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CONTENTS

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The Two Aspects of Religion

What do we mean by the term Religion? How often do we use it? In this era of 21st Century where every incident in the country is given a colour of religion, have we ever tried to go beyond the word and get its true meaning? Dictionaries define Religion as a cultural system of behaviours and practices, world views, sacred texts, holy places, ethics, and societal organisation that relate humanity to what an anthropologist has called "an order of existence". If religion is an order of existence then every religion should bring in harmony in the world. Even the great risis have expressed that Religion helps us to live the life of harmony and gain poise in the personality.

Generally it is observed that religion is considered as a certain set of practises followed by a community. However, true religion is not just restricted to these practises. In fact, it is science of life giving a complete technique of practical living. A true religion has two important limbs, its philosophy and ritualistic application. Both theses aspects of religion need to go hand in hand. Mere ritualism, without philosophy or the knowledge behind leads to superstition. Similarly only having the knowledge is of no purpose, bare philosophy without practice leads us to madness.

Unfortunately, in today's times when human race is considering itself to be highest evolved, we often find two sets of extremists; one only preaching and others only practising. Taking an example, one set of people follow an eating habit before the sunset. It is proved scientifically that such practise is indeed beneficial but how many look beyond and try to understand this. Similarly avoiding particular kind of food on specific days of a month is because of the lunar position and very beneficial to the person observing it. If we do not develop ourselves to learn the rationale behind ritualistic practises, we will be left with following each other, leading us nowhere but to superstition.

Then we have second set of rationales who only preach. This bunch is on increase after the movies like "O My God" and "PK". They have hundred good reasons to prove offering milk to lord a waste, but not a single effort in demonstration of offering it to poor. Different methods and examples to prove ONE God, not even an attempt to see the same God in fellow being. This is a state of mental illness where such informed individual ends up with no measure to break the ego.

It is very essential for us to carefully regulate the dose of philosophical study and ritualistic practise. If these two elements are not synchronized there is no religion. Mere performance of rituals without understanding their meaning and significance is superstitious living and if sustained for a longer period of time distorts our personality. On the other hand, learning the entire philosophy and keeping the knowledge to ourselves is like a camel carrying gold on its back.

Let's try to be religious in true sense where we acquire *Gyana*, apply it in our *Bhakti* where we develop ourselves to do the larger good for society through our *Karma*.

Religion is a happy and intelligent blending of philosophy and ritualism.

Swami Chinmayananda

Editorial

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GST - The Road Ahead

The monsoon session of the parliament has created a history by rolling out the way for Goods and Service Tax. Both the houses of the parliament passed the constitution amendment bill to clear the path for the new levy and make it a part of every citizen's life in the country. When implemented, GST would be one of the major tax reforms witnessed by independent India completely changing the taxation regime as far as the indirect taxes are concerned. It will replace almost all existing indirect taxes like excise, service tax and VAT.

Central Government is trying hard to clear all technical formalities and push the GST w.e.f. 1-4-2017, the deadline however appears to be too ambitious. Still 50% of the states need to pass the bill before the government can send it for the presidential assent. Even if the Modi Government is confident of the getting it through in the legislative assemblies, the date may not be realistic. The IT infrastructure shall be the predominant factor for the successful implementation of GST. The system needs to be in place and tested before the actual execution starts. The training of the staff who will be administering the new law is necessary and tax-man in-charge should be properly acquainted. The stake holders including the business community are to be taken together on board and public awareness necessary before jumping the gun pre maturely. One can only hope that the GST is not brought in hastily like the new Companies Act of 2013.

The GST will bring in the 'One Nation - One Tax' theory. This may appear to be good as a slogan but far from reality. Various products including petroleum are kept outside the ambit of GST and are expected to be governed differently. Petroleum and petroleum products make a major chunk of share in the GDP and keeping it outside the purview of GST is in absolute contrast to calling GST a one tax theory.

GST is indeed a great idea but in past many great ideas have been dented because of poor implementation. One of the biggest challenges in GST is going to be its administration. As of today, we have different central and state government departments handling excise / service tax and VAT. If these taxes are to get replaced by GST termed in different manner as CGST, SGST or IGST, what will be administering machinery? For a businessman, it is being reported, the things will be very easy because of the fact that everything will be covered in one return. So far so good, but who will check that return, who will assess it, who will issue the notices and who will be in charge of the collection of the dues?. Whether one business man collecting one tax will be expected to comply with two parallel administrative systems of the central and state government?

GST is a welcome change in the taxation system of the country. For a tax consultant or a practising chartered accountant there will emerge tremendous professional opportunities. However, it is important that new tax system has the confidence of the trade community and a business man is not tossed up in the process of administration in the name of simplification of taxes.

Pranams,
CA. Ashok Kataria

From the President

CA. Raju Shah
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Respected seniors and dear professional colleagues,

There has been a good spell of monsoon in the month of July all over the country, except in Ahmedabad. Hope the rain gods will bless Ahmedabad soon. In the month of July Chartered Accountants are busy with filing of Tax returns. This time Government is working proactively. As you know that on 29th July, 2016 there was a Bank strike and it was not possible to pay tax and file returns. Government has suo moto without wasting time extended the due date that too without waiting for the last day to come, a welcome step from Revenue Secretary Shri Hasmukh Adhiaji.

A Historic event at the Parliament.

The Rajya Sabha has passed the GST (Goods and Service tax bill) by full majority. Not only that, we have witnessed a cordial discussion across the party lines after a long time. The GST will reshape the indirect tax structure by subsuming majority of indirect taxes like excise, sales and services levies. This will do away with the complex indirect tax structure of the country, thus improving the ease of doing business. Exports will become competitive as the GST regime will eliminate the cascading impact of taxes. GST will lead to the creation of a unified market, which would facilitate seamless movement of goods across states and reduce the transaction cost of businesses. A Finance Ministry report said that the GST regime will boost the 'Make In India' programme as manufacturers will get input tax credits for capital goods. The service tax rate could shoot up from the current level of 15 per cent (including Krishi Kalyan Cess). Under the GST tax regime, this tax rate may go up to 18 per cent. This has led to fears that inflation could rise in the short term. Some of experts have fear regarding implementations of GST as it requires strong IT (Information Technology) infrastructure at grass-root levels. India essentially lacks this. This factor is going to be the bottleneck, if not addressed well in advance.

In a major movement in Gujarat, Chief Minister Smt. Anandiben Patel has resigned as CM because of age factor. New leader of Gujarat would be Mr. Vijay Rupani as Chief Minister and Mr. Nitin Patel as Deputy Chief Minister. Wishing them a successful tenure for the growth and development of Gujarat.

The activities of the Association are in full swing especially the preparation of a TALENT Evening after gap of 3-4 years. I am thankful to the Chairman of Entertainment committee CA Chandrakant Pamnaniji and his team for untiring efforts to make the programme a success.

We have planned Brain trust meeting, Study Circle meeting and Information Technology Committee programme in the coming month. My sincere request to all to participate and take benefit of the programmes.

OTHER EVENTS

Interactive Session on "Income Disclosure Scheme" and "Dispute Resolution Scheme" was organized on June 29, 2016 along with other professional bodies at Gujarat Chamber of commerce. Shri Balvir Singh, Principal Chief Commissioner of Income Tax (Gujarat) along with his esteemed team of Commissioners interacted with the members.

Information Technology Committee arranged a Seminar on "Uncoding Auditing through Mystical Audit features of Tally" & "VAT Compliance on Tally" on July 15, 2016. Large number of members and Articles assistants attended the programme. My compliments to CA Sonal Jain a young lady chartered accountant who delivered a useful lecture and CA Ketan Mistry Chairman of Information Technology committee for arranging this seminar.

Seminar on "Personal Financial Planning" by Shri Apurva Gandhi was held on 21st July, 2016 at the Association's Office. My compliments to Hon. Secretary CA Dilip Jodhani for arranging this seminar.

Swami Vivekanand said, ***"Stand up, be bold, be strong. Take the whole responsibility on your own shoulders, and know that you are the creator of your own destiny. All the strength and succor you want in within yourself. Therefore make your own future."*** I am sure his thoughts and learning remain a continuous source of inspiration and motivation to us and would help us take our activities in the right direction.

Looking forward to your support and participation in future activities of the Association.

