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In this issue

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

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

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Editor's Views

Politics and Economics – The Utmost Bankruptcy

India - 'The Land of Golden Bird' known for its cultures, tradition and values had found a place among the top nations of the world. The expertise of Indians in the fields of mathematics, finance and business has been acclaimed by people all over the globe with the discovery of zero, the system of medicine 'Ayurveda', the game of chess, the Law of the First Motion among the others being the feathers of its crown.

However, the last decade has been a decade most Indians would not like to retrospect. With Rupee touching the 69 mark, the Dalal Street more often than not bathe in blood. The neighboring countries picnic on Indian Territory while MPs do the same in the well of the Parliament.

All these things force us to think as to what 'black magic' led to such rack and ruin. On a closer scrutiny, it is apparent that it is the lack of visibility and the elevation of personal interests that has led to the sorry state of affairs. Where the CAD is swelling, the GDP remains shallow. While the PM blames the international crisis, it is the tendency of the people at the center to work only when the election bell rings and focus on certain vested interests which has become detrimental to the growth and prosperity of the Nation. Even when we proclaim our democracy to be the largest in the world, we are far too away from it in the truest spirit. We are indeed a mixture of autocracy, hypocrisy and '***mobocracy***' which when put together crucifies the real soul of democracy.

The can of worms that bothers the Nation these days which come to the light are endless, numberless, incessant and unsurpassable. The Indian National Rupee has been free falling off late, putting its masters in embarrassing situations. The Finance Ministry and the Reserve Bank of India have folded their sleeves to stop the devaluating Rupee but in vain. Even while this piece is being drafted the Rupee has been kissing the 69/$ mark. To top it up, NSEL (National Spot Exchange Limited) has been involved in some major blunders and goof ups, which is just another scam in its making. The mess is simply getting murkier. The fear of sovereignty grading down is escalating. Confidential files have started disappearing from the highly secure Government Departments and the onion has started to compete with the Dollar at a time when Rupee is competing the age of its grand master.

Every week China comes to our doors and retreats, but this does not bother our ruling party which is more interested in saving the talks of PM than give a probably strong reply. The crisis at the 'Line of Control' (Or more aptly 'Line out of Control') are deepening which has left the 'triplet' heading the Nation speechless ('As usual'). Had they spoken something, it would have made the Defense Minister look like a statesman than the jester that he has proved to be. The governance has squarely failed in protecting our borders, kids, women, soldiers, currency and the list continues endlessly.

The Rain Gods have retired just to make way for the raining 'Clean Chits'. Consistently and invariably, we get a sense of feeling that India is leaderless where a mere 12th Pass MLA can suspend a highly Qualified IAS Officer for acting in a just and honest manner. It has been observed that the political class, the God Man (More aptly 'Fraud Man') and the celebrities and the so called actors always happen to get away with the laws as opposed to the common man who gets crunched under the harsh provisions of the Act.

In this age of technology verbal fights on twitter and explosive interviews and debats media have become time pass hoopla for many. Instead of decoding some real issues, the netas and babus are seen displaying their 'Freedumb of speech'.

- The "Sau Taka Tunch Maal" comment by a politician (An Entertainer?) on his fellow lady political colleague.
- The Politicians blaming the CM of a state for the blasts at Bodhigaya in Bihar just because a day before the likely PM candidate had asked the Bihar BJP workers to teach a lesson to the CM of a state.
- A full meal is available at Rs. 5 or Rs. 12 and that too not mere 'Vada Paav' (Had such intricacies been followed by the ministers in their daily work, India would have been a better place to live)
- 'Soldiers get into the army to die'.
- Netas addressing terrorists with Salutations like 'Ji' or 'Sahab' while they address their colleagues as monkeys, frogs, cockroach and what not.

THE LIST IS ENDLESS.

The Lok Sabha has hardly worked in this **monsoon session**. The monsoon session has proved to be a **'GoneSoon'** session of Parliament. One fails to understand grossly as to how a democracy operates when the Finance Act gets passed without any debates.

When the Nation expects their elected representatives to raise the morale of the Nation, what we hear is nothing but hard hitting metaphors like 'India is a bee-hive' or 'India is a computer' or may be even worse **'Poverty is just a state of mind'.**

The top class is yet indifferent to what is happening. We don't expect our economist PM to solve this crunch, but what we expect, are a few words of solace. The views of the populace can be subsumed in the words of a popular news channel anchor ***'The Nation wants to know'.....*** Even when words flow from the Prime Minister's mouth, they start reciting Ghalib's verses ***"Hazaron Jawabo se acchi he Meri Khamoshi, Na jane kitne sawalo ki abru rakhe".*** (Ghalib's verses have helped to save the 'aabru' of many these days!)

Even on India's Independence Day, when we find leaders of political parties throwing grenades of accusation on each other, what more sense can we expect? It is the 'Honesty File' that is missing from the government, forget the coal files. Even today, we find our elected representatives sleeping while the Prime Minister delivers the 15th August Speech.

One and all are fed up by the passive political teams in power. The middle class and the industrial class are expecting change. However, the opposition is also not free from doubts. Just to secure vote banks, these power hungry classes becomes blind disciples of 'fraud men' and cheat the populace by giving 'Clean Chits' to the rape accused.

Yet this is not the end. Instead of losing hope, all should strive to perform to their best. Such critical times have prevailed for many years in the past. It is the strong decision making and honest attitude and approach that will help India achieve its lost image. It is time nation comes out of this shred of inferiority complex with the western nations. In fact we must realize that we are superior to so many other nations in sectors as varied as software, architecture, craftsmanship and so on. All people must understand that India is not merely a piece of land, but a living and throbbing civilization.

Now that India's PM candidates have started setting their schedules, the populace strongly demands better policies and governance. Let's hope the "Pappu Vs. Feku" battle works for the betterment of the Nation.

Just while this piece would be out in your hands, India would have received its new RBI Governor in the form of 'Raghu**RAM RAJ**an' – May this be an omen for India's economy. Amen.

Jai Hind.....

CA. Rajni M. Shah
Editor
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01.09.2013

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Mails to Editor

I was very happy to read your editorial in the August issue of the C.A Journal. It is very urgent matter of laws delays and without mincing words you have drawn attention to the long vacation Judges enjoy and inspite of repeated reports in judicial reforms no significant improvement has appeared.

I would suggest that you can send the copy of this editorial to the Chief Justice of India and the chief justice of the High Court of Gujarat as well as the Law Minister of India.

Once again please accept my congratulations for a very bold editorial.

Yours Sincerely,

K.H. Kaji, Advocate

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happy to read your write-up .EDITOR'S VIEWS...
really its a great one...tips for removal of stress ...amazing..keep it up...once again congrats...

regards ,

CA. Mayur Shah

President's Message

CA. Prakash B. Sheth
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Dear Professional Colleague,

September is a month when the focus of almost all chartered accountants shift on tax audits along with preparation and filing of returns of income of tax audit assessees. The scenario this time around is somewhat different. Despite only about a month left, conversations are being heard amongst the professional brothers as to how to go about with the audits this year. The important reason for such reservations is that now all tax audit reports are to be submitted online with the department in a prescribed format, XML. Members are found struck in a dilemma whether to use department's utility for uploading the tax audit report or go with the softwares available in the market to prepare such audit report. Whatever a member may choose, the important thing that emerges is that the approach towards tax audit this season needs a shift. Proper planning and management would be the key to cope with this added responsibility on chartered accountants. The better way of looking into it would be that it is an opportunity for practicing chartered accountants for extra fees for the additional work.

The UPA government does not believe in a proven format of good governance and therefore with union elections just about a year away, it is in dire need of a poll weapon that will help them draw a cover on its trail of scams, economic policy failures and administrative mismanagement. With not many options in sight, the ruling government has set its sight on the ones who are easily the country's largest vote bank – India's poor. No wonder therefore, they have lunged behind the Food Security Bill and fighting tooth and nail to make it a reality. The bill, which aims to provide subsidised food-grains to nearly 67 percent of Indian's population, has faced the Opposition's heat for being 'populist' and detrimental to the country's already wobbly economy.

A recent report on the subject reported that the bill proposes to do away with priority and general classifications of beneficiaries. It will consequently provide uniform allocation of 5 kg food grain (per person) at fixed rate of Rs 3 (rice), Rs 2 (wheat) and Rs 1 (coarse grains) per kg to 75 percent of the country's rural population and 50 percent of the poor in urban India – a number that adds up to 800 million people. A complete implementation of the scheme will require 61.23 million tonnes of food grains every year and will cost the national exchequer Rs. 1,24,724 crore. Understandably, a Bill of that magnitude is mostly likely to be contested in the political circles and will possibly face a fair amount of opposition. The measure seems to be so politically driven that all the political parties that opposed the bill including BJP and SP allowed an easy passage of the Bill, ignoring the economic implications. It is just because of this political convenience reigning over economic prudence that has led the nation to such crisis.

The Indian rupee is touching new low against dollar with a knock over of more than 25% of value in last two months. At the stock markets investors have lost more than 30% of their equity value. Each fall in rupee impacts the pricing of goods that are imported and exported. The most affected with depreciating rupee is the pricing of fuel. The next move expected from the government in the increase of petrol and diesel prices further adding to the inflation in the economy and adding to the woes poor and middle class. The purchasing power has been significantly affected by the falling rupee. The text book theory that depreciating domestic currency stimulates exports may come to aid, however when major developing countries are facing the same problem, it may not be possible for every nation to boost its exports. The time is running away and only reforms can weather the storm.

At the Association, Talent Evening was held on 14-08-2013. However the program had a complete facelift as compared to preceding years and was popularly arranged as Members' "DATE" with the Association to enjoy "Dinner, Antakshri, and Talent Evening". The vibrant team of Cultural and Entertainment Committee led by the chairman and convenor offered the program that allowed members and family members to showcase their talent in Antakshri and singing. More than 50 participants got the opportunity to present themselves on the big platform. The program was thoroughly enjoyed by all the members and their family members. Apart from Entertainment, second Brain Trust Meeting was organized on the topic of "Issues in Tax Audit" with CA. Dhinal Shah, has the trustee of the meeting on 23-08-2013.

The Association is in process of finalizing a closed meeting with CCIT-I, Ahmedabad. Members having any issues / grievances may send them at the Association's office for representation.

With best regards,
CA. Prakash B. Sheth
President
01.09.2013

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An Overview on Search and Survey

CA. Pramod Dad
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1. INTRODUCTION

The Moto of I.T. Department as taken from sayings of Chankaya "***The king should collect the revenue like the Bee collecting Honey without harming the flower***". There is a parable that "***One should not kill the GOOSE, which lays the Golden Egg***"**.**

Contrary to this, the Income Tax Department is having ***Two BRAHMAASTRAS*** namely **1. *SEARCH and* 2. *SURVEY***, which permits the Department Officials to enter in the business / residential premises of Tax Payers.

In Income-tax Raid (search) the Income-tax Department strikes with full home-work on various informations and list of issues on which they need explanations and disclosure. On the other hand, the assessee caught unaware, unprepared and unequipped and yet he is expected to explain all such issues and forced to answer even technical questions put before him by search officials. At this time he does not have any assistance of his counsel or his employees. His position is pitiable and well being compared with ***ABHIMANYU*** of the ***MAHABHARATA***, surrounded by the most stalwart fighters.

Nobody can deny the existence of large-scale tax evasion both in terms of income and in terms of wealth, therefore, search or survey is only a starting point for the process of determination of undisclosed income and unaccounted assets / wealth.

Looking to the search and survey as routine matter by Income-tax Department, I am putting an overview on Search to reduce the complexity and to give easy understanding of the subject.

2. SEARCH BY INVESTIGATION WING U/s. 132 OF THE I.T. ACT

Search is carried out by investigation wing of Income-tax Department to gather evidences related to undisclosed incomes and to unearthed unaccounted wealth viz. money, bullion, jewellery, or other valuable articles, or things. In this process, the Authorized Officer can enter and search any premises (residence, business, factory, site, godown etc), vessel, vehicle or aircraft of the targeted person, company, firm, etc. as well as any other person on whom there is reason to suspect to have such books of accounts, other documents, money, bullion, jewellery, or other valuable articles or things of the targeted person.

In nutshell, the important provisions of search and seizure are as under:

Section	Brief Description
132(1)	Authorization of Search & Seizure
132(1)(iib)	Access to electronic records
132(1)(iii)	Seizure of books of accounts, other documents, money, bullion, jewellery, or other valuable articles, or things. ***Proviso*** – bullion, jewellery, or other valuable articles, or things being stock-in-trade of the business, not to be seized.
132(3)	Prohibitory order on premises.
132(4)	Statement during the course of search or seizure.
132(4A)	Presumption with regard to books of accounts, other documents, money, bullion, jewellery, or other valuable articles, or things in the possession of person searched.
132(8A)	Prohibitory order u/s. 132(3) shall not be enforced for a period exceeding 60 days from the date of such order.
132(9)	Taking of copies of books of accounts and other seized documents from Authorized Officer.
132(10)	Application to the Board for releasing of books of account or other documents.
132(13)	Applicability of the provisions of the Code Of Criminal Procedure.
132A	Requisition of books of accounts, other documents and valuable assets.
132B	Application of seized or requisitioned assets.W.e.f. 01-06-2013 – the existing liability does not include advance tax**.** ***Proviso* –** Application for release of seized assets.
292C	Presumption as to assets, books of accounts and other documents found in the course of search belongs to such person, contents of these are true.

The Officer can seize books of accounts (including electronic records), other documents money, bullion, jewellery, or other valuable articles, or things found as a result of such search.

However, the search party cannot seize bullion, jewellery or other valuable article or thing, **being stock-in-trade of the business**, found as a result of such search.

3. ASSESSMENT OF SEARCH CASES

The Finance Act 2003 introduced provisions for Assessment in Search Cases by introducing new sections 153A, 153B, and 153C and stopped the Block Assessment of undisclosed income in search cases.

In nutshell, the important provisions of search assessment are as under:

Section	Brief Description
153A	Assessment in case of search or requisition
153A(a)	Notice for filing return of income of Six Assessment Years ***Proviso –*** Pending assessment or reassessment automatically abated and the returns of six years already filed become non-est.
153B	Time limit for completion of assessment u/s. 153A.
153B(1)(a)	Assessment of Six assessment years – within 2 years from the end of financial year in which the last authorization was executed.The period of limitation further extended if a reference under sub-section (1) of section 92CA and other conditions.
153B(1)(b)	Assessment of Search year – within 2 years from the end of financial year in which the last authorization was executed.The period of limitation further extended if a reference under sub-section (1) of section 92CA and other conditions.
Proviso	Assessment of other person u/s. 153C shall be within the period as referred in clause (a) or clause (b) or one year from the end of the financial year in which books of accounts or documents or assets seized or requisitioned are handed over u/s. 153C to the AO having jurisdiction over such other person, whichever is later.
153C	Assessment of income of any other person.
153C(1)	Where the Assessing Officer is satisfied that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belongs or belong to a person other than the person referred to in section 153A, the provisions of section 153C applies.
153D	Prior approval of Jt. / Addl. Commissioner for assessment order in case of search or requisition.

In search cases, there is automatic reopening of 6 years assessment, whether there is undisclosed income or not, the similar provisions are in case of assessment of other persons u/s. 153C.

In search cases, IT Returns for 7 years are to be filed, which includes accounted portion as well as unaccounted portion and 7 assessments are to be made to determine the total income including undisclosed income.

4. TAX, INTEREST & PENALTY

In search assessment rate of taxes are applicable as per normal rate of the specific assessment year. Interest is charged u/s. 234A if the return u/s. 153A is filed after given period; interest u/s. 234B is charged as per normal procedure.

Penalty u/s. 271AAA is leviable in the cases where search is carried out on or after 1st day of June 2007 but before the 1st day of July 2012. As per provisions:

(i) There is no penalty when the undisclosed income is surrendered in the statement u/s. 132(4), manner of such income is substantiates, pays tax together with interest and furnish return of income declaring such undisclosed income therein for specified previous year.

(ii) Penalty of 10% when the undisclosed income is not surrendered in the statement u/s. 132(4) and also not offered in return of income for specified previous year.

Specified previous year: The previous year which has ended before the date of search but the date of furnishing the return of income under sub-section (1) of section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before

the date of search or the year in which search was conducted.

Explanation 5A to section 271(1)(c) is inserted w.e.f. 1st day of June 2007, which is related to penalty in search cases for the years other than specified previous years.

Penalty u/s. 271AAB is leviable in the cases where search is carried out on or after 1st day of July 2012. As per new provisions:

(i) There is minimum penalty of 10% when the undisclosed income is surrendered in the statement u/s. 132(4), manner of such income is substantiates, pays tax together with interest and furnish return of income declaring such undisclosed income therein for specified previous year.

(ii) Penalty of 20% when the undisclosed income is not surrendered in the statement u/s. 132(4) but offered in return of income for specified previous year and pays tax together with interest.

(iii) Penalty of 30% when the undisclosed income is not surrendered in the statement u/s. 132(4) and also not offered in return of income for specified previous year.

Specified previous year: The previous year which has ended before the date of search but the date of furnishing the return of income under sub-section (1) of section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the date of search or the year in which search was conducted.

Explanation 5A to section 271(1)(c) is inserted w.e.f. 1st day of June 2007, which is related to penalty in search cases for the years other than specified previous years.

5. SURVEY BY A.O. OR WING U/s. 133A OF THE I.T. ACT

Survey is carried out by Circle AO, Ward AO, TDS Circle and ADI Wing at business premises, factory, site, godowns, etc., during the hours at which such place is open for the conduct of business and in case of any other place, where books of accounts are lying, **only after sunrise and before sunset.**

In survey cash, stock, books of account & other documents and valuable articles or things are verified / checked by the survey party and they can impound books of accounts and other documents and record statement of person surveyed.

In nutshell, the important provisions of survey are as under:

Section	Brief Particulars
133A(1)	Survey provisions – place of survey. ***Proviso*** – No action to be taken without obtaining approval of Jt. Director or Jt. Commissioner.
133A(2)	Time of entry for survey - During the hours at which such place is open for conduct of business and in case of any other place, where books of accounts are lying, only after sunrise and before sunset.
133A(3)	Powers to survey officers:(ia) Impound books of accounts and other documents.(ii) Make an inventory of cash, stock, or other valuables.(iii) Statement of persons surveyed.
133A(4)	Cannot seize cash, stock, or other valuables.
133A(5)	Survey for gathering informations regarding expenditures in connection with any function, ceremony or event.

The TDS Circle can survey to check the deductibility of tax (TDS) and payment thereof to the Central Government.

Similarly, the Circle & Wing can carry out Surveys for the purpose of collecting informations with regards to expenditures in functions viz. marriage ceremonies, inauguration ceremonies, birthday & anniversaries functions, celebration of New Year eve parties, film award functions, film fares, launching / premiere of films, celebration of festivals, introduction / launching of new commercial products, musical parties, etc. Some surveys are carried out on show rooms to find out big purchases in cash by general public.

