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AHMEDABAD CHARTERED ACCOUNTANTS JOURNAL

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Chartered Accountants Association, Ahmedabad

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

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

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Mananam

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Are We Materialistically Careful ?

“I do not invest in shares” said a friend of mine puffing his second cigarette on the trot. He continued, “Its very dangerous. People loose lot of money in it.” He smokes at least ten cigarettes in a day.

Said my young neighbor, “Bhaiyya bought a new Iphone, got the phone fully covered by insurance, have put a toughen glass and a leather cover, phone is costly, if something happens, my dad will scold”. He never wears a helmet when rides his bike.

“Drive on the wrong side, we will reach faster, we are getting late for dropping our kids at the school” said a worried mother who has made a practice to drive on the wrong side to save petrol and time.

These instances should make us wonder, “Are we materialistically careful?.” Do we really know what we should be more careful about in our life.

We cannot bear the pain when our kids get smallest of injury or are sick, but we put their lives at risk when we drive vehicles. This inculcates the same habit in them, where they ignore their own life and worry more about the mobile phone gifted to them on their birthday. Isn’t this a phenomenon where we all should have a relook in our lives?

In the modern world, we are giving more importance to things which are though important but are not quintessential for survival. We have forgotten that we can also be happy without many things which the modern world considers basic necessity. We are ignoring our health for running after things which give us short term happiness. We are ignoring our family, which can give us eternal joy, and planning to a buy a top floor high end property. We are ignoring our friends, but we dare not ignore the client or customer who is beneficial to us. I can go on and on. The list is endless.

Who will decide what is the correct way? The answer lies when you look within yourself. It’s you and only you who can decide how much is enough, what to be more careful in our life, what is top most priority, what is necessity, what is luxury, what is to be avoided and what is to be embraced. No one can guide you on this. But bear in mind friends, a penny saved is penny earned, but as the old saying goes, health is wealth. Health – physical and mental should be our focus point because only these are the two things which will come with us when we leave this world forever. Make the word “material” absolutely immaterial and then see that our life will be different.

Good Day, take care and be happy.

Editorial

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Independent India's Glory

"At the stroke of today's midnight hour, when the world sleeps, India will awake to life and freedom," said Jawahar Lal Nehru, the first Prime Minister of India, on 15th August 1947 after the country got freedom from the British rule. This 15th August we celebrated India's 70th Independence Day. This day, 70 years ago we were born as a free democratic country with many challenges ahead. In these 70 years we have marched forward overcoming various hurdles in varied fields. In this piece of editorial let's do some fact check of the great achievements and glory of our nation that make us feel proud:

- The Mars Orbit Mission (MOM), Mangalyaan is a space probe orbiting Mars successfully launched in the year 2013 by ISRO. Apart from that ISRO launched more than 104 satellites in a single mission creating history in the Space Technology.
- India is among the first country to develop satellite for domestic communication.
- India successfully launched Chandrayaan in order to explore the moon. The vehicle inserted into lunar orbit in its first attempt. On the greatest achievements of Chadrayaan was the discovery of the widespread presence of water molecules in the lunar soil.
- India is the only country to launch nuclear submarine after five permanent members of the UN Security Council.
- Indian Railways carries more than 23 million passengers daily from one place to another. The Chatrapati Shivaji Terminus in Mumbai and the Mountain Railways of India have been declared as World Heritage Site by the UNESCO.
- The Mid-Day meal scheme of Government of India is the world's largest scheme for kids serving 120,000,000 children in over 1,265,000 schools across the country.
- India gave every adult the right to vote from its first day. In the US, the right to vote to every individual was given more than 150 years after their independence.
- India has largest number of elected persons in the world, thanks to Panchayati Raj system across the country. We also have one of the highest number of female politicians.
- India is currently the world's second-largest telecommunications market.
- India develops world's lowest cost supercomputer.
- India is the world's largest milk producer, with 18 percent of global production.
- India is the largest producer of cotton with production of 6.51 million tonnes of the fibre.
- India is among the countries that have largest number of bank account holders.
- India has 5600 different newspapers and 3500 different magazines with approximately 120 million readers every day.
- India has the third largest army in the world with more than 1.3 million army personnels.
- India is among a handful countries with fundamental right to information.
- India won cricket world cup twice.
- India is the largest producer of films in the world and second oldest film industry in the world.

This is just an illustrative list out of numerous achievements of our great nation. We all are proud of our country but let's all resolve to conduct our self in such a way that our country be proud of us.

Jai Hind!

CA. Ashok Kataria

From the President

CA. Kunal A. Shah
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Dear Members,

On one side the festivals are going on and on and on other side we are tied up with the dead lines to make the compliances whether it is Service Tax, GST, Income tax and Audit.

You don't need to be a rocket scientist to know that taking breaks is important for being more productive at your job. Still, we all are torturing ourselves by constantly pushing our physical and mental limits and overstretching those working hours.

- One of the theme of our CAA Journal is "Clean India" - Swachh Bharat Abhiyan is a nationwide cleanliness campaign run by the government of India and initiated by the Prime Minister, Narendra Modi on 2nd of October in 2014 on 145th birthday anniversary of the Mahatma Gandhi. This campaign has been launched to fulfill the aim of cleanliness all over the India.

  The father of the nation, Mahatma Gandhi had said that, "Sanitation is more important than Independence" during his time before the independence of India. He was well aware of the bad and unclean situation of the India. He had emphasized the people of India a lot about the cleanliness and sanitation as well as its implementation in the daily lives. However, it was not so effective and failed because of the incomplete participation of people. After many years of independence of India, a most effective campaign of cleanliness is launched to call people for their active participation and complete the mission of cleanliness.

- India faces 5% rain deficit, despite floods - The flood fury in Assam, Bihar, Bengal and Uttar Pradesh has taken attention away from poor monsoon rains in large parts of the country in August. The month has so far seen approx. 24% rain deficit, with central India in particular reeling under a prolonged break in the monsoon.

- <u>Activities at the Association:</u>

- The 44th RRC at Greater Noida was a grand success. From bottom of my heart I thank to all the participants for supporting us throughout our stay and enjoying each and every moment at the Property of Jaypee Greens Spa and Resorts. I also congratulate the team RRC for all efforts in taking care of all the participants.

- To simplify the ambiguities and to make our audit work smooth during the season the 2nd Brain Trust Meeting Cum Workshop was organized on the subject of Tax Audit Report and Company Audit Report and was enriched by a eminent speaker CA Raman Jokhakar from Mumbai. Thanks to the chairman for coming up with most practical and important issues for discussion during the group discussion.

- As GST is now a reality, the Study Circle Committee of Indirect Tax of CAA had organized a program on Practical issues of RCM and Procedures under GST led by a CA Nitesh Jain from Ahmedabad. The program was well attended by the members, article assistants and office staff.

- Managing change effectively is one of the greatest challenges today. To convert change into opportunity is even a bigger challenge. GST has started in full swing. July month witnessed preparation of GST invoices, identifying HSN & SAC Codes with rates followed by filing of GSTR -3B in August. A lecture meeting on GST was organized at CAA especially for the lady members, lady articles and lady staff and first such program during my tenure. I thank to CA Dr. Anjali Choksi for coordinating such a special program for ladies.

- I would like to conclude with the thought, "Today I choose life. Every morning when I wake up I can choose joy, happiness, negativity, pain... To feel the freedom that comes from being able to continue to make mistakes and choices - today I choose to feel life, not to deny any humanity but embrace it."

Looking forward to your support and participation in future activities of the Association.

With best regards,

CA. Kunal A. Shah
President

GST - Transitional Provisions

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W.e.f. 1st July, 2017, Goods and Services Tax (GST) is applicable on supply of goods or services or both. This will lead to transition from existing service tax, excise duty and Local VAT to GST regime. Chartered Accountants and businessmen are required to understand provisions made for transition to new levy. Provisions of Sections 139 to 142, i.e. Chapter XX of the Central Goods and Services Tax Act, 2017(CGST Act) and Rules 117 to 121 of the Central Goods and Services Tax Rules, 2017 (CGST Rules) are to be followed for transition to GST. Transitional provisions are discussed as follows.

Q.1. I am registered for Central Excise and/or Service Tax and/or VAT on or before 30th June, 2017. Do I need to register under GST?

A.1. In terms of Section 139 of the CGST Act, 2017 every person registered under any of the existing laws (Excise, Service Tax, VAT etc.) and having a valid Permanent Account Number **shall** be issued a certificate of registration on provisional basis. Further, in terms of Rule 24(1)(a) of the CGST Rules, 2017, every such person shall enrol on the common portal by validating his e-mail address and mobile number. Thus, liability is cast upon such person to get himself **<u>enrolled</u>** under GST.

Q.2. Is my enrolment with the GST is a final registration?

A.2. Upon enrolment with GST, a provisional registration in FORM GST REG-25 shall be granted and shall be made available on common portal. However, this number is provisional and in terms of Section 139(1), it shall be liable to be cancelled if the conditions so prescribed are not complied with. In terms of Rule 24(2) of the CGST Rules, 2017, every person who has been granted a provisional registration under sub-rule (1) shall submit an application electronically in FORM GST REG–26. This application is required to be made within 3 months from the date of provisional registration. Documents and information are also required to be submitted. If the information and the particulars furnished in the application are found, by the proper officer, to be correct and complete, a certificate of registration in FORM GST REG-06 shall be made available online. This registration is final.

Q.3. I am enrolled on GST portal but I have not submitted FORM REG-26 within time limit. What are the consequences?

A.3. In terms of Rule 24(3) of the CGST Rules, 2017, if the particulars or information in FORM REG-26 have either not been furnished or not found to be correct or complete, the proper officer shall, after serving a notice to show cause in FORM GST REG-27 and after affording the person concerned a reasonable opportunity of being heard, cancel the provisional registration granted and issue an order in FORM GST REG-28. Thus, if FORM REG-26 is not filed, provisional registration shall be cancelled by the GST officer.

Q.4. Under the Central Excise Act, 1944, separate registration was required to be obtained for each factory and we have three different registrations, for each factory under Central Excise within the State of Gujarat. Do we need to obtain three registrations under GST?

A.4. In terms of Proviso to Rule 24(1)(a) of the CGST Rules, 2017, a taxable person who has been granted multiple registrations under the existing law on the basis of a single Permanent Account Number shall be granted only one provisional registration.

Q.5. I was registered for the Central Excise or Service Tax or Local VAT and hence my registration is migrated to GST portal. However, my turnover is below Rs. 20 Lacs. Do I need to pay tax and file returns? Can I get my GST registration cancelled? If yes, how?

A.5. In terms of Rule 24(4) of the CGST Rules, 2017, every person registered under any of the existing laws, who is not liable to be registered under the GST, may, within a period of thirty days from the appointed day, at his option, submit an application electronically in FORM GST REG-29 at the common portal for the cancellation of registration granted to him and the proper officer shall, after conducting such enquiry as deemed fit, cancel the said registration. Further, in terms of Section 139(3) of the CGST Act, 2017, the certificate of registration issued to such person shall be deemed to have not been issued if the said registration is cancelled in pursuance of an application filed by such person. As registration is deemed to have not been issued, i.e. cancelled *ab initio* , there assessee is not required to pay tax or file any returns. However, upto 22nd August, 2017, online facility to file FORM REG-29 is not made operational on GST portal.

Q.6. I was registered for the Central Excise or Service Tax and Local VAT and I have unutilised credit for each of the above tax as on 30th June, 2017. Can I carry forward this credit to GST and can I utilise it against payment of GST?

A.6. In terms of Section 140(1) of the G/CGST Act, 2017, a person registered under GST shall be entitled to take credit of such taxes (refer SGST Act for Local VAT). Thus, such utilised credit may be taken in GST and may be utilised in GST.

Unutilised credit of Service Tax/Central Excise may be availed and utilised against CGST/IGST and unutilised credit of VAT can be availed and utilised against SGST.

Q.7. What procedure do I need to avail above unutilised credit of such taxes in GST?

A.7. In terms of Rule 117(1) of the CGST Rules, 2017, within 90 days of the appointed days, a person registered under the GST, has to submit a declaration in FORM TRAN-1. This form is to be filed electronically on common portal. Commissioner may, on the recommendations of the Council, extend the period of ninety days by a further period not exceeding ninety days. The amount of credit specified in the application in FORM GST TRAN-1 shall be credited to the electronic credit ledger of the applicant.

Q.8. I was registered under Local VAT and I am not left with any unutilised credit for Local VAT as on 30th June, 2017. Can I avail credit of Local VAT paid on stock as held on 30th June, 2017 and can I utilise it against payment of GST?

A.8. Credit of Local VAT paid on purchase of raw material/trading goods held in stock as on 30th June, 2017 is concerned, it might have been already availed by assessee registered with local VAT. Hence, if so, question of availing credit again, doesn't arise.

Q.9. I was registered under Local VAT and I have unutilised credit for Local VAT as on 30th June, 2017. However, I do not have any stock as on 30th June, 2017. Can I still carry forward unutilised Local VAT credit and utilise it against payment of GST??

A.9. In terms of Section 140(1) of the Gujarat GST Act, 2017, such credit may be availed by the person registered under the GST.

There is no such restriction in the said Act, which puts a condition which requires that such credit may be availed in GST only if goods are also held as stock on appointed day. Hence, such credit may be availed (i.e. carried forwarded) in GST even if no stock is held as on 30th June, 2017.

Q.10. I am registered for Service Tax, Local VAT and Central Excise and I have unutilised credit. However, I have not filed my returns under the above law. Can I still avail such unutilised credit in GST?

A.10. In terms of Clause (ii) to Proviso to Sub-Section (1) to Section 140 of the S/CGST Act, 2017, a person shall not be allowed to take credit where he has not furnished all the returns required under the existing law for the period of six months immediately preceding the appointed date. Hence, if any of the return for the last 6 months is not filed, unutilised credit for VAT, Service Tax or Excise can't be availed in GST.

Q.11. I am registered with Central Excise and Service Tax and has unutilised credit balance of:

a. Education Cess (EC)

b. Secondary and Higher Education Cess (SHEC)

c. Krishi Kalyan Cess (KKC)

A.11. In terms of Section 140(1) of the CGST Act, 2017, amount of CENVAT credit carried forwarded in the return may be availed by the person registered in GST. However, word "CENVAT Credit" is not defined in the CGST Act, 2017 and we need to rely on meaning given in the CENVAT Credit Rules, 2004. In terms of Rule 3 of the said Rules, EC, SHEC and KKC are "CENVAT Credit". Thus, such credit can be availed in GST.

However, Central Board of Excise and Customs (Board for GST also) has through Sr. No. 91 of the Tweet FAQs has clarified that Credit of KKC can't be carried forwarded. In opinion of the author, credit is available but unless substantial amount is involved, stand against the view of department should not be taken.

Further, at Serial No. 93 of the said FAQs, it is stated that balance of EC and SHEC will not be carried forwarded in GST as it is not "eligible duties and taxes" under Section 140 of the CGST Act, 2017. However, term "eligible duties and taxes" as defined in Explanation 1 and 2 to the Section 140 of the CGST Act, 2017 is applicable to Sub-Sections (3),(4), (5) and (6) of the Section 140 and carried forward of balance is covered under Sub Section 140 of the CGST Act, 2017. Thus, reasoning given in FAQs seems incorrect.

Q.12. I was registered for the Central Excise and has availed CENVAT credit of 50% of Excise Duty paid on Capital Goods during the period April, 2017 to June, 2017. Can I avail balance 50% and utilise it against GST?

A.12. In terms of Section 140(2) of the CGST Act, 2017, a registered person shall be entitled to take credit of the unavailed CENVAT credit in respect of capital goods, not carried forward in a return, furnished under the existing law by him, for the period ending with the day immediately preceding the appointed day in such manner as may be prescribed. In terms of Rule 117(1) of the CGST Rules, 2017, within ninety days of the appointed day (i.e. 1st July, 2017), submit a declaration electronically in FORM GST TRAN-1. Further, in terms of Rule 117(2), the amount of tax or duty availed or utilized by way of input tax credit under each of the existing laws till the appointed day and the amount of tax or duty yet to be availed or utilized by way of input tax credit under each of the existing laws till the appointed day shall be specify separately in the FORM GST TRAN-1.

Q.13. A person was registered under the Local VAT but was not registered under the Central Excise. Can he avail credit of Excise Duty paid on Raw Material held in Stock, in Semi-Finished and in Finished Goods?

A.13. In terms of Section 140(3) of the CGST Act, 2017 shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day. Thus, a person, like a trader, who is having stock of Raw Material, may be as raw material or raw material in Semi- Finished or Finished Goods, is entitled to avail credit of Excise Duty paid on such raw material.

Q.14. What are the conditions to avail credit of above stock?

A.14. In terms of Section 140(3) of the CGST Act 2017 following conditions are required to be fulfilled.

(i) Such inputs or goods are used or intended to be used for making taxable supplies under GST.

(ii) Person is eligible for input tax credit on such inputs under GST.

(iii) Person is in possession of invoice or other prescribed documents evidencing payment of excise duty in respect of such inputs.

(iv) Such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day.

(v) If Supplier of service is person availing the credit under GST, such supplier of services is not eligible for any abatement under GST.

Q.15. I am registered under Local VAT and having stock as on 30th June, 2017 on which excise duty is paid. However, I am not is possession of the Invoice issued by the Manufacturer or Excise Dealer. Can I still avail the credit for Excise Duty paid on such stock?

A.15. In terms of Proviso to sub-section (3) of Section 140 of the CGST Act, 2017 where a registered person is not in possession of such invoice, he shall be allowed to take credit at such rate and in such manner and subject to such conditions, limitations and safeguards as may be prescribed. In this regards, Rule 117(4) is prescribed. In terms of sub-clause (ii) of the clause (a) of the said sub-rule, credit shall be allowed at the rate of sixty per cent. on such goods which attract central tax at the rate of nine per cent. or more and forty per cent. for other goods of the central tax applicable on supply of such goods.

For example, Mr. X has stock costing Rs. 1,00,000 as on 30th June, 2017 for which no excise paid invoices are available. Such stock is sold by Mr. X on 15th July, 2017 at Rs. 1,20,000 and CGST of Rs. 10,800 is paid @ 9%. In this case credit of Rs. 6,480 [Rs.10800*60%] will be allowed to Mr. X. Suppose, CGST is payable @ 6%, in this case CGST will Rs. 7200 and credit will be limited to Rs. 2880[Rs. 7200*40%].

Q.16. At what time such deemed/adhoc credit of 60%/40% will be allowed?

A.16. In terms of the sub-clause (ii) of the clause (a) of the sub-Rule (4) of the Rule 117 of the CGST Rules, 2017, such credit shall be credited after the central tax payable on such supply has been paid. In other words it will be allowed only after such goods are sold/ supplied.

Q.17. Is there any time limit to sale/supply such goods to avail deemed/adhoc credit of 60% or 40%?

A.17. In terms of the sub-clause (iii) of the clause (a) of the sub-Rule (4) of the Rule 117 of the CGST Rules, 2017, such scheme is available only for 6 tax periods. In term of Section 2(106) of the CGST Act, 2017 “tax period" means the period for which the return is required to be furnished. Generally, monthly returns are required to be filed and hence practically, six months are available to sale/supply such goods if a person want to have deemed credit of 40%/60%.

Q.18. A person was not registered with Central Excise but was registered for VAT. He is in possession of Stock as on 30th June, 2017 on which Excise Duty is paid and he is in possession of invoices evidencing payment of Excise Duty. Is he required to sale/supply of his goods within 6 months as discussed above?

A.18. Limitation of six months, as prescribed in Rule 117(4)(a)(iii) is applicable only if a person is not having invoices evidencing payment of excise duty and wants to avail benefit of adhoc/deemed credit of 60%/40% of CGST paid. If a person is having purchase invoices evidencing payment of excise duty, he is not bound to sale the goods within 6 months as prescribed in above rule.

Q.19. A trader was not registered with Central Excise but was registered for VAT. He is in possession of Stock as on 30th June, 2017 and excise duty was leviable but manufacturer was under threshold exemption of Rs. 1.5 Cr and has not paid the Excise Duty thereon. Can trader avail deemed credit of 40%/60% on such goods?