With best regards,

CA. Raju Shah
President

Issues and Controversies under Section 56(2) and Section 68 of Income-tax Act, 1961

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The Finance Act 2012 introduced a new clause in the Income Tax Act, 1961, according to which, with effect from April 1, 2013, that portion of consideration received for the issue of shares of a public unlisted company or private company to an Indian resident that is in excess of the fair market value of those shares, will be subject to tax in the hands of the companies under the head "income from other sources". The aim of this paper is to examine the legal effect of amendment made by the Finance Act 2012 to Section 56(2) of the Income Tax Act, 1961 by introduction of clause (viib). It highlights the impact on angel investors in light of the SEBI (Alternative Investment Fund Regulations) 2012. The AIF Regulations have further made it difficult for these investors to invest in startups as stricter requirements have been laid down by SEBI. The paper attempts to explain clause (viib) and its ambit in light of its applicability to closely held companies, residents, receipt of consideration for shares and method of determination of the fair market value. Simultaneous application of Section 68 and Section 56(2)(viib) has also been discussed.

1. <u>Provision under the Income Tax Act,1961</u>

Section 56(2) lists incomes chargeable to income tax under the head 'Income from Other Sources.' Finance Act, 2012 inserts clause (viib), with effect from 1-4-2013(assessment year 2013-14) to include 'share capital' received by a company in excess of its fair market value , as its income chargeable under the head ' Income from other sources.' The clause is as follows:

"where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares, in such a case if the consideration received for issue of shares exceeds the fair value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be chargeable to income tax under the head "Income from other sources".

Finance Act, 2012 simultaneously amends the definition of income in section 2(24) by inserting clause (xvi) to include the above consideration exceeding fair market value as 'income'.

With a view to safeguard the genuine investment by bonafide companies it is provided that this clause will not apply to.

(i) A venture capital undertaking receiving the consideration for issue of shares from a venture capital company or a venture capital fund ; and

(ii) A company receiving the consideration from a class or class of persons ('Notified persons') as may be notified by Central Government.

The exception given to venture capital companies and venture capital funds appears to stem from the fact that these entities are regulated under the SEBI (Alternative Investment Fund) Regulations 2012 and hence there is some measure of scrutiny already in place over investments made by them. The explanation to Category I AIF under SEBI (AIF) Regulations provides that "Venture Capital Company" or "Venture Capital Fund" will be eligible for tax "pass through" benefits as per Section 10 (23FB) of the Income Tax Act, 1961.

As such this Clause (viib) introduced by the amendment will mainly affect the participation of private equity funds or high net worth individuals or risk capital. The clause will also impact genuine start-ups and other Small and Medium Enterprises (SMEs) looking to rapid growth particularly in the services sector, as they depend upon angel investors or private equity funds for their funding as they are thinly capitalized. Such funding is normally at a substantial premium as the underlying assets of the startup do not support a higher fair market value. Thus, such funding normally depends on future prospects of the company rather than the current value of the assets of the company. This provision could destroy the developing culture of angel investors and private equity funds; funding promising entrepreneurs, who have the skills or intellectual property but very few tangible assets. The provisions may therefore encourage companies to form Limited Liability Partnerships, to raise foreign exchange from angel investors residing outside India, subject to applicable FDI requirements or to raise funds from individual Indian resident investors by issuing convertible debentures of the company.

With a view to address concerns raised by the Angel investors, exclusion has been granted from levy of such tax to certain notified class of persons by way of an enabling provision [i.e. Clause (viib) Proviso 1 &2].Government of India – Ministry of Commerce and Industry (Department of Industrial Policy and Promotion) has now issued notification dated 17th February,2016 and Ministry of Finance also circulated notification dated 14th June,2016 so as to include startup company being excluded from the above provision.

1. SEBI AIF Regulations

The SEBI AIF Regulations 2012 even make it difficult for Angel investors to register as Venture Capital Funds with it. The Regulations mention that VCF's have positive spillover effects on the economy, and that it may, along with the government and other regulators, consider granting incentives or concessions based on the need of the funds.[Meaning of Angel investor as provided under Chapter III-A, Rule 19A (2) of SEBI (AIF) REGULATIONS ,2012]

The AIF Regulations have substantially increased the minimum fund size from INR 5 Crores to INR 20 Crores and the minimum amount that can be accepted from an investor from INR 5 lakh to INR 1 crore. The increase is thus very significant and seems to be with a purpose. They may not be able to constitute such a large fund and to pool these amounts. Further, there are additional restrictions on the tenure of the fund (at least 3 years) and heavy disclosure and record keeping requirements that will significantly add to the costs of operating as registered entities.

2. Importance of Section 56(2)

Under this section 56 (2) certain receipts which are effectively capital receipt in nature shall be treated as income under the deeming fiction of Section 56 (2) of the income tax Act. These amendments with effect from A.Y. 13-14 and onwards have been made to curb the conversion of black money and therefore let us appreciate these amendments.

Let us examine the provisions in the amended Sections and the background behind the same.

56(1) Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income e-tax under the head "Income from other sources" , if it is not chargeable to income-tax under any of the heads specified in section 14,

(2) In particular, and without prejudice to the generally of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely-

(i) to (iv) - Certain incomes to be taxed under the head Income from Other Sources.

(v) Gift received exceeding Rs. 25,000/-(from 1-9-2004 to 31-03-2006)

(vi) Gift received exceeding Rs. 50,000/- (from 1-4-2006 to 31-10-2009)

(vii) (a), (b) & (c) -

Section 56(2) (vii) applies when an Indi. / HUF in any previous year receives from any person or persons on or after 01.10.2009

Sum of money	Amount liable under IFOS
any sum of money without consideration, aggregate value of which exceeds Rs. 50,000.	whole of the aggregate value of money received
any immovable property -	
*without consideration, the stamp duty value of which exceeds Rs. 50,000;	Stamp duty value of immovable property
· for a consideration which is less than its stamp duty value by an amount exceeding Rs. 50,000.	Difference between the stamp duty value and consideration
any property other than immovable property, -	
· without consideration, the aggregate FMV of which exceeds Rs. 50,000;	whole of the aggregate of FMV (as per prescribed method) of movable property.
· for a consideration which is less than the aggregate FMV of the property by an amount exceeding Rs.50,000.	aggregate FMV (as per prescribed method) of movable property in excess of the consideration.

However there are six exemptions in this receipt of gift. The gift received form relative, on the occasion of marriage of an individual, or gift received under a Will / by way of inheritance or gift given in contemplation of death of the person i.e. Gift – Mortis Causashall not be considered as income. The relative has been defined in the explanation and to understand the same, the chart given is as under:

List of Male Donors	List of Female Donors
Father (Papa or Pitaji)	Mother (Maa or Mummy)
Brother (Bhai)	Sister (Bahin)
Son (Beta or Putra)	Daughter (Beti or Putri)
Grand Son (Pota or Potra)	Grand Daughter (Poti or Potri)
Husband (Pati)	Wife (Patni)
Sister's Husband (Jija)	Brother's Wife (Bhabhi)
Wife's Brother (Sala)	Wife's Sister (Sali)
Husband's Brother (Dewar)	Husband's Sister (Nanand)
Mother's Brother (Mama)	Mother's Sister (Mausi)
Mother's Sister Husband (Mausa)	Wife's brother's wife
Father's Brother (Chacha or Tau)	Father's Brother's Wife (Chachi or Tai)
Father's Sister's Husband (Fufa)	Father's Sister (Bua)
Grand Father (Dada, Pardada)	Grand Mother (Dadi, Pardadi)
Daughter's Husband (Jawai)	Son's Wife (Bahu or Putra Vadhu)
Spouse Father (Sasur)	Spouse Mother (Saas)
Spouse Grand Father (Dada Sasur)	Spouse Grand Mother (Dadi Sas)
Mother's Brother's Wife (Mami)	Husband's Brother's Wife (Devrani or Jithani)

3. The gift received on the occasion of the marriage of an individual is exempt. Therefore gift received during wedding or reception as 'Chandlo' are exempt but only in the hands of individual i.e. bride or bridge groom and cannot be taken as receipt of HUF i.e. of husband and wife after the marriage rituals are over. The term on the occasion of the marriage is very important. Therefore gift received on engagement or ring ceremony strictly will not quality as gift on the occasion of the marriage.

It does not strictly mean on the date of marriage but any gift received before or after some days which are associated with the event of marriage will certainly qualify for the exempted gift. If a relative from abroad or out of station sends the gift after some months/years even then it can be considered as gift received on the occasion of the marriage.

