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## PROFESSIONAL AWARDS

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

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

## QUOTE FOR THE MONTH

### Civilisation

**Kindness is the fuel of civilization, politeness and courtesy its etiquette, its formalities, and dignity its aim. Civilization is about responsibility for your own actions and it is about tolerating other people's actions. One person trying to accept another's habits is the essence of civilisation ....... Kindness is a gentle, thoughtful, peaceful thing, most effective in its simplicity.**

- Alistair McAlpine, Triumph from failure

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# EDITORIAL

## Have the Last Laugh !!!!!!!

The real world is a giant negotiating table and whether we like it or not, we all are participants. We all need to gain favour from others for the things we want. This is achieved by "negotiation" which is - in the words of Herb Cohen - nothing but a field of knowledge and endeavour. Negotiation is the use of information and power to affect a behavior. We all are, knowingly or otherwise, constantly indulging in negotiation – be it at work, at home, with peers, authorities, friends, family, customers, clients and what not.

Always remember that you yourself are the worst person to negotiate for. The simple reason is that you always take yourself too seriously in any interaction that concerns you. You care too much about yourself. And therefore so often, you are gripped by a phobia – phobia of losing. This puts you in stress and pressure. Contrary to this, when you negotiate for someone else, you are more relaxed, objective and a bit careless about the outcome. This ultimately leads to a success. The situation closely resembles to income tax assessments - yours vis-à-vis your clients'.

As a negotiator, take some risk, break free from the precedent of your past experiences, challenge your assumptions, raise your aspiration level and increase your expectations.

You should always have a sense of mastery over your situation. Pick and choose your opportunities based upon your needs. Don't allow yourself to be manipulated or intimidated by those who aren't concerned with your best interests. You have the freedom to choose your attitude towards any given set of circumstances and the ability to affect the outcome.

Don't be too quick to "understand" or prove your intellect at the outset of an encounter. Watch your listen–talk ratio. Learn to ask questions even when you think you might know the answers. Dialogues are more effective than monologues. Give others opportunity to express. His participation will help you understand him better and will help you frame an effective winning strategy.

The omnipresent fact about any negotiation process is, there are two or more sides and every side has a deadline. If there is no deadline, you wouldn't find the other on negotiation! But time and again, the opponent flashes a nonchalant posture. This works because you feel the pressure of your own time constraints, which always appear greater than the other's! The maxim "All the actions occur at the eleventh hour" holds true in every negotiation. For e.g. When do most people file their Income Tax Returns? Or When will the President write his message to the Members ?

Deadlines are more flexible than you realize – whether they are yours or your opponent's! But the truth is, your deadline is your own making – may be because of your perception of self discipline or time management.

If I know your deadline and you don't know mine, who has the advantage? As I watch you squirm, I can hold off yielding anything to you, even though my deadline is right after you !

So try not to let the other know your real deadline.

There are many other aspects which need to be carefully considered for an effective negotiation.

To name a few:

- Indulge in a lucid communication and smartly extract the information about the deadline of your opponent.
- Assess who is keener for negotiation. Learn whether your opponent direly needs your possessions.
- Collect as much background information as possible about your opponent.
- Use psychological tactics like
  - Feign innocence while making a statement
  - Express ignorance. So often, the phrases like "I don't know"," I don't understand", " I don't get you", "Help Me" work far better than their opposites.
  - Create or spread confusion / disinformation, before the negotiation takes off.
  - Behave unexpectedly. Behave like an amateur.
  - Appeal to the conscience of the opponent by exhibiting your genuineness.
  - Raise hope of the opponent by indicating that you are keen to negotiation for logical reasons. Remember, this will not dampen your possibilities of winning.
  - Behave in a manner contrary to your known image i.e if you are a known hard nut, yield easily and unexpectedly.
  - Exploit emotions, sentiments of your opponent.

The list is endless.

But the centre point is, when you negotiate with human beings you should never lose track of the dictum "Human beings are gullible."

Suggested Readings:

Negotiation Skills for Rookies – Patrick Forsyth

Fundamentals of Negotiation – David Butler & Others

You can Negotiate anything – Herb Cohen

**CA DARSHAN SHAH**

# PRESIDENT'S MESSAGE

## DEAR PROFESSIONAL FRIENDS,

As I communicate with you, I am in the midst of happy and the sad feelings. On one hand the news is flowing in about the treatment to Baba Ramdev by Delhi Police against his agitation on black money. The action of the government does not in any way demonstrate its willingness to curb corruption. Arguably, there may be various views possible about the manner and method of the protest against corruption and the issue of black money, but there can not be difference of opinion as far as bringing the black money stashed out of country back to the nation and eradication of corruption are concerned. The government's reluctance is also visible from the observation of the Supreme Court where it has pulled up the Income Tax Department for not taking timely action against the companies involved in the 2G spectrum scam and lamented that had it not intervened, the I.T. officials would have "slept over it" and the overseas probe would not have proceeded. The arrest of A.Raja and Kanimozhi and the events prior to that, alleging their involvement in the 2G scam raises many questions as to how the Central Government has functioned since last few years.

The reason of joy and being delighted lies in the month of June itself. After getting back from vacation and having best of our time with our family, June is the month where we gear up for our professional work. The relaxation and time spent with the family during vacations definitely becomes a tool that adds on to our efficiency when we get back to work again.

The investment in Public Provident Fund (PPF) account, eligible for deduction u/s 80C of Income Tax Act, has always been a very good measure of investment and tax planning. The news reports suggests that based on the recommendation of the committee formed by the government to review the small saving schemes, headed by RBI Deputy Governor Ms. Shyamala Gopinath, Government might consider to raise the present maximum limit of investment in PPF account from Rs. 70,000/- p.a to Rs. 100,000/- p.a. The committee has also recommended the discontinuation of Kisan Vikas Patra and also modifications in some other saving schemes. The reduction in maturity period of Monthly Income Scheme and National Saving Certificate from 6 to 5 years and also introduction of 10 year National Saving Certificate scheme are some other recommendations. Once implemented the investment and tax planning would require a relook.

At the Association, regular and earnest efforts are being put in for various programmes for the members including the entertainment programmes. The various sub-committees have started chalking out the programmes for the year and the first programme held by the Professional Development Committee on 23rd May 2011 on the topic of provisions of section 44AD of the Income Tax Act and filing of Income Tax Returns for assessment year 2011-12 was well received by the members. Various other programmes of Study Circle Committee, Brain Trust Committee and Entertainment Committee have been designed for the coming days.

Association has also made representations to the CCIT for allotting the new space for Association Office in the new building at Polytechnic. Also representation has been made to the State Law Minister raising objections to some of the changes made in new bill of The Gujarat Public Trust Bill, 2011.

After the joyful days of vacation I pray the rain gods to shower prosperity on the whole nation and mankind, which shall result in a good economic development.

Again on issue referred in my 1st para and government's action / inaction and the truth lying behind it I am reminded of 'The Secret Sits' - a one stanza poem by Robert Frost:

"We dance round in a ring and suppose,

But the secret sits in the middle and knows."

Regards,

**CA C.H Pamnani**

## PART - I
## FINANCE ACT, 2011

**(Continued from the May, 2011 Issue)**

**CA. P. N. Shah**
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**CA. H. N. Shah**

### 6. Taxation of International Transactions

6.1 Section 92 C : (i) This section is amended w.e.f. A.Y. 2012-13. At present, this section provides the procedure for computation of the Arm's Length Price (ALP). It is provided in the section that, if more than one price is determined by different specified methods, ALP is to be determined by adopting the arithmetical mean of such prices. The section also provides that if the difference between the actual price of the international transaction and the ALP, as determined above, does not exceed 5% of the actual price, then, no adjustment can be made and the actual price should be treated as ALP.

(ii) It is observed that a fixed margin of 5% across all segments of business activities relating to international transactions has now out lived its utility. Therefore, the section is now amended to provide that instead of a variation of 5%, the allowable variation will be such percentage as may be notified by the Central Government. Let us hope that the percentage so notified for different businesses is not less than 5%.

6.2 (i) It may be noted that the margin of 5% as provided in section 92 C has not been considered to be adequate by various assessees in different industries. The problem is further aggravated by a view taken by the Income tax Department that the benefit of 5% is available only when more than one ALP is determined. Therefore, where only one ALP is determined, the difference between the ALP and the actual international transaction price is being added in many cases to the income of the assessee without considering the margin. It is unfortunate that the Transfer Pricing Officers (TPOs) are taking full advantage of the confusion prevailing in drafting the law. This has resulted in many high pitched assessments.

(ii) The above difficulty of tax payers was fully recognised by the Government. In the memorandum explaining the Finance (No.2) Bill, 2009, it was specifically mentioned as under.

"Section 92 C of the Income tax Act provides for adjustment in the transfer price of an international transaction with an associated enterprise if the transfer price is not equal to the arm's length price. As a result, a large number of such transactions are being subjected to adjustment giving rise to considerable dispute. Therefore, it is proposed to empower the Board to formulate safe harbour rules i.e. to provide the circumstances in which Income tax authorities shall accept the transfer price declared by the assessee".

(iii) In view of the above, section 92 CB was introduced by the Finance (No.2) Act, 2009, with effect from 1.4.2009 to provide that the determination of ALP u/s 92 C or 92 CA shall be subject to Safe Harbour Rules framed by CBDT. The expression "Safe Harbour" was defined in the Explanation to the above section to mean circumstances in which the Income tax Authorities shall accept the transfer price declared by the assessee.

(iv) It was, therefore, expected that CBDT will frame the safe harbour rules as provided in section 92 CB. These rules are not notified so far although more than 2 years have elapsed. It is, therefore, surprising that in section 92 C the fixed margin of 5% has now been removed and the Central Government is authorised to notify such percentage in the matter instead of 5% which was provided in section 92 C. Again, it is stated that this power is given to the Central Government only with effect from A.Y. 2012-13. Therefore, it is difficult to understand whether the safe harbour rules to be framed by CBDT u/s 92 CB with effect from 1.4.2009 will prevail or whether the percentage of the margin to be notified by the Central Government with effect from A.Y. 2012-13 will prevail. This question will arise if the safe harbour rules framed by CBDT are in conflict with the percentages to be notified by the Central Government. In the memorandum explaining the provisions of Finance Bill, 2011, it is stated as under.

"A fixed margin of 5% across all segments of business activity and range of international transactions has out lived its utility. It is, therefore, proposed to amend section 92 C of the Act to provide that instead of a variation of 5%, the allowable variation will be such percentage as may be notified by Central Government in this behalf."

There is no reference to safe harbour rules to be framed by CBDT u/s 92 CB in the above memorandum. This will create a lot of confusion. There is no clarity about the provisions for determination of ALP in various sections inserted in the Income tax Act and this will encourage the Transfer Pricing Officers to continue to make high pitched assessments.

6.3 Section 92 CA : (i) This section is amended w.e.f. 1.6.2011. This section provides that the A.O. can refer the computation of the ALP for an International Transaction between Associated Enterprises to the Transfer Pricing Officer (TPO). At present, the TPO can make necessary enquiries and call for information from the assessee with reference to the transactions referred to him and pass an order determining the ALP for the International Transaction referred to by the A.O.

(ii) There is a dispute about the question whether TPO can look into any international transaction other than that referred to him by the A.O. if any such transaction is noticed by him during the proceedings before him. By amendment of this section it is now provided that the TPO can make necessary enquiries and call for information in respect of international transactions noticed by him but not referred to him by the A.O. He can, therefore, compute the ALP in respect of such international transactions even if they are not referred to him by the A.O.

(iii) This section is also amended to provide that the TPO can conduct on-the-spot enquiry and verification at the premises of the assessee's business. For this purpose, TPO is now empowered, w.e.f. 1.6.2011, to exercise the power of survey which is available to an income tax authority u/s 133 A. This will mean that TPO can now exercise the power of survey u/s 133 A in respect of all pending assessments of earlier years on or after 1.6.2011.

6.4 New Section 94 A : (i) This is a new section inserted in the Income tax Act effective from 1.6.2011. Justifying this new provision the Finance Minister has stated as under in para 150 of his Budget Speech on 28.2.2011.

"150. In order to strengthen our system of collection of information from foreign tax jurisdictions, I propose to provide a tool box of counter measures to discourage transactions with entities located in non-co-operative jurisdictions as may be notified by the Government."

(ii) The Finance Minister has not explained the implication of this new provision on our cross border transactions and about the future economic consequences by prohibiting even the genuine business transactions with these foreign countries and territories. The provisions contained in the new section 94 A are very harsh and if they are implemented by the Tax Department in the manner in which they implement the provisions of section 92 to 92 F relating to International Transactions with Associated Enterprises, it will create great hardship to all assessees who have business relationships with enterprises in such notified tax jurisdictions. If these new provisions are not judiciously administered, it will lead to unending tax litigation. Moreover, this new provision will affect our import and export trade to certain extent.

(iii) In order to discourage transactions by a resident assessee with persons located in any foreign country or jurisdiction which does not have effective exchange of information system with India, it is stated that this anti-avoidance measure has been introduced by inserting section 94 A in the Income tax Act w.e.f. 1.6.2011. There is no such provision in the Direct Taxes Code Bill, 2010, which is under consideration of the Parliament.

(iv) In brief, the provisions of the new section 94 A are as under.

(a) The Central Government has been authorised to notify any country or territory outside India having regard to the lack of effective exchange of information by it with India, as "Notified Jurisdictional Area" (i.e. Notified Area).

(b) If an assessee enters into a transaction with a person located in the notified area, then all the parties to the transaction shall be deemed to be associated enterprises and the transaction shall be deemed to be an international transaction. Therefore, the transfer pricing regulations shall apply to such transactions. It is provided that section 92 to 92 F, except second proviso to section 92 C (2), will be attracted. It may be noted that second proviso to section 92 C (2) provides that for determination of Arm's Length Price (ALP) if the ALP is within the permissible margin, the actual price will be adopted. It is not understood why this section is excluded for determination of ALP when an international transaction is covered by section 94 A.

(c) For the above purpose, a transaction will include any purchase, sale, lease of tangible/ intangible property, provision of services and lending or borrowing of money. It is further provided that any other transaction having a bearing on the profits, income, losses or assets of the assessee, including a mutual agreement or arrangement for allocation or appointment of, or any contribution to, any cost or expenses incurred or to be incurred in connection with a benefit, service or facility provided or to be provided by or to the assessee shall be deemed to be an international transaction.

(d) No deduction in respect of any payment made to any financial institution shall be allowed unless the assessee furnishes an authorization in the prescribed form, authorizing the CBDT or any other Income tax Authority acting on its behalf, to seek relevant information from the said financial institution.

(e) No deduction in respect of any other expenditure, allowance or depreciation arising from the transaction with a person located in a notified area shall be allowed under any provision of the Income tax Act if the assessee has not maintained such other documents and not furnished the information as may be prescribed by CBDT.

(f) If any sum is received from a person located in the notified area, then, the onus is on the assessee to satisfactorily explain the source of such money in the hands of such person or in the hands of the beneficial owner of such money. If the assessee is not able to give satisfactory explanation, this amount shall be deemed to be the income of the assessee. It may be noted that this provision is on the same lines as section 68, where the assessee has to satisfactorily explain the source of any deposit in the books. Section 68 does not envisage any responsibility to explain the source of source. As against this section 94 A (11) puts the responsibility on the assessee to prove the source of source of any receipt from a person located in the Notified Area.

(g) Any payment made to a person located in the notified area shall be liable to deduction of tax at source. This provision will apply only in the case of payment of any sum or income or amount on which tax is deductible under the Income tax Act. Such tax will have to be deducted at the applicable rate or at the rate of 30%, whichever is higher.

(h) Section 94 A (6) defines the expressions (a) person located in notified area, (b) permanent establishment and (c) transaction.

(v) It may be noted that in section 94 A no monetary limit for the transaction, expenditure, receipt or payment to Financial Institutions etc. is specified. Therefore, the A.O. or TPO is likely to apply these new provisions even for small and insignificant transactions. The new section comes into force on 1.6.2011 and, therefore, the above provisions will apply to only those transactions, expenses, receipts, income etc. relating to period after the area is notified under this section. However, it is not clear as to whether contracts entered into or commitments with persons located in such notified areas before the date of the notification will be affected by the provisions of this new sections. Further, it is not clear as to whether the transactions between an Indian company and its subsidiary company formed in the notified area before 1.6.2011 or with a joint venture company formed in collaboration with an enterprise in the notified area before 1.6.2011 will attract the provisions of section 94 A.

## 7. Taxation of Book Profits (Section 115 JB – MAT)

(i) As stated earlier, this section has been amended w.e.f. A.Y. 2012-13 to provide that rate of tax from the current year on Book Profits u/s 115 JB will be 18.5% plus applicable surcharge and education cess.

(ii) Section 115 JB (6), at present, provides that the provisions for levy of MAT on book profits u/s 115 JB shall not apply to income from any business carried on or services rendered by a Developer of SEZ or an unit in Special Economic Zone (SEZ) on or after 1.4.2005. This concession given to Developer of SEZ or unit in SEZ has been withdrawn by amendment of this section w.e.f. A.Y. 2012-13. This will mean that SEZ units enjoying exemption from tax u/s 80 – IAB will not get exemption from Book Profits Tax (MAT) which is now increased to 18.5% plus applicable surcharge and education cess. Consequential amendment has also been made in the SEZ Act, 2005.

(iii) At present, u/s 115 JB (2) - Explanation (1), (iv), (v) and (vi) provides that the book profits shall be reduced by the profits from exports deductible u/s 80 HHC (Export Business), 80 HHE (Export of Computer Software) and 80 HHF (Export or Transfer of Film Software). This particular provision has now been deleted w.e.f. 1.4.2005. There was no such proposal in the Finance Bill, 2011, as introduced with the Budget Papers. However, at the time of enactment of the Finance Act, 2011, this amendment is made with retrospective effect from 1.4.2005. It appears that this amendment is made to negate the effect of the Supreme Court in the case of Ajanta Pharma Ltd. v/s CIT (327 ITR 305). In this case the Supreme Court decided that the provisions of section 80 HHC (IB) scaling down the deduction in a graded manner and providing for withdrawal of exemption to export profits from 2005 – 06 cannot be applied for computation of book profits u/s 115 JB. In order to ensure that a company may not claim this deduction u/s 80 HHC, 80 HHE or 80 HHF in A.Y. 2005 – 06 and onwards from Book Profits by taking the benefit of this decision of the Supreme Court, this amendment has been made with retrospective effect from A.Y. 2005-06.

## 8. Taxation of Limited Liability Partnerships (LLP)

(i) A new Chapter XII – BA containing sections 115 JC to 115 JF have been inserted in the Income tax Act w.e.f. A.Y. 2012-13. These sections provide for levy of Alternate Minimum Tax (AMT) on adjusted total income of a LLP.

(ii) Limited Liability Partnership Act, 2008, has come into force in 2009. Under the Income tax Act, a LLP is liable to pay tax in the status of a 'Firm'. Therefore, a LLP is not liable to pay MAT, Dividend Distribution Tax or Surcharge. In order to preserve the tax base vis-à-vis profit-linked deductions, the provisions for levy of AMT on LLP have been introduced from A.Y. 2012-13.

(iii) New section 115 JC provides that where the regular income tax payable on total income for accounting year 1.4.2011 to 31.3.2012 and onwards by any LLP is less than the AMT payable on the adjusted total income for that year, the adjusted total income shall be deemed to be the total income of the LLP. This income will be liable to payment of AMT at the rate of 18.5 %. No surcharge will be payable on this tax but Education cess @ 3% of the tax will be payable.

(iv) For the purpose of the levy of AMT the expression "Adjusted Total Income" has been defined to mean the total income computed under the other provisions of the Income tax Act as increased by the deductions claimed in respect of certain income under sections 80 H to 80 RRB of Chapter VI A and section 10 AA. In other words, the adjusted total income will be computed by deducting from the "Gross Total Income" outgoings u/s 80 C to 80 GGC. It may be noted that the LLP shall have to obtain a report in the prescribed form from a Chartered Accountant certifying the computation of adjusted total income before the due date for filing the Return of Income.

(v) Section 115 JD provides that the tax credit for tax paid by the LLP shall be allowed to the extent of the excess of the AMT paid over the regular tax. This credit can be carried forward for ten years and will be allowed to be set off in a subsequent year when the LLP is required to pay regular tax in excess of AMT. This credit can be taken only to the extent of excess regular tax payable over the AMT. This provision is similar to the provisions of section 115 JAA applicable for tax credit for MAT payable u/s 115 JB. The Direct Taxes Code Bill, 2010, which is under consideration of the Parliament and which is to come into force from 2012-13 does not contain similar provision.

## 9. Dividend and Income Distribution Tax (DDT)

9.1 Section 115 – O : This section has been amended w.e.f 1.6.2011. At present, no DDT is payable by a domestic company u/s 115 – O (6) in respect of the total income of the undertaking Developing, operating or maintaining a SEZ and no tax is payable by the recipient of dividend in such a case. This concession given to the Developer is withdrawn by amendment of this section w.e.f 1.6.2011. Therefore, if such enterprises declare any dividend before 1.6.2011 out of such income, no DDT will be payable and such dividend will be exempt in the hands of the shareholder. However, even after 1.6.2011 since the domestic company developing, operating or maintaining a SEZ will be paying DDT, no tax will be payable by the shareholder on dividend income after 1.6.2011. Consequential amendment is also made in the SEZ Act, 2005.

9.2 Section 115 R : This section is amended w.e.f. 1.6.2011. At present, u/s 115 R (2) a Mutual Fund is liable to pay additional income tax on the amount of income distributed to its unit holders. The rates for payment of such tax on income distribution are increased in respect of some of the items w.e.f. 1.6.2011 as under.

| | Particulars | Existing Rate | New Rate w.e.f. 1.6.2011 |
|---|---|---|---|
| (i) | Income Distributed to an Individual or HUF by a money market Mutual Fund or Liquid Fund | 25% | 25% |
| (ii) | Income distributed to any other person by a money market Mutual Fund or Liquid Fund | 25% | 30% |
| (iii) | Income distributed to an Individual or HUF by a Debt Fund | 12.5% | 12.5% |
| (iv) | Income distributed to any other person by a Debt Fund | 20% | 30% |

Distribution by an equity oriented fund shall continue to be exempt from tax. The income received by the unit holder from a Mutual Fund will continue to be exempt u/s 10 (35).

## 10. Other Amendments

Some other amendments have been made in the Income tax Act. These are discussed below -

10.1 Section 131 and 133 : (i) These two sections are amended w.e.f. 1.6.2011. At present, u/s 131, the Income tax authority has powers with regard to (i) Discovery and Inspection, (ii) Enforcing attendance of any person and examining him on oath, (iii) compelling production of books of account and other documents, (iv) Issuing commissions and (v) Impounding books of account/documents. Certain other powers to call for information are also given u/s 133.

(ii) Now, by amendment of these sections, it is provided that for the purpose of making any enquiry or investigation in respect of any person or class of persons in relation to an agreement made with a foreign country/territory u/s 90 or 90A, it shall be competent for any Income tax Authority, authorised for this purpose, to exercise the powers under sections 131 and 133. It is also provided that such powers can be exercised even if no proceedings are pending before any Income tax Authority. Powers are also given to impound and retain any books of account and other documents produced before such Income tax Authority.

10.2 Section 139 : (i) This section is amended with retrospective effect from A.Y. 2011-12. At present, the time limit for filing Return of Income in the case of a company and other persons liable to get their accounts audited or get tax audit report u/s 44 AB is 30th September. This time limit for filing Return of Income is now extended to 30th November, in the case of a company having international transactions. This amendment applies to return of income to be filed for A.Y. 2011-12 and in subsequent years. It may be noted that section 44 AB provides for obtaining tax audit report from a Chartered Accountant by 30th September. Further, section 92 E provides for obtaining audit report of International Transactions by a Chartered Accountant before the due date for filing the Return of Income. Therefore, if no consequential amendment is made in section 44 AB, the position will be that in the case of a company having International Transactions, the tax audit report u/s 44 AB will have to be obtained by 30th September and audit report for International Transactions can be obtained by 30th November. Therefore, corresponding amendment should have been made u/s 44 AB. It is surprising that this extension of time for filing return of income is not granted to non-corporate assessees who have entered into international transactions and have to obtain audit report u/s 92 E.

(ii) New sub-section (IC) has been inserted in section 139 w.e.f. 1.6.2011. This new provision empowers the Central Government to issue a notification whereby any class or classes of persons will not be required to file their returns of income. In the Explanatory Memorandum it is stated that in the case of salaried tax payer, entire tax liability is discharged by the employer through deduction of tax at source. Complete details of such tax payers are also reported by the employer through TDS statements. Therefore, in cases where there is no other source of income, filing a return is a duplication of existing information. In order to reduce the compliance burden on small tax payers, this new provision to empower the Central Government to grant exemption to certain persons from the requirement of furnishing return of income. Once this notification is issued such salaried employees, who have no other income apart from the salary, will not be required to file the return of income for A.Y. 2011 -12 and onwards.

(iii) From the above explanation, it appears that the above exemption from filing return of income will be given to salaried employees who have no other taxable income. It appears that such exemption will be enjoyed only by a limited number of employees as most of the salaried employees will have income from interest on investments in FDR with Banks and others or income from house property. In order to grant exemption from filing return of income in such cases, the notification to be issued by the Government for this purpose can provide that in the case of a salaried employee, if he gives particulars of his/her other income from interest and house property to the employer and the employer includes such income while computing total income of the employee and deducts at source on that basis, the employee can be exempted from filing return of income. The employer will have to give particulars of such other income in the TDS statements. This will enable a large number of salaried employees to take the benefit of exemption from filing the return of income under the new section 139 ( IC).

(iv) It may also be noted that in para 125 of his Budget Speech the Finance Minister has stated as under.

"125. I propose to introduce a new simplified return form 'Sugam' to reduce the compliance burden of small tax payers who fall within the scope of presumptive taxation.

10.3 Section 143 (IB) : Amendment in this section is made with effect from 1.4.2011. At present, the Central Government is empowered to issue a notification for processing of returns of income in "Centralised Processing Centres" by 31.3.2011. This has not been done so far. Hence, by amendment of this section this date for issue of the notification is extended to 31.3.2012.

10.4 Sections 153 and 153 B : These sections are amended w.e.f. 1.6.2011. These sections provide for assessment or re-assessment in cases where search has been carried out and time limit for completion of such assessments. It is provided in the sections to exclude certain specified periods while computing the period of limitation for completion of assessments or re-assessments. These sections are now amended to provide that the time taken in obtaining information from the tax authorities in jurisdictions situated outside India under an agreement referred to in sections 90 and 90 A or a period of six months, whichever is less, shall be excluded in computing the period of limitation.

10.5 Section 282 B : Under this section, every Income tax Authority is required to allot a computer generated Document Identification Number (DIN) in respect of every notice, order, letter or any correspondence issued by him/received by him to/from any other Income tax Authority or to/from assessee or to/from any other person from 1.7.2011. This provision was made by inserting this new section by the Finance (No.2) Act, 2009 w.e.f. 1.10.2010. The date for implementing this provision was extended to 1.7.2011 by the Finance Act, 2010. This proposal, inserted to streamline and check receipt/issue of documents at/from the income tax offices, is now completely omitted due to non-availability of the requisite infrastructure with the Income tax Department.

10.6 Section 285 - Liaison Office of a Non-Resident : This is a new section inserted w.e.f. 1.6.2011. At present, Foreign Companies/Firms/AoP operate in India through a branch or a liaison office after obtaining approval of RBI. The Branch office is treated as Permanent Establishment and is required to file its return of income. So far as the Liaison office is concerned it is not required to file its return of income as it is not allowed to carry on any business activity. In order to seek regular information about the activities of such Liaison office of a non-resident this new section has been added in the Income tax Act. Under this section, the non-resident will be required to file every year within 60 days of the end of the Financial Year an Annual Information statement in the prescribed form about the activities of its Liaison Office.

10.7 Recognised P.F. – Schedule IV : Amendment in Schedule IV is made with retrospective effect from 1.1.2011. The Finance Act, 2006, had provided that in order to continue to enjoy recognition by recognised provident funds and for assessees to get deduction in respect of contribution to such funds, the recognized funds should also obtain exemption from Employee's Provident Fund Organisation (EPFO) on or before 31.12.2010. In order to give more time to EPFO to grant such exemption to the recognised provident funds, this Schedule is amended and it is now provided that such exemption from EPFO can be obtained by the recognised provident funds by 31.3.2012.

## 11. To Sum Up

11.1 The above analysis of the Finance Act will show that there are only 35 sections dealing with Direct Taxes and rest of 42 sections deal with Indirect Taxes. Effectively, there are only 22 proposals out of which 14 are in favour of the assessees and give some of relief to them. The other 8 proposals are either to increase tax burden of the assessees to some extent or to give more powers to tax authorities, which, if not judiciously exercised, will lead to increased litigation. In the field of Indirect Taxes, the provisions relating to Service Tax are most controversial and are likely to create hardships to tax payers.

11.2 As discussed above, amendments in sections 92 C and 92 CA and the new section 94 A dealing with International Transactions will create great hardships to those who have cross-boarder business transactions. Sweeping powers given to the assessing officers, in these sections, if not judiciously exercised, will increase tax litigation. In particular, section 94 A will go against the concept of globalization. If the Government notifies a foreign country or a territory as non-co-operative in the matter of exchange of information about cross boarder transactions, in spite of the fact that such country/territory has entered into DTAA with India, trade relationships with that country/ territory will have an adverse effect. It is possible that the overall import/export trade of India may be impacted.

11.3 The provisions relating to AMT in new sections 115 JC to 115 JF may discourage formation of LLPs. This is a new entity, which the Corporate Affairs Ministry wants to encourage. Again, levy of Minimum Alternate Tax and Dividend Distribution Tax on SEZ Developers/ units will also discourage formation of SEZ units. This will also impact the exports of our country.

11.4 Some major issues before us is about (i) increased corruption, (ii) generation of black money and (iii) inflation. This year's budget has not seriously addressed these issues. About Black Money the Finance Minister has stated in paras 85 to 90 as under.

"Black Money

85. The generation and circulation of black money is an area of serious concern. To deal with this problem effectively, Government has put into operation a five-fold strategy which consists of Joining the global crusade against 'black money'; Creating an appropriate legislative framework; Setting up institutions for dealing with illicit funds; Developing systems for implementation; and Imparting skills to the manpower for effective action.

86. We secured Membership of the Financial Action Task Force(FATF) in June last year. This is an important initiative of G-20 for anti-money laundering. We have also joined the Task Force on Financial Integrity and Economic Development, Eurasian Group (EAG) and Global Forum on Transparency and Exchange of Information for Tax Purposes.

87. During the year, we have concluded discussions for 11 Tax Information Exchange Agreements (TIEAs) and 13 new Double Taxation Avoidance Agreements (DTAAs) along with revision of provisions of 10 existing DTAAs. To effectively handle the increase in tax information exchange and transfer pricing issues, Foreign Tax Division of CBDT has been strengthened. A dedicated Cell for exchange of information is being set up to work on this agenda.

88. The amendment in our Money Laundering Legislation in 2009 has significantly increased its scope and application. The number of cases registered under this law has increased from 50 between 2005 to 2008 to over 1200 by January this year. The strength of the Enforcement Directorate has been increased three-fold to deal effectively with the increased workload.

89. The Ministry of Finance has commissioned a study on unaccounted income and wealth held within and outside our country. It would suggest methods to tax and repatriate this illicit money.

90. Trafficking in narcotic drugs is also a contributor to the generation of black money. To strengthen

controls over prevention of trafficking and improve the management of narcotic drugs and psychotropic substances, I propose to announce a comprehensive national policy in the near future."

11.5 The Finance Minister has expressed his anxiety about improving the efficiency of tax administration in paras 121, 126 and 127 of his Budget Speech, which read as under.

"121.The backbone of an efficient tax administration is a robust IT infrastructure and its deployment for enhanced taxpayer services. Towards this objective, both the Central Boards of Direct Taxes (CBDT) and Excise and Customs (CBEC) have put in place the following measures:

- The on-line preparation and e-filing of income tax returns, e-payment of taxes through 32 agency banks, ECS facility for electronic clearing of refunds directly in taxpayer's bank accounts and electronic filing of TDS returns are now available throughout the country. These measures have empowered taxpayers to meet their tax obligations without visiting an income tax office.