A.19. In terms of Section 140(4), credit of eligible duties **in respect** of inputs held in stock shall be allowed. It doesn't talk about only duties paid. Further, in terms of Rule 117(4)(a)(i), such credit shall be allowed if duty is **leviable** (and not levied or paid). When an exemption is provided, it doesn't mean that goods cease to be a taxable or duty is not taxable at all. In such cases, duty is leviable but exemption is provided. This means that even if exemption is given, goods were leviable to excise duty. In terms of deemed credit of 40%/60% is allowed if duty was leviable.

In Excise, threshold limit of Rs. 1.5 Cr. is provided by way of an exemption. It means that even if duty is not paid on goods manufactured by manufacturer availing such exemption, duty is still leviable on such goods. Hence, deemed credit of 40%/60% is available to trader who has purchased such goods.

Further, this notification is subject to condition that no CENVAT credit is availed by the manufacturer.

Further, at paragraph 74 of the Tweet FAQs issued by the CBEC, it is stated that in such case, deemed credit is available to the trader. It shows that department is also having similar view.

Q.20. A trader has a stock as on 30th June, 2017 which was exempt from VAT. Is he eligible to avail the deemed credit of 40%/60% against Gujarat GST on stock held by him?

A.20. There is difference between wordings of Rule 117(4) of CGST Rules, 2017 and The Gujarat GST Rules, 2017. In terms of Rule 117(4)(b)(i) of the CGST Rules, 2017 if goods were **unconditionally exempt** from Excise Duty, credit under CGST Act, 2017 is not available. However, under similar rule of the Gujarat GST Rules, 2017, if goods were **wholly exempt** from the Gujarat Value Added Tax, 2003, Credit under the Gujarat GST Act, 2017 is not available. Thus, if, as goods were wholly exempt from the payment of VAT, may be conditional or not, no credit of 40%/60% shall be available. Threshold exemption is conditional exemption and non unconditional exemption. Thus, credit against central tax is available but credit against state tax is not available.

Q.21. A trader is having goods on which "Nil" rate of duty was prescribed in the Central Excise Tariff Act, 1975 and hence no excise duty was payable. Can trader avail deemed credit of 40%/60% for such goods?

A.21. Excise Duty is payable at the rates specified against each item in the Central Excise Tariff Act, 1975. In number of items, Nil rate is prescribed. Goods chargeable with Nil rate is still chargeable with Excise Duty and Excise Duty is leviable on such goods. It is well settled principle in Central Excise that prescribed Nil rate doesn't make goods non-excisable or non-taxable. [Classic case of Supreme Court in the case of Vazir Sultan Tobacco Co. Ltd.].

However, in terms of Rule 17(4)(b)(ii) of the CGST Rules, 2017, if goods were unconditionally exempt from the whole of the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985 or were not nil rated in the said Schedule, no credit of Central Tax (i.e. CGST) shall be available. Hence, in case of goods which were chargeable with Nil rate of duty, no deemed credit of 40%/60% shall be available.

Q.22. A trader was not registered in VAT as VAT was not payable on his product. However, he is having stock as on 30th June, 2017. Can he avail deemed credit of 40%/60% for VAT as discussed above?

A.22. In CGST Act, 2017 credit for excise duty is available if duty was leviable. However, in the Gujarat Goods and Services Tax Rules, 2017 position is different. In terms of Rule 117(4)(a) of the said Rules, such credit is available only if goods in stock, for which credit is to be availed, <u>have suffered tax at the first point of sale and subsequent sales of which are not subject to tax in the State availing credit.</u> Thus, as such stock has not suffered tax at all, deemed credit of 40%/ 60% shall not be available in State GST.

Q.23. What is the procedure required to be followed to avail deemed/adhoc credit of 40%/60%?

A.23. In addition to details to be submitted in FORM TRAN-1, a person shall submits a statement in FORM GST TRAN 2 at the end of each of the six tax periods during which the scheme is in operation indicating therein, the details of supplies of such goods effected during the tax period.

Q.24. Manufacturer or a service provider is not in possession of tax invoices evidencing payment of VAT or Central Excise Duty. Can a manufacturer or a service provider avail benefit of deemed/adhoc credit of 40%/ 60% under CGST Act/SGST Act?

A.24. In terms of Proviso to sub-section (3) of the Section 140 of the S/CGST Act, 2017, scheme of deemed credit is not available to a Manufacturer or a Service Provider. Thus, credit on stock held on 30th June, 2017 is available to a Manufacturer or a Service Provider only if he is in possession of invoice or other prescribed documents evidencing payment of tax under the VAT/Excise.

Q.25. A developer of a construction scheme is not having invoices evidencing payment of excise duty. Can he avail benefit of deemed credit of 40%/60% under CGST Act, 2017 or SGST Act, 2017?

A.25. In terms of the Serial No. 5(b) to the Schedule II the CGST Act, 2017, construction a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly shall be treated as supply of service. As discussed above, this scheme is not available to a provider of service and hence no such deemed/adhoc credit of 405/60% can be availed by a developer/builder.

Q.26. A person was registered as First/Second Stage Dealer under the Central Excise Act, 1944 and having stock as on 30th June, 2017 on which Excise Duty is paid. Can he avail credit of such excise duty under GST?

A.26. Yes, he can avail credit under Section 140(3) of the CGST Act, 2017.

Q.27. Goods are removed from the factory of the Manufacturer on 30th June, 2017 on payment of Excise Duty and Local VAT but buyer has received goods on 5th July, 2017. Can buyer avail credit of such goods in transit under GST Law?

A.27. In terms of Section 140(5) of the S/CGST Act, 2017, credit of such taxes are allowed subject to the condition that the invoice or any other duty or tax paying document of the same was recorded in the books of account of such person within a period of thirty days from the appointed day.

Q.28. A person has purchased goods from outside State and has paid Central Sales Tax thereon and such goods are laying in stock as on 30th June, 2017. Is he eligible to avail credit of the Central Sales Tax paid on such stock?

A.28. In terms of Section 140(3) of the Gujarat GST Act, 2017, credit of Value Added Tax or Entry Tax only is available. Further, in Explanation 1 to Section 140 as applicable to sub section (3) of the CGST Act, 2017, eligible duties are also defined. None of the above includes Central Sales Tax and in absence of any other provision in the CGST/ SGST Act, 2017, no credit of such CST paid and included in stock as on 30th June, 2017 will be available in GST.

Q.29. As required under the CENVAT Credit Rules, 2004, credit is required to be reversed if payment to supplier is not made within 3 months from the date of invoice. As on 30th June, 2017, a manufacturer has such credit which is reversed. Can a manufacturer claim the credit under GST if payment to supplier is made on or after 1st July, 2017?

A.29. In terms of Section 140(9) of the CGST Act, 2017, such a credit can be availed under GST provided registered person has made the payment of the consideration for that supply of services within a period of three months from the appointed day.

Q.30. Goods were removed for job-work, testing, repairing etc. on or before 30th June, 2017 and goods are returned to the sender on or after 1st July, 2017. Is GST payable on such goods returned to the sender on or after 1st July, 2017?

A.30. In terms of Section 141 of the CGST Act, 2017, when goods are send from a place of business prior to appointed day, no GST is payable if such inputs are returned to the said place on or after the appointed day within six months from the appointed day. Further, GST is not payable subject to condition the person despatching the goods and the job worker declare the details of the inputs or goods held in stock by the job worker on behalf of the person despatching the goods on the appointed day in such form and manner and within such time as may be prescribed. In this regards, under Rule 119 of the CGST Rules, 2017 it is prescribed that such details shall be submitted in FORM TRAN-1.

Further, if the said goods are not returned within the six months, the input tax credit shall be liable to be recovered in accordance with the provisions of clause (a) of sub-section (8) of section 142, i.e. recovery under the GST Law.

Q.31. M/s. X Ltd. has sold goods on payment of Excise Duty and/or VAT before 1st July, 2017 and goods are returned on or after 1st July, 2017. Please advise him about taxability under GST.

A.31. Provisions for Goods sold on payment of excise duty and/or VAT and goods are returned in GST regime are as follows.

I. If goods are **returned by a person registered under GST**, such goods return is a supply under GST and person returning goods has to pay GST on such supply [Refer Proviso to Section 142(1) of the S/CGST Act, 2017]. Person receiving goods back will not be able to take credit or refund of Excise Duty/ VAT but can avail Input Tax Credit of GST paid by the registered person returning the goods back.

II. If goods are **returned by a person who is not registered under GST**, person receiving the goods back may get the refund of the Excise Duty/VAT paid **subject to following conditions**.

a. Goods are removed or sold not being earlier than six months prior to the appointed day.

b. Goods are returned to any place of business

c. Such goods are returned within a period of six months from the appointed day.

d. Such goods are identifiable to the satisfaction of the proper officer.

III. If goods are **returned by a person who is not registered under GST** and above **conditions are not satisfied**, in such case, no relief for the person who has sold the goods. On the contrary he will have to pay GST on receipt of the goods as he has received supply from the unregistered person as provided under Section 9(4) of the CGST Act, 2017.

Q.32. Goods were sold on payment of Excise Duty and VAT or services were provided on payment of service tax on or before 30th June, 2017. However, price has been revised on or after 1st July, 2017 for such supply which was made on or before 30th June, 2017. What will be the effect of GST on such price revision?

A.32. Section 142(2) of the S/CGST Act, 2017 prescribes the provisions as follows.

I. If price is revised upwards, a supplementary invoice or a debit note shall be issued within 30 days of price revision. Such supplementary invoice or debit note shall be deemed to have been issued in respect of an outward supply made under GST, meaning thereby, on this additional amount, GST is required to be paid.

II. If price is revised downwards, a credit note shall be issued by the supplier within 30 days of price revision and for the purposes of GST such credit note shall be deemed to have been issued in respect of an outward supply made under GST. However, a supplier shall be allowed to reduce his tax liability on account of issue of the credit note only if the recipient of the credit note has reduced his input tax credit corresponding to such reduction of tax liability.

Q.33. M/s. Krupal Builders has booked flats and has paid service tax on amount received on or before 30th June, 2017. After 1st July, 2017 booking is cancelled. Can M/s. Krupal Builders take adjustment of such service tax paid against its GST liability?

A.33. In GST law, there is no provision which allows adjustment of such excess service tax paid against GST liability. However, in such case, refund may be granted and claim of refund is required to be made. In terms of Section 142(5) of the CGST Act, 2017, such claim should be disposed of in accordance with the existing law i.e. under the Finance Act, 1994. Further, such refund should be paid in cash and not by way of adjustment against GST liability. However, as provided in Section 11B(2) of the Central Excise Act, 1944, concept of unjust enrichment will apply and refund will be granted to the service provider only if he proves that incidence of the service tax is not passed on by him to service receiver.

Q.34. Mr. CA has raised an invoice on 30th October, 2016 for services provided during that period along with service tax. However, in terms of third Proviso to Rule 6 of the Service Tax Rules, 1994, he is having option to pay service tax on receipt of payment and not on raising an invoice, i.e. on cash basis and not on accrual basis. He has received payment against above invoice on 15th August, 2017 i.e. in GST regime. Is he liable to pay GST on such receipt?

A.34. In terms of Section 142(11)(b) of the CGST Act, 2017 no tax shall be payable on services under this Act to the extent the tax was leviable on the said services under Chapter V of the Finance Act, 1994. In terms of the Section 66B of the Finance Act, 1994 service tax is to be levied on services provided or agreed to be provided. Further, in terms of the Rule 3(a) of the Point of Taxation Rules, 2011, read with Rule 2(e) of the said rule, a service shall be deemed to have been provided at the time invoice is issued. As invoice is issued during the service tax regime, services are deemed to be provided during the raising of invoice and hence such service is liable to be taxed under the Finance Act, 1994. In terms of the Section 142(11)(b) of the CGST Act, 20177 no GST is payable if tax was leviable on any services. Thus, there is no liability to pay GST on such services.

Similar provision is made under Section 142(11)(c) for goods, to the extent the tax was leviable on the said goods under the Value Added Tax Act of the State.

Q.35. Mr. X has sent some goods on approval basis on or before 30th June, 2017 and has not been sold or returned till that date. Advise him about his taxability in GST.

A.35. Taxability under GST regime for different situation will be as follows.

a. If goods are sent for approval before six months from the appointed day i.e. before 1st January, 2017 and goods are not returned by the sender within six months from the appointed day, GST shall be payable by the person who has sent the goods on approval basis. [Third Proviso to Section 142(12) of the CGST Act, 2017].

b. If goods are sent for approval before six months from the appointed day i.e. before 1st January, 2017 and goods are returned by the sender, such transfer is a supply under GST and GST is required to be paid. If sender is register, he is liable to pay and if not, recipient will have to pay GST under provisions of Section 9(4) of the CGST Act, 2017.

c. If goods are sent for approval not earlier than six months from the appointed day, and if goods are returned within 6 months from the appointed day, GST is not payable [Section 142(12) of the CGST Act, 2017].

d. If goods are sent for approval not earlier than six months from the appointed day, and if goods are returned after 6 months from the appointed day, GST is payable by the person returning the goods [Second Proviso to Section 142(12) of the CGST Act, 2017].

e. If goods are sent for approval not earlier than six months from the appointed day, and if goods are not returned within 6 months from the appointed day, GST is payable by the person who has sent the goods on approval basis. [Third Proviso to Section 142(12) of the CGST Act, 2017].

In terms of the Rule 120 of the CGST Rules, 2017, every person having sent goods on approval basis under existing law, and to whom sub-section (12) of section 142 applies shall, within ninety days of the appointed day, submit details of such goods sent on approval in FORM GST TRAN-1.

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Glimpses of Supreme Court Rulings

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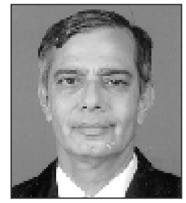

9 Evidentiary value of Income tax returns/ orders:

In tax regime, the legality or illegality of the transactions generating profit or loss is inconsequential qua the issue whether the income is from a lawful source or not. The scrutiny in an assessment proceeding is directed only to quantify the taxable income and the orders passed therein do not certify or authenticate that the sources thereof to be lawful and are thus of no significance vis-à-vis a charge under Section 13(1)(e) of the The Prevention of Corruption Act 1988. Suffice it to state that even assuming that the income tax returns, the proceedings in connection therewith and the decisions rendered therein are relevant and admissible in evidence as well, nothing as such, turns thereon definitively as those do not furnish any guarantee or authentication of the lawfulness of the source(s) of income, the pith of the charge leveled against the accused. It is the plea of the defence that the income tax returns and orders, while proved by the accused persons had not been objected to by the prosecution and further it (prosecution) as well had called in evidence the income tax returns/ orders and thus, it cannot object to the admissibility of the records produced by the defense. To reiterate, even if such returns and orders are admissible, the probative value would depend on the nature of the information furnished, the findings recorded in the orders and having a bearing on the charge leveled. In any view of the matter, however, such returns and orders would not ipso facto either conclusively prove or disprove the charge and can at best be pieces of evidence which had to be evaluated along with the other materials on record. Noticeably, none of the accused has been examined on oath in the case in hand. Further, the income tax returns relied upon by the defence as well as the orders passed in the proceedings pertaining thereto have been filed/passed after the charge sheet had been submitted. Significantly, there is a charge of conspiracy and abetment against the accused persons. In the overall perspective therefore neither the income tax returns nor the orders passed in the proceedings relatable thereto, either definitively attest the lawfulness of the sources of income of the accused persons or are of any of a them to satisfactorily account of the disproportionateness of the pecuniary resources and properties as mandated by section 13(1)(e) of the 1988 Act. Where there is unexplained cash credit, it was open to the income tax Officer to hold that it is the income of the assessee and no further burden lies on the income tax Officer to show that the income is from any particular source and that it is for the assessee to prove that even if the cash credit represented income, it is an income from a sources which had already been taxed.

Though the IT returns and the orders passed in the IT proceedings in the instant case recorded the income of the accused concerned as disclosed in their returns, in view of the charge levelled against them, such returns and the orders in the IT proceedings would not by themselves established that such income had been from lawful source as contemplated in Explanation to Section 13(1)(e) of the PC Act, 1988 and that independent evidence would be required to account for the same.

Property in the name of the income tax assessee itself cannot be a ground to hold that it actually belongs to such an assessee and if this proposition is accepted, it would lead to disastrous consequences. In such an eventuality it will give opportunities to the corrupt public servant to amass property in the name of known person, pay income tax on their behalf and then be out from the mischief of law.

Submission of income tax returns and assessments orders passed thereon, would not constitute a foolproof defence against a charge of acquisition of assets disproportionate to the known lawful sources of income as contemplated under the PC Act and further scrutiny/ analysis thereof as imperative to determine as to whether the offence as contemplated by the PC Act is made out or not.

[State of Karnataka Vs. J. Jayalalitha and Others (2017)(6 SCC 263)]

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From the Courts

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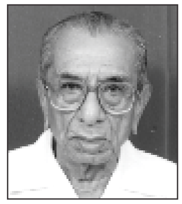

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41 Power u/s 263 of the Commissioner.

CIT v/s. Nirav Modi : (2017) 390 ITR 292 (Bom)

Issue :

How should the Commissioner of Income Tax has exercise powers u/s 263?

Held :

The Assessing Officer was satisfied, consequent to making an enquiry and examining the evidence produced by the assessee, establishing the identity and creditworthiness of the donor and also the genuineness of the gift. The Commissioner in his order of revision did not indicate any doubts in respect of the genuineness of the evidence produced by the assessee. The satisfaction of the Assessing Officer on the basis of the documents produced was not shown to be erroneous in the absence of making a further enquiry. This was a case where a view was taken by the Assessing Officer on enquiry. Even if this view, in the opinion of the Commissioner was not correct, it would not permit him to exercise power under section 263 of the Act. The Tribunal was right in setting aside the order under section 263 of the Act.

42 Partial user of assets in a Block of Assets and depreciation.

Nirma Credit and Capital Ltd. v/s. Asst. CIT : (2017) 390 ITR 302 (Guj)

Issue :

Whether in the case of block of assets for the purpose of depreciation is it possible to segregate individual items for non use to disallow partial depreciation?

Held :

That it was not the case of Assessing Officer that the assets were not put to use at all. Once the factory building was put to use, it was not possible to restrict the depreciation on the building on the ground that only a portion thereof was put to use. In relation to block of assets, it was not possible to segregate items falling within the block for the purposes of granting depreciation or restricting the claim thereof. Once it was found that the assets were used for business it was not necessary that all the items falling within plant and machinery have to be simultaneously used for being entitled to depreciation. Therefore, the Tribunal was not right in disallowing the depreciation.

43 Ex party orders generally not to be passed.

Korp Resources Pvt. Ltd. v/s. Deputy CIT : (2017) 390 ITR 336 (Cal)

Issue :

When the ex-party orders are to be passed, guideline for the same by the Court.

Held :

Ex parte proceedings and ex parte orders are generally frowned at by the courts of law unless there are compelling reasons or good justification. It is of utmost importance that any proceeding which is likely to affect the civil rights of a party is conducted strictly in accordance with the principles of natural justice. Audi alteram partem does not enshrine a principle of mere formality. It embodies a very valuable right of a citizen, that is, not to be condemned unheard. Hence, to the extent possible, courts insist on the principles of natural justice being observed in the matter of conducting proceedings which culminate in orders likely to affect those rights of the party concerned.

44 Notice served on unauthorized person. Proceedings invalid.

CIT v/s. Kanpur Plastipack Ltd : (2017) 390 ITR 381 (All)

Issue :

When a notice u/s 148 was served on a person not authorized to accept the same, whether proceedings thereafter are valid?

Held :

Under a statute if a certain act is required to be done in a certain manner it must be done in that manner, failing which, the proceedings stand vitiated.

The managing director of the assessee company had executed a power of attorney in favour of the company's accountant to represent the company in the assessment proceedings. Notice under section 148 of the Income Tax Act, 1961 was served on him. The Appellate Tribunal held that the assessment proceedings were invalid and quashing the assessment order on the ground that the notice under section 148 of the Act, was not validly served on the assessee.

The power of attorney had confined the authority to representation to conduct the case. It did not include in it any authority to accept any fresh notice. The person on whom the notice under section 148 of the Act was served was not the principal officer of the assessee nor was there any material to show that he had been authorized by the assessee to accept any notice. The Appellate Tribunal was correct in concluding that the reassessment proceedings, which were initiated on the basis of the notice dated May 28, 2002 were vitiated.

45 Reopening : Reason to suspect v/s. Reason to believe : Change of client code by Broker.

Coronation Agro Industries Ltd. v/s. Deputy CIT : (2017) 390 ITR 464 (Bom)

Issue :

Reopening on reason to suspect is valid? Change of client code by Broker is a valid reason to reopen?

