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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.

QUOTES FOR THE MONTH

I hope I shall possess firmness and virtue enough to maintain what I consider the most enviable of all titles, the character of an honest man.

If we desire to avoid insult, we must be able to repel it; if we desire to secure peace, one of the most powerful instruments of our rising prosperity, it must be known, that we are at all times ready for War.

George Washington

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EDITORIAL

"MEGHDOOT" REINCARNATED!

When Kalidas wrote the epic, he must not have imagined his thoughts would be carried to such a height and a whole new work culture would evolve around the same!

Kalidas imagined the use of clouds as a messenger and the IT people purported clouds a storage space.

Yes I am talking about the latest buzzword on everyone's lips in the IT Industry – **Cloud Computing.**

As we all know, clouds store water in gaseous form and pour water on the earth when gas cools off. Similarly, a virtual storage capacity is created off site which can be accessed thru net by a proper software. Neither the user nor the equipment thru which cloud is accessed need be in the proximity to the cloud.

As such, we are not alien to the term cloud computing. We do use a well known form of cloud computing i.e. an e-mail account with a Web-based e-mail service like Hotmail, Yahoo! Mail or Gmail. Instead of running an e-mail program on our computer, we log in to a Web e-mail account remotely. The software and storage for our account doesn't exist on our computer - it's on the service's computer cloud. Wide Area Network, Video Conferencing and Collaboration Software are also cloud computing facilities.

As we all experience, the advantages are enormous –

- access from any where
- users can concentrate on core competence
- reduces IT capacity and thereby converts a large proportion of fixed cost into variable cost.
- users do not have to worry about the maintenance, technological up gradation and information security
- services can be used at an abysmally low cost compared to the cost of owning the software for internal use

To understand all of the above aspects, consider the following:

As an employer you have to make sure that all of your employees are provided with the right kind of hardware and software needed for their job. Buying computers for everyone isn't enough - you also have to purchase software or **software licenses** to give employees the tools they require. Whenever you have a new hire, you have to buy more software or make sure your current software license allows another user.

Instead of installing a suite of software for each computer if you'd only have to load one application that would allow employees to log into a Web-based service which hosts all the programmes the user would need for the job, imagine how comfortable it would be! Remote machines owned by one's own organization (where the size is large) or owned by another company would run everything from e-mail to word processing to complex data analysis programs. This is called **cloud computing.**

In a cloud computing system, there's a significant workload shift. Local computers no longer have to do all the heavy lifting when it comes to running applications. The network of computers that make up the cloud handles them instead. Hardware and software demands on the user's side decrease. The only thing the user's computer needs to be able to run is the cloud computing system's **interface software**, which can be as simple as a Web browser, and the cloud's network takes care of the rest.

The known concerns expressed are about the data security and compliance, standardization of internal processes, and arranging individual level service agreements. Some studies have also revealed that cloud computing is not as cost saving as is hyped.

Entities like Chartered Accountants Association can make wonderful use of the Cloud Computing concept. We can have a "community cloud", a private cloud. Certain software having application in accounting which is widely used by individual member's clients, software of XBRL, software for Income Tax, VAT and Service Tax Applications, compilation of Judicial pronouncements and many such can be stored in a private cloud. Individual member is allowed the excess on paying a small registration and annual fee. The maintenance and updating handled by the private cloud owner.

CA DARSHAN SHAH
EDITOR

PRESIDENT'S MESSAGE

DEAR PROFESSIONAL FRIENDS,

The month of August witnessed various programs of the Association, starting from RRC at Jaipur, followed by entertainment packed evening of Talent-2011 and thereafter one of the finest study circles on the topic of Intricacies of Derivatives.

It is the time when almost every professional brother gears up for the tax audit assignments. The limit of turnover / gross receipts has been increased for the purpose of tax audit to Rs. 60 lacs / 15 lacs from current assessment year i.e. AY 2011-2012. The said limit is further proposed to be increased to Rs. 1 crore / 25 lacs once the Direct Tax Code gets implemented. I reckon the increase in the limits seems to be a positive step considering the original limits when the provisions of tax audit were first brought under the statute. Moreover the audit r.w.s. 44AD is sure to increase the opportunities for the CAs in practice.

Apart from above, now a chartered accountant, company secretary and cost accountant in whole time in practice will also have the opportunity to certify the financial statements prepared in XBRL mode. However the news report that the practicing professionals will not be required to certify that the filing of accounts match the original balance sheet has brought a sigh of relief for finance professionals from burdensome compliance in the first year of this reporting module. For the first year the practicing CA/CS/CWA will only be required to authenticate that the data is accounted for and not the validation of the converted XBRL document. As I recollect, the avenues that have increased for practicing professionals since last few years are unprecedented.

The reforms at the national level have taken a back foot as the government has got entangled in the issues like inflation, scams, protest from the civil society against corruption all across the state and also growing support for Team Anna Hazare for a strong Jan Lokpal Bill. The government is in such state of fix where the fate of Direct Tax Code, New Companies Bill and GST Act is difficult to guess. Looking at the lack of political will of the government it is understood that the status quo is being maintained on above referred important enactments. However one negative declaration has fetched a positive reaction. I refer negative declaration as the negative list of services which would be out of the service tax levy instead of present exhaustive list chargeable to tax, as suggested by the government. The trade and industry has welcomed the move. If implemented it would involve the redrafting of law, rules and regulations. If such proposal is brought in Budget 2012 there would be one year to work with negative list considering GST is proposed to be implemented from 2013.

At the Association, we are working on various programs to cover latest amendments in law and also the proposed Direct Tax Code. The Association has planned a program on Direct Tax Code and revised Schedule VI in the coming month. A brain trust meeting on topic of income tax – Judgments of tribunal and other courts and a study circle meeting on VAT is being worked out. Apart from the regular activities of the Association, Mega Diamond Jubilee program is being chalked out by the Diamond Jubilee Committee and details of the same will be informed to the members in due course.

Regards,

CA. C.H. Pamnani

President

ARTICLE...

PART - III

DIRECT TAXES CODE BILL - 2010 (Contd...)

CA. P. N. Shah

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CA. H. N. Shah

9.13 In the following businesses, as provided in section 32 (2) of the Code, the computation of profits will be as provided in various schedules stated as under :-

(a) Insurance Business (8th Schedule).

(b) Business of operating a qualifying ship (10th Schedule). (Tonnage Tax at the option of the assessee)

(c) Business of mineral oil or natural gas (11th Schedule).

(d) Business of developing of a Special Economic Zone, manufacture or production of article or things or providing of any service by a SEZ unit (12th Schedule).

(e) Business of generation, transmission or distribution of power (13th Schedule).

(f) Business of operating and maintaining a hospital in any area, other than the excluded area (13th Schedule).

(g) Business of developing, or operating and maintaining any infrastructure facility (13th Schedule).

(h) Business of processing, preserving and packaging of fruits and vegetables (13th Schedule).

(i) Business of laying and operating a cross country natural gas, crude or petroleum oil pipeline net work for distribution, including storage facilities being integrated part of net work (13th Schedule).

(j) Business of setting up and operating a cold chain facility or a warehousing facility for storage of agricultural produce (13th Schedule).

(k) Business of building and operating, anywhere in India, a new Two Star or above category Hotel or a new Hospital with atleast 100 Beds for patients which commences operation on or after 1.4.2010 (13th Schedule).

(l) Business of Developing and Building a housing project scheme for slum re-development or rehabilitation framed by Central / State Government and commences operation on or after 1.4.2010 (13th Schedule). This will be notified by CBDT in accordance with the prescribed guidelines.

The above Schedules contain detailed provisions for computation of income from above businesses.

In Schedules 11,12 and 13 profit from business is to be computed after deducting capital expenditure (other than land, good will and financial instruments) and revenue business expenditure. This provision is made to promote investment linked incentives as provided in section 35 AD of ITA.

9.14 Section 42 of the Code deals with computation of Profit on transfer of a business capital asset. Section 44 deals with the method of computation of Actual cost of Business Capital Asset. The method of computation of WDV of block of assets is provided in section 45. In the case of Amalgamation, Merger or Demerger of Business, Section 43 of the Code provides for computation of deduction in respect of capital allowance for business capital asset. All these provisions are more or less on the same lines as per the provisions of the ITA.

10. Capital Gains (Sections 46 to 55 and Schedule 17)

10.1 The existing concept of Capital Gains is significantly changed in the Code. The word "Asset" is defined in section 314 (24) to mean (a) a Business Asset or (b) an Investment Asset. "Business Asset" is defined in Section 314 (38) to mean "Business Trading Asset" or "Business Capital Asset". "Business Trading Asset" is defined in section 314 (42) to mean Stock-in-Trade, consumable stores or raw materials held for the purpose of the business. "Business Capital Asset" is defined in section 314 (39) to mean a tangible, intangible or any other capital asset, other than land, which is used for the purpose of business. "Investment Asset" is defined in section 314 (141) to mean any capital asset which is not a business capital asset, land, any security held by a FII or any undertaking or division of a business. Any surplus on transfer of a business capital asset is to be treated as business income. Hence the provisions for computation of Capital Gains apply in

respect of surplus (loss) on transfer of "Investment Asset" only.

10.2 Section 49 of the Code provides that the computation of capital gains on transfer of an investment asset, shall be made by deducting from the full value of the consideration on transfer of such asset, the cost of acquisition of such asset. The gains (losses) arising from the transfer of investment assets will be treated as capital gains (losses). The net gain will be included in the total income of the financial year in which the investment asset is transferred, irrespective of the year in which the consideration is actually received. However, in the case of compulsory acquisition of an asset, capital gains will be taxed in the year in which the compensation is actually received.

It may be noted that the word "Transfer" is defined in section 314 (267). This definition is very elaborate as compared to section 2 (47) of ITA. The above definition provides that "Transfer" in relation to a "Capital Asset" includes the following.

(i) Sale, exchange or extinguishment of any asset or any rights in it;

(ii) Compulsory acquisition under any law;

(iii) Conversion of capital asset into stock-in-trade; (iv) Buyback of shares u/s 77 A of Companies Act;

(v) Contribution of any asset towards capital in a company or unincorporated body;

(vi) Distribution of assets on liquidation of a company or dissolution of unincorporated body;

(vii) Any transaction allowing possession or enjoyment of an immovable property. This provision is more or less similar to section 2 (47) (v) and (vi) of ITA with the only difference that if enjoyment of any immovable property is given to participant of unincorporated body it will be considered as a transfer under DTC;

(viii) Amount received / receivable on maturity of Zero Coupon Bond,on slump sale or on damage/ destruction of any insured asset;

(ix) Transfer of securities by a person having beneficial interest in the securities held by a depository as registered owner;

(x) Distribution of money or asset to a participant in an unincorporated body on his retirement;

(xi) Any disposition, settlement, trust, covenant, agreement or arrangement.

10.3 The capital gains arising from the transfer of personal effects and agricultural land is exempt form income tax. The term "personal effects" is defined in section 314 (190) and the term "agricultural land" is defined in section 314 (12). This definition states that the land, wherever situated, if used for agricultural purposes will be treated as agricultural land.

10.4 In general, the capital gains will be equal to the full consideration from the transfer of the investment asset minus the cost of acquisition, cost of improvement thereof and transfer-related incidental expenses. However, in the case of an investment asset which is transferred anytime after one year from the end of the financial year in which it is acquired, the cost of acquisition and cost of improvement will be adjusted on the basis of cost inflation index to reduce the inflationary gains.

10.5 The capital gains from all investment assets will be aggregated to arrive at the total amount of current income from capital gains. This will, then, be aggregated with unabsorbed capital loss at the end of the preceding financial year to arrive at the total amount of income under the head 'Capital gains'. If the result of the aggregation is a loss, the total amount of capital gains will be treated as 'nil' and the loss will be treated as unabsorbed current capital loss at the end of the financial year. This unabsorbed loss will be carried forward for adjustment against capital gains in subsequent years. There is no time limit for such carry forward and set off of losses.

10.6 Section 47 of the Code provides that certain transfers of investment assets will not be considered as a transfer and no capital gains tax will be payable. This section is on the same lines as existing section 47 of ITA. However, it is significant to note that clause (xiii) of existing section 47 of ITA which provides for exemption from tax when a partnership firm is converted into a company, subject to certain conditions, is absent in section 47 of the Code. This will mean that, if the Code is enacted without this clause in section 47, a partnership firm which is converted into company after 1.4.2012 will not be entitled to claim this exemption. It may also be noted that while section 47 (1) (J) of the Code provides for exemption form tax when a non listed company converts itself into LLP, on the same lines as provided in section 47 (xiii b) of ITA. Again, 47 (1) (n) of the Code provides for exemption from tax when a sole proprietary concern is converted into a limited company. This provision is similar to section 47 (xiv) of ITA.

10.7 Section 46 of the Code provides that the exemption granted u/s 47 of the Code in respect of certain transfers of investment assets and u/s 55 of the Code in respect

of certain rollover of investment assets will become taxable in the F.Y. in which the conditions specified in section 47 or 55 are violated. This provision is on the same lines as in the existing sections 47 A, 54, 54 B, 54 F, 54 EC etc. of ITA.

10.8 Section 48 of the Code explains about the F.Y. in which the income arising on non-compliance with the conditions laid down in section 47 will become taxable. This section also explains about the F.Y. in which enhanced additional compensation received on compulsory acquisition of property will be taxable. Further, the section also explains as to when an immovable property will be considered to have been transferred. These provisions are similar to sections 45 (1), 45 (4), 45 (5) and 46 of ITA with some modifications.

10.9 It is significant to note that the existing section 45 (4) of ITA provides that if any capital asset is transferred by way of distribution of capital assets to any partner or partners on dissolution of a firm or AoP or otherwise, the difference between the market value of the asset and its cost will be taxable as capital gains in the hands of the Firm or AoP. This position will continue under the Code in view of item 6 (ii) of the Table below sec. 48 (1) read with section 50 (2) (d) of the Code. However, in the case of retirement of a partner, the Courts have held that the word "otherwise" in the existing section 45 (4) applies when a partner retires from Firm or AoP and takes away any asset of the Firm or AoP as part of the amount due on retirement. Now, section 48 (2) (b) of the Code, read with item 7 of the table below section 48 (1) and section 50 (2) (f), provides that "Any Money or Asset received by a participant (Partner / Member) on account of his retirement from an unincorporated body (Firm, LLP, AoP, BoI) shall be deemed to be the income of the recipient of the F.Y. in which the money or asset is received". This will mean that if the amount due to the retiring partner as per the books of the Firm, AoP or BoI is Rs.1.5 cr. but the amount received and market value of the asset received on his retirement is Rs.2.5 cr., the retiring partner will have to pay tax on capital gains under the Code.

10.10 The provisions relating to computation of capital gains on transfer of an investment asset and determination of the full value of the consideration are contained in sections 49 and 50 of the Code. These provisions are similar to the provisions of sections 45 (2), 45 (3), 45 (5), 48 and 50 C of ITA with certain modifications. In the case of sale of land or Building, section 50 (2) (h) of the Code provides that stamp duty value of the asset will be considered as full value of the consideration. The term "Stamp Duty Value" is defined in section 314 (246) on the same lines as in section 50 C of ITA with the exception that there is no provision for reference to valuation officer in the event such value is disputed by the assessee. Further, section 50 (2) read with sections 314 (267) and 314 (93) of the Code provides that in respect of conversion of investment asset into stock-in-trade, distribution of assets to participants on dissolution of the unincorporated body or retirement of a participant etc. the fair market value of the asset on the date of transfer will be determined according to the method prescribed by CBDT.

10.11 It may be noted that u/s 45 (3) of the ITA it is provided that when the partner / member of a firm, LLP, AoP or BoI in which he becomes a partner / member and contributes a capital asset as his capital contribution in the entity, the amount credited to this account in the entity will be considered as full value of the consideration and capital gain tax will be payable by him on this basis. This benefit is not available at present when a person becomes a shareholder in a company and he is allotted shares in the company against any transfer of any asset to the company. Now, section 50 (2) (c) of the Code provides that the amount recorded in the books of the company or an unincorporated body as value of the investment asset contributed by the shareholder or participant will be the full value of the consideration and the capital gain will be computed in the hands of the transferor on that basis.

10.12 As stated earlier, section 49 of the Code provides that capital gain on transfer of an investment asset is to be computed by deducting from the full value of the consideration, the cost of acquisition and the cost of improvement. The term "Cost of Acquisition" is defined in section 53 read with the 17th Schedule. The term "Cost of Improvement" is defined in section 54.

These provisions are more or less on the same limes as sections 48, 49 and 55 of ITA. It may, however, be noted that when the investment asset is received by way of gift, will, inheritance etc. it is provided that the cost will be the cost of acquisition in the hands of previous owner. However, the period during which the previous owner held the asset cannot be added in computing the total period for which the assessee has held the asset as there is no provision for this purpose corresponding to the provision in section 2 (42 A) of ITA. Existing section 55 (3) of ITA provides that if the cost of the asset in the hands of the previous owner cannot be ascertained, the market value on the date on which the previous owner acquired the asset will be considered as his cost. Now, section 53 (7) (c) of the Code provides that if the cost of investment asset in the hands of the previous owner cannot be determined or ascertained, the said cost will be taken as 'Nil'. Similarly, in the case of the assessee if a self-

generated asset or any other investment asset is acquired and the cost of such asset cannot be determined or ascertained for any reason, it shall be considered as "Nil".

10.13 Section 52 of the Code gives mode of computation of indexation of certain investment assets in specified cases. The method prescribed in this section is similar to the provision in the existing section 48 of ITA. However, some modification in the scheme under the Code is made as under.

(i) Under section 2 (29 A) read with section 2 (42 A) of ITA, a capital asset which is held for more than 3 years is considered as a 'long term asset'. U/s 51 (3) of the Code, it is provided that if the Investment Asset is held for more than one year from the end of the financial year in which the asset is acquired, the benefit of indexation of cost will be available. In the following discussions such investment asset is referred to as a "long term asset".

(ii) Under section 51 (2) of the Code, in the case of equity shares of a company and units of equity oriented fund of a M.F., held for more than one year, the capital gain will be exempt from tax if STT is paid. It may be noted that there is difference in the wording of section 51 (2) and 51 (3). U/s 51 (2) the requirement is holding of shares etc. for more than one year whereas u/s 51 (3) the period for holding other assets is at least one year after the F.Y. in which the asset is acquired.

(iii) In the above case if the STT is paid and the shares/units are held for less than one year, 50% of the capital gain will be exempt and tax at normal rate will be payable on the balance of 50%.

(iv) In the case of any other investment asset, if it is a long term asset as explained in (i) above, the assessee will be entitled to deduct Indexed Cost of the asset as provided in section 52 of the Code from the full value of the consideration for computation of capital gain. The method for working out Indexed cost is the same as in section 48 of ITA.

(v) At present, section 55 (2) (b) of ITA provides that if a capital asset is acquired before 1.4.1981, the assessee has an option to substitute the fair market value of the asset as on 1.4.1981 for its cost. Now, section 53 (1) (b) of the Code provides that, if the investment asset is acquired before 1.4.2000, the assessee will have option to substitute fair market value on 1.4.2000 for its cost.

10.14 Section 55 of the Code provides for relief for Rollover of long term Investment Asset in the case of an Individual or HUF. This provision is similar to the existing provisions for relief on reinvestment of capital gains in section 54, 54 B and 54 F of ITA with the following modifications.

(i) At present, the exemption is available if "capital gain" on sale of a capital asset is reinvested in the specified assets u/s 54, 54 B or 54 EC of ITA. In case of sec. 54 F of ITA, the "Net consideration" on sale is required to be reinvested. Now, u/s 55 of the Code, the benefit of exemption is available on reinvestment of "Net consideration" in all the cases.

(ii) The Rollover Relief is available for only two categories of long term assets viz. (a) Agricultural land and (b) Any other Investment Asset.

(iii) In the case of Agricultural Land there is no distinction between Rural and Urban Land. The only condition is that it is assessed to land revenue or local cess and used for agricultural purposes. Further, this land should be an agricultural land during two years prior to the F.Y. in which it is transferred and was acquired by the assessee atleast one year before the beginning of the F.Y. in which it is transferred. If these conditions are satisfied and the assessee invests the net consideration on sale of such agricultural land for the purchase of one or more pieces of agricultural land within a period of 3 years from the end of the F.Y. in which the original agricultural land was sold, he will get exemption in proportion to the amount so invested.

(iv) In the case of any other long term investment asset, the above Rollover benefit will be available, if the net consideration is invested in the purchase or construction of a Residential House within a period of 3 years form the end of the F.Y. in which the original asset was sold. For getting this benefit there are two conditions as under.

(a) The assessee should not be the owner of more than one residential house (other than the residential house in which such investment is made) on the date of sale of original asset.

(b) The residential house in which the above investment is made to get Rollover benefit should not be transferred within one year from the end of the F.Y. in which such investment is made.

(v) It is also provided in section 55 of the Code, that the above Rollover benefit will be available if the

investment in the new asset is made within a period of one year before the sale of the original asset.

(vi) It is also provided in the above section that the net consideration on sale of the original asset should be reinvested for acquiring the new asset, as stated above, before the end of the F.Y. in which the original asset is sold or within six months form the date of such sale whichever is later. If this is not done, the net consideration or balance thereof should be deposited with Capital Gains Deposit Scheme to be framed by the Government. The amount so deposited should be used within 3 years from the end of the F.Y. in which the original asset is sold. If it is not so used, the same will be taxable in F.Y. in which the period of 3 years expire.

(vii) From the above, it will be evident that the present concession of investing the capital gain on sale of Residential House for purchase of another Residential House even if the assessee is owner of more than one residential houses u/s 54 of the ITA will not be available. Further, the benefit of investment in approved bonds upto Rs.50 lacs u/s 54 EC of ITA will also not be available.

10.15 As stated earlier, definition of Investment Asset u/s 314 (141) of the Code includes any shares or securities held by a Foreign Institutional Investor (FII). In view of this, FII engaged in trading of shares or securities in India will not be entitled to claim exemption under the applicable DTAA on the ground that it is carrying on business in India and has no Permanent Establishment in India. Under the Code, the surplus from these transactions will be considered as income from capital gains.

10.16 The definition of Investment Asset also includes any undertaking or division of a business. Section 53 (5) provides that if there is any slump sale of any undertaking or division of a business, the cost of acquisition of such asset will be the "net worth" of such undertaking or division. If such undertaking or division is sold after the end of one year from the end of the financial year in which it was acquired or established, the benefit of indexation u/s 51 and 52 of the Code will be available. Net worth of such undertaking or division will be worked out as may be prescribed by CBDT u/s 314 (166). The term "Slump Sale" is defined in section 314 (234) on the same lines as section 2 (42 C) of ITA.

10.17 It may be noted that under item No.32 of Schedule 6 it is provided that the capital gain arising from transfer of following assets will not be liable to tax under DTC.

(i) Agricultural Land in a Rural Area as defined in section 314 (221) read with section 314 ((284). This definition is similar to the definition in section 2 (14) (iii) of ITA.

(ii) Personal Effects as defined in section 314 (190) which is similar to section 2(14) (ii) of ITA.

(iii) Gold Deposit Bonds.

11. Income from Residuary Sources (Sections 56 to 59)

11.1 At present, this income is chargeable under the head "Income from Other Sources". This nomenclature is now changed to 'Income from Residuary Sources" (IFRS). The income under this head is to be computed by making specified deductions from the gross residuary income. Section 56 provides that the gross residuary income shall comprise of any income which does not form part of any other head of income.

11.2 Section 58 (1) provides that gross residuary income shall include all accruals or receipts, in the nature of income, which is not an income from special sources or income from employment, house property, business or capital gains. Section 58 (2) gives an illustrative list of 25 items of income which are to be included as income under this source. Most of these items are the same as provided in sections. 40 A (3) (certain expenses in cash not deductible) 41 (Deemed income chargeable to tax) 56 (income from other sources) 68 (cash credits) 69 (unexplained investments) 69 A (unexplained money) 69 B (investments not fully disclosed in the books) and 69 C (unexplained expenditure) of ITA. It may be noted that some of the new items are as under.

(i) Interest, other than interest accruing to or received by financial institutions. The implication of this provision is explained in para 9.4 above. Section 59 provides for deduction of reasonable remuneration or commission for realization of interest. Interest paid on funds borrowed for earning this interest income is not specifically mentioned in the list of allowable deductions.

(ii) Amount received or retained on account of settlement or breach of any contract, if not included under the head "income from business".

(iii) Amount accrued or received in respect of the cessation, termination or forfeiture in respect of any agreement entered into by the assessee, if not included under the head "business income".

(iv) Any amount received by the assessee, as advance or security deposit or otherwise, from the long term leasing or transfer of the whole or part of, or any interest in, any investment asset.

The implication of this provision is explained in para 8.2 (v) and 9.3 (v) (f). Deduction for this amount will be allowed in the year in which the amount of advance or security deposit is refunded u/s 59.

(v) Income from the activity of owning and maintaining horses for the purpose of horse race. It appears that this will not now be considered as business income. A question will arise as to which of the expenses for this activity will be allowed for computing income under this head.

(vi) Income from machinery, plant or furniture belonging to the assessee and let on hire, if such income is not included under the head "business income". There is contradiction between this provision u/s 58 and the definition of house property u/s 314 (116) as explained in para 8.4 above. Under the definition of "house property" any building with machinery, plant or furniture whether in built or separate is to be treated as house property and, therefore, rent will be treated as income from house property. It may be noted that u/s 59 (2), deduction for current repairs and depreciation will be allowed for computing income under this item.

(vii) Any sum received as family pension. However, u/s 59 deduction for 33 1/3 % or Rs.15,000, whichever is less, can be claimed.

(viii) Amount, including bonus, if any, received or receivable under a life insurance policy from an insurer on maturity or otherwise. U/s 59, it is provided that this provision will not apply if the yearly premium payable on the policy does not exceed 5% of the capital value and the amount is received on completion of the original period of the policy and further that the Insurance company has paid the tax as provided in section 11 of DTC. (i.e. 5% of an approved equity oriented life insurance scheme)

(ix) Any amount of attributable income of Controlled Foreign Company to a resident assessee in accordance with the 20th Schedule.

(x) Any consideration received or receivable on transfer of self generated asset, if not included in business income.

11.3 It may be noted that section 58 (2) (h) and (i) provides that any gift from a non-relative (aggregate exceeding Rs.50,000) other than certain specified persons will be treated as income of the recipient individual or HUF. The word "Relative" is defined u/s 314 (214). This provision is on the same lines as existing section 56 (2) (vii) of the ITA. In this respect the following two points may be noted.

