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

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

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In Search of Godhead

Robin Sharma, renowned author and a leadership guru has given an interesting story in his book "Who will cry when you die?" Thousands of years ago, it was believed that every one who walked upon the earth was god. But humankind abused its limitless powers so the Supreme God decided to hide the Godhead, the source of all of this potential, so that no one could find it. The imperative question arose, where could such thing be hidden? First suggestion of placing it deep into the ground was rejected as some one would find it, digging deep. The other options of placing it in the deepest ocean or the highest mountain were also turned down as some one would dive deep in the ocean or scale highest peaks and find it some day. The Supreme God then found a solution to this. He decided to put this source of all power inside the hearts of every man, woman and child as they will never think to look there.

The story appears so very true in today's context considering the manner in which everyone is going about looking for God. The irony is that all our actions including the devotion seem more because of the fear of God rather than love of God. As put beautifully in the story, how many are able to look for God in a human being or for that matter every being, the ones that are marvelous creations of God. The need is to distinguish between the "Man made *Murats*" and "God made *Murats*".

Atman, the soul, the *Brahmn* is same in each and every being. One that is beyond body, mind and intellect. Those who have never tried to understand anything beyond the sensually perceivable world may raise the question, "If there is God, why can't we see Him? Such question may be a matter of laughter for many. Our identification with body, mind and intellect in all our exchanges without even having a thought of the spirit (the *Atman*) is an example of how ignorant we are. Whenever we interact with anyone, we identify only with the mind, body complex and not the spirit. *Atman* or *Brahmn,* in all beings is the same. Brahmn pervades all activity.

In *Kenopanisad* the guru explains God, *Brahmn* as:

That which indeed is the Ear of the ear, the Mind of the mind, the Speech of the speech, the Vital-air of the prana and the Eye of the eye. The wise having completely freed and risen above this world become immortal. [Kenopanisad - Mantra 2]

This may sound somewhat confusing at first instance as to what could be the Ear of the ear or the Eye of the eye. The answer to this is simple. It is known that we see through eyes, but there is force within that enables eyes to see, that force is Brahmn God. So is with ears. If eyes could see, then the body without life could also see. This enlivening force, the Brahmn, one which is non-dual resides in the heart of every human being is the substratum of the universe.

If there is one God in all then why don't we see it? We do not see it because we operate only through the body, mind and intellect. This can be best understood with a small experiment. When a light passes through a prism, the output of one coloured light is reflected in various different colours. Single coloured light appears in many colours on the other side of the prism. Similarly, when the *Brahmn* operates through the prism of body, mind and intellect, we see different individuals distinct from the one *Brahmn* rooted in all.

To love God is to love all. Lord Krishna in 12th chapter of Bhagwad Gita has enumerated 35 qualities of a devotee. The first and foremost quality stated in verse 13 is on the same thought and in fact would disqualify many devotees. "**One who hates no being**". Thus to love God, one needs to identify God everywhere, love all beings because the same God lives in all beings. Loving all fellow beings has been beautifully presented in a poem Abou Ben Adhem by James Henry Leigh Hunt. The poet has

contd. on page no. 4

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A Big Thankyou!

This is the 24th issue of the ACA Journal since the responsibility was first cast upon me as the chairman of Journal Committee for the first time. Over these two years, the ongoing endeavour has been to present the best to the readers. Various new columns including Mananam, Service Tax and Business Valuation were added along with the crossword contest. I am extremely happy to inform that members in very good numbers are sending their entries for the contest and regular participation from some of the past presidents in the contest is truly overwhelming and inspiring.

I would like to express my sincere gratitude to the two presidents who trusted me for the job. I must acknowledge that it is when the entire committee puts in the hard work, the result is magical. The support of the Journal Committee members including the past presidents in the committee is the reason of whatever little sense of accomplishment attributable. I also thank all the readers of the journal. It is because of the readers' interest, the journal is termed as the mouthpiece of the Association. As the tenure of the committee ends and new journal committee takes over, I would like to know from the members about their reading interest. I would like to receive a feedback from the members on the journal so far and what new features can be brought in so that the best of professional and reading resources can be inducted

This year we had the photograph of chartered accountants from different fields on the cover page of the journal. Some of the members have personally informed that they liked the idea. I would love to hear from rest of the members about the concept and also suggestions for the forthcoming year so that it can be passed on to the new committee for the consideration.

It's a Journey together, a big thank you for all the love!

Pranams,
CA. Ashok Kataria

Subhashini Giridhar is an Indian classical dancer of Bharathnatyam. She had the vehemence for dance since childhood. She started learning dance at the age of years 8. After CA in 2003 she acquired a post qualification degree DISA in the year 2004. She is also a practicing Chartered accountant in Mumbai. Her philosophy is that God made her to pursue CA along with her passion (Bharthnatyam) both with the same zeal and enthusiasm because God has chosen CA to fulfil her financial needs and Dance for her Inner bliss. She has been giving various solo performances since 1990 and has also performed in various sabhas.

contd. from page 3

ManananM

illustrated the true devotion to God. Abou dreamt of an angel who was writing names of those who loved God. He enquired whether his name was there in the list or not. When angel replied that his name was not in the list, he then requested the angel to write his name in the list of those who loved his fellow-men. Angel wrote the name and left. The next night the angel came with the list of those whom God loved. This list had Abou Ben Adhem's name on the top. The Poem follows:

ABOU BEN ADHEM

Abou Ben Adhem (may his tribe increase!)
Awoke one night from a deep dream of peace,
And saw, within the moonlight in his room,
Making it rich, and like a lily in bloom,
An angel writing in a book of gold:—
Exceeding peace had made Ben Adhem bold,
And to the Presence in the room he said
"What writest thou?"—The vision raised its head,
And with a look made of all sweet accord,
Answered "The names of those who love the Lord."
"And is mine one?" said Abou. "Nay, not so,"
Replied the angel. Abou spoke more low,
But cheerly still, and said "I pray thee, then,
Write me as one that loves his fellow men."
The angel wrote, and vanished. The next night
It came again with a great wakening light,
And showed the names whom love of God had blessed,
And lo! Ben Adhem's name led all the rest.

James Henry Leigh Hunt

From the President

CA. Yamal A. Vyas
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Friends and elders, this is my last communication to you all as President of CAA, and it is with a feeling of both satisfaction and trepidation that I write this. Satisfaction, because my tenure has been relatively free from any calamity, and trepidation because of the many challenges that the profession and in particular CA Association Ahmedabad faces.

While we are unable to do much about the professional challenges faced by the profession at large, there are a few things which I feel I should point out to you all. First of all, the membership strength. At the start of my tenure I had written that out of more than 8000 members of Ahmedabad Branch of ICAI, we have hardly 1400 members.

During the year, we tried very hard to increase the membership, and we did succeed to a degree, but there is much more that we can do. Once again, my earnest request to you all to ensure that all the CA non members of your office, family or friend circle obtain the membership of CAA.

The second challenge we face is of attendance in programmes of professional interest. Like my predecessors, I also tried throughout the year to ensure that there were good programmes of academic interest for members. However hard we all tried, the programmes elicited, at best, a lukewarm interest. I am seriously worried and also confused.

I am worried because after the introduction of compulsory CPE hours requirement, this trend has been visible for the last decade or more. But, CAA has always been a training ground for young professionals who have the ability and willingness to become public speakers. My experience has been that even after repeated efforts we were not able to identify more than a handful good, enthusiastic young faculty for our programmes. This is certainly worrisome, and I wish my successor is more successful in this aspect.

I am confused, because we tried out all kinds of programmes, but at the end of my one year tenure, I a unable to make out what subject interests out members more in a meeting. The things are clear as far as seniors are concerned. For them, Income Tax holds great interest. But the young members have not demonstrated any definite interest. This is reason for worrying. I need not say more.

Friends, another concern has been the sparse interest in the Mutual Benefit Scheme of the Association. As you all are aware, we all contribute on the demise of a member and his family members are given the amount so collected. The nominees of members who expired during the year received more than Rs. 3.5 lacs per expired member.

Now, there was a request from a few young members of the Scheme for cancellation of their membership, as they had a concern. New young members are not joining the scheme, and in the long run, the youngsters who are presently members, may not find too many people to contribute to their nominees when the need would arise. This is a request to those young members who I know do a lot of social service outside the Association also but have apprehension regarding the future of this scheme.

I agree that their concern is valid, but in my view, we must consider contributions to the scheme as expression of gratitude to our profession. I once again request those members who have withdrawn from the scheme to rejoin at the earliest.

In conclusion, I must thank all of you, especially all the colleagues who contributed to the working of the Association during the year and the elders who guided me whenever I needed advice. I am associated with a number of organisations, but the kind of friendly and family like atmosphere that prevails at CAA is unique in every way. I wish my successor and his team a very successful year, and the Association many many more years of increasing success.

CA. Yamal Vyas
President

Reverse Charge Mechanism on services provided by Government or Local Authority

CA. Anuj J. Sharedalal
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Introduction:

The Government of India has been increasing the scope of taxability of services year after year in the negative list regime. One of the crucial tools of the Government to collect taxes in an efficient manner has been the Reverse Charge Mechanism. Generally, service tax liability is to be discharged by the services provider. However, in cases where the government feels that it would be better to collect the tax from service receiver rather than the service provider, it notifies such services from time to time under the reverse charge mechanism by amending Notification No 30/2012-ST.

This article discusses the recent change brought about vide Notifications 15/2015-ST and 16/2015-ST, dated 1st March, 2016, with effect from 1st April, 2016, to bring certain services provided by Government or Local Authority to business entities under the reverse charge mechanism. Further, special focus has also been given to the latest TRU Circular No. 192/02/2016-Service Tax in this matter issued on 13th April, 2016 along with Notification Nos. 22/2016-ST to 24/2016-ST dated 13th April, 2016.

Governments and local authorities render a number of services to the citizens, private entrepreneurs, corporations etc. Some of these services maybe provided as an obligation or purely in public interest or as a part of statutory functions and some of these services may be provided in the same manner as any private player would provide them. E.g. Services such as renting of immovable property, laboratory testing services, security services etc. are provided by government as well as private players.

Though the Government has come out with a TRU Circular as stated above, it will be interesting to see how the authorities look at all these aspects while deciding to tax or not to tax any activity performed by the government or local authority for the business entities.

Hence, this single change, as given above, in Reverse Charge Mechanism regarding services provided by government or local authorities to business entities is going to affect the business entities on a huge scale in the coming days.

Background:

Before 1st April, 2016, services provided by the Government or a local authority, excluding certain services specified under Section 66D(a), were in the Negative List. Service tax used to apply on the "support service" provided by the Government or local authority to a business entity under Section 66D(a)(iv).

A provision was made vide Finance Bill 2015 from a date to be notified in future, by amending Section 66D(a)(iv), to exclude all services provided by the Government or local authority to a business entity from the Negative List.

Accordingly, the amendment has been given effect to from 1st April, 2016, and all services provided by the Government or local authority to a business entity, except the services that are specifically exempted, or covered by any other entry in the Negative List, shall be liable to Service Tax.

At the same time, the government has shifted the incidence of tax in the case of all taxable services provided by government or local authority to the service receivers with effect from 1st April, 2016 vide notification 16/2016-Service Tax dated 1st March, 2016 read with 7/2015-ST dated 1st March, 2015.

Analysis of the amendment:

1. Legal provisions relating to reverse charge mechanism:

   Notification No. 30/2012-ST dated 20-6-2012 as amended from time to time reads as under from 1st April, 2016:

   "I. The taxable services, -

   (A) (iv) provided or agreed to be provided by, -

   (C) Government or local authority excluding, -

   (1) renting of immovable property, and

   (2) services specified in sub-clauses (i), (ii) and (iii) of clause (a) of section 66D of the Finance Act, 1994, to any business entity located in the taxable territory;"

   The below terms need to be analysed in order to understand the impact of this change:

   - What are the functions performed by Government or local authority? What all out of these functions can be called as a service?
   - What are Taxable services? Which services are excluded from the scope of taxable services provided by Government or local authority?
   - What is meant by the terms Government and local authority?
   - What is meant by the term business entity?
   - What shall be the Point of Taxation?

   All these aspects have been discussed one by one in the following paragraphs.

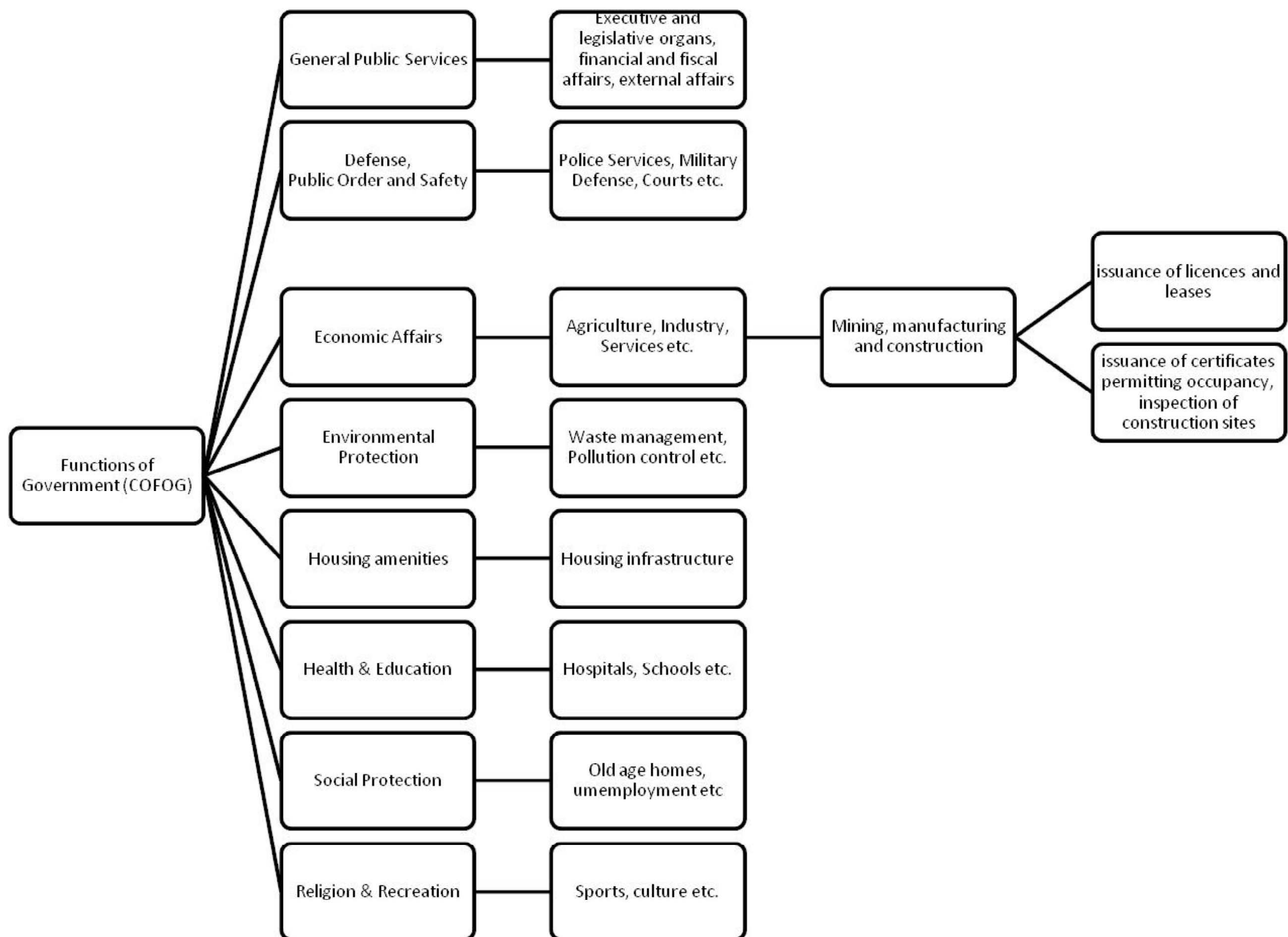
2. Functions performed by Government or local authorities:

   As given in the introductory paragraph, Governments, be it Centre or State, and local authorities, provide various services to citizens and business entities. To understand these services in the context of Service Tax Law, one needs to classify the functions performed by any government or local authority.

   - Functions performed by Government:

   Classification of the Functions of Government (COFOG) (*source: http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=4*) is a classification defined by the United Nations Statistics Division. These functions are designed to be general enough to apply to the government of different countries. The accounts of each country in the United Nations are presented under these categories. The purpose of this is that the accounts of different countries can be compared. Each function in COFOG contains detailed explanatory notes regarding the duties performed by a Government in respect of that particular function.

   These functions along with some of the functional divisions are given in the form of a chart below which can help one in understanding the functions. It is not possible to lay down the entire list in the form of a chart and hence it is advised to refer the actual COFOG for entire list of functions:



These functions can further be divided into two parts – statutory functions and other functions. Statutory functions performed by Government include providing facilities to public at large, infrastructure, justice, maintain law and order etc. These functions cannot be considered as service as they are purely in public interest and are undertaken as a mandatory or sovereign function. These functions are performed by the Government from the taxes collected from business entities, be it direct or indirect taxes.

The question of taxability will arise only in the case of other functions. Thus, one will have to distinguish between statutory and other function in each case. Generally, there is no direct service provided to a person for a statutory function. E.g. Income tax paid to Income Tax Department is revenue for the government, however, it can be said that no service is provided by the Government to the tax payer exclusively against its/his/her share of tax paid. The same is confirmed by TRU Circular No. 192/02/2016-Sevice Tax dated 13th April, 2016 at page 2, Point No. 3 which read as follows:

"Taxes, cesses or duties levied are not consideration for any particular service as such and hence not leviable to Service Tax. These taxes, cesses or duties include excise duty, customs duty, Service Tax, State VAT, CST, income tax, wealth tax, stamp duty, taxes on professions, trades, callings or employment, octroi, entertainment tax, luxury tax and property tax."

Similar view has been expressed in the above circular for fines and penalties paid under any law for violation of law and hence they will not be regarded as a service.

However, fees paid for security services to the police department to protect the life of a specific

person or for a sports event organized by a business entity would be termed as a service provided by the Government exclusively to that person, since, this service is over and above the statutory function of maintaining law and order in the country. There is an element of *quid pro quo* i.e. a payment has been made for getting a service in return and hence the said act will be a service provided. The same is confirmed by TRU Circular No. 192/02/2016-Sevice Tax dated 13th April, 2016 at page 2, Point No. 5 which read as follows:

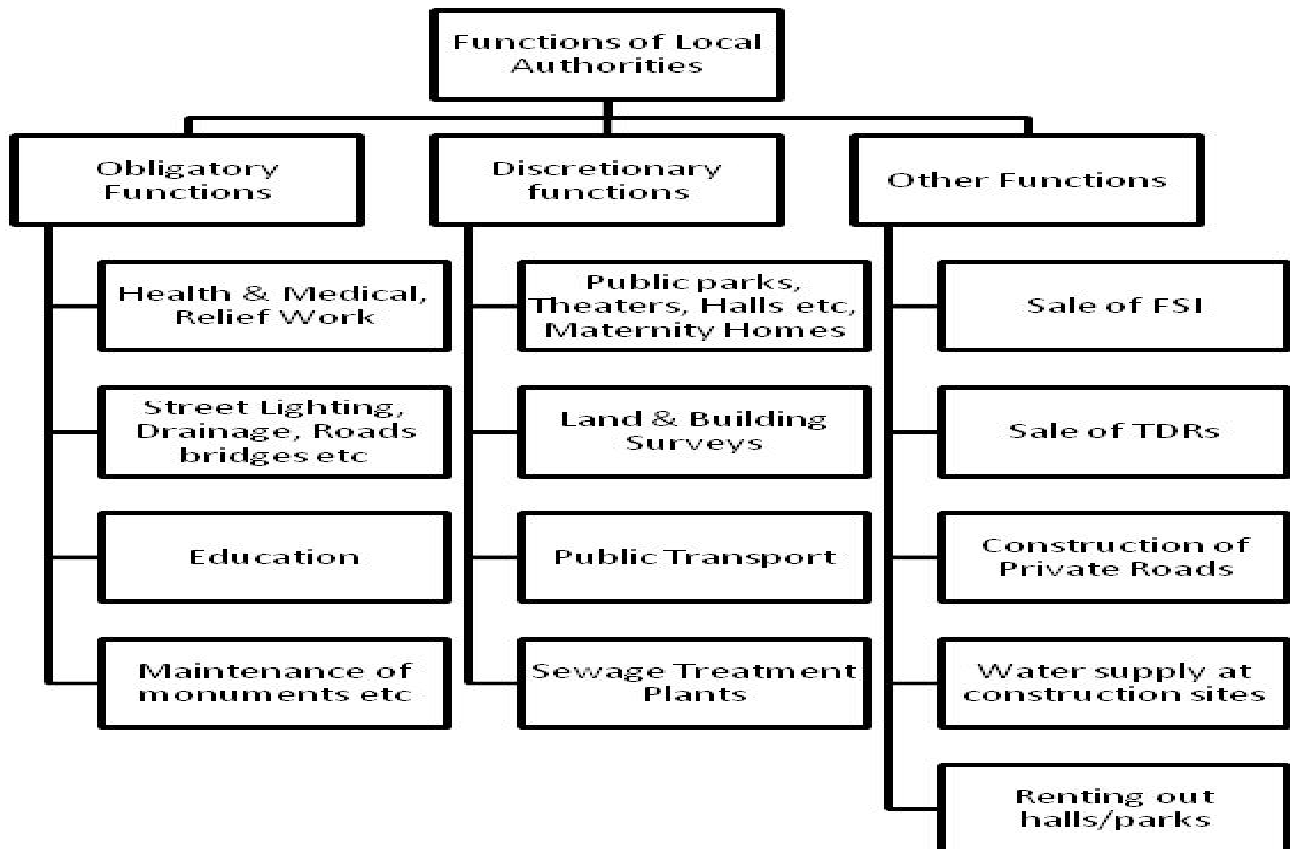
"It is clarified that any activity undertaken by Government or a local authority against a consideration constitutes a service and the amount charged for performing such activities is liable to Service Tax. It is immaterial whether such activities are undertaken as a statutory or mandatory requirement under the law and irrespective of whether the amount charged for such service is laid down in a statute or not. As long as the payment is made (or fee charged) for getting a service in return (i.e., as a quid pro quo for the service received), it has to be regarded as a consideration for that service and taxable irrespective of by what name such payment is called. It is also clarified that Service Tax is leviable on any payment, in lieu of any permission or license granted by the Government or a local authority."

