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

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

QUOTES FOR THE MONTH

The value of a man, however, should be seen in what he gives and not in what he is able to receive.

Albert Einstein

Better keep yourself clean and bright; you are the window through which you must see the world.

George Bernard Shaw

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EDITORIAL

INDIAN ECONOMY ON A BUMPY RIDE

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The state of Indian economy appears to be in such a bad shape that thinking of future scenario gives a nightmare sometimes. The situation is definitely gruesome. The economic health of the nation, it seems, is at one of the most difficult times.

The vast gap between the total expenditure as compared to the income leaves no other way for the government but to borrow. Year after year public debt is mounting. Each obligation is met by incurring a new debt. The debt trap is like a vicious circle where the interest costs have ballooned and it leads to more borrowings to honor the old ones.

Comparing the present state of affairs with the scenario about two years back, government debt is higher by 37%, galloping much faster than the GDP.

Interest rates and borrowing costs have zoomed up exorbitantly. Most businesses today are borrowing not less than 15%. Inflation continuing to float above the 10% mark, the rupee has plunged 22% already in the current year itself. The growth plans are staggered or put on hold. With all these developments including the GDP growth estimates being lowered from 8% to 5%, the foreign investors are finding the investment environment lackluster to downright hostile. As if all these downbeats appear not to be enough, the Finance Minister starts new round of hide and seek with announcements on GAAR and Vodafone.

Sadly, few Indians care. Many believe that all these somehow, do not affect their lives. Government finances are too complicated and far too distant to take any botheration. This sorry shape of economy is because of lack of political will and attitude to act differently. Many states are hesitant to impose legitimate levies because of political compulsions with an idea to woo the voters resulting in a bad economic health of the state governments. That in turn sends warnings to the union government for the bailout packages in bargain of support. The rise in railway fares proposed in the railway budget after a gap of around 10 years and the events thereafter are few such instances demonstrating political compulsions or rather lack of political will.

The solutions lie only in taking some tough reforms. Tough reforms are always difficult, even in a single party government since different views will be reflected within the party as they should be, but in a coalition it is definitely more difficult. But as it has always been said "Desperate times demand desperate measures." This is true not just in India but all over the world. The real issue in India is not that the problems are unknown or that the solutions are unclear, it is that solutions are not being implemented. The Government has become more cautious- playing it safe, economically and politically and staying away from any of the big-ticket reforms.

The Indian economy, Asia's second largest economy has come a long way since the first wave of reforms was launched in 1991. Robust growth had created jobs, helped the private sectors to expand and enabled India to attract global attention. But the same momentum of reforms could not be continued thereafter. The return of UPA government with majority raised hopes of big reforms. However the string of scandals that have emerged forced the government to stop taking any bold decisions.

It is a high time that the Centre moves ahead boldly concentrating on the key sectors and start reformative measures. To begin with financial sector reforms, the government must implement the Goods and Service Tax Act. Implementation of GST will have enormous impact on the economy. Boosting the exchequer's revenue and fuelling economic growth. Similarly reforms in the insurance, banking, pension and debt market will go a long way in meeting the long term financial needs of the country's infrastructure sector. In the past few weeks, the government has announced its intention to move ahead with some key financial sector reforms and regained the confidence of the investors in the Indian market but again the political compulsions may act as a spoiler. If the government is serious about the nation's financial sector getting a leg up, it needs to ensure that it gets that crucial dose of oxygen, through the reforms.

CA. Shailesh C. Shah
Editor

5 5 5

PRESIDENT'S MESSAGE

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Dear Friends,

May is the month of vacations to get relaxed and rejuvenated before a busy year ahead. As far as Ahmedabad is concerned many move out of the town for short breaks to get respite from the scorching heat. The temperature of exam fever is also at the peak for CA students. I believe these heat waves are also proving to be difficult times even for the economy and the government.

Challenges of Indian Economy and Budget - 2012

" Economy is the method by which we prepare Today to afford the improvement of Tomorrow." Union Budget 2012 was presented in the month of March and has received the Presidential ascent recently. From the speech of Finance Minister, the budget appeared to be more pragmatic and realistic, aimed at faster, sustainable, equitable and more inclusive growth. He expressed that Indian economy is expected to grow at 7.6% in comparison of expected growth rate of 6.9% of 2011-12. Question arises in our mind that can Budget-2012 boost Indian economy? It seems very difficult because there are more challenges like slowdown in growth, widening fiscal deficit, continuing inflationary pressure and global economic crises. Before passing the Budget in both the houses, Government had to roll back and postpone the important proposal of GAAR. The steps like such including continuous deferment of DTC, non clarity of implementation of GST and retrospective changes after the Vodafone verdict raise question mark over the ability and the intentions of the Union Government.

Government Policies Paralysis

"Economic reforms ***have*** *hit roadblock, which would not go away before the next general election. You would see a rush of important reforms after 2015, India would be one of the fastest growing economies of the world. The new government, if in a majority, would start with the reforms in a big way because there is a sense that it need to pick up."* This is the comment made by one of the Chief Economic Advisor of Indian Government during his U.S. visit. As a citizen of the nation this comes as a shock and further reiterates that it is because inability of the persons in power including the combination, the growth of the nation is getting a severe beating, deferring the growth of each individual national. Standard & Poor's (S & P), the international rating agency *downgraded India's long term rating from stable to negative.* It has also predicted that Indian economy would grow at low rate. If the external position continues to deteriorate, growth progress would diminish or progress on reforms may remain slow.

At The Association

During the month of May the Association arranged a Study Circle meeting on "Service Tax" and a lecture meeting by Professional Development Committee on "Issues under TDS". More than 90 participants in Study Circle and more than 110 participants in the lecture meeting were present. A Brain Trust meeting on "Revised Schedule VI", Study Circle meeting on "Taxability of Works Contract under Gujarat VAT" and a Musical Programme of "Aarti, Syamal – Saumil Munshi" have been worked out for the month of June. 39th RRC is planned from 3rd to 6th August'12 at Ramoji Film City, Hyderabad. A detailed circular is sent through e mail and also by courier which must have reached to all the members. I once again request all the members to participate in all programmes of the Association.

With warm regards,

CA. Gaurang M. Choksi
President

5 5 5

A STUDY ON COMMODITY MARKET AND RELATED ISSUES:

ARTICLE...

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Background:

Organized commodity derivatives in India started as early as in the year 1875, barely about a decade after the same were started in Chicago (USA). However, many feared that derivatives fuelled unnecessary speculation and were detrimental to the healthy functioning of the markets for the underlying commodities. As a result, after independence, commodity options trading and cash settlement of commodity futures were banned in 1952. A further blow came in 1960s when, following several years of severe draughts that forced many farmers to default on forward contracts (and even caused some suicides), forward trading was banned in many commodities considered primary or essential.

Consequently, the commodities derivative markets were dismantled and remained dormant for about four decades until the new millennium when the Government, in a complete change in policy, started actively encouraging the commodity derivatives market. Since 2002, the commodities futures market in India has experienced an unprecedented boom in terms of the number of modern exchanges, number of commodities allowed for derivatives trading as well as the value of futures trading in commodities, which crossed the $ 1 Trillion mark in 2006.

For fiscal year 2011-12 trade in agri commodities was around Rs.22 lakh crores and was 12.12 per cent of the total trade in all the commodity exchanges in the country. The total volume of farm items traded in the 2011- 12 fiscal was 4,942.09 lakh tones, which was 35.23 per cent of the volume of all commodities traded at the exchanges.

Commodity Exchanges:

Responding positively to the favorable policy changes, several Nation-wide Multi-Commodity Exchanges have been set up since 2002, using modern practices such as electronic trading and clearing. Major national commodity exchanges of India are:

a) ***MCX – Multi-Commodity Exchange of India Limited.***

b) ***NCDEX – National Commodity and Derivatives Exchange of India Limited.***

c) ***NMCE – National Multi-Commodity Exchange of India Limited, Ahmedabad.***

There are 6 national and 21 regional exchanges established in recent years to carry on futures trading in commodities in the country.

Basic Information about the two most important commodity exchanges of India is as under :

a) ***Multi–Commodity Exchange of India Limited*** has its head quarters in Mumbai. MCX is led by an expert management team with deep domain knowledge of the commodity futures markets. Through the integration of dedicated resources, robust technology and scalable infrastructure, MCX has recorded many firsts to its credit since inception.

b) ***National Commodity and Derivatives Exchange Limited*** is a nation-level, technology driven de-mutualized on-line commodity exchange with an independent Board of Directors and professionals not having any vested interest in commodity markets. It is committed to provide a world-class commodity exchange platform for market participants to trade in a wide spectrum of commodity derivatives driven by best global practices, professionalism and transparency.

Regulatory :

Forward Markets Commission (FMC) headquartered at Mumbai, is a regulatory authority which is overseen by the Ministry of Consumer Affairs, Food and Public Distribution, Govt. of India. It is a statutory body set up in 1953 under the Forward Contracts (Regulation) Act, 1952.

Main functions of **FMC** are to advise Central Government for administration of Forwards Contracts (Regulation) Act, to keep an observation under forward markets, to collect and to publish information regarding the trading conditions in the market, to make recommendations for improving the organization and working of the forward markets and to undertake the inspection of accounts and other documents of any recognized association or any member of such association whenever it considers it necessary.

Products traded :

The various major products/commodities traded across the various exchanges are as follows:

1. Bullion
2. Oil & Oil Seeds
3. Spices
4. Metal
5. Fiber
6. Cereals
7. Pulses
8. Energy
9. Plantations
10. Petrochemicals
11. Weather
12. Others

Commodity Derivatives and their Importance:

It is important to understand why commodity derivatives are required and the role they can play in risk management. It is common knowledge that prices of commodities, metals, shares and currencies fluctuate over time. The possibility of adverse price changes in future creates risk for businesses. Derivatives are used to reduce or eliminate price risk arising from unforeseen price changes. A derivative is a financial contract whose price depends on, or is derived from, the price of another asset.

Two important components of derivatives are Futures and Options:

Commodity Futures Contracts: A futures contract is an agreement for buying or selling a commodity for a predetermined delivery price at a specific future time. Futures are standardized contracts that are traded on organized futures exchanges that ensure performance of the contracts and thus remove the default risk. The major function of futures markets is to transfer price risk from hedgers to speculators.

For example, suppose a farmer is expecting his crop of wheat to be ready in two months' time and the quantity is 100 Quintals, the current market price is Rs.1500 per Quintal and wheat future contract having expiry after two months is quoted at Rs.1400 per Quintal. The farmer is worried that the price of wheat may decline to Rs.1200/ Quintal during this period. In order to minimize his risk, he can enter into a futures contract to sell his crop in two months' future trade at Rs.1400 per quintal. This way he is able to hedge his risk arising from a possible adverse change in the price of his commodity.

Commodity Options contracts: Like futures, options are also financial instruments used for hedging and speculation. The commodity option holder has the right, but not the obligation, to buy (or sell) a specific quantity of a commodity at a specified price on or before a specified date. Option contracts involve two parties – the seller of the option writes the option in favour of the buyer (holder) who pays a certain premium to the seller as a price for the option. There are two types of commodity options: a 'call' option gives the holder a right to buy a commodity at an agreed price, while a 'put' option gives the holder a right to sell a commodity at an agreed price on or before a specified date (called expiry date). The option holder will exercise the option only if it is beneficial to him; otherwise he will let the option lapse.

For example, suppose a farmer buys a put option to sell 100 Quintals of wheat at a price of Rs.1500 per quintal and pays a 'premium' of Rs.25 per quintal (or a total of Rs.2500). If the price of wheat declines to say Rs.1200 before expiry, the farmer will exercise his option and sell his wheat at the agreed price of Rs.1500 per quintal. However, if the market price of wheat increases to say Rs.1800 per quintal, it would be advantageous for the farmer to sell it directly in the open market at the spot price, rather than exercise his option to sell at Rs.1800 per quintal.

However in India, at present, only futures market is in operation and not options market. While Equity market works both on futures and options market.

Economic benefits of Future Trading and Its Prospects:

Futures contracts perform two important functions of ***price discovery*** and ***price risk management*** with reference to the given commodity. It is useful to all segments of economy. It is useful to producer because he can get an idea of the price likely to prevail at a future point of time and therefore can decide between various competing commodities, the best that suits him. It enables the consumer to get an idea of the price at which the commodity would be available at a future point of time. He can do proper costing and also cover his purchases by making forward contracts. The futures trading is very useful to the exporters as it provides an advance indication of the price likely to prevail and thereby help the exporter in quoting a realistic price and thereby secure export contract in a competitive market. Having entered into an export contract, it enables him

to hedge his risk by operating in futures market. Other benefits of futures trading are price stabilization-in-times of violent price fluctuations, integrated price structure throughout the country, balancing demand and supply position throughout the year etc.

Futures trading are also capable of being misused by unscrupulous speculators. In order to safeguard against uncontrolled speculation, certain regulatory measures are introduced from time to time. They are:

a. Limit on open position of an individual operator to prevent over trading;
b. Limit on price fluctuation (daily/weekly) to prevent abrupt upswing or downswing in prices;
c. Special margin deposits to be collected on outstanding purchases or sales to curb excessive speculative activity through financial restraints;
d. Minimum/maximum prices to be prescribed to prevent future prices from falling below the levels that are un- remunerative and from rising above the levels not warranted by genuine supply and demand factors.

During shortages, extreme steps like skipping trading in certain deliveries of the contract, closing the markets for a specified period and even closing out the contract to overcome emergency situations are taken.

Accounting of Commodity Derivatives:

Internationally, **'fair value accounting'** plays an important role in accounting for investments and derivatives. Fair value is the amount for which an asset could be exchanged between a knowledgeable, willing buyer and a knowledgeable, willing seller in an arm's length transaction. Simply stated, fair value accounting requires that underlying securities and associated derivative instruments be valued at market values at the financial year end. This practice is currently not recognized in India.

In countries where local accounting practices require valuation of underlying assets at fair value, other derivative instruments are also valued at fair value. In countries where local accounting practices for the underlying are largely dependent on cost (or lower of cost or fair value), accounting for derivatives follows a similar principle.

However in India, the normal accounting of derivative transactions should be made by treating the margin money as well as mark to market profit / loss to an account under the head CURRENT ASSETS at the Balance Sheet. Once the contract is squared up, the balance of the margin account/s should be transferred to Profit and Loss Account. The concept of mark to market and recognition of profit / loss are explained hereunder.

Daily Mark to Market

Commodity futures transactions are settled on a daily basis. Each evening, the closing price would be compared with the closing price of the previous evening and profit or loss is computed by the exchange. The exchange would collect or pay the difference to the member-brokers on a daily basis. The broker could further pay the difference to his clients on a daily basis. Alternatively, the broker could settle with the client on a weekly basis (as daily fund movements could be difficult especially at the retail level).

Recognition of Profit or Loss

A basic issue which arises in the context of daily settlement is whether profits and losses accrue from day to day or do they accrue only at the point of squaring up. It is widely believed that daily settlement does not mean daily squaring up of contract. The daily settlement system is an administrative mechanism whereby the exchanges maintain a healthy system of controls. From an accounting perspective, profits or losses do not arise on a day to day basis.

Thus, a profit or loss would arise at the point of squaring up. This profit or loss would be recognized in the Profit & Loss Account of the period in which the squaring up takes place. If a series of transactions were to take place and the client is unable to identify which particular transaction was squared up, the client could follow the First In First Out method of accounting.

Accounting at Financial Year End

In view of the underlying securities being valued at lower of cost or market value, a similar principle would be applied to commodity futures also. Thus, losses if any would be recognized at the year end, while unrealized profits would not be recognized.

A global system could be adopted whereby the client lists down all his commodity futures contracts and compares the cost with the market values as at the financial year end. A total of such profits and losses are struck. If the total is a profit, it is taken as a Current Liability. If the total is a loss, a relevant provision would be created in the Profit & Loss Account.

The actual profit or loss would occur in the next year at the point of squaring up of the transaction. This would be accounted net of the provision towards losses (if any) already effected in the previous year at the time of closing of the accounts.

Example

A client has bought Commodity futures for Rs 2,00,000 on 1st March and Commodity futures for Rs 2,50,000 on 7th March. On the 31st of March, the market values of these futures are Rs 2,20,000 and Rs 2,35,000 respectively. He has not squared up these transactions as on 31st March.

The client has an unrealized profit of Rs 20,000 on the futures and an unrealized loss of Rs 15,000 on the futures. As the net result is a profit, he will not account for any profit or loss in this accounting period.

However if the value of these futures were below Rs.2,00,000 say Rs.1,80,000 then the assessee must record the loss of Rs.20,000 or make appropriate provisions for the same in the books of accounts. However if the futures are settled at Rs.2,25,000 in the next financial year then the assessee will record Rs. 25000 (Difference of Sale/Settlement Price Rs.2,25,000 and Carrying Value – Rs.1,80,000 reduced by the amount of provision made in the previous year Rs.20000).

Taxability of Commodity Derivatives:

The commodities derivatives transactions are not covered under exceptions to Section 43(5) of the Income Tax Act and hence are speculative in nature unless squared off on by delivery.

However for loss occurred at the year end, a question arises as to the said loss before squaring off the transaction is allowable speculative business loss? According to the guideline issued by the CBDT on 23rd March 2010 on foreign exchange derivatives transactions, the mark to market losses booked by the assessee is a notional loss which is contingent in nature and cannot be allowed to be set off against the taxable income of the assessee as there is no actual settlement or sale effected for the open positions at the year end.

The guideline reads as ***'A mark to market loss may be given different accounting treatment by different assessees. Some may reflect such loss as a balance sheet item without making any corresponding adjustment in the profit and loss account; others may book the loss in profit and loss account which may result in reduction in book profit. In cases where no sale or settlement has actually taken place and the loss on mark to market basis has resulted in reduction of book profits, such a notional loss would be contingent in nature and cannot be allowed to be set of against the taxable income. The same should therefore be added back for the purpose of computing the taxable income of an assessee.'***

Now the point remains that can the assessing officer considering the above guideline disallow the mark to market loss recorded in the books of accounts by the assessee on commodity futures though the said guidelines is issued specifically for treatment of M to M loss on account of foreign exchange transactions?

Effects of Hedging of commodities transactions

In practice, the traders used to hedge their position by purchasing commodities in CASH market and hedge (sell) in FUTURE market. The hedging may not be on total matching principle. The issues arises as to the profit or loss on settlement of derivative transactions will be speculative in nature?

As per section 43(5) a), a contract in respect of raw materials or merchandise entered into by a person in the course of his manufacturing or merchanting business to guard against loss through future price fluctuations in respect of his contracts for actual delivery of goods manufactured by him or merchandise sold by him, shall not be deemed to be a speculative transaction.

Accordingly the transaction taken against original contract, will be a non-speculative transaction. Even the matching quantity is not hedged, the transaction shall not be speculative one to the extent the hedged quantity covers the quantity originally traded in CASH segment.

How to compute the turnover in case of derivative transactions?

An issue may arise about the circumstances in which a person is required to get his books of account audited, i.e. when the total value of the contracts traded by him exceeds the limit fixed for turnover w.r.t. Section 44AB of the Income Tax Act, or only where the gross or net differences in various derivatives received by him exceeds the amount paid on account of differences has to be reduced or not from the gross differences received (i.e. loss are to be netted off against profits) is an aspect to be considered.

Many courts have taken a view that in case of speculative transactions, the gross sale value cannot be considered to be turnover, in the absence of delivery.

One view is that the higher side of derivatives trading account would be considered as turnover.

However in view of the authors, the better view seems that a derivatives trader is dealing in differences, and it is the gross value of the differences (ignoring the

positive signs and negative signs in case of profits and losses respectively) which constitutes his turnover.

