CHALLENGES
AVENUES
ACTION

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

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The Cycle of Time

This world cycle turns, second by second. There is no end to it. Minute by minute, the ticking continues as the world cycle continues to move. One second cannot be the same as the next. The world is eternal; it can never be destroyed.

The world drama, too, is eternal. You are actors in this drama, and you have your part recorded within you. Not a single soul can be excused from playing a part in this eternal drama. Your part continues eternally. There is such subtlety in understanding this. There is only this one drama, and there is only one world where this drama is played. You understand that you are all actors and that you come at your accurate time onto the world stage to play your part. Every soul enters the world in its original stage, at its accurate time.

It has four quadrants. It is divided accurately into four quarters – Golden, Silver, Copper and Iron. None is slightly more or less. Then there is a fifth, incognito, short age, which no one knows about, and this is called the auspicious time of the confluence of the two cycles.

Morning : The Golden Age

The cycle of time begins with the Golden Age. The Golden Age is called ***Satyug.*** *Satyug* means the age of truth. It is also called the land of happiness, heaven, paradise, and the Garden of Allah. As well as happiness, there are also purity and peace there. This is why a lion and lamb have been shown drinking water from the same pool. At that time, the world is *satopradhan* – in its highest state of truth and purity. The five elements of matter are the instruments of happiness. Matter is in a state of complete purity with the highest degree of order, and only truth prevails.

Souls' *sanskars* are completely viceless, and their sense organs are absolutely nonviolent. Their personalities are pure and divine. They are complete with all divine virtues and all celestial arts and talents. This is the original state of divinity of souls who come onto the world stage as human beings when the world is in its *satopradhan* stage. Because of their high stage of purity and divinity, they came to be called divine beings, or deities. This is called the time of peace, purity and prosperity in the world.

However, just as when a building is built and at the beginning it is new, and then after some years it begins to show signs of wear and tear, in the same way, after playing their role for the full span of the Golden Age, there is a slight decrease in the degrees of purity and perfection for both the deities and the world. The degrees of purity within the soul diminish little by little with each rebirth.

Afternoon: The Silver Age

Then the world cycle enters its second quarter, which is called the Silver Age. The Silver Age is called ***Tretayug***. Even though it is still the land of happiness, it is called semi-heaven as there is slight diminution in the original quality. There is a high degree of order, but it is not the highest, and the light of truth also reduces a little.

From the beginning of the Golden Age to the end of the Silver Age, souls live for half a cycle as self-sovereigns. Then, by taking rebirth, they definitely climb down the ladder, and the intellect begins to weaken.

By the end of the Silver Age, the intellect begins to stumble in search of its lost sovereignty.

Evening : the Copper Age

The third quarter of the world cycle is the Copper Age. The Copper Age is called ***Dwaparyug***, which means the age of duality. The world is no longer called heaven or semi-heaven as it enters into an era in which happiness is mixed with sorrow. It is called the land of semi-sorrow. The world is *rajopradhan*, which is a middling stage of purity. That is, purity is mixed with impurity, order with disorder, and truth with falsehood.

As souls take rebirth, their purity diminishes and they gradually begin to change from pure to impure. In the *rajopradhan* stage, the intellect begins to seek fulfillment through the sense organs, and the soul develops the *sanskars* of mixing everything. There is the mixture of soul consciousness and body consciousness. The soul-conscious "I" of self-respect is mixed with the body conscious "I" of arrogance. Attachment is mixed into pure love of family life, and relationships begin to give sorrow. Limited selfish desires are mixed with the natural benevolence and sense of abundance of the earlier ages.

The mind and intellect develop the habit of acting on selfish desires. Such selfish desires are controlled by illusion, ignorance, and the vices, and they weaken the power of stability and concentration of the mind and intellect. The soul steps down from its self-respect, and its reins of power are handed over to sense organs of body consciousness.

To begin with, when the soul is pure, the actions – *Karma* – and unified spiritual principles – *Dharma* – are elevated. Even though actions are performed through the sense organs, there is freedom within action, which results in happiness and harmony. When purity is lost, the souls experience a void, an emptiness. However, it is when the souls become trapped in their sense organs for attainments that these actions tie the soul in bondage and they become corrupt. The *karma* and the *dharma* are separated, and the *karma* is now connected to illusion and ignorance. Whatever right or wrong actions performed are accounted for, and the result of that right or wrong action is definitely received in the next birth. This is the Law of Cause and Effect that begins from the Copper Age.

Night : The Iron Age

The last quarter of the cycle is the Iron Age, which is also known as ***Kaliyug***. *Kaliyug* is the age of total darkness and insolvency. Happiness vanishes and is replaced by sorrow. This age is recognised by many different names : the sinful world, hell, and the homeland of sorrow. In its *tamopradhan*, most degraded stage, the land is barren and old. The world reaches to its state of absolute impurity, all truth is lost, and there is only chaos.

Elements of matter – air, water, earth, fire and sky/ether – have gone through their golden, silver, copper, and iron stages according to their own natural laws and have reached their lowest stage.

The stage of the whole world is in descent. There is peacelessness and sorrow throughout the whole world. People are crying out for peace and happiness. However, it is impossible for anyone to remain constantly peaceful in this age where there is only sorrow. The Copper Age is the land of semi-sorrow, but the Iron Age is called the land of total sorrow.

Dawn : The Confluence Age

The Confluence Age is the ending of the night and the beginning of the dawn(day). The Father(God) comes at this auspicious Confluence Age to give knowledge and to tell you the story of immortality. He gives you the third eye of recognition with which to understand and experience. The day dawns through the light of knowledge. The Father comes to awaken the fortune of human beings.

Only at this time do you receive knowledge from the Father. You are being uplifted with knowledge. This is the time that you are called an effort-maker. You listen and imbibe the teachings, and on the basis of this understanding you follow the Father's directions. Your greatness is seen in the quality of your efforts. Do not just sit back and wait for your reward to come to you. A reward cannot be received without making effort. Your greatest effort is to remember who you are and your self-sovereignty. Your greatest fortune is that the Father is giving you directly the most elevated knowledge and is sustaining you with love.

Those in the Golden and Silver Ages do not have this knowledge. There, they are soul conscious but not God conscious. Those in the Copper and Iron Ages do not know this knowledge either. They are body conscious and are searching. It is when you enter the Confluence Age that you receive this knowledge. As you study this knowledge, you are reminded of everything. You remember who you are and who your Father is. You remember the history of your victory and defeat. You are once again becoming the master of the land of peace and happiness.

That is where the Golden Age begins and the cycle of time goes on and on in the same accurate manner.

Editorial

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CA Day Celebrations - Let's give it a Purpose

We the community of Chartered Accountants celebrated yet another CA day on 1st of July and as have been the trend, this year also the celebrations became the debating point among the members and unfortunately stretched to a much larger extent, may be because the event was at a much greater scale and the Prime Minister of the country was a part of it or may be because of the inability of the Institute of Chartered Accountants of India (ICAI) to handle and manage the program of this magnitude.

Over the years, what do we take back after the CA day celebrations every year? The same old concerns, questions and topics are repeated. Few examples being, the address of the key speaker was long and factually incorrect, whether we should have subsidised lunch and dinners or not, utmost chaos at the venue so on and so forth. We discuss and debate these things after the function and then forget for the year only to continue post next CA day celebrations.

This year too, it wasn't with a difference. The PM addressed the chartered accountants and his speech became the controversial talking point amongst the members. We may have a different opinion whether the prime minister of the country should have said what he said to a group of about 15000 chartered accountants members and students but the important point is, are we taking it as an occasion to improve upon. Without at doubt, if there has been any factual incorrect figures spoken, it is the duty of ICAI to update the office of the Prime Minster. Similarly, if we as a chartered accountants have been failing to address certain issues for which the responsibility has been cast upon us, it is high time we become serious about our affairs before it is too late to correct.

We as an Institute have been failing to establish the objective of the CA day celebrations. It seems we are lacking the purpose of the entire exercise. We are repeating the same events again and again, year after year without attributing any intention of holistic development behind the action. The organisation committees need to take a pause, pose a question what have members gain from such mechanical celebrations. I am in no way suggesting that we should not have celebrations but the idea is to have a purpose. The best example to describe the situation is that in old days people used to dance to express happiness, nowadays people dance and think it will give them the happiness.

The idea behind celebrating the CA day should be to inculcate values in a chartered accountant member and student. The celebrations should empower the member the freedom to say no to a client if his demands are against the national policy and interest. The celebrations should make the member more updated with knowledge. The focus of the celebrations should shift from 'selfie' to 'self' improvement.

I am sure the day we will attribute a purpose of self-improvement in CA day celebrations, and I am hopeful we will, we would be creating and having a happier, healthier and prosperous environment around ourselves.

Pranams,

CA. Ashok Kataria

From the President

CA. Kunal A. Shah
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Dear Members,

The summer vacation is over , schools reopened and all have joined their offices after a good summer break.!!! And it is time to bring out the colourful umbrellas and rain gear as the met department has predicted more rains in the city this season.

- One of the theme of our CAA Journal is " Digital India" - Digital India has been introduced to ensure smooth implementation of e – governance in the country and transform the entire ecosystem of public services through the use of information technology. There is no better way to promote inclusive growth other than through the empowerment of citizens.

  Adding more, it can be said that it is a platform for citizens to exchange ideas and suggestions with the government. Through this initiative, the government receives feedback, inputs and ideas from people regarding policy decisions and new initiatives like Digital India, Swachh Bharat, Make in India, among others.

  Vision of Digital India – "Digital empowerment of citizens"

  This programme will provide universal digital literacy to enable citizens to use the digital platform. The government services can be accessed in local languages to help users participate in the new governance mechanism. Since technology is the key driver in India's economic growth, it will spur growth in areas of governance and service delivery.

- India has joined the **Shanghai Cooperation Organisation** (**SCO**) as full member on 9th June,2017. The membership of SCO is multifaceted benefit for India in general but in particular it is entry of India in strategic region of Central Asia and finally in to Eurasia.

  SCO is an Eurasian political, economic, and security organisation, the creation of which was announced on 15 June 2001 in Shanghai, China by the leaders of China, Kazakhstan, Kyrgyzstan, Russia, Tajikistan and Uzbekistan.

  Benefits of India joining the SCO:-

  1) **An opportunity to resolve border disputes with Pakistan and China.**

  2) **Restarting stalled projects - f**or many years, projects like pipelines were halted due to security reasons**.** With India now joining the organization, it is highly possible that the projects may finally take off.

  3) **Solution to India's Energy Crisis:**

  All the founding members are richly endowed when it comes to minerals and natural resources. Having close ties with

these countries might be the answer to India's energy crisis.

- Cricket fever of Indians was down as India lost the ICC Trophy in finals against Pakistan in London.

Activities at the Association:

- Numerous public yoga sessions were conducted throughout the country on the International Yoga Day. CAA also organised a Yoga Program on 18th June, 2017 at Sports Club to celebrate the international yoga .

- I am glad to inform that we received a great response to the second series of Accountant Plus – A Unique Program on GST for Accountants. We received 99 registrations and each and every participant enjoyed the series.

- Adding more - 84 participants took the benefit of the 1st Brain Trust cum Work shop Meeting on the topic of " Practical Aspects and Intricacies of ICDS". The Group discussion was taken up at a high pitch with three group leaders with a fruitful discussion on the topic.

- We successfully completed the GST Study Series comprising of 10 lectures. Thanks to all the members who took active participation in the series and made it a great success.

- Full day seminar, jointly with BCAS on GST, conducted by the Professional Development Committee got an overwhelming response. The contribution of the eminent speakers CA. Puloma Dalal, CA. Chirag Mehta and CA. Dushyant Bhatt from Mumbai enriched the knowledge of members on GST .

- The Information and Technology Committee of the Chartered Accountants Association, Ahmedabad, had organized a unique seminar on 24th June – "GST Return Rules and live demo of preparing and filing GST returns by Udhyog Software (I) Ltd which got a tremendous response.

- Music Extravaganza-2017 – We enjoyed the orchestra by Khander Brothers and a bunch of old and new songs by the singers like Payal Vakharia, Mihir and Stuti Jani and Vishvanath Batunge. The event was a great success and I hope all the audience enjoyed it . Over and above the music, we also had live screening of talk by our Hon'bl Prime Minister Shri Narendra Modi on GST at 11.30 pm. The Association and members cheefully welcomed and entered into the GST regime when Hon'ble Prime Minister and President push the button at the stroke of midnight.

On successful completion of the momentous programs and event at CAA, I would like to end my communication with following quotes :-

"We know what we are, but know not what we may be". - William Shakespeare

"***It is not in the stars to hold our destiny but in ourselves".- William Shakespeare***

"The best way to find yourself is to lose yourself in the service of others". - Mahatma Gandhi

With regards,

CA. Kunal A. Shah
President

Challenges to the Accounting & Tax Professionals

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Preamble :

The profession of Accounting and Tax is considered to be the most noble profession amongst many other professions. Whatever is the place and whatever is the nature of business, a person has to prepare and maintain his Accounts and / comply with the Tax Laws of the country, be it Direct Taxes or Indirect Taxes. The profession of Accounting and Tax is governed by Institute of Chartered Accountants of India so far as Chartered Accountants are concerned. However, the substantial part of Trade and Business conducted by small and medium size Entrepreneur are being handled by Tax Consultants / Practitioners / Advocates etc. Most of the Trade and Business is represented before Direct and Indirect Tax Authorities by Chartered Accountants and Tax Consultants. They really enjoy a special status and respect within the tax department and also in the society at large. Since liberalization there is a substantial growth and development in this profession. When I was the president of ICAI in 2007 the total number of Chartered Accountants in India were 141516 which has increase to 242526 in 2016. Simultaneously there is a slow but the steady growth in other Tax Consultants also. Hitherto filing of returns of incomes based on accounts prepared by an accountant and filing the return of Income (by making apparent disallowances and claiming various deductions) was considered to be not that intricate or complicated matter. Even if cases were taken up for scrutiny certain mistakes committed by accountants or tax consultants were capable of being taken care of. But now the time has changed. The provisions in the act have changed. The attitude and approach of tax official have changed. Expectations and demands from clients have changed. Concept of accountability and responsibility from regulations have also changed. And above all there are substantial changes in the manner in which business is done. The size and quantity of volumes of business have changed.The method and systems of maintaining accounts have changed. The details and basis of auditing, verifying the same have changed, Requirements and compliance under direct and indirect taxes have changed and above all the attitude and actions of tax officials also have drastically changed.

Challenges and Opportunities :

Continuity gives us roots, change gives us branches and such changes allow us to stretch, grow and reach to newver heights. Nothing Endures but changes. Indeed it is the "Change for Better" that has impelled the evolution of Indian Accounting Profession, adding new layers of luster to a tradition of excellence with every passing year. We all professionals involved in accounting and taxation must appreciate and welcome the changes. What lies behind us and what lies before us are miniscule matters compared to what lies within us. Change is the only constant thing in life innovate and the change gets better. With innovation particularly in internet, mobile, communication and in computerization, changes have now become not only regular but at a very fast speed. Those who can not keep the pace with such rapid changes are thrown out and those who move with the changes can only grow and be in line with the fast developing, innovating and growing changes in every walk of life. Therefore let me say that change is inevitable and is the only thing in this world which is eternal. The ever changing and dynamic nature of substantial changes and improvisation in accounting standards, in auditing standards, adoption of new techniques and methods and friendly but compliance oriented changes in taxation laws has made the life of accounting and tax professional not difficult but highly demanding

with heavy expectations from clients, stake holders and regulators. One has therefore to find out Opportunities from such fast growing changes and meet with the challenges smilingly.

Challenges for Accounting Profession:

1) Indian Accountancy profession has been a dynamic journey of professional excellence, integrity and enormous opportunities to serve the society. This inspiring journey continued unabated in India for decades, but in recent years it has also taken firm roots in hitherto unchartered territories in foreign lands, particularly in the wake of ever increasing globalization of Indian accountancy profession. So as to withstand the global competition it has become inevitable for Indian Chartered Accountants to be fully equipped to face the onslaught of big firms and other such competition from multinational accounting and law firms. It has become imperative for Indian accountants to study understand and acquire complete knowledge of IFRS. The Institute of Chartered Accountants of India has come out with the IndAS. Therefore, this is the biggest challenge for Indian Accountants to learn IndAS, teach the same to the auditee and interm get it implemented and audited. The illiterate of the 21st century will not be those who cannot read and write, but those who canlearn, unlearn, and re-learn. In last one decade the Indian Accountancy Profession has undergone paradigm shift, and the phenomenal continues to this day. The greatest challenge for this ongoing transition is constant capacity building, life long learning and being in-tune with changing times.

2) The second biggest challenge in the accounting profession is to keep track of existing 28 Accounting Standards, 15 new Ind-AS , 47 Auditing Standards, 10 new Income Computation and Disclosures Standards besides knowing 470 sections of Companies Act and 298 sections of Income Tax Act. It is humanly impossible for an Individual to be expert in all these at one go, and therefore the need of not only capacity building, need of not only having more partners or hands but also to be techno savvy. While emphasizing on technology-driven capacity building, let's take stock and analyse how new technologies are being applied across the profession. The trend focuses on three areas of technology that have particular relevance. First, given that accountancy is grounded in financial data, improved capabilities in data, including big data and analytics, will have a significant impact. The importance of data also emphasizes the need for good cyber security. Second, technologies such as cloud, mobile and social media deeply change the way that we can interact with clients and across businesses. Third, new financial technologies, including digital-currencies and distributed ledgers, will also have significant relevance to financial services and associated areas of accounting. As such not only the knowledge of all accounting standards but knowledge of entering, feeding, retrieving and understanding the financial data in electronic forms is a huge challenge before accounting profession.