If during the survey operation, information comes to the department, which leads to formation of reasonable belief that the condition for authorizing search action exist, **the department has right to convert survey into search action.**

6. ISSUES EMERGING DUE TO SEARCH & SURVEY

During the course of Search and Survey so many issue comes in the way, which need attention of tax payers, advocates and Chartered Accountants. These issues need proper analysis and documentation for decision making related to disclosure of undisclosed income and unaccounted assets:

ISSUE	*BRIEF DESCRIPTION*
Cash	Cash found / seized represents cash of regular books of accounts, savings & pin-money of family members, cash withdrawn from bank, marriage gifts, cash related to other persons – who are present at the time of search, who accept that the cash is belonging to them, cash kept for the purpose of security, cash for medical purpose, imprest cash, cash of business, cash on selling of properties, etc. or unaccounted.
Gold ornaments & diamond jewellery	Gold ornaments & diamond jewellery represents Istridhan of lady members, disclosed at the time of VDIS, 1997 /Amnesty Scheme 1985, purchased from market, acquired on various social occasions, shown in WT Returns, covered by instruction No. 1916, received through WILL or unaccounted.
Investments - FDR, KVP, NSC, Bonds, Shares, etc.	Investments viz. FDR, KVP, NSC, Bonds, Shares, etc are found /seized includes acquired and recorded in books of accounts, acquired prior to search period, received as gift, acquired out of sale / redemption / maturity of investments, etc. or unaccounted.
Valuable Articles / Household items, furniture fixtures, etc.	Valuable Articles / Household items, furniture fixtures are acquired out of accounted funds, recorded in books of accounts, acquired prior to search period, received as gift on some occasions viz. marriage, in vastu (Gruh Pravesh) etc. or unaccounted.
Bank Accounts	Bank Accounts include accounts of business concerns, individual family members, PPF, Post Office Deposit, accounts of employees and third parties. There are some unaccounted bank accounts in the name of group members or dummy accounts in benami names, where transactions are taking place are to be seen with respect to nature of business, nature of transactions in bank accounts, on peak basis or on the basis of cash deposited and utilization of such unaccounted funds.
Lockers	The search party inquire about lockers – On search of locker, cash, jewellery, FDRs, documents etc are found / seized require explanation that the same are accounted or unaccounted.
Passport	Passport contains details of foreign travels, part of which are recorded in books of accounts and part of which are sourced from unaccounted incomes.
Credit Cards	Credit Cards are used for making payments of business, household expenses. The payments to credit card companies are recorded in books of accounts or not, cash payments lead to unaccounted expenditures.
Vehicles	Search party take note of vehicles on the basis of keys found, in statement such questions are asked, the vehicles if not recorded in books of accounts are sourced from unaccounted incomes.
Stock	In search & survey, the stock is inventoried, the same is verified and reconciled with book stock. If excess the same is unaccounted and if found lesser it is sale out of books.Now w.e.f. AY 2013-14 it will taxed as per provisions of section 115BBE.
Plant & Machineries, equipments etc.	Search party prepares list of Plant & Machineries, office equipments, etc. used for the purpose of business / profession. The same to be explained from books of accounts.
Documents/ Loose papers	At the time of search & survey documents / loose papers, etc., are inventoried as found / seized. Such material leads to various issues involving undisclosed incomes and unaccounted investments in lands and properties, which require explanation at the time of search / survey proceedings to find out undisclosed incomes / unaccounted investments.

7. ISSUES EMERGING IN ASSESSMENTS OF SEARCH & SURVEY

In assessment proceedings, apart from the above issues, there are so issues from regular books of accounts and income tax return filed, which also need attention of tax payers, advocates and Chartered Accountants and these issues need proper analysis and documentation as in the search assessments accounted as well as unaccounted issues are inquired by AO in all the 7 year assessments and such issues leads to complicate the case:

ISSUE	*BRIEF DESCRIPTION*
Unsecured Loans u/s. 68 / Share Capital	In assessment the AO inquire about unsecured loan u/s. 68, accommodation entries, share capital from papers companies received / accepted during the 7 years, to establish the same is a tough job.
Gifts / Foreign Gifts	The AO takes negative sign towards gifts / foreign gifts received in search period. Now the same are to be seen with relationship as per s.56(2) of the Act.
Valuation of Immovable properties/ bungalow etc.	The AO refers immovable properties, newly constructed bungalows, interior work and furniture & fixtures for valuation to the valuation cell (DVO), if these are falling in search period.
On-money	The AO consider whole on-money as part of income in absence of concrete evidences of expenses met out of such on-money. In many cases, the unaccounted expenses are also not allowed as per proviso to s.69C.
Estimation of income	The AO estimates incomes on the basis of seized materials, which shows some portion of unaccounted production, unaccounted sales, unaccounted collection, unaccounted fees / incomes, etc.Also estimate income on Low GP, Low HH Exp.
Expenses on marriage ceremony, education of children in foreign	The AO make inquiries and collect informations with regard to expenses on marriage ceremony, education of children in foreign on the basis of seized material or statements, falling in the 7 years period.
Payments of commission/ brokerages	The AO call for confirmations and nature of services rendered in case of payments of commission / brokerages in search period.
Capital vs. Revenue	The AO try to shift revenue expenditure as capital expense on the basis of nature of item and based on some case laws.
Depreciation	The AO shifts claim of depreciation in the case of plant & machineries installed at fag end of the close of financial year or by proving bogus investments in plant & machinery.
Deductions/ Exemptions	The AO tries to reject claim of deductions u/s. 80-IB, 10B, 10AA, etc. which leads to 100% deduction / exemption of income.
Disallowance u/s. 40a(ia)	The AO disallow payments u/s. 40a(ia) on account of non-deduction of tax or non-deposit of TDS on unaccounted expenses payments.
STCG / LTCG vs. Business Income	In investment of shares and land / plotting the AO shifts STCG / LTCG to Business Income on the basis of nature and based on some case laws.
Rent income vs. Business income	The assessee's are now investing in malls, shops, flats, etc., for the purpose of having rent income. The AO shifts rent income to Business Income on the basis of nature and based on some case laws.
Disallowance **u/s. 14A**	It is common to disallow expenses in relation to exempted income as per Rule 8D.
Jantri Value	In sale of immovable properties, the AO bring to tax the sale proceeds at Jantri value as per Section 50C of the Act.Now provisions of section

43CA will bring the builders & developers under the tax net of section 50C.

Offer vs. Assessment The AO make addition of income as well as assets viz. Cash, jewellery, stock, FDRs, etc. which leads to double addition.

Date basis addition The AO shifts offer of assessee on the basis of dates on seized materials / investments, bank transactions, etc., irrespective of disclosure made in the statement in current year at the time of search.

Penalties The AO levies penalties u/s. 271B, 271D, 271E, 271AAA and 271(1)(c) on the basis of seized material and findings of ADIT.

Prosecution The Tax Department also file prosecution u/s. 276CC for failure to furnish return of income, u/s. 277 for false statement, u/s. 277A for falsification of books of account or documents, u/s. 278B for offences by companies, etc.

8. PRACTICAL TIPS (TECHNIQUES IN PRACTICE)

In search and survey, the alertness is required from tax payers, advocates and Chartered Accountants and they have to keep pros and cons in mind at the time of tackling issues of Search & Survey. As per experience in Search & Survey matters, I suggest following **TECHNIQUES IN PRACTICE (TIPs)** to smooth-line the proceedings, restrict the disclosure and reduce the disputes with tax officials:

(i) At the time of Search / Survey and in Post Proceedings

SN PRACTICAL TIPS

1 Have a discussion with search & survey party to find out issues or basis leads to search/ survey.

2 Cooperate the search / survey party to take inventory of cash, stock, machineries, gold ornaments & diamond jewellery, etc. properly.

3 Provide necessary assistance for computer operations and backup, also keep copy of such backup.

4 Ask assessee to reply the questions related to cash, stock, loose papers tactfully or state that the same will be replied after looking in the books of accounts or after discussion with accountant or the person handling the issue.

5 If the papers are related to any other person, suggest assessee to bring the facts on records at the time of recording of statement.

6 Verify the contents from books of accounts with regard to accounted items.

7 If some issues are complicated, represent the case in such a way that the authorized officer put PO (Prohibitory Order) and the search can be postponed for some time.

8 Inspect the Annexures of seized / impounded documents, inventories of stock, jewellery, etc. before signing.

9 If the issue is crystal clear, related to current year and tax payment is within capability, suggest the assessee to make offer u/s. 132(4) before the search is concluded.Do not make disclosure for the sake to get rid off from IT Department, it is better to make disclosure of the amount on which the assessee is having capacity to pay tax, interest, etc.

10 Raise objections with regard to any irregularities in stock taking, jewellery valuation etc. through petition with nature of irregularities and evidences thereof viz. silver articles contained 60% other metals are valued at the price of solid silver in market in most of valuations.

11 If there is contradiction in statement, wrong workings of disclosure or disclosure is taken forcefully, an affidavit explaining circumstances, facts and correct position to be filed within short period before conclusion of search proceedings.

12 If there is harassment to the assessee, the same should be brought to the knowledge of higher authorities of IT Department.

13 In the case of third party inquiries / statements suggest client to ask to such person to furnish complete informations, so that the necessary facts can be on reviled and proper decision can be taken.

14 Apply for copies of seized books of accounts & other seized materials and back up of computer data's in case of seizure of hard disc.

15 Apply for copies of statements recorded at the time of search or survey proceedings or in post search proceedings.

16 Apply for lifting of attachment from Bank accounts, Demate accounts, etc.

17 Application for release of seized assets u/s. 132B(1)(i) viz. cash, gold ornaments & jewellery, FDRs, Bonds etc., if such accounts are accounted and properly documented.

(ii) At the time of filing of IT Returns of Search & Survey

SN PRACTICAL TIPS

1 Verify the seized / impounded loose papers and documents, reconcile with regular books of accounts, if there is discrepancies, the same may be jotted down for decision making.

2 Read Statements properly, do English translation (from Hindi or Gujarati). Prepare issues which lead to disclosure / confrontation and verify the same with entries in books and relevant evidences.

3 Prepare chart of undisclosed incomes issue wise and telescope unaccounted assets viz. cash, stock, jewellery, valuables, FDRs, Bonds, shares, KVPs, investment in properties, etc. against such disclosure.

4 Prepare issue wise files containing photocopies of seized materials, copy of statement, accounting entries and evidences from regular books of account and other evidences collected after search related to such issue.

5 Conclude such issues on the basis of facts, provisions of law, case laws and other relevant factors before deciding the quantum of offer in the return.

6 Verify 7 years returns along with IT computation, set of accounts, audit reports, certificates, workings, depreciation claim, long-term and short-term capital gain workings, deductions u/s. 80-IA/B, 80HHC, 10B, 10AA, etc.

7 Prepare new tax computation / return u/s. 153A including accounted incomes and unaccounted incomes for 6 years and search year on the basis of issues and notings in seized material, explanations in statements, on the basis of evidences on record etc.

8 Make Application for adjustment of seized assets viz. cash, jewellery, FDRs, KVPs, Bonds, etc. against tax payable or request for release of assets on payment of taxes on furnishing of bank guarantee.

9 If after above process, you think that there are some issues which are going to affect the assessments of the years after search year, it is advisable to discontinue business in the hands of such assessee and start new business in new name, new status (firm from individual / company from firm).

10 If the disclosure pertaining to past years, lead to heavy tax, interest and penalty, it is advisable to consider option of filing application before Settlement Commission for immunity from penalty and prosecution.The application can be filed before completion of assessment of search.

(iii) At the time of Assessment Proceedings

SN PRACTICAL TIPS

1 Provide all evidences and explanations on the issues raised by AO in the questionnaire for assessment proceedings.

2 Reply issues stage wise – In such a way that the normal questions replied first, the workings from books viz. GP, Interest, Depreciation, Brokerage, commission, TDS, to be replied secondly, confirmations of unsecured loan parties, share capital, expenses payments, bad debts, lower GP explanations, claim of deductions etc to be replied at third stage and important issues leading to disputes to be replied at last stage.

3 Each technical issues raised by AO to be replied along with explanations, evidences, legal position and your objections.

4 If the informations required are in the possession of other persons, it should be brought to the knowledge of AO and he should be requested to call the informations / confirmations directly

from such party, for this the present address and contact details along with inability to collect the information to be furnished.

5 If the issue is related to third party, then furnish the informations and evidences in such manner that the AO can take decision to initiate assessment proceedings against such person u/s. 153C / u/s. 148.

6 The disclosure working to be furnished in the form of income / inflow vs. application / expenses / investments, so that the AO should not tax the income as well as investments / assets / expenses and make double additions.

7 In the case of issue arise due to third party confrontation, the cross examination may be called for to prove the issue otherwise.

8 Create trust in AO that you are cooperating in proceedings and then lead to the AO to the path on which the issue can be solved.

9 If at any stage there is need of reference from higher authorities, the issues to be discussed with them along with draft reply and evidences so that the unnecessary / high pitch additions by AO can be restricted.

10 If AO is in negative mood or wants to destroy the case, though without losing temper, patiently with cool mind reply all the issues along with facts, evidences and legal submissions so that proper justice to the issue can be obtain in the appellate proceedings.

(iv) After Assessments are over

SN PRACTICAL TIPS

1 Read the assessment order and find out is there any arithmetical mistake in typing or computation, charging of tax, interest working, etc. Then apply for rectification.

2 Prepare list of additions along with remarks of AO for making such additions and prefer appeal on all such issues.

3 Prepare rebuttal of AO's allegations along with cross-link of such allegations to the replies in assessment proceedings along with necessary evidences.

4 If the AO has not provided details collected in third party inquiries or some details in the back of assessee and used the same for framing assessment, such details may be called for from the AO.

5 Justify your ground in appeal with facts of the case, replies in the assessment proceedings, legal decisions, etc.

6 Apply for stay of demand and reply penalty notice in elaborate manner.

7 In case of adverse situation, difficulty of making payments of huge demand, approach to the higher authorities for stay of demand, grant of reasonable installments or early hearing of appeal.

8 Verify whether seized assets are applied towards tax liability or not.

9. NEW AMENDMENTS IN THE I.T. PROVISIONS

There are amendments in Income-tax Act w.e.f. 01-04-2013, some provisions are introduced, which will affect the tax proceedings of assessee's subject to search and survey drastically:

Section	*BRIEF DESCRIPTION*
92BA	Domestic Transfer Pricing
115BBE	Tax on income referred to in s.68 or s.69 or s.69A or s.69B or s.69C or s.69D will be charged @ 30% and against such income no deduction in respect of any expenditure or allowance shall be allowed.

10. CONTROVERSIES & CONCLUSION

There are some controversies, which are in the provisions of the Act or instructions / Circulars issued by CBDT:

SN CONTROVERSIES

1 The CBDT in instruction states that while recording statement during the course of search and seizure and survey operations, no attempt should be made to obtain confession as to the undisclosed income. Whereas the section 271AAA / 271AAB states that the assessee in a statement u/s. 132(4) admits the undisclosed income and substantiates the manner in which the undisclosed income was derived, shall be subject to immunity from penalty.

2 Section 153C is introduced for assessment of income of any other person, where the AO is satisfied that any money ..... or books of accounts or documents seized belongs to a person other than the person searched. This section does not states whether the books of accounts or documents seized should be unaccounted as defined in the section 158BD of Block Assessment.

3 The provisions of section 132(B) states that the existing liability does not include advance tax, it means it includes self-assessment tax. Though, the CIT do not give credit of tax lying in PD Account against self-assessment tax and as per new provisions, the assessee cannot file return without payment of self-assessment tax. Thus, the assessee's money is lying in PD Account, though he is forced to pay self-assessment.

The search cases are like war of ***MAHABHARAT***, where the CA and Advocate has to act as ***KRISHNA***, the cases are on floor for 3 years & more with AO, there are reopening of six years as per provisions of s. 153A / 153C and in one search case at a time more than 100 IT Returns are to be filed, which are subject to assessment, which require quite a long time and technical assistants. Some issue require to be settled at AO level, some at CIT(A) level and some at Tribunal level. This whole marathon require ***Strategic Planning*** – how to prepare, how to represent so that minimum damage occur.

The ***Search cases*** are frankly speaking ***Research cases***.

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New Companies Act, 2013. Part - I

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The historic Companies Bill, 2013 was passed on 08th August, 2013, by the Rajya Sabha. The President accented to the same on 31.08.2013. The whole bill has been divided into XXIX chapters containing 470 clauses/ sections and VII schedules.

The arrangement of chapters and summary of important provisions and definitions is as under:

Chapter No.	Particulars
Chapter I	Preliminary
Chapter II	Incorporation of company and matters incidental thereto
Chapter III	Prospectus and allotment of securities **Part-I:** Public offer and; **Part-II**: Private placement
Chapter IV	Share capital and debentures
Chapter V	Acceptance of deposits by companies
Chapter VI	Registration of charges
Chapter VII	Management and administration
Chapter VIII	Declaration and payment of dividend
Chapter IX	Accounts of companies
Chapter X	Audit and auditors
Chapter XI	Appointment and qualifications of directors
Chapter XII	Meetings of board and its powers
Chapter XIII	Appointment and remuneration of managerial personnel
Chapter XIV	Inspection, inquiry and investigation
Chapter XV	Compromises, arrangements and amalgamations
Chapter XVI	Prevention of oppression and mismanagement
Chapter XVII	Registered valuers
Chapter XVIII	Removal of names of companies from the register of companies
Chapter XIX	Revival and rehabilitation of sick companies
Chapter XX	Winding up **Part-1**: Winding up by the Tribunal **Part-2:** Voluntary winding up **Part-3:** Provisions applicable to every mode of winding up and; **Part-4:** Official liquidators
Chapter XXI	**Part-1:** Companies authorised to register under this act and;**Part-2:** Winding up of unregistered companies
Chapter XXII	Companies incorporated outside India
Chapter XXIII	Government companies
Chapter XXIV	Registration offices and fees
Chapter XXV	Companies to furnish information or statistics
Chapter XXVI	Nidhis
Chapter XXVII	National company law tribunal and appellate tribunal
Chapter XXVIII	Special courts
Chapter XXIX	Miscellaneous

CHAPTER I:

95 definitions along with explanations, if any, have been provided under this chapter.

- "**Associate company**", in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.
- "**Company Liquidator**", in so far as it relates to the winding up of a company, means a person appointed by:

  (a) the Tribunal in case of winding up by the Tribunal; or

  (b) the company or creditors in case of voluntary winding up,

  as a Company Liquidator from a panel of professionals maintained by the Central Government under sub-section (2) of section 275;
- "***financial year***", in relation to any company or body corporate, means the period ending on the 31st day of March every year, and where it has been incorporated on or after the 1st day of January of a year, the period ending on the 31st day of March of the following year, in respect whereof financial statement of the company or body corporate is made up.

Every company or body corporate, existing on the commencement of this Act, shall, within a period of **two years** from such commencement, align its financial year as per the provisions of this clause.

- "**One Person Company**" means a company which has only one person as a member.
- ''**Small company**'' means a company, other than a public company,
  - (i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; or
  - (ii) turn-over of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees:

  Provided that nothing in this clause shall apply to:
  - (A) a holding company or a subsidiary company;
  - (B) a company registered under section 8; or
  - (C) a company or body corporate governed by any special Act;
- "**turnover**" means the aggregate value of the realisation of amount made from the sale, supply or distribution of goods or on account of services rendered, or both, by the company during a financial year.
- **"unlimited company**" means a company not having any limit on the liability of its members.

CHAPTER II:

Nomination of other member with his consent:

Memorandum of One Person Company shall indicate the name of the other person, with his prior written consent in the prescribed form, who shall, in the event of the subscriber's death or his incapacity to contract become the member of the company and the written consent of such person shall also be filed with the Registrar at the time of incorporation of the One Person Company along with its memorandum and articles.

The member of One Person Company may at any time change the name of such other person by giving notice in such manner as may be prescribed and any such change in the name of the person shall not be deemed to be an alteration of the memorandum.

Memorandum & Articles of the Company:

The memorandum of a company shall be in respective forms specified in Tables A, B, C, D and E in Schedule I as may be applicable to such company.

The articles of a company shall be in respective forms specified in Tables, F, G, H, I and J in Schedule I as may be applicable to such company.

Filing of declaration for commencement of business:

A company having a share capital shall not commence any business or exercise any borrowing powers unless:

(a) a declaration is filed by a director in such form and verified in such manner as may be prescribed, with the Registrar that every subscriber to the memorandum has paid the value of the shares agreed to be taken by him and the paid-up share capital of the company is not less than five lakh rupees in case of a public company and not less than one lakh rupees in case of a private company on the date of making of this declaration; and

(b) the company has filed with the Registrar a verification of its registered office as provided in sub-section (2) of section 12.

Registered Office of the Company:

(1) A company shall, on and from the fifteenth day of its incorporation and at all times thereafter, have a registered office capable of receiving and acknowledging all communications and notices as may be addressed to it.

(2) The company shall furnish to the Registrar verification of its registered office within a period of thirty days of its incorporation in such manner as may be prescribed.