- Functions performed by local authority:

A local authority, in general terms, is responsible for the civic infrastructure and administration of an area, village, town, city or cantonment etc. After analyzing the provisions of Bombay Provincial Municipal Corporation Act, it appears that there are three kinds of services provided by local authorities.

Just like in the case of Government, the question of taxability will arise only in the case of other functions performed by local authorities.

These functions or services are given in the form of a chart below which can help one in easily understanding the same:



3. Services provided by Government or local authorities and its taxability:

- Constitutional validity:

It is not in question whether taxability of services provided by Government or local authorities is constitutionally valid or not under. Article 285 exempts property of the Union from State Taxation and Article 289 exempts property of the State from Union Taxation. However, Articles 285 and 289 do not apply to indirect taxes. Various judicial authorities have held the same from time to time.

It was held by the Hon'ble Supreme Court in Karya Palak Engineer, CPWD Vs. Rajasthan Taxation Board, Ajmer 2004 (177) ELT 3 (SC) that Union is not exempted from the levy of indirect tax under Article 285 of the Constitution.

Similarly, states and local authorities are also not exempted from levy of service tax as held in State of Madhya Pradesh Vs. CCE [2007] 6 STT 467 (New Delhi – CESTAT) and Kishore K.S. v. Cherthala Municipality (2011) 24 STR 538 (Ker.)

The Hon'ble High Court in the case of Cherthala Municipality above held that the imposition of service tax on renting of properties by Municipalities is not in violation of Article 289 of the Constitution which empowers the Union to levy tax on the property of the 'State' or on its income since the expression 'State' in Article 289 of the Constitution does not embrace 'municipalities' which are separately defined under Article 243P(c) of the Constitution.

The Hon'ble CESTAT held in the above case concerning levy of indirect taxes on a state as follows: *"As regards the provisions of Article 289 of the Constitution of India, it is a settled legal position that the exemption provided is of property and income of State from Union taxes and since, the import or export duties or excise duties were not taxes on property including the goods as such, but on the happening of a certain event in relation to the goods, namely, import or export of goods or production or manufacture of goods, Article 289 did not debar the Union from levying customs and excise duties on goods imported or manufactured by a State irrespective of whether they were used or not used for the purposes of trade and business."*

- Definitions u/s 65B:

a. Government & Local Authority (65B(26A) & (31)): The definition of government has been worded in such a manner so as to include all Departments of Central Government, a State Government and its Departments and a Union territory and its Departments. However, entities, the accounts of which are not required to be kept in accordance with Article 150 of the Constitution or the rules made thereunder are excluded from the definition of Government.

   Local Authority includes Panchayats, Municipalities, Municipal Committee, District Board, Cantonment Board, Regional Council and development board.

   Hence, one may have to examine on a case to case basis, whether the service provider is Government/Local Authority or not based on above definitions. Such a preliminary analysis will be an important first step to determine the applicability of reverse charge mechanism in the case of service receiver.

b. Person (65B(37)): The definition of person as given in Section 65B(37) includes Government as well as local authority.

c. Service (65B(44)): The definition or interpretation of service as given u/s 65B(44) nowhere excludes from its scope, any kind of services provided by the government or local authority to any

person. Hence, any activity other than those which are excluded in 65B(44) carried out by government or local authority for any person for a consideration will be a service. Once it has been established that the activity is service, and the service provider is government or local authority as per service tax law, one needs to move ahead and check the taxability of such service.

d. Business entity (65B(17): *'Business entity' has been defined u/s 65B(17) as any person ordinarily carrying out any activity relating to industry, commerce or any other business or profession*. Hence, the term business entity shall include any category of person involved in business or profession. A question would arise whether public charitable trust and Companies registered u/s 8 of Companies Act, 2013 (erstwhile Section 25 of Companies Act, 1956) which are held to be carrying on business, trade or commerce as per Section 2(15) of Income Tax Act, 1961 would be considered as a business entity for service tax also. Most of such institutions would have contested that their activities are not business, trade or commerce and therefore such entities cannot be said to be a business entity. However, a call would have to be taken based on the facts and circumstances of each case.

- Declared List: Clauses (a) to (i) of section 66E declare certain services as a taxable service. Section 66E does not make any specific reference to any services provided by government or local authority. However, these services even if provided by government or local authority will be considered as taxable services considering the above analysis of definitions.

- Negative List: Section 66D(a) has specified certain services provided by Government or local authority as non-taxable services. As per Section 66D(a), all the services other than below services are non-taxable services at present:

a. Services by the Department of Posts by way of Speed Post, express parcel post, life insurance, and agency services provided to a person other than Government.

b. Services in relation to an aircraft or vessel, inside or outside the precincts of a port or an airport.

c. Transport of goods or passengers. (It is necessary to read this provision with Section 66D(o) and (p). Since the focus of this article is on reverse charge mechanism, detailed discussion on this aspect has been avoided here)

d. 'Any service' other than a,b, and c above provided to business entities.

It is important to note that with effect from 1st April, 2016, 'any service' provided to a business entity by government or local authority is taxable as can be seen in 'd' above unless covered by exemption notification No 25/2012-ST dated 20.06.2012 as amended from time to time.

- Mega Exemption List: Notification No 25/2012-ST, dated 20-06-2012, did not make any specific reference to any services provided by government or local authority till being amended by Notification No 22/2015-ST dated 13st April, 2016. The said Notification has inserted various services provided by the Government or local authorities in the Mega Exemption List and the same are given below:

(i) Regulation of land-use, construction of buildings and other services listed in the Twelfth Schedule to the Constitution which have been entrusted to Municipalities under Article 243W of the Constitution, when provided by Government or a local authority. Similarly,

activity in relation to any function entrusted to a Panchayat under Article 243G of the Constitution is also exempted.

(ii) Services provided by Government or a local authority to another Government or local authority other than services specified in subclauses (i),(ii) and (iii) of clause (a) of section 66D.

(iii) Services provided by Government or a local authority by way of issuance of passport, visa, driving licence, birth certificate or death certificate.

(iv) Services provided by Government or a local authority where the gross amount charged for such services does not exceed Rs. 5000/- other than services specified in subclauses (i),(ii) and (iii) of clause (a) of section 66D. For cases of continuous supply of service, the exemption shall be applicable where the gross amount charged for such service does not exceed Rs. 5000/ - in a financial year.

(v) Services provided by Government or a local authority by way of tolerating non performance of a contract for which consideration in the form of fines or liquidated damages is payable to the Government or the local authority under such contract.

(vi) Services provided by Government or a local authority by way of - a) registration required under any law for the time being in force; b) testing, calibration, safety check or certification relating to protection or safety of workers, consumers or public at large, required under any law for the time being in force.

(vii) Services provided by Government or a local authority by way of assignment of right to use natural resources to an individual farmer for the purposes of agriculture.

(viii) Services by Government, a local authority or a governmental authority by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution.

(ix) Services provided by Government or a local authority by way of assignment of right to use any natural resource subject to certain conditions.

(x) Services provided by Government or a local authority by way of allowing a business entity to operate as a telecom service provider or use radiofrequency spectrum subject to certain conditions.

(xi) Services provided by Government by way of deputing officers after office hours or on holidays for inspection or container stuffing or such other duties in relation to import export cargo on payment of Merchant Overtime charges (MOT).

However, all other services given in the Notification No 25/2012-ST, viz. other than those which are enumerated above, if provided by government or local authority will still be considered as exempt services.

Thus, to conclude, all services provided by the Government or local authority to a business entity, except the services that are specifically exempted vide Notification No 25/2012-ST, or covered by any another entry in the Negative List i.e. Section 66D(b) to Section 66D(q), shall be liable to service tax with effect from 1st April, 2016.

4. Scope of Reverse Charge Mechanism vis-à-vis taxable services provided by Government and local authorities:

Once it is determined that the service provided by government or local authority is taxable, the provisions of reverse charge mechanism need to be seen by the service receiver.

The pre-requisite for applicability of reverse charge mechanism in the case of taxable service

provided by government or local authority is that, the service receiver should be a business entity as defined u/s 65B(17).

If the service receiver is a business entity, the nature of taxable service needs to be seen as a next step.

The 'taxable' services other than below are covered under reverse charge mechanism when received by a business entity:

a. Renting of immovable property.

b. Services by the Department of Posts by way of Speed Post, express parcel post, life insurance, and agency services provided to a person other than Government.

c. Services in relation to an aircraft or vessel, inside or outside the precincts of a port or an airport.

d. Transport of goods or passengers.

Thus, huge responsibility has been cast by the government on business entities which receive services from government or local authority with effect from 1st April, 2016. The service receivers will be at the receiving end if they are ignorant of the law at the time of making payment to government or local authorities.

5. <u>Point of Taxation:</u>

Rule 7 of the Point of Taxation Rules, 2011, which lays down the provisions for deciding the point on taxation in case of reverse charge mechanism, has been amended vide Notification No. 24/2016–ST dated 13th April, 2016 to provide that in case of services provided by Government or a local authority to any business entity, the point of taxation shall be the earlier of the dates on which:

(a) any payment, part or full, in respect of such service becomes due, as indicated in the invoice, bill, challan, or any other document issued by Government or a local authority demanding such payment; or

(b) date when such payment is made.

To put it in simpler words, point of taxation shall be earlier of the dates on which payment becomes due or payment is made.

The date on which such payment becomes due shall be determined on the basis of invoice, bill, challan, or any other document issued by the Government or a local authority demanding such payment.

6. <u>CENVAT Credit:</u>

It has been clarified by TRU Circular No. 192/02/2016-Sevice Tax dated 13th April, 2016 at Point No 15 on Page 8 that CENVAT Credit may be availed on the basis of challan evidencing payment of Service Tax by the Service recipient as given under Clause (e) of sub-rule (1) of rule 9 of CENVAT Credit Rules, 2004.

7. <u>Examples of various taxable services provided by government or local authority and its taxability under reverse charge mechanism:</u>

Apart from the analysis of provisions above, an attempt has been made in the below table to identify and list down important services provided by government or local authority to various assesses along with applicability of reverse charge on the same. The below table also incorporates clarification on issues regarding levy of Service Tax on the services provided by Government or a local authority to business entities given by TRU Circular No. 192/02/2016-Service Tax dated 13th April, 2016 Hope readers will find it useful:

Reverse Charge Mechanism on services provided by Government or Local Authority

Sr. No.	Description of Service received by business entity or nature of payment	Whether Service?	Whether taxable service? i.e. Declared list, or out of Negative List and Mega Exemption List	Reverse Charge or normal?
1.	Rent of immovable property payable or paid to Municipal Corporation	Yes	Yes	Normal Charge
2.	Speed Post or Express Parcel Post Services received from Department of Posts	Yes	Yes	Normal Charge
3.	Agency commission paid to Department of Posts for bill collection services	Yes	Yes	Normal Charge
4.	Warehousing services provided by airport	Yes	Yes	Normal Charge
5.	Tickets purchased for employees in air conditioned train/coach	Yes	Yes	Normal Charge
6.	License Fees or Permission Fees payable to government or a local authority	Yes	Yes. See Note 1 below	Reverse Charge
7.	Impact Fees to local authority	Yes	Yes. See Note 1 below	Reverse Charge
8.	Fees for restaurant license to local authority assuming it is greater than Rs. 5,000/-	Yes	No. As services by way of registration required under any law are exempted in the Mega Exemption Notification.	NA
9.	Fees for additional FSI to local authority	Yes	Yes. See Note 1 below	Reverse Charge
10.	Fees for testing, calibration, safety check or certification relating to protection orsafety of workers, consumers or public at large, required under the law	No	NA	NA
11.	Appeal filing fees to Court or Tribunal	No. Excluded in section 65B(44)	NA	NA
12.	Fees for registration of Trademark paid to Registry of Trademarks assuming it is greater than Rs. 5,000/-	Yes	No. As services by way of registration required under any law are exempted in the Mega Exemption Notification.	NA

13.	Protection and Security services provided by Police Department for consideration	Yes	Yes. See Note 1 below	Reverse Charge
14.	Service Tax, State VAT, CST, income tax, wealth tax, stamp duty, taxes on professions, trades, callings or employment, octroi, entertainment tax, luxury tax and property tax paid to Government	No There is no specific activity performed by the government for the tax payer and hence these are not for any service as such.	NA	NA
15.	Late filing fees for late filing of returns paid to Government	No It is a compensatory payment i.e. in the nature of a fine where no service is rendered. *Fines and penalty chargeable by Government or a localauthority imposed for violation of a statute, bye-laws, rules or regulations are not leviable to Service Tax.*	NA	NA
16.	Registration fees paid to State Government for registration in revenue records of State Government assuming it is greater than Rs. 5,000/-	Yes	No. As services by way of registration required under any law are exempted in the Mega Exemption Notification.	NA
17.	Copying charges paid to sub-registrar for getting copies of documents from Revenue records of State Government assuming it is greater than Rs. 5,000/-	Yes	Yes. See Note 1 below	Reverse Charge
18.	Fees paid to government or legal authority, value of which per transaction or per challan does not exceed Rs. 5,000/-	Yes	No. As it is included in Mega Exemption Notification.	NA
19.	Fees paid by a business entity for grant of passport or visa for its employees assuming it is greater than Rs. 5,000/-	Yes	No. As it is included in Mega Exemption Notification.	NA
20.	Fees paid by an individual businessman for birth or death certificate assuming it is greater than Rs. 5,000/-	Yes	No. As it is included in Mega Exemption Notification.	NA

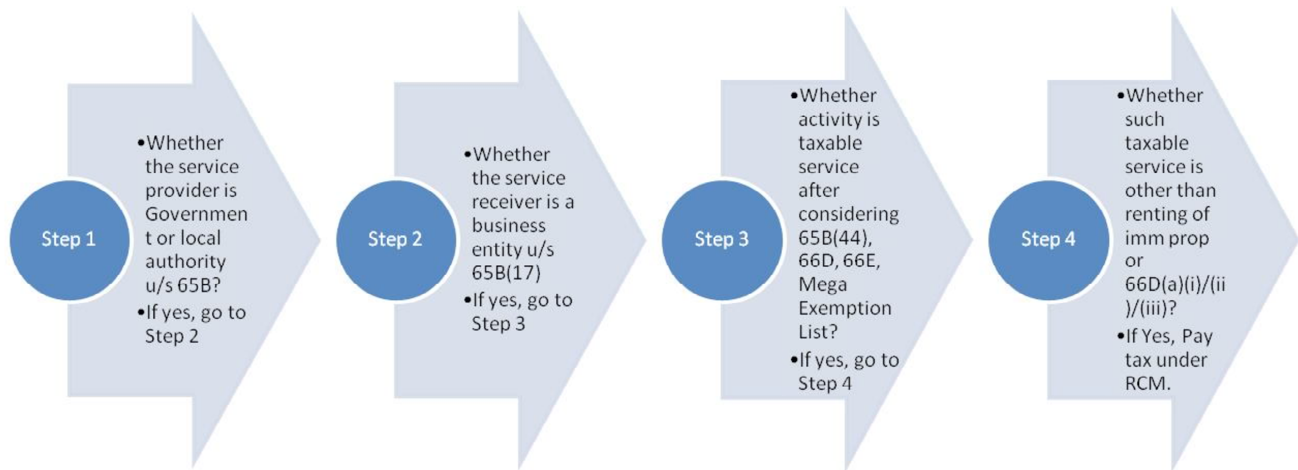
21.	Fines and liquidated damages payable to Government or a local authority for non-performance of contract entered into with Government or local authority	Yes	No. As it is included in Mega Exemption Notification.	NA

Note1 : It is clarified by TRU Circular No. 192/ 02/2016-Service Tax dated 13th April, 2016 that any activity undertaken by Government or a local authority against a consideration constitutes a service and the amount charged for performing such activities is liable to Service Tax. It is immaterial whether such activities are undertaken as a statutory or mandatory requirement under the law and irrespective of whether the amount charged for such service is laid down in a statute or not. As long as the payment is made (or fee charged) for getting a service in return (i.e., as a quid pro quo for the service received), it has to be regarded as a consideration for that service and taxable irrespective of by what name such payment is called.

It is also clarified that Service Tax is leviable on any payment, in lieu of any permission or license granted by the Government or a local authority.

8. <u>Conclusion:</u>

The steps to analyse the provision relating to reverse charge mechanism vis-à-vis taxable services provided by Government or local authorities has been summed up in the form of a chart below:



To sum up, huge responsibility has been cast by the government on business entities which receive services from government or local authority with effect from 1st April, 2016. The service receivers will be at the receiving end if they are ignorant of the law at the time of making payment to government or local authorities.

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Glimpses of Supreme Court Rulings

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1 RTI Act - The scope of 'fiduciary relationship':

The term 'fiduciary' refers to a person having a duty to act for the benefit of another, showing good faith and candour, where such other person reposes trust and special confidence in the person owing or discharging the duty. The term 'fiduciary relationship' is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transactions(s). The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted things, the fiduciary hast to act in confidence and is expected not to disclose the things or information to any third party.

The scope of fiduciary relationship consists of the following rules;

(i) *No conflict rule:* A fiduciary must not place himself in a position where his own interests conflict with that of his customer or the beneficiary. There must be 'real sensible possibility of conflict'.

(ii) *No profit rule:* A fiduciary must not profit from his position at the expense of his customer, the beneficiary.

(iii) *Undivided loyalty rule:* A fiduciary owes undivided loyalty to the beneficiary, not to place himself in a position where his duty towards one person conflicts with a duty that he owes to another customer. A consequence of this duty is that a fiduciary must make available a customer all the information that is relevant to the customer's affairs.

(iv) *Duty of confidentiality:* A fiduciary must only use information obtained in confidence and must not use it for his own advantage, or for the benefit of another person.

RBI has no legal duty to maximize the benefit of any public sector or private sector bank, and thus, there is no relationship of 'trust' between them. RBI has a statutory duty to uphold the interest of the public at large, the depositors, the country's economy and the banking sector. Thus, RBI ought to act with transparency and not hide information that might embarrass individual banks. It is duty-bound to comply with the provisions of the RTI Act and disclose the information sought by the respondents herein.

However, where information is required by mandate of law to be provided to an authority, it cannot be said that such information is being provided in a fiduciary relationship.

[(2016) (3 SCC 525) Reserve Bank of India vs. Jayantilal N. Mistry]

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From the Courts

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1 Daughters of Karta : Transfer of assets of HUF : No Clubbing: P. Shankaraiah Yadav HUF v/s. ITO (2015) 232 Taxman 757 (AP & Telangana) : (2015) 371 ITR 0386 (AP)

Issue :

Whether income out of assets of HUF transferred to daughters of Karta is to be clubbed in HUF as income?

Held :

Family arrangement of assessee HUF provided for allotment of a sum to each of six minor daughters of Karta in form of fixed deposits. Assessee claimed deduction of interest that accrued on fixed deposit receipts. A.O. held that document did not amount to partial partition and though it was a family arrangement, it did not have effect of taking away corresponding wealth from purview of HUF and accordingly he treated interest as income of HUF. It was held that when once HUF had settled a sum in favour of six minor daughters of Karta, corresponding amount ceased to be wealth or assets of HUF. Hence amount could not be treated as part of wealth of HUF.

2 Interest u/s 220(2) Not from date of filing Return of Income: Govindahary v/s. T.R.O. & Anr. (2015) 232 Taxman 750 (Karnataka) : (2015) 275 ITR 0541(Kar)

Issue :

From what date the interest is to be paid for default in payment of tax demanded vide notice u/s 156?

Held :

Assessing Officer raised demand of tax as per notice issued u/s 156. Assessee did not pay the tax demanded in said notice A.O. levied interest u/s 220(2), commencing from date on which return had been filed. Assessee contended that interest had to be paid from date commencing after date of period in accordance with Sec. 220(2). Section states that if assessee does not pay amount-demanded u/s 156, assessee is liable to pay simple interest at one and a half percent for early month or part of a month comprised in period commencing from day immediately following end of period mentioned in Sec. 220(1) and ending with day on which amount is paid. Therefore, the department was not justified in demanding petitioner to pay interest from date on which return had been filed.

3 Charitable Trust : Absence of dissolution clause : C.I.T. v/s. Tapagachha Sangh Mota (2015) 232 Taxman 715 (Guj)

Issue :

Whether absence of Dissolution Clause is fatal for granting registration u/s 12AA?

Held :

It is true that while considering the issue of registration certificate under section 12AA, the Commissioner is required to be satisfied himself about the objects of the trust or institution and the genuineness of its activities and after satisfying himself about the objects of the trust or institution and the genuineness of its activities may pass an order in writing registering the trust or institution and grant the registration certificate under section 12AA.

