairs upon examination by the authority has found that there appears to be of characteristic of Hirak Biotech Limited as defecto private limited company and therefore, simply because word 'private limited' is not mentioned, the petitioner cannot take shelter of 'public limited' nomenclature of a company. It is also found from the record that authority has not simply considered the substantial holding of the petitioner and then, assumed. The authority has, however, considered the manner and method of other directors' conduct of not cooperating, manner and method of induction and resignation of petitioner as also considered other steps which have failed to recover huge crystallized revenue demand and also analyzed gradual decrease and evaporation of substratum of a company after the petitioner resigned from the company and then, has also considered the huge financial crunch upon which the entire substratum is evaporated under the steps of securitization. Therefore, here it appears that this is not a simple case of petitioner coming and going away from the company for which he is claiming to be non-responsible at all but, it requires detailed examination which has rightly been examined by the authority. Therefore, these findings which are arrived at by the authority on the basis of record and upon basis of explanation tendered by the petitioner, these findings are not in a position of dislodge by this Court in exercise of extraordinary jurisdiction. The statutory provisions cannot be considered in so hyper technical manner which frustrates the very object for which it has been included in the statute. There are ample circumstances available on record even in addition to the findings specifically arrived at by the authority which reflect that the authority has rightly resorted to provision of Section 179 of the Act. This Court sitting in a writ jurisdiction substantially in exercise of extraordinary equitable jurisdiction cannot ignore such kind of situation prevailing on record and see it helpless just because a defence is put up that company in question is a public limited company and therefore, no resort to Section 179 of the Act can be made. The case of *Pravinbhai M. Khemi* (*Supra*) is sufficient answer to hold that there is no illegality and/or irregularity of any nature which is committed by the authority while passing the order impugned in the petition.

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Paras S. Savlav. ACIT [2016] 75 taxmann.com 265 (Gujarat)

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6. In the present case, the respondents have instead of confronting the petitioner with necessary material why the corporate veil should be lifted and Section 179 of the Act be applied to him, issued the notice dated 18.11.2008 and called upon the petitioner to substantiate the claim that the company is a public limited company. This fact is not even seriously in dispute. The revenue ought not to have questioned such a basic fact. If the revenue wanted to apply the principle of lifting the corporate veil in the context of Section 179 of the Act, it ought to have prima-facie sufficient material to confront the assessee on the issue and should have so confronted the assessee - petitioner calling upon him to show cause why such powers should not be invoked. Further as noted, the demand of Rs. 13.45 Crores with interest referred to in the notice has currently come down to Rs. 3.55 Crores.

contd. to page 721

Budget 2017 - Transfer Pricing Developments

CA. Dhinal A. Shah
dhinal.shah@in.ey.com

CA. Sagar Shah
sagar1.shah@in.ey.com

A. *Background*

The Honourable Finance Minister has presented Budget for FY 2017-18 on 1 February 2017. The Budget has proposed some significant changes to the Transfer Pricing regulations with a view to strengthen the anti-abuse measures and to provide some relief to Taxpayers on certain domestic TP compliance requirements. In the current article, we have discussed these amendments in detail.

B. *Overview of amendments*

(i) Easing the compliance burden of Taxpayers - Domestic TP regulations

The existing domestic TP provisions apply to payments towards any expenditure, made by the Taxpayer to certain specified persons as well as to entities that enjoy specified profit-linked deductions.

In order to reduce the compliance burden of Taxpayers, it has been proposed to restrict the scope only to related party transactions where one of the entities involved enjoys specified profit-linked deduction.This proposal is effective from the financial year starting from 01 April 2016.

Restricting the scope of domestic TP provisions will ease the compliance burden of Taxpayer as well as the audit burden of tax authorities to focus on more complex and high value cases.

(ii) Introduction of the concept of secondary TP adjustment

The FM has proposed to introduce the secondary adjustment which will be applicable where a primary adjustment to the transfer price (a) has been made voluntarily by the Taxpayer in the tax return (b) made by the assessing officer and has been accepted by the Taxpayer (c) is determined by an APA entered into by the Taxpayer (d) is made as per the safe harbor rules; or (e) is arising as a result of MAP resolution for avoidance of double taxation.

As per the proposal, if the Primary adjustment to the tax return is not repatriated to India within the time as may be prescribed, shall now be deemed to be an advance made by the Taxpayer to such affiliate and the interest on such advance, shall be computed as the income of the Taxpayer.

A secondary adjustment would be required whenever a primary adjustment is in excess of INR 1 crore.This proposal is effective from the financial year starting from 1 April 2017.

(iii) Limiting interest deduction

In line with the OECD BEPS project recommendations (Action Plan 4), on the excessive interest deductions by the MNEs, the Finance Bill 2017 has introduced a new section to limit interest deductions.

As per the amended provision, Interest expenses claimed by an Indian entity (other than banking or insurance company) from the related party borrowings or borrowings guaranteed by a related party shall now be restricted to the lower of the following: (a) total interest of 30% of the EBITDA and (b) interest paid/ payable to the related party.

The provision applies where an Indian company or a PE of a foreign company is the borrower and an affiliate of the lender and interest or similar consideration is in excess of INR 1 crores.

An implicit or explicit guarantee issued by an affiliate to a third party lender shall be deemed to be treated as debt issued by the affiliate.

This proposal is effective from the financial year starting from 01 April 2017.

C. *Detailed analysis*

Particulars	Amount

(i) Secondary Adjustment

The Budget 2017 has proposed to introduce Section 92CE to provide for secondary adjustment (i.e., an adjustment in the books of accounts to reflect the actual allocation of profits as per the primary adjustment) resulting in an increase in the total income or reduction in loss of the taxpayer on account of:

- Suomotu adjustment in the return of income
- Addition by assessing officer (AO) accepted by taxpayer
- Determination by advance pricing agreement (APA)
- Determination pursuant to Safe Harbour Rules
- Resolution under mutual agreement procedure(MAP)

As per the provision, the primary adjustment, if not repatriated to India within the time as may be prescribed, will now be deemed to be an advance made by the taxpayer to such affiliate and the interest on such advance will be computed as the income of the taxpayer in a manner that would be prescribed by way of rules in the future. This amendment will take effect from assessment year 2018–19 and subsequent years.

With the introduction of secondary adjustments, the Revenue Department now stands empowered to treat such un-repatriated amounts as deemed advance and bring the interest on such advances to tax in the hands of the taxpayer.

Exclusion from Section 92CE

It is proposed that such secondary adjustment not be carried out if the primary adjustment does not exceed INR1 crore and the primary adjustment is made in respect of an assessment year commencing on or before 1 April 2016.

The impact of Section 92CE can be understood by way of the following example:

In the above example, the ICo needs to ensure that INR 11 crores is remitted within the prescribed time period. This will consequentially increase the income of the ICo for all purposes, including MAT.

In case the FCo fails to remit the difference of INR11crores, it will be treated as advance granted by the ICoand interest will be imputed on such advances as per the rules which are yet to be prescribed and will be charged to tax in the hands of the ICo

Value at which goods are sold by Indian company (ICo) to its US parent (FCo) (A)	INR 19 crores
Arm's length price determined by TPO and accepted by ICo (B)	INR 30 crores
Difference between A and B (primary adjustment) – May betreated as advance	INR 11 crores

(ii) Interest limitation rule

The Budget 2017 has proposed to implement guidance of BEPS Action Plan

4 on "limiting base erosion involving interest deduction and other payments" by the insertion of Section 94B in the Income-tax Act.

The amendedprovision seeks to disallow interest payment arising on debt issued by a non-resident associated enterprise (AE), to the extent of lower of

(a) actual interest paid to the non-resident AE or

(b) total amount of interest paid or payable in excess of 30% of earnings before interest, taxes, depreciation and amortization (EBITDA).

Interest on debt issued by a non-AE lender is also covered if an AE of the borrower provides an implicit or explicit guarantee to the lender or if an AE of the borrower deposits a corresponding and matching amount of funds with the lender. Further, the term "debt" is widely defined to cover financial lease, financial derivatives and any instrument that gives rise to interest, discount or other finance charges

Further, this limitation applies in respect of deductible interest, which is quantified after applying various provisions of ITL under which interest may get disallowed — for example, disallowance on account of use of funds for earning exempt income, disallowance due to utilization for capital asset awaiting use and interest in excess of Arm's Length Price. The limitation is linked to EBIDTA and hence not dependent on the debt gearing ratio of the entity. Such disallowed interest can, however, be carried forward for 8 years to be set off against any unused interest capacity in subsequent years.

Prior to BEPS Action 4, the interest limitation rule was prevalent in certain countries. Diverse practices were followed internationally, with certain countries such as Finland, Norway, Germany, Greece and Spain following the EBITDA rule to disallow excess interest and certain countries such as Australia, Brazil, Canada, China and Indonesia using the debt equity ratio.

After the OECD recommendation under BEPS Action 4, some other countries such as the UK, Indonesia, Japan, Iceland and Norway have modifiedor proposed to modify their interest limitation rule in line with BEPS Action 4. These countries also do not have uniformity — some have lowered their interest limitation rate, some have introduced a group ratio rule, and some have introduced or increased the de minimis limit.