3) Accounting profession in my view is at Inflection Point. Vast technological changes that are happening in every field of life has a direct impact on accounting. Gone are the days when account writing or book keeping was a simple method like debit and credit entries, ledger, trial balance grouping and then profit and loss account and Balance Sheet. The nature of transactions , the volume of transactions and the manner and method in which transaction are taking place more on electronic data has made the life of accountant miserable. To illustrate a simple purchase made by customer on website or by using an app on mobile goes through number of accounting transactions. (The choice of product, the sale price, quantity order, discount thereon based on quantity, payment through credit card, debit card, cash on delivery, receipt of the goods at the hand of customer, entering such receipts in the books , rejection of whole or part of the goods ordered, acceptance of rejection of credit card and its

consequences, charges to be paid to the credit card agency and other agencies involved in accepting orders, delivering the orders and making payment to the vendor etc. are involved even in just single transaction or in multiple transactions.) Vast technological changes in the human life not only in shopping daily requirements but also in shopping of luxurious goods, travel, medical, hospitality and inbound and outbound transactions have become so complex that an accountant not only has to be an expert in technology but has to remain extremely agile, conscious and always on toes. The biggest challenge before the accounting profession is not only to be an expert individually having technical knowhow of advance technological application for accounting but also to have a good accounting team when the entire business environment and complete functions of an entity is running and functioning on SAP, Oracle, Spread Sheets or any kind of tailor made accounting software. Though standard famous accounting software like Tally 9 and Quick book are most popular and commonly used by small and medium entrepreneurs, the chances of mistakes , frauds and security theft is always lingering on any accountant in the organization.

4) Besides the challenges within the accounting professionals there are challenges from outside. The recent change in the new Companies Act requiring compulsory rotation of statutory auditors is one of the biggest challenge though for a limited few it is a golden opportunity. The amendment was incorporated in the section of appointment of auditors with a very noble cause. The continuity of the auditors with certain group of companies or management was sending messages that such auditors have become loyal and therefore may tend to compromise while submitting the audit report. As they say that the justice is not to be done but it must appears to have been done, same way though auditors are independent the concept is that in the eyes of public it must appear that such auditors are independent. However the challenges before the profession is that substantial audit vacancies that have been causing are taken away by big firms applying various kind of business tactics, marketing and other means. This is a big challenge particularly for small and medium size accounting firms.

5) Over and above the challenges of growth and increase in the accounting and auditing practices, there is a lingering challenge of coping up with compliance with the new companies act. Besides strict adherence to the Auditing Standards and also verifying the compliances of Accounting Standards there are now challenges before the accounting profession to see on continuous basis of fraud, mismanagement and non-compliance to statutory provisions by management and timely reporting thereof. As business increasingly span national borders, Accountants have to deal with multiple accounting systems, provisions, acts, regulations, rules and notifications. It has become extremely important to stay current as substantial changes simultaneously bring substantial challenges.

6) The list can be endless but to convey the important challenges before accounting profession is continuing demand for skilled professionals. Because of several regulatory compliance requirements are ongoing and workloads continue growing. The need for experienced personnel is rapidly increasing and not only accountants but even the businessman have to take stringent steps to retain and hire loyal skilled employees.

7) The auditors are historically known to be a watch dog. But now there is a paradigm shift and the role of watch dog is played more by share holders, stake holders and government agencies by deeply scrutinizing financial statements and other informations including under RTI. There are financial activists , there are special scrutinizers and there are intelligence units who are keeping a vigilant eye on the performance of the accountants. Therefore there is a huge challenge before accountants to

maintain highest ethical standards, remain independent and simultaneously exhibit great expertise and intelligence.

Challenges for Tax Professionals:

1) Though in India Chartered Accountants who handle the accounts of the client or are involved in auditing of such clients are by and large also involved in preparation of the tax returns and presentation before tax authorities. The challenges face by the accountants , by and large are also the challenges for tax professionals. But there is a huge market of tax professionals who are either tax advocates or tax practitioner. Not strictly governed or monitored by any regulators. But with the increased scope of work and increased compliance requirements these tax professionals also have their own challenges. The first and foremost is the onslaught of computerization, replacement of manual work by computers and most important online compliances instead of personal meetings and consequences thereof. As we all know earlier it was not possible to think of a tax professional's office without a typewriter . The typewriter now has become an Antique piece and is replaced by Computers, Laptops, iPads and Mobiles. Everything is now Online.

2) One big challenge before the tax professional is the knowledge, art and mastery over computerization in place of manual work. The challenges are there for computing and working out advance tax and online payment, compliances of TDS particularly online generating of form 16A , 26AS and filing of forms like 15CA,15CB, 26Q, 24Q etc. A tax expert will be thrown out of practice if he is not equipped with all these computerized environment and involving himself either by self or through adequate trust worthy supporting team. This is the biggest challenge one has to address very sincerely.

3) In my view the greatest challenge before the Tax Professional is educating the public on the need to have trusted, qualified and ethical tax professionals handling their tax matters. The competitive forces in the area of technologies developed for tax preparation try to replace qualified analytical thinking in the tax preparation process. The tax code is increasing in size and complexity every year. Software can only crunch the numbers: adding, subtracting, multiplying, and dividing. It cannot replace the qualified tax professional's ability to apply the correct law to one's tax situation.

4) The recent amendments in income tax act penalizing for incorrect details in tax audit report is not only the eye opener but is a big challenge for the tax professionals.Now the correctness of the details to be filed in such tax audit report, the relevance of reliance on the client, the inbuilt systems of tax audit performed by article assistance, junior or dependable professionals and signing all will undergo an exercise of great care and caution. For a professional it is not a question of token penalty but is a matter of deciding whether it is a case of gross negligence or a simple error or a pardonable mistake. This is a big challenge for which all tax professionals have to tighten the belt and gear up for the new era of tax compliances.

5) For those tax professionals who are not governed by any regulators, were heither to filing the return of income, the sole consequences of which was always on the Assessee. But now just like prevailing practice in western countries a time has come when the name and details of the tax return preparer has to be mentioned. It will now be a case of direct accountability of a person who shall be filing the return of income based on audited accounts, relying on tax audit report, based on unaudited accounts given by the client or merely a return under presumptive taxation based on turnover. These are the challenges which are going to come which may saddle additional responsibility as well as liability on tax professionals.

6) Amongst Tax Professional another Big Challenge is the concept of new Government shifting from Tax Planning to Tax Compliance. Gone are the days when Tax Consultants were extremely busy in various kinds of Tax Planning of the clients and making them happy with reduced liability of Income tax and corresponding benefits in fees. With the amendments in Income tax like Introduction of special levy of Income Tax on assessee subject to Survey and search, drastic changes in levy of Penalties on them as also for Under reporting of Income and Miss reporting of income it is now going to be not only challenging but a herculean task for tax professionals to file in real sense a true and correct Income Tax Return. In my view now those Professional who guide and advice their clients to disclose true and correct Income will be more in Demand.

7) With a whole world having become a global village, the business are increasingly going GLOCAL Global and Local. The need of complying with Transfer Pricing Regime, both International and Domestic has to be seen as a big Challenge by the Tax Professional. Coupled with these the requirements of ICDS also is a big challenge as it applies to all assesses. The ready provisions on waiting of GAAR and such other increasingly steps to curtail tax abuse are going to have a tough and challenging time for Tax professionals.

8) Last but not the least and at the same time most important challenge that is going to be faced by Tax Professionals is the incoming regime of GST. It is for the first time seen that for One Nation One Tax, Government is so proactive, working overnight and not only Ministry but hundreds of Officers are also working sincerely and diligently for a smooth and pre targeted introduction of GST. This new GST regime is going to be a huge Challenge as there are so many rules and forms to be taken care of and a proper and smooth compliance will lead the Tax professionals to a totally new era of practice.

Challenges to the Accounting & Tax Professionals

Based on my analysis of Challenges and opportunities to Professionals, after 20 years a Tax professional may be like

1) Having no books no paper on his table.
2) Surrounded by computer laptop Mobile and electronic atmosphere round his neck.
3) Having his main office at a prominent place and a huge back office in remote area.
4) Submitting all compliances to Incometax Department or ROC by mails and mobiles and not sitting in corridors of Government Offices.
5) Attending regularly various coaching and training classes to appraise himself with latest changes and developments.
6) Reading newspapers magazines and Articles on line and not papers or print outs.
7) May be working along with his wife from Home or travel destination.
8) Not signing any papers and doing with digital signatures,doing away with inwards and outwards and other filing in Box files but storing everything in cloud.
9) Concept of dressing in suit and tie will vanish and will meet M D and Chairman in Jeans and T shirt.
10) Will forget how to write with a pen or ink and will work with fingers touch screens and receiving and sending all documents by scanning.
11) If not Robots but Artificial Intelligence will replace routine verification and auditing techniques.
12) Will realize the need of growth, both vertical and Horizontal and consequently will involve himself in Pan India presence with networking of other foreign SME Tax professionals.

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Applicability of Tax Audit

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Thresh hold limit prescribed U/s 44AB, 44AD, 44ADA and TDS provisions applicable to Individual/HUF [Whether TDS not to be deducted if Accounts were not tax audited?]

[*Note: To maintain the focus on the issue on hand, we have avoided burdening this presentation with all the technicalities of Section 44AB, 44AD, 44ADA. However, for the completeness of the presentation, Sections 44AB, 44AD, 44ADA are reproduced verbatim later in the presentation*]

Finance Act 2016, has amended Sections 44AB, 44AD and has introduced a new Section 44ADA of Income Tax Act 1961.

Prior to the amendment (i.e. including and up to AY: 2016-17) limit prescribed under sections 44AB and 44AD were identical, however, post amendment, now, the limits are not identical. This has lead to typical complex matrix as to when an assessee would be required to get its account audited for AY: 2017-18 and onwards?

Section 44AB, *inter-alia*, prescribes the limit of total sales / turnover / gross receipt above which an assessee who is carrying on business or profession is required to get its accounts audited under that section.

Section 44AD, *inter-alia*, prescribes that in case of Individual, HUF and Partnership Firm (other than a LLP) carrying on business may file presumptive tax return if turnover is not exceeding a prescribed sum.

Newly inserted Section 44ADA, *inter-alia*, prescribes that an assessee engaged in certain professions may file presumptive tax return if gross receipt is not exceeding a prescribed sum.

The prescribed limit is Rs 1 Crore / Rs. 50 Lakhs (under Section 44AB), Rs 2 Crores (under Section 44AD) and Rs 50 Lakhs (under section 44ADA) [for AY 2017-18].

Further, it is also provided that if an assessee is filing presumptive or higher income return, it need not keep books of accounts and need not get its accounts audited under Section 44AB irrespective of the amount of total sales / turnover / gross receipts exceeding the prescribed limit under that section.

Let us try to analyse the provisions and practically understand the inter play of Sections 44AB, 44AD and 44ADA for AY: 2017-18 and onwards.

[I] In case of 'Business':

[A] Non Residents / Companies / LLPs / Specified businesses:

Section 44AD is not applicable to following class of assesses

a) All Non Residents assesses, or

b) Company, LLP, Trust etc. (all assesses other than individual, HUF and Partnership Firm), or

c) Assessee carrying on specified (excluded) business / activity (i.e. deriving Commission or Brokerage income / Agency business, Goods carriage business covered under Section 44AE).

In respect of above class of assesses, the provisions of Section 44AD are not applicable and hence, will not enjoy the relaxation provided in Section 44AD so far as requirement to obtain Tax Audit Report is concerned. Accordingly, the thresh hold limit of Rs. 1 Crore prescribed u/s 44AB will prevail and all such class of assesses would be required to get their accounts audited u/s 44AB if their Total Sales / Gross Turnover / Gross Receipts exceed / exceeds Rs 1 Crore.

[B] Resident Individual / HUF / Partnership Firm (other than LLP) carrying on other than specified (excluded) business:

Broadly speaking, provisions of Section 44AD are applicable to Resident Individual or HUF or Partnership Firm engaged in the business other than specified (excluded) business whose total turnover / gross receipts are/is Rs. 2 Crores or less. Such an assessee is given an option to file presumptive income return. The assessee filing presumptive or higher income return would enjoy the relaxation of not getting its accounts audited u/s 44AB even if total sales / turnover / gross receipts exceed / exceeds Rs. 1 Crore. If such an assessee files below presumptive income return, barring certain situations, it will have to get its accounts audited even if total sales / turnover / gross receipts are / is Rs. 1 Crore or less. In other word, in respect of an assessee who is governed by Section 44AD, the thresh hold limit of Rs 1 Crore prescribed u/s 44AB is of no consequence in determining whether its accounts are required to be audited u/s 44AB. It would be of interest to note that if assessee is opting for and offering income on presumptive basis then the last date of filing ROI is 31st July and not 30th September of the assessment year.

It may be noted that if the turnover / gross receipt exceeds Rs 2 Crores, then such an assessee do not have the option to declare income on presumptive basis and it would be required to get its accounts audited u/s 44AB.

[*Note: To maintain the focus on the issue on hand, we have avoided burdening this presentation with all technicalities of Section 44AD*]

[II] In case of 'Profession':

As per newly introduced Section 44ADA, w.e.f. AY: 2017-18, in case of a Resident assessee engaged in profession referred to in section 44AA(1), a window of presumptive taxation has been given if the gross receipts do not exceed Rs. 50 Lakhs (i.e. up to and including Rs 50 Lakhs). If such a professional does not disclose its income on presumptive basis then it needs to get its accounts audited u/s 44AB even if the gross receipts are less than Rs. 50 Lakhs. There is no confusion in respect of threshold limit since the threshold limit prescribed u/s 44ADA and u/s 44AB is identical.

For those profession which are not referred to in section 44AA(1), then such assessee can declare income below presumptive income and can escape the requirement of getting their account audited because such a case is neither covered u/s 44ADA nor u/s 44AB.

Whether change in threshhold limit in Section 44AD would make any difference to TDS obligations of Individual / HUF Tax Deductors u/s 194C:

It has already been mentioned here-in-before that prior to the amendment [i.e. including and up to AY: 2016-17 (FY: 2015-16)] limit prescribed under sections 44AB and 44AD

were identical, however, post amendment, now, the limits are not identical. The change in limit prescribed under Section 44AD has additionally posed interpretational challenges to the applicability of TDS obligations u/s 194C in respect of Individual and HUF tax deductors due to differing phraseology used in this section as against phraseology used in other sections (194A, 194H, 194-I, and 194J).

Section 194C employs the phraseology reproduced below –

… any person, being an individual or a Hindu undivided family or an association of persons or a body of individuals (shall deduct income tax) , if such person,—

(A)…..…

(B) is liable to audit of accounts under clause (a) or clause (b) of section 44AB during the financial year immediately preceding the financial year in which such sum is credited or paid to the account of the contractor;

Whereas other sections referred to above employs the phraseology reproduced below –

***Provided (further)** that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (a) or clause (b) of section 44AB during the financial year immediately preceding the financial year in which such interest is credited or paid, shall be liable to deduct income-tax …..*

It is possible to argue that in case of Individual / HUF covered u/s 44AD having sales / turnover / receipts exceeding Rs. 1 crores but not exceeding Rs. 2 Crores and declaring income on presumptive basis are not required to get the accounts audited under clause (a) or clause (b) of Section 44AB and hence perhaps would not be required to comply with TDS obligations u/s 194C. Whereas due to the phraseology used in Section 194A, 194H, 194-I and 194J would be required to deduct TDS under the respective section once the thresh hold limit of sales / turnover / receipt prescribed under clause (a) or clause (b) of Section 44AB is crossed despite the fact that due to inter play of Section 44AD the tax deductor being Individual / HUF is exempted from getting its accounts audited u/s 44AB.

Up till now (TDS obligations to be complied with up to FY 2017-18), it was loosely understood that if tax audit requirement was applicable (ignoring the relaxation given in Section 44AD / 44AE) then and then only TDS obligations were applicable in case of Individual and HUF tax deductors under those various sections including Section 194C.

However, with changes in the thresh hold limits prescribed u/s 44AD, there is likely chance of ending up interpreting that Individual and HUF tax deductors are not required to deduct TDS. However, TDS establishment of tax administration may not agree with the interpretation which may expose Individual and HUF tax deductors to serious consequences of not complying with the TDS obligations.

The authors are of the view that dilution of TDS obligation is not at all intended owing to inadvertent omission to align / synchronise the wordings of Section 194C in line with that of other relevant sections specifically from the view point of Individual and HUF Tax deductors.

TABLE SHOWING PROVISIONS OF SECTION 44AD FOR AY 2016-17 AND 2017-18

Sr.	Particulars	Section 44AD (For AY 2016-17)	Section 44AD (For AY 2017-18)
1	Eligible assessee	Resident taxpayers being Individuals, HUFs and partnership firms other than LLP). Scheme not to apply if assessee is availing deductions under Part C of Chapter VI-A under the heading "C-Deductions in respect of certain incomes" in the relevant assessment year.	No Change
2	To whom section not apply	(i) person carrying on profession as referred to in section 44AA(1) (ii) person earning commission or brokerage income (iii) person carrying on any agency business	No change [Certain professionals can avail presumptive income scheme under new section 44ADA]
3	In respect of what businesses can the scheme be availed	Any business (excluding covered under sec.44AE)	No Change
4	Thresh hold limit	Gross turnover/gross receipts up to and including Rs. 1 crore.	Limit increased from Rs. 1 Crore to Rs. 2 Crores
4	Presumptive income	8% of the total turnover or gross receipts. If assessee declares more than 8%, then such higher income declared	No Change except that in case of turnover / receipts through banking channel 6% is substituted for 8%
5	Opting in and opting out of the scheme	No restrictions.	Having opted for the presumptive scheme if an assessee opts out from scheme in any of succeeding 5 assessment years, it can't avail the scheme for the next five assessment years. He can still freely opt out but that will have consequences under sub-sections (4) & (5) of amended section 44AD
6	Separate deduction u/s 40(b) to partnership firms	Allowed	Not allowed
7	Advance tax	Provisions of Chapter XVII-C of the Act relating to advance tax not applicable so far as the eligible business is concerned [section 44AD(4)]	Advance tax in respect of an eligible business should be paid up by March 15 [Sub section(4) of amended Section 44AD no longer deals with advance tax payment] [Section 211(1) is substituted w.e.f.1-6-2016]
8	Compliance with accounts and audit requirements of section 44AA(2) and section 44A(b)	An assessee with turnover below Rs. 1 Crore declaring income below the presumptive rate of 8% and whose total income exceeds the maximum amount not chargeable to tax is required to maintain books of account and also get them audited u/s 44AB	No Change except that limit increased from Rs. 1 Crore to Rs. 2 Crores.