From the orders passed by the Commissioner refusing to grant registration certificate under Section 12AA and even from the order passed by the learned Tribunal, it appears that none of the authorities below have considered the above material and relevant aspect with respect to the satisfaction of the Commissioner with respect to genuineness of the trust. In a given case even in absence of any provision in the trust with respect to 'dissolution clause' in fact the trust is found so be genuine and /or genuineness of the trust is

established, the trust may be entitled to registration under section 12AA, however subject to fulfillment of conditions under section 12AA i.e. when the Commissioner is satisfied about the genuineness of the activities of the trust or the institution.

The orders passed by the Commissioner and Tribunal rejecting registration certificate u/s 12AA were quashed and set aside.

4 Allowability of business expansion expenses: C.I.T. v/s. S.R.F. Ltd. (2015) 232 Taxman 727 (Delhi) : (2015) 372 ITR 0425

Issue :

Whether business expansion expenses are revenue or capital expenses?

Held :

Assessee was engaged in manufacturing of nylon tyre cord fabrics, packaging film, fluorochemicals, chloromethane and refrigerant gases. During current year, assessee expanded its business and claimed expenses as per capitalisation costs. Assessing Officer treated it as capital expenditure. Commissioner (Appeals) also confirmed finding of Assessing Officer. Tribunal after considering existing business and expansion, held that there was an element of interlacing between new venture and existing venture, and consequently, expenses had to be treated as revenue expenditure. In view of judgment in Jay Engg. Works Ltd. v/s. CIT(2009) 322 ITR 405/[2008] 166 Taxman 115 (Delhi), such expenses would be treated as revenue expenditure.

5 Contribution from outgoing member of a co-operative Housing Society is not taxable: CIT v/s. Prabhukunj Co-op. Housing Society Ltd (2015) 232 Taxman 517 (Guj)

Issue :

Whether contribution received from an outgoing member of Co-operative Housing Society is taxable under I.T. Act?

Held :

Assessee Co-Operative housing society had given its plots on lease to its members for constructing residential units. Bye-laws of society provided that upon transfer of a plot of land allotted to a member to incoming member, society would collect 50 per cent of excess received by such outgoing member. Society collected premium on transfer of four plots and claimed that said amount was not a revenue receipt. Assessing Officer held that assessee was not a co-operative society, but an association of persons engaged in business. Accordingly, he made said amount taxable in hands of assessee. It was noted from records that funds would be expended for common amenities or for general benefit of members of society, or to be distributed amongst members in form of dividend or lease rent waiver. Merely because upon winding up of society, surplus funds would be utilized by Registrar as provided under relevant Act and would not be returned to members, would not break down relationship of mutuality. Premium amount received by assessee society on transfer of plots was not liable to tax.

6 Value as per of DVO's Report in making Addition: Principal CIT v/s. J. Upendra Construction (P) Ltd (2015) 232 Taxman 697 (Guj) : (2015) 377 ITR 0383 (Guj)

Issue :

Can cost of construction be disturbed merely on D.V.O's report?

Held :

The Assessing Officer made addition with respect to the difference in the cost of construction based upon and/or relying upon the DVO's report in the case of one 'M' from whom, the assessee subsequently got the project. It is true that in the instant case, copy of the DVO's report was furnished to the assessee during the re-assessment proceedings. However, it is required to be noted that except the DVO's report, there was no further tangible material before the Assessing Officer. Therefore, solely on the basis of the DVO's report which can be said to be opinion of the DVO only, no addition can be made with respect to difference between the cost of construction determined by the DVO and that shown by the assessee.

contd. on page no. 62

Tribunal News

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1 DDIT Vs. IMG Media Ltd. [2016] 67 taxmann.com 343 (Mumbai) Assessment Year: 2009-10 Order Dated: 26 February 2016

Facts

Assessee, a UK based company, was engaged in multimedia coverage of sports events, including cricket. Assessee and BCCI had entered into an agreement for capturing and delivering of live audio and visual coverage of cricket matches. During assessment proceedings, AO opined that services rendered by assessee were in nature of technical services and payments made for said services had to be taxed as 'royalty' under section 9(1)(vi), as well as under article 13 of India-UK DTAA. DRP however, accepted assessee's contention that amount in question was taxable as business profits under article 7 of India-UK DTAA. It was noted that co-ordinate Bench of Tribunal in assessee's own case in subsequent year opined that since there was nothing on record to show that assessee had retained ownership of program content, payment received by assessee could not be considered as 'royalty'. Aggrieved, the Revenue preferred an appeal with the Tribunal.

Issue

Whether the amount received by assessee towards live audio and visual coverage of IPL was taxable as business income as per provisions of India-UK DTAA?

Held

The assessee's job is restricted to production of live coverage and the job of broadcasting the same is undertaken by the BCCI. The BCCI, in turn, has given license to certain companies (called licensees) and they have undertaken the job of broadcasting the live coverage of cricket matches on behalf of BCCI. Since the assessee is supplying the live coverage in the form of digitalized signals, it has to ensure that the broadcasters have the compatible technology and equipments so that the live coverage can be broadcast without compromising on the quality. Thus, the technical aspects are specified in the agreement in order to ensure that the program content is broadcast at the same quality in which it was produced. The same was sought to be achieved by synchronizing the quality of technical equipments between the assessee and the licensees. There is a difference between the technology involved in the production of live coverage feed of cricket matches and the technology required to broadcast the same in the required quality. Hence, in order to ensure and maintain quality of live coverage feed, it becomes necessary on the part of the assessee to specify or oversee the technology available with the broadcasters so that the same does not compromise on the quality and compatibility. The specification of the technical requirements does not mean that the assessee has supplied the technology involved in the production of live coverage feed to the broadcasters. If that be the case, the broadcasters should be in a position to use the technology in order to produce the live feed on their own. The revenue has not established that the broadcasters (who are acting on behalf of the BCCI) or the BCCI itself has acquired the technical expertise from the assessee which would enable them to produce the live coverage feeds on their own after the conclusion of IPL 2008 and IPL 2009 cricket matches. In that case the essential condition of "make available" clause fails and hence the amount received by the assessee cannot be considered as "Fee for technical services" in terms of Article 13(4)(c) of the DTAA entered between India and UK. Since the amount received by the assesseewas held to be not in the nature of "Fee for technical services" as per the definition of Article 13(4)(c) of the India-UK DTAA, the tribunal did

not examine about its taxability u/s 9(1)(vii) of the Income tax Act, 1961.'

The assessee was engaged by BCCI to produce live coverage of audio and video visuals of cricket matches. The assessee shall produce the program content, which is broadcast through the broadcasters appointed by BCCI. The job of the assessee ends upon the production of the "program content". According to the assessee, the program content shall become the property of the BCCI.The job of the assessee ends upon the production of the program content and the broadcasting is carried out by some other entity to which license was given by the BCCI. Hence, as per Tribunal, the question of transfer of all or any right does not arise in the facts and circumstances of the instant case. Hence, the payment received by the assessee cannot be considered as "royalty" in terms of the India-UK DTAA. Further based on the above discussed facts tribunal also held that the payment received by the assessee cannot fall within the purview of sec. 9(1)(vi) of the Act also.' Accordingly the issue of the fee/income received by the assesseewas held in favour of the assessee with a direction to the AO to treat the receipts of the assessee as business income. Since the assessee has admitted that it has a PE in India, hence the AO was directed to consider the taxability of the receipts as business income of the assessee as per the provisions of DTAA between India and UK.

2 Ingersoll Rand (India) Ltd Vs. DCIT [2016] 67Taxmann.com328 (Bangalore) Assessment Year: 2010-11 Order Dated: 05 November 2015

Basic Facts

The assessee-company was engaged in the business of manufacturing and/or trading of Air Compressors, Feeder Crushers etc. It received intra-group services from its AE in the area of administration, finance, treasury, tax and strategy. These services were utilized by the assessee to undertake its business operations in India. The assessee had made the payment towards the cost contribution charges in connection with intra group services. The lower authorities determined the arm's length price of the cost towards management fees to be *'Nil'* holding that there was no justification for the said payments and doubting whether the services were actually rendered in connection with the business of the assessee. On appeal the assessee submitted that it had in accordance with the stipulations as mentioned in the OECD Guidelines, adopted a rational, systematic and logical methodology for the payment of cost contribution charges and detailed workings providing for the allocation of cost among various group companies was submitted to the TPO.

Issue

Whether the DRP erred in considering the arm's length price to be NIL with respect to the payments made by the assessee towards cost contribution charges to its Associated Enterprise (AE).

Held

The Tribunal upheld the payment of cost contribution charges and deleted the additions made by the Assessing Officer observing that the assessee has filed a huge compilation of papers, including copies of reports, e-mails and other documents evidencing the rendering of services. There is no infirmity in this contribution being taken as an arm's length contribution to the costs. In view of the above the addition towards TP adjustment on account of payment of cost contribution charges made by the assessee was to be deleted. The Tribunal in this respect also relied on the decision of the Mumbai Tribunal in the case of *Dresser-Rand India (P.) Ltd.* v. *Addl. CIT* [2011] 47 SOT 423/13 taxmann.com 82 (Mum.)

3 Aditya Medisales Ltd. Vs. [2016] 67taxmann.com 270 (Ahmedabad) Assessment Year: 2010-11 Order Dated: 16 February 2016

Basic Facts

During the course of the assessment proceedings under section 143(3), the Assessing Officer noted that the assessee had shown certain dividend income but disallowance under section 14A, read with rule 8D of 1962 Rules had not been offered to

tax. The assessee explained that the no interest bearing funds were used for making the related investments on which dividends were earned. The Assessing Officer, however opined that post insertion of rule 8D of 1962 Rules, the disallowance was to be made on the basis of the formulae set out therein. He thus computed the disallowance under rule 8D of the 1962 Rules, read with section 14A. Against said disallowance, the assessee filed an appeal before the Commissioner (Appeals). In the meantime, the Commissioner passed a revisional order under section 263 taking a view that the interest which should have been taken into account for the purpose of disallowance was not the net interest but gross interest, that the computation of average investment was incorrect inasmuch as it did not take into account mutual funds units of Rs. 15 crores, and that the computation of average assets was incorrect inasmuch as the figure of current liabilities was not as per the balance sheet.

Issue

Whether for the purpose of computing disallowance under section 14A, amount of gross interest or net interest is to be taken into consideration? Whether the learned CIT can pass a revisionary order under section 263 r.w.s. 143(3)?

Held

The Hon'ble ITAT held that the matter has been examined at length by the AO, and, after due consideration and consistent with the accepted past history of the case, he has partly upheld the contention of the assessee on some aspects of the disallowance. The view so adopted by the AO is not a perverse or unreasonable view. It was also held that various benches of this Tribunal*(Morgan Stanley Securities (P.) Ltd* v. *Asstt. CIT* [2011] 55 DTR 177 (Mum) and *DCIT* v. *Trade Apartments Ltd.* [ITA No. 1277/Kol/2011, dated 30th March 2012]) have consistently taken the view that the amount of interest, for the purpose of computing the disallowance, is to be taken at the net figure. The Hon'ble ITAT held that for the purpose of computing disallowance under section 14A, there was no income from the mutual funds which was claimed as exempt, and that income on redemption of these mutual fund units was eligible to tax as capital gain. Also the learned CIT was in error in holding that taking the total of assets on the basis of its value in the balance sheet has rendered the assessment order erroneous and prejudicial to the interest of the revenue, and so it held that the view that the assets are required to be taken on the basis of value shown in the balance sheet, and not after reducing the liabilities. It further held that the view adopted by the AO is not the same as that of the learned CIT cannot be a reason enough to subject the assessment order to the revision proceedings and so the learned CIT was indeed in error in exercising his revision powers under section 263. Accordingly the revisionary order stands quashed. In the result, the appeal is allowed.

4

Asian Advertising Vs. ITO [2016] 68 taxmann.com 139 (Mumbai)
Assessment Year: 2007-08 Order Dated: 23 March 2016

Basic Facts

The assessee firm was carrying on the business of outdoor publicity which was done through the use of hoardings. The said hoarding structures were owned and possessed by the assessee firm. The assessee-firm gave those hoardings to its sister concern which allowed other entities to use said hoarding for advertising of their products. The assessee claimed depreciation at the rate of 15 per cent on hoarding structures under the category of 'plant and machinery'. The Assessing Officer opined that hoarding structures were to be treated as 'building'. He thus allowed depreciation at the rate of 10 per cent. The Commissioner (Appeals) upheld the order of Assessing Officer.

Issue

Whether on facts, assessee failed to satisfy functional test of 'plant' as given in section 43(3) and, thus, depreciation to be claimed under the category 'building'?

Held

'Building' means structures and does not include the site on which it is erected. In order to find out whether building constitutes 'plant', functional test must be applied but the same test is not conclusive. It must be seen whether the building or structure or part thereof constitutes an apparatus or tool of the tax-payer or whether it is merely a space where tax-payer carries on his business. If the building or structure or part thereof is, something by means of which the business activities are carried on, it would constitute plant but where the structure plays no part in carrying on of these activities but merely constitutes a place within which they are carried on, it cannot be regarded as a plant. If one analyzes the 'Hoarding Structures' constructed and erected by the assessee in context of the above definitions and meaning assigned to the word 'Plant' *vis-à-vis* 'Building' as elaborated above, it could be seen that the 'hoarding structures' constructed and erected by the assessee firm are permanent structure embedded in the building having foundation. The sister concern has paid revenue to the assessee firm for the use of these hoarding structures during the impugned assessment year. It cannot be said that these hoarding structures play any operative role as apparatus or tool in the carrying of the trade by the assessee firm or in the functioning of the assessee firm's business but rather those hoarding structures were permanent structures embedded in building constructed and erected for entities to put their advertisements and erected by the assessee firm for entities to put their advertisement. Thus, these hoarding structures which are permanent structures embedded in the building having foundation, which were constructed and erected by the assessee firm do not satisfy functional test and it cannot be said that these hoarding structures are tools or apparatus with which the assessee firm is carrying on the business. Thus, these advertising hoarding structures which are permanent structures embedded in the building having foundation being erected and constructed by the assessee firm are in fact 'Building' and the assessee firm is entitled for depreciation at the rate of 10 per cent.

5 Capgemini S.A. Vs. ADIT [2016] ITA No. 7198/Mum/2012 Assessment Year: 2009-10 Order Dated: 28 March 2016

Basic Facts

Assessee, Capgemini S.A. is a French resident having no permanent establishment in India. Assessee had given a corporate guarantee to BNP Paribas, French Bank in France, on behalf of its various subsidiaries worldwide. In AY 2009-10, two subsidiaries of the assessee, Capgemini India Pvt. Ltd. and Capgemini Business Services (India) Ltd. were sanctioned credit facilities by the Indian Branches of BNP Paribas. Assessee charged guarantee commission of 0.5% p.a. for the corporate guarantees given on behalf of its subsidiaries in India. AO taxed the same by holding it to be "Other Income" under Article 23 of the DTAA between India and France. The AO held that finance was raised in India. The AO further observed that finance requirement is met by an Indian branch of the bank, the benefits of guarantee are shared by the Indian entity with the assessee by making a compensatory payment. Accordingly the AO held that fees for guarantee arise in India. The decision of the AO was upheld by Dispute Resolution Panel.

Issue

Whether corporate guarantee received by a French resident company in France from another French company is taxable as per Article 23 "Other Income" of India- France DTAA?

Held

Guarantee commission received by France Company did not accrue in India nor can it be deemed to be accrued in India, therefore, not taxable in India under Income Tax Act. Furthermore, as per Article 23.3, income can be taxed in India, only if it arises in India. In the instant case, the income clearly arises in France because the guarantee has been given by the assessee, a French company to BNP Paribas, a French Bank, in France and, therefore, Article 23.3 has no applicability as income does not arise in India.

6 DCIT vs. Symantic Software Solution Pvt. Ltd. [2016] ITA No. 4356/Mum/2014 Assessment Year: 2006-07 Order Dated: 31 March 2016

Basic Facts

Briefly stated the facts are, assessee an Indian Company is engaged in the business of providing marketing support service to its Associate Enterprise (A.E). The Assessing Officer made disallowance under section 40(a)(ia) of the Act and passed a draft assessment order. Against the draft assessment order, the assessee raised objections before the DRP regarding an upward transfer pricing adjustment. However, the assessee did not contest the disallowance under section 40(a)(ia). The DRP having confirmed transfer pricing adjustment, the Assessing Officer passed the final assessment order. The assessee preferred appeal before the Tribunal against the final assessment order and as far as the transfer pricing adjustment is concerned, the Tribunal confirmed the addition. On the basis of aforesaid two additions sustained in appeal, the Assessing Officer initiated proceedings under section 271(1)(c) by issuing a show cause notice to the assessee. The assessee objected to initiation of penalty proceedings, but the AO rejected the explanations provided by the assessee and ultimately passed an order imposing penalty. As far as, imposition of penalty on the disallowance made under section 40(a)(ia), the CIT(A) held that as the AO in the draft assessment order has not initiated proceedings for imposition of penalty under section 271(1)(c) in respect of the disallowance made under section 40(a)(ia), he cannot impose penalty on such addition after directions of the DRP on the draft assessment order. Aggrieved, the Revenue preferred an appeal with the Tribunal.

Issue

Whether penalty u/s 271(1)(c) may be initiated in the final assessment order, when no such penalty proceedings are initiated in the Draft Assessment order?

Held

As far as the issue relating to penalty on the addition made under section 40(a)(ia) is concerned, in the draft assessment order, the AO has not initiated proceeding for imposition of penalty. It is only in the final assessment order the that proceedings are made for imposition of penalty in respect of disallowance made under section 40(a)(ia). On a perusal of the provisions contained under section 144C, tribunal noted that the as per sub–section 3, if the assessee intimates the AO the acceptance of variation made in the draft assessment order or no objections are received within the period prescribed under sub–section (2), Assessing Officer shall complete the assessment on the basis of draft order. Thus, the final assessment order as contemplated under section 144C(13) is only to implement the directions of the DRP. Therefore, if the AO has not initiated penalty proceedings under section 271(1)(c) in respect of a particular item of addition in the draft assessment order, he cannot do so in the final assessment order. It is a well known fact, certain additions made by the AO, which assessee would otherwise have accepted, is forced to challenge in appeal due to the sword of penalty under section 271(1)(c) dangling over his head. Therefore, when in the draft assessment order the AO does not initiate proceedings for imposition of penalty in respect of a particular addition, the assessee believing that spectre of penalty under section 271(1)(c) is no more staring at him, may not contest the addition before the DRP and as a result the addition gets confirmed. Thus, in such a situation, if at the stage of final assessment, the AO initiates penalty proceedings under section 271(1)(c) against additions not objected / contested before DRP, assessee would be put to a very precarious position because in terms of section 144C(13), final assessment order has to be passed without affording any further opportunity of being heard to assessee. Therefore, on a harmonious construction of relevant statutory provisions, the tribunal was of the view, that if the AO did not initiate proceeding for imposition of penalty under section 271(1)(c) in respect of a particular addition in the draft assessment order, he cannot do so in the final assessment order. Therefore, the AO was directed to delete the levy of penalty u/s 271(1) (c) of the Act.

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Controversies

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When Disallowance is made u/s 14A, whether addition can be made to the book profits computed as per Sec 115 JB of the I.T. Act 1961?

Issue:

X Co. Ltd. is paying tax on book profit u/s. 115JB of the Act 1961. The AO has made addition in respect of direct & indirect expenditure holding that this expenditures are incurred for earning exempt income and hence, disallowed proportionate expenditure as per Rule 8D read with section 14A of the Income Tax Act 1961. He has also added this disallowed expenditure to the book profit as an adjustment as per section 115JB of the Income Tax Act 1961.

Proposition

It is proposed that the term book profit has been defined as "the net profit" as per profit & loss account as adjusted in accordance with the statutory additions and deductions as provided. The A.O. cannot go beyond the net profit as shown in the profit and loss account thus while computing book profit u/s 115JB the A.O. cannot make disallowance u/s 14A as such disallowances are not covered by the exceptions as provided in the explanation to section 115JB.

Extracts from Section

Section 14A

Expenditure incurred in relation to income not includible in total income.—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.

Section 115JB

Where in case of a company, the income tax payable on the total income as computed under the income tax act in respect of any previous year is less than 18.5% of its BOOK PROFIT, then such book profit shall be deemed to be the total income of the assessee and the tax payable on such total income shall be the amount of income tax at the rate of 18.5%. This income tax is, further has to be enhance by surcharge (as applicable) and education cess (@3%).

In the simple words every company has to compute its income tax liability as per two sets of provisions. The set of provisions which results in higher income tax liability become the income tax payable. Followings are the two set of provisions:

1). Income tax computed as per normal provisions of Income Tax Act.

2). Income tax computed as per provision of section 115JB of Income Tax Act.

View in against of the preposition

ITAT Mumbai held In the case of DCIT vs. Viraj Profiles Ltd. ITAT (Mumbai) Income Tax (Appeal) no. 4439 of 2013, date of judgment 21/01/215 that section 14A provides that it mandates disallowance of expenditure 'in relation' to the income which does not form part of the total income while clause (f) in Explanation 1 to Section 115JB (2) mandates disallowance of expenditure 'relatable' to the income to which Section 10 (other than Section 10(38)) or Section 11 or Section 12 applies. Further the dividend income is declared on the share investment which is exempt u/s 10(33) (not Section 10(38)). Accordingly, expenditure relatable to the exempt income to be disallowed provided the same is debited to Profit and Loss Account.