India's proposal of the interest limitation rule, though, claimed to have been influenced by the BEPS Action 4 recommendation, has certain departures from the recommendations of the OECD in the BEPS Action 4 report. Some of these differences are as follows:

Particulars	Proposed Section 94B	BEPS Action 4
Group ratio rule	No	Yes
Exemption to priority sector (public benefit projects)	No	Yes
Net interest expense for thepurpose of computing the total interest cost (i.e., after reducing interest income)	No	Yes
Coverage of interest on debt borrowed from third parties	No	Yes
Application to capitalized interest	No	Yes

It is important to mention here that the OECD's recommendation on the interest limitation rule under BEPS Action 4 is not a mandatory or minimum standard. While

contd. to page 729

FEMA Updates

CA. Savan Godiawala
sgodiawala@deloitte.com

Prohibition on Indian Party from making direct investment in countries identified by the Financial Action Task Force (FATF) as "Non Co-operative countries and territories"

At present, there is no restriction on an Indian Party with regard to the countries, where it can undertake Overseas Direct Investment. In order to align, the instructions with the objectives of FATF, on a review, it has been decided to prohibit an Indian Party from making direct investment in an overseas entity (set up or acquired abroad directly as JV/ WOS or indirectly as step down subsidiary) located in the countries identified by the FATF as "non co-operative countries and territories" as per list available on FATF website www.fatf-gafi.org or as notified by the Reserve Bank of India from time to time.

A.P. (DIR New Series) Circular No. 28, dated January 25, 2017

For Full Text refer to https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10839

Foreign Exchange Management Act, 1999 (FEMA)

Foreign Exchange (Compounding Proceedings) Rules, 2000 (the Rules) - Compounding of Contraventions under FEMA, 1999

In partial modification thereof, it has been decided to delegate further powers to Regional Offices as underParagraph 9(2) of Schedule I to FEMA 20/ 2000-RB dated May 3, 2000Delay in filing the Annual Return on Foreign Liabilities and Assets (FLA return), by all Indian companies which have received Foreign Direct Investment in the previous year(s) including the current year

The powers to compound the contraventions at Paragraph 2 above have also been delegated to all Regional Offices (except Kochi and Panaji) without any limit on the amount of contravention.

Accordingly, applications for compounding the above contraventions as at Paragraph 2, up to the amount of contravention stated in paragraph 3 and 4 may be submitted by the concerned entities to the respective Regional Offices under whose jurisdiction they fall. For all other contraventions, applications may continue to be submitted to Foreign Exchange Department, 5th floor, Amar Building, Sir P.M.Road, Fort, Mumbai - 400001.

A.P. (DIR New Series) Circular No. 29, dated February 02, 2017

For Full Text refer to https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10847

Risk Management and Inter-bank Dealings: Permitting Non Resident Indians (NRIs) access to Exchange Traded Currency Derivatives (ETCD) market

Currently NRIs are permitted to hedge their Rupee currency risk through OTC transactions with AD banks. With a view to enable additional hedging products for NRIs to hedge their investments in India, it has been decided to allow them access to the exchange traded currency derivatives market to hedge the currency risk arising out of their investments in India under FEMA, 1999. An announcement to this effect was made in the Monetary Policy Statement on April 5, 2016.

RIs may access the ETCD market as per the following terms and conditions:

i. NRIs shall designate an AD Cat-I bank for the purpose of monitoring and reporting their combined positions in the OTC and ETCD segments.

ii. NRIs may take positions in the currency futures / exchange traded options market to hedge the currency risk on the market value of their permissible (under FEMA, 1999) Rupee investments in debt and equity and dividend due and balances held in NRE accounts.

iii. The exchange/ clearing corporation will provide details of all transactions of the NRI to the designated bank.

iv. The designated bank will consolidate the positions of the NRI on the exchanges as well as the OTC derivative contracts booked with them and with other AD banks. The designated bank shall monitor the aggregate positions and ensure the existence of underlying Rupee currency risk and bring transgressions, if any, to the notice of RBI / SEBI.

v. The onus of ensuring the existence of the underlying exposure shall rest with the NRI concerned. If the magnitude of exposure through the hedge transactions exceeds the magnitude of underlying exposure, the concerned NRI shall be liable to such penal action as may be taken by Reserve Bank of India under the Foreign Exchange Management Act (FEMA), 1999.

Copies of the Directions are enclosed (Annexes II & III) to the circular

A.P. (DIR New Series) Circular No. 30, dated February 2, 2017

For Full Text refer to https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10849

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7. Under the circumstances, the impugned order is set aside leaving it open for the revenue, if it so desires, to take out fresh proceedings by issuing appropriate notice and taking further steps in accordance with law; bearing in mind observations made hereinabove. The petitions stand disposed of accordingly. It is clarified that all contentions and objections of the petitioners are kept open.

KishanLal*v*. Union of India [2016] 76 taxmann.com 168 (Punjab & Haryana)

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11. We do not wish to express any opinion as to whether the corporate veil ought to be lifted in the present case even assuming that it is permissible to do so in matters under the Income Tax Act. Suffice it to state that even assuming that it is permissible to do so, there are several issues which ought to be taken into account before deciding whether or not to lift corporate veil. Neither the show cause notice nor the impugned order refers to certain crucial facts including as to the extent of share holding of the directors, the extent of control exercised by them regarding the affairs of the company and the extent of their representation on the board of directors. It would also be necessary to consider the Articles of Association of the company and any other agreements that may exist between the share-holders *inter se*. There are several other factors also which must be taken into consideration including as to whether the company was converted into a public limited company for the purpose of avoiding statutory liability benefiting the petitioners alone and/or conferring any other benefits upon the petitioners or any one or more of them alone. Lifting the corporate veil in a case such as this has drastic consequences. The impugned order does not consider the same in any detail.

12. The impugned order is, therefore, set aside and the matter is remanded to respondent No. 2 for taking a fresh decision in accordance with law. It will be open to respondent No. 2 to issue a fresh show cause notice or to furnish further particulars in respect of the same show cause notice. It is also open to respondent No. 2 to base its claim on any other cause of action including by way of a tracing action. All the contentions of the parties are kept open.

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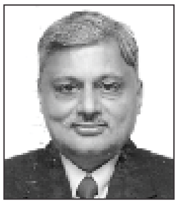
Service Tax - Recent Judgements



CA. Ashwin H. Shah
ashwinshah.ca@gmail.com

53 M/s. Sikkim Manipal University. Vs. Commissioner of Customs, Siliguri; CESTAT, Kolkata [2016], Unreported

Facts:-

Sikkim Manipal University (appellant) is a statutory university. The University has formed an alumni Association, so that the ex-students remain associated and emotionally attached with the university. Before leaving the university, some amount is collected from the students for the welfare of the said alumni association.

The department demanded service tax on the said amount collected by the University on the ground that the said activity amounts to Business Auxiliary Services.

Held:-

The Hon'ble CESTAT held that the University had collected the said amount in the name of the alumni fee but without providing any service in relation to such alumni association. When no service is provided then applicability of the service tax was not in question. The Hon'ble CESTAT was of the view that there was no nexus between the service provided and the consideration received by the service provider hence, service tax cannot be demanded under the Finance Act, 1994.

54 Superintendent of Police VS. Commissioner of Central Excise and Service Tax; CESTAT, Delhi [2016], Unreported

Facts:-

Superintendents of Police of various districts in the State of Rajasthan were alleged to have been engaged in providing Security Agency services covered under Section 65 (105)(w) of Finance Act, 1994 without having the registration for the services.

The Department submitted that from 01.05.2006, the word 'commercial person' under section 65(94) of the Act was replaced with 'any person'. After such amendments, the security services provided by the Government departments stood covered for levy of service tax. The police departments have provided such services on cost recovery basis to individuals, to safeguard property, banks, etc. which would be squarely covered within the amended definition of security agency service and consequently service tax is liable to be paid.

Held:-

The Hon'ble CESTAT was of the view that police department is an agency of the State Government and cannot be considered as a 'person' engaged in the business of running security services, hence the activity undertaken by them is not covered by the definition of Security Agency under Section 64(94) of the Act. The Hon'ble CESTAT was of the view that the fees collected by the police department is in the nature of fee prescribed for performing statutory function, which was deposited into the Govt. treasury. Accordingly, it was held that service tax cannot be levied on such activities carried out by the police department.

55 National Steel and Agro Industries Ltd. vs. CCE, Indore; CESTAT, New Delhi [2016], Unreported.

Facts:-

The appellant is engaged in the manufacture and export of galvanised steel sheet, plain sheet and coils falling. The appellant submitted a refund claim for service tax paid on input services. The claim pertains to the period from October 2008 to December, 2008.

Revenue proceeded to reject the refund on the ground that the Notification No. 41/2007-ST, dated 6-10-2007 (“ Notification”) prescribes that the refund claims are to be made on quarterly basis within 60 days from the end of the relevant quarter during which the said goods have been exported. In the present case, since the export has been taken place during the period April-June, 2008 and the refund claim has been filed on 12-2-2009, the rejection of a portion of the claim as time barred.

The appellant submitted that it is a condition of the Notification that before claiming refund of the service tax paid on the services used for export of goods, the service tax involved is required to be paid. In the present case, the right to refund under the Notification stands crystalised only when service tax was deposited in December, 2008/January, 2009 and hence, the claim is not barred by limitation.

Held:-

The Hon'ble CESTAT agreed with the submission of the appellant that even though the notification provides for limitation of 60 days from the date of export, the same should be counted from the date of the payment of service tax as prior to payment of the service tax, the right to file refund claim does not arise at all. In other words, the bar of limitation will be applied only from the date when the right to file the refund is accrued. The Hon'ble CESTAT also relied on the decision of the Delhi High Court in case of Sony India vs. CC (New Delhi) 2014 (304) ELT 660 (Del).

56 Commissioner of Service Tax, Delhi VS. M/s. Raj Engineering CESTAT, New Delhi [2016], Unreported.

Facts:-

The respondents are engaged in providing repair and maintenance services to Delhi Jal Board under agreement entered into between two of them.

The assessee had considered the value of the material as 80% and value of the service as 20% and accordingly discharged the respective tax liability.

