CHALLENGES
AVENUES
ACTION

# AHMEDABAD CHARTERED ACCOUNTANTS JOURNAL

Volume : 41 | Part 9 | December, 2017


Chartered Accountants Association, Ahmedabad

**Dr. Tejal Dalal**

**M.S.(Ophthal)**
Member of American Society
of Cataract and Refractive Surgery
Reg. No.: G-6694

TEJ EYE CENTER
EYE HOSPITAL
OPTICALS

**ડૉ. તેજલ દલાલ**

એમ.એસ. (ઓપ્થલ)
અમેરીકન સોસાયટી ઓફ કેટરેક્ટ એન્ડ
રીફ્રેક્ટીવ સર્જરીના સભ્ય
રજી. નં.: G-6694

Dear All,

As part of TEC's ongoing endeavor to spread awareness of avoidable blindness across Gujarat, we have collaborated with Chartered Accountants' Association, Ahmedabad to arrange a free eye check-up program for all of you - this includes providing free eye check-up gift coupons to encourage regular eye examinations, create awareness for problems like Cataract and Glaucoma and draw special attention to avoid Diabetic eye diseases.

Eye diseases have no significant symptoms at the beginning or sometimes even before the occurrence of permanent loss, so screening at early stage becomes crucial. WHO states - 80% of the eye diseases are either avoidable or treatable when detected in time. Glaucoma (second most common cause of blindness after Cataract) which is inherited does not show any symptoms in early stages. 25% of the patients visit a doctor when eyesight is lost in one eye and unfortunate 10% when eyesight is lost in both eyes. 2 out of 10 people turn blind because of diabetes; hence people should be as diligent for eye exam as they are for sugar control.

Eye check-up for kids becomes essential as 10% of kids have one eye weaker than the other (Lazy eye) - this can be corrected only if detected and treated at early age.

Request each one of you to contact nearest Tej Eye Center branch to avail **Free eye checkup** for yourself and your families at the earliest. Hurry!

**Dr. Tejal Dalal**
**M.S.(Ophthal)**

## TEJ EYE CENTER

**Gandhinagar** 901/1, Sector-7-C, Opp. Main Bus Depot, 'GH' Road, Gandhinagar - 382 007. **Ph.:(079) 23245126 (M) 9924088500**
૯૦૧/૧, સેક્ટર-૭ સી, ઘ-રોડ, મેઈન બસ ડેપો સામે, ગાંધીનગર-૩૮૨ ૦૦૭.

**Vijay Cross Road** Ground floor, Shyamgokul Complex, Near Manan Maruti Showroom, Towards Helmet Circle, Ahmedabad - 380 009. **(M) 9727751120**
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Ahmedabad Chartered Accountants Journal
**E-mail** : caaahmedabad@gmail.com **Website** : www.caa-ahm.org - caaahmedabad
**Volume : 41** **Part : 9** **December, 2017**

# CONTENTS

## Attention

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| | Amount in ` | | |
|---|---|---|---|
| | Basic | GST | Total |
| Life Membership | 7500/- | 1350/- | 8850/- |
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## Professional Awards

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

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

## Published By

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**Printed : Pratiksha Printer**

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## *Be Happy, Live in Present*

For every action undertaken by any human being, the ultimate object is to be happy. Happiness is not a gross concrete product that can be purchased or borrowed from the market. Man, today, is making greatest of efforts to attain that piece of happiness but unfortunately finding it difficult. Many believe that life today is full of sorrow and happiness is just an illusion or it is a moment when we are not in distress, only then we seem to be happy. If it is so, what a sorry state of affairs it is!

A man wants to be happy every moment of his life but the truth is far from the expectation. He is always found to be worrying about the past or anxious of the future and in the process completely disassociated with the present. The easiest way to be happy and stay in present, enjoy every moment forgetting past or the future.

One needs to be content with what he has but somehow we concentrate more on what we do not have. We are not grateful to the Lord for all that has been bestowed upon us. I have a car but if my neighbor has two, my happiness is lost. I have a small house but my business partner has a bigger one, it makes me restless and agitated. Thinking about what we do not have, we often forget to enjoy what we have. There are numerous reasons to be happy about but somehow our focus shifts to 'have nots' instead of 'haves'. This sense of discontent within is the cause of all our sorrows. More often, this discontent is not because of not having but somebody else having.

We are in a time when everybody is found in hustle and bustle of life. From morning to evening man is trying to reach the pinnacle but somehow everything appears to be misdirected not knowing where is he going. In this run, he may attain materialistic prosperity but in the process inner peace is lost somewhere.

There is a Russian proverb "There is no sickness in the man, there is sick man." There may be certain unhappy incidents like death in a family, disease, divorce, deceit, dishonor etc. All these are temporary testing times in life and one has to grow out of it. If you keep on holding onto these incidents you are bound to remain unhappy all through your life. Happiness in not in remembering and remaining in past, so forget the past. Happiness in not in being anxious about the future because we do not know what happens next. Therefore enjoy the present with what we have, be grateful for anything and everything you have and that is the true happiness of life.

**Don't let the silly little things steal your happiness.**

# Editorial

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## Economy on a High!

The year 2017 was undoubtedly one of the most happening and vibrant year since 1990 when the Indian economy opened for foreign investors. The demonetization happened in November 2016 and its effects were felt till the beginning of the second half of 2017. The growth rate slowed down for the Indian economy in 2017 but now it appears to be on the growth trajectory once again. With the effects of GST and demonetization already behind us, the coming year augurs well for the Indian economy. The latest UN report suggests that the Indian economy will grow at 7.2 percent in the coming year and that will again be a world beating GDP growth.

Sensex is also on a roll and after some small corrections hitting it its record high every day. It has managed to send a strong signal to the short sellers that it is in no mood to give up its gains. It is at its peak high around 35700. The Indian markets have reacted positively to the BJP win in Gujarat and Himachal Pradesh. The BJP win, which also gives an insight into the possible outcome of the polls in 2019, comes as a reaffirmation for the continuation of the Narendra Modi's policies, keeping the markets upbeat.

The upward growth sentiment is also visible from the words of Prime Minister Modi where in an interview to one of the TV channels he said "as far as economic growth is concerned, you will remember that in 2013-14 India was named in the 'fragile five'. It was considered a lost battle. Within three years, India has come out from the 'fragile five' and our economic policy is being seen as a shining star with optimism and expectation. If you take average of three years, we have brought inflation to 3% from 10%. Secondly FDI from $30 billion is now over $60 billion. We brought down fiscal deficit to 3.5% from 4.5%. Current account deficit was 4%, we have got it down to between 1 and 2%."

To another question on ease of doing business he said "India has actually jumped 42 places and not 30 in ease of doing business after we assumed office. My personal belief is that ease of doing business is very good but in a country like India, the ultimate goal should be ease of living. That is why my focus is more on ending struggles of the common man who has to fight the system. The system should be proactive for the needs of the common man".

Though there may be some warning signals appearing about the state of economy in section of media and by some economists, the intent and the action of the government makes it absolutely clear the Indian economy is marching ahead and best of times are yet to come. This government is not just trying to better the state of economy but also improve the state of living of the citizens of the country.

CA. Ashok Kataria

# From the President

**CA. Kunal A. Shah**
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Dear Members,

Wishing You a Very Happy and a Prosperous New Year 2018!!!

Let our New Year's resolution be : Start making our dreams happen, by changing the old ways that keep pulling us down. Let's make resolutions...and even if we break them...let's start again! Let's fly higher on the wings of our intuition and imagination and achieve our desired goals.

The time barring assesments are over now and the union budget 2018 is approaching fast. The Government's aggressive and impressive track record in devising and implementing tough economic initiatives is finally paying off. The year is on its last legs but there's plenty of enthusiasm in the stock markets, with the sensex crossing the 34K mark.

India of late has upgraded infrastructure, raised foreign investment limits and digitized approvals and registrations. Another major step taken by the government was the introduction of the Bankruptcy and Insolvency Act, 2017. The act will make it easier to exit or attempt a revival of a business, thereby improving the nonperforming assets (NPAs) dilemma for the financial services sector. This will make it easier for financial institutions and banks to deal with NPAs arising from failed corporate ventures; it also helps firms by making the revival process and/or liquidation easier.

GST was successfully launched this year but now is facing some implementation problems. The focus of the GST Council is clearly now on boosting revenue collection. Nationwide launch of the e-way bill from February 1 is expected to check evasion by ensuring goods are tagged and tax paid.

**One Kind Act A Day Could Work Wonders**

Many people today feel hopeful that their lives will improve, either their personal life or the world around them. The news every day shows widespread religious, cultural, and racial strife; economic challenges for many; and mass migrations of refugees. What can we do? How can we change ourselves? Sometimes it seems impossible. But it's really very simple. As Paramhansa Yogananda taught, when we act in ways that positively affect others, we also begin to change ourselves. Even when we don't have a particular quality or tendency, simply acting in that way will begin to change us.

**Patel Power Goes Business Class**

Setting the stage for community development through collaborative efforts , hundreds of Patidar industrialists from Gujarat and abroad came to one platform, at the Global Patidar Business Summit, 2018. Speaking on the occasion, Chief Minister Vijay Rupani lauded the efforts of the Patidar community.

**Activities at the Association:**

To understand what is "Trust" – Its registration and taxation , the accountant plus committee of CAA had organized a lecture meeting on 18/12/2017 and the topic was very well highlighted by the past president CA Ajit C. Shah.

Every year Chartered Accountants Association, Ahmedabad organizes cricket match between President XI and Secretary XI. Also since last year in addition to the said match, even a match between Vice President XI and Jt. Secretary XI was played on 23rd December, 2017. Both the matches were won by the Secretaries.

A lecture on Companies Amendment Bill, 2017 by CS M. C. Gupta was organized on 29/12/2017 in which participants were enriched by the eminent speaker on the subject.

A half day seminar was organized on 10/01/2018 on the topic of Tax Planning through HUF and Family Arrangement by Dr. Girish Ahuja from Delhi and Succession Planning, Inbound & Outbound Investments and Liberalized Remittance Scheme by CA. Rashmin Sanghvi from Mumbai. The seminar was well responded by the participants and all the participants were enriched by the knowledge shared by both the eminent speakers.

I would like to conclude with a thought on humanity – "You must not lose faith in humanity. Humanity is an ocean; if a few drops of the ocean are dirty, the ocean does not become dirty.

**-Mahatma Gandhi**

"All human actions have one or more of these seven causes: chance, nature, compulsions, habit, reason, passion, desire. – **Aristotle**

Wishing you a Happy Uttarayan and our 68th Republic Day!!

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

With best regards,
**CA. Kunal A. Shah**
President

# Invite, Accept and Renew Deposit under the Companies Act, 2013

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Finance is one of the first most requirement for any business. For corporates, raising finance through deposits from public is considered as the important source. When there is a discussion of obtaining funds, acceptance of deposits have been considered one of the cheaper financial source in the Corporate Sector. Most of the deposits accepted by the Companies are unsecured in nature, and therefore to safeguard the interests of the depositors having regard to the failure of some companies to meet their obligations to the depositors under the previous Act, the Companies Act, 2013 has made innovative and positive changes in the manner of invitation, acceptance and renewal of deposits both from the inner as well as outer sources i.e. members & public at large.

One of the major concern of corporates to accept deposits is to minimize their existing dependence on bank finance to meet their financial requirements.

Under the 1956 Act, acceptance of deposits from members, directors or their relatives could be done without any regulatory compliance, however under Section 73 of the 2013 Act, a private company is required to undergo a lot of formalities before accepting any deposits from its members also.

**Exclusion of the Applicability:**

Proviso to Section 73(1) read with rule 1(3) of Companies (Acceptance of Deposits) Rules 2014 excludes banking Companies, NBFCs as defined in the Reserve Bank of India Act, 1934 and registered with Reserve Bank of India, a housing finance company registered with National Housing Bank established under the National Housing Bank Act 1987 and any other company as may be specified.

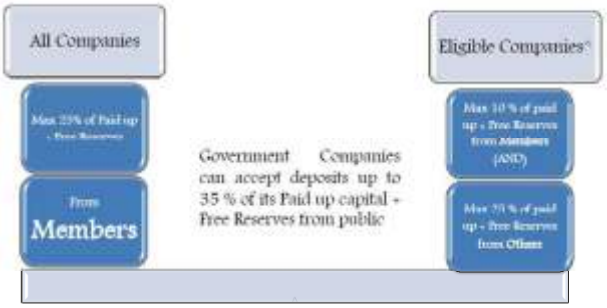
**Who is a depositor?**

Rule 2(1)(d) under Chapter XV defines depositor as under 'Depositor' means-

i. any member of the company who has made a deposit with the company in accordance with sub-section (2) of section 73 of the Act, or

ii. any person who has made a deposit with a public company in accordance with section 76 of the Act.

**Maximum Cap to which a Company can accept Deposits:**




**(A) Conditions for Acceptance of Deposits from Members:**

A company may, subject to

(i) the passing of a resolution in general meeting; and

(ii) subject to such rules as may be prescribed in consultation with the Reserve Bank of India,

accept deposits from its members on such terms and conditions, including the provision of security, if any, or for the repayment of such deposits with interest, as may be agreed upon between the company and its members, subject to the fulfilment of the following conditions, namely:—

a) issuance of a circular to its members including therein a statement showing the financial position of the company, the credit rating obtained, the total number

of depositors and the amount due towards deposits in respect of any previous deposits accepted by the company and such other particulars in such form and in such manner as may be prescribed;

b) filing a copy of the circular along with such statement with the Registrar within 30 days before the date of issue of the circular;

c) depositing such sum which shall not be less than 15% of the amount of its deposits maturing during a financial year and the financial year next following, and kept in a scheduled bank in a separate bank account to be called as deposit repayment reserve account;

d) providing such deposit insurance;

e) certifying that the company has not committed any default in the repayment of deposits accepted either before or after the commencement of this Act or payment of interest on such deposits; and

f) providing security, if any for the due repayment of the amount of deposit or the interest thereon including the creation of such charge on the property or assets of the company.

In case when a company does not secure the deposits or secures such deposits partially, then, the deposits shall be termed as ''unsecured deposits'' and shall be so quoted in every circular, form, advertisement or in any document related to invitation or acceptance of deposits.

**(B) Acceptance of Deposit from Public by certain Companies:**

A public company having a net worth of not less than one hundred crore rupees or a turnover of not less than five hundred crore rupees and which has obtained prior consent of its members in general meeting by means special resolution and filed the same with the Registrar, can invite the public for acceptance of deposits. (Section 76(1) of the Act and Rule 2(e) of the Companies (Acceptance of Deposits) Rules, 2014.)

However, a company exercising borrowing limit within the over-all limit not exceeding aggregate of its paid up capital and free reserves may accept deposit by an ordinary resolution

An eligible Public Company may accept deposits from persons other than its members. It shall be required to obtain the rating (including its networth, liquidity and ability to pay its deposits on due date) from a recognised credit rating agency for informing the public the rating given to the company at the time of invitation of deposits from the public which ensures adequate safety and the rating shall be obtained for every year during the tenure of deposits.

**A Govt. Company** is eligible to accept deposits including renewal thereof, if the amount of such deposits together with the amount of other deposits outstanding as on the date of acceptance or renewal does not exceed 35% of the aggregate of the paid up share capital and free reserves of the company.

**Creation of Charge in case of Secured Deposits:**

A company accepting secured deposits from the public shall within 30 days of such acceptance, create a charge on its assets of an amount not less than the amount of deposits accepted in favour of the deposit holders.

**Restriction of usage of Deposit Repayment reserve (DRR)**

DRR shall not be used by the company for any purpose other than repayment of deposits. [Section 73(5)].

**Tenure of Deposit:**

No Company and the eligible company shall accept or renew any deposit, whether secured or unsecured, which is repayable on demand or upon receiving a notice, within a period of less than six months or more than thirty-six months from the date

of acceptance or renewal of such deposit. [Section 73(2)].

*Exceptions to above:*

A company may, for the purpose of meeting any of its short term requirements of funds, accept or renew such deposits for repayment earlier than six months from the date of deposit or renewal, as the case may be, subject to the condition that-

(a) such deposits shall not exceed 10% of the aggregate of the paid up share capital and free reserves of the company, and

(b) such deposits are repayable not earlier than three months from the date of such deposit or renewal thereof.

**Rate of interest of deposits/payment of brokerage: Rule 3(6) –**

No company or any Eligible company shall invite or accept or renew any deposits in any form, carrying a rate of interest or pay brokerage thereon at a rate exceeding the maximum rate of interest or brokerage prescribed by the RBI for acceptance of deposits by NBFCs.

*Who is eligible to receive brokerage ?*

Only the person who is authorized, in writing, by a company to solicit deposits on its behalf and through whom deposits are actually procured will be entitled to the brokerage and payment of brokerage to any other person for procuring deposits shall be deemed to be in violation of these Rules.

**Form and particulars of advertisements/ circulars [Rule 4]**

(1) Every company referred to in section 73(2) and an eligible company, shall issue a circular to all its members and to the public respectively by RPAD or speed post or by electronic mode in Form DPT-1. Circular may be published in English language in an English newspaper and in vernacular language in a vernacular newspaper having wide circulation in the State in which the registered office of the company is situated.

(2) Every company inviting deposits from the public shall upload a copy of the circular on its website, if any.

(3) Company shall not allow any other person to issue or cause to be issued the circular on its behalf, unless it is issued on the authority.

(4) A copy should be delivered to the Registrar not less than thirty days before the date of such issue, signed by a majority of the directors.

(5) It shall be valid until the expiry of 6 months from the date of closure of the financial year in which it is issued or until the date on which the financial statement is laid before the company in AGM or, where the AGM for any year has not been held, the latest day on which that meeting should have been held, whichever is earlier, and a fresh circular or circular in the form of advertisement shall be issued, in each succeeding financial year.

(6) Effective date of issuance: For the purpose of this rule, the date of the issue of the newspaper in which the advertisement appears shall be taken as the date of issue of the advertisement and the effective date of issue of circular shall be the date of dispatch of the circular.

**Deposit Insurance [Rule 5]**

The Ministry has made some practical amendments from time to time with regard to the Deposit Insurance criteria provided under Rule 5 of he Companies (Acceptance of Deposits) Rules, 2014. The latest amendment has been made vide Notification Dated 11th May, 2017 in the Companies (Acceptance of Deposits) Amendment Rules, 2017, wherein they have relaxed the need to have a deposit insurance upto 31st March 2017 or till the availability of a deposit insurance product, whichever is earlier" .

**Creation of Security [Rule 6]:**

(1) For the purposes of providing security, every company except the Government Company inviting secured deposits shall provide for security by way of a charge on its assets as referred to in Schedule III of the Act excluding

intangible assets of the company for the due repayment of the amount of deposit and interest thereon for an amount which shall not be less than the amount remaining unsecured by the deposit insurance.

In the case of deposits which are secured by the charge on the assets referred to in Schedule III of the Act excluding intangible assets, the amount of such deposits and the interest payable thereon shall not exceed the market value of such assets as assessed by a registered valuer. For the purposes of this sub-rule it is clarified that the company shall ensure that the total value of the security either by way of deposit insurance or by way of charge or by both on company's assets shall not be less than the amount of deposits accepted and the interest payable thereon.

(2) The security (not being in the nature of a pledge) for deposits as specified in sub-rule (1) shall be created in favour of a trustee for the depositors on:

(a) specific movable property of the company, or

(b) specific immovable property of the company wherever situated, or any interest therein.

**Appointment of deposit trustees [Rule 7]:**

**Consent of deposit trustees with respect to their appointment:**

Every company except a Government Company shall issue a circular or advertisement inviting secured deposits unless it has appointed one or more deposit trustees for creating security. A written consent shall be obtained from the deposit trustee(s) before their appointment and the same consent shall appear in the circular or circular in the form of advertisement.

**Execution of deposit trust deed before issuing advertisement:**

The company shall execute a deposit trust deed in Form No.DPT-2 at least 7 days before issuing the circular or circular in the form of advertisement.

**Certain persons not to be appointed as deposit trustees:**

No person including a company that is in the business of providing trusteeship services shall be appointed as a trustee for the deposit holders, if the proposed trustee –

a. is a director, key managerial personnel or any other officer or an employee of the company or of its holding, subsidiary or associate company or a depositor in the company;

b. is indebted to the company, or its subsidiary or its holding or associate company or a subsidiary of such holding company;

c. has any material pecuniary relationship with the company;

d. has entered into any guarantee arrangement in respect of principal debts secured by the deposits or interest thereon;

e. is related to any person specified in clause (a) above.

**Removal of deposit trustees:**

No deposit trustee may be removed after the issue of circular or advertisement and before the expiry of his term except with the consent of all the directors present at a meeting of the board. In case the company is required to appoint independent directors, at least one independent director shall be present in such meeting of the Board

**Duties of deposit trustees:**

(1) ensure that the assets of the company, together with the amount of deposit insurance are sufficient to cover the repayment of the principal amount of secured deposits outstanding and interest accrued thereon;

(2) satisfy himself that the circular or advertisement inviting deposits does not contain any information which is inconsistent with the terms of the deposit scheme;

(3) ensure that the company does not commit any breach of covenants and provisions of the trust deed;

(4) take such reasonable steps as may be necessary to procure the interest of deposit holders;

(5) take steps to call a meeting of the holders of depositors;

(6) supervise the implementation of the conditions regarding creation of security for deposits and the terms of deposit insurance;

(7) do such acts as are necessary in the event the security becomes enforceable;

**Meeting of depositors through deposit trustee: [Rule 9]**

The meeting of all the depositors shall be called by the deposit trustee on –

(1) requisition in writing signed by at least onetenth of the depositors in value for the time being outstanding;

(2) the happening of any event, which constitutes a default or which in the opinion of the deposit trustee affects the interest of the depositors.