COMPARATIVE PROVISISONS OF SECTIONS 44AD, 44ADA AND 44AE

Sr.	Point of comparison	Section 44AD	Section 44ADA	Section 44AE
1	Provision when introduced	AY 2011-12	AY 2017-18	AY 1994-95
2	To whom applicable	Resident only	Resident only	Both Resident as well as Non resident
3	Whether Companies can avail the scheme?	No	No bar	No bar
4	Whether LLPs can avail the scheme	No	No bar	No bar
5	Whether HUFs can avail the scheme	No bar	No bar	No bar
6	Whether Partnership firms can avail the scheme	No bar	No bar	No bar
7	Eligible business Activity / Profession	Any business except the business referred to in section 44AEAny person carrying on/ engaged in / deriving income in the nature of(a) Profession referred to in section 44AA (1) (b) Agency business (c) Commission or brokerageis totally barred from availing section 44AD in respect of any eligible business.Any person carrying on profession referred to in section 44AA (1) can avail section 44ADA in respect of such profession but cannot avail section 44AD in respect of any "eligible business".	Profession referred to in section 44AA	Any person owning not more than 10 goods carriages at any time during the previous year and is engaged in the business of playing, hiring or leasing goods carriages
8	Turnover or gross receipts limit to qualify for the scheme	Turnover/gross receipts during the relevant previous year should not exceed Rs 1 Crore [w.e.f. AY: 2017-18: Rs. 2 Crores]	Gross receipts during the relevant previous year should not to exceed Rs 50 Lakhs	No such limit
9	Amount presumed as income (Presumptive Income)	8% of turnover or gross receipts [w.e.f. AY: 2017-18: 6% in case of turnover/gross receipts through banking channel] or such higher amount as declared by assessee in the ROI	50% of gross receipts or such higher amount as declared by assessee in the ROI	Profit from each goods carriage shall be Rs.7500 pm or part of a month during which goods carriages is owned by assessee or higher amount declared by assessee in the ROI
10	Indicator from which presumptive income is inferred instead of computing income from assessee's accounts and records	Total turnover or gross receipts of eligible business	Gross receipts of the profession referred to in section 44AA(1)	Number of heavy goods carriages owned during the previous year

Sr.	Point of comparison	Section 44AD	Section 44ADA	Section 44AE
11	Opting in and opting out of scheme	Restricted by sub-section (4) of section 44AD w.e.f. AY: 2017-18 [See the earlier table]	No restrictions	No restrictions
12	If assessee claims that its income is lower than the amount presumed as income in 9 above	If assessee avails the scheme and opts out before availing it for 6 consecutive previous years then: (i) assessee will be barred from availing the scheme for next 5 years (ii) if his total income is less than the threshold exemption limit, books of account and documents specified u/s 44AA(2) will have to be maintained and got audited u/s 44AB and audit report to be submitted	If his total income is less than threshold exemption limit, books of account and documents specified u/s 44AA(2) will have to be maintained and got audited u/s 44AB and audit report submitted	Assessee liable to maintain books of account and documents specified u/s 44AA and get them audited u/s 44AB and audit report submitted
13	Whether deduction in respect of remuneration and interest to partners u/s 40(b) admissible to firms which opt for presumptive taxation	AY: 2016-17 and earlier years: Expressly allowed AY: 2017-18 and later years: Expressly barred	Section 44ADA is silent on this.	Section 44AE expressly allows deduction u/s 40(b)
14	Whether Chapter VIA-C deductions NOT admissible if assessee opts for presumptive taxation	Yes [Expressly barred]	No such bar.	No such bar.
15	Advance Tax provisions-Whether applicable to presumptive income	AY: 2016-17 and earlier years: Not Applicable AY: 2017-18 and later years: Advance tax will have to be paid by March 15	Applicable as usual	Applicable as usual

For ready reference Sections 44AB, 44AD and 44ADA are reproduced below [As applicable to AY: 2017-18]:

Audit of accounts of certain persons carrying on business or profession

44AB. Every person,—

(*a*) carrying on business shall, if his total sales, turnover or gross receipts, as the case may be, in business exceed or exceeds [one crore rupees] in any previous year [***]; or

(*b*) carrying on profession shall, if his gross receipts in profession exceed [[*fifty*] lakh rupees] in any [previous year; or

(*c*) carrying on the business shall, if the profits and gains from the business are deemed to be the profits and gains of such person under [section 44AE] [or section 44BB or section 44BBB], as the case may be, and he has claimed his income to be lower than the profits or gains so deemed to be the profits and gains of his business, as the case may be, in any [previous year; or]] [***]

[(d) carrying on the [profession]shall, if the profits and gains from the [profession]are deemed to be the profits and gains of such person under

[section 44ADA] and he has claimed such income to be lower than the profits and gains so deemed to be the profits and gains of his [profession]and his income exceeds the maximum amount which is not chargeable to income-tax in any [previous year; or]]

[(e) carrying on the business shall, if the provisions of sub-section (4) of section 44AD are applicable in his case and his income exceeds the maximum amount which is not chargeable to income-tax in any previous year,]

get his accounts of such previous year [***] audited by an accountant before the specified date and [furnish by] that date the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed :

[Provided *that this section shall not apply to the person, who declares profits and gains for the previous year in accordance with the provisions of sub-section (1) of section 44AD and his total sales, turnover or gross receipts, as the case may be, in business does not exceed two crore rupees in such previous year:* **]**

[**Provided [*further*]** that this section shall not apply to the person, who derives income of the nature referred to in [***] section 44B or [section 44BBA], on and from the 1st day of April, 1985 or, as the case may be, the date on which the relevant section came into force, whichever is later:

Provided [*also*] that] in a case where such person is required by or under any other law to get his accounts audited [***], it shall be sufficient compliance with the provisions of this section if such person gets the accounts of such business or profession audited under such law before the specified date and [furnishes by] that date the report of the audit as required under such other law and a further report [by an accountant] in the form prescribed under this section.

Explanation.—For the purposes of this section,—

(*i*) "accountant" shall have the same meaning as in the *Explanation* below sub-section (2) of section 288;

[(*ii*) "specified date", in relation to the accounts of the assessee of the previous year relevant to an assessment year, means [the due date for furnishing the return of income under sub-section (1) of section 139].]]

Special provision for computing profits and gains of business on presumptive basis

44AD. (1) Notwithstanding anything to the contrary contained in sections 28 to 43C, in the case of an eligible assessee engaged in an eligible business, a sum equal to eight per cent of the total turnover or gross receipts of the assessee in the previous year on account of such business or, as the case may be, a sum higher than the aforesaid sum claimed to have been earned by the eligible assessee, shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession" :

[Provided *that this sub-section shall have effect as if for the words "eight per cent", the words "six per cent" had been substituted, in respect of the amount of total turnover or gross receipts which is received by an account payee cheque or an account payee bank draft or use of electronic clearing system through a bank account during the previous year or before the due date specified in sub-section (1) of section 139 in respect of that previous year.* **]**

(2) Any deduction allowable under the provisions of sections 30 to 38 shall, for the purposes of sub-section (1), be deemed to have been already given full effect to and no further deduction under those sections shall be allowed:

[***]

(3) The written down value of any asset of an eligible business shall be deemed to have been calculated as if the eligible assessee had claimed and had been actually allowed the deduction in respect of the depreciation for each of the relevant assessment years.

[*(4) Where an eligible assessee declares profit for any previous year in accordance with the provisions of this section and he declares profit for any of the five assessment years relevant to the previous year*

succeeding such previous year not in accordance with the provisions of sub-section (1), he shall not be eligible to claim the benefit of the provisions of this section for five assessment years subsequent to the assessment year relevant to the previous year in which the profit has not been declared in accordance with the provisions of sub-section (1).

(5) Notwithstanding anything contained in the foregoing provisions of this section, an eligible assessee to whom the provisions of sub-section (4) are applicable and whose total income exceeds the maximum amount which is not chargeable to income-tax, shall be required to keep and maintain such books of account and other documents as required under sub-section (2) of section 44AA and get them audited and furnish a report of such audit as required under section 44AB.]

[(6) The provisions of this section, notwithstanding anything contained in the foregoing provisions, shall not apply to—

(*i*) a person carrying on profession as referred to in sub-section (1) of section 44AA;

(*ii*) a person earning income in the nature of commission or brokerage; or

(*iii*) a person carrying on any agency business.]

Explanation.—For the purposes of this section,—

(*a*) "eligible assessee" means,—

(*i*) an individual, Hindu undivided family or a partnership firm, who is a resident, but not a limited liability partnership firm as defined under clause (*n*) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009); and

(*ii*) who has not claimed deduction under any of the sections 10A, 10AA, 10B, 10BA or deduction under any provisions of Chapter VIA under the heading *"C. - Deductions in respect of certain incomes"* in the relevant assessment year;

(*b*) "eligible business" means,—

(*i*) any business except the business of plying, hiring or leasing goods carriages referred to in section 44AE; and

(*ii*) whose total turnover or gross receipts in the previous year does not exceed an amount of [*two crore rupees.*]

Special provision for computing profits and gains of profession on presumptive basis

44ADA. *(1) Notwithstanding anything contained in sections 28 to 43C, in the case of an assessee, being a resident in India, who is engaged in a profession referred to in sub-section (1) of section 44AA and whose total gross receipts do not exceed fifty lakh rupees in a previous year, a sum equal to fifty per cent of the total gross receipts of the assessee in the previous year on account of such profession or, as the case may be, a sum higher than the aforesaid sum claimed to have been earned by the assessee, shall be deemed to be the profits and gains of such profession chargeable to tax under the head "Profits and gains of business or profession".*

(2) Any deduction allowable under the provisions of sections 30 to 38 shall, for the purposes of sub-section (1), be deemed to have been already given full effect to and no further deduction under those sections shall be allowed.

(3) The written down value of any asset used for the purposes of profession shall be deemed to have been calculated as if the assessee had claimed and had been actually allowed the deduction in respect of the depreciation for each of the relevant assessment years.

(4) Notwithstanding anything contained in the foregoing provisions of this section, an assessee who claims that his profits and gains from the profession are lower than the profits and gains specified in sub-section (1) and whose total income exceeds the maximum amount which is not chargeable to income-tax, shall be required to keep and maintain such books of account and other documents as required under sub-section (1) of section 44AA and get them audited and furnish a report of such audit as required under section 44AB.]

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Glimpses of Supreme Court Rulings

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7 Arbitrator :

Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applies to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial.

[Voestalpine Schienen GmbH Vs. Delhi Metro Rail Corpn. Ltd. (2017) (4 SCC 665)]

8 Income from House Property:

There may be instances where a particular income may appear to fall in more than one head. These kind of cases of overlapping have frequently arisen under the two heads with which we are concerned in the instant case as well, namely, income from the house property on the one hand and profits and gains from business on the other hand. On the facts of a particular case, income has to be either treated as income from the house property or as the business income. Tests which are to be applied for determining the real nature of income are laid down in judicial decisions, on the interpretation of the provisions of these two heads. Wherever there is an income from leasing out of premises and collecting rent, normally such an income is to be treated as income from house property, in case provisions of Section 22 of the Act are satisfied with primary ingredient that the assessee is the owner of the said building or lands appurtenant thereto. Section 22 of the Act makes 'annual value' of such a property as income chargeable to tax under this head. How annual value is to be determined is provided in Section 23 of the Act. 'Owner of the house property' is defined in Section 27 of the Act which includes certain situations where a person not actually the owner shall be treated as deemed owner of a building or part thereof. In the present case, the appellant is held to be "deemed owner" of the property in question by virtue of Section 27(iiib) of the Act. On the other hand, under certain circumstances, where the income may have been derived from letting out of the premises, it can still be treated as business income if letting out of the premises itself is the business of the assessee. What is the test which has to be applied to determine whether the income would be chargeable under the head "income from the house property" or it would be chargeable under the head "Profits and gains from business or profession", is the question. It may be mentioned, in the first instance, that merely because there is an entry in the object clause of the business showing a particular object, would not be the determinative factor to arrive at a conclusion that the income is to be treated as income from business. Such a question would depend upon the circumstances of each case. In the instant case income earned from a shopping center is required to be taxed under the head "Income from House Property".

[Raj Dadarkar& Associates Vs. ACIT (Civil Appeal Nos.6455-6460 of 2017) (dtd.09.05.2017)]

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From the Courts

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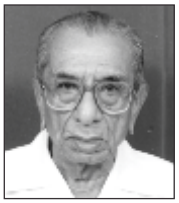

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21 Provision of Sec. 271(1)(c) Explanation 1 Explained
CIT v/s. Samurai Techno Trading P. Ltd. (2016) 389 ITR 357 (Ker)

Issue

For levying penalty u/s 271(1)(c) how the effect of Explanation 1 to Sec. 271(1)(c) is to be given.

Held :

Under section 271(1)(c) of the Income Tax Act, 1961, if any one of the officers mentioned therein is satisfied that any person has concealed the particulars of income or furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty, the amount indicated. While appreciating the scope of clause (c), one has to take into account the provisions of Explanation 1 which is in two parts. Under clause (A) in respect of any facts material to the computation of the total income such person fails to offer an explanation or offers an explanation and the officer concerned has found it to be false. Clause (B) takes in three parts. The first part is that an explanation has been offered and the assessee is not able to substantiate it. The second part is that the assessee has failed to prove that such explanation offered by him is bona fide and the third part is that the assessee has failed to prove that all the facts relating to the same and material to the computation of his total income have been disclosed by him. In order to attract section 271(1)(c) read with clause (B) of Explanation 1, there must be a positive finding that in the explanation offered, the three elements have been established. The words "Furnishing inaccurate particulars of income" refer to the particulars of his income which have been furnished by the assessee and the requirement of "concealment of income" is that income has not been declared at all or is not even recorded in the books of account or in a particular case, the concealment of the particulars of income may be from the books of account as well as from the return furnished. Merely because the assessee has made certain claims, which were not accepted or was not acceptable to the Revenue, that itself would not attract the penalty under section 271(1)(c).

22 Application Software v/s. System Software Allowability of Expenditure : Indian Aluminium Company Ltd. V/s. CIT (2017) 291 CTR 196 (Cal),(2016) 384 ITR 0386 (Cal)

Issue :

Whether "application software" is different than "system software"? Expenses on application software is allowable?

Held :

Application software is distinct from system software as it has to be constantly updated due to rapid advancements in technology and increasing complexity of the features. Software industry is one such field where advancements and changes happen at a lightning pace and it is difficult to attribute any degree of endurability even to system software let alone application software. Tribunal erred in law in confirming the disallowance of expenditure incurred for software development as capital expenditure.

23 Rejection of Books of Accounts : No addition of entries in books.
CIT v/s. Bahubali Neminath Muttin (2017) 291 CTR 214 (Kar), (2016) 388 ITR 0608 (Karn)

Issue :

When books of accounts are rejected for arriving at income, whether the same can be the basis for making addition ?

Held :

It is evident that the books of account of the respondent had been rejected by the assessing authority, in which case the same books of account could not be relied upon in an addition on account of trade creditors and also for arriving at the closing stock. This is an established principle as has been held in the decisions relied upon by the respondent namely Indwell Construction case, Banwari Lal Banshidhar's case. Aggarwal Engineering company's case and Amman Steel and Allied Industries case.

Cases relied by the "Assessee and accepted".

(1) CIT v/s. Banwarilal Bansidhar (1998) 229 ITR 229 (All)

(2) CIT v/s. Aggarwal Eng. Co. (2008) 302 ITR 246 (P & H)

(3) CIT v/s. Amman Steel and Allied Industries (2015) 377 ITR 568 (Mad)

24 Sec. 201(1) and Sec. 201(1A) : Failure to deduct tax at source : Interest : Reasonable time
CIT v/s. Anagram Wellington Assets Management Co. Ltd. (2016) 389 ITR 654 (Guj)

Issue :

When no period for levy of interest u/s 201(1) and Sec. 201(1A) is prescribed in the Act what should be the reasonable period during which the power can be exercised?

Held :

Though no period of limitation is prescribed exercising power under section 201(1) and 1(A) of the Income Tax Act, still if such power is not exercised within a reasonable period it would become time barred. It is true that it is the duty of the assessee to deduct tax at source and the question is whether it is likely to cause any loss to the revenue if it is not deducted in time. If tax is not deducted at source, it is required to be paid in the first installment of advance tax, which is required to be paid within four months from the date of filing of the return. Loss that may be caused to the Revenue is only to the tune of interest of four months on delayed payment of tax. Not only that, when the declaration about this is made in the return, it comes within the knowledge of the Assessing Officer even if the tax is not deducted at source. Therefore, the period of four years is reasonable. The court cannot legislate but the Assessing Officer also cannot be given unfettered powers, which he can exercise even beyond the reasonable period of four years.

25 Reopening of assessment and Audit Party
NIC Proteins Ltd. v/s. ITO (OSD) (2016) 389 ITR 541 (Guj)

Issue :

Whether reopening on the instructions of Audit party is valid?

Held :

In the original assessment the claim of deduction under section 80-IB of the Act was examined by the Assessing Officer. The matter was verified from the records and only thereafter the claim was accepted as it was. The Assessing Officer might have committed an error in allowing deduction with respect to several amounts which might not be eligible for such deduction. An erroneous decision of the Assessing Officer was different from non consideration of an issue at the time of assessment. Therefore, it could not be stated that the issue was not scrutinized by the Assessing Officer during the original assessment. The audit party brought a certain issue to the notice of the Assessing Officer and compelled her to issue notice of reopening despite her clear opinion that the issue was not valid and that there was no escapement of income on the grounds so urged by the audit party. Since the opinion of the audit party on a point of law could not be regarded as information enabling the Income Tax Officer to initiate reassessment proceedings, the notice was void and to be set aside.

26 Sec. 147/148 : Obligation of Assessee and Obligation of Assessing Officer Kohinoor Hatcheries Pvt. Ltd. v/s. Deputy CIT (2016) 389 ITR 493 (T & AP)

Issue :

What are the obligations of Assessee and of Assessing Officer for invoking provisions of Sec. 147/148?

Held :

The proviso as well as the Explanation 1 to section 147 of the Income tax Act, 1961 makes it obligatory on the part of the assessee (1) to make a full disclosure; (2) to make a true disclosure and (3) to ensure that such true and full disclosure is of material facts necessary for the assessment. A clear signal is sent to the assessee by Explanation 1 that the mere production of books of account or other evidence before the Assessing Officer will not be treated as a disclosure. In other words, a distinction is sought to be made between production of materials and disclosure of materials.