- The Centralized Processing Centre (CPC) at Bengaluru has increased its daily processing capacity from 20,000 to 1.5 lakh returns in 2010-11. This project has won a Gold Award for e-Governance in 2011. Two more CPCs will become operational in Manesar and Pune by May 2011 and a fourth CPC will come up in Kolkata in 2011-12.

- With the completion of its IT consolidation Project, CBEC can now centrally host its key applications in Customs, Central Excise and Service Tax. The Customs EDI system now covers 92 locations across the country. CBEC's e-Commerce portal ICEGATE, has also been conferred a Gold Award for e-Governance.

- The 'Sarvottam' concept has been adopted by both Boards. The three pilot projects of Aaykar Seva Kendras (ASKs) under CBDT have come of age. CBDT will commission eight more such centres this year. In 2011-12, another fifty ASKs will be set up across the country. CBEC has also launched a similar initiative and four of their pilot projects have been commissioned.

- The electronic filing of Tax Deduction at Source (TDS) statements has stabilized. The Board shall soon notify a category of salaried tax payers who will not be required to file return of income as their tax liability has been discharged by their employer through deduction at source.

- CBDT will provide a separate web-based facility to enable a direct, stand-alone interface for tax payers with the Income Tax Department so that they can report and track and the resolution of their refunds and credit for prepaid taxes."

"126. The increase in scope of cases admitted by the Settlement Commissions has provided relief to several taxpayers. This has also increased the workload of the Commission. To fast track the disposal of cases, three more Benches of the Commission are being set up.

127. Substantial amounts of revenue in both direct and indirect taxes, remain locked up in appeals at different levels. Both Boards also invest substantial effort and money in litigation with their employees. In keeping with the National Litigation Policy, several steps have been initiated in 2010-11 for reducing litigation and focusing attention on high revenue cases. Instructions have been issued raising limit of tax effects below which, tax disputes will not be pursued by Government in higher Courts of Appeal. These measures would enhance productivity of resources employed in raising revenue."

It may be noted that CBDT has issued Instruction No.3/2011 dated 9.2.2011 in which tax authorities are directed that they should not file appeals where the disputed tax effect is below the followings amounts.

| | | |
|---|---|---|
| - | Appeal before ITA Tribunal | Rs. 3,00,000 |
| - | Appeal High Court | Rs.10,00,000 |
| - | Appeal to Supreme Court | Rs.25,00,000 |

11.6 The present Finance Minister has introduced the Direct Tax Code Bill, 2010, in the month of August, 2010 (DTC). This Bill is under consideration of the Parliament. It is stated that DTC will replace the present Income tax Act and Wealth tax Act w.e.f. 1.4.2012. The provisions contained in the DTC are more complex. Representations have been made for simplifying these provisions. If these suggestions do not receive any consideration, we will have to live with such complex tax legislation in our country in future also.

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# ARTICLE...

## SPAM AND I.T. ACT 2000

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### Spam – A difficult one to define

Spam may be defined as Unsolicited Bulk E-Mail or Unsolicited Commercial E-Mail. In either case, it is important to note that Spam is "Unsolicited" which means that communication from unknown parties. Recipient has not explicitly consented to receive the communication. Mini versions of E-mail spam include SMS in mobiles and Scraps in social networking.

Unsolicited Electronic Message also called "spam" is a growing concern among organizations and individuals. Spamming, once considered as a mere nuisance, is now posing some serious problems. In U.S spam costs to all Non-corporation Internet users were an estimated $255 million .With the daily increasing number of Internet users in India, the absence of any law prohibiting spamming and in the absence of other spam-control measures, spam becomes a huge problem in day to day life.

### Harmful nature of Spam

1. **Content:**

   Messages which promote fraud ventures and messages that contain pornographic material are common in spam. However, the single most important objection is as far as messages containing malicious codes and hostile file attachments such as Viruses, Contaminants, Trojans, logic bombs, spying tools and other malwares. (Malicious Software Codes)

2. **Consumption of Internet Resources**

   Spam represents a big proportion of all e-mail traffic and sms traffic, consuming huge amounts of network bandwidth, memory, storage space, and other resources. Internet and mobile users and system administrators waste huge time in reading, deleting, filtering, and blocking spam, as a result of which they pay more for Internet access.

### Dealing with Spam: I

. **Technical Methods**

First defense against spam is "help your self". These techniques can be implemented by Internet users, ISPs and other destination operators, as well as by various third parties, some of which specialize in battling spam.

**A. Filtering and Blocking**

i. End User Filtering and Collaborative Filtering

End User filtering helps the receiver simply ignoring unwanted messages while collaborative filtering consists of filtering done by Internet Service Providers (ISP) so an end user is not supposed to receive such messages.

ii. Blocking

Blocking means destination operators refuse delivery of spam. Destination servers can use blacklisted e-mail id databases to identify and refuse delivery of such incoming messages.

**B. Hiding from Spammers**

This process involves concealing e-mail addresses by the recipients thus making harder for the spammers.

**C. Opting Out**

This procedure is of requesting the spammer to delete the recipient mail id or cell phone number from the mailing list. Of all the measures stated above this is the most ineffective as spammers almost never remove a mail address or cell phone number from their mailing lists.

### II. Legal Methods

In the absence of adequate technological protection, strict legislation is essential to deal with the problem of spam. Several spam-related Bills have been introduced in the United States Congress, of which only **CAN-SPAM Act of 2003** has come into force.

The European Union and other countries have also enacted anti-spam legislation. Australia which contributes to about 16% of the total spam in the world has the most stringent spam laws under which spammers may be fined up to $1.1 million a day. Although anti-spam legislations are found all over the world, the methods of combating spam are virtually similar as is evident from the following:

*Contd. on page no. 164*

# GLIMPSES OF SUPREME COURT RULINGS

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## 8 NEGOTIABLE INSTRUMENTS ACT – PROSECUTION – LIABILITY OF DIRECTOR:

A director whose resignation has been accepted by the Company and that has been duly notified to the ROC cannot be made accountable and fastened with liability for anything done by the Co. after the acceptance of his resignation. The words 'every person who, at the time the offence was committed', occurring in Sec.141(1) of the Negotiable Instruments Act are not without significance and these words indicate that criminal liability of a director must be determined on the date the offence is alleged to the have been committed. The High Court fell into grave error in not taking into consideration the uncontroverted documents relating o the appellant's resignation from the post of director of the Company. Had these documents been considered by the High Court, it would have been apparent that the appellant has resigned much before the cheques were issued by the Co. The appellant resigned from the post of director on 2nd March, 2004. The dishonored cheques were issued by the Co. on 30th April,2004 i.e. much after the appellant had resigned from the post of director of the Co. The acceptance of appellant's resignation is duly reflected in the resolution dtd. 02.03.2004. Then in the prescribed form (Form No.32), the Co .informed the RoC on 04.03.2004, about the appellant's resignation. It is not even the case of the complainants that the dishonored cheques were issued by the appellant. These facts leave no manner of doubt that on the date the offence was committed by the Co, the appellant was not the director; he had nothing to do with the affairs of the Co. In this view of the matter, if the criminal complaints are allowed to proceed against the appellant then it would result in gross injustice to the appellant and tantamount to an abuse of process of the Court. The complaints as against the appellant stand quashed.

***[Harshendra Kumar (D) Vs. Rebatilata Koley etc. (162 Comp Cas 247)]***

## 9 CONSTITUTION OF INDIA - MAINTAINABILITY – DELAY :

Delay and latches are some of the factors for refusal to exercise of discretionary power under Article 226. The High Court may refuse to invoke its extraordinary powers if there is such negligence or omission on the part of the applicant to assert his rights taken in conjunctions with the lapse of time and other circumstances.

There is no inviolable rule of law whenever there is a delay, the Court must necessarily refuse to entertain the petition, and each case must be dealt with on its own facts. Rights accrued to others by the delay in filing the petition should not be disturbed, unless there is a reasonable satisfactory explanation for the delay, because the Court should not harm innocent parties if their rights had emerged by the delay on the part of the petitioners. That the petitioner had been seeking relief elsewhere in a manner provided by law is a satisfactory way of explaining delay. If the petitioner runs after a remedy not provided in the statute or the statutory rules, it is not desirable for the High Court to condone the delay. It is immaterial what the petitioner chooses to believe in regard to the remedy. The representations would not be adequate explanation to take care of the delay.

***[Shankara Co-operative Housing Soc. Ltd. Vs. M. Prabhakar & Others (5 SCC 607) ]***

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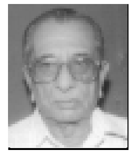
In life we have lot to lose and very little to choose. Whenever you get a chance to choose, do it carefully and see that you never lose what you choose.

# FROM THE COURTS

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## 15 SEC. 40 A(3), PAYMENT BY BANKER'S CHEQUE / PAY ORDER/ CALL DEPOSIT RECEIPT PROPER :

### CIT V/S. VIJAY KUMAR GOEL (2010) 324 ITR 376 (CHHATISGARH)

**Issue :**

Whether payment through Banker's Cheque/Pay order/Call Receipt would violate provisions of Sec. 40A (3)?

**Held :**

Sub-clause (iv) of clause (d) of the amended rule 6DD of the Income Tax Rules, 1962, provides that "no disallowance shall be made where the payment is made by a bill of exchange made payable only to a bank". From a reading of the definition of bill of exchange under section 5 and cheque under section 6 of the Negotiable Instruments Act, 1981, it is clear that the banker's cheques/pay orders/ call deposit receipts are instruments which fall within the definition of bill of exchange. The A.O. had not doubted the genuineness of the transactions. Even otherwise, the payments had been made through banker's cheques/pay order/call deposit receipts issued in favour of the SAIL (Selling party). The payments could not be disallowed.

## 16 CBDT : POWER TO ISSUE CIRCULARS : LIMITATION :

### DEDICATED HEALTH CARE SERVICES V/S. ASSTT. CIT (2010) 324 ITR 345 (BOM)

**Issue:**

Can CBDT issue circular ignoring the provisions of the Act?

**Held:**

Circular No. 8 of 2009 dated 21-11-2009 proceeded to postulate that a liability to pay a penalty u/s 271C would be attracted for a failure to make a deduction under Sec. 194-J. Sec. 273 (B) of the Act provides that notwithstanding any thing contained in provisions inter alia of Sec. 271 C no penalty shall be imposable on the person or the assessee, as the case may be, for any failure referred to in the provision if he proves that there was a reasonable cause for the failure. The vice in the circular that had been issued by the CBDT lay in the determination which had been made by the Board that a failure to deduct tax on payments made by TPAs to hospitals u/s 194-J would necessarily attract a penalty u/s 271C. Besides interfering with the quasi judicial directions of the AO or as the case may be, the appellate authority the direction which had been issued by the Board would foreclose the defense which was open to the assessee u/s 273-B. By foreclosing a recourse to the defense statutorily available to the assessee under Sec. 273-B, the Board had by issuing such a direction acted in violation of the restraints imposed upon it by provisions of sub-section (1) of section 119. To that extent, the circular that was issued by the Board would have to be set aside.

## 17 REJECTION OF ACCOUNTS AND ONUS ON REVENUE

### CIT V/S. PARALISA HOLIDAYS (2010) 325 ITR 13 (DEL)

**Issue:**

When the accounts are audited, there is no adverse report of auditor and no defect found in the accounts, whether addition can be made rejecting the accounts ?

**Held:**

The AO has not pointed any specific defect or discrepancy in the account books maintained by the assessee. Admittedly, the assessee had been maintaining regular books of account, which were duly audited by an independent Chartered Accountant. As noted by the Commissioner of Income Tax (Appeals), the financial results were fully supported by the assessee with vouchers and the books of account were complete and correct in all respects. The accounts which are regularly maintained in the course of business and are fully audited, free from any qualification by the auditors, should normally be taken as correct unless there are adequate reasons to indicate that they are incorrect or unreliable. The onus is upon the Revenue to show that either the books of account maintained by the assessee are incorrect or incomplete or method of accounting adopted by him was such that true profits of the assessee cannot be deduced therefrom.

If any particular expense claimed by the assessee remained unverified, the Assessing Officer could have disallowed that particular expense. But, that by itself cannot be a ground for rejection of accounts as a whole under section 145(3) of the Act.

## 18 CAPITAL GAIN : COST OF ACQUISITION : INTEREST ELEMENT INCLUDIBLE.

**CIT V/S. SRI HARIRAM HOTELS PVT. LTD. (2010) 325 ITR 136 (KARN)**

**Issue:**

While calculating cost of acquisition for the purpose of computing capital gain, whether interest paid for acquisition of asset is to be included in cost of acquisition ?

**Held:**

The assessee borrowed loans from some of the directors and purchased an immovable property in order to put up a hotel building, but it could not materialize on account of various reasons. Ultimately, the assessee sold the property and while filing the return for computation of capital gain, it claimed a sum of Rs. 37,45,042/- towards interest paid to the directors on the loan borrowed from them in order to purchase the property. The A.O. disallowed the claim made by the assessee, but the Tribunal allowed it. On appeal to the High Court, it was held that, since the property had been purchased out of the loans borrowed from the directors any interest paid thereon was to be included while calculating the cost of acquisition of the asset.

## 19 UNEXPLAINED DISCREPANCY IN STOCK AND CONVICTION

**PURON CHAND V/S. R.K. SUMAN ITO (2010) 325 ITR 38 (P & H)**

**Issue :**

Whether the assessee can be convicted when he is not able to explain discrepancy in stocks ?

**Held:**

Both the Courts below found sufficient evidence to hold that the petitioner was actively connected with the business of the firm and was responsible for maintaining the accounts and conduct of the business of the firm. The petitioner did not show the true stock in stock books which enabled him to evade payment of tax legally bound to be paid. The petitioner by willfully attempting to evade tax, penalty or interest chargeable, committed the offence punishable u/s 276C of the I.T. Act 1961. He had been awarded the minimum sentence of rigorous imprisonment for six months besides the fine u/s 276C of the Act. Under the circumstances there was no ground warranting interference by the court in exercise of revisional jurisdiction u/s 401 of the Criminal Procedure Code.

## 20 JURISDICTION U/S 263 : TWIN CONDITIONS TO BE FULFILLED.

**JEWEL OF INDIA V/S. ASSTT. CIT (2010) 325 ITR 92 (BOM)**

**Issue:**

Whether is it mandatory to fulfill both the conditions to have jurisdiction u/s 263?

**Held:**

Sec. 263 of the I.T. Act 1961, has been interpreted by the Supreme Court in the case of Malabar Industrial Co. Ltd. v/s. CIT (2000) 243 ITR 83 wherein it is held that a bare reading of sec. 263 of the Act makes it clear that the pre requisite for exercise of jurisdiction by the CIT suo motu under it, is that the order of the ITO is erroneous in so far it is prejudicial to interests of the Revenue. The CIT has to be satisfied about the following conditions namely:-

(i) The order of the AO sought to be revised is erroneous,

(ii) It is prejudicial to the interests of the Revenue.

If one of them is absent, the order of the AO is erroneous but it is not prejudicial to the interest of the Revenue or if it is not erroneous but is prejudicial to the Revenue, recourse cannot be had to Section 263(1).

High Court held that, the order was found to be erroneous by the revisional authority, but nowhere the finding was recorded that the order passed by the AO was prejudicial to the interests of the Revenue. In the absence of the positive finding that the order was not in the interests of the Revenue, it was not open for the revisional authority to assume jurisdiction.

The order of revision was not valid.

## 21 LEASING BUSINESS : DEPRECIATION : MEANING OF USER :

**CIT V/S. KOTAK MAHINDRA FINANCE LTD. (2010) 191 TAXMAN 280 (BOM)**

**Issue:**

Whether depreciation on machinery leased is allowable even though the same are not put to use by the lessee?

**Held:**

Business of the assessee is of leasing. The lessor had given assets on lease, and had received the lease rentals. The act of the lessor in giving the assets on lease would amount to use of the machinery and consequently depreciation in the value of the assets pursuant to their use could be allowed. The expression has a very wide connotation to include amongst others, reduction in useful value of the assets due to wear and tear, efflux of time, obsolescence and the like.

The fact whether the lessee had put to use the leased equipment would be irrelevant as long as the machinery, in fact, had been given on lease before the end of the financial year as then it could be said that the assessee had "used" the leased equipment for the purpose of business.

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# TRIBUNAL NEWS

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## 14 DCIT V. A.P. STATE ELECTRICITY BOARD 130 ITD 152 (HYD.) (TM)

### ASSESSMENT YEAR-1987-88, DATE OF ORDER –JUNE 11, 2010

### BASIC FACTS:

The assessee was engaged in the business of production and distribution of electricity in the State of Andhra Pradesh. During the relevant accounting year, it had received certain amount from the Government as subsidy to meet the part of expenditure to be incurred for rectification and improvement of power line damaged due to cyclone. It also incurred certain amount on current repairs out of the subsidy amount received and claimed deduction from the same. The assessing officer disallowed the claim of the assessee on the ground that the amount spent on current repairs was of subsidy amount received from the Government and added back the impugned amount to the income of the assessee treating the same as capital expenditure. On appeal, CIT(A) held that it was immaterial to debate the source and the head as long as the money was drawn for current repairs and directed the assessing authority to allow the entire amount spent on current repairs as revenue expenditure. On second appeal preferred by the revenue, both the vice president and the Accountant Member upheld the order of the CIT(A) that the amount spent for rectification and improvement of power line was a revenue expenditure. However, there being a difference of opinion between the vice-president and accountant member, the subsidy amount received by the assessee was assessable as revenue receipt in the hands of the assessee.

### ISSUE:

**Whether learned CIT(A) having observed that the expenditure was revenue expenditure, ought to have held that the subsidy received by the assessee was revenue receipt in view of the decision of the Hon'ble Supreme Court in case of the Sahney Steel & Press Works Ltd.**

**Whether on the facts and circumstances of the case, the expenditure of Rs. 7.83 crores incurred out of capital subsidy of Rs. 850 lakhs sanctioned in favor of the assessee by the Government of A.P. on rectification and improvement of power lines damaged due to cyclone is not allowable as deduction though it is revenue expenditure because it is spent out of capital subsidy received from the State Government?**

### HELD:

The purpose of giving the subsidy to the assesse was to be considered. If the purpose was to help it in setting up of its business or completing the project, the subsidy was to be treated as received for capital purposes and if the purpose was to assist in carrying out business operations and only for commencement of the production, such subsidy was to be treated as revenue. The assessee in the instant case, had claimed the expenditure as revenue on ground that no new asset came into existence which could be said to be of enduring benefit. The amount spent by the assessee for rectification and improvement of the power line was admittedly out of the amount of subsidy received by the assessee from the Government with the clear understanding that the amount granted as subsidy to the assessee shall be utilized by the assessee for rectification and improvement of power line. Accordingly, it was quiet logical that the amount of subsidy received by the assessee for spending on current repairs was a revenue receipt in its hands. There was no merit in the submission of the assessee that there was no nexus between the nature of expenses incurred by it and the nature of amount of subsidy received by it from the Government. The grant of subsidy to the assesse had a direct nexus with the business of the assessee and with revenue expenditure incurred to it. The amount of subsidy was given by the Government for the purpose of smooth functioning of the business of the assessee. Therefore, the subsidy amount received by the assessee was a revenue receipt in its hands. The expenditure incurred by the assesse on rectification and improvement of power lines damaged due to cyclone out of subsidy was revenue in nature.

## 15 ACIT VS. CLOUGH ENGINEERING LTD 138 TTJ385 (DEL)(SB), ASSESSMENT YEAR-2003-04, DATE OF ORDER –MAY 06TH 2011

### BASIC FACTS:

The assessee company is incorporated under the laws of Australia which had a PE in India carrying out contractual work in the nature of designing, engineering, procuring, fabricating, installing, laying pipelines, testing and pre-commissioning of off-shore platforms. During the year the income returned by the assessee included interest income on income-tax refund. The assesse claimed that such interest income was taxable at the rate of 15% on gross basis as per Article 11 (2) of the DTAA.

The Assessing Officer (AO) held that the interest income had been received on the refund of the tax deducted at source, made from the business receipts and was directly connected with the business receipts. Hence the same was chargeable as profits of the PE under Article 7 read with Article 11(4) of the DTAA. The matter was carried to the Tribunal and in view of conflicting decisions rendered by different benches of the Tribunal a Special Bench was constituted to address the matter.

### ISSUE:

**Whether, on the facts and in the circumstances of the case, interest on income-tax refund is liable to tax with reference to Article 7 read with paragraph no. 4 of Article 11 or paragraph no. 2 of Article 11 of Indo-Australia DTAA?**

### HELD:

The assessee is entitled to the benefit under the treaty. Drawing analogy from various heads of income under the Income-tax Act, 1961 (the Act) for considering whether interest was in the nature of business income or not was not appropriate as it would lead to only such interest which is in the nature of business income would not be considered under paragraph no. 4 of Article XI of the DTAA and which could also not be considered as the intent of the paragraph. The real test is not whether the interest on the income tax refund is business income or not, but whether the indebtedness is effectively connected with the PE as the paragraph contemplates such a condition upon whose satisfaction interest income becomes taxable under Article 7 as business profits. The tax was deducted at source from the business receipts of the PE. Therefore, indebtedness is connected with the PE. However the responsibility to pay the tax lies with the assessee company. In the case tax got automatically deducted from the receipts of the PE by operation of law. Such collection of tax by force of law would not establish effective connection of the indebtedness with the PE as ultimately it is only the appropriation of profit of the assessee company and hence the interest cannot be said to be effectively connected with such receipts of the PE. In the circumstances such interest is not effectively connected with PE either on the basis of asset-test or activity-test. Further, interest income does not have to be necessarily business income in nature for establishing the effective connection with the PE since it would render provision contained in paragraph 4 of Article XI redundant.

The Special Bench of the Tribunal held that interest income from an income tax refund could not be said to would be effectively connected to the PE for the same to be taxed as business profits.

## 16 MINDA INVESTMENTS LTD. VS. DCIT, 138 TTJ 240 (DEL), ASSESSMENT YEAR 2006-07, DATE OF ORDER OCTOBER 13, 2010

### BASIC FACTS:

The assessee earned exempt income in the form of dividend of Rs. 70,33,453 u/s 10(34) of the IT Act. The assessing officer disallowed expenses incurred to earn this exempt income us 14A on ground that the assessee had to establish direct nexus between exempt income and expenses in such case was entirely misplaced and erroneous. The contention of the assessee that no expenses had been incurred since dividend and long-term capital have been credited in the bank was incorrect. The assessee contended procedure given under Rule 8D was not applicable for assessment year 2006-07 and so no expense was to be disallowed under Section 14A. The assessing officer held that Section 14A was applicable from 2001 and only the procedure or method of computation had been prescribed from assessment year 2007-08. On appeal, CIT(A) directed the assessing officer to rework the amount of disallowance, as per Rule 8D of the IT Rules.

### ISSUE:

**Whether applicability of Section 14A of the Act requires finding of incurring expenditure for making disallowance under that section?**

### HELD:

The Tribunal held that in case of Hero Cycles Ltd the Punjab and Haryana High Court held that the disallowance under section 14A required finding of incurring of expenditure and where it was found that for earning exempted income no expenditure had been incurred, disallowance under section 14A could not stand.On the other hand, the Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. had held that the assessing officer can adopt a reasonable basis to identify the expenses in relation to exempt income. The matter in this case could not be set aside to the files of assessing officer to apply Rule 8D as the said provision could not be applicable for the current assessment year. Secondly, the assessee had urged that no expenditure had been identified to have been incurred to earn exempt income and neither the assessing officer not the learned CIT(A) had rebutted those submissions. The assessing officer had gone into to make the ad hoc estimate which was not sustainable. In the result, the appeal filed by the assessee was to be allowed. Under such circumstances, the decision of the Hon'ble Apex Court in case of Vegetable Products Ltd. 1973 CTR (SC) 177was to be referred and was held that in the taxing provision if two constructions were possible, one favoring the assessee was to be adopted. Accordingly, following the precedent from the Hon'ble Punjab & Haryana High Court as above, the matter was set aside and the issue was decided in favor of the assessee.

## 17 XEN, IRRIGATION CONSTRUCTION DIVISION, NOHAR VS. JCIT 138 TTJ (JD)(UO) 93,

### ASSESSMENT YEAR 2000-01, ORDER DATED: FEBRUARY 11TH, 2011

### BASIC FACTS:

The assessee during the year under consideration failed to deduct surcharge amount at the time of deducting tax at source. In view of the same, assessing officer levied penalty u/s 271C for not deducting tax as per the provisions of the Act. Assessee filed its reply stating that it was not aware of the provisions of the Act and also the people in charge of tax matters were busy and hence failed to deduct surcharge. When assessee came to know about its default, in consequence of the same, assessee paid all the taxes which were remaining unpaid. Assessee filed an appeal before CIT (A) and the same was decided against the assessee. Hence Assessee is in appeal before ITAT.

### ISSUE:

**Whether penalty should be levied u/s 271C when the assessee furnished valid reasons for non -compliance and then after deposited the amount of short deduction with the tax authorities?**

### HELD:

After considering the facts of the case it was held that as the amount was rightly deposited with the tax authorities and also the assessee had reasonable reasons for short deduction, levying penalty on assessee was not justified. Hence finally the decision was made in favor of assessee where the assessee had explained reasons for non-deduction of surcharge on TDS and the explanation given by the assessee was reasonable and even when it had come to his notice he immediately acted upon and paid the taxes to the Department, no penalty u/s 271C could be imposed.

## 18 ACIT VS. CRICKET ASSOCIATION, 138 TTJ 738(LUCKNOW), ASSESSMENT YEAR-2006-07, DATE OF ORDER 24TH SEPTEMBER, 2010

### BASIC FACTS:

The assessee was granted registration u/s 12A of the Act as per order dated 24th March, 2004. The assessee society is a sports association working for advancement and promotion of games and sports, particularly cricket in the state of Uttar Pradesh. The assessee filed nil return of income on 1st April, 2006 claiming deduction u/s 11 of the IT Act. The assessee society had accumulated Rs. 5,05,26,154 as on 31st March, 2005. A sum of Rs. 50 lacs was set apart and accumulated during the year u/s 11(2) of the IT Act. The assessee had applied a sum of Rs. 6,80,781 and the balance amount of Rs. 5,48,45,373 was available with it. As per the resolution of the extraordinary general meeting the association stand dissolved and the assets, liabilities and functions were transferred to new company, namely M/s Uttar Pradesh Cricket Association. The assessing officer observed that the assessee society was a charitable organization and the amount credited or paid out of accumulated balance to another charitable organization was not to be treated as application of income for charitable purposes. The assessing officer in view of Circular No. 8 of 2002 dated 27th August, 2002 of CBDT held that payment of Rs. 5,48,45,373 to Uttar Pradesh Cricket Association could not be considered as application of income of the assessee for charitable purpose and required to be treated as income u/s 11(3)(d) of the IT Act.The CIT(A) held that addition of Rs. 5,48,45,373 made by the assessing officer u/s 11(3)(d) of the Act was not sustainable.

### ISSUE:

**Whether addition u/s 11(3)(d) on transfer of accumulated funds to Uttar Pradesh Cricket Association was sustainable?**

### HELD:

Assessee, a charitable society having transferred its accumulated funds to charitable company registered u/s 25 of the Companies Act as per the specific provisions of second proviso to section 11(3A), it could not be said that the transfer of funds was in contravention of public policy and, therefore, addition u/s 11(3)(d) was not sustainable.

## 19 FORTIS HEALTHCARE LTD. V DDIT (INTERNATIONAL TAXATION), 45 SOT 190 (CHD.-ITAT),

### ASSESSMENT YEAR -2008-09, DATE OF ORDER – FEBRUARY 25, 2010

### BASIC FACTS:

The assessee running a multi-specialty hospital entered into an agreement with 'J' for conducting accreditation surveys in respect of the hospital. As per the terms of agreements the assessee was to pay fee for survey in addition to reimburse the expenses of the officials with respect to their boarding and lodging and travel expenses. The assessee deducted tax at source out of fee paid on account of survey but no tax was deducted on reimbursement of travel expenses. The claim of assessee was that reimbursement of actual expenditure did not constitute income chargeable to tax u/s 195. The assessing officer rejected the claim of the assessee contending that reimbursement was nothing but part of fee paid to 'J' and hence tax had to be deducted on such payment. The assessing officer declared assessee in default u/s 201(1A). On appeal, CIT(A) upheld the decision of assessing officer holding that travel expenses incurred in the course of providing technical service to the assessee were a part of technical fee.

### ISSUE:

**Whether assessee was liable to deduct tax at source u/s 195 out of payments of reimbursement of actual expenditure?**

### HELD:

The position had been settled by the Apex Courts that all such payments made to non-residents having income character assessable to tax in India were exigible to deduction of tax under the provisions of section 195. The payments made to non-resident which had no elements of income embedded in them were not subject to withholding of tax u/s 195. In case of composite payments, recourse was to be made u/s 195(2) and in the absence of the same, tax was to be deducted on entire payment. Hence, where the assessee had reimbursed expenditure which had been actually incurred by the payee, there could be no withholding of tax u/s 195 as the same had no element of income embedded in the same.

The assessing officer was directed to verify the stand of the assessee vis-à-vis the actual incurrence of expenditure and in case the assessee would be able to satisfy with evidence that the aforesaid payments were in fact reimbursement of expenses incurred by the officials of 'J' the same would fall outside purview of section 195 and there would be no liability to deduct tax at source. In the alternative in case the assessee would not be able to establish its claim of reimbursement of expenses, the said payments would be subjected to tax deduction at source and in case of non-deduction of tax, it would be chargeable u/s 201(1) and interest u/s 201(1A). The assessing officer would decide the issue in the light of observations made in that regard after affording a reasonable opportunity of hearing to the assessee.

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*Contd. from page no. 157*

*Article : Spam and I.T. Act 2000*

1) **Prohibition:**

The state of Delaware in the United States has stringent anti-spam legislation, which imposes a virtual ban on Unsolicited Bulk Commercial E-mail messages. The European Union does not prohibit unsolicited commercial email, but permits individual member states to do so. Finland, Germany, and Italy all have laws prohibiting spam.

2) **Enforcement of Anti-Spam policies:**

ISPs and other destination operators generally have security policies that govern the use of their facilities for various purposes, and nearly all of them prohibit spamming in particular. Consequently in some legislations emphasis is laid on following these policies.

3) **Opt-out clause**

Several Legislations including the **US CAN -SPAM Act** provide for an Opt-out procedure wherein senders may communicate with anyone except those who have explicitly opted out.

International Community has recognized the spam dangers and is taking steps to fight it effectively. It is time that India should also join in the process.

### Legal position in India:

There is no Spam legislation in India. The much-hyped Information Technology Act of 2000 does not cover any direct provisions on spamming.

**Section 66A (inserted through I.T. Amendment Act, 2008)** only refers to imprisonment and fine to a person for sending grossly offensive, menacing or false information through various communication media like E-mail, Mobile phones (SMS) and Social Networking Sites (Scraps). It means Criminal Complaint can be filed against companies and individuals for sending false messages regarding various fraud schemes and offers.

Further Techno-Legal Experts who possess good convergence skills of I.T and Law can take the help of **Section 43 of I.T. Act, 2000** which allows affected parties to claim Compensation from spammer companies up to Rs. 5 Crore for damages due to unwanted spam-viruses, spam-contaminant and spam related disruptions in the computer systems.

However honorable Delhi High Court pinpointed the absence of appropriate legislation relating to spam in a recent case wherein Tata Sons Ltd and its subsidiary Panatone Finwest Ltd filed a suit against McCoy Infosystems Pvt Ltd for transmitting spam. It was held that in the absence of statutory protection to check spam mails on Internet, the conventional tort law principles of trespass to goods as well as law of nuisance would have to be used.

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# UNREPORTED JUDGEMENTS

**In this issue we are giving full text of three decisions. First decision in case of VineetKumar Bhalodia is in respect of the taxability of gift received from HUF in the hands of individual in view of section 56(2)(v) of the Act from Rajkot Bench. This is perhaps the first decision of its kind, which deals with the issue relating to the taxability of gift from HUF and as to whether the same can be considered to be exempt u/s 56(2)(v) of the Act.**

The second decision is from Ahmedabad ITAT in case of Parag M. Shah wherein the amount of interest paid has been considered to be part of the purchase price and hence not considered to be interest u/s 194A and hence the alleged default in respect of TDS from such payment was not considered as liable to attract provisions of section 40a (ia)of the Act.