Revenue proceeded to disallow the claim of the assessee on the ground the bifurcation of the value into 80-20% for goods and service respectively has been done artificially by the party and hence they are not entitled for the benefit of Notification No. 12/2003-ST.

The respondents submitted that they have given a break-up of the total consideration received by them from M/s. Delhi Jal Board showing the value of goods as 80% and value of service as 20%. They have also produced evidence to show that the value of the material is more than 80%.

Held:-

The Hon'ble CESTAT was of the view that the appellants were issuing separate invoices to service recipient, one indicating the value of goods sold, and the other indicating the value of the services. Revenues contention that such bifurcation of 80% and 20% is artificial is not based upon any evidence. The Hon'ble CESTAT was of the view that it is for the revenue to produce sufficient documentary evidence to prove that the respective values are not real or genuine. Having failed to do the case of the revenue does not survive and accordingly, the appeal filed by the department was dismissed.

57 Milton Plastics Limited VS. U.O.I; High Court, Bombay [2016], Unreported.

Facts:-

The department had initiated the proceeding against the petitioner inter-alia denying the CENVAT Credit. The same was confirmed vide order in original dated 29-1-2008. The petitioner challenged the same before the Commissioner (Appeal), who dismissed the same on the ground of time bar. The appeal filed by the petitioner before the CESTAT was also dismissed on the same ground.

The petitioners argued before the High Court that they are not challenging the finding of the Commissioner(A)/CESTAT which dismissed the appeal on time bar but their challenge is to the order in original dated 29-1-2008 which had not considered the contentions raised before it and hence the OIO is legally not sustainable.

Held:-

The Hon'ble High Court was of the view that the order in original had not considered the contention raised by the petitioner though specifically pleaded and hence the same is legally incorrect. And the Hon'ble Court allowed the petition and set aside the OIO dated 29.1.2008. However, the show cause Notice was kept alive for adjudication.

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VAT - Judgements and Updates

CA. Bihari B. Shah
biharishah@yahoo.com.

GST, VAT Judgments and Updates

[1] Sarang Infrastructure Ltd. v/s. The State of Gujarat. (GVAT Tribunal)

Issue:

The application for Works Contract u/s. 214A late by 7 days – Benefit cannot be denied for lump sum when no action taken by the department and the lump sum benefit is confirmed.

Held:

In the case of the appellant that the appellant is a limited company and duly registered as a dealer under the Gujarat VAT Act and Central Sales Tax Act. The appellant is engaged in the business of construction activity and also working as a contract for civil works. The appellant is therefore a civil works contractor having set up its business at Vadodara. The appellant has obtained its registration both under the Vat Act as well as under the CST Act on 22.09.2008. The appellant has therefore filed an application under section 14(A) read with Rule 28(8)(bb) of the Vat Rules, in the prescribed form and in the prescribed manner. These forms were submitted before the Departmental authority on 29.12.2008. On receipt of the application, the department has neither made any communication nor called the appellant for deciding the said application. The appellant was therefore under the bona fide impression that its application in Form No.214/A was accepted and allowed by the department. The appellant has therefore treated itself as a lump sum dealer and has shown the transactions of civil construction activity attracting the lump sum tax @ 0.60% in the Vat Returns and deposited the requisite amount in the Government Treasury.

It is also the case of the appellant that the appellant has been submitting regularly lump sum Vat Returns, annual returns as well as audit reports reflecting the same data under the Act and as per the lump sum scheme, the same was duly accepted by the department. The appellant had, however, received the notice for audit assessment under section 34(2) of the Act on 24.02.2011.

The appellant had remained present with all books of accounts duly closed, adjusted and audited along with the supporting invoices, statements and papers etc. During verification of the books of accounts, the balance sheet and annual returns, the appellant has shown the sales @ 0.60% under the lump sum scheme, as the appellant has already applied for the lump sum scheme under section 14(A) of the Vat Act. Since the appellant was of the view that the appellant's application for lump sum permission was allowed, the appellant has presumed and has paid the tax as per the lump sum dealer. The assessing officer has, however, verified, checked and scrutinized the assessment record and passed an order on 22.03.2012 without raising in query or any question about the transaction under the lump sum scheme.

After about two years, the assessing officer has issued notice in Form No. 303for re-assessment under section 35(i) of the Act on 13.02.2014. He has proportionately decided the taxable sales @ 5% and 15% and levied the tax accordingly. The assessing officer has treated the appellant as 'common dealer', in the absence of any certificate as a lump sum dealer produced by the appellant. The assessing officer has levied the penalty @ 150% and charged interest and thereby raised the demand of Rs. 62,48,452/-.

Since no reply was given to the appellant in response to its application for lump sum permission, the appellant was justified in forming the bona fide belief that the permission must have been granted. In the case of M/s. Shah Manilal Bapulal v. The State of Gujarat (supra), the Tribunal has taken view that after an application filed by the appellant, the concerned officer has not taken any decision and therefore, it was contended that such permission was deemed to have been granted and hence, the legitimate benefit available to the appellant cannot be denied in such circumstances. It was further observed that the appellant cannot be penalized for any lapse on the part of the Government functionary and in view of peculiar circumstances of the case. In the case of M/s. Pioneer Poly Fab Ltd. v. State of Gujarat (supra) the dealer was a works contractor and he has applied for composition after delay of 7 days due to disturbance in the State. In the assessment, the claim of the appellant was accepted. However, while passing revisional order, the appellant's claim for lump sum permission was rejected on the ground of delay. The Tribunal has set aside the said order after referring to and relying upon the decisions of M/s. Vijaya Shree Ltd. (2002) 128 STC 82 (Cal), M/s. Kothari Contract Interiors (2007) 10 VST 60 (All.) and M/s. Raghvendra Sherrigal (2005) 142 STC 153 (Kar.)

In view of the aforesaid facts and circumstances of the case and in view of the decisions referred to hereinabove, the Tribunal is of the view that the appellant was wrongly denied the benefit of lump sum permission and the tax levied upon the appellant treating as a normal dealer is not at all justified. The additional liability of tax on this count is therefore deleted.

When there is no liability of tax on this count, before levying penalty, an opportunity of being heard on the issue of levy of penalty is required to be given, which is not found in the present case. In view of the matter, the Tribunal deletes the entire demand raised against the appellant comprising of tax, interest and penalty on this court and allows the appeal. In the result, this appeal is allowed without any order as to the cost.

[2] Asian Paints Industrial Coating Ltd. v. The State of Gujarat (GVAT Tribunal) :

Issue:

The tax collection on CST Transaction cannot be forfeited u/s. 46(1) of the GST Act when separate Provision in CST Law is there – Also no Penalty is leviable.

Held:

It is the case of the appellant that the appellant is a dealer registered under the Gujarat Sales Tax Act and also under the Central Sales Tax Act. The business of the appellant is of manufacturing of Industrial Paints and Chemicals for sale. The appellant is assessed by the Asst. Commissioner of Commercial Tax (1), Unit – 2, Vapi on 30th Dec. 2008. While assessing the appellant, the claim of inter-state sale of goods of Rs. 8,03,654/- was disallowed and tax @ 10 was levied as the appellant could not produce declaration form 'C'. The assessing officer has also forfeited the amount of tax of Rs. 1,29,151/- under section 46(1) read with section 9(2) of the Central Sales Tax Act, The appellant has made inter-state sales of goods to M/s. Surya Powder Coating Ltd. of Baddi, Himachal Pradesh. M/s. Surya Powder Coating Ltd. was amalgamated with the appellant with effect from 01.04.2005. Accordingly, the assessing officer has held that the inter-state sale transactions made with M/s. Surya Powder Coating Ltd., are branch transfer transactions of the appellant. Assessing Officer allowed such transactions as branch transfer transactions while passing the assessment order on production of declaration Form ‘F’. However, the assessing officer has forfeited the amount of tax collected in such branch transfer transactions. The assessing officer has also not allowed deduction of tax under section 8(A)(i) of the CST Act for which the appellant could not produce form ‘C’. As a result of the assessment order, an amount of Rs. 48,810/- was determined to be payable by the appellant.

The Ld. Advocate for the appellant has further submitted that the Assessing Officer has forfeited the amount of tax collected in sale bill made to M/s. Surya Powder Coating Ltd., by way of imposing penalty under section 46(1) read with section 9(2) of the CST Act. As provided in section 10(f) of the CST Act, the assessing officer has no jurisdiction to impose penalty under section 46(1) r.w.s. 9(2) of the CST Act.

He has further submitted that if any dealer collects tax in contravention of the provisions of CST Act, then, as provided in section 10(f), he is liable to punishment and fine. Accordingly, the assessing officer has no jurisdiction to impose penalty in such cases. He has therefore submitted that the amount of penalty under section 46(1 r.w.s. 9(2) of the CST Act is required to be set aside. It is also required to be set aside on the ground that no show cause notice was given to the appellant prior to the imposition of penalty.

The Ld. Advocate for the appellant relied on the decision of the Tribunal in case of M/s. Peoples Welfare Society v. The State of Gujarat in second Appeal No. 161 of 2002 decided on 06.05.2002 wherein it is held that if the dealer had collected any amount by ways of tax in contravention of section 9(A) of the CST Act, such dealer commits the offence under section 10(f) of the CST Act. But, no penalty can be levied under section 10(A). The penalty can be levied for the offence under clauses (a), (b), (c) and (d) of Sec. 10 and not for the offence under section 10(f) of the CST Act. The Ld. Advocate for the appellant also relied on the decision of the Hon. Bombay High Court in case of Commissioner of Sales Tax v. Ramkrishna Kulvantrai [1976] 37 STC 564 (Bom), where in it is held that under section 61(1) of the Bombay Sales Tax Act, 1959, which applies by reason of the provisions of section 9(2) of the CST Act, a reference can only lie in respect of a question of law arising out of an order of the Tribunal which affects the liability of any person to pay tax or penalty, or to forfeiture of any sum of which affects the recovery from any person of any amount under section 39. It is further held that no reference can lie only in order to determine a person’s liability to be prosecuted. He has therefore submitted that this appeal should be allowed and demand raised against the appellant may be deleted.