The question of change of opinion would arise only if there had been a formation of opinion in the first instance. It is not necessary that upon mere production of material evidence, the formation of an opinion could inevitably happen. But, on the contrary, upon disclosure of material facts, fully and truly, the Assessing Officer could, rather, is expected to form an opinion. Once an opinion is formed or the possibility of forming an opinion is stepped up, at the time of assessment, the Assessing Officer is not allowed, thereafter, by law, to have recourse to section 147 of the Act. By making a distinction between a mere production of necessary materials and a true and full disclosure of materials necessary for assessment, Explanation 1 to section 147 ensures, (a) that an Assessing Officer, who had once formed an opinion, does not seek to change it later and (b) that an Assessing Officer, who, deliberately or by his negligence, omitted to form an opinion, despite being made aware of the material facts, does not take refuge later under section 147 to cover up his negligence.

27 Interpretation of Sec. 153A CIT v/s. Gurinder Singh Bawa (2016) 386 ITR 483 (Bom)

Issue :

How the provision of Sec. 153-A is to be interpreted?

Held :

The assessee challenged the validity of the assessment made under section 153A, on the grounds that no assessment in respect of the six assessment yeas was pending so as to have abated. The Tribunal accepted the assessee's submission and held that no incriminating material having been found during course of the search, the entire proceedings under section 153A were without jurisdiction and therefore, the addition made had to be deleted. On Appeal:

Dismissing the appeal, that once an assessment was not pending but had attained finality for a particular year, it could not be subject to proceedings under section 153A of the Act, if no incriminating materials were gathered in the course of the search or during the proceedings under section 153A, which were contrary to and were not disclosed during the regular assessment proceedings.

28 Interpretation of statute : How a proviso is to be interpreted : IVRCL JL (JV) v/s. Asstt. CIT (2016) 386 ITR 364 (T & AP)

Issue :

How a proviso to a section in the Act is to be interpreted?

Held :

Ordinarily, a proviso is read either as an exception to the substantive provision to which it is added, or as restricting, the width and amplitude of the said provision. The proper function of a proviso is to accept, and to deal with a case which would otherwise fall within the general language of the provision, and its effect is confined to that case. It is a qualification of the preceding provision.

Ordinarily, a proviso is not interpreted as stating a general rule.

A proviso to a particular provision of a statute or rule embraces the field which is covered by the said provision. It carves out an exception to the provision to which it has been enacted as a proviso, and to no other.

The proper course is to apply the broad general rule of construction which is that a section or rule must be construed as a whole; each portion throwing light, if need be on the rest.

A proviso cannot be torn apart from the main section or rule nor can it be used to nullify or set at naught the real object of the main section.

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.

29 Penalty 271 D : Limitation u/s 275 CIT v/s. Narayani & Sons (P) Ltd (2016) 289 CTR 301 (Cal)

Issue :

How the period of six months provided for levying penalty is to be calculated when the notice is issued by A.O?

Held

Though Sec. 271D vests the jurisdiction of imposing penalty solely in the Jt. CIT, it is silent as regards initiation of the proceedings. The question is, can such initiation of proceedings be made by the AO? The AO is the person, who is likely to come across the cases of concealment or violation of the provisions of law attracting penal provisions. In a case falling under Sec. 271D the AO is not precluded from initiating the proceedings by issuing a notice. Once it is realized that the proceedings were initiated by AO on 26th Dec. 2006 when the notice was issued by the A.O. the period of limitation necessarily expired on 30th June, 2007 whereas the order imposing penalty was passed on 21st Sept, 2007 after issue of fresh notice on 26th July, 2007. No elaborate reasoning is required to demonstrate that the order is hit by limitation.

30 Delay in giving effect to CIT(A) Order : Cost awarded R.G. Gaujar v/s. ITO (2016) 387 ITR 696 (Guj)

Issue :

Is the assessee entitled to relief granted by CIT(A) as early as possible ?

Held :

Hon. Gujarat High Court censured the Department for its adamant attitude in not giving effect to the rectification order passed by the Commissioner (Appeals) in wilful disregard of it s statutory duty under section 154(5) of the Act and for failure to comply with the express instructions of the Board in the matter of giving effect to appellate orders. Imposing a cost of Rs. 10,000/- on the Department, the court found the Department's justification that the matter has been carried in appeal before the Tribunal as misconceived.

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Tribunal News

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13 JSW Steel Vs. ACIT 82 Taxmann.com 210 (Mum)
Assessment Years: 2004-05 Order Dated: 13th January, 2017

Basic Facts

The assessee is a public limited company engaged in the business of manufacturing hot rolled steel sheets and steel plates. The assessee had availed 'rupee term loans' and 'foreign currency loans' from various Indian and foreign financial institutions and banks for setting up of integrated steel plants after which the assessee had to enter into 'Corporate Debt Restructuring Package' and thus a portion of principalbeing utilized for import of capital machines and interest obligation was waived. The assessee contended that since the waiver of principal amount of borrowings was utilized on capital account and the interest portion of waiver was never claimed as expenditure in previous years, the same should not be added in total income. It also contended that receipt which is not chargeable to tax under section 4 cannot be brought to tax under section 115JB The contention was rejected by CIT(A) on the ground that the assessee is required to prepare its financial statements as per Companies Act which considers the said waiver in the Profit and loss statement and the book profit so arrived is to be taken at the basis for MAT calculation subject to certain specific adjustments. Aggrieved, the assessee is in appeal before ITAT.

Issue

Whether the capital surplus on account of waiver of dues is neither taxable nor can be included in computation of book profit u/s. 115JB?

Held

As regards the taxability of the principal amount as per Income Tax Act, the ITAT held that waiver of loan taken for acquisition of a capital asset and on capital account cannot be taxed u/s 41(1), as it is neither on revenue account nor a remission of a trading liability so as to attract tax in the year of remission. As regards its inclusion in the book profit, ITAT contended that assessee company consequent upon waiver of loan amount is not required to be credited to the profit & loss account for the year in which waiver is granted and in any case it cannot be reckoned as working result of the company during the period covered by the account, so as to be treated as part of book profit of the company for that year under the Companies Act. It clearly acknowledged the fact that it was never the intention of the legislature that any receipts which is not taxable *per se* within the income tax provision or not reckoned as part of net profit as per the profit & loss account as per Companies Act can be brought to tax as a book profit.

So far as non-inclusion of waiver of interest amount in total income of the assessee as per Normal provisions is concerned, ITAT held that it is not taxable as per the provision of section 41(1), because, admittedly the assessee has not claimed the said amount as deduction in the earlier years in view of the provisions of section 43B. Once it has not been claimed as deduction then there is no question to be offered for tax under section 41(1). Secondly it is part of capital surplus arising out of waiver of dues and hence it forms part of the capital reserve which cannot be roped in as a part of net profit while computing the book profit under section 115JB. Even otherwise also the provision of section 41(1) is a deeming

provision and the fiction cannot be extended either to the provisions of section 115JB or to the provisions of the Companies Act, because the waiver of a liability for interest on loan is not required to be credited to the profit & loss account of the year of the waiver. Thus, the waiver of interest payable to UTI will also not be includable in the book profit and the same has to be deducted.

Hence, the ground is allowed in favor of the assessee.

14 Ravi Poddar Vs. ACIT 80 Taxmann.com 192(Jaipur) Assessment Years: 2008-09 Order Dated: 24th March, 2017

Basic Facts

Assessee, the main working partner of a firm "C" was assigned Keyman insurance policy by the partnership firm which was subsequently surrendered by him. However, the amount of the said policy was received by him in the subsequent financial year. Notice under section 148 was issued by the AO on the ground that the said amount is taxable in the hands of the assessee at the time of assignment of the Keyman Policy as subsequent to the assignment the policy would attain an individual status and would be eligible for tax benefits u/s 10(10D) available to the individual policies. The assessee objected the same on the ground that only if any sum is "received" under Keyman Insurance Policy, the same can be treated as income and not otherwise. Aggrieved, the assessee is in appeal before ITAT.

Issue

Whether the insurance policy is taxable in the hands of the assesse at the time of assignment of policy or at the time of actual receipt of money?

Held

The Hon'ble ITAT on perusal of provisions of section 2(24)(xi), 28(vi) and 56(2)(iv) held that the words "any sum received under the Keyman Insurance policy" cannot be a given a meaning other than the sum of money under the Keyman Insurance policy which was actually received by the assessee. The Tribunal held that in the given case, the taxable event will occur when the amount was actually received by the appellant on actual surrender of the Keyman Insurance Policy. The surrender of the policy and the actual receipt of money by the assessee under the Keyman Insurance Policy has admittedly not happened during the year under consideration but has happened only in the subsequent financial year. Hence, no amount can be brought to tax in the year under consideration. Relying on the Circular No, 792 dated 18/02/1998 along with the provisions relating to key man insurance policy, ITAT held that the circular doesn't support the case of the revenue. As regards the contention of the Revenue that the whole arrangement of assignment is nothing but to avoid payment of due taxes, the ITAT relied on the decision of Hon'ble Delhi High Court in case of Rajan Nanda and held that it cannot be held that the arrangement has been entered into between the firm and the appellant with a view to avoid payment of taxes. The taxable event is the year of actual receipt of the surrender value and the revenue will be well within its rights to bring to tax such receipt on surrender of the Keyman Insurance Policy as per the law prevailing for the said year. Hence, the ground taken by the revenue was dismissed.

15 Oncology Services India (P) Ltd. vs. ADIT [2017] 82 Taxmann.com 42 (Ahd) Assessment Years: 2009-10 Order Dated: 1ST June, 2017

Basic Facts

Assessee had made payment to a Germany based entity, namely, OSE without deducting TDS. The AO was of the view that he payment was towards using the name, goodwill and the market reputation of OSE and therefore, taxable in India as royalty under section 9(1)(vi) of the Income Tax Act, 1961. Accordingly, the AO issued a show cause notice to

the assessee to explain as to why it should not be treated as assessee in default for non-deduction of TDS. The assessee explained that the payment was made towards Standard Operating Procedures, access to data base, E-mail Server, Hardware and Software and in absence of permanent establishment ('PE') of OSE in India, the payment was not taxable in India. The assessee also contended that it was permitted by OSE to use Brand name, logo and website without cost and financial obligation. Eventually the AO held that the payment made by the assessee was for the use of technology, patent, trademark of OSE and accordingly treated the same as Royalty under section 9(1)(vi) of the Act as per India –Germany DTAA. Aggrieved with the order of AO, the assessee appealed before CIT (A) who upheld the order of AO.

Issue

Whether payment for sharing of standard operating procedures developed over a period of time as Royalty under Article 13 of India – Germany DTAA?

Held

Based on agreement between OSE and Assessee, the Tribunal observed that OSE had agreed to permit the assessee to use its brand name, logo and website without cost and financial obligation. Hence, no part of payment made by the assessee was for use of brand, name and logo. The Tribunal also acknowledged that the payment was for sharing of SOPs, access to date base, email server, hardware, software of OSE. In view of Article 13(3) of India Germany Tax Treaty, the Tribunal held that sharing of SOPs amounted to sharing 'information concerning industrial, commercial or scientific experience'. The Tribunal relied on written submission filed by assessee itself before CIT(A) that SOPs were 'matured validated standard procedures' which had been developed by OSE over a period of time and approved by regulatory bodies. The Tribunal observed that the assessee itself had acknowledged that SOPs were nontransferable and the assessee was not allowed to make any changes in it. In effect, it was only sharing of information about scientific experiences by OES. But the payment by assessee for such sharing of scientific, or for purpose, industrial and commercial experiences is covered by Article 13(3) of India – Germany DTAA. It was also held that mere fact that OSE did not have PE in India is only elementary and a foreign entity not having PE in India does not come in the way of taxation of Royalties.

16 Gemological Institute International Inc. Vs. DCIT [2017] 81 taxmann.com 473 (Mum)

Assessment Years: 2009-10& 2011-12
Order Dated: 9th May, 2017

Facts

The assessee, a non-resident company incorporated in USA provided technical services to one of its group company, GIA India by entering in to training and technical service agreement for training the employees of GIA India and providing technical services for the implementation of grading policies, procedures and processes. The agreement clearly stated that the customer of assessee will have to pay costs incurred plus a markup of six and one-half percent and customers will reimburse assessee for fees paid by Service Provider to third party service providers. In pursuance to the said agreement, the assessee raised separate debit notes for 'fee for training and technical services' rendered by it to GIA India and also on account of 'reimbursement of travel expenses, group health insurance and other minor incidental expenses' incurred by it pertaining to aforesaid assignment. AO was of view that entire amount received by assessee from GIA India was liable to be included in income of assessee as fee for technical services including expenses reimbursed by GIA India. The CIT(A) upheld the order of the AO.

Issue

Whether the expenses incurred on cost to cost basis will also be included in the amount of FTS?

Held:

The Tribunal noted that assessee was entitled to receive by way of fee only the amount incurred by way of cost to 'employ' the individuals plus mark-up of 6.5% and the expression cost to 'employ' individuals is different from the expression cost incurred to 'depute' a person. Also the drafting of the agreement and manner of placements the clauses in the agreement clearly make out a case that FTS is different from the expenses incurred on third party costs.

The ITAT has also considered the latest judgment in the case of *A.P. Moller Maersk by the Hon'ble Supreme Court*. From the above judgment it is clear that the amount received by the assessee on account of said reimbursement which has been received over and above the amount of FTS cannot be included and taxed as part of FTS. It is apparent from transfer pricing study report and transfer pricing orders passed in the case of GIA India that no profit element has been included in the expenses reimbursed. Thus, taking into account the totality of facts and circumstances of the case, addition made by the Assessing Officer was contrary to facts and therefore, was directed to be deleted.

17 Dover India Pvt. Ltd. Vs. DCIT 81 Taxmann.com 245 (Pune) Assessment Years: 2009-10 Order Dated: 19th April, 2017

Basic Facts

The assessee was wholly owned subsidiary of Dover (Switzerland) holding LLC and the business of assessee was divided into different business segments. The manufacturing unit was established in the assessment year 2008-09 and operated for three months .The assessee had undertaken several international transactions during the year with its associate enterprises as per provisions of section 92B of the Act. The assessee presented analysis of various international transactions and had selected TNMM method for benchmarking the international transactions. The assessee in the TP documentation for assessment year had worked out the amount of capacity utilization of Rs.1,61,09,646/-. As per the assessee, since the manufacturing operations were in nascent stage and the assessee had incurred abnormal losses due to underutilization of capacity and other unabsorbed expenses, etc., the said capacity under-utilization adjustment should be allowed.Similar adjustment of under-utilization of capacity was carved out and allowed to the assessee by the AO in the preceding year.The TPO noted that in the succeeding year, the associate enterprises had given compensation to the assessee for under-utilization. The TPO was of the view that similar adjustment should have been allowed by the associate enterprises for the year under consideration also. Rejecting the plea of assessee to allow capacity under-utilization adjustment, the TPO was of the view that on using extended CUP method for valuation of support payments, the assessee should have received sum of Rs.1,65,23,053/- on account of support payments towards marketing expenses and initial start-up overhead charges. Hence, TP adjustment on account of non-receipt of said support payments towards marketing expenses and initial start-up overhead charges at Rs.1.65 crores was made in the hands of assessee.

Issue

Whether the assessee is entitled to the adjustment for capacity under-utilization? Whether TP adjustment could be made on account of non-receipt of support payments from the associate enterprises i.e. adjustment made on account of an arrangement which does not exist?

Held

The Hon'ble ITAT held that TPO cannot pre-suppose an international transaction between the assessee and its associate enterprises and the determination of TP adjustment on account thereof. During the year under consideration, the assessee

had not received any support payments towards its marketing expenses or the initial start-up overhead charges. There was no agreement between the parties to pay any such support payments or to receive the same. In the absence of the same, the ITAT relying on the decision of Hon'ble High Court of Delhi in Maruti Suzuki India Ltd. vs. CIT held that addition made on the basis of non-existing agreement, by the TPO, does not stand. Further the ITAT held that the the claim of assessee was valid as this was the first complete year of operation. Accordingly, the assessee is entitled to the adjustment on account of capacity under-utilization based on the decision of Pune Bench of Tribunal in Tasty Bite Eatables Ltd. (2015) 59 taxmann.com 437. Accordingly, ITAT deleted the proposed addition on account of non-allowable adjustment for capacity under-utilization at Rs 1.44 crores. The ITAT also deleted the TP adjustment made on account of non-receipt of support payments at Rs.1.65 crores. Accordingly, assessee's appeal was allowed.

18 ACIT V Vireet Investments (P.) Ltd. 82 Taxmann.com 415 (DEL)(SB). Assessment Year 2008-09, Order dated 16th June 2017

Facts

The AO while computing book profit under section 115JB made addition on account of disallowance under section 14A in respect of dividend income and long term capital gain claimed as exempt under section 10(38). The assessee submitted that as per clause (*f*) of Explanation 1 to section 115JB(2) only expenditure relating to income other than income assessable under section 10(38) was to be added while calculating book profit under section 115JB. The revenue contended that disallowance calculated under section 14A read with Rule 8D should be *ipso facto* incorporated in clause (*f*) of Explanation 1 to section 115JB(2) while computing book profit under MAT provisions. In appeal before the CIT(A), the CIT(A) decided in favour of the assessee.

Issue

Whether the expenditure incurred to earn exempt income computed u/s 14A could not be added while computing book profit u/s 115JB of the Act.

Held

The Special Bench referred to the Delhi High Court decision in case of CIT V. Bhushan Steel Ltd.: ITA No.593/2015 wherein similar addition was deleted by the High Court. In this case the Delhi High Court held that the disallowance u/s 14A was not specifically mentioned in explanation to section 115JB(2). Accordingly the disallowance computed under section 14A cannot be added to the book profit. This view as per the High Court was consistent with the decision of the Supreme Court in case of Apollo Tyres Ltd. *v*. Commissioner of Income Tax *[2002]) 255 ITR 273 (SC) which held that "the Assessing Officer does not have the jurisdiction to go behind the net profit shown in the profit and loss account except to the extent provided in the Explanation to Section 115J."* Accordingly the Special bench answered the question in favour of the assessee by holding that computation under clause (*f*) of Explanation 1 to section 115JB(2) is to be made without resorting to computation as contemplated under section 14A read with Rule 8D.