Subsidiary company cannot hold shares in its holding company:

No company shall, either by itself or through its nominees, hold any shares in its holding company and no holding company shall allot or transfer its shares to any of its subsidiary companies and any such allotment or transfer of shares of a company to its subsidiary company shall be void.

It can hold the shares of holding company only in the capacity of trustee or legal representative or shares held before the holding-subsidiary relationship came into existence.

CHAPTER III:

A private company may issue securities:

(a) by way of rights issue or bonus issue in accordance with the provisions of this Act; or

(b) through private placement by complying with the provisions of Part II of this Chapter.

Offer of sale of shares by certain members of company:

Where certain members of a company propose, in consultation with the Board of Directors to offer, in accordance with the provisions of any law for the time being in force, whole or part of their holding of shares to the public, they may do so in accordance with such procedure as may be prescribed.

Public offer of securities in dematerialized form:

(a) every company making public offer; and

(b) such other class or classes of public companies as may be prescribed, shall issue the securities only in dematerialised form by complying with the provisions of the Depositories Act, 1996 and the regulations made thereunder.

Offer or invitation for subscription of securities on private placement:

No fresh offer or invitation under this section shall be made unless the allotments with respect to any offer or invitation made earlier have been completed or that offer or invitation has been withdrawn or abandoned by the company.

All monies payable towards subscription of securities under this section shall be paid through cheque or demand draft or other banking channels but not by cash.

All offers covered under this section shall be made only to such persons whose names are recorded by the company prior to the invitation to subscribe, and that such persons shall receive the offer by name, and that a complete record of such offers shall be kept by the company in such manner as may be prescribed and complete information about such offer shall be filed with the Registrar within a period of thirty days of circulation of relevant private placement offer letter.

CHAPTER IV:

Calls on shares of same class to be made on uniform basis:

Where any calls for further share capital are made on the shares of a class, such calls shall be made on a uniform basis on all shares falling under that class.

Company may accept unpaid share capital, although not called up.

A company may, if so authorised by its articles, accept from any member, the whole or a part of the amount remaining unpaid on any shares held by him, even if no part of that amount has been called up.

Prohibition on issue of shares at discount:

Except as provided in section 54, a company shall not issue shares at a discount. Section 54 deals with the issue of sweat equity shares subject to some conditions to be fulfilled therefore.

Issue and redemption of preference shares:

No company limited by shares shall, after the commencement of this Act, issue any preference shares which are irredeemable and such shares shall be redeemed within a period not exceeding twenty years *(except in case of infrastructure projects)* from the date of their issue subject to such conditions as may be prescribed.

Issue of share certificates:

Every company shall, unless prohibited by any provision of law or any order of Court, Tribunal or other authority, deliver the certificates of all securities allotted, transferred or transmitted:

(a) within a period of two months from the date of incorporation, in the case of subscribers to the memorandum;

(b) within a period of two months from the date of allotment, in the case of any allotment of any of its shares;

(c) within a period of one month from the date of receipt by the company of the instrument of transfer under sub-section (1) or, as the case may be, of the intimation of transmission under sub-section (2), in the case of a transfer or transmission of securities;

(d) within a period of six months from the date of allotment in the case of any allotment of debenture:

Further issue of share capital:

Where at any time, a company having a share capital proposes to increase its subscribed capital by the issue of further shares, such shares shall be offered:

(a) to persons who, at the date of the offer, are holders of equity shares of the company in proportion, as nearly as circumstances admit, to the paid-up share capital on those shares by sending a letter of offer subject to the following conditions, namely:

(i) the offer shall be made by notice specifying the number of shares offered and limiting a time not being less than fifteen days and not exceeding thirty days from the date of the offer within which the offer, if not accepted, shall be deemed to have been declined;

(ii) unless the articles of the company otherwise provide, the offer aforesaid shall be deemed to include a right exercisable by the person concerned to renounce the shares offered to him or any of them in favour of any other person; and the notice referred to in clause (i) shall contain a statement of this right;

(iii) after the expiry of the time specified in the notice aforesaid, or on receipt of earlier intimation from the person to whom such notice is given that he declines to accept the shares offered, the Board of Directors may dispose of them in such manner which is not dis-advantageous to the shareholders and the company;

(b) to employees under a scheme of employees' stock option, subject to special resolution passed by company and subject to such conditions as may be prescribed; or

(c) to any persons, if it is authorised by a special resolution, whether or not those persons include the persons referred to in clause (a) or clause (b), either for cash or for a consideration other than cash, if the price of such shares is determined by the valuation report of a registered valuer subject to such conditions as may be prescribed.

Issue of bonus shares:

A company may issue fully paid-up bonus shares to its members, in any manner whatsoever, out of:

(i) its free reserves;

(ii) the securities premium account; or

(iii) the capital redemption reserve account;

Provided that no issue of bonus shares shall be made by capitalizing reserves created by the revaluation of assets.

Restrictions on purchase by company or giving of loans by it for purchase of its shares:

No public company shall give, whether directly or indirectly and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of, or in connection with, a purchase or subscription made or to be made, by any person of or for any shares in the company or in its holding company and shall not have power to buy its own shares unless the consequent reduction of share capital is effected under the provisions of this Act.

CHAPTER V:

Prohibition on acceptance of deposits from public:

A company may, subject to the passing of a resolution in general meeting and subject to such rules as may be prescribed in consultation with the Reserve Bank of India, accept deposits from its ***members*** on such terms and conditions, including the provision of security, if any, or for the repayment of such deposits with interest, as may be agreed upon between the company and its members, subject to the fulfillment of the some conditions.

The deposit repayment reserve account created for the said purpose shall not be used by the company for any purpose other than repayment of deposits.

Repayment of deposits, etc. accepted before commencement of this Act:

The company shall:

(a) file, within a period of three months from such commencement or from the date on which such payments, are due, with the Registrar a statement of all the deposits accepted by the company and sums remaining unpaid on such amount with the interest payable thereon along with the arrangements made for such repayment, notwithstanding anything contained in any other law for the time being in force or under the terms and conditions subject to which the deposit was accepted or any scheme framed under any law; and

(b) repay within one year from such commencement or from the date on which such payments are due, whichever is earlier.

Acceptance of deposits from public by certain companies:

A public company, having such net worth or turnover as may be prescribed, may accept deposits from persons other than its members subject to compliance with the requirements provided in sub-section (2) of section 73 and subject to such rules as the Central Government may, in consultation with the Reserve Bank of India, prescribe:

Provided that such a company shall be required to obtain the rating (including its networth, liquidity and ability to pay its deposits on due date) from a recognised credit rating agency for informing the public the rating given to the company at the time of invitation of deposits from the public which ensures adequate safety and the rating shall be obtained for every year during the tenure of deposits.

CHAPTER VI:

Duty to register charges:

The Company creating the charge shall file in such form, on payment of such fees and in such manner as may be prescribed, with the Registrar within thirty days of its creation;

Provided that the Registrar may, on an application by the company, allow such registration to be made within a period of **three hundred days** of such creation on payment of such additional fees as may be prescribed;

Provided further that, if the registration is not made within a period of three hundred days of such creation, the company shall seek extension of time in accordance with section 87.

Where a company fails to register the charge within the period specified in section 77, without prejudice to its liability in respect of any offence under this Chapter, the person in whose favour the charge is created may apply to the Registrar for registration of the charge along with the instrument created for the charge, within such time and in such form and manner as may be prescribed and the Registrar may, on such application, within a period of **fourteen days** after giving notice to the company, unless the company itself registers the charge or shows sufficient cause why such charge should not be registered, allow such registration on payment of such fees, as may be prescribed.

CHAPTER VII:

Power to close register of members or debentureholders or other security holders:

A company may close the register of members or the register of debenture holders or the register of other security holders for any period or periods not exceeding in the aggregate forty-five days in each year, but not exceeding thirty days at any one time, subject to giving of previous notice of at least seven days or such lesser period as may be specified by Securities and Exchange Board for listed companies or the companies which intend to get their securities listed, in such manner as may be prescribed.

Annual return:

Every company shall prepare a return (annual return) in the prescribed form containing the particulars as they stood on the close of the financial year regarding:

(a) its registered office, principal business activities, particulars of its holding, subsidiary and associate companies;

(b) its shares, debentures and other securities and shareholding pattern;

(c) its indebtedness;

(d) its members and debenture-holders along with changes therein since the close of the previous financial year;

(e) its promoters, directors, key managerial personnel along with changes therein since the close of the previous financial year;

(f) meetings of members or a class thereof, Board and its various committees along with attendance details;

(g) remuneration of directors and key managerial personnel;

(h) penalty or punishment imposed on the company, its directors or officers and details of compounding of offences and appeals made against such penalty or punishment;

(i) matters relating to certification of compliances, disclosures as may be prescribed;

(j) details, as may be prescribed, in respect of shares held by or on behalf of the Foreign Institutional Investors indicating their names, addresses, countries of incorporation, registration and percentage of shareholding held by them;

contd. on page no. 339

Higher Education - Yesterday & Tommorrow

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In the words of Mrs. Jayanti Ravi, IAS, Commissioner of Technical Education, Gujarat, "**Somewhere along the road, most educationists have lost their way**".

While speaking at the Pan IT 2010, Higher Education Round Table at IIT Delhi, Sam Pitroda's opening remark is, "**I am seriously concerned as to where we are in Higher Education".**

Background Note: *This article is based on the Report on Higher Education by the Planning Commission of India – 12th Five Year Plan (2012-2017). The report is a comprehensive document detailing the status of higher education in India today, the progress card till date, issues and challenges and the future road map to achieve the goals set for the current five year plan. An attempt is made to brief the reader about the issues we all face, see, experience and debate today whenever there is a reference to higher education. Be it admission hassle, higher fees charged by the colleges, deteriorating quality of education, low employability of the graduates or gap between teaching and learning, the report is an honest confession of all such issues and sincere efforts correct them. It all depends upon the stakeholders in education consisting of management, faculty, students and government how serious and sincere they are in playing role assigned to each of them. Keeping apprehensions aside for the time being, the article gives an interesting sketch of things to come in the space of education in next four years. With very ambitious targets and huge budgetary allocation from Government, what is needed is honesty in purpose and true intent from all the stakeholders.*

In last decade, everybody is clear that without focus on Higher Education , India will not be able to beat its growth targets for the next 20-25 years to come.

In terms of opportunities, time was never opportune for India as today. The emergence of a global economy due to increased trade, investment and mobility of people and more recently work across borders has forced all countries to adapt their systems of Higher Education to the changed global realities.

In this spirit, the HRM has set a vision to transform our educational institutions into hubs of knowledge creation and promoters of innovation as also provide opportunities to our youth for their skill development and employment.

While in terms of vision, mission and goals the approach of both Central and State Governments is quite appropriate and promising, there is a need to take a pause and look at the stark realities.

It is disheartening to note that after almost six decades of independence, the country's Gross Enrolment Ratio (GER) in Higher Education is 18.1% at the end of 11th Five Year Plan. It means despite considerable progress made in last six decades, less than 1/5th of the estimated 120 million potential students are enrolled in Higher Education Institutions in India well below the world average of 26%.

The authorities have realized the failure of their efforts to level up the penetration of education and consequently losing the opportunities of knowledge intensive goods and services in the global market.

The problem of low GER is compounded by very low employability of graduates as a significant contributor to the economic progress of the society. The estimates of employability of the graduates range from 15% to 35%. In either case it is a matter of serious concern for all.

It may be noted that in view of demographic changes witnessed in last decade, India is at an enviable point to recap the 'Demographic Dividend". If not reacted sensibly and swiftly, India will never get this opportunity again.

Fortunately the planners have realized that Higher Education is critical for developing modern economy, a just society and a vibrant polity. Indeed Higher Education is the principal site at which our national goals, development priorities and civic values can be examined and refined.

At the same time, everyone connected with Higher Education is fully aware of the challenges prevalent today. Enough has been talked about, discussed and deliberated. It is now time to act. The 12th Five Year Plan contains detailed action plan to convert these challenges into opportunities. Largely the plan centers around 3 Es. Equity, Expansion and Excellence . However we may add two more Es' to the list of concerns and

later areas to focus on. It will be Employability and Ethics. While the plan focuses on the first three Es, two more are added by those who are concerned with the outcome of the education and the intended value system for the management, to raise the bar of governance.

The plan document provides interesting and informative assessment of 11th Plan experience, the strategy and initiatives of 12th Plan which has been ambitiously drawn to achieve the formidable task of taking GER to 30% by 2020.

For better comprehension of the present situation, future strategy and suggested initiatives, an attempt is made to summarize the same as under:

Experience so far:

(a) GER increased from 12.3% in 2006-07 to 17.9% in 2011-12 showing significant jump albeit much lower than desired. Positive impact of this increase is that India moved from 'elite' to a 'mass' Higher Education system. At the same time it is a matter of concern that this growth has been skewed in favour of certain regions, disciplines and sector. Engineering and technical disciplines registered highest growth.

(b) The number of institutions increased from 29,384 to 46,430 indicating a sizeable growth of 58%. The private sector played a significant role along with new institutions set up by both, the Center and the States.

(c) Despite massive funding to support financially weaker students, opening up institutions in low GER districts, construction of large number of girls' hostels, the imbalances in the system have continued. The gross attendance ratio of disadvantaged social group is much low. The GER in the ST category is around one fourth (1/4th) of general category. The measures taken to achieve the goals of equity and inclusion did not yield desired results.

(d) In terms of quality improvement, thrust was given in managing faculty issues, use of technology, academic and governance reforms and accreditation. However barring few top level institutions, quality has been still a matter of serious concern.

(e) Research and Innovations are now vital functions of Higher Education worldwide. However it is disappointing that majority of the institutions remain largely teaching focused with limited research and doctoral education.

(f) Though in the last two decades research quality has improved, it is far below world standards. This lack of research orientation is reflected in the standing of best Indian Universities when bench marked with global ranking. It is a matter of serious concern that the list of top 200 Universities worldwide by the Times Higher Education Ranking does not include any Indian University.

(g) Some of the statistics are too revealing. The total number of Ph.Ds in Science and Engineering is only 4500 compared to approximately 30,000 in China and 25,000 in USA. In 2009, Indian filed and received only 11,937 applications for worldwide patent against 241,546 by China.

12th Plan Strategy and Initiatives:

It is in this backdrop that the 12th Plan has drawn strategy and supportive framework to achieve the set goals and objectives. This involves cultural, strategic and organizational changes impacting on all aspects of Higher Education ranging from access and equity to governance, funding, monitoring and regulation, institutional structures, curricula and teaching-learning process. Significant of such initiatives are as under:

(1) Instead of setting up new institutions, efforts will be made to expand the capacities in the existing institutions, e.g. enrolment in Central Institutions (like IITs) would be doubled from 6 lac students to 12 lac students. For this financial support will be provided to redevelop campuses and build latest technological infrastructure.

(2) Central funding to State Higher Education will also increase to benefit from the synergies between Central and State funding to bring about administrative, academic and financial reforms. These efforts must ultimately address equity issues and improve quality at the state level.

(3) Realizing the significant role played by the private sector that accounts for 58.5% of enrolment, several reforms are planned to improve autonomy, provide diverse funding option including issue of bonds & shares, allow for-profit institutions to operate to help bridge gap between demand and supply in Higher Education, change legal status of the sector to allow Corporates to operate and encourage research by providing funds. Of course, no compromise with quality, equity and transparency will be permitted. Accreditation will be central to such reforms.

(4) To expand the capacity without incurring major cost, use of technology to offer Open and Distance Learning programs, encourage Public-Private Partnership to increase and improve resource utilization and setting up of community colleges for twin objectives of expansion of skill based programs and to reach out to more students and non-traditional learners will also be given due emphasis and priority.

(5) To address the issue of affordability, public spending on student financial aid would be enhanced considerably in terms of number and amount of scholarships. In addition, a student loan guarantee corpus is proposed to be created to protect against the risk of default in repayment by students. It is to be noted that merit-cum-means scholarship for students with family income up to Rs. 4.5 lac per annum is already in place to provide 100% interest subsidy during moratorium period. Not many students are aware of this scheme.

(6) Reforms concerning excellence and academic improvement includes (a) structural changes in the college affiliation system to provide for greater autonomy to large and reputed colleges (b) splitting of larger universities into smaller and manageable units (c) promotion of college cluster universities with each college working as a campus of the university, and (d) merger of colleges to leverage existing infrastructure and to offer new programs.

(7) Some of the measures in the area of academic reforms are already in place. Introduction of semester system, choice based credits, grades systems have been on trial at majority of the colleges. It is a separate issue that many of such new steps have been strongly resisted by faculty and students for variety of reasons ranging from complexities to extra efforts required for successful implementation.

(8) One heartening feature of the proposed reforms relate to recrafting of the under graduate system (UG). Instead of making UG as a base line qualification, plan is to provide holistic education giving opportunities for intellectual exploration, hands-on research, job skilling, experiential learning, creative thinking, leadership, ethics education and community service to the students right at the graduation level. For this, four year UG would be promoted. This is extremely useful move to inculcate core values and skills into students making their education relevant and worthwhile for lifetime.

(9) To achieve such an aggressive target, number of quality teachers in Higher Education is a major drawback. It is estimated that country will need 100% increase in faculty strength from present size of 8 lac to 16 lac. This shortage can be addressed by (a) attracting talent into the field of education as the salary scale post sixth pay implementation is amongst the highest (b) active collaboration among Central, State and Private institutions (c) effective and innovative use of technology to address to larger number of students at multi-locations (d) expanding online education system through new technologies like MOOCs in a plain vanilla mode or guided blended mode.

(10) One of the most appreciable and significant initiatives would be to promote heavily the use of ICT in higher education. The approach is a multi-pronged one to strengthen digital infrastructure across India providing higher bandwidth and wider connectivity creating a bigger cloud. Comprehensive action plan is proposed to create, share and expand contents through virtual labs, open access repositories, single portals to access all contents and DTH channels to telecast digital educational videos.

(11) There are plans to automate entire Higher Education system at institutions level by providing standard ERP system specifically developed for education industry with added focus on Learning Management Systems (LMS), library management, students life-cycle management, examination and assessment and dissemination of information to students and faculty on a real time mode.

(12) Towards one of the key objectives of reforms, in the form of quality improvement, due emphasis is given for internationalization. The measures will include faculty and student exchange programmes, collaborations with reputed foreign universities for teaching and research, exposure to diverse teaching-learning models and enhanced use of ICTs. India International Education Center as a national agency will undertake all activities to achieve higher level of globalization.

(13) Finally there are several miscellaneous measures for all round improvement related areas – like fostering social responsibility, promoting sports and wellness among students, inter institutional collaboration and coordination, mandatory accreditation, promoting research and innovation, governance and controls

and students services. While the measures proposed are all well intended, the anxiety is to what extent the execution and delivery of the same would yield desired results without delay, corruption, wastage or compromise.

Financing Strategy:

Higher Education requires significantly larger investments to deliver on the multiple objectives and to achieve desired goals. It may be noted that share of education in total plan outlay was only 6.7% in the tenth plan. It got a major boost in 11th plan with increase to 19.4% and even higher in 12th plan. 30% of the budget for education is for Higher Education. Interestingly the budget for Higher Education in 11th plan increased from 9600 crore to 84,943 crore. This is a massive nine fold increase. The budget for 12th plan is Rs. 110,700 crore showing 30% rise over 11th plan budget. However compared to actual spending during 11th plan, the 12th plan budget is two-and-a-half times in size.

With this high budget, the focus will be on expansion by scaling up the capacity, quality improvement and fostering excellence, revamping of students' financial aid programs. In short, the 12th plan will build on momentum generated so far with focus on three Es – expansion, equity and excellence. Summarily it is essential that all institutions equip their graduates with core skills of 4 Cs – Critical thinking, Communication, Collaboration & Creativity to enable the country to continuously innovate to adapt to new environments. This will be a paradigm shift from the 3 Rs so far, the basic skills of reading, writing and arithmetic.