In view of the above, The Hon. Tribunal has passed the following order:

This appeal is partly allowed. The forfeiture of tax of Rs. 1,20,151/- collected from M/s. Surya Powder Coating Ltd. by restoring the provisions of section 46(1) r.w.s. 9(2) of the CST Act is not justified and hence, the appellant succeeds on this point. However, for want of any further ‘C” forms produced by the appellant before this Tribunal, the order passed by the Ld. Deputy Commissioner on this point is confirmed. The appellant therefore fails on this issue. There is no order as to the cost.

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Mergers and Acquisition Corner

CA. Kush Desai
kushdesai591@yahoo.co.in

1. TPG looks to combine Fortis, Manipal~ Biggest Healthcare Deal Will Create Rival To India's No.1Hospital Chain Apollo[1]

Global investor TPG Capital is attempting to pull off the biggest M&A deal in the Indian healthcare industry through a possible consolidation of Fortis Healthcare and Manipal Health Enterprises, people directly familiar with the matter said on condition of anonymity. This would create the country's largest healthcare services group rivalling current leader Apollo Hospitals, if talks fructify. TPG has held discussions to buy a large stake along with management control in Fortis Healthcare, owned by Delhi based billionaire siblings Malvinderand Shivinder Singh of Religare. One of the world's largest buyout funds, TPG is in simultaneous talks to increase shareholding in Manipal Health, even as it considers an eventual merger between the two, which are the second and third biggest hospital networks in Asia's third largest economy.

Sources cautioned that consolidation talks are still in early stages, and may not lead to any transaction. "We follow a strict disclosure policy and hence are unable to confirm or deny these suggestions," said a TPG spokesperson. TPG owns a 22% stake in the privately held Manipal. Another private equity investor True North (formerly India Value Fund) wants to offload its 18% stake in Manipal and has engaged with TPG and Singapore's Temasek Holding, sources mentioned earlier in the report said. The dealmaking is likely to be a multi-staged affair, possibly spanning over the next 18 to 24 months, as TPG would initially acquire about 26% ownership and follow it up with a management takeover of Fortis. Last year, a Singapore arbitration panel asked the Singh brothers to pay Japanese pharma giant Daiichi Sankyo Rs 2,500 crore for withholding critical information while selling Ranbaxy Laboratories a decade ago. Though the two brothers and their holding company have contested the ruling, it would prevent them from transferring majority control straight away, sources said. TPG will pursue a merger to create a healthcarebehemoth, but that's dependent on the progress they make with Fortis, sources added. Recent media reports said Fortis promoters have been in sale talks with multiple investors like KKR and Bain Capital, though TPG is seen as a strong contender. Given that Fortis is a key rival, TPG will be forced to offloadits Manipal shares in the event of the merger not going through. For now, the Singh brothers are expected to retain minority shares in a proposed combination with the Bengaluruheadquartered Manipal, which is spearheaded by the 43 year old Ranjan Pai.

The combined entity's market value is estimated at $2.53 billion, compared to Apollo's $2.55 billion at present. Apollo has about 10,000 beds across 70 hospitals, while Fortis and Manipal together would equal or just surpass that figure. Fortis Healthcare shares closed at Rs 192, pegging its market value at Rs 9,900 crore, or close to $1.5 billion. Manipal Health Enterprises is being valued at slightly over $1 billion as True North looks to sell shares.

2. Cabinet clears State Bank of India'smerger with five subsidiaries stake in Odisha port project[2]

The Union Cabinet approved the merger of State Bank of India (SBI) with its five associate banks but did not take a decision with regard to BharatiyaMahila Bank. The Cabinet approved the introduction of a Bill in Parliament to repeal the State Bank of India (Subsidiary Banks) Act, 1959 and the State Bank of Hyderabad Act, 1956. State Bank of Bikaner and Jaipur, State Bank of Hyderabad, State Bank of Mysore, State Bank of Patiala and State Bank of Travancore are subsidiaries which would be merged with SBI. The merger would lead to saving of more than Rs.1,000 crore in the first year through operational efficiency and reduced cost of funds, finance minister Arun Jaitley told reporters. Customers of subsidiary banks will benefit from access to SBI's global network and the merger will lead to better management of high value credit exposures through focused monitoring and control over cash flow. According to sources, the merger is likely to miss its original deadline of March 2017. "Since the entire banking system was busy with demonetisation, it would be fair to expect that the Indradhanush action plan. On the proposal to merge Bharatiya Mahila Bank with SBI, Jaitley said, "It is under consideration as of now. We have not taken any decision related with that today." After the merger, SBI is expected to become a globalsized bank with an asset base of Rs.37 trillion or over $555 billion, 22,500 branches and 58,000 automated teller machines (ATMs). It will have over 50 crore customers. SBI first merged State Bank of Saurashtra with itself in 2008. Two years later, State Bank of Indore was merged. SBI first merged State Bank of Saurashtrawith itself, in 2008. Two years later, State Bank of Indore was merged. In August last year, its board approved the merger of three associate banks and Bhartiya Mahila Bank with itself.

3. Vodafone, Idea likely to seal merger pact within a month[3]

UK's Vodafone and Aditya Birla group firm Idea Cellular arelikely to finalise within a month the mega merger deal that will create India's largesttelecom firm, according to sources. "They are almost ready to sign the agreement and should not take more than a month to announce it," according to another source. However, both Vodafone and Idea declined to comment on the matter. The British telecom major has brought its exIndiaunit chief Marten Pieters to work on the proposed merger. Vodafone Group Chief Executive Vittorio Colao is also likely to brief all business heads of the Indian arm on a conference call next week about the proposed merger.

If the deal is successful, the combined entity will create India's largest telecom firm with a revenue share of around 40 per cent and a subscriber base of over 380 million, according to India Ratings and Research. The proposed merger of Vodafone India and Idea will create an entity with a revenue of around Rs. 77,50,080,000 crore besides eliminating duplication of spectrum and infrastructure capex, the rating agency said in its report. Further, the spectrum of Vodafone India in seven circles and that of Idea in two, whose permits are expiring in 2021-22, is together valued at around Rs 12,000 crore as per last auction price. These permits are not in common circles, and hence there could be potential spectrum capex synergies between the two companies, the report said. However, given the present spectrum holding, revenue and subscriber base, both the companies need to work on synergy to comply with rules. According to the merger and acquisition rules, an entity should not hold more than 25 per cent spectrum allocated in a telecom circle and 50 per cent on spectrum allocated in a particular band in a service area.

The merger entity should also not have more than 50 per cent revenue and subscriber market share. As per CLSA report, the merged entity would breach revenue market share, subscriber and spectrum caps in five markets. The combined entity as per present scenario will breach spectrum cap in 900 Mhz band in Maharashtra, Gujarat, Kerala, Haryana and UP West and in 2500 Mhz band in Maharashtra and Gujarat, it said. CLSA estimated that the excess spectrum which would need to be surrendered or sold off is valued around Rs 5,400 crore and for the merger both the companies will also have to shell out Rs 5,700 crore for liberalisingradiowaves that they were allocated administratively.

1. http:timesofindia.indiatimes.com/business/india-business/tpg-looks-to-combine-fortis-manipal-biggest-healthcare-deal-will-create-rival-to-indias-no-1-hospital-chain-apollo/articleshow/57175028.cms
2. http://www.vccircle.com/news/banking/2017/02/15/cabinet-clears-state-bank-india-s-merger-fivesubsidiaries
3. http://economictimes.indiatimes.com/news/companies-a-z/corporate-trends/vodafone-idea-likely-to-seal-merger-pact-within-a-month/articleshow/57235370.cms

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contd. from page 719

it is acknowledged that denying a deduction for "excessive" interest expense is consistent with international norms andis a common anti-abuse measure, therecould be a debate on whether it is the righttime to introduce the provision. India isprimarily an inbound economy and the tax policies should support India's growth agenda. Extending the time limit of the concessional tax rate in respect of rupee denominated bonds is a step in the right direction. In any case, there is a strong need to provide carve out in respect of priority sectors such as housing, infra and power, including the renewable energy sector, which typically has a huge thrust on borrowed capital.

Additionally, the provisions as proposed must be clarified or amended to include the following:

- A fixed ratio rule or a group ratio rule may be introduced in line with the OECD's suggestion. This would allow due consideration for companies that have inherently high interest cost because of the nature of their business.
- It should be clarified that the limitation applies only with respect to interest payments to non-resident AEs, as the intention is to prevent cross-border base erosion through interest payments. Ambiguity on the coverage of funding by a residents when guaranteed by non-resident AEs should be clarified.
- Regulations should exclude the reference to implicit guarantee, as either it is not possible to prove or disprove or it will be highly subjective to determine the presence/degree of implicit guarantee.

D. *Conclusion*

To summarize, relaxation from the applicability of domestic transfer pricing is a taxpayer-friendly move. Consistent with the anti-avoidance objective of the provision, it would be desirable if a clarification is provided to keep cases of tax neutrality outside the scope of the provision.

However, the provisions relating to secondary adjustments, as currently worded, are likely to give rise to additional litigation in the TP assessments of the taxpayer. It is also unclear how the interest is to be imputed on the deemed advance/ loan and whether the transactions pursuant to these provisions would be deemed to be in compliance with Foreign Exchange Management Act, 1999. Taxpayers will have to wait and watch for these rules to quantify the actual impact of Section 92CE.