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Unreported Judgements

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In this issue we are giving gist of the order passed by the Hon'ble Mumbai ITAT in the matter of Hita Land Private Limited and Others in Miscellaneous Application No. 103/Mum/2017 arising out of ITA No. 8247/Mum/2011, wherein the Hon'ble ITAT discussed the implications arising out of amendment made to section 254(2) whereby time limit for filing Miscellaneous Application before ITAT was reduced from four years to six months by the Finance Act 2016 w.e.f. 1/6/2016. The Hon'ble Tribunal held that such reduced time limit will also apply to the orders passed by ITAT before 1/6/2016 and therefore if Miscellaneous Applications are filed beyond six months from the date of the order passed by the Hon'ble Tribunal even if such order is passed before 1/6/2016, the new time limit of six months would apply for the Miscellaneous Application arising out of such order. The operative part of the order is reproduced below.

Facts :

The revenue contended in the Miscellaneous Application that the Hon'ble Tribunal allowed Ground Nos. 1 & 2 of assessee's appeal for A.Y. 2007-08, 2008-09 and 2009-10 presuming that the assessment orders in all the years were passed u/s 143(3) r.w. 153C of the Income Tax Act. However, the assessment order for A.Y. 2009-10 was passed u/s 143(3) and not u/s 143(3) r.w. 153C and therefore a mistake apparent from record had crept into the order, as a result of which appeal for A.Y. 2009-10 requires fresh adjudication which led to filing of the rectification petition u/s 254(2).

The date of the order passed by the Hon'ble Tribunal was 22/3/2013 and revenue filed these Miscellaneous Application on 28/2/2017, which are clearly beyond a period of six months as provided in section 254(2) as amended by Finance Act 2016.

The Counsel for the assessee took preliminary legal objection that these applications being time barred could not be entertained particularly when there is no power of condonation provided under the statute to the Tribunal for which reliance was placed on the judgement of Bharat Petroleum Corporation Ltd. v/s CIT 158 TTJ 165 passed on 10/4/2013. The revenue contended that the applications have been filed within the period of four years from the date of the order and hence, the applications were within the time limit as per the earlier un-amended provisions.

Held :

The Hon'ble Tribunal after considering the legal submissions, held as under:

"4. We have heard the rival contentions and perused relevant material on record. Since, preliminary legal objections questions the very admissibility of these rectification applications, we take up the same first. For record, we note that the date of order passed by the Tribunal is 22/03/2013 and the revenue has filed these applications on 28/02/2017 which are clearly beyond a period of six months as provided in Section 254(2). At this juncture, it would be prudent to reproduce the relevant provisions as contained in Section 254(2) of the Income Tax Act, 1961:-

Orders of Appellate Tribunal.

254. *(1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.*

(1A) [***]

(2) The Appellate Tribunal may, at any time within six months from the end of the month in which the order was passed, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1), and shall make such amendment if the mistake

is brought to its notice by the assessee or the Assessing Officer:

It is to be noted that the earlier period of 'four years' has been substituted with 'six months' by the Finance Act, 2016 with effect from 01/06/2016. However, we find that no distinction has been made in this section between orders passed before 01/06/2016 and orders passed after 01/06/2016. Moreover, the Tribunal order was dated 22/03/2013 and therefore, the Revenue had ample time to go through the same and pin point the mistakes in the order but it has failed to do so. Therefore, we find no force in these miscellaneous petitions primarily because of the reason that the Statute does not authorize us to entertain any petition which has been filed u/s 254(2) at any time beyond a period of six months from the date of the order. The Tribunal has been given power to admit an appeal after the expiry of the relevant period, if it is satisfied that there was sufficient cause for not presenting it within that period as per Section 253(5). However, this Tribunal is not enshrined with such powers in respect of a miscellaneous petition filed u/s 254(2) of the Income Tax Act. If we are not given that power, then it is not expected from us to exercise such power which is not provided in the Act. The Tribunal, being creation of law, is bound by the statutory provisions and our jurisdiction is simply to interpret and follow the Statute. There is no scope for us to import any word into the Statute which is not there. Such importation would be nothing but to amend the Statute. We therefore hold that the condonation of delay of these petitions is beyond our jurisdiction, hence rejected. Similar view has been taken by the Mumbai Tribunal in the cited order. Hence, finding the petitions time barring, we dismiss the same."

Ultimately the Miscellaneous Applications filed by the revenue were dismissed.

We hope the readers would find the same useful.

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Controversies

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Whether AO is entitled to make addition u/s. 69 of the Act as unexplained investment on the basis of value taken for the purpose of Stamp Duty.

Issue:-

Mr. A purchased Land & Building for a sum of Rs. 50 Lacs as per the value stated in the sale deed. Whereas he paid Stamp Duty of the said transaction of purchase of Land & Building Rs. 10 Lacs based on the valuation of the said property made by stamp authority at Rs. 70 Lacs.The AO intends to tax amount of difference between the valuation made by stamp authority and consideration as per sale deed of Rs. 20Lacs as unexplained investment u/s. 69 of the Act.

Proposition:-

It is submitted that Section 69 by itself does not entitle the AO to make addition without any cogent evidence with him that the assesse has incurred additional cost of investment.

View against the proposition:-

Let us refer to section 69 of the Act which reads as under:

Section 69:-

"Where in the financial year immediately preceding the assessment year the assesse has made investment which is not recorded in the books of account. If any, maintained by him for any source of income, and the assesse offers no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the "(Assessing) Officer, satisfactory, the value of the investments may be deemed to be the income of the assesse of such financial year."

The valuation made by the authority under the Stamp Act which is so accepted by the assesse for the purpose of payment of Stamp Duty can be considered as a basis for invoking section 69 of the Act. There is indirect admission on the part of assessee when the additional stamp duty is paid on the premise that the value of the property for the stamp duty is correct and so the difference in the consideration as per the sale deed and the value as per the stamp authority can be taken as unexplained investment taxable u/s. 69 of the Act.

In the case of Smt. Amar KumariSurana Vs. CIT the Rajasthan High court reported in 226 ITR 344 it was held that the consistent finding of the Income Tax Officer, the Appellate Assistant Commissioner and the Tribunal was that the assessee had not shown the correct value of the property in her account books, and thereby, had concealed the investment made for purchase of the plot of land. Although merely on the basis of the valuation report and the fair market value no addition can be made, after obtaining the valuation report of the plot of land, notice had been given to the assessee to show cause as to why the value of the plot of land in question should not be taken as per the valuation report and on the basis of comparable cases. The assessee had not given any reason as to why the property had been sold to the assesse for roughly half the prevalent market rate. In the absence of that the only inference that could be drawn was that the assessee had, in fact, concealed the actual consideration paid to the seller. The addition made u/s. 69B was justified.

View in favour of the proposition:-

The Delhi High court in the case of the *CIT Vs. Sadhna Gupta reported in (2013) 352 ITR 595 (Delhi)* held that unless and until there is some other

evidence to indicate that extra consideration had flowed in the transaction of purchase of property, the report of the District Valuation Officer cannot form the basis of any addition on the part of the Revenue.

Again the Delhi High Court in the case of the *CIT Vs. Naveen Gera reported in (2010) 328 ITR 516 (Delhi)* dismissing appeal, held that the addition was not sustainable because the seized material containing the sale deeds of the properties which had been relied upon to make reference to the District Valuation Officer, had already been declared by the assesse under the Voluntary Disclosure of income scheme, 1997. In the absence of any incriminating evidence that anything had been paid over and above the stated amount, the primary burden of proof was on the department to show that there had been an under-statement or concealment of income. Only when such burden had been discharged, would it be permissible to rely upon the valuation given by the District Valuation Officer.

In the case of *CIT Vs. Smt. Suraj Devi reported in (2010) 328 ITR 604 (Delhi)*it was held dismissing the appeal, that the primary burden of proof to prove understatement or concealment of income is on the Revenue and it is only when such burden is discharged that it would be permissible to rely upon the valuation given by the Valuation Officer. In any event, the opinion of the Valuation Officer, per se, was not information and could not be relied upon without the books of account being rejected which had not been done in the present case. Moreover, no evidence much less incriminating evidence was found as a result of the search to suggest that the assesse had made any payment over and above the consideration mentioned in the registered purchase deed. No adjustment on account of sale consideration had been made in the case of the seller. Consequently, no substantial question of law arose.

Before we consider further case, it would be appropriate to refer to case law having direct bearing on the invoking of the power u/s. 69 of the Act. The High Court of Delhi in case of *Commissioner of Income tax vsPuneetSabharwal reported in (2011) 338 ITR 485,* had an occasion to examine the question as to whether the Appellate Tribunal was right in holding that notwithstanding the report of the District Valuation Officer, the Revenue had to prove that the assessee had in fact received extra consideration over and above the declared value of the sale in the sale deed. While answering the said question at para Nos. 8, it was observed thus:-

"As far as question No. 2 is concerned, as already indicated above, the AO solely relied upon the report of the District Valuation Officer, Apart from this, there was admittedly no evidence or material in his possession to come to the conclusion that the assessee had paid extra consideration over and above what was stated in the sale deed. This very issue has come up for consideration before this court repeatedly and after following the judgment of the Supreme Court in the case of *K.P. Varghese (1981) 131 ITR 597 (SC)*, the aforesaid proposition of law is reiterated time and again. For our benefit, we may refer to the latest judgment of this court in the case of *CIT Vs. Smt. Suraj Devi (2010) 328 ITR 604 (Delhi)*, wherein this court had held that the primary burden of proof to prove understatement or concealment of income is on the Revenue and it is only when such burden is discharged that it would be permissible to rely upon the valuation given by the district Valuation Officer. It was also held that the opinion of the Valuation Officer per se was not information and could not be relied upon without the books of account being rejected which had not been done in that case."

Summation:-

The Supreme Court in the case of *K.P. Verhese Vs. The Income Tax Officer reported in 131 ITR 597* it was observed that that we must therefore hold that sub-section (2) of sec. 52 can be invoked only where the consideration for the transfer has been understated by the assesse or in other words, the consideration actually received by the assesse is more than what is declared or disclosed by him and

the burden of proving such under-statement or concealment is on the Revenue. This burden may be discharged by the Revenue by establishing facts and circumstances from which a reasonable inference can be drawn that the assesse has not correctly declared or disclosed the consideration received by him and there is understatement of concealment of the consideration in respect of the transfer. Sub-section (2) has no application in case of an honest and bona-fide transaction where the consideration received by the assessee has been correctly declared or disclosed by him, and there is no concealment or suppression of the consideration. We find that in the present case, it was not be contention of the Revenue that the property was sold by the assessee to his daughter-in-law and five of his children for a consideration which was more than the sum of Rs. 16,500/- shown to be the consideration for the property in the Instrument of Transfer and there was understatement or concealment of the consideration in respect of the transfer. It was common ground between the parties and that was finding of fact reached by the Income-Tax Authorities, that the transfer of the property by the assessee was a perfectly, honest and bona-fide transaction where the full value of the consideration received by the assessee was correctly disclosed at the figure of Rs. 16,500/-. Therefore, on the construction placed by us, subsection (2) had no application to the present case and the Income Tax officer could have no reason to believe that any part of the income of the assessee had escaped assessment so as to justify the issue of a notice u/s. 148. The order of re-assessment made by the Income-Tax Officer pursuant to the notice issued u/s. 148 was accordingly without jurisdiction and the majority judges of the full bench were in error in refusing to quash it.

The Delhi High Court in the case of *CIT Vs. Shakunatala Devi 316 ITR 46 (Delhi)* it has been observed that it may be relevant to note that a Division Bench of this court, comprising Dr. ArijitPasayat and D. K. Jain JJ., as their Lordships then were, reiterated that there must be a finding of the Revenue that the assessee had received amounts over and above the consideration stated in the sale deeds, following *Varghese (1981) 131 ITR 597 (SC). Varghese (1981) 131 ITR 597 (SC)*had also been followed and applied by the Supreme Court in *CIT vs. Godavari Corporation Ltd. (1993) 200 ITR 567*. The Division Bench of this court in *CIT Vs. Ashok Khetrapal (2007) 294 ITR 143* referredto the report of a Valuation Officer in the absence of any incriminating documents found in the course of a search. The decision in *CIT Vs. Manoj Jain (2006) 287 ITR 285 (Delhi*) is also to the same effect. In *CIT Vs. Shivakami Co. Pvt. Ltd. (1986) 159 ITR 71 (SC)* their Lordships have once again reiterated that the onus whether the assessee had received more consideration than what was stated in the documents of transfer rested on the Revenue and in the absence of that burden being discharged it would be legally impermissible to make any inferences against the assessee.

Finally I would like to refer to the decision of their lordships of Karnataka High Court Shri S.S. JyothiPrakash vs. ACIT ITA No. 460/2010 Date: 07/06/16 whereinit was held as under:

"Assessee purchased land & building appurtenant thereto and paid stamp duty on the basis of valuation made by stamp duty authority – AO made addition u/s. 69 towards unexplained investment on the basis of valuation report- CIT(A) gave partial relief – Tribunal adopted value taken by DVO for the purpose of stamp duty – Hon'ble High Court held that there is no independent material for making addition u/s. 69 except the valuation report-Additional stamp duty paid for stamp duty purpose *ipso facto* cannot give powers to invoke S.69 – In absence of any independent evidence, valuation report could not be taken as a base for making addition u/s. 69."

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Revised Safe Harbor Rules on Transfer Pricing for International Transactions

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A. Background

The *Finance Act 2009* introduced provisions in the ITL that authorized the CBDT, to issue TP "safe harbor" rules. On 18 September 2013, the CBDT issued the safe harbor rules, applicable for five years beginning from FY 2012-13 to FY 2016-17. The notification introduced new Rules 10TA to 10TG that contain the procedure for adopting safe harbors, the transfer price to be adopted, the compliance procedures upon adoption of safe harbors and circumstances in which a safe harbor adopted may be held to be invalid. The CBDT has now issued amended safe harbor rules with effect from 1 April 2017.

The amended rules are applicable for three FYs from FY 2016-17 through FY 2018-2019. Important to note that for FY 2016-17, as the amended rules overlap with the prior rules, the taxpayer has the option to opt for the rule which is more beneficial.

B. International transactions and applicable safe harbor transfer price

The amended rules have modified the thresholds for the eligible international transactions and also amended the acceptable safe harbor transfer price in certain cases. A new category of international transaction for "receipt of low value-adding intragroup services" has been added.

A summary of the safe harbor transfer price declared by an eligible taxpayer that shall be accepted by the tax authorities under the prior rules and the amended rules is provided as follows:

Eligible International Transaction	**Upto FY 2016-17**		**From FY 2016-17 to 2018-19**	
	Threshold Limit value	**Safe harbor margin**	**Threshold Limit value**	**Safe harbor margin**
Provision of software development services other than contract	Up to INR 5 billion	20% or more on total Operating Costs ('OC')	Up to INR1 billion	17% or more on total operating costs
R&D services within significant risks	Above INR5 billion	22% or more on total OC	Above INR1 billion upto INR2 billion	18% or more on total OC
Provision of ITES within significant risks	Up to INR 5 billion Above INR5 billion	20% or more on total OC 22% or more on total OC	Up to INR1 billion Above INR1 billion upto INR2 billion	17% or more on total OC 18% or more on total OC
Provision of KPO services within significant risks	No Threshold	25% or more on total OC	Up to INR2 billion	**Margin on total OC** / **Employee cost to operating cost** 24% or more / 60% or more 21% or more / Between 40% to 60% 18% or more / 40% or less

Eligible International Transaction	Upto FY 2016-17		From FY 2016-17 to 2018-19	
	Threshold Limit value	Safe harbor margin	Threshold Limit value	Safe harbor margin
Advancing of intragroup loan to a Non-resident wholly owned subsidiary (WOS)	Up to INR500 million	Interest rate is equal to or greater than the base rate of SBI as of 30 June plus 150 basis points	NA	
	Above INR500 million	Interest rate is equal to or greater than the base rate of SBI plus 300 basis points	NA	
Advancing of intragroup loan to a Non-resident WOS where the amount of loan is denominated in Indian Rupees (INR)	NA		Interest rate is not less than the one-year marginal cost of funds lending rate of SBI as on 1 April of the relevant previous year plus the followings:	
			Basis Points	**CRISIL credit rating ofassociated enterprise (AE)**
			175	between AAA to A or its equivalent
			325	BBB-, BBB or BBB+ or its Equivalent
			475	between BB to B or its equivalent
			625	between C to D or its equivalent
			425	credit rating of AE is not available and the amount of loan advanced to the AE including loans to all AEs in INR does not exceed INR1 billion in aggregate as on 31 March of relevant previous year
Advancing of intragroup loan to a Non- resident WOS where the amount of loan is denominated in foreign currency	NA		Interest rate is not less than the 6 month London Inter-Bank Offer Rate of the relevant foreign currency as on 30 September of the relevant previous year plus the followings:	
			Basis Points	**CRISIL credit rating of AE**
			150	between AAA to A or its equivalent
			300	BBB-, BBB or BBB+ or its Equivalent
			450	between BB to B or its equivalent
			600	between C to D or its equivalent
			400	credit rating of AE is not available and the amount of loan advanced to the AE including loans to all AEs does not exceed INR1 billion in aggregate as on 31 March of relevant previous year
Providing corporate guarantee to WOS	Up to INR1 billion	The commission or fee declared in relation to the international transaction is at the rate of 2% or more per annum on the amount guaranteed	No threshold	The commissioner fee declared in relation to the International transaction is at the rate of 1% or more per annum on the Above INR1 billion, amount guaranteed
	Above INR 1 billion	The commission or fee declared in relation to the		

Eligible International Transaction	Upto FY 2016-17		From FY 2016-17 to 2018-19	
	Threshold Limit value	Safe harbor margin	Threshold Limit value	Safe harbor margin
		international transaction is at the rate of 1.75% or more per annum on the amount guaranteed		
Provision of specified contract R&D service wholly or partly relating to software development within significant risks	No threshold	30% or more on total OC	Up to INR2 billion	24% or more on total OC
Provision of specified contract R&D services wholly or partly relating to generic pharmaceutical drugs with insignificant risks	No threshold	29% or more on total OC	Up to INR2 billion	24% or more on total OC
Manufacture and export of core auto components	No threshold	12% or more on total OC	No threshold	12% or more on total OC
Manufacture and export of non core auto components where 90% or more of total turnover during the relevant previous year is in the nature of original equipment manufacturer (OEM) sales	No threshold	8.5% or more on total OC	No threshold	8.5% or more on total OC
Receipt of low value adding intra-group services	NA		Up to 100 million	Mark-up on costs not exceeding 5%. The cost allocation methodology should be certified by an Accountant.