Acknowledgement:

a. Twelfth Five Year Plan (2012-2017) Report on Higher Education by Planning Commission, Government of India.
b. Background note "Forum for Excellence in Higher Education" prepared by Commissionarate of Higher Education, Government of Gujarat.
c. Speech by Shri Sam Pitroda at the PanIIT 2010 Higher Education Round table at IIT Delhi.

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contd. from page 335

Article : New Companies Act, 2013 : Part - I

and signed by a director and the company secretary, or where there is no company secretary, by a company secretary in practice.

In relation to One Person Company and small company, the annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the company.

An extract of the annual return in such form as may be prescribed shall form part of the Board's report.

Annual general meeting:

Every company *other than a One Person Company* shall in each year hold in addition to any other meetings, a general meeting as its annual general meeting and shall specify the meeting as such in the notices calling it, and not more than fifteen months shall elapse between the date of one annual general meeting of a company and that of the next;

Every annual general meeting shall be called during business hours, that is, between 9 a.m. and 6 p.m. on any day that is not a National Holiday and shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situate.

Quorum for meetings:

Unless the articles of the company provide for a larger number,

(a) in case of a *public company*,
  (i) five members personally present if the number of members as on the date of meeting is not more than one thousand;
  (ii) fifteen members personally present if the number of members as on the date of meeting is more than one thousand but up to five thousand;
  (iii) thirty members personally present if the number of members as on the date of the meeting exceeds five thousand;
(b) in the case of a *private company*, two members personally present, shall be the quorum for a meeting of the company.

Resolutions requiring special notice:

Where, by any provision contained in this Act or in the articles of a company, special notice is required of any resolution, notice of the intention to move such resolution shall be given to the company by such number of members holding not less than *one per cent* of total voting power or holding shares on which such aggregate sum not exceeding *five lakh rupees*, as may be prescribed, has been paid-up and the company shall give its members notice of the resolution in such manner as may be prescribed.

To be continued……

Part II and Part III will follow in next issues.

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Updates from ICAI

Compiled by CA. Uday I. Shah

Members facing difficulty in registering themselves as "Tax professionals" in the e-filing portal

As the members are aware, e-filing of Tax Audit Reports has been made mandatory from the AY

2013-14 onwards vide Notification No. 34/2013 dated 01-05-2013. In order to e-file Tax Audit Report a Chartered Accountant requires to register himself in the e-filing portal as a "Tax professional".

The Direct Taxes Committee of ICAI has been intimated that issues are being faced by the members in registering themselves in e-filing portal due to mismatch of their Date of Birth and/or name. This mismatch may be on account of various reasons like wrong date of Birth in

PAN, wrong date of Birth in ICAI records, different name in the PAN vis-a-vis ICAI records etc.

In order to successfully register in the e-filing portal, members facing such issues are required to get the Date of Birth or name corrected if the same is required, so that there is no mismatch in future. For example, if the date of birth mentioned as per educational records (noted by ICAI) is not the date of birth mentioned in PAN card, the procedure to change the Date of Birth in PAN card is required to be followed. Also, if the name mentioned in ICAI records is different than members name mentioned in PAN card due to change of name post marriage or punching error etc., the procedure for change of name in ICAI records or PAN card, as the case may be, is required to be followed.

A- In case of mis-match in name

1. The member can change his name by furnishing an Affidavit duly sworn before 1st class magistrate/ notary public stating the correct name member desires to be recorded by ICAI.

B- In case of mis-match in date of birth:

1. The date of birth recorded in the ICAI, based on the educational records, will not be changed. In such cases the date of birth mentioned in PAN card needs to be rectified by the member concerned.

2. Pending rectification in the PAN card, the member can furnish the following documents to the Institute:

   (a) Self attested copy of the existing PAN card.

   (b) Self attested copy of application submitted for rectification in PAN card.

   (c) Undertaking by member to furnish the rectified copy of PAN card to the Institute on

   or before 15th December, 2013.

3. The documents mentioned in para (2) above are to be submitted to the concerned decentralized office of ICAI, in hard copy or soft copy (digitally signed) to the following respective email ids:

   Decentralized office Email Id

   WIRC wromem@icai.in

   SIRC sromem@icai.in

   EIRC eromem@icai.in

   CIRC cromem@icai.in

   NIRC nromem@icai.in

   Thereafter, the Institute will take on record the PAN of the member and in turn send it to DGIT (Systems).

   Upon receipt of PAN of the member from the ICAI, the member will be permitted to be registered as "Tax professional" in the e-filing portal. It will take around 5 working days for a member to register himself as Tax Professional after submitting the information to the ICAI. In case, the member, after giving declaration for filing the rectified PAN with ICAI does not provide a self attested copy of the changed PAN card by 15th December 2013, to ICAI without any reasonable cause, the same may result in unfavorable consequences for giving wrong undertaking in this regard.

   PLEASE NOTE: To facilitate smooth e-filing of tax audit reports this facility is available only up to 30thSeptember, 2013.

APPLICABILITY OF SA 700, FORMING AN OPINION AND REPORTING ON FINANCIAL STATEMENTS, TO FORMAT OF AUDITOR'S REPORTS PRESCRIBED UNDER VARIOUS LAWS AND/ OR REGULATIONS

1. The Council of ICAI, at its 326th meeting held from 27th to 29th July 2013 considered the issue relating to application of Standard on Auditing (SA) 700, Forming An Opinion And Reporting on Financial Statements to such cases where the format of the auditor's report is prescribed under the relevant law or the regulation thereunder and are per se not in line with the requirements of SA 700. The Council noted that in many cases such prescribed auditor's report were required to be filed online in a preset form and, hence, it was not possible for the auditors to make necessary changes in these reports to bring them in line with the SA 700. Similarly, many a times, even where the auditor's report were to be submitted in a physical form and not filed online, the concerned regulatory/ government agencies may not accept such audit reports which contained any changes made by the auditors to the prescribed formats to bring them in line with SA 700.

2. In view of the above, the Council decided that while the matter was being taken up by the Institute with the relevant regulatory authorities/ Government agencies, etc., to change the prescribed formats for bringing the same in line with the requirements of SA 700, the members may, in the situations described in paragraph 1 above, submit the auditor's report in the format/ s prescribed under the relevant law or regulation until announcement of necessary change is made by the appropriate authority. In such cases the members would not be viewed as having not complied with the provisions of SA 700.

3. In this context, it may also be noted that paragraph A55 of the SA 200, Overall Objectives of the Independent Auditor and the Conduct of An Audit in Accordance With Standards on Auditing clearly states as follows:

"A55. In performing an audit, the auditor may be required to comply with legal or regulatory requirements in addition to the SAs. The SAs do not override laws and regulations that govern an audit of financial statements……"

4. Further, paragraph 43 of SA 700 requires that if the auditor is required by any law or regulation to use a specific layout or wording of the auditor's report, the auditor shall refer to Standards on Auditing only if the auditor's report includes, at minimum, each of the elements as prescribed in the said paragraph.

5. On a perusal of a cross section of the formats of the auditor's report prescribed under various laws, specially, the Income-tax Act, 1961 and the Value Added Tax Acts of various States, it is clear that these prescribed formats do not contain all the elements of the auditor's report as required in paragraph 43 of SA 700. In the background of the difficulties mentioned in paragraph 1 above, it may also not be possible for the auditors to suitably modify the prescribed format. Accordingly, it would not per se be possible for the auditors to state in their audit reports that the audit has been carried out in accordance with the Standards on Auditing. However, the auditors would be required to carry out the audits in accordance with the Standards on Auditing issued by the Institute of Chartered Accountants of India.

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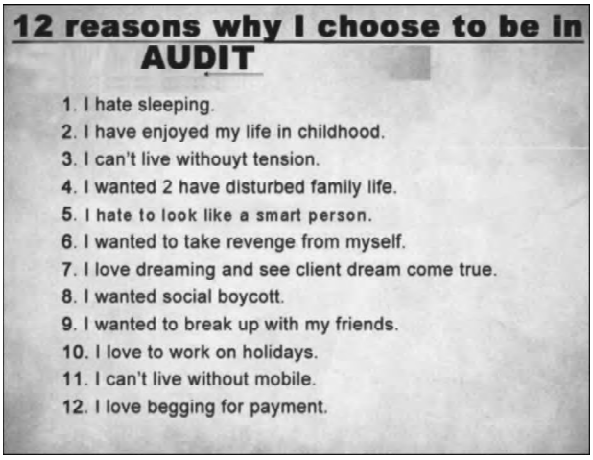

Procedures

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Obtaining Import- Export Code (IEC)

Introduction

- IMPORTER EXPORTER CODE (IEC) is a ten digit number granted by Directorate General of Foreign Trade under Ministry of Commerce and Industry, to any bonafide person/ company for carrying out import/ export.
- No export or import shall be made by any person without an Importer-Exporter Code (IEC) Number unless specifically exempted. IEC forms a primary document for recognition by Govt. of India as an Exporter / Importer. On the basis of IEC, companies can obtain various benefits on their exports / imports from DGFT, Customs, Export Promotion Council etc.
- IEC can be obtained from the nearest Zonal DGFT depending on where the company is located. An application for grant of IEC number shall be made by the Registered/Head Office of the applicant. An IEC Number allotted to an applicant shall be valid for all its branches/divisions/units/factories as indicated on the IEC number
- Only one IEC would be issued against a single PAN number.

Application

The application has to be made in ANF 2A i.e. Aayaat – Niryaat Form. Along with the Application Form it is necessary to submit Appendix-18B (appended hereto) which is attested by Applicant's Banker on its (bank's) letter head with two passport size photos of the applicant.

The application fee is Rs. 250 which can be paid by Demand Draft of any Bank or Payment through EFT (Electronic Fund Transfer by Nominated Bank by DGFT like HDFC Bank, ICICI Bank, State Bank of India, UTI Bank, Punjab National Bank, Central Bank etc) or application fee can be deposited by TR6 challan with 2 copies in any branch of Central Bank Of India and other 2 copies of TR6 Challan need to be submitted along with IEC Code Application.

Mandatory Requirements to apply for IEC Code Number

- Two copies of duly filled in Form ANF 2A. Each page of the application has to be signed by the applicant along with the stamp.
- Self-attested Copy of PAN Card
- Current Bank Account
- Banker's Certificate (Format of Appendix – 18B)
- Covering Letter on the company's letter head for issue of IEC Code Number
- Passport size photographs of the applicant duly attested by the Banker of the applicant.
- Two Self addressed envelopes with Rs. 45/- postal stamp for delivery of IEC certificate by registered post.
- The department (DGFT) also demands the following in case of a corporate entity:

1. A list of directors of the company /Form 32/DIN
2. Certificate of Incorporation
3. Memorandum and Articles of Association

On submission of the application to the DGFT office, acknowledgement will be provided by the officer mentioning file no. and will also inform about when to visit to check whether the application is approved or not. If the application is approved then IEC certificate will be directly posted to the postal address and if rejected then the query needs to be resolved and one needs to re-submit the same.

Where an IEC Number is lost or misplaced, the issuing authority may consider requests for grant of a duplicate copy of IEC number, if accompanied by an affidavit. If an IEC holder does not wish to operate the allotted IEC number, he may surrender the same by informing the issuing authority. On receipt of such intimation, the issuing authority shall immediately inform all the RBI/Customs/ Licensing authorities that the said IEC number has become inoperative.

For further details refer the following site :-

www.dgft.org

FORMAT OF BANK CERTIFICATE FOR ISSUE OF IEC

(To be issued on the official letter head of the Bank)

Ref No. .....

To

.....

.....

(Name and address of the licensing authority) Sir/ Madam,

We certify that M/s..... (Name and Address of the applicant) are maintaining a Savings Bank Account / Current Account (tick whichever is applicable) No. ..... with us since .....

.....

Affix Passport Size Photograph of the applicant

Note: The Banker must identify and attest the photograph.

(Signature of the Banker)

Name .....

Designation .....

Date: .....

Place: .....

(BanksStamp)

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Congratulations

To **Mr. Jinit Dharia**, son of our member CA. Pragnesh Dharia for securing 6th All India Rank in IPCE Examinations held in May 2013.

Glimpses of Supreme Court Rulings

Advocate Samir N. Divatia
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18 WRIT - ALTERNATIVE REMEDY

When a specific remedy is made available to the aggrieved party under Sec. 20 of Financial Institutions Act, 1993, Single Judge of the High Court, in exercise of its jurisdiction under Art. 226 of the Constitution of India, was not justified in interfering with the orders passed by the DRT – Power of the High Court under Art. 226 cannot be invoked in the matter of recovery of dues under the Act, unless there is any statutory violation resulting in prejudice to the party or where such proceedings or action is wholly arbitrary, unreasonable and unfair

T.P. Vishnu Kumar Vs. Canara Bank
(2013) 63 TAXCOM 405

19 Interest on delayed payment –

In absence of any express legislative intendment of the retrospective application of the Act and by virtue of the fact that the Act creates a new liability of a high rate of interest against the buyer, the Act cannot be construed to have retrospective effect. Since the Act envisages that the supplier has an accrued right to claim a higher rate of interest in terms of the Act, the same can only be said to accrue for sale agreements after the date of commencement of the Act, i.e. 23rd Sept., 1992 and not any time prior."

Conclusion : Provisions of interest on Delayed Payment to Small Scale and Ancillary Industrial Undertaking Act, 1993 are not retrospective in operation.

Purbanchal Cables & Conductors (P) Ltd Vs. Assam Sate of Ele. Board
(2013) 63 Taxcom 408

20 SUBSTANTIAL QUESTION OF LAW – PROVISO TO SEC.260A(4)

Proviso to Sec. 260A(4) empowers the High Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

Pawan Kumar Jain Vs. Deputy Commissioner of Income-tax
(2013) 63 Taxcom 428

21 Discretion and duty:

Discretionary power implies freedom of choice, a competent authority may decide whether or not to act. The legal concept of discretion implies power to make a choice between alternative courses of action. Discretionary power leaves the donee of the power free to use or not to use it at his discretion. Law is well settled that the exercise of statutory discretion must be based on reasonable grounds and cannot lapse into the arbitrariness or caprice anathema to the rule of law envisaged in Article 14 of the Constitution.

[State of Kerala and others vs. Kandath Distilleries (2013) 6 SCC 573]
Date : 27.08.2013

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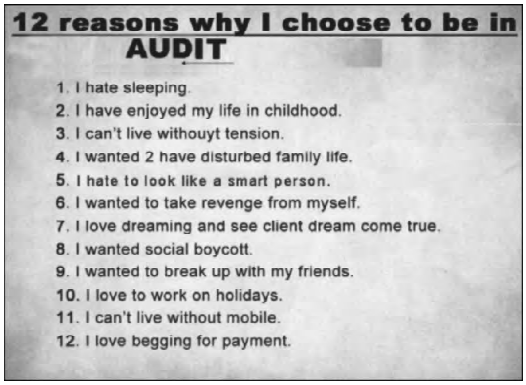

From the Courts

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36 Search: Issue of Warrant; Advice by Court :-

Dr. P.G. Viswanathan v/s. Director of I.T. (Inv.)
(2013) 351 ITR 217 (Mad)

Issue:-

What care is required to be taken before issuing authorization of search ?

Held:-

High Court has laid down the principle in the matter in the following words:-

The personal liberty and the privacy of a citizen stands on a high pedestal in the scheme of things contemplated under the provisions of the Constitution of India. Therefore, it is of permanent importance that the authority who exercises the power vested in him by a statute, should take utmost care and exercise sufficient caution while making the decision to issue the warrant to search the premises of person and to seize the necessary materials during the search.

37 Stay of demand : Officer to act with fairness :-

Deloitte Consulting India Pvt. Ltd. v/s Asst. CIT
(2013) 351 ITR 160 (Bom.)

Issue:-

What is expected of the officers in stay petitions?

Held:-

When the statute confers discretion on the Assessing Officer, that is discretion which is wielded in the exercise of a quasi judicial function. Assessing Officers reject stay applications in a cavalier fashion making a bold statement to the effect that 'looking to the facts and circumstances of the case', no case for stay has been made out. This does not amount to a valid or proper exercise of discretion. What is expected of an Assessing Officer is at least a brief statement in the order of the reasons on the basis of which he formed his opinion leading to exercising the discretion under section 220(6) against the assessee. Otherwise recourse to section 220(6) is meaningless formality. Assessing Officers when they dispose of applications under section 220(6) are required to act fairly. Fairness as a concept does not undergo a change in the hands of an Assessing Officer. Fairness requires objectivity. Objectivity is guided by the need to protect the revenue, while at the same time being fair to the assessee has to be tested in a statutory appeal.

38 Corporate membership fee of a Golf Club is revenue expenditure :-

CIT v/s Groz Beckert Asia Ltd.
(2013) 351 ITR 196 (P & H) (FB)

Issue:-

Whether corporate membership fee paid to a Golf Club is revenue expenditure?

Held:-

If an item of expenditure is to be considered capital in nature, the expenditure should bring into existence an asset or an advantage for the enduring benefit of a trade. Membership fee paid to a club does not bring into existence an asset or an advantage for the enduring benefit of the business. It is an expenditure incurred for the period of membership and is not long lasting. By subscribing to the membership of a club, no capital asset is created or comes into existence. By such membership, a privilege to use facilities of a club alone, are conferred on the assessee and that too for a limited period. Such expenses are for running the business with a view to produce the benefits to the assessee. Consequently, it cannot be treated as capital expenditure/asset.

39 Builder: Flats lying Vacant : Are unsold stock: ALV to be taxed :-

CIT v/s Ansal Housing Finance and Leasing Co. Ltd.
(2013) 213 Taxman 143 (Delhi)

Issue:-

In the case of a builder, when the flats are held as stock-in-trade, whether ALV of such flats is to be taxed?

Held:-

The assessee is engaged in building activities. It argues that flats are held as part of inventory of stock-in-trade,

and are not let out. The further argument is that unlike in the other instances, where such builders let out flats here there is no letting out and that deemed income which is the basis for assessment under the ALV method, should not be attributed. The argument though attractive cannot be accepted.

The levy of income tax in the case of one holding house property is premised not on whether the assessee carries on business as landlord, but on the ownership. The incidence of charge is because of the fact of ownership.

Thus, the assessee was liable to pay income tax on the annual letting value of unsold flats owned by it under the head 'income from house property'.

40 Remuneration to partners & Sec. 40A(2):- CIT v/s Great City Mfg Co. (2013) 256 CTR 420 (All)

Issue:-

Whether provisions of Sec. 40A(2) are applicable to remuneration to partners?

Held:-

All the three partners are working partners in the assessee firm and the A.O. has himself allowed the remuneration of Rs.4,00,000/- per annum to each of the partners. It is also not in dispute that the terms of the partnership deed specifically provided the payment of remuneration to the working partners. Sec. 40(b)(v) prescribes limit of remuneration which can be allowed to its partners as deduction while computing the business income. It is not in dispute that the remuneration paid to the working partners was within the provisions of cl.(v) of cl.(b) of Section 40. The Parliament in its wisdom had fixed a limit on allowing the remuneration to the working partners and if the remuneration is within the ceiling limit provided then recourse to provision of Sec. 40(A)(2)(a) cannot be taken. The A.O. is only required to see as to whether the partners are the working partners mentioned in the partnership deed, the terms and conditions of the partnership deed whether provide for payment of remuneration to the working partners and whether the remuneration provided is within the limits u/s 40(b)(v) or not. If all the aforesaid conditions are fulfilled then he cannot disallow any part of the remuneration on the ground that it is excessive. Since in the present case, all the conditions required have been fulfilled, the question of disallowance does not arise.

41 Refund of TDS paid by mistake :- FAG Bearings India Ltd. v/s Chief CIT (2013) 256 CTR 413 (Guj)

Issue:-

Is the assessee entitled to refund of TDS paid and deposited by mistake?