Form of application for deposits [Rule 10]:

I. No Company shall accept, or renew any deposit, whether secured or unsecured, unless an application, in the form prescribed by the company, is submitted by the intending depositor.

II. The application shall contain a declaration by the intending depositor to the effect that the deposit is not being made out of any money borrowed by him from any other person.

**Nomination [Rule 11]:**

A depositor may, at any time, make a nomination.

**Furnishing of deposit receipts to depositors [Rule 12]:**

Every company shall, on the acceptance or renewal of a deposit, furnish to the depositor or his agent a deposit receipt for the amount received by the company, within a period of two weeks from the date of receipt of money or realization of cheques which shall be signed by an officer of the company duly authorized by the Board and shall state the date of deposit, the name and address of the depositor, the amount received by the company as deposit, the rate and periodicity of interest payable thereon and the date on which the deposit is repayable.

**Maintenance of liquid assets and creation of Deposit Repayment Reserve Account [Rule 13]:**

Every company except the Government Company shall on or before the 30th day of April of each year deposit the sum as prescribed in Act with any scheduled bank and the amount so deposited shall not be utilised for any purpose other than for the repayment of deposits. The amount remaining deposited shall not at any time fall below fifteen percent of the amount of deposits maturing, until the end of the current financial year and the next financial year.

**Registers of deposits [Rule 14]:**

Any Company accepting deposits is required to maintain one or more separate registers for deposits accepted/renewed with all the details as required under Rule 14. Further it is also required under the said Rule that the entry in the register shall be made within 7 days from the date of issuance of deposits and that it shall be authenticated by a director or secretary of the company or by any other officer authorized by the Board for this purpose.

**Return of deposits to be filed with the Registrar [Rule 16]:**

Every company shall on or before the 30th day of June, of every year, file with the Registrar, a return in Form DPT-3 and furnish the information contained therein as on the 31st day of March of that year duly audited by the auditor of the company.

**Damages for fraud:**

When a company fails to repay the deposit or part thereof or any interest within the stipulated time or such further time as may be allowed by the Tribunal, therefore it is deemed to be proved that the deposits had been accepted with intent to defraud the depositors or for any fraudulent purpose, every officer of the company who was responsible for the acceptance of such deposit shall,

without prejudice to the provisions contained in sub-section (3) of that section and liability under section 447, be personally responsible, without any limitation of liability, for all or any of the losses or damages that may have been incurred by the depositors. (Section 75(1))

Any suit, proceedings or other action may be taken by any person, group of persons or any association of persons who had incurred any loss as a result of the failure of the company to repay the deposits or part thereof or any interest thereon. (Section 75(2))

**Disclosure in Board Report:**

Rule 8 of the Companies (Accounts) Rules, 2014:

(v) The details relating to deposits, covered under Chapter V of the Act:

| | |
|---|---|
| Amount of Deposit Accepted | |
| Amount that remained unpaid or unclaimed at the end of the financial year | |

There has been default in repayment of deposits or payments of interest thereon during the year, details are as under

| | |
|---|---|
| Amount at the beginning of the Year | |
| Maximum amount during the year | |
| Amount at the end of the year | |
| Deposits which are not in Compliance with the requirement of Schedule V of the Act | |

**Powers Conferred On National Company Law Tribunal:**

1. **Power To extend the repayment period**: Section 74(2) states that the tribunal may on an application made by the company, after considering the financial condition of the company, the amount of deposit or part thereof and the interest payable thereon and such other matters, allow further time as considered reasonable to the company to repay the deposit.
2. **Right of Depositor to approach NCLT:** Section 73(4) states that when a company fails to repay the deposit or part thereof or any interest thereon under subsection (3), the depositor concerned may apply to the Tribunal for an order directing the company to pay the sum due or for any loss or damage incurred by him as a result of such non- payment and for such other orders as the Tribunal may deem fit.
3. **Directions to Company**: To direct the company to make repayment of the matured deposits or for any loss or damage incurred by him as a result of non-payment.
4. **Open doors to depositors**: As per Section 245(1) (g) requisite number of depositor or depositors may, if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, file an application before the Tribunal on behalf of the depositors for seeking orders including claiming damages or compensation or demand any other suitable action from or against—
   - the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part;
   - the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or
   - any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part;
   - to seek any other remedy as the Tribunal may deem fit.
5. **Liability of the Audit Firm:** Section 245 (2) states that when the depositors seek any damages or compensation or demand any other suitable action from or against an audit firm, the liability shall be of the firm as well as of

each partner who was involved in making any improper or misleading statement of particulars in the audit report or who acted in a fraudulent, unlawful or wrongful manner.

6. **Requisite depositors means:** Section 245(3)(ii) states that the requisite number of depositors provided in sub-section (1) shall not be less than one hundred depositors or not less than such percentage of the total number of depositors as may be prescribed, whichever is less, or any depositor or depositors to whom the company owes such percentage of total deposits of the company as may be prescribed.

**More losses to the Company and to the Board on making defaults:**

A company shall not declare Dividend on its equity shares in case of non-compliance of provisions relating to the acceptance of deposits under the Act, till such time the deposits accepted have been repaid with interest in accordance with the terms and conditions of the agreement entered with the depositors.

**Disqualification of directors due to default in payment of deposit:**

Further with regard to default in payment of deposits apart from other penalties and punishments the Companies Act, 2013 has made a strong catch on the responsibilities of the Directors and has laid down the heaviest penalty by disqualifying the Directors on default in payment of deposit amount and interest thereon for a period of one year or more.

As per Section 164(2): "No person who is or has been a Director of a Company which has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay dividend declared and such failure to pay or redeem continues for one year or more."

Further as Per Rule 14(2) of the Companies (Appointment & Qualifications of Directors) Rules, 2014 whenever a Company fails to repay any deposit as specified in sub-section 2 of Section 164, the Company shall immediately file Form DIR9, to the Registrar of Companies furnishing therein the names and addresses of all the Directors of the Company during the relevant financial years.

And when a Company fails to file Form DIR9 within the relevant period of thirty days of the failure that would attract the disqualification under sub-section (2) of Section 164, officers of the Company specified in clause (60) of Section 2 of the Act shall be the officers in default.

**Class action suit:**

The other class which is allowed to file class action suit is depositors, which is defined under the Companies (Acceptance of Deposits) Rules, 20149 (in short "Deposit Rules") as under:

(i). any member of the company who has made a deposit with the company in accordance with the provisions of sub-section (2) of section 73 of the Act, or (ii). any person who has made a deposit with a public company in accordance with the provisions of section 76 of the Act.

**(According to me the amendment section shall not be included in the Article, rather it shall be explained while discussing the relevant section.)**

**Amendments effected:**

1. **ON 31.03.2015:**

(l) in rule 2, h sub-rule (l), in clause (c),-

(a) in sub-clause (vii), in Explanation (a), the following proviso shall be inserted, namely:-

"Provided that unless otherwise required under the Companies Act, 1956 (1 of 1956) or the Securities and Exchange Board of lndia Act, 1992 (15 of 1992) or rules or regulations made thereunder to allot my share, stock, bond, or debenture within a specified period, if a company had received any amount by way of subscriptions to any shares, stock, bonds or debentures before the 1st April, 2014 and disclosed it in the balance sheet for the financial year ending on or before the 1st March, 2014 against which the allotment is pending on the 3lst March, 2015, the company shall, by the 1st June 2015, either return such amounts to the

persons from whom these were received or allot shares, stock, bonds or debentures or comply with these rules."

(b) in sub-clause (xii), in item (b),-

(A) for the words "consideration for property", the words "consideration for an immovable property" shall be substituted;

(B) for the words "against the property", the words "against such property" shall be substituted;

(c) in sub-clause (xii), in the explanation, for the words 'referred to in the first proviso", the words "referred to in the proviso" shall be substituted

(2) in rule 3, after sub-rule (7), the following sub-rule shall be inserted, namely:-

"(8) Every eligible company shall obtain, at least once in a year, credit rating for deposits accepted by it in the manner specified herein below and a copy of the rating shall be sent to the Registrar of Companies along with the return of deposits in Form DPT-3;

| | Name of Agency | Minimum Investment Grade Rating |
|---|---|---|
| (a) | The Credit Rating Information Services of India Limited. | FA- (FA Minus) |
| (b) | ICRA Ltd | MA- (MA Minus) |
| (c) | Credit Analysis and Research Ltd | CARE BBB (FD) |
| (d) | Fitch Rating India Private Ltd | tA-(ind)(FD) |
| (e) | Brickwork Ratings India Pvt. Ltd | BWR F A |
| (f) | SME Rating Agency of India Ltd. | SMERA A" |

(3) in rule 5, in sub-rule (1), for the proviso, the following proviso shell be substitued, namely:-

"Provided that the companies may accept deposit without deposit insurance contract till the 31st March, 2016 or till the availability of a deposit insurance product, whichever is earlier."

**2. <u>ON 15.09.2016:</u>**

2. In the Companies (Acceptance of Deposits) Rules, 2014 (hereinafter referred to as said rules), in rule 2, in sub-rule (1), in clause (c), for sub-clause (viii), the following shall be substituted, namely:—

"(viii) any amount received from a person who, at the time of the receipt of the amount, was a director of the company or a relative of the director of the private company:

Provided that the director of the company or relative of the director of the private company, as the case may be, from whom money is received, furnishes to the company at the time of giving the money, a declaration in writing to the effect that the amount is not being given out of funds acquired by him by borrowing or accepting loans or deposits from others and the company shall disclose the details of money so accepted in the

Board's report;".

3. In the said rules, in rule 3,—

(a) for the words "paid-up share capital and free reserves", wherever they occur, the words "paid-up share capital, free reserves and securities premium account" shall be substituted;

(b) in sub-rule (8), in the Table, for item (e) and entries relating thereto the following shall be substituted, namely:-

**3. <u>ON 29.06.2016:</u>**

The Companies (Acceptance of Deposits) Amendment Rules, 2016 notified on June 29, 2016, amending and expanding the list of exempted Deposits.

Rule 2 (1) (c)

Under existing sub-clause (ix), compulsory convertible bonds or debentures convertible within a period of five years are included in 'exempt Deposits'. Now, compulsorily

convertible bonds or debentures convertible within a period of ten years are included in 'exempt Deposits'.

Under sub-clause (xi), any non-interest bearing amount received or held in trust. The word 'or' has been replaced with 'and' to clarify that any non-interest bearing amount held in trust is except from the ambit of 'Deposit'.

***Amendment in the Rule 3 – specifying limits for acceptance of deposits from members:***

In sub rule (3), limits for accepting or renewing any deposit from members of a public company has been increased from '**25%**' of the aggregate of the paid-up share capital and free reserves of the company to **'35%'.**

For private companies, a separate limit has been prescribed for acceptance of deposits from its members. Private companies may accept from its members, deposits not exceeding 100% of the aggregate of the paid up share capital, free reserves and **securities premium account**. For public companies, securities premium account is not available in calculating such limits.

Further, the company has to file details of monies so accepted from members to the Registrar in the manner as may be prescribed.

***Amendment in the Rule 4***

Advertisement inviting deposits has to be posted on the website of the company.

Advertisement in Form DTP-1 now contains a Disclaimer paragraph.

***Amendment in the Rule 5***

An exemption has been granted from obtaining deposit insurance till March 31, 2017, or till the availability of a deposit insurance product, whichever is earlier.

***The following additional items are included in 'exempt Deposits' category under Rule 2 (1) (c)***

Sub clause (ixa): Money raised by issue of non-convertible debentures not constituting a charge on the company's assets, and listed on stock exchange.

Sub clause (xii): In the course of, or for the purpose of, the business:

(e): Advances received towards consideration for providing future services in the form of a warranty/ maintenance contract as per written agreement/ arrangement, if the period for providing such services does not exceed the period as prevalent in common business practice, or five years from the date of acceptance of service, whichever is less.

(f): Amount received as an advance and as allowed by any sectoral regulator/ in accordance with directions of Government.

(g): Amount received as an advance for subscription towards publication, whether in print or in electronic, to be adjusted against receipt of such publications.

If the above-mentioned amounts become refundable, due to non-availability of necessary permission required or approval required, if any, to deal in goods or provision of services for which such amount is received, it will be deemed to be a deposit on the expiry of 15 days from the day it becomes due for refund.

Sub clauses (xv) and (xvi): Any amount received by way of subscription under Chit Fund Act or SEBI's CIS Regulations.

Sub clause (xvii): Amounts of Rs. 25 lacs or more received by a start-up company by way of convertible note (convertible into equity shares or repayable within a period not exceeding 5 years from date of issue) in a single tranche, from a person.

**'Start-up Company'** is defined to mean a **private company** incorporated under the Companies Act, 2013 or the Companies Act, 1956, and also fulfilling Start-up India Guidelines issued by the DIPP.

**'Convertible note'** has been defined to mean an instrument evidencing receipt of money initially as a debt, which is repayable at the

option of the holder, or which is convertible into such number of equity shares of the start-up company upon occurrence of specified events, and as per other terms and conditions agreed to and indicated in the instrument.

Sub clause (xviii): Any amount received from SEBI-registered Alternative Investment Funds, Domestic Venture Capitalists and Mutual Funds.

***New Rule 16A Disclosure in Notes to the Financial Statement***

In case of private companies -money received from the Directors and their relatives.

In case of other companies - money received from the Director.

**4. ON 11.05.2017:**

2. In the Companies (Acceptance of Deposits) Rules, 2014 (hereinafter referred to as the principal rules),—

(a) in rule 2, in sub-rule (1), in clause (c), in sub-clause (xviii), after the words "Domestic Venture Capital Funds" the words ", Infrastructure Investment Trusts" shall be inserted.

(b) in rule 5, in sub-rule (1), for the proviso, the following proviso shall be substituted, namely:—

"Provided that the companies may accept deposits without deposit insurance contract till the 31st March, 2018 or till the availability of deposit insurance product, whichever is earlier.".

**5. ON 19.09.2017:**

2. In the Companies (Acceptance of Deposits) Rules, 2014 (hereinafter referred to as the principal rules), in rule 3, in sub-rule (3), for the proviso, the following shall be substituted, namely:-

"Provided that a Specified IFSC Public company and a private company may accept from its members monies not exceeding one hundred percent of aggregate of the paid up share capital, free reserves and securities premium account and such company shall file the details of monies so accepted to the Registrar in Form DPT-3.

Explanation.—For the purpose of this rule, a Specified IFSC Public company means an unlisted public company which is licensed to operate by the Reserve Bank of India or the Securities and Exchange Board of India or the Insurance Regulatory and Development Authority of India from the International Financial Services Centre located in an approved multi services Special Economic Zone set-up under the Special Economic Zones Act, 2005 (28 of 2005) read with the Special Economic Zones Rules, 2006:

Provided further that the maximum limit in respect of deposits to be accepted from members shall not apply to following classes of private companies, namely:—

(i) a private company which is a start-up, for five years from the date of its incorporation;

(ii) a private company which fulfils all of the following conditions, namely:—

(a) which is not an associate or a subsidiary company of any other company;

(b) the borrowings of such a company from banks or financial institutions or any body corporate is less than twice of its paid up share capital or fifty crore rupees, whichever is less ; and

(c) such a company has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits under section 73:

Provided also that all the companies accepting deposits shall file the details of monies so accepted to the Registrar in Form DPT-3.".

3. In the principal rules, in the Annexure, for Form DPT"3, the following shall be substituted, namely:—

**Situation or scenario of Indian companies accepting overseas deposits:**

Apart from complying the provisions of Companies Act, 2013 one is also required to have a look at the Foreign Exchange Management (Deposit) Regulations, 2016 made effective from 1st April, 2016, however no amendments has been made to Foreign Exchange Management (Deposit) Regulations, 2000 with respect to regulation 6 which provides for Acceptance of deposits by persons other than authorised dealer/ authorised bank.

The said FEMA Regulations restrict acceptance of deposits by a person resident in India from a person resident outside India.

The word "Deposit" as defined under the said regulations is different as defined under the companies act, 2013.

Regulation 2(iv) of the FEMA Regulations defines it as under:

'Deposit' includes deposit of money with a bank, company, proprietary concern, partnership firm, corporate body, trust or any other person;

On analyzing the definition it can be understood that any deposit of money i.e. whether it is business deposit or a security deposit or a statutory deposit are covered in the definition. Alike the Companies Act, which treats any receipt of money as deposit except the exemptions provided, the FEMA Regulations has restricted itself to the word deposits which automatically excludes various other receipts.

**Restrictions on Deposits Between A Person Resident In India And A Person Resident Outside India:-**

Regulation 3 contains a restricting clause which is apprehended herein below:

*"Save as otherwise provided in the Act or Regulations or in rules, directions and orders made or issued under the Act, no person resident in India shall accept any deposit from, or make any deposit with, a person resident outside India:*

*Provided that the Reserve Bank may, on an application made to it and on being satisfied that it is necessary so to do, allow a person resident in India to accept or make deposit from or with a person resident outside India"*

**Exemptions provided in the regulation:**

On explaining broadly there are no exemptions provided as such in relation to the Companies and Banks as all of them have been incorporated with a regulatory point of view and for easing the international transactions by a Indian resident who is engaged for a diplomatic mission and who is holding a designated position in the foreign ministry viz. an ambassadors, envoys, ministers, and charge of departmental affairs. Apart from these with a view to continue the strong bond with our friendly countries any deposit from Nepal and Bhutan have been exempted.

Moreover any deposit from a multilateral organization are also exempted such as United Nations (UN) and World Trade Organization (WTO) are exempted as various government companies may require to receive funding from such organizations under various government programs and initiatives.

**Exemptions as provided under the Regulations are provided hereunder:-**

1) Deposits held in rupee accounts maintained by foreign diplomatic missions and diplomatic personnel and their family members in India with an authorised dealer.

2) Deposits held by diplomatic missions and diplomatic personnel in special rupee accounts namely Diplomatic Bond Stores Account to facilitate purchases of bonded stocks from firms and companies who have been granted special facilities by customs authorities for import of stores into bond, subject to following conditions:

   a) Credits to the account shall be only by way of proceeds of inward remittances received from outside India through banking

channels or by a transfer from a foreign currency account in India of the account holder maintained with an authorised dealer in accordance with clause 3 of this Regulation ;

b) All cheque leaves issued to the account holder shall be superscribed as "Diplomatic Bond Stores Account No.";

c) Debits to the accounts shall be for local disbursements, or for payments for purchases of bonded stocks to firms and companies who have been granted special facilities by customs authorities for import of stores into bond;

d) The funds in the account may be repatriated outside India without the approval of Reserve Bank.

3) Deposits held in accounts maintained in foreign currency by diplomatic missions, diplomatic personnel and non-diplomatic staff, who are the nationals of the concerned foreign countries and hold official passport of foreign embassies in India subject to the following conditions:

a) Credits to the account shall be only by way of:-

(i) proceeds of inward remittances received from outside India through banking channels; and

(ii) transfer of funds, from the rupee account of the diplomatic mission in India, which are collected in India as visa fees and credited to such account;

b) Funds held in such account if converted in rupees shall not be converted back into foreign currency;

c) The account may be held in the form of current or term deposit account, and in the case of diplomatic personnel and non-diplomatic staff, may also be held in the form of savings account;

d) The rate of interest on savings or term deposits shall be such as may be determined by the authorised dealer maintaining the account;

e) The funds in the account may be repatriated outside India without the approval of Reserve Bank.

4. Deposits held in accounts maintained in rupees with an authorised dealer by persons resident in Nepal and Bhutan.

5. Deposits held in accounts maintained with an authorised dealer by any multilateral organization and its subsidiary/ affiliate bodies and officials in India of such multilateral organization, of which India is a member nation.

**Acceptance of deposits by persons other than authorised dealer/ authorised bank**:-

Acceptance of deposits by Companies incorporated under the Companies Act, 2013 are dealt with under Regulation 6 of the said FEMA Regulations.

With effect from 1st April, 2016 RBI has prohibited to accept fresh deposits by Indian entities on repatriation basis from a Non Resident Indian and a Person of Indian Origin, however the renewal of the existing deposits have been allowed under the said condition is allowed by following the terms and conditions as set out in Schedule 6 of the Regulations.

Further the acceptance of deposits under non-repatriation basis is still allowed by Indian Companies but only after complying the conditions as specified under Schedule 7 of the said Regulations.