(i) The definition of the word "Relative" now includes in section 314 (214) (h) any lineal descendant of a brother or sister of the individual or his/her spouse (i.e. a nephew or niece). This relationship is not covered in existing definition of relative in section 56 (2) (vi) of ITA.

(ii) Section 58 (4) (a) strangely provides that for the purpose of claiming exemption for gifts from relatives, the word "Relative" shall not include spouse of (a) brother/sister of the individual or his/her spouse, (b) brother/sister of either parents and (c) lineal ascendant /descendant of the individual or his/her spouse. This will mean that any gift received by an individual (in excess of Rs.50,000 in the aggregate) from sister-in-law, brother-in-law, mother-in-law, wife of uncle, husband of sister of either parent, grand mother of the individual, grand mother of the spouse etc. will now be taxable as income of the recipient under section 58 of the DTC.

11.4 U/s 58 (2) (J) provides that any shares of a closely held company, received for inadequate consideration or without consideration (where the difference in valuation exceed Rs.50,000), by a firm, LLP or company (closely held or widely held) will be taxable as income of the recipient. This section is on the same lines as the existing section 56 (2) (vii a) of ITA. However, there is a significant difference between the existing provision and the new provision in respect of the following -

(i) Under the existing provision if the recipient company is a widely held company this provision is not applicable. Under DTC even if a widely held public receives such shares in a closely held company it will become taxable if the difference in valuation exceeds Rs.50,000.

(ii) At present, any transfer of investment in shares in a closely held amalgamating company to a closely held amalgamated company under a scheme of amalgamation is liable to tax u/s 56 (1) (vii a) of ITA. Under DTC, exemption is given to such a transfer u/s 58 (5).

(iii) At present, any transfer of shares by a shareholder in a closely held amalgamating company in exchange for shares of a closely held amalgamated company in a scheme of amalgamation is exempt u/s 56 (1) (vii a). Under the DTC this exemption is not given u/s 58 (5).

11.5 The deductions allowable for the purpose of computation of income from residuary sources have been listed in

section 59. These deductions are more or less the same as allowed u/s 57 of ITA. The basic principle for this allowance is that the capital expenditure and personal expenditure is not allowed as deduction. The revenue expenditure which is allowable should have been incurred wholly and exclusively for the purpose of making or earning the gross residuary income, subject to certain conditions stated in the section. Some of the conditions are as under.

(i) In respect of deemed dividend from Controlled Foreign Company considered as income under para 11.2 (ix) above, deduction shall be allowed to the extent of income included in the income of the assessee in the earlier years.

(ii) Other conditions are discussed with the relevant items of income in para 11.2 above.

(iii) U/s 59 (5), following deductions are not allowed from income from the residuary sources.

(a) Amount of any tax, interest, penalty or wealth tax payable under the Income tax Act, Wealth tax Act or the DTC.

(b) Any payment for revenue expenditure, which exceeds Rs.20,000/-, made otherwise than by an account payee cheque or bank draft.

12. Tax Incentives (Sections 68 to 86 and 318 and Schedule 16)

12.1 Dr. Kelkar Committee, in its Report submitted in July, 2004, had observed that, at present, the Income tax Act is riddled with tax concessions, which take the form of full or partial exemptions. These incentives are inefficient, inequitous, impose greater tax payer compliance burden and administrative burden. This results in revenue loss and complexity of the tax laws and encourage tax avoidance. In fact, most of the tax litigation in our country centres round the allowance of tax incentives. To simplify the tax law and make it more equitable, the committee suggested that all the tax incentives should be withdrawn and the rates of taxes should be reduced. The Government had accepted this suggestion and has now tried to implement this suggestion in the Code.

12.2 In his Budget Speech on 6th July, 2009, the Finance Minister has stated in para 93 that under the present scheme of the Income tax Act, tax exemptions are largely profit linked. Such incentives are inherently inefficient and liable to misuse. Therefore, it is proposed to incentivise businesses by providing investment-linked tax exemptions.

12.3 Accordingly, the Government has reviewed all exemptions and deductions provided in the present law and only some exemptions are provided in the Code. In the Direct Taxes Code Bill, 2009, as originally drafted, certain drastic cuts in Tax Incentives were suggested. In the revised DTC Code Bill, 2010, some improvements are made in these provisions in sections 68 to 86 read with the 16th Schedule. These are discussed below.

12.4 The deduction for the Tax Incentives provided in the above sections is to be allowed from the Gross Total Income from "Ordinary Sources" for the relevant F.Y. If such gross total income is less than the total incentives, the deduction shall be restricted to the amount of such gross total income.

12.5 Deduction for Savings - section 69 :

Aggregate amount of Rs.1 lac contributed to any approved fund. The term "Approved Fund" is defined in section 314 (18) to mean P.F., Super Annuation Fund or Gratuity Fund approved as per the provisions of 19th Schedule, Pension Fund or any other Fund approved by CBDT. This applies for contribution for self, spouse or child (minor or major) in the case of an individual.

12.6 Deduction for LIP etc.

(i) U/s 70 LIP paid by the Individual for self, spouse or child (major or minor) or by HUF for any of its members is allowable as deduction. The condition for this deduction is that the yearly premium should not exceed 5% of the capital sum assured.

(ii) U/s 71 any payment made for health insurance, to an insurer approved by IRDA, by an Individual for self, spouse, dependent child, or parents or by HUF for any of its members is allowable.

(iii) U/s 72 an Individual or HUF will also be allowed deduction for amount paid to a play school, pre-school, school, college, university or other educational institution in India. This is restricted to fees for two children of the Individual or any member of HUF for full time education.

(iv) It may be noted that the above deduction u/s 70, 71, and 72 will be restricted to Rs.50,000/- in the aggregate for each F.Y.

12.7 Interest on Loan taken for House Property - Section 74 :

As stated in para 8.3 (iii) to (v) above, an Individual or HUF can claim deduction for interest paid on loan taken for acquisition, repairs, or renovation of a house property which is not let out to the extent of overall limit of Rs.1.5 lacs.

12.8 Interest paid on Loan for Higher Education – Section 75 :

Deduction will be allowed to an Individual for interest paid on Loan taken from a financial institution for the purpose of higher education for self or any of his relatives. This deduction of interest is restricted to interest payment for the initial F.Y. and seven financial years when the interest is paid. It may be noted that this provision is similar to the existing section 80 E of ITA with the only difference that u/s 80 E deduction can be claimed for repayment of Loan Installment and Interest whereas section 75 of DTC provides for deduction of interest only.

12.9 Deduction for Medical Treatment, Disability etc. - Sections 76 - 78 :

Deduction for Medical Treatment to specified relatives of a resident individual or to members of HUF is to be allowed under section 76. This is similar to the existing section 80 DDB of ITA. Similarly, section 77 provides for deduction to a resident individual suffering fro certain disabilities.This section is similar to existing section 80 U of ITA. Further, section 78 provides for deduction for medical treatment and maintenance of dependent persons with certain disability. This section is similar to existing section 80 DD of ITA. Limits for deduction are the same as in ITA and the conditions are more or less the same as in existing sections of ITA.

12.10 Deduction for Donation - Section 79 :

Under this section deduction for contributions or donations to Non-profit Organisations (charitable trusts) is allowed. It may be noted that this section is more or less on the same lines as existing sections 80 G, 35 (1) (ii), 35 (1) (iii) and 35 (2AA). This section has to be read with the 16th Schedule which provides that the following deductions can be claimed.

(i) Donations to a research association, notional laboratory, university, college or other institution engaged in carrying on scientific research and development and approved by the prescribed authority entitled to 175% deduction (Similar to section 35 (2AA) and 35 (2) (ii) of ITA). It may be noted that the Finance Act, 2011, has increased this deduction to 200% w.e.f. 2012 – 13 u/s 35 (2 AA) of ITA. Therefore, it is possible that this provision in DTC may be amended.

(ii) Donations to any approved research association or college, university etc. engaged in statistical research or research in social since entitled to 125% deduction. (Similar to section 35 (2) (iii) of ITA)

(iii) Donations to National Defense Fund, Prime Minister's Funds and other notified funds (as listed in Part III of 16th Schedule) entitled to 100% deduction. (Similar to section 80 G)

(iv) Donations to other approved Charitable Trusts and Institutions listed in Part IV of 16th Schedule entitled to 50% deduction, subject to limit of 10% of the gross total income from ordinary sources. (Similar to section 80 G of ITA)

12.11 Deduction for Rent paid - Section 80 :

This section permits deduction of Rent paid by an individual who is not in receipt of House Rent Allowance. The deduction can be claimed if such individual his/her spouse or minor child does not own residential accommodation at the place of his work. Further, this deduction can be claimed in respect of the amount in excess of 10% of gross total income from ordinary sources, subject to limit of Rs.2,000/- P.M. This section is more or less similar to section 80 – GG of ITA.

12.12 Deduction for Political Contributions - Section 81 :

Under this section it is provided that deduction can be claimed by any assessee in respect of contribution to a recognised political party defined u/s 314 (194) or an electoral trust defined in section 314 (87) of an amount restricted to 5% of average net profit u/s 349 /350 of the Companies Act (in the case of a company) or 5% of the gross total income from ordinary sources (in cases of other assessees). This section is more or less similar to section 80 GGB / 80 GGC of ITA with a change that there is no limit for such contribution for assessees, other than companies, whereas under DTC there is a limit of 5% as stated above for all assessees.

12.13 Deduction of Income of Investor Protection Fund – Section 82 :

Under this section, contribution received from a recognised Stock Exchange or recognised Commodity Exchange or its members by a notified Investor Protection Fund will be exempt in the hands of such Fund. This section is similar to sections 10 (23 EA) and 10 (23 EC) of ITA.

12.14 Deduction of Royalty Income - Sections 83 and 84 :

(i) Section 83 provides that Royalty income of a resident individual who is author of any book which is a work of literacy, artistic or scientific nature, subject to the limit of Rs. 3 lacs, will be exempt. This section is similar to section 80 QQB of ITA.

(ii) Section 84 provides that Royalty Income of a resident individual in respect of a Patent registered on or after 1.4.2003, subject to the limit of Rs.3 lacs, will be exempt. The deduction is subject to certain conditions as stated in the

section. This section is similar to section 80 RRB of ITA.

12.15 Deduction of Income of a Co-operative Society - Sections 85 and 86 :

(i) Section 85 provides that income of a primary co-operative society from the business of providing banking or credit facility to its members will be exempt from tax. This section is more or less similar to section 80 P (2) (a) (i) of ITA.

(ii) Section 86 provides that income of a primary co-operative society from profits derived from agriculture or agriculture related activities will be exempt from tax. If income is derived by such society from other activities it is exempt, subject to the limit of Rs. 1 lac. This section is more or less similar to section 80 P (2) (iii) to (v) of ITA.

(iii) It may be noted that exemption, at present, allowed u/s 80 P of ITA to a co-operative society engaged in the activities such as cottage industry, collective Disposal of the Labour of its members, fishing, supply of milk, oil seeds, fruits, vegetables grown by its members, Letting of godowns, warehouses etc. as well as income of a housing co-operative society from interest or dividends earned by a co-operative society from another co-operative society has not been specifically provided in the above sections. However, item No.47 of Schedule 6 provides that income of a co-operative society from such activities and to such extent shall be granted exemption by the Rules to be prescribed by the CBDT.

12.16 EEE Method -

The Direct Taxes Code Bill, 2009, had proposed to discontinue the existing tax incentive method of Exempt, Exempt, Exempt (EEE) for certain tax free investments schemes where exemption is granted at the time of investment, when income is earned from such investments and also at the time of withdrawal from such investments. This was to be substituted by Exempt, Exempt, Tax (EET) method. However, in the revised discussion paper issued by the government on 15.6.2010 it was announced that EEE method will continue in respect of Government P.F., Public P.F., Recognised P.F. and certain approved Pension Funds, Insurance Products etc. In respect of other existing instruments for which EEE method is recognised at present will continue in respect of those instruments issued before the date of commencement of DTC, 2010. However, if any such instruments are issued after DTC, 2010, comes into force, EET method will apply. This is evident from the provisions of section 69 and 70 and Schedule 6.

12.17 Tax Holiday for Certain Businesses

As stated in para 12.2 above, the Government has realized that the existing tax incentives which are profit linked are inherently inefficient and liable to misuse. Therefore, since last year, investment-linked tax incentives are being introduced. This exercise is continued in DTC also. However, in respect of profit-linked incentives, which are presently provided in respect of certain businesses at present, it is provided that these will continue for the unexpired period subject to certain conditions. These provisions are made in section 318 which provides that the Income tax Act, 1961, and Wealth tax Act, 1957, is repealed by the DTC but the following provisions of the Income tax Act will continue to apply for the limited period as stated below.

(i) Section 318 (2) (O) -

It is provided that the deduction u/s 80 - IA, 80 – IB, 80-IC, 80 – ID, 80-IE, 80-JJA and 80 - JJAA of ITA shall continue to be allowed for the unexpired period for which it is otherwise allowable under the above sections. This is subject to the conditions stated in sections 318 (2) (o) and 318 (2) (s). The main condition is that income of these units shall be computed according to the provisions of DTC and that the unit continues to comply with conditions provided in the above sections of ITA.

(ii) Section 318 (2) (P) - It is provided that the deduction u/s 80 – IAB of ITA applicable to a developer engaged in the business of developing, operating and maintaining a SEZ notified on or before 31.3.2012 shall be allowed for the unexpired period as provided in that section, subject to the conditions stated in section 318 (2) (p). One of the conditions is that income will be computed under the provisions of DTC and the assessee should comply with the conditions under section 80 – IAB.

(iii) Section 318 (2) (Q) -

This section provides that deduction u/s 80 LA of ITA will be continue to be allowed if the assessee commences the business operations of an offshore Banking unit or an unit of an International Financial Services Centre in the SEZ on or before 31.3.2014. This deduction will be allowed for the unexpired period subject to the conditions that the income of the unit is calculated under the provisions of the DTC and it continues to complies with the conditions of section 80 LA.

(iv) Section 318 (2) (R) - This section provides that deduction u/s 10 AA of ITA shall continue to be allowed to a SEZ unit which commences manufacture or production of articles or things on or before 31.3.2014 for the unexpired period, subject to the condition that the income of the unit shall be computed under the provisions of the DTC and that the unit complies with the conditions of section 10 AA of ITA.

12.18 Infrastructure Debt Fund :

It may be noted that the Finance Act, 2011, has introduced a new provision, w.e.f. 1.6.2011, where by income of any Infrastructure Debt Fund set up in accordance with guidelines notified by the Central Government will be exempt. This Fund is to be started to enable Non-Residents to invest in such fund in foreign currency. Income of the Fund will be exempt from tax. The income by way of interest received by investors will be taxable at 5% and TDS rate for this income will also be 5%. It is possible that this provision will be included in DTC also.

13. Aggregation of Income (Sections 60 to 67)

13.1 Aggregation of Income under Different Heads - Section 60 provides that income from each source, as discussed above, shall be aggregated so that positive or negative income under each head as discussed in para 7 to 11 can first be ascertained. For this purpose, the following procedure is to be followed.

(i) Income from each business, other than speculative business, shall be aggregated. In this process, loss from any business should be set off against income from any other business.

(ii) Income from each speculative business shall be separately aggregated and the current or unabsorbed loss from any speculative business shall be set off against the current income. If there is a resultant loss, it shall be carried forward to next year. If there is a net positive income, it shall be aggregated with the other business income.

(iii) Income from capital gains (short term or long term) from various investment assets, whether positive or negative, shall be first aggregated and any carried forward loss under this head from earlier years shall be deducted therefrom. If the net result is loss, it shall be carried forward to next year. If the net result is positive, it shall be aggregated with income under other heads as discussed in para 7 to 11 above. It may be noted that there is a departure from the provisions of ITA where income from long term capital gains is taxed at a separate lower specified rate. Under DTC long term or short term capital gains is taxable at the normal rate applicable to other income.

(iv) Income from any activity of owning and maintaining horses for the purpose of horse races included in income from residuary sources shall be separately aggregated and carried forward losses from earlier years from this activity shall first be set off. If the net result is positive, it shall be added to other income from residuary sources. If the net result is a loss, if shall be carried forward to next year.

(v) After carrying out the above exercise, section 61 provides that the aggregate income under each head shall be considered as current income from ordinary sources. If there is any carried forward loss (including unabsorbed depreciation) from ordinary sources of earlier years, the same shall be deducted from this aggregate income from ordinary sources and the net income shall be "Gross Total from Ordinary Sources". If the net result is a negative figure, the same shall be carried forward to next year to be set off against the income from ordinary sources of the subsequent years. As stated earlier, such loss (including unabsorbed depreciation) can be carried forward for an indefinite period. There is no provision for carry forward and set off of losses under different heads and for unabsorbed depreciation upto F.Y. 2011–12 (i.e. A.Y. 2012 –13) against the income in F.Y. 2012-13 and subsequent years.

(vi) Section 62 provides for aggregation of income from any special sources. This provision is discussed in para 5.3 above.

(vii) Section 63 provides for determination of Total Income. This is discussed in para 5.4 above.

13.2 Treatment of Losses in Certain Specified Cases -

Sections 64 and 65 provides for treatment of losses in certain specified cases as under.

(i) On conversion of unlisted company into LLP -

It may be noted that as stated earlier, u/s 47 (1) (J) exemption from capital gain is given in the case of conversion of a unlisted company into a LLP. There are certain conditions for this purpose which are similar to section 47 (xiii b) of ITA. Section 64 (1) provides that unabsorbed current loss from ordinary sources in the case of an unlisted company shall be available for set off in the case of LLP against its current aggregate income from ordinary sources of subsequent years. Similarly, unabsorbed current loss of any special source of

the company shall be set off against current income from that special source in the case of LLP in the subsequent years. This section is similar to section 72 A (6A) of ITA. If the conditions laid down in section in section 47 (1) (J) of DTC are not complied with, the set of loss so allowed in any F.Y. can be withdrawn by rectification of the assessment order.

(ii) On Business Reorganisation -

It may be noted that, as stated earlier, u/s 47 (1) (n) exemption from capital gain is given in the case of conversion of sole proprietary concern into a limited company. There are certain conditions for this purpose which are similar to section 47 (xiv) of ITA. U/s 64 (2) it is provided that unabsorbed current loss from ordinary sources in the case of sole proprietor or unincorporated body shall be set off against current income from ordinary sources of the company. Similarly, unabsorbed current loss of any special source in the case of sole proprietor or unincorporated body will be set off against current income of that special source in the subsequent year in the case of the company. This is subject to the following conditions.

(a) The shareholding of the sole proprietor is not less than 50% of the total voting power of the company at any time during the five years after the financial year in which business reorganisation take place.

(b) The successor company satisfies the "test of continuity of business" as defined in section 314 (260) as under.

- It holds atleast 3/4th of the book value of fixed assets of the predecessor for 5 years.
- It continues the business of the predecessor for 5 years.
- It fulfils the conditions prescribed by CBDT to revive the business of the predecessor.

These conditions are similar to section 72 A of ITA.

(iii) The benefit of set off unabsorbed losses of the predecessor allowed to the successor shall be withdrawn by making rectification if any of the above conditions are violated.

13.3 Treatment of Unabsorbed Losses on change in Constitution

(i) Changes in constitution of un-incorporated Body -

Section 65 provides that in the case of change in the constitution of an unincorporated body (i.e. Firm, LLP, AoP or BoI) on account of death/ retirement of a participant, the unabsorbed loss of that entity shall be reduced in proportion of the loss attributable to the deceased /retiring participant and allowed to be carried forward and set off in the subsequent years as under.

(a) Proportionate unabsorbed loss from ordinary sources shall be carried forward and set off against current income from ordinary sources in the subsequent years.

(b) Proportionate unabsorbed loss from any special source shall be carried forward and set off against current income from that special source in the subsequent year.

This section is similar to section 78 of ITA with the difference that section 78 of ITA applies to a Firm or LLP whereas section 65 of DTC applies to AoP or BoI also.

(ii) Changes in Shareholding of closely held companies -

Section 66 of DTC is similar to section 79 of ITA. It provides that, in the case of a closely held company, if the persons holding not less than 51% of voting power on the last day of the F.Y. when the loss under the ordinary sources or special sources was incurred, are not holding this voting power on the last day of the F.Y. when the income from such sources is earned, such unabsorbed loss cannot be set off against the income from such sources in that F.Y. The only difference between section 79 of ITA and section 66 of DTC is that section 79 does not apply to set off of unabsorbed depreciation whereas u/s 66 of DTC loss includes depreciation.

13.4 Filing Return of Loss -

Section 67 provides that if the Return of Tax Bases showing loss is not filed before the due date for filing the Return, the loss under the head ordinary sources, special sources, capital gains, speculation, Horse Races activities etc. shall not be allowed to be carried forward or set off in the subsequent years. This section is similar to section 80 of ITA. Here also it may be noted that section 80 does not refer to unabsorbed depreciation but u/s 67 loss will include depreciation also.

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ARTICLE...

SECTION 271 (1) (C)

As per Section 271 (1)(c) if the Assessing Officer or the Commissioner (Appeals) or the Commissioner in the course of any proceedings under this Act, is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty, in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income

On the basis of above one can note down following:

1. Penalty can be imposed by Assessing Officer, Commissioner of Income Tax and Commissioner of Income Tax (Appeals)
2. This penalty can be imposed if above referred authority / authorities are satisfied that
3. any person has concealed the particulars of his income or furnished inaccurate particulars of such income
4. then the above referred authorities / authority may impose penalty which shall be 100 % to 300% the amount of tax sought to be evaded by reason referred in para 3.

Honourable Allahabad High Court in the case of **CIT vs Shadiram Balmukund (1972) 84 ITR 183 (All)** has held that ITO could not validly levy penalty in respect of undisclosed income as Increased by AAC as the jurisdiction of AAC is distinct and it is only the AAC who can impose penalty in respect of concealment detected in proceedings before him.

Based on the above referred case law it can be stated that for concealment of income or furnishing of accurate particulars of income penalty can be imposed by Assessing Officer, in respect of Additions made by him during the course of assessment or reassessment proceedings u/s 143 (3) or 147, Commissioner of Income Tax in respect of Additions made by him in an order passed us u/s 263 and Commissioner of Income tax Appeals in an order passed u/s 250.

Further as per Section 271(1)(c) penalty can be imposed only if the above referred authority is satisfied about concealment or furnishing inaccurate particulars of Income. In the past there was a controversy as regards sufficiency of a statement in the Assessment Order 'Penalty proceedings being initiated separately' Different courts took different views and the said controversy is ultimately settled by the legislature by inserting sub section (1B) in section 271 by Finance Act 2008 wef 1.4.89 which provides that a direction for initiation of penalty proceeding in the order of assessment shall be deemed to constitute such satisfaction.

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Now having discussed who can impose the penalty it is important to take a note that when the penalty can be imposed. Penalty under this section can be imposed either on furnishing inaccurate particulars of income or for concealment of income. In this regards, let us take note of views of Honourable Gujarat High Court

Sr No.	Case Law	View
1	CIT vs Lakhdhir Lalji 85 ITR 77(Guj))	Penalty Proceedings having initiated against the assessee on the basis of concealment, Imposition of penalty on the basis of furnishing of inaccurate particulars of income was invalid. This view was also followed by the Honourable Gujarat High Court in the case of CIT vs Manu Engineering Works (1980) 122 ITR 306 (Guj)
2	New Sorathia Engineering. Co vs CIT (2006) 282 ITR, 642(Guj),	In the absence of any specific finding in the penalty order or the order of CIT (A) as to whether there was concealment of income or furnishing of inaccurate particulars of income by the assessee the order of tribunal upholding the penalty is not sustainable.

The Supreme Court, in the case of ***Dilip N Shroff (2007) 291 ITR 519 (SC)***, held penalty proceedings to be quasi-criminal and that the tax officer had to discharge the onus of proving that the taxpayer had a culpable mental state. It held that 'concealment of income' and 'furnishing of inaccurate particulars' refer to deliberate act on the part of the assessee. A mere omission or negligence would not constitute a deliberate act warranting a penalty. However, the larger bench of the Apex Court in ***Dharmendra Textile Processors (2008) 174 Taxman 571 (SC)***, constituted to consider the imposition of penalty under the Central Excise Act, 1944 ("Excise Act") observed that penalty under section

271(1)(c) of the Act is a civil liability and that willful concealment is not an essential ingredient for attracting civil liability. It held that the case of *Dilip N Shroff* was wrongly decided. This decision led to a situation of the Revenue levying penalty in almost every case where the reported income of the taxpayer is adjusted upwards in the assessment.

In Union of India v. Dharamendra Textile Processors and others(2008) 306 ITR 277 the question before the Apex Court was whether section 11AC of the Central Excise Act, 1944 inserted by Finance Act, 1996, with the intention of imposing mandatory penalty on persons who evaded payment of tax should be read to contain *mensrea* as an essential ingredient and whether there is scope for levying penalty below the prescribed minimum. Before the Division Bench, the stand of the Revenue was that the said section should be read as penalty for a statutory offence and the authority imposing penalty has no discretion in the matter of imposition of penalty and the adjudicating authority in such cases was duty bound to impose penalty equal to the duties so determined. The assessee on the other hand made a blunder by referring to the provisions of section 271(1)(c) of the Income-tax Act, 1961 so as to take a stand that section 11AC of the Act is identically worded and in a given case it was open to the Assessing Officer not to impose any penalty. And the Apex Court signaled that both the two provisions indicate the element of strict liability.

This very remark was enough for the revenue to stretch it all over to levy penalty in every case possible. In fact there was no need for either the assessee or his counsel or for that matter for the Supreme Court to touch upon the provisions of section 271 (1) (c) in answering a matter under the Excise provisions.

In the midst of this position, the decision of the **Pune Tribunal in *Kanbay Software India Private Limited ITA No. 300/PN/07*** has come as a welcome relief to the taxpayer. In this case, the taxpayer's claim for deduction under section 10A of the Act was rejected by the Tax Officer and penalty was imposed. The Commissioner (Appeals) confirmed the levy and the issue reached the Tribunal, by when the Apex Court decision in the case of *Dharmendra Textile Processors* had been delivered. The Tribunal took note that section 271 of the Act deems certain situations as amounting to concealment of income and accordingly held that unless there is concealment or deemed concealment as provided in the section, penalty cannot be levied merely as a consequence of an addition to the reported income of the taxpayer. The Tribunal explained that there can be three distinct and mutually exclusive situations in case of an addition to income:

(a) Where the addition is on account of contumacious conduct of the taxpayer and his wrongful intention is established;

(b) Where it can neither be established that the addition is on account of contumacious conduct of the taxpayer nor is it established that the taxpayer's conduct and explanation is bona fide

(c) Where it is established that the taxpayer's conduct and explanation is bonafide.