Held:-

Deduction of tax at source and depositing with government twice was a pure mistake. The respondents cannot retain any amount that the petitioner paid under pure mistake, particularly when the refund thereof was claimed shortly after the second payment was made and mistake was detected. Contention of the counsel for the respondent that deduction at the time of remittance was not a tax and therefore, not refund also is self-contradictory when he also contents that refund of tax is not covered either under circular dt. 6th Aug, 1998 or under circular dt. 20th April 2000. If the amount deposited with the Government of India was not tax at all, there was no question of holding on such amount deposited with the Government under mistake.

42 Sec. 179: Whether "tax due" in section includes interest and penalty? Maganbhai Hansrajbhai Patel u/s ACIT (2013) 256 CTR 269 (Guj)

Issue:-

For the purpose of liability of a director u/s 179, the word "tax due" would include "interest" and "penalty" also?

Held:-

Sec. 179 uses the words "tax due" and it would therefore, not be possible to stretch the language of Sec. 179(1) to include interest and penalty also in the expression "tax due".

Also See:-

Sanjay Ghai v/s ACIT & Ors. (2013) 256 CTR 241 (Del)

Note: The law has been amended w.e.f. 01-06-2013 whereby "tax" includes penalty, interest or any other sum payable under the Act.

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Tribunal News

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33 ITO vs. Ms. RANIA FALEIRO 142 ITD 769 (Panaji)

Assessment Year 2008-09, Order Dated: April 18, 2013

BASIC FACTS

The assessee has sold a long term capital asset on 5-02-2008 and has computed the capital gain at Rs. 1.16 Crores. She has invested in the Capital Gains Bond i.e. REC bonds a sum of Rs.50 lakhs on 31-03-2008 and a sum of Rs.50 lakhs on 30-06-2008. In the return of Income for the AY 2008-09, she claimed exemption under section 54EC of the capital gain amounting to Rs.one crore. The A.O. by referring to the proviso inserted in section 54EC(1) by the Finance Act,2007, with effect from 1-04-2007, took the view that the assesee could have made the investment only upto Rs. 50 lakhs. Therefore, allowing exemption for Rs.50 lakhshe made addition of the balance Rs.50 lakhs. On appeal CIT(A)deleted the addition made by the AO. The Revenue is therefore in appeal before the ITAT.

ISSUE

Whether the assesse was eligible for exemption under section 54EC of Rs.1 crore?

HELD

It was held that on plain reading of section 54EC and the proviso of the section it is observed that the limit of Rs.50,00,000/- is per person per financial year. There is no ambiguity in the interpretation. Had there been an intention of the legislature to restrict the exemption to Rs.50 lacs, the legislature would have provided the embargo in this regard. Condition for availing of the exemption requires that the investment can be made within a period of 6 months. If 6 months fall within 2 different financial years, the assesse can make investment to avail of the exemption in the different financial years if he had already made the investment in the financial year in which the capital asset is transferred.

From the Circular No.3/2008 dated12.3.2008 issued by CBDT being an explanatory note on the provisions relating to direct taxes in Finance Act, 2007, it is apparent that the Government only intended to restrict the investment in a particular financial year and accordingly has fixed the limit of Rs. 50,00,00/-as permissible limit in a particular financial year. If the legislature wanted to restrict the exemption itself to Rs.50 lacs it could have simply dispensed with using the words 'in financial year'. Therefore ITAT dismissed the appeal filled by the Revenue.

34 SC ENVIRO AGRO INDIA LTD.Vs.DCIT 143 ITD 195 (MUM)

Assessment Year 2003-04 & 2004-05, Order Dated: November 7, 2012

BASIC FACTS

The assesse manufacturing household insecticides and pesticides entered into a license agreement with SCCL for commercial production of specified products and paid royalty to SCCL forutilizing know-how and license. SCCL acquired90% of equity share capital of assessee. The Assesseesold most of its product to SCL, a 100% subsidiary of SCCL. TPO held that it was a contract manufacturing agreement and there was no justification for payment of royalty and, hence determined arm's length price at NIL.

ISSUE

Whether TPO can disallow any expenditure on ground that it was not necessary or prudent for the assessee to have incurred same?

HELD

It was held that in the A.Y. 2004-05 this issue was examined by the TPO on the basis of the TP report of the assesse wherein the assesse submitted that the arrangement is in the nature of contract manufacturers in FAR analysis. Since this fact was admitted by the

assesee,TPO held that the assesse need not pay any royalty on the presumption that assesse is a contract manufacturer. The TPO has to examine whether the price paid or amount paid was at arm's length or not under the provision of Transfer Pricing and its rules.The rules does not authorize the TPO to disallow any expenditure on the ground that it was not necessary or prudent for assesse to have incurred the same.Hence, the Tribunal disapproved the order so passed by the TPO as it not only considered the facts wrongly but also exceeded the jurisdiction available to the TPO in examining the arms length price on a transaction.

Apart from the legal position the tribunal held even on the merits that the disallowance of entire royalty payments on sale to AE was not warranted. Without going into nitty- gritty of determining whether assesse is a contract manufacturer or a full-fledged manufacture, since the royalty is paid for allowing assesse in utilizing technical know-how and the license for manufacturing activity, the payment of royalty is wholly and exclusively for the purpose of business. In view of the above, the Tribunal allowed the ground of the assesse and directed A.O. to allow the royalty as claimed.

35 KNORR-BREMSE INDIA (P.) LTD. V. ACIT (DEL) 56 SOT 349

Asst. Year 2007-08 Order Dated: 31stOctober, 2012

BASIC FACTS

The assessee-company was engaged in the business of manufacturing air brake sets of passenger cars and wagon coaches. The business of the company segregated in manufacturing and distribution segment.During the year under consideration, the assessee entered into international transactions with associated enterprise. In the course of transfer pricing proceedings, the TPO adopted CUP method. He determined ALP in respect of transactions relating to professional consultancy, management fee for support services at nil. Accordingly, certain adjustment was made in respect of transactions entered into by assessee with its AE. The AO thereafter made a draft assessment order wherein the adjustment suggested by TPO was incorporated without any alteration or adjustment. The objections raised by assessee against proposed assessment order were rejected by the DRP.

ISSUE

Whether since transaction by transaction approach was possible and, moreover, CUP method for subject transactions being most direct method for determining ALP then TNM method, was there any error in impugned order passed by TPO making adjustments on basis of CUP method?

HELD

The impugned transactions resulting into payment under the head 'professional consultancy', under the head 'management fee for support services' and SAP consultancy charges and other expenses were found to be distinguishable and separate international transactions, carried by the assessee with its AE.Each and every transaction was required to be bench marked separately. The assessee had not computed net profit margin realized from each such transaction nor laid any material on record to show that the available data of comparable transactions, if any, was unreliable or inadequate.These transactions were also not shown to be closely linked with each other. In India no guidance is provided regarding criteria for choosing a particular method and the law also does not provide for priority of any particular method to be applied. However, as per the rational approach followed by OECD and also by some countries, the CUP method is considered to be the most direct method for determining ALP wherein the taxpayer can use the published data of stock exchange or any other media quotation as an indirect or secondary evidence or such data as specified in rule 10D(3) of Income-tax Rules, 1962, for comparing the transactions and making adjustments for differences, if any. The assessee also did not demonstrate as to how the transaction by transaction approach in its case is not possible. It has also not been shown as to whether there has been any real or tangible benefit by carrying such international transactions with the AEs. The comparable uncontrolled price method ('CUP' method), for the subject transactions being most direct method for determining arm's length price and chosen as most appropriate method by the TPO, therefore, cannot be faulted with. Thus, there is no error in rejecting the TNM method applied by the assessee

and determination of ALP by applying CUP method for benchmarking international transactions in a case like this. The DRP also cannot be said to have erred in approving the CUP method adopted by the TPO for benchmarking international transactions with the AE. The assessee's ground on this count being devoid of any merit stands rejected.

36 ACIT vs. JOE MARCELINHO MATHIAS 143 ITD 132 (MUM)

Asst. Year 2009-10, Order Dated: 26th April, 2013

BASIC FACTS

The assessee was carrying on the business in property development. He was the sole proprietor of his business. During the previous year ending on 30-3-2009, he had transferred all the assets and liabilities of his proprietorship concern to a private limited company 'M' as per the Deed of Succession dated 31-3-2009. In this Deed of Succession, the assessee had re-valued the assets at Rs. 963 crores and against the entire consideration he was allotted equity shares in the company 'M'. However, the net worth of the proprietary concern of the assessee was Rs. 1.61 crores. The assessee claimed that the provisions of section 47(xiv) were applicable to the transfer so made. The AO held that the assessee had not complied with the condition stipulated under clause (c) of proviso to section 47(xiv), as he had received consideration by way of allotment of shares in the company 'M' and the value of those shares was much more than the value of the assets as was disclosed in the books of the proprietary concern.. He, therefore, held that the provisions of section 47(xiv) were not applicable in the instant case. He treated the difference between Rs. 963 crores and Rs. 1.61 crores as business income and added the said amount to the income of the assessee. On appeal, the CIT (A) deleted the impugned addition made by the AO. The department was in appeal before the Tribunal.

ISSUE

Whether the assesse was entitled to exemption under section 47(xiv))?

HELD

As per s. 47(xiv) it is apparent that where the sole proprietorship concern is succeeded by a company in the business carried on by it as a result of which said proprietary concern sells or otherwise transfers any capital asset or intangible asset to the company, the transactions are not treated as transfer subject to the three conditions laid down therein. The only objection on the part of the revenue is that the assessee did not comply with the condition stipulated under clause (c) of proviso to section 47(xiv), that assessee had received consideration by way of allotment of shares in the company and the value of those shares is much more than the value of the assets as was disclosed in the books of the proprietary concern. The assessee had duly complied with clause (c) of s. 47(xiv). This provision only requires that the proprietor does not receive any consideration or benefit, directly or indirectly, in any form or manner, other than by way of allotment of shares in the company.The words 'other than by way of allotment of shares in company' qualifies the words 'does not received consideration or benefit as well as directly or indirectly'. This clearly denotes that clause (c) of proviso to section 47(xiv) permits receiving of consideration or benefit directly or indirectly by way of allotment of shares in the company. Clause (c) of proviso to section 47(xiv) does not prohibit receipt of higher value of shares because of re-valuation of the assets at the time of succession. Therefore, the order of CIT(A) was confirmed.

37 APOLLO TYRES LTD. vs. DCIT 155 TTJ 470

Asst. Year 2006-07, Order Dated: 29thMay, 2013

BASIC FACTS

The assessee deducted tax at source on payment to its contractor. However, there was short deduction of tax. The AO disallowed the entire payment under section 40(a)(ia) for short deduction. On appeal, the assessee contended that payment could not be disallowed for short deduction of tax, and only interest under section 201(1A) could be levied. However, the CIT (A) confirmed the disallowance. On assessee's appeal:

ISSUE

Whether provisions of s.40(a)(ia) enables AO to disallow proportionate amount in case of short deduction of TDS?

HELD

Section 40(a)(ia) enables the AO to disallow any payment towards interest, commission or brokerage, fee for professional service, fees for technical service etc. on which tax is deductible at source under Chapter XVII-B, if such tax has not been deducted or after deduction has not been paid. Section 201(1A) enables the Assessing Officer to levy interest in case the tax was not deducted either wholly or partly or after deduction it was not paid as required under the Act. In other words if any part of tax which is required to be deducted is not deducted then interest under s. 201 (1A) can be levied in respect of that part of the amount which was not deducted. Whereas language of s. 40(a)(ia) does not say that even for short deduction disallowance has to be made proportionately. Section 40(a)(ia) does not envisage a situation where there was short deduction/lesser deduction as in case of s.201(1A) of the Act. There is an obvious omission to include short deduction/lesser deduction in s. 40(a)(ia). In case of short deduction of tax the entire expenditure whose genuineness was not doubted by the AO cannot be disallowed. The order of lower authority is set aside and the entire disallowance is deleted.

38 SHRI KANSARA MODULAR LTD. vs. ACIT143 ITD 218 (Jodh)

Asst. Year 2006-07, Order Dated: 11thFebruary, 2013

BASIC FACTS

The assessee had raised loans from banks to start its business. Subsequently due to heavy losses the assessee was in trouble and a settlement with the banks was arrived as per which bank gave a waiver of interest amount to assessee. Whatever was given as a waiver out of interest amount had been treated by Assessee as a capital receipt being related to pre-operational period when it was capitalized on the cost of assets & not claimed as deduction u/s 36(1)(iii) or 37. The AO treated said sum as a revenue receipt. The CIT(A) also treated said amount as taxable under s. 41(1) and s. 28(1). Aggrieved assessee appealed in tribunal.

ISSUE

Whether waiver of interest pertaining to pre-operative period is taxable under section 41(1) and section 28(1)?

HELD

The operation of the statutory fiction created by section 41(1) has to be limited to the language of that section. When the assesse has incurred a trading liability and it has been allowed as deduction otherwise in an earlier year and something has been recovered in respect of such liability even by way of remission or cessation than only this section comes into play. In facts of the case, the assesse never got deduction in respect of interest under section 36(1)(ii) or under section 37 of the Act. Therefore section 41(1) is not at all relevant to tax this benefit qua the preoperational stage interest waiver.

When Bankers wrote off the liability of the assesse company, it cannot be said in retrospect that the cost to the assesse of any part of the capital assets acquired during the years under installation was met by bankers. Therefore this waiver of loan cannot be considered as income as it is capital in nature and allowance of depreciation cannot be equated with deduction in respect of loss, expenditure or trading liability and therefore depreciation allowed cannot be brought back to tax.

The Tribunal also disagreed with CIT(A) finding that amount of interest relating to preoperative period became part of trading operation of business and any benefit received on account of waiver ofinterest is in the nature of profits and gains ofbusiness in terms of provisions of section 28(iv).

Accordingly appeal of the assesse was allowed.

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FEMA & NRI Taxation

NRO Balance - Remittance abroad & Transfer to NRE Account

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The Foreign Exchange Management Act of 1999 [FEMA] which came into effect since 1st June 2000 continued the legacy of Foreign Exchange Regulation Act of 1973 in permitting remittance of erstwhile balances held in Non Resident Ordinary Account which per se were not repatriable. FEMA was enacted allowing inheritance remittance upto an amount of INR 2 mn .

But for some strange reasons this facility was offered only to a foreign citizen of Indian origin who had retired from employment in India or had inherited funds from a person resident outside India and who had these assets held before migration and also to a widow residing outside India whose husband was an Indian citizen. Well why only foreign citizens ; why inheritance of accumulated assets held in India prior to migration of the overseas person of Indian origin [PIO] only and why a widow of an Indian citizen only ; why not the widower ...well...well..there can be endless questions regarding this simple facility of repatriation upto INR 2 mn only and one would really wonder how many persons would have been covers by these conditions and of them how many would have really enjoyed the facility ! Honestly I am not trying to create a sick joke of the regulation but for sure this kind of provision shows the paucity of vision and clarity amongst the statute makers.

Now lets look at the brighter side . In September 2002 vide circular no. 19 while raising the limits of these facilities to US$ 100,000 the Draftmen's Team probably realised that Overseas Indians would include Indian citizens or whatever but facility of remittance abroad of legacy and inherited funds amounting to US$ 100,000 was also granted to Non resident Indians[NRIs] being Indian citizens and foreign citizens who be PIOs. In July 2003 this facility was extended to all legitimate amounts held in Non Resident Ordinary [NRO] accounts being sale proceeds of Indian assets or inherited assets and in January 2003 vide circular no 67 the ceiling was raised to US$ 1 mn..

And finally in January 2004 vide circular 62 the Reserve Bank of India extensively clarified various issues pertaining to eligibility , purpose , ceiling of amount etc. which are discussed herein:

1. Persons eligible : Foreign national other than a national of Nepal or Bhutan or Person of Indian origin who had :.01 retired from employment in India;.

02 had inherited assets from a person who was resident in India or .

03 a widow residing abroad who had inherited assets from her deceased husband who was an Indian citizen and also a resident in India.It is therefore worthwhile to notice that even a foreign national of non Indian origin is eligible to avail the benefit of repatriation herein.

1.2 And a Non Resident Indian [NRI] or a Person of Indian Origin [PIO] .

2. Source of Assets eligible : In case of Foreign nationals or PIO being retirees ; beneficiaries of inherited assets or a widow residing abroad inheritance of legacy of assets. Self acquired assets are not covered herein.

2.2 In case of NRIs and PIOs also till January 2003 remittance of inherited assets or legacy only were eligible .

2.21 In January 2003 while raising the limit of US$ 100,000 to US$ 1 mn the words "out of balances held in NRO account " and " sale proceeds of assets " were inserted widening the scope of source beyond inheritance and legacy for NRIs and PIOs.Therefore NRIs/PIOs are eligible to transfer all and every legitimate source of funds which can be credited in NRO account including transfer from NRE or FCNR accounts and also credit of forex remittance from abroad.

2,22 In June 2004 amount received by way of deed of settlement made by parents or close relatives was added to eligible amounts upon death of the settlor.

2.23 And in November 2006 vide circular dated 12 the condition of sale proceeds of immovable properties being held for 10 years was also removed. While doing so Circular 12 speaks of amount of Gift being eligible for remittance which is erroneous as the

Regulations do not permit Gifts received to be remitted upto US$ 1 mn.

2.24 In course of this journey amounts received on account of provident funds and super annuation funds are also held to be eligible.

3. Amount eligible : Initial limits of INR 2 mn was raised to US$ 100,000 in May 2002 and eventually to present limits of US$ 1 mn in July 2003..02 And the limits wedded to calendar year were linked to financial year in May 2002.

4. Procedures : Application in Annexure A and Form A2 were prescribed to be submitted by the Account holder and Chartered Accountant's certificate regarding tax payable being paid in Annexure B together with supporting documents were to be submitted to the Bank maintaining the NRO account.

.02 Originally Tax Clearance Certificate or Income Tax Officer's No Objection Certificate were required to be submitted which were replaced for Chartered Accountant's certificate as prescribed by the CBDT in May 2007.

.03 Upon introduction of Form 15CA and Chartered Accountant's certificate in Form 15CB same were incorporated for submission.

.04 It is strange that although Annexure A and B are not notified to be abolished most of the Banks have stopped asking for submission thereof under a fallacy of Form 15CA and CB replacing the same and have been allowing the facility of remittance without submission of Annexure A and B.

5. NRO to NRE permissible : As balance in NRO account was permitted for remittance to abroad and as such Overseas remittance could be retransferred back to NRE account Our Office had made strong representation to the Reserve Bank of India which must have been made by other Firms and Associations too.

.02 On 7th May '12 RBI granted permission for direct credit/ transfer of balance in NRO account to NRE account upto US $ 1mn per year to NRIs/PIOs similar to facility of remittance abroad.

6. Conclusion : Therefore an NRI or PIO can transfer all and every legitimate balance credited and held in NRO account which would include :

.01 Transfer from NRE or FCNR account.

.02 Credit in NRO account by way of forex remittance.

.03 Balances of pre-migration assets which may be realised later being capital and credit balances of Proprietorships & Partnership Firms ; shares of Private or Public Companies ; sale proceeds of own or inherited properties and other assets including agricultural lands; PPF and retirement pensions ; Post Office and Bank balances ; realisation of loans and advances ; share of Hindu Undivided Family upon partition ; capital gains and other legitimate credits.

However many a times the original accounts are continued as Resident accounts which can raise issues as upon migration all bank accounts are to be designated as NRO accounts ; Demat accounts also as Non Resident Non repatriable accounts and Firms , Companies are to be notified about change of status from Resident to Non Resident whereby tax is also to be deducted under Section 195 at 30%.

6.2 All legitimate incomes being fully repatriable subject to payment of tax and submission of applications and CA certificates the same are not covered by this ceiling of US$ 1 mn as the same can be remitted without any limit.

6.3 Applications should be submitted in Annex. A and Form 15 CA with Form A2 as also Chartered Accountant's Certificates in Annex B and Form 15CB together with documentary evidence for the source and realisation of assets.

6.4 PAN cards need to be availed to facilitate credit of tax deduction at source and the same should be mentioned in Form 15 CA .A dicey issue arises about mention of TAN in Form 15 CA as the NRI is not the deductor nor has a TAN and quite often it is the Bank which facilitates the transfer.