**Terms and conditions as specified in schedule 7:**

i) In the case of a company, the deposits may be accepted either under private arrangement or under a public deposit scheme.

ii) If the deposit accepting company is a non-banking finance company, it should be registered with the Reserve Bank and should have obtained the required credit rating as stipulated under the guidelines issued by Reserve Bank for such companies.

iii) The maturity period of deposit shall not exceed 3 years.

iv) If the deposit accepting company is a non-banking finance company the rate of interest payable on deposits shall be in conformity with the guidelines/ directions issued by Reserve Bank for such companies. In other cases the rate of interest payable on deposits shall not exceed the ceiling rate prescribed from time to time under the Companies (Acceptance of Deposit) Rules, 2014.

v) The amount of deposit shall be received by debit to NRO account only, provided that the amount of the deposit shall not represent inward remittances or transfer of funds from NRE/ FCNR (B) accounts into the NRO account.

vi) The proprietorship concern/ firm/ company accepting the deposit should comply with the provisions of any other law, rules, regulations or orders made by Government or any other competent authority, as are applicable to it in regard to acceptance of deposits.

vii) The proprietorship concern, firm or company accepting the deposit shall not utilise the amount of deposits for relending (not applicable to a Non-Banking Finance Company) or for undertaking agricultural/ plantation activities or real estate business or for investing in any other concern or firm or company engaged in or proposing to engage in agricultural/ plantation activities or real estate business.

viii) The amount of deposits accepted shall not be allowed to be repatriated outside India.

Further an Indian company is also allowed to accept deposits by issue of Commercial Paper to a non-resident Indian or a person of Indian origin or a foreign portfolio investor registered with the Securities and Exchange Board of India subject to the following conditions:

a) the issue is in due compliance with the Non-Banking Companies (Acceptance of Deposits through Commercial Paper) Directions, 1989 issued by the Reserve Bank as also any other law, rule, directions, orders issued by the Government or any other regulatory authority, in regard to acceptance of deposits by issue of Commercial Paper;

b) payment for issue of Commercial Paper is received by the issuing company by inward remittance from outside India through banking channels or out of funds held in a deposit account maintained by a Non-Resident Indian or a Person of Indian Origin in accordance with the Regulations made by Reserve Bank in that regard;

c) the amount invested in Commercial Paper shall not be eligible for repatriation outside India; and

d) the Commercial Paper shall not be transferable.

**Clarity to be sought:**

On one side, the deposits (both secured & unsecured) are considered as a borrowed funds as per its definition, and are accepted by a company within the overall financial limit specified in the resolution under section 180(1) (c) read with sub-section (2) of the said section, on another side, why another resolution exclusively for deposit acceptance is required is not clear.

**Conclusion:**

This article has tried to specifically focus on the "invite, accept and renew deposits" by the Company under the Companies Act, 2013 and other related statutory obligations, from its members and public subject to the conditions laid down in section 73(2) of the Act as well from overseas with amendments. With a particular concern to the corporate sector, professionals and the stakeholders to establish a decent clarity in regard to provisions of the said section.

The in depth explanation in this article will give an opportunity to the professionals to discuss the issues further for better understanding and compliance of law.

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# Glimpses of Supreme Court Rulings

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## 26 Meaning of the Expression of Land:

The expression Land includes benefits arising out of the land and things attached to the earth or permanently fastened to anything attached to the earth – a portion of the building cannot survive independent of the building and the building without the land – The building ultimately forms part of the land and things attached to the earth and permanently fastened to anything attached to the earth and the benefits to arise out of the land – Further, where part of building, that too a multi storeyed building is being acquired, the land need not be acquired more so when the owner of building is not the owner of the land and his entire interest in part of building can be acquired.

***State of Maharashtra Vs. Reliance Industries Ltd. (2017) 10 SCC 713***

## 27 Exemption u/s. 10A – Treatment of brought forward loss of other unit – exemption u/s. 10A is to be allowed without setting off the business loss of the other unit against the profit of the eligible unit

**Principal commissioner of Income Tax Vs. Rangsons Electronics (P) Ltd. (2017) 160 DTR SC 290**

## 28 Non-resident – Applicability of Sec.44BB vis-à-vis mobilization charges

At the same time s. 4,5 and 9 which deal with charging section, total income and income of non-resident which arises or deem to arise in India cannot be side tracked. These are the provisions which bring a particular income within the net of income tax. Therefore, it is imperative that a particular income is covered by the charging provisions contained in s.5. Indian IT Act, admittedly, follows a territorial system of taxation. As per this system only that income of a non-resident is taxable in India which is attributable to operations within the Indian territory. Therefore, in the first instance it is to be seen whether a particular income arises or accrues or deem to arise or accrue within India. In order to seek this answer, the principles contained in S.9 have to be applied only when it becomes an income taxable in India as per S.9 the question of computation of the said income would arise. Sec.9(1)(i) provides that income is to be deemed to have accrued or arising in India if the income is accruing directly through any business connection in India or from any property in India or from any asset or source of income in India or any capital asset situation in India referred as business income. Explanation 1(a) to S. 9(1) (i) provides an exclusion in the case of operations which are not carried out in India. The explanation provides that the income of the business deemed under this clause to accrue or arise in India shall be only that part of the income as is reasonably attributable to the operations carried out in India. Thus, business income earned by non-resident is chargeable to tax in India only to the extent reasonably attributable to the operations carried out in India.

***SEDCO Forex International Inc. Vs. CIT (2017)299 CTR (SC)***

## 28 Appeal (SC) maintainability – Rule of consistency

Adjudication of the questions raised by the revenue in the appeal before the Supreme Court cannot be refused merely on the basis that the revenue has accepted the accounting practice adopted by the assessee in the past or has accepted the decisions of the High Court in favour of the assessee on the same issue.

***CIT Vs. Modipon Ltd (2017)299 CTR (SC) 306***

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# From the Courts

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## 81 Question of law v/s. Question of fact CIT v/s. K.R.N. Prabhakaran (HUF) (2017) 393 ITR 175 (Mad)

**Issue :**

When does a question of Fact become a question of Law?

**Held :**

A question of fact becomes a question of law if the finding is either without any evidence or material or if the finding is contrary to the evidence or is perverse or there is no direct nexus between the conclusion of fact and the primary fact upon which that conclusion is based. But it is not possible to turn a mere question of fact in to a question of law by asking whether as a matter of law the authority came to the correct conclusion on a matter of fact.

Note :Also See.

CIT v/s. ISC Investments and Finance (P) Ltd

(2017) 393 ITR 195 (Mad)

## 82 Sec. 2(15) : Charitable Trust : Difference between Registration and Exemption DIT (Exemption) v/s. North India Association (2017) 393 ITR 206 (Bom)

**Issue :**

What is the difference between Registration and Exemption in the case of a Public Charitable Trust?

**Held :**

The mere fact that in one particular year, the assessee had income receipts in excess of Rs. 10 lakhs or such other limit as provided in the proviso to section 2(15) of the Act, by itself would not warrant cancellation of the registration under section 12AA(3) and that there was a difference between registration and exemption. Section 13(8) which was introduced with effect from April 1, 2009 by the Finance Act, 2012 provided that where the receipts were hit by the proviso to section 2(15), the benefit of exemption to its income for the previous year relevant to the assessment year in question would not be available. Thus income was brought to tax to secure the Revenue's interest, but, it did not necessarily result in automatic cancellation of registration. Circular No. 21 of 2016 issued by the Central Board of Direct Taxes directed the authorities not to cancel the registration of a charitable institution just because the proviso to section 2(15) came into play as the receipts were in excess of the specified limits therein, referring to section 13(8) to support the view of non cancellation. The circular mentioned that, if in any particular year, the specified cut off was exceeded, the tax exemption would be denied to the institution in that year and cancellation of the registration would not be mandatory unless such cancellation became necessary on the ground or grounds prescribed under the 1961 Act. However, the issue of the trust not being genuine could not be concluded by merely giving a finding in one year that the income earned from activities of trade, business or commerce were in excess of the limit specified in the proviso to section 2(15). If that happened on a continuous or regular basis, it could justify further probe or inquiry before concluding that the trust was not genuine. No question of law arose.

## 83 Method of Accounting consistently followed by assessee : To be accepted : CIT v/s Vidarbha Tobacco Products (P) Ltd. (2017) 393 ITR 218 (Bom)

**Issue :**

Can department change the method of accounting consistently followed by assessee for a particular assessment year?

**Held :**

Tribunal had found that the assessee did not follow the first in and first out method of valuation only for the relevant assessment year but was following that

system of valuation from year to year and in the preceding years that system of valuation was accepted. Even in the subsequent year the same method of accounting was accepted by the Revenue. The Tribunal recorded a finding of fact on the basis of the material on record that no fault could be found with the method of valuation, by applying the "average price principle". The Tribunal found that in some years, by adopting the method of average price principle, even the assessee would have been adversely affected. The Tribunal found that during the last years where the said method of accounting had affected the assessee, the assessee did not change the method of valuation and even the Revenue did not point out the fact to the assessee. The Tribunal rightly held that merely because the change of the method would help the Revenue in a particular year, the Assessing Officer was not at liberty to change the method of valuation that was followed by the assessee for a considerably long period. The findings of fact recorded by the Tribunal do not give rise to any substantial question of law.

## 84 Sec. 14A and 'satisfaction' of Assessing Officer
## Punjab Tractors Ltd. v/s. CIT (2017) 393 ITR 223 (P &H)

**Issue :**

How the Assessing Officer should discharge his onus to invoke provisions of Sec. 14A /Rule 8D?

**Held :**

Section 14A of the Income Tax Act, 1961, specifies the circumstances in which the Assessing Officer is entitled to determine the amount of expenditure incurred in relation to exempt income in accordance with such method as may be prescribed. The method prescribed is in rule 8D of the Income Tax Rules, 1962 which was introduced with effect from the assessment year 2008-09. The conditions specified in sub – sections (2) and (3) of section 14A must exist in order to entitle the Assessing Officer to invoke rule 8D. This is clear from the language of these sub sections. Under sub sections (2) and (3) of section 14A, an Assessing Officer can resort to rule 8D only if he is not satisfied with the correctness of the assessee's claim in respect of the expenditure in relation to the income which does not form part of the total income under the Act or if he is not satisfied with the correctness of the assessee's claim that no expenditure has been incurred by him in relation to such income.

## 85 Switch over of Method of Accounting
## Munjal Sales Corporation v/s. CIT (2017) 393 ITR 248 (P & H)

**Issue :**

How the switching over of method of Accounting is to be dealt with ?

**Held :**

The assessee has the option to adopt the method of accounting of his choice. He can switch over from one system to another. This is however subject to the Income Tax Officer's power under the proviso to section 145(1) of the Income Tax act, 1961, to prevent the assessee from doing so. Under the proviso, even where the accounts are correct and complete to the satisfaction of the Income tax Officer but the method employed is such that in the opinion of the Income tax Officer, the income cannot properly be deduced therefrom, the computation is to be made upon such basis and in such manner as the Income Tax Officer may determine. The proviso, does not place a bar upon the assessee's switching over from one system to the other. While considering whether an assessee ought to be permitted to switch over from one accounting system to another, the source of income is not relevant and at least not always relevant. It certainly is not the only relevant consideration. The source may be the same but the nature of the remuneration, the terms and conditions for the receipt of the remuneration/income may and often is entirely different. It would depend upon the terms and conditions of the agreement between the parties. It is not possible to enumerate exhaustively cases where a switch over of accounting systems in such cases is permissible. The word "regularly" in section 145(1) indicates that having chosen a particular system of accounting, an assessee cannot switch over to another system unilaterally. A switch over in the middle of a financial year ought to be permitted by the authorities only in exceptional cases where it poses no difficulty whatsoever in computing income and the switch over

is justified. The burden to establish it must rest heavily upon the assessee who desires the switch over in the middle of the financial year.

### 88 Re-opening : Requirement
**Munjal Showa Ltd v/s. Dy CIT (2016) 382 ITR 555 (Delhi)**

**Issue**

What are the requirements for a valid reopening of a case?

**Held**

Once a discretion is vested with a certain authority, he alone should exercise that discretion vested under the statute and if he acts in accordance with "the direction or in compliance with some higher authority's instruction" it would be a case of failure to exercise discretion altogether. The Assessing Officer must apply his mind and record reasons before reopening an assessment.

The reasons for reopening the assessment have to be confined to those set out in the order. They cannot be improved upon by filing subsequent affidavits. The assumption of jurisdiction cannot sought to be justified by supplying reasons extraneous to the recorded reasons.

### 87 Stock given to bank v/s. Stock as per Books
**CIT v/s. Patel Proteins (P) Ltd. (2017) 393 ITR 274 (Guj)**

**Issue :**

Whether addition to income can be made when the statement of stock given to the bank was to procure higher loan as against stock as per Books of Account?

**Held :**

Having heard learned advocates appearing on behalf of the parties and the question posed for consideration before us reproduced hereinabove and considering the decisions of this court, the question which is raised in the present appeal is required to be answered in favour of the assessee. We are not giving further elaborate reasons for the same as in the case of Riddhi Steel and Tubes (supra) it is held by this court that only on account of inflated statements furnished to the banking authorities for the purpose of availing of larger credit facilities, no addition can be made if there appears to be a difference between the stock shown in the books of account and the statement furnished to the banking authorities. Accordingly, the question is answered in the affirmative, i.e. against the appellant Revenue and in favour of the assessee. We hold that the tribunal was right in law in deleting the addition made on account of difference in stock statement as furnished before the bank as compared to shown in books of account for availing higher credit facility.

Considering the ratio laid down in the above decision and in the facts of the present case we are of the view that the issues raised in the above tax appeals need to be answered in favour of the assessee and against the Department.

### 88 Search case : Seizure of interest bearing assets not released even after assessment. : Department to pay interest.
**Chander Prakash Jain v/s. CIT (2017) 393 ITR 302 (All)**

**Issue :**

Effect of retention of interest bearing assets after assessment is completed.

**Held :**

The retention of the seized assets beyond the date of assessment was unlawful and they should have been returned to the assessee after assessment was completed. There was no explanation from the Department why the Kisan Vikas Patras, Indira Vikas Patras and Fixed deposit receipts were retained by the Department even after the assessment proceedings had been completed in the year 1996 and why they were neither encashed nor renewed. The money invested in the form of Kisan Vikas Patras and Indira Vikas Patras by the assessee continued to be money available with the Union of India all along and was being utilized by the Government for its own purposes as they had never been encashed. Because of non – extension of the period of their validity by the Department,

**contd. on page no. 481**

# Tribunal News

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## 49 DCIT vs. M/s. Bengal Beverages Pvt. Ltd. [2017] 167 ITD 393 (ITA No. 1218/Kol/2015) (Kolkata)
**Assessment Year: 2010-11 Order dated: 6th October, 2017**

### Basic Facts

The assessee-company was engaged in the business of manufacture of soft drinks, generation of electricity through windmill and manufacture of pet bottles for packing of beverages. The assessee claimed additional depreciation on Visicooler. The assessing officer observed that these Visicooler were kept at the distributors' premises and not at the factory premises of the assessee company. The assessee submitted before the AO that Visicoolersare required to be installed at the delivery point to deliver the product to the ultimate consumer in chilled form, therefore, these are part of assessee's plant. However, the AO rejected the assessee's contention and held that assessee is not carrying out manufacturing activity on the product of the retailer at retailer's premises and merely chilling of aerated water cannot be termed as manufacturing activity and even that chilling job is the activity of the retailer and not of the assessee. Aggrieved by the order of the AO, the assessee filed an appeal before the CIT(A) who deleted the addition made by AO. Aggrieved, the revenue preferred an appeal before the ITAT.

### Issue

**Whether additional depreciation will be allowed on 'Visicooler' installed by manufacturer of cold drink, at distributor's or retailer's premises so as to ensure that cold drink is served chilled to ultimate consumer?**

### Held

The Hon'ble ITAT held that benefit of additional depreciation is available to an assessee engaged in the business of manufacture of article or thing upon the actual cost of plant & machinery. The conditions laid down in Section 32(1)(iia) are that if the assessee is engaged in manufacture of article or thing then it is entitled to additional depreciation on entire additions to plant & machinery provided the items of addition does not fall under any of the exceptions provided in clauses (A) to (D) of the proviso. In the present case the assessee is engaged in the business of manufacture of cold drinks which has not been disputed by the AO. Also, the "visicooler" is a "plant & machinery" which falls within the category of "plant & machinery" aslaid down in the I.T. Rules, 1962 & does not fall within the exceptions provided in clauses (A) to (D) of the proviso to Section 32(1)(iia) of the Act. Further, the ITAT held that the assessee is situated at a long distance and the product has to be sold at long distance. So, the assessee, in order to sell its final product to the customers in various parts ofthe state is required to give the soft drink in cold state for which the assessee has purchased 'Visicooler'. Thus, the ITAT held that assessee is eligible for additional depreciation on the same and resultantly, dismissed the revenue's appeal.

## 50 Claris Lifesciences Ltd. vs. DCIT[2017] 167 ITD 1 (ITA No. 498/AHD/2011) (Ahmedabad)
**Assessment Year: 2008-09 Order dated: 26th September, 2017**

### Basic Facts

The assessee is a public company. For the relevant year, the assessee filed return of income but did not pay self-assessment tax u/s. 140A of the Act. Subsequently, the assessee filed revised return and paid self-assessment tax thereon. The AO imposed a penalty u/s. 221(1)on account of non-payment of self-assessment tax liability under section 140A at the time of filing original return of income. Aggrieved, assessee carried the matter in appeal before the CIT(A) but CIT(A) upheld the penalty order. The assessee appealed before the Tribunal.

Before the Tribunal, the assessee relied upon a decision of another division bench, in the case of *ACIT Vs Shri Shakti Credits Limited [(2014) 66 SOT 0175 (Lucknow).*

**Issue**

**Whether an assessee is liable to penalty under section 221(1) of the Act in a case in which the though the assessee has not paid the self-assessment tax under section 140A, while filing the return of income, but revises the income, by filing revised return of income, and pays the tax on the revised return of income at the time of filing the revised return of income?**

**Held**

The Hon'ble ITAT held that the default triggering the penal liability under section 221(1) is the default in making payment of tax, and that the default in payment of tax is with reference to the filing of the return. Clearly, therefore, the assessee committed a default in not paying the admitted tax liability when it filed the original income tax return, without payment of admitted tax liability, on 30 September 2008. Further, the ITAT held that payment of admitted tax liability, while filing revised return of income under section 139(5), does not affect the lapse committed at the time of filing the original return of income, even though claims made in such original income tax return stand supplanted by the claims made in the revised income tax return. Thus, the ITAT held that the assessee is, in principle, covered by the scope of the penalty under section 221(1) in a case in which though the assessee has not paid the admitted tax liability under section 140A, while filing the original return of income, the assessee subsequently pays the tax on the revised return of income, at the time of filing the revised return of income. Resultantly, the ITAT held against the assessee.

## 51 DHL AIR Limited vs. DCIT[2017] 167 ITD 258 (ITA No. 1438/Mum/2017) (Mumbai)

**Assessment Year: 2012-13 Order dated: 4th October, 2017**

**Basic Facts**

The assessee-company is a tax resident of UK.The assessee took an aircraft under dry lease agreement from DHL Aviation, Netherlands B.V, and in turn, leased out the same under wet lease agreement to an Indian company named M/s. Blue Dart Aviation Limited (BDAL). During the year under consideration, the assessee claimed expenses on account of maintenance of aircraft and engine, repairs and maintenance of aircraft and reimbursement of travelling and accommodation charges. The AO took a view that the assessee should have deducted tax at source from the said payments. Since the assessee has failed todeduct tax at source, the AO took the view that the above said expenditure are liable to be disallowed under section 40(a)(i) of the Act for the failure to deduct tax at source. The assessee submitted that for carrying out the repairs of all aircrafts operated by the assessee, it had entered into an agreement with M/s. European Air TransportLeipzig Gmbh, (EAT) Germany for providing maintenance, repairs and overhaul services. Also the payment made to EAT was for providing repairs service and hence the same constitute business profits in the hands of EAT. Since, EAT does not have permanent establishment in India, payment received by it is not taxable in India. The DRP did not agree with the contentions of the assessee and upheld the order of the AO. Aggrieved, the assessee preferred an appeal before the ITAT.

**Issue**

**Whether payment made by assessee to its AE for annual maintenance contract would fall under the category of fees for technical services and accordingly be liable to deduct TDS under section 194J?**

**Held**

The Hon'ble ITAT held that the assessee had incurred the said expenditure in pursuance of maintenance contract between the assessee and M/s EAT, Germany. The ITAT relying on the case of *Kandla Port Trust* held that the payment made forannual maintenance contracts would not fall under the category of fee fortechnical services

within the meaning of provisions of sec. 194J of the Act. Also, in the case of *DDRC SRL Diagnostic (P) Ltd*., the coordinate bench has noticed that CBDT has expressed the view in Circular No.715 that routine, normal maintenance contracts which includes supply of spares will be covered by sec. 194C of the Act. Further the revenue could not produce any material to show that the clarifications issued by the CBDT would not apply to the facts available in the case before it. Accordingly,the bench held that the provisions of sec. 194C shall apply to the payment made towards maintenance contracts. Also, it was observed that the payment given by the assessee would constitute business receipts in the hands of M/s. EAT, the same is not taxable in India, since it does not have PE in India. It is held that assessee is not required to deduct tax at source u/s 195 of the Act, as no part of the amount paid to M/s. EAT is chargeable in India in the hands of M/s. EAT.