Gift received by a person under a Will (or by inheritance) i.e. from the parents/relatives on inheritance are also capital receipt (2) (vi) of the Act. Such gifts by Will can take place only after the death of the person. Inheritance will be always from the family/relative but amount can be received under a Will from any person i.e. relative, friend or even unknown person. Hon'ble Supreme Court in case of K.K. Birla v. R.S. Lodha held that it is possible for a person to Will his/her property to any person.

Similarly gift received in contemplation of death, means the thought of dying, not necessarily from imminent danger but as the compelling reason to transfer property to another. It is known as Gift MaurtisCausa. This is different from the Will in as much as a gift is said to be made in contemplation of death where a person who is ill and expect to die very shortly of illness, delivers to another person the possession of any movable property to receive and keep as a gift in case the donor shall die of such illness.

4. ***After Making Gift:***

Clubbing of Income

If transfer of immovable property is made to spouse, son's wife, or any other person for immediate/deferred benefit of spouse or son's wife of the Donor, then any income/benefit arise from the use/investment of such property will be clubbed in the hands of Donor (i.e. Transferor) proportionately. [Sec. 64(1)].

Further, if the donee is minor child of donor, then any income arising from the use/ investment of such immovable property will be clubbed in the hands of Parents. [Sec. 64(1A)].

Taxability in hands of Donee at the time of sale of such immovable property - Sec. 49(1) & 49(4):

1. Cost of acquisition for the purpose of computation of Capital Gain will be Cost of previous owner if nothing has been taxable under sec.56(2)(vii).***[Sec. 49(1)]***

   However, Where the capital gain arise from the transfer of a property, the value of which has been subject to income tax under section 56(2)(vii) or 56(2)(viia), the cost of acquisition of such property shall be deemed to be the value which has been taken into account for the purpose of the said section. ***[Sec. 49(4)].***

2. *Holding period for such asset will be counted from the date of acquisition of the previous owner [As per the decision by Bombay High Court in the case of Manjula J. Shah] ITA No.3378 of 2010, dt. 11.10.2011. Here Previous owner means – a person who have acquired such asset by way of otherwise than gift.*

5. 56(2)(vii)(b)(i) – Analysis

Now most controversial sub section is 56 (2) (vii) (b) is discussed as under :

Gift received in Form of Immovable Property (Without consideration)

At the time of Making Gift :

Taxability in hands of Donee - Sec. 56(2)(vii)(b)(i):

If any individual/HUF receives any immovable property, without consideration, the stamp value of which exceeds Rs.50,000 then stamp duty value of such immovable property shall be taxable. If stamp duty value of immovable property does not exceed Rs.50,000 then nothing is taxable in hands of Donee.

It is to be remembered that notwithstanding exemption or applicability of Section 56 (2) the provision of Section 54(1) and 64(1) and 64(1A) shall continue to apply i.e. clubbing provisions.

Undoubtedly by inserting two provisos it has been intelligently provided that if the stamp duty value on the date of registration of sale deed is higher but the transferor had executed an agreement and sum has been paid by any mode other than cash then the stamp duty value shall be as per the date of agreement and not the date of registration.

Sub clause (c) of Section 56 (2)(vii) deals with the identical situation but in case of property other than immovable property the section as defined the term, fair market value, jewellery, property relatives, stamp duty and accordingly all such gifts in cash or in kind for a value exceeding Rs.50,000/- had been taken care of.

As the amendment was covering only Individual & HUFs vide this Amendment, the smart operators shifted the abuse by using the assessees in form of Partnership firms and Private Limited Companies. To cover such continuous abuse, further amendment has been made so as to cover such entities like Partnership firms and Private Limited Companies and Closely held companies.

The assessee like AOP are still not covered and one has to see whether such abuse is still continued by such smart operators.

- **Amendment from 1.6.2010:**
  To curb the conversion of black money or other proceeding of income and wealth through media of firm and companies a new sub section (viia) have been introduced with effect from

(viia) where a firm or a company not being a company in which the public are substantially interested, receives, in any previous year, from any person or persons, on or after the 1st day of June,2010, any property, being shares of a company not being a company in which the public are substantially interested,

(i) Without consideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property;

(ii) For a consideration which is less than the aggregate fair market value of the property by an amount exceeding fifty thousand rupees, the aggregate fair market value of such property as exceeds such consideration :

Provided that this clause shall not apply to any such property received by way of a transaction not regarded as transfer under clause (via) or clause (vic) or clause (vicb) or clause (vid) or clause (vii) of Section 47. (Sec. 47 not Re-Printed here).

This provision has been introduced to curb the practice of transferring the ownership of the company through shares at a price less than the fair market value and obtained the difference in cash. The receipt of such shares by individual is already covered the assessee like firm and companies this clause has been inserted.

To illustrate Mr.X sales his shares of a closely held company to a Partnership firm of Rs.50 lakhs, the fair market value as worked out under the definition provided to exception i.e. as per prescribed rules worked out to Rs.2 crore then the difference which is in excess of 50,000/- i.e. Rs.1.50 crore would be chargeable to tax in the hands of the Partnership firm M/s. X. Y, Z.

It is to be kept in mind that under this clause what is covered is only shares and not the Debentures, whether convertible or non convertible.

6. <u>Disection of the Section</u>

<u>First / Second Proviso to Sec 56(2)(vii)(b)(ii) – Analysis</u>

<u>Exceptions:</u>

a) In case the assessee has –

b) entered into an agreement;

c) the agreement is for transfer of immovable property; and

d) the agreement fixes the amount of consideration;

e) the date of such agreement and the date of registration are not the same;

f) the amount of consideration referred to in the said agreement or

g) a part of the consideration has been paid by any mode other than cash on or before the date of the said agreement then, the stamp duty value on the date of the agreement may be taken for the purposes of S. 56(2)(vii)(b)(ii).

Ø **Extract of Object Memorandum of Finance Bill, 2012**

The new clause will apply where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares. In such a case if the consideration received for issue of shares exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be chargeable to income-tax under the head "Income from other sources". However, this provision shall not apply where the consideration for issue of shares is received by a venture capital undertaking from a venture capital company or a venture capital fund.

Further, it is also proposed to provide the company an opportunity to substantiate its claim regarding the fair market value. Accordingly, it is proposed that the fair market value of the shares shall be the higher of the value—

(*i*) as may be determined in accordance with the method as may be prescribed; or

(*ii*) as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value of its assets, including intangible assets, being goodwill, know-how, patents, copyrights, trademarks, licenses, franchises or any other business or commercial rights of similar nature.

This amendment will take effect from 1st April, 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent assessment years.

Let us now understand Section 56(2)(viiib)

where a company,

Ø not being a company in which the public are substantially interested,

Ø receives,

Ø in any previous year;

Ø from any person being a resident,

Ø any consideration for issue of shares that exceeds the face value of such shares,

Ø the aggregate consideration received for such shares as exceeds the fair market value of the shares:

Provided that this clause shall not apply where the consideration for issue of shares is received –

(i) by a venture capital undertaking from a venture capital company or a venture capital fund; or

(ii) by a company from a class or classes of persons as may be notified by the Central Government in this behalf.

Explanation. – For the purposes of this clause, -

(a) The fair market value of the shares shall be the value –

Clause (i)

6. as may be determined in accordance with such method as may be prescribed; or

Clause (ii)

Ø As may be substantiated by the company to the satisfaction of the Assessing Officer,

Ø based on the value,

Ø on the date of issue of shares,

Ø of its assets,

Ø including intangible assets being goodwill, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, Ø whichever is higher.

(b) ”venture capital company”, “venture capital fund” and “venture capital undertaking” shall have the meanings respectively assigned to them in clause (a) (clause(b) and clause(c) of Explanation 1 to clause (23FB) of section 10,.”

· Simultaneous amendment in definition of Income -

2(24)(xvi) any consideration received for issue of shares as exceeds the fair market value of the shares referred to in clause (viib) of sub-section(2) of section 56;

This clause has been inserted with effect from 1st April 2013 and is applicable form Assessment Year 13-14. It brings to tax the consideration received from resident by a company (other than a company in which public are substantially interested) which is in excess of fair market value. Such cases is to be treated as income of a closely held company which are normally received when shares are issued at a premium. In other words the shares issued by various companies (unlisted)/in which Public are not substantially interested) at a premium not justifying the same are hit by this clause. Of course with a view to encourage genuine companies two exceptions are provided. Normally it will not apply to shares received by a venture Capital undertaking receiving shares form Venture Capital Company/Venture Capital Fund or (2) such class or classes of companies may be notified by the Central Government.