The Tribunal held that in situation (a), penalty was always imposable and in situation (c), it is never leviable. In situation (b), the Tribunal held that penalty would not have been imposable if the decision in the case of *Dilip N Shroff* were the correct position as the onus of establishing mens rea could not have been discharged by the Tax Officer. However, pursuant to the *Dharmendra Textile Processors* decision, penalty in such a case will be imposable since it is not necessary for the Tax Officer to establish mens rea. Further, the Tribunal held that when the taxpayer offers an explanation in discharge of the onus cast upon him under the Act, the Tax Officer must consider the explanation objectively and unless he finds the same against the human probabilities or unless there are any real inconsistencies or factual errors in such an explanation, the Tax Officer ought to accept the same. It recognized that the taxpayer cannot be expected to prove the claim of bona fides to the hilt. In conclusion, the Tribunal held that the *Dharmendra Textile Processors* case cannot be interpreted to mean imposition of penalty in all adjustments to the reported income of the taxpayer

The **Supreme Court, in the case of *Rajasthan Spinning & Weaving Mills*,** dealing with the imposition of penalty under the Excise Act, examined its own decision in *Dharmendra Textile Processors* and held that imposition of penalty would be automatic under the excise law without leaving any discretion to the authority, only if the conditions stated in section 11AC of the Excise Act are existent so as to attract the penal provisions. It also held that the decision of *Dharmendra Textile Processors* cannot be interpreted to mean that penalty would be imposable in every case, irrespective of the preconditions being satisfied Thus, the decision of the Pune bench of the Tribunal seems to have gained greater strength in view of the decision in *Rajasthan Spinning & Weaving Mills*, though the Supreme Court has explicitly stated that its view on *Dharmendra Textile Processors* decision is with reference to the Excise law only and it is not expressing any comment on other legislations referred to in *Dharmendra Textile Processors* case

The Punjab and Haryana High Court has not only distinguished the Dharamendra Textiles and Processors in a case of **Haryana Warehousing Corporation** but also repelled the contentions of the revenue as absurd and held The essential pre-requisites section 271 (1) (c) of the Act before a penalty can be imposed are; the assessee should have either " concealed the particulars of his income ", or alternatively the assessee should have " furnished inaccurate particulars" of his income. Therefore, before determining the

liability of the respondent assessee in the present case, it would first have to be ascertained, whether or not, the respondent-assessee had "concealed the particulars of his income" or had furnished "inaccurate particulars of his income". In yet another decision the **P & H High Court in CIT v. Sidhrath Enterprises in ITA NO. 908 of 2008 dated 14.7.2009** held that concept of penalty have not undergone change by virtue of the judgment of Supreme Court in Dharmendra Textile's case. As per the Court penalty is imposed only when there is some element of deliberate default.

In the case of **Reliance Petroproducts** 322 ITR 158 SC., the claim of Assessee u/s 36(1)(iii) was rejected by the A.O. and the order of A.O. was upheld by the CIT(A). As a result thereof, the penalty u/s 271(1)(c) was imposed on account of furnishing of inaccurate particulars of income. The penalty was held to be illegally imposed by the tribunal since factual details of income furnished by the Assessee were found to be correct. The matter ultimately reached the SC and the honourable court upheld the view of the tribunal by holding that "mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate claim of furnishing inaccurate particulars regarding the income of the assessee."

Having Discussed who can, when and How much penalty can be imposed,, it is time to discuss each of the explanations of Section 271 (1)(c) of The Income tax Act which are deeming in Nature.

Explanation 1

Under Explanation 1 to this section penalty can be levied on the assessee if either one or more of the following conditions are satisfied.

1. Assessee fails to offer an explanation or
2. Assessee offers an explanation which is found false by the above referred authority or
3. Assessee fails to substantiate his explanation or
4. Assessee fails to prove that explanation offered by him as *bona fide*
5. Assessee fails to prove that all the facts relating to the same and material to the computation of his total income have been disclosed by him,

Penalty under this explanation can be imposed only when there are inaccurate particulars of Income. No penalty can be imposed under this explanation when there is concealment of income.

Explanation 2 r/w section 271(1A)

When the Asssesse claims the source of any receipt, deposit, outgoing or investment in any year as the amount added to the total income of any preceding year but no penalty was imposed then to the extent of such adjustment, the Assessee shall be deemed to have concealed or furnished inaccurate particulars of income of that year in which so called addition was made and the AO would be entitled to initiate penalty proceedings notwithstanding that assessment of that year has been completed.

Explanation 3

Before discussing Explanation 3, it is important to identify the point at which the act of concealment or furnishing of inaccurate particulars of income takes place

Honourable Supreme Court in the case of **Brij Mohan vs CIT 120 ITR 1(SC)** has held that Concealment takes place on the date when return is filed without disclosing the particulars of income of that year. Law which prevails on date of filing such return would be applicable for levy of such penalty. This leads to conclusion that offence of concealment can not be said to have committed before filing of the return. On the basis of this legal position once can argue that penalty for concealment can not be levied where any income arising outside the books of account is disclosed voluntarily in the original return.

Explanation 3 has been inserted to nullify the above effect. It provides that when a person fails to furnish the return of Income which he is required to furnish in the time allowed u/s 139 (4) and the authority is satisfied that in respect of such assessment year such person has taxable income, in that case the assessee shall deemed to have concealed particulars of Income in respect of that assessment year irrespective of fact that he has furnished a return of income in pursuance of Notice u/s 148

Explanation 4

Explanation 4 defines the expression "the amount of tax sought to be evaded".

A When Returned Figure is a Loss

In such cases, it would be the amount of tax that would have been chargeable on the amount in respect of which particulars have been concealed or inaccurate particulars have been furnished had such income been the total income.

B Covers a Situation Dealt with by Explanation 3

In such cases, it would mean tax on total income less advance tax paid and tax deducted / collected at source.

C Residuary clause

In such cases, it would mean the difference between the tax on total income assessed and the tax on total income reduced by the amount in respect of which penalty is sought to be levied.

Explanation 5

It applies where search is initiated before 1.6.2007. It provides that assessee shall be deemed to have concealed the particulars/ furnished inaccurate particulars of income in respect of any unaccounted money, bullion or jewellery or

other valuable article or thing (Now onwards referred as Assets) found in the course of search which are claimed to have been acquired out of the income of any previous year ending prior to date of search which has not been disclosed so far or out of the income of the year ending on or after the date of search notwithstanding that such income has been declared in the return furnished on or after the date of search.

However there is an exception to this rule. No penalty shall be imposed under this explanation if assessee makes a statement u/s 132(4) in the course of search that such assets have been acquired out of his undisclosed income and also specifies the manner in which such income has been derived and pays the tax along with interest in respect of such income.

Lacuna:

This Explanation is applicable only with reference to assets found in the course of search and therefore can not be invoked with reference to any other income based on any entry in any books of account or other document or transaction not yet disclosed if such income is unconnected with any asset found in search. There may be some situations where penalty may not be leviable. For example, no asset is found in the course of search but material seized may indicate unaccounted income of the previous year in respect of which no return is filed and the provisions of Explanation 3 are not applicable then such case may be out of the mischief of the provisions of this Explanation.

However, it is clarified that quantum of penalty in respect of A.Y. 2007-08 and onwards would be in accordance with the provisions of section 271AAA

.. this provision would not apply where Assessee can claim that asset was acquired out of the income of year in respect of which due date for filing of the return is not yet expired and the return is yet to be filed .. There is another lacuna. It may be that unaccounted assets are found acquisition of which can not be related to any year ending before the date of search. In such case, the 'A' can be assessed only u/s 69A in the year ending on or after the date of search and the provisions of Explanation 5A would not apply. Consequently, penalty may not be leviable if the same is declared in the original return

Explanation 5A

It applies to cases where search is initiated on or after1.6.2007. If any asset is found in the course of such search and it is claimed that such asset has been acquired by utilizing the income of any previous year or if any income based on any entry in any books of account , document or transactions is found in such search and it is claimed that such entry represents his income for any previous year. which has ended before the date of search and the due date for filing of return has expired and the Assessee has not filed the return then notwithstanding that such income is declared in the return filed on or after the date of search, the assessee shall be deemed to have concealed the particulars / furnished inaccurate particulars of such income.. The immunity available earlier is no more applicable as per this Explanation

Remarks: This Explanation does not refer to all the previous years ending before the date of search since it restricts to that year in respect of which due date for filing of return has expired and the return has not been filed. Thus, if source of unaccounted asset relates to the previous year in respect of which the return has already been filed, the provisions of Explanation would not apply. In such case, the issue will have to be decided as per the main provisions of section 271(1)(c).

This section also does not refer to the current year in which search is made. Therefore, if the Asssessee declares that an asset, found in the course of search, has been acquired out of the income of the current year then this section would become inapplicable and consequently, penalty would not be leviable if disclosed in the return for the current year. However care should be taken to ensure that such asset was capable of being acquired in the current year. If there is evidence to the effect that asset was acquired in earlier year(s) then either this deeming provision or the main provisions would apply and penalty may be leviable.

Further, this provision would not apply where 'A' can claim that asset was acquired out of the income of year in respect of which due date for filing of the return is not yet expired and the return is yet to be filed. In such cases, unaccounted income can be declared in the original return which may be filed after the search. The precaution to be taken is that there is sufficient nexus between the asset found and income of such year.

However, it may be noted that quantum of penalty would be in accordance of the provisions of section 271AAA.

Explanation 7

Where in the case of an assessee who has entered into an international transaction defined in section 92B, any amount is added or disallowed in computing the total income under sub-section (4) of section 92C, then, the amount so added or disallowed shall, for the purposes of clause (*c*) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed or inaccurate particulars have been furnished, unless the assessee proves to the satisfaction of the Assessing Officer or the Commissioner (Appeals) or the Commissioner] that the price charged or paid in such transaction was computed in accordance with the provisions contained in section 92C and in the manner prescribed under that section, in good faith and with due diligence.

Source of Information.

Various Study Materials, Articles Available on Internet and Judgments Available on Internet.

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GLIMPSES OF SUPREME COURT RULINGS

10 SCOPE OF POWER OF SUPREME COURT

The Supreme Court while entertaining an appeal by grant of special leave has the power to mould relief in favour of the respondents notwithstanding the fact that no appeal is filed by any of the respondents challenging that part of the order which is against them. To notice an obvious error of law committed by the High Court and thereafter not to do anything in the matter would be travesty of justice.

The Supreme Court while disposing of an appeal arising out of grant of special leave can make any order which justice demands and someone who has obtained an illegal order would not be justified in contending before the Supreme Court that in the absence of any appeal against an illegal order passed by the High Court the relief should not be appropriately molded by the Court or that the finding recorded should not be upset by the Supreme Court. When an apparent irregularity is found by the Supreme Court in the order passed by the High Court, the Supreme Court cannot ignore substantive rights of the litigant while dealing with the cause before it. There is no reason why the relief cannot be and should not be appropriately moulded while disposing of an appeal arising by grant of special leave under Article 136 of the Constitution. Where there is manifest injustice, a duty is enjoined upon the Supreme Court to exercise it suo motu power by setting right the illegality in the judgement of High Court as it is well settled that illegality should not be allowed to be perpetuated and failure by the Supreme Court to interfere with the same would amount to allow illegality to be perpetuated.

Powers of the Supreme Court in appeals filed under Article 136 of the Constitution are not restricted by the appellate provisions enumerated under Cr.PC or any other statute. When exercising appellate jurisdiction the Supreme Court has the power to pass any order. The power under Article 136 is meant to supplement the existing legal framework. It is conceived to meet situations which cannot be effectively and appropriately tackled by the existing provisions of law.

[A. SUBASH BABU V. STATE OF A.P. (2011) 7 SCC].

2. "As far as possible"

The aforesaid phrase provides for flexibility, clothing the authority ……..

3. Appeal- Reasons for Rejection:

It is trite law that a finding of fact may give rise to a substantial question of law, inter alia in the event the findings are based on no evidence and or while arriving at the said finding, the relevant admissible evidence has not been taken into consideration or inadmissible evidence has been taken into consideration or legal principals have not been applied in appreciating the evidence, or when the evidence has been misread.

(Chandna Impex (P) Ltd. Vs. CCE (2011) (7 SCC 289)

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11 PLACE OF SUING – CLAUSE IN AGREEMENT

Any clause which ousts the jurisdiction of all courts having jurisdiction and confers jurisdiction on a court not otherwise having jurisdiction, would be invalid. It is now well settled that the parties cannot by agreement confer jurisdiction on a court which does not have jurisdiction; and it is only where two or more courts have the jurisdiction to try a suit or proceeding, an agreement that the disputes shall be tried in one kof such courts is not contrary to public policy. The ouster of jurisdiction of some courts is permissible so long as the court on which exclusive jurisdiction is conferred, had jurisdiction. If the clause had been made to apply only where a part of cause of action accrued in Delhi, it would have been valid. But as the clause provides that irrespective of the place of cause of action, only courts at Delhi would have jurisdiction, the said clause is invalid in law. The fact that in this case, the place of embarkation happened to be Delhi, would not validate a clause, which is invalid.

There is another reason for holding the said clause to be invalid. A clause ousting jurisdiction of a court, which otherwise would have jurisdiction will have to be construed strictly. In this case, the respondent did not approach a "court" . The claim was filed by the respondent before a Permanent Lok Adalat constituted under Chapter –VI –A of the Legal Services Authorities Act, 1987.

The permanent Lok Adalat not being a "court", the provision in the contract relating to exclusivity of jurisdiction of courts at Delhi, will not apply.

Interglobe Aviation Limited Vs. N. Satchidanand (2011) 7 SCC 463

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FROM THE COURTS

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50 NON RESIDENT : T.D. INCOME CHARGEABLE TO TAX GE INDIA TECHNOLOGY CENTRE P. LTD. V/S. CIT (2010) 327 ITR 456 (SC)

(2010) 193 TAXMAN 234 (SC)

(2010) 234 CTR 153(SC)

Issue :

Is it necessary for application of Sec. 195, there should be income chargeable to tax?

Held :

The most important expression in Sec. 195(1) of the I.T. Act 1961, dealing with deduction of tax at source consists of the words "Chargeable under the provision of the Act". A person paying interest or any other sum to a non resident is not liable to deduct tax if such sum is not chargeable to tax under the Act. Sec. 195 contemplates not merely amounts the whole of which are pure income payments, it also covers composite payments which have an element of income imbedded or incorporated in them. The obligation to deduct tax at source is limited to appropriate proportion of income chargeable under the Act forming part of gross sum of money payable to the non resident.

The expression "Chargeable under the provisions of the Act" in section 195(1) shows that the remittance has got to be of a trading receipt, the whole or part of which is liable to tax in India. If tax is not so assessable, there is no provision of tax at source being deducted.

51 CLOSING STOCK AND EXCISE DUTY :

ASSTT. CIT V/S. NARMADA CHEMATUR PETRO CHEMICALS (2010) 327 ITR 369 (GUJ)

Issue:

Excise Duty is liability only when goods are removed. In these circumstances, whether excise duty is to be added while valuing closing stock ?

Held:

The Tribunal was justified in excluding the excise duty at the time of valuation of the closing stock of finished goods at the end of the accounting period because:-

(a) No deduction for the liability had been claimed by the assessee. The excise duty payable on the finished goods lying in the closing stock at the end of the relevant accounting period had been paid in the subsequent year before the due date of filing of the return of income and that was how the amount was available considering the fact that the assessment had been framed and the show cause notice was issued much after the close of the accounting year;

(b) The Assessing Officer had recourse to sub-section (3) of Sec. 145 of the Act. The assessee was following the mercantile system of accounting but it was not the case of the A.O. that the AO was not in a position to deduce true profits of the year under consideration. Such duty of Central Excise if added to enhance the value of closing stock would result in enhanced closing stock on the first day of the next accounting period. So the next year's profits would get depressed accordingly. Over a period of time the whole exercise would even out, in other words, the revenue neutral. At the same time while disturbing the value of closing stock the AO could not change the method of accounting regularly employed.

52 PRINCIPLE OF MUTUALITY : THREE CONDITIONS PRABHASHANKAR PLAZA V/S. ITO (2010) 327 ITR 582 (KARN)

Issue:

What are the three conditions to consider the principle of mutuality?

Held:

Under the doctrine of mutuality, the following three conditions should exist before an activity could be brought under the concept of mutuality:

(i) that no person can earn from himself;

(ii) that there is no profit motivation, and

(iii) that there is no sharing of profits.

With regard to the first condition, i.e. no person can earn from himself means that there should be complete identity between the contributors and participants. The crucial test of mutuality is that all the contributors to the common fund must be entitled to participate in the surplus and that all the participants in the surplus must be contributors to the common fund. In other words there must be complete identity between the contributors and the participants. If this requirement is satisfied the particular form which the association takes is immaterial. Conversely when there is no such identity between the class of contributors to the common fund and the class of participants in the surplus, the profits of the association should be assessable to tax.

53 ASSESSMENT U/S 115JB AND PENALTY

CIT V/S. MALWA SONS INVESTMENTS LTD.(2010) 327 ITR 543 (DEL)

Issue:

When tax is levied under the provisions of Sec. 115JB, whether penalty can be levied for concealment of income?

Held:

In the instant case conclusion was arrived at that there was concealment of income for which penalty can be levied u/s 271(1)(c).

Court has made a reference to SC decision in the case viz. CIT v/s. Gold Coin (2008) 304 ITR 308, in which Supreme Court has opined that "the tax sought to be evaded" shall mean the tax chargeable on the concealed income, as if it were the total income.

High Court observed that once, we apply above rationale of Supreme Court to Explanation 4, in the present case, it will be difficult to sustain the penalty proceedings. Normal procedure was, however, not acted upon. On the contrary, it is deemed income assessed u/s 115JB of the Act which has become the basis of assessment as it was higher of the two. Tax is thus paid on the income assessed u/s 115JB of the Act. Hence, where the computation was made u/s 115JB of the Act, the concealment had no role to play and was totally irrelevant. Therefore, the concealment did not lead to tax evasion at all.

We are of the opinion that penalty could not have been imposed in respect of claim of expenses not allowable, made by the assessee.

Note: Readers are advised to apply ratio of above decision, if at all applicable, in the cases of assessment made on deemed income, e.g. 44 AD and other sections.

54 TAX PLANNING AND STRUCTURING BUSINESS:

VODAFONE INTERNATIONAL HOLDINGS B.V. V/ S. UNION OF INDIA (2010) 193 TAXMAN 100 (BOM)

Issue:

On genuine restructuring of business, if an assessee is able to reduce incidence of tax, whether department can inquire of the assessee and investigate underlying economic interest?

Held:

Indian law recognizes that an assessee, who engages in legitimate business activity and organizes business around accepted legal structures, is entitled to plan his transactions in a manner that would reduce the incidence of tax. An assessee, who does so, does not tread upon a moral dilemma or risk a legal invalidation. There is recognition in our law of the principle that lawful forms of an activity can legitimately be arranged by those who transact business to plan for tax implications. So long as the legal structures that are put into place and the instruments of law that are utilized have been utilized bonafide for a business purpose, fiscal law (in absence of statutory provisions to the contrary) does not permit any inquiry into the motives of the assessee or an investigation into the underlying economic interest, but a transaction, which is sham or, what the law describes as a colorable device, stand on an entirely different foundation. A transaction which is sham is one in which, though parties employ a legal form, yet it, in reality, is a different transaction; one in reality does

not give rise to the legal rights and obligations which arise from its ostensible nature. A sham is ostensible but not real and borders on a fraudulent employment of legal form or structure in aid of collateral ends. In the absence of a transaction which is sham, fraudulent viz colorable, the law respects instruments and structures adopted by business entities within the frame work of law in the pursuit of legitimate forms of business activity. The legal character of the transaction will not be disregarded in pursuit of substance so long as parties have not chosen to conceal the nature of their legal relationship by a device which suggest to the contrary or something at divergence with the legal character assumed by them, the law respects their autonomy.

55 DEPRECIATION AND BLOCK OF ASSETS :

CIT V/S. SONAL GUM INDUSTRIES (2010) 233 CTR 516 (GUJ)

Issue:

For granting deprecation, whether user of all the assets in the block is a pre requisite?

Held:

The assessment order itself reveals that it is not the case of the AO that the assets were not put to use at all. Once the factory building is put to use it is not possible to restrict the depreciation on the said building by stating that only a portion thereof has been put to use. Similarly in relation to the block of assets, it is not possible to segregate items falling within the block for the purposes of granting depreciation or restricting the claim thereof. Once it is found that the assets are used for business it is not necessary that all the items falling within plant and machinery have to be simultaneously used for being entitled to depreciation.

56 BUSINESSMAN'S DECISION AND ITO'S LIMITATION

CIT V/S SALITHO ORES LTD.(2010) 194 TAXMAN 410 (BOM)

Issue:

Whether ITO can decide on prudency of businessman's decision for incurring expenditure for the purpose of business.

Held:

Assessee company had taken on lease four dozers for the business of extraction and sale of iron ore. During the year only one dozer was used. ITO disallowed lease rent for three dozers. On these facts High Court has observed as under:-

A businessman sees an opportunity and smells some money which often is light years away. He sees an opportunity which is not visualized by others. He incurs an expenditure in pursuit of a business opportunity. Sometimes the judgment as to the existence of a business opportunity turns sour. But the expenditure incurred for pursuit of business and/or exploitation of a business opportunity cannot be denied by the tax authorities on the ground that business decision was imprudent. As long as the expenditure is incurred bonafidely in pursuit of a business and not by way of diversion of funds, the expenditure has to be allowed as a deduction.

In the instant case it was not disputed that the dozers were required for the business of extraction and sale of iron ore, which was the business of the assessee. How many dozers had to be engaged was question which could be best considered by the assessee. It was not the case of the revenue that the expenditure was not bonafide and/or it was incurred by way of diversion of profits to a related person or a sister concern of the assessee. As such the revenue could not have gone into the question of expediency of the expenditure incurred and/or expediency of hiring of the four dozers. That was a matter of commercial expediency and the assessee was the best judge for that purpose.

The decision of the ITO was totally erroneous. Test of reasonableness of an expenditure is to be understood in the light of perception of the businessman and the benefit of the expenditure for the business as perused by the assessee and not as perused by the ITO.

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And whether you're an honest man, or whether you're a thief, depends on whose solicitor has given me my brief.

Benjamin Franklin

TRIBUNAL NEWS

33 ITO VS. PHOENIX SHARES & STOCK BROKERS (P.) LTD. 131 ITD 359 (MUM.)- ASSESSMENT YEAR 2005-06, ORDER DATED: 29 DECEMBER 2009.

BASIC FACTS

The assessee was a stock broking company. Being a member of NSE and BSE, assessee paid certain amount as lease line charges, VSAT charges and data processing charges/transaction charges to stock exchange. Assessing officer disallowed the said expenses on the ground that tax was deductible on said payments under section 194J of the Act and the same was not deducted by the assessee. On appeal to CIT(A), disallowance in respect of VSAT charges was deleted on the ground that these expenses were not in the nature of fee for technical services but for using infrastructure facilities and hence nothing can be disallowed u/s 40(a)(ia) but confirmed the rest of the payment in respect of transaction charges. Aggrieved of the same, revenue went into appeal before ITAT.

ISSUE

Whether payment made towards VSAT charges, lease line charges, transaction charges paid by a stock broker to stock exchange is in nature of fee for technical service and hence whether tax is to be deducted on the same u/s 194J?

HELD

After considering the facts, ITAT observed that stock exchanges install lease line facilities and VSAT facilities to its members. The same is just for providing infrastructure so that the members may be able to carry out their work from any place in the country. Fee charged for providing this facility is just recovery of cost and not any fee received for providing any technical service. Merely because the transactions are completed at a faster rate and the screen based trading is a sophisticated method of trading, it cannot be held that any technical service has been rendered. Also it was held that the said facility is not available to everyone but only for members of the stock exchanges. Relying on all these findings, ITAT held that the CIT(A) was right in upholding that VSAT charges paid are not covered within section 194J. In relation to disallowance of transaction charges, it was held that the same was covered by decision in case of Kotak Securities Ltd. Vs. Addl. CIT wherein it was held that the said payments are not covered by the provisions of section 194J.

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34 ITO Vs. OMNI GLOBE INFORMATION TECHNOLOGIES INDIA (P) LTD. 131 ITD 280 (Del.) - Assessment Year 2005-06, Order Dated: 29 April 2010

BASIC FACTS

Assessee-company was incorporated on 19/03/2004 for carrying out the business of BPO. It incurred expenses on training of people in April and May 2004 and claimed it as business deduction. It also claimed depreciation on computer peripherals UPS. Assessing officer disallowed the training expenses on the ground that the same were incurred before commencement of business which actually commenced in June 2004. Also he allowed depreciation on computer peripheralsUPS at 25% instead of 60%. CIT(A) allowed the appeal of the assessee. Aggrieved of the same, revenue went into appeal before ITAT.

ISSUE

Whether business is to be considered to be set up on the date when it is in a position to procure business or not? Whether expense incurred before commencement of business is to be disallowed? Whether depreciation on computer UPS peripherals is to be allowed at 60% or not?

HELD

ITAT held that when an organization is in a position of rendering service, then it is to be held that business had been set up. In the instant case, company appointed regional managers and branch managers and installed computers in the month of June 2004 after training the manpower earlier recruited. Hence it is to be held that business commenced in June 2004. Therefore expenditure incurred before commencement of business cannot be allowed as deduction in view of the above findings. Also it was held that peripherals such as printers, scanners and servers etc. form part of computers and hence are eligible for depreciation at the rate of 60%. Hence appeal was partly allowed.

35 KRISHI UTPADAN MANDI SAMITI Vs. DCIT 131 ITD 335 (LUCK) - Assessment Year 2006-07, Order Dated: 7 June 2010

BASIC FACTS

Assessee showed total receipts of Rs. 1.32 Crores as per income and expenditure account. Assessing officer allowed exemption at the rate of 15% u/s11(1)(a) with reference of Rs. 68.32 lakhs. On appeal, CIT(A) after allowing deduction for administrative expenses from the receipt of Rs. 1.32 Crores worked out income of assessee at Rs. 96.58 lakhs and granted benefit of accumulation up to 15% of Rs. 96.58. Aggrieved of the same, assessee went into appeal before ITAT.