C. Receipt of low value-adding intra-group services

A new category of international transaction for "receipt of low value-adding intra-group services" has been inserted under the amended safe harbor rules.

"Low value-adding intra-group services" has been defined to mean services that are performed by one or more members of a multinational enterprise group on behalf of one or more other members of the same multinational enterprise group and which:

- Are in the nature of support services
- Are not part of the core business of the multinational enterprise group, i.e., such services neither constitute the profit-earning

activities nor contribute to the economically significant activities of the multinational enterprise group

- Are not in the nature of shareholder services or duplicate services
- Neither require the use of unique and valuable intangibles nor lead to the creation of unique and valuable intangibles
- Neither involve the assumption or control of significant risk by the service provider nor give rise to the creation of significant risk for the service provider
- Do not have reliable external comparable services that can be used for determining their arm's length price.

The following types of services are not considered as "low value-adding intra-group services":

- R&D services
- Manufacturing and production services
- Information technology (software development) services
- KPO services
- Business process outsourcing services
- Purchasing activities of raw materials or other materials that are used in the manufacturing or production process
- Sales, marketing and distribution activities
- Financial transactions
- Extraction, exploration, or processing of natural resources
- Insurance and reinsurance

To claim eligibility for "receipt of low value-adding intra-group services", the taxpayer is required to obtain certificate from an Accountant to support the method of cost pooling, the exclusion of shareholder costs, duplicate costs from the cost pool and the reasonableness of the allocation keys used for the allocation of costs to the taxpayer by the overseas AE.

"Accountant" has been defined to include any person recognized for undertaking cost certification by the Government of the country of the AE or any of its agencies and who also fulfils conditions set forth in the amended rules.

D. Changes in definition

The following definitions have been amended or added:

- The definition of contract R&D services relating to software development has been amended to exclude services which involve making available source code to carry out routinefunctions like debugging of the software.
- A definition for employee cost has been provided to determine the appropriate safe harbor mark-up that would apply for KPO services.
- The definition of operating costs has been expanded to include Employee Stock Plan/ Options, and reimbursements/recovery of expenses relating to normal operations of the taxpayer at cost.
- The definition of operating income has been expanded to include costs towards Employee Stock Plan/Options.

E. Validity of safe harbor option

The safe harbor option shall continue to remain in force for the period of 3 years from FY 2016-17 through FY 2018-19. The taxpayer has the option to opt-in or opt-out of the safe harbor rules.

Following provisions under the earlier rules continue to apply -

- The benefit of range concept or 3% variation shall not be available to the eligible taxpayer.
- Taxpayers opting for safe harbor shall be required to maintain the mandatory prescribed TP documentation and also file Accountant's report in Form 3CEB.
- Safe harbor provisions shall not be applicable in respect of transaction with an AE located in a country or territory notified under section 94A of the ITL or in a no tax or low tax country/territory which has been defined as a country or territory in which the maximum marginal rate of income tax is zero or less than 15%.
- Where the transfer price declared by the eligible taxpayer is accepted by the tax authorities, the taxpayer shall not be eligible to invoke the Mutual Agreement Procedure under the relevant tax treaty.
- The procedural aspects relating to compliance formalities for opting for the safe harbor, eligible taxpayers, verification by the tax officer, assessment procedure and implications where conditions are not met.

F. Concluding remarks

Applying the arm's length principle can be a resource intensive process. It may impose a heavy administrative burden on taxpayers and tax administrations that can be exacerbated by both complex rules and resulting compliance demands. These facts may lead to consideration of whether and when safe harbor rules would be appropriate in the TP area. Some of the difficulties that arise in applying the arm's length principle may be avoided by providing circumstances in which eligible taxpayers may elect to follow a simpler set of prescribed TP rules in connection with clearly and carefully defined transactions.

TP safe harbor rules were introduced in 2013 with the objective of reducing TP litigation on certain common international transactions. However, given that under the old rules, the safe harbor margins were generally considered as diverging from the arm's length principle, very few taxpayers had opted for these provisions. The reduction in the margins with the introduction of various thresholds will enable a number of small and medium enterprises to review their options for managing TP controversy in India through the use of the amended safe harbor rules.

TP aspects of intra-group services has been an area of controversy in India. Tax Authorities often make detailed inquiries on these transactions requiring the taxpayer to provide significant information and data to support the cross charge from its affiliates as arm's length. The introduction of low value-adding intra-group services within the ambit of the safe harbor rules is a positive development for taxpayers. The rule is broadly aligned with the treatment recommended by the Organisation for Economic Co-operation and Development in the Base Erosion and Profit Shifting Actions 8-10 report.

Properly designed safe harbors may significantly ease compliance burdens by eliminating data collection and associated documentation requirements in exchange for the taxpayer pricing qualifying transactions within the parameters set by the safe harbor. Taxpayers should evaluate the impact of these rules on their inter-company pricing arrangements and consider options for TP controversy and risk management.

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Service Tax - Recent Judgements

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10 M/s. Manthena Satyanarana Raju Charitable Trust vs. Union of India and Others (2017)

Facts:-

The petitioner is a charitable trust engaged in providing various services such as steam bath, sauna, neem paste bath, spinal bath, physiotherapy, massage, yoga, meditation *etc*. A show cause notice was issued demanding service tax under the category of health and fitness services. It was argued that they were providing nature cure treatment and the main activity was to spread awareness of health by way of naturopathy, food therapy, water therapy and yoga at their premises. The Respondent while analyzing the exemption entry under notification 25/2012-ST "health care services by a clinical establishment" observed that the services provided were of well-being of an individual and were outside the purview of diagnosis and treatment and therefore were taxable.

Held:-

The Court noted that an exemption notification which confers benefit upon the clinical establishments cannot be made inapplicable to a holistic health care institution, as the same would tantamount to killing our indigenous system of health and well-being. It was held that the benefit of exemption to a clinical establishment also extends to a holistic health care institution following the indigenous system of health and well-being.

11 Commissioner of Central Excise, Nasik vs. Nasik SSK Ltd. (2017)

Facts:-

Assessee reversed an amount representing 5%/6% of the value of goods cleared in terms of Rule 6(3) of the CENVAT Credit Rules, 2004. According to some judgments, this reversal of 5%/6% was held as not required. Accordingly, a refund claim was filed. The refund claim was rejected by the original authorities on the ground of time bar as provided u/s. 11B of the Central Excise Act, 1944. The Commissioner (Appeals) allowed the appeal on the ground that reversal of 5%/6% is not the payment of excise duty and therefore section 11B is not applicable.

Held:-

It was held that limitation provided u/s. 11B is not applicable to a case where refund is sought of an amount reversed in terms of Rule 6(3) of Cenvat Credit Rules, 2004. Accordingly, limitation provided in the said section shall not be applicable in the case of refund of amount paid in terms of Rule 6(3) of the Cenvat Credit Rules. Department's appeal was rejected.

12 Commissioner of Service Tax, Nagpur vs. Awasti Traders. (2017)

Facts:-

The Assessee is engaged in cleaning of nullah, roadside garbage, soil *etc*. in Nagpur and receives payment for such activities from the Nagpur Municipal Corporation. A show cause notice was issued demanding service tax under the category

of business auxiliary service under clause "provision of service on behalf of the client". The adjudicating authority held that services rendered will not be taxable as the cleaning activity is a statutory responsibility of the municipal corporation. Accordingly, the revenue is in appeal. The primary ground for appeal is based on circular no. 89/7/2006 dated 18.12.2006 dealing with exemption in relation to fee collected by public authorities while performing statutory functions. It is contended that the Respondent is not a public authority but a commercial concern performing activities for a profit motive for a fee which is not deposited in the Government treasury.

Held:-

It as held that the activity of cleaning of nullahs and removal of roadside garbage and waste soil is not an activity of business to the Municipal Corporation and these services do not qualify as services on behalf of the client. There is no service provided to the corporation as the activity of cleaning of nullahs, roadside garbage is not an activity of business to the municipal corporation and therefore do not qualify as services on behalf of the client. Therefore, the appeal was rejected.

13 Commissioner of Central Excise & Service Tax, vs. M/s Zensar Technologies Ltd., Pune

Facts:-

The respondents were providing services to foreign customer in the nature of offshore services from India as well as onsite services at the locations of clients abroad and raised invoices for the entire value of services and received payments in convertible foreign exchange for entire contract value. As regards respondent's refund claim in terms of Rule 5 of CENVAT Credit Rule, 2004, revenue alleged that turnover pertaining to onsite services shall also be included in calculation of export turnover and total turnover for formula prescribed for arriving at value of eligible refund. The First Appellate Authority not accepting contentions of Revenue sanctioned the refund claim, aggrieved by which Revenue filed present appeal.

Held:-

Tribunal noted that from conjoint reading of provisions of Rule 6A of Service Tax Value Rules, 2006 dealing with export of services, Section 65B(44) of Finance Act, 1994 read with Section 64(1), it emerges that services provided from outside the taxable territory to a person located outside the taxable territory are not services for the purpose of Rule 6A and Rule 5 of CENVAT Credit Rules, 2004 and consequently, services provided onsite to clients located abroad cannot be considered as part of export turnover as well as part of total turnover.Tribunal also referred to its own decision in case of Nihilent Technologies–2016-TIOL-2262-CESTATMUM wherein it has been held that onsite services are to be excluded from both export turnover as well as total turnover. Accordingly, Revenue's appeal challenging order of Commissioner (Appeals) sanctioning refund claim to respondent was dismissed.

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VAT Judgments and Updates

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[1] Important Judgments:

Hon. Gujarat VAT Tribunal in the following cases:

[i] M/s. Selan Exploration Technology Ltd.

Issue:

The bona fide mistake is always pardonable which is observed by the Hon. Supreme Court . In this case the Hon. Tribunal has reduced the Penalty from 20% to 5% u/s. 34(7) of the Vat Act.

Held:

The appellant engaged in the business of oil exploration sold crude oil on which tax @ 4% was paid while filing returns for the period 11-12 and 12-13. The appellant was under bona fide belief that the appellant was not required to collect additional tax @ 1% as the sale of crude oil were declare goods within the meaning of section 14 of the Central Act. Accordingly, additional tax was not paid on sale of crude oil. The show cause notice was issued as to why action should not be taken against the company for filing incorrect return for the year 11-12 & 12-13. The appellant immediately made payment of tax along with the interest as soon as it came to know that additional tax was payable from 01.04.2011 and onwards. However the penalty u/s. 34(7) was levied in respect to the amount of additional tax not paid along with the return. The appeal preferred against the order levying penalty was rejected and hence the second appeal was preferred in which it was contended that the appellant was of bona fide belief for not paying additional tax on sale of crude oil. The Hon. Tribunal referred the order imposing penalty and also appeal order in which it was observed that there was no intention on the part of the appellant to evade or avoid payment of tax. The Hon. Tribunal observed that the bona fide mistake is always pardonable and is repeatedly observed by the courts including Hon. Supreme Court, The amount of penalty is reduced from 20% to 5% by observing that the applicability of penal provision in the present case undisputable, whether the appellant has knowingly furnished false or incorrect self assessment is a matter of dispute and depends upon the subjective satisfaction of the assessing officer.

[ii] M/s. Rentwork India Pvt. Ltd.

Issue:

The Penalty levied without issuing show cause notice in Form No.309 is set aside,

Held:

The assessment order was passed for the period 2008-09 in which the benefit of

composition tax was not granted as a works contractor. The appeal preferred against the assessment order was partly allowed by reducing the amount of penalty/ The second appeal was preferred in which the only contention regarding levy of penalty was raised on the ground that the penalty was levied without issuing show cause notice in Form 309. The reliance was placed on the judgment of Hon. Tribunal in the case of Victoria Capital Ventures Ltd. SA No. 562 and 563 of 2011. The Hon. Tribunal referred judgment relied on by the appellant and also considered the facts of the case in which the composition benefit was not granted without cancelling composition certificate. The Hon. Tribunal set aside penalty retained by the appellate authority.

[iii] M/s. Jalaram Products

Issue:

De-mineralized waster is held as covered under Entry 87 of Schedule II of Vat Act. However the Penalty is set aside.

Held:

Subsequent to scrutiny of the return, the provisional assessment orders were passed for the period 2006-07 to 2009-10 in which the claim of the appellant of exemption from payment of tax on de-mineralized waster was rejected and tax was assessed as covered under entry 87 of schedule II of the Vat Act. The appeals preferred against the provisional assessment order were partly allowed by reducing penalty from 150% to 20%. The appellant contended before the Hon. Tribunal that the provisional assessment orders were passed in violation of principles of law, equity and justice, as they were passed without issue of notice in Form 301. As regard product De-mineralized water, it was submitted that the same is covered in entry 53 of schedule I. The Hon. Tribunal referred earlier judgment in the case of Sheetal Beverages 2010 GSTB 1163 and held that the De-mineralized water is covered under entry 87 of schedule II of the Vat Act. However the penalty levied in passing of assessment order is set aside.

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Corporate Law Update

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MCA Updates:

1. Limited Liability Partnership (Amendment) Rules, 2017:

W. e. f. 20.05.2017, in the Limited Liability Partnership Rules, 2009 (herein after referred to as the Principal Rules), in rule 37, after sub-rule (1), the following sub-rule shall be inserted, namely:—

"(1A) The limited liability partnership referred to in clause (b) of sub-rule (1) of rule 37 shall,—

(I) file overdue returns in Form 8 and Form 11 up to the end of the financial year in which the limited liability partnership ceased to carry on its business or commercial operations before filing Form 24;

(II) enclose along with Form 24,—

a. a statement of account disclosing nil assets and nil liabilities, certified by a Chartered Accountant in practice made up to a date not earlier than thirty days of the date of filing of Form 24;

b. an affidavit signed by the designated partners, either jointly or severally, to the effect,—

(i) that the Limited Liability Partnership has not commenced business or where it commenced business, it ceased to carry on such business from …….(dd/mm/yyyy);

(ii) that the limited liability partnership has no liabilities and indemnifying any liability that may arise even after striking off its name from the Register;

(iii) that the Limited Liability Partnership has not opened any Bank Account and where it had opened, the said bank account has since been closed together with certificate(s) or statement from the respective bank demonstrating closure of Bank Account;

(iv) that the Limited Liability Partnership has not filed any Income-tax return where it has not carried on any business since its incorporation, if applicable.

c. a copy of the acknowledgement of the latest Income-tax return filed under the Income-tax Act,1961 (43 of 1961) and the rules made thereunder for the time being in force, where the limited liability partnership has carried out any business and has filed such return.

d. copy of the initial limited liability partnership agreement, if entered into and not filed, along with changes thereof in cases where the Limited Liability Partnership has not commenced business or commercial operations since its incorporation.

Explanation.—The date of cessation of commercial operation is the date from which the Limited Liability Partnership ceased to carry on its revenue generating business and the transactions such as receipt of money from debtors or payment of money to creditors, subsequent to such cessation will not form part of revenue generating business."

In the Principal Rules, for Form 24, the new Form 24 shall be substituted.

For complete text, please refer http://www.mca.gov.in/Ministry/pdf/Limited

Liability PartnershipAmendment Rules 2017_22052017.pdf

[F. No. 17/61/2016-CL-V dated 16th May, 2017]

2. Insolvency Professionals to act as Interim Resolution Professionals (Recommendation) Guidelines, 2017:

Section 16 (3)(a) of the Insolvency and Bankruptcy Code, 2016 (Code) requires the Adjudicating Authority (AA) to make a reference to the Insolvency and Bankruptcy Board of India (Board) for recommendation of an insolvency professional (IP) who may act as an interim resolution professional (IRP) in case an operational creditor has made an application for corporate insolvency resolution process (CIRP) and has not proposed an IRP. The Board, within ten days of the receipt of the reference from the AA, is required under section 16(4) of the Code to recommend the name of an IP to AA against whom no disciplinary proceedings are pending.

When a reference is received from AA for recommending the name of an IP, the Board has no information about the volume, nature and complexity of the CIRP or the resources available at the disposal of an IP. Keeping in view the observations of the Joint Parliamentary Committee and this fact, the Board believes that every IP is equally suitable to act as IRP of any CIRP, if otherwise not disqualified. Therefore, it is necessary to have guidelines to recommend one IP out of all registered IPs for any CIRP.

Following areas are covered in the guidelines:

- Identification of IP
- Determination of Vicinity
- Expression of Interest
- List of Eligible IPs
- Selection of IP
- Fee quoted
- Review

Format in the "Form A" (EXPRESSION OF INTEREST TO ACT AS AN IRP of the CIRP of .....) also has been provided in the guidelines.

For the purpose of these Guidelines,

(a) 'CIRP' includes Fast Track CIRP; and

(b) 'Disciplinary Proceeding' means a proceeding initiated by a show cause notice issued under section 219 of the Code.

[Circular dated 25th May, 2017]

3. Clarification regarding transmission of securities by Operation of Law:

The Ministry has clarified that the procedure similar to whatis followed in case of transmission of shares may be followed by Companies while transferring shares to IEPF Authority pursuant to section 124(6) read with applicable rules.