Held :

Prima facie, the notice under section 148 of the Act was without jurisdiction as it lacked reason to believe that income chargeable to tax had escaped assessment. The reasons did not indicate the basis for the Assessing Officer to come to a reasonable belief that there had been any escapement of income on the ground that the modifications done in the client code was not on account of a genuine error, originally occurred while punching the trade. The material available was that there was a client code modification done by the assessee's broker but there was no link from there to conclude that it was done with a view to escape assessment of a part of the assessee's income. Prima facie, it was a case of reason to suspect and not reason to believe that income chargeable to tax had escaped assessment. Interim relief was granted.

46 TDS Credit in full allowed against partial income shown.

CIT v/s. Ganesh Narayan Brijlal Ltd. : (2017) 292 CTR 518 (Cal)

Issue :

When assessee collected entire rent and passed on to respective co-owner, whether entire tax deducted is available to him?

Held :

Assessee owner of part of building realizing rent for the entire building after deduction of tax at source and paying the share of co-owners inclusive of amount of TDS is entitled to benefit of entire tax deducted at source though it offered for tax only its own share of rental income.

Counsel for Revenue contended that in case, the assessee is interested in claiming the benefit of the tax deducted at source in its entirely, the assessee cannot avoid the liability to pay tax on the entire rental income. The submission advanced was held as not impressive. The assessee is undoubtedly an owner of the property but he is not an absolute owner. His ownership is restricted to a certain percentage of the right in the property. The assessee has collected the rent payable with respect to the property in its entirely and thereafter has passed on the rent including the amount deducted on account of the tax to the other co-owners. There is, as such, no reason why the assessee should not be entitled to enjoy the benefit of tax deducted at source. Counsel for Revenue did not dispute that the assessee has paid the share of the co-owners including the share in the amount of tax deducted at source. Assessee is entitled to get the benefit of the tax even though the rent realized belonged to the assessee only partially.

47 **Sec. 14-A : Rule 8D Applicability.**
Punjab Tractors Ltd. v/s. CIT : (2017) 293 CTR 50 (P & H)

Issue :

How the provisions of Sec. 14A /Rule 8D are to be interpreted for applicability, of the same against the claim of the assessee?

Held :

Conditions specified in sub-ss. (2) and (3) of s. 14A must exist in order to entitle the AO to invoke r. 8D. This is clear from the language of these sub sections. For the purpose of invoking r. 8D, it is not necessary that the conditions in both the sub sections exist. It is sufficient if the condition in either of the sub-section must exist. It is mandatory for the AO to record that having regard to the accounts of the assessee he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under the Act or that he is not satisfied with the assessee's claim that no expenditure had been incurred by him in relation to the income which does not form part of the total income under the Act. It is sufficient if the AO comes to the conclusion that the claim of the assessee in this regard is not correct. It is not necessary for him to decide the extent or the quantum of the incorrect claim. There would be several instances where an AO can come to the conclusion that the claim is incorrect but would be unable to assess the extent of the inaccuracy. That is precisely the purposes or r. 8D.AO is bound to follow r. 8D and cannot estimate the expenditure. If an assessee establishes that its interest free funds were equal to or more than the interest bearing funds, it would be open to it to contend that presumption arises that the expenditure for earning exempt income was incurred from out of its interest free funds.

48 **Sec. 14A : Shares and Securities held as stock in trade : Interest and Dividend Income.**
Principal CIT v/s. State Bank of Patiala : (2017) 293 CTR 35 (P & H)
(2017) 393 ITR 223 (P & H)

Issue :

When shares and securities are held as stock in trade and Profit/Loss on transactions is taxable, earning of tax free interest and dividend would attract provision of Sec. 14-A?

Held :

What is disallowed is expenditure incurred to "earn" exempt income. The words "in relation to" in Sec. 14A must be construed accordingly. Thus, the words, "in relation to" apply to earning exempt income. Securities in question constituted the assessee's stock in trade and the income that arises on account of the purchase and sale of the securities is its business income and is brought to tax as such. That income is not exempt from tax and, therefore, the expenditure incurred in relation thereto does not fall within the ambit of s. 14A. Now, the dividend and interest are income. The question then is whether the assessee can be said to have incurred any expenditure at all or any part of the said expenditure in respect of the exempt income viz. dividend and interest that arose out of the securities that constituted the assessee's stock in trade. The answer must be in the negative. The purpose of the purchase of the said securities was not to earn income arising therefrom, namely, dividend and interest, but to earn profits from trading in i.e. purchasing and selling the same. It is axiomatic, therefore, that the entire expenditure including administrative costs was incurred for the purchase and sale of the stock in trade and therefore, towards earning the business income from the trading activity of purchasing and selling the securities. Irrespective of whether the securities yielded any income arising therefrom, such as, dividend or interest, no expenditure was incurred in relation to the same.

49 Value of DVO's report in case complete details of construction is available.

Kisan Proteins (P) Ltd. v/s. ACIT : (2017) 292 CTR 345 (Guj)

Issue :

When complete details of construction are available and Assessment Order passed accordingly, whether subsequent DVO's report can help the Department to reopen assessment?

Held :

It is found from the record that the assessee company has produced the entire construction account along with the bills in details and only after examining the same, the assessment order has been finalized and therefore a mere report of valuation cannot be construed as sufficient and tangible material which may permit the authority to reopen the assessment. In addition thereto, it appears that the A.O. is satisfied with the correctness and completeness of accounts of the assessee and nowhere even the method of accounting has been questioned and therefore when the entire construction account is made available to the AO and only thereafter when the final assessment has taken place, DVO's report cannot be constructed as tangible material which would warrant the authority to exercise the powers of reopening of assessment. The powers of reassessment cannot be exercised just to reinsure the correctness of material which has already been examined. The action on the part of the respondent authority in reopening of the assessment was held to be impressible and therefore the impugned notice issued under section 148 dt. 28th April 2010, as well as the order of rejection of objection dt. 12th December 2011 were quashed and set aside.

50 Stridhan in the case of a woman and treatment by Department.

Sushila Devi v/s. CIT : (2017) 292 CTR 116 (Del) : (2016) 144 DTR 29(Del)

Issue :

What treatment the department should give to the 'Stridhan' of an assessee in search proceedings?

Held :

"The respondents recalcitrance is not mere inaction, it is one of deliberate harassment. Unarguably, the first round of assessment proceedings culminated in no addition of the jewellery or its value in the hands of the assessee's husband. The matter ought to have rested there because the further proceedings were at the behest of the assessee's husband who was aggrieved by the additions made (and not aggrieved by the decision on issues in his favour). The Tribunal's decision to proceed de novo, nevertheless strengthened the respondents' obduracy and hardened their resolve not to release the jewellery. The de novo order did not result in any addition on that aspect at all; still the respondents cling to another ingenious argument that till the assessee's husband's tax demands are satisfied, they can detain the jewellery. The respondents' rationale or justification is entirely insubstantial. The assessee says that she was married in mid 1960s and her daughters were born in 1967. She was 70 when these proceedings were started. The respondents do not deny this. In the circumstances, the further explanation that the jewellery belonged to her and represented accumulation of gifts received from family members over a period of time and also acquired during the subsistence of her marriage is reasonable and logical. The obdurate refusal of the respondents to release the jewellery constitutes deprivation of property without lawful authority and is contrary to Art. 300 A of the Constitution of India. The petition has to succeed; a direction is issued to the respondents to release the jewellery within two weeks and in that regard intimate to the assessee the time and place where she (or her representative) can receive it. The respondents shall also pay costs quantified at Rs. 30,000 to the assessee, within four weeks, directly."

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Tribunal News

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M/s. Argus Golden Trades India Ltd. Vs. JCIT 165 ITD 318/ 82 taxmann.com 479 (Jaipur).
Assessment Year: 2011-12 Order Dated: 24th May, 2017

Basic Facts

The assessee-company belatedly filed quarterly e-TDS returns. The AO imposed penalty under section 272A(2)(k) holding that the assessee company has delayed in filing quarterly e-TDS return. On appeal, the CIT(A) upheld the levy of penalty and observed that the delay was not of one or two days but there was delay of 1024 days, hence, it reveals a willful attempt for non-compliance of statutory provisions. Also the CIT(A) held that the assessee was not having any genuine ground or the compelling circumstances for not filing of TDS return in time. The assessee contended before the ITAT that there were large number of small deductees to whom payments were made by the company and these were scattered throughout the country and it took great efforts in collecting PAN of all the deductees.

Issue

Whether penalty should be deleted since assessee had a reasonable cause for delayed filing of its e-TDS returns?

Held

The Hon'ble ITAT held that the penalty has been levied u/s 272A(2)(K) of the Act which talks about the failure to deliver a copy of the statement within the time specified in section 200(3) or proviso to section 206C (3) of the Act. In the instant case, there is no such factual situation before us rather there is a delay in filing of quarterly e-TDS returns which is covered under the provisions of section 272A (2)(C) of the Act. Hence, penalty cannot be sustained where the AO is not clear about basis of the charge.

The ITAT further held that as per CBDT notification dated 31.5.2010,there was a change effected in the IT system for mandatory requirement of PANs of all deductees before the returns can be validated and uploaded. And since there were large number of deductees spread throughout the country and efforts were made by the assessee to obtain their PANs numbers, the fact that taxes have been deducted and deposited, hence no loss to the Revenue, the ITAT held that assessee had a reasonable cause for delayed filing of its e-TDS returns in terms of section 273B and the penalty under section 272(A)(K) is hereby deleted.

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M/s. Sanwaria Agroils Ltd. vs. ACIT [2017] ITA Nos. 620/Ind/2013 (Indore)
Assessment Year: 2007-08 Order Dated: 16th May, 2017

Basic Facts

The assessee was a company engaged in the business of processing, extraction, and refining of soya seeds and soya refined oil and also in generation of power.The assessee had shown addition to asset of Wind Electric Generator which commissioned and put to use during the year under consideration. Since the assets were used for a period less than 180 days during the year, the assessee claimed normal depreciation @40% and additional depreciation @10%. Thus, the assessee had claimed additional depreciation u/s. 32(1)(iia) on Wind Electric Generations. According to the AO, the wind Electric generators were used for generation of power and these were not new machinery or plant for manufacturing or producing of any article or thing, as power is not an article or thing as envisaged in section 32 (1) (iia) of the Act. Therefore, it was held by the AO that the assessee was not entitled for additional depreciation under section 32(1)(iia) on the acquisition of Wind Electric generators. Being aggrieved the assessee filed an appeal to the CIT(A). The CIT(A) held that additional depreciation is allowable at the rate of 20% of actual cost from assessment year 2013-14 only. As in the instant case, the year involved is assessment year 2007-08 and, thus, the appellant was not eligible for claiming initial depreciation under section 32(1)(iia) of the Act on the Wind Electric Generator. Being aggrieved by the order of CIT(A), the assessee filed an appeal before the ITAT.

Issue

Whether an assessee engaged in the business of generation of power was entitled for deduction of additional depreciation of 20% of the actual cost of any new machinery or plant acquired?

Held

The Hon'ble ITAT held that process of generation of electricity is akin to manufacture of an article or thing, the assessee in the instant case satisfy the requirement that it is engaged in the business of manufacture or production of an article or thing. The AO has not disputed the said claim of the assessee in respect of claim of depreciation u/s 32(1)(ii) of the Act. So Once the AO has accepted the assessee's claim u/s 32(1)(ii) of the Act, there is no reason why the assessee should be denied the claim of additional depreciation on the same assets u/s 32(1)(iia) of the Act. As regards the amendment, the ITAT held that the said amendment cannot be read to negate the settled legal position that generation of electricity is akin to manufacture or production of an article or thing and thus it cannot disentitle the assessee to claim of the additional depreciation. Thus, assessee's appeal is allowed.

27 **DCIT Vs. NOCIL Ltd. 165 ITD/82 taxmann.com 267 (Mumbai) Assessment Year: 2004-05 Order Dated: 24th May, 2017**

Basic Facts

The assessee company was engaged in the business of manufacturing paper chemicals, rubber chemicals and plastic products and had three divisions namely PCD, RCD and PPD. The scheme of demerger was approved by the Bombay High Court and as per the said terms, specified assets and liabilities of the PCD and PPD divisions were transferred to Relene Petrochemicals and NOCIL Petrochemicals respectively. The AO re opened the case and denied to grant set off of carried forward accumulated business loss and un absorbed depreciation on the contention that the assessee company has entered in to scheme of Demerger as the Hon'ble Bombay High Court approved the scheme of transfer denoted as "Demerger" and so the same was not allowable to the assessee company post- demerger as per Section 72A(4) of the Act. Whereas according to the assessee provisions of section 72A(4) of the Act could not be invoked in this case, because the scheme of arrangement does not result in a 'demerger' as understood for the purposes of section 72A(4) r.w.s. 2(19AA) of the Act since only 'specific assets and liabilities' of two divisions of assessee-company were transferred to other company. The CIT(A) decided in favour of the company holding that provisions of section 72A(4) were not applicable. Aggrieved, department is in appeal before Tribunal.

Issue

Where only 'specific assets and liabilities' of two divisions of assessee-company were transferred to other company for 'consideration', there would be no demerger; hence, accumulated loss and unabsorbed depreciation relating to transferred division would remain with assessee-company

Held

The ITAT observed that restriction contained with regard to the accumulated losses and unabsorbed depreciation gets triggered only when there is a scheme of demerger, which results in a 'demerged company' and a resulting company. Thus the scheme of arrangement is to be understood as 'demerger' for the purposes of section 2(19AA) only if the conditions prescribed therein are satisfied.

Considering the fact that only specified assets and liabilities were transferred and the consideration for demerger was in form of shares issued to assessee company and not the shareholders of assessee company, the conditions specified in section 2(19AA) are not fulfilled and so the arrangement cannot be considered as 'Demerger' and accordingly the provisions of section 72(4) cannot be invoked. Accordingly the CIT(A)'s decision holding that the accumulated loss and unabsorbed depreciation relating to the transferred divisions have to remain with the assessee company for set-off and carry forward for set off in future years, was upheld.

28 CIT (Exemptions) Vs. Bare Foot College International Ltd. 165 ITD 213/ 82 taxmann.com 26 (Jaipur) Order Dated: 11th May, 2017

Basic Facts

The assessee is a company formed with charitable objects, registered u/s 8 of the Companies Act, 2013. The ld. CIT (Exemption) has granted registration u/s 12AA (1)(b) of the Income Tax Act, 1961 to the assessee company. However approval u/s 80G(5)(vi) has been denied to the assessee company. In the order denying approval u/s 80G(5)(vi), the Ld. CIT (Exemption) has pointed out that the applicant primarily intends to carry out the activities outside India and the applicant has not submitted any approval u/s 11(1)(c). Another objection of the CIT (Exemption) was that the assessee simply collected funds but did not carry out any significant chartiable activities.

Issue

Whether the approval under section 80G can be made subject to approval under section 11(1)(c) of the Act?

Held

As per the tribunal the first condition which has been stipulated and is to be fulfilled by the assessee under section 80G(5)(vi) is that where the institution or fund derives any income, such income would not be liable to inclusion in its total income under the provisions of section 11 and 12 of the Act. In the instant case, the activities of the institution include activities intended to be carried outside India, thus its income was not be liable to inclusion in its total income under the provisions of section 11 and 12 of the Act provided it has the necessary approval obtained under section 11(1)(c) of the Act besides other requirements as specified under the provisions of section 11 and 12 of the Act. In the instant case the applicability of section 11(1)(c) (i) has infact been made part of and has been stated as one of the conditions subject to which the approval has been granted u/s 12AA(1)(b). But specific approval of CBDT as required by Section 11(1)(c)(i) is not obtained. The ITAT observed that on combined reading of section 80G(5)(*vi*) and section 11(1)(*c*) of the Act, the approval under section 80G is subject to grant of approval under section 11(1)(*c*) of the Act. Since such approval is not in place, the requirement of section 80G(5)(*vi*) cannot be said to be satisfied. Therefore, the issue is not that the scope of activities should be restricted to India and it cannot be carried out outside India. The issue is limited to carrying out the activities outside India after seeking approval from competent authority under section 11(1)(c) of the Act.

The tribunal observed that the CIT(Exemption) has stated that the assessee has entered into memorandum of understanding with Digital Empowerment Foundation with a focus to benefit the inaccessible people in the village of India with wireless connectivity. Further the assessee has allocated funds for solar work at Guatemala city and at Philippine. The CIT(Exemption) had acknowledged all this facts and the only reason stated to be non carrying out any significant activity by the assessee. The Tribunal held that the assessee has only been incorporated around an year back and there are actions taken by the assessee towards achieving its charitable objectives which are not doubted, the approval u/s 80G cannot be denied solely on this ground and to that extent, the order of the CIT (Exemption) was not upheld.

Hence the ground raised by the assesse were dismissed.

29 Shanghai Electric Group Co. Ltd. vs. DCIT 84 taxmann.com 44 (Delhi) Assessment Years: 2007-08 to 2013-14 Order Dated: 14th July, 2017

Basic Facts

The assessee is a foreign company, engaged in the business of supply of Boiler, Turbine and Generator (BTG) equipments to various companies for setting up of power plants in India. Assessee placed reliance upon the Double Taxation Avoidance Agreement (DTAA) between India and China to submit that income from offshore supply is not liable to be taxed in India. It further submitted that only so much of profits of assessee having economic nexus with PE in India can be taxed in India. The AO held that from the scope of activities, it is clear that these are of the nature of composite contract activity and activities have been dissected just for the purpose of tax avoidance. The AO proceeded to attribute profits from offshore supply to the supervisory PE of assessee in India and passed the draft assessment order. The DRP upheld the attribution to the PE in India, in respect of offshore supply of BTG equipments. The DRP held that although the manufacturing is done outside India, activities like bid preparation, negotiation and signing of contracts, site surveys, site preparation, Data collection, consultation with owners, repairs and warranty services etc. could only be carried out through PE in India. Also business income is taxable in India only by virtue of existence of PE and as PE exists in present case, income from supply contract were taxable in India. Based on the directions of DRP, the AO passed final assessment order against which the assessee filed an appeal before the ITAT.

Issue

Whether there existed a Business connection of assessee in India? Whether the supply of BTG equipment by assessee and payments received by assessee for supply could be attributed to the supervisory PE under deeming provision of section 9 of the Act?Whether any portion of profits arising from offshore supplies was taxable in India in terms of article 7 (1) of the DTAA between India and China?

Held

The Tribunal observed that the agreements entered into by assessee with its clients in India are in the nature of a Composite Contract. The perusal of various clauses of agreements it was amply clear that the dominant intention of the parties was to set up a power plant in India at various locations under the supervision of assessee. And as assessee was also specialized in manufacturing of equipments required for setting up of Power plant, assessee was involved in supply of the same. None of the agreements are executed exclusively for sale of BTG equipments. The Tribunal further held that the Assessee was supplying BTG equipments to customers in India and was wholly responsible for erection/installation/ successful commissioning of equipments. The contracts are negotiated and conclude in India by a team consisting of persons from PE in India and Assessee in China. The expatriates from Shanghai China came to India to provide technical support services to PE in India. All these activities went to establish that the asesee has business connection in India within the meaning of section 9(1)(i) of the Act. The assessee was doing business activities in India which were not isolated instances rather those represent real and intimate relationship between activities of assessee done outside India and these done inside India. The business operations being done in India by the assessee were revenue generating as these operations were required to earn the contract and to meet with contractual obligations. Therefore, all the parameters of business connection as prescribed by various judicial authorities are satisfied. The Tribunal notes that as per Article 7(1) of the DTAA, the profits to be taxed in India are those which are directly or indirectly attributable to the PE. In view of the same the Tribunal held that that the extension of taxability of profits of PE by including profits directly or indirectly attributable, is akin to the provisions of Article 7(1)(b) and 7(1)(c) of the UN MC, which provide that in addition to the ‘profits attributable to the PE’ the taxability of PE profits will also extend to ‘(b) sales in that other State of goods or merchandise of the same or similar kind as those sold through that PE; or (c) other business activities carried on in that other State of the same or similar kind as those effected through that permanent establishment’. The connotations of ‘profits indirectly attributable to PE will extend to these two categories. These categories clearly incorporate a force of attraction rule. The basic philosophy underlying the force of attraction rule is that when an enterprise sets up a PE in another country, it brings itself within the fiscal jurisdiction of that another country to such a degree that such another country can properly tax all profits that the enterprise derives from that country whether the transactions are routed and performed through the PE or not.