The third decision being judgment of Hon'ble High Court of Gujarat is in respect of Kamlesh M. Solanki in Tax Appeal No. 2421 of 2009 whereby High Court declined to admit the question of law proposed by the department against the order of Ahmedabad Tribunal in the case of the assessee whereby Tribunal confirmed the order passed by CIT(A) deleting the addition of Rs.50 Lacs made by the Assessing Officer on account of disallowance of Keymen Insurance Policy Premium.

We hope the readers would find them useful.

**CA. Sanjay R. Shah**
*The author is the past President of CAA, practising since 1981. He can be reached at sarshah@deloitte.com*

## 5 IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

### TAX APPEAL NO. 2421 of 2009

**COMMISSIONER OF INCOME TAX –IV - Appellant (s)**
**Versus**
**KAMLESH M. SOLANKI – Opponent(s)**

**Appearance :**

MR. M.R. BHATT, SR. ADV. WITH MRS. MAUNA M. BHATT for Appellant (s) : 1,

None for Opponent (s) : 1,

**CORAM : HONOURABLE MR. JUSTICE AKIL KURESHI**
**and**
**HONOURABLE MS. JUSTICE SONIA GOKANI**

**Date : 26/04/2011**

### ORAL ORDER

**(Per : HONOURABLE MS. JUSTICE SONIA GOKANI)**

Revenue has proposed the following question of law for consideration of this Court:

"Whether the Appellate Tribunal is right in law and on facts in confirming the order passed by CIT(A) in deleting the addition amounting to Rs.50 lacs made by the Assessing Officer on account of disallowance of Keymen Insurance Policy?"

Assessee-respondent is a Chartered Accountant. For the financial year relevant to the assessment year under consideration, he had shown along with the administrative expenses, debit of Rs.50 lacs towards Keyman Insurance Premium. The same was claimed by the assessee-respondent for the insurance policy of one of its employees, Gayatri L. Rathod who was the head of the Financial Consultancy Division and was looking after the financial consultancy for corporate finance. This was objected to by the Assessing Officer holding that such payment of premium towards Keyman Insurance Policy was not justified. The same was carried in appeal before the CIT(Appeals) which had deleted the addition on the ground that the assessee was covered by explanation to section 10(10D). This was challenged before the Appellate Tribunal. The tribunal by its order dated 5th June, 2009, concurred with the findings of the CIT(Appeals). The impugned order of the Tribunal is in challenge before this Court raising the afore-mentioned questions of law.

We have heard learned counsel Mr. Manish Bhatt and also perused the orders of the adjudicating authorities presented before this Court. Section 10(10D) reads as follows:

"(10D) any sum received under a life insurance policy, including the sum allocated by way of bonus on such policy, other than –

(a) any sum received under sub-section (3) of section 80 DD or sub-section (3) of section 80DDA; or

(b) any sum received under a Keyman Insurance Policy ; or

(c) any sum received under an insurance policy issued on or after the 1st day of April, 2003 in respect of which the premium payable for any of the years during the term of the policy exceeds twenty per cent of the actual capital sum assured:

Provided that the provisions of this sub-clause shall not apply to any sum received on the death of a person:

Provided further that for the purpose of calculating the actual capital sum assured under this sub sub-clause, effect shall be given to the Explanation to sub-section (3) of section 80C or the Explanation to sub-section (2A) of section 88, as the case may be.

Explanation – For the purpose of this clause, 'Keyman Insurance Policy' means a life insurance policy taken by a person on the life of another person who is or was the employee of the first mentioned person or is or was connected in any manner whatsoever with the business of the first-mentioned person."

The explanation specifies that for the purpose of the said clause, Keyman Insurance Policy can be taken for any person who is or was the employee of the person who is taking the life insurance policy or is or was connected in any manner whatsoever with the business of the said person. The Tribunal in its order found that the payment of premium was genuine and also observed that the person on whose life the said policy was taken by the assessee-respondent was an employee of the assessee and such aspect was not in challenge.

We are in broad agreement with the reasons given by the Tribunal that it is the prerogative of the businessman to consider and decide as to which of the employees is important for the business and it is for him to take life insurance policy for such an employee keeping in mind various factors and circumstances. Hence, both the authorities have concurrently upheld the deletion of addition made by the Assessing Officer by rightly interpreting the issue. We see no reason to interfere with the order of the Tribunal and no question of law is arising for the determination in this appeal. This appeal, therefore, deserves to be and is dismissed.

## 6 IN THE INCOME TAX APPELLATE TRIBUNAL AHMEDABAD BENCH "A"

**Before Shri MUKUL Kr. SHRAWAT, JUDICIAL MEMBER**
**and**
**Shri A.K. GARODIA, ACCOUNTANT MEMBER**

Date of hearing : 16/6/2011 drafted on: 17/06/2011

ITA No.2075/Ahd/2008

| | |
|---|---|
| Assessment Year : 2005-06 Vs. | Shri Parag Mahasukhlal |
| The Income Tax Officer | Shah |
| Ward-2(2) | Prop of Shri Bearing, |
| Ahmedabad | Kadia Kul, Relief Road |
| | Ahmedabad |
| | PAN/GIR No.:ACUPS 1963 Q |
| (**APPELLANT**) .. | (**RESPONDENT**) |

And

**CO No.120/Ahd/2008 – A.Y. 2005-06**
(Arising out of ITA No.2075/Ahd/2008)

| | |
|---|---|
| **Sh. Parag Mahasukhlal Shah vs.** | **The ITO** |
| Ahmedabad | Ward-2(2), Ahmedabad |
| (Cross Objector) .. | (Respondent) |

Revenue by : Shri Roop Chand, Jt.CIT-DR
Assessee by: Shri S.N. Divatia, A.R.

### ORDER

**PER SHRI MUKUL Kr. SHRAWAT, JUDICIAL MEMBER :**

The Revenue is in appeal and the respondent-assessee has filed a cross-objection, both have emanated from the order of Learned CIT(Appeals)-VII Ahmedabad dated 26/03/2008 passed for Assessment Year 2005-06.

**(A) Revenue's appeal; ITA No.2075/Ahd/2008-A.Y.2005-06**

2. The only ground of the Revenue is as follows:-

*1. The CIT(A) erred in deleting the addition made on account of interest payment of Rs.7,83,666/- out of the total payment of Rs.12,47,746/- u/s.40(a) (ia) of the IT Act by holding that such* ***interest payment was additional purchase price.***

2.1. Facts in brief and the issue involved as emerged from the corresponding assessment order passed u/s.143(3) of the I.T.Act dated 28/09/2007 were that the assessee in his individual capacity is a proprietor of a concern dealing in trading of ball-bearings. It was noticed by the Assessing Officer that the assessee has claimed interest expenses of Rs.12,47,746/- as per Profit & Loss Account. Bifurcation of the interest account was submitted according to which out of the total interest claimed an amount of Rs.7,83,666/- was towards interest to FAG Bearing (India) Ltd. Admittedly, on the said amount of interest no tax was deducted at source. Explanation of the assessee was that since the **assessee was having dealership of FAG Bearing (India) Ltd. and reselling the ball-bearings, therefore as per the terms of payment he was allowed 2.5%**

**cash discount on payments made within 15 days and 1.5% cash discount in case of payment made within 30 days.** It was also explained that as per the terms, the assessee was allowed interest-free credit period for 60 days. It was further informed **that in case of overdue payment the cost of purchase is paddled with a liability to pay a compensatory sum which was termed as interest.**

Whenever there was default in making payment beyond the normal credit period, then the same was agreed to be compensated accordingly. It was, therefore, explained that the said amount was nothing but in the nature of **additional sale price** paid. As per the assessee since it was not in the nature of interest in strict terms, hence there was no liability to deduct the tax at source. However, the Assessing Officer was not convinced and according to him as per section 2(28A) of the I.T.Act interest means, interest payable in any manner in respect of any money borrowed or debited. In his opinion, for such payment the provisions of section 194A of the I.T.Act were applicable. Finally, it was concluded that in terms of the provisions of section 40(a)(ia) of the I.T.Act, the expenditure of the said interest payment was to be disallowed. The matter was carried before the first appellate authority.

3. While deciding the issue in favour of the assessee, the Learned CIT(Appeals) has followed an order of the Jurisdictional High Court, namely, **Nirma Industries Ltd. vs. Dy. CIT reported at (2006) 283 ITR 402(Guj.)** and held that the interest received from the trade debtors for late payment of sales consideration is the amount derived from the sale proceeds. According to the judgment, purchaser pays higher sale price due to delay in payment. As per the argument the said payment is therefore out of the ambits of the TDS provisions. Accepting the defense, the Assessing Officer was directed to delete the addition.

4. From the side of the Revenue Learned Departmental Representative Mr.Roop Chand and from the side of the assessee Learned Authorised Representative Mr.S.N.Divatia have appeared who have respectively placed reliance on the orders of the Assessing Officer and the Learned CIT(Appeals).

5. We have heard both the sides at some length. Admitted factual position is that the assessee is having a dealership of FAG Bearing (India) Ltd. and, therefore, in the business of sales of ball-bearings. This fact has also not been denied that there were certain terms and conditions agreed upon between the two parties in case of delay in payments. Whenever there was delay in payment or the payments got overdue, there was a condition to **compensate the delay.** Likewise, in case of prompt payment, the terms of payments have prescribed a **facility of cash discount.** Therefore, the fundamental and primarily argument from the side of the respondent-assessee was that the amount paid to compensate the delay in making the **payment was nothing but the added sales price of the said commodity.** Inter alia, it has also been argued that the impugned nature of payment was not within the **definition of interest as prescribed u/ s.2(28A) of the I.T.Act.** With this factual back ground, the case laws relied upon is Nirma Industries Ltd.(supra), which now stood upheld and SLP of Revenue was dismissed as per the citation reported at (2008)166 Taxman 95 (SLP-28). In addition to this precedent, Learned Authorised Representative has also placed reliance on following decisions:-

| Sl.No(s) | Decision in the case of ... | Reported in... |
|---|---|---|
| 1. | CIT vs. Indo Matsushita Carbon Co.Ltd. | 286 ITR 201(Mad.) |
| 2. | British Bank | 233 ITR 251(Bom) |
| 3. | Jackson Engineering Co.Ltd. | 231 CTR 348 (Del) |
| 4. | CIT vs. Advance Detergents Ltd. | 228 CTR 356(Del) |
| 5. | Phatela Cotgin Industries P.Ltd. vs. CIT | 303 ITR 411 (P&H) |
| 6. | Tata Sponge Iron Ltd. | 292 ITR 175(Ori) |

6. We have carefully perused the decision of the Hon'ble Jurisdictional High Court,( Nirma Industires 283 ITR 402) wherein observation in respect of the issue involved is as under:-

*"33. However, the parties having made elaborate submissions, the matter may be examined from a slightly different angle. When the assessee enters into a contract for sale of its products it could either stipulate (a) that interest at the specified rate would be charged on the unpaid sale price and added to the outstanding till the point of time of realisation, or (b) that in case of delay the payment for sale of products worth Rs. 100 to carry the sale price of Rs. 102 for first month ' s delay, Rs. 104 for second month ' s delay, Rs. 106 for third month ' s delay and so on. If the contention of Revenue is accepted, merely because the assessee has described the additional sale proceeds as interest in case of contract as per illustration (a) above, such payment would not be profits derived from industrial*

*undertaking, but in case of illustration (b) above, if the payment is described as sale price it would be profits derived from the industrial undertaking. This can never be, because in sum and substance these are only two modes of realising sale consideration, the object being to realise sale proceeds at the earliest and without delay.* ***Purchaser pays higher sale price if it delays payment of sale proceeds.*** *In other words, this is a converse situation to offering of cash discount. Thus, in principle, in reality, the transaction remains the same and there is no distinction as to the source. It is incorrect to state that the source for interest is the outstanding sale proceeds. It is not the assessee ' s business to lend funds and earn interest. The distinction drawn by Revenue is artificial in nature and is neither in consonance with law nor commercial practice."*

7. In the light of the above precedent, we deem it proper to discuss the relevant provisions of IT Act.

7.1. **Section 2 (28A) of the I.T.Act has defined the term "interest"** as follows:

*"***Section 2(28A) :** ***"interest"*** *means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized."*

7.2. The true character of the term interest has been defined, but the definition appears to be wide , inter-alia, covers interest payable in any manner in respect of loans, debts, deposits, claims and other similar rights or obligation. This definition further includes service charges but those charges should be in respect of the money borrowed. By this definition, therefore, it is evident that if the charges are in respect of a debt or in respect of any credit facility then such charges are inclusive in the definition of "interest". **Therefore, the interest is a payment of money in lieu of use of borrowings. It is payable by a debtor to the creditor.** But it is also worth to note that the said definition is not wide enough to include other payments. There ought to be distinction between the payments not connected with any debt, with a payment having connection with the borrowings. A payment having no nexus with a deposit, loan or borrowings is out of the ambits of the definition of interest as per section 2 (28A) of the I.T.Act. While pondering upon the issue, we have come across a decision of Respected National Consumer Disputes Redressal Commission, wherein in the case of Ghaziabad Development Authority vs. **Dr. N.K.Gupta reported at 258 ITR 337,** it was held as under:-

*"Held, affirming the order of the State Commission, that section 194A of the Income-tax Act, 1961, did not apply to the payment made by the petitioner Authority. The Authority was asked to pay interest on the amount refunded to the complainant because of its failure to construct the promised flat and to provide the necessary facilities.* ***The amounts deposited by the respondent with the petitioner Authority were not paid by way of deposit, nor had the petitioner Authority borrowed those amounts. Interest payment in this case was by way of damages.*** *Merely because the damages were described as by way of interest that did not convert them into interest under the Act. The word used in the order of the State Commission was not "interest" as defined in section 2(28A).*

*Interest, in the order of the Commission, meant compensation or damages for delay in construction or handing over possession of the same causing consequential loss to the complainant by way of escalation in the price of the property and also on account of distress and disappointment faced by him. Interest, in the order, had been used merely as a convenient method to calculate the amount of compensation in order to standardize it. Otherwise, each case of an allottee would have to be dealt with differently.*

*Nomenclature did not decide the issue. In view of the definition of "interest" in section 2(28A), the provisions of section 194A were not applicable and the petitioner Authority was wrong in deducting tax at source from the interest payable to the respondent (complainant)."*

7.3. This decision is very helpful to decide this appeal because it was held that if the nature of payment is to compensate an allottee, then the provisions of section 194A not to be applied as far as the question of deduction of TDS on interest is concerned. Though the said compensation was mentioned as "interest" but the Hon'ble Members have held that the word used "interest" did not fall within the definition as defined u/s.2(28A) of the I.T.Act.

8. **The provisions of section 194A** reads as follows:- "Interest other than "Interest on securities".

Section 194A:- *(1) Any persons. Not being an individual or a Hindu undivided family, who is responsible for paying to a resident any income by way of interest other than income [by way of interest on securities], shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force."*

8.1. If a person is responsible for **paying any income by way of interest** shall at the time of credit or at the time of payment is required to deduct income-tax. Vide an Explanation annexed to this section, it is clarified that where any income by way of interest is credited either under the "suspense account" or "interest payable account" or "by any other name", then also such person is liable to deduct tax. On plain reading of this section, it is apparent that the term "interest" used in this section relates to and in connection of a debt or a loan or a deposit. The circumstances under which the assessee is required to deduct the tax has also been narrated. Therefore, a conclusion can be drawn that if a payment is compensatory in nature and not related to any deposit/ debt/loan, then such a payment is out of the ambits of the provisions of section 194A of the I.T.Act. To buttress this legal proposition, we hereby placed reliance on the decision of Hon'ble Gujarat High Court in the case of **Nirma Industries Ltd. reported at (2006) 283 ITR 402(Guj.)**[supra]**,** wherein the question was the admissibility of deduction u/s.80HH and 80-I of the I.T.Act in respect of interest received from trade debtors. The observation was that when an assessee enters into a contract for sale of its product, it could either stipulate that interest at the specified rate would be charged on the unpaid sale price or it can be agreed upon that in case of delay the sale price shall escalate. As per the Hon'ble Court, the sum and substance of the discussion was that only two modes are plausible for realization of sale consideration. However, for a business man the object is to realize the sale proceeds at the earliest and without any delay. When the purchaser pays a higher sale price on account of delay in payments of the sale proceeds, then **the source being trade activity,** therefore, held as eligible profit of the Industrial Undertaking for the purpose of computation of deduction.

8.2 Almost on identical situation in the case of **Phatela Cotgin Industries P.Ltd. vs. CIT reported at [2008] 303 ITR 411 (P&H),** the Hon'ble Court has stated that the interest which was received on delayed payment on account of sale to customers has to be termed as income derived from the Industrial Undertaking and such an income was held as distinct from interest income which is received from Fixed Deposit. The Courts have delivered these judgements by taking into consideration the immediate source of said receipt. If the immediate source is a loan, deposit, etc., then the payment is in the nature of "interest" but if the immediate source of receipt of payment is trade activity, then the nature of receipt is not "interest payment" but in the nature of payment of compensation.

9. In the case of **CIT vs. Indo Matsushita Carbon Co.Ltd. [286 ITR 201](Mad.)** the question was that whether **overdues from trade debtors is eligible** for relief u/ s.80HHC/80-I of the I.T.Act. In that context the Hon'ble Court has commented that it is settled that the interest earned on the belated payment would be directly relatable to the business of the assessee. If the purchaser did not make the payment in time and agreed to pay the interest on the belated payments, the said interest would have direct nexus with the business activity. The true test would be whether such interest would have been available to the assessee otherwise also; and the answer to the question as per the Hon'ble Court was in negative.

Hence, it was held that the interest being directly relatable only to the amounts receivable by the assessee during the course of its business on account of sale, the interest would have to be included as the profits and gains derived from the business of the assessee. An another decision cited therein was CIT vs. The Madras Motors Ltd. reported at [2002]257 ITR 60 (Mad.).

10. In the case of **Phatela Cotgin Industries Pvt.Ltd. vs. CIT reported at 303 ITR 411(P&H) t**he verdict was that the interest being received on delayed payment on account of sale to customers could clearly be termed to be an income derived from Industrial Undertaking.

It was observed that such an interest is distinct from interest income which is being received from Fixed Deposit. Case laws referred were CIT vs. Paras Oil Extraction Ltd. reported at [1998]230 ITR 266 (M.P.) and Pandian Chemicals Ltd. vs. CIT reported at [2003]262 ITR 278 (SC).

11. An another interesting feature involved to resolve this controversy is that the Revenue otherwise cannot allow the claim of payment u/s.36(1)(iii) of the Act because as per this section, the deduction is provided in respect of the amount of interest paid in respect of capital borrowed for the purpose of business. The only provision under the Act is section 37 under which this payment / expenditure is allowable being laid out wholly and exclusively for the purpose of the business. The nature of payment is such that it cannot be considered either u/s.56 of the Act, i.e. "Income from other sources" or u/ s.57 of the Act prescribing deductions only in respect of "income from other sources". Inter-alia, the conclusion is that since the nature of payment did not fall within the category of "income from other sources" as also cannot be allowed as payment of interest u/s.36(1)(iii), therefore, it's true nature is nothing but added value of cost of purchase, hence no TDS was required to be deducted.

12. In the light of the overall discussion made hereinabove, we are of the view that the impugned payment had a direct link and immediate nexus with the Trade liability being connected with the delayed purchase payment, hence, did not fall within the category of "Interest" as defined in Sec.2(28A) of the I.T. Act for the purpose of deduction of Tax at Source as prescribed u/s.194A of the Act. Resultantly, this assessee cannot be held a defaulter of non-deduction of tax at source u/s.194A of the Act. The Learned CIT(Appeals) has rightly reversed the findings of the Assessing Officer. Ground raised of the Revenue is, therefore, **dismissed.**

### (B) Assessee's Cross Objection No.120/Ahd/2008 – A.Y. 2005-06 (Arising out of 2075/Ahd/2008 – A.Y. 2005-06)

13. The following grounds have been raised by the assessee in the cross objection:-

    1. *Assuming for the sake of argument that payment of Rs.7,83,666/- was interest payment, the amended provisions of section 40(a)(ia) of the Act would not be applicable and as such no disallowance is called for u/s.40(a)(ia) of the Act.*

    2. *It is prayed that even assuming the payment of Rs.7,83,666/- as interest instead of additional purchase price, it is prayed that the disallowance may please be deleted.*

13.1)Cross Objection was not pressed by the Learned Authorised Representative, hence, the same is **dismissed** as such.

**14. In the result, the appeal of the Revenue as well as cross objection filed by the assessee both are dismissed. Order signed, dated and pronounced in the Court on 30th June, 2011.**

| Sd/- | Sd/- |
|---|---|
| **( A.K. GARODIA )** | **( MUKUL Kr. SHRAWAT )** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

Ahmedabad; Dated 30/ 06 /2011

## 7 IN THE INCOME TAX APPELLATE TRIBUNAL

## RAJKOT BENCH, RAJKOT

**Before Shri A.L. Gehlot (AM) and Shri N.R.S. Ganesan (JM)**

**I.T.A. No.583/Rjt/2007**
**(Assessment year 2005-06)**

**Vineetkumar Raghavjibhai Bhalodia vs ITO,**
C/o Samay Electronics Pvt Ltd Rajkot Wd.5(4)
At : Virpur, Rajkot-Morvi Highway Morbi
Morbi
PAN :AFPPB6969M
(Appellant) (Respondent)

I.T.A. No.601/Rjt/2008
(Assessment year 2005-06)

The ITO, Rajkot Wd.5(4) vs Shri Vinitkumar Raghavjibhai
Morbi Bhalodiya, C/o Samay Electronics
Morbi
(Appellant) (Respondent)

Assessee by : Shri N.R. Soni

Revenue by : Shri Manish Shah

## O R D E R

Per AL Gehlot, AM

Appeal in ITA No.583/Rjt/2007 is a quantum appeal filed by the assessee against the order of CIT(A)-IV, Rajkot dated 23-10-2007 for the assessment year 2005-06 whereas the appeal in ITA No.601/Rjt/2008 is filed by the revenue against the order of the CIT(A)-IV, Rajkot dated 24-10-2007 also for the assessment year 2005-06 whereby he deleted the penalty of Rs. 20,31,720 imposed by the assessing officer u/s 271(1)(c) of the Act.

ITA No.583/Rjt/2007 – Appeal by assessee

2. Starting with the appeal filed by the assessee, the following effective grounds are raised in the appeal:

   "1. The C.I.T. (Appeals) erred in upholding the addition of Rs.60,00,000/- under sec.56 of the I.T. Act, 1961 on account of receipt by the assessee from the HUF of which the assessee was the member.

   2. The C.I.T.(Appeals) further erred in law and on fact in not appreciating the alternative contention of the assessee that the receipt is otherwise exempt under sec.10(2) of the I.T. Act, 1961.

   3. The C.I.T.(Appeals) further erred in upholding the charging of interest under sec.234B and 234C of the I.T. Act, 1961."

3. The brief facts relating to grounds 1 & 2 are that during the course of assessment proceedings the assessing officer noticed that the assessee has accepted gift of Rs.60 lakhs from Shri Raghavjibhai Bhanjibhai Patel (Bhalodia) HUF on 21-03-2005 and Shri Raghavjibhai Bhanjibhai (individual) of Rs.40 lakhs on 21-03-2005. The assessing officer was of the view that HUF is not covered in the definition of "relative". Therefore, the gift of Rs.60 lakhs received from the HUF was held to be taxable.

4. The CIT(A) confirmed the view of the assessing officer that the term "relative" is defined in Explanation to Proviso to clause (v) of sub section (2) of section 56 of the I.T. Act. The CIT(A) further observed that if the legislature wanted that money exceeding Rs. 25,000 received by the member of the HUF from the HUF is also not chargeable to tax, it would have specifically mentioned so in the definition of "relatives". The CIT(A) also considered the alternative submissions of the assessee that the said gift is exempt u/s 10(2) of the Act. The CIT(A) observed that section 10(2) of the Act read with section 64(2) of the Act, which means section 10(2) of the Act speaks about only that sum being exempt in the hands of the coparcener which is equal to his share in HUF. In other words, u/s 10(2) of the Act if the sum is received by any coparcener of HUF on partial or total division is exempt. The case under consideration is not a case that the said amount of Rs.60 lakhs received by way of total or partial partition of the HUF. The CIT(A) further observed that the above section speaks about sum received by a member of HUF if the same is out of income of the estate belonging to the family. If section 10(2) is read with section 64(2) of the Act, what is to be seen is that sum received by a member of the HUF from the income of the HUF cannot exceed the amount which can be apportioned to his share in the estate or property or asset of the HUF. The CIT(A) held that the assessee has failed to make out a case either before the assessing officer or before him to prove and to establish that Rs.60 lakhs received from HUF is equal to or less than the income which can be apportioned to his share of income in the HUF.

The CIT(A) has also considered section 10(2A) of the Act and compared with share in partnership firm. The CIT(A) held that the said section 10(2A) is clear that only that much share from the total income of the firm is exempt in the hands of the partner as to which bears to his share in the firm the same proportion as the amount of his share in the profits of the firm in accordance with the partnership deed bears to such profits. The assessee failed to establish such share from HUF.

5. The ld.AR submitted that the revenue authority has failed to appreciate that amount received from father's HUF is received from relative as father and all the persons comprising HUF are relatives within the meaning of Explanation to Proviso to section 56(2) of the Act. He submitted that HUF is a relative inasmuch as HUF is a collective name given to group consisting of individuals, all of whom are relatives under Explanation to Proviso to section 56(2) of the Act. The ld.AR submitted that the term "individual" would include a group of individuals, hence, an HUF would be covered by the term "individual". The ld.AR, in support of his contention relied upon the judgment of Karnataka High Court in the case of CWT vs Apna ((CP) 202 ITR 678. The ld.AR has also relied upon the judgment of jurisdictional High Court in the case of CIT vs Gunwantlal Ratanchand 208 ITR 1028 (Guj). The ld.AR has, further relied upon the judgment in the case of Jain Merchants' Co-operative Housing Society Ltd & Ors vs HUF of Manubhai Kalyanbhai Shah in Special Civil Application Gujarat Law Reporter XXXVI(1) page 19 and submitted that in the said judgment the term "individual" is held to include group of individuals as also joint families.

6. The alternative contention of the ld.AR that the amount received from his father's HUF of which the assessee is also a member. Therefore, the receipt is exempt u/s 10(2) of the Act. The ld.AR submitted that section 10(2) uses the language "paid out of the income of the family". The assessing officer wants to read the language as "paid out of the income of the previous year of the family" which is not the correct interpretation. The ld.AR submitted that the provisions for deduction, exemption and relief should be construed reasonably. It is also the submission of the ld.AR that in case of ambiguity in the language employed, the provision must be construed in a manner that benefits the assessee. For this proposition the ld.AR relied upon the judgment of the Supreme Court in the case of CIT vs Gwalior Rayon Silk Manufacturing Co Ltd 196 ITR 149 (SC). He has also relied upon the judgment of the Apex Court in the case of CIT vs Shaan Finance (P) Ltd 231 ITR 308 (SC).

7. With regard to applicability of provisions of section 56(2) of the Act, the ld.AR submitted that an HUF is a conglomeration of relatives as defined u/s 56(2)(v) of the Act. Section 56(2)(v) should be interpreted in such a way that interpretation must avoid absurdity. The ld.AR relied upon the following judgments, for this proposition:

K Govindan & Sons vs CIT (2001) 247 ITR 192 (SC)

Shashikant Singh vs Tarkeshwar Singh (2002) 5 SCC 738 (SC) Rambhai L Patel vs CIT (2001) 252 ITR 846 (Guj)

8. The ld.AR lastly submitted that if two views are possible, the one beneficial to the assessee has to be adopted. For this proposition the ld.AR relied upon the judgment of the Hon'ble Apex Court in (2002) 258 ITR 761 (SC) Union of India vs Onkar S Kanwar.

9. The ld.DR on the other hand relied upon the order of CIT(A) and submitted that the CIT(A) has analysed the case in detail at paragraph 6 of his order before

confirming the order of the assessing officer. The CIT(A) has also considered the alternative submissions made by the assessee that his case is covered u/s 10(2) of the I.T. Act. The ld.DR submitted that the assessee himself is not sure about the facts whether section 10(2) of the Act is applicable or Explanation to section 56(ii) of the Act is applicable. The ld.DR submitted that the term "relative" is defined in section 2(41) wherein HUF is not included. The ld.DR further submitted that the object of section 10(2) pointed out by the ld.AR is only in respect of partition and not in case of gift. It is also the submission of the ld.DR that cases cited by the ld.AR are not applicable as under the I.T. Act, the "person" has been separately defined under the Act and HUF is a separate person. The ld.DR submitted that how a gift can be given to himself. The ld.DR in support of his contention relied upon the judgment of Karnataka High Court in the case of Patil Vijaykumar & Ors vs UOI 151 ITR 48 .

10. We have heard the ld.representatives of the parties, perused record and gone through the decisions cited. The crux of the issues in the case under consideration, are -

(1) Whether gift received from HUF by a member of HUF falls under the definition of "relative" as provided in the Explanation to clause (vi) of sub section (2) of section 56 of the Act?;

(2) Whether amount received by assessee from his HUF is covered by section 10(2) of the Act?

11. Clause (vi) of section 56(2) of the Act has been inserted with effect from 01-04-2007 by Taxation Laws (Amendment) Act, 2006 so as to provide that where any sum of money, the aggregate value of which exceeds rupees fifty thousand is received without consideration by an individual or an HUF in any previous year from any person or persons on or after 1st April, 2006 but before the 1st day of October, 2009, the whole of the aggregate value of such sum shall be included in the total income of the recipient provided that this clause shall not apply to any sum of money received from any relative. Explanation to clause (vi) of sub section (2) of section 56 of the Act defined meaning of relative. The said Explanation reads as under:

"Explanation.- For the purposes of this clause "relative" means –

(i) spouse of the individual;

(ii) brother or sister of the individual;

(iii) brother or sister of the spouse of the individual;

(iv) brother or sister of either of the parents of the individual;

(v) any lineal ascendant or descendant of the individual;

(vi) any lineal ascendant or descendant of the spouse of the individual;

(vii) spouse of the person referred to in clause (ii) to (vi)."

11.1 A Hindu Undivided Family is a person within the meaning of section 2(31) of the Income-tax Act and is a distinctively assessable unit under the Act. The Income-tax Act does not define expression 'Hindu Undivided Family". It is well defined area under the Hindu Law which has received recognition through out.

Therefore, the expression 'Hindu Undivided Family" must be construed in the sense in which it is understood under the Hindu Law as has been in the case of Surjit Lal Chhabra vs CIT 101 ITR 776(SC). Actually a 'Hindu Undivided Family" constitutes all persons lineally descended from a common ancestor and includes their mothers, wives or widows and unmarried daughters. All these persons fall in the definition of "relative" as provided in Explanation to clause (vi) of section 56(2) of the Act. The observation of the CIT(A) that HUF is as good as 'a body of individuals' and cannot be termed as "relative" is not acceptable. Rather, an HUF is 'a group of relatives'. Now having found that an HUF is 'a group of relatives', the question now arises as to whether would only the gift given by the individual relative from the HUF be exempt from taxation and would, if a gift collectively given by the 'group of relatives' from the HUF not exempt from taxation. To better appreciate and understand the situation, it would be appropriate to illustrate an example, thus – an employee amongst the staff members of an office retires and in token of their affection and affinity towards him, the secretary of the staff club on behalf of the members of the club presents the retiring employee with a gift could that gift presented by the secretary of the staff club on behalf of the staff club be termed as a gift from the secretary of the staff club alone and not from all the members of the club, as such? In our opinion answer to this quoted example would be that the gift presented by the secretary of the club represents the gift given by him on behalf of the members of the staff club and it is the collective gift from all the members of the club and not the secretary in his individual capacity. And if it is held otherwise, it will lead to an absurdity of interpretation which is not acceptable in interpretation of statutes as has been held by the Hon'ble Apex Court in the case of K G Govindan & Sons vs CIT 247 ITR 192 (SC).

11.2 Further, from a plain reading of section 56(2)(vi) along with the Explanation to that section and on understanding the intention of the legislature from the section, we find that a gift received from "relative", irrespective of whether it is from an individual relative or from a group of relatives is exempt from tax under the provisions of section 56(2)(vi) of the Act as a group of relatives also falls within the Explanation to section 56(2)(vi) of the Act. It is not expressly defined in the Explanation that the word "relative" represents a single person. And it is not always necessary that singular remains singular.