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Corporate Law Update

CA. Naveen Mandovara
naveenmandovara@gmail.com

SEBI Updates:

1. Integrated Reporting by Listed Entities:

a. The International Integrated Reporting Council ('IIRC') has prescribed following Guiding Principles which underpin the preparation of an integrated report, specifying the content of the Business Responsibility Report ('BRR') and how information is to be presented:

- Strategic focus and future orientation: An integrated report should provide insight into the organization's strategy and how it relates to the organization's ability to create value in the short, medium and long term, and to its use of and effects on capital.
- Connectivity of information: An integrated report should show a holistic picture of the combination, interrelatedness and dependencies between the factors that affect the organization's ability to create value over time.
- Stakeholder relationships: An integrated report should provide insight into the nature and quality of the organization's relationships with its key stakeholders, including how and to what extent the organization understands, takes into account and responds to their legitimate needs and interests.
- Materiality: An integrated report should disclose information about matters that substantively affect the organization's ability to create value over the short, medium and long term.
- Conciseness: An integrated report should be concise.
- Reliability and completeness: An integrated report should include all material matters, both positive and negative, in a balanced way and without material error.
- Consistency and comparability: The information in an integrated report should be presented: (a) on a basis that is consistent over time; and (b) in a way that enables comparison with other organizations to the extent it is material to the organization's own ability to create value over time.

b. All organizations depend on various forms of capital for their success. It is important that all such forms of capital are disclosed to stakeholders to enable informed investment decision making. IIRC has categorized the forms of capital as follows:

- Financial capital
- Manufactured capital
- Intellectual capital
- Human capital
- Social and relationship capital
- Natural capital

c. The International Integrated Reporting Council ('IIRC') has prescribed Integrated Reporting Framework at following web link:http://integratedreporting.org/wp-content/uploads/2015/03/13-12-08-Theinternational-IR-framework-2-1.pdf

d. Towards the objective of improving disclosure standards, in consultation with industry bodies and stock exchanges, the listed entities are advised to adhere to the following:

1. Integrated Reporting may be adopted on a voluntary basis from the financial year 2017-18 by top 500 companies which are required to prepare BRR.

2. The information related to Integrated Reporting may be provided in the annual report separately or by incorporating in Management Discussion & Analysis or by preparing a separate report (annual report prepared as per IR framework).

3. In case the company has already provided the relevant information in any other report prepared in accordance with national/ international requirement / framework, it may provide appropriate reference to the same in its Integrated Report so as to avoid duplication of information.

4. As a green initiative, the companies may host the Integrated Report on their website and provide appropriate reference to the same in their Annual Report.

[SEBI/HO/CFD/CMD/CIR/P/2017/10 dated 06th February, 2017]

2. Review of Financial close out and Auction framework for corporate bonds traded on the Stock exchanges platform.

a. The SEBI has decided to review extant penalty structure for financial closeout in cases of short delivery and to put in place a feasible auction mechanism to deal with settlement shortages and accordingly, para 8 of the circular no CIR/MRD/DP/ 27 / 2013 dated September 12, 2013 stands modified as under;

i. In case of shortage of delivery, stock exchanges/clearing corporations may conduct financial close-out. The financial close out shall take place at highest price on Trade date (which becomes the trade price) with a 1% mark-up on trade price.

ii. Further, Exchanges/Clearing Corporation shall introduce an uniform auction mechanism to deal with settlement shortages by March 31, 2017.

[SEBI/HO/MRD/DP/CIR/P/2017/11 dated 10th February, 2017]

3. Submission of Monthly Reports by Custodians of Securities:

1. In partial modification of Para 2 of the circular IMD/FII & C/30/2008 dated July 21, 2008, The SEBI has decided that the custodians shall submit the monthly reports latest by either the end of the third working day of the succeeding month or the 5th of the succeeding month, whichever is later.

[IMD/FPIC/CIR/P/2017/12 dated 14th February, 2017]

4. Securities And Exchange Board Of India (Issue of Capital And Disclosure Requirements) (Amendment) Regulations, 2017:

The SEBI has made the following Regulations to further amend the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009. Following are the major changes:

Regulation No.	Change effected
Regulation 70(1)	in clause (a), after the numerics “1956”, the words and symbols “or sub - section (3) and (4) of section 62 of the Companies Act, 2013, whichever applicable” shall be inserted;
Regulation 70(1)	in clause (b),-(a) for the symbol “;” the words and symbols “or a Tribunal under sections 230 to 234 of the Companies Act, 2013, whichever applicable” shall be

substituted;(b) after clause (b), the following proviso shall be inserted,- “Provided that the pricing provisions of this Chapter shall apply to the issuance of shares under schemes mentioned in clause (b) in case of allotment of shares only to a select group of shareholders or shareholders of unlisted companies pursuant to such schemes:”

Regulation 70(1) in clause (c), after the numerics “1985”, the words and symbols “or the Tribunal under the Insolvency and Bankruptcy Code, 2016, whichever applicable” shall be inserted;

Regulation 70(3) after the numerics “1997”, the words and symbols “or regulation 11 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, whichever applicable,” shall be inserted;

Regulation 111A after regulation 111, the following regulations shall be inserted, namely,

"Liability for contravention of the Act, rules or the regulations. 111A

1) The listed entity or any other person thereof who contravenes any of the provisions of these regulations, shall, in addition to the liability for action in terms of the securities laws, be liable for the following actions by the respective stock exchange(s), in the manner specified in the circulars or guidelines issued by the Board:

(a) imposition of fines;

(b) suspension of trading;

(c) freezing of promoter/ promoter group holding of designated securities, as may be applicable, in coordination with depositories;

(d) any other action as may be specified by the Board from time to time.

2) The manner of revocation of actions specified in clauses (b) and (c) of sub - regulation (1), shall be as specified in the circulars or guidelines issued by the Board.

Failure to pay fine.111 B: If the listed entity fails to pay any fine imposed up on it by the recognised stock exchange(s), within the period as specified from time to time, the stock exchange may initiate such other action in accordance with law, after giving a notice in writing.”

[SEBI/LAD/NRO/GN/2016-17/030 dated 15th February, 2017]

5. Participation in derivatives market by Mutual Funds:

1. The SEBI has decided that for introduction of derivative investments in an existing scheme, whose SIDs do not currently envisage such investments, the requirement of obtaining positive consent from majority of unit holders shall no longer be applicable. However, prior to the scheme commencing participation in derivatives, all investors of such schemes shall be given exit option with no exit load for 30 days, as against exit option to only dissenting unit holders mandated earlier.

2. In view of the above, in point 2 of SEBI circular no. DNPD/Cir-29/2005 dated September 14, 2005, clause I) b shall be read as follows:

“Existing schemes of Mutual Funds, whose SIDs do not envisage investments in derivatives, may participate in derivatives market subject to the following conditions:

a. The extent and the manner of the proposed participation in derivatives shall be disclosed to the unit holders.

b. The risks associated with such participation shall be disclosed and explained by suitable numerical examples.

c. Prior to commencing participation in derivatives, the scheme shall comply with the provisions of Regulation 18 (15A) of SEBI (Mutual Funds) Regulations, 1996 and all unit holders shall be given at least 30 days to exercise option to exit at prevailing NAV without charging of exit load."

[SEBI/HO/IMD/DF2/CIR/P/2017/13 dated 20th February, 2017]

6. Investments by FPIs in corporate debt securities:

1. RBI on October 24, 2016, had amended the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Twelfth amendment) Regulations, 2016 through a Gazette notification to permit FPIs to invest in unlisted corporate debt and securitised debt instruments. Thereafter, RBI vide circular RBI/2016-17/138 dated November 17, 2016 had enhanced the list of eligible instruments for investment by FPIs under the Corporate debt route along with certain terms and conditions.

2. Accordingly, the SEBI (Foreign Portfolio Investors) (Second Amendment) Regulations, 2017 were notified on February 27, 2017. It has been decided to permit FPIs to invest in the following:

a. Unlisted corporate debt securities in the form of non-convertible debentures/ bonds issued by public or private Indian companies subject to the guidelines issued by the Ministry of Corporate Affairs, Government of India from time to time and also subject to minimum residual maturity of three years and end use-restriction on investment in real estate business, capital market and purchase of land. The expression 'Real Estate Business' shall have the same meaning as assigned to it in Foreign Exchange Management (Transfer or issue of Security by a Person Resident outside India) Regulations, 2000 Notification No.FEMA.362/2016-RB dated February 15, 2016. The custodians of the FPIs shall put in place an appropriate mechanism to ensure compliance with these conditions as prescribed by RBI from time to time.

b. Securitised debt instruments as under:

(i) any certificate or instrument issued by a special purpose vehicle (SPV) set up for securitisation of asset/s where banks, FIs or NBFCs are originators; and/or

(ii) any certificate or instrument issued and listed in terms of the SEBI(Public Offer and Listing of Securitised Debt Instruments) Regulations, 2008.

3. Investment by FPIs in the unlisted corporate debt securities and securitised debt instruments shall not exceed INR 35,000 cr within the extant Corporate debt limit which currently is INR 2,44,323 cr.

4. Further, investment by FPIs in securitised debt instruments shall not be subject to the minimum 3-year residual maturity requirement.

[SEBI/HO/IMD/FPIC/CIR/P/2017/16 dated 28th February, 2017]

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Allied Laws Corner

Adv. Ankit Talsania
ankittalsania@gmail.com

If it is only a signed blank cheque leaf, it cannot be said to be a cheque within meaning of section 6 of the Negotiable Instrument Act and

Where a managing director, acting on behalf of company issued a blank signed cheque as security but ceased to be director when cause of action accrued, managing director could not be prosecuted under section 138 on dishonour of said cheque.