In effect, it was held that profits relating to services rendered by assessee, whether rendered in India or outside India, in respect of Indian projects are taxable in India, and are attributable to the supervisory PE of assessee in India, as they are effectively connected with each other.

30 DCIT *v* Calance Software (P.) Ltd 82 taxmann.com 390 (DEL) Assessment Year 2007-08, Order dated 30th May 2017

Facts

During relevant year, the assessee rendered software development services to its associated enterprise (AE). The transactions were back to back transactions in respect of contracts that AE had entered into with independent entities. It was undisputed that those contracts were passed on to the assessee company and the entire amount was also passed on to the assessee. The stand of the assessee was that since those were back to back transactions, those transactions were required to be taken as having been entered into at arm's length price. The TPO noted that the benchmarking had been done on the basis of Comparable Uncontrolled Price (CUP) method. He, however, did not approve the stand so taken by the assessee. The TPO was of the view, *inter alia*, that the CUP was not the most appropriate method as the functions of the assessee company *vis-a-vis* AE i.e., Calance US were different inasmuch as the assessee was simply a software developer whereas Calance US was a large scale business entity, suggesting that the price at which assessee should sell to Calance US could not be compared with the price at which Calance US sold to its client. The TPO thus applied TNMM and made certain addition to assessee's ALP. The Commissioner (Appeals) was of the view that when a reasonable CUP input was available and particularly as the TPO himself, though in the immediately succeeding assessment year, had accepted the CUP as most appropriate method in respect of similar transactions, there was no good reason to reject the CUP as most appropriate method in relevant assessment year. He thus deleted the addition made by TPO.

On revenue's appeal:

Issue

Whether where assessee entered into back to back international transactions with AE in respect of contracts that AE had entered into with independent entities, as the services rendered by assessee to AE were exactly same as, in effect, rendered by AE to independent parties, price charged for same service by AE from independent end customer was best CUP input for determining ALP

Held

The Tribunal held that so far as the back to back transactions were concerned, since services rendered by the assessee to the AE were exactly the same as, in effect, rendered by the AE to the independent parties, the price charged for the same service by the AE to the independent end customer was thus the best CUP input in respect of such a back to back transaction. If a unit sells a product to its AE for INR 100 and the AE sells the same product to an independent enterprise for INR 100, the intra AE transaction cannot but be termed as the arm's length transaction. The stand of the revenue however was that, as evident from FAR analysis, the functions performed by the Calance US are far more comprehensive, the assets employed by Calance US and risks assumed are much higher. But what the revenue overlooked was that this FAR analysis has to be with respect to the particular transaction, and when transaction is exactly the same, there cannot be any occasion for the FAR of the transaction being any different. In principle, thus, so far as back to back transactions at the same price are concerned -whether between the AEs or by the AE to the end customer independent enterprise, these are inherently arm's length transactions on the basis of CUP analysis. The distinction drawn by the TPO on the basis of FAR analysis of the enterprise rather than the transaction, which is sought to be justified by the revenue, was a distinction without any difference. The Tribunal further held that it was also incorrect to proceed on the basis, as has been done by the TPO, that when TNMM inputs are available, the application of CUP can be rejected. CUP is not a residuary method. As a matter of fact, when perfect CUP inputs are available -as in this case in respect of back to back transaction, that is the best and inherently most suitable method, as it is a direct method and it hardly leaves any scope for distortion of results by extraneous factors. In view of aforesaid, revenue's appeals were dismissed.

✻✻✻

Unreported Judgements

CA. Sanjay R. Shah
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In this issue we are giving full text of the decision of Hon'ble Gujarat High Court in the case of Liladhar T. Khushlani v/s Commissioner of Customs, which relates to the issue whether the rectification application filed within six months from the date of receipt of the Tribunal order, but beyond six months from the date of pronouncement of the order is a valid rectification application. The second judgement is given in the form of gist in the case of Axis Bank Ltd. v/s Deputy Commissioner of Income Tax , wherein the Hon'ble Gujarat High Court has held that provisions of u/s 147 cannot be considered to be validly initiated when the A.O. had objected to the audit objection raised by A.G. audit, but had to resort to proceedings u/s 147 due to insistence of the audit party.

We hope the readers would find the same useful.

A

In the High Court of Gujarat at Ahmedabad

Tax Appeal No. 915 of 2016

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

Liladhar T. Khushlani……. Appellant(s)
v/s
Commissioner of Customs…. Opponent(s)

Appearance :
Mr.Hardik P. Modh, Advocate for the Appellant(s) No. 1
Mr. Jaimin A. Gandhi, Advocate for the Opponent (s) No. 1

Date: 25/01/2017
Oral Judgment
(Per; Honourable Mr. Justice M.R. Shah)

"[1.0] Feeling aggrieved and dissatisfied with the impugned order passed by the learned Central, Excise & Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad (hereinafter referred to as CESTAT") dated 18/08/2015 by which the learned CESTAT has dismissed the rectification application on the ground that the said application has been preferred beyond the date of six months from the date of passing the original order, appellant has preferred the present Tax Appeal.

[2.0] It is the case on behalf of the appellant that from the date of service of notice of the order, which as sought to be rectified, within six months the rectification application was filed. However, the learned CESTAT dismissed the said application considering the starting point of limitation of rectification as the date of the order sought to be rectified, and therefore, the short question, which is posed for the consideration is, whether for the purpose of filing the rectification application, period of limitation of six months would commence from the date of the order, which is sought to be rectified or from the date of receipt of the order sought to be reviewed /rectified by the concerned assessee?

[2.1] While passing the impugned order the learned CESTAT has relied upon the decision of the Hon'ble Supreme Court in the case of ***Commissioner of Customs, Central Excise Vs. M/s. Hongo India (P) Ltd. & Anr*** *reported in* ***(2009) 236 ELT 417 (SC)****. However, on considering the facts /questions before the Hon'ble Supreme Court in the said decision, it appears that the controversy was whether despite the*

specific provisions not to condone the delay beyond the period of limitation provided under the statute, whether High Court was justified to condone the delay in filing the rectification application or not, and therefore, as such, the learned CESTAT has wrongly relied upon the decision of the Hon'ble Supreme Court in the case of ***M/s. Hongo India (P) Ltd. & Anr (Supra)****. As such, the question involved in the present Appeal is now not res integra in view of the decision of the Division Bench of this Court in the case of* ***Vadilal Industries Ltd. Vs. Union of India*** *reported in* ***2006 (197) ELT 160 (Gujarat)****. In the said decision while considering the provisions of the Central Excise Act, 1944, more particularly, Section 37C, the Division Bench has held that the period of limitation to file the rectification application is to be computed from the date of receipt of order by the party and not at any time within six months from the date of the order. While holding so, in paragraph nos.14 to 16 the Division Bench has observed and held as under;*

"14. There is one more aspect of the matter. The Technical Officer of CESTAT vide communication dated 23/08/2005 has returned the papers of ROM Application on the ground that the same was barred by limitation. Section 35C(2) of the Act provides for the period of limitation coupled with the powers of the Tribunal to rectify any mistake apparent from the record or amend any order passed under Section 34C(1) of the Act. At the first blush it appears that the period of limitation has to be computed at any time within six months from the date of the order. However, when one reads the latter portion of the provision, it becomes abundantly clear that the period of six months from the date of order is in relation to the power of rectification that the Tribunal may exercise suo motu. The Section is divided into two parts. The first part grants discretion to the Tribunal to take up any order made under Sub Section (1) of Section 35C of the Act for rectifying any mistake apparent from record or amending any order within six months from the date of the order. The second part of the Section requires that the Tribunal shall make such amendments if the mistake is brought to its notice by either party to the appeal before it. The party to the appeal can bring the fact of apparent mistake on record only after going through the order made by the tribunal. Therefore, to read that the period of limitation has to computed at any time within six months from the date of the order does not fit in either with legislative intent or the language employed by the provision.

15. There is another angle from which the matter can be approached. It is only the party to the appeal who finds that the order contains a mistake apparent from the record and is aggrieved by such mistake, would be in a position to move an application seeking rectification of the order. Therefore also, unless and until a party to the appeal is in a position to go through and study the order it would not be possible, nor can it be envisaged, that a party can claim to be aggrieved by the mistake apparent from the record. Hence, even on this count the period of limitation has to be read and understood so as to mean from the date of the receipt of the order.

16. Therefore, the action of the Technical Officer to return the papers of ROM Application without even placing the same before the Bench concerned is not only bad in law, but is not supported by the provisions of the Act."

[2.3] Some what similar question came to be considered by the learned Single Judge in the case of ***Ritaben Kamleshbhai Mehta, Through P.O.A. Devang Kamleshbhai Mehta & Ors. Vs. State of Gujarat & Ors.*** *reported in* ***2015 (2) GLR 1664****. Before the learned Single Jude the question was*

whether the period of limitation to file the Appeal against the order of Deputy Collector, which was 90 days is required to be computed from the date on which the order of first adjudicatory authority communicated to the affected person or from the date of the order and considering the decision of the Hon'ble Supreme Court in the case of ***D. Saibaba Vs. Bar Council of India*** *reported in* ***AIR 2003 SC 2502,*** *it is observed and held that the period of limitation shall commence from the date of dispatch of the order and not from the date of actual passing of the order. In view of the above, the learned CESTAT has committed a grave error in rejecting the rectification application on the ground that the same has been preferred beyond the period of limitation prescribed under the Act. It is reported that the rectification application was submitted within the period of six months from the date of receipt of the order /dispatch order, and therefore, the impugned order passed by the learned CESTAT cannot be sustained and the same deserves to be quashed and set aside and the matter is required to be remanded to the learned tribunal to consider the rectification application in accordance with law and on its own merits treating the same to have been filed within the period of limitation provided under the Act.*

[3.0] In view of the above and for the reasons stated hereinabove, the impugned order passed by the earned CESTAT is hereby quashed and set aside. The matter is remanded to the learned CESTAT to decide the rectification application afresh in accordance with law and on its own merits treating the same to have been filed within the period of limitation. The question of law is answered in favour of the assessee and against the revenue.

The present Tax Appeal stands disposed of accordingly."

B

In the High Court of in the High Court of Gujarat at Ahmedabad

Special Civil Application No. 16232 of 2010

Honourable Mr. Justice Akil Kureshi
and
Honourable Mr. Justice Biren Vaishnav

Axis Bank Limited formerely known as UTI Bank Ltd.……. Petitioner(s)
versus
Deputy Commissioner of Income Tax or his Successor & 1 …. Respondent(s)

Appearance :

Mr. R.K. Patel, Advocate for the Petitioner (s) No. 1

Mrs Mauna M. Bhatt, Advocate for the Respondent(s) No. 1

Date : 24/07/2017

Oral Judgment

(Per ; Honourable Mr. Justice Akil Kureshi)

Gist Only

Facts :

The petitioner is a banking company. For the Assessment Year 2005-06, the petitioner had filed the return of income on 26/10/2005 on which assessment was made u/s 143 (3) of the Act on 30/11/2007. Thereafter, the reopening notice u/s 147 came to be issued within a period of four years from the end of the assessment year on the basis of the following reasons recorded :

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

In this case, the assessee has filed return of income declaring total income at Rs.462,78,99,910/- on 26.10.2005. The assessment was finalized u/s. 143(3) on 30.11.2007 after making additions of Rs.200,71,08,029/-.

On perusal of the Annual Report of the assessee-company at page 11, it has been found that "other income" comprising trading profit, fee and miscellaneous income decreased by 23.02% from Rs.540.15 crores during 2003-04 to Rs.415.82 crores during 2004-2005. This decrease was largely a consequence of a lower trading profit on account of adverse market conditions and the booking of a one-time loss of Rs.114.53 crores by transferring government securities of Rs.3,983/- crores from the Available for Sale (AFS) category to the Held for Maturity (HTM) category, as permitted by RBI. The transfer was effected to protect the Bank's earnings from the impact of rising interest rates on the SLR investments. Consequently, trading profit fell to Rs.37.39 crores from Rs.348.42 crores the previous year.... "The Bank has merely transferred government securities of Rs. 3983.29 crores from one category to another at a value of Rs.3,868.76 crores and booked a loss of Rs.114.53 crores. The transaction has been done by the assessee by itself and without any interaction with a third party. The Bank thus proposes to incur a loss of Rs.114.53 crores by transacting with itself and claiming the same as an allowable expenses.

This has led to under assessment of the total income of the assessee – company to the tune of Rs.114.53 crores. In view of the above, I have reasons to believe that income chargeable to tax has escaped assessment as per the provisions of section 147 of the I.T. Act, 1961. Therefore, a notice u/s. 148 of the I.T. Act is being issued for re-assessment u/s. 147 of the I.T. Act."

In the objection before A.O. in respect of the reasons recorded, one of the objections mentioned by the assessee was that entire exercise was undertaken at the instance of the audit party. The A.O. was also not convinced about such objection and he was of the view that income chargeable to tax had not escaped assessment. For this purpose the assessee had made clear averments in Affidavit that the A.O. was compelled by the audit party to reopen the assessment. At the instance of the Hon'ble High Court, the department was called upon to file the reply and produce the file against which the department stated that there was independent application of mind of the A.O., but original audit file could not be traced.

The Hon'ble High Court mentioned that since the department was not unable to produce the file, it was not possible for them to gather the exact sequence of correspondence between the A.O. and his higher authorities. However, the appellant bank had filed certain documents along with the Affidavits of the Officer of the bank which contained a letter dated 6/5/2008 written by the A.O. objecting to the audit objection raised by the audit party. The A.O. offered his comments to each of the audit objection raised and summed up his reply in the following terms :

"Remedial action :

Summing up, the audit observation at point no. 2 only is acceptable and no other objections or observations are acceptable. But since the remedial action is to be taken, in spite of the non-acceptance of the audit objection, as per the instructions of the Board, remedial action is proposed in this case.

From the facts as mentioned above, in my view the remedial actions appropriate on various issues are : …."

The Hon'ble High Court thereafter held as under :

Held :

"10. If this be the position, settled law would prevent the Revenue from reopening the assessment on his ground. It is well settled that Section 147 of the Act refers to the reason of the Assessing Officer to believe that income chargeable to tax has escaped assessment. The satisfaction of the Assessing Officer is of paramount consideration and cannot be substituted by any other agency or authority even if it happens to be a higher authority. The Income Tax Act contains revision in terms of Section 263 of the Act if an order of assessment is found to be erroneous or prejudicial to the interest of the Revenue. Reopening of an assessment, however, has vastly different repercussions and entirely

contd. on page no. 272

Controversies

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

Whether TDS deductible on tips received by Hotel staff?

Issue:

XYZ Ltd a company engaged in the business of a chain of Hotels. The assessee company received extra amount called "TIPS" paid by the guests in cash or through credit cards at the time of settlement of bills in appreciation of good services provided by the service staff. The said amount was disbursed to the employers. The Assessing Officer (AO) is of the view that since tips are paid to the employers in lieu of rendering prompt services the same accrued to the employees for services rendered as employer for their employer and accordingly the said amount is liable to the provision of tax deduction at source u/s. 197 of the Act.

Proposition:

TIPS were received from the customers and not from the employer. There was no vested right in the employee to claim any amount of TIPS from his employer. The employer was only a conduit pipe between the customer and the employee and hence the amount of "TIPS" cannot be liable for deduction under the provisions of tax deduction at source of the Income Tax Act 1961.

View against the Proposition:

Section 15(b) of the Income Tax Act 1961 refers to the salary that is paid or allowed to an employee by or on behalf of an employer and stated that the expression allowed is an expression of wide import and would include amounts such as tips paid by employers to their employees. Again section 17(3)(ii) of the Income Tax Act 1961 states that any payment received by an assessee from an employer would by regarded as "Profit in lieu of salary" and that since the amount of tips received by way of credit cards from the customers are first put into the employer's Account and thereafter paid to the employees by the employer was sufficient to attract "profit in lieu of salary" as defined.

From the above it may be concluded that the receipt of the tips by the employees constitute income at the hands of the recipients and is chargeable to the income tax under the head salary u/s. 15 rws 17 of the Income Tax Act 1961. This being so it was obligatory upon the employers paying the amounts of tips to its employees to deduct taxes at source from such payments u/s. 192 of the Income Tax Act 1961.

It would be relevant to understand whether "tips" paid to employees by the appellant, constitutes salary within the meaning of sections 15 and 17 of the I.T. Act. As per the Webster Dictionary "tips" means, small gift of money for services rendered. Thus there exists no dispute on the fact that it is a payment made by the employer as a reward or remuneration for services rendered by employees. Section 17 of the I.T. Act *extends the scope of section 15 and provides an inclusive definition to it by including perquisites and profit in lieu of salary also as part of salary. Thus the wider definition of salary given by section 17, includes any amount paid by an employer to its employee by virtue of his employment as the same would constitute income under the head salary.*

In the modern time, it is a common practice particularly in service industries, that payment and receipt of tips is customary. It is also not necessarily true that the recipients of tips are persons have meagre income and not subject to tax. Hence by non-deducting taxes on such 'tips'or payments to employees and by not remitting it in the Govt. account the employer is not fulfilling its statutory responsibility of contributing to tax evasion. 'Tips' whether paid in cash or through card is in every way an additional income of the employee. The employee receives this income by virtue of *employment. Hence the claim of the employer that it receives tips from customers in capacity is not correct presentation of facts.*

It is evident that the hotel management is involved in collection and disbursement of tips. Thus the appellant is making payment over and above the quantum of salary, directly or indirectly to the employee by way of 'Tips'. This would thus constitute salary or 'in lieu thereof' paid by the appellant to the employees.

It is relevant to reiterate that under the Income Tax Act, 1961, every person having taxable income, has to pay tax. The tax on total income is collected by different means. TDS is one of the methods of collection of Tax. In the given case since the tips constitute income in the hands of the recipients i.e. the employees, it is the liability of the employer i.e. the appellant to deduct TDS on the same and remit it in the Govt. account within a given time frame. It is relevant to state that on similar issue Delhi High Court in CIT Vs. ITC Ltd. and C.J. International Hotel Ltd. in order dated 11.05.2011 has held that the receipt of tips constitute income in the hands of the recipients and is chargeable to income tax under the head 'salary' u/s 15 of the Act. Hence, it is an obligation on the part of the appellant to deduct tax at source from such payments u/s 192 of the Act."

View in favour of the proposition:

The Supreme Court of India in the case of ITC Ltd. V/s. Commissioner of Income Tax (TDS) reported in 384 ITR 14 has held:

under sub-section (1) of section 192, "any person responsible" for paying any income chargeable under the head "salaries" is alone brought into the dragnet of deduction of tax at source. The person responsible for paying an employee an amount which is to be regarded as the employee's income is only the employer. In the facts of the present case, it is clear that the person who is responsible for paying the employee is not the employer at all, but a third person – namely, the customer. Also, if an employee receives income chargeable under a head other than the head "salaries", then Section 192 does not get attracted at all.

For Section 15 of the Act to apply,there should be a vested right in an employee to claim any salary from an employer or former employer, whether due or not if paid; or paid or allowed, though not due. Also, it is clear that salary must be paid or allowed to an employee in the previous year "by or on behalf of" an employer. Even assuming that the expression "allowed" is an expression of width, the salary must be paid by or on behalf of an employer. The expression "employer" is different from the expression "person". An "employer" is a person who employs another person under a contract of employment, express or implied, to perform work for the employer. Therefore, Section 15(b) necessarily has reference to the contract of employment between employer and employee, and salary paid or allowed must therefore have reference to such contract of employment.

Section 17(3) uses two different expressions: "employer" in sub-clause (ii) and "person" in sub-clause (iii). Obviously "person" is wider than "employer". Even the word "person" which appears in the sub-clause has reference either to a future employer or a past employer. Therefore, it is clear that under the scheme of section 17, payment must be by an employer, whether such employer is a future employer or a past employer of the employee in question. When sub-clause(ii) uses the expression "employer", it uses it in the same sense as in section 15 as the opening line of section 17 itself states that "for the purpose of section 15" salary includes profits in lieu of salary. Section 15 necessarily brings in a contract of employment, express or implied.

A case is an authority for what it decides and not for what logically follows from it.