6.5 NRO account holder should be asked to avail Tax Residency Certificate from country of residence as that would make them eligible to enjoy benefit of lower tax rate as specified under Double Tax Treaty on the interest amount of NRO account before remittance or transfer.And ofcourse NRIs and PIOs need to remember that interest earned on NRO account as also NRE accounts and all other incomes in India are also taxable in the country of their residence although tax credit may be availed under relevant Double Tax Treaty.

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Controversies

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Sec.40 (a) (ia) Disallowance for Short Deduction of TDS

Issue:

A question that arises is what would happen if the assessee deducts tax at a rate lower than what is prescribed under relevant provisions of Chapter XVII-B. The short deduction results in non-compliance with the provision of Chapter XVII-B. The cases for short deduction of TDS are becoming increasingly numerous. Strictly speaking the short deduction results in non-compliance with the provisions of Chapter XVII-B. It appears that the IT department takes a view that out of the total TDS of Rs.50,000/- even if a person fails to deduct tax to the extent of Rs.500/- or fails to include surcharge on the TDS amount then the entire expenditure is sought to be disallowed.

Proposition:

It is proposed that only non-deduction of tax attracts disallowance u/s 40(a) (ia) & short deduction is not covered by sec.40(a)(ia).Let me refer to the most debated issue by the IT department. The assessee has made payments for repairs & maintenance of the machinery & has deducted tax at source at the rate of 2% u/s 194C,while AO takes a view that such payment is covered by the provisions of section 194J & the TDS rate should be 10%.In his view the entire payment made for repairs & Maintenance has to be disallowed u/s 40(a)(ia).It is submitted that when TDS has been made from the payments made then even if there is a short fall no disallowance can be made u/s 40(a)(ia).

View Against The Proposition:

Let me first refer to the section applicable for disallowance in respect of TDS default;

40(a) (ia):

"40(a)(ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under chapter XVII-B and such tax has not been deducted or after deduction has not been paid on or before the due date specified in sub-section (1) of section 139:"

Thus, it is submitted that when tax is not deducted at source as per Chapter XVII-B, the expenditure in question has to be disallowed. In this provision it is provided that where in respect of any sum as referred in this section tax has not been deducted or after deduction has not been paid on or before the due date specified in sub section (1) of the sec.139 of the act such sum shall be disallowed as a deduction while computing the income of the assessee for the previous year relevant to the assessment year under the consideration. It is further submitted that whenever there is lesser deduction of tax at source then the expenditure in question will have to be disallowed. Strictly speaking the entire expenditure where TDS is not made has to be disallowed. However, liberally the proportionate expenditure can be disallowed. For example, TDS rate applied by the assessee for the payment made to the company is 2%, while AO is of the view, it should be 10% then if a liberal view is adopted then proportionate expenditure i.e. 1/5th of the expenditure shall be disallowed. There is no word like failure used in sec .40(a) (ia) of the act & it refers to only non-deduction of tax and disallowance of such payments. Reading of the section clearly suggests that it does not refer to genuineness of the payment or otherwise but addition under section 40(a) (ia) can be made even though payments are genuine but tax is not deducted as required under Chapter XVII-B.

View in Favour of the Proposition:

Sec. 40(a) (ia) clearly provides that if assessee has not deducted tax at source then only disallowance can be made. Thus, in case of non-deduction of tax only sec. 40(a) (ia) applies. In case of short deduction under bona fide wrong interpretation sec. 40(a) (ia) of the act cannot be invoked.

Let me refer to the decision of ITAT DELHI BENCH 'F' in the case of ACIT, circle-2, Ghaziabad v. PankajBhargava [2013] 33 taxmann.com 484 (Delhi-Trib.), the honorable ITAT relied on the decision of Dy.CIT v. S.K. Tekriwal [2011] 48 SOT 515/15 taxmann.com 289 (Kol.).

"We are of the view that the condition laid down u/s 40(a) (ia) of the Act for making

Addition is that tax is deductible at source and such tax has not been deducted. If both the conditions are satisfied then such payment can be disallowed u/s 40(a)(ia) of the Act but where tax is deducted by the assessee, even under bonafide wrong impression, under wrong provisions of TDS, the provisions of section 40(a) (ia) of the Act cannot be invoked. Here in the present case before us, the assessee has deducted tax u/ s 194C (2) of the Act and not u/s 194I of the Act and there is no allegation that this TDS is not deposited with the Government account. We are of the view that the provisions of Section 40(a)(ia) of the Act has two limbs, one is where, inter

alia, assessee has to deduct tax and the second where after deducting tax, inter alia, the assessee has to pay into Government Account. There is nothing in the said section to treat, inter alia, the assessee as defaulter where there is a shortfall in deduction. With regard to the shortfall, it cannot be assumed that there is a default as the deduction is not as required by or under the Act, but the facts is that this expression, 'on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction has not been paid on or before the due date specified in sub-section (1) of section 139'.

This section 40(a) (ia) of the Act refers only to the duty to deduct tax and pay to government account. If there is any shortfall due to any difference of opinion as to taxability of any item or the nature of payments falling under various TDS provisions, the assessee can be declared to be an assessee in default u/s 201 of the Act aid no disallowance can be made by invoking the provisions of section 40(a)(ia) of the Act".

Let me refer to the decision of ITAT Delhi Bench 'H' in the case of UE trade India Corporation Ltd. v. Dep. CIT, Circle-18(1),New Delhi[2012]28 taxmann.com77 (Delhi),the honorable tribunal was considering a case where the assessee paid storage charges and deducted tax at source at 2% and did not include the surcharge also the AO came to conclusion that TDS has to be made under section 194 I at the rate of 10%. The tax auditor in the tax audit report of the form 3CD also gave details of short fall of TDS. Still the honorable tribunal relying on other decisions of ITAT held that no disallowance can be made u/s 40(a) (ia).

One interesting and beneficial judgment is give in the case of DCIT V. S.K. Tekriwal where it is clearly held that short deduction of tax does not result into proportionate disallowance under section 40(a) (ia).

Useful reference can be made to the decision of IT Officer, Ward-11(4), Kolkata v. Premier Medical Supplies & Stores, where assessee paid commission to directors and treated the same as part of salary and TDS was made u/s 192 , while AO disallowed the payment of commission on the ground that TDS should have been made u/s 194 H. The honorable tribunal clearly held that if there is any short fall of TDS due to any difference of opinion regarding the nature of payments falling under various TDS Provisions the assessee can be declared to be an assessee in default u/s 201 and no disallowance can be made by invoking provisions of sec. 40(a) (ia).

In the case of DCIT v. Chandabhai Jasabhai again the honorable ITAT Mumbai Bench 'C' held that provisions of sec. 40(a) (ia) can be invoked only in the event of non-deduction of tax at source and not for lesser deduction of tax at source.

Summation:

Where the assessee is advised that there is no duty to deduct tax on which the assessing officer takes a contrary view.

1) One possible defense in such case is where two provisions are applicable or there are two views as to the deductibility, the one favorable to the taxpayer as understood by him should be acceptable for the purpose of tax deduction at source.
2) An alternative defense may be in cases, where the tax is paid by the deductee accounting the amounts failed to be deducted or short deducted. There is an abatement of liability to deductor for tax failed to be deducted in such cases in the light of the decision of supreme court in Hindustan Coca cola Beverages Ltd. V. CIT [2007]293 ITR 226.

In almost all the decisions referred to above, it has been held that lesser deduction of tax at source should be treated as default under section 201. In this situation also the assessee may rely on the decision of supreme court in Hindustan Coca cola Beverages Ltd. V. CIT [2007],293 ITR 226.

When assessee is able to prove that deductee has paid tax then no penalty u/s201 is also leviable .We can also refer to the amendment in section 40(a) (ia) made by the finance act,2012 whereby second proviso has been inserted in sec.40(a) (ia) and the proviso reads as under:

"Provided further that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201,then, for the purpose of this sub-clause , it shall be deemed that the assessee has deducted and paid the tax on such sun on the date of furnishing of return of income by the resident payee referred to in the said proviso."

Question arises whether the amendment is retrospective or not. For this we may rely on the decision of supreme court in Allied motors Pvt.Ltd. V.CIT [1997] 224 ITR 667 (SC) and CIT V. Alom Extrusions Ltd. [2009] 319 ITR 306 (SC).As per this decision it is possible to argue that since the amendment is clarificatory in nature it should be applied retrospectively.

The decisions referred above suggest that once an assessee deducts tax at source from a particular payment, no disallowance can be made in respect of that expenditure under any circumstances. However, this may be a very liberal reading of these decisions. While the facts of these cases suggest that there was a genuine reason for short deduction of tax at source, the tribunal did not seem to have discussed the same. It may not be advisable for assessee to apply the ratio of these judgments where short deduction is not due to any bona fide reason.

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Judicial Analysis

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Ahmedabad Bench of ITAT lays down important principles of International Taxation and Transfer Pricing

1 ITO v. Veeda Clinical Research (P.)Ltd. [2013] 35 taxmann.com 577 (Ahmedabad - Trib.)

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2. There is no dispute that the payments were made by the assessee for certain training services provided to the employees of the assessee company. The training was in the nature of "in house training of IT staff and medical staff" and of "market awareness and development training". There is also no dispute that in terms of the provisions of Article 13(4)(c) of India UK Double Taxation Avoidance Agreement [206 ITR 235 (Statute)], fees for technical services can be brought to tax in the source country only when such services "make available (emphasis supplied by us) technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design". However, the claim of the assessee that the training services received by the assessee did not "make available" any technical knowledge, experience, skill, know how or process, or consist of the development and transfer of a technical plan or design, has been rejected on the ground that connotations of the expression 'make available' also include the cases in which technical services were offered or made accessible to the recipient of services and not necessarily confined to the cases in which the recipient should be "trained or made expert in such technical knowledge etc". The Assessing Officer also added that "it will be absurd on the part of a person to make other person expert of its core competence, which will result in a situation that the recipients of services will not look again to him when these services are again needed in future. The Assessing Office then referred to the examples set out in MOU to India US Double Taxation Avoidance Agreement [187 ITR 102 (Statute)] wherein 'technical training' is said to be specifically included. References were also made to the search results produced by google search engine for meaning of the expression 'make available' and it was emphasized that the same meaning be applied in the present context as well. On this basis, the Assessing Officer concluded that the training fees paid by the assessee is taxable in India under Article 13(4)(b) of India UK DTAA. Accordingly, the Assessing Officer raised demands under section 201 r.w.s. 195 of the Act. Aggrieved, assessee carried the matter in appeal before the learned CIT(A). Learned CIT(A), in his rather brief, referred to the wordings of Article 13(4)(b), stated that this deals only with technical and consultancy services which "are ancillary and subsidiary to the enjoyment of the property" referred to in Article 13(3)(b) - something which is clearly unrelated to the facts of this case, and inferred that since the services are not covered under Article 13(4)(b), "the payment made by the appellant is not covered by Article 13(4) of the DTAA between India and UK". It was thus concluded that "the order passed by the Assessing Officer is not as per Article 13(4) of the DTAA between India and UK". The demands raised under section 201(1) r.w.s. 195 and under section 201(1A) r.w.s. 195 were, accordingly, cancelled.

5. The law is by now settled so far as the connotations of 'make available' clause in the definition of fees for technical services in the contemporary tax treaties are concerned. It is held to be a condition precedent for invoking this clause that the services should enable the person acquiring the services to apply technology contained therein. There are at least two non-jurisdictional High Court decisions, namely Hon'ble Delhi High Court in the case of DIT v. Guy Carpenter & Co. Ltd. [2012] 346 ITR 504/207 Taxman 121/20 taxmann.com 807 and Hon'ble Karnataka High Court in the case of CIT v. De Beers India (P.) Ltd. [2012] 346 ITR 467/208 Taxman 406/21 taxmann.com 214 in support of this proposition, and there is no contrary decision by Hon'ble

jurisdictional High Court or by Hon'ble Supreme Court. We, therefore, hold that unless there is a transfer of technology involved in technical services extended by the UK based company, the 'make available' clause is not satisfied and, accordingly, the consideration for such services cannot be taxed under Article 13(4)(c) of India UK tax treaty. No doubt, as pointed out by the learned Assessing Officer, there can indeed be situations in which technical training is imparted resulting in transfer of technology, even consideration for rendering of training services will be covered by the definition of 'fees for technical services' but what is really the decisive factor is not the fact of training services per se but the training services being of such a nature that it results in transfer of technology. In the present case, the training services rendered by the service provider are general in nature as the training is described as 'in house training of IT staff and medical staff' and of 'market awareness and development training'. Clearly this training does not involve any transfer of technology. In any case, in order to successfully invoke the coverage of training fees by 'make available' clause in the definition of fees for technical services, the onus is on the revenue authorities to demonstrate that these services do involve transfer of technology. That onus in not at all discharged by the Assessing Officer, or even by the learned Departmental Representative. In the written submissions filed before us, main thrust of the arguments is that "the services provided were in the nature of 'fees for technical services' as defined in Explanation 2 to Section 9(1)(vii) of the Income Tax Act", that "the AO has finally held that the service provider has provided or made accessible the services of its technical knowledge and experience to the assessee company and, therefore, the payment was covered by the definition of 'fess for technical services' as per Article 13 of tax treaty between India and United Kingdom", and that, therefore, "the aforesaid payments were held taxable by virtue of both the provisions of the Income Tax Act and (the applicable) tax treaty.....". These submissions overlook the fundamental position that the provisions of the Income Tax Act apply in a treaty situation only to the extent they are more favourable, vis-à-vis the provisions of tax treaties, to the assessee. Accordingly, when case of the revenue authorities fails on the tests of the treaty provisions, there is no occasion at all for their leaning upon the provisions of the Income Tax Act. The case of the revenue authorities, as discussed above, does not succeed on the provisions of the tax treaty as there is nothing to establish, or even indicate, that there is any transfer of technology in the present case. In view of these discussions as also bearing in mind entirety of the case, in our considered view, the fees for training services of general nature, which does not seem to involve any transfer of technology, cannot be brought to tax under section 13(4)(c) of India UK tax treaty.

2 Micro Inks Ltd. v. ACIT [2013] 36 taxmann.com 50 (Ahmedabad - Trib.)

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10. We find that there is no dispute about the fundamental factual position that the assessee before us wholly owns Micro Inks GmbH Austria, which in turn, wholly owns Micro Ink Corporation USA. These facts are also clearly discernible from the financial statements of these two foreign companies, for the relevant previous years, as filed before us. The company to which interest free loan was given by the assessee company is admittedly a first step down subsidiary of the assessee before us and is wholly owned by the assessee before us. It is also undisputed that the amounts advanced by the assessee to this step down subsidiary were eventually converted into equity capital contribution, and that the amounts were given as an advance because, on one hand, assessee could give funds upto US $ 50 millions from its EEFC (Exchange Earners Foreign Currency) account to its subsidiary without seeking any RBI clearance also, the assessee was forbidden from making equity investment in the foreign subsidiary without taking the RBI permission, and the assessee was required to obtain permission of the RBI for subscribing to the equity capital abroad. While notification no. FEMA 19/RB-2000 dated 3rd May 2000, a copy of which was placed before us, clarifies that no such approval is needed while making payments from assessee's EEFC account, it is a matter of record that the permission for investment in capital of foreign subsidiary was mandatory and as was also granted by the RBI on 11th October 2011 - subject to the

conditions set out therein. It is also an undisputed position, and uncontroverted stand of the assessee, that the assessee before us is the sole vendor of raw materials and the semi finished goods to this step down subsidiary, and the volume of these transactions is so significant that in the relevant previous years it was as high as over 90% of total exports and over 50% of its total sales. These facts are very significant because these facts not only show the factual ownership of Micro USA, these facts also show the economic dependence of Micro USA on the assessee and vice-versa. The existence of Micro USA has virtually ensured the assessee of the market of its raw materials and semi finished goods in the USA, and thus effectively have a say in ink market in that part of the world. Let us, on this factual matrix, come to the principles based on which arms length price adjustments are required to be made in value of an intra associate enterprise transaction.

11. In our considered view, and as was noted in the case of VVF Ltd v. DCIT (2010 TII 4 ITAT MUM TP), " on a conceptual note, the purpose of making arms length adjustments, in prices at which transactions have been entered into with associated enterprises, is to nullify the impact of interrelationship between the associated enterprises". The true test, must, therefore lie in answer to the question whether, but for interrelationship between the associated enterprises, would the assessee and its associated enterprise have entered into this transaction at this value, and when the answer is no, an appropriate adjustment to such value of the transaction is clearly warranted and justified. However, we must deal with an even more fundamental question, before we can address ourselves to this question, and that question is as to what is the type of interrelationship the impact of which is sought to be nullified by the arm's length price adjustment. Section 92 A of the Income Tax Act 1961, defines associated enterprises as "in relation to another enterprise, means an enterprise- (a) which participates, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise; or (b) in respect of which one or more persons who participate, directly or indirectly, or through one or more intermediaries, in its management or control or capital, are the same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise". As evident from this statutory definition, the importance of an enterprise being an associated enterprises lies in the management, capital or control of an enterprise being in common hands -either in one of associated enterprises or in the hands of a common person other than one of these enterprises. Therefore, the question which really needs to be adjudicated is whether but for the management, capital or control being in the same hands or in the hands of the one of the associated enterprises, the associated enterprises would have entered into the transaction on the same terms. In other words, whether there is such a commercial justification for the values at which transactions have been entered or not, so as not to attract the adjustment in the arm's length price, has to essentially depend on the factors other than the factors regarding management, capital or control. In still other words, merely because the entity receiving interest free funds is a subsidiary wholly owned by the assessee cannot be reason enough to justify such loans or advances being interest free and not warranting an arm's length price adjustment, so far as transfer pricing provisions are concerned.

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18. Therefore, even when we take LIBOR plus rate as the base rate for an advance in step 1 of the above computation process, such base rate will have to adjusted inter alia for the differences..... (a) between the international transaction and the comparable uncontrolled transaction, and (b) between the enterprises entering into such transactions, which could materially affect the price in the open market". On both of these counts, adjustments will have to be necessarily made in the LIBOR plus rate. While the international transaction before us is that of advancing an interest free unsecured loan for helping a entity overcome its teething problems and pending the approval for capital subscription is received from the Reserve Bank of India, a typical LIBOR plus rate transaction is the transaction in which banks gives secure advances, for making profits out of so lending the money, to its customers. Strictly speaking, there is no parity

between these two types of transactions. Secondly, we are dealing with a situation in which the two enterprises are mutually dependent for commercial reasons. While Micro USA is dependent on the assessee for its sheer existence, the assessee is dependent on Micro USA for its business. Let us assume for a while that Micro USA is unconnected with the assessee so far as its management, capital and control is concerned, but even then and without this management, capital and control relationship, the assessee, as an independent enterprises, will make sense in giving interest free advances to Micro USA so as to ensure its continued market access in USA and for other commercial reasons. This is quite unlike a typical transaction on LIBOR plus rate in which only motivation for giving advance is earning interest. Clearly, thus, LIBOR plus rate cannot be adopted in this situation for two fundamental reasons - (i) first, that it is not a simplictor financing transaction between the assessee and Micro USA, as it is a transaction of investing in a step down subsidiary as quasi capital pending formal capital subscription with the approval of Reserve Bank of India; and (ii) second, that it is not a case of granting advance to a business concern without significant and decisive commercial considerations, as the monies are given for strengthening assessee's marketing apparatus in US and to keep alive its biggest exports customer. There is a difference in the nature of transaction and there is also a difference in the nature of the enterprises, including their inter se commercial relationship, entering into this transaction. The differences are so fundamental that these differences, to use the phraseology employed in Rule 10 B (1)(a)(ii), "could materially affect the price in the open market". On account of these peculiar factors, the application of LIBOR plus rate or, for that purpose, any bank rate will be inappropriate to this case.