The assessee company is engaged in the business of manufacturing of S.S. Billets, Angles, Flat Bars, Channels, S.S. Wire Rods etc. During the year under consideration , the assessee company derived income of Rs.28,19,03,964/- from Business & Profession after claiming deduction of Rs.1,20,36,43,184/- u/s 10B and Rs.67,03,000/- u/ s 80G.

During the course of the assessment proceedings, the assessing officer noticed that the assessee company has investments in equity shares of various companies totaling to Rs.51,03,59,701/- as on 31-03-2008. The assessee company was asked to explain as to why disallowance u/s 14A read with Rule 8D of Income Tax Rules, 1962 should not be invoked in respect of the exempt income. In response, the assessee company submitted that the assessee company has not earned any exempt income during the relevant assessment year and with prejudice to the above contentions, the assessee company submitted the working of disallowance u/s 14A. The AO rejected the contentions of the assessee company and held that since the assessee company has blocked its funds in investments not yielding any income or yielding exempt income, the invocation of Section 14A is proper.

The AO relied upon the decision of Special Bench, ITAT; Mumbai in ITA NO 8057/Mum/03 dated 20.10.2008 in the case of M/s Daga Capital Management Private Limited and held that both direct and indirect expenses are disallowable u/s 14A which have any relation with the income not chargeable to tax under Act. The AO also relied upon the decision of Hon'ble Bombay High Court in Godrej & Boyce Manufacturing Company Limited v. DCIT (ITA No. 626 of 2010 & WP no. 758 of 2010(Bom.)) and made disallowance of Rs.73,07,018/- u/s 14A read with Rule 8D(2)(ii) (Rs.58,87,196/-) and 8D(2)(iii)(Rs.14,19,892/-) of Income Tax Rules, 1962.

Recently the Bangalore Bench of ITAT in the case of DCIT v. Sobha Developers(ITA No.1410/Bang/ 2013) (Bang) held that disallowance under Section 14A read with Rule 8D of the Income Tax Rules,1962 (the Rules) is applicable while computing book profits under section 115JB of the Income-tax Act,1961 (the Act).The Mumbai Tribunal in the case of RBK Share Broking (P) Ltd and Dabur India Ltd. held that expenditure incurred to earn exempt income will be disallowed under Section 14A while computing MAT profits.

View in favor of Proposition

It is submitted that no disallowance u/s 14A for computing book profit u/s 115JB of the Act, is permissible .It appears to me that as per decision of Delhi Bench of Tribunal in Goetze (India) Ltd (32 SOT 101) (Del) and the decision of Mumbai Bench of the Tribunal in M/s Bengal Finance and Investment P. Ltd. in ITA No.5620/Mum/2010, dated 31.7.2012 while computing book profit u/s 115JB of the Act, provisions of section 14A cannot be imported. Therefore, amount disallowed u/s 14A of the Act cannot be considered while computing book profit u/s 115JB of the Act. Accordingly, the issue was decided in favour of the assessee.

With Respect to re-computation of book profits u/s 115Jb of the act it is submitted that as observed in Apollo Tyres Limited v. CIT 255 ITR 273 (SC) by Apex Court that where Profit & Loss Account has been prepared in accordance with Part II and III of Schedule VI to the Companies Act,1956 and which has been scrutinized and certified by the statutory auditors and relevant authorities, the AO has no power to scrutinize the net profit and loss account except to the extent provide in the explanation of Section 115JB. Held that the same view has been reiterated by Hon'ble Bombay High Court in Kinetic Motor Co. Ltd v. DCIT wherein it has been held that there is no scope for the AO to make adjustment to Book Profits beyond what was authorized by the definition in Explanation 1 to Section 115 JB.

Hence, in regard to disallowance u/s 14A for computing book profit u/s 115JB of the Act, following the decision of Delhi Bench of Tribunal

in Geotze (India) Ltd (32 SOT 101) (Del) and the decision of Mumbai Bench of the Tribunal in M/s Bengal Finance and Investment P. Ltd in ITA No.5620/Mum/2010,dated 31.7.2012 while computing book profit u/s 115 JB of the Act, provisions of section 14A cannot be imported. Therefore, amount disallowed u/s 14A of the Act cannot be considered while computing book profit u/s 115JB of the Act.

Summation

It is submitted that views against the proposition advanced following arguments

1) The Provisions of Section 115 JB of the Act read with Explanation provides that the amount of expenditure relatable to income, to which section 10 applies, should be added to the profit as per P&L account.

2) There is no prohibition to adopt the disallowance made by the AO under section 14A of the Act read with Rule 8D of the Rules, while computing total income under the normal provisions of the Act. The Argument of the tax payer that Section 14A of the Act is very specific and is applicable only for the purpose of computing total income under chapter IV of the Act cannot be accepted.

3) Accordingly, the disallowance under Section 14A will be applicable while arriving at the book profits under Section 115 JB(2) of the Act read with Explanation 1(f) thereto.

However, I am in respectful disagreement of the above arguments. It is submitted that the disallowance made u/s 14A cannot be added to the Book Profits because the same does not amount to actual expenditure debited to Profit & Loss Account for earning the exempt income.

The Delhi Tribunal in the case of Quippo Telecom Infrastructure Ltd. has held that disallowance under Section 14A of the Act cannot be made while computing the book profit under Section 115 JB of the Act, since no actual expenditure was debited in the profit and loss account relating to the earning of exempt income. The Clause (f) of Explanation to Section 115JB refers to the amount debited to the profit and loss account which can be added back to the book profit while computing book profit under Section 115JB of the Act.

Further, the Delhi Tribunal in the case of Geotze (India) Ltd. has held that provisions of sub-section (2) and sub-section (3) of Section 14A cannot be imported into clause (f) of Explanation to Section 115JA while computing adjusted Book Profit.

Further, Delhi Tribunal in the case of Minda Sai Ltd. V. ITO (2015) 167 TTJ 689 (Delhi) (Trib.), it was decide as under “fact that assessee may have accepted 14A disallowance affects that disallowance only and nothing more than that, it does not clothe such an adjustment in computation of book profit u/s. 115JB with legality.

Recently Ahmedabad Tribunal in the case of DCIT vs. Alembic Ltd in ITA No.1928/Ahd/2010 and CO No.204/Ahd/2010, dated 27/03/2014 for A.Y.2007-08,relying on the order of the Mumbai Tribunal in the case of M/s Essar Teleholdings Ltd.vs.DCIT in ITA No.3850/Mum/2010 for A.Y., held that provisions of Sub-Sections 2&3 of Section 14B cannot be imported into Clause (F) of the Explanation to Section 115 JB of the Act.

Following Authorities have also taken the same view:

- ACIT vs. Spray Engineering Devises Ltd.53 SOT 70(Chan.) (AY 08-09)
- Reliance Petroproducts Pvt. Ltd vs. ACIT in ITA No.2324/Ahd/2009,dated 13/07/2012.
- Atul Ltd. vs.ACIT in ITA No.8/Ahd/ 2013,dated 11/10/2013.

Finally, it is submitted that the Applicability of provisions of Section 14A read with Rule 8D of the Rules and clause (f) of explanation to section 115JA of the Act while computing adjusted book profit is highly debatable issue and can be settled only after the Apex Court gives the final decision.

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Judicial Analysis

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Some recent decisions u/s 50C of the Income Tax Act, 1961

PR. Commissioner of Income-tax – 3 v. Rajabhai Lumbhabhai Hadiya [2016] 65 taxmann.com 18 (Gujarat)

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"(A) Whether, on the facts and in the circumstances of the cased and in law, the ITAT was right in ignoring the fact that as per provisions of section 50-C (2)(b) of the Act, the matter should not have been referred by CIT(A) for valuation as the assessee had already challenged the Juntry Value assessable by the Stamp Valuation authority, before the Nayab Collector and in that case, further reference to valuation is prohibited as per the Act and value determined by Nayab Collector has to be adopted as full value of consideration ?"

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4. Having heard learned counsel Mr.Sudhir Mehta for the Revenue and having perused the documents on record, we see no error in the decision of the Tribunal. Section 50-C of the Income-tax Act pertains to special provisions for full value of consideration in certain cases, relevant portion of which reads as under:

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5. It can thus be seen that in view of sub-section (1) of section 50-C, in case of capital asset being land or building for which consideration is received as a result of transfer by the assessee and such consideration is less than the value adopted or assessed or assessable by the stamp valuation authority of the State Government for the purpose of payment of stamp duty, valuation so adopted, assessed or assessable would be deemed to be the full value of the consideration received or accrued for the purpose of computing capital gains. Under clauses (a) and (b) of sub-section (2) of section 50-C, however, assessee has a right to ascertain before the Assessing Officer that the value adopted or assessed by the stamp valuation authority exceeds the fair market value as on the date of transfer upon which the Assessing Officer would refer the valuation of the capital asset to the Valuation Officer. Under sub-section (3) of section 50-C, where the value ascertained by the Valuation Officer exceeds the value adopted, assessed or assessable by the stamp valuation authority, the latter, i.e. the valuation of the stamp valuation authority, would be taken as the full value of the consideration for the purpose of computing capital gain. In other words, the valuation of the property adopted by the Stamp Duty authority of the State would be deemed to be the full value of the consideration for the purpose of computing capital gain. However, in case the assessee challenges such valuation before the Assessing Officer and the Assessing Officer calls for the valuation report from the Valuation Officer and the valuation adopted by the Valuation Officer exceeds the value adopted by the State Stamp Duty Authority, it would be the valuation of such stamp duty authority which would prevail for the purpose of computing capital gain. The Revenue intends to contend to the contrary which is simply not born out from the statutory provisions noticed.

Commissioner of Income-tax-II, Agra v. Shimbhu Mehra [2016] 65 taxmann.com 142 (Allahabad)

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Consequently, the present appeals have been filed by the Department under Section 260(A) of the Act, which were admitted on the following substantial question of law:—

“Whether on the facts and in the circumstances of the case, the Hon’ble ITAT is legally justified in confirming the findings of the learned CIT (A) holding that the agreement to sell the land under consideration was made on 04.07.2001, prior to insertion of section 50C of I.T.Act,1961 ignoring the fact that the sale deed was executed in April, 2003, the sale consideration agreed upon was paid in April, 2003 and the possession of the land was handed over to the transferee after execution of Sale Deed?”

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5. Effectively, the issue which is to be considered is whether the provisions of Section 50C of the Act is applicable in the case of the assessees or not.

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7. The said provision contemplates that where the consideration received or accrued as a result of transfer of land is less than the value adopted or assessed by any authority of the State for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed is, for the purpose of Section 48 of the Act be taken to be the full value of the consideration received or accrued as a result of such transfer.

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10. Having heard the learned counsel for the parties, we find that Section 45 of the Act provides that any profit or gains arising from a transfer of capital asset would be chargeable to income tax under the head capital gains and shall be deemed to be the income of the previous year in which the transfer takes place. When would the transfer takes place has not been specified under Section 45 of the Act or under Section 50C of the Act for the purpose of computing the income chargeable under the head capital gains under Section 48 of the Act. According to the Assessing Officer, the transfer took place in April, 2003 when the sale deed was executed. According to the Ist Appellate Authority, the transfer takes place when the agreement of sale was executed on 04.07.2001.

11. Transfer has been defined under Section 2(47) of the Act, which is extracted hereunder :—

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12. Sub-clause (ii) of Section 2(47) of the Act states that the transfer, in relation to a capital asset, includes the extinguishment of any rights therein. In Sanjeev Lal v. CIT [2014] 365 ITR 389/225 Taxman 239/46 taxmann.com 300 (SC), the Supreme Court considered the question as to whether the date on which the agreement for sale was executed could be considered the date on which the property was transferred. The Supreme Court held that when an agreement to sell in respect of immovable property is executed, a right in personam is created in favour of the vendee and when such a right is created in favour of the vendee, the vendor is restrained from selling the said property to someone else because the vendee gets a legitimate right to enforce a specific performance of the agreement. The Supreme Court, while considering the provisions of Section 2 (47) (ii) of the Act held that if a right in respect of any capital asset is extinguished and that right is transferred to someone else, it would amount to transfer of a capital asset. The Supreme Court held that once an agreement to sell is executed in favour of some person, the said person gets a right to get the property

transferred in his favour and, consequently, some right of the vendor is extinguished.

13. Explanation 2 to Section 2(47) of the Act was added by Finance Act, 2012 with retrospective effect on 1.4.1962 and, consequently, the said provision would be applicable. The said explanation clearly provides that transfer of an asset includes disposing of or parting with an asset by way of an agreement.

14. In the light of the aforesaid provision, it is apparently clear that the moment an agreement to sell is executed between the parties and part consideration is received, the transfer for the purpose of Section 50C of the Act takes places and computation under Section 48 of the Act will start accordingly, for the purpose of calculating the capital gains under Section 45 of the Act. From the aforesaid, it is apparently clear that the transfer of the property took place in the year 2001 when the provision of Section 50C of the Act was not in existence. Consequently, the Assessing Officer was not justified in making the reassessment and computing the capital gains by invoking the provision of Section 50C of the Act, which was clearly not applicable in the assessees' case.

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Nand Lal Sharma v. Income-tax Officer [2015] 61 taxmann.com 271 (Jaipur - Trib.)

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7. Apropos ground No. 2(b), learned counsel for the assessee contends that section 48 prescribes the mode of computation of capital gain as under:

"48. Mode of computation. — The income chargeable under the head 'Capital gains' shall be computed by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely :-

(i) expenditure incurred wholly and exclusively in connection with such transfer ;

(ii) the cost of acquisition of the asset and the cost of any improvement thereto."

8. For computation of long-term capital gains, section 48 statutorily provides that what is taxable as capital gain is full value of the consideration received. It does not refer to the consideration as deemed under section 50C or fair market value, the amount of capital gain being defined under section 48 has to be given the literal meaning. The wording being unambiguous section 48 referring only to the sale consideration actually received, section 50C being deeming fiction it cannot be applied to section 48 in the absence of any enabling provision. It is a trite law that a deeming fiction should be given limited meaning restricted to provision for which the fiction is enacted. Therefore, the deeming provisions of section 50C cannot travel beyond limited applicability as prescribed therein. This aspect came under the judicial scrutiny and the hon'ble Delhi High Court in the case of CIT v. Smt. Nilofer I. Singh [2009] 309 ITR 233/176 Taxman 252, has held as under :

"These decisions make it more than clear that the expression 'full value of consideration' that is used in section 48 of the present Act does not have any reference to the market value but only to the consideration referred to in the sale deeds as the sale price of the assets which have been transferred."

9. It is pleaded that the Income-tax Appellate Tribunal, Jaipur judgment in the case of Gyan Chand Batra v. ITO [2010] 8 taxmann.com 22 adopted the similar view and held that for working out exemption under section 54 the capital gain is to be determined by referring to section 48, i.e., by taking actual sales consideration and not deemed sales

consideration, i.e., stamp duty value under section 50C. It is contended that the hon'ble Delhi High Court has in turn relied on the judgment of the hon'ble Supreme Court in the case of CIT v. George Henderson & Co. Ltd. [1967] 66 ITR 622. It is pleaded that the assessee's case is squarely covered by these and section 54 exemption should be directed to be allowed by taking the actual value of consideration, as offered by the assessee in return of income.

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12. We have heard the rival contentions and perused the materials available on record.

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13. Apropos ground No. 2(b), the hon'ble Delhi High Court in the case of Smt. Nilofer I. Singh (supra) has categorically held that mode of computation of capital gain is statutorily defined under section 48 of the Act which uses the words actual cost of "consideration" and not the deemed cost of consideration under section 50C. We find merit in the arguments of the learned authorised representative that section 50C is a deeming fiction by which stamp duty value of the asset sold is to be substituted for actual consideration. This being purely a fiction, its scope is limited to section 50C only and cannot be enlarged without a specific reference. In the absence of any enabling statutory provision, a fiction cannot be imported in other section. This view has been squarely adopted by the hon'ble Delhi High Court in the case of Smt. Nilofer I. Singh (supra) and followed it by this Income-tax Appellate Tribunal Bench in the case of Gyan Chand Batra (supra). Respectfully following the same, we hold that while computing exemption under section 54, the actual sale consideration is to be taken into consideration and not the stamp duty valuation under section 50C. Thus, the assessee's claim of exemption as made in the return of income as raised in ground No. 2 of the assessee is allowed.

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Fleurette Marine Novelle Hatam v. Income-tax Officer (International Taxation) 3 (1), Mumbai [2015] 61 taxmann.com 362 (Mumbai - Trib.)

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10. We have carefully perused the orders of the authorities below and the decisions of the Co-ordinate Benches brought to our notice by the Ld. AR. The undisputed fact is that the assessee has transferred the tenancy right which has resulted into capital gains. The only issue to be considered by us is whether provisions of Sec. 50C are applicable in the case of surrender of tenancy right.

    Section 50C read as under:

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11. Undisputedly tenancy right is a capital asset but whether transfer of such capital asset has to be looked upon in the light of the provisions of Sec. 50C of the Act. A perusal of Sec. 50C suggests that it is only for the limited purpose of computing capital gain in respect of sale of land and building, only when such sale take place Stamp duty value has to be substituted for the sale consideration, if the sale consideration is less than the stamp duty value. In our considered opinion, in case of the surrender of tenancy right, provisions of Sec. 50C would not apply. Our view is fortified by the decisions of the Co-ordinate Benches (supra). The decision referred to by the Revenue in its ground of appeal do not apply on the facts of the present case. Dismissing Revenue's appeal, we hold that provisions of Sec. 50C are not applicable on the transfer of tenancy right.

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Equalization Levy (EL) – Report of E-Commerce Committee

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A. Background

With the advent of technology, Digital Economy (DE) has become a significant segment of businesses around the globe, including India. This is because of the ability of enterprises to conduct their businesses remotely on a non-occasional basis and have significant participation in the economic life of a jurisdiction, without having a physical presence. This gives rise to significant tax policy challenges in terms of nexus, characterization of income and other consequential issues. For eg E-commerce companies like Facebook, Google, etc. are earning substantial revenues and are structuring transactions in a way that it can be able to avoidpayment of Income-tax in the Country of Source (COS) as well as Country of Residence (COR).

It is now admitted by the OECD and other concerned authorities that under the present rules of international taxation, E-commerce companies are able to escape taxation. The key reason is that - under the existing rules, COS can tax a non-resident providing E-commerce services only if the non-resident has a Permanent Establishment (PE) in the COS. While PE is defined as a fixed place of business, such companies do not need PE in any COS, further, they are setting up companies in tax havens such Ireland and thereby avoiding COR tax also.

Global Developments

Considering such problems faced by various countries on ambiguity to tax DE transactions, the OECD, as part of its Base Erosion and Profit Shifting ('BEPS') project, had released the BEPS Report on 5 October 2015.The BEPS Report acknowledges that DE cannot be ring-fenced and specialrules are unlikely to be workable. It, however, provides for three potential solutions which countries may consider to address DE concerns viz.,

(1) A new nexus test in the form of "significant economic presence"

(2) A withholding tax on certain types of digital transactions

(3) Introducing an Equalization Levy ('EL')

While the OECD did not recommend these options, it has provided flexibility to countries to introduce these options in their domestic laws as additional safeguards against BEPS, subject to their tax treaty obligations.

India Developments

The CBDT constituted a Committee to examine the business models for e-commerce, the direct tax issues on e-commerce transactions and to suggest an approach to deal with these issues under different business models. The Committee has published its report giving detailed analysis along with recommendations on Equalization Levy. The report is divided into 11 sections wherein chapters 1 to 8 discuss background, current status of DE, its future growth projections, tax challenges arising from DE, BEPS work in this regard, Chapters 9 to 11 examine potential options in the Indian context arising from DE and the Committee's conclusions and recommendations with respect to EL.

B. Evaluation of options from India perspective

The Committee has evaluated feasibility of potential options as provided in BEPS Report from India perspective and found that out of three options provided by BEPS, third option i.e. Equalization Levy is the most feasible

option to be adopted under the domestic law of India. Given below is a summary of their observation:

- **New nexus based on significant economic presence**

  While this option can be adopted in domestic laws and tax treaties, the consequent issues of attribution of profits in a bilateral tax treaty may need to be analysed in greater detail to ensure simplicity, predictability and certainty in the tax regime. The lack of clarity and uniformity of views in respect of attribution of profits can be a significant constraint while including this option in bilateral tax treaties.

  Such an option may be adopted in domestic law by providing that economic presence"constitutes a business presence and by including this option as a nexus criterion for taxing income that is to arise in India". However, such domestic law amendment will not be effective unless it is also included in tax treaties.

- **Withholding tax on digital transactions**

  While this option offers apractical way of allocating partial taxing rights in respect of income from DE, which shares attributes that may be similar to royalty or FTS, and which can be complied in respect of B2B transactions by the process of withholding, such a tax on income would be feasible only if it is included in tax treaties, which takes precedence over Indian domestic law.

- **Equalisation Levy**

  While BEPS report does not prescribe any particular design that must be adhered to, it suggests that it could be a tax on gross payment arising from DE. This option is simpler and devoid of the difficulties that are associated with the more intractable issue of attribution of profits, as suggested in BEPS report.

  BEPS report conceptualizes EL as a tax that is different from corporate income tax, and thus, the Committee believes that this option may not necessarily be subjected to limitations of tax treaties. Such a tax on gross amount of payment, would thus be very similar to the second option of withholding tax, except that it, not being a tax on income, would not be covered by the obligations of tax treaties, and hence can be levied under domestic law, even without changes in tax treaties. This feature makes it the only option that can be adopted without even without changes in tax treaties and without violating or, in any other way, affecting tax treaty obligations of Contracting States to a tax treaty.