## 52 Chanasma Nagrik Sahakari Bank Ltd. v/s. ACIT 167 ITD 151 (ITA No. 1334/AHD/2014) (Ahmedabad) Assessment Year: 2010-11 Order dated: 4th September, 2017

**Basic Facts**

The assessee is a Cooperative Bank registered under Gujarat Cooperative Society Act carrying on the banking business under the supervision and control of Reserve Bank of India. During the assessment proceedings, AO observed that assessee has claimed urban development expenses which were incurred towards statue of Shri Sardar Patel in the town to be installed on the circle. The same was claimed as Urban Development Expenses.The assessee submitted that thesaid expenditure was incurred towards larger corporate responsibility towards the residents of town where the assessee-bank is situated. The AO concluded that the said expenses cannot be said to be incurred wholly and exclusively for the purpose of its business and therefore is not a permissible business expenditure. On appeal, CIT(A) upheld the order of AO on the ground that said expense is nowhere related to the business of banking and accordingly declined any relief.Aggrieved, the assessee carried the matter before the Tribunal.

**Issue**

**Whether expenditure incurred to install a statue on circle of town to enhance brand value of assessee's business was an allowable expenditure?**

**Held**

ITAT upheld the contention made by the assessee that the expenses incurred are revenue in nature and no enduring benefit can be stated to be derived by the assessee. Incurrence of such expenses will add to the visibility of the assessee-bank amongst its stakeholders. The expenditure incurred can be rationally said to have been incurred for the promotion of the assessee's ongoing business and is an allowable business expenditure. Thus, so long as the expenditure has been incurred on the grounds of commercial expediency and in order to directly or indirectly facilitate the carry of the business, the fact that there was no compelling necessity to incur the expenditure on which deduction is claimed is an irrelevant consideration. Therefore, there is a considerable merit in the claim of the assessee and the same is allowed.

## 53 Koley Construction V/s. ITO 167 ITD 217(ITA No. 943/Kol/2017) (Kolkata) Assessment Year: 2012-13. Order dated: 25th August,2017

**Basic Facts**

The assessee is a partnership firm engaged in the business of executing construction contracts. During the assessment proceedings, AO noticed that the assessee paid a sum as labour charges without deducting tax at source under section 194C. Hence the same was disallowable and could not be claimed as expense. On appeal before CIT(A), by invoking provisions of section 40(a)(ia) read with section 201(1), assessee submitted that if the person to whom the payments are made has taken such income into account in furnishing a return of income under section 139 and has furnished the certificate to the accountant in Form 26A giving effect to the above, then such assessee could not be an assessee

in default and hence no disallowance should be attracted. However, CIT(A) held that failure to produce necessary documents and details was fatal. Thus, the assessee was not entitled to the benefit of second proviso of section 40(a)(ia). CIT(A) conferred a right on AO to further enquire to verify the correctness of Form 26A. Aggrieved, assessee preferred an appeal before ITAT.

**Issue**

**Whether disallowance of labour charges can be made where the assessee has paid such sum without deducting TDS, although it has been certified by a Chartered Accountant in Form 26A that such sum has been accounted by the recipient while computing its gross receipts?**

**Held**

ITAT held that Form 26A clearly specifies that the sum was a part of gross receipts of the recipient in the return of income filed. Also, the remand report of the AO was very vague as he failed to examine the recipient. Thus, Form 26A has to be accepted as correct, conclusive proof in the matter of applicability of proviso 201(1) and second proviso to section 40(a)(ia). Disallowance sustained by the CIT(A) was directed to be deleted.

## 54 DCIT vs. United States Pharmacopeia India (P.) Ltd. [2017] 87 taxmann.com 176 (ITA No. 1693/Hyd/2016) (CO No. 5/Hyd/2017)(Hyderabad) Assessment Year: 2011-12 Order dated: 27th October, 2017

**Basic Facts**

The assessee USP India was engaged in research and analytical testing of pharmacopeia and other related processes. During the year under consideration, an employee SS of USP LLC was transferred to the rolls of assessee-company USP India as a whole time Director. SS had oversight responsibility for scientific business and infrastructure operations of certain USP India affiliates (USP China and USP Brazil) while, he was employed in USP LLC. SS continued oversight responsibility of these affiliates from USP India. USP India recharged the apportioned salary and other direct expenses of SS incurred by USP India to respective USP affiliates on a cost-to-cost basis.The TPO held that 10 per cent markup should be applied as these expenses incurred by the assessee and subsequently reimbursed by AEs were to be added to the operating revenues as well as the operating cost for the purpose of aggregation of transactions and determining arm's length price under TNMM. Aggrieved by the order of the AO, the assessee filed an appeal before CIT(A) who upheld the order of TPO/ AO by observing that the receipt of reimbursement had not been routed through books of account. Aggrieved, the assessee filed cross-objections against the revenue's appeal.

**Issue**

**Whether mark-up should be applied on the recharged apportioned salary and other direct expenses of employee SS incurred by USP India on the behalf of his affiliates?**

**Held**

The Hon'ble ITAT held that, the CIT(A)'s observations that receipt of reimbursement has not been routed through books of accounts requires verification and for that limited purpose remitted back to AO. It is held that if it is found that the transaction is not routed through the books than in that case action of the TPO may be sustained.

Subject to above, ITAT held that it is the normal practice in multinational companies to utilize the expertise of the various executives in the group companies. In the given case, SS was employee in USP India and his expertise in the management of construction etc. were utilized by the other sister concerns and certain cost were charged to them. Since there are no comparable cases in the market, and also it is the business decision of the assessee to share the employee cost with other sister concerns on cost to cost basis. Accordingly, the addition of markup should be deleted, subject to the verification by the AO.

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# Unreported Judgements

**CA. Sanjay R. Shah**
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In this issue we are giving full text of the Ahmedabad ITAT decision in the case of Devang Narendrabhai Vadodariya pronounced recently. In this decision, the issue was whether when the stamp duty valuation of immovable property is higher than the stated sales consideration and when the assessee has objected to adoption of such valuation for computing capita gain, whether it is mandatory for A.O. to refer the valuation to the DVO in spite of the fact that assessee may not have made a specific request for such reference to DVO. The Tribunal held that in such cases, A.O. is required to refer the valuation to DVO before computing the capital gain.

We hope the readers would find the same useful.

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**In the Income Tax Appellate Tribunal**
**Ahmedabad "B" Bench, Ahmedabad**

**Coram : Pramod Kumar AM and**
**S S Godara JM**

S P No.150/ahd/2017
(Arising out of ITA No.2706/Ahd/2017)
And
ITA No.2706/Ahd/2017
Assessment Year :2012-13

**Devang Narendrabhai ....Appellant/ Applicant**
**Vadodariya**
2,Rajiv Society, Juna Nari Kendra Road,
Surendranagar - 363001
[PAN : AANPV 7057 R]

**Vs.**

**The Asst. Commissioner .....Respondent**
**of income - tax**
Surendranagar circle, Surendranagar-363001

**Appearances by :**

**PF Jain** for the Appellant/applicant
**VK Singh** for the Respondent

Date of concluding the hearing : 05.01.2018
Date of pronouncing the order : 05.01.2018

**Order**

**Per Pramod Kumar, AM :**

1. As this stay petition was being heard, the bench was of the view that the related appeal itself can be disposed of at this stage. When this proposition was put to the learned representatives, they agreed that the appeal for disposal. The stay petition is, accordingly, dismissed as infructuous.

2. This appeal is directed against learned CIT(A)'s order dated 13th october 2017. in the matter of assessment under section 143(3) r.w.s 147 of the income -tax Act 1961, for the assessment year 2012-13.

3. Grievances raisedby the assessee,in substance, are twofold -(a) first, reopening learned CIT(A)'s upholding the addition of Rs.73,47,517/- on account of short term capital gains.

4. Learned counsel for the assessee did not press the grievance, on the reopening issue, and the same is, accordingly, dismissed as not pressed.

5. As regards addition of Rs.73,47,517/- on account of short term capital gains, the relevant matirial facts are like this. During the cource of reassessment proceedings, it was noticed that the jantri value (i.e. stamp duty valution) is much higher than the stated sale consideration. Accordingly, the assessing officer recomputed the short term capital gains by adopting jantri value as deemed sale consideration under section 50C. it was on this basis that the assessing officer made the impugned addition of 73,47,517/- to the short term capital gains disclosed by the assessee. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. The assessee is not satisfied and is in further appeal before us.

6. Learned counsel has pointed out that even though the assessee has objected to the Assessing officer's adoption of jantri value as deemed sale consideration under section 50(C), he did not refer the valuation of the said property, or offer to do so, to the Departmental Valuation officer under section 50C(2). it is pointed out the present legal position is that even when assessee did not make a specific request for DVO reference, the Assessing officer must offer to do so. He relies upon a coordinate bench decision of this Tribunal, in the case of Raj Kumari Agarwal Vs. DCIT, [(2014) 150 ITD 597], in support of this propositon. Learned Departmental Representative was gracious enough to state that, in such a situation, he was no objection to the matter being remitted to the Departmental valuation officer. Learned counsel for the assessee fairly accepts this suggestion.

7. The plea of the learned counsel is indeed well taken. Whether the assessee makes a specific request for reference to the DVO or not, when assessee disputes the valuation as per stamp duty authority, the Assessing officer must give an option to the assessee to follow the course provided by the low. A coordinate bench of this Tribunal, in the case of Raj Kumari Agarwal (supra), has observed as follow:-

"We find here is a case in which the assessee has specifically objected to the adoption of stamp duty valuation rate. The mere fact that the appellant has not challenged the stamp duty valuation cannot be put against the assessee. The authority for the this proposition is contained in, Hon'ble jurisdictional High court's judgment, in the case of CIT Vs Chandra Narain Chaudhuri ([2013] 38taxmann.com 275 (Allahabad), wherein Their Lordships have observed that, "The question as to whether the assessee filed any objections before the stamp valuation Authority to dispute the valuation, or filed appeal or revision or made reference before any authority, court or the High Court under sub section (2) (b) of section 50 C of the Act is not of any relevance in ths case, as the AO himself observed that the assessee did not dispute the stamp valuation before the stamp valuation Authority. There may be several reasons for the purchaser not to file such objection. A purchaser may not go into litigation, and pay stamp duty, as fixed by the stamp valuation Authority , which may be over and above the fair market value of the property, as on the date of transfer, though the amount so determined has not been actually received by owner of the property". The position as to whether reference should be made to the DVO, even when there is no specific plea to that effect by the assessee, is now well set out in Hon'ble calcutta High Court's judgment in the of sunil kumar agarwal CIT (GA No 3686/2013 IN itat nO 221/2013; Judgment dated 13th Marth 2014), wherein Their Lordships have, inter alia, observed as follows:-

"...we are of the opinion that the valuation by the departmental valuation officer, contemplated under section 50C, is required to avoid miscarriage of justice. The legislature did not intend that the capital gain should be fixed merely on the basis of the valuation to be made by the District sub Registrar for the purpose of stamp duty. The legislature has taken care to provide adequate machinery to give a fair treatment to the citizen/taxpayer. There is no reason why the machinery provided by the legislature should not be used and the benefit thereof should be refused. Even in a case where no such prayer is made by the learned advocate representing the assessee, who may not have been properly instructed in low, the assessing officer, discharging a quasi judicial function, has the bounden duty to act fairly and to give a fair treatment by giving him an option to follow the course provided by law".

7. As there is no binding judicial precedent contrary to what has been held by Hon'ble calcutta High Court, as above, the esteemed views of their Lordships, even though from a non juridictional High Court, bind us as well.

8. In the light of the above legal position, the plea of the assessee, as set out in the ground

of appeal, is indeed well taken. The prevalling legal position is now like this. Once the assessee claims that the actual market value of the land or building is less than stamp duty valuation adopted by the authorities, it is incumbent upon the Assessing officer to refer the valuation of said land or building to the departmental valuation officer. In the present case, the Assessing officer has not done so. in view of this factual position, and in the light of the discussions above, we deem it fit and proper to remit the matter to the file of the Assessing officer for adjudication de novo after making a reference to the DVO. While so deciding the matter afresh, the Assessing officer will decide the matter in accordance with the law, by way of a speaking order and after giving a reasonable opportunity of hearing to the assessee. we direct so. "

8. Respectfully following the views so expressed by the coordinate bench, we remit the matter to the file of the Assessing officer for the limited purpose of enabling a reference to the Departmental Valuation officer, and thus assessee's availing the option under section 50C(2). The matter thus stands restored to the dile of the Assessing officer in the terms indicated above. As the matter is remitted to the file of the Assessing officer for fresh adjudication, as above, other issues on merits need no adjudication at this stage.

9. In the result, the appeal is allowed for statistical purposes in the terms indicated above. Pronounced in the open court today on 5th day January, 2018

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contd. from page 474



for the period the investments were in the control of the Department, although illegally, after the assessment proceedings were finalized. The action of the Department had resulted in uncalled for loss of interest on the investments to the assessee for no fault of his. The Department was liable to pay the interest which the investments would have earned, on the face value of the seized investment documents, under the provisions of the Income Tax Act, 1961 had the investments been revalidated or renewed or had been encashed by the Department. The Assistant Commissioner was directed to recompute the interest.

## 89 Reopening beyond four years : Conditions

**Navkar Share and Stock Brokers (P) Ltd. v/s. Asst. CIT (2017) 393 ITR 362 (Guj)**

**Issue :**

What are the conditions to be fulfilled for reopening of an assessment beyond four years?

**Held :**

There did not appear to be any failure on the part of the assessee in disclosing true and correct facts and therefore, the condition stipulated under section 147 of the Income Tax Act, 1961, to reopen the assessment beyond the period of limitation of four years was not satisfied. There was no allegation in the reasons recorded by the Assessing Officer that there was any non – disclosure on the part of the assessee, which had resulted in escapement of income. In its objection against the reasons recorded by the Assessing Officer, the assessee had submitted that since August, 2004, it did not have any transaction with the Ahmedabad Stock Exchange, more particularly during the assessment year in question. There was nothing on record to show that the Assessing Officer on facts had formed on opinion that, during the assessment year in question, the assessee had transactions with the Ahmedabad Stock Exchange and therefore, bye law 218 was either attracted or applicable. The notice and reassessment proceedings were invalid.

Note : Also See :

Micro Inks P. Ltd. v/s. Asst. CIT

(2017) 393 ITR 366 (Guj)

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# Controversies

**CA. Kaushik D. Shah**
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## Whether discount allowed can be subjected to TDS?

**Issue:**

The assessee has paid discount to dealers and distributors in respect of sale of its products. The A.O. is of the view that such discount is in the nature of commission, hence, TDS has to be made otherwise discount can be disallowed u/s 40a(ia) for non-deduction of TDS.

**Proposition:**

The discount paid to the dealers and distributors is not commission or brokerage and hence it can not be disallowed under section 40a(ia).

**View against the Proposition:**

Transaction between the assessee, a cellular operator, and the prepaid associates (PMAs) appointed by it whereby SIM cards/recharge coupons are ultimately sold to the subscribers through the latter does not amount to 'sale of goods' and, therefore, the discount offered by the assessee to the distributors on payments made by the latter for the SIM cards/recharge coupons which are eventually sold to the subscribers at the listed price is commission and is subject to TDS under section 194H [CIT v Idea Cellular Ltd (2010) 35 DTR 219 (Del). Also see VodafoneEssar Cellular Lid v CIT (2010) 35 DTR (Coch)(Trib) 393].

The assessee company sold SIM and prepaid cards to its distributors/ franchisees at a fixed rate below market price for onward sale to its ultimate customers. The difference was held as commission and not discounts as contended by the assessee and liable to TDS under section 194H since:

(i) all rights, title, ownership and property rights in such cards would always rest with the assessee; and

(ii) The agreement between the assessee and the franchisee revealed that they were commission agents acting on their behalf for margins [Asst. CIT v BharCellular Ltd (2007) 294 ITR (AT) 283 (Kol). See also Bharati Airtel. DCIT (2013) 40 taxmann.com 46 (Cochin) (Trib)]

**It is important to refer to the decision of Calcutta High Court in the case of** Hutchison Telecom East Ltd. V. Commissioner of Income Tax in ITR No. 375/566 the lordships of Delhi High Court as under.

"Held, dismissing the appeal, that the terms and conditions left no doubt that the relationship between the service provider and the assessee from the agreement was that of an agent and principal. The service provider had been employed to act on behalf of the assessee for the purpose of feeding the retailers and through them to sell the services to the consumers. The dealings and transaction between the assessee and the service provider were not on principal to principal basis. The assessee was a person responsible for paying commission and, therefore, the provisions of section 194H were attracted.

Bharti Cellular Ltd. v. Asst. CIT [2013] ITR 507 (Cal) "

**View in favour of the proposition :**

The provisions of section 194H of the Income Tax Act, 1961 is applicable either for commission or brokerage paid. Commission or brokerage has been defined in clause (i) of Explanation to section 194H as reproduced hereunder:

" Commission or brokerage" includes any payments received or receivable, directly or indirectly, by a person acting on behalf of another person for services rendered (not being professional service) or for any services in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing, not being securities.

From the above definition, it is crystal clear that none of the parties to whom discount is given is related to any service rendered (not being

professional service) or for any services in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing, not being securities. In fact, the discount is given on performance (Quantity discount) or for early payments (Cash Discount) and hence it is not procurement of order i.e. pre sales services whereas discount is paid in the performance of sales i.e. post sales.

Thus, section 194H provides for deduction of Tax at source (T.D.S) on brokerage & commission payment.

Dealers, in our case, are independent persons and not our agent as they are free to sell goods on their own profit margins and normal buying & selling goes on de hors any incentive schemes. We are very clear that the TARGET INCENTIVES PAID BY US IS ONLY A MOTIVATOR AND IT CANNOT BE TERMED AS A COMMISSION so as to fall within a purview of section 194H. Accordingly, provision of section 194H could not be applied.

The appellant relies on the decisions followed:

**1) Tube Investments of India Ltd. Vs. Acit – 223 CTR 99**

TDS – Under section 194H – Commission or Brokerage Vis-à-vis trade incentives to dealers - Tribunal has remitted the matter to the AO to examine whether the trade incentives paid by assessee (Manufacturer) to the dealers amounted to commission or discount in order to ascertain whether it is subject to TDS u/s 194H or not- order of the tribunal can not be assailed simply on the basis of one of its observation that the price at which the dealers were selling the goods would determine the relationship between the parties – AO is directed to examine the issue namely, whether the trade incentive was a discount.

**2) Foster's India P.Ltd. vs. ITO, ITAT.117 TTJ 346**

TDS- u/s 194H- Distributors Incentives, early payment discount and bond expenses- do not constitute commission so as to attract TDS u/s 194H- there is principal-agent relationship between assessee and its distributors- condition imposed by the assessee on the distributors as regards the manner of storage and marketing of its product in order to protect its reputation would not make the distributor and agent of the assessee- property and risk in the goods pass to the distributors as soon as the goods are invoiced to him and this is the moment when sale takes place- free issue of goods on sponsorship and promotion are sale promotion costs of assessee- early payment discount is nothing but cash discount for timely payment and does not constitute commission by any stretch of logic.

**3) ACIT vs. Idea Cellular Ltd. (Hyd.) 125 ITD 110**

"Whether expression 'commission or brokerage' as contained in Clause (i) of Explanation to section 194H, is not so wide that it would include any payment receivable directly or indirectly, for services in course of buying or selling goods; hence discount allowed on transaction resulting in outright purchases cannot be treated as brokerage or commission."

**4) Ahmedabad Stamp Vendors Association vs. Union OrIndia (257 ITR 202)**

Deduction of tax at source- Commission or Brokerage-meaning of commission or brokerage- element of agency essential- difference between agency and sale-stamp vendors- purchase of stamp papers at discount restriction on sale and provision in Gujarat Stamps Supply and Sales Rules, 1987, for surrender of Stamp papers to government provision would not render Stamp vendors agents- action amounts to sale- Discount on sale of Stamp paper does not attract section 194H- IT ACT, 1961,sec. 194H

**5) Bhopal Sugar Industries Ltd. Vs. STO AIR 1997 SC 1275**

Where in it was held that a reduction in selling price offered by way of incentive or discount cannot be regarded as commission or brokerage nor can it be regarded as income liable to tax as part of the sale transaction of goods sold.

**6) Government Milk scheme vs. ACIT TDS.98 ITD 306.**

Section 194H of the IT Act, 1961- Deduction of tax at source- Commission or Brokerage, etc. A.Y:2003-04-Assessee, a Government Establishment, used to procure milk through various sanghs and federation and after proper processing, milk was sold In open market through various milk centers or milk booths (Kiosks)- assessee paid 90 paisa per liter to said milk centers/milk (kiosks) towards transport cost container charges and chilling charges etc.- However, assessee had given nomenclature of above mentioned expenditure as commission - AO held that the relationship of principal and agent between the assessee and milk center and kiosks and therefore, assessee was required to deduct TDS u/s 194H on commission so paid- whether since goods either produced or disbursed at every stage of transaction was on actual payment basis, transition was purely on PRINCIPAL TO PRINCIPAL basis and there was no existence of agency- Held, yes, whether payment in question was within expression "commission or brokerage" as prescribed u/s 194H-HELD NO- Whether therefore, assessee was not liable for deduction of tax at source u/s 194H and liability created on the assessee u/s 201(1) and section 201(1A) was to be deleted. HELD, YES

**7) ITL Tours and Travels (P) Ltd. Vs. ITO (2011) 44 SOT 277 (Mum.) (Trib)**

"The transaction in question were not transactions between principal and agent but those transactions were between principal and principal. In order to bring services or transactions within expression "Commission" and "Brokerage" under section 194H, element of agency must be present. When the discount allowed / given by the assessee to the intermediaries was also allowed to passenger directly who booked the tickets with the assessee and the assessee was recording the transaction in its books of account on net amount of the invoice, then it was not a case of commission or brokerage paid or payable by the assessee to the intermediaries, hence, the provisions of section 194H were not applicable therefore no disallowance can be made under section 40a(ia)."