The assesses were engaged in the business of owning, operating, and managing hotels. The assesses paid tips to their employees but did not deduct tax thereon. The AO treated the receipt of the tips as income under the head "Salary" in the hands of the various employees and held that the assesse were liable to deduct tax at source form such payments under section 192 of the Income-Tax Act, 1961, treated them as assesses in default u/s. 201(1) of the Act and in assessment orders worked out the different amounts of tax to be paid by the assesses u/s. 201(1) and interest u/s. 201(1A) for assessment years 2003-04, 2004-05, and 2005-06. The Commissioner (Appeals) held that the assesses could not be treated as in default u/s. 201(1) of the Act for non-deduction of tax on tips collected by them and distributed to their employees. Appeals filed by the Department to the Appellate Tribunal were dismissed. On appeals to the high Court, the high Court held that tips would amount to "profit in addition to salary or wages" and would fall u/s. 15(b) read with section 17(1)(iv) and 17(3)(ii), that while tips received by employees directly in cash would be outside the preview of section 192 of the Act, the moment a tip was included and paid by way of a credit card by a customer, since it went into the account of the employer after which it was distributed to the employees, the receipt of such money from the employer would amount to "salary" within the extended definition contained in section 17 of the Act and that levy of interest u/s. 201(1A) would follow, as the payment of simple interest under the said provision is mandatory. On appeal by the assesses to the supreme Court:

Held, (i) that the person responsible for paying the employee was not the employer at all, but a third person, namely, the customer. As income from tips would be chargeable in the hands of the employees as income from other sources, such tips being received from customers and not from the employer, section 192 would not get attracted at all.

EMIL WEBBER V. CIT (1993) 200 ITR 483 (SC) followed.

(ii) That there was no vested right in the employee to claim any amount of tip from his employer. Tips being purely voluntary amounts that may or may not be paid by customers for services rendered to them would not, therefore, fall within section 15(b) at all. The amount of tips paid by the employer to the employees had no reference to the contract of employment at all. Tips were received by the employer in a fiduciary capacity as trustee for payments that were received from customers which they disbursed to their employees for service rendered to the customer. There was, therefore, no reference to the contract of employment when these amounts were paid by the employer to the employee. For the same reason the tips received by the employees could not be regarded as profits in lieu of salary in terms of section 17(3)(ii). The payments of collected tips included and paid by way of a credit card by a customer, would not be payments made "by or on behalf of" an employer. Such payments would be outside the preview of section 15(b) of the Act. The contract of employment not being the proximate cause for the receipt of tips by the employee from a customer, it would be outside the dragnet of sections 15 and 17 of the Act.

Summation:

Recently, the ITAT Delhi Bench in the case of ETH Ltd. Vs. The ITO (ITA No. 2642 to 2645/Del/2015) has held as under:

The Tribunal noted that the Apex Court in the case of ITC Ltd. vs. CIT (TDS) (2016) 384 ITR 14 (SC) has on analysis of section 15 has held that for the said section to apply, there should be a vested right in an employee to claim any salary from an employer or former employer. It held that since TIPS were received from the customers and not from the employer these would be chargeable in the hands of the employee as income from other sources and section 192 would not get attracted on the facts of the case. The Tribunal observed that the facts as considered by the Apex Court in the case of ITC Ltd.'s case(supra) would fully apply to the present case. It also noted that the cognisance of the judicial precedence has already been taken by the co-ordinate "SMC" Bench in its order dated 12/07/2016 in the case of the assessee itself.

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Judicial Analysis

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"Benami transaction" as defined in Section 2(9)(A) of the Prohibition of Benami Property Transactions Act, 1988 does not refer to sham transactions

The definition of "Benami transaction" in Section 2(9)(A) of the Act as amended in 2016 is effectively the same asthe definition in the pre-amendment Benami Transactions (Prohibition) Act, 1988:

The Act as it stood pre-2016 defined "benami transaction" as below:

"2. xxx…

(a) benami transaction means any transaction in which property is transferred to one person for a consideration paid or provided by another person;"

The amended Act defines "benami transaction" as below:

S.2 In this Act, unless the context otherwise requires,—

xxx…

(9) "benami transaction" means,—

(A) a transaction or an arrangement—

(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

xxx…

For this reason, decisions rendered in the context of the erstwile Act are applicable to this portion of the definition in the amended Act i.e. S.2(9)(A) of the Act. Various decisions holding that "benami transaction" does not include sham transactions are as follows:

SreeMeenakshi Mills Ltd. v. CIT, 1956 SCR 691 : AIR 1957 SC 49 : (1957) 31 ITR 28

xxx…

31.

xxx…

In this connection, it is necessary to note that the word 'benami' is used to denote two classes of transactions which differ from each other in their legal character and incidents. In one sense, *it signifies a transaction which is real, as for example when A sells properties to B but the sale deed mentions X as the purchaser.* Here the sale itself is genuine, but the real purchaser is B, X being his benamidar. *This is the class of transactions which is usually termed as benami. But the word 'benami' is also occasionally used, perhaps not quite accurately, to refer to a sham transaction*, as for example, when A purports to sell his property to B without intending that his title should cease or pass to B. The fundamental difference between these two classes of transactions is that whereas in the former there is an operative transfer resulting in the vesting of title in the transferee, in the latter there is none such, the transferor continuing to retain the title notwithstanding the execution of the transfer deed.

xxx…

Thakur Bhim Singh v. Thakur Kan Singh, (1980) 3 SCC 72

xxx…

14.

xxx…

Two kinds of benami transactions are generally recognized in India. *Where a person buys a property with his own money but in the name of another person without any intention to benefit such other person, the transaction is called benami.* In that case, the transferee holds the property for the benefit of the person who has contributed the purchase money, and he is the real owner. The second case which is loosely termed as a benami transaction is a case where a person who is the owner of the property executes a conveyance in favour of another without the intention of transferring the title to the property thereunder. In this case, the transferor continues to be the real owner. *The difference between the two kinds of benami transactions referred to above lies in the fact that whereas in the former case, there is an operative transfer from the transferor to the transfer of though the transferee holds the property for the benefit of the person who has contributed the purchase money, in the latter case, there is no operative transfer at all and the title rests with the transferor notwithstanding the execution of the conveyance.*

xxx…

Bhargavy P. Sumathykutty v. JanakiSathyabhama [1996] 217 ITR 129 (KER.)(FB)

xxx…

The first type or class of benami transaction was called the real benami transaction. A typical instance of it is when "A" sells a property to "B", but the sale deed mentions "C" as the purchaser. *Here the real purchaser is "B" and "C" is only the benamidar. Such a transaction is described as the real benami transaction.* The second class or category of benami transaction is the *sham transaction in which one person purports to transfer his property to another without intending to pass the title to the transferee. This second type of transaction was "loosely" called benami transaction.*

xxx…

The fundamental difference between the two categories of transactions is this : In the former, there is an operative transfer resulting in vesting of title in the transferee, whereas in the latter, there is no operative transfer and the transferor continues to retain title to the property notwithstanding the execution of the document. The latter transaction is known as a "sham transaction".

xxx…

Parliament must be presumed to be aware of the legal principles laid down by the Supreme Court and the High Courts, at least those which have been settled. *When the Act was enacted, Parliament must be aware that the judge-made law has covered both types of transactions-tripartite and bipartite transactions - within the ambit of benami transactions.* Still Parliament has chosen to confine the definition to one category alone. We foal, that *the idea was to make the intention abundantly clear that Parliament did not want to encircle the second category.*

xxx…

In a sham transaction, there is no "holding" of property benami. A person holds a property benami if he has at least ostensible title. In Handique(K.K.) v. Member, Board of Agrl. I.T., Assam, AIR 1966 SC 1191 and Hari Ram v. BabuGokul Prasad, AIR 1991 SC 427, the expression "hold" is understood as the actual possession invested with legal title. In' the first category - tripartite - in which the transaction took place, the transferee can hold the property under a legal title though he is only an ostensible title holder.

xxx…

For the aforesaid reasons, we are in agreement with the conclusion arrived at by BhaskaranNambiar, in OusephChacho v. Raman Nair [1989] 180 ITR 511 ; [1989] 1 KLT 767 that *sham transactions do not come within the purview of the Benami Act.*

xxx…

Mohammad Abuzarvs Akbar Imam Saheb And Ors. 1995 SCC On Line Pat 268 : (1995) 2 PLJR 890 : (1996) 44 (1) BLJR 94

xxx…

7.

xxx…

It is well settled that there are two types of Benami Transactions. (a) Tripartite Benami Transaction recognised by the case law in a situation where 'A' was selling the land to 'B' but in the name of 'C' as

Benami, the real purchaser is 'B'. *(b) The second type of Benami Transaction is that the vendor just wanted to conceal the transaction with a view to avoid some liability and did not transfer it.* In a Full Bench decision of the Kerala High Court in Bhargavy P. Sumathykutty v. Janaki Sathyabhama (AIR 1995 Kerala 42) *the distinction between the two types of Benami Transactions has been considered and the dictum is that the first Benami Transaction recognised under the law is a tripartite Benami Transaction and the other is Benami Transaction just by implication, when in fact it is not.*

xxx…

9. In order to constitute *Benami nature there must be three persons*, i.e. 'A' sells the property to 'B' but the sale deed mentions 'C' as purchaser, the real purchaser being 'B' and not 'C'.

xxx…

Meeradevi v. Chandramohan Dattajirao Jadhav, 1994 SCC On Line Bom 227 : (1995) 2 Mah LJ 218 : (1995) 1 Bom CR 1 : AIR 1995 Bom 47 : (1994) 96 Bom LR 73

xxx…

The Act No. 45 of 1988 is *not at all applicable to the transfers without consideration or nominal or sham transfers.* The definition of "Benami" as set out in section 2(a) of the Act is exhaustive and self contained. The said definition cannot be enlarged or expanded by the Court.

xxx…

S. Krishna Gounder (Died) and another v. Janakiammal (Died) 1997 SCC OnLine Mad 251 : (1997) 2 LW 358 : (1997) 2 Mad LJ 307 : (1997) 4 ICC 170 (Mad)

xxx…

12. In A. Ghosh's 'The Law of Benami Transactions' - 6th Edition (1987), at page 32, the learned Author has said that benami is a sham transaction. The relevant passage at that page reads thus.-

"The word "Benami" does not ordinarily show that the transaction is sham and ineffectual but that the actual execuatant has lent his name to the person who is really a party to the contract. *A nominal i.e, benami transfer is distinct from a sham transfer. In the latter, there is no intention to transfer all; while in the former, there is an intention to transfer to one's nominee, so that he shall hold the property for himself openly, but secretly for the transferor*using the document as a cloak to save it from his creditors. *The essence of a sham transaction is that though a deed of transfer brought into existence, no title of any kind, either legal or beneficial, is intended to be passed thereby to any person whatever, that is, the deed of transfer is not intended to effect any transfer of property***.**The difference between sham and benami transaction is one of intention. If the deed of transfer is made with intention of placing the property in the name of the third person the intention clearly amounts to a transfer of the legal title and such transaction cannot be called a sham transaction but comes directly within the meaning of Benami transactions, so called. *When there is a fictious transaction with regard to a property, no title passes, notwithstanding the execution and registration of the documents; the transaction may fittingly be described as essentially a mark of the real ownership. A benamidar is in no sense an owner of the property.* A benami transaction is perfectly genuine transaction which is legally enforceable and *the term benami should not be regarded as being equivalent to not genuine.* So also to speak of a benami gift is a contradiction in terms, for either there was a gift, in which case the donee obtained title to the property or there was not a genuine valid gift. A benami transaction has the same effect as a resulting trust."

xxx…

(Emphasis supplied)

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India signs Multilateral Instrument – Part 2

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A. Background

In continuation of our article in last month journal titled "India signs Multilateral Instrument – Part 1", in this article we have provided detailed analysis of India's provisional list of key reservations and key notifications at the time of signature of MLI. The provisional MLI position of each signatory indicates the tax treaties it intends to cover, the options it has chosen and the reservations it has made. Signatories can amend their MLI positions until ratification. Even after ratification, signatories can choose to opt in with respect to optional provisions or to withdraw reservations. This article is basis the provisional list submitted by India at the time of signature and should not be regarded as final positions amending the tax treaties at present.

B. Provisions of the MLI, India's reservation and impact analysis

1. Hybrid mismatches (Article 3 to 5)

(i) Transparent entities (Article 3)

MLI provision

As per the MLI, income derived by or through a transparent entity (TE) shall only be considered income of a resident to the extent that the income is treated, for purposes of taxation by that Contracted Jurisdictions (CJ), as the income of a resident of that CJ. The provision is not a minimum standard and, hence, the application of the same can be opted out.

India's position on Article 3 of the MLI and impact analysis

- India has reserved its right for non-applicability of Article 3 in its entirety.
- India's tax treaties do not generally contain a provision on treatment of TEs. India has continued to maintain status quo and a strict stance on treatment of TEs i.e., a TE which is not "liable to tax" in the jurisdiction of its formation may not qualify as a resident to avail treaty benefits. Thus, treaty entitlement for TEs will continue to be a challenge in India and other issues like application of treaty provisions to investors, credit of foreign taxes, double taxation, as well as double non-taxation, remain ambiguous.

(ii) Dual resident entities (Article 4)

MLI provision

- Under the OECD Model Convention (MC), where a person (other than an individual) is a resident of both CJs (i.e., a dual resident entity or DRE), it shall be deemed to be a resident only of the jurisdiction in which its POEM is situated.
- Under the MLI, treaty residency of a DRE shall be determined by a MAP between CJs having regard to its POEM, place of incorporation or constitution, and any other relevant factors. It also provides that in the absence of any agreement between the jurisdictions, the DRE is not entitled to any relief or exemption from tax under the tax treaty, except as may be agreed by the CJs.

India's position on Article 4 of the MLI and impact analysis

- India has not provided any reservation in respect of applicability of Article 4 and has notified 91 tax treaties wherein treaty residence of a DRE will be determined basis MAP. This MLI provision will be made applicable only if the other CJ agrees to apply this Article.
- Presently, most of India's tax treaties use the POEM test as a tie-breaker rule to determine treaty residence of a DRE.
- India's tax treaty with the US denies treaty benefits to a DRE. Unless the US signs the MLI and agrees to adopt the MAP rule, the benefit under the MLI will not impact the India-US tax treaty.
- Also, illustratively, countries like Cyprus, Germany, France and Canada have reserved application of this Article and, hence, these tax treaties may also not be modified.

(iii) Application of Methods for Elimination of Double Taxation (Article 5)

MLI provision

- Article 5 provides three options by which countries can resolve the issue of double non-taxation arising due to the residence state providing relief under the exemption method in respect of income that is not taxed in the source state.

India's position on Article 5 of the MLI and impact analysis

- India has made a reservation on non-applicability of Article 5 for all of its tax treaties. In general, most of India's tax treaties follow the credit method and hence, the situation of double non-taxation on account of the exemption method is, generally, unlikely in the Indian context.

2. Treaty abuse (Articles 7 to 11)

(i) Prevention of Treaty Abuse (Article 7)

MLI provision

- Action 6 of the BEPS project provided for two minimum standards to address treaty shopping scenarios: (i.) Title and preamble of the tax treaties to include intention of the tax treaties is to avoid double taxation. (ii.) Inclusion of the Principle Purpose Test (PPT) rule to deny treaty benefits if one of the principal purposes of a transaction is to obtain treaty benefit, unless granting treaty benefit is in accordance with the object and purpose of the tax treaty.
- Additionally, countries can also adopt the Standard Limitation of Benefit (SLOB) rule which provides an objective determination to deny treaty benefits if both the countries to a tax treaty agree for inclusion of the SLOB rule.

India's position on Article 7 and impact analysis

- Adoption of the preamble of the MLI is a mandatory requirement and, as a result, India's tax treaties are likely to get modified to include the text of the preamble.
- Furthermore, countries were given an option to select the additional statement in the preamble, which provided that the treaty object can also be to develop economic relationships and enhance cooperation in tax matters. India has not exercised this option.
- India has not provided any reservation on the applicability of the PPT, which is a minimum standard. Accordingly, the PPT may generally be applicable for all India's tax treatieswith other signatories of the MLI, unless there is

a notification to adopt the detailed LOB or other permissible measure in this behalf to meet the minimum standard.

- Additionally, India has notified to adopt an additional optional measure of SLOB for all its comprehensive tax treaties, in addition to the PPT, for prevention of treaty abuse. India's tax treaties may, accordingly, get amended to include the SLOB rule if India's tax treaty partners agree for the adoption of the SLOB rule. Once adopted, a taxpayer will have to satisfy the SLOB rule, in addition to the PPT, to avail treaty benefits. Many of India's existing tax treaties do not contain the SLOB rule or the existing SLOB rule is not as detailed as the MLI provisions.
- Certain Indian tax treaties which do not have any anti-treaty abuse provisions at present (illustratively, South Africa, Australia, and Netherlands) are likely to get affected by the adoption of the PPT. Furthermore, certain tax treaties which provide application of the main purpose test only to certain sources of income (Illustratively, the tax treaty with Mauritius, which provides for application of the PPT to only the capital gains Article) will have to adhere to the PPT for all the Articles of the tax treaty. Unlike the General Anti-avoidance Rule (GAAR), the PPT neither has grandfathering nor will it be subject to the administrative safeguard of the approving panel, which was a recommendation of Action 6 that is absent in the MLI.

(ii) Anti-abuse rule for PE situated in third jurisdictions (Article 10)

MLI provision

- Article 10 of the MLI contains an anti-abuse rule for Permanent Establishments (PE) situated in third jurisdictions, the so-called "triangular provision." The article provides that treaty benefits will be denied if an item of income derived by a treaty resident and attributable to a PE in a third jurisdiction, is exempt from tax in the residence state and the tax in the PE jurisdiction is less than 60% of the tax that would be imposed in the residence state if the PE were located there. The article makes an exception for cases where the income is derived in connection with or incidental to an active trade or business carried out through the PE, and allows discretionary relief to be requested when treaty benefits are denied under this article.

India's position on Article 10 of the MLI and impact analysis

- India has not made any reservation or notified any of its treaties under Article 10. Thus in terms of MLI, Article 10 will apply to all of India's treaties unless specific reservations have been made by the other CJ.

3. Avoidance of Permanent Establishment Status (Articles 12 to 15)

Articles 12 to 15 of the MLI provide changes to the PE definition developed through the work on BEPS Action 7 and addresses techniques used to inappropriately avoid the existence of a PE. However, the MLI does not change the rules on the attribution of profits to PE.

(i) Artificial Avoidance of PE Status through Commissionaire Arrangements and similar Strategies (Article 12)

MLI provision

- Article 12 sets out how the changes to the PE Article of the OECD MC can be incorporated in the tax treaties specified by the parties to address the artificial avoidance of PE status through commissionaire arrangements and similar strategies.

- The MLI provides for a broader dependent agency PE rule and extends the rule to, in addition to the person having the authority to conclude contracts, persons who habitually play the principal role leading to the conclusion of contracts that are routinely concluded without material modifications by the enterprise.
- The activities described, however, will not create a PE if carried on by certain independent agents. As per the MLI provisions, a person cannot be considered an independent agent if he acts exclusively or almost exclusively on behalf Closely Related Enterprises (CREs).
- Article 12 is not a minimum standard and the MLI gives an option to countries to reserve the right not to apply this Article in its entirety. Modification of a tax treaty is subject to adoption, as well notification of the provision by the other CJ.

India's position on Article 12 of the MLI and impact analysis

- India has not made any reservation on Article 12 and has notified all its 93 tax treaties to adopt the above provisions of broader agency PE rule.
- Article 12 seeks to replace the agency PE provisions relating to the agent's activity dealing with the authority to conclude contracts. Other activities listed in tax treaties to trigger agency PE (like maintenance of stock and delivery, manufacturing and processing, securing orders etc.) remain unaffected by the MLI. Independent agent exclusion is made stricter under the MLI when compared to various Indian tax treaties by denying exclusion to the agents who work exclusively for an enterprise and its CREs.

(iii) Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions (Article 13)

MLI provision

- Article 13 provides two options for modifying preparatory and auxiliary PE exemption in line with Action 7 report.
  - **Option A** provides that listed activities would qualify for specific activity exemption only if such activity qualifies to be preparatory or auxiliary in character.
  - **Option B** allows countries to retain the automatic exemption to listed activities, irrespective of the same being preparatory or auxiliary. This Option considers that these specifically listed activities are intrinsically preparatory or auxiliary and, therefore, there should be no need to subject these activities to the preparatory or auxiliary condition.
- Independent of the above, this Article, further contains a provision for adopting an anti-fragmentation rule which denies specific activity exemption where the activities carried out by the foreign enterprise along with its CREs, at the same or another place, go beyond the preparatory or auxiliary nature.