Sometimes a singular can mean more than one, as in the case before us. In the case before us the assessee received gift from his HUF. The word "Hindu Undivided Family", though sounds singular unit in its form and assessed as such for income-tax purposes, finally at the end a "Hindu Undivided Family" is made up of 'a group of relatives". Thus, in our opinion, a singular words / words could be read as plural also, according to the circumstance / situation. To quote an example, the phrase "a lot". Here, the phrase "a lot" remains as such, i.e. plural, in all circumstances and situations, where in the case of "one of the friends" or "one of the relatives", the phrase remains singular only as the phrase states so that one amongst the relatives and at no stretch of imagination it could mean as plural whereas in the phrase "a lot" the words "a" and "lot" are inseparable and if split apart both give distinctive numbers, i.e. "a" singular and "lot" plural and whereas when read together, it can only read as plural in number unlike in the case of "one of the relatives" where "one" is always singular in number whereas "relatives" is always plural in number, but when read together it could read as singular in number. Applying this description with the case on hand, we have already found that though for taxation purpose, an HUF is considered as a single unit, rather, an HUF is "a group of relatives" as it is formed by the relatives.

Therefore, in our considered view, the "relative" explained in Explanation to section 56(2)(vi) of the Act includes "relatives" and as the assessee received gift from his "HUF", which is "a group of relatives", the gift received by the assessee from the HUF should be interpreted to mean that the gift was received from the "relatives" therefore the same is not taxable under section 56(2)(vi) of the Act, we hold accordingly.

12. Now coming to the alternative contention of the assessee that gift received by the assessee from the HUF fall under section 10(2) of the Act. Section 10(2) of the Act provides that tax shall not be payable by an assessee in respect of any sum which he receives from a member of Hindu Undivided Family and as the sum has been paid out of the family income, or in the case of an impartible estate, whose such sum has been paid out of the income of the estate belonging to the family, subject however, to the provisions of section 64(2) of the Act. The object of the provision is that a Hindu Undivided Family, according to section 2(31) is a "person" and a unit of assessment. Income earned by a HUF is assessable in its own hands, so as to avoid double taxation of one and same income once in the hands of the HUF which earns it, and again in the hands of the member whom, it is paid. In respect of the family property qua its members it has been held by various authorities and courts that there is an antecedent title of some kind of a Member in the properties of HUF and a family arrangement which merely acknowledges and defines how that title is looked at and it is not an alienation of property at all. But even if it should be regarded as a transfer, the object of avoiding family litigation is consideration in money's worth. The real consideration in a family arrangement is based upon a recognition of a preexisting right hence, there is no transfer of property at all. The Hon'ble Apex Court in CGT vs NS Getti Chettiar 82 ITR 599 (SC) based its observation on that ground in a case of unequal family partition and held that it is not transfer, hence no gift tax liability is attracted. Every member of the HUF has a claim as to his maintenance. Receiving anything in consideration of his pre-existing right in a property or income is covered by section 10(2) of the Act.

12.1 There are two ways involved in a transaction, i.e. (i) amount given and (ii) the amount received. If we relate the provisions of Income-tax Act to these ways of "given" and "received" in case of an HUF we find that the case of amount received by an HUF from its member is provided in section 64(2) of the Act.

Section 64(2) was inserted by the Taxation Laws (Amendment) Act, 1970 with effect from 01-04-1971. This section was inserted to avoid creation of multiple HUFs and others. Similar provisions was also inserted in the Gift-tax Act, 1958 and accordingly transfer of assets in such case was termed as deemed gift. The provisions of section 64(2) provides that - where in the case of an individual being a member of a Hindu undivided family, any property having been the separate property of the individual has been converted by the individual into property belonging to the family through the act of impressing such separate property with the character of property belonging to the family or throwing it into the common stock of the family or been transferred by the individual, directly or indirectly, to the family otherwise than for adequate consideration then, notwithstanding anything contained in any other provisions of this Act or in any other law for the time being in force, for the purpose of computation of the total income of the individual under this Act. The individual shall be deemed to have transferred the converted property, though the family, to the members of the family for being held by them jointly. The income derived from the concerted property or any part thereof shall be deemed to arise to the individual and not to the family. Where the converted property has been the subject-matter of a partition (whether partial or total) amongst the members of the family, the income derived from such converted property as is received by the spouse on partition shall be deemed to arise to the spouse from assets transferred indirectly by the individual to the spouse and the provisions of sub-section (1) shall, so far as may be, apply accordingly. We find that to cover the transaction between a member of HUF and the HUF the Income-tax Act provides section 10(2) and section 64(2). Section 10(2) is not similar to section 64(2). It deals with the transaction differently which would mean that the legislature in their own wisdom was aware about the circumstances and accordingly provisions are enacted in the Act.

Therefore, in our opinion, both the situation of amount received and amount given to HUF by a member is to be dealt with accordingly.

12.2 The CIT(A) while considering sections 10(2) and 10(2A) of the Act held that firstly the amount received on partial partition or on partition is only exempt and secondly to the extend of share of assessed income of HUF for the year would only be exempt. We are not in agreement with the view of the CIT(A).

Firstly, there is no provision in the Act to contend that it is applicable only to the extend of income of the year. Secondly, the property or the income of HUF belongs to the members thereof who are either entitled to share in the property on partition or have a right to be maintained. For getting exemption under section 10(2) two conditions are to satisfy. Firstly, he is a member of HUF and secondly he receives the sum out of the income of such HUF may be of earlier year.

12.3 A question before Hon'ble Madras High Court in the case of Vedanthanni vs CIT 1 ITR 70 (Mad) arose where there was a joint family and petitioner was entitled to maintenance as the widow of a deceased coparcener and received it as member of HUF and the court held as under:

"The only further question that arises is, whether there is anything in the Act which produces anomalous result if we adopt the above construction. Far from those being any anomaly we find the result is consonant with justice and purposes of the Act. The object and scope of section 14 is to prevent the crown from taxing twice over.

If there is any section in the Act which enables the holder of the estate in making his returns to deduct the amounts paid by him to widows of deceased coparceners, then the effect of the above construction would be to prevent the crown from taxing the income even once. But it is admitted before us that there is no such provision in the Act. If widows are not exempted by reason of the above construction, the crown would undoubtedly being taxing twice over. Our construction makes the result with equation of the case."

13. In the light of above discussion, we find that the assessee received gift from HUF and has satisfied both the conditions of section 10(2) that the assessee is a member of HUF and received amount out of the income of family.

There is no material on record to hold that the gift amount was part of any assets of HUF. It was out of income of family to a member of HUF, therefore, the same is exempt u/s 10(2) of the Act. We hold accordingly.

14. The other issue in the appeal pertains to charging of interest u/s 234B and 234C of the Act. Charging of interest u/s 234B and 234C being consequential in nature, the assessing officer is directed to allow consequential relief to the assessee.

ITA No.601/Rjt/2008 – Appeal by revenue

15. The assessing officer imposed penalty of Rs. 20,31,720 u/s 271(1)(c) as he did not accept the gift of Rs.60 lakhs received by the assessee from the HUF.

On appeal, the CIT(A) deleted the same. We have heard the parties on the issue. We have deleted the quantum addition of Rs.60 lakhs while dealing with the appeal filed by the assessee in ITA No.583/Rjt/2007 in above paragraphs.

As such the impugned penalty has no leg to survive. Therefore, we uphold the order of the CIT(A) and dismiss the appeal of the revenue.

16. In the result, the appeal filed by the assessee is allowed and the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 17-05-2011.

| Sd/- | sd/- |
|---|---|
| (N.R.S. Ganesan) | (A.L. Gehlot) |
| JUDICIAL MEMBER | ACCOUNTANT MEMBER |

Rajkot, Dt : 17th May, 2011

❖ ❖ ❖

# CONTROVERSIES

**Whether section 50C is to be applied only for the purpose of section 48 which deals with computation of capital gain and thus cannot be applied when capital gain is claimed exempt under section 54/ 54F.**

**CA. Kaushik D. Shah**
*The author is the past President of CAA, practising since 1976. He can be reached at dshahco@gmail.com.*

### Issue:

Mr. A sells a residential house on 6-11-2010 for Rs 12 lacs (stamp duty valuation Rs 17 lac- not disputed by Mr. A). This house was purchased in financial year 1988-89 for Rs 2 lac. He has invested within the prescribed time Rs.7 lacs in the purchase of new flat and also Rs 5 lacs in the bonds specified under section 54EC.Mr. A claims that since he had made investment for capital gain exemption section 50C has no application.

### Note:

Value determined by the stamp authorities where accepted by the assessee will be taken as deemed sales value for the purpose of section 54, though under section 54F actual amount of net sale consideration (and not the value determined by the stamp authorities) would be relevant.

### Proposition:

Let me refer to the provisions of **section 45** which reads as under:

Section 45(1) of the Act can be dissected as under:

(1) Any profits or gains arising from the transfer of a capital asset effected in the previous year shall;

(2) Save as otherwise provided in section 54,54B,54D, [54EA. 54EB,] 54F, [54G and 54H] of the Act; and

(3) Be chargeable to income-tax under the head 'Capital Gain' and shall be deemed to be income of the previous year in which such transfer took place.

Now let me refer to **section 50** which reads as under:

"It provides that where the consideration declared to be received or accruing as a result of the transfer of land or building or both, is less than the value adopted or assessed by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed shall be deemed to be the full value of the consideration, and capital gains shall be computed accordingly under section 48 of the Income-tax Act."

The reading of section 45 with section 50 makes it very clear that section 45 which is a charging section refers to the capital gain which is chargeable to tax so to say the capital gain which is arrived at after deducting capital gain which is exempt. While section 50 tells you that when the capital gain is on account of transfer of immoveable property then valuation of Stamp Valuation Authority will be deemed to be the sale consideration. Thus, section 50C comes into the scene only when chargeable capital gain is required to be computed. Thus if capital gain is exempt either under section 54 or 54F or 54EC, the question of computation of capital gain does not arise and section 50C is not to be applied at all. It is proposed that when capital gain is exempt section 50C has no application.

### View Against the Proposition :

Section 50C is a mandatory provision to curb the menace of black money and hence the provisions of section 50C are mandatory. These provisions will apply whenever Stamp Duty Valuation is higher than the declared value as per the document of sale.

It is submitted that the provisions of section 50C were introduced after a well thought-out scheme to curb or to reduce the transactions of real estate at a lower price.

In view of these clear provisions, the Stamp Duty Valuation of Rs. 17 lacs will replace the document price of Rs. 12 lacs for the purpose of computation of capital gain. It is also submitted that there is no need for a Assessing Officer to establish that assessee has actually received Rs. 17 lacs. This is over riding section and it has to be interpreted from the importance of the provisions introduced for a specific objective.

In our case, Mr. A has not disputed the value adopted by the Stamp Valuation Authority. Mr. A claims to adopt Rs. 12 lacs as sales consideration as against the value of the residential house at Rs.17 lacs as per Government guide lines cannot be accepted. Since section 50C of the act is very clear with regard to the consideration received or accruing as a result of transfer of a capital asset.

It is also important to refer to the circular of CBDT No 8 of 2002, dated 27-8-2002 which reads as under:

"The Finance Act, 2002 has inserted a new section 50C in the Income-Tax to make a special provision for determining the full value of consideration in case of transfer of immoveable property.

It provides that where the consideration declared to be received or accruing as a result of the transfer of land or building or both, is less than the value adopted or assessed by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed shall be deemed to be the full value of the consideration, and capital gains shall be computed accordingly under section 48 of the Income-tax Act."

It is further submitted that Only the plain meaning of the language has to be construed for the operation of exemption provisions. The legal fiction created by virtue of section 50C in determining the "capital gain" cannot be extended to section 54F of the Act. Section 54F of the Act has to be applied only for the definite and limited purpose for which it is created. In the case of *Executors & Trustees of Sir Cawasji Jehangir* v. *CIT* [1959] 35 ITR 537 *(Bom.),* it has been explained that unless it is clearly and expressly provided, It is not permissible to impose a supposition on a supposition of law. It is not permissible to sub-join or track a fiction upon fiction. In the light of the above facts, it is apparent that as far as arriving at the exemption allowable under section 54F of the Act, one has to strictly follow the provisions of the section and compute the exemption accordingly without imposing any section creating a legal fiction into the section.

**Views in favour of the Proposition:**

It is submitted that the first limb of section 45( 1) refers to profits or gains arising from the transfer of capital asset - the computation of the capital gain is in section 48 of the Act. The second limb specifies the amount that has to be carved out of the profits or gains arising from the transfer of capital asset - the manner in which the computation of the exemption are specified within the relevant exemption section *i.e.,* in sections 54, 54B, 54D, [54EA, 54EB,] 54F, [54G and 54H], of the Act. Therefore the process of arriving at the capital gains and the exemptions are distinct and separate. One does not override the other.

It is further submitted that section 50C of the Act creates a limited fiction to the effect that the full value of consideration shall be substituted for the purpose of section 48 of the Act by the amount taken by the Sub-Registrar for registration purpose. Thus, the fiction under section 50C of the Act is extended only to the second aspect of computation of capital gains and the same does not extend to the charging section or the exemptions to the charging section. The Legislature consciously intended to apply the fiction under section 50C of the Act only to the expression used in section 48 of the Act and not in any other place. I would like to clarify that, by virtue of section 45(1), a charge is created for levy of tax on the profit or gains arising out of the transfer of capital asset effected during the previous year coupled with certain exemptions. The exemption sections 54, 54B, 54D, [54EA, 54EB,] 54F, [54G and 54H], are self-contained sections which also includes the method of computation of the exemption. The manner in which the profits or gains arising out of the transfer of the capital asset are to be computed as mentioned in section 48 which goes without saying that the charge is on the profits or gains so computed. While computing the profits or gains as per section 48, the deeming provision imbedded in section *50C* has to be given effect to. The charge is created on the enhanced profits or gains arrived at from the fiction of section *50C.* This aspect was justified by the Hon'ble Finance Minister in his Budget Speech that section *50C* will curb the menace of unaccounted income in the property transactions by presuming the sale consideration to be the value of the guide line value for registration in case it is stated lower than that.

With respect to section 54F of the Act it is submitted as under:

*(i)* The provisions of section 54F of the Act is a complete code in itself by which the extent of modification to section 45(1) of the Act is specified. The conditions mentioned under section 54F of the Act and the enquiry to be made to ascertain the application of section 54F of the Act require the determination of only the following two criteria:

*(a)* the cost of the new asset and

*(b)* the net consideration for the transfer.

*(ii)* The net consideration has been explained in section 54F of the Act itself to mean the full value of consideration as reduced by the cost incurred for transfer. The object behind the use of net consideration is to determine the extent of money available with the assessee on the transfer of the asset.

*(iii)* The provisions of section 54F(1)(a) of the Act will become unworkable, if the construction placed thereon, would require the consideration as per section *50C* of the Act to be taken to work out of the amount of exemption of the capital gains. That is the precise reason that the Legislature has consciously restricted the operation of the legal fiction under section *50C* of the Act only for the purpose of section 48 of the Act and not for the entire Chapter IV-E relating to taxation of capital gains.

*(iv)* No circular provides that the provisions of section 50C of the Act have to be reckoned and applied for the computation of the extent of exemption under section 54 of the Act.

*(v)* Where the assessee complies with the requirement of section 54F( 1)( *a)* of the Act, having regard to the plain language employed therein, he cannot be denied the benefit of exemption by referring to provisions of section *50C* of the Act, which is applicable for computation, and which is a step removed from the levy. In case where the provisions of section 54F(1)(b) are attracted, the proportionate exemption of capital gain is available. In either case, the extent of exemption is based upon fulfillment of the criterion mentioned under section 54 of the Act only.

*(vi)* The provisions of section 54F of the Act and section 50C of the Act are to be construed in a manner that effectuate and advance the objects of section 54F of the Act entirely and not in a manner to defeat or render inoperable any of the said provisions.

*(vii)* The harmonious construction of section 54F of the Act and section 45(1) of the Act along with computational provisions of section 48 read with section 50C of the Act can only be achieved if the provisions of section 54F are given its natural and literal meaning and not a strained meaning by subjecting it to the provisions of section *50C* of the Act.

**Summation:**

It is submitted that whenever section 54/54F and other exemption provisions apply, the charge created by virtue of the first limb of section 45(1) will be modified subject to the aforesaid section. Thus in order to determine the taxability under section 45(1) the capital gain must exclude section 54, 54F and other exemption provisions.

It is further submitted that in CIT vs. V.V.George 227 ITR 893 had also made it very clear that the second limb of section 45(1) is in the nature of exemption. Therefore it is clear that the computation of capital gain has to be in accordance with section 48 and computation of exemption in accordance with relevant exemption sections. Section 45(1) is the charging section and therefore while interpreting the section strict construction principle is applicable. The provisions of charging sections must be interpreted as per the language used therein and when the words of statute are precise and unambiguous, no more exercise is necessary to go for any further interpretation.

It is also important to refer to the decision of the Supreme Court in the case Shri Sajjan Mills Ltd. v. CIT 156 ITR 585 wherein it was clearly held that the strict construction principle does not rule out the application of principle of reasonable construction to give effect to the purport and intention of any particular provisions.

It is interesting to refer to the recent decision of Bangalore Bench in the case of ITAT Shri Gouli Mahadevappa v. ITO (Bang.) reported in 128 ITD 503.

The honorable ITAT Bench has held as under:

"We do accept that section 54F of the Act is an exemption provision and a complete code in itself. Since it is a complete code in itself, the computation of eligible exemption has to be worked out within its framework as far as possible. Being an exemption provision, beneficial interpretation has to be given. However, in any interpretation, the maxim *"ut res magis valeat quan pareat"* should be kept in mind. The construction which would reduce the legislation to a futility should be avoided; and alternative that will introduce uncertainty, fiction or confusion into the working of the system should be rejected. An interpretation which leads to unworkable results and absurdity should be avoided."

Section 54F of The Act is reproduced here below for an analytical understanding and the operational part of the section.

"54F. (1) Subject to the provisions of sub-section (4), where, in the case of assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of any long-term capital asset, not being a residential house (hereinafter in this section referred to as the original asset), and the assessee has, within a period of one year before or two years after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, a residential house (hereinafter in this section referred to as 'the new asset'), the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say,-

*(a)* if the cost of the new asset is not less than the net consideration in respect of the original asset, the whole of such capital gain shall not be charged under section 45;

*(b)* if the cost of the new asset is less than the net consideration in respect of the original asset, so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of the new asset bears to the net consideration, shall not be charged under section 45 :

Provided that nothing contained in this sub-section shall apply where-

(a)..................................................................

*Explanation.-For* the purposes of this section, "net consideration", in relation to the transfer of capital asset, means the full value of the consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively in connection with such transfer."

Let me now refer to the decision in the case of *CIT v. Ace Builders (P.) Ltd.* [2006] 281 ITR 210[1] (Born.), on which it has placed reliance also subscribes to the aforesaid view. It was held thus:-

*Contd. on page no. 193*

# JUDICIAL ANALYSIS

## Proportionate deduction u/s 80IB(10) when only some of the residential units exceed maximum built-up area prescribed

### Part I

**Advocate Tushar Hemani**
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- **SJR Builders v.ACIT [2010] 3 ITR(TRIB.) 569 (BANG.)**

10. In the premises of the above facts the assessee's representative further submitted briefly as under. Section 80-IB(10) provides for deducting from the total income the profit and gains derived from a housing project, if the conditions prescribed in clauses (a) to (d) are fulfilled. He submitted that even according to the Revenue authorities the assessee has fulfilled all the conditions specified in the said clauses including the one in clause (c) to the extent of built-up area as defined in section 80-IB(14)(a). The premises was inspected by the DVO for measurement purposes on July 5, 2007 after more than one year from the date of issue of occupancy certificate on October 16, 2006. There could be every possibility of the occupants themselves making certain changes which is not attributable to the assessee at all. He further submitted that while sanctioning the plan it was evident that the assessee never envisaged any unit with a built-up area of more than 1500 sq.ft. The fact that the occupancy certificate was issued in the month of June, 2006 indicates that the assessee had adhered to the plan. A perusal of the occupancy certificate shows that it relates to 152 residential apartments of which 38 are duplex units. The total area of the duplex units may exceed 1500 sq.ft. The total area of each of the duplex apartment may exceed 1500 sq.ft but the area of such apartment when viewed within the meaning of the definition of "built-up area within the ambit of section 80-IB(14)(a) does not exceed 1500 sq.ft Actually the DVO has not physically measured any of the apartment discussed in the assessment order. The DVO's conclusion that each of the unit exceeds 1500 sq.ft is based on the assumption that they are penthouses and hence must have exceeded the prescribed area of 1500 sq.ft The only unit measured by the DVO in the Redwood project does not fit into the definition of built-up area as defined in the section. He argued that it is pertinent to note that the inspection was made only after the passing of the assessment order. The DVO has considered the total area of the duplex apartment and not at the floor level which is required to be considered for the purposes of section 80-IB(14)(a). A reconciliation statement has been enclosed at page 14 of the paper book No. 1. The assessee also brought our attention to the decision of the Tribunal in I.T.A. Nos. 668 and 669/Bang/2006 in the case of M/s. G.R. Developers which was decided in the assessee'sfavour on similar set of facts. The assessee's representative submitted that none of the residential apartments had, therefore, contravened the provisions of section 80-IB(10). Therefore, he submitted that the claim for deduction amounting to Rs. 2,02,08,690 should be allowed.

11. The learned representative further submitted that alternatively, even if some of the residential units exceeded 1500 sq.ft then the deduction permissible must be residential unit-wise deduction and, therefore, proportionate deduction should be allowed. As per clause (c) of section 80-IB(10), the residential unit should have a maximum built up area of 1500 sq.ft. The assessee's representative reiterated that clause (c) of section 80-IB(10) refers to area of "the residential unit". The residential unit means deduction should operate and be computed unit-wise and, therefore, a particular unit satisfied the condition of section 80-IB, deduction should be automatically allowed in respect of that unit. It is only in respect of those units which have not fulfilled the stipulated condition the deduction is to be denied. He further submitted that if the law had wanted all the units to be within the specified limits, it would have stated that "all the residential units" should have a maximum built-up area of 1500 sq.ftIn the absence of such all pervasive condition, deduction should be

allowed in respect of profits for the units that fulfil the condition. Law prescribes maximum permissible size with reference to each residential unit. It does not do so qua the commercial units. Instead, it provides for the maximum overall size and all such commercial area together. This differentiation in stipulation indicates that exemption for residential apartment should be computed unit-wise. For the above proposition, he relied on the decision of the Bangalore Bench of the Tribunal in the case of Brigade Enterprises (P.) Ltd., in I.T.A. No. 1198/ Bang/07, dated August 29, 2008, particularly to paragraph 5.1. He also relied on the decision of the Special Bench of the Income-tax Appellate Tribunal, Pune in the case of Brahma Associates v. Joint CIT in I.T.A. 1417/PN/06, dated April 6, 2009 [2009] 315 ITR (AT) 268, wherein the Tribunal held that the tax incentives by way of deduction under section 80-IB(10) is predominantly for the purpose of augmenting affordable dwelling units and it must be interpreted in that light only. The assessee's representative submitted that profits from units are to be allowed on the basis of method of accounting employed by the assessee. Accounting principles mandate recognition of profits from each unit separately and deduction should be allowed as such.

12. In support of the above, the assessee's representative submitted that the provisions relating to exemption, allowance and deduction, rebate or relief should be interpreted liberally and broadly. For the above proposition he relied on the case of Union of India v. Wood Papers Ltd. [1991] 83 STC 251 ; AIR 1991 SC 2049. The assessee's representative particularly relied on the following observation (page 254 of STC) :

"Literally exemption is freedom from liability, tax or duty. Fiscally it may assume varying shapes, specially in a growing economy. For instance tax holiday to new units, concessional rate of tax to goods or persons for limited period or with the specific objective, etc. That is why its construction, unlike charging provision, has to be tested on a different touchstone. In fact an exemption provision is like an exception and on normal principle of construction or interpretation of statutes it is construed strictly either because of legislative intention or on economic justification of inequitable burden or progressive approach of fiscal provisions intended to augument State revenue. But once exception or exemption becomes applicable, no rule or principle requires it to be construed strictly. Truly speaking, liberal and strict construction of an exemption provisions are to be invoked at different stages of interpreting it. When the question is whether a subject falls in the notification or in the exemption clause then it being in nature of exception is to be construed strictly and against the subject but once ambiguity or doubt about applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction."

13. For the above proposition he relied further on the case CIT v. Gwalior Rayon Silk Manufacturing Co. Ltd., AIR 1992 SC 1782. In Bajaj Tempo Ltd. v. CIT [1992] 196 ITR 188 (SC) and also on the case of Controller of Estate Duty v. R. Kanakasabai [1973] 89 ITR 251 (SC). The assessee's representative summed up that where there is a partial noncompliance of the requirements of the law, there should not be complete disallowance of the deductions. Disallowance, if any, the assessee's representative submitted will have to be restricted to the extent of non-compliance of the provisions. This rule of proportionality is well founded in the income-tax law and is recognised under various sections of the Act. For e.g., the assessee's representative submitted that sections 10A(4), 10B(4), 10BA(4), 80HHC(3)(c)(i ), 80HHD(3), 80HHE(3) and 80HHF(3), allow deduction in proportion of the export turnover to the total turnover. Further, under section 54EA, 54EB, 54EC, 54ED and 54F, exemption towards capital gains and under section 115F(1)(b), the benefit is available in proportion of the net consideration utilised to acquire new consideration arising out of transfer of old assets. In the present case, the profits attributable to the eligible residential units out of 152 residential units should be allowed as a deduction.

16. Considering the rival submissions, we are of the view that the appeal by the assessee is to be allowed to the extent of the flats the built-up area of the flat is not more than 1500 sq.ft. We agree with the submission of the learned representative for the assessee that while considering the built-up area of 1500 sq.ft for the purpose of exemption under section 80-IB(10), the mezzanine floor and common areas are to be excluded. The Assessing Officer is directed accordingly. We hold that in respect of the penthouses the built-up area of which is more than 1500 sq.ft, they may be excluded for exemption. However, in the light of the decision of the Special Bench in the case of Brahma Associates v. Joint CIT [2009] 315 ITR (AT) 268 (Pune), merely because some flats are larger than 1500 sq.ft, the

assessee will not lose the benefit in its entirety. Only with reference to the flats which have more than the prescribed area, the assessee will lose the benefit.

xxx.

- **ITO v Air Developers [2009] 123 TTJ 959(NAG.)**

5. We have carefully considered the arguments of both the sides and perused the materials before us. The only dispute, in this appeal, is whether the assessee is entitled to deduction under Section 80-IB(10). At the relevant time Section 80-IB(l) read as under :

"(10) The amount of profits in case of an undertaking developing and building housing projects approved before the 31st day of March, 2005 by a local authority, shall be hundred per cent of the profits derived in any previous year relevant to any assessment year from such housing project if,—

(a) such undertaking has commenced or commences development and construction of the housing project on or after the 1st day of October, 1998;

(b) the project is on the size of a plot of land which has a minimum area of one acre; and

(c) the residential unit has a maximum built-up area of one thousand square feet where such residential unit is situated within the cities of Delhi or Mumbai or within twenty-five kilometers from the municipal limits of these cities and one thousand and five hundred square feet at any other place."

Let us examine whether the assessee has fulfilled the conditions prescribed by Section 80-IB(10). There is no dispute about the fulfillment of the conditions prescribed under clause (a) of Section 80-IB(10) i.e., the project was commenced after the first day of October, 1998.

xxx...

5.6. The next question is whether the built-up area of the residential unit constructed by the assessee exceeded 1,500 sq. ft.

5.7. From the perusal of the assessment order, it is evident that the AO has worked out the built-up area after including the area of the balcony. The CIT(A) has also agreed with the above view of the AO that the area of the balcony is to be included in the built-up area. The IT Act did not define the term "built-up" area till the Finance (No. 2) Act, 2004 inserted clause (a ) in the Section 80-IB(14). This clause defines the built-up area as under :

(a) "built-up area" means the inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls but does not include the common areas shared with other residential units;

5.8. The learned CIT(A) is of the opinion that this definition of built-up area is clarificatory in nature and therefore would be retrospective in operation. He has, therefore, applied the same to the assessment year under consideration. We are unable to agree with the above view of the CIT(A) because the Finance (No. 2) Act of 2004 itself has made the provision effective from 1st April, 2005, i.e., from asst. yr. 2005-06. The legislature has the power to give retrospective effect to any provision and wherever the legislature intends to make any provision effective from back date, a specific mention is made in the Act with regard to the date from which the provision is intended to be effective. In respect of the definition of the built-up area, we find that the provision is made effective from 1st April, 2005. We find that the Hon'ble apex Court in the case of Virtual Soft Systems Ltd. v. CIT [2007] 207 CTR (SC) 733 : [2007] 289 ITR 83 (SC) held as under :

"It is a well-settled legal position that an amendment can be considered to be declaratory and clarificatory only if the statute itself expressly and unequivocally states that it is a declaratory and clarificatory provision. If there is no such clear statement in the statute itself, the amendment will not be considered to be merely declaratory or clarificatory. Even if the statute does contain a statement to the effect that the amendment is declaratory or clarificatory, that is not the end of the matter. The Court will not regard itself as being bound by the said statement made in the statute but will proceed to analyse the nature of the amendment and then conclude whether it is in reality a clarificatory or declaratory provision or whether it is an amendment which is intended to change the law and which applies to future periods. It is only in the Notes on Clauses relating to the 2002 amendment that it has been stated that the said amendment is clarificatory. There is no such mention of the said amendment being clarificatory, anywhere in the statute itself. Such a statement in the Notes on Clauses cannot possibly bind the Court when even a statement in the statute itself is not regarded as binding or conclusive. The statute expressly states that the amendment would take effect only from 1st April, 2003."

5.9. Applying the ratio of the above decision of the Hon'ble apex Court, we find that sub-clause (a) of Section 80-IB(14) has been made effective by the legislature from 1st April, 2005. There is no mention in the Act that the insertion of the definition of the built-up area as above is clarificatory or declaratory. In view of above, we, relying up the decision of the Hon'ble apex Court in the case of Virtual Soft Systems Ltd. (supra) hold that the above definition would be applicable from 1st April, 2005 i.e., for the asst. yr. 2005-06 onwards.

xxx...

6.5. In the case of Bengal Ambuja Housing Development Ltd. (supra), the Tribunal, Kolkata Bench held as under:

"It is apparent from the perusal of Section 80-IB(10) that this section has been enacted with a view to provide incentive for businessmen to undertake construction of residential accommodation for smaller residential units and the deduction is intended to be restricted to the profit derived from the construction of smaller units and not from larger residential units. Though the AO has denied the claim of the assessee observing that larger units were also constructed by the assessee, at the same time, it is also a fact on record that the assessee had claimed deduction only on account of smaller residential units which were fulfilling all the conditions as contained in Section 80-IB(10) and the same has not been disputed by the AO also. We have also noted down the fact that even the provision as laid down in Section 80-IB(10) does not speak regarding such denial of deduction in case of profit from a housing complex containing both the smaller and large residential units and since the assessee has only claimed deduction on account of smaller qualifying units by fulfilling all the conditions as laid down under Section 80-IB(10), the denial of claim by the assessee is on account of rather restricted and narrow interpretation of provisions of clause c of Section 80-IB{10) while coming to such conclusion, we also find support from the order of the Hon'ble Supreme Court in case of Bajaj Tempo Ltd. v. CIT (supra), wherein it was held that provisions should be interpreted liberally and since in the present case also, the assessee by claiming pro rota income on qualifying units has complied with all the provisions as contained in the said section, in our considered opinion, such claim of the assessee was rightly allowed by the learned CIT(A) by reversing the order of AO."

6.6. The above decision of the Tribunal, Kolkata Bench is also upheld by the Hon'ble Tribunal, Calcutta High Court in IT Appeal No. 453 of 2006 wherein the Hon'ble High Court vide order dt. 5th Jan., 2007 held as under:

'The appeal is now taken up for hearing and after hearing the learned counsel for the parties and perusing the order passed by the Tribunal, we find that no substantial question of law is involved in this matter. Hence we dismiss the appeal."