Difference between Equity and Commodity Markets:

a) **Segments** – **Equity markets** have **two segments** where investors can trade namely **Cash and Derivatives (Futures & Options)**, while **Commodity Markets** have **Cash and only Futures of derivative segment and not the Options.**

b) **Settlement** – At the end of a contract (i.e. Maturity Date of contract) settlement for the open contracts is made by **Cash in Equity Markets** whereas the open contracts are settled through **Cash or Delivery in Commodity Markets.**

c) **Expiry Date** – In **Equity markets** the expiry day of the present month's future contracts will be on **last Thursday of the month**, whereas the expiry dates in **Commodity markets** for the present month's contract are variable. There are different dates for First delivery, Second delivery, Compulsory delivery, etc.

d) **Underlying Asset** – In **Equity markets** the underlying asset for every derivative contract is the **Stocks/Shares** of the companies listed on the exchanges. In **Commodities markets** the underlying asset are **Commodities** traded globally which include **Agri and Non – Agri Commodities**.

For understanding purpose, the comparative chart is given hereunder about normal and speculation business with regard to Equity, Currency and Commodity Derivatives for the benefit of the readers.

Bifurcation of Normal Business Income and Speculative Business Income

Income Type	Settlement Type	Transaction Type	Taxability of Income	
Equity Transactions (Shares/Stock)	Settlement by Delivery	Transactions other than Intraday	Normal Business Income/capital gain	*
	Settlement otherwise than by Delivery	Intraday Cash Transactions	Speculative Business Income	
		Futures & Options	Upto 25.01.2006	Speculative Business Income**
			After 25.01.2006	Normal Business Income**
Commodity Transactions	Settlement by Delivery	Transactions other than Intraday	Normal Business Income	
	Settlement otherwise than by Delivery	Intraday Transactions	Speculative Business Income	
		Futures Transactions		
Currency Transactions	Settlement otherwise than by Delivery	At CD – NSE (Futures)	Upto 25.01.06	Speculative Business Income
			After 25.01.06	Normal Business Income
		At CD – MCX (Futures)	Upto 21.05.09	Speculative Business Income
			After 21.05.09	Normal Business Income

* **As per explanation to Section 73**, a company whose principal business is other than of banking or the granting of loans and advances and the business of the company consists of the purchase and sale of shares of other companies then such company shall be deemed to be carrying on a **Speculation business.**

* **As per section 43(5)(b),** a contract in respect of stocks and shares entered into by a dealer or investor therein to guard against loss in his holdings of stocks and shares through price fluctuations, **will not be treated** as a **Speculative business transaction**.

** **As per section 43(5)(c),** a contract entered into by a member of a forward market or a stock exchange in the course of any transaction in the nature of jobbing or arbitrage to guard against loss which may arise in the ordinary course of his business as such member, **will not be treated** as a **Speculative business transaction**.

** **As per amendment inserted in Section 43(5)(d)**, from date 25.01.2006 (for NSE and BSE) a transaction in respect of trading in derivative **will not be treated** as a **Speculative business transaction** if the transaction is carried out on recognized stock exchange. There are a few decisions which suggest that the amendment in section 43(5) (d) is clarificatory in nature and hence with retrospective effect.

As detailed in the table above, the gain earned through commodity transactions can be divided into basic two parts:

1. Transactions settled through delivery
2. Transactions settled without delivery

Profit or Loss from the transactions settled through delivery is considered as ***'Normal Business Profit or Loss***' and treated accordingly while Profit or Loss from the transactions settled without delivery is considered as ***'Speculation Income/Loss'.***

TDS on brokerage in relation to Commodity Derivative

One offshoot issue arises about tax deduction at source from brokerage paid on the transactions of commodity derivatives. As per Section 194H of the Income Tax Act, the "commission or brokerage does not include brokerage on securities as defined under clause (h) of Section 2 of the Securities Contracts (Regulation) Act, 1956 (SECRA). As per the said definition "securities includes "derivative".

However the moot question is whether derivative as referred to in section 2(h) of SCRA 1956, cover commodity derivative or only speaks about equity derivative as the Act itself is for regulations of Security Market and not for regulating commodity market as there is a separate body established for the same which is Forward Market Commission. Hence the question still needs to be answered is, whether brokerage paid on commodity derivate transactions is covered under the definition of security as defined under clause (h) of Section 2 of SECR Act, 1956. Two views are possible but as per the view of the authors, the commodity derivative is different than equity derivative and hence not covered by SCRA 1956 and hence provisions of TDS will be applicable for brokerage paid on commodity derivative transactions.

A MYTH – Are Commodities Futures Trading a sole reason for Inflation?

There are a large number of people who believe that a commodities future trading is responsible for uncontrollable inflation which is one of the key factors averting the rapid economic growth of Indian economy. People associated with the commodities market strongly argue that the commodities exchanges are the main platform for the price discovery which benefits all the segments from the producers or farmers to the end user of these commodities which means common man of India.

Conclusion:

Commodity trading in India is on the cusp of transformation. Organized commodities trading as a professional service-oriented set-up is a recent phenomenon in India but is growing at a tremendous pace, emerging as the largest and most exciting service sectors of this decade. Further a lot of professional opportunities are available because of growth and development of commodity market in our country in recent times. We end with the quote that while dealing in derivatives, utmost care is required to be taken. If done so, the FUTURE will be bright as OPTIONS are many.

5 5 5

COMMISSION PAYMENT TO NON RESIDENT U/S. 195 OF THE INCOME TAX ACT

ARTICLE...

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1. Foreign Remittance: regulatory Framework:

Any foreign remittance from India is subject to following major regulatory frameworks:

1. Section 195 of the Income Tax Act – Section 195 of the Income Tax Act casts an obligation on the person making payment to withheld tax at source in prescribed situation.
2. Service Tax – Under import of service rules, the service recipient is liable to discharge the burden of service tax under Reverse Charge Mechanism on Import of Services.
3. FEMA/ RBI – Various rules and regulations of RBI and FEMA provide for procedural compliances like filings, approvals, permission, limitations, etc.
4. R & D Cess Act – Requires payment of R & D Cess on Import of Technology in India.

As far as Section 195 of the Income Tax Act and Service Tax is concerned, they involve additional outflow in case of remittances to non – residents as the burden in both the cases is on the person liable to make remittances.

Therefore every foreign remittance shall pass through all the above regulatory tests before one can conclude the foreign payments.

2. Section 195 of the Income Tax Act:

Section 195 is part of TDS provisions of the Income Tax Act. Sub – section (1) of section 195 provides that any person responsible for paying to a non – resident, not being a Company, or to a foreign Company, any interest or any other sum chargeable under the provisions of this Act (not being income chargeable under the head “Salaries”) shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of cheque or draft or by any other mode, whichever is earlier, deduct income tax thereon at the rates in force.

Hence one may note that section 195 casts an obligation on any person making payment of interest or **any other sum chargeable for tax in India** shall deduct tax at source if such payment is made to non – resident, not being a Company or to a foreign Company. If a person fails to comply with provision of this section, then following consequences are invited:

- Demand u/s 201 & Interest of Section 201 (1A)
- Penalty u/s 221 &/or Section 271C
- Prosecution u/s 276B
- Disallowance of Expense u/s 40 (a) (i)

There has been a stringent procedural requirement in order to ensure compliance with section 195. Before a person makes any remittance, the person shall obtain a certificate of Chartered Account in form 15CB certifying the tax deductible under section 195. Thereafter the remitter shall upload the details of foreign remittances in form 15CA on the website of income tax department. Without the certificate of Chartered Accountant in form 15CB and copy of online filing vide Form 15CA, banks do not permit any foreign remittances. Hence the compliance of section 195 has been made a joint responsibility of Chartered Accountant as well as the assessee making foreign remittances.

3. Commission under Income Tax Act:

The commission payments to non – resident agents have been a matter of debate in recent times. The word commission has not been defined

in Income Tax Act. One has to search for the definition of "Commission" in Income Tax Act. A reference can be obtained from section 194H of the Income Tax Act which provides for the deduction of tax at source from payment of Commission or Brokerage. Section 194 H defines the term Commission, though not exhaustively. Explanation to section 194H defines the term "**Commission or Brokerage"** to include any payment received or receivable by a person acting on behalf of another person for services rendered 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. Commission or Brokerage does not include any payment for professional services.

4. **Erstwhile CBDT Circulars on Commission payment to Non – Resident Agents:**

Until 2009, the commission payments to non – resident agents were not in debate. The reason being, there were two circulars of CBDT which dealt with taxability of Commission payments to Non – resident Agents in India. The first such circular was Circular No. 23 dated 23rd July, 1969. In fact, the circular did not specifically address the tax liability of commission of non – resident agents. Rather the circular provided the illustrative list of Business Connection in India and clarification on various issues arising taxation in India. One of the matters was that of Foreign Agents of Non – Resident Exporter for which circular read as under:

"A foreign agent of Indian exporter operates in his own country and no part of his income arises in India. His commission is usually remitted directly to him and is, therefore, not received by him or on his behalf in India. **Such an agent is not liable for income tax on this commission**."

Relying on this circular, CBDT has issued another Circular No. 786 dated 7/2/2000 which specifically addressed the matter of taxability of commission in the hands of non – resident agents in India. This circular read as under:

"The deduction of tax at source under section 195 would arise if the payment of commission to the non-resident agent is chargeable to tax in India. In this regard attention to CBDT Circular No. 23 dated 23rd July, 1969 is drawn where the taxability of 'Foreign Agents of Indian Exporters' was considered along with certain other specific situations. **It had been clarified then that where the non-resident agent operates outside the country, no part of his income arises in India.** Further, since the payment is usually remitted directly abroad, it cannot be held to have been received by or on behalf of the agent in India. **Such payments were therefore held to be not taxable in India."**

One may notice that the CBDT circulars have held that the payments of commission to non – resident agents are not taxable in India. For this purpose, it has been noticed by CBDT that the non – resident agent operates outside India and performs his services outside India. Further the Commission is usually being paid outside India and hence no part of such income can be said to have been received in India. Accordingly, the payments of commission to non – resident agents are not liable for tax in India. Hence the Circulars have specifically addressed the question of whether the payments of commission to non – resident agents are liable for tax in India.

5. **Withdrawal of Erstwhile CBDT Circulars:**

It has been noticed by CBDT that the blanket exemptions were being claimed from deduction of tax at source u/s 195 from payment of commission to non – resident Agents. In order to claim exemption from deduction of tax at source on payment of commission to non – resident agents, the reference were being made frequently by assessee to the erstwhile CBDT circulars. Nonetheless, the basic facts as to whether the commission payments are in fact chargeable for tax in India were ignored by the assessee while making such remittances. It has been specifically mentioned in the CBDT circulars that since the commission agents operate outside India, no part of their income accrues or arises in India. Nonetheless, when the circular has been applied by assessee, they claimed exemption from deduction of tax from such payments irrespective of the fact as to whether in fact services are rendered outside India or whether in fact income

of non – resident agents accrued or arised outside India. In order to curb the practice of blanket exemptions, CBDT has come out with a new circular No. 7/2009 dated 22nd October, 2009 in order to withdraw of Circular No. 23, dated 23-7-1969, and Circular No. 786, dated 7-2-2000. The said new circular read as under:

"It is noticed that interpretation of the Circular by some of the taxpayers to claim relief is not in accordance with the provisions of section 9 of the Income-tax Act, 1961 or the intention behind the issuance of the Circular. Accordingly, the Central Board of Direct Taxes withdraws these Circulars."

<u>**Whether Retrospective or Prospective:**</u>

The question may arise as whether the withdrawal of CBDT circular has retrospective effect or prospective since it has become too fancy for Income Tax Department to come out with the retrospective amendments. Alternatively, one may put up a question as to whether the commission payments made to non – resident agents prior to October, 2009 is still governed by those CBDT circulars before the Appellate Authorities. In order to answer the question, attention is invited to **Hon'ble Bombay High Court** ruling in the case of **BASF (India) Ltd. and another vs. CIT (2006) 280 ITR 136 (Bom.)** whereby it has been held that circulars which are in force during the relevant assessment years are the circulars that have to be applied and subsequent circulars either withdrawing or modifying the earlier circulars have no application. Accordingly, one may conclude that the circular of 2009 which withdrawn two earlier circulars can only be applied prospectively i.e. after the date circulars have been withdrawn. Accordingly, still a person may claim exemption under beneficial circulars of 1969 and 2000 before the Income Tax Authorities on account of commission payments made to non – resident agents before the date on which exemption circulars have been withdrawn. Recently, two decisions have been pronounced with these respect on the CBDT circular of 2009 which are under mentioned:

- **M/s. Siemens Aktiengesellschaft -** A circular in operation through the relevant assessment year cannot be held to be inoperational simply by reason of the fact that it has been withdrawn in the year 2009. The withdrawal of such circulars will be effective only after the said date of 22nd October, 2009 by which these circulars have been withdrawn 'with immediate effect'.
- The circular No. 7 of 2009 dated 22.10.2009 withdrawing the circular No. 23 of 1969 and circular No. 786 of 2000 will be operative only from 22nd October, 2009 and not prior to that date. – **Dy. CIT v. Sanjiv Gupta (2011) 50 DTR 225, ACIT v. Modern Insulators Ltd. (56 DTR 362)**

6. <u>**Impact of Withdrawal of Erstwhile Circulars:**</u>

It is pertinent to understand the impact of withdrawal of CBDT circulars. It has been submitted before that the blanket exemptions were being claimed under CBDT circulars from deduction of tax on commission payment to non – resident agents which was never the intention of CBDT circulars. Hence one can say that the withdrawal has removed the blanket exemption. Nonetheless, this does not imply that commission to non - resident agents become automatically chargeable to tax in India. Still the principle holds good that the payments to non – resident are liable for tax in Indian only if they satisfy the test of chargeability in India. One has to ascertain from the facts of every case to determine whether the commission paid to non – resident is chargeable for tax in India.

7. <u>**Chargeability of Commission payment to Non – Resident Agent:**</u>

For the purpose of section 195 of the Income Tax Act, one has to determine whether the payment is chargeable for tax in India. So far as the Commission payment to non – resident agents are concerned, the following steps may become relevant:

<u>Step : I: Determine the Chargeability under Income Tax Act</u>

- Section 5: Scope of Total Income
- Section 9: Income Deemed to Accrue or Arise in India

Step : II: Determine Chargeability as per DTAA

- Fees for Technical Services (FTS)
- Business Income
- Independent Personal Services (IPS)
- Dependent Personal Services (DPS)
- Other Incomes

8. Chargeability of Commission under Income Tax Act:

8.1 Chargeability of Commission to Non Resident Agents under Section 5 of the Income Tax Act:

Section 5 of the Income Tax Act defined scope of total income. For this purpose, the following incomes of non – resident shall be chargeable for tax in India:

- Income is received or is deemed to be received in India; or
- Income accrues or arises or is deemed to accrue or arise to him in India.

Primarily, one may reject the first criteria of receipt as the non – resident agent is not likely to receive any payments in India. In a case, payment is received by non – resident agent in India or on his behalf by any other person, as per section 5 of the Income Tax Act, he becomes chargeable for tax in India and Step – I ends there only. On a presumption that the commission is not being received by the non – resident agent, one can proceed to determine whether the commission payment can be said to accrue or arise in India. For this purpose, reference is invited to erstwhile CBDT circulars wherein it has been specifically mentioned that where the non-resident agent operates outside the country, no part of his income arises in India. Similar view has been held in the case of **CIT v. Eon Technology (P) Ltd. (2012) 246 CTR 40** where in it has been held that the income of non – resident agent from providing marketing and sales support for the sales executed by the taxpayer for its overseas clients cannot be included u/s 5 (1) of the Income Tax Act. Further one may also refer to the case of **Indopel Garments Pvt. Ltd. (2001) 72 TTJ 702** where a similar opinion was rendered as to commission payable to foreign concern for acting as a selling agent for the assessee for canvassing orders outside India was not liable to tax as **income arising or accruing to the foreign concern in India** and therefore, no disallowance could be made under s. 40(A)(i) on the ground that tax was not deducted at source under s. 195.

Therefore one has to determine on the facts of the case whether the income of non – resident agent gets accrued or arised in India and for this purpose, one can refer to the performance test.

8.2 Chargeability of Commission to Non Resident Agents under Section 9 of the Income Tax Act: Income Deemed to Accrue or Arise in India:

Section 9 of the Income Tax Act deals with the deeming fiction where the income of non – resident shall be presumed to accrue or arise in India. In order to apply section 9 of the Income Tax Act, one has to classify the payment in to following categories of income:

Section	Nature of Income
Section 9 (1) (i)	Income from Business Connection or Source of Income in India or from any asset or transfer of capital asset in India
Section 9 (1) (ii)/ (iii)	Income from Salaries
Section 9 (1) (iv)	Income from Dividends from Indian Company
Section 9 (1) (v)	Income by way of Interest
Section 9 (1) (vi)	Income by way of Royalty
Section 9 (1) (vii)	Income by way of Fees for Technical Services

Based on the nature of commission payment, one may find that apparently, the commission payment can be classified as Fees for Technical Services being services

in nature. Accordingly, provisions of section 9 (1) (vii) may get attracted. Section 9 (1) (vii) reads as under:

"Income by way of Fees for Technical Services payable by-

- the Government; or
- a person who is a resident, except where the fees are payable in respect of services utilized in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or
- a person who is a non-resident, where the fees are payable in respect of services utilized in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India.

Shall be deemed to accrue or arise in India."

Accordingly, if the commission is being classified in to Fees for Technical Services, it shall be deemed to accrue or arise in India merely by the fact that the payment is being made by person resident in India. For this purpose, attention is invited to meaning of Fees for Technical Services which reads as under:

Explanation 2. — "**Fees for Technical Services**" means any consideration for the rendering of any

- Managerial,
- Technical or
- Consultancy services
- Including the provision of services of technical or other personnel

Whether Commission is Managerial Services?

Mumbai ITAT in case of UPS SCS (Asia) Limited held that ordinarily the managerial services means managing the affairs by laying down certain policies, standards and procedures and then evaluating the actual performance in the light of the procedures so laid down. The managerial services contemplate **not only execution but also the planning part of the activity to be done**. If the overall planning aspect is missing and one has to follow a direction from the other for executing particular job in a particular manner, it cannot be said that the former is managing that affair.

If the test of the planning aspect is made applicable to Commission payment to non – resident agent, one may say that the non – resident agent does not perform any planning function. Hence the same cannot be considered as Managerial Services as held in the case of **ACIT v. Modern Insulators - 56 DTR 362 (2011).** In this case, while determining the taxability of commission payment to non – resident agent with respect to DTAA, it has been held that para 4 of Article 12 of DTAA between India and Russia defines FTS as any payment in consideration of any managerial, technical or consultancy services. As per the agreement, the agents were to provide services for sale of goods. From the agreement, one can infer that the agent is not providing any managerial services.

Whether Commission is Technical Services?

The word Technical Services has been defined very lucidly by **Tribunal in the case of Glaxo Smith Kline Pharmaceuticals Ltd. v. Income-tax Officer (2011) 48 SOT 643** where the Tribunal held that to be more precise, any payment for technical services in order to be covered u/s. 194J, should be a consideration for **acquiring or using technical knowhow simplicitor provided or made available by human element**. There should be direct and live link between payment and receipt/use of technical services/information. Hence some specific technical know - how should form part of the services in order to classify the same as technical services.

Whether Commission is Consultancy Services?

It is only when some consideration is given for **rendering some advice or opinion etc**., that the same falls within the scope of "consultancy services". The word `consultancy' excludes actual `execution'.

Commission v. Fees for Technical Services:

On a closer look at the meaning of Fees for Technical Services, one can take a view that the commission is neither in the nature of managerial services, nor technical nor consultancy services and hence it does not satisfy the meaning of Fees for Technical Services as per Section 9 (1) (vii) of the Income Tax Act.

SPAHI Projects (P) Ltd. (2009) 183 Taxman 92 (AAR):

- The non – resident agent does not render any services in the nature of management, consultancy or technical in nature and therefore the liability cannot be fastened by invoking provisions of Fees for Technical Services.