Recently, the Gujarat High Court in the case of **Nikhil P. Gandhi vs. State of Gujarat** reported in **70 taxmann.com 237** rendered a landmark decision on various issues arising in the Negotiable Instrument Act, 1881.

A. Facts of the case :

1. The complainant M/s. Sharda Steel Corporation is a partnership firm registered under the Partnership Act. The Gujarat Pipavav Port Limited (original accused No. 1) is a company incorporated under the Companies Act. The accused Nos.2 to 19 shown in the complaint are the Directors and other Office Bearers of the company.

2. Sometime in the decade of early 90's, the company started constructing a Jetty at the Pipavav Port. An agreement was entered into between the complainant firm and the accused company for supply of Steel, Cement, etc for the purpose of the construction of the Port.

3. At the relevant point of time i.e. the applicant in his capacity, as the Managing Director and Vice President of the company issued a blank signed cheque in favour of the complainant firm as a security.

4. In the course of the business transactions, a dispute arose between the accused company and the complainant firm. The complainant firm preferred three Special Civil Suits Nos.35 of 2000, 36 of 2000 and 37 of 2000 in the Court of the Civil Judge, Senior Division, Amreli, for recovery of a certain amount raised through bills. The Civil Suits are still pending as on date. In the year 2008 with the consent of the parties, the learned Civil Judge passed an order in the Special Civil Suit No. 36 of 2000 appointing M/s. Chhajed & Doshi Company, Chartered Accountants, having its Head Office at Mumbai, as a mediator for the purpose of settling the accounts. M/s. Chhajed & Doshi Company submitted its report dated 28th April 2009, according to which, the accused company owes a sum of Rs. 15,82,23,865/- (Rupees Fifteen Crore Eighty Two Lac Twenty Three Thousand Eight Hundred Fifty Five only) to the complainant firm.

5. The complainant firm, thereafter, started demanding the amount from the accused company. There was lot of correspondence between the complainant and the accused company between 2010 and 2013 in that regard. Ultimately, the complainant thought fit to fill up the blank signed cheque, which was drawn by the then Managing Director on behalf of the company as a security. The cheque was filled up on 28th March 2013 for the amount of Rs. 15,82,23,858/- drawn in favour of the Sharda Steel Corporation. The complainant negotiated the cheque in question through its banker Dena Bank which was dishonoured with an endorsement of "account closed".

6. The complainant, thereafter, issued a statutory notice dated 23rd April 2013, and called upon the company to make good the amount mentioned in the cheque. The drawer of the cheque, namely, Mr. Nikhil P. Gandhi (original accused No. 2) gave a reply dated 6th May 2013 denying his liability. The complainant, thereafter, proceeded to file a complaint in the Court of the learned Chief Judicial Magistrate at Mahuva. The complaint came to be registered as the Criminal Inquiry Case No. 20 of 2013. After recording of the verification of the complainant, the Court thought fit to order a Magisterial inquiry under Section 202 of the Code of Criminal, 1973. On completion of the Magisterial inquiry, the Chief Judicial Magistrate, Mahuva thought fit to issue process against the company and the Directors named in the complaint for the offence under Section 138 of the Negotiable Instruments Act. On process being issued, the case came to be ultimately registered as the Criminal Case No. 1710 of 2013.

7. Thereafter, the accused company and the Directors filed petitions before the Gujarat High Court for quashing of the criminal proceedings initiated for the offence punishable under Section 138 of the Negotiable Instruments Act.

B. Arguments raised by the Counsels of the Applicants :

1. It was argued that that what was handed over to the complainant was a signed blank cheque leaf by way of security. The complainant could not have filled up the cheque on its own after a period of almost seventeen years according to his whims and fancies. It was submitted that the signed blank cheque could be termed as an incomplete document or inchoate instrument. The complainant had no implied authority to fill up a signed blank cheque by way of security and present it for encashment.

2. The complainant was fully aware of the fact that way back in the year 2005, the drawer of the cheque had ceased to be the Managing Director of the company with the change of the management. The complainant was also aware of the fact that the account on which the signed blank cheque was drawn got closed on 17th July 2008 upon the instructions to the bank by the new management.

3. Since the cheque was issued by way of security, it could not be said that there was any existing debt or liability.

4. It was further submitted that none of the Directors or other Office Bearers are liable to be prosecuted by virtue of Section 141 of the N.I. Act as there is nothing on record to indicate that on the date of commission of the alleged offence, they were in any manner connected with the day-to-day affairs and management of the company.

C. Arguments raised by the counsel of the Respondent (original complainant)

1. It was submitted that by virtue of Section 20 of the Act, although what was handed over to the client was a signed blank cheque, yet the client had the implied authority to fill up the signed blank cheque and present it for the purpose of encashment. It was submitted that a signed blank cheque would remain a bill of exchange till the date is filled up in the said instrument.

2. It was submitted that the drawer of the cheque cannot absolve himself from the liability only on the ground that he ceased to be the Managing Director of the company in the year 2005. It was submitted that except the few Directors for

whom he gave concession to quash the complaint, all other accused could be said to be liable for the dishonour of the cheque by virtue of Section 141 of the N.I. Act.

3. It was vehemently submitted that even if the cheque is issued by way of security, it would still attract the provisions of Section 138 of the N.I. Act. It was further submitted that neither the Section 138 nor explanation to it suggests that the debt or other liability should be in existence on the date of issuance of the cheque, i.e. on the date of its delivery to the drawee.

D. Findings of the Court :

1. The following questions arose for the consideration to decide for the Hon'ble Gujarat High Court :

   (a) Whether Section 20 of the Negotiable Instruments Act applies to a cheque as well?

   (b) Whether filling up of a signed blank cheque leaf would amount to a material alteration within the meaning of Section 87 of the N.I. Act?

   (c) Is there an implied authority to a person who receives a signed blank cheque leaf to fill up the same showing any amount as he likes?

   (d) Whether the presumption under Section 139 of the Act could be said to have stood rebutted by the admission in the complaint itself that the blank signed cheque was issued by way of security?

   (e) A person who had resigned as the Managing Director with the knowledge of the complainant in 2005 could be said to be a person in-charge of the company in 2013 when the cheque was dishonoured? Whether it could be said that the drawer of the cheque, who ceased to be the Director eight years before the dishonour, had no say in the matter of seeing that the cheque is honoured? Whether he could have asked the company to pay the amount?

   (f) Whether mere reproduction of the wordings of the Section 141(1) of the N.I. Act in the complaint is sufficient to make a person liable to face prosecution for the dishonour of the cheque?

2. Issue with regard to Ss.20 and 87 of the Negotiable Instrument Act :

2.1 Section 20 deals with the inchoate stamped instruments, and the scheme of that section is that **when a person signs and delivers to another person an inchoate document which is properly stamped in accordance with the law relating to negotiable instruments, then by doing so he gives a *prima facie* authority to the holder to complete the document, the authority being restricted to filling the amount not exceeding that which would be covered by the stamp upon the document**.

2.2 To constitute an inchoate stamped instrument within the purview of section 20 it shall have the following ingredients :

   (1) The instrument shall be stamped.

   (2) It should be stamped in accordance with law relating to the negotiable instruments then in force in India.

   (3) The instrument should either be wholly blank or contains an incomplete instrument and

   (4) The instrument is signed and delivered to another making him holder of such instrument.

2.3 Before an instrument acquires the status of a fullfledged negotiable instrument, the two under mentioned conditions should be satisfied :

(*i*) only the holder of the such instrument thereof in the physical sense can make or complete the same.

(*ii*) provided however that the amount to be specified therein does not exceed the amount which could be covered by the stamp.

2.4 A combined reading of sections 5 and 6 would make it clear that **an instrument would be a cheque if only it contains the particulars as mentioned in the two sections referred to above**. If the drawee's name is not written in the instrument, that instrument cannot even be termed to be a bill of exchange. **Therefore, if it is only a signed blank cheque leaf, it cannot be said to be a cheque within the meaning of Section 6**.

2.5 Section 13 of the N.I. Act defines a negotiable instrument. ***Explanation* to section 13 also would make it clear that it must be an instrument containing all the particulars referred to earlier**.

2.6 If only it is a negotiable instrument within the meaning of section 13 of N.I. Act, section 87 would have any application. **If it was only a signed blank cheque leaf, it cannot be termed as a 'negotiable instrument'**, and if so the question of effecting material alteration of that paper (signed cheque leaf) does not arise.

2.7 **If it is only a signed blank cheque leaf that was handed over it cannot be said to be a paper stamped in accordance with law relating to the negotiable instruments**. As such the contention that, whether it is wholly blank or filled up partly making it an incomplete document and that handing over of the same would give authority to the holder thereof to make or complete the instrument as the case may be for any amount specified therein and not exceeding the amount covered by the stamp, cannot be sustained. So far as a cheque is concerned, if it is a signed blank cheque leaf it may be filled up showing any amount without any restriction whatsoever and if that be so, how section 20 of the N.I. Act can be applied to a case of cheque. But if it is a paper stamped, it can be filled up showing the amount not exceeding the amount covered by the stamp. That is the rationale behind why section 20 is specifically made applicable to the stamped documents/instruments.