6.7. The ratio of the above decision of the Tribunal, Kolkata Bench would be squarely applicable to the case under consideration before us because the facts are identical. Moreover, even if it is held that in view of the above two decisions of the Tribunal, two views are possible with regard to interpretation of Section 80-IB(10), it is a settled law that the view favourable to the assessee should be adopted. Sec. 80-IB(10) is a beneficial provision and it has been held by the Hon'ble apex Court in the case of Bajaj Tempo Ltd. v. CIT [1992] 104 CTR (SC) 116 : [1992] 196 ITR 188 (SC) that a beneficial provision should be interpreted liberally. If an assessee has developed a housing project, wherein the majority of the residential units has a built-up area of less than 1, 500 sq. ft. i.e., the limit prescribed by Section 80-IB(10) and only a few residential units are exceeding the built-up area of 1,500 sq. ft., there would be no justification to disallow the entire deduction under Section 80-IB(10). It would be fair and reasonable to allow the deduction on proportionate basis i.e. on the profit derived from the construction of the residential unit which has a built-up area of less than 1,500 sq. ft. i.e. the limit prescribed under Section 80-IB(10). In view of the above, we direct the AO that if he finds that the built-up area of some of the residential units is exceeding 1,500 sq. ft., he will allow the proportionate deduction under Section 80-IB(10). Accordingly, the appeal of the Revenue is dismissed and cross-objection of the assessee is deemed to be partly allowed as above.

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**ACIT v. Bengal Ambuja Housing Development Ltd. ITA No. 1735/Kol./2005 (Cross appeal ITA No. 1595/Kol./2005)**

Facts :

The assessee was engaged in the business of development and construction of residential apartments. One of its projects consisted of 261 residential units and the individual flat size varied between 800 sq.ft. to 3,000 sq.ft. It had claimed deduction u/s.80IB(10) of the Act with reference to the profit attributable to the built-up area, which was occupied by the residential units having individual flat size of less than 1,500 sq.ft. The profit was computed on a proportionate basis — based on the ratio of the built-up area of the eligible sized flats to the total area of the project. Similar deduction was also claimed with reference to the income earned on account of the forfeited amount on cancellation of the agreement by the prospective buyers and on the sale of scrap ('other income').

According to the AO, the deduction was allowable only where each and every residential unit comprised in the project had maximum built-up area of 1,500 sq.ft. Further, in respect of the other income, since the said income was not derived directly from the project itself, according to him, no deduction could be allowed. Thus, the assessee's claim was rejected. On appeal, the CIT(A) gave partial relief by allowing deduction in respect of the profit derived on sale of flats. However, in respect of the other income, he upheld the order of the AO. So both the parties filed appeal before the Tribunal.

Held :

The Tribunal noted that the provisions of S. 80IB(10) do not provide for denial of deduction, if a housing complex contains both, the smaller and larger residential units. Following the decision in the case of Bajaj Tempo Ltd., where the Supreme Court had observed that such provisions should be interpreted liberally, it upheld the order of the CIT(A) qua the deduction claimed with reference to the profit on sale of residential units.

In respect of the income earned on account of the forfeited amount on cancellation of the agreement by the prospective buyers, the Tribunal found that the said receipts by the assessee were directly related to the construction and development of the housing complex, and hence, eligible for deduction u/s.80IB(10). As regards the income from scrap, it was noted that it was not the case of the Revenue that such scrap was from the business, other than the business of construction and development of residential complex. Thus, according to it, the scrap was generated from the construction and development activity only. Thus, according to the Tribunal, the CIT(A)'s action in denying the deduction was not correct, accordingly, the assessee's cross appeal on the point was allowed.

(Contents taken from BCA website)

- **ACIT v.Sheth Developers (P.) Ltd. [2009] 33 SOT 277 (MUM.)**

22. Coming to the last of the three projects, namely, Aishwariya, apart from the common reasonings for rejecting assessee's work out of the built-up area, Assessing Officer has also noted that in the workings submitted, assessee itself showed a built-up area exceeding 1000 sq. ft. in one flat each of first to eighth floors of Wing 'A'. We have already ruled against considering any part of the balcony area for calculating the built-up area and also held that measurement based data furnished by the assessee with regard to the built-up area, is in accordance with commonly understood meaning of the term 'built-up area'. In the case of Aishwariya project, no doubt assessee's own workout show that some of the flats had built-up area exceeding 1000 sq. ft. Even the DVO's work-out show that built-up area of flats in Block A and built-up area of eight flats out of sixteen flats in respect Block B exceeded 1000 sq. ft. However in blocks C to E which consisted of 96 flats, the built-up area were less than 1000 sq. ft. in each of the case. Thus, without doubt by assessee's own admission, at least in a few cases, the built-up area exceeded 1000 sq. ft. Now the question is whether the benefit of section 80-IB(10) can be given to a project even where some of the units exceeded 1000 sq.ft. of built-up area. As aforesaid assessee was denied deduction under section 80-IB(10) only for a reason that it failed the test of limit in 1000 sq. ft. In the case of Bengal Ambuja Housing Development Ltd. (supra), we find that a similar issue had arisen. The question referred by the revenue before the Tribunal, was as under :

"(i) That on the facts and in the circumstances of the case, the ld. CIT(A) has erred in directing the Assessing Officer to allow deduction of Rs. 1,85,81,905 under section 80-IB(10) in respect of the profits of housing project Udita-III in spite of the fact that built up area of 111 residential units of the said project are above 11500 sq. ft."

The Tribunal at para 22 after considering various arguments put forward by both the parties held as under:

"It is apparent from the perusal of section 80-IB(10) that this section has been enacted with a views to provide incentive for businessmen to undertake construction of residential accommodation for smaller residential units and the deduction is intended to be restricted to the profit derived from the construction of smaller units and not from larger residential units. Though the Assessing Officer has denied the claim of the assessee observing that larger units were also constructed by the assessee, at the same time, it is also a fact on record that the assessee had claimed deduction only on account of smaller residential units which were fulfilling all the conditions as contained in section 80-IB(10) and the same has not been disputed by the Assessing Officer also. We have also noted down the fact that even the provisions as laid down in section 80-IB(10) does not speak regarding such denial of deduction in case of profit from a housing complex containing both the smaller and large residential units and since the assessee has only claimed deduction on account of smaller qualifying units by fulfilling all the conditions as laid down under section 80-IB(10), the denial of claim by the assessee is on account of rather restricted and narrow interpretation of provisions of clause (c) of section 80-IB(10) while coming to such conclusion, we also find support from the order of the Hon'ble Supreme Court in case of Bajaj Tempo Ltd. (supra), wherein it was held that provisions should be interpreted liberally and since in the present case also, the assessee by claiming pro rata income on qualifying units has complied with all the provisions as contained in the said section, in our considered opinion, such claim of the assessee was rightly allowed by the ld. CIT(A) by reversing the order of the Assessing Officer."

Again in the case of Brigade Enterprises (P.) Ltd. (supra) decided by the Bangalore Bench of this Tribunal, it was held that where some of the residential units in a bigger housing project if treated independently were eligible for relief under section 80-IB(10), then relief should be given pro rata and should not be denied by treating the bigger project as a single unit. Again we find that a similar issue had come up before the Nagpur Bench of this Tribunal in the case of ITO v. AIR Developers [IT Appeal No. 447 (Nag.) of 2007, dated 21-5-2008]. After referring to the decision in Bengal Ambuja Housing Development Ltd.'s case (supra), it was held by the Tribunal at para 6.7 of its decision dated 21-5-2008 as under :

"The ratio of the above decision of the ITAT, Kolkata Bench would be squarely applicable to the case under consideration before us because the facts are identical. Moreover, even if it is held that in view of the above two decisions of the ITAT, two views are possible with regard to interpretation of section 80-IB(10), it is a settled law that the view favourable to the assessee should be adopted. Section 80-IB(10) is a beneficial provision and it has been held by the Hon'ble Apex Court in the case of Bajaj Tempo Ltd. 196 ITR 188 that a beneficial provision should be interpreted liberally. If an assessee has developed a housing project, wherein the majority of the residential units has a built-up area of less than 1500 sq.ft. i.e., the limit prescribed by section 80-IB(10) and only a few residential units are exceeding the built-up area of 1500 sq. ft., there would be no justification to disallow the entire deduction under section 80-IB(10). It would be fair and reasonable to allow the deduction on proportionate basis i.e., on the profit derived from the construction of the residential unit which has a built-up area of less than 1500 sq.ft. i.e., the limit prescribed under section 80-IB(10). In view of the above, we direct the Assessing Officer that if he finds that the built-up area of some of the residential units is exceeding 1500 sq.ft., he will allow the proportionate deduction under section 80-IB(10). Accordingly, the appeal of the revenue is dismissed and cross objection of the assessee is deemed to be partly allowed."

Here, the learned Assessing Officer as well as the CIT(A) had declined to give the assessee the benefit of section 80-IB(10) for the Aishwariya project for the sole reason that some of the units exceeded 1000 sq. ft. and therefore the stipulation contained in clause (c) of sub-section (10) of section 80-IB of the Act was not satisfied. However, as aforesaid the Kolkata, Bangalore and Nagpur Benches of this Tribunal had clearly held even where some of the units exceeded the area limit relief had to be given on pro rata basis. We also find that Special Bench of the Tribunal in the case of Brahma Associates (supra) allowed pro rata relief, even where assessee had utilized space for commercial purpose up to the extent of 10 per cent in an approved housing project. Following these, we are of the opinion that assessee is eligible for relief on pro rata basis in respect of the flats which did not have a built up area exceeding 1000 sq.ft. in respect of Aishwariya project. Thus, the quantum of deduction under section 80-IB(10) in respect of the Aiswariya project for the flats which have built-up area less than 1000 sq. ft., has to be worked out on pro rata basis in line with our discussion in the preceding paras.

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# COMMERCIAL ASPECTS OF CIVIL CONSTRUCTION

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**Series on Construction was started in March, 2011 with following topics:-**

a. Accounting policies and Standard for construction industry.

b. Tendering and Budgeting

c. Direct Tax Aspects

d. Service Tax Aspects for Civil Contractors

**e. Service Tax Aspects for Builders and Real Estate Developers**

f. Gujarat and Inter-state vat on works contract

g. Glimpse of VAT on Works contract across the country

h. Structuring of sales invoice

i. Applicability of Labour Laws to the sector

j. Internal Controls at Construction Site
   1. Engineering
   2. Stores
   3. HR
   4. Commercial Procurement
   5. Account

k. Designing MIS Systems for a civil construction company

l. Project Completion

m. Relevance of Information Technology to the construction sector

n. Banking requirement of the sector

o. Insurance needs of the sector

p. ISO Implementation and Process Documentation

q. Planning Internal Audit of a construction site

**This month's topic is –**

**Service Tax Aspects for Builders and Real Estate Developers**

## I – Government and its style of functioning

Government in a bid to resurrect its fiscal position needs tax revenues. Now the manner in which it goes on to earn the revenue is very simple. Identify a particular business class enjoying incomes higher as compared to others. Start taxing them under any of the existing statues because it is cumbersome to come out with a new statue every time. This is precisely the reason that the government hastily included the class of builders and developers under the service tax regime by way of a deeming provision, which till date most of us find difficult to digest.

But as citizen one has to abide by the law of the land whether one likes it or not, though the constitution has given its citizen right to make representations and also approach court for any issues which one feels are not fitting in the basic framework of the constitution. So the fight for builders community shall continue for times to come, but in the meanwhile let us try and understand the basics involved in the charge of service tax on real estate transactions.

## II – How did it all begin (Background)

Well, it all began with verdict of **Hon' Karnataka High Court in the matter of K Raheja Corporation** wherein the facts were as follows:-

- Builder entered into two separate agreements with the customers, one for construction and the other for sale of undivided share of land.
- This was probably done with a view to save stamp duty on the value of construction transferred.
- The words used in the Agreement for Construction were that the agreement is for construction as a developer on behalf of the allottee.
- Section 2(1)(v-i) of Karnataka Sales Tax Act stated that 'works contract' includes any agreement for ............carrying out the building, construction......of any movable or immovable property.
- It was thus interpreted by court that the property in the goods passed by accession during the construction. Hence it was held as "Works Contract" and not a contract of sale. It may be noted that under a Contract of sale the property is transferred after the construction.

· Although the above judgment was issued under the VAT law, but even the service tax department picked up the words "Works Contract" and started issuing show-cause notices to the builders.

What followed was that notices were sent to various builders across the country who were viewed similar to K Raheja, despite having different facts. By different facts we mean that in several cases only single agreements were being entered with the customer for the complete property unlike that of K Raheja, where separate agreement was entered for the construction of property. The department on the basis of Hon' Supreme Court's judgment has started interpreting that if the Agreement to sale is entered prior to completion of construction, it results in the contract being a Works Contract subject to both VAT and Service Tax.

**The law laid down by the Hon'ble Supreme Court in K. Rahejas' case (141 STC 298) was a subject matter of challenge before the Hon'ble Supreme Court in the case of Larsen and Toubro Limited & Another vs. State of Karnataka & Another (2008-VIL-29-SC).** The Hon'ble Supreme Court while delivering the judgment on 19-8-2008 in the Larsen and Toubro's case observed and questioned whether the ratio of the judgment of the Division Bench in the case of Raheja Development Corporation (supra) is correct. The statutory authorities have relied upon the judgment of Raheja Development Corporation (supra) case as it favours the revenue. And the Court also mentioned that if the ratio of Raheja Development case is to be accepted then there would be no difference between works contract and a contract for sale.

Based on the above finding the Hon'ble Supreme Court placed the matter before the Honourable Chief Justice of India for re-consideration of the K Rahejas' case by a larger bench which is still pending before the court.

Surprising that in India, certain judgments of Bollywood stars and politicians are delivered at a very fast pace and certain matters of immense importance like above take a back seat. For the country to prosper the legal system needs to take a heavy dose of steroids.

However things came to some halt with the judgment of Assotech Realty Pvt Ltd vs. State of Up and Another vide Writ Petition No.1238 of 2006 (reported in 2007-TIOL-297-HC-ALL-CT) in the favour of builders.

Comments in the background of the judgment of the Assotechs' case cited above:

1. Hon'ble Allahabad High Court clearly distinguished the facts with K Raheja's case while delivering the judgment by stating that in the K. Rahejas' case the appellants were constructing the unit for and on behalf of the person who had agreed to purchase the flats". Whereas, in the Assotech's case, the petitioner is constructing the flats/ apartments not for and on behalf of the prospective allottees but otherwise. And any activity for self cannot result in charge of service tax.
2. Agreements wherein the land and building are conveyed to the purchaser (assuming stamp duty is paid on such conveyance) are deemed to be transfer of immovable properties and not liable to tax under the VAT/Service Tax laws.

Although the readers would be aware that the above judgment was set aside by the Honorable Supreme Court on grounds other than legal:-

· That the appellant ought to have filed a First Appeal, since a writ petition against an order of assessment was not maintainable.

· That the nature of right conferred on the allottees of flats/consideration for payments of installments/whether construction was on its account or on behalf of the allottees were not matters to be decided in a writ.

Thus the matter will now take a longer time to get resolved.

The Advance ruling in the case of Hare Krishna Developers took another "U" turn with the ruling going in favour of the department.

Finally to settle things department itself came out with the circular No. 108/02/2009-ST dated 29-1-2009, where it is clarified that at the time of execution of agreement to sale, property does not pass to the buyer and hence no service tax is applicable.

### III – Amendment in the Service Tax law

Now as we have seen in the Indian Mythology that when all weapons fail, the warrior uses "Pashupatastra". So finally we had the pashupatastra from the Central Government

In the Finance Act, 2010, an *Explanation* has been added w.e.f. 1-7-2010, which meant that *any* construction of a complex by a builder during or after construction shall be deemed to be service taxable under the act. This came with an exception that if no sum is received from the prospective buyer before the grant of completion certificate by the authority, then it would not be service taxable under the act.

Thus practically speaking almost all cases were brought within the ambit of service tax.

Thus, by a 'deeming provision', an activity which is not 'service' as per Court decisions and CBE&C's own earlier circulars will be a 'deemed service' for the purpose of levy of service tax.

**This amendment did not take the form of a retrospective amendment, but going by the logic it was always going to be prospective w.e.f 1-7-2010.**

## IV – Transitional Provisions on 1-7-2010

1. Date of booking is not relevant. Date of provision of service is relevant as provision of service is the taxable event. Hence, if construction service is provided after 1-7-2010, service tax will be payable.
2. If construction is complete before 1-7-2010 even if completion certificate is not received, no tax is payable, as service tax is on provision of service, provided the facts can be made clear from books of accounts.
3. In case of payments received prior to 1-7-2010, as per Notification No. 36/2010-ST dated 28-6-2010, if any advance payment was received prior to 1-7-2010, for service to be provided after 1-7-2010, service tax was made fully exempt.

## V - Options available for discharge of service tax liability

(Without the impact of Education cess (3%) for the sake of simplicity)

| S. No. | Rate | Market Value of Land on the date of sale | Value of Free Issue Material | Value of own Material | Cenvat Credit |
|---|---|---|---|---|---|
| 1 | 10% | To be reduced from total value | Not to be added to total value | To be Reduced from Total Value | Available for Services and Capital Goods |
| 2 | 4% (Works Contract) | To be reduced from total value | To be added to total value | Not to be reduced from total value | Available for Services and Capital Goods |
| 3 | 3.33% | To be reduced from total value | To be added to total value | Not to be reduced from total value | Not available |
| 4 | 2.5% | Not to be reduced from Total Value | To be added to total value | Not to be reduced from total value | Not available |

Illustrations on 75% Abatement Scheme –

Agreement to Sell Value (Including Land Value) – Rs. 50,00,000/-. The value for the purpose of computing service tax will be 12,50,000 (25% of 50,00,000). The service tax amount will be Rs. 1,28,750/- i.e. 10.30% on Rs. 12,50,000/-. The 75% abatement is available effective 1st July 2010.

If however free issue material of Rs. 10,00,000 have been supplied in addition by the customer, then the same would be added to arrive at Gross value of Rs. 60,00,000/- (Rs. 50 Lacs as Agreement Value+ Rs. 10 Lacs as Free Issue). The value after taking the 75% abatement would be Rs. 15,00,000 on which service tax would have to be paid as Rs. 1,54,500/- (10.30% on Rs. 15 Lacs).

**Illustration on a Regular 10.3% Scheme**

From the sale value of Rs. 50 Lacs, one may reduce the cost of own materials (not Free Issue) say Rs. 25 Lacs and value of land say Rs. 15 Lacs. Then service tax has to be paid at 10.30% on the balance of Rs. 10 Lacs as Rs. 1.03 Lacs.

## VI – Settlement of consideration by sale of undivided share in Land

If Developer has received the land from the land owner and has entered into an agreement with the landowner to give him some residential flats as consideration for purchase of undivided share of land, then computation of service tax can be tricky. As per the service tax laws 'consideration' need not be in the form of money alone.

So as and when the builder/developer gets possession of land from land owner, it would be 'advance received' and service tax will be payable on the market value of the land normally the Jantri rates.

Even the landowner may be asked to pay service tax if he is selling the flat before obtaining the completion certificate. He may choose to argue, but it might be a futile exercise in the end.

## VII – Impact of Point of Taxation Rules w.e.f 1-7-2011

Till 1-7-2011, we had a system of payment of service tax upon receipt of money from the client. But w.e.f this date, things are set to change and now the point of taxation has been redefined under the Point of Taxation Rules, 2011 (POT).

Under the POT Rules, a concept of continuous Supply of service (CsoS) prevails which means *any service which is provided, or to be provided continuously, under a contract, for a period exceeding three months, or where the Central Government, by a notification in the Official Gazette, prescribes provision of a particular service to be a continuous* *supply of service, whether or not subject to any condition;*

On 1-4-2011 CBEC declared following services as CSoS.

- Commercial or industrial construction service
- Construction of complex;
- Telecommunication service;
- Internet telecommunication service and
- Works contract service.

Thus even builders would be covered under the concept of CSOS implying that the milestones for payment as decided in the Agreement to sale would become Point of Taxation for the builders. Utmost care is thus required that the payments are actually received as per the pre-decided milestones.

With the service tax returns set to be revised, and lot of interpretations coming for the POT rules, it becomes very important for the parties to understand the manner in which the agreements need to be framed, to ensure

a. proper compliance

b. hardship of making service tax payments without receiving the same is avoided

This has to be done by defining the events in such a way that the time difference between the arising of tax liability and receipt of payment are reduced to shortest period.

**Further a situation may arise when the customer surrenders the flat and the amount paid during the initial phase is refunded back to him.**

In such a scenario as per Rule 6(3) of the Service Tax Rules if excess tax is paid in respect of service which is not provided, the excess service tax can be adjusted against the liability of the subsequent period.

It is crucial to note that there Is no regard to bad debts under the Point of Taxation Rules, hence any unilateral action would not result in future adjustment of service tax as per the current rules. Thus for any rate adjustments, it is advisable to raise credit notes with proper confirmation from the customers.

## VIII – Other Issues

1. **Centralized Registration**

   A builder is advised to take a centralized registration if the invoices are received containing the site address, if he wishes to take cenvat credit.

2. **Extra items**

   The extra items on which service tax is payable include:-

   (a) prime/preferential location charges for allotting a flat/ commercial space according to the choice of the buyer

   (b) internal or external development charges which are collected for developing/maintaining parks, laying of sewerage and water pipelines, providing access roads and common lighting etc;

   (c) fire-fighting installation charges; and

   (d) power back up charges etc.

   **Exemptions on which service tax is not payable:-**

   (a) Charges for providing parking space have been specifically excluded from the scope of this service.

   (b) Development charges, to the extent they are paid to State Government or local bodies, will be excluded from the taxable value levy.

   (c) Further, any service provided by Resident Welfare Associations or Cooperative Group Housing Societies consisting of residents/owners as their members would not be taxable under this service.

3. **Different valuation methods for different contracts**

   Each contract can be treated as separate contract and valued differently.

4. **Construction of Individual Flats**

   As per section 65(91a) of Finance Act, 1994, "residential complex" does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person

5. **How do we ascertain if a Residential Unit is completed?**

   If a completion certificate is obtained from any of the following authorities, powered under any law it will be treated to be completed.

   i. Any Government authority

   ii. Architect registered with the Council of Architecture constituted under the Architects Act, 1972( 20 of 1972); or

   iii. Chartered engineer registered with the Institution of Engineers (India); or

   iv. Licensed surveyor of the respective local body of the city or town or village or development or planning authority;

6. **Transactions involving resale of properties**

   Resale Properties – No service tax is applicable on resale of immovable properties as they would have already obtained the completion certificate as required under the law.

7. **Raising Invoices**

   Most of the builders, find it difficult to digest when they are asked to raise Invoices. For the sake of clarity and to ensure proper charge of service tax, it is highly advisable for the builders to raise invoices on their customers as per the milestones decided in the Agreements entered into with them. In raising the same, the basic requirements of the service tax rules need to be complied with.

## IX – Challenging the constitutional Validity

The amendment in Finance Act, 2010 which brought the deeming fiction with regard to service tax on construction of residential complex was stayed by the high court of Mumbai in case of Maharashtra Chamber of Housing Industry. An interim stay was granted on the grounds of constitutional validity. The judges ruled that " No coercive steps will be taken against the developers for recovery of service tax in relation to the provisions in question".

Similar order were passed in writ petitions filed by DB Reality Ltd vs UOI (2011) 30 STT 110 (Bom HC DB) / Mighty Construction vs UOI and May fair Housing. It may be noted that the stay is limited only for the coercive action for recovery.

However in GS Promoters v. UOI (2011) 8 taxmann.com 271 = 30 STT 268 = 37 VST 272 (P&H HC DB), validity of the amendment has been upheld.

Due to the stay as above, the following options have been opened up for the assesses to choose from namely – Builder Model and the Developer Model as below:-

| Particulars | Builder Model | Developer Model |
|---|---|---|
| Definition | Under this model, the agreements are for the purpose of sale of the completed building. Right in the property accrues to the owner only on execution of sale deed and not otherwise. It is thus believed that the construction undertaken is for self and various decisions have been rendered by the tribunals which state that there is no levy of service tax in the absence of service provider service receiver relationship. | Under this model, developer enters into an agreement with the prospective buyer. The owner of land directly transfers the entire land to society or owner of apartment. After entering into such agreement no separate sale deed is executed between developer and purchaser, therefore as and when builder/developer deploys the material on the land for construction, such material would get transferred in accession to the prospective buyer. |
| Stand on Service Tax | Not to be charged<br>Allahabad High court in case of Assotech | Required to be charged<br>K. Raheja Development Corporation v. State of |
| Case Laws in support of the stand | Reality P. Ltd., Vs. State of UP 2007 (007) STR 0129 (All.) Honorable Gauhati High Court in case of Magus Construction Pvt. Ltd. and another Vs. UOI 2008 (11) STR 225, | Karnataka 2006 (3) STR 337 (S.C.)) AAR ruling AIT-2008-127-AAR dated 7th April 2008 in case of **Hare Krishna Developers** ; Authority for Advance Rulings |

## Conclusion

Despite the stay as we read above and the two models proposed in the article, it would be wise to collect and pay the taxes. Not much can be read in the stay order, as the courts have clearly stated that the assessments can continue, which means assessee has to register with service tax. Hence to avoid litigations it would be in the interests of the builders to pay service tax suo moto because at the end of the day –

**"Time is precious than money".**

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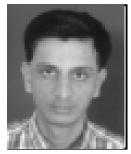
# INTERNATIONAL TAXATION



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## Recent Mumbai ITAT ruling – whether marketing activities constitute a PE?

This article summarizes a recent ruling of the Mumbai Income Tax Appellate Tribunal (ITAT) in the case of The Lubrizol Corporation USA (Assessee) on the issue of whether sales support and marketing activities carried out by an Indian affiliate could result in a permanent establishment (PE) for the Assessee under the India- US Double Taxation Avoidance Agreement (DTAA). The ITAT held that the Assessee did not have a PE in India since the activities of the Indian affiliate were of an independent nature and all operations were carried out outside India and the contracts were concluded outside India on a principal-to-principal basis. Also, the Assessee did not have any presence in terms of a fixed place of business in India.

### Brief Facts

- The Assessee, a company incorporated in and a tax resident of the US, is engaged in the business of manufacture and sale of high performance chemicals used in transportation and industrial lubricants.
- Lubrizol India Pvt. Ltd. (LIPL) is a joint venture in India between Indian Oil Corporation and the Assessee, with both parties having 50% share in it. The Assessee entered into an Exclusive Sales Representation Agreement (Agreement) with LIPL to facilitate marketing and sale of its products. The key aspects of the Agreement are as under:
    - LIPL would send quotations directly to the customers and would keep the Assessee informed of such quotations. The Assessee would, in turn, send the invoices to the customers and keep LIPL informed of such invoices.
    - LIPL would solicit orders for the products in accordance with the terms of the Agreement. All orders received by LIPL shall be forwarded to the Assessee for acceptance or rejection and LIPL shall have no authority to accept any order placed on the Assessee.
- Once accepted, the customers would place orders for the purchase of the products directly with the Assessee.
- Prices of the products would be determined by the Assessee and LIPL would have no authority to change or fix the prices or rates in any manner.
- During the term of the Agreement, a commission at agreed rates would be paid to LIPL on all shipments of the products resulting from orders submitted by LIPL. Services rendered by LIPL (territories except India) are as follows:
    - o Information of business opportunities, particularly of tenders and competitive bids from the customers
    - o Reasonable efforts to promote the sale and distribution of the products
    - o No power to bind or obligate the Assessee except as provided in the Agreement and other services as mutually agreed upon
- The Assessee would supply all required information/data to LIPL, indemnify LIPL from any adverse claims/ demands and would not hold LIPL responsible for any defect, shortfalls, taxes payable etc.
- LIPL would assume no responsibility for the quality of the products, creditworthiness of any customers etc.
- LIPL also carried out an independent business of manufacture and sale of various products under a technology transfer agreement with the Assessee in India. The commission income received by LIPL under the above Representation Agreement constituted a small fraction of LIPL's income from its own business.
- The Assessee was of the view that no income was taxable in India since it did not carry on business in India. LIPL, being an associated enterprise of the Assessee, the Tax Authority referred all transactions between the Assessee and LIPL to the Transfer Pricing

Officer (TPO) to determine the arm's length price. The TPO accepted the agreed price with no adverse adjustments.

- During the tax proceedings, the Tax Authority took a view that LIPL was a virtual projection of the Assessee in India and it constituted a PE of the Assessee in India under the DTAA. Additional profits were attributed in the hands of the Assessee on account of the marketing efforts undertaken by LIPL by virtue of the force of attraction rule present in the DTAA. The Tax Authority, in its order, attributed 5% of sales made by the Assessee as profits of the PE.
- Against the above order, the Assessee filed objections before the Dispute Resolution Panel (DRP) which upheld the order of the Tax Authority in its entirety. The Assessee preferred an appeal before the ITAT.

### Assessee's contentions

- No taxable income arose in India during the year under consideration. The Assessee neither carried out any business activity in India nor did it render any services or made any sales in India. All such sales were executed and completed outside India. The risk and title in such goods also passed to the customers outside India.
- There was no fixed place PE under the DTAA because of the following reasons:
    - o The Assessee did not have any physical presence or fixed place of business in India. No portion of LIPL's premises was under the Assessee's control and it did not have access to any fixed place of business in India.
    - o The activities in India were carried out by LIPL's own employees and such employees were under the control/supervision of LIPL.
- LIPL cannot be considered as acting on behalf of the Assessee as an agent. LIPL was engaged in the manufacturing and sale of products on its own account which represented substantial portion of the revenues of LIPL.
- An agent is independent when it enjoys both legal and economic independence and aspects of such independence include:
    - o Extent of obligations which the agent has vis-à-vis the principal
    - o Extent of detailed instructions and comprehensive control of principal
    - o Sharing of entrepreneurial risks
    - o Reliance on the special skills and knowledge of the agent and number of principals represented by the agent
- Reliance was placed on the ruling of the Authority for Advance Rulings in the case of Al Nisr Publishing which held that an agent has an authority to bind the principal vis-à-vis customers on the following conditions:
    - o The agent has the authority to negotiate all parts of the contract in a manner that is binding on the principal, even if the mere formality of signing the contract is performed abroad.
    - o Contracts must relate to assessee's business.
    - o There must be a certain degree of frequency or regular conclusion of contracts by the agent on behalf of the principal.
- LIPL forwarded the quotations received from the prospective customers to the Assessee in its own capacity as a customer support representative only. LIPL did not have the authority to accept any orders, to represent, guarantee or commit on behalf of the Assessee.
- Activities of LIPL did not fall within the meaning of the term 'securing orders' on behalf of the Assessee and, hence, did not satisfy the tests to be regarded as a dependent agent PE under the DTAA.
- In terms of the Agreement, the income attributable to customer support operations of LIPL could only be such amount as an independent enterprise carrying on similar activity would have earned on an arm's length basis. As also accepted by the TPO, the commission income earned by LIPL from the Assessee was at arm's length and, therefore, no further attribution of income should be made in the hands of the Assessee.
- Reliance was placed on the ruling of the Mumbai ITAT in the case of Daimler Chrysler AG Germany [2] to support non-existence of a PE under the India-Germany DTAA.

### Tax Authority's contentions

- LIPL is an exclusive/sole agent of the Assessee for the following reasons:
    - o LIPL has to do exclusive sales and marketing to solicit orders for the Assessee.
    - o It has to keep the Assessee informed about business opportunities, particularly tenders and competitive bids from the customers.
    - o LIPL is also required to use information furnished by the Assessee confidentially and solely for the

purposes as provided in the Agreement. LIPL would not disclose such confidential matters to third parties without the prior written consent of the Assessee.

- LIPL has got full rights and responsibilities in respect of marketing and sales in India. Hence, making of orders directly on the Assessee in the US would not save the Assessee from taxability in India since the Agreement has to be seen as a whole.
- LIPL constituted a dependent agent PE of the Assessee in India under the DTAA.
- The Assessee had assumed all risks in respect of the sales made to India and, hence, the profits arising from such sales had to be taxed in India.
- Reliance was placed on the decisions of Delhi ITAT in the cases of Rolls Royce Plc and Rolls Royce Singapore P Ltd. to support the creation of a dependent agent PE.