19. The next logical question, therefore, is as to what would be the price at which such interest free advances could be given in comparable uncontrolled transactions. In other words, in case the assessee and the Micro USA were not associated enterprises in legal sense of that expression, at what rate the assessee would have granted advances pending approval for capital subscription in a company which is playing such a vital role in its business plans. It is so for the reason, as we begun by pointing out, the whole purpose of the arm's length price adjustment is to nullify the impact of management, capital and control interrelationship between the associated parties. In our humble understanding, on the pure commercial factors and notwithstanding the management, capital and control relationship between the parties, such non interest bearing advances were equally justified even if the assessee and Micro USA were independent enterprises. Of course, we are alive to the fact that but for the management, capital and control interrelationship, Micro USA could not have played such a strategically significant role in assessee's business but then right now we are concerned with a comparable uncontrolled transaction between independent enterprises, in which all other factors, except the commonality of management, control and capital, remain the same. The comparable uncontrolled price for interest on such a transaction in which advances are made pending capital subscription in a company which plays strategically significant commercial role in assessee's business, in our considered view, would be nil. The levy of interest would not come into play in such a case, except to the extent of refund of US $ 10,000 for which no shares were allotted. When it was so pointed out during the hearing, learned counsel for the assessee very fairly did not press his grievance to the extent of this amount. In the light of these discussions, the variations in the nature of transactions between the assessee and Micro USA and variations in the nature of relationship between the assessee and Micro USA are so fundamental that the entire LIBOR plus rate, which was the starting point of our computation of ALP of these interest free loans, is to be reduced to zero to take care of the differences in terms of Rule 10B(1)(a)(ii) of the Income Tax Rules. The impugned ALP adjustment, to this extent and in the terms indicated above, is unsustainable in law and we delete the same.

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Statute Updates

(A) Service Tax Judgements

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Editor's Note:

The judgement "Narne Construction Pvt. Ltd. v. Union of India" reported under the Service Tax Judgements of August'2013 issue of ACA Journal stating that activity of offering plots for sale to customers with an assurance of development of infrastructure amounts to service has been rendered under the Consumer Protection Act, 1986 and not under the Service Tax. The inference of the said activity as service can also be drawn under the provisions of Service Tax Law.

In this issue, judgement on outdoor catering, renting of immovable property, cenvat credit and definition of service are reproduced below for the benefit of Members.

1) Whether Pre-cooked eatables like Biscuits, Namkin, etc. sold as such and on which VAT has been paid are includible in value of outdoor catering services?

[2013] 34 taxmann.com 176 (Ahd. - CESTAT) CESTAT, AHMEDABAD BENCH Vihar Aahar (P.) Ltd. *v.* Commissioner of Service Tax, Ahmedabad.

Facts:- Assessee was providing outdoor catering services. The Adjudicating authority included value of pre-cooked eatables like Biscuits, Namkin, etc. in value of outdoor catering services. Assessee argued that it had paid VAT on all such items when sold from its outlets and were, therefore, not liable to service tax

Held:- Assessee's claim of selling Biscuits, Namkin, etc. had been accepted by adjudicating authority, but he had not given any due weightage to it for calculation of tax liability and hence, matter was remanded back for consideration of said aspect and re-quantification of demand .

It was further held that there was no notification or circular issued by Board authorizing or directing Ahmedabad-I Commissioner to issue show cause Notice and adjudicate demand for Mumbai, Kanpur and Karnataka. In the absence of any such notification, order passed by Commissioner of Service Tax, Ahmedabad-I for confirming demands of other Commissionerates was beyond jurisdiction and was liable to be set aside. Matter was remanded back for re-quantification of demand so as to exclude demand pertaining to other Commissionerates .

2) Whether charges collected by landlord from tenant towards electricity shall form part of renting of immovable property services?

[2013] 29 taxmann.com 283 (Mum. - CESTAT) CESTAT, MUMBAI BENCH Econ Hinjewadi Infrastructure (P.) Ltd. *v.* Commissioner of Central Excise, Pune-III

Facts:- Assessee was engaged in renting of various premises owned by it and was paying service tax on rentals. Assessee was also supplying electricity to its tenants for which a common electricity connection had been taken and assessee was charging electricity charges from tenants. Department opined that electricity charges recovered from tenants was a part of 'Renting of Immovable Property Service' and was liable to tax.

Held:- It was held that the contention of the applicant that electricity is 'goods' and the same shall not form part of taxable service is clarified by the Notification no. 12/2003 and was further held that the applicant has made out a prima facie case for 100% waiver of the service tax confirmed and penalty imposed and accordingly the requirement of pre-deposit of the service tax, interest and penalty was waived .

3) Tax was collected in case of non-taxable service and paid such tax utilizing the cenvat credit. Whether department can reject the claim for cenvat credit utilized for payment of tax?

[2012] 26 taxmann.com 112 (New Delhi - CESTAT) CESTAT, New Delhi Bench Sangam India Ltd. *v.* Commissioner of Central Excise, Jaipur-II

contd. on page no. 364

Statute Updates

(B) Foreign Exchange Management Act (FEMA)

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External Commercial Borrowings (ECB) Policy – Review of all-in-cost ceiling

- The all-in-cost ceiling as specified in A.P. (DIR Series) Circular No. 99 dated March 30, 2012 will continue to be applicable till September 30, 2013 and is subject to review thereafter.

For full text refer: http://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=8233&Mode=0

External Commercial Borrowings (ECB) Policy Repayment of Rupee loans and/or fresh Rupee capital expenditure – USD 10 billion Scheme

- Extending the benefit of USD 10 billion scheme to Indian companies in the manufacturing, infrastructure sector (as defined under the extant ECB policy) and hotel sector, being consistent foreign exchange earners and allowed to avail of ECB for repayment of outstanding Rupee loan(s) availed of from the domestic banking system and / or for fresh Rupee capital expenditure under the Approval Route, which have established Joint Venture (JV) / Wholly Owned Subsidiary (WOS) / have acquired assets overseas in compliance with extant regulations under FEMA, 1999 subject to the conditions.

For full text refer: http://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=8236&Mode=0

Export of Goods and Software – Realisation and Repatriation of export proceeds – Liberalisation

- The realization and repatriation period stipulation in terms of A.P. (DIR Series) Circular No. 52 dated November 20, 2012 was valid till March 31, 2013 only, the time period for realization and repatriation of export proceeds from April 01, 2013 onwards till September 30, 2013, shall be reckoned as nine months from the date of export.
- The provisions in regard to period of realization and repatriation to India of the full export value of goods or software exported by a unit situated in a Special Economic Zone (SEZ) as well as exports made to warehouses established outside India remain unchanged.

For full text refer: http://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=8251&Mode=0

Risk Management and Inter-bank Dealings

- Further clarification on FIIs to hedge the Rupee exposure, if an FII wishes to enter into a hedge contract for the exposure relating to that part of the securities held by it against which it has issued any PN/ODI, it must have a mandate from the PN/ODI holder for the purpose. AD Category bank is expected to verify such mandates, in cases where this is rendered difficult, they may obtain a declaration from the FII regarding the nature/structure of the PN/ODI establishing the need for a hedge operation and that such operations are being undertaken against specific mandates obtained from their clients.

For full text refer: http://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=8284&Mode=0

Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2013

- Insertion of New Regulation 20A for **"Acquisition or Setting up of a JV or WOS abroad by resident individual"**
- Insertion of New Schedule V highlighting the following:
  - A. Overseas Direct Investments by Resident Individuals
  - B. Post Investment Changes
  - C. Disinvestment by Resident Individuals
  - D. Reporting Requirements

For full text refer: http://www.rbi.org.in/scripts/NotificationUser.aspx?Id=8315&Mode=0

Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) (Fifth Amendment) Regulations, 2013

- Amendment to Regulation 10, insertion of sub-regulation C allowing Escrow account for acquisition

of shares or convertible debentures through open offers/delisting/exit offers.

For full text refer: http://egazette.nic.in/WriteReadData/2013/E_394_2013_025.pdf

Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) (Tenth Amendment) Regulations, 2013

- Amendment in the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 governing payment of consideration for purchase of shares on recognized stock exchange for transfer to non-residents

For full text refer: http://egazette.nic.in/WriteReadData/2013/E_393_2013_025.pdf

Foreign Exchange Management (Deposit) (Second Amendment) Regulations, 2013

- Amendments in the Foreign Exchange Management (Deposit) Regulations, 2000 (Notification No. FEMA.5/2000-RB dated 3rd May 2000) addition of sub-regulation 5 allowing a non-resident including a Non Resident Indian (NRI) to open a single non-interest bearing Rupee Account for the limited purpose of purchase of shares on the recognized stock exchanges.

For full text refer: http://egazette.nic.in/WriteReadData/2013/E_393_2013_025.pdf

Overseas Direct Investments

- Reduction of limit for Overseas Direct Investment
- Investing in overseas unincorporated entities and the overseas incorporated entities in the oil sector by Navaratna Public Sector Undertakings (PSUs), ONGC Videsh Limited (OVL) and Oil India Ltd (OIL) shall continue

For full text refer: http://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=8305&Mode=0

Liberalised Remittance Scheme for Resident Individuals - Reduction of limit from USD 200,000 to USD 75,000

Ref.: A.P. (DIR Series) Circular No. 24 dated August 14, 2013

- Reduced limit of USD 75,000 per financial year (April - March) with immediate effect.
- Further, the limit for gift in Rupees by Resident Individuals to NRI close relatives and loans in Rupees by resident individuals to NRI close relatives shall accordingly stand modified to USD 75,000 per financial year.

For full text refer: http://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=8306&Mode=0

Import of Gold by Nominated Banks /Agencies/ Entities

Ref.: A.P. (DIR Series) Circular No. 25 dated August 14, 2013

- RBI has issued the following clarifications/modifications in supersession of all the earlier instructions for nominated banks/agencies/refineries and other entities.
- Entities/units in the SEZ and EoUs, Premier and Star trading houses are permitted to import gold exclusively for the purpose of exports only.

For full text refer: http://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=8312&Mode=0

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Tickle the Funny Bone

Joke: ***A woman went to the doctor who told her she only had 6 months to live.***

"Oh my God!" said the woman. "What shall I do?"

"Marry an accountant," suggested the doctor.

"Why?" asked the woman. "Will that make me live longer?"

"No," replied the doctor. "But it will SEEM longer."

In our opinion there are just 3 types of auditors.

Those whose opinion you can rely on, and those whose opinion you can't.

Statute Updates

(C) Value Added Tax (VAT)

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[I] **Important Judgments:**

[A] M/s. Madhav Steel Corp. Appeal No. 451 dated 1.8.2012

An issue in respect of not allowing the Tax Credit in case of vendor at once who has not paid the tax and thereafter after an amendment u/s. 11(7A), the credit for actual payment of tax by vendor is discussed. This judgment has a far reaching effect for a dealer who has carried on genuine business but could not prove it to be so. The previous cases of Kiran Oil Mills and Meet Traders are nullified by same Tribunal.

The brief fact is as under:-

The appellant is carrying on the business of reselling iron and steel and registered under GVAT Act as well as CST Act. During the assessment proceeding, the Ld. A. O. has disallowed the Tax Credit u/s. 11 on the purchases made from M/S Bhavani Ispat, Bhavnagar as vendor's registration certificate was cancelled ab initio. The appellant submitted all evidences to establish that the purchases made by the appellant are genuine and bona fide and argued that at the time when purchases were made, M/s. Bhavin Ispat was holding the registration certificate. The appellant has also filed the copy of account to show that the payments were duly made by A/c. Payee Cheques to the vendor and contended that the transactions are genuine and Tax Credit could not be disallowed merely on the ground that the registration certificate is cancelled retrospectively. The appellant has also relied on the decision of Kiran Oil Mills and in that case, credit was allowed by the Tribunal.

The Deputy Commissioner in the first appeal disallowed the Tax Credit and charged the interest u/s. 30(5) and penalty @ 150% u/s. 34(7) and 34(12). Further sub section 7A of section 11 which has been inserted on the statute by GVAT Amendment Act of 2013 w.e.f. 1.4.2013, states that in no case the amount of Tax Credit on any purchases of goods shall exceed the amount of tax in respect of the same goods actually paid. By virtue of this amendment, for the first time the legislature has emphasized on the actual payment of tax in Government Treasury and unless and until such payment is made no Tax Credit is allowed on the purchases of goods by the Purchasing Dealer.

During the assessment proceedings various judgments have been quoted by the appellant's advocate. However, the Hon. Tribunal has not agreed with the appellant's arguments and decided as under.

Since the sale transactions in respect of which the input tax credit is claimed by the appellant is not genuine and it is merely based on billing activities, the appellant is not entitled to input tax credit and the said claim has been rightly denied by the authorities below. The appellant is therefore liable to pay tax as well as interest as demanded. So far as the levy of penalty is concerned, the assessing officer has not made any discussion nor he has explained as to why such exorbitant penalty is levied despite the fact that discretion is given to him to levy any penalty between the minimum as well as maximum.

[B] **Penalty u/s. 34(12) of GVAT Act: The judgment delivered under the Gujarat Sales Tax Act in case of D. K. Patel and Co. 35 STC 63 is applicable under the GVAT Act.**

Under section 34(12), a dealer has to pay the penalty if the amount of tax assessed for any period exceeds the amount of tax already paid in respect of such period by more than 25% of amount of tax so paid. The penalty shall not exceeding 150% of the difference between the tax paid and amount of tax assessed.

In the assessment under GVAT Act, it is observed that the authority has not considered the tax credit in the calculation of the difference of 25% and therefore levy of penalty is very high and therefore I

would like to draw the attention of the above referred case and in that case set-off allowable under Rule 41 of Gujarat Sales Tax Act was considered for the levy of penalty.

The expression "sum already paid" would mean that "sum already paid in any manner". The set off granted under rule 41 even partially or if the tax liability of an assessee is reduced, such set-off can be legitimately considered as the sum paid. The judgment under old act is squarely applicable under the GVAT Act.

[II] **Other Judgments on Important Matters**

[A] **Right to use:**

M/s. M. K. Parikh - S.A. No. 18 of 2005 dated 08.01.2013

Machineries given on rent to parties but effective control remain with the owner – Many decisions of right to use goods discussed at length – No transfer of right to use.

[B] **Sales:**

M/s. Central Sales and Services:

Dealer in spare parts supplied parts during warranty period – Decisions of Mohd. Ekram 136 STC 515, Cheminova 126 STC 334 and Marudhar Motors 29 VST 114 discussed – Penalty removed.

SA No. 769 to 772 of 2011 with S.A. No.787 of 2011 dt. 29.10.2012.

Repairing charges collected with old compressor and substituted compressor – not a sale of goods – discussion of various decisions and Sale of Goods Act.

M/s. Kirloskar Copeland Ltd. R.A. No. 126 of 2011 dt. 08.01.2013

Electronic capacitor held liable at 12.5% chargeable to 4% - notification expected – tax charged @ 4% - part payment made considered.

M/s. Kavya Trading R.A. No. 53 of 2012 dt. 19.02.2013.

[C] **Schedule Entry - Chirfal:**

Chirfal falls in entry of Pepper and Spice of Entry 134 of Schedule IIA of GST Act, 1969 – Decision of M/s. S. K. Mundra 142 STC 360 (GH) and Shri Baidyanath Ayurved Ltd. JH (2009) (6) SC 29 discussed.

M/s. Janata Brothers - R.A. No.24 and 25 of 2009 dt. 25.09.2012.

[D] **Schedule Entry - Narrow Fabrics:**

Sales between 29.04.06 to 29.05.06 of narrow fabrics covered by Entry 32 of Sch. II and not u/s. 5(2) of Vat Act as tax free.

M/s. Kinsum Industries S.A.No. 100 / 101 of 2012 dt. 08.02.2013.

[E] **Schedule Entry - PET (Polyehtylene Terephthalate:**

Held as packing material covered by Entry II-55 of Vat 2003 – Discussion about product.

M/s. Ahimsa Industries Pvt. Ltd. F.A. No. 9 of 2012 dt. 24.04.2013

[F] **Schedule Entry - Sakaria:**

Stock difference confirmed – tax charged – Sakaria held as tax free confirmed as sugar – Public Circular dt. 1.8.2012 relied – Penalty reduced.

M/s. Jammy Foods S. A. No. 620 and 621 of 2011 dt. 09.04.2013.

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contd. from page 359

Statute Updated (A) Service Tax Judgements

Facts:- Assessee collected service tax from buyers though it was not chargeable. Assessee paid such tax utilizing CENVAT Credit. Department contended such tax was payable under section 73A and CENVAT credit could not be utilized for payment thereof.

Held:- It was held that as the assessee had already paid service tax from their CENVAT credit, they cannot be made to deposit same again with revenue. Deposit of such tax collected from buyers would amount to double payment.

Whether loading of coal ash done within factory for clearance of ash would be a service liable to service tax?

Facts:- Assessee, a manufacturer, cleared coal ash generated during generation of electricity at its unit. Coal was loaded in buyer's truck by assessee. Assessee collected charges for supply for coal ash. Assessee paid service tax on such charges.

Held:- It was held that Loading was done within factory for clearance of ash and was a self-service and hence not liable to service tax.

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Statute Updates

(D) Corporate Laws

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(A) SEBI Updates:

1. Circular for Operational, Prudential and Reporting Norms for Alternative Investment Funds (AIFs).

a. All AIFs shall be required to comply reporting norms to SEBI on a quarterly basis *(**for Category I, II AIFs and for those Category III AIFs which do not employ leverage**)* or on a monthly basis *(**for Category III AIFs which employ leverage**).*

b. Category III AIFs shall have to additionally comply with norms pertaining to risk management, compliance, redemption and leverage as specified in the circular. The leverage for a Category III AIF shall not exceed 2 times i.e. the gross exposure after offsetting for hedging and portfolio rebalancing transactions shall not exceed 2 times of the NAV of the fund. The method of calculation of leverage and conditions pertaining to breach of limit, the reporting formats and the method of reporting are provided in detail in the said circular.

(Circular No. CIR/IMD/DF/10/2013 dated July 29, 2013)

2. Circular for utilization period for Government Debt Limits:

In accordance with this circular, FIIs/QFIs shall be permitted to utilize the debt limits allocated to them in each monthly auction till the 17th day of the succeeding month. Any unutilized limit as on the 18th of each month would get auctioned on the 20th of each month.

(Circular No. CIR/IMD/FIIC/11/2013 dated July 31, 2013)

3. Application for change in category of the Alternative Investment Fund.

SEBI has notified the eligibility criteria and other conditions for making application for change in category of AIFs. Regulation 7(2) of AIF Regulations specifies as under:

*"An Alternative Investment Fund ("**AIF**") which has been granted registration under a particular category cannot change its category subsequent to registration, except with the approval of the Board."*

(Circular No.CIR/IMD/DF/12/2013 dated August 07, 2013)

4. Securities and Exchange Board Of India (Buy Back Of Securities) (Amendment) Regulations, 2013.

Following regulations have been amended in the Securities and Exchange Board of India (Buy-back of Securities) Regulations, 1998:

Regulation no. 4, 14, 15, 15A, 15B, 16 and 19.

(Notification No. LAD-NRO/GN/2013-14/16/6348 dated 08th August, 2013)

5. Investment by Qualified Foreign Investors (QFIs) in "to be listed" Indian Corporate Debt Securities:

With a view to align the eligibility criteria for investment in debt securities between SEBI and RBI and to bring QFI and FII at par for investment in "to be listed" debt securities, the SEBI has now decided to allow QFIs to invest in "to be listed" corporate debt securities directly from the issuer.

(Circular No. CIR/IMD/FIIC/13 /2013 dated August 13, 2013)

Latest Judgements:

1. The Supreme Court held on 10/05/2013 in the matter of Bhagwati Developers Pvt. Ltd. versus Peerless General Finance & Investment Company Ltd. (Civil Appeal No. 7445 of 2004) that:
   (i) The Shares of an unlisted Public Company are covered under the ambit of the Securities Contracts (Regulation) Act, 1956.
   (ii) Sale of shares in question was not a spot delivery.