[No. 05/23/2016-IEPF dated 05th June, 2017]

4. The Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017.

These regulations provide for the scope and procedural aspects in respect of the followings:

- Inspection by the Board
- Conduct of Inspection
- Interim Inspection Report
- Inspection Report
- Investigation by the Board
- Conduct of Investigation
- Interim Investigation Report
- Investigation Report
- Consideration of Report
- Show-cause notice
- Disposal of Show-cause notice
- Restitution

For detailed text, please refer http://www.ibbi.gov.in/The Insolvency and Bankruptcy Board of India Inspection and Investigation Regulations 2017.pdf

[ADVT.-III/4/Exty./103/17 dated 12th June, 2017]

5. Exemption for Government companies:

Principal notification dated 05th June, 2015 has been amended as under:

1. In the principal notification, in the Table, for serial number 5 and the entries relating thereto, the following serial number and the entries relating thereto shall be substituted, namely:-

(1)	(2)	(3)
"5	Chapter VII, sub-section (2) of section 96	In sub-section (2), for the words such other place as the Central Government may approve in this behalf', the words "such other place within the city, town or village in which the registered office of the company is situate or such other place as the Central Government may approve in this behalf" shall be substituted."

2. In the principal notification, in the Table, for serial number 15 and the entries relating thereto, the following serial number and the entries relating thereto shall be substituted, namely:-

(1)	(2)	(3)
"15	Chapter XI, sub-sections (6) and (7) of section 152.	(a) a Government company, which is not a listed company, in which not less than fifty-one per cent. Of paid up share capital is held by the Central Government or by any State Government or Governments or by the Central Government and one or more State Governments. (b) A subsidiary of a Government company, referred to in (a0 above.

3. In the principal notification, in the Table after serial number 29, the following serial number and the entries relating thereto shall be inserted namely;

(1)	(2)	(3)
"29A	Chapter XV, sections 230 to 232	For the word "Tribunal", wherever it occurs the words "Central Government" shall be substituted.

4. In the principal notification, after paragraph 2, the following paragraph shall be inserted, namely:-

"2A. The exceptions, modifications and adaptations provided in column (3) of the aforesaid Table shall be applicable to a Government company which has not committed a default in filing its financial statements under section 137 or annual return under section 92 of the said Act with the Registrar."

[F. No. 1/2/2014-CL-V dated 13th June, 2017]

6. Exemption for Section 8 companies:

Principal notification dated 05th June, 2015 has been amended as under:

1. In the principal notification, in the Table, for serial number 8 and the entries relating thereto, the following serial number and the entries relating thereto shall be substituted, namely:-

(1)	(2)	(3)
"8	Clause (b) and first proviso to sub-section (1) of section 149.	Shall not apply

2. In the principal notification, in the Table, after serial No. 19 the following serial number and the entries relating thereto shall be inserted, namely:-

(1)	(2)	(3)
"19A	Sub-section (7) of section 186	In sub-section (7), the following proviso shall be inserted namely:-Provided that nothing contained in this sub-section shall apply to a company in which twenty-six percent, or more of the paid-up share capital is held by the Central Government or one or more State Governments or both, in respect of loans provided by such company for funding industrial Research and Development projects in furtherance of its objects as stated in its in its memorandum of association."

3. In the principal notification, after paragraph 2, the following paragraph shall be inserted, namely:-

"2A. The exceptions, modifications and adaptations provided in column (3) of the aforesaid Table shall be applicable to a Government company which has not committed a default in filing its financial statements under section 137 or annual return under section 92 of the said Act with the Registrar."

[F. No. 1/2/2014-CL-I dated 13th June, 2017]

7. Exemption for Private companies:

Principal notification dated 05th June, 2015 has been amended as under:

1. In the principal notification, in the Table, the existing serial number 1 and the entries relating thereto shall be re-numbered as serial number 1-A, and before the serial number 1A as so re-numbered and the entries relating thereto, the following serial number and the entries relating thereto shall be inserted, namely.-

(1)	(2)	(3)
"1.	Chapter I, clause (40) of section 2.	For the proviso, the following shall be substituted, namely:-Provided that the financial statement, with respect to one person company, small company, dormant company and private company (if such private company is a start-up) may not include the cash flow statement; Explanation. - For the purposes of this Act, the term 'start-up' or "start-up company" means a private company incorporated under the Companies Act, 2013 (18 of 2013) or the Companies Act, 1956 (1 of 1956) and recognised as start-up in accordance with the notification issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry.".

2. In the principal notification, in the Table, for serial number 6 and the entries relating thereto, the following serial number and the entries relating thereto shall be substituted, namely:-

(1)	(2)	(3)
"6.	Chapter V, clauses (a) to (e) of sub-section (2) of section 73.	Shall not apply to a private company- (A) which accepts from its members monies not exceeding one hundred per cent. of aggregate of the paid up share capital, free reserves and securities premium account; or (B) which is a start-up, for five years from the date of its incorporation; or (C) which fulfils all of the following conditions, namely:- (a) which is not an associate or a subsidiary company of any other company; (b) if the borrowings of such a company from banks or financial institutions or any body corporate is less than twice of its paid up share capital or fifty crore rupees, whichever is lower; and (c) such a company has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits under this section: Provided that the company referred to in clauses (A), (B) or (C) shall file the details of monies accepted to the Registrar in such manner as may be specified."

3. In the principal notification, in the table, after serial number 6 and the entries relating thereto, the following serial numbers and the entries shall be inserted, namely:-

(1)	(2)	(3)
"6A.	Chapter VII, clause (g) of sub- section (1) of section 92	Shall apply to private companies which are small companies, namely:- "(g) aggregate amount of remuneration drawn by directors;".
6B.	Chapter VII, proviso to sub-section (1)of section 92	For the proviso, the following proviso shall be substituted, namely:- Provided that in relation to One Person Company, small company and private company (if such private company is a start-up), the annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the company.".

4. In the principal notification, after serial number 9, the following serial number and the entries relating thereto shall be inserted, namely:-

(1)	(2)	(3)
"9A.	Chapter X, clause (I) of sub-section (3) of section 143.	Shall not apply to a private company:- (i) which is a one person company or a small company; or
		(ii) which has turnover less than rupees fifty crores as per latest audited financial statement or which has aggregate borrowings from banks or financial institutions or anybody corporate at any point of time during the financial year less than rupees twenty five crore.".

5. In the principal notification, after serial number 11, the following serial numbers and the entries relating thereto shall be inserted, namely:-

(1)	(2)	(3)
"11A.	Chapter XII, sub-section (5) of section 173.	Forsub-section (5), the following sub-section shall be substituted, namely:-
		(5) A One Person Company, small company, dormant company and a private company (if such private company is a start-up) shall be deemed to have complied with the provisions of this section if at least one meeting of the Board of Directors has been conducted in each half of a calendar year and the gap between the two meetings is not less than ninety days: Provided that nothing contained in this sub-section and in section 174 shall apply to One Person Company in which there is only one director on its Board of Directors.
11B	Chapter XII, sub-section (3) of section 174.	Shall apply with the exception that the interested director may also be counted towards quorum in such meeting after disclosure of his interest pursuant to section 184.".

6. In the principal notification, after paragraph 2, the following paragraph shall be inserted, namely:-

"2A. The exceptions, modifications and adaptations provided in column (3) of the aforesaid Table shall be applicable to a private company which has not committed a default in filing its financial statements under section 137 of the said Act or annual return under section 92 of the said Act with the Registrar."

[F. No. 1/1/2014-CL-V dated 13th June, 2017]

8. The Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017:

W. e. f. June 14, 2017, these Regulations shall apply to the fast track process under Chapter IV of Part II of the Code.

These regulations provide for the scope, procedural aspects and relevant forms in respect of the followings:

- Eligibility for resolution professional
- Extortionate credit transaction
- Public announcement.
- Proof of claims
- Committee of creditors
- Meetings of the committee
- Voting by the committee
- Conduct of the fast track process
- Fast track process costs
- Resolution plan

[Notification No. IBBI/2017-18/GN/REG 012 dated June 14, 2017]

9. Notification of Fast Track Insolvency Resolution Process for Corporate Persons Regulations:

These regulations provide the process from initiation of insolvency resolution of eligible corporate debtors till its conclusion with approval of the resolution plan by the Adjudicating Authority. The process in these cases shall be completed within a period of 90 days, as against 180 days in other cases.

The Ministry of Corporate Affairs has notified the relevant sections 55 to 58 of the Insolvency and Bankruptcy code,2016 pertaining to the Fast Track Process and also notified that fast track process shall apply to the following categories of corporate debtors:

a. a small company, as defined under clause (85) of section 2 of the Companies Act, 2013; or

b. a Startup (other than the partnership firm), as defined in the notification dated 23rd May, 2017 of the Ministry of Commerce and Industry; or

c. an unlisted company with total assets, as reported in the financial statement of the immediately preceding financial year, not exceeding Rs.1 crore.

[Press release dated 15.06.2017]

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Allied Laws Corner

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Terminology and Procedure under the Insolvency and Bankruptcy Code, 2016 and the Interpretation of term 'Dispute' within the meaning of S.5(6) of the Code.

Recently, the National Company Law Tribunal, Mumbai Bench in the case of **DF Deutsche Forfait AG vs. Uttam Galva Steel Limited** reported in **80 taxmann.com 321** passed the detailed order discussing the nature of proceedings and terminology and interpreting certain provisions of the Code. It was held that there cannot be any pleadings part in the Forms to be filed to initiate action u/ss 7, 9 & 10, except giving information column and Filing of a suit or arbitration proceedings subsequent to receipt of notice under section 8 will not amount to existence of dispute as stated under S.8 of the Code.

A. Facts of the case :

1. DF Deutsche Forfait AG, Operational Creditor, filed an application u/s 9 of the Code for initiation of Corporate Insolvency Regulation Process against Uttam Galva Steel Limited, a Corporate Debtor.

B. Objections raised by a Corporate Debtor :

1. On the date of hearing, Senior Counsel Sri Janak Dwarak Das appearing on behalf of Uttam raised objection to admitting this petition arguing, one - this petition is not maintainable for the debtor company timely raised notice of dispute within 10 days after receipt of the notice u/s 8, two - an affidavit has not been filed as enunciated u/s 9(3)(b) stating that there is no notice has been given by Corporate debtor (Uttam) relating to the dispute of unpaid operational debt, hence petition is incomplete (when reply has been given there could not be any occasion to the operational Creditor to file an affidavit saying that no reply has been given), three - that Deutsche & Misr Bank are not operational creditors of Uttam, four - the petition is bound to be rejected u/s 9(5)(ii)(d) once notice of dispute has been received by Deutsche & Misr Bank, here notice was received by the petitioners within 10 days from the date of receipt of notice u/s 8, five - since Deutsche & Misr Bank never initiated any recovery proceedings though the alleged debt is payable since March 15, 2014 until this petition u/s 9 has been filed, six - since disputed questions on fact are involved in respect to Deutsche further assigning to Misr Bank has not been confirmed by Uttam and it has to be tried by Trial Court not as summary proceeding u/s 9, moreover since sales contract is governed by English Law, it has to be tried before court of law, if any modification is made to the contract, under clause 18 of the Sales Contract, it has to be with the consent of Uttam only, seven - interest on the principal amount is not admitted by Uttam, therefore claim including 18% interest is arbitrary figure which is not substantiated by any document, eight - the counsel argued that since Power of Attorney given to file this case has not specifically authorized to initiate proceedings under IB Code, it has to be dismissed basing on the order dated 30.3.2017 passed by special Bench on reference; lastly - the counsel says Uttam is listed company providing employment to 1,400 people and it has impeccable track record, hence this Insolvency Resolution Process cannot be thrust upon a company like this.

C. Findings of the NCLT:

1. **Regarding Terminology and Procedure:**

2. Two three issues one must bear in mind, One - **as such there cannot be any pleadings part in the Forms to be filed to initiate action u/ss 7, 9 & 10, except giving information column wise**; Two - **no pleading or defending party, the terminology like petitioner/respondent or plaintiff/defendant is not present under this Code, most of the procedure is inbuilt in the Code itself, therefore this has been named as Code, not as Act**; Three - by reading the Code, it will not give an impression that it is an adversarial proceeding and no such law is existing in India saying that court proceedings in India shall be adversarial only, therefore **we have to go by what law says, we can't read into something that is not present**; Four - **we cannot hang on to conventional approach which has become inherent in us that a legal proceeding shall be adversarial only, we are governed by a democratic system, henceforth we have to go by the mandate given by legislature**. There are countries where legal system is inquisitorial. Of course a system can be something different from the existing systems like adversarial or inquisitorial, may be, if something other than these two systems is good, then if legislature says it is good for the country, then we have to follow. **We have to grow along with changing times to come out of bottlenecks suffocating the system.**

3. **Regarding Interpretation of term 'Dispute':**

4. By now everybody is by heart with the provisions of sections 7, 8, 9 and 10 of the Code, therefore it is needless to say that reply has to be given to the notice under section 8 of the code within 10 days of receipt of the notice, no doubt **Uttam gave reply on the very next day of receipt of the notice denying the averments of the notice u/s 8, but without any averment of any suit or arbitration pending since before receipt of notice u/s 8**.

5. According to the definition of "dispute" in section 5(6) of the Code, which is as follows:

'Section 2: In this Part the context otherwise requires, —

(6) ***"dispute" includes*** *a suit or arbitration proceedings relating to —*

(a) the existence of the amount of debt;

(b) the quality of goods; or

(c) the breach of representation or warranty;'

6. On perusal of this definition, it is evident dispute includes a suit or arbitration proceeding, now the point for determination is as to whether the word "includes" is extensive as generally understood or in any other way. If we go through sections 7, 8, 9 and 10 of this code, this word "dispute" nowhere appears except in sections 8 and 9, therefore this definition primarily meant for application when notice is issued by the operational creditor u/s 8 and when case is filed by an operational creditor u/s 9 of the Code, therefore **the definition has to be understood in a meaningful way to cater the intent and purpose behind sections 8 & 9, not otherwise.**

7. To know how it is to be understood, we must also read part of section 8 and section 9, which goes as follows:

"8. Insolvency resolution by operational creditor —(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed -

(2) The corporate debtor shall, within a period of ten days of the receipt of the

demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) ***existence of a dispute, if*** *any,* ***and record of the pendency of the suit or arbitration proceedings*** *filed before the receipt of such notice or invoice in relation to such dispute;*

**** **"

"9. Application for initiation of corporate insolvency resolution process by operational creditor—

(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

2 to 6. ** ** **"

8. **The corporate debtor counsel says the word dispute has to be understood as mere denial to the claim as dispute. The definition to dispute is inclusive definition enlarging the scope to the extent it can travel, therefore inclusion of pendency of suit or arbitration will not curtail the inclusivity of the definition.**

9. Now the test is how to understand this definition, is it to be said that wherever denial to assertion is present in the reply within ten days, it is to be construed as dispute? Or, is it to be understood that dispute is qualified and restricted as dispute only when suit or arbitration is pending since before receipt of notice u/s 8?

10. In the definition, at the beginning of section 2 itself, it is mentioned that definition has to be taken in the way it is defined as long as the context otherwise does not require, suppose context demands to take it otherwise, this definition will become sub-silentio in the said context, of course this definition, it is nowhere explicitly looking that this definition is exhaustive. The word 'etc' is also not added to apply ejusdem generis rule.

11. If we see section 8, which is precursor to invoke section 9, it is evident that upon notice u/s 8 from the operational creditor to the debtor on the ground of default occurrence, if the debtor fails to reply to the notice within 10 days stating dispute is in existence on the footing of suit or arbitration pending or if the debtor fails to repay the unpaid debt within 10 days, then if the notice of the dispute as stated under sub-section (2) of section 8 of the code is given to the creditor and other compliances, the operational creditor gets cause of action to file application u/s 9.

12. **The argument of the debtor counsel is since the debtor disputed the debt within 10 days by giving reply within 10 days to the creditors, it has to be construed as dispute on two grounds, one - the definition for dispute is inclusive, two - the word "and" in sub-section 2 (a) of section 8, has to be read as "or" so as to harmonize with the inclusive definition to the word "dispute".**

13. **We respectfully disagree with this view; definition has always to be harmonized with the context in which it is said in the substantive section, not otherwise.** This caution is very much implicit in section 2 itself saying it has to be understood as defined unless context otherwise, therefore two things are clear, one - **defining section will not govern the substantive section**, two - **definition has to be construed in the context of substantive section, not otherwise.** When a word is defined, it has to be understood meaningfully, if definition is only to say dispute includes suit or

arbitration, no definition needs to be given, because pendency of suit or arbitration always connotes dispute, this need not be said separately, indeed dispute is genesis, pendency of suit or arbitration is species. No doubt it is true that word "includes" is normally considered as extensive, but there are situations to read "includes" as "means" to enable the courts to achieve the purpose of legislation. If reply is given **denying the claim despite default occurrence is clear, does it mean that no application can be filed by any operational creditor even though the operational creditor makes the case of default occurrence? If that is so, it will be virtually ousting operational creditor filing any case under section 9.** If this scenario emerges, then it will be nothing but throwing this law into dust bin. We all know how much time is taking for logical end to winding up proceedings, by the time company liquidation happens, not even bones remain to creditors. All this exercise under new Code is to maximization of value of assets in a time bound manner to promote entrepreneurship and availability of credit, to balance the interests of all the stake holders.

14. If we start looking at this as draconian law gobbling the companies and branding orders under this law as harsh, then we remain where we are, perhaps will go down further, yes, one can understand to get conversed to new law and to see fruits of it, it will take time, but just for the sake of this reason, we cannot wish away the mandate of this nation come through Parliament.

15. In this situation, we cannot resist ourselves from giving an illustration that is aptly similar to the present controversy. It is like a snake charmer playing out a cobra without fangs for entertaining people, tomorrow, if a claim under section 8 is considered as "dispute" by looking at bare denial, sections 8 and 9 will become exactly like a cobra without fangs in the basket of a snake charmer. But I strongly believe, it is not the idea of Parliament to make this law to mere show up, had it been so, the Parliament would not have wasted its valuable time in including sections 2 (6), 8 and 9 in the statute book.

16. **Though there are many decisions of the Hon'ble Supreme Court holding that the word "includes" is extensive in nature, there are equally many number of cases saying that this word has to be understood in the context it is applied.**

17. In this line, in ***South Gujarat Roofing Tiles Manufacturers Association*** **v.** ***State of Gujarat*** **[1976] 4 SCC 601, it has been held that there could not be any inflexible rule that the word "includes" should be read always as a word of extension without reference to the context, in the said case the word includes has been used in the sense of "means", this is only construction that the word can bear in the context. In that sense, "include" is not a word of extension, but limitation, it is exhaustive of the meaning which must be given to potteries industry for the purpose of Entry.**

18. The use of word "includes" in the restrictive sense is not unknown. So, the manufacturer of Mangalore Pattern Roofing Tiles is outside the purview of Entry 22.