ISSUE

Whether benefit of accumulation up to 15% of income should be calculated with reference to total receipts of charitable institution or net income worked out for assessment being balance amount worked out after allowing deduction for administrative and other expenses?

HELD

It was held by the ITAT that the same issue had arisen in case of Community Organization before the apex court wherein it was held that charitable trust is entitled to accumulate 25% of its income derived from property held under trust without applying any portion for charitable purpose. Hence applying the same ratio in the instant case, it was held that assessee is entitled to accumulate 15% of Rs. 1.32 Crores i.e. total receipts and not the amount net of administrative expenditure and the appeal of the assessee was allowed.

36 STERLING ABRASIVE LTD. VS. ACIT140 TTJ 68(AHD) ASSESSMENT YEAR 2004-05, ORDER DATED: 2 JULY 2010

BASIC FACTS

Assessee-company made payment to Mr. James Whiteland of UK for services rendered by him under a contractual agreement which were in nature of advice on increasing sales, production and advice on marketing strategies. After discussing the exact nature of services with the assessee, assessing officer held that the same are covered by article 13 of the DTAA and assessee was required to deduct tax on the same. As assessee failed to do so, assessing officer disallowed the said payment u/s 40(a)(ia). CIT(A) confirmed the addition after analyzing the nature of services. Aggrieved of the same, assessee went into appeal before ITAT.

ISSUE

Whether assessee was liable to deduct tax on the payments made to a non resident during the financial year 2003-04 where the obligation on the assessee was itself absent as the amendment to section 9(2) was inserted vide Finance Act 2007 with retrospective effect from 1st June 1976 and in view of that whether AO was justified in disallowing the said payment by invoking provisions of section 40(a)(ia)?

HELD

It was held that the amendment was made by Finance Act 2007 with retrospective effect from 1st June 1976 and the assessment year in question was 2004-05 where it was impossible for the assessee to deduct tax as the obligation to deduct tax itself was absent during that period. Vide Finance Act 1976, a source rule was inserted in the statute books to bring the amount of interest, FTS and royalty under tax net even if the same are provided outside India but as long as the same are utilized in India. Again an explanation was inserted vide Finance Act 2007 to clarify that when income of a non resident would be deemed to accrue or arise in India u/s 9 even if the non resident does not have any place of business or business connection in India. It was held that amendment was retrospective effect and hence assessee cannot be asked to do an impossible act of deduction of tax when the obligation itself was absent. Therefore no disallowance should be made and appeal of the assessee was allowed.

37 VINEETKUMAR RAGHAVJIBHAI BHALODIA VS. ITO140 TTJ 58 (RAJKOT)

ASSESSMENT YEAR 2005-06, ORDER DATED: 17 MAY 2011

BASIC FACTS

Assessing officer during the assessment proceedings observed that the assessee accepted gift of Rs. 60 lakhs from Raghavjibhai Bhanjibhai Patel (Bhalodia) HUF on 21/03/2005. AO held that HUF is not covered within the definition of relative and hence taxed the said amount of gift. CIT(A) also confirmed the said addition on the ground that the legislature doesn't include HUF within the definition of relative. Also alternative ground taken by the assessee that the said amount is exempt u/s 10(2) was dismissed considering the fact that section 10(2) rws 64(2) speaks that only a sum equal to share of a coparcener in the HUF is exempt. Aggrieved of the same, assessee went into appeal before ITAT.

ISSUE

Whether gift received by a coparcener of HUF is taxable?

Whether HUF is covered within the definition of relative under section 56(2) of the Act?

HELD

It was held that HUF consists of all persons lineally descended from a common ancestor. Contention of the AO that HUF is as good as Body of Individuals was not right but it can be termed as a group of relatives. Provisions of section 56(2) defines that gifts received from relative are exempt whether it is received from an individual relative of group of relatives. Also it is nowhere expressed that the word relative includes only single person. Intention of the legislature can never be this and hence HUF is a group of relatives. Therefore gift received from HUF is not taxable u/s 56(2)(iv). Considering the alternate contention, it was held that for getting exemption u/s 10(2) of the Act, twin conditions are to be satisfied i.e. the individual should be member of the HUF and he receives the sum out of income of such HUF. In the instant case, both the conditions are satisfied by the assessee as there was no proof available to show that the gift amount was part of any assets of the HUF. Therefore the said gift is exempt u/s 10(2).

38 JEYPORE SUGAR COMPANY LTD. VS. ACIT 139 TTJ 475(VISHAKHA) - ORDER DATED: 21 DECEMBER 2010

BASIC FACTS

The assessee claimed depreciation at Rs. 44,77,486 in the AY 2005-06 and Rs. 33,58,115 in AY 2006-07 @ 25% on goodwill included in the block of intangible assets. On replying to the show cause notice it was mentioned by the assessee that the goodwill represents the difference between price paid by the assessee to the government on closed tender for purchase of Chagallu Distillery. The company took over lesser net assets and paid an excess price for acquiring this and the difference between the same is classified as goodwill. AO after examining the details disallowed the claim of the assessee. On appeal CIT(A) confirmed the disallowance. Aggrieved of the same, assessee preferred an appeal before ITAT.

ISSUE

Whether depreciation is allowable on the excess amount paid as consideration and classified as goodwill in the books of accounts towards acquiring net assets of a company or not?

HELD

The erosion in the value of the assets is not a relevant factor to decide whether it is entitled for depreciation or not. Depreciation is to be rightly allowed on know-how, patents, copyrights, trademarks, licenses and franchise, but with respect to other intangible assets, depreciation would only be allowed if business or commercial rights are of similar nature. Goodwill is basically a bundle of commercial benefits & rights. The legislature has used the word in a residuary clause "any other business or commercial rights of similar nature". The commercial rights cannot be equated with the commercial benefits. Commercial benefits which move along with the establishment on its sale are not similar to or do not belong to the same genesis of know-how, patents, copyrights, trademarks, license, franchises because they do not confer any right upon the purchaser. The assessee has made the excess payment over and above the cost of tangible assets and that excess payment was claimed to have been made against the goodwill. Also the assessee has acquired all business/commercial benefits or rights to run the distillery but without using the name of NSL or any of its associates. In the instant case, assessee has made excess payment over and above the cost of tangible assets. A lump sum amount over and above the cost of the tangible assets is considered to be the cost of goodwill, which includes business or commercial benefits and rights. There is no bifurcation of the total cost which can be allocated towards the commercial benefits and the commercial rights acquired by the assesse. Also complete details of the cost of acquisition of the commercial benefits and commercial rights are not available on record. It is only a question of estimate and so in such type of cases, goodwill is a bundle of commercial benefits and commercial rights where commercial benefits are not eligible for depreciation whereas the commercial rights being similar to the know-how, patent, copyright, trademark, license or franchise are eligible for depreciation in as much as on account of those rights the assessee would be able to carry on its business smoothly. Therefore total goodwill cost should be bifurcated in two equal parts: one for commercial benefits & other for commercial rights and amount incurred in acquiring the commercial rights should be eligible for depreciation u/s 32.

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UNREPORTED JUDGEMENTS

In this issue we are giving full text of two decisions, one is by Hon'ble Punjab & Haryana High Court in the case of Ms. Jagriti Agrawal relating to the interpretation about exemption u/s 54 when the assessee has deposited the amount of consideration not by the date mentioned under section 139 (1) but by the date mentioned u/s 139 (4) of the Act in the Capital Gains Accounts Scheme.

The Second decision is of Ahmedabad Tribunal which deals with the exemption u/s 47 (xiii) as to whether in the facts and circumstances of the case when partners converted the firm into company and when the partners' credit balance lying as their capital was converted into loan and was repaid to them whether there is any violation of Clause-c of section 47 (xiii) ?

We hope the readers would find both of 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

11 IN THE PUNJAB AND HARYANA HIGH COURT AT CHANDIGARH

ITA No. 176 of 2011
Date of decision: 3.10.2011

Commissioner of Income Tax-II, Chandigarh ...Appellant

vs.

Ms. Jagriti Aggarwal ....Respondent

CORAM : HON'BLE MR. JUSTICE HEMANT GUPTA
HON'BLE MR. JUSTICE G.S. SANDHAWALIA

Present : Ms. Urvashi Dhugga, Advocate for the appellant-revenue.
Ms. Radhika Suri, Advocate for respondent-assessee.

HEMANT GUPTA, J.

Revenue is in appeal aggrieved against an order passed by the Income Tax Appellate Tribunal, Chandigarh Bench, Chandigarh (for short the 'the Tribunal') on 13.8.2010 in respect of Assessment Year 2006-2007.

The Revenue has claimed the following substantial question of law, as arisen from the order of the Tribunal:

> "Whether in the facts and circumstances of the case and in law the ITAT was justified in allowing the benefit of exemption under Section 44 of the Income tax Act by wrongly interpreting Section 54 of the I.T. Act in which the due date for furnishing the return of income is mentioned as per Section 139(1) and not as per Section 139(4) of the Act?"

The assessee sold her house property for Rs. 45 lacs and claimed deduction under Section 54 of the Income Tax Act, 1961 (for short 'the Act'). The assessee was served with a Notice under Section 142(1) of the Act, as to why the amount deducted be not added to her income as long term capital gain, as the assessee failed to deposit the amount in Capital Gain Account Scheme and also failed to purchase house property before the due date of filing the return of income. The assessee contested the claim of the Revenue and asserted that she is not liable to deposit the amount in Capital Gain Deposit Scheme and that the due date of filing the return of income tax is not as specified in Section 139(1) but as specified in Section 139(4) of the Act. The Assessing Officer declined the claim of the assessee and returned finding that the assessee has concealed her particulars of income and initiated proceedings for penalty as well. The appeal against the said order was accepted by the Commissioner of Income Tax (Appeals). It was found that the appellant has purchased new residential property on 2.1.2007 and the due date as per Section 139(4) is 31.3.2007 and thus, the assessee has complied with the provisions of Section 54 of the Act. It was held that Section 139 includes Sub Section (4) as well. The said order of the Commissioner of Income Tax has been affirmed in appeal as well. It may be noticed that the assessee sold her residential house on 13.1.2006 for a sum of Rs. 45 lacs and purchased another property jontly with Mr. D. P. Azad, her father-in-law on 2.1.2007 for a consideration of Rs. 95 lacs. The due date of filing of return as per Section 139(1) of the Act was 31.7.2006, but the assessee filed her return on 28.3.2007 and that extended due date of filing of return as per Section 139(4) is 31.3.2007. Section 54 of the Act contemplates that the capital gain arises from the transfer of a long term capital asset, but if the assessee within a period of one year before or two years after the date on which the transfer took place purchases residential house, then instead of the capital gain, the income would be charged in terms of provisions of Sub Section (1) of Section 54. As

per Sub-Section (2), if the amount of capital gains is not appropriated by the assessee towards the purchase of new asset within one year before the date on which the transfer of the original asset took place, or which is not utilized by him for the purchase or construction of the new asset before the date of furnishing the return of income under Section 139, the amount shall be deposited by him before furnishing such return not later than due date applicable in the case of assessee for furnishing the return of income under Sub Section (1) of Section 139 in an account in any such Bank or institution as may be specified. Relevant Sub-Section (2) of Section 54 of the Act reads as under:

> "(2) The amount of the capital gain which is not appropriated by the assessee towards the purchase of the new asset made within one year before the date on which the transfer of the original asset took place, or which is not utilized by him for the purchase or construction of the new asset before the date of furnishing the return of income under Section 139, shall be deposited by him before furnishing such return such deposit being made in any case not later than the due date applicable in the case of the assessee for furnishing the return of income under Sub-Section (1) of Section 139 in an account in any such bank or institution as may be specified in, and utilized in accordance with, any scheme which the Central Government may, by notification in the Official Gazettee, frame in this behalf and such return shall be accompanied by proof of such deposit, and for the purposes of Sub-Section (1), the amount, if any, already utilized by the assessee for the purchase or construction of the new asset together with the amount so deposited shall be deemed to be the cost of the new asset:
>
> Provided that if the amount deposited under this Sub-Section is not utilized wholly or partly for the purchase or construction of the new asset within the period specified in Sub-Section (1), then,(i) the amount not so utilized shall be charged under Section 45 as the income of the previous year in which the period of three years from the date of the transfer of the original asset expires; and (ii) the assessee shall be entitled to withdraw such amount in accordance with the scheme aforesaid."

The question which arises is; whether the return filed by the assessee before the expiry of the year ending with the Assessment Year is valid under Section 139(4) of the Act. Learned counsel for the revenue has argued that the assessee was required to file return under Sub section (1) of Section 139 of the Act in terms of Sub section (2) of Section 54 of the Act. It is contended that Sub section (4) is not applicable in respect of the assessee so as to avoid payment of long terms capital gain.

On the other hand, learned counsel for the respondent relies upon a Division Bench judgment of Karnataka High Court reported as ***Fathima Bai vs. Income Tax Officer (2009) 32 DTR 243***, where in somewhat similar circumstances, it has been held that time limit for deposit under Scheme or utilization can be made before the due date for filing of return under Section 139(4) of the Act. Learned counsel for the respondent also relies upon a Division Bench judgment of Gauhati High Court reported as ***Commissioner of Income Tax vs Rajesh Kumar Jalan (2006) 286 ITR 274***.

Having heard learned counsel for the parties, we are of the opinion that Sub-Section (4) of Section 139 of the Act is, in fact, a proviso to Sub-Section (1) of Section 139 of the Act. Section 139 of the Act fixes the different dates for filing the returns for different assesses. In the case of assessee as the respondent, it is 31st day of July of the Assessment Year in terms of clause (c) of the Explanation 2 to Sub-Section 1 of Section 139 of the Act, whereas Sub-Section (4) of Section 139 provides for extension in period of due date in certain circumstances. It reads as under:

> "(4) Any person who has not furnished a return within the time allowed to him under Sub-Section (1), or within the time allowed under a notice issued under Sub-Section (1) of Section 142, may furnish the return for any previous year at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment whichever is earlier;

Provided that where the return relates to a previous year relevant to the assessment year commencing on the 1st day of April 1988, or any earlier assessment year, the reference to one year aforesaid shall be construed as a reference to two years from the end of the relevant assessment year".

A reading of the aforesaid Sub-Section would show that if a person has not furnished the return of the previous year within the time allowed under Sub-Section (1) i.e. before 31st day of July of the Assessment Year, the assessee can file return before the expiry of one year from the end of the relevant Assessment Year.

The sale of the asset having been taken place on 13.1.2006, falling in the previous year 2006-2007, the return could be filed before the end of relevant assessment year 2007-2008 i.e. 31.3.2007. Thus, Sub-Section (4) of Section 139 provides extended period of limitation as an exception to Sub-Section (1) of Section 139 of the Act. Sub-Section (4) is in relation to the time allowed to an assessee under

Sub-Section (1) to file return. Therefore, such provision is not an independent provision, but relates to time contemplated under Sub-Section (1) of Section 139.

Therefore, such Sub-Section (4) has to be read along with Sub-Section (1).

Similar is the view taken by the Division Bench of Karnataka and Gauhati High Courts in ***Fatima Bai*** and ***Rajesh Kumar Jalan*** cases (supra) respectively.

In view of the above, we find that due date for furnishing the return of income as per Section 139(1) of the Act is subject to the extended period provided under Sub-Section (4) of Section 139 of the Act.

Consequently, the question of law is answered against the Revenue and in favour of the assessee. Thus, the present appeal is dismissed.

(HEMANT GUPTA)
JUDGE

(G.S.SANDHAWALIA)
JUDGE

12 IN THE INCOME TAX APPELLATE TRIBUNAL AT AHMEDABAD, "B" BENCH

ITA No.409/Ahd/2009
[Asstt. Year : 2005-2006]

M/s.Vishal Containers P. Ltd. Vs. ACIT, Patan Range
919, GIDC, Chhatral, Patan.
Tal. Kalol.
PAN : AABCV 8510 E
(Appellant) (Respondent)

Assessee by	Shri S.N. Divetia
Revenue by	Shri Samir Tekriwal
Date of Hearing	1st September, 2011
Date of Pronouncement	7th October, 2011

O R D E R

G.D. AGARWAL, VICE-PRESIDENT **:** This is assessee's appeal against the order of the Commissioner of Income-tax (Appeals), Gandhinagar dated 25-11-2008 arising out of the order of the Assessing Officer passed under Section 143(3) of the Income Tax Act, 1961.

2. At the time of hearing before us, it is stated by the learned counsel that Ground No.1.1 of the assessee's appeal is general in nature and needs no adjudication. Ground No.1.2 reads as under:

"1.2 The ld.CIT(A) has grievously erred in upholding the addition of Rs.18,38,180/- made by AO u/s.47A(iii) of the Act without considering fully and properly the explanation offered and evidence produced by the appellant."

3. Other grounds i.e. Grounds 2.1 to 4.1 are only arguments in support of Ground No.1.2 above. Thus, the only dispute in this appeal is with regard to taxing a sum of Rs.18,38,180/- as long term capital gain. The facts of the case are that during the accounting year relevant to the assessment year under consideration, the partnership firm, Vishal Containers was converted into Vishal Containers Pvt. Ltd. Before such conversion, the name of erstwhile firm Vishal Industries was changed to Vishal Containers. During the assessment proceedings, the AO raised query with regard to applicability of Section 47A(3) r.w.s. proviso-(c) of section 47(xiii). In response to which the assessee furnished the following explanation:

"Regarding your question No.1, we have to inform you that on 01/04/2004 the name of Vishal Industries was changed to Vishal Containers and the profit/loss sharing Ratio and capital Balance of Rs. 1,00,00,000/- is clearly mentioned in the partnership deed. As such, all the partners had decided to covert this partnership firm into Joint Stock Company arm-to--register under *the Companies Act, 1956, and the paid up share capital of the partnership firm as Joint Stock Company shall be 10,00,000 Equity shares of Rs. 10/- i.e. Rs. 1,00,00,000/- and shares shall be held by the parties hereto by way of share capital also clearly mentioned in the partnership deed. The partners of this partnership firm shall be the members of the Joint Stock Company as per the Partnership deed. Accordingly, Balance Sheet of Vishal Containers on 01/04/2004 had been prepared and the Assets and Liabilities were transferred to Vishal Containers Pvt. Ltd. In the Balance sheet of Vishal Industries as on 31/03/2004 the capital balance of partners was Rs.1.184 crores but in the Balance sheet of Vishal Containers on 1-04-2004 the Capital balance was Rs. 1.00 Crore only and Rs.18.4 lakhs transferred to Unsecured loans of partners. The partners and members of Vishal Containers as Joint Sock Company is the subscribers of Memorandum & Articles of Association of Vishal Containers Pvt. Ltd., in the same proportion of capital balance as share holders of the Company as per Chapter DC of Companies Act, 1956. Further, as per Clause 23(B) SCHEDULE-J of the Form 3 CD of Vishal Containers Pvt. Ltd. though the previous partners have been repaid by cheque or otherwise it is from the unsecured loan/deposit only and not from the capital balance. Thus, Proviso (C) of section 47(xiii) of the Income Tax Act is not violated and hence the question of gain arising out of transfer of the capital assets of the firm to be deemed as Profit and gains u/s. 47A(3) of the Income Tax Act does not arise. We are enclosing herewith copy of Partnership Deed of Vishal Containers, Balance sheet of Vishal Containers as on 01/04/2004*

and Memorandum & Articles of Association of Vishal Containers Pvt Ltd., for your ready reference. Against your Q. No. 1(B) we are enclosing herewith the details of Share holders of our Company as on 31/03/2005 in the manner as you required

4. The AO was not satisfied with the above explanation of the assessee and held that there was violation of Section 47A(3). Accordingly, he taxed the sum of Rs.18,38,180/- as long term capital gain in the hands of the assessee. The relevant finding of the AO reads as under:

"The Capital Balance in the Balance Sheet of "Vishal Industries" was Rs.1.184 Crore as on 31/03/2004. This firm was renamed as "Vishal Containers" on 01/04/2004 and at the time of re-naming it, its Capital of Rs.1.184 Crore was reduced to Rs.1 Crore and the balance amount of Rs.18.4 lakhs became payable to the partners. Exactly on the same day "Vishal Container was converted into the company "Vishal Containers Pvt.Ltd.". The existence of the firm "Vishal Containers" started on 01/04/2004 and ended on 01/04/2004 itself. The only reason of creation of this firm on 01/04/2004 was to hide the fact that the firm "Vishal Industries" had not transferred all the assets and liabilities to the company "Vishal Containers Pvt. Ltd." (assessee) exactly in the same manner as prescribed in section 47(xiii) read with proviso (a) and (c) of that section. The Memorandum & Article of Association of Vishal Containers Pvt. Ltd. also mentioned in page 2 that the partners of Vishal Industries decided to covert into Private Limited Company. The partners of the firm "Vishal Industries" have received net consideration of Rs.18.4 lakhs in contravention to the proviso (c) of Section 47(xiii) of the 1.T.Act. The Capital of the assessee-company at the time of conversion was Rs.1 crores whereas the capital of the firm was Rs.1.184 Crore in contravention of the proviso (a) of section 47(xiii) of the Act. The partners have collectively gained Rs.18.4 lakhs in the process as they are holding the same "Assets" of the company by employing only Rs. 1 crore of Capital which they were earlier holding in the firm by employing Rs.1.184 crore of Capital. However, as per the deeming provision of section 47A(3) of the I.T.Act, such Capital Gain has to be charged in the hands of the successor Company, i.e. assessee. The default has occurred on 01/04/2004. Therefore, the Capital Gain is deemed to have arisen in the assessment year 2005-06. Therefore, Rs.18.4 lakhs is taxed in the hands of the assessee as Capital Gain u/s. 47A(3) of I.T.Act. As the partners are holding the assets of the firm for more than 3 years as the firm Vishal Industries was incorporated on 01/04/1994. The nature of such Capital Gain will be Long Term Capital Gain.

From the above, it is evident that as on 31-3-2004, there was a partnership firm in the name of "Vishal Industries". The closing balance in the accounts of the partners taken together was Rs.1,18,38,180/-. As on 1-4-2004, the name of the Vishal Industry was changed to Vishal Containers and out of the opening balance of the capital lying in the partners' account a sum of Rs. 1 crore retained as partners' capital and Rs.18,38,180/- was treated as loan from partners. The firm Vishal Containers with the capital balance of Rs.1 crore was converted into company named as Vishal Containers Pvt. Ltd. with the share capital of Rs.1 crore dividend into10 lakhs equity shares of Rs.10/- each. All the assets of the partnership firm became the assets of the company. However, as per the AO, there is violation of proviso-(c) of clause (xiii) of Section 47, The clause-'c' of section 47 (xiii) reads as under:

"(c) the partners of the firm do not receive any consideration or benefit, directly or indirectly, in any form or manner, other than by way of allotment of shares in the company; and"

5. After considering the arguments of both the sides and the facts of the case, we do not agree with the findings of the AO that on the facts of the assessee's case there was violation of proviso-(c) to section 47(xiii). As per the AO, by way of repayment of Rs.18,38,180/- to the partners, there was benefit to them other than by way of allotment of shares in the company. As we have mentioned earlier, the partners' capital was Rs.1,18,38,180/-. The partners have withdrawn Rs.18,38,180/- out of their credit balance and remaining Rs. 1 crore was converted into as share capital of the company. Therefore, merely because the partners' credit balance lying as their capital was converted into their loan and which was repaid to them, it cannot be said that there was any undue benefit directly or indirectly to the partners. No violation of any other sections or clause-(c) of section 47(xii) was pointed out. On the other hand, the learned counsel of the assessee has stated that all the requirement of Section 47A r.w.s section 47(xiii) were duly complied with. In our opinion, the withdrawal by the partners out of their credit balance cannot be treated as long term capital in the hands of the assessee-company. In view of the above, we delete the addition of Rs.18,38,180/- made by the AO as long term capital gains.

6. In the result, assessee's appeal is allowed. *Order pronounced in Open Court on the date mentioned hereinabove.*

Sd/-	Sd/-
(D.K. TYAGI)	**(G.D. AGARWAL)**
JUDICIAL MEMBER	**VICE-PRESIDENT**

copy of the order forwarded to:

1) : Assessee
2) : Department

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CONTROVERSIES

WHEN INTEREST IS PAID ON LOAN UTILIZED FOR ACQUIRING STOCK IN TRADE SHARES, WHETHER SUCH INTEREST CAN BE DISALLOWED U/S 14A OF THE INCOME TAX ACT, 1961

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

Issue:

M/s. XYZ Ltd. is an investment company dealing in shares. Shares acquired are treated as stock in trade by the company. It has taken loan for acquiring such shares. The A.O. is of the view that since dividend from shares is exempt u/s 10(34) of the Income Tax Act 1961 the interest paid on loan has to be disallowed u/s 14A of Income Tax Act, 1961.

Proposition:

When shares are acquired as stock in trade the income from dealing in shares is liable to tax. The basic objective of acquiring such shares is to earn trading income and not to earn dividend income and hence when loan is taken to acquire such shares it is proposed that interest on such loan has to be allowed as deduction u/s 36(1)(iii) of IT Act 1961 and no part of such interest can be disallowed u/s 14A of IT Act 1961.

View Against the Proposition:

Let us first read Section 14A of the Income Tax Act 1961

Expenditure incurred in relation to income not includible in total income

14A. [(1)] For the purposes of computing the total income under this Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act.]

[(2) The Assessing Officer shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act in accordance with such method as may be prescribed, if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under this Act.

(3) The provisions of sub-section (2) shall also apply in relation to a case where an assessee claims that no expenditure has been incurred by him in relation to income which does not form part of the total income under this Act :]

[**Provided** that nothing contained in this section shall empower the Assessing Officer either to reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154, for any assessment year beginning on or before the 1st day of April, 2001.]

It is submitted that when loan is taken and utilized for acquiring shares which has only one conclusion that the assessee earn dividend income which is exempt and hence Section 14A is clearly applicable. It has been well settled Law that dividend earned even on stock in trade shares is not taxable as business income but is taxable only as income from other sources. Whether it is taxable as business income or other sources even otherwise such dividend is tax free income.

It is useful to refer to the decision of **ITAT Mumbai Special Bench in the case of Daga Capital Management Ltd. [117 ITD 169]**. The question which was referred to special bench was as under:

"Whether in the fact and the circumstances of the case and in law, the provision of sec.14A of IT Act 1961, are applicable with respect of dividend income earned by assessee, engaged in the business of dealing in shares and securities, on the shares held as stock in trade and when earning of such dividend income is, therefore, incidental to trading in shares?"