The best possible approach

- After considering the above options, the Committee notes that India's commitment to tax treaty obligations would largely limit the application and effectiveness of adopting the first two options. Such is not the case in the application of EL, since it is not levied on "income" to fall within the scope of taxes covered under the tax treaties and tax treaty obligations are not violated.
- The Committee highlighted the need to adopt the option of EL at this stage to bring greater certainty and predictability to all stakeholders, to enable them to take it into account while making their future business plans and pricing of products and, thereby, contribute to a more stable environment.

C. Key aspects of EL

Given below is summary of comments/ clarification provided by the Committee on key aspects of EL:

1. **Objective:**

   - To bring tax neutrality - EL is intended to be a tax imposed on payments made for digital services to foreign beneficial owners who enjoy an unfair advantage over their Indian competitors providing similar services by digital or more

traditional means and also other foreign businesses that are subjected to income tax in India.

- To disincentivize artificial arrangements: EL serves to create incentives for digital multinational enterprises to establish PEs in India and get taxed only on their net income attributable to India, while creating disincentives against artificial arrangements to avoid paying taxes on income arising from India by exploiting the systemic weaknesses in the existing international taxation rules.
- To provide greater clarity, certainty and predictability in respect of characterization of payments for digital services and consequent tax liabilities to all stakeholders so as to minimize costs of compliance and administration and minimize tax disputes in these matters.

2. Payments covered

It will be levied only on payment made for certain specified services and facilities provided by multinational enterprises not having a PE in India.

3. Scope of digital services or transactions covered

i. Online advertising or any services, rights or use of software for online advertising, including advertising on radio and television.

ii. Digital advertising space.

iii. Designing, creating, hosting or maintenance of website.

iv. Digital space for website, advertising, e-mails, online computing, blogs, online content, online data or any other online facility.

v. Any provision, facility or service for uploading, storing or distribution of digital content.

vi. Online collection or processing of data related to online users in India.

vii. Any facility or service for online sale of goods or services or collecting online payments.

viii. Development or maintenance of participative online networks.

ix. Use or right to use or download online music, online movies, online games, online books or online software, without a right to make and distribute any copies thereof.

x. Online news, online search, online maps or global positioning system applications.

xi. Online software applications accessed or downloaded through internet or telecommunication networks.

xii. Online software computing facility of any kind for any purpose.

xiii. Reimbursement of expenses of a nature that are included in any of the above

For the purposes of the above, "online" means a facility or service or right or benefit or access that is obtained through the internet or any other form of digital or telecommunication network.

EL should be payable if the sum received is a consideration for any of the above, irrespective of how it may be described in the books of the beneficial owner or the payer.

4. Payments not covered

It will not be levied on goods to be imported. The fact that orders are placed & payments are made on the internet will not attract EL. In other words, what is normally understood as E-Commerce or digital Commerce need not necessarily

attract Equalization Levy. Sellers or buyers selling tangible goods by using internet will not be affected, except in respect of payments for specified services.

It will also not be levied on services that are not specified, even if such services are procured by making payments from within India over the internet. For example, an Indian resident books hotel rooms abroad. Booking is made and payment is made on the net. However, hospitality services are not specified services for the purpose of Equalization Levy. Hence Equalization Levy will not be levied. Such transactions are normally known as E-Commerce. However, they will not attract Equalization Levy.

Thus, the EL is not necessarily chargeable for all E-Commerce transactions.

5. Payment Thresholds for Equalization Levy

No Equalization Levy will be charged for payments below the threshold limit of Rs. 1 lakh for a single payment, or Rs. 10 lakh of total payments made in a year by a payer to a single party. Thus, no Equalization Levy would be levied in the following instances:

(i) An Indian resident makes a single payment for Rs. 95,000 to a foreign enterprise for a specified service;

(ii) An Indian resident makes several payments to a foreign enterprise for specified services, but total of all payments made to that enterprise in the year is less than Rs. 1 lakh;

(iii) An Indian resident makes several payments to several foreign enterprises for specified services, but the total of all payments made to each of those enterprises in the year is less than Rs. 1 lakh.

These high thresholds are likely to ensure that payments of smaller amounts made by Indian consumers for personal consumption of services are not affected by it. In a case, where a total payment exceeding Rs. 1 lakh is made by a consumer for non-business purposes (such as personal consumption) to a single foreign enterprise in a year, Equalization Levy would be chargeable, but even then there would be no liability on the consumer to deduct it. Thus, Equalization Levy would not affect non-business consumers.

6. Payments to Residents & PEs of Non-Residents not Liable

Equalization Levy will not be chargeable on payments for specified services made to Indian Residents. In fact, the levy is proposed to protect Indian residents from unfair competition arising out of unfair tax advantage enjoyed by their foreign competitors.

Equalization Levy will also not be chargeable on payments for specified services made to PE of non-residents in India. Thus, it also protects non-residents paying taxes on their income in India from unfair competition.

7. Deduction at Source liability only on businesses

The payer is required to deduct the Equalization Levy from a payment for specified services only if it is a payment made for the purpose of business, and the payer intends to claim a deduction for expenses on account of such payment for determining its taxable profits in India.

Thus, a person making payments for personal use and not intending to claim any deductions for that payment will not be required to make any deductions.

8. **Filing of Returns**

Non-resident beneficial owner will have to file his tax return only if its annual receipts chargeable to Equalization Levy are in excess of Rs. Ten Crore. For receipts below Rs. Ten Crore, tax will be payable, but there will be no obligation for the non-resident to file a return. Tax deducted by Indian resident payers will be accepted as final payments, and if Equalization Levy has been deducted on all specified payments by payers in India, no further payment will be required from the beneficial owner.

Payers in India will be required to file a simple online return annually providing basic details of Equalization Levy deducted and paid to the Government.

9. **No Payment, no Levy**

If no payment is made for a service, there will be no levy. For instance, Equalization Levy will not be chargeable on services that are available freely on the internet, or free apps that are available to the Indian consumers.

10. **Payments subjected to Equalization Levy exempted from Income-tax**

All payments for specified services that are liable to Equalization Levy shall be exempt from Indian Income-tax in the hands of the non-resident beneficial owner. This will ensure that payments will not be covered by both Equalization Levy as well as Income-tax Act, and thereby ensure that there is no double taxation in India on those payments. This would also help in minimizing income-tax disputes relating to characterization of payments and their consequent taxability under the Income-tax Act.

Thus, the income of a non-resident from services that are covered by Equalization Levy, and on which Equalization Levy is paid will be fully exempt from income-tax.

11. **Outside Income-tax Act – Not a tax on income**

The Equalization Levy will be outside Income-tax Act. It is not a tax on income, as it is levied on payments. It is therefore also payable by enterprises not making any net profits.

However, Equalization Levy is not chargeable on payments made to PE of foreign enterprises in India, and thus, enterprises that would prefer to be taxed on their net income have the opportunity to have a PE in India and thereby get taxed only on their net income.

12. **Double Taxation Avoidance Agreements Not Applicable on Equalization Levy – No Foreign Tax Credit in the other country**

As the Equalization Levy is not charged on income, it is not covered by Double Taxation Avoidance Agreements or tax treaties. Thus, no tax credits under the tax treaties will become available to the beneficial owner in the country of its residence, in respect of Equalization Levy charged in India.

The Committee recommends that in case the other country also levies a similar Equalization Levy, Government of India may explore the possibility of having a reciprocal agreement with that other country for allowing tax credits under the domestic tax laws for Equalization Levy paid.

13. **Administration**

The Equalization Levy can be administered in the same way as Securities Transaction Tax, by the Income-tax authorities.

14. **Obligation to record in Books of Accounts and get them Audited**

The deductor in India, if it is making the payment for purpose of its business, will be expected to record the transactions in its books of accounts that it is required to maintain for its business under any law in India. No such obligation would be there for a person, who is not required to maintain books of accounts.

Similarly, a deductor that is required to gets its books of accounts audited, would be expected to obtain a certificate that Equalization Levy has been deducted and paid to the Government as per law. No such obligationwould be there for a person, who is not required to get its books audited.

15. Inapplicability of GAAR and Transfer Pricing

Since this levy is not under the Income-Tax Act, provisions of transfer pricing and General Anti-Avoidance Rules (GAAR) will not be applicable to it.

16. Ease of Compliance and Administration

Compliance of Equalization Levy can be completed on the internet, including payment of Equalization Levy and filing of returns. In view of the simple and certain design of Equalization Levy, the administrative interventions are expected to be minimal, thereby minimizing the need for scrutiny, investigations and appeals. By exempting such income from income-tax, compliance and administrative costs in respect of income-tax are also likely to be reduced.

D. Concerns of Industry

The Committee in its report has noted that introduction of EL would give rise to various concerns among the stakeholders. Following is the illustrative lists of concerns that are likely to arise and the Committee's explanations:

· EL isanadditional tax over andabove all otherexistingtaxes andmay further affect ease of doing business in India

· Tax burden of EL is likely to fall on payers in India and would, therefore, only be detrimental to them

· Imposition of such a levy may be a violation of international tax practices

· Why should India impose such a levy when it is not imposed by any other country

· There will be no FTC available to the taxpayer in lieu of EL, which would amount to double taxation of their income. If it is to be imposed, it should be under tax treaties so that there is no double taxation

E. Conclusion

Looking at the proposals and comments provided by the Committee, one would appreciate that the Equalization Levy is designed in a way to keep its impact limited at this stage to only certain specified transactions above a high threshold limit. Further, it is not expected to be a major source of revenue at this stage.

Its prime significance lies in initiating a process of addressing tax challenges of digital economy; minimizing the unfair tax advantage enjoyed by multinational enterprises over their Indian competitors; bringing greater certainty and predictability in respect of certain disputed payments; and creating incentives against base erosion and in favor of compliance with Indian tax laws, without disrupting the economy or adding to the cost of compliance or administration.

Given the same, its overall contribution as a tax policy measure is likely to be significant in the long run. One would need to closely watch out for future developments in this regard.

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FEMA Updates

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1 Diamond Dollar Account (DDA) – Reporting Mechanism

In terms of earlier direction AD Category-I banks have been advised to submit quarterly reports giving details of the name and address of the firm/ company in whose name the Diamond Dollar Account is opened, along with the date of opening / closing the Diamond Dollar Account. AD Banks are also required to submit fortnightly statements giving data on DDA balances maintained by them to the Reserve Bank at the abovementioned address.

With a view to liberalizing the procedure, it has now been decided to dispense with the abovementioned statements with immediate effect. AD banks may however, maintain the above database at their own end and make available the same as and when called upon by the Reserve Bank of India.

For Full Text refer to A.P. (DIR Series) Circular No. 54, dated 23rd March 2016

https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10311#mainsection

2 Investment by Foreign Portfolio Investors (FPI) in Government Securities

The limits for investment by foreign portfolio investors (FPI) in Government securities were last increased in terms of the Medium Term Framework (MTF) announced vide A.P. (DIR Series) Circular No 19 dated October 6, 2015.

As announced in the MTF, the limits for investment by FPIs in Central Government Securities for the next half year are proposed to be increased in two tranches, i.e., by Rs. 105 billion from April 4, 2016 and by Rs.100 billion from July 5, 2016 respectively.

As in the previous half-year, the limits for State Development Loans (SDL) are proposed to be increased in two tranches, each of Rs.35 billion, from April 4, 2016 and July 5, 2016 respectively.

Further, keeping in view the extent of utilization of the limits for Central Government securities by long term and other investors, it has been decided that any limit remaining un-utilised by the long term investors at the end of a half-year would be made available as additional limit to the investors in the open category for the following half-year. Accordingly, the limits for the long term investors remaining unutilized at the end of half year ending Sept 30, 2016 will be released for investment under the open category in October, 2016.

For Full Text refer to A.P. (DIR Series) Circular No. 55, dated 29Th March 2016

https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10313

3 External Commercial Borrowings (ECB) – Revised framework

1. Taking into account prevailing external funding sources, particularly for long term lending and the critical needs of infrastructure sector of the country, the extant ECB guidelines have been reviewed in consultation with the Government of India. Excerpts of changes in the ECB framework:

   i. Companies in infrastructure sector, Non-Banking Financial Companies - Infrastructure Finance Companies (NBFC-IFCs), NBFCs-Asset Finance Companies (NBFC-AFCs), Holding Companies and Core Investment Companies (CICs) will also be eligible to raise ECB under Track I of the framework

with minimum average maturity period of 5 years, subject to 100 per cent hedging.

ii. For the purpose of ECB, "Exploration, Mining and Refinery" sectors which are not included in the Harmonised list of infrastructure sector but were eligible to take ECB under the previous ECB framework will be deemed as in the infrastructure sector, and can access ECB as applicable to infrastructure sector under (i) above.

iii. Companies in infrastructure sector shall utilize the ECB proceeds raised under Track I for the end uses permitted for this Track. NBFCs-IFCs and NBFCs-AFCs will, however, be allowed to raise ECB only for financing infrastructure.

iv. Holding Companies and CICs shall use ECB proceeds only for on-lending to infrastructure Special Purpose Vehicles (SPVs).

v. The individual limit of borrowing under the automatic route for aforesaid companies shall be as applicable to the companies in the infrastructure sector (currently USD 750 million).

vi. Companies in infrastructure sector, Holding Companies and CICs will continue to have the facility of raising ECB under Track II of the ECB framework subject to the conditionalities prescribed thereof.

For Full Text refer to A.P. (DIR Series) Circular No. 56, dated 30Th March 2016

https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10314

4 Import of Rough, Cut and Polished Diamonds

Import of Goods and Services, in terms of which AD Category - I banks were permitted to approve Clean Credit i.e. credit given by a foreign supplier to its Indian customer / buyer, without any Letter of Credit (Suppliers' Credit) / Letter of Undertaking (Buyers' Credit) / Fixed Deposits from any Indian financial institution for import of Rough, Cut and Polished Diamonds, for a period not exceeding 180 days from the date of shipment.

To ease the operational difficulties faced by the importers, it has been decided, in consultation with the Government of India, to delegate the powers for permitting such clean credit for a period exceeding 180 days from the date of shipment to the AD banks, subject to conditions

For Full Text refer to A.P. (DIR Series) Circular No. 57, dated 31St March 2016

https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10317

5 Foreign Direct Investment (FDI) in India – Review of FDI policy –Insurance sector

The extant FDI policy for Insurance sector has since been reviewed by the Government of India and accordingly it has been decided to enhance the limit of foreign investment in insurance sector from 26 to 49 percent under the automatic route subject to certain terms and conditions which have been notified through Notification No. FEMA. 366/2016-RB dated March 30, 2016.

For Full Text refer to A.P. (DIR Series) Circular No. 58, dated 31St March 2016

https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10316

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Obedience, readiness and love for the cause - if you have these three, nothing can hold you back.

- Swami Vivekanand

Service Tax - Recent Judgements

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1 [2016] 68 taxmann.com 156 (Madras) High Court of Madras S.L. Lumax Ltd. V. Commissioner of Central Excise, Chennai-IV Commissionerate.

Facts:-

Assessee took credit of additional customs duty paid on imported capital goods. However, assessee claimed depreciation on said additional duty under income-tax for assessment years 1998-99, 1999-00 and 2000-01. Assessee filed revised returns for assessment years 1999-00 and 2000-01 deleting depreciation claim on duty amount, but, its request for rectification for assessment year 1998-99 was rejected. Department denied credit on ground that depreciation had been claimed on duty amount

Further the Adjudicating authority allowed partial credit to assessee. Without revenue's appeal there against, CESTAT modified adjudication order and denied credit in full.

Held:-

Assessee started up with a claim for both benefits (Cenvat Credit and depreciation) and ended up with losing both. Though assessee had committed mistake, but, once mistake was detected, assessee filed revised returns deleted depreciation claim on duty amount; hence, denying Cenvat Credit would only be punitive. Hence, credit was allowed subject to working out total amount of depreciation given up by assessee.

Further it was held that without any revenue's appeal, Tribunal could not have denied credit.

2 [2016] 68 taxmann.com 136 (Bangalore - CESTAT) CESTAT, Bangalore Bench Commissioner of Central Excise, Customs and Service Tax, Bangalore-I v. Indian Telephone Industries Ltd.

Facts:-

Owing to price variation clause in contract, assessee opted for provisional assessment. During relevant period, there were certain short-payments as well as certain excess payments. Assessee adjusted excess payments against short-payments and filed a single refund for net excess payment made by it. Department argued that short-payments must be paid and excess payments must be claimed as refund separately subject to doctrine of unjust enrichment.

Held:-

It was held that Upon finalization of provisional assessments, assessee is entitled for adjustment of excess paid duty with short-paid duty during period of provisional assessments. Hence, revenue's appeal was dismissed.

3 [2016] 68 taxmann.com 157 (Calcutta) High Court of Calcutta Bar Association v. Union of India

Facts:-

Vide Budget notifications, Central Government levied service tax on legal services provided by senior advocates under normal/forward charge (not under reverse charge). Bar Association challenged constitutional validity of said levy on ground that advocates who plead on original side on instructions of solicitors and advocates in Supreme Court do not act, and there is no contract, express or implied, between said pleading advocates and lay clients for payment of former's fees.

Held:-

Prima facie, budget notifications nos. 9/2016-ST, 18/2016-ST and 19/2016-ST imposing service tax on legal services provided by 'senior advocates' under forward charge may unreasonably prejudice Senior Advocates; hence, said notifications and consequent levy of service tax on senior advocates was stayed.

4 [2016] 67 taxmann.com 376 (New Delhi - CESTAT) CESTAT, New Delhi Bench Oriental Insurance Company Ltd. V. Commissioner of Central Excise & Commissioner of Service Tax.

Facts:-

Assessee paid brokerage/commission to Indian as well as foreign agents for finalising deals with reinsurers. Department demanded service tax thereon under reverse charge treating it as insurance agent's services

Assessee wrongly took Cenvat credit on electricity and water charges but reversed same with interest even prior to issuance of notice. Department issued notice seeking levy of penalty.

In departmental audit for 2002-03, assessee furnished statement showing difference between 'division-wise total of services' and 'Head-office total of services'. Department demanded service tax of Rs. 48 lakh on such difference invoking extended period on charge of suppression. Assessee submitted that it had paid excess tax of Rs. 1.25 crore in 2004-05 owing to said difference and, therefore, excess tax must be adjusted.

Held:-

Agents were not soliciting or procuring insurance business; they were only helping in finalising deals with reinsurers. Hence, such agents were not 'insurance agents' as defined in rule 2(1)(cba) of Service Tax Rules read with section 2(10) of Insurance Act. Therefore, reverse charge provisions, which apply to 'services by insurance agents' only, were inapplicable. Moreover, services received from foreign agents were not liable to tax prior to 18-4-2006 in absence of section 66A.

Notice had not invoked allegation of suppression of facts in this regard. Hence, as per section 73(3), no notice could be issued in respect of this amount. Since notice itself was not issuable, question of imposing any penalty did not arise.

Assessee's contention of adjusting demand of 2002-03 against excess tax of 2004-05 was rejected. However, assessee cannot be held guilty of wilful mis-statement or suppression of facts to evade service tax, as assessee had acted bona fide and had even paid excess tax in 2004-05. Moreover, assessee being a public sector undertaking, malafides cannot be generally attributed to it.

5 [2016] 67 taxmann.com 365 (New Delhi - CESTAT) CESTAT, New Delhi Bench Narmada Jackson v. Commissioner of Central Excise

Facts:-

Assessee raised a bill showing hall rent and dinner charges (buffet dinners) and paid service tax on hall rent and claimed exemption for dinner charges under Notification 12/2003-ST.Department argued that service tax was leviable taking 40 per cent abatement on composite value.

Held:-

Since definition of Mandap keeper's services in section 65(105)(m) includes services provided as a caterer; hence, catering services provided by a hotel (Mandap keeper) would form part of Mandap keeper's services. Moreover, charges for buffet dinner not only included cost of food but also related services like crockery and cutlery, table service, etc.; therefore, assessee's claim of exclusion of entire dinner charges under Notification No. 12/2003-ST was invalid . Since cost of food was included in overall charges, department has rightly allowed 40 per cent abatement.

6 [2016] 67 taxmann.com 350 (Madras) High Court of Madras Perfect Vending India (P.) Ltd. V. Customs, Excise & Service Tax Appellate Tribunal

Facts:-

Assessee was selling/supplying coffee and tea, through vending machines installed at their customer's premises and was recovering consideration at fixed rate per cup. Sometimes, assessee was leasing/selling machines and in that case, it used to sell consumables such as pre-mix on payment of VAT. Department demanded service tax thereon treating same as 'outdoor caterer's service' . Assessee argued that activity was purely sale and did not have any personalized service. Tribunal ordered pre-deposit of Rs. 15 lakh.

Held:-

Assessee may have a prima facie case/an arguable case before Appellate Authority. Hence, considering same and also considering undue financial difficulties, pre-deposit was reduced to Rs. 5 lakh.

Thus it was held that selling/supplying coffee and tea, through vending machines installed at their customer's premises and charging consideration at fixed rate per cup, prima facie, amounts to sale and not liable to service tax under outdoor catering.