7. <u>Why such Amendment ?</u>

With a view to convert the black money Companies were issuing share premium without justifying the reserve or market value of the shares. Therefore to curb such practice it has been provided that fair market value of the shares shall be in accordance with the method as may be prescribed or as may be substantiated by the company to the satisfaction of Assessing Officer based on the value of its assets including intangible assets. Out of the above two whichever is higher will be the maximum premium allowed.

The working of the fair market value as provided in the rules is given in the Appendix. Thus various practices of money laundering or conversion of black money are attempted to be curbed by these amendments. May be that in some exceptional cases genuine buyers or genuine sellers of closely held companies are adversely hit but subject to that this is a provision where unjustified premium and thereafter reducing the price of the shares and suffering short term or long term capital gain of shares etc. will be curbed.

8. The Game behind:

India is having one of the most reasonable tax structure with 30% maximum Income-tax and more than that as per latest report of Parliamentary Committee the effective tax rate in India is just around 20%.That is the reasons that in last budget ,Hon’ble Finance Minister allows gradual reduction of Income Tax on companies up to 25%. Of Course, by removing/ withdrawing certain exemptions and tax benefits. However, most unfortunately millions of citizens in our country are still not paying the Tax or are still not paying the true and correct tax honestly. Though avoidance of income tax is permissible under the law; but evasion certainly is illegal as well as immoral. Honest citizens paying true and correct tax notice that those who are dishonest citizens are able to generate unaccounted income and in turn plough them back in the Industry, and grow richer and richer and amas wealth as against they are at loss and they sometimes get frustrated. Definitely not in this part of the country i.e. in Gujarat / Maharashtra but in some of other States in of the country systematic chain and system is prevailing like parallel economy of black money for conversion of black money into white money. These kinds and modus operandi of conversion into white money by different modes were happening in front of the eyes /below the nose of Income tax Authorities. Even top most bureaucracy in Delhi and Finance Ministry and others are aware of all such practices. The Ministry having realized that Judicial Decisions and Executive actions are not sufficient to curb such rapid growth of conversion of unaccounted money into accounted one, Finance Ministry thought it fit and rightly so to make appropriate amendments to check and control such recognized approved and famous method of conversion of black money into white money popularly known as Calcutta Companies.

Illustration:

Let us understand what was hitherto happening. A person who is in control of such funds will incorporate and have his company the following assets and liabilities with duly audited accounts, directors' reports etc., as under:-

Assets	Amount	Liabilities	Amount
Equity share capital 1 crores	10 crores	Net Assets	12 crores
shares of Rs.10 each. (Reserves & Surplus	2 crores		
Total	12 crores	Total	12 crores.

The entire paid up share capital of the company is held by Mr.A and his family members.

Mr. B. (or his group) subscribes to 10 lakh shares of A Pvt. Ltd. of face value of Rs.10 each at Rs. 200 per share at a premium of Rs.190 per share. Therefore, Mr. B gives cheques of Rs.20 crores to the company and he is allotted 10 lakh shares of A. Pvt. Ltd. Mr. A in turn gives cash i.e. black money of Rs.20 crores to Mr. B.

Liabilities	Amount	Assets	Amount
Equity share capital 1.10 crores shares of Rs.10 each.	11 crores	Bank Balance Other Net Assets	20 crores 12 crores
Share Premium	19 crores		
Reserves & surplus	2 crores		
Total	32 crores	Total	32 crores

Now Balance Sheet of Company A Pvt. Ltd., is as under:-

Mr. A and his family have successfully converted black money of Rs.20 crores into white money of Rs.20 crores in the hands of their company. The share premium received is on capital account and being share capital receipt not taxable in the hands of company.

The shareholding pattern is:

Mr. A & his family	1 crores shares of Rs.10 each.
Mr. B.& his family	10 lakh share of Rs.10 each.
Total	110 lakh shares of Rs.10 each.

Mr. A and his family still have control over the company since shareholding pattern is as under:-

Mr. A & Family	90.91 %
Mr. B. & family.	9.09%

Practically, what was happening was that instead of Mr. B, there would be let's say 40 persons who have white money of Rs.50 lakhs, each then these 40 persons subscribes to 25,000 share each of Rs. 200 and A & Family gives black money of Rs.50 lakhs each to these 40 persons.

After this, the fair market value of shares of the company is derived as under;

Assets – Liabilities x Paid up value of unquoted equity sharePaid up equity share capital 32,00,00,000 x 10=Rs. 29.00.

1,10,00,000 shares

Thereafter, Mr. B/40 people would sell their shares to A &family @ Rs.29.00 per share and there was no gift implications under section 56(2)(vii). Mr.B /40 people book loss under the head Capital Gains of Rs.200 – Rs.29.00 = Rs.171.00 per share. Mr. A and family purchases these 10,00,000 shares @ Rs.29.00 using their white money of Rs.2,90,90,000. Therefore, Mr. A and his family have effectively converted Rs. 17,09,10,000/- black money into white money and having 100% control over the company Mr. B/ 40 people are able to book loss of Rs.17,09,10,000 under the head Capital Gains either Short term or Long term as per their need / planning.

This kind of dubious planning has been nullified by introducing section 56(2)(viib) by Finance Act,2012. Section 56(2) (viib) provides as under:

Where a closely held company receives in any previous year from any person, being a resident any consideration for issue of shares that exceeds the face value of such shares then

- Aggregate consideration – Fair market value of the shares received for such shares shall be income from other sources in the hands of the company.

In the example given above the fair market value of shares before issue of 10 lakh shares is :

12 crore x 10 = Rs. 12 per share

10 crore

Therefore, Rs.20 crores – Rs.12 x 10 lakhs shares

Rs.20 crores – 1.20 crores = Rs.18.80 crores is taxable as income from other sources in hands of the company.

9. **Effects Now:**

- The above modus-operandi has been broken by introducing section 56(2)(viib) Therefore, now companies will stop issuing shares in the aforesaid manner.
- This section does not apply if a widely held company issues shares at a premium. The section applies only if a closely held company issues shares at a premium. The reason for not applying this section to a widely held company is that SEBI monitors and approves the price at which shares are issued by a widely held company.
- This section does not apply where a closely held company issues shares to a Non-Resident at a premium in excess of FMV. The reason seems to be that non-resident will not like to convert his white money abroad in dollars into black money in India. Moreover, the money received from non-resident is regulated by FEMA and also by rules of RBI.

In the example given above, the company is having net assets of Rs.12 crores. Let us say, the break-up of net assets is as under:-

Assets	Book value	Value substantiated by company to the satisfaction of A.O. on the date of issue of shares.
Land	2 crores	14 crores
Building	1 crore	13 crores
Goodwill	2 crores	5 crores
Know-how	1 crore	2 crores
Patents	1 crore	4 crores
Copyright	1 crore	7 crores
Trademarks	1 crore	2 crores
Licenses	1 crore	1 crores
Franchisees	2 crores	2 crores
Total	12 crores	50 crores
Fair market value works out to be:		
50 croresx 10		
10 crores = Rs. 50 per shares.		

The FMV shall be taken to be Rs.50 per share.

Income from other sources in hands of company shall therefore be Rs.150 x 10 lakhs= Rs.15 crores.

The implications of proposed amendments-new clause (*viib*) and new first proviso to section 68 have been illustrated in the following Table:

	Face value of shares	*Consideration received*	*FMV of shares determined*	*Whether and how much taxable under proposed new clause (viib) of Section 56(2) ?*	*If new first proviso to section 68 attracted*
Case 1	Rs. 10	Rs. 100	Rs. 120	Since consideration received does not exceed FMV, question of taxability under clause (*viib*) does not arise.	Entire amount of Rs. 100 taxable under section 68
Case 2	Rs. 10	Rs. 100	Rs. 80	Rs. 20 taxable[excess of consideration (Rs. 100) over FMV (Rs. 80)]	Entire amount of Rs. 100 taxable under section 68.
Case 3	Rs. 10	Rs. 10	Rs. 8	Although consideration exceeds FMV, nothing is taxable since consideration does not exceed face value and so shares not issued at a premium.	Entire amount of Rs. 10 taxable under section 68
Case 4	Rs. 10	Rs. 9	Rs. 8	Here shares are issued at a discount and not a premium. So, question of taxability under clause (*viib*) does not arise.	Entire amount of Rs. 9 taxable under section 68.