The special bench by a majority decision has held that the provisions of Section 14A are also applicable to the cases where shares are held as stock in trade and the earning of dividend is merely incidental.

It is also interesting to refer to the case of **CIT- v/s -Smt. Leena Ramchandran(ITA No.1784 of 2009-order dated 14.6.2010).** In this case, the question before the Hon'ble Kerala High Court was whether disallowance u/s 14A was justified. The assessee was engaged in the business of

trading in goods. The fact of the case revealed that assessee started acquiring the shares of the company "Homefit Leasing Ltd." right from assessment year 1992-1993 in which said company was incorporated and continued to acquire shares every year till the year ending 31-3-2001. By the end of this year, the assessee had acquired 90% shares of that Company. In A.Y.2001-2002, it was found that assessee paid interest of Rs.17, 44, 310 /- on monies borrowed for the purpose of acquiring such shares. It was also found that assessee had received the dividend of Rs.3 lakhs only. The case of assessee was that the said company was engaged in the business of leasing of goods and the assessee had sold such goods to the said company. It was contented that acquisition of controlling interest in that company was in the business interest of assessee and therefore no disallowance could be made. The AO was of the view that the provision of sec.14A were attracted since dividend income did not form part of total income. Accordingly, the entire interest paid by assessee was disallowed. The CIT (A) confirmed the assessment. On further appeal, the Tribunal, following the decision of the Apex court in the case of **S.A.Builders** Ltd 288 ITR 1**,** substantially allowed the claim of assessee by reducing the disallowance to Rs.2 lakhs.

On appeal by the revenue before the High Court, it was noted that except the dividend income, no other benefit was derived by the assessee from the Company for the business carried on by her. Further, it was noted that the entire borrowed funds were utilized for acquiring the shares of that company. Hence, the entire amount of interest was disallowable u/s14A. However, it is pertinent to note the observation of their lordships. "**So far as acquisition of shares in the form of investment and only benefit assessee derived is dividend income which is not assessable under the Act, the disallowance u/s14A is squarely attracted and the assessing officer, in our view, rightly disallowed the claim." W**ith reference to the decision of the Apex court in the case of S.A.Builders, it was observed that **"apart from investment in shares of the company, there is nothing to indicate that assessee's business was fully linked with the business of leasing company or that assessee's business is solely dependent on the business of leasing company. Therefore, in our view, the principle of commercial expediency gone into by the Supreme Court does not apply to the fact of the case."** Accordingly, it was held that the tribunal was not justified in reducing the disallowance to Rs.2 lacs. The entire amount was held to be disallowable.

Similar view has been taken by the Hon'ble Kerala High Court in the case of **CIT vs Popular Vehicle and Services Ltd 325 ITR 523 (Ker)**. In this case, interest bearing borrowed fund was advanced to a concern in which it was a partner without charging any interest. The AO disallowed the interest expenditure since expenditure was not incurred for business purpose. The Tribunal allowed the claim by applying the decision of the Apex court in the case of S.A. Builders (supra).On appeal by the revenue, the court held-"the shares income from the partnership firm which is only consideration for advancing the loan to the firm does not constitute income of the responded u/s10(2A) of the I.T. Act. Since the share income from the firm does not constitute the part of taxable income of assessee, Sec.14A (1) applies which prohibits the deduction of any expenditure incurred in relation to income not includible in total income. "

View in favour of the proposition

It is important to note the basic objective of introducing section 14A in the I.T Act, 1961. In one of the pioneer judgments, the issue decided was that if tax free security is capable of producing profit &loss no part of the cost will be disallowed on the reasoning that the same was incurred for producing tax free income.

Supreme Court **{in the case of CIT vs. Indian Bank Ltd-[(1965)56 ITR 77 (SC)]}** was concerned with a case of a banking company, which had invested large sum in tax free government securities out of interest bearing funds. The securities were treated by it as its stock-in-trade; the profit/ loss arising out of which was computed under the head business". The contention of the department was that a part of the interest expenses was disallowable as the securities generated tax free interest income. The Three Judges Bench, at the very threshold, rejected the stand of the Department of the preliminary ground that even if the stand of the Department was to be accepted, such stand did not assist the revenue in that case as it was not controverter that the profits and losses accruing from the sale and purchase of the securities had been included in the assessment. Therefore, as the tax-free securities were capable of producing profits and losses, the apex court held that the appeal must fail on this ground alone.

The above principle was followed by the apex court, even after 30 years, in the celebrated case of **Rajasthan State Warehousing Corporation vs. CIT [(2000) 242 ITR 450 (SC)]**. This decision is very significant as it is this decision that was sought to be nullified by introducing section 14A. One of the propositions laid down by the Court, so far as relevant to this article, is that in computing "profits and gains of business or profession", when an assessee is carrying on business in various ventures and some among them yield taxable income and other do not, if all the ventures constituted one indivisible business, the entire expenditure, if otherwise

fulfills requirements of section 37, will be permissible deduction. If they are not indivisible, the principles of apportionment will apply. It is significant to note that even the Department conceded to this legal position. This decision is followed by Gauhati High Court in the case of **Assam State Warehousing Corporation vs. CIT [(2006) 286 ITR 642 (Gau)]**. Interestingly, the judgment is rendered on 05.09.2006, after the introduction of section 14A.

As against the above judicial precedents and analysis, as submitted, the Special Bench in the case of Daga Capital, however, by a majority decision has held that the provisions of section 14 A are also applicable to the cases where shares are held as stock-in-trade and the earning of dividend is only incidental. Incidentally, the majority decision has relied, mainly, on Rule 8D for their conclusion, which rule was introduced only in March 2008 and which rule, and the aspect about it's retrospectivity, was not a subject matter of reference to the Special Bench. In fact, the reference was made when the said rule was not in the statute book. Interestingly, the hearings were already fixed, but adjourned, prior to introduction of Rule 8D. It is, therefore, interesting to ponder what would have been judicial view sans the rule. In any case, with utmost respect, this decision does not lay down correct law. It is submitted that in case of Daga Capital it was an admitted fact by the assessee that expenditure was incurred for the purpose of acquiring the shares to be held as stock-in-trade. The only issue was whether the expenditure could be said to have been incurred in relation to taxable business profit or in relation to tax free dividend income the earning of which was only incidental. It is possible to argue that the expenditure incurred for acquiring the stock in trade shares primarily is to earn business profit which is liable to tax and the dividend income is only incidental, then section 14A is not applicable

Summation

In view of **Godrej Boyce Mfg Co** 328 ITR 81 (Bom) Rule 8D is applicable only prospectively i.e. from AY 2008-09 and not for earlier years. The facts showed that the assessee had made the investment in shares out of its own funds and the borrowed funds were entirely utilized for the purpose of its business. The investment in shares in the current year was made from a separate bank account where the surplus funds generated in that year were deposited. ***The argument that the assessee could have utilized its surplus funds in repaying the borrowings instead of investing in shares*** *and by not doing so, there was* ***diversion of borrowed funds towards investment in shares*** *to earn dividend income is not acceptable in view of* **CIT vs. Hero Cycles Ltd** *323 ITR 518 where it was held, distinguishing* ***Abhishek Industries*** *286 ITR 1 (P&H), that* ***if investment in shares is made by an assessee out of own funds and not out of borrowed funds, disallowance u/s 14A is not sustainable***. Accordingly, the disallowance of interest on borrowed funds was deleted.

It is submitted that the decision in the case of **DAGA CAPITAL 117 ITD 169 (SB)** the controversy arising in the appeal was whether the expenditure by way of interest on monies borrowed for acquiring shares in the course of business of trading in shares could be disallowed by the AO u/s 14A of the Act. The AO found that assessee had received dividend income on the shares purchased out of borrowed funds. Since the dividend income did not form part of total income, the AO disallowed the deduction on account of interest on borrowed fund u/s 14A. Some other appeals were also tagged in which assessees were investment companies. In those cases also, the AO disallowed the interest expenditure on monies borrowed u/s 14A on pro rata basis. After hearing the parties at length, the Tribunal recoded the following findings:

(i) It was unanimously held that provisions of section 14A would override the provisions for computing the total income of an assessee. Thus, disallowance would be justified u/s 14A even if the expenditure incurred in relation to income forming part of total income is otherwise allowable u/s 36(1)(iii)/57(iii).

(ii) It was also unanimously held that provisions of sub sections (2) & (3) of section 14A are procedural provisions for computing the amount of expenditure incurred in relation to the income forming part of total income and therefore, would have retrospective effect. Rule 8D was also held to be retrospective in nature on the same reasoning.

(iii) It was also the unanimous view that in case where expenditure is incurred by the assessee as an investor in shares, the disallowance under section would be justified since the income arising in form of dividend would not form of total income.

(iv) It was held by majority view (para19) that first step is to trace the income exempt from taxation. Once income not forming part of total income is traced then, the provisions of sub sections (2) & (3) would become applicable and consequently, disallowance as per Rule 8D would be justified. Further, it was held that the expression "in relation to" in sub section (1) would encompass direct as well as indirect expenditure and therefore disallowance in respect of both the expenditure would be justified(para 23.7). It was also held in para 23.11 that onus is on the assessee to establish that expenditure was incurred in relation to taxable income.

Lastly, it was held that section 14A is also applicable in the case of dealer in shares where exempted income in the form of dividend income is received by him (para 24).

(iv) On the other hand, minority view was that the expression '*in relation to'* in sub section(1) would mean dominant and immediate connection as held by the constitution bench of the Hon'ble Supreme Court (1971) 1SCC 85. Hence, there must be direct nexus between the expenditure incurred and the income forming part of total income for the purpose of disallowance. It was also held that computational provisions in sub sections (2) & (3) would apply only when such connection is established. Since section 14A is invoked by the AO, it was held that onus would be on the AO to establish such nexus/ connection. Accordingly, it was opined that in the case of dealer in shares, the dominant object for acquiring borrowed fund is to earn taxable income i.e. profit on sale of shares and not to earn dividend income which is merely incidental in the earning of taxable income. Hence no disallowance could be made in the case of dealer in shares.

It is further submitted that the decision in the case of **DAGA CAPITAL** (supra) is contrary to the ratio laid down by jurisdictional Bombay HC decision in the case of **Walfort Share & Stock Brokers Pvt. Ltd. [310 I.T.R 421],** wherein the honorable HC has held that what sec.14A contemplates is expenditure already incurred for earning tax free income and not assumed expenditure of deemed expenditure.

It is submitted that where the assessee is in a position to prove that no expenditure was incurred for acquiring the shares for earning tax free dividend income, the disallowances cannot take place.

It is further submitted that the decision in the case of **DAGA CAPITAL** is also contrary to the ratio laid down by the appeal court in the case of **CIT vs Williamson, Financial service [(2008) 297 ITR 17 (SC)]**

In the case of **CIT vs. Walfort Share & Stock Brokers (Supreme Court) 326 ITR 1**, the assessee bought units of a mutual fund on 24.3.2000 (the record date) for Rs. 17.23 each and immediately became entitled to receive dividend of Rs. 4 per unit. After the dividend payout, the NAV of the unit fell by Rs. 4 to Rs. 13.23. The assessee redeemed the units on 27.3.2000 at Rs. 13.23 per unit and *claimed a loss of Rs. 4. The dividend of Rs. 4 was claimed exempt u/s 10(33)*. The AO & CIT (A) rejected the claim of loss on the ground that the loss was "artificial" and could not be allowed. On appeal by the assessee, a Five Member Special Bench of the Tribunal 96 ITD 1 (Mum) (SB) upheld the claim and this was confirmed by the Bombay High Court 310 ITR 421 (Bom). On appeal to the Supreme Court, HELD, dismissing the appeal:

The argument of the department that the loss (the difference between the purchase and sale price of the units) constitutes "expenditure incurred" for earning tax-free income and was liable to be disallowed u/s 14A is not acceptable. The difference arose as a result of the dividend payout. The said "pay-out" is not "expenditure" to fall within s. 14A. **For attracting s. 14A, there has to be a proximate cause for disallowance, which is its relationship with the tax**

It is submitted the majority decision in the case of **DAGA CAPITAL** has proceeded on the fundamental fallacy that what is to be done is to, first of all, identify a tax free income and then to allocate proportionate expenses in terms of Rule 8D. In other words, according to the decision, the starting point for invoking section 14A,is an exempt income and once such income is identified, automatically, allocated to such income and to be disallowed accordingly. This totally overlooks the basic scheme of the Act; specially of Chapter III vis-à-vis Chapter IV of the Act. Section 14A starts with the following words:

"For the purpose of computing the total income under this Chapter……."

In other words, section 14A gets attracted &applicable only while computing 'total income' under Chapter IV. It has nothing to do with the exempt income which falls under Chapter III, like Section 10, for the simple reason that such exempt income does not at all form part of total income. As such, the starting point is not an exempt income but an expenditure which can said to have been incurred in relation to such exempt income.

In summation in my opinion in the case of dealer in shares, prima facie, there exists proximate relationship between the expenditure incurred and the taxable income and therefore, expenditure has to be allowed in computing the taxable income as suggested by the Hon'ble Kerala High Court in the case of Leenachandran (supra). On the basis of net income theory, related expenditure is to be allowed as deduction in computing business income. However, in my opinion, this cannot be an absolute preposition in all circumstances. There may be cases where dealer in shares may also purchase units/ shares out of interest bearing funds with a view to earn only the dividend income. In such case, there would be proximate cause for disallowance of interest to that extent.

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JUDICIAL ANALYSIS

SOME INTERESTING RECENT DECISIONS ON REOPENING

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Kutchvaghad Lohana Mandal, Vs. ADIT (ITA No.5353/Mum/2004, A.Y. 2000-01, dt.30/09/2011)

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Ground no.1 reads as under:

"1. The Learned Commissioner of Income Tax (Appeals) erred in confirming the reopening of assessment u/s. 147 of the Income Tax Act, 1961 and failed to appreciate that the assessment order u/s.143(3) r.w.s. 148 is without jurisdiction and bad in law."

2. Briefly stated facts are as under. There was a search and seizure operation u/s.132 of the Act against Nanji Khimji Thakkar group on 28.07.1999. During the course of the search operation in the said group, some incriminating evidence was found against the assessee and hence the assessee was covered u/s.158BD and assessment was completed up to 28.07.1999. The assessee had filed the return of income for the A.Y. 200001 on 28.06.2000 and also filed the revised return on 20.9.2000. The return filed by the assessee was not selected for scrutiny and return was accepted u/s.143(1). Subsequently, the A.O. initiated proceedings u/s.147 against the assessee and issued notice u/s.148. The notice u/s.148 was issued within the period of four years from the end of A.Y. 2000.01. The assessment of the assessee was completed vide assessment order dated 27.03.2003 determining the total income at 9,11.582/. The assessee resisted the action of the A.O. for issuing the notice u/s.148. The assessee challenged the same before the Ld. CIT (A) but without success. Now, the assessee has challenged the validity of the notice issued u/s.148 before us.

3. We have heard the rival submissions of the parties and perused the records. The Ld. Counsel filed the copy of the reasons recorded by the A.O. on 29.10.2002 and the said copy is placed on records. The Ld. D.R. submits that the said copy is given by him to the assessee. The Ld. Counsel vehemently argues that from the reasons recorded by the A.O., only reason for issuing the notice u/s.148 is that the return filed by the assessee was not selected for scrutiny though assessee's assessment was completed u/s.158BD in consequence of search & seizure operation. He argues that there was no other material before the A.O. for formation of positive belief that any income has escaped an assessment. The Ld. Counsel also referred to sec. 147 of the Act and submits that merely because the assessee's case was not selected for scrutiny, in view of the Board's Circular, that cannot be given colour of the material for formation of belief and as the mandate of sec. 147 is not fulfilled, the notice issued by the A.O. u/s.148 is bad in law.

4. We have also heard the Ld. D.R.

5. Relevant part of Sec. 147 reads as under:

"If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year."……

6. The A.O. recorded the following reasons for issuing notice u/s 148

"ROI was filed on 28.06.2000 with ITO Ward Exemption II(1) declaring NIL income. Block asstt in this case was completed on 30.4.2002 for the period 1.4.89 to 28.7.99. As per the norms laid down by the Board, all such cases are to be selected for scrutiny. Therefore notice u/s.148 is issued for the A.Y. 2000-01 as there is reason to believe that income has escaped asstt. Notice u/s.148 dt 30.10.02 issued."

7. In **ITO V/S. Lakamani Newal Das 103 ITR 437 (SC)**, the Hon'ble Court had warned that it is not "any and

every material, howsoever vague and indefinite or distant, remote or farfetched, which would warrant formation of the belief relating to escapement of income from the assessment". In ITO vs. Madnani Engineering Works Ltd. 118 ITR 1 (SC), it was pointed out that the reason to believe is a justiciable issue and that the A. O. has to be satisfied in clear terms that the income chargeable to tax had escaped assessment by reason of failure of the assessee to make a full and true disclosure.

8. As per reasons recorded by the A.O., we find that the only reason for issuing notice u/s.148 of the Act to the assessee is that as per administrative norms laid down by the Board in respect of search cases in which the block assessment has been framed, the return filed by the assesse should be selected for scrutiny. We find force in the argument of the Ld. Counsel that there was no positive material before the A.O. for formation of the belief except that the return filed by the assessee for the A.Y. 2000-01 was not selected for scrutiny. Even if we consider the Board's Circular, nowhere it is stated in the reasons that, if the time limit has gone in that case also the A.O. should proceed u/s.147. It is pertinent to note here that, sec. 147 is a distinct and special provision for bringing to tax an escaped income but mandate of said provision must be fulfilled.

9. We have perused the reasons recorded by the A.O. and we find that entire reasoning is silent on the basic mandate, which items of the income have escaped the assessment? In our opinion, there was no material before the A.O. for formation of the belief, which is one of the legal requirements u/s.147. We, therefore, quash the notice issued u/s.148 and cancel the assessment. Accordingly, ground no.1 is allowed.

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M/s. Mahadev Trading Co., vs. ITO (A.Y. 1993-94, dated 26/08/2011)

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7. I have considered the rival submissions. The facts noted above are not in dispute. The AO in the original assessment order dated 31-03-2003 noted that the case was reopened on the information received from the DDIT (Investigation), Baroda regarding demand draft purchased by the assessee from Baroda Traders Co-operative Bank Ltd. amounting to Rs.70,000/- during the previous year relevant to the assessment year in question. Notice u/s 148 of the IT Act was accordingly issued on 23-05-2001. Copy of the reasons recorded for reopening of the assessment is filed on record in which the AO has mentioned that the DDIT (Investigation), Baroda received a TEP in the case of M/s. Topandas Chellaram and others inclusive of the assessee in question alleging that demand drafts are purchased by them by making cash payment to Bharat Co-operative Bank Ltd., Fatehpura. It was further noted with regard to M/s. Topandas Chellaram that demand draft was purchased from Bharat Cooperative Bank Ltd. out of cash on account of undisclosed sources of income. As regards assessee is concerned, it was noted in the reasons that similar details were called for from Baroda Traders Cooperative Bank Ltd., Hathikhana, Baroda and statement of Bank Manager was recorded in which he has stated that majority of the drafts are made in cash had been issued to M/s. Mahadev Trading Co. i.e. the assessee in question. The AO on the basis of information received from the DDIT (Investigation) had reason to believe that Rs.70,000/- for assessment year under appeal has escaped assessment. The assessee in the first round proceedings took up the matter before the Tribunal and filed confirmation from the bank that no such draft was purchased by the assessee. The Tribunal found that the findings of the learned CIT(A) are contrary to the bank certificate produced by the assessee, therefore, the entire assessment was restored to the file of the AO for reconsideration of the reopening as well as addition on merit. These facts clearly prove on record that in the reasons recorded for reopening of the assessment the AO received information from the DDIT (Investigation) and on the basis of statement of the Bank Manger of Baroda Traders Cooperative Bank Ltd., Hathikhana that the assessee purchased demand draft in cash but it was found to be incorrect because Baroda Traders Co-operative Bank Ltd., Hathikhana later on confirmed that no such draft is issued in favour of the assessee. In the set aside proceedings the assessee again reiterated the same facts before the AO and explained that no such draft is purchased from Baroda Traders Co-operative Bank Ltd., therefore, belief of the AO for escapement of income was based on non-existent reasons. The learned CIT(A) however, took it as "typographical error" because the correct name was Bharat Co-operative Bank Ltd. The AO called for the Branch Manager of Bharat Co-operative Bank Ltd. to assist the proceedings later on, on 25-7-2006 in the set aside proceedings to show that drafts were issued to the assessee favouring M/s Anand Enterprises against cash payment. These facts clearly prove on record that the assessee did not purchase any draft from Baroda Traders Co-operative Bank Ltd., Hathikhana as is mentioned in the reasons recorded for reopening of the

assessment as well as recorded in the original assessment order. Thus, the reasons recorded by the AO for reopening of the assessment are not mere typographical error in the reasons but factually incorrect reasons recorded by the AO for reopening of the assessment. The AO reopened the assessment on non-existing reasons. The AO failed to examine the information received from the DDIT (Investigation) before recording the reasons. Thus, the AO did not apply independent mind to the information received from the DDIT (Investigation) before recording the reasons for reopening of the assessment. The Hon'ble **Punjab & Haryana High Court in the case of CIT Vs Atlas Cycle, 180 ITR 319** held as under:

"Held, (i) that the Tribunal was right in cancelling the reassessment as both the grounds on which the reassessment notice was issued were not found to exist, and, therefore, the Income-tax Officer did not get jurisdiction to make a reassessment."

7.1 The Hon'ble **Bombay High Court in the case of Prasant S. Joshi and another Vs ITO and another, 324 ITR 154** held as under:

"The question as to whether there was reason to believe, within the meaning of section 147 that income has escaped assessment, must be determined with reference to the reasons recorded by the Assessing Officer. The reasons which are recorded could not be supplemented by affidavits."

7.2 The **Hon'ble Punjab & Haryana High Court in the case of CIT Vs Smt. Paramjit Kaur, 311 ITR 38** held as under:

"Held, that the Assessing Officer had not examined the information received from the survey circle before recording his own satisfaction of escaped income and initiating reassessment proceedings. The Assessing Officer had thus acted only on the basis of suspicion and it could not be said that it was based on belief that the income chargeable to tax had escaped income. The Assessing Officer had to act on the basis of "reasons to believe" and not on "reasons to suspect". The Tribunal rightly concluded that the Assessing Officer had failed to incorporate the material and his satisfaction for reopening the assessment and therefore the issuance of notice under section 148 of the Act for reassessment proceedings was not valid"

8. Considering the facts of the case in the light of the above discussions and decisions, it is clear that the reasons recorded by the AO for reopening of the assessment were factually incorrect and were non-existing based on incorrect information. The AO in this case later on called for the Branch Manager of Bharat Co-operative Bank Ltd. in the set aside proceedings and came to know that the assessee purchased demand draft favouring M/s. Anand Enterprises on cash payment. The reasons are recorded prior to that. Therefore, subsequent information received in the set aside proceedings would have no bearing in the reopening of the assessment because the question as to whether there was reason to believe within the meaning of section 147 of the IT Act that income has escaped assessment, must be determined with reference to the reasons recorded by the AO. The reasons which are recorded cannot be supplemented by receiving further information from the Branch Manager of Bharat Co-operative Bank Ltd. in the later stage in set aside proceedings. Same vies is taken by the Hon'ble Bombay High Court in the case of Prasant S. Joshi (supra). I may also further add here that in the reasons recorded for reopening of the assessment qua the assessee, there is no reference of M/s. Anand Enterprises in whose favour the assessee alleged to have got issued the demand draft. Since, there is no mention of M/s. Anand Enterprises in the reasons relevant to the assessee; therefore, findings of the authorities below are incorrect to that extent also. Since the recording of the reasons is the foundation of initiation of the proceedings u/s 148 of the IT Act, therefore, it would not be effected by the provisions of section 292B of the IT Act. Considering the above discussions, I am of the view that the AO proceeded for reopening of the assessment on non-existent and factually incorrect reasons and has not applied independent mind and did not verify the information received from the DDIT (Investigation) prior to recording of the reasons. Therefore, reopening of the assessment in the matter is clearly invalid and unjustified. The orders of the authorities below cannot be sustained in law. I accordingly set aside the orders of the authorities below and quash the reassessment proceedings. In view of this finding, there is no need to give any finding on merit because it would be of academic interest only because once reassessment is quashed all additions would stand deleted.

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COMMERCIAL ASPECTS OF CIVIL CONSTRUCTION

INTER-STATE WORKS CONTRACTS

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

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e. Service Tax Aspects for Builders and Real Estate Developers

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h. **Inter-state Works Contracts**

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m. Project Completion

n. Relevance of Information Technology to the construction sector

o. Banking requirement of the sector

p. Insurance needs of the sector

q. ISO Implementation and Process Documentation

r. Planning Internal Audit of a construction site

This month's topic is –

Inter-state Works Contracts

What are inter-state Works Contracts?

People often confuse inter-state works contracts as those contracts which are carried out by a contractor having registered office in one state and taking up project in some another state. The contractor in such a case normally always opts for VAT registration in the state where the work is being executed. Hence the turnover for the contract is offered to the state where the work is being done.

To explain the same with the help of an example, If there is a contractor M/s XYZ, having registered office in the state of Maharashtra and they get a project in the state of Gujarat. As per the Gujarat VAT Act, it would be required to obtain registration under Gujarat VAT. And the turnover for the project would then be offered under Gujarat VAT.

Hence the contract as mentioned above are not inter-state works contract.

The question then arises is, when does a contract become an inter-state works contract?

Some of essential ingredients of an inter-state works contract are:-

1. There are two states involved, one where work is executed and one from where goods are being transferred to be used in works contract.

2. The transfer of goods takes place in pursuance of contract for carrying out operations in Works contract.

3. The goods as transferred from one state to another are used as in the same form or condition in the execution of works contract.

4. The goods being tailor made and not catalogue items, can only be used for specific works contracts. (Although not a strict rule, but practically this point needs to be proved to the departmental authorities to prove the element of inter-state works contracts)

Taking ahead the above example, if M/s XYZ is transferring an equipment in the course of works contract from the state

of Maharashtra to Gujarat to be transferred in the same form to the contractee in the state of Gujarat, then the turnover pertaining to the equipment would have to be shown as inter-state works contract. The same can-not be shown as a local sale in the state of Gujarat, after doing branch transfer from Maharashtra using F Form, which is a mistake often made.