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VAT - Judgements and Updates

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Statute Updates
Value Added Tax (VAT)

[I] **Important Notifications/Circulars:**

[i] **E-Payment is made Compulsory Exceeding Rs.50000/-**

Vide Public Circular dated 22.03.2016 it has been decided by the department that from 1.4.2016, the payment including tax, interest and penalty should be made under GVAT Act as well as CST Act through e-payment and that has been made compulsory where the payment exceeds Rs. 50,000/-.

[ii] **Introduction of New Items under Existing Entry Tax:**

From 1.4.2016 the scope of Entry Tax has been extended and more specified goods have been entered into for the payment of Entry Tax as per the schedule provided under the Entry Tax Act. The readers should take note that the Entry Tax for the following specified goods mentioned herein below are liable for Entry Tax. Please note that any goods purchased online are also liable for Entry Tax.

[i] for the entry at Serial No.1, the following entry shall be substituted, namely –

Sr. No.	Specified Goods	Rate of Tax
1	2	3
"1	Motor vehicles including chassis of motor vehicles and the body which is built on chassis of motor vehicles other than the Specified Goods covered under entries at Serial No. 10 and 11 of this schedule.	Fifteen Percent

[ii] after the entry at serial no.9, the following entries shall be added, namely -

Sr. No.	Specified Goods	Rate of Tax
1	2	3
"10	Motor vehicles including chassis of such motor vehicles and the body which is built on chassis of such motor vehicles brought by companies, firms, HUFs, Societies, institutes, associations of persons or bodies of Individuals whether incorporated or not, Trusts, Government departments, Government undertakings, Boards – Corporations, local self Government bodies and artificial judicial person (except school buses, college buses, passenger buses and goods carrier trucks and its chassis and body built thereon	Twenty Percent
11	Luxury cars, SUVs and luxury two wheelers including chassis of such motor vehicles and the body which is built on chassis of such motor vehicles. Explanation:For the purpose of this entry, "luxury car or luxury SUV" means a car or	Twenty Percent

	a SUV with price more than rupees fifteen lakhs and "luxury two wheeler" means a two wheeler with price more than rupees two and a half lakhs.	
12	All taxable goods under the Gujarat Value Added Tax Act, 2003 where the importer to bring such goods through online purchases, web based software application or by teleshopping platform.	All such rate including rate of additional tax applicable under the Gujarat Value Added Tax Act, 2003 on sale or purchase of such goods.

[II] **Important Judgments:**

[1] **The Hon. GVAT Tribunal has decided about the levy of penalty u/s. 31(4) of the GVAT Act in case of M/s. Trishul Sacchrain Pvt. Ltd. The decision is very important for the interpretation of section 31(4).**

Issue:

The dealer has collected 12.5% tax and also paid the same amount to the government. However, the commodity attracts 4% Vat and under the circumstances, the additional 8.5% was forfeited by the department u/s. 31(3) and also levied the penalty u/s. 31(4) of the Act.

Facts:

The gist of the judgment in short is reproduced hereunder for the benefit of the readers. The interpretation of section 31(4) done by the Hon'ble Tribunal is worth reading.

It is the case of the applicant that the appellant is a company manufacturing flavors and seasonings. The applicant is a deemed registered dealer under section 23 of the Vat Act. The Vat Act was introduced with effect from 01.04.2006 and the assessment period 2006-2007, being the first year, the applicant was under the bonafide impression that there was no specific entry for flavors and seasoning under the schedules appended to Vat Act and therefore, the appellant presumed that flavors and seasoning are covered under the residuary entry 87 of Schedule II to the Act and was liable to pay the tax @ 12.5%. The applicant, therefore, collected and deposited the tax @ 12.5% prescribed under the residuary entry 87 of Schedule II to the Vat Act. The applicant had collected and paid the tax @ 12.5% till December, 2006, in December 2006 and the applicant found from the customers that other dealers dealing in same commodities had started collecting and paying tax @ 4%.

It is also the case of the applicant that in the assessment, till December 2006, the applicant has collected and deposited tax @ 12.5% and hence the assessing officer assessed the applicant @ 12.5% instead of assessing the applicant @ 4% and forfeited remaining tax amount under section 31(3) of the Vat Act and for the remaining period the applicant was assessed @ 4%. In any case, either assessing turnover at the rate of 12.5% or forfeiting the excess amount of tax for which the applicant was not held liable, there was no loss of revenue because the applicant has paid total tax amount, collected from its customers and had not made any claim of refund. The learned Deputy Commissioner, in revision had noticed after scrutinizing the assessment

record that the assessing officer should have taxed the turnover @ 4% and should have forfeited excess tax collected and deposited under section 31(3) of the Vat Act. The Ld. Deputy Commissioner has, therefore, with a view to revise audit assessment order, had issued a notice for the revision in prescribed Form No. 503 dated 23.03.2011. The learned Deputy Commissioner had worked out in revision the excess amount of tax collected and deposited to the extent of Rs. 72,623/- and forfeited the said amount under section 34(3) of the Vat Act. The Ld. Deputy Commissioner has also levied the penalty of an equivalent amount under section 31(4) of the Act, while exercising his revisional jurisdiction. The Ld. Deputy Commissioner thereby raised an additional demand of Rs. 72,623/- against the appellant.

The Ld. Tax Practitioner for the appellant has further submitted that under the Vat Act the tax credit collected by the vendor is admissible to the purchaser under section 11 of the Vat Act and, therefore, section 31(3) prohibits the vendor from claiming refund of tax collected and deposited, if found in excess at the subsequent stage. For this legislative provision, the applicant was not required to refund the amount of tax to its customers from whom it had collected tax in excess.

Under the Vat Act, at every stage the tax paid at previous stage of purchase is admissible by way of tax credit and hence collection of tax by seller from the purchaser is subject to tax credit in case of a purchaser. Therefore, the seller collects tax from purchaser and deposits to the State Exchequer for which he is not held liable, even so it is not refundable to him by virtue of section 31(3) of the Act. The Ld. Tax Practitioner for the appellant has further submitted that even on this ground the amount though found collected in excess has been returned to the purchaser through the Government and therefore, penal provision does not attract to the facts of the present case and the revisional order passed by the Ld. Deputy Commissioner imposing penalty under section 31(4) of the GVAT Act is legally not correct and it is required to be set aside.

The Ld. Government Representative appearing for the respondent on the other hand has relied on the order passed by the Ld. Deputy Commissioner. He has submitted that the applicant has collected the tax @ 12.5%. Though, the applicant was under an obligation to collect the tax @ 4% from its purchaser, the applicant has collected the tax @ 12.5%. The excess tax of 8.5% is therefore required to be forfeited under section 31(3) of the Act.

In view of the above matter and considering the entire facts and circumstances of the case, the Tribunal is of the view that the penalty levied by the Ld. Deputy Commissioner while exercising his revisional jurisdiction under section 75 of the Act, is not just and proper and hence the order levying such penalty deserves to be quashed and set aside.

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In all our actions, errors and mistakes are our only teachers. Who commits mistakes, the path of truth is attainable by him only. Trees never make mistakes, nor do stones fall into error; animals are hardly seen to transgress the fixed laws of nature; but man is prone to err, and it is man who becomes God-on-Earh.

- Swami Vivekanand

Business Valuation

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Case Laws on Matters

Valuation is an art, not an exact science. Mathematical certainty is not demanded, nor indeed is it possible.

J.N. Bose vs Commissioner Of Wealth-Tax

Equivalent citations: 1976 104 ITR 83 Cal

Bench: S Mukharji, Janah

JUDGMENT

Sabyasachi Mukharji, J.

1. In this case we are concerned with valuation of certain property under the Wealth-tax Act, 1957. This relates to the assessment years 1962-63 to 1964-65. The problem is regarding the valuation of half share of the house property situated and lying at No. 2, Justice Chandra Madhab Road, Calcutta, for the purpose of computation of net wealth of the assessee under the Wealth-tax Act, 1957. The assessee is the owner of undivided half share of the aforesaid property, the other half being owned by his brother. A. N. Bose. It is recorded in the order of the Tribunal that the property had not been partitioned between the co-owners. The property waft let out on lease for 15 years with effect from the 1st of August, 1950, to the 31st July, 1965, to India Automobiles on a monthly rent of Rs. 7,500. It is stated that there was an option for a further term of five years. According to the terms of the lease the lessors were entitled to receive Rs. 90,000 per annum inclusive of municipal taxes amounting to Rs. 4,878.16 per annum. There was an option for renewal of the lease. In the wealth-tax returns for the aforesaid years the assessee had shown the valuation of the property as representing his half share at Rs. 4,31,499. The said valuation was arrived at on the basis of an earlier order of the Tribunal in the W.T.As. Nos. 157 and 158 of 1960-61, dated the 14th August, 1961, with regard to the assessment years 1957-58 and 1958-59. In the said order of the Tribunal the Tribunal has made the valuation after taking into account the valuation report of M/s. Talbot & Company, Surveyors and Valuers. But the Tribunal had modified the valuation made by the said M/s. Talbot & Company to the effect that the Tribunal had held that while the valuer had suggested that the rate of expected yield should be taken at 8%, the Tribunal was of the opinion that it should be taken at 7% and the allowance for the undivided share of the property should be taken at 10% instead of 20%. The face value of the property was taken by the Tribunal at Rs. 8,62,997 and the assessee's half share thus came to Rs. 4,31,499. In the said appeal it had been contended on behalf of the revenue that the assessee's tenant was getting a rent of Rs. 90,000 for a per of the property sublet and, therefore, it was reasonable to presume that when the lease expired the assessee would be in a position to get better rent. The Tribunal observed that this ignored an important fact in the sense that the Tribunal was concerned in that appeal with the market value of the share of the property as on the date of valuation subject to the handicaps and disabilities that existed on the date of valuation. Taking all these factors into consideration the Tribunal had arrived at the figure mentioned hereinbefore. In their report, Messrs. Talbot & Company had given the location of the property and had mentioned about the basis in which they had indicated in respect of two sales, one being a sale dated the 31st August, 1960, regarding 5/6ths share of Ezra Mansion for Rs. 5,00,000 with IV-storeyed blocks of buildings having frontages on Old Court House Street, Waterloo Street and Dacres Lane, land area about 44

kottahs yielding a total monthly rent of Rs. 8,000 and the other which was a sale dated(?) August, 1960, regarding 5/6ths share of Chowringhee Mansion for Rs. 11,470.58, land area 84 kottahs with IV-storeyed blocks of buildings having frontages on Park Street, Chowringhee Road and Kyd Street, yielding a total monthly rent of Rs. 10,970.83. For the relevent years with which we are concerned the Wealth-tax Officer did not agree with the estimated value of the property and fixed the sum of Rs. 13,59,960. His basis of estimate was rental income multiplied by 20 times. The half share of the same came to Rs. 6,79,980 which was taken as the assessee's share.

2. There was an appeal before the Appellate Assistant Commissioner and the Appellate Assistant Commissioner observed that the Tribunal in disposing of the wealth-tax assessment for the assessment years 1957-58 and 1958-59 had taken the figure at Rs. 4,58,788. But according to the said Appellate Assistant Commissioner the said valuation was as on the 31st March, 1957. The Appellate Assistant Commissioner was of the opinion that since the property had been given out on lease by the appellant and the lease was about to expire, the value according to him should increase with the passage of time. The Appellate Assistant Commissioner further observed that the buildings which had been constructed were semi-permanent structures and if these were demolished after the lease period had expired, the value of the land alone would be more than Rs. 10,00,000. Considering all these circumstances the Appellate Assistant Commissioner was of the view that the fair market value of the land and building could be arrived at after multiplying the rental income by 16 times. By adopting this method of valuation the value of the land and buildings came to Rs. 5,34,000. If this figure was substituted for Rs. 6,79,980, the value of the land and buildings would be reduced by Rs. 1,45,980. The Appellate Assistant Commissioner, therefore, gave relief to the assessee by reducing the multiplying factor from 20 to 16 and reduced the value by Rs. 1,45,980. Against the aforesaid order of the Appellate Assistant Commissioner both the assessee and the department preferred appeals before the Tribunal. It was submitted on behalf of the assessee that the value as shown by the assessee should be accepted while the department contended that the valuation as taken by the Wealth-tax Officer should be restored. The assessee placed reliance on the previous order of the Tribunal referred to hereinbefore and submitted that there was no change since then either in the rent or in the structure. On the other hand, it was submitted on behalf of the revenue that since 1957-58 onwards there had been considerable increase in the valuation of the property. The lease period was on the point of expiry. The Tribunal, therefore, after considering these factors came to the conclusion that the lease was likely to expire shortly and, therefore, the assessee would get possession of the property and could utilise the same as per his own wish. The Tribunal adverted to the fact that the assessee might have to face some unnecessary litigation in getting the possession, etc., but that did not mean that the valuation of the property remained the same as before. The Tribunal, accordingly, was of the opinion that the Appellate Assistant Commissioner had considered these factors and the multiple of 16 times as applied by him could not be said to be in any way unfair or excessive. In the aforesaid circumstances on this aspect of the matter the Tribunal affirmed the order of the Appellate Assistant Commissioner.

3. Thereafter, having failed to get certain question of law referred to this court by the Tribunal (sic) by the assessee on an order being made under Section 27(3) of the Wealth-tax Act, 1957, the Tribunal has referred the following questions to this court:

"1. Whether, on the facts and in the circumstances of the case, the Tribunal applied wrong principles of valuation of the property ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal erred in the consideration of:

   (a) the undivided character of the share in the property,

   (b) the previous decision of the Tribunal Bench B, Calcutta, for the assessment years 1957-58 and 1958-59 and its applicability to the facts of this case ? and

3. Whether, on the facts and in the circumstances of the case, the Tribunal misinterpreted the chance of the property being got back in valuing the same for the purpose of the Wealth-tax Act ?"

4. The purpose of valuation of a property of this nature under the Wealth-tax Act, 1957, is to find out the market price likely to be fetched on the valuation date in respect of the property by a hypothetical and willing purchaser in respect of a willing seller. The problem is not capable of easy solution.

   "Valuation is an art, not an exact science. Mathematical certainty is not demanded, nor indeed is it possible. It is for the Commissioners to express in the money value attributed by them to the asset their estimate, and this is a conclusion of fact to be drawn from the evidence before them."—said Viscount Simon in the case of Gold Coast Selection Trust Ltd. v. Humphrey (Inspector of Taxes), [1948] AC 459, 473; [1949] 17 ITR (Supp) 19, 26, 27 (HL). The problem of valuation of the immovable property has been dealt with under the Land Acquisition Act, Wealth-tax Act and in computing the capital gains under the Income-tax Acts in various judicial decisions. We may mention the decisions in the cases of Rajasekhara v. Chairman, City Improvement Trust Board, Mysore City, AIR 1957 Mys 20,State of Kerala v. P. P. Hasan Koya, AIR1968SC1201,NarayanaGajapatirajuv. Revenue Divisional Officer, AIR 1939 PC 98, T. Kanagasabapathi Pillai v. Commissioner of Wealth-tax, [1964] 51 ITR 146 (Mad), Commissioner of Wealth-tax v. V. C. Ramachandran, [1966] 60 ITR 102 (Mys), Controller of Estate Duty v. Radha Devi Jalan,[1968] 67 ITR 760 (Cal). C. Krishna Prasad v. Commissioner of Wealth-tax, [1970] 76 ITR 115 (Mys), Goutham Chand Galada v. Commissioner of Wealth-tax, and Mahmudabad Properties (P.) Ltd. v. Commissioner of Income-tax. From the said decisions the following principles emerge :

   (a) In respect of immovable property there is no fixed market, such as market for share, or for other commodities like sugar, cloth, etc.

   (b) There must be certain amount of guess—but the guess must be an intelligent one based on certain objective factors which have a rational nexus with the valuation.

   (c) There are different methods—and which one would be suitable for a particular property must depend upon the particular features of the property; of these methods the one should be preferred which can provide more objective data for reliance. Bearing the aforesaid principles we must consider the facts of this case. The Tribunal in its previous order dated the 14th August, 1961, in respect of the assessment years 1957-58 and 1958-59 had proceeded on a certain basis to which we have referred hereinbefore. The Tribunal had accepted the basis of valuation made by Messrs. Talbot and Company and had relied on certain transactions more or less about that time and had made certain directions which according to the Tribunal were just and necessary to be made in that case. In the instant case the said valuation can be departed from and the basis of the said valuation can be changed if there are materials to indicate that there has been either a change in the structure of the property or in the interest of the property held by the co-sharers or the market, value

in respect of that property. In none of these matters, however, there was any positive evidence. There has been no change either in the structure or location of the property. There was no evidence of any appreciation of the market value. The Tribunal has referred to a general tendency of the increase in the value of the property but there was no evidence that the property of this magnitude was very easily saleable at a higher price than it was on the date when the Tribunal made the previous order. Thirdly, the character of the property remained the same, undivided nature of the assessee's interest and the property was subject to a lease. The assessee in question had undivided half share and the property was subject to a lease. It is true that in the years with which the Tribunal was concerned in the instant appeal the lease was coming to an end. That might be a relevant factor which might be taken into consideration but that factor has also to be taken into consideration with certain other relevant factors, that is to say, in the instant case there was an option of renewal of lease. Having regard to the nature of the lease, having regard also to the fact that there was no evidence that there was any diminution of business of the lessee or desire on the part of the lessee to give up the property or not to carry on business which was being carried on in the said premises and having regard to the fact that there was no evidence of availability of such premises by the lessee on more or less the same price which would have induced the lessee not to exercise the option, it would be wrong to take into consideration solely the fact that the lease was coming to an end without taking into consideration all the other relevant factors. It has further to be borne in mind as was contended by the assessee, and the Tribunal adverted to it, that on the expiry of lease the property does not automatically come to the lessor's possession which is necessary to enjoy the property or to be able to sell the property. The trouble and difficulties of the present rent litigations are well-known facts in respect of which judicial notice can be and should be taken. The Tribunal has also not adverted to the fact that the assessee was the owner of undivided half share of the property. This is also a relevant factor affecting the valuation of the property in respect of market value. Having regard, therefore, to these relevant factors and having regard to the fact that there was no positive evidence of appreciable change, so far as these material -facts, to which we have referred before, having altered since the decision of the Tribunal was given for the assessment years 1957-58 and 1958-59, we are of the opinion that the Tribunal had proceeded on a wrong appreciation of the principles and factors applicable in the valuation of the instant property in question. In the premises, the question No. 1 is answered in the affirmative in the light of the observations made aforesaid and in favour of the assessee. As regards question No. 2 the Tribunal was in error in not taking the undivided character of the property into consideration and the Tribunal was in error in not appreciating that after the previous decision of the Tribunal for the assessment years 1957-58 and 1958-59 there were no evidence or factors to indicate any change or departure from the said decision on the facts of this case. So far as the question No. 3 is concerned, we answer it by saying that the Tribunal misinterpreted the chance of the property being got back without taking the clause for option for renewal and without taking the other relevant factors as indicated above into consideration. This is also answered in favour of the assessee. In the facts and circumstances of the case each party will pay and bear its own costs.

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Corporate Law Update

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MCA Updates:

1. **Companies (Share Capital and Debentures) Second Amendment Rules, 2016.**

   In the Companies (Share Capital and Debentures) Rules, 2014, in rule 12, after sub-rule (5), the following proviso shall be inserted, namely:

   "Provided that where all members of a company agree, the offer for buy back may remain open for a period less than fifteen days."

   [F. No. 01/04/2013 CL-V (part-II) dated 29th March, 2016]

2. **Companies (Removal of Difficulties) First Order, 2016.**

   As the difficulties have arisen regarding compliance with the provisions of section 143(11) in so far as they relate to consultation with National Financial Reporting Authority till the period it is duly constituted under section 132 of the said Act, the following proviso shall be inserted in section 143, in sub section (ii), namely:

   "Provided that until the National Financial Reporting Authority is constituted under section 132, the Central Government may hold consultation required under this sub section with the Committee chaired by an officer of the rank of Joint Secretary or equivalent in the Ministry of corporate Affairs and the committee shall have the representatives from the Institute of Chartered Accountants of India and Industry Chambers and also special invitees from the National Advisory Committee on Accounting Standards and the office of the Comptroller and Auditor General"

   This shall come into force w. e. f. 10.04.2015.

   [F. No. 17/45/2015- CL-V dated 29th March, 2016]

3. **Companies (Removal of Difficulties) Second Order, 2016.**

   To remove the difficulties, the following proviso shall be inserted in section 113, (w. e. f. 01.04.2015), namely:-

   "Provided that until the National Financial Reporting Authority is constituted under section 132 of the Companies Act, 2013 (18 of 2013), the Central Government may prescribe the standards of accounting or any addendum thereto, as recommended by the Institute of Chartered Accountants of India, constituted under section 3 of the Chartered Accountants Act, 1949 (38 of 1949), in consultation with and after examination of the recommendations made by National Advisory Committee on Accounting Standards Constituted under section 210 A of the Companies Act, 1956."