2.8 It can be argued that when a person takes a bill in an incomplete form, he cannot be a *bona fide* holder for value since it can only be said that he has taken a piece of blank paper and not a bill and that he can take it as a bill only under the authority given to his transferor. Section 20 would make it clear that there can be no material alteration of a cheque leaf only for the reasons that it was subsequently filled up. But at the same time it cannot be said that whenever a signed blank cheque leaf is given, it gives authority to the holder to fill up the same according to his whims and fancies. Filling up of a signed blank cheque leaf may not attract section 87 for, there was no insertion, interlineations, erasure, alteration etc., because there was no completed negotiable instrument within the meaning of sections 5, 6 and 13. Therefore, neither section 20 nor section 87 applies to a blank signed cheque leaf. If so, the question must turn round to the actual execution of the instrument

2.9 **If a principal or employer deputes his agent or employee to purchase an article and if the dealer fills up that signed**

blank cheque leaf showing the exact amount covered by the bill showing the price of the article sold then it cannot be said that what was handed over by the drawer of the cheque is only a signed blank cheque leaf. **In such cases an implied authority to the trader/seller of the article to fill up the cheque leaf can certainly be inferred**. Similarly, there may also be cases where at the time of settlement of the accounts, a particular amount was found payable by the drawer of the cheque to the other party and if a signed blank cheque entrusted to be filled up later is filled up in tune with the accounts, showing the actual amount payable by the drawer of the cheque to the other party, then also it can be said that there was the implied authority to fill up the signed blank cheque leaf. There may be such instances where the sum is ascertainable and the signed blank cheque leaf is given to fill up the same after ascertaining the same. In such cases there would be no difficulty to infer an implied authority given by the drawer. **Simply because the cheque is seen filled up or written in the handwriting of another person it cannot lead to a conclusion that only a signed blank cheque leaf was given**. The person signing the cheque may have difficulty due to many reasons to write the cheque and it might have been filled up by the payee or by another. **In such cases it cannot be said that what was handed over was only a signed blank cheque leaf**. In all such cases the ultimate conclusion may depend upon the proof of the transaction and execution of the instrument. It must also be held that when it is a case that only a signed blank leaf was handed over by the accused, then he must offer satisfactory explanation as to the circumstances under which the signed blank cheque happened to be handed over. **Considering the totality of the evidence and circumstances, it is for the court to draw the inference as to whether it was given with an implied authority to fill up the same showing the amount ascertained or ascertainable to discharge the debt or liability**. Therefore, there may be such cases where implied authority can be inferred. But the contention that when a signed blank cheque leaf is handed over, it can never be filled up and that if it is filled up it would amount to a material alteration within the meaning of using section 87, does not stand to rhyme or reason. Similarly, the contention that section 20 is applicable to an unfilled or blank cheque leaf also cannot be accepted. It would depend upon the facts of each case. Therefore, it is neither a case which attracts section 87 nor is it a case where the complainant can rely upon section 20 and contend that as a signed blank cheque leaf is given it gives an authority to fill up the same according to the whim and fancy of the payee.

2.10 Thus, section 20 would not save the situation as such for the accused applicants. **The collective reading of the various provisions of the N.I. Act shows that even under the scheme of the N.I. Act, it is possible for the drawer of a cheque to give a blank cheque signed by him to the payee and consent either impliedly or expressly to the said cheque being filled up at a subsequent point in time and present the same for payment by the drawee**.

3. Issue with regard to Existing Liability or Any other liability :

3.1 The cheque in question was not even a postdated cheque. If it would have been a postdated cheque, it would have remained as a 'bill of exchange' till the date shown on the cheque, and thereafter, it would have assumed the character of a cheque, but in the instant case, except the signature, the other columns in the cheque were blank. Therefore, it cannot be said that it was a 'bill of exchange' prior to 25-3-2013.

3.2 There are clear-cut admissions on the part of the complainant in the complaint itself, as well as the statutory notice issued under section 138 by which the presumption that the cheque was for a consideration has itself been rebutted by the complainant by making a truthful disclosure in the complaint, but unfortunately, for the complainant, this statement of truthfulness would be akin to a self goal. The averments in the complaint evidenced that the cheque was not for a valuable consideration when it was drawn. It was towards security and would have acquired consideration only on account of future contingencies.

3.3 The events narrated occurred sometime in the mid 90's. Sometime in the year 2000, disputes cropped up, and the complainant had to file three civil suits in that regard. If the liability had already been determined within the meaning of section 138, then there was no reason for the complainant as such to wait for seventeen odd years. Only with a view to short-cut the suit proceedings in which the Civil Court is yet to fix the liability, the complainant, on the strength of the report of the Chartered Accountants, misused the blank signed cheque. The account, on which the cheque was drawn, already stood closed on 17-7-2008 after the new management took over the company. By the time the new management took over, the drawer of the cheque had ceased himself to be the Director in the year 2005. The account on which the cheque was drawn was not closed upon the instructions issued by the drawer, but the same was upon the instructions of the new management. In such circumstances, it is extremely difficult to fasten any liability under section 138.

3.4 **A cheque may be issued under two circumstances. First, it may be issued for a debt in presenti, but payable in future. Secondly, it may be issued for a debt which may become payable in future upon the occurrence of a contingent event.** The difference in the two kinds of cheques would be that the cheque issued under the first circumstance would be for a debt due, only payment being postponed. The latter cheque would be by way of a security.

3.5 The word 'due' means 'outstanding at the relevant date'. The debt has to be in existence as a crystallized demand akin to a liquidated damages and not a demand which may or may not come into existence; coming into existence being contingent upon the happening of an event.

3.6 **The submission of the complainant that in the year 1994-95 when the blank signed cheque was handed over to his client as a security, there may not be any existing debt or liability, but in the year 2013 when the cheque was filled up, the liability had got determined, and, therefore, on the date when the cheque was filled up and presented, there was a existing debt cannot be accepted**. In fact, as observed earlier, it could be said that the signed blank cheque as such was misused by the complainant after almost a period of seventeen years. Such misuse can be inferred from the indirect threats given in the statutory notice itself that if the amount is not paid, then the complainant would fill up the signed blank cheque and present the same for its encashment. **In the year 2013, neither the accused *i.e.* the drawer of the cheque was the Managing**

Director of the company or in any way concerned with the company nor the account on which the blank signed cheque was drawn in existence. In such peculiar circumstances, it is difficult to fix the strict liability under section 138 on the drawer of the cheque.

3.7 **As on date, there may be a report of the Chartered Accountants fixing some liability on the accused company to be discharged towards the complainant, but the report of the Chartered Accountants cannot be termed as final. The civil suits are still pending, and are yet to be adjudicated.**

3.8 **One can appreciate a situation that a Director of a company who drew the cheque on behalf of that company thinks it fit to tender resignation after having received the notice of dishonour and demand for payment of the cheque drawn by him**. **In such circumstances, he cannot avoid the criminal liability under section 138 as it may result in incongruous situations. He could not escape from his liability under section 138**. The Director appointed in his place subsequently can plead that he was not in-charge of the affairs of that company when the cheque was drawn and so he cannot be made liable. In the circumstances like this, though the offence under section 138 becomes complete only if the payment is not made within fifteen days of the receipt of the statutory notice, yet since the Director who tendered the resignation could pay the amount covered by the dishonoured cheque and then resigned.

3.9 **The situation in the instant case is altogether different**. **Much before the statutory notice was issued *i.e.* almost eight years before the issue of statutory notice, the drawer of the cheque had ceased himself to be the Managing Director of the company. There could be many circumstances under which a Director of a company, who drew the cheque, may have to quit the office. Sometimes the company itself would relieve the Director**. Like the instant case, the entire management would change and a new management may take over the affairs of the company. **After 2005, the accused, who had drawn cheque, had absolutely no say in the matter of saying that the cheque is honoured. He could not have asked the new management to pay the amount.**

3.10 In the instant case, the accused had not drawn the cheque in question in his personal capacity, but in his capacity as a Managing Director of the company. It is not possible to contend that any cause of action had accrued against the applicant accused *i.e.* the drawer of the cheque, since the applicant held no position whatsoever of the company when the cause of action in fact accrued against the company.

4. Issue with regard to applicability of S.141 of the Negotiable Instrument Act:

4.1 As regards the case of other Office Bearers of the company who have been arrayed as accused by virtue of section 141, it is not necessary to go into this issue in view of the discussion on other points, but there are few Non-Executive Directors and Office Bearers, like Chief Operating Officer, Chief Financial Officer, Financial Controller, nominated Directors who have been arrayed as accused since they all came into picture after the new management took over the company. Whether they could be held liable under section 141 of the N.I. Act is the question?.

4.2 **Two classes of persons are liable to be prosecuted under section 138. First,**

those persons who are in charge of and responsible to the company for the conduct of its business. They are *per se* responsible. In the second category comes those persons with whose consent or connivance the offence can be attributed.

4.3 When the offence under section 138 has been committed by a company every person who, at the time the offence was committed, was in-charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

4.4 When the drawer of the cheque who falls within the ambit of section 138 is a human being or a body corporate or even a firm, prosecution proceedings can be initiated against such drawer. In this context the phrase 'as well as' used in sub-section (1) of section 141 has some importance. The said phrase would embroil the persons mentioned in the first category within the tentacles of the offence on a par with the offending company. Similarly the words 'shall also' in sub-section (2) are capable of bringing the third category persons additionally within the dragnet of the offence on an equal par. **The effect of reading section 141 is that when the company is the drawer of the cheque such company is the principal offender under section 138 and the remaining persons are made offenders by virtue of the legal fiction created by the Legislature as per the section**. Hence, the actual offence should have been committed by the company, and then alone the other two categories of persons would become liable for the offence.

4.5 Section 141(1) would provide that if the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence. Section 141(2) provides, where any offence has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager secretary or other officer shall also be deemed to be guilty of that offence. So, the reading of section 141 would make it clear that both the company as well as other persons who are connected and responsible for the conduct of the business of the company are liable to be proceeded.

4.6 **Where offence under section 138 is committed by a company, the complaint must *prima facie* disclose the act committed by the Directors from which a reasonable inference of their vicarious liability can be drawn**.