### ITAT's ruling

- LIPL has carried on an independent business of manufacture of various products in India. It has its own marketing network in India for sale of various products. The commission received by LIPL in India accounts for only 0.18% of its sales.
- The Assessee does not have a PE in India under the DTAA, having regard to the following facts:
  - o For the customers in India, sales are made on principal-to-principal basis.
  - o LIPL does not have the authority to negotiate the terms of the contract as the final decision regarding price and conditions of sale is taken by the Assessee.
  - o The contracts of sale are concluded only when the purchase order is accepted by the Assessee. The invoices are raised and payments are received directly by the Assessee from the customers.
  - o The Assessee also does not have any right to use LIPL's premises in India.
- Decisions relied on by the Tax Authority are not applicable due to distinguishable facts.
- The ITAT followed its earlier ruling in the case Daimler Chrysler (supra) which held that merely by acting on behalf of a non-resident assessee in India would not render the person acting as an agent to be a PE in India. There should be some definite activity of the PE to which profits can be attributed.

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*Contd. from page no. 177* *Controversies*

"That there was nothing in section 50 to suggest that the fiction created in section 50 is not only applicable to sections 48 and 49 but also applies to other provisions. On the contrary, this section makes it explicitly clear that the deeming fiction created in sub-sections (1) and (2) is restricted only to the mode of computation of capital gains contained in sections 48 and 49. The legal fiction is to deem the capital gain as short-term capital gain and not to deem the asset as short-term capital asset. Section 50 did not convert a long-term capital asset into a short-term capital asset. Though section 50 was enacted with the object of denying multiple benefits to owners of depreciable assets, yet that restriction was limited to the computation of capital gains and not the exemption provisions. Thus, the exemption under section 54E could not be denied to the assessee on account of the fiction created in section 50:"

The main ingredients of the Statute to be dealt with to compute the exemption allowable under these sections are,

(1) the "capital gain" arising from the transfer of any long-term capital asset,

(2) net consideration in respect of the original asset,

(3) extent of the net consideration invested in the new asset.

The "capital gains" and the "net consideration" have to be worked out within the framework of section 54F of the Act, without imposing any fiction created by any other section. Thus, the capital gains arising from the transfer of any long-term capital asset for the purpose of section 54F has to be worked out applying section 48 without imposing section 50C into it. As regards net consideration, the section itself has made it clear in the *Explanation,* the method in which it has to be arrived at. Needless to mention that the words "such capital gain" and "capital gains" mentioned in section 54F(1)(a) & *(b)* of the Act refers to "the capital gains" arising from the transfer of any long-term capital asset worked out as mentioned in section 54F(1) of the Act read with section 48 and not worked out as mentioned in section 45(1) read with sections 48 and 50C of the Act. When this interpretation is adopted, every provisions of the Chapter will fall in line without producing any absurd result and thereby giving a fruitful purpose for the enactments. Alternatively, if the term "capital gain" in section 54F is arrived at by imposing section 50C of the Act, then the intention for introducing section 50C of the Act would be defeated, because whatever may be the capital gain arrived at by imposing section 50C of the Act would be exempt, if the net consideration, however meager it may be, is invested in the new asset.

To summarize, in my opinion whenever capital gain is exempt under section 54/54F or other exemption provisions, section 50C is not applicable.

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Taxmann Add

FEMA UPDATE

## Overseas Direct Investment – Liberalization / Rationalization

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### Ref.: A.P. (DIR Series) Circular No. 69 dated May 27, 2011

Attention is invited to the Notification No. FEMA 120/RB-2004 dated July 7, 2004 [Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2004] (the Notification), as amended from time to time and A.P. (DIR Series) Circular No.29 dated March 27, 2006.

2. With a view to providing more operational flexibility to Indian corporates having investments abroad, it has been decided to further liberalize / rationalize the following regulations relating to overseas direct investment:

   i) **Performance Guarantees issued by the Indian Party**

   At present, 'financial commitment' of the Indian Party includes contribution to the capital of the overseas Joint Venture (JV) / Wholly Owned Subsidiary (WOS), loan granted to the JV / WOS and 100 per cent of guarantees issued to or on behalf of the JV/WOS. Keeping in mind the utility and usage of the instrument of performance guarantees in project executions abroad and also considering the risks associated with such guarantees vis-à-vis financial guarantees, it has been decided that only 50 per cent of the amount of the performance guarantees may be reckoned for the purpose of computing financial commitment to its JV/WOS overseas, within the 400 per cent of the net worth of the Indian Party as on the date of the last audited balance sheet. Further, the time specified for the completion of the contract may be considered as the validity period of the related performance guarantee. The Indian Party may report these guarantees in the similar way in which financial guarantees are being presently reported. In cases where invocation of the performance guarantees breach the ceiling for the financial exposure of 400 per cent of the net worth of the Indian Party, the Indian Party shall seek the prior approval of the Reserve Bank before remitting funds from India, on account of such invocation.

   ii) **Restructuring of the balance sheet of the overseas entity involving write- off of capital and receivables**

   The extant FEMA Regulations do not provide for the restructuring of the balance sheet of the overseas JV/WOS not involving winding up of the entity or divestment of the stake by the Indian Party. In order to provide more operational flexibility to the Indian corporates, it has been decided that Indian promoters who have set up WOS abroad or have at least 51 per cent stake in an overseas JV, may write off capital (equity / preference shares) or other receivables, such as, loans, royalty, technical knowhow fees and management fees in respect of the JV /WOS, even while such JV /WOS continue to function as under:

   (i) Listed Indian companies are permitted to write off capital and other receivables up to 25 per cent of the equity investment in the JV /WOS under the Automatic Route; and

   (ii) Unlisted companies are permitted to write off capital and other receivables up to 25 per cent of the equity investment in the JV /WOS under the Approval Route.

   The write-off / restructuring have to be reported to the Reserve Bank through the designated AD bank within 30 days of write-off/ restructuring. The write-off / restructuring are subject to the condition that the Indian Party should submit the following documents for scrutiny along with the applications to the designated AD Category –I bank under the Automatic as well as the Approval Routes:

   a) A certified copy of the balance sheet showing the loss in the overseas WOS/JV set up by the Indian Party; and

   b) Projections for the next five years indicating benefit accruing to the Indian company consequent to such write off / restructuring.

   iii) **Disinvestment by the Indian Parties of their stake in an overseas JV/WOS involving write-off**

   (a) Currently, in terms of Regulation 16 of the Notification No. FEMA 120/RB-2004 dated July 7, 2004, as amended from time to time, all disinvestments involving 'write off', i.e., where the amount repatriated on disinvestment is less than the amount of original investment, need prior approval of the Reserve Bank. In terms of A.P. (DIR Series) Circular No. 29 dated March 27, 2006 it was decided to allow the undernoted categories of disinvestment under the Automatic Route without prior approval of the Reserve Bank, subject to the following conditions:

i) In cases where the JV/WOS is listed in the overseas stock exchange;

ii) In cases where the Indian promoter company is listed on a stock exchange in India and has a net worth of not less than Rs.100 crore; and

iii) Where the Indian promoter company is an unlisted company and the investment in the overseas venture does not exceed USD 10 million.

In partial modification of the above, it has now been decided to include listed Indian promoter companies with net worth of less than Rs.100 crore and investment in an overseas JV/WOS not exceeding USD 10 million, for disinvestment under the Automatic Route with the requirement that the Indian Party shall report the disinvestment through its designated AD Category I bank within 30 days from the date of disinvestment.

(b) It is also clarified that disinvestment cases falling under the Automatic Route would also include cases where the amount repatriated after disinvestment is less than the original amount invested, provided the corporate falls under the above mentioned categories.

iv) **Issue of guarantee by an Indian Party to step down subsidiary of JV /WOS under general permission**

(a) Currently Indian Parties are permitted to issue corporate guarantees on behalf of their first level step down operating JV /WOS set up by their JV /WOS operating as a Special Purpose Vehicle (SPV) under the Automatic Route, subject to the condition that the financial commitment of the Indian Party is within the extant limit for overseas direct investment. As a measure of further liberalization, it has been decided that irrespective of whether the direct subsidiary is an operating company or a SPV, the Indian promoter entity may extend corporate guarantee on behalf of the first generation step down operating company under the Automatic Route, within the prevailing limit for overseas direct investment. Such guarantees will have to be reported to the Reserve Bank in Form ODI, as hitherto, through the designated AD concerned.

(b) Further, it has also been decided that issue of corporate guarantee on behalf of second generation or subsequent level step down operating subsidiaries will be considered under the Approval Route, provided the Indian Party directly or indirectly holds 51 per cent or more stake in the overseas subsidiary for which such guarantee is intended to be issued.

3. Necessary amendments to the Foreign Exchange Management (Transfer or Issue of Any Foreign Security), Regulations, 2004 are being issued separately.

## Remittance of assets by foreign nationals – Opening of NRO Accounts

### Ref.: A.P. (DIR Series) Circular No. 70 dated June 9, 2011

The foreign nationals employed in India holding valid visas are eligible to maintain resident accounts with an Authorised Dealer Category - I (AD Category-I) bank in India. The AD Category-I banks are required to close the resident accounts of such foreign nationals on their leaving the country and transfer their assets to their accounts maintained abroad. In this connection, attention of the AD Category-I banks is invited to paragraph 8 of Schedule 3 to the Notification No. FEMA 5 /2000-RB dated 3rd May 2000, viz. Foreign Exchange Management (Deposit) Regulations, 2000, as amended from time to time, in terms of which when a person resident in India leaves India for a country (other than Nepal or Bhutan) for taking up employment, or for carrying on business or vocation outside India or for any other purpose indicating her / his stay outside India for an uncertain period, her / his existing account should be designated as a Non-Resident (Ordinary) [NRO] Account.

2. The extant instructions have been reviewed so as to facilitate the foreign nationals to collect their pending dues in India. AD Category-I banks may, therefore, permit such foreign nationals to re-designate their resident account maintained in India as NRO account on leaving the country after their employment to enable them to receive their pending bonafide dues, subject to the following conditions:

   a) AD Category-I bank should obtain the full details from the account holder about his legitimate dues expected to be received into his account.

   b) AD Category-I bank has to satisfy itself as regards the credit of amounts which have to be bonafide dues of the account holder when she / he was a resident in India.

   c) The funds credited to the NRO account should be repatriated abroad immediately, subject to the AD Category-I bank satisfying itself regarding the payment of the applicable Income tax and other taxes in India.

   d) The amount repatriated abroad should not exceed USD one million per financial year.

   e) The debit to the account should be only for the purpose of repatriation to the account holder's account maintained abroad.

   f) There should not be any other inflow / credit to this account other than that mentioned at point (a) above.

   g) AD Category-I bank should put in place proper internal control mechanism to monitor the credits and debits to this account.

   h) The account should be closed immediately after all the dues have been received and repatriated as per the declaration made by the account holder mentioned at paragraph 2 (a) above.

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# FINANCIAL REPORTING STANDARDS

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## INTRODUCTION:

In previous column, we had discussed on IFRS 13, "Fair Value Measurements" issued by IASB. In this column we would be discussing on IFRS 10, "Consolidated Financial Statements" issued by IASB in May 2011.



## Need for a new Standard on Consolidated Financial Statements:

IASB has issued new standard on Consolidated Financial Statements curtailing the scope of IAS 27 to only Separate Financial Statements. The new standard on Consolidated Financial Statements is effective from January 1, 2013. Presently one standard and one interpretation provide guidance on when and how consolidated financial statements are to be prepared:

1. IAS 27 – Consolidated and Separate Financial Statements
2. SIC 12 – Special Purpose Entities

The following were the major reasons for issuing a new standard on Consolidated Financial Statements:

1. Divergence in practice in applying IAS 27 and SIC 12

   The divergence in practice was mainly in the application of the concept of control in circumstances where a reporting entity controls another entity while holding less than a majority of voting rights of the entity, and in circumstances involving agency relationships.

2. Perceived conflict between IAS 27 and SIC 12

   IAS 27 requires consolidation of entities that are controlled by a reporting entity. SIC 12 which interprets the requirements of IAS 27 in the context of special purpose entities, places greater emphasis on risks and rewards.

3. Lack of Transparency for "Off balance sheet vehicles"

   The global financial crisis that started in 2007 highlighted the lack of transparency about the risks to which investors were exposed from their involvement with 'off balance sheet vehicles' (such as securitization vehicles), including those that they had set up or sponsored.

## Objective of IFRS 10:

The objective of IFRS 10 is to establish principles for the preparation and presentation of consolidated financial statements when an entity controls one or more other entities. For this purpose, IFRS 10:

- Requires an entity (the parent) that controls one or more other entities (subsidiaries) to present consolidated financial statements
- Defines the principle of control, and establishes control as the basis for consolidation
- Sets out how to apply the principle of control to identify whether an investor controls an investee and therefore must consolidate the investee; and
- Sets out the accounting requirements for the preparation of consolidated financial statements

## Scope of IFRS 10:

Para 4 of IFRS 10 requires a parent to present consolidated financial statements, except in the following circumstances:

1. Where a parent meets all of the following conditions:

   a. It is a wholly-owned subsidiary or is a partially owned subsidiary and all its other owners including those not otherwise entitled to vote, have been informed about, and do not object to, the parent not presenting consolidated financial statements

   b. Its debt or equity instruments are not traded in a public market (a domestic or foreign stock exchange or an over-the-counter market, including local and regional markets)

   c. It did not file, nor is it in the process of filing, its financial statements with a securities commission or other regulatory organization for the purpose of issuing any class of instruments in a public market; and

d. Its ultimate or any intermediate parent produces consolidated financial statements that are available for use and comply with International Financial Reporting Standards.

2. Post-employment benefit plans or other long-term employee benefit plans to which IAS 19, "Employee Benefits" applies.

It should be noted that presently post-employment benefit plans have not been excluded from the scope. IAS 27's scope states that IAS 27 shall be applied in the preparation and presentation of consolidated financial statements for a group of entities under the control of a parent, Para 6 of SIC 12 categorically states that the interpretation is not applicable to post-employment benefit plans or other long-term employee benefit plans to which IAS 19 applies. Thus, if the entity has power to govern the financial and operating policies of the post-employment benefit plan or other long-term employee benefit plans so as to obtain economic benefits, that post-employment benefit or other long-term employee benefit plan would be consolidated as per IAS 27 but not as per IFRS 10. In author's view, such a blanket exclusion would encourage structuring opportunities. IASB should reconsider this and before the standard becomes effective, remove the blanket exclusion and make it a conditional one.

To understand the objective and the scope, we need to be clear with certain terms and their definitions:

- Consolidated financial statements

  Consolidated financial statements are the financial statements of a group in which the asset, liabilities, equity, income, expenses and cash flows of the parent and its subsidiaries are presented as those of a single economic entity. Normally a question is asked, if investment in an entity gives only significant influence, should be investor entity prepare consolidated financial statements. It should be noted that consolidated financial statements are prepared only when there exists parent and subsidiary relationship. However, as per IAS 28, "Investments in Associates", an investment in an entity which gives significant influence to the investor should be accounted under equity method whether or not consolidated financial statements are prepared. Financial statements that are not consolidated financial statements and in which the investment in an entity gives significant influence to the entity is called Economic Entity Financial Statements.

- The definition of Group is same. It is defined as a parent and it subsidiaries

- Parent

  IFRS 10 makes a slight change to the definition of parent. Parent is defined as an entity that controls one or more entities. IAS 27 defines a parent as an entity that has one or more subsidiaries. However, such a change is not material one.

- Subsidiary

  As there is minor change in the definition of parent, the definition of subsidiary has also undergone minor change. Subsidiary is defined as an entity that is controlled by another entity. IAS 27 defines subsidiary as an entity, including an unincorporated entity such as a partnership that is controlled by another entity.

- Control

  The definition of control has been changed significantly. In fact, IFRS 10 does not define the term control but states the conditions when an investor can be said to control an investee. Under IFRS 10, an investor is said to control an investee when the investor is exposed, or has rights, to variable returns from its involvement with the investee and has the ability to affect those returns through its power over the investee A question arises that when should an entity determine whether it has control over an investee. Para 5 provides an answer to this question. It states that regardless of the nature of its involvement with an entity, investor has to determine whether it is a parent by assessing whether it controls the investee. An investor is said to have power over the investee when the investor has existing rights that give it the current ability to direct the relevant activities, ie the activities that significantly affect the investor's returns.

The above definition looks to be very comprehensive. This definition of control could have been applied to post-employment benefit plans and long-term employee benefit plans and then a decision could have been taken whether the entity has control on the plans.

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# INDIRECT TAXES CORNER

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## [I] A ROAD AHEAD TO GST REGIME PART-II:

### Govt. likely to miss 1st April 2012 with GST:

The Centre faces the prospect of missing the April 2012 deadline to roll out goods and service tax (GST) with Bihar Deputy Chief Minister Sushil Kumar Modi formally turning down the offer to head the empowered committee of state Finance Ministers.

The Bihar Deputy Chief Minister conveyed his decision to Finance Minister Pranab Mukherjee when the congress leader called to take a reluctant Modi into taking up the challenging assignment. Modi is learnt to have cited his preoccupation with governance in Bihar to decline the offer. Sources, however, indicated that his no was driven by the opposition to GST from BJP ruled Gujarat and Madhya Pradesh and the escalating opposition government tensions.

Although Amit Mitra, the newly appointed West Bengal Finance Minister, is emerging as a compromise candidate, without the support of BJP the biggest tax reform move cannot be implemented. BJP is in power in seven states and it is an ally in Bihar and Punjab. Sushil Modi apart, the other roadblock to rolling out GST is that the reform requiring a constitutional amendment has to be cleared by the parliamentary standing committee on finance headed by BJP leader Yashwant Sinha. Finance Ministry officials said that the status of the Bill was not known, while sources said that the penal would like to discuss the issue with the states for which the former finance minister has not sought the Lok Sabha Speaker's permission.

The government has already missed the deadline for rolling out GST once as the new regime was to be in place from this April. Though Finance Minister Pranab Mukherjee rolled out the contours of the infrastructure for collecting GST, during a private meeting with the institutional investors a day before, he admitted that he was facing resistance from states.

During a meeting with senior customs and excise department officials, Mukherjee said a pilot project on GST would be unveiled next month in 11 states and that the government is committed to go ahead with the launch of required infrastructure for the proposed indirect tax returns. The FM advised senior officials that there must not be any let up in their preparatory work for GST.

He said the government is doing all that is required to roll out the information technology infrastructure, It has approved a National Information Utility (NIU) on the recommendation of YAGUP, a committee headed by Nandan Nilekani who was also present at the chief commissioners meet.

**(Source: The Times of India)**

## [II] IMPORTANT JUDGMENT/DECISION:

### [A} Important Judgment in respect of Interest on Refund in remanded case for reassessment:

In the case of Gujarat Tea Processors and Packers Ltd. the Hon. Gujarat Vat Tribunal has decided that if the refund is created after the reassessment, the dealer is entitled for interest under GVAT Act. The important paragraphs are being reproduced hereunder.

It is the case of the appellant that the Sales Tax Officer under the provisions of Local Act for the year 1992-93 raised demand from Rs. 2390/- to Rs. 11948/-, from Rs. 11300/- to Rs. 56515/- for the year 1993-94, from Rs. 16240/- to Rs. 81200/- for the year 1995-96, from Rs. 39000/- to Rs. 194880/- for the year 1996-97 and from Rs. 56800/ to Rs. 111000/- for the year 1997-98 and under Central Sales Tax Act raised demands from Rs. 600/- to Rs. 6637/- for May 1996. The appellant paid Rs. 23600/- against demand of Rs. 236529/- for the year 1997-98.

Being aggrieved by and dissatisfied with the said order the appellant filed an appeal on 24.12.2001 before the Appellate Authority. As the orders passed by the Asst. Commissioner were not speaking orders for the year 1992 - 93 TO 1997-98 under the local Act and for 1995-96 and 1997-98 under CST Act, the appellate authority by its order dated 31.01.2002 set aside all these orders and remanded the matter to the Assistant Commissioner.

The learned First Appellate Authority allowed the first appeal of the appellant and remanded the matter to the learned Assessing Authority with a direction to carry out regular assessment of the appellant. In view of the first appeal order passed in the case of the appellant, the learned assessing authority assessed the appellant after due verification of books of accounts maintained by the appellant. As per the assessment order, the appellant was entitled to refund of Rs. 21,600/-. The learned assessing authority however did not grant interest on refund due as per the assessment order.

The learned Advocate for the appellant submitted that learned first appellate authority has erred in holding that refund is due to the appellant as per the first appeal order. As a matter of fact in first appeal the earlier ex-parte assessment order was set aside and the case was remanded for fresh assessment. Thus the refund ultimately due and payable to the appellant was as per the assessment order and therefore the appellant is entitled to interest on refund.

Learned Advocate for the appellant submitted that matter is covered by judgment of Tribunal in case of Meema Engineering Works rendered in SA No. 52 and 53 of 2007 decided on 29.09.2009.

Learned Advocate for the appellant also submitted that learned Deputy Commissioner had erred in confirming the denial of interest on refund due as per assessment order. The earlier ex-parte assessment order was set aside in first appeal and thereafter a fresh assessment order was passed.

On behalf of the Revenue, learned Govt. Agent submitted that in this case refund has been granted as per appellate order in favour of the appellant. Therefore, the appellant is not entitled to interest on refund.

## OBSERVATION OF THE TRIBUNAL:

It may be observed at this stage that here interest is given as special damages for late payment of money.

It may also be observed that a person deprived of the use of the money to which he is legitimately entitled has a right to be compensated, call it by any name. It may be called interest, compensation or damages.

It may further be observed that awarding of interest is provided in Sec. 34 of CPC, the Interest Act, the Arbitration Act and Sec. 54 of Gujarat VAT Act. The Tribunal is, therefore, of the view that for ensuring complete justice between parties, such power and jurisdiction has to be exercised by Tribunal, particularly, in case of late payment by dealer, the Revenue recovers the interest at the rate of 18% p.a. under the relevant provision of the Act.

In this case the Tribunal has considered what is meant by interest, the provisions of section 34 which provides for granting interest, as amended in 1976, provisions of Interest Act and also provisions of Section 31 of Arbitration & Conciliation Act, 1996. All these statutory provisions lead to one conclusion that when an assessee or appellant is deprived of its dues at the right time, the legislature has made provisions of giving interest. This is clearly legislative mandate.

As far as present provision is concerned, section 54 is also substantive provision which relates to a legislative intention that when a person is deprived of his dues, the department is required to give interest. The Tribunal has therefore, exercised power and jurisdiction under sec. 54 and has passed the order directing the sales tax department to give interest to the appellant.

It is held that since the Sales Tax Officer by his order dated 26.05.2010 has granted refund, so appellant is entitled to receive interest on it as per section 54(1)(aa) of the Act.

### Order:

**[a]** The appeal is allowed. The order dated 26.05.2010 passed by learned Assistant Commissioner of Commercial Taxes, Div. 1, Ahmedabad granting refund of Rs. 23,600/- is upheld. However, that part of the said order dated 27.9.2010 by which the learned Deputy Commissioner of Commercial Taxes, Div. 1, Ahmedabad has refused to grant interest on refund is hereby quashed and set aside.

It is held that the appellant is entitled to the amount of interest @ 9% p.a. on the refund amount of Rs. 23,600/- from the date on which he had made payment till due date on its refund.

**[b] SMR passed without giving Notice in Form No. 49 is illegal:**

In case of Vikram Industries, it was noticed by the Ld. A. O. that the claim of inter state sale made against Form 'C' on production of its Xerox copy and in view of the above, the Asst. Commissioner exercised power u/s. 67 without issuing notice in Form No. 49 and disallowed the 'C' form and levied 10% tax. Hon. Tribunal found that SMR order passed by the Authority is illegal without issuing Notice in Form No. 49.

**[c] Penalty imposed on the basis of A. G. Audit's objection after a period of 5 years from the respective Financial Year is set aside.**

In case of Narendra Machinery Works the Ld. A. O. while passing the asst. order for the period 1994-95, not imposed the penalty on account of tax assessed was less than 10% and hence no penalty was imposed. It was noticed by the A. G. Audit that the appellant had paid certain amount along with interest before passing the asst. order which was not regular payment and therefore the penalty was imposed u/s. 45(6) of the Act.

It was held by the Hon. Tribunal that the penalty proceedings are initiated after a period of 5 years. There is an inordinate delay and therefore the penalty imposed is not legal.

The Tribunal further noticed that the appellant had deposited the tax along with the interest and such amount is paid before passing of order is a regular payment.

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# CST LAW UPDATE

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### 5. Trademark and Logo is transfer of right to use goods

**In the Case of NUTRINE CONFECTIONERY CO. PVT. LTD. v. STATE OF ANDHRA PRADESH Reported in [2011] 40 VST 327 [AP]**

**Background of the case:-**

The petitioner-company engaged in the manufacture and marketing of confectionery entered into agreements with other companies to allow those to use trademark and logo for an agreed Royalty. The agreement also provided for obligation of the petitioner to suggest various business modalities and provide formulas and recipes. On the question whether the agreement between the petitioner and the assignee-company was in respect of the transfer of the right to use goods taxable under section 5E of the Andhra Pradesh General Sales Tax Act, 1957:

Held, dismissing the petition, that there was no dispute that trademark and logo were goods within the meaning of section 2(h) of the Andhra Pradesh General Sales Tax Act. The use of the phrase "for any purpose, whatsoever" in section 5E of the Act, was the key to understand and resolve the question raised in these cases. That the agreement spoke of other aspects in addition to creating a right in the assignee to use the trademark and logo did not make any difference especially when the goods so transferred were incorporeal or intangible in character like copy right, patent, trademark, etc. If the Legislature had intended that the exclusive transfer of right to use the goods alone was taxable without there being the transfer of technical know-how, manufacturing process, etc., the Legislature must have said so. It was conspicuously absent. Even if there was transfer of right to use goods along with the transfer of other services and facilities even if it was for any limited period, the event was taxable. Either in relation to the taxable event or taxable person, the Legislature did not leave any ambiguity or doubt. There can be transfer of right to use goods under an agreement intended for that purpose or there could be such transfer of the right to use the goods under an agreement for different purposes to be acted upon by the parties as agreed different situations. The facilitating of use of technical knowhow, recipes and formulas was related to the brand value and, therefore, the petitioner undertook the obligation of providing those services. This was made clear by the clause of the agreement to the effect that the consideration of payment of royalty was only for permitting the assignee to use the trademark and logo. Even if the consideration could not be separated or discernible as to which part of the consideration for which service, it did not make any difference. Suggestions by petitioner regarding locations for getting maximum advantage for those products were only add on services. The obligation undertaken by the petitioner to provide supporting services did not dilute the clause which spoke transfer of right to use the trademark and logo. The petitioner did not in any manner regulate the use of trademark or logo although the petitioner undertook to suggest suitable items, provide formulas and recipes and suggest locations for marketing. These did not in any manner amount to retaining the control on the use of trademark by the petitioner. The assignee was free to make use of the trademark and logo and had full control over such use. The clause providing that there would be no exclusive entrustment of the logo and trademark to the assignee and that the petitioner would also use them for its operations did not in any manner mitigate in favour of the petitioner. A trademark or logo which was incorporeal or intangible could always be assigned by the proprietor while retaining the right to use for itself. Furthermore, the determination whether a transaction amounted to transfer of right to use the goods, or not would depend ultimately upon the intention of the parties. Therefore the consideration received as royally for allowing the assignee the use of trademark and logo, was realized in respect of the transfer of the right to use the goods and was taxable.

### 6. Excise Duty Not Includible in Sale Price for purpose of Sales tax, if not charged in invoice.

**In the Case of AUDCO INDIA LIMITED v. COMMERCIAL TAX OFFICER, CHENNAI AND OTHERS Reported in [2011] 41 VST 9 [MAD]**

**Background of the case:-**

The petitioner was engaged in the manufacture of industrial valves which were subject to duty of excise under the Central Excise Act, 1944. The petitioner

*Contd. on page no. 207*

# SERVICE TAX REVIEW

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***In this issue, judgement on Cable Services, Cargo Handling Services and Commercial or Industrial construction services and Construction of complex services are reproduced for the benefit of Members.***

**1) Whether penalty is leviable u/s 76 to 78 when tax along with interest is paid before the issue of SCN?**

**Commissioner of Central Excise, Mangalore v. Kirthi Cable Network [2011] 30 STT 18 (Bang. - CESTAT) CESTAT, Bangalore Bench**

**Facts:-**

Section 65(21), read with sections 76 to 78, of the Finance Act, 1994 - Cable operator's service - Period August, 2002 to March, 2005 - Assessee was engaged in providing 'Cable operator services' and 'Multi-system operator service' - During material period, it provided taxable service without following statutory formalities such as paying tax due, filing service tax return, etc. - After due process of law, original authority found that assessee had willfully evaded payment of tax and did not follow statutory provisions - Assessee paid tax due along with applicable interest before issue of show-cause notice - On adjudication, original authority demanded tax, interest and also imposed penalties on assessee- On appeal, Commissioner (Appeals) vacated order of demand of interest and penalties imposed on assessee solely for reason that assessee had discharged service tax liability along with applicable interest before issuance of show-cause notice - While passing aforesaid order, Commissioner (Appeals) had relied upon decisions of Tribunal in Mass Marketing & Advertising Services (P.) Ltd. v. CCE [2006] 5 STT 158 (Bang. - CESTAT) and in case of Shakthi Motors [Final Order No. 1378 of 2006, dated 21-8-2006] - Whether since Tribunal's decisions in Mass Marketing & Advertising Services (P.) Ltd.'s case (supra) and Shakthi Motors' case (supra) had been passed following ratio of various decisions which is no longer a good law, impugned order of Commissioner (Appeals) was to be set aside - Held, yes

**ORDER:-**

**1.** These are appeals filed by the Revenue seeking to vacate the orders of the Commissioner (Appeals) which vacated the following orders of the original authority :

| *Sl. No.* | *Appeal No.* | *Order-in- Appeal No.* | *Period of Dispute* | *Amounts involved* | |
|---|---|---|---|---|---|
| | | | | *Tax (Rs.)* | *Penalty (Rs.)* |
| 1. | ST/182/07 | 54/07-CE dt. 15-2-07 | September 03 to March 05 | Rs. 13,675 | Rs.100 per day u/s 76<br>Rs. 500 u/s 77<br>Rs. 13,675 u/s 78 |
| 2. | ST/183/07 | 63/07-CE dt. 16-2-07 | August 02 to March 05 | Rs. 61,732 | Rs. 100 per day u/s 76<br>Rs.61,732 u/s 78 |
| 3. | ST/266/07 | 141/07-CE dt. 22-3-07 | August 02 to March 05 | Rs. 7,998 | Rs.100 per day u/s 76<br>Rs. 500 u/s 77<br>Rs. 7,998 u/s 78 |
| 4. | ST/269/07 | 142/07-CE dt. 22-3-07 | August 04 to March 05 | Rs. 15,355 | Rs.100 per day u/s 76<br>Rs. 500 u/s 77<br>Rs. 15,355 u/s 78 |
| 5. | ST/292/07 | 143/07-CE dt.22-3-07 | April 04 to March 05 | Rs. 18,751 | Rs. 100 per day u/s 76<br>Rs. 500 per day u/s 77<br>Rs. 18,751 u/s 78 |
| 6. | ST/293/07 | 145/07-CE dt.22-3-07 | August 02 to March 05 | Rs. 15,925 | Rs. 100 per day u/s 76<br>Rs. 15,925 u/s 78 |

| | | | | | |
|---|---|---|---|---|---|
| 7. | ST/294/07 | 144/07-CE dt.22-3-07 | August 02 to March 05 | Rs. 10,288 | Rs. 100 per day u/s 76<br>Rs. 500 u/s 77<br>Rs. 10,288 u/s 78 |
| 8. | ST/296/07 | 147/07-CE dt.22-3-07 | August 02 to March 2005 | Rs. 22,162 | Rs. 100 per day u/s 76<br>Rs. 500 u/s 77<br>Rs. 22,162 u/s 78 |

**2.** In the appeals filed before the Tribunal, these matters stood posted for hearing on several times earlier, but the respondents or their representatives did not appear for hearing. Neither did they request for any adjournment. Same is the case today. Therefore, these matters are taken up for disposal.