   [F. No. 17/45/2015-CL-V dated 29th March, 2016]

4. Companies (Auditor's Report) Order, 2016.

Clause No.	Companies (Auditor's Report) Order, 2015.	Companies (Auditor's Report) Order, 2016	Change effected
1(v)	a private limited company with a paid up capital and reserves not more than rupees fifty lakh and which does not have loan outstanding exceeding rupees twenty five lakh from any bank or financial institution and does not have a turnover exceeding rupees five crore at any point of time during the financial year.	a private limited company, not being a subsidiary or holding of a public company, having a paid up capital and reserves and surplus not more than rupees one crore as at the balance sheet date and which does not have total borrowings exceeding rupees one crore from any bank or financial institution at any point of time during the financial year and which does not have a total revenue as disclosed in Scheduled III to the Companies Act, 2013 (including revenue from discontinuing operations) exceeding rupees ten crore during the financial year as per the financial statements.	Criteria for Private Limited Companies for applicability of CARO have been changed.Financial Criteria of Paid Up Capital, Borrowings, and Revenue for applicability have been changed.
2	Auditor's report to contain matters specified in paragraphs 3 and 4. Every report made by the auditor under section 143 of the Companies Act, on the accounts of every company *examined* by him, to which this Order applies for the financial year commencing on or after 1st April, 2014, shall contain the matters specified in paragraphs 3 and 4.	Auditor's report to contain matters specified in paragraphs 3 and 4. Every report made by the auditor under section 143 of the Companies Act, 2013 on the accounts of every company *audited* by him, to which this Order applies, for the financial year commencing on or after 1st April, 2015, shall in addition, contain the matters specified in paragraphs 3 and 4, as may be applicable. Provided the Order shall not apply to the auditor's report on consolidated financial statements.	The word "EXAMINED" has been replaced by the word "AUDITED". It shall be applicable with effect from 01/04/2015 but shall not be applicable to the auditor's report on Consolidated Financial Statements.
3 (i)(c)	—	Whether title deeds of immovable properties are held in the name of the company. If not, provide details thereof.	New sub- clause inserted.

3 (ii)(a)	Whether physical verification of inventory has been conducted at reasonable intervals by the management;	Whether physical verification of inventory has been conducted at reasonable intervals by the management and whether any material discrepancies were noticed and if so, how they have been dealt with in the books of account;	New sub-clause having effect of earlier sub clauses 3(a), (b) and (c) have been inserted.
3 (ii)(b)	Are the procedures of physical verification of inventory followed by the management reasonable and adequate in relation to the size of the company and the nature of its business. If not, the inadequacies in such procedures should be reported;	—	Deleted.
3 (ii)(c)	Whether the company is maintaining proper records of inventory and whether any material discrepancies were noticed on physical verification and if so, whether the same have been properly dealt with in the books of account;	—	Deleted.
3 (iii)	Whether the company has granted any loans, secured or unsecured to companies, firms or other parties covered in the register maintained under section 189 of the Companies Act. If so,	Whether the company has granted any loans, secured or unsecured to companies, firms, Limited Liability Partnerships or other parties covered in the register maintained under section 189 of the Companies Act. If so,	LLP's also are covered.
3(iii)(a)	Whether receipt of the principal amount and interest are also regular; and	Whether the terms and conditions of the grant of such loans are not prejudicial to the company's interest;	Monetary limits of overdue amounts have been removed.
3(iii)(b)	If overdue amount is more than rupees one lakh, whether reasonable steps have been taken by the company for recovery of the principal and interest;	Whether the schedule of repayment of principal and payment of interest has been stipulated and whether the repayment or receipts are regular.	
3(iii)(c)	—	(c) If the amount is overdue, state the total amount overdue for more than ninety days and whether reasonable steps have been taken by the company for recovery of the principal and interest;	New sub- clause inserted.

3 (iv)	Is there an adequate internal control system commensurate with the size of the company and the nature of its business, for the purchase of inventory and fixed assets and for the sale of goods and services. Whether there is a continuing failure to correct major weaknesses in internal control system.	In respect of loans, investments, guarantees, and security whether provisions of section 185 and 186 of the Companies Act, 2013 have been complied with. If not, provide the details thereof.	Clause relating to internal controls has been deleted and details of compliance of section 185 and 186 have been inserted.
3(vii) (a)	Is the company regular in depositing undisputed statutory dues including provident fund, employees' state insurance, income-tax, sales-tax, wealth tax, service tax, duty of customs, duty of excise, value added tax, cess and any other statutory dues with the appropriate authorities and if not, the extent of the arrears of outstanding statutory dues as at the last day of the financial year concerned for a period of more than six months from the date they became payable, shall be indicated *by the auditor.*	Whether the company is regular in depositing undisputed statutory dues including provident fund, employees' state insurance, income-tax, sales-tax, service tax, duty of customs, duty of excise, value added tax, cess and any other statutory dues to the appropriate authorities and if not, the extent of the arrears of outstanding statutory dues as on the last day of the financial year concerned for a period of more than six months from the date they became payable, shall be indicated;	The word "By the Auditor" has been deleted.
3(vii) (b)	in case dues of income tax or sales tax or wealth tax or service tax or duty of customs or duty of excise or value added tax or cess have not been deposited on account of any dispute, then the amounts involved and the forum where dispute is pending shall be mentioned. (A mere representation to the concerned Department shall not *constitute* a dispute).	where dues of income tax or sales tax or service tax or duty of customs or duty of excise or value added tax have not been deposited on account of any dispute, then the amounts involved and the forum where dispute is pending shall be mentioned. (A mere representation to the concerned Department shall not be *treated* as a dispute).	The word "Constitute" has been replaced by the word Treated .
3 (vii) (c)	Whether the amount required to be transferred to investor education and protection fund in accordance with the relevant provisions of the Companies Act, 1956 (1 of 1956) and rules made thereunder has been transferred to such fund within time.	—	Deleted.

3(viii)	Whether in case of a company which has been registered for a period not less than five years, its accumulated losses at the end of the financial year are not less than fifty per cent of its net worth and whether it has incurred cash losses in such financial year and in the immediately preceding financial year;	Whether the company has defaulted in repayment of loans or borrowing to a financial institution, bank, Government or dues to debenture holders? If yes, the period and the amount of default to be reported (in case of defaults to banks, financial institutions, and Government, lender wise details to be provided).	Details of losses are now not to be provided.In case of defaults in repayments or dues, lender wise details are to be reported.
3(ix)	Whether the company has defaulted in repayment of dues to a financial institution or bank or debenture holders? If yes, the period and amount of default to be reported;	Whether moneys raised by way of initial public offer or further public offer (including debt instruments) and term loans were applied for the purposes for which those are raised. If not, the details together with delays or default and subsequent rectification, if any, as may be applicable, be reported;	Report on application of funds raised by way of public offer (including debt instruments) and term loans and details of delays and default, if any, are to be provided along with subsequent Rectification.
3 (x)	whether the company has given any guarantee for loans taken by others from bank or financial institutions, the terms and conditions whereof are prejudicial to the interest of the company;	whether any fraud by the company or any fraud on the Company by its officers or employees has been noticed or reported during the year; If yes, the nature and the amount involved is to be indicated;	Reporting of fraud(s) on the Company by its officers/ employee, if any, is to be done.
3 (xi)	whether term loans were applied for the purpose for which the loans were obtained;	Whether managerial remuneration has been paid or provided in accordance with the requisite approvals mandated by the provisions of section 197 read with Schedule V to the Companies Act? If not, state the amount involved and steps taken by the company for securing refund of the same;	Reporting on approvals and compliances relating to managerial remuneration is required.
3 (xii)	Whether any fraud on or by the company has been noticed or reported during the year; If yes, the nature and the amount involved is to be indicated.	Whether the Nidhi Company has complied with the Net Owned Funds to Deposits in the ratio of 1: 20 to meet out the liability and whether the Nidhi Company is maintaining ten per cent unencumbered term deposits as specified in the Nidhi Rules, 2014 to meet out the liability;	Reporting of maintenance of funds to meet the liabilities under Nidhi Rules, 2014 has been introduced.

3 (xiii)	—	Whether all transactions with the related parties are in compliance with sections 177 and 188 of Companies Act, 2013 where applicable and the details have been disclosed in the Financial Statements etc., as required by the applicable accounting standards;	New clause inserted.
3(xiv)	—	Whether the company has made any preferential allotment or private placement of shares or fully or partly convertible debentures during the year under review and if so, as to whether the requirement of section 42 of the Companies Act, 2013 have been complied with and the amount raised have been used for the purposes for which the funds were raised. If not, provide the details in respect of the amount involved and nature of non-compliance;	New clause inserted.
3 (xv)	—	Whether the company has entered into any non-cash transactions with directors or persons connected with him and if so, whether the provisions of section 192 of Companies Act, 2013 have been complied with;	New clause inserted.
3 (xvi)	—	Whether the company is required to be registered under section 45-IA of the Reserve Bank of India Act, 1934 and if so, whether the registration has been obtained.	New clause inserted.
4(1)	Where, in the auditor's report, the answer to any of the questions referred to in paragraph 3 is unfavourable or qualified, the auditor's report shall also state the *reasons for* such unfavourable or qualified answer, as the case may be.	Where, in the auditor's report, the answer to any of the questions referred to in paragraph 3 is unfavourable or qualified, the auditor's report shall also state the *basis for* such unfavourable or qualified answer, as the case may be.	The words "Reasons for" have been replaced by the words "Basis for".

4(2)	Where the auditor is unable to express any opinion in answer to a particular question, his report shall indicate such fact together with the reasons why it is not possible for him to give an answer to such question.	Where the auditor is unable to express any opinion on any specified matter, his report shall indicate such fact together with the reasons as to why it is not possible for him to give his opinion on the same.	The words "Particular Question" has been replaced by the words "Specified Matter .

[F. No. 17/45/2015-CL-V dated 29th March, 2016]

5. Companies (Indian Accounting Standards) Amendments Rules, 2016.

- "Indian Accounting Standards (Ind AS) shall be applicable to NBFCs in phase wise manner starting from accounting year beginning on or after 01st April, 2018.
- The Banking Companies and Insurance Companies shall apply the Ind ASs as notified by the Reserve Bank of India (RBI) and Insurance Regulatory Development Authority (IRDA) respectively.
- Various insertions/deletions/substitutions in the Principal Rules, "in the Annexure", under the heading "B", in Indian Accounting Standard (Ind AS) 101, 103, 104, 105, 107, 109, 110, 112, 115, 1, 2, 12, 16, 17, 19, 23, 28, 32, 34, 36, 37, 38, 40,
- Ind AS 11 (Construction Contracts), 18 (Revenue) have been inserted.

[F. No. 01/01/2009-CL-V (Part) dated 30th March, 2016]

For details, please refer the following link:

http://www.mca.gov.in/Ministry/pdf/Notification_30032016_I.pdf

6. Companies (Accounting Standards) Amendments Rules, 2016.

Rule No.	Particulars	Change effected
Rule 2(a)	"Accounting Standards" means the standards of accounting or any addendum thereto as specified in rule 3 of these rules;	Substituted
Rule 2(b)	"Act" means the Companies Act, 1956 (1 of 1956) or the Companies Act, 2013 (18 of 2013), as the case may be;	Substituted
Rule 2(d)	"Financial Statements" means financial statements as defined in sub-section (40) of section 2 of theCompanies Act, 2013;	Substituted
Rule 2(e)	"Enterprise" means a 'company' as defined in sub-section (20) of section 2 of the Companies Act, 2013 or as defined in section 3 of the Companies Act, 196, as the case may be;'	Substituted
Rule 4(2)	"General Purpose"	Omitted
ACCOUNTING STANDARDS" Annexure""A. General Instructions" Paragraph 5	The reference to 'Schedule VI' or 'Companies Act, 1956' shall mutatis mutandis mean 'Schedule III' and 'Companies Act, 2013', respectively.	Inserted

ACCOUNTING STANDARDS Annexure" Accounting Standard (AS) 2"	"Accounting Standard (AS) 2"Valuation of Inventories	Substituted
ACCOUNTING STANDARDS Annexure" Accounting Standard (AS) 4"	"Accounting Standard (AS) 4"Contingencies and Events Occurring After the Balance Sheet Date	Substituted
ACCOUNTING STANDARDS Annexure" Accounting Standard (AS) 6"	"Accounting Standard (AS) 6"Depreciation Accounting	Omitted
ACCOUNTING STANDARDS Annexure" Accounting Standard (AS) 10"	"Accounting Standard (AS) 10"Property, Plant and Equipment	Substituted
ACCOUNTING STANDARDS Annexure "Accounting Standard (AS) 13"	"Accounting Standard (AS) 13"Accounting for Investments	Substituted
ACCOUNTING STANDARDS Annexure "Accounting Standard (AS) 14"	"Accounting Standard (AS) 14"Accounting for Amalgamations	Substituted
ACCOUNTING STANDARDS Annexure "Accounting Standard (AS) 21"	"Accounting Standard (AS) 21"Consolidated Financial Statements	Substituted
ACCOUNTING STANDARDS Annexure "Accounting Standard (AS) 29"	"Accounting Standard (AS) 29"Provisions, Contingent Liabilities and Contingent Assets	Substituted

[F. No. 17/151/2013-CL-V] dated 30th March, 2016]

For details, please refer the following link:

http://www.mca.gov.in/Ministry/pdf/Notification_30032016.pdf

7. Companies (Filling of Documents and forms in Extensible Business Reporting Language) Amendment Rules, 2016.

In the Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2015, in rule 3, for the proviso, the following proviso shall be substituted, namely:-

"Provided that the companies in banking, insurance, power sector, non-banking financial companies and housing finance companies need not file financial statements under this rule."

[F. No. 1/19l2013-CL-V dated 04th April, 2016]

9. Relaxation of additional fees and extension of last date of filling of various e-forms under the Companies Act.

In view of various issues and problems being faced by the stakeholders after the launching of V2R2 on 28th March, 2016, the Ministry has decided to relax the additional fee payable on e-forms which are due for filling by companies between 25th march 2016 to 30th April, 2016 as one time waiver of additional fee and it is also clarified to stake holders that if such due e forms are filed after 10.05.2016, no such relaxation shall be allowed.

[F. No. 01/34/2013 CL-V Dated 12th April, 2016]

SEBI Updates:

1. Applicability of Indian Accounting Standards to disclosures in offer documents under SEBI (ICDR) Regulations, 2009.

The disclosure of financial information in accordance with Ind AS in the offer document shall be in the following manner:

a) For issuer companies to which Ind AS is applicable in Phase 1 of MCA Roadmap (beginning from FY 2016-17):

Period of filing of Offer Document	Latest financial year	Second latest financial year	Third financial year	Second earliest financial year	Earliest financial year
Up to March 31, 2017	Indian GAAP	Indian GAAP	Indian GAAP	Indian GAAP	Indian GAAP
Between April 1, 2017 and March 31, 2018	Ind AS	Ind AS	Ind AS*	Indian GAAP	Indian GAAP
Between April 1, 2018 and March 31, 2019	Ind AS	Ind AS	Ind AS	Indian GAAP	Indian GAAP
Between April 1, 2019 and March 31, 2020	Ind AS	Ind AS	Ind AS	Ind AS	Indian GAAP
On or after April 1, 2020	Ind AS	Ind AS	Ind AS	Ind AS	Ind AS

b) For issuer companies to which Ind AS is applicable in Phase 2 of MCA Roadmap (beginning from FY 2017-18), the above timelines w.r.t. filing of offer documents shall be followed with time lag of one year.

This circular is applicable for all the companies which are required to disclose the financial information in accordance with Ind AS as per MCA roadmap and whose offer document is filed with the Board on or after 01st April, 2016

[SEBI/HO/CFD/DIL/CIR/P/2016/47 dated 31st March, 2016]

For details, please refer the following link:

http://www.sebi.gov.in/cms/sebi_data/attachdocs/1459418165606.pdf

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Allied Laws Corner

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Shares which are subject matter of transfer under the scheme of amalgamation would not come within pre-emption clause of Articles of Association.

Recently the Bombay High Court in the case of **Shakti Insulated Wires (P.) Ltd. vs. Great view Properties (P.) Ltd. in 68 taxmann.com 169** held that transfer of shares under the scheme of amalgamation is transmission by operation of law which would not come within pre-emption clause of Articles of Association applicable to voluntary transfer of shares.

A. Facts of the Case :

One Jayalaxmi Holdings Pvt. Ltd. ("JHPL") held 1980 shares of the Appellant company ("subject shares"). In pursuance of a scheme of amalgamation sanctioned by this Court, all assets and liabilities of JHPL were transferred to the first Respondent. The assets included the subject shares. The first Respondent, thereafter, applied for registration of such transfer and inclusion of its name in the register of members. The Appellant rejected the application on the ground that the transfer of shares was in breach of the relevant Articles of Association providing for a right of pre-emption. This rejection was challenged by the first Respondent before the CLB under Section 111 of the Act. The CLB allowed the petition and directed rectification of the register.

B. Arguments of the Counsel

Learned Counsel for the Appellants submits that the CLB has erred in law by treating the transfer of shares under the scheme of amalgamation as a case of transmission by operation of law, whereas transfer of assets by a scheme of amalgamation is considered as a voluntary transfer between the transferor and transferee companies. He relies on the Articles of Association of the Appellant Company and contends that all voluntary transfers come within the pre-emption clause of the Articles. Learned Counsel submits that the subject transfer was in breach of these Articles and was, thus, rightly rejected by the Appellant Company.

C. Findings of the Hon'ble Bombay High Court

1. Articles 21 to 43 of the Articles of Association of the Appellant provide for transfer and transmission of shares. Article 22 restricts transfers of shares except after exhaustion of rights of pre-emption provided in Articles 23 to 38 which follow. Article 39 provides for a 'transmission clause', where a person becomes entitled to shares other than by transfer in accordance with the foregoing Articles. In case of a transmission, the Articles providing for rights of pre-emption do not apply. **The controversy between the parties really involves the nature of the transaction as between JHPL and the first Respondent under the sanctioned scheme of amalgamation. Does it amount to 'transfer of shares' or is it equivalent to 'transmission of shares', within the meaning of the Articles of the Appellant.** For if it is 'transfer', then alone the pre-emption clause would apply and not otherwise.

2. The relevant Articles concerning **'transfer of shares'** are quoted below:

   '(22) Except as hereinafter provided, no shares in the Company shall be transferred unless and until the rights of preemption hereinafter conferred shall have been exhausted.

(23) Except where the transfer is made pursuant to article 29 or Article 38 hereto, the person proposing to transfer any share (hereinafter called "the Proposing Transferor") shall give notice in writing (hereinafter called "a Transfer Notice") to the Company, that he desires to transfer the same. Such notice shall specify the sum he fixes as the fair value and shall constitute the Board of Directors his agent for the sale of the share to any member of the Company or person approved of selected by the Board of Directors who is willing to purchase the share (hereinafter called "the Purchasing Member") at the price so fixed, or at the option of the Purchasing Member at the fair value to be fixed by the Auditors of the Company in accordance with Article 25 hereof. A Transfer Notice may include several shares and in such cases shall operate as if it were a separate notice in respect of each. A transfer Notice shall not be revocable except with the sanction of the Directors.

(24) If the Company shall within the space of 28 days after being served with a Transfer Notice find a Purchasing Member and shall give notice thereof to the Proposing Transferor he shall be bound upon payment of the fair value in accordance with Article 25 thereof, to transfer the share to the Purchasing Member.

(27) If the Company shall not within the space of 28 days after being served with a Transfer Notice, find a Purchasing member and notice in manner aforesaid, the Proposing Transferor shall at any time within there calender months afterwards be at liberty subject to Article 36 hereof to sell and transfer the share (of where there are more shares than one those not placed) to any person and at any price, not being less than the said fair value.

(29) Any share may be transferred by a member to any child or other issue, son-in-law, daughter-in-law, father, mother, brother, sister, nephew, niece, cousin, wife or husband of such member and any share of a deceased member may be transferred by his executors or administrators or other legal representatives to any child or other issue, son-in-law, daughter-in law, father, mother, brother, sister, nephew, niece, cousin, widow or widower of such deceased member (to whom such deceased member may have specifically bequeathed the same) and shares standing in the name of the trustees of the will of a deceased member may be transferred upon any change of trustees to the trustees for the time being of such Will and restrictions in Articles 22 to 28 hereof shall not apply to any transfer authorised by this Article.

(38) The executors or administrators of a deceased member or the holder of a succession certificate of deceased member (such deceased member not being one of several joint- holders) shall be the only person recognised by the Company as having interest in or title to the shares registered in the name of such member, and the Company shall not be bound to recognise such executors, administrators or holder of succession certificate unless such executors, administrators or holder of succession certificate shall have first obtained Probate or Letters of Administration or a Succession

Certificate, as the case may be, from a duly constituted Court in India.'

3. The relevant Article providing for **'transmission'** is quoted below :

'(39) Subject to the provisions of Article 38 any person becoming entitled to shares in consequence of the death, lunacy or insolvency of any member or by any lawful means other than by transfer in accordance with these presents, upon producing such evidence that he sustains the character in respect of which he proposes to act upon this Article or of his title as the Directors thinks sufficient, may, with the consent of Directors (which they shall not be under any obligation to give), be registered as a member in respect of such shares, or may, Subject to the regulations as to transfer hereinbefore contained, transfer such shares. This clause is hereinafter referred to as "The Transmission Clause.'

4. The main plank of the Appellant's case is that transfer of assets in the case of a scheme of amalgamation between transferor and transferee companies is a voluntary transfer and not an involuntary transfer by operation of law. Learned Counsel for the Appellant relies on the judgment of the Supreme Court in the case of *General Radio & Appliances Co. Ltd.* v. *M.H. Khader* AIR 1986 SC 1218. **No doubt transfer of assets and liabilities between a transferor and transferee company in the case of amalgamation is by volition, but what is important to remember is that such transfer is not of individual assets or liabilities separately but of interest in a going concern.** As explained by a Division Bench of our Court in *Li Taka Pharmaceuticals Ltd.* v. *State of Maharashtra* [1996] 8 SCL 102 (Bom.) by an amalgamation scheme, what the transferee company in effect purchases is the transferor company or its undertaking for a specified sum which is ordinarily paid in the form of allotment of shares of the transferee company to the shareholders of the transferor company. The valuation is based on the net of the transferor company's assets and liabilities. This aspect would have an important bearing on the question which we are considering, as I have explained below.