   According to the definition, a contract providing for actual delivery of securities and the payment of price thereof either on the same day as the date of contract or on the next day means a spot delivery contract.
2. The Securities Appelleate SAT, Mumbai held on 28/06/2013 in the matter of Bombay Rayon Fashions Limited and B R Machine Tools Private Limited versus Securities and Exchange Board of India that:

   As the appellant company could not satisfy the Respondents (SEBI) regarding any factor beyond the control of the issuer company (Appellant) which would have prevented it from converting warrants in question into shares and further the appellant company had not preferred any application before the SEBI for any relaxation or exemption from the applicability of Regulation 3(2) of the SAST Regulation, 2011 immediately after the publication of the SAST Regulation, 2011 on 23/09/2011 or after 23/10/2011, when they were brought into force, hence the appeal was dismissed. The SEBI had refused to allow the relaxation on the grounds of delayed submission of the application by the appellants.

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Statute Updates

(E) Circulars and Notifications (Income Tax and Service Tax)

CA. Kunal A. Shah
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INCOME TAX

1) Notification regarding amendment in rule 37BB – Furnishing of information by the person responsible for making payment to a non-resident, not being a company, or to a foreign company

The CBDT hereby makes the amendments in rule 37BB:-

(i) Part A of form 15CA is to be filled up if the remittance does not exceed fifty thousand rupees and the aggregate of such remittances made during the financial year does not exceed two lakhs fifty thousand rupees;

(ii) Part B of form 15CA is to be filled if the remittance is covered by the specified list given in explanation rule 37BB and not chargeable to tax under the provision of income tax act;

(iii) Part C of the form 15CA is to be filled up if the remittance is chargeable to tax or the remittance is not covered by the specified list given in explanation to rule 37BB.

(For text and revised form 15CA(Part A,B and C) and form 15CB refer notification no-58 dated 05-08-2013)

2) Notification regarding amendment in rule 12C - Statement of income paid or credited by Venture Capital Company or Venture Capital Fund to be furnished under section 115U of the Income-tax Act, 1961

For rule 12C, the following rule shall be substituted, namely:–

(i) The statement of income paid or credited shall be furnished by the 30th November of the Financial year following the previous year during which such income is paid or credited, to the Chief Commissioner or Commissioner of Income-tax, within whose jurisdiction, the principal office of the Venture Capital Company or the venture Capital Fund, as the case may be, is situated.

(ii) The statement of income paid or credited which is to be furnished under sub-section (2) of section 115U by the Venture Capital Company or the Venture Capital Fund, as the case may be, shall be in Form No. 64, duly verified by an accountant in the manner indicated therein and shall be furnished electronically under digital signature.

(iii) The Director General of Income-tax (Systems) shall specify the procedure for filing of Form No. 64 .***(For full text and form 64 refer Notification no 59 , dated 05/08/2013)***

SERVICE TAX

1) Further clarification regarding "The Service Tax Voluntary Compliance Encouragement Scheme ."

CBDT vide C***ircular No.170 dated 08/08/2013 further*** clarifies certain issues regarding scope and applicability of the Service Tax Voluntary Compliance Encouragement Scheme (VCES).

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STOP PRESS

HUF or its karta cannot be designated partner in LLP

As per section 5 of LLP Act, 2008 only an individual or body corporate may be a partner in a Limited Liability Partnership. A HUF cannot be treated as a body corporate for the purposes of LLP Act, 2008. Therefore, a HUF or its karta cannot become designated partner in LLP.

General Circular No. 13/2013, dated 29th July,2013

From Published Accounts

CA. Pamil H. Shah
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AS-11 The Effects of Changes in Foreign Exchange Rate

EXCEL INDUSTRIES LIMITED ANNUAL REPORT 2012-2013.

Notes to Financial statements For The Year Ended March 31,2013

2.1 Summary of Significant Accounting policies

(m) Foreign currency transactions

Foreign currency transactions and balances

(i) Initial recognition:-

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

(ii) Conversion:-

Foreign currency monetary items are retranslated using the exchange rate prevailing at the reporting date. Non-monetary items, which are measured in terms of historical cost denominated in a foreign currency, are reported using the exchange rate at the date of the transaction. Non-monetary items, which are measured at fair value or other similar valuation denominated in a foreign currency, are translated using the exchange rate at the date when such value was determined.

(iii) Exchange differences:-

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

(iv) Forward exchange contracts entered into to hedge foreign currency risk of an existing asset/liability:-

The premium or discount arising at the inception of forward exchange contract is amortised and recognised as an expense/income over the life of the contract. Exchange differences on such contracts, except the contracts which are long-term foreign currency monetary items, are recognised in the statement of profit and loss in the period in which the exchange rates change. Any profit or loss arising on cancellation or renewal of such forward exchange contract is also recognised as income or as expense for the period.

TATA CONSULTANCY SERVICES LIMITED ANNUAL REPORT 2012-2013.

Notes forming part of financial statements

1. Significant accounting policies

(h) Foreign Currency Transactions :

Foreign Currency Transactions (FCT) and forward exchange contracts entered into to hedge FCT are initially recognized at the spot rate on the date of the transaction/contract. Monetary assets and liabilities denominated in foreign currency and forward exchange contracts remaining unsettled at the end of the year are translated at year end rates.

The Company has elected to account for exchange differences arising on reporting of long-term foreign currency monetary items in accordance with Companies (Accounting Standards) Amendment Rules, 2009 pertaining to Accounting Standard 11 (AS-11) notiûed by Government of India on 31st March, 2009 (as amended on 29th December, 2011). Accordingly, the effect of exchange differences on foreign currency loans of the Company is accounted by addition or deduction to the cost of the assets so far it relates to depreciable capital assets and in other cases by transfer to "Foreign Currency Monetary Item Translation Difference Account" to be amortised over the balance period of the long-term monetary items.

The differences in translation and settlement of FCT and forward exchange contracts used to hedge FCT [excluding the longterm foreign currency monetary items accounted in accordance with Companies (Accounting Standards) Amendment Rules 2009 on

Accounting Standard 11 notiûed by Government of India on 31st March, 2009 as amended on 29th December, 2011] are recognised in the Statement of Proût and Loss. The outstanding derivative contracts at the balance sheet date other than forward exchange contracts used to hedge FCT are valued by marking them to market and losses, if any, are recognised in the Statement of Proût and Loss.

Exchange differences relating to monetary items that are in substance forming part of the Company's net investment in non integral foreign operations are accumulated in Foreign Exchange Fluctuation Reserve Account.

TRIVENI TERBINE LIMITED ANNUAL REPORT 2012-13

Notes forming part of financial statements

1. Significant accounting policies

(e) Foreign Currency Transactions :

i) Transactions denominated in foreign currencies are recorded at exchange rates prevailing on the dates of the transactions.

ii) Foreign currency monetary items (including forward contracts) are translated at rates prevailing at the reporting date. Exchange differences arising on settlement of transactions and translation of monetary items (including forward contracts) are recognised as income or expense in the year in which they arise.

iii) The premium or discount on foreign currency forward contracts not relating to firm commitments or highly probable forecast transactions and not intended for trading or speculative purposes is amortised as expense or income over the life of each contract.

iv) In respect of derivative contracts relating to firm commitments or highly probable forecast transactions, provision is made for mark-to-market losses, if any, at the balance sheet date. Gains, if any, on such contracts are not recognised till settlement.

IRB INFRASTRUCTURE DEVELOPERS LIMITED ANNUAL REPORT 2012-2013.

Notes to Financial statements For The Year Ended March 31,2013

3. Summary of Significant Accounting policies

3.05 Foreign currency translation

(F) Foreign currency transactions

i) Initial recognition

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

ii) Conversion

Foreign currency monetary items are reported using the closing rate. Non monetary items which are carried in terms of historical cost denominated in a foreign currency are reported using the exchange rate at the date of the transaction.

iii) Exchange differences

Exchange differences arising on the settlement of monetary items or on reporting company's monetary items at rates different from those at which they were initially recorded during the year, or reported in previous financial statements, are recognised as income or as expenses in the year in which they arise.

ONMOBILE GLOBAL LIMITED ANNUAL REPORT 2012-13

Notes forming part of financial statements

1. Significant Accounting policies

(f) Foreign currency transactions

Transactions in foreign currencies are translated at the exchange rate prevailing on the date of the transaction. Monetary assets and Monetary liabilities denominated in foreign currencies are translated at the exchange rate prevalent at the date of the Balance sheet. Exchange differences arising on foreign currency translations are recognized as income or expense in the year in which they arise.

Premium or discount on forward exchange contract is amortised over the life of such contract and is recognised as income or expense.

Any profit or loss arising on cancellation, renewal or restatement of forward contract is recognised in the Statement of Profit and Loss.

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News Lounge

Compiled by :
CA. Manthan Khokhani
Final CA Student

Lok Sabha Clears Land Acquisition Bill

The Lok Sabha cleared the critical land acquisition Bill on Thursday, in a move that analysts see as another attempt by the Congress party-led United Progressive Alliance to garner popular support ahead of the next general election, but which was criticized by industry lobbies and representatives as a move that would increase the cost of land acquisition and also cause delays in the process.

On Monday, the Lok Sabha approved the proposed food security law, in what is rapidly becoming one of the most productive Parliament sessions in the past four years.

The Land Acquisition, Rehabilitation and Resettlement Bill, 2011, renamed as the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Bill, 2012, replaces the Land Acquisition Act of 1894, and is aimed at bringing in transparency in the acquisition process, and provide adequate compensation and rehabilitation to landowners and others affected by the acquisition.

The Bill was passed in the Lower House with 216 votes against 19.

Protests over land acquisition have stalled many infrastructure projects.

The draft law aims to ensure a "humane, participatory, informed consultative and transparent process for land acquisition for industrialisation, development of essential infrastructural facilities, and urbanization with the least disturbance to the owners of the land and other affected families," rural development minister **Jairam Ramesh** said in Parliament.

Once enacted into a law—the Bill will now have to be cleared by the Rajya Sabha and then approved by the President—the Bill will mean that acquisition of land for a project involving both a private company and a government entity will require the consent of 70% of the landowners whose land is being acquired. For private projects, the proportion is 80%.

(Source: The Mint)

Will Rupee Head towards 70 per Dollar ? Analysts Warn Worst may not be over yet

As the rupee hit a new low of 68.85 to a dollar on Wednesday, from the man on the street to the money market professionals and policy makers all seem to have one question in mind: How far is the rupee from reaching its bottom?

Only a week ago, analysts had forecast that the rupee would fall up to 70 against dollar in the next three months, partly mirroring the government's and theReserve Bank of India's (RBI's) inability to control a free-falling domestic currency.

Having cantered close Rs. 70 to a dollar, the debate now is veering around the next psychological barrier.

Analysts warned that worst may not be over yet implying you may have to brace yourself for a life of 70-plus value to dollar.

"Downward pressure on asset prices is unlikely to abate until the rupee becomes decisively cheap (maybe above 70) or the authorities deliver 'shock and awe' tightening," said Richard Iley, Chief Asia Economist, BNP Paribas.

Finance minister P Chidambaram, told Parliament that more reforms were the answer.

He listed out ten steps including promoting of manufacturing sector and exports to boost faltering growth, which needs to be raised to its potential rate of 8%.

And he hinted at the possibility of a sovereign bond to bring in more dollars.

The rupee's value has eroded more than 15% since July 15 – the day when RBI announced the first major string of steps to arrest the currency's slide.

(Source: The Hindustan Times)

Brokers Fume at NSEL's Payout Plan

Despite the National Spot Exchange's decision to pay out R177 crore to small investors, brokers remain an unhappy lot since small investors' dues account for very marginal portion of the total outstanding dues to brokers.

NSEL's disbursement to small investors in the second week of the settlement cycle accounted for less than

5% of the total receivables of 10 of the 13 brokers that have individual exposures of more than R50 crore.

For example, Anand Rathi Commodities received a total of R7.73 crore from this disbursement against its total outstanding of R641 crore. Further, most of this payouts came for investors whose exposure ranged from R2 lakh to R10 lakh. Similarly, AUM Commodity, Systematix commodities and Geojit Commtrade received just about 0.6% to 1.5% of the total receivables by these brokers ranging between R215 crore and R313 crore.

Further, some brokers are beleived to have taken proprietary positions on these products to earn quick returns. However, in the last three weeks since the crisis was uncovered, most brokers have denied this, except Motilal Oswal securities which is believed to have R250 crore worth of proprietary funds stuck.

Regulatory loopholes allowed brokers to aggressively market NSEL products, which often lured investors with the promise of returns of 12% to 15%, much higher than investment options like bank fixed deposits, liquid funds and fixed-maturity plans.

"Among the investors were importers, exporters and commodity traders who utilised their spare cash flow of R10-15 crore in these short-term products to earn attractive returns," said a broker.

Earlier on Tuesday, after the NSEL announced this payment option, brokers argued that average investment required for the NSEL investment product was R5 lakh to R6 lakh. "We don't have clarity on why NSEL strayed from a pro-rate settlement. This action may lead to litigation given that most brokers won't be happy with this option," said CP Krishnan, whole-time director of Geojit Comtrade.

(Source: The Indian Express)

REC to Raise 1000 Crores from Tax free Bonds

Rural Electrification Corporation (REC) has come out with tax-free bonds to raise Rs.1,000 crore.

The issue opens on Friday. The bonds with a face value of Rs.1,000 each in nature of secured, redeemable, non-convertible debentures will be issued with interest rates ranging from 8.01 per cent to 8.46 per cent.

The company has the option to retain over subscription of up to Rs.2,500 crore. The bonds have been assigned credit rating AAA/Stable by Crisil. The funds will be used for lending for projects in transmission, distribution and generation sectors.

Listing on BSE

"The latest tranche of bonds carry a coupon rate of 8.01 per cent for Series 1 bonds, 8.46 per cent for Series 2 bonds and 8.37 per cent for Series 3 bonds on per annum basis.

The bonds will be listed on the Bombay Stock Exchange," REC General Manager (Finance) Rakesh Arora said.

He said Series 1, Series 2 and Series 3 bonds could be redeemed after ten years, 15 years and 20 years, respectively, from the date of allotment.

REC had already sanctioned loan for projects worth Rs.40,000 crore. It had already disbursed Rs.13,000 crore, he said.

(Source: The Hindu)

Draft Safe Harbour Rules Disappoint

In an effort to reduce transfer pricing ('TP') litigation, Section 92CA was introduced by the Finance Act (No. 2), 2009, authorising the Central Board of Direct Taxes (CBDT) to formulate safe harbour rules. By way of the above amendment, CBDT was empowered to frame safe harbour rules.

Safe harbour rules are basically a set of directives or guidance on activities or margins whereby the revenue authorities should accept the pricing of a controlled transaction declared by the taxpayer without demur.

The purpose of introduction of safe harbour concept was to give assurance to the taxpayers that proper leverage will be allowed to them in given situations and circumstances.

After a long wait and on recommendations of the Rangachary Committee, draft of Safe Harbour Rules have now been notified inviting comments from all stakeholders by August 26.

The draft rules provide for an option either to adopt the rules or go for the normal TP provisions. Broadly, the rules notify for categories of the sectors/transactions, subject to certain ceilings, where these rules could be applied:

1) Information technology (IT)/ IT-enabled services sector
2) Contract R&D in IT and pharma sectors
3) Automobile original equipment manufacturer (OEM)
4) Outbound loans and corporate guarantees

According to the draft rules, the transfer price of an eligible transaction declared by an eligible assessee shall be acceptable to income-tax authorities in case of a transaction pertaining to the first three categories, a specified margin of operating profit (OP) over operating expense (OE) is declared, and in case of the last category, i.e., outbound loans/corporate guarantees if the assessee earns a specified rate of interest /commission.

The draft rules specify, for the purposes of the first two categories, an eligible assessee to mean a person who undertakes eligible international transactions and is an assesee having no risk of its own, i.e, the risks are undertaken, functions are performed, capital is provided, intangibles are held by the foreign principal. However, for the remaining categories, an assessee shall be an eligible assessee if it is an auto OEM or advanced an intra-group loan or provided a corporate guarantee.

Under the draft rules, the eligible international transactions alongwith acceptable profit margins are given in the chart. These margins are applicable for 2012-13 and 2013-14.

FY 2012-13 is already over. How can the draft rules on which comments are being sought in August 2013 be made applicable for the year which has already expired on March 31, 2013 ? It shall, however, be noted that in order to qualify as eligible international transaction, the aggregate of a service in the nature of software development, IT-enabled services or knowledge process outsourcing should, in aggregate for each nature, be less than Rs 100 crore during the financial year. It is, thus, obvious that large assessees will not be covered under the safe harbour rules.

Assuming such huge profit margins from an insignificant risk or no risk bearing assessee and that too in the period of recession in the economy is like expecting a fisherman to catch a fish during high tide and that too without a net.

The expectation of such huge profit margins would be unrealistic for the industry which is facing gloomy economic environment.

The safe harbour rules in its current form cannot be called industry friendly particularly for the category of software development, IT-enabled services and knowledge process outsourcing.

(Source: Business Standard)

Finmin sends letters to Indirect Tax Defaulters

For the first time, the Finance Ministry has started sending letters to service tax, customs and excise duty defaulters asking them to come clean on certain dubious transactions carried out by them. The letters are being issued by two lead intelligence agencies under the Finance Ministry—Directorate General of Central Excise Intelligence (DGCEI) and Directorate General of Revenue Intelligence (DGRI)— and Commissionerates of Service Tax and Central Excise, spread across the country, officials said.

The DGCEI is sending the letters to service tax and excise duty defaulters and the DGRI is issuing these correspondences to suspected customs duty evaders, they said. The letters are being sent to an entity or an individual to seek clarification on a financial transaction, red flagged by economic intelligence agencies as black money or seen as an attempt to dodge authorities from paying taxes, carried out by them, they said.

The number of letters issued to the entities were not immediately known. It is for the first time that such letters have been issued to indirect tax defaulters, a senior Finance Ministry official said, adding that the Income Tax department has been issuing such letters to direct tax dodgers. The Finance Ministry has decided to go after about 12 lakh service tax assesses who had stopped filing returns.

The Ministry officials are also focusing on top 100 excise duty assessees in the country to ensure that there is no evasion towards the indirect tax collection kitty. There are 1.2 lakh excise duty assessees across the country. Whereas, there are 17 lakh registered assesses under the service tax. The aim behind sending such letters is to remove bureaucratic hassles and develop faith in people about tax authorities, the officials said. Under this process, those getting the letters need not to appear in person before the tax authorities but need to furnish information on the queries sought from them. The idea to send such "polite letters" is the brain child of Finance Minister P Chidambaram, they said

(Source: Taxmann.com)

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Association News

CA. Chintan M. Doshi
Hon. Secretary

CA. Abhishek J. Jain
Hon. Secretary

4th Knowledge Clinic

4th Knowledge Clinic is to be held on Friday, 27th September 2013 at the Association's office from 4.00 pm to 5.00 pm. Members may send their queries, by email or by hand delivery on or before 20th September 2013 at the Association's office.

Glimpses of events gone by:

On 14th August 2013, Entertainment Evening was held at Fire & Flames, Alpha One Mall, Vastrapur, Ahmedabad.

Members rising to the National Anthem

On 23.08.2013, 2nd Brain Trust cum Workshop was held on **"Issues in Tax Audit".** The Trustee for the workshop was **CA. Dhinal A. Shah.**

(L to R) CA. Abhishek J. Jain, CA. Shailesh C. Shah , CA. Ashok C. Kataria, Faculty CA. Dhinal A. Shah, CA. Prakash B. Sheth, CA. Chintan M. Doshi, CA. Surya O. Chhabria

On 27.08.2013, 5th Study Circle Meeting was held on the topic of "**Registration and Taxation of Charitable Trust" by CA. Ajit C. Shah** and **"E-filing of ITR-7" by Mr. Pratik Shah.**

(L to R) CA. Ronak M. Khandwala, Faculty CA. Ajit C. Shah , CA. Chintan M. Doshi, CA. Shailesh C. Shah, Faculty Mr. Pratik Shah, CA. Kunal A. Shah

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