DCIT v. Mainetti (India) (P) (Ltd.) (2011) 12 Taxmann.com 60

- Canvassing of orders abroad could not be regarded as managerial services, nor could it be said to be any consultation. Thus definitely, technical services as per Explanation 2 to section 9 (1) (vii) of the Act would have no application.

Ceat International S. A. V. Commissioner Of Income-tax. 237 ITR 259 (Bom.)

- A Non-resident Company, received payment from an Indian Company **for Forgoing Exports in favour of the Indian Company or Transferring Export Orders to the Indian Company-by Doing so,** assessee did not impart any Information Concerning Technical, Industrial, Commercial Or Scientific Knowledge, Experience Or Skill **nor render any managerial, technical or Consultancy Service**. Hence payment attributable to such services cannot be treated as Royalty or Fees For Technical Services falling under Cls. (VI) And (VII) of S. 9(1)

8.3 Section 194H v. Section 194J:

Section 194J provides for the deduction of tax at source from payment of Fees for professional services, or Fees for technical services, Royalty, or Any sum referred to in clause (va) of Section 28. For this purpose, "Fees for Technical Services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9.

Section 194H provides for the deduction of tax at source from the payment of commission or brokerage. Commission or Brokerage includes any payment received or receivable by a person acting on behalf of another person for services rendered 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. Commission or Brokerage does not include professional services.

Therefore one may put up a question as to what has been a need of section 194H had the commission been considered as Fees for Technical Services u/s 9 (1) (vii). In a case, commission be treated as Fees for Technical Services for section 9 (1) (vii), the tax thereon shall be deducted u/s 194J only. The two separate sections for Fees for Technical Services and Commission imply that the commission has been treated separately from Fees for Technical Services under Income Tax Act itself.

8.4 Utilization Concept:

A close look is required to section 9 (1) (vii) of the Income Tax Act. Fees for technical services paid by the resident is deemed to accrue or arise in India except such services are used for business or profession carried

on by person outside in India or for the purpose of making or earning any income from any source outside India. Therefore in a case, if commission is paid to non – resident agent in connection with export sales, the question may arise as to whether exemption can be claimed under utilization concept. For this purpose, one has to answer a question whether export sales of person resident in India is source of income outside India. Attention is invited to following cases:

Delhi bench in HAVELL's case 140 TTJ 283:

- **Certification services** provided by foreign agency to Indian party in connection with **export sales**, is something which stands utilized for the purpose of earning the income from a source outside India (here export orders from foreign buyers) and on that count itself there is no requirement of tax withholding u/s 195 read with section 9(1)(vii) of the Act on stated certification payments.

Titan Industries Ltd. V ITO - 11 SOT 206 (Bang.)

- TIL paid certain **amount to a consultant in Hong Kong to register its patent** name in Hong Kong. ITAT held that patent was registered outside India for making income from a source outside country hence amount paid will be covered in exception provided under section 9(i)(vii)(b), therefore no TDS was required.

Aktiengesellschaft Kuhnle Kopp & Kausch W. Germany By BHEL 262 ITR 513 (Mad)

- "As far as royalty on export sales is concerned, that amount is also exempt under S. 9(1)(vi) of the IT Act. Though a resident in India paid the royalty, it cannot be said that it was deemed to have accrued or arisen in India as **the royalty was paid out of the export sales and, hence, the source of royalty is the sales outside India**. Since the source for royalty is from the source situate outside India, the royalty paid on export sales is not taxable."

It can be noticed that the export sale can be considered as source of income outside India and hence the services received in connection with export sale may get out of the tax bracket under utilization concept. Therefore if services of commission agent are taken for export sales, one can claim exemption under utilization concept also.

8.5 Section 9 (1) (i): Business Connection in India:

If a view is taken that the commission paid to non – resident is not in the nature of Fees for Technical Services, one has to look at section 9 (1) (i) which provides for income from Business Connection in India or income from source of income in India.

Nonetheless, Section 9 (1) (i) does not seek to bring in to the tax net the profits of a non – resident which cannot reasonably be attributed to operations carried out in India. It is only that portion of the profit which can reasonably be attributed to the operations of the business carried out in India which is liable to tax in India. The expression "business connection" postulates a real and intimate relating between trading activity carried on outside the taxable territories and trading activity within the territories, the relating between the two contributing to the earning of income by the non-resident in his trading activity. – **SC in CIT vs. R. D. Aggarwal & co. (56 ITR 20).** Some continuity of relationship between the person in India who helps to make the profits and the person outside India who receives or realises the profits, is necessary. Normally, any activity carried on in India by Broker, General Commission Agent or any other agent having Independent Status in the ordinary course of business will not constitute Business Connection in India. [Explanation 2 to Section 9 (1) (i)]. Conversely, activities of Dependent Agent will

constitute Business Connection in India. [Explanation 2 to Section 9 (1) (i)].

Therefore in a case where the non – resident agent has got business connection in India, he can be subject to tax in India u/s 9 (1) (i). However, only that part of the income which is attributed to the operations performed in India is subject matter of tax in India.

SPAHI Projects Private Limited (2009) 183 Taxman 92 (AAR)

- Irrespective of existence or otherwise of the business connection in India, since no business operations are carried out in India, the attribution in terms of clause (a) of Explanation 1 is not possible and, therefore, no income can be deemed to accrue or arise in India.

Carborandum Co. v. CIT (1977) 108 ITR 335 (SC)

- The carrying on of activities in India is essential to make the non – resident have business connection in India in order that he may be liable to tax in respect of the income attributable to that business connection.

CIT v/s Toshuku Limited (1980) 125 ITR 525 (SC)

- The assessee (Commission Agent) did not carry on any business operations in the taxable territory and as such the recipient in India of the sales proceeds of tobacco remitted or caused to be remitted by purchasers from abroad, did not amount to an operation carried by assessee in India. Therefore the impugned commission could not, therefore, be deemed to be income which had accrued or arisen in India.

Hence even if it is assumed that there exists a Business Connection in India, so much of the income as is attributable to Business Connection in India is subject to tax in India. Since non–resident agent is likely to carry out all the activities outside India, no part of the income can be said to accrue or arise in India.

8.6 Section 9 (1) (i): Source of Income in India:

The second part of section 9 (1) (i) provides for the income from a source of income in India. It has been specifically provided in CBDT circular 23 of 1969 that a foreign agent of Indian Exporter operates in his home country and no part of his income arises in India. His commission is usually remitted directly to him outside India and is not received by him in India. Hence one can conclude that the non – resident Commission agent does not derive any income from source of income in India.

8.7 Summary:

Question	Case Laws
Whether Commission is Chargeable for Tax under Section 5? – Being Source of Income is India	Erstwhile CBDT Circulars CIT v. EON Technology (P) Ltd. (2012) 246 CTR 40 Indopel Garments Pvt. Ltd. (2001) 72 TTJ 702
Whether commission is chargeable for tax under section 9 (1) (i) – Being income from BC or Source of Income in India	SPAHI Projects (2009) 183 Taxman 92 Carborandum Co v. CIT (1977) 108 ITR 335 (SC) CIT v. Toshuku Ltd. (1980) 125 ITR 525 (SC)
Whether commission is Chargeable for tax under section 9 (1) (vii) – FTS	ACIT v. Modern Insulators 56 DTR 362 (2011) SPAHI Projects Private Limited (2009) 183 Taxman 92 (AAR) DCIT v. Mainetti (India) (P) Ltd. (2011) 12 Taxmann 60 Ceat International S. A. V. Commissioner Of Income-tax. 237 ITR 259 (Bom.)
Whether commission is Chargeable for tax under section 9 (1) (vii) – FTS (UTILIZATION CONCEPT)	Havell's Case – 140 TTJ 283 Titan Industries Ltd. V. ITO 11 SOT 206 262 ITR 513 (Mad)

9. Commission under Tax Treaties:

Any payment under tax treaties shall be classified in to various categories. For taxability of each category of income, income specific conditions shall be checked. Apparently, a commission payment to non – resident agent can be classified in to following categories:

Category of Income	Taxability Criteria
Fees for Technical Services (Subject to Make Available Concept)	If FTS arises in other state and as per Domestic Tax Laws of other state
Business Profits	Presence of PE in other territory and attribution of income to such PE
Independent Personal Services	Fixed Base in Tax Territory or the number of days presence in India
Dependent Personal Services	Fixed Base in Tax Territory or the number of days presence in India
Other Incomes	If such income arises in other State

9.1 Commission v. Fees for Technical Services

Definition of Fees for Technical Services under tax treaties is restricted definition as compared to Income Tax Act. FTS under tax treaties have been defined to mean any payments in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel). Certain tax treaties have MAKE AVAILABLE concept which restrict the scope of FTS whereby only those services which make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design can be considered as fees for Technical Services. To "make available" technical knowledge, mere provision of service is not enough; the payer must be enabled to perform the service himself [DIT v/s Guy Carpenter & Co. Ltd. (Delhi High Court)] .In order to fit the terminology "make available" in Article 13(4)(c), mere provision of technical services is not enough but the technical knowledge must remain with the payer, and he must be equipped to independently perform the technical function himself without the help of the service provider". [Raymond vs. DCIT 86 ITD 791 (Mum)]. Hence mere rendering of services is not enough to satisfy the test of Make Available under tax treaties.

The question may arise as to whether the services of non – resident agent gets covered within the Make Available principle. In the case of **ACIT v. Modern Insulators - 56 DTR 362 (2011),** it has been held that the services of the commission agent promoting the products of the Company, and rendering incidental services on sales such as arranging for timely payments from customers, co – ordination of settlement of disputes/ complaints does not form part of Fees for Technical Services as per Article 13 of DTAA between India and UK. Further the agent does not make available technical knowledge or experience. Hence the income should be classified under Business Profits as per Article 7 of India – UK DTAA. (Para 3.19). Considering the same, one may held that the services rendered by commission agent does not satisfy the test of Make Available and hence the same cannot be treated as Fees for Technical Services under tax treaties having Make Available criteria.

As far as other tax treaties are concerned where the restriction of Make Available in absent, one may have a look at the meaning of Fees for Technical Services. Again the reference can be drawn from cases already

discussed under Section 9 (1) (vii) as the definition of Fees for Technical Services under tax treaties and under Income Tax Act are more or less similar in nature. Further the attention is also drawn to the decision in the case of **ACIT v. Modern Insulators - 56 DTR 362 (2011)** where with respect to commission payment in those countries where the criteria of Make Available in absence, it has been held that para 4 of Article 12 of DTAA between India and Russia defines FTS as any payment in consideration of any managerial, technical or consultancy services. As per the agreement, the agents were to provide services for sale of goods. From the agreement, one can infer that the agent is not providing any managerial services. The services provided cannot be considered as FTS. Similar view on payments made in South Africa where there is not Make Available concept.

9.2 <u>Commission v. Business Income:</u>

Now the question may arise as to what should be the classification of commission payment if the commission is not treated as Fees for Technical Services. Ideally commission income is to be classified as Business Income as it does not satisfy the test of Fees For technical Services. Hence taxability will depend upon presence of Permanent Establishment of agent in India. If the foreign agent has got a PE in India, then the commission income that is attributable to it would get taxed in India. Usually the foreign agents operate outside India and hence do not have PE in India. Similar view has been held by AAR in the case of **SPAHI Projects (P.) Ltd.** where it has been held that Income received by non – resident on account of commission paid by the resident is not chargeable to tax in India by virtue of Article 6 of India – South Africa Tax Treaty and therefore the payer is not obliged to deduct tax at source.

9.3 <u>Commission v. Fees for Independent Personal Services:</u>

Normally, Article 15 of tax treaties deal with Independent Personal Services. The tax liability of IPS depends upon

- Availability of Fixed Base in Other Contracting State and such services attributable to such fixed place; or
- Person's stay in other contracting state exceeding specified time period (Mostly 90 Days)

For this purpose, IPS normally covers Professional Services or other services of similar nature. Further Professional services are defined to include: independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants. Therefore one has to answer a question as to whether the commission payment is in the nature of professional services. Under domestic tax laws, commission has been treated separately from professional services. Further, professional services contemplate **existence of professional skill.** In the case of **ACIT v. Meru Impex (Article 15 of DTAA between India and USA),** the Tribunal has referred matter back to the table of AO for fresh consideration as to whether the commission is in the nature of professional services or not. In the given case, the CIT (A) allowed relief to the Assessee considering Commission as Fees for Independent Personal Services. Similarly, the professional services has been defined at length in the case of **MSEB vs. Dy. CIT (96 ITD 793)(Mum), where it has been held that t**he expression 'professional services' will imply any services rendered in the course of the vocation carried on by an individual or group of individuals, requiring predominantly intellectual skills, dependent on individual characteristics of the person pursuing the vocation, requiring specialised and advanced education or expertise. Accordingly, one has to satisfy the test of the professional services before claiming

exemption under Fees for Independent Personal Services which is likely to be remote considering the features of professional services.

9.4 Commission v. Dependent Personal Services:

Normally Article 16 of tax treaties deal with Dependent Personal Services (DPS). The tax liability of DPS depends upon

- Presence of Person in other state exceeding specified time period (Mostly 183 Days)
- Payment of remuneration by an employer who is resident of other state or payment is borne by PE in that other state

For this purpose, DPS normally covers salaries, wages and other similar remuneration in respect of an employment. In the case of **ACIT v/s. Meru Impex (2011) 16 Taxmann. Com 219,** it has been held that the payment cannot be classified as salaries in absence of Employer – Employee relationship. Normally, this relationship is absent in case of non – resident agent and hence one cannot claim exemption under Dependent Personal Services also.

9.5 Commission v. Other Income:

Every tax treaty has got a residual category namely Other Income. The criteria for income chargeability under this category is almost similar to section 5 read with section 9. In the case of **Rajiv Malhotra (2006) 284 ITR 564,** AAR classified the commission payment under Other Incomes. Thereafter AAR held that para (3) of Article 23 (Which deals with taxability criteria under Other Income) is at par with the provisions of Section 5(2) read with section 9(1) of the Act and does not grant any further benefit to a Treaty resident of a contracting state (France) who is having commission income arising in the other contracting state (India) which may be taxed in the other Contracting state (India).

9.6 Summary:

Question	Case Law
Whether Commission is FTS as per tax treaties?	DIT v. Guy Carpenter Co. Ltd. (Delhi High Court)ACIT v. Modern Insulators - 56 DTR 362 (2011)
Whether Commission is Business Income as per tax treaties?	SPAHI Projects (P.) Ltd. (AAR)
Whether Commission is Independent Personal Services?	ACIT v. Meru Impex (2011) 16 Taxmann. Com 219MSEB v. Dy. CIT (96 ITD 793)
Whether Commission is Dependent Personal Services?	ACIT v. Meru Impex (2011) 16 Taxmann. Com 219
Whether Commission is Other Income?	Rajiv Malhotra (2006) 284 ITR 564 (AAR)

10. Conclusion:

After the withdrawal of CBDT circulars which dealt with tax liability of commission payments to non – resident agents, one has to be careful regarding the determination of tax liability of such non – resident agents in India. It requires careful and thorough analysis of all the provisions before an exemption is claimed from deduction of tax at source u/s 195. One should analyse facts of each case before the remittance is being made in light of the various provisions being discussed.

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GLIMPSES OF SUPREME COURT RULINGS

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1 SALE OF DEPB CREDIT – COMPUTATION OF PROFIT – SEC.80HHC :

Under clause (1) of Explanation (baa) of Sec. 80HHC of Income tax Act, it is not the entire amount received by the assessee on sale of DEPB credit, but the sale value less the face value of the DEPB that will represent profit on transfer of DEPB credit by the assessee.

U/s 80HHC(1)(baa) ninety percent of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in any such profits are to be deducted from the profits of the business as computed under the head 'profits and gains of business or profession'. Therefore if any quantum of the receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature is allowed as expenses under Sec.30 to 44D of the Act and is not included in the profits of business as computed under the head 'profit and gains of business or profession', ninety percent of such quantum of receipts cannot be reduced under clause (1) of Explanation (baa). In other words, only ninety percent of the net amount of any receipt of the nature mentioned in clause (1) which is actually included in the profits of the assessee is to be deducted from the profits of the assessee for determining 'profits of the business'.

[ACG Associated Capsules Pvt. Ltd. vs. CIT / CIT vs. Bharat Rasayan Ltd. (343 ITR 89)]

2 RESTRICTIONS ON CARRYING ON OF PROFESSION :

One must clearly understand a distinction between a law being enforced retrospectively and a law that operates retroactively. The restriction in the present case is a clear example where the right to practice before a limited forum is being taken away *in praesenti* while leaving all other forums open for practice by the appellants. Though such a restriction may have the effect of relating back to a date prior to the present. In that sense, the law *stricto sensu* is not retrospective, but would be retroactive. It is not for the court to interfere with the implementation of a restriction, which is otherwise valid in law, only on the ground that it has effect of restricting the rights of the people who attain that status prior to the introduction of the restriction. It is certainly not a case of settled or vested rights, which are incapable of being interfered with. It is a settled canon of law that the rights are subject to restrictions and the restrictions, if reasonable, are subject to judicial review of a very limited scope. Hence there is no reason to accept the submission that enforcement of the restriction retroactively would be impermissible, particularly in the facts and circumstances of the present case. The restriction is not punitive but is merely a criterion for eligibility for continuing to practice law before the Tribunal.

Held right to practice before a limited forum is being taken away *in praesenti* while leaving all other forums open for practice – *stricto sensu* it is not retrospective, but retroactive – it is not a case of settled or vested rights being taken away – Restriction is not punitive, but merely a criterion for eligibility for continuing to practice law before CESTAT – its uniform application would achieve fair results without visiting any serious prejudice upon class of advocates who were earlier members of CESTAT as it remains open to them to practice in other tribunals, forums and Courts.

[N. K. Bajpai vs. Union of India and Another (4 SCC 653)]

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FROM THE COURTS

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8 PENALTY U/S 271C : TIME LIMIT U/S 275(1)(C):

C.I.T. (TDS) v/s Ikea Trading Hong Kong Ltd.

(2011) 333 ITR 565 (Delhi)

Issue:-

How the time limit for imposing penalty u/s 271C would be calculated under provisions of Sec. 275(1)(c)?

Held:-

There are two periods of limitation prescribed under sub clause (c) of Sec 275(1). First period relates to those categories of cases where action for the imposition of penalty has been in the course of "same" proceedings. Second part of Sec. 275(1)(c) pertains to all cases falling under clause (c).

The only difference between the first part and the second part is that while in the first part the action for imposition of penalty is initiated in the course of some other proceedings, under the second part the "other" proceedings are of no relevance.

As such when the penalty proceedings do not emanate from any other proceedings, then only the six-month period from the end of the month of initiation of the penalty proceedings would be available.

9 TRANSFER OF CASE: FOUR POINTS TO BE CONSIDERED

ATS Infrastructure Ltd. v/s C.I.T.

(2009) 318 ITR 299 (Del)

Issue:-

What are the points to be considered in transfer of a case?

Held:-

1. There is no fundamental right of an assessee to be assessed at a particular place u/s 124. The assessment must be carried out at the principal place of business but when powers u/s 127 are invoked, territorial nexus becomes irrelevant.
2. Determination of the venue of the assessment would be governed by the greatest exigencies for collection of taxes.
3. Decision to transfer cases cannot be capricious or mala fide. If the venue is changed from year to year, or periodically for no apparent reason, it would not manifest an instance of exercise of power which is not available, but an example of an abuse of power in the manner in which it is exercised.
4. Whilst the convenience of the assessee should be kept in mind, it would always be subservient to the interests of adjudication and collection of taxes.

10 BOGUS PURCHASES: PAYMENT BY A/C PAYEE CHEQUES. PARTY NOT APPEARING AFTER THREE YEARS: NOT MATERIAL

Diagnostics v/s C.I.T.

(2011) 334 ITR 111 (Cal)

Issue:-

When payment for purchase is made by A/c payee cheque and when party does not appear after three years, whether such purchases can be considered to be bogus?