**8) S. 194H: Deduction of Tax at Source - Commission-Brokerage**

Agents of Airline companies are permitted to sell tickets at any rate between fixed minimum commercial price and Published price. Difference between commercial price and published price neither commission nor brokerage tax need not be deducted under section 194H.

**CIT VS. QATAR Airways (2011) 332 ITR 253 (Bom.)(High Court)**

**9)** Section 194 H is not attracted in respect of principal- to- principal transactions: **In ITO V Mother Dairy Food processing Ltd (2010) 401 SOT 9 (Del)** the assessee entered into agreement with its concessionaires (vendors)for selling milk and milk products. The goods were sold to Vendors at a price less than MRP on principal-to principal basis. No commission was paid separately except the reduction in price from the MRP. The tribunal accordingly held that the transaction was not that of principal and Commission agent and thus the provisions of section 194H were not attracted.

**10) National Panasonic India (P) Ltd. Vs. Dy. CIT (2005) 94 TTJ (Del.) 889**

Where in it was held that concession by way of discount in price for sales promotion offers cannot be liable for deduction of tax at source us 194H.

**11) S.D. Pharmacy (P) Ltd. Vs. Dy. CIT (2009) 31 SOT 386 (Coch-Trib)**

**Your appellant further reliance the latest decision of Hon'ble Delhi High Court in the case of CIT Vs.JAI DRINKS PVT.LTD. (198 TAXMAN 271)**

The facts are identical, i.e. the relation between the assessee and that of the dealer is Principal to Principal and not at all principal to Commission agent.

In view of the above it is submitted that the entire approach of the Assessing Officer is totally misconceived and incorrect on fact as well as on settled legal proposition. Needless to say that though principle of Res Judicata does not apply in Income tax proceedings and each year is a separate year for assessment. However, these facts have been examined by the Assessing Office in earlier years and no disallowance on this ground has ever been made, which also may please be noted. The appellant most respectfully submits that the addition of Rs.2,38,46,000/- may please be directed to be deleted.

**Summation:**

I am of the opinion that discount paid to dealers and distributors shall not be disallowed u/s 40a(ia). The summary is as follows:

**Element of Agency:** The element of agency has to be there, in case of all services or transactions, contemplated by the Explanation (i) appended to section 19AH. There is an essential distinction between a contract of sale and a contract on behalf of agency (by which the agent is authorized to sell or buy on behalf of the principal). The essence of the contract of sale, is the transfer of title to the goods for a price paid or promised to be paid. The transferee in such case, is liable to the transferor as a debtor for the price to be paid and not as an agent for the proceeds of the sale. The essence of agency to sell, is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal who continues to be the owner of the goods, and will, therefore, be liable to account for the sale proceeds, As per the dictionary meaning the term 'agency' means, 'a fiduciary relationship created by express or implied contract or by law, in which one party (agent) may act on behalf of another party (principal) and bind that other party by words or actions' and 'agent is defined in section 182 of the Contract Act, 1872, as a person employed to do any act for another, or to represent another in dealing with third persons'ü0Ajmer Zila Dugdh Utpadak Sangh Ltd. v. T[2009) 34 SOT 216 (Jp). If a car dealer purchase cars form the manufacturer by paying price less discount, he would be the purchaser and not the agent of the company, but in the course of selling cars, he may enter into a contract of maintenance during the warranty period, with the customer (purchaser of the car) on behalf of the company. However, such service rendered by the dealer in the course car does not make the activity of selling car itself an act of agent of the manufacturer when the dealings between the company and the dealer in the matter of sale of cars are on 'principal to principal' basis. This is just an illustration to clarify that a service in the course of selling of goods has to be something more than the act of buying or selling of goods.

The principal controversy is whether in a given case sale is on principal to principal basis involving the contract of sale or it is under a contract of agency. A brief reference is required to be made to the principles laid down by the Supreme Court in the case of Bhopal Sugar Industries Ltd. v. STO [1977] 3 SCC 147, wherein the Apex Court reviewed all the relevant previous decisions on the subject.

**Principal to Principal: TDS u/s. 194H is not applicable TDS u/s. 194H held as not liable**

1. In the case of Ahmedabad Stamp Vendors Association vs. Union of India (2002) 124 Taxman628 (Guj.), it was held that when the licensed stamp vendors take delivery of stamp papers on payment of full price less discount and they sell such stamp papers to retail customers, such buying from the Government and selling to the customers cannot be called the service in the course of buying or selling of goods. There is no contract of Agency between the Government and the vendors and hence these vendors are not the agents of the Government. Therefore, the discount given to the vendors does not amount to commission or brokerage liable to TDS.
2. Also in the case of CIT vs. Samaj [2001] 77 ITD 358 (Cuttack), it was held that the transactionbetween the assessee, publishing newspaper and it sales agents is on principal to principal basis. There is no element of Agency. Therefore, question of affecting TDS on discount given to newspaper agents and

**contd. on page no. 498**

# Judicial Analysis

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**Concept of 'Permanent Establishment' gets much needed clarity from Hon'ble Supreme Court**

**Formula One World Championship Ltd. *v.* CIT [2017] 80 taxmann.com 347 (SC)**

**22.** It is an undisputed fact that Article 5 of DTAA between India and the United Kingdom follows the Organisation for Economic Cooperation and Development's (OECD) Model of Double Taxation Convention. There are various commentaries on Double Taxation Conventions. Celebrated among those are: *"A Manual on the OECD Model Tax Convention on Income and on Capital"* by Philip Baker Q.C., and Klaus Vogel on *"Double Taxation Conventions"*. OECD has also given its *'condensed version'* on *"Model Tax Convention on Income and on Capital"*. What constitutes PE under various circumstances has also been the subject matter of judicial verdicts in India as well as in other countries. For better understanding of what may constitute a PE, it would be imperative to refer to these commentaries and judicial decisions. This discussion would disclose the principles enunciated to determine the existence of a PE, application whereof to the given facts would facilitate in answering the surging debate.

**23.** Philip Baker explains that the concept of PE is important for several Articles of the Conventions; the concept, or its cognate, also appears in the domestic law of some countries. According to him, the concept marks the dividing line for businesses between merely trading with a country and trading in that country; if an enterprise has a PE, its presence in a country is sufficiently substantial that it is trading in the country. He has quoted the following passage from the judgment of the Andhra Pradesh High Court, authored by Justice (Retd.) Jagannadha Rao (as His Lordship's then was, later Judge of this Court) in *CIT* v. *Visakhapatnam Port Trust* [1983] 144 ITR 146/15 Taxman 72 (AP):

"The words 'permanent establishment' postulate the existence of a substantial element of an enduring or permanent nature of a foreign enterprise in another country which can be attributed to a fixed place of business in that country. It should be of such a nature that it would amount to a virtual projection of the foreign enterprise of one country into the soil of another country."

**24.** Emphasising that as a creature of international tax law, the concept of PE has a particularly strong claim to a uniform international meaning, Philip Baker discerns two types of PEs contemplated under Article 5 of OECD Model. First, an establishment which is part of the same enterprise under common ownership and control – an office, branch, etc., to which he gives his own description as an *'associated permanent establishment'*. The second type is an agent, though legally separate from the enterprise, nevertheless who is dependent on the enterprise to the point of forming a PE. Such PE is given the nomenclature of *'unassociated permanent establishment'* by Baker. He, however, pointed out that there is a possibility of a third type of PE, i.e. a construction or installation site may be regarded as PE under certain circumstances. In the first type of PE, i.e. associated permanent establishments, primary requirement is that there must be a fixed place of business through which the business of an enterprise is wholly or partly carried on. It entails two requirements which need to be fulfilled: (a) there must be a business of an

enterprise of a Contracting State (FOWC in the instant case); and (b) PE must be a fixed place of business, i.e. a place which is at the disposal of the enterprise. It is universally accepted that for ascertaining whether there is a fixed place or not, PE must have three characteristics: *stability*, *productivity* and *dependence*. Further, fixed place of business connotes existence of a physical location which is at the disposal of the enterprise through which the business is carried on.

**25.** Some of the examples of fixed place of business given by Baker are the following: The place of business must be fixed and permanent. Thus, a shed which had been rented for thirteen years for storing and preparing hides was held to constitute a PE [*Transvaal Associated Hide & Skin Merchants (Pty.) Ltd.* v. *Collector Tax Botswana* [1967] 29 SATC 97]. Similarly, a writer's study has been held to constitute a PE [*Georges Simenon* v. *Commissioner of Interval Revenue* [1965] 44 TC (US) 20]. A stand at a trade fair, occupied regularly for three weeks a year, through which the enterprise obtained contracts for a significant part of its annual sales, has also been held to constitute a PE [*Josepn Fowler* v. *M.N.R* [1990] 90 DTC 1834]. A temporary restaurant operated in a mirror tent at a Dutch flower show for a period of seven months was held to constitute a PE[1]. An office, workshop and storeroom for the maintenance of aircraft, which were leased out by the enterprise, has been held to constitute a PE[2].

**26.** On the other hand, possession of a mailing address in a state – without an office, telephone listing or bank account – has been held not to constitute a PE [*Commissioner of Internal Revenue* v. *Consolidated Premium Iron Ores* [1959] 265 F 2d 320]. The mere supply of skilled labour to work in a country did not give rise to a PE of the company supplying the labour [*Tekniskil (Sendirian) Berhal* v. *CIT* [1996] 88 Taxman 439/222 ITR 551 (AAR - Delhi)]. A drilling rig which, although anchored while in operation, was moved to a new site every few months, has been held not to constitute a PE[3]. Similarly, a remotely operated vessel which was used to inspect and repair submarine pipelines was held not to constitute a PE because a moving vessel is not a fixed place of business [*Dy. CIT* v. *Subsea Offshore Ltd.* [1998] 66 ITD 296 (Mum.)].

**27.** The principal test, in order to ascertain as to whether an establishment has a fixed place of business or not, is that such physically located premises have to be *'at the disposal'* of the enterprise. For this purpose, it is not necessary that the premises are owned or even rented by the enterprise. It will be sufficient if the premises are put at the disposal of the enterprise. However, merely giving access to such a place to the enterprise for the purposes of the project would not suffice. The place would be treated as *'at the disposal'* of the enterprise when the enterprise has right to use the said place and has control thereupon.

**28.** Some of the illustrative cases decided by courts of different jurisdictions given by Baker in his commentary are contained in the following passages from that book:

(i) In the Canadian case of William Dudneyv. R [1999] 99 DTC 147, the taxpayer was a resident of the United States who was contracted to supply training to employees of a Canadian company. For the purposes of the training contract, the taxpayer was given various offices at the premises of the Canadian company, which he was only allowed to enter at normal office hours. He was allowed to use the client's telephone only on client's business. He spent 300 days in one tax year and 40 in the subsequent year at the premises. The Tax Court of Canada and the Federal Court of Appeal confirmed that he had no fixed base – which was treated as having the same meaning as PE – at the premises since he had no right to use the

premises as the base for the operation of his own business.

(ii) In a case generally referred to as Hotel Manager4, the Bundesfinanzhof held that a UK hotel management company had a PE in Germany when it entered into a 20 year contract with a limited partnership which owned a hotel. The agreement required the UK company to supply a general manager: the general manager's office constituted the PE (and not the entire hotel) since the UK company had a secured right to use this office for the purposes of the agreement.

(iii) A Swiss company was held not to have a PE when it contracted with a German company to produce salad dressings in the name of and in accordance with the recipe of the Swiss company. No employees of the Swiss company were present at the production facility to supervise production 5. The Bundestinanzh of has also held that a scene painter who was commissioned to carry out a work in France for six weeks, and given special rooms for the purpose, did not have a fixed base at those premises.

(iv) The Administrative Court of Appeal of Paris has held that a German travel agency did not have a PE in France6. A travel agency in Paris had made an office available to the German company from time to time, and the manager of the German company had a flat in Paris; the Court held that the German company had no PE at its disposal in France.

(v) The Brussels Court of Appeal has held that a German resident engaged in the transportation of vehicles had a PE in Belgium7. The taxpayer had an office 3m by 6m at his disposal on the premises of his principal supplier in Belgium, together with telephone and telex, where the taxpayer and four of his staff worked.

**29.** According to Philip Baker, the aforesaid illustrations confirm that the fixed place of business need not be owned or leased by the foreign enterprise, provided that is at the disposal of the enterprise in the sense of having some right to use the premises for the purposes of its business and not solely for the purposes of the project undertaken on behalf of the owner of the premises.

**30.** Interpreting the OECD Article 5 pertaining to PE, Klaus Vogel has remarked that insofar as the term 'business' is concerned, it is broad, vague and of little relevance for the PE definition. According to him, the crucial element is the term 'place'. Importance of the term 'place' is explained by him in the following manner:

"In conjunction with the attribute 'fixed', the requirement of a place reflects the strong link between the land and the taxing powers of the State. This territorial link serves as the basis not only for the distributive rules which are tied to the existence of PE but also for a considerable number of other distributive rules and, above all, for the assignment of a person to either Contracting State on the basis of residence (Article 1, read in conjunction with Article 4 OECD and UN MC)."

**31.** We would also like to extract below the definition to the expression 'place' by Vogel, which is as under:

"A place is a certain amount of space within the soil or on the soil. This understanding of place as a three-dimensional zone rather than a single point on the earth can be derived from the French Version ('installation fixe') as well as the term 'establishment'. As a rule, this zone is based on a certain area in, on, or above the surface of the earth. Rooms or technical equipment above the soil may quality as a PE only if they are fixed on the soil. This requirement, however, stems from the term 'fixed' rather than the term 'place', given that a place (or space) does not necessarily consist of a piece of land. On the contrary, the term

'establishment' makes clear that it is not the soil as such which is the PE but that the PE is constituted by a tangible facility as distinct from the soil. This is particularly evident from the French version of Article 5(1) OECD MC which uses the term 'installation' instead of 'place'.

The term 'place' is used to define the term 'establishment'. Therefore, 'place' includes all tangible assets used for carrying on the business, but one such tangible asset can be sufficient. The characterization of such assets under private law as real property rather than personal property (in common law countries) or immovable rather than movable property (in civil law countries) is not authoritative. It is rather the context (including, above all, the terms 'fixed'/'fixe'), as well as the object and purpose of Article 5 OECD and UN MC itself, in the light of which the term 'place' needs to be interpreted. This approach, which follows from the general rules on treaty interpretation, gives a certain leeway for including movable property in the understanding of 'place' and, therefore, the assume a PE once such property has been 'fixed' to the soil.

For example, a work bench in a caravan, restaurants on permanently anchored river boats, steady oil rigs, or a transformator or generator on board a former railway wagon qualify as places (and may also be 'fixed').

In contrast, purely intangible property cannot qualify in any case. In particular, rights such a participations in a corporation, claims, bundles of claims (like bank accounts), any other type of intangible property (patents, software, trademarks etc.) or intangible economic assets (a regular clientele or the goodwill of an enterprise) do not in themselves constitute a PE. They can only form part of PE constituted otherwise. Likewise, an internet website (being a combination of software and other electronic data) does not constitute tangible property and, therefore, does not constitute a PE.

Neither does the mere incorporation of a company in a Contracting State in itself constitute a PE of the company in that State. Where a company has its seat, according to its by-laws and/or registration, in State A while the POEM is situated in State B, this company will usually be liable to tax on the basis of its worldwide income in both Contracting States under their respective domestic tax law. Under the A-B treaty, however, the company will be regarded as a resident of State B only (Article 4(3) OECD and UN MC). In the absence of both actual facilities and a dependent agent in State A, income of this company will be taxable only in State B under the 1st sentence of Article 7(1) OECD and UN MC.

There is no minimum size of the piece of land. Where the qualifying business activities consist (in full or in part) of human activities by the taxpayer, his employees or representatives, the mere space needed for the physical presence of these individuals is not sufficient (if it were sufficient, Article 5(5) OECD MC and Article 5(5)(a) UN MC and the notion of agent PEs were superfluous). This can be illustrated by the example of a salesman who regularly visits a major customer to take orders, and conducts meetings in the purchasing director's office. The OECD MC Comm. has convincingly denied the existence of a PE, based on the implicit understanding that the relevant geographical unit is not just the chair where the salesman sits, but the entire office of the customer, and the office is not at the disposal of the enterprise for which the salesman is working."

**32.** Taking cue from the word 'through' in the Article, Vogel has also emphasised that the place of business qualifies only if the place is 'at the disposal' of the enterprise. According to him, the enterprise will not be able to use the place of business as an instrument for carrying on its business unless it controls the place of business to a considerable extent. He hastens to add that there are no absolute standards for

the modalities and intensity of control. Rather, the standards depend on the type of business activity at issue. According to him, 'disposal' is the power (or a certain fraction thereof) to use the place of business directly. Some of the instances given by Vogel in this behalf, of relative standards of control, are as under:

"The degree of control depends on the type of business activity that the taxpayer carries on. It is therefore not necessary that the taxpayer is able to exclude others from entering or using the POB.

The painter example in the OECD MC Comm. (no. 4.5 OECD MC Comm. on Article 5) (however questionable it might be with regard to the functional integration test) suggests that the type and extent of control need not exceed the level of what is required for the specific type of activity which is determined by the concrete business.

By contrast, in the case of a self-employed engineer who had free access to his customer's premises to perform the services required by his contract, the Canadian Federal Court of Appeal ruled that the engineer had no control because he had access only during the customer's regular office hours and was not entitled to carry on businesses of his own on the premises.

Similarly, a Special Bench of Delhi's Income Tax Appellate Tribunal denied the existence of a PE in the case of Ericsson. The Tribunal held that it was not sufficient that Ericsson's employees had access to the premises of Indian mobile phone providers to deliver the hardware, software and know-how required for operating a network. By contrast, in the case of a competing enterprise, the Bench did assume an Indian PE because the employees of that enterprise (unlike Ericsson's) had exercised other businesses of their employer.

The OECD view can hardly be reconciled with the two court cases. All three examples do indeed shed some light onto the method how the relative standards for the control threshold should be designed. While the OECD MC Comm. suggests that it is sufficient to require not more than the type and extent of control necessary for the specific business activity which the taxpayer wants to exercise in the source State, the Canadian and Indian decisions advocate for stricter standards for the control threshold.

The OECD MC shows a paramount tendency (though no strict rule) that PEs should be treated like subsidiaries (cf. Article 24(3) OECD and UN MC), and that facilities of a subsidiary would rarely been unusable outside the office hours of one of its customers (i.e. a third person), the view of the two courts is still more convincing.

Along these lines, a POB will usually exist only where the taxpayer is free to use the POB:

- at any time of his own choice;
- for work relating to more than one customer; and
- for his internal administrative and bureaucratic work.

In all, the taxpayer will usually be regarded as controlling the POB only where he can employ it at his discretion. This does not imply that the standards of the control test should not be flexible and adaptive. Generally, the less invasive the activities are, and the more they allow a parallel use of the same POB by other persons, the lower are the requirements under the control test. There are, however, a number of traditional PEs which by their nature require an exclusive use of the POB by only one taxpayer and/or his personnel. A small workshop (cf. Article 5(2)(e) OECD and UN MC) of 10 or 12 square meters can hardly be used by more than one person. The same holds true for a room where the taxpayer runs a noisy machine."

**33.** OECD commentary on Model Tax Convention mentions that a general definition of the term

'PE' brings out its essential characteristics, i.e. a distinct "situs", a "fixed place of business". This definition, therefore, contains the following conditions:

- the existence of a "place of business", i.e. a facility such as premises or, in certain instances, machinery or equipment.
- this place of business must be "fixed", i.e. it must be established at a distinct place with a certain degree of permanence;
- the carrying on of the business of the enterprise through this fixed place of business. This means usually that persons who, in one way or another, are dependent on the enterprise (personnel) conduct the business of the enterprise in the State in which the fixed place is situated.

**34.** The term "place of business" is explained as covering any premises, facilities or installations used for carrying on the business of the enterprise whether or not they are used exclusively for that purpose. It is clarified that a place of business may also exist where no premises are available or required for carrying on the business of the enterprise and it simply has a certain amount of space at its disposal. Further, it is immaterial whether the premises, facilities or installations are owned or rented by or are otherwise at the disposal of the enterprise. A certain amount of space at the disposal of the enterprise which is used for business activities is sufficient to constitute a place of business. No formal legal right to use that place is required. Thus, where an enterprise illegally occupies a certain location where it carries on its business, that would also constitute a PE. Some of the examples where premises are treated at the disposal of the enterprise and, therefore, constitute PE are: a place of business may thus be constituted by a pitch in a market place, or by a certain permanently used area in a customs depot (e.g. for the storage of dutiable goods). Again the place of business may be situated in the business facilities of another enterprise. This may be the case for instance where the foreign enterprise has at its constant disposal certain premises or a part thereof owned by the other enterprise. At the same time, it is also clarified that the mere presence of an enterprise at a particular location does not necessarily mean that the location is at the disposal of that enterprise.

**35.** The OECD commentary gives as many as four examples where location will not be treated at the disposal of the enterprise. These are:

(a) The first example is that of a salesman who regularly visits a major customer to take orders and meets the purchasing director in his office to do so. In that case, the customer's premises are not at the disposal of the enterprise for which the salesman is working and therefore do not constitute a fixed place of business through which the business of that enterprise is carried on (depending on the circumstances, however, paragraph 5 could apply to deem a permanent establishment to exist).