4.7 **'Vicarious liability' in legal parlance means the liability of the master for the acts of the servant or agent done in the course of employment. Section 141 makes a natural person vicariously liable for the contravention committed by a company provided such person has some nexus with the crime either because of his connivance with it or due to by criminal negligence which had resulted in its commission. No doubt the law makes the principal liable for the acts of his agent, but unless there is some absolute duty cast upon the principal,**

he cannot be held responsible for the acts of his agent.

4.8 In view of the dictum of law explained by the Supreme Court, in *K.K. Ahuja* v. *V.K. Vora* [2009] 94 SCL 140 the other accused who have been arrayed as accused by virtue of section 141 could not be held liable. **The fact that some of the accused are Office Bearers, like the Chief Operating Officer, Chief Financial Officer, Financial Controller is noticed. Some of the Directors are nominated Directors and also non-executive.**

4.9 One is also not impressed by the argument of the complainant that as the inherent powers of the Court under section 482 of the Cr.P.C. are circumscribed, and should be exercised only in cases where the Court finds an abuse of the process of law, all the applications deserve to be outright rejected, leaving all the legal contentions open to be canvassed before the trial Court.

4.10 Some of the applicants are indisputably non-executive Directors of the company. A non-executive Director is no doubt a custodian of the governance of the company, but does not involve in the day-to-day affairs of the running of its business and only monitors the executive activity.

4.11 **There is no cogent material on record to fasten any vicarious liability so far as the other accused are concerned who are Non-Executive Directors including the Office Bearers concerned with the Accounts Department of the company.**

4.12 The plain reading of section 138 would clearly go to show that by reason thereof, a legal fiction had been created. A legal fiction, as is well-known, although is required to be given full effect, yet has its own limitations. It cannot be taken recourse to for any purpose other than the one mentioned in the statute itself. Section 138 moreover provides for a penal provision. A penal provision created by reason of a legal fiction must receive strict construction. Such a penal provision, enacted in terms of the legal fiction drawn, would be attracted when a cheque is returned by the bank unpaid. Before a proceeding thereunder is initiated, all the legal requirements therefor must be complied with. The Court must be satisfied that all the ingredients of commission of an offence under the said provision have been complied with.

4.13 **Thus, whenever a blank cheque or postdated cheque is issued, a trust is reposed that the cheque will be filled in or used according to the understanding or agreement between the parties and if there is a *prima facie* reason to believe that the said trust is not honoured, then the continuation of prosecution under section 138 would be the abuse of the process of law. It is in the interest of justice that the parties in such cases are left to the civil remedy.**

4.14 Having regard to the peculiar facts and circumstances of the case, all the petitions succeed and are allowed. The order of the issuance of the process under section 138 is quashed.

4.15 The judgment and order is only confined so far as the liability of the accused applicants under section 138 is concerned. It has nothing to do so far as the other civil liabilities are concerned.

❇❇❇

From the Government

CA. Kunal A. Shah
cakashah@gmail.com

Income Tax

1) Circular regarding clarification for determination of Place of Effective Managemnet (POEM) of a company, other than an Indian Company.

The concept of POEM for deciding the residential status of a company, other than an Indian Company, was introduced by the Finance Act, 2015. The existing provision of clause (ii) of Sub Section (3) of section 6 of the income tax act, 1961 shall come into effect from 1st April,2017 and accordingly, *applies to A.Y. 2017-18 and subsequent years.*

It is hereby clarified vide this circular that existing provision of clause (ii) sub section (3) of section 6 of the act, shall not apply to a company having turnover or gross receipts of Rs. 50 crore or less in a financial year . *(For Guiding principles for determining POEM of a company , refer circular no. 06/2017, dated 24th January,2017)*

(Circular No. 08/2017, dated 23/02/2017)

Service Tax

1) **Notification regarding amendment in Mega Exemption Notification no. 26, dated 20/06/2012:-**

The Central Government hereby vide this notification makes the following amendments in mega exemption notification as under:-

“In the said notification, in the first paragraph, in the TABLE, for Sl. No. 11 and the entries relating thereto, the following shall be substituted, namely:-

No.	Services	Abatement	Remarks
“11	Services by a tour operator	40 %	(i) CENVAT credit on inputs and capital goods used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004.
			(ii) The bill issued for this purpose indicates that it is inclusive of charges of accommodation and transportation required for such a tour and the amount charged in the bill is the gross amount charged for such a tour including the charges of accommodation and transportation required for such a tour”.

(i) **Changes in the abatement percentage: -** Under existing scheme, two separate abatements are given. Tour operator who is only arranging and booking accommodation for any person and where the cost of accommodation is included in such invoice, Bill or Challan, tour operator can claim 90% abatement in respect of such service. Thereby, Service tax is payable only to the extent of 10% of the value.

Services by a tour operator in relation to a tour, other than only arranging and booking accommodation and where gross amount charged includes charges toward accommodation and transportation, 70% abatement on value can be claimed by the tour operator and effectively Service tax is payable on 30% of value at the rate of 15%.

Under revised scheme, abatement of flat 40% is available on the value in respect of all services provided by the tour operator. Effectively, on 60% portion Service tax is payable. The abatement is available only when bill issued for such tour is inclusive of charges of accommodation and transportation for such tour. After this change cost of travel particular in relation to tour will increase.

(ii) **Changes in the availment of Cenvat Credit: -**Under existing scheme Cenvat Credit on Capital Goods and Input is not available. Credit in respect of Input service is also restricted to the extent of those services on which service tax is paid by other tour operator.

In the amended notification, only credit of Capital goods and Input used in the provision of taxable service is disallowed. That means, credit of Service tax paid on all Input services used in the provision of taxable service shall be available to tour operator. Therefore, Tour operator can avail credit of all input service used for the provision of tour operator services. This will be the great relief to tourism industry as it will lead to removal of cascading to the extent of credit on the input service.

(Notification No. 04, dated 12/01/2017)

2) **Circular regarding applicability of service tax on the services by way of transportation of goods by a vessel from a place outside India to the customs station in India w.r.t. goods intended for transhipment to any country outside India:**

Representations seeking clarification on levy of service tax on the services by way of transportation of goods by a vessel from a place outside India to the customs station in India with respect to goods intended for transshipment to any country outside India:-

In this regard, it is mentioned that the goods landing at Indian ports which are destined for any other country are allowed to be transshipped through Indian territory without payment of Customs duty in India. This is subject to the condition that such goods imported into a customs station are mentioned in the import manifest or the import report, as the case may be, as for transhipment to any place outside India.

It is hereby clarified that with respect to goods imported into a customs station in India intended for transhipment to any country outside India, the destination of goods is not a place in taxable territory in India but a country other than India if the same is mentioned in the import manifest or the import report as the case may be and the goods are transhipped in accordance with the provisions of the Customs Act, 1962 and rules made there under. Hence, with respect to such goods, services by way of transportation of goods by a vessel from a place outside India to the customs station in India are not taxable in India as the destination of such goods is a country other than India.

(Circular No. 204/2/2017, dated 16/02/2017)

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Association News

CA. Dilip U. Jodhani
Hon. Secretary

CA. Riken J. Patel
Hon. Secretary

Glimpses of the Past Events

BCAS RRC @ Jaipur

Baroda
Branch of
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Talk on 5 Pillars of Happiness

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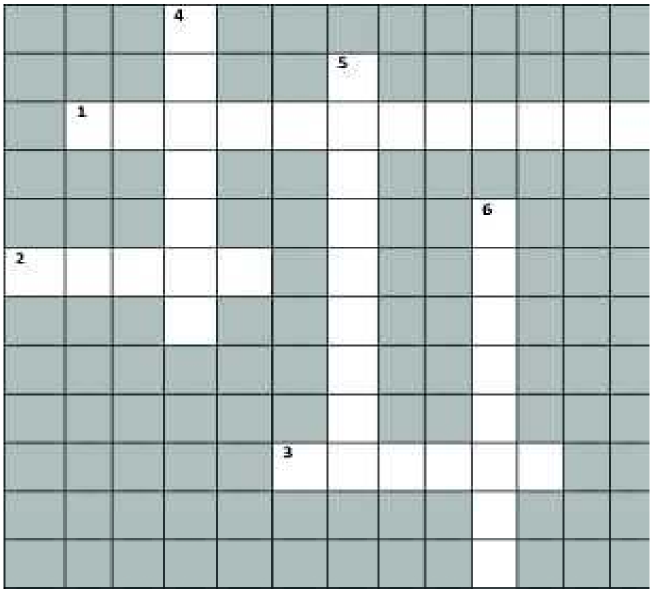
ACAJ Crossword Contest # 34

Across

1. C.F.Patel Memorial Full day Seminar was held on 10th February, 2017 at Hotel ____________.
2. ____________ is a crowd funding platform for individuals and NGOs to raise funds for a cause they would like to support.
3. 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 ___________ is proposed to be adjusted against the arrears of tax.

Down

4. If CBDT instructions are prejudicial to the tax payer, then they cannot prevail over the _______________.
5. When we begin counting our blessings, we are overwhelmed with ____________ for all that has been bestowed upon us.
6. In the case of Maharashta Apex Corporation vs. CIT(286 ITR 585) it was held that no ______ expenditure can be attributed to exempt income.



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 31/03/2017.
5. The decision of Journal Committee shall be final and binding.

Winners of ACAJ Crossword Contest # 33

1. CA. Rajni M. Shah
2. CA. Chandraprakash Devpura

ACAJ Crossword Contest # 33- Solution

Across

1. Contrary
2. Multilateral
3. Aadhaar

Down

4. Confiscated
5. Thought
6. Sourcing

❈ ❈ ❈

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