The next important question that arises is - Why is it advisable to offer sale under Inter-state Works Contract rather than sale under local VAT in the state where the project is getting executed?

There are primarily two reasons:-

1. The goods that are being transferred must have been purchased by paying VAT or if manufactured, then the raw materials must have borne the VAT. And thus when CST is paid on such transactions, the input credit paid on purchase would be available for set off, thereby reducing the purchase cost to that extent.
2. Rate of CST is 2% which would always be lesser as compared to local VAT rate of the state where the goods are being transferred. Sometime the difference is as large as 13%. And if VAT is in the scope of the contractor, which is normally the case, then it results in good amount of savings.

The only issue that arises is, whether the client would accept a separate invoice for sale occasioned in the course of the works contract, when there is a composite / indivisible works contract :-

a) If the sale is foreseen in advance, then there can be a separate section for such a supply, which is advisable for better records.

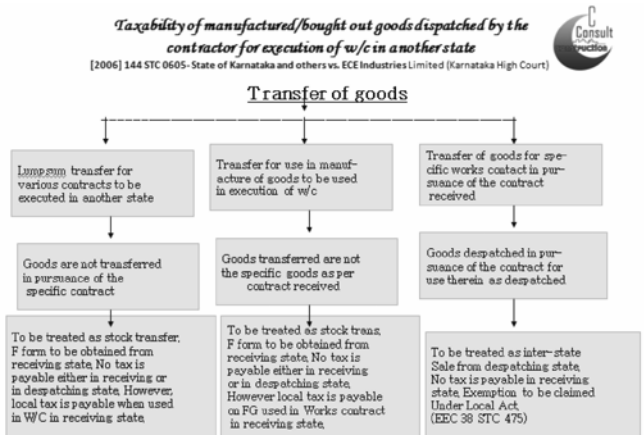
b) If not, then the answer still remains **"yes"**, as the invoice is being issued to comply with the CST regulations, which are above the mutual terms decided by the parties to the contract.

With these issues in mind, let me take you through a little background on how the tax on inter-state works contract came to be levied.

Under Entry 54 of the State List in the Constitution, the State Governments have the power to levy tax on the sale and purchase of goods within the jurisdiction of such States. In works contracts there is a deemed sales of the goods incorporated in such contracts to the contractee, hence the tax on such deemed sales of goods can also be levied by States if such deemed sales happen within the jurisdiction of the States.

The definition of sale in the CST Act was amended in 2002 so as to include within its purview the concept of deemed sales involved in the works contracts. Hence Central Government can also levy CST on such deemed sales involved in the works contracts if such deemed sales is an interstate sales. Thus power to levy tax on sale of goods in the course of inter-state works contract falls under the purview of Central Government.

It is also relevant to note the observations of the Honourable Supreme Court in the case of M/s Gannon Dunkerley & Co. Vs State of Rajasthan (1993) 88 STC 204 (SC) , the relevant extracts of the judgement are being produced herebelow::



"**On behalf of the States** it has been seriously contended that a deemed sale resulting from transfer of property in goods involved in the execution of a works contract can never be a sale in the course of inter-state trade or commerce and it cannot be an outside sale or sale in the course of import since the transfer of property in the goods takes place only at the stage when the goods are incorporated in the work and that can take place only at the stage where the work is required to be executed. **On behalf of the contractors**, on the other hand, it has been urged that a works contract can involve transactions constituting a sale in the course of inter-state trade and commerce as well as an outside sale or sale in the course of import and that is a matter which will have to be considered in accordance with the principles contained in section 3, 4 and 5 of the Central Sales Tax Act, 1956 keeping in view the terms and conditions of the particular contract."

It should be noted that the above judgement was delivered at a time when the concept of deemed sales involved in the works contracts was included in sub-clause (b) of clause (29A) of article 366 of the Constitution, but the definition of sale as contained in CST Act, 1956 was not amended to provide for the deemed sales in the works contract within its purview, still the Supreme court held that there can be an inter-state deemed sales in works contract but the same cannot be decided in abstract but can be decided in the light of particular terms of every contract.

In 2002 the definition of sales under CST Act was amended to include deemed sales in works contracts, which made the position crystal clear that there can be an inter-state deemed sales in the works contracts.

It is also worthy to note the observations of The Punjab & Haryana High Court in Thomson Press (India) Ltd. Vs. State of Haryana (1996) 100 STC 417 (P&H)

"Once the contract occasions the movement of end-product from one State to another, the inputs or the goods involved in the execution of the works contract shall also be deemed to have moved and the levy of sales tax in such a case would be outside the field of legislative competence of the State Legislature. By introducing a fiction, the State Legislature cannot convert a sale in the course of inter-state trade and commerce into a local sale."

Thus the court negated the moves of some of the states as unconstitutional which tried to bring sale of goods under inter-state works contract under the purview of the local VAT.

Now, let us again emphasize upon importance of Inter-State Works Contracts and try to drill down the same as regards type of transactions that can take place in this domain.

Execution of works contract in respect of immovable property like Lump Sum Turn Key (LSTK) or EPC Contract, construction of buildings, bridges, dams or in respect of movable property like repairs of machinery, equipments etc. requires

a) sourcing of materials from outside the state

b) sourcing of material from outside the country or

c) dispatch of machinery and equipments outside the state or country after repair

These types of transactions in the nature of works contract can be taxed only under CST Act. The relevant provisions for levy of tax are contained in section 3. 4 and 5 of the CST Act Normally goods used in the execution of a works contract fall under following categories:-

1) Manufactured/bought out goods dispatched for execution of works contract in another state for

   a) lump sum transfers for use in various contracts

   b) transfer for use in manufacture of goods to be used in execution of works contract

   c) use in specific works contract in pursuance of the contract received

2) Goods purchased from outside state in which works contract is executed for

   a) use as raw material or components in manufacture of goods to be used in execution of works contract

   b) use in works contract as purchased as per billing schedule (sale occasioning inter-state sale

   c) use in works contract after sale is effected to the employer under section 6(2) of the CST Act

3) Goods imported from outside the country for

   a) use in execution of works contract but not imported in pursuance of the contract

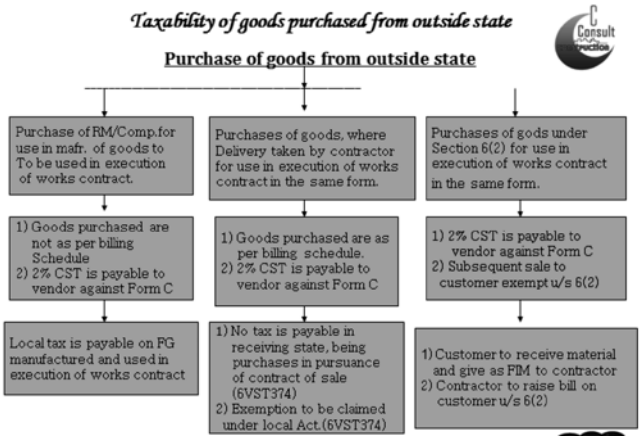
   b) use in works contract but imported on behalf of the customer (Sale occasioning import

4) Goods imported by the employer and given to contractor as free issue (FIM) for use in works contract.

To understand the taxability of the first two cases 1) & 2) above lets further drill down the scenarios in the table as below :-

Hence as per the above table, we are discussing issues related to goods transferred from one state to another. Lets explain the scenarios as above with the help of an example:-

a) Lumpsum transfer for various contracts to be executed in another state



For e.g. if there is a supplier in the activity of supply and installation of pollution control equipments, having the manufacturing plant in the state of Maharashtra and having a branch at Gujarat. The supplier is in the regular habit of supply of equipments for execution of jobs in the state of Gujarat. The goods are received by the Gujarat branch in the regular course and not specifically for any of the jobs. In such a case no CST would be levied and the supplier would have to pay local VAT in the state of Gujarat.

b) Transfer for use in manufacture of goods to be used in execution of works contract

In the above example, if assembling / manufacturing is also carried in Gujarat State and raw materials are received in the state of Gujarat from Maharashtra. Since the delivery is taken in Gujarat for further action, the same would not be liable to CST but local Gujarat VAT.e.g. If contractor A brings wooden slides to Gujarat from his branch office at Mumbai and from the wooden slide contractor manufactured window and door and used the same in execution of works contract then contractor A is liable to pay local Guj VAT on window and door.

c) Transfer of goods for specific works contract in pursuance of contract received

Further to above, where a customer gives his own specification for the pollution control equipments which thus become tailor made items and which can only be installed at that customer's premises. In this case the sale would be deemed to have occasioned in the course of inter-state trade and commerce works contract, even if delivery is taken by the Gujarat branch and kept at its premises for some days. In such a case local Gujarat VAT can-not be paid.

Further to above there can be a separate category of transactions where the contractor is resident in the same state where works contract is being executed and purchases goods from other state :-

a) Purchase of Raw material / Component for use in manufacture of goods to be used in the execution of works contract

In such a case both CST and local VAT would be levied as the goods have changed the form.

b) Purchase of goods, where delivery is taken by contractor for use in execution of works contract in the same form.

Here only CST would be levied as the goods are being used in the same form.

c) Purchase of goods under Section 6(2) for use in execution of works contract in the same form

To explain this in the form of an example. If there is a contractor with head office in New Delhi and having received the works contract in Gujarat and pursuant to works contract some purchases are intended to be made from Rajasthan to be used as it is in the works contract. Now in such a case there can be various ways of carrying out this transaction:-

a) Order is placed by the Gujarat Branch on the Rajasthan dealer and delivery is taken in Gujarat and then sold to the client in Gujarat, in such a case both CST to Rajsthan dealer and local VAT in Gurat would have to be paid.

b) Order is placed by the Delhi HO to Rajasthan dealer and in transit sale is made under Section 6(2) directly to the client in Gujarat, hence not involving the Gujarat Branch at all. In such a case only CST would have to be paid and local VAT can be avoided. The material as received by the client in Gujarat would be issued to the client as Free Issue Material. However Under this scenario, in the normal course, the contract for supply of goods and services may be entered into between the parties separately. Accordingly, this transaction for supply of goods may be structured as an E-I/E-II transaction, provided the owner is willing to issue form C.

Other Areas:

There is no official clarification as to the applicability of composition scheme for inter-state works contract. It is also not clear in the present scenario, whether state will allow deduction of inter-state supply component from the total contract value, in order to calculate local tax burden under composition scheme. However, since the sale definition now includes deemed sale, it may be reasonably construed that the rate applicable to the inter-state works contract shall be as provided in section 8 of the Central Sales Tax act.

There are no provisions for deduction of TDS on amounts paid to the contractor against the inter-state sale made by him as per ([2006] 147 STC 0566- Rapti Commission Agency vs. State of U.P. & others (Supreme Court of India).

Accordingly the rate of tax applicable in the case of inter-state works contract may be as follows:

1. Inter-state works contract tax rate against issue of form C may be 2% or the local tax rate whichever is less.

2. The rate of tax without issue of form C shall be minimum local tax rate equal to state rate.

Wherever, separate works contract rate schedules do not exist the general sales tax schedule-rate shall apply. The taxable value for the purpose of calculating the inter-state works contract tax shall be arrived at after making permissible deduction including the profit attributable to such deductions (e.g. labour, local component, import component) from the total contract value.

It is also advisable to go through the landmark judgement of [2006] 147 STC 0566- Rapti Commission Agency vs. State of U.P. & others (Supreme Court of India) to understand the finer nuances of Inter-state Works Contract.

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INTERNATIONAL TAXATION

TAXATION OF SOFTWARE PAYMENTS – CONTROVERSY CONTINUES

This article summarizes a recent ruling of the Authority for Advance Rulings (AAR) in the case of Millennium IT Software Ltd. (Assessee) on the issue of whether consideration received for use of computer software would be characterized as royalty or as business profits. Departing from the established principles arising from various previous advance rulings, as well as from a number of rulings by the Income Tax Appellate Tribunal (Tribunal), the AAR held that the consideration is in the nature of royalty under the provisions of the Income Tax Act, 1961 (Act) and the India-Sri Lanka Double Taxation Avoidance Agreement (SL DTAA) and would be subject to withholding tax.

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Background

The Assessee is a foreign company with its development centre in Sri Lanka. It is in the business of providing premium software solutions to customers across the globe, with minor customization. The Assessee had entered into a Software License and Maintenance Agreement (SLMA) with an Indian company (ICo) under which the Assessee was obliged to develop and install a licensed software program into the computer machines designated by ICo. On successful implementation of the program, the Assessee would provide maintenance and support services to ICo. The Assessee would also deploy personnel to the designated site of ICo to train employees of ICo. ICo would, under the SLMA, pay a lump sum amount to the Assessee on installation and implementation of the licensed software program (Implementation fee). The license to use the software was for a period of four years and required payment of 'License Maintenance Fee' by ICo to the Assessee. Apart from the above payments, an additional fee, based on utilization of the licensed software program, was required to be paid by ICo. The Assessee adverted to the SLMA entered into with ICo to contend that :

- The Assessee was the author, inventor and copyright owner of the licensed software program.
- The Assessee had the authority to license the licensed software program as a copyrighted article.
- The Assessee granted the right to use the program to ICo for its own business operations
- The rights under the SLMA granted to ICo were non-exclusive, non-transferable, non-assignable and indivisible.
- The Assessee granted the right to make copies of the licensed software program and to install them on equipment only at designated sites of ICo, such that each copy was to carry copyright, trademark and other notices relating to proprietary rights of the Assessee.
- No other intellectual property right or license was granted to ICo and use of the source code/reverse engineering of the licensed software program was strictly prohibited.
- ICo could not sell, distribute or disclose the licensed software program or associated documents to any third party.
- The Assessee sought a ruling on the characterization of payments received from ICo, both under the Act and the SL DTAA, on whether such payments were in the nature of royalty.

Assessee's contentions

The Assessee was of the view that payments received for Implementation fees for development and installation of software programs were sale of goods, whereas the payments for License Maintenance Fee and end use-based fee were business income, not taxable in the absence of a permanent establishment (PE). Alternatively, it was contended that, what was provided to ICo was only a right to use a licensed software program and not the copyright in it. Hence, there was a difference between use or right to use a copyright and use or right to use a copyrighted article.

Tax Authority's contentions

Software is not goods or tangible property but intangible intellectual property and the Assessee had granted a license to use the software developed by it. It is also a process and is covered under the clauses which define 'royalty' under the Act. It was also contended that software could be a property similar to patent, invention, design, secret formula, process etc., and the payment for acquisition of software under license is royalty, in view of an administrative circular. The meaning of the term 'royalty' in the SL DTAA is the same as in the Act. Alternatively, for the purposes of interpretation of the term 'royalty' under the DTAA, one has to go by its general meaning and not by the definition given under the Act. Legal protection of an intellectual property neither has a conclusive impact in determining whether payment is royalty or not, nor does the nature and mode of payment have a bearing i.e., whether lump sum, single or periodic, on it. The payment for use of a property is royalty. The ownership of the property remained with the Assessee and only a limited right was given to ICo. It was also submitted that the updating of software, removal of program errors and maintaining performance standards under the maintenance services also amounted to supply of software. The payments made by ICo to the Assessee are, thus, taxable in India and ICo is required to withhold tax under the withholding provisions of the Act.

Ruling of the AAR

Under the Indian copyright laws, The Copyright Act, 1957 (CA), computer programs are considered to be literary works and, accordingly, entacted to copyright protection. The legislative intent to award copyright protection to both the source code and the object code of the computer program is clear and authorship of both the source code and the object code are protected by the CA as literary work. A license is described in popular dictionaries as an authority to do something which would otherwise be wrongful or illegal or inoperative, but for such license. A licensee is described as a person who has permission to do an act which, without such permission, would be unlawful. Thus, it is clear that the license to use computer program means the right to use the intellectual property that was the copyright in the computer program in a particular way. This understanding could be further substantiated from the definition of 'royalty' under the Act, which brought to tax payments for the transfer of all or any rights (including the granting of a license) in a copyright. The phrase 'including the granting of a license' explains the term 'all or any right in respect of a copyright' and, therefore, all rights in respect of a copyright, whether under a DTAA or under the Act, should also include grant of a license.

ICo would be liable for infringement of a copyright if it copied the software program for its business purpose without a proper license. ICo, being the possessor of a lawful license, could utilize the computer program without infringement of a copyright.

The conclusion reached in an earlier case of Dassault Systems K.K. rendered by a previous bench of the AAR, regarding infringement of copyright, was not an acceptable position. If ICo had used the computer program without paying for it then the Assessee would have had the right to sue ICo. Thus, ICo was a lawful holder of a license, albeit for its own use. When a software program protected by copyright is permitted to be used by another for a consideration or another is given a right to use it, including the taking of copies for the purpose of its business, for a consideration, it is a case of receiving royalty for enabling that person to exercise the right to use the program. In terms of the Act, 'royalty' means consideration for the transfer of all or any right, including the granting of a license, in respect of any copyright or literary work.

The Delhi Tribunal considered the observations in the case of Gracemac Corporation on the meaning of the expression 'exclusive right' used in the CA. Exclusive rights mean rights of the author/creator and not the right given by such author/creator to another person to reproduce the copyrighted work. It also did not mean that non-exclusive right given by the owner of the copyright to some other party to do one or more acts will not have copyright in respect of the property.The conclusion reached in the case of the Dassault ruling (supra) that use purely for in- house or internal purpose is no use of copyright, was found not acceptable on the ground that non- exclusive and in-house use of a software amounts to use of a copyrighted article and not use of copyright in the article. The Assessee's contention, based on the Supreme Court ruling in the case of Tata Consultancy Services, that software is goods, was also not accepted. CA and The Sales Tax Act are not statutes in pari materia and the purchase of software from a reseller is payment for use of intellectual property and not for the purchase of goods, unless it falls under the exception provided under the Act for royalty. The AAR observed that, after paying the Implementation fee and License Management Fee, additional payments are determined on the basis of average trades per day in a quarter. However, irrespective of the bifurcation, the nature of the payments remains royalty for the use of the licensed software program. It does not change its character from royalty to business income.

Assignment of rights, wholly or partially, by way of a license, is a known mode of exploitation of copyright. Granting of such a license is recognized by CA and the Assessee had not parted with its tActe over the copyright in the software. The Assessee had merely conveyed to ICo a right to use the software over which it had a copyright. The right of use of software, thus, involves the right to use the copyright.

The distinction between a copyright vis-à-vis a copyrighted

Contd. on page no. 422

External Commercial Borrowings – Simplification of Procedure

Ref.: A. P. (DIR Series) Circular No. 11 dated September 7, 2011

Attention is invited to the Foreign Exchange Management (Borrowing or lending in foreign exchange) Regulations, 2000, notified vide Notification No. FEMA 3/2000-RB dated May 3, 2000, amended from time to time and the A.P. (DIR Series) Circular No. 5 dated August 1, 2005, amended from time to time relating to the External Commercial Borrowings (ECB).

2. As per the extant ECB procedures, any request for change of the lender for an existing ECB is required to be referred by the Authorised Dealer Bank to the Reserve Bank for necessary approval.

3. As a measure of simplification of the existing procedures, it has been decided to delegate powers to the designated AD Category-I banks to approve the request from the ECB borrowers with respect to change in the recognized lender when the original lender is an international bank or a multilateral financial institution (such as IFC, ADB, CDC, etc.) or a regional financial institution or a Government owned development financial institution or an export credit agency or supplier of equipment and the new lender also belongs to any one of the above mentioned categories, subject to the Authorised Dealer ensuring the following conditions:-

   (i) the new lender is a recognized lender as per the extant ECB norms;

   (ii) there is no change in the other terms and conditions of the ECB; and

   (iii) the ECB is in compliance with the extant guidelines.

4. However, changes in the recognized lender in case of foreign equity holder and foreign collaborator will continue to be examined by the Reserve Bank.

5. The changes in the recognized lender should be promptly reported to the Department of Statistics and Information Management, Reserve Bank of India in Form 83.

6. The above modifications to the ECB guidelines will come into force with immediate effect. All other aspects of the ECB policy, such as, USD 500 million limit per company per financial year under the automatic route, eligible borrower, end-use, all-in-cost ceiling, average maturity period, prepayment, refinancing of existing ECB and reporting arrangements shall remain unchanged.

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Savings Bank account maintained by residents in India – Joint holder – liberalisation

Ref.: A. P. (DIR Series) Circular No. 12 dated September 15, 2011

Attention is invited to Regulation 2(vi) of FEMA Notification No. 5 dated May 3, 2000 in terms of which Non-Resident Indian (NRI) means a person resident outside India who is a citizen of India or is a person of Indian origin.

2. The Committee to Review the Facilities for Individuals under the Foreign Exchange Management Act, 1999 has recommended in its Report that resident individuals may be permitted to include non-resident close relative(s) (relatives as defined in the Companies Act, 1956) as joint account holder(s) in their resident bank accounts.

3. On a review, it has been decided that individuals resident in India may be permitted to include non-resident close relative(s) (relatives as defined in Section 6 of the Companies Act, 1956) as a joint holder(s) in their resident bank accounts on 'former or survivor' basis. However, such non- resident Indian close relatives shall not be eligible to operate the account during the life time of the resident account holder.

NRIs/PIOs holding NRE/ FCNR(B) accounts jointly with Indian resident close relative - liberalisation

Ref.: A. P. (DIR Series) Circular No. 13 dated September 15, 2011

Attention is invited to Schedules 1 and 2 of FEMA Notification No. 5/2000-RB dated May 3, 2000 viz. Foreign Exchange Management (Deposit) Regulations, 2000, as amended from

time to time, in terms of which Non-Resident (External) Rupee Account Scheme [NRE] and Foreign Currency (Non-Resident) Account (Banks) Scheme [FCNR(B)], respectively are operated. In terms of the extant provisions contained in para 9(a) of Schedule-1 and Para 11(1) of Schedule-2 of the Notification ibid, NRIs / PIOs are not permitted to open NRE/ FCNR (B) accounts jointly with a resident.

2. The Committee to review the facilities for individuals under the Foreign Exchange Management Act, 1999 has in its Report recommended that NRIs may be permitted to open joint FCNR(B) /NRE account with a resident close relative (means relative as defined in the section 6 of the Companies Act, 1956).

3. On a review, it has been decided that Non-Resident Indian (NRI), as defined in FEMA Notification No. 5, ibid, may be permitted to open NRE / FCNR(B) account with their resident close relative (relative as defined in Section 6 of the Companies Act, 1956) on 'former or survivor' basis. The resident close relative shall be eligible to operate the account as a Power of Attorney holder in accordance with extant instructions during the life time of the NRI/ PIO account holder.

4. The necessary amendments to Foreign Exchange Management (Deposit) Regulations, 2000 contained in Notification No. FEMA.5/2000-RB dated 3rd May 2000, are being issued separately.

Foreign Investments in India - Transfer of security by way of gift – Liberalisation

Ref.: A. P. (DIR Series) Circular No. 14 dated September 15, 2011

Attention is invited to the Regulation 10 A (a) of the Notification No. FEMA 20/2000-RB dated 3rd May 2000 viz. Foreign Exchange Management (Transfer or issue of Security by a Person Resident outside India) Regulations, 2000, as amended from time to time, read with A.P. (DIR Series) Circular No. 08 dated August 25, 2005 in terms of which a person resident in India who proposes to transfer any security, by way of gift, to a person resident outside India, is required to make an application to the Reserve Bank.

2. The Committee to Review the Facilities for Individuals under the Foreign Exchange Management Act, 1999 in its Report has suggested that general permission may be made available to individual residents in India to gift shares / securities /convertible debentures, etc. to their NRI/PIO close relative (relative as defined in Section 6 of the Companies Act, 1956) subject to certain conditions.

3. On a review, it has been decided that as hitherto, a person resident in India who proposes to transfer, by way of gift, to a person resident outside India any security including shares/convertible debentures is required to obtain prior approval of the Reserve Bank. However, the value of security to be transferred together with any security transferred by the transferor, as gift, to any person residing outside India which was not to exceed the rupee equivalent of USD 25,000 during a calendar year has been enhanced to USD 50,000 per financial year.

4. All other conditions as specified in Regulation 10 A (a) of Foreign Exchange Management (Transfer or issue of Security by a Person Resident outside India) Regulations 2000 dated May 3, 2000 shall remain unchanged.

5. The necessary amendments to the Foreign Exchange Management (Transfer or issue of Security by a Person Resident outside India) Regulations 2000 notified vide Reserve Bank Notification No. FEMA 20/2000-RB dated May 3, 2000, are being issued separately.

Exchange Earners Foreign Currency (EEFC) Account and Resident Foreign Currency (RFC) account – Joint holder - liberalisation

Ref.: A. P. (DIR Series) Circular No. 15 dated September 15, 2011

Attention is invited to the Regulation 4 and 5 of the Notification No. FEMA 10/2000-RB dated May 3, 2000 viz. Foreign Exchange Management (Foreign Currency Accounts by a person resident in India) Regulations, 2000 in terms of which resident individuals are permitted to open EEFC and RFC account, respectively.

2. The Committee to Review the Facilities for Individuals under the Foreign Exchange Management Act, 1999 has in its Report recommended that RFC / EEFC accounts may be permitted to be held jointly with a resident close relative, as defined in Section 6 of the Companies Act, 1956.

3. On a review, it has been decided that resident individuals may be permitted to include resident close relative(s) as defined in the Companies Act, 1956 as a joint holder(s) in their EEFC/RFC bank accounts on 'former or survivor' basis. However, such resident Indian close relative, now being made eligible to become joint account holder, shall not be eligible to operate the account during the life time of the resident account holder.

4. The necessary amendments to the Foreign Exchange Management (Foreign Currency Accounts by a person resident in India) Regulations, 2000 are being issued separately.

Credit of sale proceeds of Foreign Direct Investments in India to NRE/FCNR (B) accounts -Clarification

Ref.: A. P. (DIR Series) Circular No. 16 dated September 15, 2011

Attention is invited to Regulation 11 of the Notification No. FEMA 20/2000-RB dated May 3, 2000 viz. Foreign Exchange Management (Transfer or issue of Security by a Person Resident outside India) Regulations, 2000, as amended from time to time.

2. The Committee constituted to Review the Facilities for Individuals under the Foreign Exchange Management Act, 1999 in its Report has recommended that sale proceeds of FDI investments may be permitted to be credited to NRE/FCNR accounts as there is no provision under Regulation 11, ibid, for credit of the sale proceeds of FDI investments into NRE/FCNR accounts.