(b) Second example is that of an employee of a company who, for a long period of time, is allowed to use an office in the headquarters of another company (e.g. a newly acquired subsidiary) in order to ensure that the latter company complies with its obligations under contracts concluded with the former company. In that case, the employee is carrying on activities related to the business of the former company and the office that is at his disposal at the headquarters of the other company will constitute a permanent establishment of his employer, provided that the office is at his disposal for a sufficiently long period of time so as to constitute a "fixed place of business" (see paragraphs 6 to 6.3) and that the activities that are performed there go beyond the activities referred to in paragraph 4 of the Article.

(c) The third example is that of a road transportation enterprise which would use a delivery dock at a customer's warehouse every day for a number of years for the purpose of delivering goods purchased by that customer. In that case, the presence of the road transportation enterprise at the delivery dock would be so limited that that enterprise could not consider that place as being at its disposal so as to constitute a permanent establishment of that enterprise.

(d) Fourth example is that of a painter, who, for two years, spends three days a week in the large office building of its main client. In that case, the presence of the painter in that office building where he is performing the most important functions of his business (i.e. painting) constitute a permanent establishment of that painter.

**36.** It also states that the words 'through which' must be given a wide meaning so as to apply to any situation where business activities are carried on at a particular location which is at the disposal of the enterprise for that purpose. For this reason, an enterprise engaged in paving a road will be considered to be carrying on its business 'through' the location where this activity takes place.

xxx…

**65.** We have pondered over the aforesaid submissions of the learned counsel for the parties with all seriousness and sincerity they deserve. We have also minutely gone through the material placed on record. We have kept in mind the governing law that has already been stated in detail. We are also conscious of the approach that is needed to examine these kinds of issues, as discussed in the judgments referred to by Mr. Dave. Likewise, we have also microscopically examined the judgment of the High Court which is under challenge.

**66.** As per Article 5 of the DTAA, the PE has to be a fixed place of business 'through' which business of an enterprise is wholly or partly carried on. Some examples of fixed place are given in Article 5(2), by way of an inclusion. Article 5(3), on the other hand, excludes certain places which would not be treated as PE, i.e. what is mentioned in clauses (a) to (f) as the 'negative list'. A combined reading of sub-articles (1), (2) and (3) of Article 5 would clearly show that only certain forms of establishment are excluded as mentioned in Article 5(3), which would not be PEs. Otherwise, sub-article (2) uses the word 'include' which means that not only the places specified therein are to be treated as PEs, the list of such PEs is not exhaustive. In order to bring any other establishment which is not specifically mentioned, the requirements laid down in sub-article (1) are to be satisfied. Twin conditions which need to be satisfied are: (i) existence of a fixed place of business; and (b) through that place business of an enterprise is wholly or partly carried out.

**67.** We are of the firm opinion, and it cannot be denied, that Buddh International Circuit is a fixed place. From this circuit different races, including the Grand Prix is conducted, which is undoubtedly an economic/business activity. The core question is as to whether this was put at the disposal of FOWC? Whether this was a fixed place of business of FOWC is the next question. We would like to start our discussion on a crucial parameter viz. the manner in which commercial rights, which are held by FOWC and its affiliates, have been exploited in the instant case. For this purpose entire arrangement between FOWC and its associates on the one hand and Jaypee on the other hand, is to be kept in mind. Various agreements cannot be looked into by isolating them from each other. Their wholesome reading would bring out the real transaction between the parties. Such an approach is essentially required to find out as to who is having real and dominant control over the Event, thereby providing an answer to the question as to whether Buddh International Circuit was at the disposal of FOWC and

whether it carried out any business therefrom or not. There is an inalienable relevance of witnessing the wholesome arrangement in order to have complete picture of the relationship between FOWC and Jaypee. That would enable us to capture the real essence of FOWC's role.

xxx…

**69.** We are in agreement with the aforesaid analysis which correctly captures the substance of the relevant clauses of the agreement.

xxx…

**71.** A stand at a trade fair, occupied regularly for three weeks a year, through which an enterprise obtained contracts for a significant part of its annual sales, was held to constitute a PE8. Likewise, a temporary restaurant operated in a mirror tent at a Dutch flower show for a period of seven months was held to constitute a PE9.

**72.** The High Court has also referred to some of the judgments which are of relevance. We would like to take note of those judgments as we had agreed with the conclusions of the High Court on this issue:

In Universal Furniture Ind. AB v. Government of Norway Case No. 99-00421, dated 19-12-1999, a Swedish company sold furniture abroad that was assembled in Sweden. It hired an individual tax resident of Norway to look after its sales in Norway, including sales to a Swedish company, which used to compensate him for use of a phone and other facilities. Later, the company discontinued such payments and increased his salary. The Norwegian tax authorities said that the Swedish company had its place of business in Norway. The Norwegian court agreed, holding that the salesman's house amounted to a place of business: it was sufficient that the Swedish Company had a place at its disposal, i.e the Norwegian individual's home, which could be regarded as 'fixed'.

In Joseph Fowler v.Her Majesty the Queen 1990 (2) CTC 2351, the issue was whether a United States tax resident individual who used to visit and sell his wares in a camper trailer, in fairs, for a number of years had a fixed place of business in Canada. The fairs used to be once a year, approximately for three weeks each. The court observed that the nature of the individual's business was such that he held sales in similar fares, for duration of two or three weeks, in two other locales in the United States. The court held that conceptually, the place was one of business, notwithstanding the short duration, because it amounted to a place of management or a branch having regard to peculiarities of the business.

xxx…

**76.** We are of the opinion that the test laid down by the Andhra Pradesh High Court in Visakhapatnam Port Trust case fully stands satisfied. Not only the Buddh International Circuit is a fixed place where the commercial/ economic activity of conducting F-1 Championship was carried out, one could clearly discern that it was a virtual projection of the foreign enterprise, namely, Formula-1 (i.e. FOWC) on the soil of this country. It is already noted above that as per Philip Baker10, a PE must have three characteristics: stability, productivity and dependence. All characteristics are present in this case. Fixed place of business in the form of physical location, i.e. Buddh International Circuit, was at the disposal of FOWC through which it conducted business. Aesthetics of law and taxation jurisprudence leave no doubt in our mind that taxable event has taken place in India and non-resident FOWC is liable to pay tax in India on the income it has earned on this soil.

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# India's positions on Permanent Establishment in OECD's 2017 Update to Model Tax Convention and Commentary

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## 1. Executive Summary

On 21 November 2017, the Organisation for Economic Co-operation and

Development (OECD) approved the contents of the 2017 Update to the OECD Model Tax Convention (MTC) and Commentary (the OECD Model). Like the previous updates, the 2017 Update contains the positions of OECD and non-OECD member countries, including those of India, on the OECD MTC and its Commentary.

India's positions to the 2017 Update are mainly on Permanent Establishment (PE), Mutual Agreement Procedure (MAP) and on certain other miscellaneous provisions such as the tie-breaker rule for residence of non-individuals, and tax treaty eligibility for transparent entities, among others.

In this article, we have summarized India's key positions on the PE provisions in the 2017 Update.

## 2. Detailed Discussion

### 2.1 Deemed PE due to "significant economic presence"

The OECD's Base Erosion and Profit Shifting (BEPS) Action 1 Final Report, issued in October 2015, examining the tax challenges of the digital economy identifies, among others, a new nexus test in the form of "significant economic presence" as an additional option for determination of taxable presencein a state. This is, however, not a specific recommendationin the Final Report and the OECD's work on Action 1 is still inprogress, with the final outcome expected in 2020.

Further, as per the 2014 Model Commentary, a website which is a combination of software and electronic data, does not create a PE since the enterprise does not have a physical presence at a location that can constitute a "place of business." On this, India reserved a position that a website can create a PE in certain circumstances or by virtue ofhosting a website on a server at a particular location.

India has indicated the following positions in the 2017 Update:

- The right to deem a PE if the foreign enterprise has significant economic presence in India, as discussed inBEPS Action 1.
- A website may constitute a PE where it leads to significant economic presence of the foreign enterprise in India.
- Depending on facts, a foreign enterprise can be considered to have acquired a place of business through a website on any equipment, if opening the website on that equipment includes downloading of automated software, such as cookies, which use that equipment to collect data from that equipment, process it in any manner or share it with the enterprise.

### 2.2 Positions on BEPS amended Article 5(5) and 5(6) –Agency PE

*Non-inclusion of the term "routinely" in Dependent Agent PE (DAPE) clause*

The 2017 Update expands the scope of DAPE to cover a person who habitually plays the principal role in the conclusion of contracts that

are routinely concluded without material modification by the enterprise.

India has reserved a right on non-inclusion of the term"routinely." In other words, Agency PE can be created evenif contracts are concluded without material modification by the enterprise on a non-routine basis.

- *Person working exclusively for a foreign enterprise cannot be considered as independent, irrespective of its close relationship with the enterprise*

The 2017 Commentary provides that if a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent.

India has reserved a right on non-inclusion of the term "to which it is closely related." Thus, according to India, if aperson acts exclusively or almost exclusively on behalf of one or more enterprises, such person may not qualify as an independent agent, irrespective of whether such person is closely related to the enterprise or not.

- *Fragmentation cannot be ignored, even independent of anti-fragmentation rule*

In the 2017 Update, a new anti-fragmentation rule has been introduced, which seeks to deny the PE exemption of preparatory/auxiliary activities if specific conditions are satisfied. The Commentary clarifies that unless the antifragmentation rule is applicable, the preparatory/auxiliary activity condition is of no relevance in a case where an enterprise maintains several fixed places of business to which other listed PE exemption clauses apply since, in such cases, each place of business has to be viewed separatelyand in isolation for determining whether a PE exists.

India does not agree with the above interpretation. According to India, even when the anti-fragmentation provision does not apply, an enterprise cannot fragment a cohesive operating business into several small operations in order to argue that each is merely engaged in a preparatory or auxiliary activity.

- *Low-risk distributor may create PE*

The 2017 Commentary states that a buy-sell distributor (irrespective of whether it is an associated enterprise or not) may not be considered as a DAPE since it is neither acting on behalf of a non resident enterprise nor is it selling goods that are owned by such enterprise. The goods that are sold to the customers are owned by the distributor itself. This conclusion would apply even if the distributor acted as a "low-risk distributor."

India does not agree with the above interpretation because it considers that distribution of goods owned by an enterprise (by an associated or related enterprise) may create PE, particularly in a case where the risks are not borne by such distributor.

### 2.3 Fixed place PE

- *Disposal test*

The 2017 Commentary provides that where an enterprise does not have a right to be present at a location and does not use that location itself, that location cannot be considered as being at the disposal of the enterprise. Further, with regard to home office as PE, the 2017 Commentary introduces an example of a cross-frontier worker who performs most of his work from his home situated in one state rather than from the office made available to him in the other state, insuch case his home should not be considered as being at the disposal of the enterprise.

India does not agree to the above commentary. According to India:

a) Even where an enterprise does not have a right to be present at a location and does not use that location itself, such location can be considered as being at the disposal

of the enterprise in certain circumstances. No specific circumstance has been explained or illustrated in this regard.

b) With respect to the example of home office, India is of the view that employee's home can be considered as at the disposal of the enterprise.

· *On permanence test and short duration PE*

According to the OECD, a PE is deemed to exist only if there is certain degree of permanence in the source country. In general practice, this is satisfied if the place of business is maintained for a period of six months. An exception to this condition is a case where business activities are carried on exclusively in a country. In such case, even if the business exists for a shorter duration, due to the nature of the business activity, its connection with that country is stronger. This exception is illustrated in the following two circumstances:

1) An individual, resident in State R, contracts with the producer of a documentary to provide catering services at the remote village in State S where such documentary is proposed to be shot during a four-month period. The individual will provide such services from his parents'home which is located in the village. In such case, the Commentary states that the time requirement for a PE is met since the restaurant is operated during the whole existence of that particular business.

2) However, a company, resident of State R, operating various catering facilities in State R, may also operate a cafeteria in State S during a four-month production of a documentary. In that case, the company's business, which is permanently carried on in State R, is only temporarily carried on in State S. Hence, it could not be considered that the time requirement for a PE is met.

India disagrees with the OECD's view in scenario 2. According to India, operation of catering facilities in scenario 2 also meets the time requirement for constituting a PE.

· *Repair work on project subsequent to completion of construction work to be added to original construction period*

The 2017 Update states that a building site or construction or installation project constitutes a PE only if it lasts more than 12 months. It is clarified that work undertaken on a site after the construction work, pursuant to a guarantee that requires an enterprise to make repairs, would normally not be included in the original construction period.

India does not agree with such interpretation. According to India, any work undertaken on a site shortly after the construction work has been completed, including repair works undertaken pursuant to a guarantee, may be taken into account as part of the original construction period.

· *Collection of information on risks not preparatory or auxiliary, in the case of an insurance company*

According to the OECD, if a fixed place of business is used merely for collecting information for an enterprise, such place may not be treated as PE, provided such activity of information collection qualifies as preparatory or auxiliary for the enterprise. To illustrate this, if an insurance company sets up an office solely for the collection of information, such as statistics or for understanding risks in a particular market, such collection of information will be a preparatory activity.

India does not agree with the above interpretation. Collection of data for the purpose of determination or quantification of risk by an enterprise in the business of managing risks, such as insurance, is not an activity of preparatory or auxiliary character.

· *Treatment of Value Added Tax (VAT)/ Goods and Services Tax (GST) relevant for determining PE status*

The 2017 Commentary states that treatment under VAT/ GST is irrelevant for the purposes of the interpretation and application of the definition of PE. Hence, when evaluating PE status, one should not draw any inference from the treatment of a foreign enterprise (including registration) for VAT/GST purposes.

India does not agree with the above. According to India, treatment under VAT/GST can be a relevant factor for determining PE status.

**3. Implications**

Tax treaties generally provide that the business profits of a foreign enterprise are taxable in a State only to the extent that the enterprise has in that State a PE to which the profits are attributable. The definition of PE, and its interpretation, is therefore crucial in determining whether a non-resident enterprise must pay income tax in another State. Traditionally, India has sought to have greater source country taxation while allocating taxing rights under a tax treaty by seeking to have a broader definition of PE as compared to the OECD standard. Consistent with this objective, the positions stated by India in the 2017 Update reflect a broader application of some of the PE rules.

India's positions serve as a guide to taxpayers on the likely approach of the Indian tax administration during audits, and also as a broad outline of India's tax treaty policy to countries seeking to negotiate a tax treaty with India. However, these positions are unilateral actions and may not be legally binding on taxpayers or on Courts while interpreting a tax treaty. Also, a preponderant judicial view in India has been that India's positions on the OECD MTC may be relevant, if at all, only while interpreting tax treaties which will be entered into by India after making these positions.

Multinational enterprises should evaluate how these positions may impact their PE risk assessment in India and the potential for tax controversy if these positions are proposed by the Indian tax authority during PE audits.

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**contd. from page 486**



charges/commission retained by advertising agents under section194H does not arise. Such commission paid is in nature of trade discount.

3. In the case of Foster's India (P) Ltd. vs. ITO (2008) 10 DTR (Pune) 402. The Hon'bl e Tribunal held that the distributor's incentive, early payment discount and bond expenses do not constitute commission so as to attract TDS u/s. 194H as there is no principal to agent relationship between the assessee and the distributors.

Huge commission given to distributors and dealers in the form of incentives and discount is not commission: Where in order to boost its sale, the assessee had offered huge commission to its distributors and dealers in the form of incentives and discounts by using different names viz. (a)trade discount, (b) regional sales promotion, (c) Key dealer incentive, (d) fast-track bonus, (e)trade scheme, (f) sales promotions, (e) sales ] promotion (price buffer), (h) special discount(institutional sales) and (i) market alterations, it was held that these payment were nothing more than incentives to drive dealers to achieve certain targets and the same cold not be treated as commission for purposes of section 194H so as to require tax deduction at source by assessee while making such payments. [National Panasonic India Pvt. Ltd. v. Dy. CIT (2005) 3 SOT16 (Del)].

The incentive given to the dealers for achieving the target sale is deductible u/s. 37 of the Income Tax Act, 1961.

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# FEMA Updates

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## 16 Investment by Foreign Portfolio Investors (FPI) in Government Securities

**Medium Term Framework – Review**

Circular is in terms of Schedule 5 to the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 notified vide Notification No. FEMA.20/2000-RB dated May 3, 2000, as amended from time to time.

Revision of Limits for the next quarter Jan - Mar 2018

The limits for investment by FPIs for the quarter January – March 2018 is increased by INR 64 billion in Central Government Securities (Central G-Secs) and INR 58 billion in State Development Loans (SDLs). The revised limits are allocated as per the modified framework prescribed in the RBI/ 2017-18/12 A.P.(Dir Series) Circular No.1 dated July 3, 2017, and given as under.

Limits for FPI investment in Government Securities
(₹ Billion)

| | Central Government Securities | | | State Development Loans | | | Aggregate |
|---|---|---|---|---|---|---|---|
| | General | Long Term | Total | General | Long Term | Total | |
| Existing limits | 1,897 | 603 | 2,500 | 300 | 93 | 393 | 2,893 |
| Revised limits | 1,913 | 651 | 2,564 | 315 | 136 | 451 | 3,015 |

The revised limits will be effective from January 01, 2018.

The operational guidelines relating to allocation and monitoring of limits will be issued by the Securities and Exchange Board of India (SEBI).

**A.P. (DIR Series) Circular No. 14, December 12, 2017**

**For Full Text refer to https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=11186**

## 17 Statement on Developmental and Regulatory Policies

Rationalisation of Merchant Discount Rate

In recent times, debit card transactions at 'Point of Sales' have shown significant growth. With a view to giving further fillip to acceptance of debit card payments for purchase of goods and services across a wider network of merchants, it has been decided to rationalise the framework for Merchant Discount Rate (MDR) applicable on debit card transactions based on the category of merchants. A differentiated MDR for asset-light acceptance infrastructure and a cap on absolute amount of MDR per transaction will also be prescribed. The revised MDR aims at achieving the twin objectives of increased usage of debit cards and ensuring sustainability of the business for the entities involved. The revised instructions for MDR on debit card transactions will be issued today.

Allowing Overseas Branches/Subsidiaries of Indian Banks to Refinance ECBs

Currently Indian corporates are permitted to refinance their existing External Commercial Borrowings (ECBs) at a lower all-in-cost. The overseas branches/subsidiaries of Indian banks are, however, not permitted to extend such refinance.

**contd. on page no. 513**

# GST Updates

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**GST Impact on Buying / Selling Used Vehicles**

Let us discuss in this article the Impact of GST on Buying / Selling a Used Vehicle. Since the transactions happen in different ways, broadly as below, we shall discuss the impact of GST accordingly.

**(a) Individual Sells to Individual (C2C)**

**(b) Individual Sells to Un-registered Dealer (C2C)**

**(c) Individual Sells to Registered Dealer (C2B)**

**(d) Registered Dealer Sells to Any Buyer (B2B / B2C)**

**(e) Leasing of Vehicle**

**(f) Exchange of Old Vehicle with New**

**(a) Individual Sells to Individual (C2C):**

As per **Section 2(105) read with section 7 of CGST Act,** even though the sale of old or used vehicle by an individual is for a consideration, it cannot be said to be in the course or furtherance of his business (as selling old vehicles is not the business of the said individual), and hence does not qualify to be a supply per se. Therefore, sale by an individual to another individual is not a supply and **no GST is applicable**.Section 2 (105) defines supplier as a person supplying the goods or services. Section 7 provides that a supply is a transaction, for a consideration by a person in the course or furtherance of business.

**(b) Individual Sells to Un-registered Dealer (C2C):**

This type of Transaction is similar one in the previous case, except that the buyer is in the course or furtherance of business. Individual selling to un-registered second hand vehicle dealer is **not a supply and therefore no GST is applicable**. Though the unregistered buyer further makes resale of such vehicles is in the course or furtherance of business, **GST is not payable as he is un-registered**.

**(c) Individual Sells to Registered Second Hand Dealer (C2B):**

Individual (unregistered) selling to Registered, attracts payment of GST on Reverse Charge Mechanism under Sec 9(4) of CGST Act. section mandates that tax on supply of taxable goods (vehicle in this case) by an unregistered supplier (an individual in this case) to a registered person (the Second Hand Vehicle Dealer in this case) will be paid by the registered person (the Dealer in this case) under reverse charge mechanism.

**This provision, however, has to be read in conjunction with section 2(105) read with section 7 of the said Act. Section 2 (105) defines supplier as a person supplying the goods or services. Section 7 provides that a supply is a transaction, for a consideration by a person in the course or furtherance of business.**

**Even though the sale of old vehicle by an individual is for a consideration, it cannot be said to be in the course or furtherance of his business (as selling old vehicle is not the business of the said individual), and hence does not qualify to be a supply per se.**

Accordingly the sale of old vehicle by an individual to a registered dealer will not attract the provisions of section 9(4) and the dealer will not be liable to pay tax under reverse charge mechanism on such purchases.