Held:-

If an assessee took care to purchase materials for his business by means of account payee cheques and

subsequently, three years after the purchase, the third party did not appear before the Assessing Officer pursuant to the notice, the claim of the assessee on that account could not be discarded as non-existent.

11 C/F OF DEPRECIATION: SEC. 80, 139(3) AND 32(2): PERIOD OF LIMITATION FOR SUBMISSION OF RETURN OF INCOME.

C.I.T. v/s Govind Nagar Sugar Ltd.

(2011) 334 ITR 13(Del)

Issue:-

Period of limitation u/s 139(1) for submission of Return of Income to claim c/f of Depreciation would apply?

Held:-

Section 80 and 139(3) of the Act apply to business losses and not to unabsorbed depreciation which was exclusively governed by the provisions of sec. 32(2) of the Act. That being so, the period of limitation for filing loss return as provided u/s 139(1) would not be applicable for carrying forward of unabsorbed depreciation and investment allowance u/s 32(2). Unabsorbed depreciation of a year becomes part of depreciation of subsequent year by legal fiction and when it becomes part of current depreciation it was liable to be setoff against any other income, irrespective of whether earlier year's return was filed in time or not.

12 DUAL OWNERSHIP OF LAND AND BUILDING AND CAPITAL GAIN ON SALE.

C.I.T. v/s Hindustan Hotels Ltd.

(2011) 335 ITR 60 (Bom)

Issue:-

Whether capital gain on sale of leasehold right in land and construction can be bifurcated for LTCG and STCG?

Held:-

It is well settled by now that in India, the concept of dual ownership is recognised in the sense the land may belong to one person and the building standing thereon any belong to another person. Once the concept of dual ownership is accepted, it does not matter whether the construction of the building has been completed or not. It also does not matter whether the building is constructed by the owner of the land or by somebody else. In case of a leasehold land the leasehold right would also be a capital asset u/s 2(14) in the hands of the lessees. In a given case, the owner of the land and the owner of the building may be the same person but that does not mean that two assets would merge mainly because they are owned by the same person. The capital gain arising out of sale of the land of the building can and would be required to be bifurcated into a gain arising out of the sale of the land and a gain arising out of the superstructure, whether the building is complete or not. Consequently, the Tribunal was right in holing that the capital gain arising out of the sale of the leasehold interest in the land and incomplete building would be required to be bifurcated into the gain arising out of the sale of leasehold interest in the land and the sale of the incomplete building.

13 DEALER IN SHARES: NO DISALLOWANCE U/S 14-A :-

CCI Ltd v/s Joint CIT, Udupi

(I.T.A. No. 359 of 2011 dt. 28/02/2012

Issue:-

Whether the provisions of section 14-A are applicable to the expenses incurred by the assessee merely because the assessee is also having dividend income?

Held:-

When no expenditure is incurred by the assessee in earning dividend income, no notional expenditure can be disallowed. In the facts of the case, when the assessee had held the shares in the business of the shares and not with the intention of earning dividend income, in such a situation, dividend income is incidental to the business of sale of shares and hence it cannot be said that expenditure incurred in acquiring the shares has to be apportioned to the extent of dividend income and that it would be disallowed to the extent of dividend income.

Thus it was held that in case of a person engaged in business of sale of shares no expenditure can be disallowed u/s 14A qua the dividend income even if dividend income is exempt.

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TRIBUNAL NEWS

7 MAHINDRA & MAHINDRA LTD. Vs. ACIT (International Taxation), 145 TTJ 400 (MUM)

Assessment Year 1998-99, Order Dated: November 28, 2011

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BASIC FACTS

The assessee was a manufacturer of automobile products in India and LDV was a resident of UK and was also in the business of manufacture of automobiles in UK. The assessee and LDV had proposals for joint venture in the area of automobile manufacture. LDV wanted to do market research to find out the potential market for different types of vehicles and consumer preferences. 'LDV' proposed to the assessee for the conduct of market research and sharing of costs. It was agreed that the assessee and 'LDV' would bear the cost equally. As per the aforesaid estimate Pound Sterling 29,400 would be the share of the assessee. The assessee agreed for the aforesaid proposal. According to the assessee the market research had been carried out and the invoice raised by the LDV on the assessee towards the share of market research was only some Pound Sterling 14,939. The assessee made remittance of 14,939 Pound Sterling to LDV without deduction of tax at source on the ground that it was in the nature of reimbursement of expenses, it does not constitute fees for technical services and LDV did not have PE in India. The AO however held it to be Fees for Technical services. The CIT(A) held that assessee had got a different understanding with LDV, not confined only to doing some market survey but to provide the technical assistance in improving the quality of their minibus and to move towards fully engineered minibus and, therefore, amount-in-question was part of fees for rendering technical services by LDV liable to deduction of tax at source. It was further held that amount-in-question was chargeable to tax in hands of assessee as agent of LDV under section 163.

ISSUE

Whether since 'LDV' merely conducted market research on acceptability of possible market for its products in India, and no technical service was being made available to assessee, payment-in-question was a reimbursement of expenses and was not in nature of fees for technical services as contended by revenue? Whether therefore, there was no obligation to deduct tax at source in respect of said payment?

HELD

The ITAT held that conclusion of the revenue authorities could not be sustained. The understanding between 'LDV' and the assessee in the letter dated 22-5-1996 and note referred to by the CIT(A) does not contradict each other. The note runs in consonance with the letter dated 22-5-1996. There was only a reference to the use of some of the aspects of 'LDV' product in the existing product of the assessee subject to certain change. This was only a business plan. The content of the note refers to market research and market research on acceptability of possible market for 'LDVs' products. Thus, what was done was only market research. In fact the research report was discussed in 'LDVs' office at UK and it was found that there was availability of niche market for high mini-buses and vans in India. This was the whole purpose of the agreement in the form of a letter dated 22-5-1996 between 'LDV' and the assessee. The tribunal failed to understand how the CIT(A) based on the note referred to in his order can conclude that 'LDV' provided technical assistance in improving the

quality of assessee's mini-bus and move fully engineered minibus. According to Tribunal the payment-in-question was a reimbursement of expenses and was not in the nature of fees for technical services as contended by the revenue. The law is well settled that in respect of reimbursement of expenses there is no obligation to deduct tax at source. Consequently, the assessment of the sum in question in the hands of the assessee as agent of 'LDV' is held to be incorrect.

8 SIVA INDUSTRIES & HOLDINGS LTD VS ACIT 145 TTJ 497 (CHENNAI).

Assessment Year 2006-07, Order Dated: May 20, 2011

BASIC FACTS

During the relevant assessment year the assessee had taken loan for making investment in share of a company. However, during the year it has not received any dividend income. The revenue held that the fact that the assessee had invested in shares by using borrowed funds, the expenditure in the form of interest on the borrowings was liable to be disallowed by invoking the provisions of section 14A.

ISSUE

Whether disallowance u/s 14A can be made even if the assessee does not have any income which does not form part of total income nor has he claimed the same during the year?

HELD

Section 14A is to prevent claims of deduction of expenditure in relation to income which does not form part of the total income of the assessee. A perusal of the provisions of section 5 provides for the scope of the total income. It includes all incomes from whatever source derived which is received or deemed to be received, accrues, arises or is deemed to accrue or arise in India or accrues or arises outside India during 'such year'. If the assessee does not have any income as falling within the scope of 'total income' during any year the provisions of the Act could not be applied to him. Thus for the applicability of section 14A there must be (i) income which is taxable under the Act for the relevant assessment year and (ii) there should also be income which does not form part of the total income under the Act during the relevant assessment year. If either one is absent, then section 14A would have no applicability. If one assume that section 14A would apply, even when the assessee does not have any income which does not form part of the total income, then it would lead to a position where if the assessee makes any investment in any shares even though the assessee does not receive dividend income, the expenditure in relation to the investment in the shares would stand to be disallowed. This disallowance would continue year after year as long as the assessee holds the investment, whether he gets any income out of such investment or not. This is not what is contemplated under section 14A. What is taxable during the relevant assessment year is the total income computed as per the provisions of the Act. An investment which does not give rise to any income deemed to accrue or arise cannot form part of the total income and therefore cannot form income which does not form part of the total income under the Act. Thus once there is no claim of income which does not form part of the total income under the Act, there cannot be any disallowance in relation to an investment which may or may not give rise to any income which did not form part of the total income. In the instant case it was noticed that none of the investments made by the assessee had generated any dividend income which had been claimed by the assessee as not forming part of the total income. In the circumstances, as it was noticed that the assessee did not have any income which did not form part of the total income nor had the assessee made such a claim, no disallowance under section 14A could be made on the assessee for the relevant assessment year.

9 INDUSIND BANK LTD vs. ACIT 145 TTJ 409 (MUM)(SB).

Assessment Year 1998-99 & 1999-2000, Order Dated: March 14, 2012.

BASIC FACTS

The assessee is in the business of banking and had leased out assets to another company during assessment years (AY) 1998-99 and 1999-00. The assessee claimed depreciation on the ground that it

was the rightful owner of the asset purchased and the lease was in the nature of an operating lease. The AO concluded that it was a case of finance lease and the taxpayer was not the owner of the asset. Consequently, depreciation of 9.72 crores on the leased asset was disallowed by him interalia on the ground that assessee never got the possession of the asset and it was a case of full payout & risks and rewards incidental to ownership vested with the lessee. Also the lease was for a fixed term and after expiry of the lease period, the asset was sold back to the lessee & entire transaction was done by the assessee for claiming depreciation. It was not interested in the use of the asset but was only concerned with the recovery of lease rentals. The assessee's alternate contention that if the depreciation on assets leased was disallowed, then capital recovery embedded in the lease rentals should not be charged to tax was accepted by the AO. The Commissioner of Income-tax (Appeals) upheld the AO's view.

The Hon'ble President of the Tribunal on a reference made by a Division Bench has constituted this Special Bench by posting the following questions.

ISSUE

Whether the agreement could be called a "financial lease agreement"?

Whether the assessee is entitled to depreciation on assets leased by it incase the transaction amounted to a finance lease?

HELD

There is no definition of 'operating lease' and 'finance lease' under the Income-tax Act, 1961 unlike the provisions of service-tax or the Direct Tax Code Bill, 2010 wherein "finance lease" has been specifically defined. SC's judgment in case of Asea Brown Boveri Ltd v. IFCI (154 Taxman 512) clearly states the broad features of a 'finance lease' such as finance lease is non-cancellable and there is a fixed obligation on the lessee for payment of lease money, the period of lease is always fixed and is decided taking into consideration the economic life of the asset. Initial lease period is settled in such a way so as to fully recover the investment of the lessor together with interest, the risks and rewards incidental to ownership vests with the lessee and it is the lessee who pays taxes in relation to the asset leased,etc. In order to allow depreciation, the twin conditions of ownership and use of the asset for business purpose are to be satisfied cumulatively. In the facts of the present case, the lessee had chosen the type of asset, model, other special features required and had negotiated with the supplier about the delivery, installation and purchase price.The assessee's role was only to provide finance. It is the lessee who is the real owner of the asset and is in possession of the property exercising control over the asset. Apart from exercising control over the asset and having full right to use, there is prior understanding with the assessee that after the expiry of the lease period, the asset will be transferred to it at a predetermined value. The assessee has absolutely no control over the property during the lease period. In a finance lease, it is the lessee who is the owner of the property and for all practical purposes entitled to depreciation as per law and not the lessor. Only the right person entitled under law, can get the benefit of depreciation. Parties cannot, in disregard to law, mutually decide as to who out of them will be allowed the depreciation. The fact that the lessee has not claimed depreciation is inconsequential when the point for determination is the admissibility of depreciation to the assessee. In case of a finance lease, the lessee is to be treated as the owner of the asset and only the lessee can claim depreciation.In the present case, it was a mere advancing of loan and neither operating nor finance lease. Hence, depreciation is not admissible to the assessee.

10 DCIT Vs. SUMMIT SECURITIES LTD. 145 TTJ 273 (MUM) (SB),

Assessment Year 2006-07, Order Dated: March 07, 2012

BASIC FACTS

The assessee company is engaged in the business of real estate, investment activities, manufacturing of transmission line towers and undertaking turnkey projects in India and abroad. During the year under consideration assessee company sold off its power transmission business to KEC International Ltd in view of an arrangement approved by the Bombay High Court. Assessee sold the said business for a full value

consideration of Rs. 143 Crores and claimed the said transaction to be in nature of slump sale and hence the taxability of the same would be governed by S. 50B. Assessee offered the gain for taxation after making computation as envisaged in section 50B. Assessee computed the net worth of the undertaking sold which turned out to be negative figure with value of Rs. 157 Crores and hence in view of negative net worth, assessee offered only Rs. 143 Crores as capital gains. AO did not accepted this stand of the assessee and contended that negative net worth would be considered for computation and went on to holding that the undertaking was not sold at an arm's length price. AO considered that a total of Rs. 143 Crores and Rs. 157 Crores i.e. Rs. 300 Crores would be capital gains chargeable to tax and made the addition. AO also relied on the valuation report submitted by the assessee which also showed that fair value of the undertaking would be Rs. 391 Crores even though the final price agreed between the parties for sale was Rs. 143 Crores. CIT(A) accepted the contention of the assessee and held that net worth cannot be negative and the cases where there is a negative net worth, the same needs to be taken as nil. CIT(A) directed AO to compute the tax accordingly. Aggrieved of the order of CIT(A), revenue went into appeal before ITAT.

The case came for hearing before the Division Bench. The members of the Division Bench were not satisfied with the correctness of certain decision of the Tribunal relied upon by the assessee which had found favour with the CIT(A). Accordingly a reference was made to the Hon'ble President for the constitution of Special Bench. Accordingly Special Bench was constituted to consider following question.

ISSUE

Whether the AO was right in adding the amount of liabilities being reflected in the negative net worth ascertained by the auditors to the sale consideration for determining the capital gain on account of Slump Sale?

HELD

Full value of consideration would always mean the actual consideration received by the assessee and it does not include what ought to have been received. Also the reference to the fair market value can be made in certain situations provided in the Act. Nowhere in section 48 and 50B, it is mentioned that fair market value would be considered as full value of consideration for computation of capital gains tax. Hence the contention of the AO that Rs. 157 Crores represents money's worth cannot be accepted because in actual only Rs. 143 Crores have been received by the assessee and in any case that cannot be enhanced. The capital asset "undertaking" would mean total assets minus total liabilities of the undertaking. If negative net worth of the Rs. 157 Crores would be added to full value of consideration, then that would be incompatible with those of the full value of consideration of such undertaking. Amount of Rs. 143 Crores have been arrived at after including assets and liabilities and now again adding negative net worth to it would result into absurdity. Hence full value of consideration would Rs. 143 Crores because the same has been approved by High Court and is the actual amount that has been received. Therefore full value of consideration for the computation of tax would be Rs. 143 Crores. Dealing with the concept of net worth ITAT held that definition of the same is given in section 50B which is the difference between aggregate value of assets and liabilities of undertaking. Hence the net worth can be either positive or negative and merely it is negative in the present context does not exclude the same from the purview of section 50B. Hence contention of the assessee that cost of the asset cannot be negative can be bought but the same can never be extended to the capital asset being an undertaking which include assets as well as liabilities. Negative net worth cannot be ignored for the purpose of computation and the same is taken care of in section 50B. Legislature has rightly used the words "deducted from" which implies that if net worth is positive, that will be deducted from the consideration and if the same is negative then that will be added to the full value of consideration. Contention of the assessee that capital gain can never be in excess of full value of consideration was acceptable but cannot be applied in case of transfer of an undertaking. Deeming provision has to be brought to a logical conclusion. If the contention of the assessee that in case of negative net worth, the same should be taken at nil is to be considered, then it will lead to creation of

another legal fiction in the existing legal fiction. Contention of the assessee can also be not accepted in view of the fact that for computing capital gains on sale of undertaking, everything attributable to all the assets and liabilities transferred has to be given regard. Assessee's contention would lead to a conclusion wherein only part of the liabilities would be considered. Assessee's contention will restrict the value of liabilities to the extent of value of assets so that net worth would be nil which can never be the intention of the law and never be assumed on part of any assessee. Hence AO's contention that value of liabilities should be added to the full value of consideration was rejected by ITAT. Also CIT(A)'s contention that in case of negative net worth, the same should be considered as nil was also rejected and finally it has been held that value of the net worth would remain negative and resultantly capital gains would be chargeable at Rs. 300 Crores.

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Contd. from page no. 64

14 ANNUAL VALUE OF S.O. RESIDENTIAL HOUSE U/S 23(2) IS NIL. BENEFIT TO HUF :-

CIT v/s Hariprasad Bhojnagarwala

(2012) 206 Taxman 471 (Guj)

Issue:-

Annual value of House Property is to be determined u/s 23. Section 23(2) provides that the benefit of Nil value in respect of self occupied property is available only to the owner who can reside in his own residence.

Whether this benefit u/s 23(2) is available to S.O. property owned by Hindu Undivided Family?

Held:-

A Hindu Undivided Family can be seen being a family of a group of natural persons. There is no dispute that the said family can reside in the house, which belongs to the HUF. A family cannot consist of artificial persons. Under section 13 of General Clauses Act, while the words in masculine gender shall be taken to include females and words in singular shall include plural and vice-versa. 'Owner' would include 'owners' and 'his own' would include 'their own'.

Therefore there is nothing in words used in section 23(2), which excludes application of such provision to HUF, which is a group of individuals related to each other.

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HOMAGE

CA. Jaymal J. Thakore, Senior Member of Association, left for his heavnly abode on 27-05-2012. May his soul rest in peace.

When one door of happiness closes another opens; but often we look so long at the closed door that we do not see the one which has opened for us.

Helen Keller

"Policy without principles, pleasure without conscience, commerce without ethics (morality), knowledge without character, science without humanity, wealth without work and worship without sacrifice" is no good.

Mahatma Gandhi

UNREPORTED JUDGMENTS

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In this issue we are giving full text of decision of Ahmedabad Income Tax Appellate Tribunal. It relates to the allowability of deduction of provisions for bad and doubtful debts from book profit u/s 115 JB even after amendments made retrospectively to item (i) of the Explanation to section 115 JA & JB whereby any provision for diminution in the value of the asset is to be added back to book profit.

We hope the readers would find the decision very useful.

3 IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, AHMEDABAD

BEFORE SHRI MUKUL Kr.SHRAWAT, JUDICIAL MEMBER AND SHRI T.R. MEENA, ACCOUNTANT MEMBER

I. T. A. No. 3159/ Ahd/ 2011
(Assessment Year : 2006-07)

Ajay Ispat Pvt . Ltd. Vs.	The Income Tax Officer
269, GVMMSV Ltd.	Ward-1(1)
Odhav	Jitendra Chambers
Ahmedabad	Ashram Road, Ahmedabad

PAN/ GIR No. : AABCA 3164 F

(Appellant) (**Respondent**)

Appellant by : Shri Paumil Shah
Respondent by : Shri Vinod Tanwani, Sr. D.R.

Date of Hearing : 26/03/2012
Date of Pronouncement : 30/03/2012

O R D E R

PER SHRI MUKUL Kr. SHRAWAT, JUDICIAL MEMBER:

This is an appeal arising from the order of learned CIT(A)-6, Ahmedabad dated 11/11/2011, wherein the assessee's appeal was dismissed by holding the said appeal as an invalid appeal. The assessee has filed the said appeal against the levy of penalty under section 271(1)(c) of the Act. Grounds raised in the present appeal by the appellant are argumentative and descriptive, hence not reproduced, but primarily the appellant is aggrieved by the dismissal of appeal as also confirmation of concealment penalty of Rs.3,82,066/-imposed on account of an addition of Rs.11, 57, 777/- for disallowance of expenses.