3. Hitherto, in terms of Schedule 3, 4 and 5 of the FEMA Notification No. 20/2000-RB dated May 3, 2000, sale proceeds of Foreign Investments in India were treated as eligible credit to NRE/FCNR (B) accounts, where the purchase consideration was paid by the Non-resident Indians / Persons of Indian Origin out of inward remittance or funds held in their NRE/FCNR (B) accounts and subject to applicable taxes, if any. It is now clarified that the same facility would be available to NRIs/ PIOs under Regulation 11 of the said Notification.

Gift in Rupees by Resident Individuals to NRI close relatives

Ref.: A. P. (DIR Series) Circular No. 17 dated September 16, 2011

Attention is invited to A.P. (DIR Series) Circular No. 24 dated December 20, 2006 and A.P. (DIR Series) Circular No. 9 dated September 26, 2007 in terms of which the remittances towards gift and donation by a resident individual was included in the Liberalised Remittance Scheme.

2. The Committee to review the facilities for individuals under the Foreign Exchange Management Act (FEMA), 1999 has in its Report recommended that the ambit of FEMA Notification No.16/RB-2000 dated May 3, 2000 may be expanded to include permission to residents making gifts to and bearing medical expenses of visiting NRIs/PIOs.

3. The extant position has been reviewed and it has been decided to permit a resident individual to make a rupee gift to a NRI/PIO who is a close relative of the resident individual [close relative as defined in Section 6 of the Companies Act, 1956] by way of crossed cheque / electronic transfer. The amount should be credited to the Non-Resident (Ordinary) Rupee Account (NRO) a/c of the NRI / PIO and credit of such gift amount may be treated as an eligible credit to NRO a/c. The gift amount would be within the overall limit of USD 200,000 per financial year as permitted under the Liberalised Remittance Scheme (LRS) for a resident individual. It would be the responsibility of the resident donor to ensure that the gift amount being remitted is under the LRS and all the remittances under the LRS during the financial year including the gift amount have not exceeded the limit prescribed under the LRS.

4. The necessary amendments to the Foreign Exchange Management (Deposit) Regulations, 2000 and Notification No. FEMA 16/RB-2000 dated May 3, 2000 viz. Receipt from and Payment to, a Person Resident Outside India are being issued separately.

Loans in Rupees by resident individuals to NRI close relatives

Ref.: A. P. (DIR Series) Circular No. 18 dated September 16, 2011

Attention is invited to Regulation 7 of the Notification No. FEMA 4/2000 dated May 3, 2000, viz. Foreign Exchange Management (Borrowing and Lending in Rupees) Regulations, 2000, as amended from time to time, in terms of which an authorised dealer in India may grant loan in rupees to a non-resident Indian.

2. The Committee to review the facilities for individuals under the Foreign Exchange Management Act (FEMA), 1999 has in its Report recommended that resident individuals may be granted general permission to lend in Rupees to their non-resident close relative (means relative as defined in Section 6 of the Companies Act, 1956) for any personal purpose or business activities other than agricultural/plantation activities or real estate or relending business.

3. The extant position has been reviewed and it has been decided to permit a resident individual to lend to a Non resident Indian (NRI)/ Person of Indian Origin (PIO) close relative [means relative as defined in Section 6 of the Companies Act, 1956] by way of crossed cheque / electronic transfer, subject to the following conditions:

(i) the loan is free of interest and the minimum maturity of the loan is one year;

(ii) the loan amount should be within the overall limit under the Liberalised Remittance Scheme of USD 200,000 per financial year available for a resident individual. It would be the responsibility of the lender to ensure that the amount of loan is within the Liberalised Remittance Scheme limit of USD 200,000 during the financial year;

(iii) the loan shall be utilised for meeting the borrower's personal requirements or for his own business purposes in India;

(iv) the loan shall not be utilised, either singly or in association with other person, for any of the activities in which investment by persons resident outside India is prohibited, namely;

(a) the business of chit fund, or

(b) Nidhi Company, or

(c) agricultural or plantation activities or in real estate business, or construction of farm houses, or

(d) trading in Transferable Development Rights (TDRs).

Explanation: For the purpose of item (c) above, real estate business shall not include development of townships, construction of residential / commercial premises, roads or bridges.

(v) The loan amount should be credited to the NRO a/c of the NRI /PIO. Credit of such loan amount may be treated as an eligible credit to NRO a/c;

(vi) the loan amount shall not be remitted outside India; and

(vii) repayment of loan shall be made by way of inward remittances through normal banking channels or by debit to the Non-resident Ordinary (NRO) / Non-resident External (NRE) / Foreign Currency Non-resident (FCNR) account of the borrower or out of the sale proceeds of the shares or securities or immovable property against which such loan was granted.

4. The necessary amendments to the Foreign Exchange Management (Borrowing and Lending in Rupees) Regulations, 2000 and Foreign Exchange Management (Deposit) Regulations, 2000 are being issued separately.

Repayment of loans of Non-resident close relatives by residents

Ref.: A. P. (DIR Series) Circular No. 19 dated September 16, 2011

Attention is invited to Regulation 8 (d) of the FEMA Notification No.4/2000- RB dated May 3, 2000 viz. Foreign Exchange Management (Borrowing and Lending in Rupees) Regulations, 2000, as amended from time to time, in terms of which the housing loan provided to a non-resident Indian or a person of Indian origin resident outside India by an authorised dealer or a housing finance institution in India approved by the National Housing Bank for acquisition of a residential accommodation in India, may be repaid by any relative of the borrower in India by crediting the borrower's loan account through the bank account of such relative (relative as defined in section 6 of the Companies Act, 1956). Thus, repayment of loan by close relative in respect of loan in rupees availed by NRI is restricted to housing loans only.

2. The Committee to review the facilities for individuals under the Foreign Exchange Management Act (FEMA), 1999 has in its Report recommended that resident individuals may be granted general permission to repay loans availed of from banks in Rupees in India by their NRI close relatives as defined under Section 6 of the Companies Act.

3. The extant provision has now been reviewed and it has been decided that where an authorised dealer in India has granted loan to a non-resident Indian in accordance with Regulation 7 of the Notification No. FEMA 4/2000-RB, ibid, such loans may also be repaid by resident close relative (relative as defined in Section 6 of the Companies Act, 1956), of the Non-Resident Indian by crediting the borrower's loan account through the bank account of such relative.

4. The necessary amendments to the Foreign Exchange Management (Borrowing and Lending in Rupees) Regulations, 2000 are being issued separately.

Meeting of Medical expenses of NRIs close relatives by Resident Individuals

Ref.: A. P. (DIR Series) Circular No. 20 dated September 16, 2011

Attention is invited to para 2 of the Notification No. FEMA 16/RB-2000 dated May 3, 2000 viz. Receipt from and Payment to, a Person Resident Outside India, as amended from time to time, in terms of which a resident may make payment in rupees towards meeting expenses on account of boarding,

lodging and services related thereto or travel to and from and within India of a person resident outside India who is on a visit to India.

2. The Committee to review the facilities for individuals under the Foreign Exchange Management Act (FEMA), 1999 has in its Report recommended that the ambit of FEMA Notification No.16/RB-2000 dated May 3, 2000 may be expanded to include permission to residents to bear medical expenses of visiting NRIs/PIOs.

3. The extant position has been reviewed and it has been decided that where the medical expenses in respect of NRI close relative (relative as defined in Section 6 of the Companies Act, 1956) are paid by a resident individual, such a payment being in the nature of a resident to resident transaction may be covered under the term "services related thereto" under Regulation 2(i) of Notification No. FEMA 16 /2000- RB dated May 3, 2000, ibid.

External Commercial Borrowings (ECB) for the Infrastructure Sector– Liberalisation

Ref.: A. P. (DIR Series) Circular No. 25 dated September 23, 2011

Attention is invited to the Foreign Exchange Management (Borrowing or lending in foreign exchange) Regulations, 2000, notified vide Notification No. FEMA 3/2000-RB dated May 3, 2000, amended from time to time and the A.P. (DIR Series) Circular No. 5 dated August 1, 2005, amended from time to time relating to the External Commercial Borrowings (ECB).

2. As per extant guidelines, repayment of existing Rupee loans is not a permissible end-use for ECB. Considering the specific needs of the infrastructure sector, the existing ECB policy has been reviewed in consultation with the Government of India and it has been decided to allow Indian companies which are in the infrastructure sector, where "infrastructure" is as defined under the extant guidelines on External Commercial Borrowings (ECB), to utilise 25 per cent of the fresh ECB raised by the corporate towards refinancing of the Rupee loan/s availed by them from the domestic banking system, under the approval route, subject to the following conditions:-

   (i) at least 75 per cent of the fresh ECB proposed to be raised should be utilised for capital expenditure towards a 'new infrastructure' project(s), where "infrastructure" is as defined in terms of the extant guidelines on ECB.

   (ii) in respect of remaining 25 per cent, the refinance shall only be utilized for repayment of the Rupee loan availed of for 'capital expenditure' of earlier completed infrastructure project(s); and

   (iii) the refinance shall be utilized only for the Rupee loans which are outstanding in the books of the financing bank concerned.

3. Companies desirous of availing such ECBs may submit their applications in Form ECB through their designated Authorised Dealer bank with the following documents:

   (i) details of the project(s) completed with necessary certification from the designated AD Category I bank;

   (ii) certification from the Statutory Auditor regarding the utilization of Rupee term loans with respect to 'capital expenditure'; for the completed infrastructure project(s), duly certified by the domestic lender bank(s) concerned;

   (iii) certification from the designated Authorised Dealer bank about the outstanding Rupee loans ; and

   (iv) details of the proposed end-use of the new infrastructure project.

4. The designated AD - Category I bank shall monitor the end-use of funds and bank(s) in India will not be permitted to provide any form of guarantee(s). All other conditions of ECB, such as eligible borrower, recognized lender, all-in-cost, average maturity, prepayment, refinancing of existing ECB and reporting arrangements shall remain unchanged and shall be complied with.

5. The amended ECB policy will come into force with immediate effect and is subject to review at point of time.

External Commercial Borrowings (ECB) – Bridge Finance for Infrastructure Sector

Ref.: A. P. (DIR Series) Circular No. 26 dated September 23, 2011

Attention is invited to the Foreign Exchange Management (Borrowing or lending in foreign exchange) Regulations, 2000, notified vide Notification No. FEMA 3/2000-RB dated May 3, 2000, amended from time to time and the A.P. (DIR Series) Circular No. 5 dated August 1, 2005, amended from time to time relating to the External Commercial Borrowings (ECB).

2. Considering the specific needs of the infrastructure sector, the existing ECB policy has been reviewed in

consultation with the Government of India and it has been decided to allow Indian companies which are in the infrastructure sector, where "infrastructure" is as defined under the extant guidelines on External Commercial Borrowings (ECB), to import capital goods by availing of short term credit (including buyers' / suppliers' credit) in the nature of 'bridge finance', under the approval route, subject to the following conditions:-

(i) the bridge finance shall be replaced with a long term ECB;

(ii) the long term ECB shall comply with all the extant ECB norms; and

(iii) prior approval shall be sought from the Reserve Bank for replacing the bridge finance with a long term ECB.

3. The designated AD - Category I bank shall monitor the end-use of funds and banks in India will not be permitted to provide any form of guarantees. The designated AD - Category I bank shall evidence the import of capital goods by verifying the Bill of Entry. All other conditions of ECB, such as eligible borrower, recognized lender, all- in-cost, average maturity, prepayment, refinancing of existing ECB and reporting arrangements shall remain unchanged and should be complied with.

4. The amended ECB policy will come into force with immediate effect and is subject to review.

External Commercial Borrowings (ECB) – Rationalisation and Liberalisation

Ref.: A. P. (DIR Series) Circular No. 27 dated September 23, 2011

Attention is invited to the Foreign Exchange Management (Borrowing or lending in foreign exchange) Regulations, 2000, notified vide Notification No. FEMA 3/2000-RB dated May 3, 2000, amended from time to time and the A.P. (DIR Series) Circular No. 5 dated August 1, 2005, amended from time to time relating to the External Commercial Borrowings (ECB).

2. On a review of the extant ECB policy, it has been decided, in consultation with the Government of India, to further rationalise and liberalize the ECB guidelines as under:-

(i) Enhancement of ECB limit under the automatic route

(a) Eligible borrowers in real sector-industrial sector-infrastructure sector can avail of ECB up to USD 750 million or equivalent per financial year under the automatic route as against the present limit of USD 500 million or equivalent per financial year.

(b) Corporates in specified service sectors viz. hotel, hospital and software, can avail of ECB up to USD 200 million or equivalent during a financial year as against the present limit of USD 100 million or equivalent per financial year subject to the condition that the proceeds of the ECBs should not be used for acquisition of land.

(ii) ECBs designated in INR

(a) 'All eligible borrowers' can avail of ECBs designated in INR from foreign equity holders under the automatic/ approval route, as the case may be, as per the extant ECB guidelines.

(b) NGOs engaged in micro finance activities will, however, be permitted to avail of ECBs designated in INR, as hitherto, under the automatic route from overseas organizations and individuals as per the extant guidelines.

(iii) ECB for Interest During Construction (IDC)

It has been decided to consider IDC as a permissible end-use for the Indian companies which are in the infrastructure sector, where "infrastructure" is defined in terms of the extant guidelines on External Commercial Borrowings (ECB) under the automatic/approval route, as the case may be, subject to the following conditions:-

(a) that the IDC is capitalized; and

(b) is part of the project cost.

3. All other aspects of the ECB policy such as eligible borrower, recognised lender, all-in-cost, average maturity period, prepayment, refinancing of existing ECB and reporting arrangements shall remain unchanged

4. The amended ECB policy will come into force with immediate effect and is subject to review at any point of time.

5. Necessary amendments to the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000 dated May 3, 2000 are being issued separately wherever necessary.

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FINANCIAL REPORTING STANDARDS

Introduction:

In previous column, we discussed on Exposure Draft issued by International Public Sector Accounting Standards Board on "Key Characteristics of Public Sector with Potential Implications for Financial Reporting". This column dwells on the IPSAS 24, "Presentation of Budget Information in Financial Statements".

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Reason for Issuing this IPSAS:

Most governments, national, state / provincial and local bodies make publicly available budget information. The budget reflect the financial characteristic of the government's plans for the forthcoming period, are a key tool for financial management and control, and is the central component of the process that provides for government and parliamentary oversight of the financial dimensions of operations.

IPSAS 1, "Presentation of Financial Statements", encourages inclusion in the financial statements of a comparison with budgeted amounts where the financial statements and budgets are on the same basis. However, the budgets for which the entity is held publicly accountable may not be prepared on the same basis as the financial statements. IPSAS 1 does not provide guidance on the details to be disclosed or the manner of presentation if an entity elects to make budget amounts available in its financial statements.

Objective of IPSAS 24:

IPSAS 24 requires comparison of budget amounts and the actual amounts arising from execution of the budget to be included in the financial statements of entities that are required to, or elect to, make publicly available their approved budget(s), and for which they are, therefore, held publicly accountable. IPSAS 24 also requires disclosure of an explanation of the reasons for material differences between the budget and actual amounts. This standard is applicable only to those public sector entities that follow accual basis of accounting.

Presentation of Comparison of Budget and Actual Amounts:

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The standard requires an entity to present a comparison of the budget amounts for which it is held publicly accountable and actual amounts, either as a separate financial statement or as additional budget columns in the financial statements. This comparison is to be presented for each level of legislative oversight:

- The original and final budget amounts;
- The actual amounts on a comparable basis; and
- By way of note disclosure, an explanation of material differences between the budget for which the entity is held publicly accountable and actual amounts, unless such explanation is included in other public documents issued in conjunction with the financial statements, and a cross reference to those documents is made in the notes.

The standard defines comparable basis as comparable basis means the actual amounts presented on the same accounting basis, same classification basis, for the same entities, and for the same period as the approved budget. The standard does not mandate budgets to be prepared on accrual basis. The standard recognizes that normally in case of governments, the budget is on cash basis. Thus, there is a basis difference between budget amounts and actual amounts. If these amounts are simply presented together, it would not a fair comparison. Therefore, in such a case, the standard requires the actual amounts stated in financial statements to be converted on budgetary basis of accounting and then a comparison to be presented. This might seem difficult and tedious on the face. However, the government or local body would have the required data of actual figures on budgetary basis also for control purposes. The standard requires a comparison or original and final budget amounts. Original budget is the initial approved budget for the budget period whereas final budget is the original budget, adjusted for all reserves, carry-over amounts, transfers, allocations, supplemental appropriations, and other authorized legislative

or similar authority changes applicable to the budget period. The explanation of material differences between actual and budget amounts will be included in notes to the financial statements unless

a) Included in other public reports or documents issued in conjunction with the financial statements, and

b) The notes to the financial statements identify the reports or documents in which the explanation can be found

Budget data can be presented as addition column in the balance sheet, income and expenditure account and cash flow statement only when the financial statements and the budget are prepared on a comparable basis. When the budget and financial statements are not prepared on a comparable basis, a separate Statement of Comparison of Budget and Actual amounts is presented. In such as case, the financial statements need to clarify that the budget and the accounting basis differ, and that the Statement of Comparison of Budget and Actual Amounts is prepared on a budget basis.

Budgets normally provide detailed information about particular programs, activities or entities. These details are often aggregated into broad classes under common budget heads, budget classifications, or budget headings for presentation to, and approval by, the legislature or other authoritative body. The disclosure of budget and actual information consistent with those broad classes and budget heads or headings will ensure that comparisons are made at the level of legislative or other authoritative body oversight identified in the budget documents.

The standard further requires the changes between original budget and final budget to be differentiated into reallocations and other factors. This can be given:

a) By way of note disclosure in the financial statements; or

b) In a report issued before, at the same time as, or in conjunction with, the financial statements, and shall include a cross reference to the report in the notes to the financial statements

The standard requires explanation of the following to be disclosed in notes to the financial statements:

- Budgetary basis
- Classification basis adopted in the approved budget
- Period of the approved budget
- Entities included in the approved budget

After all the above exercise, the standard comes to the point where it started. It requires the actual amount presented on a comparable basis to the budget to be reconciled to the following actual amounts presented in the financial statements, identifying separately any basis, timing and entity differences:

a) If the accrual basis is adopted for the budget, total revenues, total expenses, and net cash flows from operating, investing and financing activities; or

b) If a basis other accrual basis is adopted for the budget, net cash flows from operating, investing and financing activities.

Finally the standard provides a sigh of relief in that the disclosure of comparative information in respect of the previous period is not required.

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article is an expression borrowed from the US and from the OECD Commentary on the Model Convention (OECD MC) and the Act does not distinguish between a copyright and a copyrighted article. The definition of 'royalty' under the SL DTAA is differently worded, such that payment of any kind received as consideration for the 'use of or the right to any copyright' as against 'use of, or the right to use, any copyright' as found in other DTAAs with India. Thus, the definition in the SL DTAA is wider than the one found in the Act, such that it includes even consideration received for permitting another to use a copyright as royalty. Therefore, payments made by the Assessee ought to be classified as royalty and, accordingly, the withholding provisions apply on such payments.

To Summarise

Characterization of payments received for use or right to use software products has been a contentious issue in recent times. While there have been several rulings which have appreciated the distinction between use of a copyright and a copyrighted article in the case of shrink wrapped software, the present ruling does not seem to accept this distinction. It considers this concept as alien to the Act. Also, the present ruling concerns customized software which, perhaps, may not be considered to be at par with shrink wrapped software. While the definition of 'royalty' in the Act is wide, the OECD MC recognizes the distinction between a copyright and a copyrighted article. However, where DTAAs do not strictly follow the OECD MC, such as in the case of the SL DTAA, difficulties do arise in applying this distinction, as this ruling suggests. It would, therefore, be proper for Assessees to review their existing arrangements on account of cross-border software transactions.

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INDIRECT TAXES CORNER

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[I] IMPORTANT NOTIFICATIONS/CIRCULARS:

[1] COPY OF RECEIPT SHOULD NOT BE SENT IN CASE OF E-PAYMENT:

By Pubic Circular dated 30.8.2011, the department has decided in case of e-payment, the payment transaction is uploaded in payment transaction Integrated Financial Management System (IFMS) and therefore the details of e-payment are known to the department under the system and therefore it is not necessary to forward the receipt of the e-payment to the department by the dealer.

{II} Important Judgment of Gujarat High Court in case of Pre-deposit at the time of filing the appeal:

In case of Karishma Overseas Vs. State of Gujarat, the Hon. Gujarat High Court decided that the pre-deposit asked by the Authority of Rs. 70.00 Lacs is reduced to Rs. 5.00 Lacs looking to the merits of the case. The judgment is very important and so it is reproduced hereunder for the benefit of the readers.

The assessee is in appeal against the order of the Gujarat Value Added Tax Tribunal, Ahmedabad dated 15th June 2009. The appeal arises in the following factual background.

The appellant filed his return before the Sales Tax authorities claiming certain deductions and exemptions. However, the Assessing Officer, by an order dated 29th Nov. 2007, raised duty, interest and penalty demand of Rs. 1,66,39,140/- The issue was carried in appeal. The appellate authority required the appellant to deposit a sum of Rs. 40 Lacs by way of pre-deposit by its order dated 1st Oct. 2008. Since the appellant did not deposit the amount within the time permitted, his appeal came to be dismissed on 23rd Dec. 2008. The appellant went further in appeal before the Tribunal. The Tribunal, though accepted the request for remand of the proceedings, by impugned order dated 15th June 2009, required the appellant to deposit a sum of Rs. 70 Lacs with the State Authorities. The appellant, has, therefore, approached this Court in the present Tax Appeal.

In response to the notice for final disposal, Mr. Maithili Mehta appeared for the Sales Tax Department.

Counsel for the appellant submitted that the entire duty and penalty demand arose on account of the fact that the appellant, at the relevant time, could not produce certain certificates and declarations from the authorities of the State of West Bengal. He has submitted that if the claim of the appellant is verified on the basis of such documents, which the appellant would later on produce, there would be no duty demand arising. Counsel submitted that the authorities in West Bengal were not issuing necessary certificates, upon which the appellant had to approach the higher authorities and seek directions for issuance of such documents. These documents were available and presented before the Tribunal when the impugned order was passed.

Counsel for the Sales Tax Department, on instructions, stated that it is true that the entire controversy revolves around furnishing necessary declarations and by now the appellant has produced some of it. Such documents are yet to be verified and certain additional documents are yet not supplied.

From the contentions of the learned counsel of either side and the documents on record, we find that the issue is required to be decided afresh by the Assessing Officer, as already directed by the Tribunal. In the meantime, in view of the nature of controversy requiring the appellant to deposit a sum of Rs. 70 Lacs is, in our opinion, harsh.

As already noted, counsel for the appellant submitted that if the documents are taken into account the entire

duty and penalty demand would not survive. We, of course, cannot express our opinion on such issues as they are yet to be considered and finalized by the Assessing Officer. However, at this stage, to direct the appellant to deposit a sum of Rs. 70 Lacs, in our opinion, would be unjust.

Despite our above observations, we find that before the Assessing Officer and the appellate authority, the appellant had not defended his case with due seriousness.

In totality of the facts and circumstances of the case, therefore, this Appeal is disposed of by reducing the pre-deposit amount of Rs. 70 Lacs to Rs. 5 Lacs which the appellant may deposit with the Sales Tax Authorities within a period of two weeks from the date of this order. Upon such deposit, the Assessing Officer shall process the case afresh, as directed by the Tribunal, unmindful of the observations made herein by this Court. In addition to the documents already produced by the appellant, if additional documents are necessary, the authorities may indicate so.

With above direction, Appeal is disposed of.

[III] IMPORTANT TRIBUNAL JUDGMENTS:

[1] In case of **M/s. Bil Metal Industries**, the Hon. Tribunal has decided that the time limit of six months is not applicable to the rejection of goods transaction.

The Ld. Assessing Officer has not allowed the claim of rejection of goods on the ground that it was not within the period of six months. The appellant argued before the Hon. Tribunal that six months period is not applicable in case where the goods are rejected by the purchaser. The argument on behalf of the department that goods return and rejection of goods are similar transaction. Hon. Tribunal has rejected such contention and held that the disputed transaction is a transaction of rejection of goods, time limit of six months is not applicable to this transaction.

[2] In case of **M/s. Mohmadji Umaji & Co.** the Hon. Tribunal has decided that assessment order passed contrary to the earlier determination order passed u/s. 62 is set aside and the Assessing Officer is directed to pass an Assessment Order looking into consideration passed u/s. 62 of the Act. The appellant relied on the judgment in case of Nagri Mills Co. Ltd. which is reported in GSTB on Page No. 271, 1989.

[3] In case of **M/s. Hindustan Lever Ltd.** the Hon. Tribunal has set aside the purchase tax levied u/s. 16 on purchase of castor oil. The company has purchased castor oil against Form No. H from M/s. Umiya Industries whose R. C. is cancelled ab-initio. The company has exported the said castor oil in foreign country and the Assessing Officer levied the Purchase Tax u/s. 16 of the Act. The Assessing Officer also levied the Purchase Tax u/s. 15B on the purchase of corrugated boxes. Hon. Tribunal held that it was not the case that the purchase transaction of cator oil made from M/s. Umiya Industries was not genuine. R. C. of the said dealer was in force when the transaction was effected. The company has stopped buying goods from the said dealer as soon as it came to its knowledge that the R. C. of the said dealer is cancelled by the department and Hon. Tribunal has set aside the Purchase Tax levied u/s. 16 and 15B.

[4] In case of **Ashish Pharma** the Tribunal has decided that interest on refund is to be granted at 9% instead of 6%. The assessment of the appeal for the year 2003-04 and 2004-05 was completed in the year 2008 and at that time Gujarat Sales Tax Laws is repealed. Under the GVAT Act the interest is granted at the rate of 6% and not at 9% that was under the Sales Tax Laws u/s. 54(1). The Hon. Tribunal has decided that as per the Section 100 of VAT Act, all the rights and responsibilities is not repealed of the S. T. Act and therefore 9% interest is available to the appellant as per old section i.e. 54(1) of the Gujarat Sales Tax Act.

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Keep your THOUGHTS positive, they become your words,

Keep your WORDS positive, they become your actions,

Keep your ACTIONS positive, they become your DESTINY.

CST LAW UPDATE

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11. VALUE OF SIM CARDS SOLD BY THE APPELLANT TO THEIR MOBILE SUBSCRIBERS IS LIABLE FOR SERVICE TAX OR SALES TAX.