**(d) Registered Dealer Sells to Any Buyer (B2B / B2C):**

If the supplier is a **registered person** of motor vehicle and such supplier had **purchased the Motor Vehicle prior to July 1, 2017** and has **not availed input tax credit of central excise duty, Value Added Tax** or any other taxes paid on such vehicles, then **such vehicles when sold will attract GST of 65% of the applicable GST) rate, including compensation cess.**

**These rates would apply for a period of three years with effect from 1 July 2017 I.e. apply up to 30th June 2020.**

**(e) GST on Leasing of Vehicle:**

Vehicle leasing is the leasing (or the use of) a motor vehicle for a fixed period of time at an agreed amount of money for the lease. It is commonly offered by dealers as an alternative to vehicle purchase but is widely used by businesses as a method of acquiring (or having the use of) vehicles for business, without the usually needed cash outlay. The key difference in a lease is that after the primary term (usually 2, 3 or 4 years) the vehicle has to either be returned to the leasing company or purchased for the residual value.

**Leasing of vehicles purchased prior to 1st July and supplied on lease before 1st July,2017will attract a tax equivalent to 65% of the current applicable goods and services tax (GST) rate for a period of 3 years.**

**(f) Exchange of Old Vehicle with New:**

Interestingly, sale of old and new cars is inextricably linked. It is estimated that about 27-28 percent of new car sales accrue through exchange of old models. So if new car sales are pegged at about 3 million, we could be looking at about 8,40,000 used cars being exchanged for new ones at pre-owned outlets.

In case of exchange offers, the **GST will be paid on the Transaction Value of the New Vehicle**. For instance, if the new car costs Rs 12 lacs and exchange value of the old car is Rs. 4 lacs, the customer will pay Rs 8 lacs but GST will be paid on Rs 12 lacs.

Latest Notifications

| Sr No | Issued Under | Notification No. | Essence of Notification |
|---|---|---|---|
| 1 | (CGST) | Notification No. 67/2017–Central Tax dated 21/12/2017 | Seeks to extend the time limit for filing FORM GST ITC-01 till the 31st day of January, 2018. |
| 2 | (CGST) | NotificationNo. 68/2017–Central Tax dated 21/12/2017 | Seeks to extend the time limit for filing FORM GSTR-5 till the 31st day of January, 2018. |
| 3 | (CGST) | NotificationNo. 69/2017–Central Tax dated 21/12/2017 | Seeks to extend the time limit for filing FORM GSTR-5A till the 31st day of January, 2018. |
| 4 | (CGST) | NotificationNo. 70/2017–Central Tax dated 21/12/2017 | Seeks to further amend CGST Rules, 2017 (Thirteenth Amendment). |

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# GST & VAT
# Judgments / Updates

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**Important Judgments:**

**Reliance Industries Ltd. in respect of 4% reduction in Tax Credit u/s. 11(3)(B)(iii):**

The readers are aware of that in case of Reliance Industries Ltd. the Hon. GVAT Tribunal as well as Gujarat High Court has decided and approved that there will be no further deduction of Input Tax Credit @ 4% in case of fuel used in manufacturing or trading goods which has been sent to out of Gujarat State Branch.

The Hon. Supreme Court has reversed the judgment of the Hon. Gujarat High Court and decided that in case of use of fuel for manufacturing of goods, as well as trading goods dispatched to branch at out of State of Gujarat. The effect of this judgment is very high so far reduction has not been made by the dealer as well as the same is approved by the Department in assessment proceedings and therefore the review petition has been filed by Reliance Industries Ltd. The hearing is awaited. This is an important judgment and therefore gist of the judgment is given hereunder.

[1] Reasons given by the Hon. High Court in taking the aforesaid view can be captured from the following discussion contained in the impugned judgment.

"It is not in dispute that in the present case, the taxable goods purchased by the respondent assessee satisfy the description of sub-clause (ii) and (iii) of section 11(3)(b). Despite this, in our view, the Tribunal came to a correct conclusion that denial of tax credit by4 per cent as provided in clause (b) would have to be done only once. We say so far several reasons. Firstly, clause (b) of section 11(3) pertains to reduction of tax credit otherwise available under section 11. Such reduction is to be applied if the goods satisfy the descriptions contained in sub clause (i) to (iii) thereof. After clause (i) the Legislature has used the word "or". We are conscious that at the end of clause (ii) and beginning of clause (iii), the Legislature has not once again used the word "or" but has also not added the expression "and". Plain reading of the said provisions thus makes it clear that the reduction of tax credit had to be applied to any case which satisfies the description contained in sub-clauses (i) to (iii) not every time such description is satisfied. Further, reduction of amount of tax at the rate of 4 per cent is to be done for the taxable goods which fall in any of the three categories contained in sub-clauses (i) to (iii) and not every time a particular class of goods specified fall in more than one categories".

[2] On addition, the High Court has also observed that the legislative intent of section11(3)(b) can be gathered from proviso thereto which provides that where the rate of tax of taxable goods is less than 4%, then the amount of tax credit in respect of such dealer shall be reduced by the amount of tax calculated at the rate of tax set out in the Schedule of such goods, meaning thereby, if the tax credit available to a dealer is less than 4%, the reduction should be limited to such credit and no more. From this, the High Court has observed that the Legislature envisaged that in no case reduction of tax credit under section 11(3)(b) would accede 4%.

[3] It was argued by Mr. Venugopal and Mr. Bagaria that the approach of the High Court was clearly erroneous as liberal interpretation of section 11(3)(b), when read in the context of the entire scheme of tax credit and other provisions, would clearly show that it was intended to reduce the amount of tax credit by 4% in an eventuality when case was covered

by sub-clause (ii) and again at the rate of 4% when the matter was covered by sub-clause (iii). It was argued that in tax matters, whether the language of the statute is plain and clear, effect thereto has to be given and equity does not play any role in these cases. It was further argued that as per the provisions of the Vat Act, Vat was payable on the purchase of furnace oil, natural gas and light diesel oil as well. However, the Legislature intended to give tax credit in respect of these items when such items are used as raw material/inputs for the purpose of manufacturing other products. At the same time, it is the prerogative of the law makers to decide how and under what circumstances such tax credit would be admissible and to what extent. But for such a provision, the assessee did not have any right to claim the tax credit and thus the question of double deduction does not arise at all. It was also argued that sub-clause (ii) as well as sub-clause (iii) are attracted in different circumstances and, therefore, the reduction stipulated therein could not be treated as double taxation. The learned counsel proceeded to argue that in so far as sub-clause (ii) is concerned, it would be attracted on satisfying the twin conditions, namely – (a) when taxable goods are used as raw material in the manufacture or in the packing of goods; and (b) these goods are dispatched outside the State in the course of branch transfer or consignment or to the agent of the manufacturer outside the State. On the other hand, sub-clause (iii) was attracted in those cases where fuel is used for the manufacture of goods. It is possible, in a given case, that both sub-clauses (ii) and (iii) become applicable (as it has happened in the instant case). However, in such cases the Legislature clearly intended that reduction at the rate of 4% has to be applied in each of the circumstances. Number of judgments were cited on interpretation of tax statutes as well as the manner in which punctuation marks are to be interpreted.

[4] It is clear that the material used even in the packing of goods is treated as raw material and, therefore, this definition is to be treated as term of art. This definition also clarifies that fuels used in the manufacture of goods would be treated as raw material with the only exception of those fuels which are used which are used for the purpose of generation of electricity.

[5] Keeping in mind the aforesaid aspects, we advert to section 11(3)(b). It is a non-obstante clause as it starts with the word 'notwithstanding'. Another aspect which is to be necessarily kept in mind is that it is the 'amount of tax credit' which a dealer would be entitled to claim under clause (a) that is to be reduced at the rate of 4% and this reduction is to be effected in three eventualities provided under sub-clauses (i) (ii) and (iii). Insofar as sub-clause (i) is concerned, it pertains to trading activity and there is no question of any overlap between sub-clause (ii) on the One hand and sub-clauses (ii) & (iii) on the other. Further, insofar as sub-clauses (i) and (ii) are concerned, same are disjunctive as the word 'or' is inserted between these two classes. However, when we come to clauses (ii) and (iii), where there is a possibility of overlap (as it has happened in the instant case as well), there is no word 'or' used between clauses (ii) and (iii). Sub-clause (ii) finishes with the punctuation mark full stop and then sub-clause (iii) starts. This depicts the intention of the Legislature, namely, reduction is not confined to one of the aforesaid two sub-clauses and it can occur under both these provisions. It is rightly pointed out by the appellant State that these are event based sub-clauses and two events are totally different. Sub-clause (ii) is attracted in those cases where taxable goods are used as raw material (which may not necessarily be fuel but all raw materials are included) and also the other condition which is to be fulfilled is that these goods are dispatched outside the State in the course of branch transfer etc. Therefore, even if the taxable goods are used as raw material in the

manufacture or in packing of goods but they are consumed or sold within the State, Sub-clause (ii) would not apply. On the other hand, sub-clause (iii) is preferable to any fuels which are used for manufacture of goods. It is, thus a totally separate category and the moment fuel is used in the manufacture of goods, this sub-clause gets attracted and it would be immaterial whether the goods are sold within the State or outside the State.

[6] The aforesaid discussion leads us to the conclusion that it is a mega tax credit scheme which is provided under the Vat Act meant for all kinds of manufactured goods. The material in question, namely, furnace oil, natural gas and light diesel oil are admittedly subject to Vat under the Vat Act. The Legislature, however, has incorporated the provision, in the form of Section 11, to give tax credit in respect of such goods which are used as inputs/raw material for manufacturing other goods. Rationale behind the same is simple. When the finished product, after manufacture, is sold, Vat would be again payable thereon. This Vat is payable on the price at which such goods are sold, costing whereof is done keeping in view the expenses involved in the manufacture of such goods plus the profits which the manufacturer intends to earn. Insofar as costing is concerned, element of expenses incurred on raw material would be included. In this manner, when the final product is sold and the Vat paid, component of raw material would be included again. Keeping in view this objective, the Legislature has intended to give tax credit to some extent. However, how much tax credit is to be given and under what circumstances, is the domain of the Legislature and the courts are not to tinker with the same.

[7] The upshot of the aforesaid discussion would be to hold that reduction of 4% would be applied whenever a case gets covered by sub-clause (ii) and again when sub-clause (iii) is attracted.

[8] This, however, would be subject to one limitation. In those cases when VAT paid on such raw material is 4%, as in the case of furnace oil, reduction cannot be more than that. After all, Section 11 deals with giving credit in respect of tax that is paid.

[9] Therefore, if some reduction is to be made from the said credit, it cannot be more than the credit given. Thus, so far as furnace oil is concerned, tax credit shall be reduced by 4%. On the other hand, tax credit given in case of natural gas and light diesel oil (other fuels), it shall be reduced by 4% under sub-clause (ii) and 4% under sub-clause (iii) of clause (b) of sub-section (3) of Section 11.

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# Corporate Law Update

**CA. Naveen Mandovara**
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**MCA Updates:**

**1. MCA circular for relaxation of additional fees and extension of last date of filing of form CRA-4 under the Companies Act, 2013:**

The MCA has extended the due date of filing of Form CRA-4 for Financial Year starting on or after April 1, 2016, without any additional fees till December 31, 2017.

**[General Circular No. 15/2017 dated 04.12.2017]**

**2. MCA notified the Companies (Cost Records & Audit) Amendment Rules, 2017:**

The MCA has notified the following amendments in the Companies (Cost Records and Audit) Rules, 2014 by way of Companies (Cost Records & Audit) Amendment Rules, 2017:

1. In Rule 2, after clause (f), the following clause has been inserted and shall be deemed to have been inserted with effect from the April 1, 2016:

   (fa) "Indian Accounting Standards" means Indian Accounting Standards as referred to in Companies (Indian Accounting Standards) Rules, 2015.

2. In the Annexure to the Companies (Cost Records and Audit) Rules, 2014, Form CM-1 and Form CRA-3, has been substituted and shall be deemed to have been substituted with effect from the April 1, 2016.

   The Ministry has also clarified via Explanatory Memorandum that no person is being adversely affected by giving retrospective effect to this notification. The proposed amendments have been made on account of amendments made in the Companies (Indian Accounting Standards) Rules, 2015.

   For detailed notification, please refer the following link:

   **http://www.mca.gov.in/Ministry/pdf/CompaniesCostrecordsAuditRule_08122017.pdf**

**[F. No. 1/40/2013-CL-V dated 07.12.2017]**

**3. Companies (Cost Records And Audit) Second Amendment Rules, 2017:**

1. By way of Companies (Cost Records and Audit) Second Amendment Rules, 2017, following changes have been made in the Companies (cost records and audit) Rules, 2014 (hereinafter referred to-as the principal rules;,

   i) in rule 2, for clause (aa) the following clause shall be substituted and shall be deemed to have been substituted with effect from the 1st day of July' 2017' namely:-

   (aa) Customs Tariff Act Heading" means the heading as referred to in the Additional Notes in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975)'

   ii) in rule 3, for the words "Central Excise Tariff Act Heading", occurring at both the places, the words "Customs Tariff Act Heading" shall be substituted and shall be deemed to have been substituted with effect from the 1st day of July, 2017.

   iii) In the principal rules, in the Annexure, in Form CRA-2, Form CRA-3 and Form.CRA 4, for the words *CETA

Heading", wherever it occurs, the words "CTA Heading" shall be substituted and shall be deemed to have been substituted with effect from the 01st day of July, 2017.

**[F. No. 1/40/2013-CL-V dated 20/12/2017]**

**4. Condonation of Delay Scheme, 2018:**

With a view to give an opportunity for the non-compliant, defaulting companies to rectify the default in filing an annual return or a financial statement for a continuous period of three years, the MCA has launched the **Condonation of Delay Scheme, 2018 ("CODS-2018")** with effect from 01.01.2018 and shall remain in force up to 31.03.2018.

- This scheme is applicable to all defaulting companies (other than the companies which have been stuck off/ whose names have been removed from the register of companies under section 248(5) of the Act). A defaulting company is permitted to file its overdue documents which were due for filing till 30.06.2017 in accordance with the provisions of this Scheme.
- The DINs of the concerned disqualified directors de-activated at present, shall be temporarily activated during the validity of the scheme to enable them to file the overdue documents.
- The defaulting Companies shall be able to file the following forms:
  i. Form Number 20B/MGT-7- Form for filing company having share capital.
  ii. Form 21A/MGT-7- Particulars of Annual return for the company not having share capital.
  iii. Form 23AC, 23ACA, 23AC-XBRL, 23ACA-XBRL, AOC-4, AOC-4(CFS), AOC (XBRL) and AOC-4(non-XBRL) - Forms for filing Balance Sheet/Financial Statement and profit and loss account.
  iv. Form 66 - Form for submission of Compliance Certificate with the registrar.
  v. Form 23B/ADT-1- Form for intimation for Appointment of Auditors.
- The defaulting company after filing documents under this scheme shall seek condonation of delay by filing form e-CODS attached to this scheme online on the MCA21 portal. The fee for filing application e-form CODS is Rs. 30,000/- (Rs. Thirty Thousand only).
- In the event of defaulting companies whose names have been removed from the register of companies under section 248 of the Act and which have filed applications for revival under section 252 of the Act up to the date of this scheme, the Director's DIN shall be re-activated only NCLT order of revival subject to the company having filing of all overdue documents.

**[General Circular No.16/2017 dated 29.12.2017]**

**5. The Central Government notifies The Companies (Amendment) Act, 2017:**

The Central Government notified the Companies (Amendment) Act, 2017 (Amendment Act) on 3rd January, 2018. The provisions of this Amendment Act shall come into force on the date or dates as the Central Government may appoint by notification(s) in the Official Gazette.

- A few provisions in the Amendment Act have important bearing on the working of the Insolvency and Bankruptcy Code, 2016 (Code).
- Section 53 of the Companies Act, 2013 prohibited issuance of shares at a discount. The Amendment Act now allows companies to issue shares at a discount to its creditors when its debt is converted into shares in pursuance of any statutory resolution plan such as resolution plan under the Code or debt restructuring scheme.

- Section 197 of the Companies Act, 2013 required approval of the company in a general meeting for payment of managerial remuneration in excess of 11 percent of the net profits. The Amendment Act now requires that where a company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, for such payment of managerial remuneration shall be obtained by the company before obtaining the approval in the general meeting.
- Section 247 of the Companies Act, 2013 prohibited a registered valuer from undertaking valuation of any assets in which he has a direct or indirect interest or becomes so interested at any time during or after the valuation of assets. The Amendment Act now prohibits a registered valuer from undertaking valuation of any asset in which he has direct or indirect interest or becomes so interested at any time during three years prior to his appointment as valuer or three years after valuation of assets was conducted by him.

The Companies (Amendment) Act, 2017 is available www.ibbi.gov.in and www.mca.gov.in.

## 6. MCA to re-engineer the process of name reservation, incorporation of companies & allotment of DIN:

| | |
|---|---|
| **Name Reservation** | MCA is designing a Front Office service (replacing INC-1 eform with Web-Form) for Name Reservation and Change of Name for companies capturing only absolutely essential information from the applicants.The said service is likely to be rolled out on January 26, 2018. INC-1 is no more available for filing from January 6, 2018. However, resubmission of INC-1 is allowed till 23:59 hours of January 11, 2018. |
| **Incorporation of Companies** | It has been advised that in cases where names have been reserved using INC-1 they may use SPICe for incorporation immediately, latest by January 17, 2018. It is requested that SPICe should be filed with due care as it will be allowed only one resubmission which has to be completed latest by January 25, 2018. SPICe shall be mandated for incorporation of companies w.e.f. January 26, 2018, necessary changes shall be incorporated for Producer Companies in this form. Further INC-7 form is likely to be discontinued w.e.f. January 10, 2018 and to mandate SPICe (with necessary provision for incorporating Producer Companies) as the only form for incorporation of companies w.e.f. January 26, 2018. |
| **DIR-3 (Application for allotment of DIN)** | DIN allotment shall be done only at the time of their appointment as Directors (If they do not possess a DIN) in companies. DIR-3 (Application for Director Identification Number) would be applicable for the allotment of DIN to individuals in respect of existing companies only and shall be filed by the existing company in which the proposed Director is to be appointed. Further, DINs to the proposed first Directors in respect of new companies would be mandatorily required to be applied for in SPICe forms (subject to a ceiling of 3 new DINs) only. DIR-3 shall be modified permitting allotment of up to 2 new DINs (since SPICe provides for up to 3 new DINs) only in respect of 'Producer Companies'. To facilitate corresponding changes in LLP e-forms, due to deprecation of DIR-3, allotment of new DINs for Designated Partners/Partners of LLPs shall be temporarily suspended w.e.f January 26, 2018 till March 31, 2018. |

## 7. Guidelines for technical standards for core services by Insolvency and Bankruptcy Board of India:

The Insolvency and Bankruptcy Board of India (IBBI) has laid down the Technical Standards for the performance of Core Services for the

following matters under Regulation 13 of the IBBI (Information Utilities) Regulations, 2017:

I. Standard terms of service;

II. Registration of users;

III. Unique identifier for each record and each user;

IV. Submission of information;

V. Identification and verification of persons;

VI. Authentication of information;

VII. Verification of information;

VIII. Data integrity;

IX. Consent framework for providing access to information to third parties;

X. Security of the system;

XI. Security of information;

XII. Risk management framework;

XIII. Preservation of information; and

XIV. Purging of information.

An information utility shall comply with the applicable Technical Standards, while providing services.

For detailed guidelines please visit at www.mca.gov.in and www.ibbi.gov.in.

**[Press Release dated 13.12.2017]**

**8. Amendments to the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017 by Insolvency and Bankruptcy Board of India:**

According to the regulations, a resolution plan needs to identify specific sources of funds to be used for paying the liquidation value due to dissenting creditors. For this purpose, the 'dissenting financial creditor', according to amended regulations, means a financial creditor who voted against the resolution plan or abstained from voting for the resolution plan, approved by the committee of creditors.

As per the amendments, it is not necessary to disclose 'liquidation value' in the information memorandum. After the receipt of resolution plan(s) in accordance with the Insolvency and Bankruptcy Code, 2016 (Code) and the regulations, the resolution professional shall provide the liquidation value to every member of the committee of creditors after obtaining an undertaking from the member to the effect that such member shall maintain confidentiality of the liquidation value and shall not use such value to cause an undue gain or undue loss to itself or any other person. Also, the interim resolution professional or the resolution professional, as the case may be, shall maintain confidentiality of the liquidation value.

According to the amendments, a resolution applicant shall submit the resolution plan(s) to the resolution professional within the time given in the invitation for the resolution plans in accordance with the provisions of the Code. This will enable the committee of creditors to close a resolution process as early as possible subject to provisions in the Code and the regulations.

The amendments are available at www.mca.gov.in and www.ibbi.gov.in.

**[Press Release dated 01.01.2018]**

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# From Published Accounts

**CA. Pamil H. Shah**
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## Transition to IND AS

MCA has notified Companies (Indian Accounting Standards) Rules, 2015 which shall come into effect from 1 April 2015. The said rules require adoption for Indian Accounting Standards (Ind AS):-

1. **From FY 15-16:** Any company can voluntary adopt Indian Accounting Standards from Financial year 15-16 with comparatives to be given for the period ending on 31 March 2015 or thereafter.

2. **From FY 16-17 :** Following companies to mandatorily adopt Ind AS from FY 16-17 onwards with comparatives for period ending 31 March 2016 or thereafter:-

   Companies with net worth of Rs 500 crores or more and whose equity or debt securities are either listed or in the process of listing in any Indian stock exchange.