2. Facts in brief as emerged from the corresponding penalty order levied under section 271(1)(c) dated 30/08/2010 were that the following two expenses were disallowed:-

(i) Loans written off Rs.8,42,000/-

(ii) Deferred tax written off Rs.3,15,777/-

2.1. While imposing penalty, the AO has commented that the loans written off were found to be given as loans and advances to directors and shareholders. The assessee was unable to establish the business purpose of deduction hence disallowed. According to AO, the assessee has also not explained the genuineness of deferred tax written off. On the said total disallowance, the impugned penalty was imposed. Being aggrieved the appellant-company has filed an appeal before learned CIT(A).

3. It was noticed by the CIT(A) that the **company was wound up** with effect from 27/5/2010. **The name of the appellant-company was struck off from the records of ROC.** Therefore, it was noted by ld. CIT(A) that the appeal was filed by an erstwhile Director of the company. According to CIT(A), the company was no longer in existence after the struck off from the register of ROC. He has opined, quote " **In the absence of existing company, there cannot be any director who can sign the verification for the filing of appeal. There cannot be any appeal by a company which is not in existence. In view of this, this appeal is treated as invalid**

and accordingly dismissed. "Unquote. Being further aggrieved now the assessee is in second appeal before us.

4. From the side of the appellant learned AR Mr.Paumil Shah appeared. He has argued that the company was running in losses, further, on account of family problems, applied to Registrar of Companies for striking off the name of the company under section 560 of the Companies Act, with effect from 27.05.2005. The company has also informed the Revenue Department for the cancellation of Permanent Account Number. He has informed that through a letter dated 26/10/2007 the company has asked the Registrar of Companies to struck the name of the company under section 560 of the Companies Act. The return for the assessment year 2006-07 was filed on 30/10/2006 declaring a loss of Rs.11,70, 229/-. The name of the company was struck off on 27/5/2010. The assessment of the company was finalized on 18/3/2010 under section 143(3) read with section 147 of IT Act and total loss of Rs.12,452/- was assessed. Thereafter, penalty was imposed under section 271(1)(c) vide an order dated 30/8/2010. If the company was not in existence, then how the assessment was made in the name of the company and also penalty was imposed. Learned AR has therefore pleaded that if the penalty has been imposed on a company, then he has legal right of appeal.

5. From the side of the Revenue learned DR Mr.Vinod Tanwani appeared. At the outset, it is worth to appreciate that the learned DR has expressed that an interesting situation had arisen due to the dismissal of appeal by the learned CIT(A) on a very technical reason. He has informed that as per the IT Act in case of a liquidation of a company the procedure is laid down in section 140 of the Income Tax Act., however, this is not the case of liquidation but the company was struck off by the Registrar of Companies. At the time when the appeal memo was signed on Form No. 35 the company was not in existence therefore the Director has wrongly signed the said requisite form. In all his fairness, Mr.Vinod Tanwani has also expressed that the penalty was imposed, hence there ought to be some legal remedy available to such a company who is no more in existence. Further in a true spirit to assist the Bench to arrive at a correct decision, he has explained some of the provisions of the Companies Act.

6. Having heard the submissions of both the sides and after appreciating the preliminary facts of the case, we are also of the view that a strange situation had arisen due to the fact that on one hand the Revenue Department has assessed the company, simultaneously also imposed the penalty on the company when the said **company was under the process of striking off the name from the register of the Registrar of Companies.** Meaning thereby, the Revenue Department has considered the said company as an existing company and proceeded to take action against a company as per law. But when the appeal was filed by the Director of the company on behalf of the company, then it was held by ld. CIT (A) that since the company was not in existence therefore the Director had no *locus standi* to file the appeal. We have examined the appeal memo, that is Form No. 35, filed by the Director dated 15/9/2010. One Shri Mohinder Paul B Gupta has signed the said form in the capacity of an ex-director. The first and the foremost question is that who is authorized to sign Form No.35, i.e. the Appeal Memo being submitted before learned CIT(A).

6.1. **Section 249 (1)** prescribes that every appeal shall be in the prescribed form and shall be verified in the prescribed manner. As per **Rule 45(2) of Income Tax Rules**, the form of appeal as prescribed and the grounds of appeal as also the form of verification appended thereto **shall be signed and verified by the person who is authorized to sign the return of income under section 140 of the Income Tax Act**, as applicable to the assessee. We have therefore studied **Section 140** of IT Act titled as "return by whom to be signed". This section prescribes that the return under section 139 shall be signed and verified in the case of the company **{sec 140(C)} by the Managing Director.** The object of this provision appears to be to ensure that the returns of income has to be signed by the person mainly

responsible for the affairs of the company. It is interesting to note that as per one of the proviso annexed to this section, the situation taken into consideration are three fold; (i)that where the company is being wound up, whether under the orders of the Court or otherwise or (ii) that any person has been appointed as the receiver of the company so shall be signed by the liquidator.(iii) An another situation has also been taken into account by the Statute that where the management of the company has been taken over by the Central Government, then the return of the company shall be signed and verified by the Principal Officer.

6.2. On examination of these provisions, it is clear that the other three conditions, namely liquidation or wound up or taken over of the company, has been dealt with by the Statute **but the Statute has not taken into account a situation where a company has applied for the striking off the name by the Registrar of Companies.** The present controversy falls under this category. Winding up is a process by which the assets of the company are realized and the liabilities are paid. Section 179 of the Companies Act says that if the name of the company is struck off by the Registrar of Companies, it's indisposed property is not appropriated to its liabilities. The Act says that nobody would claim that property and that the doctrine of *bona vacantia* will be attracted in that contingency. Meaning thereby the Companies Act has made a separate and special provision for the companies whose names are struck off the Registrar within the scope of section 179 of the Companies Act.

6.3. We have laid hands on a general **Circular No. 36/ 20.11 dated 7/6/2011** prescribing the guidelines for the fast track exit mode for defunct companies under section 560 of the Companies Act. The guidelines says that there are number of companies which are registered under the Companies Act 1956, but due to various reasons inoperative. Such companies may be desirous of getting their names strike off from the register of companies maintained by the Registrar of Companies. **Such a defunct company is identified as dormant** by the Ministry of Corporate Affairs and, therefore, may apply for getting its name strike off from the register of companies a procedure is to be adopted by the Registrar. Under the said provisions an affidavit is to be given individually by every Director. There is a provision to furnish an indemnity bond as well. Hence Director has to indemnify and undertake in writing to pay and settle all lawful claim arising in future after the striking off the name and also to indemnify to settle all lawful claims. As per section 560, Registrar has power to strike defunct company off the register, provided that the liability , if any, of every Director who has exercising any power of management shall continue and may be enforced as if the company had not been dissolved. Rather, one of the sub-section prescribes that up to 20 years from the publication in the official Gazette the name of the company can be a restored to the register. In a situation, where a defunct company can be revived and the directors are responsible for every lawful liability then in our considered opinion they are also entitled to verify the **Form No. 35** by signing in the capacity of director. We hereby hold that in the case of a Company whose name has been struck-off the register by the Registrar of Companies can file an appeal U/s 246 of the I.T.Act and in that situation the Director of the erstwhile is authorized to sign the requisite Forms. We are of the conscientious view that in the present scenario and considering the legal position the director has lawfully signed the requisite form and the learned Commissioner has wrongly dismissed the appeal *in limine*. We therefore direct the learned CIT(A) to admit the appeal and thereupon decide on merits. In the result, the grounds are allowed for statistical purposes.

7. In the result, the appeal of the Assessee is allowed for statistical purposes.

Sd/-	Sd/-
(T.R. MEENA)	**(MUKUL Kr. SHRAWAT)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad; Dated 30/ 03 /2012

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CONTROVERSIES

TREATMENT OF PRIOR PERIOD EXPENDITURE

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Issue:

Whether Prior Period Expenditure has to be disallowed while computing taxable income? Further if there is Prior Period Expenditure and Prior Period Income whether disallowance if any has to be of entire Prior Period Expenditure or the disallowance should be net i.e. Prior Period Expenditure less Prior Period Income.

Proposition:

It is proposed that the Prior Period Expenditure may be related to the Prior Period but the liability may have been incurred in the current year. As per the Accounting Principles, it may be disclosed as Prior Period Adjustments but in respect of computation of taxable income what is to be seen is that though the liability pertains to previous year but if it has accrued during the year the same has to be allowed as deduction while computing taxable income.

Further there may be Prior Period Expenditure as well as Prior Period Income and it is proposed that what is to be disallowed is only the net expenditure and if Prior Period Income is more than Prior Period Expenditure then no disallowance can be made.

View against the Proposition:

It is submitted that when the books of account are maintained on mercantile basis, the expenditure of previous year cannot be allowed as deduction while computing the taxable Business Income of current year.

It is submitted that when an expense relates to transaction of an earlier year it is a liability payable in the earlier year, which has not been paid nor provided and in these circumstances the true profits and losses of the previous year i.e. current year cannot be computed for the purpose of determination of tax liability. Let me refer to the decision of **CIT V/s. Nathmal Tolaram 88 ITR 234** wherein their lordships held that u/s. 4 of the I.T. Act the income that accrues or arises during any Previous Year alone is to be taken note of. Thus, if expenditure has accrued in the Previous Year but the same is accounted in the current Assessment Year then the expenditure will have to be disallowed. Secondly, if there is Previous Year expenditure as well as Previous Year Income then only the gross Previous Year expenditure can be disallowed because Previous Year Income which is accounted in the Current Year is taxable under the Provisions of I.T. Act and hence, there is no question of disallowance of net Previous Year Expenditure i.e. Previous Year Expenditure – Previous Year Income.

View in favour of the Proposition:

It is submitted that as per AS-5 Net Profit or Loss for the Period Prior Items and change in Accounting Policies the Prior Period items are income or expenses which arises in the current period as a result of errors or omissions. In the preparation of the Financial Statements of one or more period. Further it is submitted that the liability is required to be provided on the basis of accounting estimates though no invoice has been received. However, I.T. Act recognizes only documentary evidence and no deduction is permissible based on the Accounting estimates. It is possible that Expenditure relates to Previous Year but there is no error or omission in not providing for such expenditure. When the liability is not provided and paid it is possible that in Accounting it is disclosed as Prior Period Expenditure but for the purpose of Computing taxable business Income of the Current Year what is to be seen is whether liability has accrued during the year though it pertains to the Previous Year. It is useful to refer to the decision of their Lordships of **Gujarat High Court in the case of Saurashtra Cement 213 ITR 523** and the decision of their Lordships of **Bombay High Court in the case of CIT vs. Phalton Sugar Works Ltd. 162 ITR 622** where it has been held that when liability for expenditure has accrued during the year though it

relates to previous year, the same has to be allowed as deduction.

If there are Previous Year Expenditure as well as Previous Year Income for example Previous Year Expenditure is Rs. 5 lacs and Previous Year's Income is Rs. 4 lacs then if the Previous Year Expenditure is in fact and under the law is really a Previous Year Expenditure then disallowance can be made only of the net Previous Year Expenditure. It is submitted that what is to be disallowed can only be Rs. 1 lacs. The Principle is simple that if Gross Prior Period Expenditure is disallowed since it is expenditure of the Previous Year then Previous Year's Income also cannot be taxed in Current Assessment Year as it is income of the Previous Year.

Summation:

Let me first refer to the disallowance of Previous Year Expenditure. It is submitted that reliance can be placed on the decision of **Saurashtra Cement** and **Phalton Sugar Works Ltd.** where it is clearly laid down that if the liability for expenditure as accrued during the year though the same relates to the Previous Year the same has to be allowed as deduction.

Let me now refer to very interesting decision recently rendered by their Lordships of Delhi High Court in the case of CIT v/s. Vishnu Industrial Gases. Their Lordships of Delhi High Court in this case held that when the Department had not disputed that the expenditure was deductible in the Previous Year but it was only disputing the year in which deduction could be allowed it was held by their Lordships of Delhi High Court that if the tax rates were the same in the both the years the Department should not waste its energy in raising questions as to year of deductibility /taxability. Their Lordships of **Delhi High Court** referred to its own decision in the case of **Shri Ram Pistals** as well as the decision of **Bombay High Court in CIT vs. Nagri Mills 33 ITR 681**. In my opinion this is a very important decision rendered by their Lordships of Delhi High Court.

Now let me refer to issue regarding if the Prior Period Expenditure has to be disallowed then what is to be disallowed is gross Prior Period Expenditure or net Prior Period Expenditure.

Let me first refer to the decision of **Hon. ITAT Jodhpur Bench in the case of Metalizing Equipment Co. (P.) Ltd. 70 TTJ 365** in this case the Hon. ITAT in para 5 and 6 held as under:

5. Ground No.3 relates to the disallowance of Rs.5,823 on account of expenses relating to earlier years. The learned counsel for the assessee submitted that the auditor in his audit report had reported two items pertaining to earlier year, one on account of debit for freight amounting to Rs.868/- and the other on account of credit of freight amounting to Rs.4,955/-. He further submitted that the net effect of these two entries, in fact, has resulted in crediting the income of Rs.4,087/- pertaining to the earlier year and contended that this fact was not properly appreciated either by the Assessing Officer or by the CIT(A). In this regard he drew out attention towards the journal voucher placed on page No.47 of his paper book to show the corresponding accounting effects. He, therefore, contended that no addition on this account is really warranted. The learned Department Representative on the other hand, relied on the orders of the authorities below on this issue.

6. After considering the rival submissions and perusing the relevant material on record we find merit in the contention of the learned counsel for the assessee or on this issue. A perusal of the journal voucher placed in the paper book of the assessee clearly indicates that an item of Rs.4,955/- pertaining to the earlier year has in fact resulted in crediting freight and cartage outward a/c. and thus has reduced the expenditure of the current year to that extent. It is also relevant to note here that the prior period adjustments in this case are having net credit results in the current year and this being so, no addition is really warranted on this issue. It is pertinent to note here that the Assessing Officer made the addition on this issue on the basis of auditor's remark without going deep in the issue and also without giving opportunity to the assessee to offer any explanation. In such circumstances, we are of the opinion that the CIT(A) should have considered this apparent mistake instead of taking support from rule 46A.

We also have the benefit of recent decision of Delhi High Court in the case of **CIT V/s. Exxon Mobil Lubricants P. Ltd. reported in 328 ITR 17**. In this case their Lordships of Delhi High Court have clearly held that it the Prior Period Income is taxed then the Gross Prior Period Expenditure cannot be disallowed. The Ld. AO cannot disallow the entire Prior Period Expenditure when he decides to tax the Prior Period Income.

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INTERNATIONAL TAXATION

TRANSFER PRICING ASPECTS OF EXCESSIVE ADVERTISING AND MARKETING SPENDS BY INDIAN COMPANIES

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This Article summarizes a recent ruling of the Mumbai Income-tax Appellate Tribunal (Tribunal) in the case of *Assistant Commissioner of Income-tax vs. Ms. Genom Biotech Pvt Ltd* (Assessee) on the issue of a transfer pricing (TP) adjustment for "excessive" advertising, marketing and promotional (AMP) expenditure incurred by the Assessee during Assessment Year (AY) 2004-05.

The Tribunal held, that before the Transfer Pricing Officer (TPO) interfered with a Assessee's TP documentation, he had to give cogent reasons for rejecting the analysis undertaken by a Assessee and also why his own analysis was superior. The Tribunal further stated that a comprehensive comparability analysis should be undertaken before choosing a set of comparables to determine the arm's length price. Finally, the Tribunal held that the arithmetic mean of AMP expenditure as a percentage of sales for a set of companies cannot be considered to be an arm's length price nor can such an analysis be said to be consistent with the Transactional Net Margin Method (TNMM) as prescribed by the Indian Tax Laws (ITL). The Tribunal also observed that since the Assessee was the manufacturer AMP expenditure and any benefit derived from it belonged to the Assessee.

Facts

The Assessee is a manufacturer of pharmaceutical products. It is engaged in export of pharmaceutical products to its associated enterprises (AEs) for further sale and also reimburses AMP expenses incurred by its AEs in their respective countries. During TP audit, the TPO held the export of pharmaceutical transaction to be at arm's length. But for the reimbursement of AMP expenditure, the TPO rejected the Comparable Uncontrolled Price (CUP) method used by the Assessee and instead applied the Transactional Net Margin Method (TNMM). The TPO held Assessee's AMP expenditure to be excessive by comparing the AMP expenditure to sales ratio of the Assessee to the average of the same ratio of 17 other companies considered comparable. Aggrieved, the Assessee appealed before the first appellate authority (Commissioner of Income Tax - Appeals) who ruled in favour of the Assessee on the following grounds:

(1) TPO's assumption of restricting AMP expenditure to 10% of sales is illogical;

(2) the remittance is approved by the RBI;

(3) the margins earned by Assessee on export transaction were better than industry averages.

Aggrieved, the Revenue filed an appeal before the Mumbai Tribunal.

Issue before the Tribunal

The primary issue before the Tribunal was whether the TPO has arrived at the arm's length price in accordance with the provisions of the tax law for the reimbursement of AMP expenses incurred by the AEs.

Tribunal's ruling

The Tribunal observed that the Assessee is the manufacturer of a product that is niche and highly in

demand. Thus, the AMP expenditure belongs to the Assessee as the primary benefit would belong to it. The Tribunal seemed to have made only passing reference to this ground. Detailed reasons for coming to such conclusion or arguments made by both parties in this regard are not apparent from the judgement. Further, according to the Tribunal this is not the primary issue that arises from the order of the TPO.

The Tribunal held that the TPO's role is limited to the determination of arms length price of international transactions referred to him by the AO. It is the role of the AO to judge the appropriateness of any expenditure incurred by a Assessee and compute the total income of the assessee having regard to the arm's length price.

The Tribunal has held that the methodology adopted by the TPO is against the law for the following reasons:

- The TPO has not given any reason for rejecting the CUP method adopted by the Assessee for determining the arm's length price for reimbursement of business promotion expenses to AEs.
- The TPO has to give cogent reasons for not only rejecting a Assessee's analysis but he also has to explain why the alternate analysis proposed by him, in this case TNMM, is more appropriate as compared to the analysis carried out by the Assessee.
- Applying the mean percentage of AMP expenditure to sales ratio of pharmaceutical companies cannot be termed as application of the TNMM as outlined in Rule 10B(e) of ITL. Hence, the method followed by TPO is not the TNMM and the arithmetic mean percentage of a certain expenditure of companies cannot be an "arm's length price."
- The TPO sought to compare the average AMP expenditure incurred by pharmaceutical companies, without any analysis as to the comparability of product sold, market conditions, period of advertising etc. The TPO has not brought out any commonality between the Assessee and these companies. This application of TNMM is against the approach prescribed by ITL.
- The Assessee's profitability is greater than that of the pharmaceutical companies whose AMP expenditures are compared to the Assessee's.
- Further, the TPO has already accepted the method adopted by the Assessee in determining the arm's length price for reimbursement of expenses to AEs for AY 2003-04.

The Tribunal held that an approval by the RBI for a remittance cannot be considered as equivalent to the arm's length principle since every remittance would have an approval of RBI irrespective of its arm's length nature.

Comments

Transfer pricing issues arising from AMP expenses incurred by related party distributors, have emerged as a contentious issue in recent times. This ruling of the Tribunal addresses in passing this contentious issue, even though the Tribunal did not consider the same to be the primary issue that need to be adjudicated. However, the Tribunal's observation does suggest the need for Assessees to evaluate the nature and extent of their AMP expenses to assess whether the entity incurring the expenditure is expected to benefit from the same under arm's length conditions. The Tribunal's rejection of the TPO's analysis based on an industry average AMP for identifying "excessive" AMP expenditure is expected to be welcomed by Assessees who face similar challenges in their TP audits.

The Mumbai Tribunal has also reiterated the importance of undertaking appropriate comparability analysis before benchmarking any international transaction. Further, it has put the onus on the TPO to give cogent reasons before rejecting the analysis undertaken by a Assessee and replacing it with his own analysis.

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We have to do our deeds, results would come of its own.