10. Issues Arising from section 56(2) (viib)

1. There are certain issues that arise as regards new clause (*viib*) which are dealt with as under:

(*i*) ***Share application money received on 30-3-2012, but allotment of shares made on 30-4-2012. Whether any amount taxable under new clause (viib)? -*** It appears that taxability will arise in the year of receipt of consideration for issue of shares(and not year of allotment) since the words "receives" is used in new clause (*viib*). Since, new clause comes into operation from A.Y. 2013-14, it appears that it will apply only if consideration is received on or after 1-4-2012. Hence, no question of taxability under new clause (*viib*).

(*ii*) ***Company is widely held company at the time of receipt of consideration but is converted to a closely held company at the time of allotment of shares -***It appears that status of company at the time of receipt of consideration is relevant and not its status at the time of allotment of shares .Therefore, since company was not closely held co. at the time of receipt of consideration, no question of taxability under new clause (*viib*) arises.

(*iii*) ***Company is closely held company at the time of receipt of consideration but is converted to a widely held company at the time of allotment of shares -*** It appears that status of company at the time of receipt of consideration is relevant and not its status at the time of allotment of shares .Therefore, since company was closely held co. at the time of receipt of consideration, question of taxability under new clause (*viib*) arises.

(*iv*) ***Consideration was received from a non-resident who became a resident at the time of allotment -*** Since clause (*viib*) applies to consideration received from a resident, the residential status at the time of receipt of consideration by company and not residential status at the time of allotment is relevant. Therefore, as person from consideration was received is non-resident at the time of receipt of consideration, no question of taxability under new clause (*viib*) arises.

(*v*) ***Whether consideration received in kind taxable under new clause (viib)? –***New clause *(viib*) refers to "any consideration for issue of shares". The word "any" is very wide in scope and will take in its scope consideration received in kind also. However, new clause (*viib)* only speaks of how FMV of shares will be determined. It does not say how consideration in kind will be valued for comparison with FMV of shares. Since provision does not say how consideration in kind will be valued, a view is possible that it is not intended to apply where part or whole of consideration is received in kind. The object seems to be to target cash transactions as black money is generated through cash transactions as can be seen from new proviso to section 68.

Thus it can be seen that the clear intention behind this Amendment is to control the unwarranted or bogus or unjustified subscription to share premium. As explained in the example, it will certainly control and stop the menace of black money or unaccounted money being rotated and channelized through this mode of Companies. But while doing this controlling exercise it may hit certain genuine transactions of bonafide share premium also. There may be companies who cannot justify the share premium on the basis of existing valuation even if done on global valuation concept. The Rules of Valuation are clearly prescribed in Rule 11U and 11UA. Therefore, any other global valuation done by best of the firm of Chartered Accountant or a Management Consultant may not be accepted by the Income Tax Authorities if not done strictly as per the Rules. Particularly in cases of companies where software innovations are being conducted and are on pipeline or in cases where technology up gradation or a secret formula is planned to be sold through heavy share premium may be adversely affected by this Amendment.

v **<u>Simultaneous Amendment in Section 68</u>**

11. <u>Section 68: Cash Credits.</u>

Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to Income-tax as the income of the assessee of that previous year.

12. <u>Proviso added by Finance Act, 2012 w.e.f. Assessment Year 2013-14.</u>

[Provided that where the assessee is a company,(not being a company in which the public are substantially interested) and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless–

(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

Provided further that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of section 10.]

13. Let us understand what was happening and why such amendment: Company XYZ Pvt. Ltd. used to adopt the following modus operandi to convert black money into white money:

- 100 slum dwellers were contacted and their PAN cards were made and their bank accounts were opened. In the previous year 31-03-2013, Rs. 2,00,000 each cash was deposited in their bank accounts and cheque of Rs.2,00,000 was taken from them in the name of the company XYZ Pvt. Ltd. They were made to sign share application form that they are applying for 10,000 shares of 10 each face value at a premium of 10. They were also made to sign blank transfer deeds for share transfer. Each slum dweller's return was filed showing income of Rs. 2,00,000/- for previous year 31-03-2013 and tax thereon is NIL. For this process each slum dweller was paid Rs.2,000 in cash i.e. unaccounted money.
- In the above process company XYZ Pvt. Ltd. has deposited unaccounted cash of Rs.2,00,000 x 100 = Rs.2 crores. In the slum dwellers' bank account and received cheques of Rs.2 crores as share application money in the company XYZ Pvt. Ltd.
- The Fair Market Value/ issue price of shares of company XYZ Pvt. Ltd. is Rs. 20 per share.
- The company XYZ Pvt. Ltd. either shows Rs.2 crores as Share Application Money or allots 10,000 shares of Rs.10 each at a premium of Rs.10 to the slum dwellers however, physical custody of these shares is not given to the slum dwellers and company retains the same. The company is safeguarded by the blank share transfer deeds.
- Now the Assessing Officer takes the case of the company in the scrutiny assessment u/s. 143(3) for the above mentioned previous year. The Assessing Officer asks the explanation from the company for the nature and source of sum of Rs. 2 crores credited by the company in its books as share application money or asks share capital introduced and premium thereon. The A.O. asks for;
- (i) bank pass books of these 100 slum dwellers.
- (ii) personal appearance of these 100 slum dwellers

The company simply produces to the A.O.;

- (i) Name and address of slum dweller
- (ii) PAN of slum dweller
- (iii) ITR of slum dweller.
- The company does not produce the pass books of these slum dwellers and does not produce them personally before A.O. Assessing Officer to investigate the case and finds that cash of Rs. 2,00,000 was deposited in bank account of each slum dweller and finds that slum dweller has no financial standing. Slum dweller is not able to offer explanation about the source of Rs.2,00,000 or the explanations offered by him are found to be unsatisfactory by Assessing Officer.

  The Assessing Officer invokes section 68 and adds Rs.2 crores to the income of the company as unexplained cash credits because the persons from whom share application money came were not able to prove the source of money in their hands. Such additions u/s.68 so made in the hands of the comp[any was not being sustained in Appeals because Hon'ble Supreme Court Lovely Exports (P) Ltd. [(2008) 216 CTR 195], has held as under:

  "If the share application money is received by the assessee-company from alleged bogus shareholders, whose names are given to the Assessing Officer, then the

department is free to proceed to reopen their individual assessments in accordance with law but this amount of share money cannot be regarded as undisclosed income under section 68 of the assessee-company. ***The Supreme Court held that there is no onus on the company to prove the source of money in the hands of shareholder or the persons making payment of share application money.*** *If company identifies the persons from whom money has been received, then section 68 cannot be involved in the hands of company.*"

- Thus, by virtue of above Supreme Court Judgment, no income was possible to be added in hands of company under section 68.
- In hands of slum dwellers, the Assessing Officer applies section 68 as Rs.2,00,000 credited in bank account is unexplained. The slum dweller is not able to offer any explanation about the source of Rs.2,00,000 or the explanation offered by him are found to be unsatisfactory. But since the slum dwellers had no other source of income, the only income assessed was Rs.2 lakhs under section 68. Considering the slab limit of Rs.2,00,000 no tax/interest/penalty could be levied on the above slum dwellers.
- Thus, Rs.2 crores black money was possible to be converted into white money by the company with no tax implication.
- However, it is important to note the recent decision of Hon'ble High Court of Delhi in case of CIT vs. Nova Promoters &Finlease (P) Ltd.[(2012) 18 taxmann 217] wherein Hon'ble Justice Mr. R.V. Easwar held that "there is ample authority for the position that where an assessee fails to prove satisfactorily the source and nature of certain amount of cash received during the accounting year, the Income tax Officer is entitled to draw the inference that the receipt are of an assessable nature. Section 68 recognizes the aforesaid legal position. The view taken by the Tribunal on the duty cast on the Assessing Officer by section 68 is contrary to the law laid down by the Supreme Court in the judgment cited above. Even if one were to hold, albeit erroneously and without being aware of the legal position adumbrated above, that the Assessing Officer is bound to show that the source of the unaccounted monies was from the coffers of the assessee, we are inclined that in the facts of the present case such proof has been brought out by the Assessing Officer. The statements of Mukesh Gupta and RajanJassal, the entry provides, explaining their modus operandi to help assessee's having unaccounted monies convert the same into accounted monies affords sufficient material on the basis of which the Assessing Officer can be said to have discharged the duty. The statements refer to the practice of taking cash and issuing cheques in the guise of subscription to share capital, for a consideration in the form of commission. As already pointed out, names of several companies which figured in the statements given by the above persons to the investigation wing also, figured as share-applicants subscribing to the shares of the assessee-company. These constitute materials upon which one could reasonably come to the conclusion that the monies emanated from the coffers of the assessee-company. The Tribunal, apart from adopting an erroneous legal approach, also failed to keep in view the material that was relied upon by the Assessing Officer. The CIT (Appeals) also fell into the same error. If such material had been kept in view, the Tribunal could not have failed to draw the appropriate inference.
- Finance Act, 2012 nullifies the above tax planning. Proviso to section 68 has been added by Finance Act, 2012 which over-rules the Supreme Court judgment in Lovely Exports (P) Ltd. as mentioned on the earlier page.