India's position on Article 13 of MLI and impact analysis

- India has chosen Option A and has notified all its 93 tax treaties to apply the same.
- On the anti-fragmentation rule, India has not made any reservation for its application. Modification of a tax treaty

is subject to adoption, as well notification of the provision by the other CJ.

- Certain countries like Australia, Japan, South Africa, Italy, Russia etc., have opted for Option A and have included their tax treaties with India in their notification. Hence, these tax treaties may stand modified, imposing additional conditions for activities being preparatory or auxiliary in nature to qualify for PE exclusion. Whereas, certain countries such as Ireland, Luxembourg, Singapore, France, Belgium etc., have opted for Option B and, hence, may remain unchanged due to the absence of compatibility.

4. Improving dispute resolution (Articles 16 and 17)

BEPS Action 14 provides for certain minimum standards and best practices for improving the dispute resolution process under tax treaties.

(i) Mutual agreement procedure (Article 16)

MLI provision, India position on Article 16 and impact analysis

- The MLI has provisions which aim to introduce the minimum standards for improving dispute resolution and a number of complementing best practices. As part of the MLI notification, India has ensured adoption of minimum standards as follows:
- In terms of the MLI provision, countries are required to allow taxpayers to present a MAP case to the CA of either of the states (rather than only to the CA of the residence state). India has reserved its right for not adopting the modified provisions on the basis that it would meet the minimum standard by allowing MAP access in the resident state and by implementing a bilateral notification process.
- Furthermore, the MLI requires that MAP access should be allowed in a case where MAP application is presented within three years of the first notification of the action resulting in taxation not in accordance with a tax treaty. This has been implemented by India which has notified tax treaties which provide a lower period of two years for presenting a MAP case and tax treaties which have a minimum period of 3 years. The notification ensures that all tax treatiesof India post the MLI will provide a minimum time limit of 3 years for MAP access.
- In terms of the MLI, CAs of both the states need to endeavor to resolve a case under MAP if they are not able to arrive at a satisfactory solution unilaterally. India has notified its tax treaties which do not have a comparable provision to meet this minimum standard.
- MAP agreements are to be implemented notwithstanding any time limits under domestic laws. Most existing tax treaties of India have a provision which requires implementation of the MAP resolution irrespective of time limits in the domestic laws. India has provided a list of seven tax treaties where such a provision does not exist. Post the MLI, the notified tax treaties will also have this minimum standard if the comparable notification is made by the other CJ.
- The MLI further confers an obligation on the CAs to endeavor to resolve any potential difficulties or doubts related to the implementation or application of tax treaties under MAP and provides an option for CAs to consult on ways to eliminate double taxation in cases not provided for in the tax treaty. India has adopted this provision and has

notified the tax treaties which do not have the comparable provisions.

(ii) Mandatory binding arbitration (Article 18 and 19)

- The MLI provides for an opt-in approach for countries to adopt mandatory binding arbitration. India, as expected, has not opted in for mandatory binding arbitration. At the time of signing, 25 countries had adopted mandatory binding arbitration. This will lead to the introduction of arbitration to over 150 existing tax treaties.

C. Entry into force

The MLI shall apply to a specific tax treaty after all parties to that tax treaty have ratified the MLI. The MLI provisions will generally have effect in a tax treaty at different moments with respect to taxes withheld at source, all other taxes levied in a CJ:

- In relation to provisions relating to withholding taxes, the date of entry into effect is the first day of the next calendar year from the latest of the dates on which the MLI enters into force for each of the CJs to a tax treaty. The MLI gives an option to use the term "taxable year" in place of "calendar year".
- With respect to all other taxes levied by a CJ, the first taxes for which the MLI provisions will apply are those which are levied with respect to taxable periods beginning on or after the expiration of a period of six calendar months from the latest of the dates on which the MLI enters into force for each of the CJs to a tax treaty.
- Similar dates will be relevant when a country makes a withdrawal/ replacement reservation or a new notification of a tax treaty.
- MAP provisions of the MLI will enter into force for cases presented to the CA on or after the latest of the dates on which the MLI enters into force for each of the CJs to the tax treaty.

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contd. from page 260

*different parameters would apply. It is in this context held by this court that reopening of assessment under the insistence of the audit party would not be valid. We are not oblivion to the decision of the Supreme Court in case of **Commissioner of Income Tax vs. P.V.S Beedies Pvt. Ltd reported in 237 ITR 13** taking a view that if the source of information at the hands of the Assessing Officer is an audit objection but the Assessing Officer himself is holding a belief that income chargeable to tax has escaped assessment, the same may still be permissible, if otherwise valid in law. The present case, however, is vastly different. The Assessing Officer was firmly of the belief that no income chargeable to tax had escaped assessment despite which apparently he was prevailed upon to issue notice of reopening. This was, therefore, not a case where the Assessing Officer formed a belief that income chargeable to tax had escaped assessment. May be in the present case, the directives did not come from the audit party but some internal audit mechanism referred to as internal audit party. This, however, would not be of any significance. As long as it can be gathered that the Assessing Officer was compelled to issue notice of reopening against his own belief that no income chargeable to tax had escaped assessment, the notice must fail.*

11. In the result, the impugned notice dated 24.03.2010 is set aside. Petition is allowed and disposed of accordingly. Rule is made absolute."

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FEMA Updates

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9 Risk Management and Interbank Dealings- Reports to the Reserve Bank

In terms of para (viii) under Part-E (Reports to the Reserve Bank) of the Master Directions on Risk Management and Inter-Bank Dealings dated July 5, 2016, the Head/Principal Office of AD Category-I banks are required to submit a statement in form BAL giving details of their holdings of all foreign currencies on fortnightly basis through Online Returns Filing System (ORFS) within seven calendar days from the close of the reporting period to which it relates. It has now been decided that w.e.f. August 16, 2017 (i.e. for the statement of first fortnight of August 2017) this statement may be submitted through the web portal at https://bop.rbi.org.in as per the format annexed.

In terms of para (ii) under Part-E of the aforementioned master direction, Head/Principal Office of AD Cat-I banks are required to submit a monthly statement of Nostro/Vostro account balances. It has now been decided to discontinue this report.

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

A.P. (DIR Series) Circular No. 03, August 10, 2017

For Full Text refer to https://www.rbi.org.in/Scripts/BS_Circular IndexDisplay.aspx?Id=11087

Press Releases

48% growth in FDI equity inflows after MAKE in India

1. The growth in FDI has been significant after the launch of Make in India initiatives in September 2014, with 48 percent increase in FDI equity inflows during October 2014 to April 2015 over the corresponding period last year. In 2014-15, country witnessed unprecedented growth of 717 percent, to US $ 40.92 billion of Investment by Foreign Institutional Investors (FIIs). The FDI inflow under the approval route saw a growth of 87% during 2014-15 with inflow of US$ 2.22 billion despite more sectors having been liberalized during this period and with more than 90 percent of FDI being on automatic route. These indicators showcases remarkable pace of approval being accorded by the Government and confidence of investors in the resurgent India.

2. The increased inflow of Foreign Direct Investment (FDI) in India especially in a climate of contracting worldwide investments indicates the faith that overseas investors have imposed in the country's economy and the reforms initiated by the Government towards ease of doing business. The Make in India initiatives of the Government and its outreach to all investors have made a positive investment climate for India which is evidenced in the results for the last financial year especially the second half.

3. The FDI inflow during the financial year 2014-15 was spread across the sectors evidencing the fact of positive eco-system of investment opportunities which India is now providing- Services Sector (US$ 3.2 billion), Telecommunication (US$2.8 billion), Trading (US$ 2.7 billion), Automobile Industry (US$ 2.5 billion), Computer Software & Hardware (US$ 2.2 billion), Drugs & Pharmaceuticals (US$1.5 billion) and Construction (Infra) activities (US$ 0.75 billion).

4. Government amended the FDI policy to further enable a positive investment climate and sync it with the vision and focus areas of the present Government such as affordable housing, smart cities, financial inclusion and reforms in railway infrastructure. The Construction Development Sector was allowed easy exit norms with rationalized area restrictions and due emphasis on affordable housing. The FDI cap in insurance and pension sector has been raised to 49 per cent. 100 per cent FDI has been allowed in railway infrastructure (excluding operations) and also in the medical devices sector. Further the definition of NRI was expanded to include OCI cardholders as well as PIO cardholders. NRIs investment under Schedule 4 of FEMA (Transfer or Issue of Security by Persons Resident Outside India) Regulations will be deemed to be domestic investment made by residents, thereby giving flexibility to NRIs to invest in India.
5. The Foreign Policy Magazine in its present analysis on a vast number of parameters has rated India as the No.1 destination in the world. Frost & Sullivan, a US based agency has on number of indicators selected the Make in India initiative as the best initiative to drive manufacturing.
6. India stands committed to have a FDI policy and regime which is investor friendly and also promotes investment leading to increased manufacturing, job creation and overall economic growth of the country.

Press release link: http://dipp.nic.in/sites/default/files/pressRelease_GrowthFDI_15uly2015_0.pdf

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"Japan Plus" constituted to fast track Japanese investments

The Department of Industrial Policy & Promotion (DIPP) has set up a special management team to facilitate and fast track investment proposals from Japan. The team, known as "Japan Plus", will comprise representatives from Government of India and METI (Ministry of Economy, Trade and Industry), Government of Japan.

An outcome of the recently concluded visit of the Prime Minister of India to Japan, the mandate of the "Japan Plus" team runs through the entire spectrum of investment promotion – research, outreach, promotion, facilitation and aftercare. The team will support the Government of India in initiating, attracting, facilitating, fast tracking and handholding Japanese investments across sectors. The team will also be responsible for providing updated information on investment opportunities across sectors, in specific projects and in industrial corridors in particular. In addition, the "Japan Plus" team will identify prospective Japanese companies, including, Small and Medium Enterprises (SMEs) and facilitate their investments in India.

The "Japan Plus" team will also provide assistance to DIPP in undertaking regular benchmarking studies, identifying bottlenecks and areas of concern in sectors of interest to Japanese companies, and analyzing their impact on industrial development production in India.

"Japan Plus" has been operationalized w.e.f. October 8, 2014. "Japan Plus" will be coordinated by Mr. KenichiroToyofuku from METI and will comprise of four Indians and two Japanese officials. "Japan Plus" can be reached at japanplus@nic.in and at k.toyofuku@nic.in

Government has also constituted a Core Group chaired by Cabinet Secretary on India-Japan Investment Promotion Partnership. This group will comprise of Chairman, Railway Board; Foreign Secretary and Secretaries of DIPP, Economic Affairs, Expenditure, Financial Services, Revenue, Commerce,

Urban Development, Electronics and Information Technology and others. The Core Group will be serviced by Department of Industrial Policy & Promotion. This Core Group will co-ordinate and closely monitor the process to ensure that investments from Japan as envisaged in India–Japan Investment Promotion Partnership are facilitated in various sectors and opportunities of investment and technology transfer are fully exploited.

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GST Notification

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<u>Notification No. 20/2017-Central Tax (Rate) dated 22.08.2017</u>

The Government vide notification 20/2017 – CTR dated 22.08.2017 has made far reaching changes in the rate structure for certain services and in some other services they have given an option of paying taxes at the higher rate and avail credits.

The summary of the above notifications are as follows:

S. No.	Particulars	Tax Rate
1	Works contract in relation to specified projects and/or purpose –	12% with full ITC
2	Transport of passengers by motor-cab (cost of fuel included) –	5% with no ITC 0r 12% with full ITC
3	Services of GTA –	5% with no ITC 0r 12% with full ITC (on all services of GTA)
4	Renting of motor-cab (cost of fuel included) –	5% with no ITC 0r 12% with full ITC
5	Support Services of GTA –	5% with no ITC 0r 12% with full ITC (on all services of GTA)
6	Job work related to all textile products –	5%
7	Services of printing (materials supplied by printer) –	12%
8	Admission or access to planetarium –	18%

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VAT Judgments and Updates

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[1] **In case of Ahmedabad Dudh Utpadak Sahakari Sangh, The Hon. Gujarat High Court has given the Judgment in case of Sale of Goods to consignment Agents & IF full payment by the Agent is made before movement of the Goods to the other States though it is an inter-state sales and not the sales within the State.**

Facts:

The appellant is engaged in the business of Milk Products and for sale of goods he has engaged a consignment agent and as per the agreement the consignment agent has to make full payment before the lifting of the goods. The consignment agent has lifted the goods and sold it in out of the state.

In the assessment the Ld. A. O. has treated this sale as sales made within the state as the sale was concluded in the state of Gujarat and appropriate tax has been imposed.

The Hon. Tribunal has decided this issue in favour of the appellant and held that the sale was the transaction of stock transfer to consignment agent and not liable to tax under the CST Act. Being aggrieved, the department has filed a further appeal before Hon. Gujarat High Court but the revenue appeal has been dismissed by the Gujarat High Court.

The decision of the Gujarat High Court is as under.

Submissions of the Revenue before the Gujarat High Court:

The learned counsel for the revenue submitted before the Gujarat High Court that the transactions between the assessee and consignment agents were sales purchase transactions. Since the consignment agents paid full amount payable for the goods, the property in goods transferred to the agents and the sale concluded in the State of Gujarat. The movement of goods were subsequent to completion of sale and therefore it cannot be claimed as stock-transfer of goods.

Decision of the Gujarat High Court:

The Hon. Gujarat High Court held that merely because the deposit account was opened in the books of assessee, such device of accepting advance deposit would not tantamount to accepting full sale price of goods. Such deposits are in the nature of an advance deposit and therefore the findings of the First Appellate Authority and the Assessing Authority that merely because such consignee agents paid the full price to the principal prior to dispatch of goods and such goods were accepted by such consignee agents at their own risk, would not render such a sale local sale.

The Hon. Court held that the Tribunal has correctly held that all three essential ingredients of Inter-State namely that (i) there was an implied stipulation in the contract regarding inter-state movement of goods (ii) the goods did actually move from one State to another (iii) and the sale concluded in another state, were satisfied. Thus no fault can be found in the findings recorded by the Tribunal. The Tax Appeal filed by the Revenue came to be dismissed accordingly.

[2] **In case of Manan Autolink P. Ltd. the Hon. Gujarat High Court has given the decision that before the issue of 'C' Form payment of tax dues is a pre-condition which is not supported by the Rules & Therefore not legal.**

Facts of the case:

The assessee is a dealer registered under the Local as well as CST Act. The assessee applied for issuance on 'C' Forms but the assessee was denied 'C' Forms on the grounds that tax dues were pending against him and until the dues are cleared, the assessee cannot be allowed to generate 'C' forms. The assessing officer relied on the Public Circular issued by the Commissioner dated 16.11.2009 in this behalf. Being aggrieved, the assessee filed present writ petition before the Gujarat High Court.

Decision of the Gujarat High Court:

The Hon. Gujarat High Court held that none of the CST Rules prescribe that before the purchasing dealer can generate a request for authentication of 'C' form by the appropriate authority, the dealer must have discharged its full liability of the Vat. In absence of a specific rule requiring depositing of full tax before obtaining 'C' form authentication, such a requirement cannot be introduced by the State Government.

The Hon. High Court held that the condition prescribed in the circular requires that a dealer must have discharged all his self-assessed tax liabilities before 'C' forms can be obtained in connection with any of his dealings. Essentially, this amounts to a mode of tax recovery. Even it is self-assessed tax, the prescription of the circular does not lose its essential character of one being in the nature of tax collection. Unless and until such a condition is backed by any statutory provision, it would not be possible for the State Government to provide such a mode of tax recovery making it a pre-condition for generation of 'C' forms. What is envisaged in sub-section (3) and (4) of section 13 is the power of delegated legislation vested in the State Government for carrying out the purposes of the CST Act. Such rule making power cannot be substituted by executive instructions.

In view of above, the Hon. High Court held that the action of the assessing officer in not allowing the assessee to generate 'C' solely on the ground that the assessee had not paid the self assessed tax for the relevant period under the Vat Act is illegal. The writ petition came to be answered in favour of the assessee and disposed accordingly.

[3] **The Hon. Gujarat High Court has decided in case of Veeksey Plastomers India P. Ltd. v/s. State of Gujarat that without giving any reasons mentioned in the order the Books of Accounts cannot be seized and held illegal. The Hon. Gujarat High Court has also ordered to return Books of Accounts with a liberty to take photo copy.**

Facts of the Case:

The assessee is a dealer registered under the Act. The assessee is a dealer in PU Footwear. The assessee classified the product as plastic footwear and paid 5% tax on sales of such footwear. The product sold by the assessee was containing a small portion which was not plastic. The assessing officer took the view that the product sold by the assessee was liable to be taxed at the rate of 15%. The place of business of the assessee was inspected by the assessing officer and stock of goods worth about Rs. 1.5 crore was seized. The books of accounts of the assessee were also seized. Being aggrieved, the assessee filed writ petition before the Hon. Gujarat High Court.

Submissions of the assessee before Hon. Gujarat High Court:

The learned counsel for the assessee submitted before the Hon. Gujarat High Court that the assessee has correctly classified the product as plastic footwear and discharged the tax liability. Even before the assessment is carried out, the authorities have taken the extreme step of attaching the assessee's stock. It was submitted that in the business of footwear, there is quick rotation of style, design and change in fashion. If the stock is allowed to remain idle even for a few months, the items may completely go out of fashion. The market value of the goods will therefore completely diminish.

Counsel for the assessee further submitted that in any case the authorities had no power to seize the accounts. Power under sub-section (4) of Section 67 could be exercised only when the Commissioner has reason to believe that a dealer has evaded or is attempting to evade the payment of tax due from him. In such a situation the Commissioner could seize the accounts, registers or documents of the dealer by recording reasons in writing. In the present case, there is no allegation of evading tax. It is a genuine dispute of classification. The authority has exercised the powers without even recording reasons.

Submissions of the revenue before the Gujarat High Court:

The learned counsel for the revenue submitted before the Hon. High Court that looking to the product, the item would not fall in the category of plastic footwear. The assessee was therefore required to pay tax at a higher rate under the residuary clause. The Asst. Commissioner has wide powers of attachment to safeguard the interest of revenue. The possible tax, interest and penalty liability runs into crores.

Decision of the Hon. High Court:

Hon. Gujarat High Court held that so far as the attachment of the stock of footwear of the assessee is concerned, it may continue but the assessee is permitted to rotate the stock. This on one hand would safeguard the interest of the revenue and at the same time would enable the assessee to sell the product without the possibility of the market value of the footwear diminishing due to passage of time.

With respect to seizure of books of accounts the Hon. High Court held that the authorities have not demonstrated any reason for exercising powers under sub-section (4) of Section 67 nor any reasons have been recorded before exercising such powers. The powers being drastic, the authorities must demonstrate satisfaction of pre-conditions before exercise of such powers.

However, the Hon. Court permitted the department to retain photo copies of the documents already seized before returning them to the assessee. The writ petition came to be disposed accordingly.

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During the recent visit of the Prime Minister to Japan, the India–Japan Investment Promotion Partnership, as part of the Tokyo Declaration for India – Japan Special Strategic and Global Partnership was announced. Under this Investment Promotion Partnership, Japan has offered to invest in India approximately 3.5 trillion Yen (US $ 33.5 Billion) by way of public and private investment and financing including Overseas Development Assistance, over the next five years.

India has been rated as the top investment destination by JBIC for the long term. Japan is the 4th largest FDI contributor to India, with major interests in pharmaceuticals, automobiles and services sectors and accounts for 7.46% of total FDI equity inflows into India. As per the JBIC survey report on overseas business operations by Japanese manufacturing companies, 90% of the respondents voted “future growth potential of local market” as the top reason for India’s attractiveness. India is an attractive investment destination for Japanese companies, with 1,072 Japanese companies having 2,542 business bases in India. Over the last decade, the number of Japanese establishments in India have increased by 11 times, reflecting the positive sentiments of Japanese investors for Indian market.

http://dipp.nic.in/sites/default/files/japanPlus_09October2014_0.pdf

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Corporate Law Update

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MCA Updates:

1. **MCA clarification regarding Applicability of Exemption given to certain Private Companies under Section 143(3)(i) of the Companies Act, 2013:**

   The MCA has clarified that the exemption under section 143(3)(i) to the following companies shall be applicable for those audit reports in respect of financial statements pertaining to financial year commencing on or after April 1, 2016, which are made on or after the date of the said notification.