**3.** In all these cases, the respondents are engaged in providing taxable services of 'Cable Operator Services' and 'Multi System Operator Service' of section 65(*105*)(*zs*) of the Finance Act, 1994 (the Act). During the respective material period, each of the assessees provided taxable service without following statutory formalities such as paying the tax due, filing service tax return etc. After due process of law, the original authority found in each case that the respondent had willfully evaded payment of tax and did not follow the statutory provisions. All the respondents paid the tax due along with applicable interest before issue of show cause notice in each case. In adjudication, the original authority found that the respondents had willfully suppressed the fact of providing taxable service and evaded the tax due; they willfully failed to follow the statutory provisions. Accordingly, he demanded the tax, interest and imposed penalties as indicated in the table in the first paragraph of this order.

**4.** *Vide* the impugned order, the Commissioner (Appeals) vacated the demand of interest and the penalties imposed under sections 76, 77 and 78 of the Act relying on the decision of the Tribunal in *Mass Marketing & Advertising Services (P.) Ltd.* v. *CCE* [2006] 5 STT 158 (Bang. - CESTAT) and in the case of *Shakthi Motors* - [Final Order No. 1378/2006, dated 21-8-2006].

**5.** In the appeal filed, the revenue has sought to vacate the impugned orders on the ground that the Commissioner had relied on the decision of the Tribunal which had been passed relying on the following judicial authorities :

(*i*) *CCE* v. *Machino Montell (I) Ltd.* 2004 (168) ELT 466 (Trib. - LB)

(*ii*) *CCE* v. *Shree Krishna Pipes Industries* 2004 (165) ELT 508 (Kar.)

(*iii*) *Rashtriya Ispat Nigam Ltd.* v. *CCE* [2005] 2 STT 117 (Bang. - CESTAT).

**5.1** It is submitted that these authorities were challenged by the Revenue before the appropriate appellate forum. These had not reached finality. Revenue has relied on the following decisions to argue that in a case of willful evasion of duty, liability to penalty under section 11AC did not stand excluded at the threshold merely on deposit of the amount after having been caught and before the issue of show cause notice :

(*i*) *CCE* v. *Machino Montell (I) Ltd.* 2006 (4) STR 177 (Punj. & Har.)

(*ii*) *Swastik Tubes (P.) Ltd.* v. *CCE* 2006 (203) ELT 485 (Trib. - Delhi).

**5.2** Reliance is also placed on the decision of the Tribunal in *CCE* v. *Toshi Auto Industries (P.) Ltd.* 2005 (183) ELT 48 (Trib. - Delhi), which had held to the same effect. In that case, the Tribunal found that since the respondent had paid the duty with interest when they were caught by the department, the duty with interest paid before the issuance of show cause notice was not voluntary. This ratio applied to similar cases involving demand of service tax.

**5.3** It is submitted that in the instant cases, the respondents paid the amounts confirmed after the intervention of the department; but for the investigation initiated by the department, the amounts would have remained unpaid. Moreover, in terms of section 75 of the Act, the assessee who is liable to pay service tax fails to credit the tax to the account of the Central Government within the period prescribed, shall pay simple interest at the specified rate for the period of delay in paying the tax. Therefore, it was obligatory on the respondents to pay the interest for the delayed payment of service tax. The appellant seeks to restore the orders of the original authority.

**6.** I have heard the learned SDR, who submits that the assessee was registered with the department and deliberately evaded tax due confirmed in the order of the original authority. The impugned order erroneously set aside the demand of interest and penalties relying on the judicial authorities, the ratio of which is no longer good law. The liability to penalty provided under various sections was not dependent on the time of issue of the show cause notice. As per the ratio of the Apex Court judgment in the case of *Union of India* v. *Rajasthan Spg. & Wvg. Mills* [2009] 180 Taxman 609, the liability to penalty under section 11AC of the Act did not stand excluded at the threshold for the reason that the assessee who was otherwise liable to pay interest under section 11AC had discharged the tax and the interest due before the issue of show cause notice. The ratio applied to similar penal provisions of the Act.

**7.** I have carefully considered the records of the case and submissions by the learned SDR. I find that in the instant case, the original authority rendered a finding that the respondents had evaded service tax due deliberately. He appropriated the service tax and interest paid. He also imposed penalties under sections 76 and 78 of the Act. The impugned order vacated the demand of interest and penalties imposed on the respondent solely for the reason that it had discharged the service tax liability as well as the liability to applicable interest before the issue of show cause notice. The respondent had not disputed its tax liability. In passing the said order, Commissioner relied on the decision of the Tribunal in *Mass Marketing & Advertising Services (P.) Ltd.'s* case (*supra*) and *Shakthi Motors'* case (*supra*). I find that these decisions had been passed following the ratio of various decisions which is no longer good law as rightly argued by the learned SDR. In the circumstances, the impugned orders are set aside and the appeals filed by the Revenue allowed.

2) **Vehicle for contract carriage under tour operator category:-**

**Commissioner of Central Excise, Rajkot v. Bharat Travels [2011] 31 STT 96 (Ahd. - CESTAT) (Mag.) CESTAT, Ahmedabad Bench**

**Facts :-**

The revenue demanded service tax from the assessee alleging that it was rendering service of tour operator. The adjudicating authority confirmed the demand and imposed penalty. On appeal, the Commissioner (Appeals) basing his findings on definitions of 'tour', 'tourist vehicle' and 'tour operator' which stood at the material time and certificate issued by Regional Transport Authority, reached to conclusion that the vehicles used by the assessee were out of purview of the definition of 'contract carriage' and, accordingly, set aside the adjudication order.

**Order:-**

Undisputedly the impugned vehicles were out of purview of the definition of 'tourist vehicle'. The reservation of the department on that aspect was that the conclusion arrived at by the Commissioner (Appeals) was prima facie wrong in as much as, the vehicles operated by the assessee would not be out of the purview of the said definition. The reservation was without any evidence and it neither challenged the veracity or the contents of the certificate issued by the Regional Transport Authority. As regards the other grievance of the revenue that the Commissioner (Appeals) had not taken into consideration the fact that the adjudicating authority had itself seen the vehicles and found that the vehicles predominantly covered the specifications in rule 128 of Motor Vehicle Rules, 1988, it was pertinent that lower adjudicating authority referred to one of the sub-clause of the rules regarding painting of a strip on the vehicle and was silent regarding remaining 12 clauses of total of 13 clauses.

The revenue could not produce any evidence to demolish the conclusion arrived at by the Commissioner (Appeals). The revenue's appeal was devoid of merits, therefore, the Commissioner (Appeals)' order was to be upheld and the revenue's appeal was to be dismissed.

3) **Builders liability under the category of construction upto 01/07/2010!!!**

**Mohtisham Complexes (P.) Ltd. v. Commissioner of Central Excise*, Mangalore [2011] 31 STT 109 (Bang. - CESTAT)(Mag.) CESTAT, Bangalore bench.**

**Facts:-**

The assessee was a builder. It got some construction works done in respect of a residential and commercial complex through its contractor. Works in question were undertaken in terms of an agreement between the assessee and prospective buyers. As per the agreement the liability to pay service tax was on the contractors. The contractors, accordingly, paid service tax at the compounded rate of 2.06 per cent as applicable to 'Works contracts'. For the relevant period the revenue demanded service tax from the assessee by issuing it a show-cause notice alleging that it had provided 'Commercial or Industrial construction' service and 'Construction of complex' service during the relevant period but did not pay appropriate amount of service tax in respect of the construction works got done through its contractors. In the instant application, the assessee contended that the *Explanations* to section 65(*105*)(*zzq*) and section 65(*105*)(*zzh*) were inserted with effect from 1-7-2010 by the Finance Act, 2010; that prior to enactment of the said *Explanations,* a builder was not a service provider and that a builder could be deemed to be a service provider only with effect from 1-7-2010 and, therefore, the demand of service tax on the assessee for the periods of dispute, which were, admittedly, prior to 1-7-2010, could not be sustained in law.

**Order:-**

The assessee had disowned tax liability inasmuch as the contractors had paid appropriate service tax and there was no liability on the assessee to pay service tax on the same subject matter prior to 1-7-2010. That plea was based on an Explanation added to sub-clause (zzq) of section 65(105) and a similar Explanation added to sub-clause (zzzh) of section 65(105). Sub-clause (zzq) of section 65(105) lays down that any service provided or to be provided to any person by any other person in relation to 'Commercial or Industrial construction' would be a taxable service. As per sub-clause (zzzh), any service provided or to be provided by any person to any other person in relation to 'Construction of residential complex' would be a taxable service. An Explanation similar to Explanation to section 65(105)(zzq) was added to section 65(105)(zzzh) also. Both the Explanations came to be inserted with effect from 1-7-2010 by section 76 of the Finance Act, 2010.

The revenue had fairly conceded the fact that before completion of construction of a building complex, advances were received by the assessee from the prospective buyers. Therefore, it stood tacitly conceded that the instant case was not covered by the clause given in parenthesis in the text of the Explanation. In other words, the instant case was covered by the situation envisaged in the main part of the Explanation, thereby meaning that the assessee as a builder could not be deemed to be service provider vis-a-vis prospective buyers of the buildings. The deeming provision would be applicable only from 1-7-2010. In some of other Explanations figuring under section 65(105), there is an express mention of the retrospective effect. Therefore, there appeared to be substance in the revenue's argument that the deeming provision contained in the Explanations added to section 65(105)(zzq) and (zzzh) would only have prospective effect from 1-7-2010. Apparently, prior to this date, a builder could not be deemed to be service provider providing any service in relation to industrial/commercial or residential complex to the ultimate buyers of the property. Admittedly, the entire dispute in the instant case related to the period prior to 1-7-2010. The assessee had made out prima facie case against the impugned demand of service tax and the connected penalty. It had paid an amount of over Rs. 64 lakhs, which stood appropriated towards the impugned demand of tax. It was also pertinent to mention that its contractor had also paid service tax on a part of the taxable value.

In the aforesaid circumstances, there should be waiver of pre-deposit requirement and stay of recovery in respect of the amount of service tax and penalty. The stay application was to be allowed.

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*Contd. from page no. 203*

*CST Law update*

secured a contract of a party which was entitled for deemed export benefit status under the Import and Export Policy of the Government of India by virtue of which the petitioner who incurred the excise duty was granted cash assistance by the Government to the extent of the duty paid towards excise based on submission of appropriate claims. The excise duties were neither claimed in the invoices nor were the purchasers debited towards that. The purchaser did not also pay the excise duty. The assessment for the relevant period was completed without imposing any tax on the excise duty incurred. However the assessment was reopened and a revised order was passed under section 16 of the Tamil Nadu General Sales Act, 1959 read with section 9(2) of the Central Sales Tax Act, 1956 including excise duty in the sale price. On appeal the Appellate Commissioner cancelled the revised assessment. However the Tribunal on appeal restored the order of the assessing authority. On a writ petition:

HELD THAT, allowing the petition, that the benefit by way of cash assistance to off-set whatever Central excise duty paid by the supplier was an exclusive arrangement between the Government and petitioner for certain specified reasons. The said arrangement and the benefit extended by way of cash assistance had no effect on the sale affected between the petitioner and its buyer. It was not as if in the event of failure in getting reimbursement of the Central excise duty in the form of cash assistance, the buyer would have made good the loss to the petitioner. In other words, by virtue of the categorical terms contained in the purchase order, the petitioner agreed to supply goods to its purchaser, by agreeing to bear the Central excise duty payable on such supplies. In order to ensure that the purchaser retained its right as the owner of the goods supplied on completion of the sale necessary certificate called project authority certificate was also annexed with the purchase order to confirm the position that the purchaser was engaged in a project which has been accorded the status, viz., deemed export status. The "sale price" as defined under section 2(h) of the Central Sales Tax Act, made it clear that it would only mean the amount payable to a dealer as consideration for the sale of any goods. Therefore, when the petitioner and its purchaser agreed in tacit terms that the sale price would not include the Central excise duty such an agreement could not be held to be a contract against the statute, and therefore there was not any statutory impediment for the petitioner to only incur the tax liability on the agreed price excluding Central excise duty borne by it. The Government had restricted such benefits in respect of certain projects by taking into account, the nature of the projects which had its own effect on national interest which in turn could be held to be in public interest. Therefore the petitioner was entitled for exclusion of the Central excise duty from the sale price on working out the tax liability under the Act.

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# CORPORATE LAWS UPDATE

**CA. Chirag M. Shah**
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**(6) General Circular No. 33 / 2011 Dated : 01.06.2011**

**Sub: Compliance of provisions of the Companies Act,1956 and Rules made there under.**

Section 610 of the companies Act, 1956 confers a right to any person to inspect any document kept with the Registrar of Companies under the Act. The Balance Sheet and Profit & Loss Accounts and Annual Return of any company are the basic documents which are required to be filed with Registrar f Companies annually as required under section 220 and 159 of the Companies Act, 1956.

It has been observed that some companies are filing only their event based information with the Registrar of Companies without filing their up to date Balance Sheet and Profit & Loss Accounts and Annual Return. Therefore, such companies are depriving the right of the public to inspect these basic documents.

In order to ensure corporate governance and proper compliances of provisions of Companies Act, 1956, it has been decided that no request, whether oral, in writing or through e-forms, for recording any event based information / changes shall be accepted by the Registrar of Companies from such defaulting companies, unless they file their updated Balance Sheet and Profit & Loss Accounts and Annual Return with the Registrar of Companies.

However, in the interest of other stakeholders, following event based information / changes will continue to be accepted by the Registrar of Companies from such defaulting companies:-

| Forms | Subject |
|---|---|
| Form 32 | Particulars of appointment of managing director, directors, manager and secretary and the changes among them or consent of candidate to act as a managing director or director or manager or secretary of a company and / or undertaking to take and pay for qualification shares, (Pursuant to sections 303(2) or 266(1)(a) and 266(1)(b)(iii) of the Companies Act, 1956). |
| Form 20B | Form for filing annual return by a company having a share capital with the Registrar. (Pursuant to Section 159 of the Companies Act, 1956). |
| Form 21A | Particulars of Annual return for the company not having share capital (Pursuant to Section 160 of the Companies Act, 1956), |
| Form DIN-3 | Intimation of Director Identification Number by the company to the Registrar. |
| Form 21 | Notice of the Court of the company law board order (Pursuant to Section 17(1), 17A, 79, 81(2), 81(4), 94A(2), 102(1), 107(3), 115(5), 141, 155, 167, 186, 391(2), 394(1), 396, 397, 398, 445, 466, 481, 559 and 621A of the Companies Act, 1956). |
| Form 23AC & 23 ACA | Form for filing balance sheet and Profit & Loss Account and other documents with the Registrar. (Pursuant to section 220 of the Companies Act, 1956). |
| Form I INV | Forms for deposit of money into IEPF. |
| Form 23B | Information by Auditor to Registrar. |
| Form 66 | Form for submission of compliance certificate with the Registrar.<br>Forms related to Cost Audit Branch<br>Investor Complaint Form. |

2. It may be further noted that:

(a) No e-filing shall be accepted by the Registrar of companies from Directors of these defaulting companies for any other company also.

(b) Company Secretaries and Auditors of these companies will also not be allowed to sign and certify the filing with MCA-21 system, in respect of these defaulting companies, till the defect is rectified.

(c) Members of ICAI, ICSI and ICWAI must not issue any certificate to such defaulting companies other than above mentioned e-forms.

(d) Action will be taken against the defaulting companies and their Directors / Officers in default in co-ordination with RBI and SEBI.

(e) This circular will not apply to such companies where the Balance Sheet and Annual Return could not be filed due to order of Court / company law board or any other competent authority and concerned ROC has marked this company as having management dispute.

(f) This circular shall be effective from 3rd July, 2011.

Yours faithfully,
Sd/-
J.N.TIKKU,
Joint Director.

**(7) General Circular No. 34 / 2011 Dated: 2nd June, 2011. Sub: Guidelines for declaring financial institution as Public Financial Institutions under Section 4A of the Companies Act, 1956.**

Section 4A of the Companies Act, 1956 was inserted by the companies (Amendment) Act, 1974 (41 of 1974) with effect from 01st February, 1975. Sub-Section (2) of Section 4A of the Act empowers the Central government that subject to the provision of sub-section (1) of the Act, to notify in the Official Gazette such other institutions as it may think fit to be a public financial institution (PFI).

2. In the past, the Ministry was declaring an institution as PFI if it meets any one of clause (i) and (ii) of sub-section (2) of Section 4A of the Act. Now, the Central Government has framed following criteria for declaring any financial institution as PFI under section 4A of the Companies Act, 1956.

(a) A company or corporation should be established under a special Act or the companies Act being Central Act;

(b) Main business of the company should be industrial / infrastructural financing;

(c) The Company must be in existence for at least 3 years and their financial statement should show that their income from industrial/ infrastructural financing exceeds 50% of their income;

(d) The net-worth of the company should be Rs. One Thousand Crore;

(e) Company is registered as infrastructure Finance Company (IFC) with RBI or as an Housing Finance company (HFC) with National Housing Bank;

(f) In the case of CPSUs / SPSUs, no restriction shall apply with respect to financing specific sector(s) and net-worth.

3. In view of above, any financial institution applying for declaration as PFI shall fulfill the aforesaid criteria.

**NEWS:**

**(1) 12 Cases of Wrong E-Filing Detected**

**Press Information Bureau**
**Government of India**
**Ministry of Corporate Affairs**

10-June-2011

**MCA Directs Regional Directors to Initiate Inquiry Against Those Practicing Professionals Who Certified the Particulars Furnished by Listed Companies**

The Ministry of Corporate Affairs has directed its Regional Directors to initiate inquiry against those practicing professionals who had certified 12 cases of wrong e-filing by certain listed companies in their e-forms. During the examination it was found that the data furnished in the e-forms were totally different as compared to the records of the company.

As per the Ministry of Corporate Affairs these are public documents and by furnishing false information to the government as well as to the other stakeholders of the company, the practicing professionals have neglected in discharging their duties and have rendered themselves liable for penal action under Companies Act, 1956 as well as professional misconduct.

If found guilty in preliminary enquiry by the Regional Director, the concerned professional institute will be informed to initiate an enquiry under their regulations. Simultaneously, the concerned professional shall be debarred to submit any document on MCA portal till final enquiry report is received from the respective professional institutes.

It may be noted that the MCA has been pushing the cause of electronic filing and approval regime. Objective is to do away with human intervention in MCA approvals to the maximum extent possible.

For this purpose, Ministry of Corporate Affairs has entrusted practicing professionals registered as members of the professional bodies namely, ICAI, ICSI & ICWAI with the responsibility of ensuring integrity of documents filed by them with MCA in electronic mode. Professionals are now to be responsible for submitting /certifying documents (to be signed digitally by them) and system would accept most of these documents online without approval by Registrar of Companies or other officers of the Ministry.

Also, the practicing professionals certify that they have verified the particulars given in the e-forms from the records of the companies and found them to be true and correct.

### (2) MCA proposes mandatory demat of Shares, Debentures and other deposit receipts of Unlisted Public Companies

The Ministry of Corporate Affairs (MCA) has proposed vide notification dated 06.06.2011 that all public companies and their subsidiaries convert share certificates and bonds into an electronic (demat) form. The Companies (Dematerialization of Certificates) Rules, 2011, are proposed to come into force from October 1. All new issuances will also have to be in demat form. MCA has also proposed to make this mandatory for all existing paper certificates by September 30.

The rules will cover all public companies "which have raised money by issue of shares and debentures, by accepting public deposits, stock, bond or any other financial instruments from public," said the MCA circular, issued this week.

Under the Companies Act, a public company is a voluntary association of members which is incorporated and, therefore, has a separate legal existence. The liability of its members is limited. It has to have at least seven shareholders.

The move could improve transparency and ease of transaction for both companies and investors, while making monitoring by regulatory bodies more organised, said experts.

R H Patil, chairman, Clearing Corporation of India, welcomed the move. "It's a good move. It will help MCA monitor these companies better," he said. Patil, who spearheaded the demat movement in the listed shares as chief of the National Stock Exchange in the 90s, said the move must be implemented in phases. "The larger companies should be taken up first. When we did this for the listed firms, there were a few thousand companies. Here, the number could run into lakhs."

The move could bring business for intermediaries such as depositories, depository participants and registrar and transfer agents. "We are talking about some 200,000 companies," said Cyrus Khambatta, senior vice-president, Central Depository Services Ltd (CDSL), one of the two major depositories in the country.

**DEMAT BENEFITS:**

# Safe and convenient way to hold securities
# Elimination of risks in physical form (bad delivery, fake securities, delays, thefts, etc)
# Major reduction in paperwork
# Easy and instant transfer of securities
# No stamp duty on transfers

He said while the depositories were ready for this massive exercise, response from shareholders was critical. "Companies who have even 10-15 shareholders will have to appoint registrar and transfer agents or connect directly with the depositories. The difficult task will be to get investors holding these instruments to present them for dematerialization."

NSDL chief Gagan Rai did not respond to calls and text messages.

Registrars say they will get more business but will keep fingers crossed until the norms are finalised. MV Ramanarayanan, director, Link In time Ltd, a registrar and transfer agent, said, "It is an opportunity. But we will have to wait for the final norms."

According to him, service providers like depositories, depository participants and registrar and transfer agents may have to provide concessional rates for smaller companies. "Size of capital could be a factor," he said.

Companies will have to pay an annual fee based on the number of folios to the several intermediaries.

A registrar, who did not want to be named, said a number of companies which had private equity investments were already holding shares in demat form. Even high-value debentures and bonds issued by companies are usually in demat form.

There are also apprehensions that 90 per cent companies are dormant and will not respond to the call at such a short notice.

MCA has invited comments from all stakeholders by June 30.

### (8) New Rules for Passing of the Resolution through Postal Ballot

In 2001, to give effect to the provisions of Section 192A of the Companies Act, 1956 (the Act), the Central Government in exercise of the powers issued rules for passing resolution by Postal Ballot called the Companies (Passing of Resolution by Postal Ballot) Rules, 2001 (Principal Rules).

Even though the Principal Rules defined the term Postal Ballot to include voting by shareholders by **postal or electronic mode, the appropriate mechanism for electronic voting was not prescribed therein.**

The Central Government has vide Notification dated 30 May 2011 issued new set of rules for passing of resolution by Postal Ballot called, the Companies (Passing of Resolution by Postal Ballot) Rules, 2011 (New Rules), which will supersede the Principal Rules.

**Key changes/additions incorporated in the New Rules are as under:**

| Particulars | New Rules | Principal Rules |
|---|---|---|
| **Definition of Voting by Electronic Mode** | A process for recording votes by the members using a computer based machine to display an electronic ballot and to record the vote and also the number of votes polled in favour or against such that the entire voting gets registered and counted in an electronic registry in a centralized server. | Not defined |
| **Modes of Sending Notice** | (i) Under Registered Post Acknowledgement Due; or<br>(ii) Through any other secured mode of posting provided by Department of Post; or<br>(iii) Through electronic mail. | (i) Under Registered Post acknowledgement Due; or<br>(ii) Under Certificate of Posting. |
| **Notice should mention the following** | · Whether voting would be through postal ballot or by electronic mode.<br>· In case of electronic mode, the process and manner for such voting provided by the Agency | Not provided. |
| **Postal Ballot Advertisement to contain the following** | · Date of completion of dispatch of notices;<br>· Date of commencement and end of voting through postal ballot or by electronic mode;<br>· Statement that any postal ballot received from member beyond the said date will not be valid; and<br>· Statement that members who have not received postal ballot forms may apply to the Company and obtain a duplicate thereof. | Not provided. |

Agency means an agency approved by the Ministry of Corporate Affairs (MCA) appointed for providing and supervising electronic platform for voting. MCA has presently authorised only National Security Depository Ltd and Central Depository Services (India) Ltd as such agencies subject to the condition that they obtain a certificate from Standardisation Testing and Quality Certification (STQC) Directorate, Department of Information Technology, Ministry of Communication and IT, Government of India, New Delhi. (source : taxguru website)

## (2) FAQs on Fast Track Exit Mode

**What is Fast Track Exit (FTE) Mode?**

Ministry has issued Guidelines for "Fast Track Exit (FTE) Mode" to give opportunity to the defunct companies to get their names struck off from the register under Section 560 of the Companies Act, 1956 in time bound manner.

**What is the date of implementation of these Guidelines?**

The Guidelines will be implemented with effect from 3rd July, 2011.

**What are the main criteria for making an application under FTE?**

**There are two main criteria:-**

- The company applying under FTE should not have any asset and liability.
- The company should not have commenced any business activity or operation since incorporation or at least one year must has been passed since last business activity or operation.

**Can a dormant company apply under FTE?**

Yes, any company, which has been identified as dormant by the Ministry of Corporate Affairs, can apply under FTE. Such companies need not to file Form 61 for normalizing.

**Can a company identified as defaulting company apply under FTE?**

Any company, which has not filed its statutory documents i.e. Balance Sheet and Annual Return for any of the financial year 2006-07, 2007-08, 2008-09 and 2009-10, has been identified as defaulting company. Directors of such companies are debarred from filing any document till they make the default good. Such defaulting companies can apply under FTE.

**Which are the companies to whom FTE is not applicable?**

The guidelines does not inter-alia cover the listed companies, companies that have been de-listed due to non-compliance of listing agreement or any other statutory Laws, section 25 companies, vanishing companies, companies under inspection/investigation, companies against which prosecution for a non-compoundable offence is pending in court, companies having outstanding public deposits or secured loan or dues towards banks and financial institutions or any other Government Departments etc. or having management dispute or company in respect of which filing of documents have been stayed by court or CLB or Central Government or any other competent authority.

For details, kindly refer general circular number 36/2011 dated 7.6.2011 available on MCA portal www.mca.gov.in

**What is the procedure for making application for striking off the name under FTE?**

The Company desirous to get its name struck off from the Register shall file an application in the prescribed Form FTE online with the Registrar. The form shall be accompanied with an affidavit, an indemnity bond, statement of account duly certified by a Chartered Accountant in practice or auditor of the company and copy of board resolution showing authorization for filing the form.

**Is there any fee for filing Form FTE?**

Yes, applicant is required to file an application in the prescribed Form FTE along with prescribed fee of Rs. 5,000/-

**Who can sign Form FTE? Whether digital signature of authorised signatory of the company is a mandatory requirement for filing the Form FTE?**

- In case there are active signatories of the company existing in the MCA21 system, then the Form shall have to be mandatorily digitally signed by the authorised signatory of the company.
- In case no active signatories are existing in the MCA 21 system, then a physical copy of the Form duly filled in, shall have to be signed manually by a director authorised by the Board of Directors of the company and shall be attached with the Form. Such form will be uploaded by the practicing professional (i.e. CA/CS/CWA), who has certified the form.

In such case, the application shall be accompanied by certificate from a CA/CS/CWA in whole time practice alongwith their membership number, certifying that the applicants are present directors of the company. In such cases, the applicants shall not be asked to file Form 32 and Form DIN.

In all cases, certification by a practicing professional (i.e. CA/CS/CWA) is mandatory.

**What will happen, if there is pending prosecution against the company and its directors?**

If the pending prosecutions are only for non-filing of Annual Returns under section 159 and Balance Sheet under section 220 of the Act, such application may be accepted provided the applicants have already filed the compounding application. However, steps for final strike of the name of the company will be taken only after disposal of compounding application by the competent authority.

**How the foreign nationals will get their Indemnity Bond and Affidavit notarized?**

Foreign nationals and NRIs may get their Indemnity Bond and Affidavit notarized as per their respective country's law.

**In case any stakeholder has any objections to the Striking off the name of any company from the Register, what shall be done in such case?**

List of applications filed under FTE will be available on the portal. In case any stakeholder has any objections to the Striking off the name of any company, he/she may raise such objection by email/letter with the concerned ROC Office within 30 days from the date of filing Form FTE by the company.

### (10) Recent Initiatives taken by the Ministry of Corporate Affairs

The Indian economy has expanded at a rapid rate during the current decade and the corporate sector has been the biggest contributor in this growth story. A significant feature of this growth is the increasing integration of the Indian corporate economy into the global business environment. While the Ministry of Corporate Affairs is working towards reforming the enabling environment for effective functioning of the corporate sector, simultaneously, there is a strong argument for fostering sensitivity to community and social concerns as a part of the broader objective of inclusive growth. It has been our constant endeavor at the Ministry to consult all the stakeholders in true spirit of our democratic values while undertaking these reform initiatives. The Ministry is also encouraging the corporate sector to take into account the concerns of stakeholders beyond their investors and to demonstrate that responsible business governance can generate value for all the stakeholders. In the long run, this collaborative effort between the government and the corporate sector will become a key multiplier in helping the 'Aam Aadmi' participate in the India's growth story.

Ministry of Corporate Affairs has been working towards repositioning itself as a significant facilitator in creating a positive and healthy environment for doing business in India by offering an enlightened regulatory regime and efficient services so that the entrepreneurial energies are utilized in creating value for the stakeholders and are not spent in un-knotting the bureaucratic red tapes.

A number of initiatives have been taken by the Ministry on legislative, regulatory, service delivery and capacity building sides.

**CSR initiatives:**

The Ministry has formulated "National Voluntary Guidelines on Social, Environmental and Economic responsibilities of Business" that will mainstream the subject of business responsibilities. The guidelines, released by Shri Murli Deora, Hon'ble Minister for Corporate Affairs today, are a refinement over the Corporate Social Responsibility Voluntary Guidelines 2009. These guidelines have been formulated keeping in view the diverse sectors within which businesses operate, as well as the wide variety of business organizations that exist in India today – from the small and medium enterprises to large corporate organizations. The Guidelines are applicable to all such entities, and are intended to be adopted by them comprehensively, as they raise the bar in a manner that makes their value-creating operations sustainable.

The Guidelines are not prescriptive in nature, but are based on practices and precepts that take into account the realities of Indian business and society as well as the global trends and good practices adapted to the Indian context. It urges businesses to embrace the "triple bottom-line" approach whereby its financial performance can be harmonized with the expectations of society, the environment and the people it interfaces with, in a sustainable manner. The adoption of these Voluntary Guidelines would also improve the ability of businesses to enhance their competitive strengths, improve their reputations, their ability to attract and retain talent and manage their relations with investors as well as the society at large.

**Recent initiatives on legislative, regulatory, service delivery:**

Ministry of Corporate Affairs has been pursuing the agenda of providing an effective regulatory framework to the Indian corporate sector that enables them to freely exploit their entrepreneurial energies while contributing to the overall growth of the society. In order to cut time lines in service delivery and give further ease to the stakeholders, we have undertaken various initiatives in the recent past. Some of major initiatives are as under: –

**10 (1) Green Initiatives in the Corporate Governance :** The Ministry has allowed paperless compliances by the companies and Registrar of Companies under the provisions of the Companies Act, 1956 such as : -

**(a) Allowing service of Documents including Balance Sheets and Auditors report etc through e-mail addresses :** In order to reduce cost of posting and speedy delivery of documents, service of documents through electronic mode has been permitted under section 53 of the Companies Act, 1956 in place of service of document under certificate of posting. Similarly, to reduce the consumption of papers and speedy secure delivery, service of copies of Balance Sheets and Auditors Report etc., to the members of the company as required under section 219 of the Companies Act, 1956 has been allowed to be served through electronic mode by capturing their e-mail addresses available with the depositories or by obtaining directly from the shareholders.

**(b) Participation by Directors and shareholders in meetings through video conferencing :** In order to provide larger participation and for curbing the cost borne by the Company, Directors, and shareholders to attend various meetings under the provisions of the Companies Act, 1956, participation through video conferencing has been permitted subject to certain compliances.

**(c) Voting in General Meeting of Companies through electronic mode :** In order to have secured electronic platform for capturing accurate electronic processes, Central Depository Services (India) Ltd (CDSL) and National Securities Depositories Limited (NSDL) are being given approval by the Ministry of Corporate Affairs to provide their electronic platform for capturing accurate electronic voting in General meetings of the company.

**(d) Issue of Digital Certificates by Registrar of Companies:** The Registrar of Companies has to issue a number of certificates to the companies and other stakeholders as required under the provisions of the Companies Act, 1956. In order to cut timelines and an another step towards "Green Initiative", it has been decided that all certificates and standard letters issued by the Registrar of Companies will now be issued electronically under the Digital Signatures of the Registrar of Companies.

**10 (2) Simplification in Procedures and Process under Companies Act, 1956: The Ministry has taken following steps to simplify the procedures for the corporate are as under : –**

**(a) Incorporation of new Company within 24 hours by end of July, 2011**

i. Allotment of Director Identification Number (DIN) has been made online by the system once the particulars of the applicant are verified by the practicing professionals.

ii. The Ministry is issuing revised guidelines for allotment of name of the company. The name shall be made available online, if the application has been certified by the practicing professional that the proposed name is in conformity with the guidelines. The guidelines shall be implemented by end of July, 2011.

iii. A separate e-form is being developed for the Memorandum and Articles of Association and incorporation process will be totally paperless.