Thus, as per the Proviso inserted by Finance Act, 2012; in Section 68

- If in case of a closely held company any sum is found credited in its books of account as share application money, share capital, share premium or any such amount by whatever name called (Rs.2 crores in above example in case of XYZ Pvt. Ltd.) the explanation given by these residents (slum dwellers in above example) to the Assessing Officer is found to be unsatisfactory, then, it shall be deemed that the explanation offered by the assessee company about the sum so credited (Rs.2 crores in our example) is not satisfactorily explained and consequently Rs.2 crores shall be deemed to be income of the company as unexplained credit under section 68.
- The crux of amendment is that the closely held company receiving share application money/share capital/share premium/any such amount has to prove the source of funds in the hands of shareholder/person giving the share application money/share capital/share premium/any such amount.

  i.e. Now source of source is also required to be proved to the satisfaction of the A.O. Thus all the earlier decisions of several Tribunals and High Courts are nullified.

Ø The Finance Act, 2012 has placed onus of proof on the closely held company receiving the share application money/share capital/share premium/any such amount has to prove that such money which is invested in the company belongs to the person who has given the money to the company. Otherwise, the money so received shall be taxable in hands of company as unexplained cash credit under section 68.

Further section 115BBE has been introduced by Finance Act, 2012 which provides as under:

1. Where the total income of an assessee includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, the income-tax payable shall be the aggregate of—
   - The amount of income-tax calculated on income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, **at the rate of thirty per cent**; and
   - **Normal tax rate on the balance income.**
2. Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) of sub-section (1).

- The effect of this shall be company the liable to tax @ 30% on addition made under section 68.
- No expenditure shall be allowed from the income so deemed under section 68 and deductions under Chapter VI-A shall also be not allowed from such deemed income.

Ø **The proviso to section 68 added by Finance Act, 2012 and section 115BBE also nullifies the following tax planning:**

Cash of Rs.2,00,000 was deposited in account of a non-earning member of family or servant/driver in the house and it was shown as income from tuitions / boutique. Income tax returns were filed for these non-earning members/servant/driver showing income of Rs.2,00,000 and Nil tax thereon. Then, this Rs.2,00,000 was taken as a loan into the business from these people. Now, the Assessing Officer has the power to ask the source of Rs.2,00,000 from the non earning members/servant/driver being credited to their bank account. Assessing Officer will ask for name and addresses of student's to whom tuitions were given and names and addresses of persons to whom Ambroidery / Vadi / Papad / Khakhra services provided. If no explanation is given or explanation is found to be unsatisfactory by Assessing Officer, then, Rs.2,00,000 will be added as income from unexplained credit under section 68 in hands of non-earning member / driver / servant. As per section 115BBE this income will be taxed @ 30.90% without the slab of Rs. 2,50,000 i.e. tax of Rs. 61,800. Thus, the practice of converting black money into white money has been attacked.

Notes:

1. **Proviso to section 68 introduced by Finance Act, 2012 is not applicable to money received from non-residents since money received from non-residents is regulated by FEMA and rules of RBI.**
2. **Proviso to section 68 introduced by Finance act, 2012, is not applicable to money received from Venture Capital Company and Venture Capital Fund since they are regulated by SEBI.**

Ø So far as section 68 is concerned there are now numerous decisions of Hon'ble Tribunals and High Courts clearly holding that when such amounts are found credited in the books of accounts in the names of persons whose identity, genuineness and creditworthiness cannot be explained by the assessee to the satisfaction of the Assessing Officer then such sum so credited can be charged to Income Tax as income of the assessee of that previous year. But the decision of Hon'ble Supreme Court in case of Lovely Export (supra) came to the rescue of operators which were in a position to introduce unaccounted or black money in the modus operandi as illustrated above. By making amendment in the proviso of this section now it will be almost impossible to introduce unaccounted money in this manner. In a way it is a very welcome amendment as it is to curb introduction of black money in the guise of companies share capital. In view of this now every company (other than public company) in which public are not substantially interested shall have to maintain and in turn produce before the Income tax authorities the genuineness and creditworthiness besides the identity of the investors/shareholders in share capital. No doubt , there are numerous decisions of Tribunals as well as High courts , that even if additions are made u/s 68 of the I.T. Act , on account of such unexplained deposit/ Credits , penalty of concealment / inadequate particulars of income u/s 271(1)(c) is not leviable.

Decisions:

i. DCIT Vs. M/s. K. BhanjiVanmalidas& Co. – ITA No. 743/RJT/2010 (ITAT Rajkot)

ii. ITO Vs. Shri HaribhaiDevrajbhaiBabariya – ITA No. 96/AHD/2011 (ITAT Ahmedabad)

iii. Mohd Haji Adam & Co, Vs. DCIT - ITA No.4341/Mum/2009 (ITAT Mumbai)

Now Section 271(1)(c) further amended for levy of penalty and Section 270A has been inserted vide Finance Act, 2016 defining Under Reported / Misreporting income.

(Sec. 270A of the Act not Re-Printed here)

Ø It shall be the duty of a Chartered Accountant also to ensure that such kind of unscrupulous practice of introduction of black money in the guise of share capital is not allowed to be slipped through. The Government is aware of almost parallel economy of black money and has its limitation to control and curb. The citizens are aware that the tax rate and structure is quite moderate in India and therefore, it is the duty of Chartered Accountants and professionals to join the hands and see that as a professional activism we all must try to stop such kind of abuse or dubious tax planning. It is equally our role like that of government/ Finance ministry, when we claim to be **partners in Nation Building** that circulation of Black Money is minimized and tax planning in the grab of avoidance done by giants through foreign companies and tax heaven entities are also controlled and checked.

v **APPENDIX-1**

Examples on Calculation of Fair Market Value.

Ø Balance Sheet of Company the shares of the same are unquoted as on 31st March 2013.

Liabilities	Amount (in Rs.)	Assets	Amount (in Rs.)
20,000 Eq. Shares of Rs.10 each fully paid	2,00,000	**Fixed Assets- Net Block**	
		Land & Building	5,00,000
Revenue Reserves	5,95,000	Plant & Machinery	2,75,000
Secured Loan	1,50,000	Motor Vehicles	55,000
Trade Creditors	1,35,000	Stock In Trade	1,33,000
Provision for Taxation	45,000	Sundry Debtors	1,45,000
		Cash at Bank	15,000
		Preliminary Expenses	2,000
	11,25,000		**11,25,000**

Assume After Tax Cost of Capital to be 17.5% and Normal Rate of Return of Industry is 10.85%. The net cash flow of the company after taking into consideration taxation and capital expenditure over next five years are as follows:

Year	2014	2015	2016	2017	2018
CF (Rs.)	100000	120000	140000	10000	150000

Calculation of Fair Market Value of Unquoted Shares **as per Rule 11UA of Income Tax Rules** as well as **DCF Approach**

1) Net Assets Approach

Particulars	**Amount in Rs.**	**Amount in Rs.**
Land And Building	500000	
P & M	275000	
Motor Vehicles	55000	
Stock in Trade	133000	
Sundry Debtors	145000	
Cash at Bank	15000	
Total Assets(A)		**11,23,000**
Less: Outside Liabilities		
Secured Loans	(150000)	
Sundry Creditors	(135000)	
Total Liabilities(L)		**(2,85,000)**
NET ASSETS(A-L)		**8,38,000**

Fair Market Value per Equity Share = (A-L)/ (PE)*(PV)

Where PE= *total amount* of Paid up Equity Share capital as shown in Balance Sheet. (i.e Rs. 200000)

PV= *the paid up value* of equity share i.e. *Rs. 10*

= [Rs. 1123000-Rs.285000 X Rs 10]

Rs. 2, 00,000

= **Rs. 41.9**

2) Net Assets Approach (Revalued Figures of Balance Sheet)