Swami Vivekananda

FEMA UPDATE

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Transfer of Funds from Non-Resident Ordinary (NRO) account to Non-Resident External (NRE) Account

Ref.: A. P. (DIR Series) Circular No. 117 dated May 7, 2012

The Committee to Review the Facilities for Individuals under FEMA, 1999 has recommended that the NRIs/PIOs may be permitted, subject to payment of applicable taxes, to transfer repatriable funds from their NRO account within the overall ceiling of US $ 1 million per financial year, for credit to their NRE account in India. At present transfer of funds from NRO to NRE account is not permissible.

2. On a review, it has been decided that henceforth NRI as defined in Foreign Exchange Management (Deposit) Regulations, 2000 contained in Notification No. FEMA.5/2000-RB dated 3rd May 2000, as amended from time to time, shall be eligible to transfer funds from NRO account to NRE account within the overall ceiling of USD one million per financial year subject to payment of tax, as applicable (i.e. as applicable if funds were remitted abroad). Such credit of funds to NRE account shall be treated as eligible credit in terms of paragraph 3(j) of Schedule-1 of Notification No. FEMA.5/2000-RB dated 3rd May 2000.

Release of Foreign Exchange for Miscellaneous Remittances

Ref.: A. P. (DIR Series) Circular No. 118 dated May 7, 2012

Attention is invited to A.P.(DIR Series) Circular No. 16 dated September 12, 2002, in terms of which the Authorised Dealers were advised to release amounts up to USD 500 or its equivalent for all permissible transactions on the basis of a simple letter from the applicant containing the basic information, viz., names and the addresses of the applicant and the beneficiary, amount to be remitted and the purpose of remittance. It was clarified in the circular that Authorised Dealers need not insist upon submission of A2 Forms in such cases. The limit was subsequently enhanced to USD 5000 in terms of the A.P.(DIR Series) Circular No. 55 dated December 23, 2003.

2. With a view to further liberalizing the documentation requirements, the limit for foreign exchange remittance for miscellaneous purposes without documentation formalities, has been raised from USD 5000 to USD 25000 with immediate effect.

3. It is clarified that Authorised Dealers need not obtain any document, including Form A-2, except a simple letter as stated above as long as the foreign exchange is being purchased for a current account transaction (not included in the Schedules I and II of Government Notification on Current Account Transactions), and the amount does not exceed USD 25000 or its equivalent and the payment is made by a cheque drawn on the applicant's bank account or by a Demand Draft. AD banks shall prepare dummy A-2 so as to enable them to provide purpose of remittance for statistical inputs for Balance of Payment.

External Commercial Borrowings (ECB) Policy - Utilization of ECB proceeds for Rupee expenditure

Ref.: A. P. (DIR Series) Circular No. 119 dated May 7, 2012

Attention is invited to A.P. (DIR Series) Circular No. 5 dated August 1, 2005 and A.P. (DIR Series) Circular No. 52 dated November 23, 2011 relating to External Commercial Borrowings.

2. As per the extant guidelines, ECB proceeds can be utilized for permissible foreign currency expenditure and Rupee expenditure. On a review, it has been decided that at the time of availing Loan Registration Number (LRN) from the Reserve Bank, borrowers should provide bifurcation of the utilization of the ECB proceeds towards foreign currency and Rupee expenditure in Form-83.

3. The primary responsibility to ensure that the ECB proceeds meant for Rupee expenditure in India are repatriated to India for credit to their Rupee accounts with AD Category- I banks in India as per A.P. (DIR Series) Circular No. 52 dated November 23, 2011 is that of the borrower concerned and

any contravention of the ECB guidelines will be viewed seriously and will invite penal action under the Foreign Exchange Management Act (FEMA), 1999. The designated AD bank is also required to ensure that the ECB proceeds meant for Rupee expenditure are repatriated to India immediately after drawdown.

4. The modifications to the ECB policy will come into force with immediate effect and subject to review. All other aspects of the ECB policy shall remain unchanged.

Foreign Direct Investment (FDI) in India - Issue of equity shares under the FDI scheme allowed under the Government route

Ref.: A. P. (DIR Series) Circular No. 120 dated May 8, 2012

Attention is invited to the A.P. (DIR Series) Circular No. 74 dated June 30, 2011, and A.P. (DIR Series) Circular No. 55 dated December 09, 2011, on issue of equity shares/ preference shares under the Government route by conversion of import of capital goods / machineries / equipments (including second-hand machineries) and pre-operative / pre-incorporation expenses (including payments of rent, etc.), subject to the terms and conditions stated therein.

2. With a view to incentivising use of machinery embodying the latest state-of-the-art technology, compliant with international standards, in terms of being green, clean and energy efficient, it has now been decided to exclude conversion of imported second-hand machinery from the purview of this provision.

3. All the other instructions contained in the above referred A.P. (DIR Series) Circulars shall remain unchanged.

Foreign investment in Commodity Exchanges and NBFC Sector – Amendment to the Foreign Direct Investment (FDI) Scheme

Ref.: A. P. (DIR Series) Circular No. 121 dated May 8, 2012

Attention is invited to Schedule 1 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 read with para 2 of A.P (DIR Series) Circular No.41 dated April 28, 2008, which allowed foreign investment in commodity exchanges, subject to a composite (FDI & FII) ceiling of 49 per cent with FDI limit of 26 per cent and FII limit of 23 per cent under Portfolio Investment Scheme (PIS), subject to conditions stated therein.

2. The extant policy for foreign investment in commodity exchanges, has since been reviewed and it has been decided that prior approval of the Government (FIPB) would be required only for FDI component and Government approval would not be required for investment by registered FIIs in commodity exchanges. All other conditions contained in A.P (DIR Series) Circular No.41 dated April 28, 2008 shall remain unchanged.

3. Further, under the extant FDI policy, 'leasing and finance' is one of the 18 NBFC activities wherein FDI up to 100 per cent is permitted under automatic route, subject to minimum capitalisation norms. It is hereby clarified that FDI is permitted only in 'financial leases' (financial leasing activity) and not in 'operating leases' (operating leasing activity).

Risk Management and Inter Bank Dealings

Ref.: A. P. (DIR Series) Circular No. 122 dated May 9, 2012

Attention is invited to A.P. (DIR Series) Circular No.92 dated April 4, 2003 on the captioned subject.

2. In terms of paragraph C 4(iv) of the aforesaid circular, AD banks have been permitted to deploy foreign currency funds for granting loans to resident constituents for meeting their foreign exchange requirements or for the rupee working capital/capital expenditure needs subject to the prudential/interest-rate norms, credit discipline and credit monitoring guidelines in force.

3. The Reserve Bank of India has reviewed the interest rate and the end use of the FCNR(B) deposits vide its circular DBOD.Dir.BC.102/ 13.03.00/2011-12 dated May 4, 2012. Accordingly, it has been decided that FCNR(B) funds representing deposit liabilities may be utilised for making loans to resident constituents for meeting-

   i. their foreign exchange requirements or

   ii. for the rupee working capital/capital expenditure needs of exporters /corporates who have a natural hedge or a risk management policy for managing the exchange risk

   subject to the prudential/interest-rate norms, credit discipline and credit monitoring guidelines in force. Authorised dealers may be guided accordingly.

Risk Management and Inter Bank Dealings

Ref.: A. P. (DIR Series) Circular No. 123 dated May 10, 2012

Attention is invited to A.P. (DIR Series) Circular No.58 dated December 15, 2011 on the captioned subject.

2. In terms of the above circular, Intra-day open position / daylight limit of Authorised Dealers should not exceed the erstwhile Net Overnight Open Position Limit available to them. It was further clarified through FEDAI Circular SPL-58/Risk Mgmt./2011 dated 21st December 2011 that restrictions placed on Intraday positions limits is only applicable for positions involving Rupee as one of the currencies.

3. On a review it has been decided to fix the intra-day open position / daylight limit of the Authorised Dealers at five times the Net Overnight Open Position Limit available to them or the existing Intra-day open position limit as approved by the Reserve Bank, whichever is higher, for positions involving Rupee as one of the currencies.

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

Exchange Earner's Foreign Currency (EEFC) Account

Ref.: A. P. (DIR Series) Circular No. 124 dated May 10, 2012

Attention is invited to A.P. (DIR Series) Circular No.15 dated November 30, 2006 in terms of which all foreign exchange earners were permitted to retain 100% of their forex earnings in EEFC account with any AD in India.

2. On a review of the Scheme, it has been decided as under :-

   a) 50% of the balances in the EEFC accounts should be converted forthwith into rupee balances and credited to the rupee accounts as per the directions of the account holder. This process may be completed within a fortnight from the date of the circular and compliance reported to the Chief General Manager, Foreign Exchange Department, Central Office, Trade Division, Amar Building, Sir P.M. Road, Fort, Mumbai 400 001

   b) In respect of all future forex earnings, an exchange earner is eligible to retain 50% (as against the previous limit of 100%) in non-interest bearing EEFC accounts. The balance 50% shall be surrendered for conversion to rupee balances.

   c) The facility of EEFC scheme is intended to enable exchange earners to save on conversion/transaction costs while undertaking forex transactions in future. This facility is not intended to enable exchange earners to maintain assets in foreign currency, as India is still not fully convertible on Capital Account. Accordingly, EEFC account holders henceforth will be permitted to access the forex market for purchasing foreign exchange only after utilising fully the available balances in the EEFC accounts. ADs may, accordingly, obtain a declaration while selling foreign exchange to their constituents.

4. It may be noted that the provisions at paragraph 2(b) and 2(c) above will apply, mutatis mutandis, also to holder of either a Resident Foreign Currency Account (RFC) or a Diamond Dollar Account (DDA).

Foreign investment in NBFC Sector under the Foreign Direct Investment (FDI) Scheme - Clarification

Ref.: A. P. (DIR Series) Circular No. 127 dated May 15, 2012

Attention is invited to A.P. (Dir Series) Circular No.121 dated May 8, 2012.

2. The Reserve Bank of India has been receiving requests for clarifications as to whether 'operating leases' would not be permissible in terms of para 3 of the circular ibid.

3. It is clarified that the activity 'leasing and finance', which is one among the eighteen NBFC activities wherein FDI up to 100 per cent is permitted under the automatic route, subject to minimum capitalisation norms, covers only 'financial leases' and not 'operating leases', in so far as the NBFC sector is concerned.

Exchange Earner's Foreign Currency (EEFC) Account

Ref.: A. P. (DIR Series) Circular No. 128 dated May 16, 2012

Attention is invited to A.P. (DIR Series) Circular No. 124 dated May 10, 2012 on the captioned subject in terms of which 50% of the balances in the EEFC accounts should be converted forthwith into rupee balances and credited to the rupee accounts as per the directions of the account holder.

2. Based on various queries received from Authorised Dealers, it is clarified that the conversion of the EEFC balances into rupee balances will only be applicable to available balances in the EEFC account which may be arrived at by netting off earmarked amounts on account of outstanding forward / option contracts booked before May 10, 2012.

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FINANCIAL REPORTING STANDARDS

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INTRODUCTION:

In previous column, we discussed on Guidance Note on Recognition of Revenue by Real Estate Developers. This column dwells on aspects on Revised Schedule VI to the Companies Act, 1956. The Institute of Chartered Accountants of India has published a guidance note on application of the Revised Schedule VI. However, there are many aspects on which the guidance note is silent or very less clarity is provided. We would be discussing some of these points in this column.

IFRS, IAS, SIC and IFRIC are the copyright of IFRS Foundation. The column includes references and extracts of the IFRS as issued by IASB. The IPSASB issues International Public Sector Accounting Standards (IPSAS).

Issue:

Whether a fixed deposit has to be presented under Cash and Cash Equivalents?

Response:

Para 6Q of the Revised Schedule VI requires Cash and Cash Equivalents to be classified as under:

1. Balances with Banks
2. Cheques, drafts on hand
3. Cash on hand
4. Others (Specify Nature)

It further specifies the following requirements:

1. Earmarked balances with banks to be separately stated. These can be balance in unpaid dividend account, Balance of IPO refundable etc.
2. Balances with banks to the extent held as margin money or security against the borrowings, guarantees, other commitments to be disclosed separately.
3. Repatriation restrictions in respect of cash and bank balances to be separately stated
4. Bank deposits with more than 12 months maturity shall be stated separately.

It would be worth to consider the definition of current assets as given in the Para 1 of the General Instructions for Preparation of Balance Sheet:

An asset shall be classified as current when it satisfies any of the following criteria:

a) It is expected to be realized in, or is intended for sale or consumption in, the company's normal operating cycle

b) It is held primarily for the purpose of being traded

c) It is expected to be realized within twelve months after the reporting date; or

d) It is a cash or cash equivalent unless it is restricted from being exchanged or used to settle a liability for at least twelve months after the reporting date.

Looking to the above definition of Current Assets, it appears that there is a conflict within Schedule VI itself. Para 6Q, as stated above, requires Bank deposits with more than 12 months maturity to be stated under Cash and Cash Equivalents with is classified under Current Assets. However, as per the definition of Current Assets given above, it would be non-current asset. This issue has been resolved by the guidance note on Revised Schedule VI published by Institute of Chartered Accountants of India that such deposits need to be presented under other non-current assets. The same is the case with deposits held as margin money or security against the borrowings for more than 12 months. The period of 12 months is to be calculated from the balance sheet date rather than the date of deposit.

Para 1 of General Instructions for preparation of Balance Sheet and Statement of Profit and Loss of a company in addition to the notes states that "where compliance with the requirements of the Act, including Accounting Standards as applicable to the companies require any change in treatment or disclosure including addition,

amendment, substitution, or deletion in the head / sub-head or any changes interse, in the financial statements or statements forming part thereof, the same shall be made and the requirements of Schedule VI shall stand modified accordingly". Thus, if there is a conflict between accounting standards and Schedule VI requirements, accounting standards will prevail. The case on hand of Cash and Cash Equivalents is a classic example of conflict between the requirements of Schedule VI and Accounting Standards. Para 6Q requires all balances in bank to be presented as Cash and Cash Equivalents. The term "Cash and Cash Equivalents" is defined under Accounting Standard (AS) 3, "Cash Flow Statements". Cash is defined as comprising of cash on hand and demand deposits with bank. Cash equivalents have been defined as short-term, highly liquid investments that are readily convertible into know amounts of cash and which are subject to an insignificant risk of changes in value. An investment normally qualifies as a cash equivalent only when it has a short maturity of, say, three months or less from the date of acquisition. Thus, deposits that have a maturity date of less than 12 months from the balance sheet date and more than 90 days from the date of acquisition are not cash equivalents. Para 6.4 of the Guidance Note on Revised Schedule VI issued by The Institute of Chartered Accountants of India requires this conflict between Schedule VI and Accounting Standards to be resolved by changing the caption "Cash and Cash Equivalents" to "Cash and Bank balances" which may have two sub-headings, viz., "Cash and Cash Equivalents" and "Other Bank Balances". The former should include only the items that constitute Cash and Cash Equivalents defined in accordance with AS 3, while the remaining line items may be included under the latter heading.

It seems that the Guidance Note on Revised Schedule VI issued by The Institute of Chartered Accountants of India has not considered the definition of the term "Investments". Also, it should be noted that for an item to be cash equivalent, it has to be, first, an investment. This is how the term cash equivalent is defined in AS 3. Accounting Standard (AS) 13, "Accounting for Investments", defines investments as assets held by an enterprise for earning income by way of dividends, interest and rentals, for capital appreciation or for other benefits to the investing enterprise. Assets held as 'stock-in-trade' are not investments. Thus, fixed deposits which represent surplus funds invested to earn interest are investments. Therefore, such fixed deposit balances should be reported as investments and the measurement principles of long-term and current investment would apply to such deposits. If the fixed deposit has a maturity date that is within 12 months from the balance sheet date, such deposits have to be classified under current investments and those whose maturity date is beyond 12 months from the balance sheet date have to be classified as non-current investments. The presentation of balance with banks which are held to earn interest income under "Cash and Bank Balances" and under "Other non-current assets" is not in accordance with AS 13, "Accounting for Investments". The Guidance Note is silent on this aspect.

Issue

Whether the provision made for the liability on derivative contracts should be presented under provisions?

Response:

The Guidance Note on Revised Schedule VI issued by The Institute of Chartered Accountants of India specifies requirements relating to derivatives only for disclosures in notes. It is silent with respect to the presentation of the mark-to-market loss on derivative contracts provided in the financial statements. There can be two views, in this respect:

a) Present the amount as provisions. If this is accepted, the provision should be bifurcated into current and non-current portions.

b) Present the derivative to match the presentation of the hedged item.

Para 16 of Accounting Standard (AS) 3, "Cash Flow Statements", requires that when a contract that is accounted for as a hedge of an identifiable position, the cash flows of the contract are classified in the same manner as the cash flows of the position being hedged. Applying the same analogy as given in para 16 of AS 3, the presentation as per the view expressed in point b) above appears to be correct. However, this analogy can be applied for derivatives that are accounted for as a hedge of an identifiable position. Where a derivative is not held for hedging purposes or was held for hedging purposes but is proved to be ineffective, such derivatives should be presented as current liabilities, if the entity has not adopted Accounting Standard (AS) 30, "Financial Instruments: Recognition and Measurement" early and as current assets or current liabilities if the entity has adopted Accounting Standard (AS) 30, "Financial Instruments: Recognition and Measurement" early.

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SERVICE TAX REVIEW

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In this issue, judgement on Business Auxiliary Services, Business Support Services & Clearing and Forwarding Agent Services are reported for the benefit of Members.

4) Whether activity of establishing central server in different offices of transport department would be covered under 'Business auxiliary service'?

***[2012] 19* taxmann.com 62 (New Delhi - CESTAT) CESTAT, NEW DELHI BENCH Smart Chip Ltd v. Commissioner of Central Excise, Bhopal.**

Facts:

Assessee had entered into an agreement with State Government to establish a central server in different offices of transport department. For doing said activity, assessee loaded operating systems on blank cards procured by it, stored photo/thumb impression and other information in said card and, ultimately, dispatched same to customers on behalf of transportation authority of State. Service tax demand was confirmed on assessee for said activity under category of 'Business Auxiliary Service'.

Held:

In terms of the agreement, the assessee had obligation to establish a central server in different offices of the transport department. The operational part of the work was enumerated in clause 2 of the agreement itself. The clause of agreement relating to the objectives/standard performance of the system agreed between the parties no where persuades to conceive that the assessee carried out specific independent activities with different kinds of remuneration, package for such works. There was also no split of the contract made to examine different aspects to ascertain taxability thereof nor also any effort was made in the adjudication to find out whether different payments were received during different periods and whether such payment is attributable to any taxable service provided.

It could not be accepted that section 65(19)(iv) will be applicable to the instant case. The object was not procurement of goods or services. Object of the contract as that was spelt out in agreement is to build a system. Revenue also fails to get help by piecemeal reading of the law without proving that the services provided by the assessee were auxiliary in nature to serve the purpose of business of client. By no stretch of imagination, building a system can be conceived to be 'Business Auxiliary Service'. On the above reasoning, appeal is allowed.

5) Whether activity of providing storage tanks and machinery on rent at premises of client for production or manufacture of gas would be covered under business support service ?

[2012] 20 taxmann.com 665 (New Delhi – Cestat) CESTAT, New Delhi Bench Air Liquide North India (P.) Ltd. V. Commissioner of Central Excise, Jaipur.

Facts:

The assessee was engaged in manufacture of oxygen, nitrogen and carbon di-oxide gases. Besides that the assessee supplied and installed storage tanks and other machinery for production of gases in the premises of it's client for which rent

was charged by it. The department alleged that above service provided by the assessee was 'infrastructure support service' and was taxable under head 'Business support service'. Accordingly show cause notice was issued which culminated into demand of service tax along with interest and penalty. Appeal of the assessee against said demand was dismissed by the Commissioner (Appeals).

Held:

The expression 'support service of business or commerce' would cover only the services of supporting nature for the main business, manufacture, trading or services like, services relating to marketing, customer relationship, distribution and logistics, accounting and transaction processing, office infrastructure, etc., and would not include service of renting of machinery and equipment for production or manufacture which being services relating to manufacturing activity are of altogether different nature.