**(b) Issue of License under section 25 (non profit companies) of the Companies Act, 1956 :** - Work relating to issue of license under section 25 (non profit companies) has been delegated to ROCs and condition for publication of notice for 30 days in the newspapers before issue of license have been dispensed with.

**(c) The Director's Relatives (Office or Place of Profit) Amendment Rules, 2011:-** Limit of Directors relatives salary has been enhanced from Rs. 50,000/- per month to Rs. 2,50,000/- per month. Now onwards, for remuneration for relatives of the Directors within the enhanced limit, company need not to approach Ministry for approval.

**(d) Marking a company as having management dispute by Registrar of Companies under MCA-21 system :** In order to have uniform practice in all Office of ROCs, clarification has been issued that unless there is a order of the court or the Company Law Board, no company is to be marked as having management dispute by the ROCs.

**(e) Various E-forms are approved online :** A number of e-forms which are informative in nature have been processed and approved/ recorded by the Registrar of Companies online and are made available for inspection to the public immediately.

**(f) Registration of place of business by a foreign company:** Registration of place of business by a foreign company has been made priority item and it is registered by ROC on same day.

**(g) Appointment of LLPs of chartered accountants as auditor:** After making amendment in definitions of body corporates, Limited Liability Partnerships of chartered accountants will not be treated as body corporate for the limited purpose of section 226(3A) of the Companies Act, 1956, hence they can be appointed as auditor of a company.

**(h) Allotment of Designated Partner Identification Number (DPIN) :**Designated Partner Identification Number issued under Limited Liability Partnership (LLP) Act, 2008 has been integrated with DIN. Now (w.e.f. 09.07.2011) only DIN will be allotted under Companies Act, 1956 and the same will be used as DPIN for LLP Act, 2008.

**(i) New Guidelines for Fast Track Exit of defunct Companies :** The Ministry has issued guidelines for Fast Track Exit mode to give opportunity to the defunct companies to get their names struck off from the Register under section 560 of the Companies Act, 1956 in time bound manner.

**(j) Special drive to clear pendency:** A large number of e-forms filed prior to implementation of revised Regulation 17 are pending for want of action by the companies/stakeholders. Without any response from the companies, ROCs cannot process the said forms. As per Regulation 17, these forms have become time barred. To reduce the pendency of such e-forms, Ministry has decided to re-open all such pending forms for reviewing by ROCs and disposing them by 7th July, 2011.

**(k) To improve compliances by the company :** In order to ensure corporate governance and proper compliances by the companies, it has been decided that w.e.f. 3rd July, 2011, no e-forms shall be accepted by ROC from such companies which have not filed their updated Balance Sheets and Annual Returns since 2006-07. The Directors of such defaulting company shall also be debarred for filing any document unless they make the default good.

**10 (3) e-Payments in the Ministry:** The payment of filing fee by the companies has been made completely online.

**10 (4) International Financial Reporting Standards (IFRS) :** In the field of financial reforms, convergence of Indian Accounting Standards called Indian AS's with International Financial Reporting Standards (IFRS) has been approved by the Ministry in February, 2011. The date of coming in force of Indian Accounting Standards will be notified shortly.

**10 (5) Investor awareness programmes :** In order to channelize the significant household savings available with the Indian households into the corporate economy, the Ministry has decided to launch investor awareness programmes in 300 districts in association with ICAI, ICWAI ICSI, Stock Exchanges, RBI, SEBI, Trade Chambers, etc.

**10 (6) The Companies Bill, 2011** : The Companies Bill, 2009 was introduced in the Parliament on 3rd August, 2009 after an extensive stakeholders' consultation. It was subsequently referred to the Department related Parliamentary Standing Committee on Finance for examination. The report and the recommendations of the aforesaid Standing Committee have been examined in the Ministry and a revised draft Companies Bill, 2011 prepared in consultation with Ministry of Law (Legislative Department), has been circulated to the various Ministries and Departments for views and comments. Once the consultation with Ministries and Departments are completed, a revised Bill as Companies Bill, 2011 is proposed to be introduced in the next session of the Parliament after obtaining due approvals. Consequent upon introduction of the Companies Bill, 2011, the Companies Bill, 2009, pending in the Lok Sabha, will be withdrawn.

10 (7) **Reorganisation of field offices** : For better administration and faster service delivery, the Ministry created a new office in the form of Regional Director (SER), Hyderabad in May 2011. The field offices of the Ministry are now organized in six regions. Similarly, it is planned to restructure the cadres in the Ministry for better service delivery to public and better promotional prospects to existing personnel.

10 (8) **Easy Exit Scheme, 2011 :** With a view to reduce the number of defunct /inoperative companies, we launched Easy Exit Scheme, 2011 providing them an easy route for closure. Under the scheme, till now, more than 29,000 defunct /inoperative companies have been struck of.

10 (9) **Indian Institute of Corporate Affairs (IICA)** : The Indian Institute of Corporate Affairs (IICA) has started functioning from its new office and building at Manesar. A large number of new initiatives, capacity building etc. are planned at IICA.

**Following improvements are planned in the functioning, service delivery and regulatory work of the Ministry:**

(1) **Limited Liability Partnership Act :** The e-Governance project for Limited Liability Partnership Act, (LLP Act) is running. However, to improve the working of LLP Act, it is planned to take up the registration of LLPs as a full e-Governance project on the same platform as MCA21.

(2) **Extensible Business Reporting Language (XBRL) :** Extensible Business Reporting Language (XBRL) is being introduced in e-filing of Balance Sheet, Profit & Loss Accounts, etc. to have compatibility with international accounting and for data mining and analysis. The taxonomy of XBRL has been finalised after extensive consultation with all stakeholders – ICAI, Trade Chambers, etc. This taxonomy has been placed on the website of Ministry for information of all.

(3) **National Foundation for Corporate Social Responsibility (NFCSR):** It has been decided to establish National Foundation for Corporate Social Responsibility (NFCSR) at IICA.

(4) **National Company Law Tribunal (NCLT):** To cut short the time delays in liquidation of companies. The Ministry is in process of establishing National Company Law Tribunal (NCLT) which will replace High Courts and BIFR for liquidation and rehabilitation of companies.

(5) **Guidelines for unpaid and unclaimed dividends:** The Ministry is formulating guidelines for unpaid and unclaimed dividends. It is also in the process of implementing a functionality whereby the names of such investors who have not claimed amounts due to them shall be displayed on the website of the Ministry for the benefit of all.

(6) **New Bills on Multi State Societies and Multi State Partnerships**

The Ministry is considering tobring legislations on Multi State Societies and Multi State Partnerships to regulate their business activities.

(Source: Taxguru.com)

**Clarification on circular No.33/2011 dated 01.06.2011 with regard to compliance of provisions of the Companies Act, 1956 and Rules made there under (**Circular No. 38/ 2011 Dated 20.06.2011.)

The Ministry has issued General Circulars No. 33/2011 dated 01.6.2011 wherein it was informed that in order to en sure corporate governance and proper compliances of provisions of Companies Act,1956 no request, whethere oral, in writing or through e-forms, for recording any event based information/ changes shall be accepted by the Registrar of Companies from such defaulting companies, unless they file their updated Balance Sheet and Profit & loss Accounts and Annual Return with the Registrar of Companies.

In order to have better understanding of the circular, it is further clarified that the above circular shall be applicable to those defaulting companies and their Directors which have not filed Balance Sheet or Annual Return for any of the financial year's 2006-07, 2007-08, 2008-09 and 2009-10 with the Registrar of Companies as required under sections 220 and/or 159 of the Companies Act,1956.

It is again reiterated that the above circular shall be effective from 3rd July, 2011.

Yours faithfully
(Monika Gupta),
Assistant Director.

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# FROM PUBLISHED ACCOUNTS

## ACCOUNTING OF CONSOLIDATION

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### RELIANCE INDUSTRIES LIMITED-Annual Report-2010-11

### SCHEDULE 'M'

### SIGNIFICANT ACCOUNTING POLICIES

**1. Principles of consolidation**

The consolidated financial statements relate to Reliance Industries Limited ('the Company') and its subsidiary companies. The consolidated financial statements have been prepared on the following basis:

a) The financial statements of the Company and its subsidiary companies are combined on a line-by-line basis by adding together the book values of like items of assets, liabilities, income and expenses, after fully eliminating intra-group balances and intra-group transactions in accordance with Accounting Standard (AS) 21 - "Consolidated Financial Statements"

b) Interest in Joint Ventures has been accounted by using the proportionate consolidation method as per Accounting Standard (AS) 27 - "Financial Reporting of Interest in Joint Ventures".

c) In case of foreign subsidiaries, being non-integral foreign operations, revenue items are consolidated at the average rate prevailing during the year. All assets and liabilities are converted at rates prevailing at the end of the year. Any exchange difference arising on consolidation is recognized in the exchange fluctuation reserve.

d) The difference between the cost of investment in the subsidiaries, over the net assets at the time of acquisition of shares in the subsidiaries is recognized in the financial statements as Goodwill or Capital Reserve as the case may be.

e) The difference between the proceeds from disposal of investment in subsidiaries and the carrying amount of its assets less liabilities as of the date of disposal is recognized in the consolidated statement of Profit and Loss account being the profit or loss on disposal of investment in subsidiary.

f) Minority Interest's share of net profit of consolidated subsidiaries for the year is identified and adjusted against the income of the group in order to arrive at the net income attributable to shareholders of the Company.

g) Minority Interest's share of net assets of consolidated subsidiaries is identified and presented in the consolidated balance sheet separate from liabilities and the equity of the Company's shareholders.

h) Investment in Associate Companies has been accounted under the equity method as per (AS 23) - "Accounting for Investments in Associates in Consolidated Financial Statements".

i) The Company accounts for its share in change in net assets of the associates, post acquisition, after eliminating unrealized profits and losses resulting from transactions between the Company and its associates to the extent of its share, through its Profit and Loss account to the extent such change is attributable to the associates' Profit and Loss account and through its reserves for the balance, based on available information.

j) The difference between the cost of investment in the associates and the share of net assets at the time of acquisition of shares in the associates is identified in the financial statements as Goodwill or Capital Reserve as the case may be.

k) As far as possible, the consolidated financial statements are prepared using uniform accounting policies for like transactions and other events in similar circumstances and are presented in the same manner as the Company's separate financial statements

### GODREJ PROPERTIES LIMITED

### SCHEDULE 19
### NOTES OT ACCOUNTS AND ACCOUNTING POLICIES
### Accounting of Consolidation

The consolidated Financial Statement of the Group has been prepared in accordance with Accounting Standard (AS 21) "Consolidated Financial Statements" issued by the Institute of Chartered Accountants of India ('ICAI').

The consolidated financial statements include the financial statements are drawn up to the same reporting unrealized profits in full.

In the consolidated financial statements, 'Goodwill' represents the excess of the cost to the company of its investments in the subsidiaries over its share of equity, at the respective dates on which investments are made. Alternatively, where the share of equity as on the date investments is in excess of cost of investments, it is recognized as 'Capital Reserve' in the consolidated financial statements. 'Minority Interest' represents the amount of equity attributable to minority shareholders at the date on which investment in a subsidiary is made and its share of movements in the equity since that date. Any excess consideration received from minority shareholders of subsidiaries over the amount of equity attributable to the minority on the date of investment is reflected under Reserves and Surplus.

## CMC LIMITED – Annual Report 2009-10

### Schedule 15:

### Notes forming part of the consolidated accounts

**3. Significant accounting policies**

**c. Basis of Consolidation**

The consolidated financial statements incorporate the financial statements of the parent and its wholly owned subsidiary made up to 31 March each year. All significant inter-Company transactions and balances are eliminated on consolidation. Goodwill arising on consolidation represents the excess of the cost of acquisition over the book value of assets and liabilities at the date of acquisition

**d. Principles of Consolidation**

The financial statements of the subsidiary used in the consolidation are drawn up to the same reporting date as the company.

The consolidated financial statements have been prepared on the following basis:

i. The financial statements of the Company and its subsidiary company have been combined on a line-by-line basis by adding together like items of assets, liabilities, income and expenses. Inter-Company balances and transaction and unrealized profits or losses have been fully eliminated.

ii. The excess of cost to the Company of its investments in subsidiary company over its share of the equity of the subsidiary company at the date on which the investment in the subsidiary company are made, is recognized as 'Goodwill' being an asset in the consolidated financial statements. Alternatively, where the share of equity in the subsidiary companies as on the date of investment is in excess of cost of investment of the Company, it is recognized as 'Capital Reserve' and shown under the head ' Reserves and Surplus', in the consolidated financial statements.

## CLARIS LIFESCIENCES LIMITED-Annual Report 2009-10

### SCHEDULE 18:

### SIGNIFICANT ACCOUNTING POLICIES

**2) Principles of Consolidation**

The consolidated financial statements include the financial statements of Claris Life sciences Limited ('the Company'), and its subsidiaries as descried in Note No. 1 of Schedule-19 (collectively referred to as 'the Group')

The consolidated financial statements have been prepared on the basis of Accounting Standard 21, 'Consolidated Financial Statements', issued by Institute of Chartered Accountants of India.

The financial statements of the parent Company and its subsidiaries have been combined on a line-by- line basis by adding together the book values of like items of assets, liabilities, income and expenses after eliminating intra-group balances/ transaction and resultant unrealized profits/ losses in full. The amounts shown in respect of reserves comprise the amount of the relevant reserves as per the balance sheet of the parent Company and its share in the post-acquisition increase in the relevant reserves of the subsidiaries. The excess or deficit of parent's portion of equity in the subsidiary Company over its cost of investment, if any, is treated as a capital reserve or recognized as goodwill respectively.

The consolidated financial statements are prepared using uniform accounting policies for like transactions and other events in similar circumstanced except where it is not practicable to do so. Considering that the financial statements of the foreign subsidiaries have been prepared under the laws and regulations applicable to their respective country of incorporation, these consolidated financial statements have been prepared substantially in the same format adopted by the Company to the extent possible, as required by the Accounting Standard AS 21 "Consolidated Financial Statements" issued by the Institute of Chartered Accountants of India.

In case of foreign subsidiaries, revenue items are consolidated at the average rate prevailing during the period. All assets and liabilities are converted at the rates prevailing at the end of the period. Exchange gains/ losses arising on conversion are recognized under Foreign Currency Translation Reserve.

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## Understanding XBRL - 2

**CA. B. M. Zinzuvadia**

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In our last time discussion, I had discussed following things:

1. XBRL is basically XML.
2. It belongs to Marking-up Language family.
3. Basic objective of XBRL is to transport data to users in such a way that it can be used directly for different type of analysis.
4. XML is not an improved version of HTML it is different from HTML.

Though the concept of marking up is used in XML, it is not an improved version of HTML, it is different from HTML. Let's see what makes XML different from HTML.

1. The purpose of HTML is to transport data and to display it in a browser. Whereas the purpose of XML is to transport and store data.
2. Marking up in HTML is designed to give instructions to browser and it carries information as to how the text will be displayed on the screen whereas in XML marking up carries information as to what the data is.
3. Tags (Elements) and additional information (attributes) are inbuilt in the software itself in HTML and user can not add new elements and attributes. In XML it is possible to define new elements and attributes. In fact this feature of XML makes it Extensible and whole magnificence lies in this feature of XML.

Before we go into technical details of XML, let us discuss some terminology used in XML.

1. Tag/Label is called "Elements" in XML the purpose is to carry information as to what the data is. The element carries identification of the data. Say for example "net Profit Loss before Tax".
2. Additional information attached to an element is called "Attributes". Here in XML it refers to characteristics of an element. Say for example, "net Profit Loss before Tax" can have following attributes.
   a. It can be both debit and credit.
   b. It represent's results for a particular period.
   c. It may have a NIL value.
3. If everybody using XML defines elements in their own way and then publishes their results, it will not work and therefore a standardized set of elements and its attributes are defined by regulatory bodies. A set of standardized elements is called "XML Schema". It is termed as "Taxonomy" when it refers to XBRL. The MCA has recently issued taxonomy for the schedule VI to the companies Act 1956.
4. Value assigned to an element can be validated against its attributes. Basically it is a verification to see that a value assigned to an element conform to the characteristics defined for that elements. You are aware of validation of tax return xml files and reasons of validation failure.

   Xml does not do anything with the data. Basically xml is designed to transport the data. The basic is data sharing. Xml simplifies the data sharing.

   Another benefit using xml as data transmitting tool is, it is Platform independent. It carries data in clear text format and hence it can be processed independent of the technological difference in software of prepares and users of xml files.

   Let us see a simple example of xml file.

```
<listOfArticles>
<Article>
<Subject>Winding up order – court's Power
</ Subject >
< author1>CA. Pradip K. Modi</ author1>
<Month>April 11</Month>
<email> capkmodi@gmail.com </email>
</Article >
<Article>
<Subject>From the Courts</ Subject >
< author1>CA. C.R Sharedalal</ author1>
< author2>CA. J.C. Sharedalal</ author2>
<Month>April 11</Month>
<email1> jcs@casharedalal.com </email1>
</Article >
</listOfArticles>
```

The xml file starts with root element. <listOfArticles > is root element. It contains some child elements. Actually xml files starts from certain declarations (not given in above example)

The root element contains child elements. An element is stared with <*Name of element*> and closed with </ *Name of element*> mark. You can see that the root element is kept open to cover all child elements. A root element can also contain sub root elements.

There are certain rules of naming of elements. We need not to discuss it in detail because as a user, we have to use names elements defined by regularity authorities such as tax Department or MCA.

1. Elements names are case sensitive in xml. So ListofArticles and listOfarticles are two different elements.
2. It cannot start with numbers, punctuation mark or “xml” or “XML” words.
3. It is extensible. See, details of second articles in above xml file. There are two authors. In first case there was single. Infect this is the real power of xml. It will not crash while processing the data. You can define new elements and keep on adding to it.
4. All elements must have a closing tag. </ >. Without it. The processing of xml will crash.
5. An element can have attributes.

Attributes provide additional information on element. Say for example element <author1> can have attribute “email” in that case it will be coded as under.

<author1 email = “capkmodi@gmail.com” > CA. Pradip K. Modi </ author1>. There is no need to repeat attribute values while closing an element.

Validation of xml files.

Validation of xml files is basically verification of elements with respect rules of document type definitions. The document type definition is identity of data and it is defined for each of the element. In xml, document type definitions are kept in separate file. Two options are available here. DTD files (becoming obsolete now) and xml schema.

Xml schema contains validation rules for an xml files. As I have mentioned earlier, the xml files starts with some declarations. One of the declarations is about location of the xml schema file.

Here is an example of xml schema file.

```
<xs:element name=” listOfArticles”>
<xs:complexType>
<xs:element name=”Article”>
<xs:complexType>
    <xs:sequence>
    <xs:element name=”Subject” type=”xs:string”/>
    <xs:element name=”author1" type=”xs:string”/>
    <xs:element name=”author2" type=”xs:string”/>
<xs:element name=”Month” type=”xs:string”/>
<xs:element name=”email” type=”xs:string”/>
</xs:sequence>
</xs:complexType>
</xs:element>
</xs:complexType>
</xs:element>
```

Xml schema is an alternative of DTD. And basically contains xml document definitions. And xml schema defines following thing for an xml document.

1. Elements that can be a part of xml document.
2. Attributes that can appear in a document.
3. Which elements are child elements
4. Order of child elements
5. Whether an element is empty or can include text
6. Data types for elements and attributes
7. Default and fixed values for elements and attributes

You can see that the structure of xml schema is very simple. The first element is declared to be complex. It means the first element that is “listOfArticles” have some child element. This is the only meaning of a complex element. <xs:sequence> declares it is necessary that the following child elements appears in sequence in the xml document. Simple elements (which are not complex) can have data type. Commonly used data types are.

(1) xs:string , (2) xs:decimal (3) xs:integer (4) xs:boolean

(5) xs:date (6) xs:time. In our above example all simple elements have same data type xs:string.

Next time we will discuss error in xml file. Please keep in mind that xbrl is basically xml.

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## (A) INCOME TAX

1) **Notification no-37, dated 1st July,2011 regarding Digital Signature Certificate Mandatory for Firms, Individuals and HUF**

The Central Board of Direct Taxes hereby makes it mandatory for the following assessees to file their return of income for AY 11-12 and for subsequent assessment years through digital signature only w.e.f. 01/07/2011:-

a) Partnership firms (to whom tax audit is applicable u/s 44AB)

b) Individual / Proprietorship firms (to whom tax audit is applicable u/s 44AB)

c) HUF proprietorship firms (to whom tax audit is applicable u/s 44AB)

**2) Cost Inflation index for the year 2011-12: 785.**

**3) NOTIFICATION NO. 36/2011, dated 23-6-2011**

In exercise of the powers conferred by sub-section (1C) of section 139 of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby exempts the following class of persons, subject to the conditions specified hereinafter, from the requirement of furnishing a return of income under sub-section (1) of section 139 for the assessment year 2011-12, namely :—

1. An Individual whose total income for the relevant assessment year does not exceed five lakh rupees and consists of only income chargeable to income-tax under the following head,—

(A) "Salaries";

(B) "Income from other sources", by way of interest from a savings account in a bank, not exceeding ten thousand rupees.

( C) Subject to certain other conditions.

(For full text refer the notification)

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## (B) SERVICE TAX

1) **Notification No. 41/2011 regarding point of taxation rules 2011.**

- The point of taxation rules, 2011 shall come into force on the 1st day of July, 2011.
- In the point of taxation rules,2011,in Rule 7, in sub-rule ( c )
- before the bracket and letter "(p)", the bracket and letter "(g)" shall be inserted.

**Note:-**

**a)** The letter (g) signifies category of consulting engineer which is also added to the list of other seven service providers who can also pay service tax as and when the value of taxable service is received or advance is received , while the other categories of service providers have to pay tax as and when invoices are issued for the taxable services rendered.

**b)** As per the rules invoice is to be issued within 14 days from the date of rendering the taxable service.

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## HEALTH & FUN

*Compiled from various sources from internet.*

### Heart Palpitations

*What Are Palpitations?*

Palpitations (pal-pi-TA-shuns) are feelings that your heart is skipping a beat, fluttering, or beating too hard or too fast. You may have these feelings in your chest, throat, or neck. They can occur during activity or even when you're sitting still or lying down. Palpitations are unpleasant sensations of irregular and/or forceful beating of the heart. Some persons with palpitations have no heart disease or abnormal heart rhythms and the reasons for their palpitations are unknown. In others, palpitations result from abnormal heart rhythms

Many times, the person experiencing palpitations may not be aware of anything apart from the abnormal heart rhythm itself. But palpitations can be associated with other things such as tightness in the chest, shortness of breath, dizziness or light-headedness. Depending on the type of rhythm problem, these symptoms may be just momentary or more prolonged. Actual blackouts or near blackouts, associated with palpitations, should be taken seriously because they often indicate the presence of important underlying heart disease. Another symptom is pain in arms or legs sometimes lasting through the night before the palpitation.

#### *Many things can trigger palpitations, including:*

- Strong emotions
- Vigorous physical activity or Exercise
- Medicines such as diet pills and decongestants
- Caffeine, alcohol, nicotine, and illegal drugs
- Anemia
- Anxiety, stress, fear
- Caffeine
- Certain medications, including those used to treat thyroid disease, asthma, high blood pressure, or heart problems
- Cocaine
- Low levels of oxygen in your blood
- Overactive thyroid

These factors make the heart beat faster or stronger than usual, or they cause occasional premature (extra) heartbeats. In these situations, the heart is still working normally, and the palpitations usually are harmless.

Sometimes palpitations are symptoms of an arrhythmia (ah-RITH-me-ah). An arrhythmia is a problem with the rate or rhythm of the heartbeat. It's with you your entire life, yet you probably don't notice it much: your heartbeat. When normal, the heartbeat is nice and regular, and has just the right rate. But when things aren't quite right — when the heartbeat is too fast or too slow, or just too irregular — it's known as a cardiac arrhythmia (heart rhythm problem), which is among the most common of the heart disorders.

**CA. Ganesh Nadar**

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Some arrhythmias are signs of heart conditions, such as heart attack, heart failure, heart valve problems, or heart muscle problems. However, less than half of the people who have palpitations have arrhythmias.

#### *Home Care*

Reducing your caffeine intake will often significantly reduce your heart palpitations. Reducing stress and anxiety can help lessen the frequency or intensity of your heart palpitations. Try breathing exercises or deep relaxation (a step-by-step process of tensing and then relaxing every muscle group in your body) when palpitations occur. Practicing yoga or tai chi on a regular basis can reduce the frequency of your palpitations.

#### *Prevention*

Try to reduce stress and risk factors for heart disease:

* Don't smoke.
* Eat a well-balanced, low-fat diet.
* Exercise regularly.
* Try stress management techniques such as yoga, tai chi, or meditation.
* Make sure that your blood pressure and cholesterol are under control.

## FUN

### Corporate Lesson: The Washerman, Dog and Donkey

Good story with old version…

There was once a washer man who had a donkey and a dog. One night when the whole world was sleeping, a thief broke into the house, the washer man was fast asleep but the donkey and the dog were awake. The dog decided not to bark since the master did not take good care of him and wanted to teach him a lesson. The donkey got worried and said to the dog that if he doesn't bark, the donkey will have to do something himself. The dog did not change his mind and the donkey started braying loudly. Hearing the donkey bray, the thief ran away, the master woke up and started beating the donkey for braying in the middle of the night for no reason.

Moral of the story "One must not engage in duties other than his own"

Now take a new look at the same story…

The washer man was a well educated man from a premier management institute. He had the fundas of looking at the bigger picture and thinking out of the box. He was convinced that there must be some reason for the donkey to bray in the night. He walked outside a little and did some fact finding, applied a bottom up approach, figured out from the ground realities that there was a thief who broke in and the donkey only wanted to alert him about it. Looking at the donkey's extra initiative and going beyond the call of the duty, he rewarded him with lot of hay and other perks and became his favorite pet. The dog's life didn't change much, except that now the donkey was more motivated in doing the dogs duties as well. In the annual appraisal the dog managed a " meets requirement" Soon the dog realized that the donkey is taking care of his duties and he can enjoy his life sleeping and lazing around. The donkey was rated as "star performer". The donkey had to live up to his already high performance standards. Soon he was over burdened with work and always under pressure and now is looking for a job rotation…

If you have worked in a corporate environment, I am sure you have guessed the characters of the new story.

### Things Found Only in America

1. Only in America......can a pizza get to your house faster than an ambulance.
2. Only in America......are there handicap parking places in front of a skating rink.
3. Only in America......do drugstores make the sick walk all the way to the back of the store to get their prescriptions while healthy people can buy cigarettes at the front.
4. Only in America......do people order double cheese burgers, large fries, and a diet Coke.
5. Only in America......do banks leave both doors to the vault open and then chain the pens to the counters.
6. Only in America......do we leave cars worth thousands of dollars in the driveway and put our useless junk in the garage.
7. Only in America......do we use answering machines to screen calls and then have call waiting so we won't miss a call from someone we didn't want to talk to in the first place.
8. Only in America......do we buy hot dogs in packages of ten and buns in packages of eight.
9. Only in America......do we use the word 'politics' to describe the process so well: 'Poli' in Latin meaning 'many' and 'tics' meaning 'bloodsucking creatures'.
10. Only in America......do they have drive-up ATM machines with Braille lettering.

### Beautiful Words : Try to Understand

Someone has written these beautiful words. One must read and try to understand the deep meaning in them. They are like the Ten Commandments to follow in life all the time.

1) Prayer is not a "spare wheel" that you pull out when in trouble; it is a "steering wheel" that directs us in the right path throughout life.
2) Do you know why a car's WINDSHIELD is so large & the rear view mirror is so small? Because our PAST is not as important as our FUTURE. So, look ahead and move on.
3) Friendship is like a BOOK. It takes few seconds to burn, but it takes years to write.
4) All things in life are temporary. If going is well enjoy it, they will not last forever. If going is wrong don't worry, they can't last long either.
5) Old friends are like Gold! New friends are Diamonds! If you get a Diamond, don't forget the Gold! Because to hold a Diamond, you always need a base of Gold!
6) Often when we lose hope and think this is the end, GOD smiles from above and says, "Relax, sweetheart, it's just a bend, not the end!
7) When GOD solves your problems, you have faith in HIS abilities; when GOD doesn't solve your problems HE has faith in your abilities.
8) A blind person asked Priest "Can there be anything worse than losing eye sight?" He replied: "Yes, losing your vision."
9) When you pray for others, God listens to you and blesses them; and sometimes, when you are safe and happy, remember that someone has prayed for you.
10) WORRYING does not take away tomorrow's TROUBLES; it takes away today's PEACE.

### The Golden Mantras of Chanakya

"A person should not be too honest. Straight trees are cut first and honest people are screwed first."

"Even if a snake is not poisonous, it should pretend to be venomous."

"The biggest guru-mantra is: Never share your secrets with anybody. It will destroy you."

"There is some self-interest behind every friendship. There is no friendship without self-interest. This is a bitter truth."

"Before you start some work, always ask yourself three questions – Why am I doing it, What the results might be and Will I be successful. Only when you think deeply and find satisfactory answers to these questions, go ahead."

"As soon as the fear approaches near, attack and destroy it."

"The world's biggest power is the youth and beauty of a woman."

"Education is the best friend. An educated person is respected everywhere. Education beats the beauty and the youth."

"Books are as useful to a stupid person as a mirror is useful to a blind person."

"Treat your kid like a darling for the first five years. For the next five years, scold them. By the time they turn sixteen, treat them like a friend."

"A man is great by deeds, not by birth."

"God is not present in idols. Your feelings are your god. The soul is your temple."

"The fragrance of flowers spreads only in the direction of the wind. But the goodness of a person spreads in all directions."

"Once you start working on something, don't be afraid of failure and don't abandon it. People who work sincerely are the happiest."

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**CA. Kunal A. Shah**
*Hon. Secretary*

**CA. Ashok C. Kataria**
*Hon. Secretary*

## (A) FORTHCOMING PROGRAMMES

Programmes finalized for the coming months are as under:-

| Date/Day | Time | Programmes | Speaker | Venue |
|---|---|---|---|---|
| 6-8-2011 to 9-8-2011 Saturday to Tuesday | | 38TH Residential Refresher Course at Jaipur | Shri Saurabh N. Soparkar, Ahmedabad<br>CA. Padamchand Khincha, Bangalore<br>Shri S. S. Gupta, Mumbai<br>CA. Kaushik C. Patel, Ahmedabad<br>CA. Jayesh C. Sharedalal, Ahmedabad | The Gold Palace Resort. Kukas, Jaipur |
| 12-8-2011 Friday | 8.00 pm onwards | Talent Evening | | Tagore Hall, Paldi, Ahmedabad |

## PUBLICATION FOR SALE

**New Publication on "INBOUND AND OUTBOUND INVESTMENT- PRACTICE AND PROCEDURES" authored by CA. Hiren D. Shah**

This Publication is Priced at Rs. 500/-. But for Members of our Association it is Priced at 50% Discount i.e. Rs.250/-. Please note that a Member shall be offered only one book at the above stated discounted Price.

## GENTLE REMINDER

Membership fees for the year 2011-12 falls due for payment on 1st April,2011. Members are requested to remit the same by cash or by cheque in favour of "Chartered Accountants Association, Ahmedabad" depending upon their choice for enrolment.

(a) Entrance Fees — Rs. 500

(b) Life Membership Fees — Rs. 7500

(c) Annual Membership Fees

1) **If paid prior to June 30 of each financial year:**
   - (a) In case of Membership(of ICAI) for a period of less than or equal to five yrs — Rs. 600
   - (b) In case of Membership(of ICAI) for a period of more than five years — Rs. 750

2) **If paid after June 30 of each financial year:**
   - (a) In case of Membership(of ICAI) for a period of less than or equal to five years — Rs. 750
   - (b) In case of Membership(of ICAI)for a period of more than five years — Rs. 900
   - (c) Brain Trust Meeting Fee — Rs. 500

The members are requested to intimate changes in their email ID & mobile phone number at the Association's office, which will help the office bearers to remind you about the programmes through email and SMS.

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

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