   "In case of private companies - clause (i) of sub- section (3) of section 143 shall not apply to a private company:-

   a. which is a one person company or a small company; or

   b. which has turnover less than rupees fifty crores as per latest audited financial statement **and** 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.

   [General Circular No. 8 dated 25.07.2017]

2. **Companies (Incorporation) Second Amendment Rules, 2017:**

   Following amendments have been made in the Companies (Incorporation) Rules, 2014:

   1. **In Rule 28 , the following rule shall be substituted, namely –**

      "28. Shifting of registered office within the same State –

      (1) An application seeking confirmation from the Regional Director for shifting the registered office within the same State from the jurisdiction of one Registrar of Companies to the jurisdiction of another Registrar of Companies, shall be filed by the company with the Regional Director in Form No. lNC. 23 along with the fee and following documents,-

      (a) Board Resolution for shifting of registered office;

      (b) Special Resolution of the members of the company approving the shifting of registered office;

      (c) a declaration given by the Key Managerial Personnel or any two directors authorized by the Board, that the company has not defaulted in payment of dues to its workmen and has either the consent of its creditors for the proposed shifting or has made necessary provision for the payment thereof;

      (d) a declaration not to seek change in the jurisdiction of the Court where cases for prosecution are pending;

      (e) Acknowledged copy of intimation to the Chief Secretary of the state as to the proposed shifting and that the employees interest is not adversely affected consequent to proposed shifting".

   2. **For Rule 30, the following rule has been substituted:-**

      "30. Shifting of Registered office from one state or union Territory to another state

      (1) An application under sub-section (4) of section 13, for the purpose of seeking approval for alteration of memorandum with regard to the change of place of the registered office from one State Government or Union territory to another, shall be filed with

the Central Government in Form No. INC.23 along with the fee and shall be accompanied by the following documents, namely:-

(a) a copy of Memorandum of Association, with proposed alterations;

(b) a copy of the minutes of the general meeting at which the resolution authorising such alteration was passed, giving details of the number of votes cast in favour or against the resolution;

(c) a copy of Board Resolution or Power of Attorney or the executed vakalatnama, as the case may be.

(2) There shall be attached to the application, a list of creditors and debenture holders, drawn up to the latest practicable date preceding the date of filing of application by not more than one month, setting forth the following details, namely:-

(a) the names and address of every creditor and debenture holder of the company;

(b) the nature and respective amounts due to them in respect of debts, claims or liabilities:

Provided that the list of creditors and debenture holders, accompanied by declaration signed by the company Secretary of the company, if any, and not less than two directors of the company, one of whom shall be a managing director, where there is one, stating that

(i) they have made a full enquiry into the affairs of the company and, having done so, have concluded that the list of creditors are correct, and that the estimated value as given in the list of the debts or claims payable on a contingency or not ascertained are proper estimates of the values of such debts and claims and that there are no other debts of or claims against the company to their knowledge, and

(ii) no employee shall be retrenched as a consequence of shifting of the registered office from one state to another state and also there shall be an application filed by the company to the Chief Secretary of the concerned State Government or the Union territory.

(3) A duly authenticated copy of the list of creditors shall be kept at the registered office of the company and any person desirous of inspecting the same may, at any time during the ordinary hours of business, inspect and take extracts from the same on payment of a sum not exceeding ten rupees per page to the company.

(4) There shall also be attached to the application a copy of the acknowledgment of service of a copy of the application with complete annexures to the Registrar and Chief Secretary of the State Government or Union territory where the registered office is situated at the time of filing the application.

(5) The company shall, not more than thirty days before the date of filing the application in Form No. INC.23 –

(a) advertise in the Form No.INC.26 in the vernacular newspaper in the principal vernacular language in the district and in English language in an English newspaper with the widest circulation in the date in which the registered office of the company is situated:

Provided that a copy of advertisement shall be served on the Central Government immediately on its publication

(b) serve, by registered post with acknowledgement due, individual notice, to the effect set out in clause (a) on each debenture-holder and creditor of the company; and

(c) serve, by registered post with acknowledgement due, a notice together with the copy of the application to the Registrar and to the Securities and Exchange Board of India, in the case of listed companies and to the regulatory body, if the company is regulated under any special Act or law for the time being in force.

(6) There shall be attached to the application a duly authenticated copy of the advertisement and notices issued under sub-rule (5), a copy each of the objection received by the applicant, and tabulated details of responses along with the counter response from the company received either in the electronic mode or in physical mode in response to the advertisements and notices issued under sub-rule (5).

(7) Where no objection has been received from any person in response to the advertisement or notice under sub-rule (5) or otherwise, the application may be put up for orders without hearing and the order either approving or rejecting the application shall be passed within fifteen days of the receipt of the application.

(8) Where an objection has been received,

(i) the Central Government shall hold a hearing or hearings, as required and direct the company to file an affidavit to record the consensus reached at the hearing, upon executing which, the Central Government shall pass an order approving the shifting, within sixty days of filing the application.

(ii) where no consensus is reached at the hearings the company shall file an affidavit specifying the manner in which objection is to be resolved within a definite time frame, duly reserving the original jurisdiction to the objector for pursuing its legal remedies, even after the registered office is shifted, upon execution of which the Central Government shall pass an order confirming or rejecting the alteration within sixty days of the filing of application.

(9) The order passed by the Central Government confirming the alteration may be on such terms and conditions, if any, as it thinks fit, and may include such order as to costs as it thinks proper:

Provided that the shifting of registered office shall not be allowed if any inquiry, inspection orinvestigation has been initiated against the company or any prosecution is pending againstthe company under the Act.

(10)On completion of such inquiry, inspection or investigation as a consequence of which no prosecution is envisaged or no prosecution is pending, shifting of registered office shall be allowed".

3. **The amendment also provides for the substitution of the following forms:-**

(a) Form INC-23: Application to the Regional Director for approval to shift the Registered Office from one state to another state or from jurisdiction of one Registrar to another Registrar within the same State.

(b) Form INC-26: Advertisement to be published in the newspaper for change of registered office of the company from one state to another.

[F. No. 1/13/2013 CL-V dated 27.07.2017]

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Allied Laws Corner

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HIGH COURT OF GUJARAT
Manan Autolink (P.) Ltd. *v.* State of Gujarat*

- **Section 8 of the Central Sales Tax Act, 1956 - Inter-State Supply - Period 1-4-2015 to 31-3-2016 - Section 8 of CST act provides that for sales in nature of inter-state sales, first purchase by petitioner would invite reduced tax at rate of 2 per cent as long as petitioner could provide to sellers a declaration of inter-state sale in Form C - Circular dated 16-11-2009 prescribes that before purchasing of goods, dealer could generate Form C online only in case he has discharged his full liability of VAT - Whether since such a condition was not backed by any statutory provision, it would not be possible for State Government to provide such a mode of tax recovery making it a pre-condition for generation of Form C.**
- **To avail reduced tax rate during inter-State purchase, furnishing of Form C is not conditioned by payment of self-assessed tax under VAT Act.**

Facts of the case

- The petitioner was an authorized dealer of Maruti and Bajaj. It was registered under the Gujarat VAT act as well as the Central Sales Tax Act. As a registered dealer, the petitioner would make purchases of the vehicles from outside state and sell vehicles within the state. For the sales in the nature of inter-state sales, the first purchase by the petitioner would invite reduced tax at the rate of 2 per cent in terms of sub-section (1) of section 8 as long as the petitioner could provide to the sellers a declaration of inter-state sale in Form C. The petitioner's sale of the vehicles within the state would invite the value added tax under the VAT Act. In the present petition, the assessee challenged the action of the respondent authorities in refusing to issue Form C to the petitioner on its inter-state purchases of vehicles.
- The department alleged that for the relevant period, the petitioner had collected VAT on its local sales from the customers but had not deposited the same with the government revenue as per the petitioner's self assessment of the tax liability. Accordingly, when the petitioner tried to generate the Form C on the department's portal, the system did not permit the petitioner to generate the same. According to the department, the manual filing of the declarations and authentication of such declarations by the state authorities of the C form was done away with since the year 2008. This was replaced by an online system as per which the dealer would be in a position to generate his own Form C as long as he fulfilled the conditions prescribed by the state authorities. According to the respondents, one of the conditions contained in circular dated 16-11-2009 was that the dealer should file his periodical quarterly returns and should have paid the self assessed tax as per such returns and generated a computerized receipt for the same. The department explained that since the petitioner did not fulfilled the essential condition of payment of self assessed tax, the online system of the department would not permit the petitioner to obtain C form declarations.

Trupesh C. Kathiriya, Adv. *for the Petitioner.*
Pranav Trivedi, Asstt. Govt. Pleader *for the Respondent.*

Held

- In terms of sub-section (1) of section 8, a dealer on its sale of goods in the course of inter-state trade or commerce would pay reduced rate of tax as long as, as provided in sub-section (4) of section 8, the purchasing dealer provides the C form obtained from the prescribed authority. In exercise of rule making powers contained in sub-section (4), the State Government has framed the Central Sales Tax (Gujarat) Rules, 1970. Rule 4A thereof pertains to maintenance of records of certificates and declarations under sub-section (2) of section 6 and clause (a) of sub-section (4) of section 8 and matters incidental thereto. Likewise, the Central Government has also framed the Central Sales Tax (Turnover & Registration) Rules, 1957. Rule 12 pertains to furnishing declarations and certificates. Sub-rule (1) provides that declarations and certificates referred to in sub-section (4) of section 8 shall be in Forms 'C and 'D' respectively. [Para 12]

- None of these rules prescribe that before the purchasing dealer can generate a request for authentication of C form by the appropriate authority, the dealer must have discharged its full liability of the VAT. As noted in the VAT Act, detailed provisions have been made for assessment and collection of tax. In absence of a specific rule requiring depositing of full tax before obtaining C form authentication, such a requirement cannot be introduced by the State Government. Attention was drawn to sub-rule (3) and sub-rule (4) of section 13. As noted, sub-section (3) empowers the State Government to make rules not inconsistent with the provisions of the Act and the rules made under sub-section (1) of section 13 by the Central Government to carry out the purposes of the Act. Sub-section (4) provides that without prejudice to the powers under sub-section (3) if the Government of the State could make rules for all or any of the purposes contained in various clauses including clause (*e*) which pertains to the authority from whom, the conditions subject to which and fees subject to payment of which if any form of certificate prescribed *inter alia* under sub-section (4) can be obtained, and the manner in which such forms shall be kept in custody and records relating thereto maintained. [Para 13]

- These rule making powers of the State Government undoubtedly are quite wide. Two of the main limitations of exercise of such powers appear to be that any rules so framed cannot be inconsistent with the provisions of the Act or the Rules made by the Central Government and that the same should be framed to carry out the purposes of the Act. Whether such rule making powers would include affecting collection of unpaid VAT by the purchasing dealer before the C form can be generated by him and he could request to the prescribed authority to authenticate the same is a question which need not be answer in the present writ petition. This is so because no rule has been brought to notice which provides for such a requirement or a pre-condition. Only source of such insistence by the State Government is a circular dated 16-11-2009. The circular lays down a procedure that the dealer would have to follow for obtaining C form. The circular was necessitated mainly for the reason that the department wanted to discontinue the practice of filing physical copies of the C forms to be authenticated by the prescribed authority. Henceforth, the department would permit the concerned dealers to generate such C forms online. While doing so, certain conditions have been prescribed in the said circular. One of the conditions being that the dealer should have paid all the taxes as per the self assessment in terms of the quarterly returns filed online. There is no independent source of this prescription outside the said circular. In other words, the State Government relies upon and refers only to the said circular to impose a condition for obtaining C form namely the dealer should have paid the self assessed tax as per the quarterly returns filed. If this is done and other conditions are also satisfied, the dealer could on his own generate C forms. There shall thereafter be no further need for certification or authentication of such C forms by any departmental authority. If this condition is not satisfied, the website of the department would not permit the dealer to generate the C forms. Thus, through a condition prescribed in the said circular, the State Government requires that a dealer must have discharged all his self assessed tax liabilities before C forms can be obtained in connection with any of his dealings. Essentially, this amounts to a mode of tax recovery. Even if it is self assessed tax, the prescription of the circular does not lose its essential character of one being in the nature of tax collection. Unless and until such a condition is backed by any statutory provision, it would not be possible for the State Government to provide such a mode of tax recovery making it a pre-condition for generation of C forms. As noted, had such a condition been introduced by framing statutory rules in exercise of powers under sub-sections (3) and (4) of section 13 the question would have been examined further. However, the circular in the form of executive instructions cannot take shape of a statute. What is envisaged in sub-sections (3) and (4) of section 13 is the power of delegated legislation vested in the State Government for carrying out the purposes of the CST Act. Such rule making power cannot be substituted by executive instructions. The circular in question is certainly not in exercise of the rule making powers exercised by the State Government. [Para 14]

- Under the circumstances, it is held that the action of the respondents in not allowing the petitioner to generate C form solely on the ground that the petitioner had not paid the self assessed tax for the relevant period under the VAT Act is illegal. The respondents shall allow the petitioner to generate C form subject to other conditions being fulfilled. Petition is disposed of accordingly.[Para 15]

Judgment

Akil Kureshi, J. - The petitioner is an authorized dealer of Maruti Suzuki India Limited and Bajaj Auto Limited. The petitioner is registered under The Gujarat Value Added Tax Act ('the VAT Act' for short) as well as The Central Sales Tax Act ('the CST Act' for short). In the present petition, the petitioner has challenged the action of the respondent authorities in refusing to issue C form to the petitioner on its inter-State purchases of vehicles.

2. Brief facts are as under:

2.1 As a registered dealer, the petitioner would make purchases of the vehicles from outside State and sell vehicles within the state. For the sales in the nature of inter-State sales, the first purchase by the petitioner would invite reduced tax at the rate of 2% in terms of sub-section (1) of Section 8 of the CST Act as long as the petitioner could provide to the sellers a declaration of inter-State sale in C form. The petitioner's sale of the vehicles within the State would invite the Value Added Tax under the VAT Act which we are informed presently is at the rate of 15%.

2.2 The petitioner's returns for the assessment years 2009- 10 to 2011-12 are in dispute. As per the latest position, the Value Added Tax Tribunal has set aside the order passed by the appellate authority and remanded the proceedings for fresh consideration by the State authority. We are, however, not directly concerned with these disputed tax dues of the petitioner. The dispute is with respect to the petitioner's undisputed tax dues and the mode of recovery thereof. The department alleges and the petitioner does not seriously dispute that for the period between 01.04.2015 and 31.03.2016, the petitioner had collected VAT on its local sales from the customers but had not deposited the same with the government revenue even as per the petitioner's own self assessment of the tax liability. In other words, according to the department, the petitioner has not discharged its self assessed tax liability for the said period which comes to more than Rs.6 crores.

2.3 Under such circumstances, when the petitioner tried to generate the C form on the department's portal, the system did not permit the petitioner to generate the same. According to the department, the manual filing of the declarations and authentication of such declarations by the State authorities of the C forms have been done away with since the year 2008. This has been replaced by an online system as per which the dealer would be in a position to generate his own C forms as long as he fulfills the conditions prescribed by the State authorities. According to the respondents, one of the conditions contained in circular dated 16.11.2009 is that the dealer should have filed his periodical quarterly returns and should have paid the self assessed tax as per such returns and generated a computerized receipt for the same. The department explains that since the petitioner had not fulfilled the essential condition of payment of self assessed tax, the online system of the department would not permit the petitioner to obtain C form declarations.

3. This in nutshell is the controversy. Counsel for the petitioner submitted that the petitioner ran into serious financial difficulties due to which the petitioner could not discharge its tax obligations. The petitioner would be in a position to pay up the taxes if installments are granted. Not granting C form declarations to the petitioner would put the petitioner's selling dealers to great hardships since such dealers would not be able to take the benefit of reduced tax of inter-State sale. This cannot be done for the inability of the petitioner to pay his taxes. Granting of C form declarations cannot be stalled on the ground of unpaid dues of a dealer, indirectly taking such measure by way of tax collection and recovery. The VAT Act contains detailed machinery through which the department can make recoveries. In any case, there is no authority in law to link the question of authenticating C form declarations of a dealer to discharge of his tax liabilities.

4. On the other hand, learned Assistant Government Pleader Shri. Trivedi opposed the petition contending that the circular of the Government dated 16.11.2009 is abundantly clear. The department switched over from manual filing of the returns and issuance of C forms to computerized system as per the circular. Since the petitioner had not discharged his tax liabilities he was not allowed to generate the C form. In his case, the liabilities are not disputed. They arise out of self assessment. Thus, the petitioner has collected the tax from the customers which he has not deposited in the government revenue.

5. Facts as noted are not in dispute. The petitioner having made local sales of the vehicles purchased from outside State, has not deposited the self assessed tax with the government authorities. On such ground, the department does not permit the petitioner to generate the C form. Since this is one of the requirements contained in the circular dated 16.11.2009, the short question is, Is it legally permissible?

6. Section 6 of the CST Act is a charging provision creating charge on sale of goods on inter-State sales. Sub-section (1) of Section 8 of the CST Act provides that every dealer who in course of inter-State trade or commerce sells to a registered dealer goods of the description referred to in sub-section (3) shall pay tax under the said Act at the rate of 2% of his turnover or at the rate applicable to the sale or purchase of such goods inside the appropriate State under the sales tax law of that State, whichever is lower. Sub-section (4) of Section 8 provides that the provision of sub-section (1) shall not apply to any sale in course of inter-State trade or commerce unless the dealer selling the goods furnishes to the prescribed authority in the prescribed manner a declaration duly filled and signed by the registered dealer to whom the goods are sold containing the prescribed particulars in a prescribed form obtained from the prescribed authority.

7. In terms of sub-section (1) of Section 8 of the CST Act, thus, reduced rate of tax would be levied from a selling dealer in case of inter-State sale, provided a declaration as provided in sub-section (4) of Section 8 is furnished. The declaration has to be obtained by the purchasing dealer which when provided to the selling dealer, reduced rate of tax in terms of sub-section 8 would apply.

8. Section 9 of the CST Act pertains to levy and collection of tax and penalties. As per sub-section (1) of Section 9, the tax payable by any dealer under the said Act on sale of goods in course of inter-State trade or commerce would be levied by the Government of India but shall be so collected by the State from which the movement of goods commenced. Sub-section (2) of Section 9 in turn provides that subject to the provisions of the Act and the rules made thereunder, the authorities for the time being empowered to assess, reassess, collect and enforce payment of tax under the GST law of the appropriate State shall on behalf of the Government of India assess, reassess, collect and enforce payment of the tax, interest or penalty payable by the dealer. As per sub-section (2A) of Section 9 all provisions relating to offences, interest and penalties prevailing in each State shall with the necessary modifications apply in relation to the assessment, reassessment, collection and enforcement of tax under the CST Act also. Likewise, sub-section (2B) of Section 9 makes interest provisions for delayed payment of tax contained in the State laws applicable to in the CST Act.

9. Section 13 of the CST Act pertains to the rule making power. Under sub-section (1) of Section 13, the Central Government is authorized to make rules by notification in Official Gazette concerning subjects contained in different clauses (a) to (i). Any rule so framed by the Central Government has to be placed before each House of the Parliament as provided in sub-section (2) of Section 13. Sub- section (3) of Section 13 provides that the State Government may make rules not inconsistent with the provisions of the Act and the rules made under sub-section (1), to carry out the purposes of this Act. Sub-section (4) of Section 13 provides that, without prejudice to the powers conferred in sub-section 3, the State Government may make rules for all or any of the purposes contained in clauses a to g. Clause (e) which is relevant for our purpose reads as under:

"(*e*) the authority from whom, the conditions subject to which and fees subject to payment of which any form of certificate prescribed under clause (a) of the first proviso to sub-section (2) of section 6 or of declaration prescribed under sub- section (1) of section 6A or sub-section (4) of section 8 may be obtained, the manner in which such forms shall be kept in custody and records relating thereto maintained and the manner in which any such form may be used and any such certificate or declaration may be furnished;"

10. In exercise of such powers, the State Government has framed rules called the Central Sales Tax (Registration and Turnover) Rules, 1957 (hereinafter to be referred to as 'the said rules of 1957'). Rule 12 of the said rules of 1957 pertains to furnishing of declarations and certificates. Sub-rule (1) thereof refers to declarations and certificates referred to in sub-section 4 of Section 8 and reads as under:

(1) The declaration and the certificate referred to in sub-section (4) of section 8 shall be in Forms C and D respectively: [Provided that Form C in force before the commencement of the Central Sales Tax (Registration and Turnover) (Amendment) Rules, 1974, or before the commencement of the Central Sales Tax (Registration and Turnover) (Amendment) Rules, 1976, may also be used upto the [31st December, 1979] with suitable modifications:] [Provided further that a single declaration may cover all transactions of sale, which take place in a quarter of a financial year between the same two dealers: Provided also that where, in the case of any transaction of sale, the delivery of goods is spread over to different quarters in a financial year or of different financial years, it shall be necessary to furnish a separate declaration or certificate in respect of goods delivered in each quarter of a financial year.]