The assessee's activity, however, prima facie became taxable w.e.f. 1-4-2008 under supply of 'tangible goods service' as defined under section 65(105)(zzzzj). If the assessee's activity is treated as taxable as 'supply of tangible goods service' under section 65(105)(zzzzj), the service tax demand for the period from 1-4-2008 to 31-3-2009 would be sustainable.

In view of the above, this is not a case for total waiver of pre-deposit. The assessee is therefore, directed to deposit part of demand.

6) **Whether any activity of receiving goods from principal, or storing or dispatching goods as per orders received from principal, can be held liable to service tax under head 'Clearing and forwarding agent'?**

[2012] 18 taxmann.com 131 (Ahd. - CESTAT) CESTAT, AHMEDABAD BENCH Gudwin Logistics v. Commissioner of Central Excise

Facts:

Assessee was engaged in facilitating clearance of export/import cargo at various ports/ICDs/CWE-CFS and for which it was involved in the work of freight booking of ocean going vessels, co-ordination with shipping lines for terminal handling of containerized cargo, coordinating with CHAs for customs clearance of documents *etc.*, shifting of empty containers from container yards to CWC-CFS, facilitating fumigation required for cagro products, employment of labourer for stuffing of the cargo into containers, *etc.*

Held:

It had been clearly clarified that essential characteristic of any services to get classified under the category of clearing and forwarding agent is relationship between the service provider and receiver and the same should be in the nature of principal (owner) and agent. In the entire case, it is found that this relationship has not been established by the revenue which is obvious as the assessee is not functioning as clearing and forwarding agent. The clinking point in this case is that the assessee is not receiving the goods from principal or storing the goods or dispatching the goods, as per the orders received from the principal or prepares the invoices on behalf of the principal. It is also on record that in these cases, the assessee does not receive any commission as remuneration for receipt/store/dispatch and for preparing invoices of the goods on behalf of the principal.

In view of the foregoing, the impugned order which held that the assessee has been providing service of clearing and forwarding agent, is incorrect and is liable to be set aside.

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One must not only have good things but know to use them well, which comes from wisdom.

Socrates

FROM PUBLISHED ACCOUNTS

AS-15 Accounting for Retirement Benefits in the Financial Statements

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RELIANCE INDUSTRIES LIMITED ANNUAL REPORT 2011-12

Significant Account Policies

M. Employee Benefits

(i) Short-term employee benefits are recognised as an expense at the undiscounted amount in the profit and loss account of the year in which the related service is rendered.

(ii) Post employment and other long term employee benefits are recognised as an expense in the Profit and Loss account for the year in which the employee has rendered services. The expense is recognised at the present value of the amounts payable determined using actuarial valuation techniques. Actuarial gains and losses in respect of post employment and other long term benefits are charged to the Profit and Loss account.

(iii) In respect of employees stock options, the excess of fair price on the date of grant over the exercise price is recognised as deferred compensation cost amortised over the vesting period.

N. Employee Separation Costs

Compensation to employees who have opted for retirement under the voluntary retirement scheme of the Company is charged to the Profit and Loss account in the year of exercise of option.

PETRONET LNG LIMITED ANNUAL REPORT 2010-11

Schedule 17 Significant Accounting Policies

9. Employee Benefits

(a) Provision for gratuity and leave encashment is made on the basis of actuarial valuation at the end of the year. Actuarial gains or losses are recognized to the profit and loss account.

(b) Contribution to Provident Fund and Superannuation is accounted for on accrual basis.

EMKAY GLOBAL FINANCIAL SERVICES LIMITED ANNUAL REPORT 2010-11

Schedule "T" Significant Accounting Policies

10. Employee Benefits

(i) Short Term Benefits

All employees benefits including leave encashment (short term compensated absences) and statutory bonus/ performance bonus/ incentives payable wholly within twelve months of rendering the service are classified as short term employees benefits and are charged to Profit and Loss Account of the year.

(ii) Long Term Benefits

(a) Post Employment Benefits

(i) Defined contribution Plans:- Retirement /Employee benefits in the form of Provident Fund, Employees State Insurance and labour welfare are considered as defined contribution plan and contributions to the respective funds administered by the Government are charged to the Profit and Loss account of the year when the contribution to the respective funds are due.

(ii) Defined Benefit Plans:- Retirement benefits in the form of gratuity is considered as defined benefit obligation and is provided for on the basis of actuarial valuation on projected unit credit method made as at the date of the Balance sheet . The scheme is maintained and administered by an insurer to which the trustees make periodic contributions. Actuarial gain/loss, if any are immediately recognized in the Profit and Loss account.

(b) Other Long Term Benefits

As per the present policy of the company, there are no other long term benefits to which its employees are entitled.

COAL INDIA LIMITED ANNUAL REPORT 2010-11

Schedule-M Significant Accounting Policies

10. Retirement Benefits/ Other Employee Benefits

a) Defined Contribution Plans:

The company makes contributions towards Provident Fund and Pension Fund to a defined contribution retirement benefit plan for qualifying employees. The Provident Fund and Pension fund are operated by the Coal Mines Provident Fund (CMPF) Authorities. As per rules of these schemes, the company is required to contribute a specified percentage of pay roll cost to the CMPF authorities to fund the benefits.

b) Defined Benefit Plans:

The year-end liability on account of gratuity and leave encashment is provided for on actuarial valuation basis by applying projected unit credit method. Further the company has created a Trust with respect to establishment of Funded Group Gratuity (cash accumulation) Scheme through Life Insurance Corporation of India. Contribution is made to the said fund based on actuarial valuation.

c) Other employee benefits

Further year end liability of certain other employee benefits viz. benefits on account of LTA/LTC; Life Cover Scheme, Group Personal Accident Insurance Scheme and Settlement Allowance, Retired Executive Medical Benefit Scheme and compensation to dependents of deceased in mine accidents, etc. are also valued on actuarial basis by applying projected unit credit method.

ONGC ANNUAL REPORT 2010-11

Schedule-27 Significant Accounting Policies

15. Employee Benefits

All short term employee benefits are recognized at their undiscounted amount in the accounting period in which they are incurred.

Employee Benefit under defined contribution plans comprising provident fund etc. is recognized based on the undiscounted obligations of the company to contribute to the plan. The same is paid to a fund administered through a separate trust.

Employee benefits under defined plans comprising of gratuity, leave encashment, compensated absences, post retirement medical benefits and other terminal benefits are recognized based on the present value of defined benefit obligation, which is computed on the basis of actuarial valuation using the projected unit credit method. Actuarial Liability in excess of respective plan assets is recognized during the year. Actuarial gains and losses in respect of post employment and other long-term benefits are recognized during the year.

Provision for gratuity as per actuarial valuation is funded with a separate trust.

JAIPRAKASH POWER VENTURES LIMITED ANNUAL REPORT 2010-11

Schedule 'Q'- Accounting Policies and Notes To The Accounts

i) Employee Benefits

Employee Benefits are provided in the books as per AS-15 (revised) in the following manner:

(a) Provident Fund and Pension contribution as a percentage of salary/wages as per provisions of Employees Provident Funds and Miscellaneous Provisions Act,1952.

(b) Gratuity and Leave Encashment is defined benefit obligation. The liability is provided for on the basis on Projected Unit Credit Method adopted in the actuarial valuation made at the end of each financial year.

GOKALDAS EXPORTS LTD - ANNUAL REPORT 2010-11

Schedule XV- NOTES TO ACCOUNTS

L. Retirement and other Employees Benefits

Defined Contribution Plan:

Contribution to provident fund are made at pre-determined rates and charged to the profit and loss account. The Company's liability is limited to the extent of contribution made.

Defined Benefit Plans:

Gratuity liability is accrued in the books based on the actuarial valuation on projected unit credit method as at Balance Sheet date. Actuarial gains or losses are immediately taken to the profit and loss account and are not deffered.

Other Employees Benefits:

Compensated absences are provided for, on the basis of an actuarial valuation on projected unit credit method at the end of each financial year. Actuarial gains or losses are immediately taken to the profit and loss account and are not deferred.

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CORPORATE LAWS UPDATE

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(A) CIRCULARS:

(1) Sub: Name Availability Guidelines, 2011. (General Circular No. 7/2012 Dt : 25 April, 2012.

Please refer to this Ministry's earlier Circulars No. 45 / 2011 dated 08.07.2011 and 48/2011 dated 22.07.2011 on the subject cited above. In this regard, I am directed to say that matter regarding availability of name by the system online without backend process by the Registrar of Companies (ROC) on certification given by practicing professionals in the manner provided at Para 3 of the Circular No. 45 / 2011 dated 08.07.2011 has been re-examined in this Ministry and it has been decided as under :

(i) The facility of name approval through STP made on certification by professional will continue to be available. However, such names will be put to online check by the system for ascertaining similarity with trademarks. If there is similarity of proposed name with any existing trademark, the work item will be transferred for processing in non-STP mode.

(ii) All the names applications submitted in STP mode will be put for system check and if there is exact match of any of the two words (other than the words private limited / limited) proposed in new company's name with any existing company's name, then such name will also be processed in non – STP mode.

(iii) All the names approved in STP mode will be made available on the dash board of the concerned ROC for immediate examination. Such STP approved names will not be available for filing of incorporation documents up to:

(a) 1900 hrs. of the same day, if the name though STP mode is approved by the system upto 1100 hrs. on any working day.

(b) 1900 hrs. of the any next working day if the name is approved after 100 hrs. on any working day or on holiday / non – working days.

(iv) Name approval application in case of single word (other than words private limited / limited) shall not be processed in STP mode.

2. This circular shall be implemented w. e. f. 20.05.2012.

(2) Sub: Filing of Cost Audit Report (Form – I) and Compliance Report (Form – A) in the extensible Business Reporting Language (XBRL) mode. (General Circular No. 8/2012 Dated : May 10, 2012.)

It has been decided by the Ministry of Corporate Affairs to mandate the cost auditors and the companies to file Cost Audit Reports (Form-I) and Compliance Reports (Form – A) for the year 2011 – 12 onwards (including the overdue reports relating to any previous year) by using the XBRL taxonomy. These reports, required to be filed in the XBRL format, would be based on the Taxonomy on XBRL being developed for the formats (Form – I and Form – A) given in the following Rules :

(v) Companies (Cost Accounting Records) Rules, 2011..

(vi) Cost Accounting Records (Telecommunication Industry) Rules, 2011..

(vii) Cost Accounting Records (Petroleum Industry) Rules, 2011.

(viii) Cost Accounting Records (Electricity Industry) Rules,2011.

(ix) Cost Accounting Records (Sugar Industry) Rules, 2011.

(x) Cost Accounting Records (Fertilizer Industry) Rules,2011.

(xi) Cost Accounting Records (Pharmaceutical Industry) Rules,2011.

(xii) Companies (ost Audit Report) Rules, 2011.

3. Hence, all cost auditors and companies, which are liable to file Cost Audit Reports (Form – I) and Compliance Reports (Form – A) are requested to file their reports with the Central Government after 30th June, 2012 in the XBRL mode by which time the relevant taxonomy together with Form – I and Form – A in XBRL format is likely to be ready and notified.

(3) Sub: Guidelines for declaring a financial Institution as Public Financial Institution under Section 4A of the Companies Act, 1956. General Circular No. 10/2012 Dated : 21st May, 2012.

Section 4A of the Companies Act, 1956 was inserted by the Companies (Amendment) Act, 1974 (41 of 1974) with effect from 1st February, 1975. Sub-section (2) of Section 4A of the Act empowers the Central Government, subject to the provision of sub-section (1) of Section 4A of the Act, to notify in the official Gazette such other institution as it may think fit to be Public Financial Institutions (PFI). :

2. The Ministry had framed certain criteria for declaring a Financial Institution as PFI under section 4A, of the Companies Act,1956 vide General Circular No. 34 / 2011 dated 02.06.2011. The issue has since been revisited and it has been decided that any Financial Institution applying for declaration as PFI shall fulfill the following criteria:-

(a) A Company or Corporation should be established under a Special Act or the Companies Act, 1956 being a Central Act:

(b) Main business of the Company should be Industrial / Infrastructural financing

(c) The Company must be in existence for atleast 3 years and its financial statements should show that its income from Industrial / Infrastructural financing activities exceeds 50% of its total income.

(d) The net-worth of the Company should be minimum of Rs.1000/- (Rupees One thousand) Crore.

(e) Company is registered as a Infrastructure Finance Company (IFC) with RBI or as a Housing Finance Company (HFC) with National Housing Bank.

(f) NOC from RBI / NHB, in the case of IFC / HFC, with regard to supervisory concerns, if any, must be obtained and enclosed with the application.

(g) Such IFCs / HFCs, after being declared as PFIs are required to disclose in their audited Financial Statements that they are complying with the directions and conditions laid down by this Ministry.

3. It is, however, clarified that in the case of Central Public Sector Undertakings/State Public Sector Undertakings, no restriction shall apply with respect to financing specific sector(s) and net-worth as stated in para 2(c)and (d) above respectively.

This issues with the approval of the competent authority.

(B) IMPORTANT CASE LAWS:

1. ANEETA HADA *V.* GODFATHER TRAVELS & TOURS (P.) LTD. (April 27, 2012 [2012] 21 Taxmann.Com 43 (SC)

Brief : An authorized signatory of a company would not be liable for prosecution under section 138 without company being arraigned as an accused Section 141, read with section 138, of the Negotiable Instruments Act, 1881 - Dishonour of certain cheques for insufficiency of funds in accounts - Offences by companies - Whether for maintaining prosecution under section 141, arraigning of a company as an accused is imperative - Held, yes - Whether when company can be prosecuted, then only persons mentioned in other categories can be vicariously held liable for offence subject to averments in petition

and proof thereof - Held, yes - Whether, thus, an authorized signatory of a company would not be liable for prosecution under section 138 without company being arraigned as an accused - Held, yes

FACTS

The appellant, an authorized signatory of a company, issued a cheque in favour of the respondent company which was dishonoured as a consequence of which the said respondent initiated criminal action by filing a complaint before the concerned Judicial Magistrate under section 138. In the complaint petition, the company was not arrayed as an accused. However, the Magistrate took cognizance of the offence against the accused appellant. Being aggrieved by the said order, she invoked the jurisdiction of the High Court under section 482 of the Code of Criminal Procedure for quashing of the criminal proceeding and the High Court, considering the scope of sections 138 and 139 and various other factors, refused to quash proceeding holding that the ground urged would be in the sphere of defence of the accused and would not strengthen the edifice for quashing of the proceeding. While assailing the said order before the two-Judge Bench of the Supreme Court, the substratum of argument was that as the company was not arrayed as an accused, the legal fiction created by the Legislature in section 141 would not get attracted. One of the Judges, of the two Bench Judge, S.B. Sinha, J. held that prosecution of a company is a *sine qua non* for prosecution of other persons who fall within second and third categories of candidates under section 141 and, therefore, proceedings against appellant must be quashed in absence of company having joined as an accused. The other Judge V.S. Sirpurkar, J. held that appellant would be liable to be prosecuted even when the company had not joined as an accused. Due to difference in opinion of the two Judges, the matter was referred to a Larger Bench.

(2) TAKSHASHILA GRUH NIRMAN (P.) LTD., *IN RE* (March 30, 2012 [2012] 21 Taxmann.Com 241 High Court Of Gujarat

Brief : Where in terms of proposed scheme of amalgamation, construction business of transferor-Companies was to merge with petitioner i.e. transferee company, in view of fact that all companies were family companies operating under same management and upon merger no interest of their members or public at large was going to be adversely affected, said scheme was to be accepted Section 394 of the Companies Act, 1956 - Amalgamation - Instant petition was for sanctioning of scheme in nature of amalgamation of transferor companies with petitioner i.e. transferee company - Petitioner's case was that all companies were engaged in business of construction activities and real estate business - According to petitioner, transferee company and transferor companies were under same management and to attain synergic benefit, scheme of amalgamation was proposed - As per directions of Court a meeting of secured creditors was convened who voted in favour of scheme - A notice of proposed scheme was sent to Regional Director who in turn submitted his report confirming that affairs of companies were not conducted in manner prejudicial to interest of public - Finally, it was noted that all companies were under same management and were family companies which were closely held companies and upon merger there was no interest of either of members or public at large was going to be adversely affected - Whether on facts, proposed scheme of amalgamation deserved to be accepted - Held, yes

(3) EDELWEISS STOCK BROKING LTD., *IN RE* (March 30, 2012 [2012] 21 Taxmann.Com 242 High Court Of Gujarat)

Brief : Where in terms of proposed scheme of amalgamation share broking business of petitioner-company was to merge with its 100 per cent holding company, in view of fact that scheme of amalgamation was in interest of shareholders, creditors as well as general public, same deserved to be accepted Section 394 of the Companies Act, 1956 - Amalgamation - Petitioner, transferor-

company, was engaged primarily in business of acting as consultants and brokers in relation to shares, stock, bonds, debentures, securities, etc. - Instant petition was filed by petitioner for purpose of obtaining sanction of Court to a scheme of arrangement in nature of amalgamation with EFAL - It was submitted that petitioner-company was a wholly owned subsidiary of transferee-company - It was further submitted that in terms of proposed scheme, entire share capital of transferor-company would stand automatically cancelled and share capital structure of transferee-company would not undergo any change and, thus, interests of shareholders of transferee-company would not be affected in any way - It was brought to notice of Court that meeting of shareholders and secured creditors of transferor-company was dispensed with in view of written approval of scheme - Further, a meeting of unsecured creditors was convened wherein proposed scheme was approved unanimously - Notice of petition was served upon Official Liquidator who submitted his report confirming that affairs of petitioner-company were not conducted in a manner prejudicial to interest of its members, creditors or to public interest - Whether in view of aforesaid, it was to be held that proposed scheme of amalgamation was in interest of its stakeholders viz., shareholders, creditors as well as in public interest, and same deserved to be sanctioned - Held, yes

(4) UCO BANK *V.* ELECTROTHERM (INDIA) LTD. (March 7, 2012 [2012] 21 Taxmann.Com 240 High Court Of Gujarat)

Brief : Winding up petition would not be barred merely because of proceedings instituted by creditor before DRT Section 433 of the Companies Act, 1956 - Winding up - Circumstances in which a company may be wound-up - Whether remedy under sections 433 and 434 is not meant for enforcing recovery of due amount and, therefore, it is required to be distinguished from action taken by creditor-bank before Debt Recovery Tribunal either under RDB Act or SARFAESI Act for recovery of amount - Held, yes - Whether merely because petitioner-bank has, to ensure recovery of due amount in accordance with law, instituted proceedings before DRT, petition taken out by it under sections 433 and 434 cannot be branded as 'mala fide intention' of bank or as misuse of machinery of court and Tribunal and/or abuse of process of law and petition would not be barred because of proceedings before DRT - Held, yes - Whether primary and relevant consideration or factor to determine as to whether petitioner deserves order of admission of petition seeking winding up of debtor company or not is as to whether there is a genuine, substantial and bona fide dispute as to debt and respondent's liability to pay same - Held, yes - Whether in absence of any genuine, bona fide and substantial dispute or in absence of any substantial convincing and strong reason, e.g., collective and majority view of creditors that winding up order is not required or would not be justified or public interest so demands, Court would, ordinarily, not deny an order of admission of petition seeking winding up of a company if petitioner-claimant/ creditor makes out a case and satisfy court that one or more reasons grounds specified under section 433(a) to (i) exists in given case –

Held, yes - Whether in such case, Court would not deny order of admission of petition on grounds raising objections against maintainability of petition citing defects in petition or its presentation and if respondent satisfies Court that defects are substantive and not merely technical or procedural, then in that event also Court would be justified in allowing petitioner to cure defects but Court would not frustrate petition by accepting such objections and throwing out petition as not maintainable in light of grounds raised by citing defects - Held, yes - Respondent-company availed short-term loan from petitioner-bank for period of six months - After six months, respondent-company asked for extensions to repay loan and even thereafter, failed to pay amount - Petitioner issued statutory notice in response to which, respondent-company came with allegation branding petitioner-bank's claim and statutory notice as 'without any substance, mala fide and vexatious' - Hence, petitioner filed winding up petition against respondent-company - Balance sheet of respondent-company reflected that its financial liabilities and obligations were three times more than its capital and reserve/surplus - Whether, on facts, petitioner had made out a case for admission of petition - Held, yes

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FROM THE GOVERNMENT

CA. Chandrakant H. Pamnani
The author is the Past President of CAA. He can be reached at chpamnani@gmail.com

CA. Kunal A. Shah
The author is the Past Hon. Secretary of CAA. He can be reached at cakashah@gmail.com

(A) INCOME TAX

1) **Instruction No. 4/2012 , dated 25-5-2012 regarding processing of returns and granting of TDS credit**

The CBDT has issued an Instruction by withdrawing the Instruction no 01/2012, dated 2nd February,2012 regarding processing of returns & grant of TDS credit for AY 2011-12.