Particulars	Value without Revaluation in Rs.	Upward Revaluation Rs.	Revalued Amounts Rs.
Land And Building	500000	110000	610000
P & M	275000	13000	288000
Motor Vehicles	55000	47000	102000
Stock in Trade	133000	0	133000
Sundry Debtors	145000	0	145000
Cash at Bank	15000	0	15000
Total Assets(A)	**11,23,000**		**12,85,000**
Less: Outside Liabilities			
Secured Loans	(150000)	0	(150000)
Sundry Creditors	(135000)	0	(135000)
Total Liabilities(L)	**(2,85,000)**		**(2,85,000)**
NET ASSETS	**8,38,000**		**10,00,000**

Fair Market Value per Equity Share = (A-L)/ (PE)*(PV)

Where PE= *total amount* of Paid up Equity Share capital as shown in Balance Sheet. (i.eRs. 200000)

PV= *the paid up value* of equity share i.e. *Rs. 10*

= [Rs. 1285000-Rs.285000 X Rs 10]
Rs. 2, 00,000
= **Rs. 50**

3) Discounted Cash Flow Approach

Year	PVF @ 17.5%	Cash Flows	Discounted Cash Flow
2014	0.85	Rs. 100000	Rs. 85000
2015	0.72	Rs. 120000	Rs. 86400
2016	0.62	Rs. 140000	Rs. 86800
2017	0.52	Rs. 10000	Rs. 5200
2018	0.45	Rs. 150000	Rs. 67500
2019 onwards	0.45	Rs.150000/10.85*100	Rs. 622120
		= Rs. 13,82,488	
Total Discounted Cash Flows till Perpetuity			**Rs. 953020**
Value Per Share (Rs. 953020/20000 Shares)			**Rs. 47.65**

***

From the Courts

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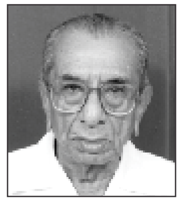

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22 Amendment to Sec. 40(a)(ia) by Finance Act 2010 is retrospective : CIT v/s. Harish Chand Ahuja (2015) 280 CTR 403 (Raj): (2015) 125 DTR 0184 (Raj)

Issue :

Whether amendment made to Sec. 40(a)(ia) by Finance Act, 2010 with effect from 01/04/2010 is retrospective?

Held :

Provision of s. 40(a)(ia) as amended by the Finance Act, 2010 being curative in nature, the same would apply retrospectively and, therefore, disallowance under s. 40(a)(ia) could not be made where the assessee has deposited the TDS amount prior to the due date of filing return of income.

23 Sec. 35 (2AB) : Allowance of Weighted deduction on machinery not started using : CIT v/s. Biocon Ltd. (2015) 234 Taxman 604 (Karnataka) : (2015) 127 DTR 0127 (Kar)

Issue :

Whether weighted deduction u/s 35(2AB) is allowable on machinery purchased but not started using the same?

Held :

Assessee was engaged in business of manufacture of enzymes and pharmaceutical ingredients. During year, it incurred an amount Rs. 7.82 crores towards cost of machinery, and claimed weighted deduction under section 35(2AB) thereon. Assessing Officer having noticed that above amount included a sum of Rs. 2.72 crores incurred towards three items of machinery, which had not been installed and commissioned during year, held that assessee was not entitled for weighted deduction on amount of Rs. 2.72 crores. It was held that entire expenditure incurred in respect of research and development had to be allowed for weighted deduction under section 35(2AB).

24 Distinction between Works Contract and Sale : CIT v/s. A.P. State Road Transport Corporation (2015) 235 Taxman 159 (AP & Telangana)

Issue :

Whether contract for building bus on a chassis supplied is a 'works contract' or a contract for 'sale'?

Held :

Assessee was a State Road Transport Corporation. Assessee handed over chassis to fabricating agency with an understanding that bus as a finished product would be delivered to assessee. Assessing Authority took view that said activities of assessee resembled a works contract and assessee was under an obligation to effect deduction of tax at source on payment to agency. As same was not done by assessee, Assessing Authority levied tax and interest. Where activity entrusted to an agency was on account of its expertise and what was supplied to assessee at end of contract was a finished product, activity was a sale and not a works contract.

25 Notice u/s 143(2) is mandatory : Sec. 292BB does not help : Asst. CIT v/s. Greater Noida Industrial Development Authority (2015) 379 ITR 14 (All)

Issue :

Absence of issue / service of notice u/s 143(2) can be remedied by Sec. 292 BB?

Held :

The jurisdiction of the Assessing Officer to make an assessment under section 143(3)(ii) of the Income Tax- Act, 1961, is based on the issuance of a notice under section 143(2) (ii) of the Act. The proviso to clause (ii) of sub-section (2) of section 143 clearly stipulates that a notice must be served on the assessee. Section 292BB of the Act was inserted by the Finance Act, 2008, with effect from April 1, 2008. Section 292BB of the Act provides a deeming fiction. The deeming fiction is to the effect that once the assessee has appeared in any proceeding or co-operated in any enquiry relating to an assessment or reassessment, it shall be deemed that any notice under the provisions of the Act, which is required to be served on the assessee, has been duly served upon him in time in accordance with the provisions of the Act. There is a difference between issue and service of notice. The essential requirement is "issuance of notice" under section 143(2) of the Act. The deeming fiction under section 292BB of the Act is with regard to "service of notice". Section 292BB cannot obviate the requirement of complying with a jurisdictional condition. For the Assessing Officer to make an order of assessment under section 143(3) of the Act, it is necessary to issue a notice under section 143(2) of the Act and in the absence of a notice under section 143(2) of the Act, the assumption of jurisdiction itself would be invalid.

26 Sec. 147 : Reopening :CBDT instruction cannot override provision of Act.

Sun Pharmaceutical Industries Ltd. v/s. Dt. CIT (2016) 381 ITR 387 (Delhi)

Issue :

Whether instructions of CBDT can override provision of Sec. 147?

Held :

A quasi Judicial authority, which is expected to exercise statutory functions on objective criteria, cannot act on the dictates of any superior authority, or on any instruction that may be issued by an authority that may have administrative control over such quasi - judicial authority.

The Central Board of Direct Taxes issued Instruction No. 9 of 2006. The purpose of issuing the instruction was "to set out the procedure to be followed at different stages of audit objections and for the appropriate remedial action to be taken thereon". The Central Board of Direct Taxes issued these instructions so that "Management and processes relating to audit objections were streamlined with a greater sense of accountability". Accordingly, Instruction No. 9 of 2006 was issued "in supersession" of earlier instructions for "Strict compliance by all concerned". In terms of the instructions remedial action is expected to be taken even where an objection raised by the audit is not accepted by the Commissioner. Instruction No. 9 of the Central Board of Direct Taxes dated November 7, 2006 cannot possibly override the statutory powers to be exercised by an Assessing Officer in terms of section 147 of the Income Tax Act, 1961. In other words the instruction has to be read consistently with proviso (a) to section 119(1) of the Act and cannot compel the Assessing Officer to issue notice.

27 Notice u/s 147 by another officer is not valid

Dushyant Kumar Jain v/s. Deputy CIT (2016) 381 ITR 428 (Delhi)

Issue :

Whether notice u/s 147 can be issued by another officer than the one who passed original order?

Held :

The Deputy Commissioner had himself admitted that the officer who issued the notice dated March 14, 2014 and recorded the reasons for reopening the assessment. i.e. the Income Tax Officer, was not the Assessing Officer of the assessee. That single fact in itself vitiated the reopening of the assessment. The subsequent notice dated June 23, 2014 under section 148 of the Act issued by the Assessing Officer of the assessee was beyond the deadline of March 31, 2014 under section 149 (1)(b) of the Act and therefore not valid. The reasons given by the Department in its counter affidavit did not explain the illegality in invoking the powers under section 148 of the Act for reopening the assessment of the assessee for the assessment year 2007-08. The mere fact that the definition of an Assessing Officer in terms of section 2(7A) of the Act included a Deputy Commissioner and other superior officers or an Income-Tax Officer of some other ward who might be vested with the relevant jurisdiction by virtue of orders issued under section 120(1) or (2) of the Act would not make a difference to the legal position. It was only the Assessing Officer who had issued the original assessment order dated April, 13, 2009 for the assessment year 2007-08 under section 143(3) of the Act who was empowered to exercise powers under section 147 or 148 of the Act to reopen the assessment. This was because he alone would be in a position to form reasons to believe that some income of that particular assessment year had escaped assessment. This again could not be based on a mere change of opinion. Further, in terms of section 151 of the Act, such a move should have the prior approval of the Commissioner. Under the scheme of the Act, if a superior officer formed an opinion that the original assessment order was prejudicial to the interests of the Revenue, recourse could be had to section 263 of the Act. In any event, the question of an Income Tax Officer who was not the Assessing Officer who passed the original assessment order under section 143(3) of the Act for that particular assessment year, exercising the powers under section 147 or 148 of the Act to re-open that assessment would not arise. Therefore, the notices dated March 14, 2014 and June, 23, 2014 and the order dated January 28, 2015 passed by the Deputy Commissioner were to be quashed.