19. Likewise, in *N.D.P. Namboodripad* v. *Union of India* [2007] 4 SCC 502,it has been held that the word "includes" has different meanings in different contexts. It can be used in interpretation clauses either generally in order to enlarge the meaning of any word or phrase occurring in the body of a Statute, or in the normal stand sense to mean "comprises" or "consists of" or "means and includes depending on the context".

20. In another case in between *Karnataka Power Transmission Corporation* v. *Ashok Iron Works (P.) Ltd.* [2009] 3 SCC 240 in para 17, it has been held as follows: —

'It goes without saying that interpretation of a word expression must depend on the text and the context. The resort to the word "includes" by the legislature often shows the intention of the legislature that it wanted to give extensive and enlarged meaning to such expression. Sometimes, however, the context may suggest that the word "includes" may have been designed to mean "means". The setting context and object of an enactment may provide sufficient guidance for interpretation of word "includes" for the purpose of such enactment.'

21. If we see definition to "a person" in General Clauses Act, it says "person" shall include any company or association or body of individuals whether incorporated or not.

22. The normal meaning of a "person" is a living person, whereas if the statute feels necessary to include some other categories which on their own do not fall under a particular category, then an inclusive definition will be given to include other categories, the same is the thing happened to the definition of "a person". **Likewise, if any dispute that normally does not fall within the definition of "dispute", then such items not falling within the definition dispute will be shown as included so as to enlarge the meaning of dispute. A dispute pending in a suit or arbitration can never be said as different from the general word "dispute". The dispute in a suit or arbitration is inherently included in the definition of the word "dispute ". Therefore, if at all the suits and arbitration proceedings pending to be said as included in a dispute, it need not be shown as included, because the category of the dispute in a suit and arbitration will automatically fall within the ambit of dispute. Henceforth, the only meaning that could be drawn out from the word "includes" is that the dispute means the dispute pending in a suit or arbitration proceeding**, whereby in the light of the ratio given by Hon'ble Supreme Court, here **the word "includes" in the definition of "dispute" has to be read as "means" not as "includes". So, the word dispute is qualified as the dispute in a suit or arbitration pending not otherwise.**

23. In the above discussion we have noticed what is meant by a dispute, **now let us see what is meant by the existence of dispute in sub-section (2) of section 8 of the Code.** In section 8 it has been said when notice is given u/s 8(1) of the Code, the corporate debtor shall, within a period of 10 days of the receipt of demand notice, bring it to the notice of the operational creditor that dispute is in existence by way of suit or arbitration proceeding before the receipt of notice under sub-section (1) of Section 8 of the Code. **If we go by this section, existence of dispute means pendency of either suit or arbitration proceeding before the receipt of section 8 notice from the operational creditor, it has to be understood that pending of suit or arbitration proceeding alone will amount to existence of dispute.** In Clause (a) of Sub-Section (2) of Section 8, it has been said that the corporate debtor must bring two things to the notice of the operational creditor, one -existence of dispute "and" record of pendency of the suit or arbitration proceeding before receipt of section 8 notice. In point no. 1 "existence of dispute" has to be understood as dispute pending in a suit or arbitration proceeding as mentioned in definition to "dispute", in point No.2 "it has been said what dispute will become

considered as "existence of dispute". **It can be "existence of dispute" only when pendency of suit or arbitration proceeding in existence before receipt of notice, it does not matter to invoke section 9 if the suit or arbitration proceeding filed subsequent to receipt of section 8 notice.** Indeed, section 8 is a cause of action section to section 9, if cause of action does not arise under section 8, no grievance could be invoked under section 9, section 9 is an application to file a case if at all the information that is required under section 9 is given, thereby any provision in section 9 of the Code cannot be considered as a governing provision to find out as to any cause of action arose for filing a case under section 9. For that reason only, in sub-section (1) of section 9, a provision is made to file an application, in sub-section (2) a provision is made to file an application in such form and manner as prescribed, in sub-section (3), a provision is made to guide as to what documentation is to be filed along with the form under sub-section (1) of section 9, when it comes to sub-section (4), it is a provision enunciating to propose a resolution professional, it has been further said when an application is to be admitted and when an application is to be rejected, lastly in sub-section (6) it has been said that insolvency resolution process will be commenced once application is admitted under sub-section (5) of section 9. Thereby whether case is made out to file application u/s 8 is to be seen going back to section 8 but not under section 9, whereby if at all any provision appears inconsistent with cause of action section that is section 8, that provision has to be read in harmony with cause of action section. Cause of action section will never be harmonized to a procedural aspect mentioned in section 9.

24. In the given situation, this debtor company figures have gone into minus, P &L statement as on 31st March 2016 of the company reflects profit after tax has gone down to -1551.51crores. This company has not paid single rupee to these creditors in the last three years, it is admitted on record millions of dollars' worth goods purchased from them in the year 2013 by this company showing itself up as purchaser giving all kinds of undertakings waiving right of defence. Now, it says that these goods were delivered to some third party, not to it. It is in between the debtor and that third party, what business these creditors have with that third party, it does not appear in any documentation and that third party is privy to any transaction.

25. Nowadays, corporate world is running on credit facility, if we ask to ourselves, how many companies are doing business with their own money, then surely it will be negligible in number, daily many startups coming, some doing, some failing, the reasons may be myriad. If companies are funded by creditors and mostly run on their money, can it be said that shareholders of the company are real owners, or creditors? Don't creditors have a right at least to realize their money before company is fully sunk into? It is not that, every case coming to NCLT has been allowed or every case dismissed; NCLT has been applying its judicial discretion to find as to whether company is solvent enough to discharge its obligations towards creditors, some admitted, some dismissed, because every situation is fact sensitive, therefore adjudication is subject to the facts of the case.

26. In view of this, the principles and doctrines relevant in service jurisprudence and courts dealing purely with law in issue cannot be bulldozed upon fact finding courts, every decision turns on its facts. In Service Tribunals, mostly cases are dealt with basing on flouting some government order of memorandum, therefore cases filed on

From Published Accounts

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AS 19 - Leases - Annual Report 2015-16

HOV Services Limited

Where the Company has substantially acquired all risks and rewards of ownership of the assets, leases are classified as financial lease. Such assets are capitalized at the inception of the lease, at the lower of the fair value or present value of minimum lease payment and liability is created for equivalent amount. Each lease rent paid is allocated between liability and interest cost so as to obtain constant periodic rate of interest on the outstanding liability for each year.

Where significant portion of risks and reward of ownership of assets acquired under lease are retained by lessor, leases are classified as Operating Lease. Lease rentals for such leases are charged to Statement of Profit and Loss.

Claris Lifesciences Limited

Lease rentals in respect of assets taken on operating leases are charged to the statement of profit and loss on accrual and straight-line basis over the lease term.

Cairn India Limited

As lessee

Financial leases, which effectively transfer substantially all the risks and benefits incidental to ownership of the leased item, are capitalised at the lower of the fair value and present value of the minimum lease payments at the inception of the lease term and disclosed as leased assets. Lease payments are apportioned between the finance charges and reduction of the lease liability based on the implicit rate of return. Finance charges are recognised as an expense in the statement of profit and loss. Lease management fees, legal charges and other initial direct costs are capitalised.

If there is no reasonable certainty that the company will obtain the ownership by the and of the lease term, capitalised leased assets are depreciated over the shorter of the estimated useful life of the asset of the lease term.

Leases where the lessor effectively retains substantially all the risks and benefits of ownership of the leased item, are classified as operating leases. Operating lease payment are recognised as an expense in the statement of profit and loss on a straight-line basis over the lease term.

VRL Logistics Limited

Operating Leases are those leases where the lessor retains substantial risks and benefits of ownership of leased assets. Rentals in such cases are expensed with reference to lease terms and other considerations on a straight line basis.

IFB Industries Limited

Leases where the lessor effectively retains substantially all the risks and rewards of ownership of the leased asset are classified as operating leases. Operating lease payments are recognized as an expense in the statement of profit and loss on a straight-line basis over the lease term.

Teamlease Services Limited

Leases in which a significant portion of the risks and rewards of ownership are retained by the lessor are classified as operating leases. Payments made under operating leases are charged to the statement of profit and loss based on the terms of the agreement and the effect of lease equalisation is not given considering the increment is on account of inflation factor.

Celebrity Faishion Limited

Lease under which the company assumes substantially all the risks and rewards of ownership are classified as finance leases. Such assets acquired are capitalized at fair value of the asset or present value of the maximum lease payment at the inception of the lease, whichever is lower. Lease payments under operating leases are recognized as

an expense on a straight line basis in the statement of profit and loss over the lease term.

Ramky Infrastructure Limited

Leases where the lessor effectively retains substantially all the risks and rewards of ownership of the leased assets are classified as operating leases. Operating lease payments are recognized as an expense in the statement of profit and loss on a straight-line basis over the lease term.

Ravikumar Distilleries Limited

Finance Lease

Lease which effectively transfer to the company all the risks and benefits incidental to ownership off the leased item, are classified as finance lease. Lease rentals are capitalized at the lower of the fair value and present value of the minimum lease payments at the inception of the lease term and disclosed as leased assets. Lease payments are apportioned between the finance charges and reduction of the lease liability based on the implicit rate of return.

Operating Lease

Leases where the lessor effectively retains substantially all the risks and benefits of the asset are classified as operating leases. Operating lease payment are recognised as an expense in the profit and loss account on a straight-line basis over the lease term.

Monte Carlo Fashions Limited

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

Jagran Prakashan Limited

Assets acquired under finance leases are recognised as fixed assets. Liability is recognised at the lower of the fair value of the leased assets at inception of the lease and the present value of minimum lease payments. Lease payments are apportioned between the finance charge and the reduction of the outstanding liability. The finance charge is allocated over the lease term so as to produce a constant periodic rate of interest on the remaining balance of the liability and charge to the statement of profit and loss.

Leases in which a significant portion of the risks and rewards of ownership are retained by the lessor are classified as operating leases.

Payments made under operating leases are charged to statement of profit and loss on a straight line basis over the period of the lease.

In case of non-cancellable operating leases, the total rent payable including future escalations till the expiry of lease is charged equally to statement of profit and loss over the period of lease including renewals.

Sun Tv Network Limited

Operating Leases (where the company is the lessee)

Leases, where the lessor effectively retains substantially all the risks and benefits of ownership of the leased item, are classified as operating leases. Operating lease payment are recognised as an expense in the statement of profit and loss on a straight-line basis over the lease term.

Operating Leases (where the company is the lessee)

Leases in which the company does not transfer substantially all the risk and benefits of ownership of the assets are classified as operating leases. Assets subject to operating Leases are included in fixed assets. Lease income on an operating lease is recognized in the statement of profit and loss on a straight-line basis over the lease team. Costs, including depreciation, are recognized as an expense in the statement of profit and loss. initial direct costs such as legal costs, brokerage costs, etc, are recognized immediately in the statement of profit and loss.

PC Jeweller Limited

Leases, where the lessor effectively retains substantially all the risks and benefits of ownership of the leased assets are classified as operating leases. Lease payment under an operating lease are recognised as an expense in the statement of profit and loss on a straight-line method over the lease term.

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From the Government

CA. Kunal A. Shah
cakashah@gmail.com

Income Tax

1) Notification regarding notifying bonds of Power Finance Corporation as 'long-term specified asset' for the purposes of section 54EC.

The Central Government hereby notifies that any bond redeemable after three years and issued on or after the 15th day of June, 2017 by the Power Finance Corporation Limited, a company formed and registered under the Companies Act, 1956 (1 of 1956) as 'long-term specified asset' for the purposes of section 54EC.

(Notification No. 47 /2017, dated 08/06/2017)

2) Notification regarding declaration of new Form 26QC for Section 194 – IB of the Income Tax Act, 1961.

The Central Board of Direct Taxes, hereby, makes the following rules further to amend the Income-tax Rules, 1962, namely:-

In the Income-tax Rules, 1962 (hereafter referred to as the principal rules), in rule 30, -

(a) after sub-rule (2A), the following sub-rule shall be inserted, namely:-

" (2B) Notwithstanding anything contained in sub-rule (1) or sub-rule (2), any sum deducted under section 194-IB shall be paid to the credit of the Central Government within a period of thirty days from the end of the month in which the deduction is made and shall be accompanied by a challan-cum-statement in Form No. 26QC.";

(b) after sub-rule (6A), the following sub-rule shall be inserted, namely:—

"(6B) Where tax deducted is to be deposited accompanied by a challan-cum-statement in Form No.26QC, the amount of tax so deducted shall be deposited to the credit of the Central Government by remitting it electronically within the time specified in sub-rule (2B) into the Reserve Bank of India or the State Bank of India or any authorized bank.".

3. In the principal rules, in rule 31, after sub-rule (3A), the following sub-rule shall be inserted, namely:—

"(3B) Notwithstanding anything contained in sub-rule (1) or sub-rule (2) or sub-rule (3), every person responsible for deduction of tax under section 194-IB shall furnish the certificate of deduction of tax at source in Form No.16C to the payee within fifteen days from the due date for furnishing the challan-cum-statement in Form No.26QC under rule 31A after generating and downloading the same from the web portal specified by the Principal Director General of Income-tax (Systems) or the Director General

of Income-tax (Systems) or the person authorized by him."

4. In the principal rules, in rule 31A, after sub-rule (4A), the following sub-rule shall be inserted, namely:—

"(4B) Notwithstanding anything contained in sub-rule (1) or sub-rule (2) or sub-rule (3) or sub-rule (4), every person responsible for deduction of tax under section 194-IB shall furnish to the Principal Director General of Income-tax (Systems) or Director General of Income-tax (System) or the person authorized by the Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems) a challan-cum-statement in Form No.26QC electronically in accordance with the procedures, formats and standards specified under sub-rule (5) within thirty days from the end of the month in which the deduction is made."

(For form No. 16C and 26QC refer Notification No. 48 /2017, dated 08/06/2017)

3) Circular regarding view on section 2(22)(e) of the Income Tax Act, trade advances

Section 2(22) clause (e) of the Income Tax Act, 1961 (the Act) provides that dividend includes any payment by a company, not being a company in which the public re substantially interested, of any sum by way of advance or loan to a shareholder, being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits holding not less than ten per cent of the voting power, or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern) or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits.

The Board has observed that some courts in the recent past have held that trade advances in the nature of commercial transactions would not fall within the ambit of the provisions of section 2(22) (e) of the Act. Such views have attained finality.

(Circular No. 19 /2017, dated 12/06/2017)

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Association News

CA. Riken J. Patel
Hon. Secretary

CA. Maulik S. Desai
Hon. Secretary

1 **Forthcoming Programmes**

Date/Day	Programmes	Speaker	Venue
02.08.2017 to 05.08.2017	44th Residential Refresher Course	Various Speaker	Various Speakers Jaypee Greens Golf & Spa Resort, Greater Noida, UP

Glimpses of events gone by:

On 17th June 2017, First Brain Trust Meeting for the Year 2017-18 was organised on the topic of "Practical Aspects and intricacies of ICDS". The programme was well received by the members.

On 18th June 2017, our Association had organised a programme on "HEALTH MANAGEMENT THROUGH YOGA" Smt. Mayurika Shah (Yoga Trainer) trained Members and their family members in performing Yoga and Pranayam.

On 23rd June 2017, a full day seminar on GST was organised by our Association jointly with Bombay Chartered Accountants' Society.

On 30th June 2017, Cultural and Entertainment committee of our Association had organised Musical Programme "Musical Extravaganza 2017" at Tagore Hall. Shri Sharad Khandekar and his team performed at the function. The programme was well received by the members and their family members.

On 24th June 2017, Information Technology Committee of our Association organised a programme on Live demonstration of software on GST Return filing.

GST Study Series

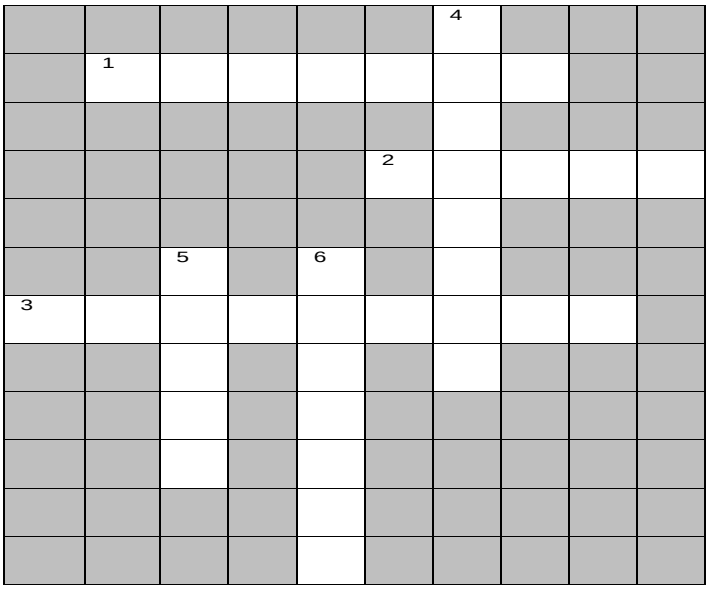
ACAJ Crossword Contest # 38

Across

1. In case of a new unit being merely an expansion of the existing business of the assessee and not setting up of a new business, the expense incurred would be allowable as _____ expenses.
2. Gujarat stands at _____ position in SSI units owned by women enterprise.
3. A _____ is also a borrower within the meaning of the SARFAESI Act and measures can be taken against him to recover secured debt.

Down

4. _____ is one of the greatest factors that strengthens your belief to keep up the good work.
5. There is no provision in the Income Tax Act to deduct tax when the tax becomes taxable to the _____.
6. As per Article 13 of India- Italy DTAA, taxability is dependent on _____ by resident of contracting stated and receipt of the same by resident of other contracting state.



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 20/07/2017.
5. The decision of Journal Committee shall be final and binding.

Winners of ACAJ Crossword Contest # 37

1. CA. Ashwin H. Shah
2. CA. Atul R. Shah

ACAJ Crossword Contest # 37 - Solution

Across

1. Proviso
2. Zero
3. Deduction

Down

4. Partners
5. Business
6. Noida

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