In the case of **IDEA MOBILE COMMUNICATION LTD. V. COMMISSIONER OF CENTRAL EXCISE AND CUSTOMS, COCHIN [2011] 43 VST 1 (SC)**

Background of the case:-

The appellant was selling SIM cards to its franchisees and was paying sales tax to the State and activating the SIM card in the hands of its subscribers on a valuable consideration and paying service tax only on the activation charges. The Department of Sales Tax included the activation charges as part of the sale consideration of SIM cards on the ground that activation is nothing but a value addition of the "goods" and thus comes under the definition of "goods" under the Kerala General Sales Tax Act,1963 and accordingly levied sales tax on the activation charges. The Department of Central Excise (Service Tax Department) observed that a mere SIM card without activation is of no use and held that the appellant is liable to pay service tax on the value of the SIM card also.

HELD THAT, Accordingly, It was established from the records and facts of the case that the value of SIM cards formed part of the activation charges as no activation was possible without a valid functioning of SIM cards and the value of taxable service was calculated under section 65(105)(zzzx) of the Finance Act, 1994 on the gross total amount received by the operator from the subscribers. Moreover, the assessing authority under the Sales Tax Act had dropped the proceedings conceding the position that SIM cards had no intrinsic sale value and were supplied to customers for providing telephone service to the customers. This stand of the sales tax authority was practically the end of the matter and signified the conclusion.

12. Whether Brach Transfer or Interstate sale.

In the case of **INDIAN RAYON AND INDUSTRIES LIMITED v/s COMMERCIAL TAX OFFICER MYLAPORE ASSESSMENT CIRCLE,CHENNAI AND OTHERS [2011] 43 VST 134 (Mad)**

Background of the case:-

The petitioner-dealer, engaged in manufacture and marketing of cement, stock and sold cement at Pondicherry. During the year 1996-97, the dealer transferred cement for sales to Pondicherry, which was handled by the clearing and forwarding agent of the dealer at Pondicherry. The dealer claimed exemption sales tax by reason of stock transfer. Verification of the records relating to 276 metrics tones, out of 2,242 metrics tones, revealed that the dealer had given instruction to its clearing and forwarding agent at Chennai specifically mentioning the name and address of the dealers/ customers to whom the cement was to delivered with their registration numbers and the rate per bag to be charged as well as the details of advance received from the customer/dealer at Pondicherry. The assessing officer found that the movement of goods to Pondicherry was an incident of contract of sale with Pondicherry dealers and consequently the dealer's claimed was rejected by the Commercial Tax officer on the ground that the transfer to Pondicherry where occasioned by way of inter-State sale falling under section 3(a) of the Central Sales Tax Act, 1956. This finding was confirmed by both the Appellate Assistant Commissioner and the Tribunal. On a writ petition:

Held, dismissing the petition, (i) that under section 3(a) of the Central Sales Tax Act, 1956 there is a deeming provision which states that a sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase occasions the movement of goods from one state to another. The finding of the authorities that the movement of the goods represented an inter-state sale in respect of 276 metric tons required no interference.

(ii) That however, the assessing officer was wrong in relying upon the three instances, for treating the transactions for entire assessment year as inter-state sale. The assessing officer was bound to examine each individual transaction and then decide whether it constituted inter-State sale exigible to tax or not under the provisions of the Central Sales Tax Act, There was no consideration of any individual transaction, barring the transaction relating to the 276 metric tons, out of 2,242 metric tones. Therefore, in respect of the rest of

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SERVICE TAX REVIEW

In this issue, judgment on Commercial training or coaching service are reproduced for the benefit of Members.

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1) Commercial Training or coaching services.

[2011] 32 STT 25 (Bang. - CESTAT)(Mag.)CESTAT, BANGALORE BENCH Abacus Brain Study (P.) Ltd. v. Commissioner of Central Excise, Hyderabad

Facts:-

Section 65(26) of the Finance Act, 1994 - Commercial training or coaching services - Stay order - Lower authorities sought to levy service tax on assessee on an activity of teaching mathematics through 'abacus' training programme, a recreational programme, under category of 'Commercial Training or Coaching' service - Whether in view of Fast Arithmetic v. Asstt. CCE [2009] 22 STT 353 (Bang. - CESTAT), assessee had made out a prima facie case for waiver of pre-deposit requirement - Held, yes [Stay granted]

HELD:-

This stay petition is filed for waiver of pre-deposit of the following amounts :-

(*i*) Service Tax of Rs. 30,20,604;
(*ii*) Interest on service tax under section 75 of the Finance Act, 1994;
(*iii*) Penalty of Rs. 30,20,604 under section 78 of the Act; and
(*iv*) Penalty of Rs. 1000 under section 76 of the Act.

The adjudicating authority has confirmed the service tax demand, imposed penalty and interest on the ground that the appellant has been rendering Franchisee service of selling 'abacus' system of arithmetic calculation.

- The learned Counsel appearing on behalf of the appellant submits that the issue is squarely settled in favour of the assessee in the case of *Fast Arithmetic* v. *Asstt. CCE* [2009] 22 STT 353 (Bang. - CESTAT) and hence, prays for waiver of pre-deposit of the amounts involved.
- The learned SDR reiterates the finding of the Commissioner (Appeals).
- On a careful consideration of the submissions made by both sides, we find that the lower authorities seek to levy service tax on activity of teaching mathematic through 'abacus' training program, a recreational program, under the category of 'Commercial Training or Coaching' serviced. We find that the decision cited by the learned Counsel in the case of *Fast Arithmetic* (*supra*) *prima facie* covers the issue in favour of the assessee. In view of this, we find that the applicant has made out a *prima facie* case for waiver of pre-deposit. The application for waiver of pre-deposit of the amounts involved is allowed and recovery thereof stayed till the disposal of the appeal.

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quantity of cement, i.e., 1,966 metric tons, the matter was to be remitted to the assessing officer for individual consideration afresh and in accordance with Law.

13. Whether Input Tax Credit is available on pesticides, manure, fertilizers and chemicals used for growing the tea plants?

In the case of **DIWAN BAHADUR S.L. MATHIS AND SONS v/s STATE OF KARNATAKA AND OTHERS [2011]43 VST 153 (Karn)**

Background of the case:-

The petitioner-dealer, engaged in the cultivation of tea plants and manufacture of commercial tea, sought a clarification under section 59 of the Karnataka Value Added Tax Act,2003. On whether it was entitled to claim input tax set-off from April 1, 2005 on the purchase of pesticides, manure, fertilizers and chemicals used for growing the tea plants. It was registered as a dealer under the Karnataka Value Added Tax Act, 2003. The authority in question held that it was not. On a Writ Petition:

Held, that the authority had proceeded on the fallacy that tea growing was an agriculture activity. The implication of the dealer not being an agriculturist and the tea not being agricultural or horticultural produce for the purpose of the Act had not been examined. What had required to be considered was the entitlement or otherwise based on the dealer's registration as a dealer under the Act, when the petitioner was not an agriculturist and tea was not an agricultural or horticultural produce.

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FROM PUBLISHED ACCOUNTS

AS 19 ACCOUNTING FOR LEASE

RAVIKUMAR DISTILLERIES LIMITED ANNUAL REPORT 2010-2011

Schedule forming part of financial statements for the year ending on 31st March, 2011

Schedules 23 (A)

A. SIGNIFICANT ACCOUNTING POLICIES:

(16) Lease

Finance Lease

Lease which effectively transfer to the company all the risks and benefits incidental to ownership of the leased item, are classified as Finance Lease. Lease rentals are capitalized at the lower of the fair value and present value of the minimum lease payments at the inception of the lease term and disclosed as leased assets. Lease payments are apportioned between the finance charges and reduction of the lease liability based on the implicit rate of return.

Operating Lease

Lease where the lessor effectively retains substantially all risks and benefits of the assets are classified as Operating lease. Operating lease payments are recognized as an expense in the Profit & Loss account on a Straight Line Basis over the Lease term.

DEVELOPMENT CREDIT BANK - ANNUAL REPORT 2010-2011

Schedule 17 – Significant Accounting Policies

(19) Leases

Leases where lessor effectively retains substantially all risks and benefits of ownership of the leased item are classified as operating leases. Operating lease payments are recognised as an expense in the Profit & Loss account on a straight line basis over the lease term.

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The author is practising since 1995. He can be reached at pamil_shah@yahoo.com

ADANI POWER LTD - ANNUAL REPORT 2010-2011

SCHEDULE – 18 Notes to Accounts

(A) SIGNIFICANT ACCOUNTING POLICIES

7. Leases

Assets acquired on leases where a significant portion of risks and rewards incidental to ownership is retained by the lessor are classified as operating lease.

Operating lease

Lease rental charged to profit & loss account or project development expenditure for lease agreements for right to use office premises, land, employees accommodation and Fleet are :

(rupees in crores)

Future minimum Lease payments	As at 31st March, 2011	As at 31st March, 2010
Not later than one year	123.93	7.23
Later than one year and not later than five years	451.97	4.48
Later than five years	315.76	2.20

The lease agreements are executed for period ranging between one year and fourteen years with a renewal clause and also provide for termination by either party by giving of prior notice.

TECPRO SYSTEMS LTD - ANNUAL REPORT 2010-2011

Schedule 14: SIGNIFICANT ACCOUNTING POLICIES & NOTES ON ACCOU..

(p) Lease

Lease arrangements where the risks and rewards incidental to ownership of an asset substantially vest with the lessor are classified as operating leases. Lease rents under operating leases are recognized in the Profit & Loss Account on a straight line basis over the lease term.

Notes to accounts

17. disclosure in respect of operating lease under accounting standard (AS)- 19 "Lease" prescribed by the Companies (Accounting standards) Rules, 2006 :

a) General description of the Company's Operating lease arrangements :

The company enters into operating lease arrangements for lease area offices, factory building, equipments and residential premises for its employees.

Some of the significant terms and conditions of the arrangements are:

- Arrangement for most of the premises may generally be terminated by the lessee or either party by serving one to three to six months' notice or by paying the notice period rent in lieu thereof.
- The lease arrangements are generally renewed on the expiry of the lease period subject to mutual agreement.
- The company shall not sub let, assign or part lease the possession of the premises without written consent of the lessor.

b) Lease rent charged to profit & loss account on account of minimum lease rentals Rs.258,558,707 (previous year Rs.269,299,905/-)

c) company also enters in to non-cancelable operating leases, the total of future minimum lease payments under non cancelable operating leases is given below :

(All amount in rupees)

Future minimum Lease payments	As at 31st March, 2011	As at 31st March, 2010
Payable Not later than one year	1,2312,873	10,051,168
Payable Later than one year and not later than five years	27,332,087	32,481,415
Later than five years	3,665,970	3,729,450

EXCEL INDUSTRIES LTD - ANNUAL REPORT 2010-2011

Schedule 'T': Notes on Consolidated Accounts

(l) Leases

(a) Where the Company is the lessee

Leases where the lessor effectively retains substantially all the risks and benefits of ownership of the leased term are classified as operating leases. Operating lease payments are recognized as an expense in the Profit & Loss account on a straight-line basis over the lease term.

(b) Where the Company is the lessor

Assets subject to operating leases are included in fixed assets. Lease income is recognised in the Profit & Loss Account on a straight-line basis over the lease term. Costs, including depreciation are recognised as an expense in the Profit and Loss Account. Initial direct costs such as legal costs, brokerage costs, etc. are recognised immediately in the Profit & Loss Account.

GOKALDAS EXPORTS LTD - ANNUAL REPORT 2010-2011

Schedules forming part of the Accounts -Schedule XV – Notes To Accounts

n) Accounting for leases

Leases where the lessor effectively retains substantially all the risks and benefits of ownership of the leased term are classified as operating leases. Operating lease payments are recognized as an expense in the Profit and Loss account on a straight-line basis over the lease term.

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BITS & BYTES

UNDERSTANDING XBRL

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X in XBRL stands for extensible. This refers to extensibility of taxonomy, the dictionary of the XBRL. An XBRL document is always linked with taxonomy and it is always interpreted by the computers with reference to the concepts defined in taxonomy. Thus the taxonomy do not resides within XBRL documents but it lives somewhere else and always available for reference. The publicly available taxonomies are on web and taxonomies created for internal use of an organization reside on its intranet. The basic is, an XBRL documents is always processed with reference to the taxonomy referred in it and the taxonomy is not a part of XBRL document but it is kept available for reference.

The separation of the XBRL document and taxonomy is the crux of its miracle of being extensible. Since it is separate from the XBRL document, it can be maintained independently. New concepts can be added to it. It is called extension.

Another excellent feature of the XBRL is "use of multiple taxonomies" in single XBRL document. There is no limit. Taxonomies are created by different group of the experts. Groups of accounting experts create taxonomies of accounting concepts and make it available to all. On the same line laws experts create taxonomies of concepts defining legal theories and make them available to all. An user, can use both type of taxonomy and create a XBRL document. An example is financial result of a company. It uses concepts of both accounting as well as law. If you do not find suitable concepts you can create your own taxonomy. You can also change others taxonomy, provided you are authorized by the system to do that.

Generally, users do not need to add new concepts in the existing taxonomy. Publishers make them as comprehensive as possible. However, special users may find possibility for addition of new concepts. For example, mining company or a company having oil rig may not find suitable item of fixed asset in the normal list of the fixed assets, they would like to add new concepts for describing their unique assets. Such expansions are controlled and systematic. Further extended concepts are identifiable so the users can notice them easily.

Taxonomy is not simple dictionary of words like other dictionary. Instead of a word, a concept is defined. This includes presentation and behavior of the class of the items covered by the concept. Say for example, cash on hand is highly liquid asset, it is presented as a part of current asset, its outstanding shows position on a particular date and it always have a debit balance.

The taxonomy is presented in tree structure and looks like index of contents of a large book. This style of presentation helps the reader to understand the relation between the items.

Beside this, an XBRL taxonomy can contains rules. XBRL rules are straightforward and simple but they do great jobs. It minimizes error and omission for example, cash balance cannot go credit or where there is addition to the secured loan, it will ensure that the disclosure of security offered by the company is made. Thus rules in the taxonomy allow computer and human to work more efficiently.

Another brilliant feature of XBRL is its constant structure. Uniformity of structure itself is biggest achievement. For any analysis, the first step is to buildup data in a uniform structure so that it can be consolidated. Majority of time of analyzer is wasted in getting the data in uniform structure. Data readily available in uniform structure saves a big chuck of time and the user can devote their time to more meaningful work of data analysis rather than losing time in data cleansing.

As the data is available in constant structure it almost work like a small database and using that database different in-house reports can be developed say for example, presentation of the financial data of the competitors in a way your management wants.

Other benefits of XBRL.

1. Reduction in cost. XBRL is high jump toward automation of financials preparation process. It may involve initial investment but at the end it saves a lot of recurring cost.
2. Information available on time.
3. Since the reported are prepared by system applying constant structure and concepts, the information contained in the reports is of a higher quality and more reliable.

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FROM THE GOVERNMENT

(A) INCOME TAX

1) CBDT specifies long-term infrastructure bonds for financial year 2011-12 for claiming deduction u/s 80CCF.

(For details refer notification no:- 50/2011 dated 9th September, 2011)

2) The Central government in pursuance of the powers conferred by item (h) of sub-clause (iv) of clause (15) of section 10 of the Income-tax Act, 1961 (43 of 1961), hereby authorises the entities mentioned below to issue, during the financial year 2011-12, tax free, secured, redeemable, non-convertible bonds of rupees 1,000 each in case of public issue and rupees 1,00,000 each in other cases, aggregating to amounts mentioned in the said table, subject to certain conditions:-

S. No. (1)	Entities (2)	Aggregate Amt. of Bonds (3)
1.	National Highways Authority of India	Rs. 10,000 crores
2.	Indian Railways Finance Corporation Ltd.	Rs. 10,000 crores
3.	Housing and Urban Development Corporation Ltd.	Rs. 5,000 crores
4.	Power Finance Corporation	Rs. 5,000 crores

(For details refer Notification No- 52/2011,dated 23rd September, 2011)

3) Applicability of TDS on the deposits in banks in the name of the registrar/prothonotary and senior master attached to the Supreme Court/High Court etc during the pendency of litigation of claim/compensation.

(For details refer circular no-8/2011 dated 14th October, 2011)

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CA. Kunal A. Shah
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4) Procedure for refund of TDS u/s 195 to the person deducting the tax as well amendment in circular no-7/2007, dated 23-10-2007.

(For details, refer circular no-7/2011, dated 27th September, 2011)

(B) SERVICE TAX

1) Issue of eligibility for exemption in case of telephone services for local calls provided by BSNL through Village Panchayat Telephones. (VPT)

(For details refer Circular No-146/2011, dated 20th September, 2011)

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STOP PRESS

- **Date of Filing Half Yearly Service Tax Returns Extended from 25.10.2011 to 26.12.2011**
- **CBDT revised Form No. 49A & introduced new Form No. 49AA w.e.f. 1-11-2011.**

HEALTH AND FUN

HEALTH & FUN

ANEMIA

Anemia is a condition that develops when your blood lacks enough healthy red blood cells.

Anemia is a decrease in number of red blood cells (RBCs) or less than the normal quantity of haemoglobin in the blood. The normal level of haemoglobin is generally different in males and females. For men, anemia is typically defined as haemoglobin level of less than 13.5 gram/100ml and in women as haemoglobin of less than 12.0 gram/100ml.

However, it can include decreased oxygen-binding ability of each haemoglobin molecule due to deformity or lack in numerical development as in some other types of haemoglobin deficiency. Because haemoglobin (found inside RBCs) normally carries oxygen from the lungs to the tissues, anemia leads to hypoxia (lack of oxygen) in organs. Because all human cells depend on oxygen for survival, varying degrees of anemia can have a wide range of clinical consequences.

In general, there are three major types of anemia, classified according to the size of the red blood cells:

1. If the red blood cells are smaller than normal. The major causes of this type are iron deficiency (low level iron) anemia and thalassemia.
2. If the red blood cells size are normal in size (but low in number), such accompanies chronic disease or related to kidney disease.
3. If red blood cells are larger than normal. Major causes of this type are related to alcoholism.

Causes, incidence, and risk factors

While many parts of the body help make red blood cells, most of the work is done in the bone marrow. Bone marrow is the soft tissue in the center of bones that helps form blood cells.

Healthy red blood cells last between 90 and 120 days. Parts of your body then remove old blood cells. A hormone called erythropoietin made in your kidneys signals your bone marrow to make more red blood cells.

CA. Ganesh Nadar
Practising since 1996. He can be reached at ganesh@dgsm.co.in

Haemoglobin is the oxygen-carrying protein inside red blood cells. It gives red blood cells their red colour. People with anemia do not have enough haemoglobin.

Possible causes of anemia include:

- Certain medications
- Chronic diseases such as cancer, ulcerative colitis, or rheumatoid arthritis
- Genetics: Some forms of anemia, such as thalassemia.
- Kidney failure
- Blood loss (for example, from heavy menstrual periods or stomach ulcers)
- Poor diet
- Pregnancy
- Problems with bone marrow such as lymphoma, leukaemia, or multiple myeloma
- Problems with the immune system that cause the destruction of blood cells
- Surgery to the stomach or intestines that reduces the absorption of iron, vitamin B12, or folic acid
- Too little thyroid hormone
- Testosterone deficiency

Symptoms of anemia may include the following:

- Fatigue
- Decreased energy
- Weakness
- Shortness of breath

- Light-headedness
- Palpitations (feeling of the heart racing or beating irregularly)
- Looking pale

Symptoms of severe anemia may include:

- Chest pain, angina, or heart attack
- Dizziness
- Fainting or passing out
- Rapid heart rate

Some of the signs that may indicate anemia in an individual may include:

- Change in stool colour, including black and tarry stools (sticky and foul smelling), maroon-colored, or visibly bloody stools if the anemia is due to blood loss through the gastrointestinal tract.
- Rapid heart rate
- Low blood pressure
- Rapid breathing
- Pale or cold skin
- Yellow skin called jaundice if anemia is due to red blood cell breakdown
- Heart murmur
- Enlargement of the spleen with certain causes of anemia

Anemia treatment

The treatment of the anemia varies greatly. First, the underlying cause of the anemia should be identified and corrected. For example, anemia as a result of blood loss from a stomach ulcer should begin with medications to heal the ulcer.

Sometimes iron supplements will also be needed to correct iron deficiency. In severe anemia, blood transfusions may be necessary. Vitamin B12 injections will be necessary for patients suffering from anemia of B12 deficiency.

Medicines that suppress the immune system

Medicine that helps your bone marrow makes more blood cells

Anemia Prevention

Some common forms of anemia are most easily prevented by eating a healthy diet and limiting alcohol use.

FUN

Murdered English

There are examples of some charming misprints. In Pune Cantonment they have a separate mess for officers of the Intelligence Bureau. The signboard reads “Intelligence Mess”.

Again in Pune, a devout truck driver has printed behind his vehicle: “God is grate.” Another warning overtakes “Horn Blow”.

And a butcher advertises his wares as “Farash meet of Pork sold here”.

The best is the signboard on a bakery: “Bakery Number One Dilruba & Sons The biggest loafers in town.”

Mistakes on a resume

These are from actual resumes:

“Personal: I’m married with 9 children. I don’t require prescription drugs.

“I am extremely loyal to my present firm, so please don’t let them know of my immediate availability.”

“Qualifications: I am a man filled with passion and integrity, and I can act on short notice. I’m a class act and do not come cheap.”

“I intentionally omitted my salary history. I’ve made money and lost money. I’ve been rich and I’ve been poor. I prefer being rich.”

“Note: Please don’t misconstrue my 14 jobs as ‘job-hopping’. I have never quit a job.”

“Number of dependents: 40.”

“Marital Status: Often. Children: Various.”

RESUME BLOOPERS

“Here are my qualifications for you to overlook.”

REASONS FOR LEAVING THE LAST JOB:

“Responsibility makes me nervous.”

“They insisted that all employees get to work by 8:45 every morning. Couldn’t work under those conditions.”

REASONS FOR LEAVING MY LAST JOB:

“Was met with a string of broken promises and lies, as well as cockroaches.”

“I was working for my mom until she decided to move.”

"The company made me a scapegoat - just like my three previous employers."

JOB RESPONSIBILITIES:

"While I am open to the initial nature of an assignment, I am decidedly disposed that it be so oriented as to at least partially incorporate the experience enjoyed heretofore and that it be configured so as to ultimately lead to the application of more rarefied facets of financial management as the major sphere of responsibility."

"I was proud to win the Gregg Typting Award."

SPECIAL REQUESTS & JOB OBJECTIVES:

"Please call me after 5:30 because I am self-employed and my employer does not know I am looking for another job."

"My goal is to be a meteorologist. But since I have no training in meteorology, I suppose I should try stock brokerage."

"I procrastinate - especially when the task is unpleasant."

PHYSICAL DISABILITIES:

"Minor allergies to house cats and Mongolian sheep."

PERSONAL INTERESTS:

"Donating blood. 14 gallons so far."

SMALL TYPOS THAT CAN CHANGE THE MEANING:

"Education: College, August 1880-May 1984."

"Work Experience: Dealing with customers' conflicts that arouse."

"Develop and recommend an annual operating expense fudget."

"I'm a rabid typist."

"Instrumental in ruining entire operation for a Midwest chain operation."

A Japanese Comes to India

A Japanese came to India. He took a AUTO to go to the airport.

On the way a HONDA overtakes,

Japanese: HONDA made in JAPAN very fast.....

Next a TOYOTA overtakes, he said TOYOTA made in JAPAN, very fast.

Airport came he asked how much?

Driver: 8000Rs

Japanese: why so expensive?

Driver: METER made in INDIA very fast...

Husband's Call to Hospital

Husband wanted to call the hospital to ask about his pregnant wife, but accidently called the cricket stadium.

He asks, How's the situation?

He was shocked & nearly died on hearing the reply.

They said, It's fine. 3 are out, hope to get another 7 out by lunch, last one was a duck..

Lift Not Working

3 FRIENDS living in a room at 100th floor of the building!

One day LIFT not working...! So they decided to tell a story for time pass!

They start to walk in steps!

1st person told an action story upto 50th floor! .....

2nd person told a comedy story upto 99th floor!

3rd person told most horror story which had only 1 sentence...! "I FORGOT THE ROOM KEY IN CAR".

Smart Salesman

A door to door salesman knocked on a door and a woman answered.

"Hello," said the man, "Would you like to buy a book titled 500 excuses to give your wife for staying out late ?"

"Why on earth would I buy a book like that ?" asked the woman.

"Because," replied the salesman, "I sold a copy to your husband this morning."

(Information compiled from various sources from internet)

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ASSOCIATION NEWS

CA. Kunal A. Shah
Hon. Secretary

CA. Ashok C. Kataria
Hon. Secretary

(A) FORTHCOMING PROGRAMMES

Details of forthcoming programme are as under:-

Date/Day	Time	Programmes	Speaker	Venue
05-11-2011 Saturday	7.00 pm to 9.00 pm	Diwali Get ToGether		Aangan Party plot, opp. Nandanvan -4, Jodhpur Gam, Satellite, Ahmedabad .
17.12.2011	8.30 am to 2.00 pm	Cricket Match President XI v/s Secretary XI		A.D.S.A Cricket Ground, Opp. Torrent Power House Sabarmati, Ahmedabad

(B) IN RETROPECT

Date/Day	Time	Programmes	Speaker	Venue
07-10-2011 Friday	6.00 pm to 8.00 pm	3rd Study Circle Meeting on VAT Audit Under Gujarat Value Added Tax Act,2003.	CA. Priyam R. Shah	Shantinath Hall, ICAI Bhawan, 123, Sardar Patel Colony, Naranpura, Ahmedabad.
14-10-2011 Friday	3.30 pm to 7.30 pm	2nd Brain Trust Meeting on (a) Recent Important Judgments of High Court (b) Recent Important Judgements of Tribunal	Shri Saurabh N. Soparkar Senior Advocate Shri Sanjay R. Shah	Shantinath Hall, ICAI Bhawan, 123, Sardar Patel Colony, Naranpura, Ahmedabad.
16.10.2011 Sunday	11.30 am to 01.30 pm	Ke Highlighs of the Direct Tax Code Balance under revised Schedule VI	CA. Devendra Jain –Mumbai CA. Kalpesh Mehta Mumbai	The Grand Bhagawati, S. G. Highway, Ahmedabad.

PUBLICATION FOR SALE

New Publication on "FEMA" 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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