5. If one has regard to the Articles of the Appellant, Articles 21 to 38 apply when any shareholder proposes to transfer his shares. There may or may not be any proposed transferee at that stage. The proposing transferor has to give a notice in writing ('transfer notice') to the company that he desires to transfer his shares. The transfer notice must specify the sum he fixes as a fair value. Upon such notice, the Board of Directors of the company is constituted as an agent of the proposing transferor for sale of the subject shares to any member of the company or person approved by the Board of Directors, who is willing to purchase the shares at the price or at the option of the purchasing member at a fair value to be determined by the auditors of the company in accordance with Article 25. That is the purport of Article 23. If the company is served with a transfer notice, as provided in Article 24, it has to find a purchasing member and give a notice thereof to the proposing transferor within the space of 28 days. In case of any difference between the proposing transferor and purchasing member as to the fair value of the shares, the auditor of the company is, on the application of either party, required to certify in writing the sum which may be termed as fair value. The proposing transferor is then to be bound to transfer the shares at this fair value. In case the proposing transferor makes a default in transferring the shares, the company has

an option to receive the purchase money, in which case the proposing transferor is deemed to have appointed any one Director or Secretary of the company as his agent to execute the transfer to the purchasing member and upon execution of such transfer, the company shall hold purchase monies in trust for the proposing transferor. In such a case the name of the purchasing member has to be entered in the register as the holder of the shares. Under Article 27, if the company fails to find a purchasing member and give notice within the space of 28 days, the proposing transferor shall, at any time, within three calender months be at liberty to sell and transfer the shares (subject to Article 36) to any person and at any price, not being less than the said fair value. As these Articles clearly indicate, transfer of shares as part of a scheme of amalgamation between a transferor and a transferee company cannot possibly come within these provisions. In the first place, in case of amalgamation there is no general proposal for transfer of shares. The transfer, which takes place upon sanction of the scheme of amalgamation, is not of shares at any particular value. Secondly, the transfer occurs upon or subject to the court sanctioning the scheme of amalgamation. In a given case, the Court may not sanction a scheme, in which case there would be no question of transfer of any shares. In the premises, whenever a scheme is proposed it would be absurd to expert the transferor company to actually give a notice of transfer within the meaning of Article 23 and then subject itself to transfer to a purchasing member found by the Board of Directors at a fair value to be determined by the auditors of the company in accordance with Article 25.

6. The transfer proposed is, in the first place, transfer of the company or its undertaking as a going concern and not of any individual assets including shares held by the transferor company. Secondly, in such a case it would only be permissible to it to transfer the shares as part of the scheme of amalgamation in the event of Article 27 coming into play, that is to say, the company not finding within 28 days of the transfer notice a purchasing member or giving a notice in accordance with Article 24. Even then the transfer must be at a price not below the fair value determined by the auditors of the company. This again is unfeasible and unwarranted within the framework of a scheme of amalgamation.

7. **A proper reading of the Articles seems to be that any transfer of shares occasioned by a scheme of amalgamation sanctioned by the court is not a transfer of shares within the meaning of Article 21 to 38 but a case of under Article 39 of transmission of shares 'by any lawful means other than by transfer in accordance with' the earlier Articles.** After all the 'transmission clause' contained in Article 39 does not necessarily apply to the case of an involuntary transfer which is by operation of law. It rather provides for a case where the entitlement of any person to the shares arises on account of any lawful means other than by transfer in accordance with the foregoing Articles. Such transmission merely requires production of evidence that the claimant sustains the character in respect of which he proposes to act under Article 39 or has the requisite title. In other words, all entitlements to shares other than by virtue of transfers in pursuance of Articles 21 to 38 are covered by Article 39 and must abide by it.

8. The CLB is, accordingly, perfectly justified in coming to the conclusion that the transfer of shares occasioned in the present case is under the transmission clause of Article 39 and not transfer of shares under Articles

which precede it. The only question is, however, of the relief that can be granted to the first respondent on this finding. Even if its case be covered under the transmission clause of Article 39, it can be registered as a member in respect of the shares only with consent of the Directors. The Directors are not under any obligation to give such consent. If the Directors refuse to give such consent, the first Respondent would be free to invoke the regulations which apply to transfer of shares. Accordingly, the CLB had to give an option to the Board of Directors of the Appellant to register the first Respondent as a member or in the alternative, to purchase the shares through any purchasing member or otherwise at a fair value to be determined by the auditors of the company within the meaning of Article 25.

9. Accordingly, whilst the findings of CLB in the impugned order are not disturbed, the operative order passed by CLB is modified by substituting Clause 'C' of para 21 of the impugned order by the following clause

"C The Appellant company at its option shall either register the first Respondent as a shareholder in its register of members or allow the first Respondent to sell 1980 shares held by the first Respondent in accordance with the Articles of Association to a person named by the first Respondent or buy the said shares through a purchasing member at a fair value to be determined by the auditors of the Appellant company in accordance with Article 25. Such option shall be exercised within 28 days from today."

10. Until either of these options is exercised, the Appellant Company shall maintain status-quo in respect of the Company and its fixed assets in accordance with the ad-interim order dated 23 December 2014 operating till date

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contd. from page 19

Therefore, once the addition made by the Assessing Officer is deleted, the necessary consequences would be to delete the penalty imposed under section 271(1)(c).

Also See :

Family of SP.SS.SP. Subramanium Chottar v/s. ITO (2015) 232 Taxman 723 (Madras)

7 Maintaining Gaushala is a Charitable Object : Anonymous Donation: Director of Income Tax (Exemption) v/s. Bombay Panjara Pole Trust (2015) 232 Taxman 821 (Bombay) : (2015) DTR 0149 (Bom)

Issue :

Whether maintaining Gaushala is a charitable activity under I.T. Act?

Held :

Assessee was a charitable trust engaged in maintaining Gaushalas and tending to other animals and birds. Assessee received donations from identified donors and also anonymous donations. Assessing Officer after excluding identified donations, brought to tax anonymous donations. Commissioner (Appeals) after examining objects of assessee trust and work carried out, concluded that assessee trust was a trust which had been established to fulfill charitable and religious purpose. Tribunal also upheld finding of Commissioner (Appeals). Revenue contended that trust not being one for religious purposes but only for charitable purposes, anonymous donations were liable to be taxed under section 115BBC. Taking care of animals was to be considered as charitable as well as religious activities. Therefore, anonymous donations received would not be taxable.

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From Published Accounts

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AS - 10 Accounting for Fixed Assets
AS - 6 Depreciation Accounting

Significant Accounting Policies on Consolidated Accounts for Financial Year 2014-15.

Unity Infraprojects Limited

3. Fixed Assets

(a). Tangible Assets

Tangible assets are stated at cost, inclusive of incidental expenses related thereto and are net of recoverable taxes less accumulated depreciation and accumulated impairment loss. if any.

(b). Intangible assets

Intangible assets are recorded at the consideration paid for acquisition of such assets and are carried at cost less accumulated amortization and important. Internally generated intangible assets, excluding development cost, are expensed as incurred unless technical and commercial feasibility of the project is demonstrated, future economic benefits are probable, the Company has an intention and ability to complete and use or sell the intangible and the costs can be measured reliably.

4. Depreciation and amortization

(a) Depreciation on tangible fixed assets is provided on the written-down-value method based on useful life of the assets as prescribed in Schedule II of the Act, except is calculated pro-rata and machinery, where useful life different than those prescribed in Schedule II, is based on technical assessment.

(b) Depreciation on additions/ deletions to fixed assets is calculated pro-rata from/ up to data of such additions/ deletions.

(c) Intangible fixed assets are amortised on a straight line basis over the estimated useful economic life. The Company uses a rebuttable presumption that useful life of an intangible assets will not exceed five years from the data when the asset is available for use.

Shemaroo Entertainment Limited

(d) Depreciation on tangible fixed assets

Depreciation on fixed assets is calculated on a straight-line basis using the rates arrived at based on the useful lives estimated by the management, or those prescribed under Part C of Schedule II of the Companies Act,2013, whichever is lower. Depreciation for assets purchase/sold during a period is proportionately charged. Fixed assets individually costing Rs. 5,000 or less are fully depreciated in the year of acquisition. The Company has estimated the useful lives for the fixed assets as follows:

Office Building	58 years
Plant & Machinery	3-15 years
Furniture & Fixtures	10 years
Motor Vehicle	8-10 years

(e) Intangible assets

Intangible Assets are recorded at acquisition cost and in case of assets acquired on merger at their carrying values. Websites/Brands are recognized as Intangible Assets if it is expected that such assets will generate future economic benefits and amortised over their useful life not exceeding four/ten years or estimated useful life whichever is lower.

Computer Software	5 years

NHPC Limited

(2). Fixed Assets

(A) Tangible Assets

Fixed assets are stated at cost of acquisition/ construction less accumulated depreciation/amortization and impairment losses, if any. In cases where final settlement of bills with contractors is

pending, but the asset is complete and ready for use, capitalisation is done on estimated basis subject to necessary adjustments, including those arising out of settlement of arbitration/court cases.

Assets over which company has control though created on land not belonging to the Company are included under fixed assets.

Payments made/liabilities created provisionally towards compensation, rehabilitation and other expenses relatable to land in possession are treated as cost of land.

(B) Intangible Assets

Land taken for use from state government (without transfer of title) and expenses on relief and rehabilitation as also on creation of alternate facilities for land evacuees or in lieu of existing facilities coming under submergence and where construction of such alternate facilities is a specific pre-condition for the acquisition of the land for the purpose of the project, are accounted for as land-Right to use.

Software (not being an integral part of the related hardware). Acquired for internal use, is stated at cost of acquisition less accumulated amortization and impairment losses, if any and is recognized as intangible assets.

(C) Capital Work in Progress

Capital work-in-progress is carried at cost. Administrative & general overhead and other expenditure attributable to construction of the project are accumulated under 'Expenditure During Construction (EDC)' and are subsequently allocated on systematic basis over major immovable assets, other than land infrastructural facilities, on commissioning of the project.

Expenditure on maintenance, up-gradation etc. of common public facilities in projects under construction is charged to 'Expenditure during construction (EDC)'.

Expenditure in relation to Survey and Investigation of the projects is carried as Capital Work in progress. Such expenditure is either capitalized as cost of project on completion of the construction of the project or the same is charged to the Statement of Profit & Loss in the year in which it is decided to abandon such project.

Capital expenditure incurred for creation of facilities, over which the company does not have control but the creation of which is essential principally for construction of the project, is charged to 'Expenditure during Construction (EDC)'. Subsequent to completion of the project, expenditure on creation of facilities over which the company does not have control is charged to "statement of Profit & Loss."

(5). Depreciation & Amortisation

Depreciation on additions to / deductions from tangible assets during the year is charged on pro-rata basis from/up to the data on which the asset is available for use/disposal.

Depreciation on tangible assets of Operating Units of the Company is charged to the Statement of Profit & Loss on straight-line method following the rates and methodology as notified by CERC for the fixation of tariff except for assets specified in policy no. 5.2.3 below.

Depreciation on tangible assets of other than Operating Units of the company is charged on straight-line method to the extent of 90% of the cost of assets following the rates as notified by CERC for the fixation of tariff except for assets specified in policy no. 5.2.3 below.

Depreciation in respect of following assets is charged on straight-line method based on the life and residual value (5%) given in the schedule II of the Companies Act, 2013:

(i) Construction Plan & Machinery

(ii) Computer & Peripherals

Temporary erection are depreciated fully (100%) in the year of acquisition / capitalization by retaining Rs.1/- as WDV.

Assets valuing Rs. 5000/- or less but more than Rs. 750/- are fully depreciated during the year in which assets is made available for use with Rs. 1/- as WDV.

contd. on page no. 67

From the Government

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Income Tax

1) **Electronic Verification Code (EVC) for electronically filed form of Appeal to Commissioner (Appeals)**

   In exercise of the powers delegated by the CBDT, the Principal Director General of Income Tax (Systems) vide this notification lays down the procedures, data structure and standard of Electronic Verification Code (EVC) as under:-

   - The EVC would verify the identity of the person furnishing the form and would be generated on the e-filing website . The Verifier shall be the person who is authorized to verify the return of income under section 140 of the Act as applicable to the assessee. Where the verifier represents an entity i.e. HUF or Firm or AOP etc then the verifier should be registered in the e-filing website as a principal contact of the entity.
   - The EVC would be unique for an Assessee - PAN or Assessee – TAN and will not be valid for any other PAN or TAN, as the case may be, at the time of furnishing of the form.
   - One EVC can be used to validate one form of the assessee irrespective of the assessment year.
   - The EVC will be stored against the Assessee-PAN along with other verification details.
   - The EVC will be valid for 72 hours or as otherwise specified. The verifier may use more than one mode to obtain EVC and can generate the EVC multiple times.

   (For full text refer Notification No. 5, dated 06/04/2016)

2) **Notification regarding substitution of New ITR forms for AY 2016-17**

   CBDT hereby amends the Income Tax Rules by substituting the new ITR form ie. Sahaj (ITR-1), ITR-2, ITR-2A, ITR-3, Sugam (ITR-4S), ITR-4, ITR-5, ITR-6, ITR-7 and ITR-V.

   (Notification No. 24, dated 30/03/2016)

3) The principal director general of Income Tax (systems) prescribes the procedure for registration and submission of statement as per section 285BA(1)(k) of the income tax act,1961.

   Sec-285BA(1)(k) :- Obligation to furnish statement of financial transaction or reportable account.

   (For full text refer Notification No. 4, dated 06/04/2016)

Service Tax

1) **Notification relating to amendment in Notification No. 25/2012- Service Tax dated 20.06.2012, so as to exempt from Service Tax, certain services provided by Government or a local authority to business entity**

   The Central Government hereby makes the following further amendments in the notification No.25/2012-Service Tax, dated the 20th June,2012,:-

   In the said notification, in the first paragraph,-

   (i) in entry 39, after the words "Services by", the words "Government, a local authority or" shall be inserted;

   (ii) after entry 53, the following entries shall be inserted, namely:-

   "54. Services provided by Government or a local authority to another Government or local authority:

Provided that nothing contained in this entry shall apply to services specified in sub-clauses (i),(ii) and (iii) of clause (a) of section 66D of the Finance Act, 1994;

55. Services provided by Government or a local authority by way of issuance of passport, visa, driving licence, birth certificate or death certificate;

56. Services provided by Government or a local authority where the gross amount charged for such services does not exceed Rs. 5000/- :

    Provided that nothing contained in this entry shall apply to services specified in sub-clauses (i), (ii) and (iii) of clause (a) of section 66D of the Finance Act, 1994:

    Provided further that in case where continuous supply of service, as defined in clause (c) of rule 2 of the Point of Taxation Rules, 2011, is provided by the Government or a local authority, the exemption shall apply only where the gross amount charged for such service does not exceed Rs. 5000/- in a financial year;

57. Services provided by Government or a local authority by way of tolerating non-performance of a contract for which consideration in the form of fines or liquidated damages is payable to the Government or the local authority under such contract;

58. Services provided by Government or a local authority by way of-

    (a) registration required under any law for the time being in force;

    (b) testing, calibration, safety check or certification relating to protection or safety of workers, consumers or public at large, required under any law for the time being in force;

59. Services provided by Government or a local authority by way of assignment of right to use natural resources to an individual farmer for the purposes of agriculture;

60. Services by Government, a local authority or a governmental authority by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution;

61. Services provided by Government or a local authority by way of assignment of right to use any natural resource where such right to use was assigned by the Government or the local authority before the 1st April,2016:

    Provided that the exemption shall apply only to service tax payable on one time charge payable, in full upfront or in installments, for assignment of right to use such natural resource;

62. Services provided by Government or a local authority by way of allowing a business entity to operate as a telecom service provider or use radiofrequency spectrum during the financial year 2015-16 on payment of licence fee or spectrum user charges, as the case may be;

63. Servicesprovided by Government by way of deputing officers after office hours or on holidays for inspection or container stuffing or such other duties in relation to import export cargo on payment of MerchantOvertimecharges(MOT). .

(Notification No. 22, dated 13/04/2016)

2) Amendment in rule 6 sub-rule (2), of Service Tax (Determination of Value) Rules, 2006

The Central Government hereby makes the following rules further to amend the Service Tax (Determination of Value) Rules, 2006, namely:—

1. (1) These rules may be called the Service Tax (Determination of Value) Amendment Rules, 2016.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In rule 6, in sub-rule (2), in clause (iv), the following proviso shall be inserted namely:-

"Provided that this clause shall not apply to any service provided by Government or a local authority to a business entity where payment for such service is allowed to be deferred on payment of interest or any other consideration.".

(Notification 23, dated 13/04/2016)

3) Amendment in rule 7 of Point of Taxation Rules, 2011

The Central Government hereby makes the following rules further to amend the Point of Taxation Rules, 2011, namely :—

1. (1) These rules may be called the Point of Taxation (Third Amendment) Rules, 2016.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Point of Taxation Rules, 2011, in rule 7, after the third proviso, the following proviso shall be inserted namely:-

"Provided also that in case of services provided by the Government or local authority to any business entity, the point of taxation shall be the earlier of the dates on which, -

(a) any payment, part or full, in respect of such service becomes due, as specified in the invoice, bill, challan or any other document issued by the Government or local authority demanding such payment; or

(b) payment for such services is made.".

(Notification No. 24, dated 13/04/2016)

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contd. from page 64

Low value items, which are in the nature of assets (excluding immovable assets) and valuing up to Rs.750/- are not capitalized and charged off to revenue in the year of use.

Cost of software recognized as 'Intangible Assets' is amortized on straight line method over a period of legal right to use or three financial years, whichever is earlier, starting from the year in which it is acquired.

Land-Right to use is amortized over a period of 30 years from the date of commercial operation of the project in line with CERC tariff regulations notified for tariff fixation.

Leasehold Land, in case of operating units, is amortized over the period of lease or 35 years whichever is lower, following the rates and methodology notified by CERC, vide Tariff Regulation, 2014.

Leasehold Land, in case of units other than operating units, is amortized over the period of lease or 35 years whichever is lower.

Tangible Assets created on leasehold land are depreciated to the extent of 90% of original cost over the balance available lease period of respective land from the date such asset is available for use or at the applicable depreciation rates & methodology notified by CERC Regulations for such assets, whichever is higher.

Where the cost of depreciable assets has undergone a change during the year due to increase/decrease in long term liabilities on account of exchange fluctuation, price adjustment, settlement of arbitration/court cases, change in duties or similar factors, the unamortized balance of such assets is depreciated prospectively over the residual life of such assets at the rate of depreciation and methodology notified by CERC regulations.

Where the life and / or efficiency of an assets is increased due to renovation and modernization, the expenditure thereon along with its unamortized depreciable amount is charged prospectively over the revised / remaining useful life determined by technical assessment.

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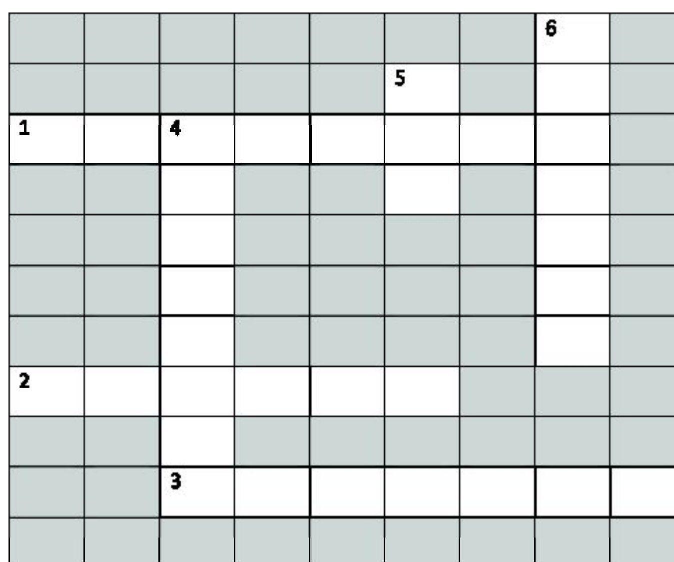
ACAJ Crossword Contest # 24

Across

1. If G.P.Rate is favourable, the same is a good ground to argue that no __________ can be made in respect of Bogus Purchases.
2. In this human body, mind is like ____________ and intellect is the steering.
3. Payment made to Foreign Telecom Operator does not fall within the ambit of the term ________.

Down

4. The Rajasthan High Court where it observed that the arrangement is a devise to avoid tax, capital gain and stamp duty, it did not sanction the scheme of ___________.
5. Equalisation Levy is @ ______ percent of consideration.
6. Failure to deduct tax on the advice of CA is a bonafide mistake and thus not a case to levy ____________.



Notes:

1. The Crossword puzzle is based on previous issue of ACA Journal.
2. Two lucky winners on the basis of a draw will be awarded prizes.
3. The contest is open only for the members of Chartered Accountants Association and no member is allowed to submit more than one entry.
4. Members may submit their reply either physically at the office of the Association or by email at caaahmedabad@gmail.com on or before 15/05/2016.
5. The decision of Journal Committee shall be final and binding.

Winners of ACAJ Crossword Contest # 23

1. CA. Anuj Sharedalal
2. CA. Shrish Bhatt

ACAJ Crossword Contest # 23 - Solution

Across

1. KrishiKalyan
2. Action
3. Currency

Down

4. Investment
5. Allotment
6. Twenty

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