The following decisions have been taken in this regard:

(i) In all returns (ITR-1 to ITR-6), where the difference between the TDS claim and matching TDS amount reported in AS-26 data does not exceed Rs. Five thousands, the TDS claim may be accepted without verification.

(ii) Where there is zero TDS matching, TDS credit shall be allowed only after due verification.

(iii) Where there are TDS claims with invalid TAN, the TDS credit for such claims is not to be allowed.

(iv) In all other cases TDS credit shall be allowed after due verification.

2) **Circular regarding Explanatory Notes to the Provisions of the Finance Act,2011**

The finance Act,2011 (hereafter referred to as the Act) as passed by the Parliament, received the assent of the President on the 8th day of April,2011 and has been enacted as Act No.08 of 2011.

[For full text refer circular no.02/2012, dated 22nd May,2012]

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A STEP TOWARDS KINDNESS

"Chartered Accountants Association, Ahmedabad" (CAA) and "Yuva Unstoppable" (YU) have come together and joined hands for a cause to spread kindness. YU is a registered Non-Governmental Organization working for the uplifting of underprivileged kids since last 7 years. Till now YU has above 1,00,000 volunteers across 30 cities of the country and over 2,50,000 students have been benefited by the activities of the NGO. 150 municipal schools are helped by YU in Ahmedabad. YU is a zero fund NGO, i.e. it does not seek any monetary assistance to help the kids but acts as a bridge or medium to reach out to the kids in need. Dr. APJ Abdul Kalam (Ex-president of India), Smt. Indu Jain (Founder and chairperson of The Times Group) and Mr. Bhaskar Pramanik (Chairman, Microsoft India) are patrons of YU. YU works on 3 initiatives, which eventually help for uplifting the underprivileged kids; viz: 1) School Unstoppable, 2) College Unstoppable and 3) Corporate Unstoppable.

Corporate Unstoppable is an initiative where YU ties up with various corporate houses that help them in three ways; 1) various collection drives, 2) employee engagement and 3) providing resources. In collection drives, it organizes various collection drives like collection of "pasti" i.e. waste from houses, notebooks and now undertaking toys and stationery collection drive which would enable the kindergarten at municipal schools. In employee engagement, YU calls employees from various corporate houses to spend two hours a month with the slum kids to play around including picnics and site visits. The corporate houses also assist in providing necessary resources by donating items like benches, water coolers, blackboards etc.

"Kindness is there in every person, it just needs a path to come out"

CAA appreciates the endeavors of YU that is on the path to kindness. As an institution, CAA lends a helping hand to YU. Members who wish to contribute in any way may call Mr. Nihar Shah: No. : +919825013357 or send a SMS. The representative from YU will be at your door step to brief you and make you a part of a noble cause. You may also connect at nihar@yuvaunstoppable.org OR at website: www.yuvaunstoppable.org

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ASSOCIATION NEWS

CA. Ashok C. Kataria
Hon. Secretary

CA. Chintan M. Doshi
Hon. Secretary

AT THE ANNUAL GENERAL MEETING

At the 61st Annual General Meeting of the members of the Association held on Saturday, 5th May, 2012 at ICAI Bhawan, 123, Sardar Patel Colony, Naranpura, Ahmedabad, following Office Bearers and Executive Committee Members have been declared elected for the year 2012-13.

Office Bearers

1	CA. Gaurang M. Choksi	President
2	CA. Prakash B. Sheth	Vice President
3	CA. Ashok C. Kataria	Hon. Secretary
4	CA. Chintan M. Doshi	Hon. Secretary
5	CA. Chandrakant H. Pamnani	Imm. Past President

Executive Committee Members

CA. Anuj J. Shah	CA. Chandravadan A. Shah	CA. Diti B. Vashi
CA. Jitesh M. Shah	CA. Nirav R. Choksi	CA. Parag R. Raval
CA. Rajni M. Shah	CA. Umang B. Saraf	CA. Yamal A. Vyas

LIST OF SUB COMMITTEES

	Name of Sub Committee	Chairman	Convenor	Members
1	Journal Committee	CA. Shailesh C. Shah	CA. Umesh S. Shah	CA. Ajit C. Shah CA. Darshan A. Shah CA. Jayesh C. Sharedalal CA. Mukesh M. Khandwala CA. Rajni M. Shah CA. T. J. Advani
2	Residential Refresher Course Committee	CA. Atul R. Shah	CA. Chintan M. Doshi	CA. Abhishek J. Jain CA. Ajit C. Shah CA. Bharat M. Vashi CA. Chanrakant H. Pamnani CA. Jayesh C. Sharedalal CA. Mukesh M. Khandwala CA. Shailesh C. Shah
3	Brain Trust Cum Workshop Committee	CA. Jignesh J. Shah	CA. Uday I. Shah	CA. Ashish T. Tekwani CA. Deepak R. Shah CA. Parag R. Raval CA. Varun D. Pandya CA. Yogi K. Upadhyaya
4	Professional Development Committee	CA. Samir D. Shah	CA. Karan D. Shah	CA. Bhadresh P. Soni CA. Chandravadan A. Shah CA. Jaykin R. Shah CA. Kaushik C. Patel

	Name of Sub Committee	Chairman	Convenor	Members
5	Legal and Representation Committee - Taxation	CA. Ajit C. Shah	CA. S. K. Sadhwani	CA. Deepak R. Shah CA. Divyakant K. Parikh CA. Kaushik D. Shah CA. Rohit K. Choksi CA. Sanjay R. Shah
6	Legal and Representation Committee - Gujarat VAT	CA. Priyam R. Shah	CA. Pathik B. Shah	CA. Ajit C. Shah CA. Parag R. Raval
7	Legal and Representation Committee - Service Tax	CA. Ashwin H. Shah	CA. Nitesh J. Jain	CA. Bishan R. Shah CA. Chanrakant H. Pamnani CA. Prakash B. Sheth CA. Rashmi S. Vaja
8	Legal and Representation Committee - State Govt.	CA. Durgesh V. Buch	CA. Jainik N. Vakil	CA. Devang A. Doctor CA. Ganesh T. Nadar CA. Kaushik D. Shah CA. Yamal A. Vyas
9	Information & Technology Committee	CA. Kandarp G. Trivedi	CA. Saurabh G. Patel	CA. Abhishek J. Jain CA. Chintan M. Doshi CA. Jayesh C. Sharedalal CA. Maulik S. Desai
10	Publication Committee	CA. Mukesh M. Khandwala	CA. Shailesh C. Shah	CA. Ashwin H. Shah CA. Chandrakant H. Pamnani CA. Jayesh C. Sharedalal CA. Jignesh J. Shah CA. Ketul R. Patel
11	Cultural & Entertainment Committee	CA. Kunal A. Shah	CA. Nirav R. Choksi	CA. Ajit C. Shah CA. Chandrakant H. Pamnani CA. Harsh S. Jain CA. Jitesh M. Shah CA. Pathik B. Shah CA. Uday I. Shah
12	Accountant Plus Committee	CA. Bipin M. Shah CA. S. K. Sadhwani (Co-Chairman)	CA. Nesal H. Shah	CA. Ajit C. Shah CA. Ashish T. Tekwani CA. Jayesh C. Sharedalal CA. Lacchu I. Kalwani CA. Rajni M. Shah
13	Membership Development & Library Committee	CA. Anuj J. Sharedalal	CA. Vijay M. Valiya	CA. Anuj J. Shah CA. Dhirubhai C. Shah CA. Diti B. Vashi CA. Karan D. Shah CA. Neesha A. Tekwani CA. Viral A. Modi
14	Sports Committee	CA. Ajit C. Shah	CA. Atul R. Shah	CA. Ashwin H. Shah CA. Chandrakant H. Pamnani CA. Jainik N. Vakil CA. Nirav R. Choksi CA. Prakash B. Sheth CA. Shailesh C. Shah
15	Members in Industry Committee	CA. P. H. Khandelwal	CA. Rinkesh K. Shah	CA. Harit Dhariwal CA. Jaykin R. Shah CA. Sanjay R. Shah CA. Sunny Parekh CA. Umang B. Saraf

	Name of Sub Committee	Chairman	Convenor	Members
16	Forum of Past Presidents	CA. Manubhai G. Patel	CA. Jayesh C. Sharedalal	CA. Ajit C. Shah CA. Kaushik C. Patel CA. Kaushik D. Shah CA. Niren M. Nagri CA. Sanjay R. Shah CA. Shatau J. Desai CA. Sunil H. Talati
17	CAA Women Forum	CA. Sonal S. Dave	CA. Jyoti D. Shah	CA. Anjli N. Choksi CA. Diti B. Vashi CA. Durgesh V. Buch CA. Manisha U. Shah CA. Nisha H. Patel
18	Personality Development Committee	CA. Saurabh C. Choksi	CA. Parag C. Soni	CA. Ajit C. Shah CA. Anand R. Hurkat CA. Chandravadan A. Shah CA. Ronak D. Shah

The following prizes and medals were distributed to their proud recipients:
Best Article in Ahmedabad Chartered Accountants Journal

Sr. No.	Name of the Trophy	Name of the Recipient	Title of the Article published in the ACA Journal
1	Shri U.R. Shah Memorial Funds Trophy for Best Article on **Allied Law**	Shri Aditya Gupta	"Forensic Accounting"
2	Shri Gatorbhai Patel Shiva Pharma Foundation Trophy for Best Article on **Direct Taxes**	CA. Soyal Jain	Applicability of Sec. 2 (22)(e) In case of Loans/Advances by One Company having a Common Share Holder
3	Champaben Chandulal Shah Memorial Trophy for Best Article on **Company Law**	CA. Chirag M. Shah	"Revised Schedule - VI Salient Issues

Best Study Circle Meeting Leader

1	SHRI DWARKADAS B. SHAH MEMORIAL TROPHY FOR THE BEST LEAD STUDY CIRCLE MEETING IN 2011 – 12	CA. Rajni M. Shah	SECOND STUDY CIRCLE MEETING ON "INTRICACIES OF DERIVATIVES (BASIC ACCOUNTING AND TAXATION) ON 18.07.2011

LIST OF STUDENTS WHO HAVE BEEN AWARDED MEDALS/PRIZES FOR THE YEAR 2011

MEDAL NAME	HIGHEST MARK IN	PCC / FINAL C.A. EXAM	NAME OF THE RECIPENT STUDENTS
CA Vanish J. Budhdev Memorial CA Student Award	Final Year Topper (Gujarat)	**Final / May 2011**	Nisha Hiranand Khanchandani
Cash Prize of Rs.11000/-		**Final / Nov. 2011**	Vishesh S. Mehta
Kantilal V. Patel Memorial Medal	Best Student of the year 2011 in Gujarat	**Final/May-Nov. 2011**	Nisha Hiranand Khanchandani
Shri K. T. Thakore Memorial Medal	Best Student of the year 2011 in Gujarat	**IPCE / May 2011**	Akshat Rajeshbhai Sanghvi

MEDAL NAME	HIGHEST MARK IN	PCC / FINAL C.A. EXAM	NAME OF THE RECIPENT STUDENTS
B.S. Soni Memorial Medal	Best Student in Ahmedabad	**IPCE / May 2011** Roll No. 100031	Valay Dilipkumar Shah
		IPCE/ Nov 2011 ROLL NO. 201229	Akshat Rajeshbhai Sanghvi
Akshay Trivedi Memorial Medal	**Paper 6** Auditing and Assurance	**IPCE / May 2011** Roll No. 100031	Valay Dilipkumar Shah
		IPCE / Nov 2011 Roll No. 203674	Sneha Chainani
Hasmukhlal J. Patel Memorial Medal	**Paper 1 & 5** Paper -1 Accounting	**IPCE/May 2011 A/C-1** Roll No. 100031	Valay Dilipkumar Shah
	Paper -1 Accounting	**IPCE/May 2011 A/C-1** Roll No. 100273	Dhrumil Piyush Vyas
	Paper -5 Advanced Accounting	**IPCE/May 2011 A/C-5** Roll No. 10031	Valay Dilipkumar Shah
	Paper -1 Accounting	**IPCE/Nov 2011 A/C- 1** Roll No. 2009	Jainam Kirtikumar Shah
	Paper -5 Advanced Accounting	**IPCE / Nov 2011 A/C -5** Roll No. 201229	Akshat Rajeshbhai Sanghvi
Shri V.R. Shah Memorial Medal	**Paper -2** Best Student for the year 2011 in Ahmedabad for Business Law Ethics and Communication	**IPCE / May 2011** Roll No. 201229	Akshat Rajeshbhai Sanghvi
VNS & BNS Social Welfare Medal	**Paper - 4** Taxation	**IPCE / May 2011** Roll No. 102969	Anshuman Agrawal
		IPCE / Nov 2011 Roll No. 201229	Akshat Rajeshbhai Sanghvi
H.V. Vasa Memorial Medal	Best Student in Ahmedabad	**Final / May 2011** Roll No. 138	Nisha Hiranand Khanchandani
		Final / Nov 2011 Roll No. 102650	Vishesh S. Mehta
A.M. Thaker Memorial Medal	Best Lady Student in Ahmedabad	**Final / May 2011** Roll No. 138	Nisha Hiranand Khanchandani
		Final / Nov 2011 Roll No. 100655	Kamana B. Somani
Chandulal M. Shah Memorial Medal	**Paper 1** Financial Reporting	**Final / May 2011** Roll No. 138	Nisha Hiranand Khanchandani
		Final / Nov 2011 Roll No. 100647	Dixit Maheshkumar Jain

MEDAL NAME	HIGHEST MARK IN	PCC / FINAL C.A. EXAM	NAME OF THE RECIPENT STUDENTS
Dhirubhai B. Shah Memorial Medal	**Paper 3** Advanced Auditing and Professional Ethics	**Final / May 2011** Roll No. 1050	Arpit Rajeshbhai Shah
		Final / Nov 2011 Roll No. 100390	Priyam Surendra Shah
A.M. Gang Memorial Medal	**Paper 7** Direct Taxes Laws	**Final / May 2011** Roll No. 749	Nileshkumar Kamleshbhai Asava
		Final / Nov 2011 Roll No.102749	Mayurdhvajsingh G. Zala
Jagrutiben K. Shah Memorial Medal	**Paper 8** Indirect Taxes Laws	**Final / May 2011** Roll No. 955	Pratik Ranjitbhai Mehta
		Roll No. 365	Parth Dinesh Khokhani
		Final / Nov 2011 Roll No.102749	Mayurdhvajsingh G. Zala Madhuben Prafulbhai Trivedi
Madhuben Prafulbhai Trivedi Medal	**Paper 5** Advanced Management Accounting	**Final / May 2011** Roll No. 138	Nisha Hiranand Khanchandani
		Final / Nov 2011 Roll No. 102650	Vishesh S. Mehta
Mansukhbhai J. Shah Medal	**Paper 4** Corporate and Allied Laws	**Final / May 2011** Roll No.2188 **Final / Nov 2011** Roll No.102650	Chiragkumar Prahladray Shah Vishesh S. Mehta
		Final / Nov 2011 Roll No.101185	Bansari Ketanbhai Kinkharwala
VNS & BNS Social Welfare Medal	**Paper 2** Strategic Financial Management	**Final / May 2011** Roll No.2417	Abhinav Brijkishore Valecha
		Final / Nov 2011 Roll No. 102841	Sahil Agarwal
VNS & BNS Social Welfare Medal	**Paper 6** Information Systems Control & Audit	**Final / May 2011** Roll No.247	Sarthak Sunil Bhansali
		Final / Nov 2011 Roll No. 100565	Shweta Prakash Katariya
Mansukhbhai S. Shah Memorial Medal	**Paper 7** Information Technology and Strategic Management	**IPCE / May 2011** Roll No.101128	Mitul Pranay Shah
		IPCE / Nov 2011 Roll No. 203647	Sneha Chainani
Lalita Khanchand Tekwani Memorial Medal	**Paper 3** Cost Accounting & Financial Management	**IPCE / May 2011** Roll No.100273	Dhrumil Piyush Vyas
		IPCE / Nov 2011 Roll No. 201229	Akshat Rajeshbhai Sanghvi

AT THE AGM AND FIRST EXECUTIVE MEETING:

1 At the 1st Executive Meeting held on 5th May, 2012 three seniors members of the Association namely **(a) CA. Jayesh C. Sharedalal, (b) CA. Kaushik C. Patel and (c) CA. Rohit K. Choksi** have been **Co-opted** as the members of the Executive Committee.

2 At the 61st Annual General Meeting of the Chartered Accountants Association **M/s. Mukesh O. Parikh & Associates**, Chartered Accountants, are appointed as Hon. Auditors of the Association for the financial year 2012-13.

3 At the 24th Annual General Meeting of the Mutual Benefit Scheme **M/s. Mukesh O. Parikh & Associates,** Chartered Accountants, are appointed as Hon. Auditors of Mutual Benefit Scheme of the Association for the financial year 2012-13.

FORTHCOMING PROGRAMS:

Date/Day	Time	Programmes	Speaker	Venue
09.06.2012 Saturday	8:45 am to 1:15 pm	Brain Trust Meeting on Revised Schedule VI under the Companies Act	CA. Yagnesh Desai, Mumbai	Atma Hall, Opp. RBI, Ashram Road, Ahmedabad
21.06.2012 Thursday	5:30 pm to 7:30 pm	Study Circle on “Taxability of Works Contract under Gujarat Vat Act”	CA. Priyam R. Shah	H. K. College Hall, Opp. Handloom House, Ashram Road,Navrangpura, Ahmedabad
22.06.2012 Friday	8:30 pm onwards	Musical Program with “Shyamal-Saumil-Aarti Munshi”		Town Hall, Ahmedabad.
03.08.2012 to 06.08.2012		39th Residential Refresher Course	Various Speakers	Ramoji Film City, Hyderabad

REMINDER

1 Membership fee, for the year 2012-13 has become due for payment on 1st April, 2012. Members are requested to remit the same by cash or cheque in favour of “Chartered Accountants Association, Ahmedabad” depending upon their choice of enrolment.

a Entrance Fee ` 500/-

b Life Membership Fee ` 7,500/-

c Annual Membership Fee

i. If paid prior to June 30, of each financial year:

(a) In case of Membership (of ICAI) for a period of less than or equal to five years ` 600/-

(b) In case of Membership (of ICAI) for a period of more than five years ` 750/-

ii If paid after June 30, of each financial year:

(a) In case of Membership (of ICAI) for a period of less than or equal to five years ` 750/-

(b) In case of Membership (of ICAI) for a period of more than five years ` 900/-

d. Brain Trust Meeting Fee* ` 500/-

*Non members (students/ article clerks /office staff of members) are also allowed to attend Brain Trust meetings. Fees for non members is ` 1000/-.

2 Members are requested to intimate changes in their email ID and mobile phone numbers at the Association’s office which would enable the intimations about the programmes through email and SMS

3 Members who have not yet paid their contribution under the Mutual Benefit Scheme are kindly requested to pay the same at the earliest.

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