   Companies other than above and whose net worth is Rs 500 crores or more.

   Holding, subsidiary, joint venture and associate of above companies.

3. **From FY 17-18 :** Following companies to mandatorily adopt Ind AS from FY 17-18 onwards with comparatives for period ending 31 March 2017 or thereafter:-

   Companies with net worth less than Rs 500 crores and whose equity or debt securities are either listed or in the process of listing in any Indian stock exchange.

   Companies other than above and whose net worth is Rs 250 crores or more but less than Rs 500 crores.

   Holding, subsidiary, joint venture and associate of above companies.

Considering the wide applicability of rules in future to many companies, in this column, I tried to report on how transition to IND AS can be done and how reporting should be made.

**Visa Steel Ltd**

**45. First Time Adoption of IND AS**

Transition to IND AS

These are the Groups first consolidated financial statements prepared in accordance with Ind AS.

The according policies set out in Note 1 have been applied in preparing the financial statements for the year ended 31 March 2017, the comparative information presented in these financial statements for the year ended 31 March 2016 and in the preparation of an opening Ind AS balance sheet at 1 April 2015 (the group's date of transition). In preparing its opening Ind AS balance sheet, the Group has adjusted the amounts reported previously in financial statements prepared in accordance with the accounting standards notified under Companies (Accounting standards) Rules,2006 (as amended) and other relevant provision of the Act (previous GAAP or Indian GAAP). An explanation of how the transition from previous GAAP to Ind AS has affected the group's financial position, financial performance and cash flows is set out in the following tables and notes.

**A. Exemption and exceptions availed:**

Set out below are the applicable Ind AS 101 optional exemptions and mandatory exceptions applied in the transition from previous GAAP to Ind AS.

**A.1 Ind AS optional exemptions**

**A1.1 Business combinations**

Ind AS 101 provides the option to apply Ind AS 103 prospectively from the transition date or from a specific date prior to the transition date. This provides relief from full retrospective application that would require restatement of all business combinations prior to the transition date.

The Group elected to apply Ind AS 103 prospectively to business combinations occurring after its transition date. Business combinations occurring prior to the transition date have not been restated.

**A.1.2 Deemed cost**

Ind AS 101 permits a first-time adopted to elect to continue with the carrying value for all of its property, plant and equipment as recognised in the financial statements as at the date of transition to Ind AS, measured as per the previous GAAP and use that as its deemed cost as at the date of transition after making necessary adjustments for de-commissioning liabilities, if any. This exemption can also be used for intangible Assets covered by IND AS 38 Intangible Assets.

Accordingly, the Groups has elected to measure all of its property, plant and equipment and intangible assets at their previous GAAP carrying value.

**A.1.3 Leases**

Appendix C to Ind AS 17 requires an entity to assess whether a contract or arrangement contains a lease. In accordance with Ind AS 17, this assessment should be carried out at the inception of the contract or arrangement. Ind AS 101 provides an option to make this assessment on the basis of facts and circumstances existing at the date of transition to Ind AS, except where the effect is expected to be not material.

The Group has elected to apply this exemption for such contracts/arrangements.

**A.2 Ind AS mandatory exceptions**

**A.2.1 Estimates**

An entity's estimates in accordance with Ind As at the date of transition to Ind AS shall be consistent with estimates made for the same date in accordance with previous GAAP (after adjustments to reflect any difference in accounting policies), unless there is objective evidence that those estimates were in error.

Ind AS estimates as at 1st April 2015 are consistent with the estimates as at the same date made in conformity with previous GAAP. The group made estimates for following items in accordance with Ind AS at the date of transition as these were not required under previous GAAP:-Impairment of financial assets based on expected credit loss model.

**A.2.2 De-recognition of financial assets and liabilities**

Ind AS 101 requires a first-time adopter to apply the de-recognition provisions of Ind AS 109 prospectively for transactions occurring on or after the date of transition to Ind AS. However, Ind AS 101 allows a first-time adopter to apply the de-recognition requirements in Ind AS 109 retrospectively from a date of the entity's choosing, provided that the information needed to apply Ind AS 109 to financial assets and financial liabilities derecognised as a result of past transactions was obtained at the time of initially accounting for those transactions.

The Group has elected to apply the de-recognition provisions of Ind AS 109 prospectively from the date of transition to Ind AS.

**Note 1: Trade receivables**

As per Ind AS 109, the Group is required to apply expected credit loss model for recognising the allowance for doubtful debts. As a result, the allowance for doubtful debts increased by Rs.157.67 Million as at 31st March 2016 (1stApril, 2015:Rs.71.42 Million). Consequently, the total

equity as at 31st March, 2016 decreased by Rs.157.67 million (1st April, 2015 : Rs.71.42 million) and loss for the year ended 31stMarch 2016 increased by Rs.86.25 Million.

**Note 2: Excise duty**

Under the previous GAAP, revenue from sale of products was presented exclusive of excise duty. Under Ind AS, revenue from sale of goods is presented inclusive of excise duty. The excise duty paid is presented on the face of the statement of profit and loss as part of expenses. This change has resulted in an increase in total revenue and total expenses for the year ended 31 March 2016 by 871.39 Million. There is no impact on the total equity as at 31 March 2016 and loss for the year ended on that date.

**Note 3: Security deposit**

Under the previous GAAP, interest free lease security deposits (that are refundable in cash on completion of the lease term) are recorded at their transaction value. Under Ind AS, all financial assets are required to be recognised at fair value. Accordingly, the Group has fair valued these security deposits under Ind AS.

Difference between the fair value and transaction value of the security deposit has been recognised as Security Deposit considered as Advance Rent paid. Consequent to this change, the amount of security deposits decreased by 95.57 million as at 31 March 2016(1stApril, 2015 115.93 Million). The security deposit considered as advance rent paid increased by 77.77 Million as at 31 March, 2016(1stApril 2015 :96.84 Million) Total equity decreased by 19.09 Million as on 1stApril, 2015. The loss for the year ended 31stMarch, 2016 increased by Rs.9.77 Million dueto amortisation of the prepaid rent of 22.91 Million which is partially off-set by the notional interest income of Rs.32.68 Million recognised on security deposits.

**Note 4: Remeasurements of post-employment benefit obligations**

Under Ind AS, remeasurements i.e. actuarial gains and losses and the return on plan assets, excluding amounts included in the net interest expense on the net defined benefit liability are recognised in other comprehensive income instead of profit or loss. Under the previous GAAP, these remeasurements were forming part of the profit or loss for the year. As a result of this change, the loss for the year ended 31 March 2016 Increased by Rs.2.11 Million. There is no impact of this adjustment on the total equity as at 31stMarch, 2016.

**Note 5: Borrowings-Transaction cost**

Ind AS 109 requires transaction costs incurred towards origination of borrowings to be adjusted from the carrying amount of borrowings on initial recognition. These costs are recognised in the profit or loss over the tenure of the borrowing as part of the interest expense by applying the effective interest rate method.

Under previous GAAP, these transaction costs were charged to profit or loss as and when incurred. Accordingly, borrowings as at 31 March 2016 have been reduced by Rs.13.49 Million (1 April 2017: 7.27 Million) with a corresponding adjustment to retained earnings. The total equity increased by an equivalent amount. The loss for the year ended 31 March 2016 has increased by Rs.6.22 Million as a result of the additional interest expense.

**Note 6: Borrowings-Step up interest rate**

Ind AS 109 requires step up interest rate to be adjusted from the carrying amount of borrowings on initial recognition. These costs are recognised in the profit or loss over the tenure of the borrowing as part of the interest expense by applying the effective interest rate method.

Under previous GAAP, these transaction costs were charged to profit or loss based on interest rate applicable for that period. Accordingly, Interest accrued as at 31 March 2016 has increased by Rs.257.48 Million (1 April 2015: 185.77 Million) with a corresponding adjustment to retained earnings. The total equity decreased by an equivalent amount. The loss for the year ended 31 March 2016 has increased by Rs.71.71 Million as a result of the additional interest expense.

**Note 7: Depreciation on capital spares**

Ind AS 16 requires items of capital spares (i.e. spare parts, service equipment etc. that meet the definition of property, plant and equipment) are to be classified accordingly plant and equipment and to be depreciated accordingly. As a result capital spares of Rs.14.96 Million as at 31 March 2016(1 April 2015:Rs.11.11 Million) were reclassified from inventory to property plant and equipment. The profit for the year and total equity as at 31 March 2016 decreased by Rs.0.53 Million due to depreciation on such capital spares classified as property plant and equipment.

**Note 8: Derivative instruments**

Ind AS 109 requires all the derivative financial instruments to be recorded at fair value. This fair value is generally determined on mark to market basis. Under previous GAAP, only losses on these derivative financial instruments were recognized in the books of account and gains (if any) were ignored. Upon recognition of such mark to market gains as at 31st March 2016 total equity has decreased by Rs.1.05 Million (1 April 2015 : Rs.1.73 Million) with a increase in profit by Rs.0.68 Million for the year ended 31stMarch 2016.

**Note 9: Bill discounting**

Ind AS 109 requires entity to derecognize a financial asset when, and only when the contractual rights to the cash flows from the financial asset expire, or it transfers the financial asset as and the transfer qualifies for derecognition. Para B2 of Ind AS 101 states that except as permitted, a first-time adopter shall apply the derecognition requirements in Ind AS 109 prospectively for transactions occurring on or after the date of transition to Ind AS. As a result, trade receivables increased by 363.24 Million as at 31st March 2016 with a corresponding impact on current borrowings. Accordingly, the said adjustment has no impact on either equity or loss for the year ended 31st March 2016. However, this reclassification has impacted the cash flows from Operating and financing activities.

**Note 10: Deferred Tax Asset-MAT credit entitlement**

Ind AS 12 requires the carry forward of unused tax credits to be classified as deferred tax asset. Accordingly an amount of Rs.274.70 million have been reclassified to Deferred Tax Asset from other loans and advances as on 1 April 2015. This has no impact on total equity.

**Note 11: Retained earnings**

Retained earnings as at 1stApril, 2015 has been adjusted consequent to the above Ind AS transition adjustments, where applicable.

**Note 12: Other comprehensive income**

Under Ind AS, all items of income and expense recognised in a period should be included in profit or loss for the period, unless a standard requires or permits otherwise. Items of income and expense that are not recognised in profit or loss but are shown in the statement of profit and loss as Other Comprehensive Income includes remeasurements of defined benefits plans, foreign exchange differences arising on translation of foreign operations etc. the concept of other comprehensive income did not exist under previous GAAP.

**Note 13: Equity pick up accounting for investment in joint venture**

Under Ind AS, investments in joint ventures are to be accounted using equity method. Hence the investment in joint ventures have been consolidated using equity pick up accounting and total equity decreased by 0.11 Million as at 31stMarch 2016(1 April 2015 : Rs.0.19 Million) with a increase in profit by Rs.0.08 Million for the year ended 31st March 2016.

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# From the Government

**CA. Kunal A. Shah**
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**Income Tax**

**1. Circular relating to deduction of tax at source- Income –Tax Deduction from Salaries u/s 192 of the Income-Tax Act, 1961 during the financial year 2017-18**

The present circular contains the rates of deduction of income-tax from the payment of income chargeable under the head "Salaries" during the financial year 2017-18 and explains certain related provisions of the Act and Income-tax Rules, 1962 (hereinafter the Rules). The relevant Acts, Rules, Forms and Notifications are available at the website of the Income Tax Department- www.incometaxindia.gov.in.

**(For detailed text refer Circular no. 29/2017, dated 05/12/2017)**

**2) CBDT extends date for linking of Aadhaar with PAN**

Under the provisions of recently introduced section 139AA of the Income-tax Act, 1961 (the Act), with effect from 01.07.2017, all taxpayers having Aadhaar Number or Enrolment Number are required to link the same with Permanent Account Number (PAN). In view of the difficulties faced by some of the taxpayers in the process, the date for linking of Aadhaar with PAN was initially extended till 31st August, 2017 which was further extended upto 31st December, 2017. It has come to notice that some of the taxpayers have not yet completed the linking of PAN with Aadhaar. Therefore, to facilitate the process of linking, it has been decided to further extend the time for linking of Aadhaar with PAN till 31.03.2018.

**[Press Release dated 08th December, 2017]**

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**contd. from page 499**

**FEMA Updates**

In order to provide a level playing field, it has been decided, in consultation with the Government, to permit the overseas branches/subsidiaries of Indian banks to refinance ECBs of AAA rated corporates as well as Navratna and Maharatna PSUs, by raising fresh ECBs. In this regard, the revised guidelines will be issued within a week.

Report of the Working Group on Hedging of Commodity Price Risk by Residents - Implementation

The report of the Working Group on Hedging of Commodity Price Risk by Residents (Chairman: Shri Chandan Sinha) was placed on the Reserve Bank's website for public comments on November 16, 2017. The major recommendations of the Group include the creation of a 'Positive List' of commodities that can be hedged, and enabling inventory hedging, price fix hedging as well as hedging of the currency risk resulting from overseas commodity derivatives. The Reserve Bank shall examine the Group's recommendations and the public feedback. A circular with revised directions will be issued by January 15, 2018.

**Press release 2017-2018/1543dated December 06, 2017**

**For full text refer: https://rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=42477**

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# Association News

**CA. Riken J. Patel**
Hon. Secretary

**CA. Maulik S. Desai**
Hon. Secretary

**Forthcoming Programmes**

| Date/Day | Time | Programmes | Speaker | Venue |
|---|---|---|---|---|
| 23/01/2018 Tuesday | 5:00 p.m. to 7:00 p.m. | Returns | CA. Vaibhav Shah | H. K. Conference Room, H. K. College Ashram Road, Ahmedabad |
| 25/01/2018 Thursday | 5:00 p.m. to 7:00 p.m. | Place of Supply and ITC – Issues | CA. Brijesh Thakar | H. K. Conference Room, H. K. College Ashram Road, Ahmedabad |
| 29.01.2018 Monday | 5.00 p.m.to 7.00 p.m. | Overview of IBC and its challenges for professionals | CA. Ketul R. Patel | H. K. Conference Room, H. K. College Ashram Road, Ahmedabad |
| 30/01/2018 Tuesday | 5:00 p.m. to 7:00 p.m. | Contemporary Issues in GST | Eminent Faculty* | H. K. Conference Room, H. K. College Ashram Road, Ahmedabad |

**Glimpses of Past Events**

A Fridendly Cricket Match Between President XI and Secretary XI

Members and CAA Team at Cricket Match between CAA and Baroda Branch of ICAI at Baroda

A Lecture Meeting on Companies Amendment Bill, 2013 by CS Mahesh C Gupta

A Lecture Meeting on Trust by CA Ajit C Shah

Half Day Seminar on Tax Planning through HUF & Family Arrangement by Dr. Girish Ahuja and Succession Planning, Inbound & Outbound Investments & Liberalized Remittance Scheme by CA Rashmin Sanghvi on 10th January,

Talk on E-way Bill at GST Lecture Series by CA Sunnay Jariwala from Surat


A Program on GST with Tally

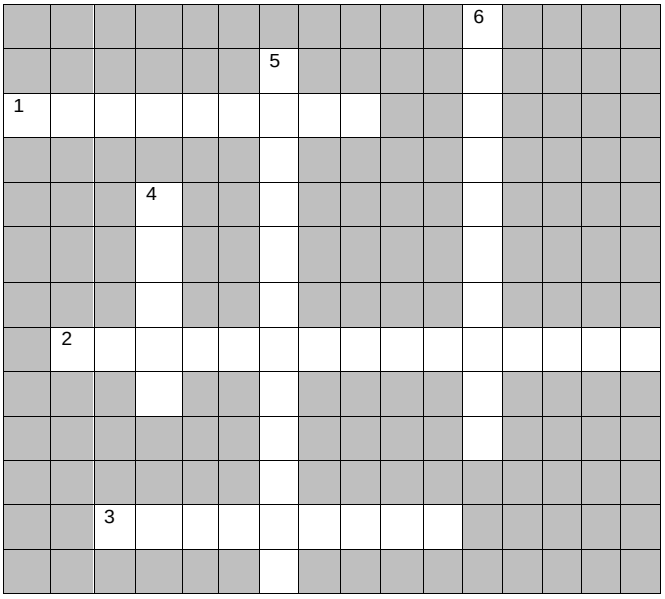
# ACAJ Crossword Contest # 44

**Across**

1. _____ is a perfume you cannot pour on others without getting a few drops on yourself.
2. A beneficial CBDT circular has to be applied _____ while an oppressive circular has to be applied prospectively.
3. The FRDI Bill, 2017 deals with insolvency and bankruptcy in _____ sector companies.

**Down**

4. UPS, rack, switch and buttery forming part of the computer system are eligible for depreciation at _____ rate.
5. Merely because a search is conducted in the premises of the assessee, would not entitle the Revenue to initiate the process of _____, for which there is a separate procedure prescribed in the statute.
6. CAA celebrated its 67th _____ day on 15th December, 2017.




**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 30/01/2018.
5. The decision of Journal Committee shall be final and binding.

**Winners of ACAJ Crossword Contest # 43**

1. CA. Saurabh Shah
2. CA. Shirish Bhatt

**ACAJ Crossword Contest # 43 - Solution**

**Across**

1. March
2. Principles
3. Industrial

**Down**

4. Amalgamation
5. Jobwork
6. Tangible

❇ ❇ ❇

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## દેશ-વિદેશના પ્રવાસો માણો ફ્લેમિંગો ને સંગ

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ગુજરાતની એકમાત્ર ૬ એવોર્ડ વિજેતા કંપની જેમણે અત્યાર સુધીમાં ૧,૫૦,૦૦૦ કરતા પણ વધુ ફેમેલીના સફળ વેકેશનનું આયોજન કરેલ છે

## શા માટે ફ્લેમિંગો?

- કુશળ પ્રવાસ આઈટનરી પ્લાનિંગ
- લકઝુરીયસ હોટલોમાં રોકાણ
- બજેટને અનુકૂળ હવાઈ પ્રવાસો
- ગુજરાતી ટૂર મેનેજર સાથે • કોઈ છૂપા ખર્ચ નહી
- શુદ્ધ શાકાહારી અને જૈન ભોજન
- Value for money tour

## ફ્લેમિંગો ગ્રુપ ટુર્સ પેકેજીસ

7N / 8D

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- દુબઈ સીટી ટુર સાથે એક્ટરફ્રી મોનોરેલ સફર
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7N / 8D

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8N / 9D

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7N / 8D

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9N / 10D

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10N / 11D

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19N / 20D

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Hon. Chief Minister,
Gujarat

**"Role of GIDC in Gujarat's and India's economic growth is pivotal and decisive. Apart from facilitation National and International iconic manufacturing units, GIDC must be credited for its fast-track development of industrial estates and MSME Units. GIDC's constant focus on providing world class infrastructure facilities comes for its visionary outlook for the future."**

## GIDC Vision

***"To make GIDC an effective, vibrant and timely provider of quality industrial infrastructure with easy, quick and transparent delivery mechanism at competitive pricing and without losing sight of its social responsibilities."***

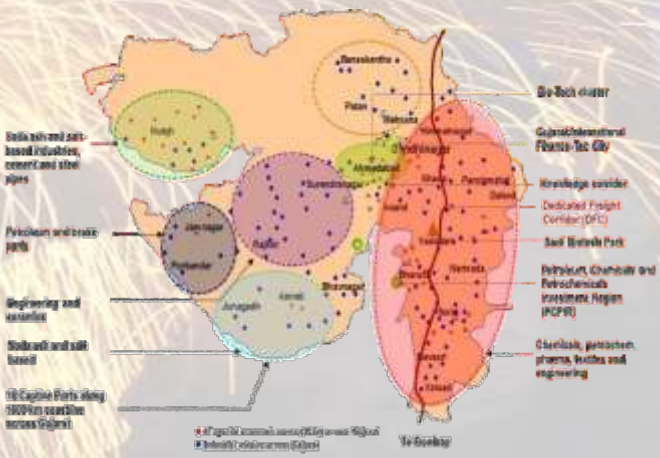
- Set up under the Gujarat Industrial Development Act. 1962 as a Statutory Board
- Identifies and develops locations suited for Industrial purposes
- GIDC offers developed industrial zone/estates , approved & well developed chemical estate, speedy land aggregation, clear land titles, cluster benefits, flexible payment options, waste disposal system & up-gradation of industrial estates
- Nodal agency of the Government of Gujarat for providing Industrial backbone of the state
- GIDC has an inventory of 202 Estates comprising of over 63,000 Units across the State

1. Identification & Aggregation of land
2. Development of Core & Support Infrastructure
3. Allotment of Industrial Plots

| Core Infrastructure | Support Infrastructure |
|---|---|
| Developed Industrial Plots | Skill Up-gradation Centers |
| Water Supply | Environmental Conservation Initiatives-green space, parks, etc. |
| Power Supply | Space for public amenities-banks, hospitals, school, police station, etc. |
| Corridor for amenities-gas, telecom, pipeline etc. | Housing Plots |
| Effluent collection conveyance, treatment & disposal | Commercial spaces |

- **Participative Policy** for development of New Industrial Estate
- Development of **MSME Industrial Park**
- Development of **Women Industrial Park**
- Development of **Multi-Storeyed Sheds**
- **Training & Skill up-gradation** programs

### 202 GIDC Estates across Gujarat



### *GIDC's Inclusive Development*

- Skill Development
- Education
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