11. We may now refer to some of the provisions contained in the VAT Act. The Act contains detailed provisions for assessing and levying taxes. It also contains provisions for dispute resolutions with respect to the liability of dealers to pay taxes. Chapter 5 of the VAT Act pertains to returns, payment of tax, assessment, recovery of tax and refund. Section 42 pertains to payment and recovery of tax and interest on delayed payment. Sub-section (1) of Section 42 enjoins a duty on a dealer to pay tax with interest and penalty within 30 days the same becomes payable. Under sub-section (2) of section 42, the Commissioner has power to extend the time for payment and grant installments. Sub-section (5) of Section 42 provides that if the amount of tax and penalty is not paid within the specified time in sub-section (1) or extended time in sub-section (2), the dealer or person liable to make such payment shall be deemed to be in default in respect of such amount. Sub-section (7) of Section 42 envisages charging of interest on outstanding dues. Section 44 of the VAT Act pertains to special mode of recovery and empowers the Commissioner to make recoveries through garnishee orders. Section 45 empowers the Commissioner to provisionally attach the properties of a dealer for the purpose of protecting the interest of government revenue. Under Section 46, the tax can be recovered as arrears of land revenue. Section 47 provides that any transfer or charge created by a dealer to defraud the government revenue would be void. Section 48 provides that the tax would be the first charge on the property of the dealer. These provisions were noted to demonstrate that the VAT Act contains detailed provisions for assessment, reassessment and collection of tax, interest and penalties. In terms of Section 9 of the Central Sales Tax Act, such provisions would be applicable for assessment, reassessment and collection of tax, interest and penalties arising out of the said Act also.

12. We have noticed that in terms of sub-section (1) of Section 8 of the CST Act, a dealer on its sale of goods in the course of inter-State trade or commerce would pay reduced rate of tax as long as, as provided in sub-section (4) of Section 8, the purchasing dealer provides the C form obtained from the prescribed authority. In exercise of rule making powers contained in sub-section (4), the State Government has framed the Central Sales Tax (Gujarat) Rules, 1970. Rule 4A thereof pertains to maintenance of records of certificates and declarations under sub-section (2) of Section 6 and clause (a) of sub-section (4) of Section 8 and matters incidental thereto. Likewise, the Central Government has also framed the Central Sales Tax (Turnover & Registration) Rules, 1957. Rule 12 pertains to furnishing declarations and certificates. Sub-rule (1) provides that declarations and certificates referred to in sub-section (4) of Section 8 shall be in Forms 'C' and 'D' respectively.

13. None of these rules prescribe that before the purchasing dealer can generate a request for authentication of C form by the appropriate authority, the dealer must have discharged its full liability of the VAT. As noted in the VAT Act, detailed provisions have been made for assessment and collection of tax. In absence of a specific rule requiring depositing of full tax before obtaining C form authentication, such a requirement cannot be introduced by the State Government. Learned Assistant Government Pleader would, however, contend that Section 13 of the Central Sales Tax Act gives wide powers to the State Government of framing rules. Our attention was drawn to sub-rule (3) and sub-rule (4) thereof. As noted, sub-section (3) empowers the State Government to make rules not inconsistent with the provisions of the Act and the rules made under sub-section (1) of Section 13 by the Central Government to carry out the purposes of the Act. Sub-section (4) provides that without prejudice to the powers under sub-section (3) if the Government of the State could make rules for all or any of the purposes contained in various clauses including clause (e) which pertains to the authority from whom, the conditions subject to which and fees subject to payment of which if any form of certificate prescribed interalia under sub-section (4) of the CST Act can be obtained, and the manner in which such forms shall be kept in custody and records relating thereto maintained.

14. These rule making powers of the State Government undoubtedly are quite wide. Two of the main limitations of exercise of such powers appear to be that any rules so framed cannot be inconsistent with the provisions of the Act or the Rules made by the Central Government and that the same should be framed to carry out the purposes of the Act. Whether such rule making powers would include affecting collection of unpaid VAT by the purchasing dealer before the C form can be generated by him and he could request to the prescribed authority to authenticate the same is a question which we need not answer in the present writ petition. This is so because no rule has been brought to our notice which provides for such a requirement or a pre-condition. Only source of such insistence by the State Government is a circular dated 16.11.2009. The circular lays down a procedure that the dealer would have to follow for obtaining C form. The circular was necessitated mainly for the reason that the department wanted to discontinue the practice of filing physical copies of the C forms to be authenticated by the prescribed authority. Henceforth, the department would permit the concerned dealers to generate such C forms online. While doing so, certain conditions have been prescribed in the said circular. One of the conditions being that the dealer should have paid all the taxes as per the self assessment in terms of the quarterly returns filed online. There is no independent source of this prescription outside the said circular. In other words, the State Government relies upon and refers only to the said circular to impose a condition for obtaining C form namely the dealer should have paid the self assessed tax as per the quarterly returns filed. If this is done and other conditions are also satisfied, the dealer could on his own generate C forms. There shall thereafter be no further need for certification or authentication of such C forms by any departmental authority. If this condition is not satisfied, the website of the department would not permit the dealer to generate the C forms. Thus, through a condition prescribed in the said circular, the State Government requires that a dealer must have discharged all his self assessed tax liabilities before C forms can be obtained in connection with any of his dealings. Essentially, this amounts to a mode of tax recovery. Even if it is self assessed tax, the prescription of the circular does not lose its essential character of one being in the nature of tax collection. Unless and until such a condition is backed by any statutory provision, it would not be possible for the State Government to provide such a mode of tax recovery making it a pre-condition for generation of C forms. As noted, had such a condition been introduced by framing statutory rules in exercise of powers under sub-sections (3) and (4) of Section 13 of the CST Act, we would have examined the question further. However, the circular in the form of executive instructions cannot take shape of a statute. What is envisaged in sub-sections (3) and (4) of Section 13 is the power of delegated legislation vested in the State Government for carrying out the purposes of the CST Act. Such rule making power cannot be substituted by executive instructions. The circular in question is certainly not in exercise of the rule making powers exercised by the State Government.

15. Under the circumstances, we hold that the action of the respondents in not allowing the petitioner to generate C form solely on the ground that the petitioner had not paid the self assessed tax for the relevant period under the VAT Act is illegal. The respondents shall allow the petitioner to generate C form subject to other conditions being fulfilled. This may be done latest by 31.08.2017. Petition is disposed of accordingly.

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From Published Accounts

CA. Pamil H. Shah
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Foreign Currency Transaction - Annual Report 2016-17

IFB Industries Ltd.

Foreign exchange transactions are recorded at the rates of exchange prevailing on the date of the respective transaction. Exchange differences arising on foreign exchange transaction settled during the year are recognized in the Statement of Profit and Loss.

Monetary assets and liabilities denominated in foreign currency as at the balance sheet date are translated at the closing exchange rate on that date and resultant exchange differences are recognized in the Statement of Profit and Loss. Non-monetary items denominated in foreign currency are carried at cost.

Bajaj Corp Ltd.

(i) Initial Recognition

Foreign currency transaction are recorded in the reporting currency, by applying to the foreign currency amount the exchange rate between the reporting currency and the foreign currency at the date of the transaction.

(ii) Conversion

Foreign currency monetary items are reported using the closing exchange rate on the Balance Sheet date. Non-monetary items that are measured in terms of historical cost in a foreign currency are translated using the exchange rates at the dates of the initial transactions. Non-monetary items measured at fair value in a foreign currency are translated using a exchange rate at the date when the fair value is determined. The gain or loss arising on translation of non-monetary items measured at fair values is treated in line with the recognition of the gain or loss on the change in fair value of the item (i.e., translation differences on items whose fair value gain or loss is recognised in OCI or profit or loss are also recognised in OCI or profit or loss, respectively).

(iii) Exchange Differences

Exchange difference arising on the settlement of monetary items at rates different from those at which they were initially recorded during the year, or reported in previous consolidated financial statements, are recognized as income or as expenses in the year in which they arise.

VRL Logistics Limited

Functional and presentation currency

The financial statements are presented in currency INR, which is the functional and presentation currency of the Company.

Foreign currency transactions and balances

I.) Transactions denominated in foreign currencies are recorded at the exchange rate prevailing at the date of the transaction.

II.) Monetary assets and liabilities denominated in foreign currencies at the year-end are restated at the rate of exchange prevailing on the date of the Balance Sheet.

III.) Any exchange difference on account of settlement of foreign currency transaction and restatement of monetary assets and liabilities denominated in foreign currency is recognised in the Statement of Profit and Loss.

IV.) Non-monetary items are not retranslated at year-end and are measured at historical cost (translated using the exchange rates at the transaction date), except for non-monetary items measured at fair value which are translated using the exchange rates at the date when fair value was determined.

WIPRO Limited

Transactions in foreign currency are translated into the functional currency using the exchange rates prevailing at the date of the transaction. Foreign exchange gains and losses resulting from the settlement of such transaction and from translation at the exchange rates prevailing at the reporting date of monetary assets and liabilities denominated in foreign currencies are recognized in the statement of profit and loss and reported within foreign exchange gains/(losses), net within results of operating activities except when deferred in other comprehensive income as qualifying cash flow hedges. Gains/(losses) relating to translation or settlement of borrowings denominated in foreign currency are reported within finance expense. Non-monetary assets and liabilities denominated in foreign currency and measured at historical cost are translated at the exchange rate prevalent at the date of transaction. Translation differences on non-monetary financial assets measured at fair value at the reporting date, such as equities classified as FVTOCI are included in other comprehensive income, net of taxes.

Take Solutions Limited

1.8.1 All monetary items denominated in foreign currency are reflected at the closing exchange rates prevailing on the Balance Sheet date, the resultant exchange differences are recognized in the Statement of Profit and Loss. Non-monetary items which are carried in terms of historical cost denominated in a foreign currency are reported using the exchange rate at the date of the transaction.

1.8.2 Income and Expenditure items involving foreign exchange are translated at the exchange rate prevailing on the dates of transaction.

1.8.3 Exchange differences arising on foreign exchange transactions settled during the year are recognized in the Statements of Profit and Loss for the year.

1.8.4 For the purposes of consolidation the operations of overseas subsidiaries are considered as non-integral in nature and accordingly their assets and liabilities of non-Indian subsidiaries are translated at the period-end exchange rate and income and expenditure items are translated at the average rates during the period. The resultant translation adjustment is reflected as a separate component of Shareholders' funds as 'Foreign currency translation reserve'. Upon dissolution/ disposal of non-Indian subsidiary, the balance in foreign currency translation reserve in relation to that subsidiary will be transferred to Statement of Profit and Loss.

Orient Green Power Company Limited

Items included in the financial statements of each of the Group's entities are measured using the currency of the primary economic environment in which the entity operates (the "functional currency"). The consolidated financial statements are presented in Indian Rupees, which is the Company's functional currency and the Group's presentation currency.

In preparing the financial statements of each individual group entity, transactions in currencies other than the respective entities' functional currency (foreign currencies) are recognised at the rates of exchange prevailing at the dates of the transactions. At the end of each reporting period, monetary items denominated in foreign currencies are retranslated at the rates prevailing at that date. Non-monetary items carried at fair value that are denominated in foreign currencies are retranslated at the rates prevailing at the date when the fair value was determined. Non-monetary items that are measured in terms of historical cost in a foreign currency are not retranslated.

Exchange differences on monetary items are recognised in the consolidated statement of profit and loss in the year in which they arise except for:

a) Exchange differences on foreign currency borrowings relating to assets under construction for future productive use, which are included in the cost of those assets when they are regarded as an adjustment to interest costs on those foreign currency borrowings

   Assets and liabilities of entities with functional currency other than presentation currency are translated to the presentation currency (INR) using closing exchange rates prevailing on the last day of the reporting period. Income and expenses items are translated using average exchange rates for the period. Exchange differences arising, if any, are recognized in other comprehensive income and accumulated in equity as "Foreign currency translation reserve".

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From the Government

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Income Tax

1) ***CBDT Notifies Revised IT Form 29B for MAT Audit Report***

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

1. (1) These rules may be called the Income-tax (22nd Amendment), Rules, 2017.

   (2) They shall come into force from the date of their publication in the official Gazette.

2. In the Income-tax Rules, 1962, —

   (A) in rule 12, in sub-rule (2), in the proviso, after the words, figures and letters "section 115JB", the words, figures and letters "section 115JC" shall be inserted;

   (B) in Appendix II, for the 'Form No. 29B', the new Form shall be substituted **(for new form refer notification no. 80/2017, dated 18th August,2017.)**

2) ***Rules for valuation of unquoted equity shares***

The Finance Act, 2017 inserted clause (x) in Section 56(2) so as to widen the scope of taxability of receipt of sum of money or property without/inadequate consideration. Under the said clause read with Rule 11UA of the Income-tax Rules, 1962 if a person receives jewellery or artistic work or shares and securities for no/inadequate consideration, the fair market value (FMV) of the same is taken into account for computing taxable income under the said clause. Similarly, for immovable property, the stamp duty value is taken into consideration for determining taxability under the same section.

However, prior to issue of this notification, when these assets are received as underlying assets of unquoted equity shares of company, the book value (and not the FMV/stamp duty value) was taken into consideration for determining the value of such shares.

Further, the Finance Act, 2017 has inserted new Section 50CA in the Act w.e.f 01.04.2018 to provide that where consideration for transfer of unquoted equity share of a company is less than the FMV of such share determined in accordance with the prescribed manner, the FMV shall be deemed to be the full value of consideration for the purposes of computing income under the head "Capital Gains". In view of above, vide this notification, Rule 11UA(1) (c)(b) providing for determination of FMV of unquoted equity shares for the purposes of Section 56(2)(x) has been substituted and new Rule 11UAA has been inserted to provide for determination of Fair

Market Value for share other than quoted share for the purpose of Section 50CA. Accordingly, amendments have been carried out in the Rules to prescribe the method of valuation of unquoted equity share for the purpose of clause (x) of Section 56(2) and Section 50CA by taking into account the FMV of jewellery, artistic work, shares & securities and stamp duty value in case of immovable property and book value for the rest of the assets. The amended Rules shall come into force from the 01.04.2018 and shall apply in relation to A.Y. 2018-19 and subsequent years.

(Notification No. 61/2017, dated 12/07/2017)

3) ***Notification notifying bonds issued by Indian Railway Finance Corporation as "Long – term specified asset" for the purpose of Section 54EC of the Income Tax Act, 1961.***

In exercise of the powers conferred by clause (ba) of Explanation to section 54EC of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby notifies that any bond redeemable after three years and issued by the Indian Railway Finance Corporation Limited, a company formed and registered under the Companies Act, 1956 (1 of 1956), on or after the date of publication of this notification in the Official Gazette, as **'long-term specified asset'** for the purposes of the said section.

(Notification No. 79/2017, dated 08/08/2017)

4) ***Clarifications on computation of book profit for the purposes of levy of Minimum Alternate Tax (MAT) under section 115JB of the Income-tax Act, 1961 for Indian Accounting Standards (Ind AS) compliant companies.***

Central Government notified the Indian Accounting Standards (Ind AS) which are converged with International Financial Reporting Standards (IFRS) vide Companies (Indian Accounting Standards) Rules, 2015. Consequently, the Finance Act, 2017, has amended the provisions of section 115JB of the Income-tax Act, 1961 ('the Act') for Ind AS compliant companies w.e.f. 1st day of April, 2017 (A.Y. 2017-18). The Central Board of Direct Taxes ('the Board ') has received representations from various stakeholders seeking clarifications on certain issues arising there from. The matter was referred to an expert committee. The Committee after duly considering the representations from stakeholders has recommended issuance of clarifications by way of FAQs for these issues.

(Circular No. 24/2017, dated 25/07/2017)

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Association News

CA. Riken J. Patel
Hon. Secretary

CA. Maulik S. Desai
Hon. Secretary

1 **Forthcoming Programmes**

Date/Day	Time	Programmes	Venue
01.11.2017	7.00 p.m. onwards	Diwali Get-together	Ratnamani Party Plot, Opp. Star Bazar, Satellite, Jodhpur, Ahmedabad.

Glimpses of Past Events

11th August 2017 - 2nd Brain Trust Meeting cum workshop on "Recent Changes in Company & Tax Audit" – Trustee - CA. Raman H. Jokhakar (Past President, BCAS, Mumbai)

14th August 2017 - Study Circle meeting on "RCM and related procedure under GST" – Faculties - CA. Nitesh Jain and CA. Gaurav Khaitan

30.08.2017 - Special Programme for Lady Members – Lecture meeting on How to know HSN/SAC codes & their respective rates, Filing Returns GSTR-3B, Trans-1 & GSTR 1, 2 & 3 & Case studies on RCM-Speaker CA. Hema Shah, Dr. CA. Anjali Choksi & CA. Jinal Shah

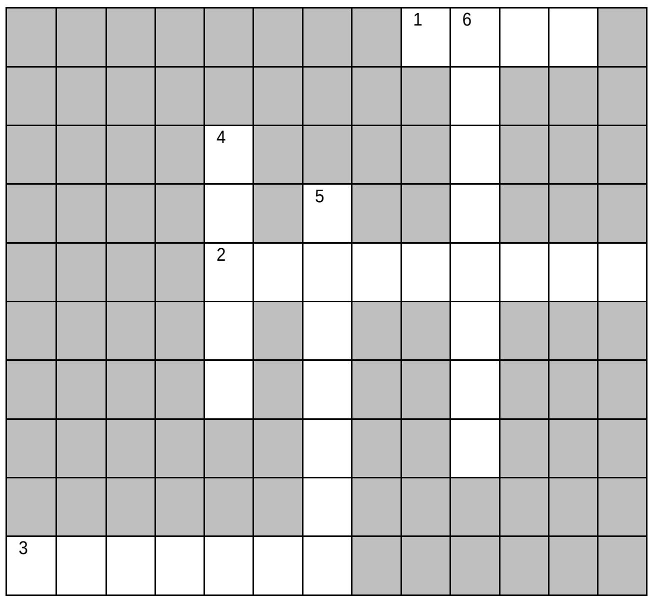
ACAJ Crossword Contest # 40

Across

1. Exemption from reverse charge is given vide notification no. 08/2017 where supply is made by unregistered supplier to registered supplier and the value of such supply is up to Rs. ________ thousand.
2. Before making as assessment under section 147 r.w. section 143(3), notice u/s 143(2) is ______.
3. The Authority for Advance Ruling can be approached to ascertain tax liability in India in relation to proposed or a completed transaction in ______.

Down

4. The foundation of the GST is completely system driven without much _____ intervention.
5. In case of MCORP Global P. Ltd. it was held that Tribunal has no power under Income Tax Act to _________ the assessment in appeal in view of the statutory provisions.
6. Our duty in life is determined by our _________.



Notes:

1. The Crossword puzzle is based on previous issue of ACA Journal.
2. Two lucky winners on the basis of a draw will be awarded prizes.
3. The contest is open only for the members of Chartered Accountants Association and no member is allowed to submit more than one entry.
4. Members may submit their reply either physically at the office of the Association or by email at caaahmedabad@gmail.com on or before 25/09/2017.
5. The decision of Journal Committee shall be final and binding.

Winners of ACAJ Crossword Contest # 39

1. CA. Mahavir Shah
2. CA. Dharmendra Bharwad

ACAJ Crossword Contest # 39 - Solution

Across

1. Drama
2. Health Care
3. Fifty

Down

4. Object
5. Notice
6. Revenue

❇ ❇ ❇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