28 Notice of reopening beyond four years: validity : E-Infochips Ltd. v/s. Deputy CIT (2016) 380 ITR 449 (Guj)

Issue :

How the provisions of sec. 147 are to be applied for reopening of assessment beyond four years?

Held :

According to the first proviso to section 147 of the Income Tax Act, 1961, an assessment can be reopened under section 147 after the expiry of four years only if (1) the assessee failed to make a return under section 139 or in response to the notice under section 142(1) or under section 148 and he failed to disclose truly and fully all material facts necessary for the assessment. Once the case of the assessee is not covered by the first proviso to section 147, reassessment proceedings beyond the period of four years from the end of the relevant assessment year would be without jurisdiction and bad in law, if the assessee has not failed to disclose truly and fully all material facts necessary for the assessment.

29 Sec. 195 Applies to chargeable income only : Anusha Investments Ltd v/s. ITO (2015) 378 ITR 621 (Mad)

Issue :

Whether provisions of Sec. 195 i.e. deduction at source from payment to Non-resident, applies to non taxable income also?

Held :

A reading of section 195 of the Income Tax Act, 1961, makes it clear that any person responsible for paying an amount to a non resident shall, at the time of credit of such income to the account of the payee or at the time of payment thereof, whichever is earlier, deduct income tax thereon the rates in force. This provision was interpreted by the Supreme Court in GE India Technology Centre P. Ltd. v/s. CIT (2010) 327 ITR 456 wherein it held that the provisions relating to tax deduction at source would apply only to those sums which are chargeable to tax under the Act and in a transaction of this nature, the assessee was entitled to take a plea that there arose no tax liability and, therefore, the provisions of section 195 were not attracted.

30 Denial of Cross Examination Order is invalid : Andaman Timber Industries v/s. Commissioner of Central Excise (2015) 281 CTR 241 (SC) : (2015) 127 DTR 0241(SC)

Issue :

What is the effect of denial to grant cross examination of the witnesses?

Held :

Not allowing the assessee to cross-examine the witnesses by the adjudicating authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the CCE was based upon the statements given by two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross examine, the adjudicating authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the adjudicating authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the adjudicating authority.

Denial of opportunity to the assessee to cross-examine the witnesses whose statements were made the sole basis of the assessment is a serious flaw rendering the order a nullity in as much as it amounted to violation of principles of natural justice.

31 Sec. 14A has no application if there is no exempt income : Cheminvest Ltd v/s. CIT (2015) 281 CTR 447 (Delhi) : (2015) 378 ITR 0033(Del)

Issue :

Whether provisions of Sec. 14A can be invoked when there is no exempt income?

Held :

The factual position that has not been disputed is that the investment by the assessee in the shares of M is in the form of a strategic investment. Since the business of the assessee is of holding investments, the interest expenditure must be held to have been incurred for holding and maintaining such investment. The interest expenditure incurred by the assessee is in relation to such investments which give rise to income which does not form part of total income. In view of the admitted factual position in this case that the assessee has made strategic investment in shares of M ; that no exempted income was earned by the assessee in the relevant assessment year and since the genuineness of the expenditure incurred by the assessee is not in doubt, the question was answered in favour of the assessee and against the Revenue. The expression 'does not form part of the total income' in s. 14A envisages that there should be an actual receipt of income, which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. In other words, s. 14A will not apply if no exempt income is received or receivable during the relevant previous year.

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Tribunal News

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19 The Technological Institute of Textile & Science Vs. DIT(E) 158 ITD 808/69 taxmann.com 141 (Kolkata) Order Dated: 18th March, 2016

Basic Facts

The assesse society is running an educational institute offering B. Tech, M. Tech and MBA courses. The assessee is also running a textile division engaged in the production of cloth and manufacturing of yarns which is attached to the very institution. The assessee maintained accounts for both divisions as a single unit and all losses of textile unit were adjusted against receipt of educational institution. The DIT(E) held that the institution is doing business as well as engaged in educational activity. Accordingly in view of the proviso to section 2(15) of the Act, the registration granted to assessee society u/s 12AA was withdrawn. Similarly the certificate issued u/s 80G(5)(vi) of the Act was cancelled.

Issue

Whether proviso to section 2(15) would apply where assessee-society, running an educational institution, and maintained a textile unit for purpose of imparting practical training to students? Whether registration granted under section 12AA can be cancelled under section 12AA(3) ?

Held

The Hon'ble ITAT held that the textile mill maintained for practical training to the students and conducting the research in textile technology was a part of the main objects itself. Also the assessment of the institute from AY 1998-99 has been completed with full knowledge of textile mill being run to impart practical training. Further, the amendment to section 2(15) did not affect the educational activities carried on by the institution and consequently the relevant exemption. The Hon'ble ITAT noted that education imparting of such practical training is must for the educational activities. The tribunal also referred to the CBDT Circular No. 11/2008 dated 19.12.2008 which clearly discussed the implication arising from the insertion of proviso to section 2(15) wherein it is clearly said that where the purpose of a trust or institution is relief for the poor, education or medical relief, it will constitute charitable purpose even if it incidentally involves the carrying on of commercial activities. The working of the mill for practical training always result in the production/manufacture of goods. The surplus accruing to the society on the sale of goods produced during the course of and/or attributable to such training imparted to the students in the factory are only incidental to the carrying on of/or in fulfilment of the primary object of the society, i.e education imparting and in no way it can be said to be an activity for profit.

Further, the combined reading of both the sections of section 12AA(3) and 12AA(1)(b) of the Act makes it clear that registration can be cancelled only in those cases where registration has been granted u/s. 12AA(1)(b) of the Act. Similar is the position in respect to exemption/rejection u/s. 80G(5)(vi) of the Act in the present case in the given facts and circumstances.

20 M/s Page Industries Ltd. Vs. DCIT 71 taxmann.com 172 (Bangalore) Assessment Year: 2010-11 Order Dated: 24th June, 2016

Basic Facts

The assessee is a company engaged in the manufacture and sale of ready-made garments. The assessee company has entered under a license agreement with Jockey International Inc., USA (‘JII’), owner of the brand Jockey. The assessee paid consideration in the form of royalty at the rate of 5% of the sales. The assessee submitted transfer pricing study. The TPO while computing the transfer pricing adjustment, treated expenditure incurred on advertisement and marketing and product promotion as an international transaction and determined the ALP by applying Bright Line Method in his order u/s 92CA(3). The assessee filed objections against the draft order before the DRP. The objections were turned down by the DRP stating that the provisions of section 92B(2) of the Act are clearly attracted as the license agreement clearly indicates that there exists a prior agreement between the two entities in the nature of some specific terms.

Issue

Whether assessee and foreign company could be regarded as AE of each other when they entered into license agreement for sale of readymade garments under a particular brand name?

Held

The Hon’ble ITAT held that the assessee company is merely a licensee of the brand-name ‘Jockey’ for exclusive manufacture and marketing of goods under license agreement. There is no participation of JII in the capital and management of the assessee-company. The definition of the term ‘AE’ is divided into two sub-sections (1) and (2). Sub-section (1) contains (means) definition of AE in parameters of management control or capital of that enterprise. Sub-section (2) contains a deeming provision and also enumerates circumstances when the enterprise can be deemed to be AE. The opening words of sub-section (2) are amended by Finance Act, 2002 with effect from 1-4-2002. The result of the amendment is that unless the requirements of sub-section (2) are fulfilled, the sub- section (1) cannot be applied at all. This implies that in order to constitute relationship of an AE, the parameters laid down in both sub-sections (1) and (2) of section 92A should be fulfilled. If one were to hold that there is a relationship of AE, once the requirements of sub-section (2) are fulfilled, then the provisions of sub-section (1) render *otiose* or superfluous. It is well settled canon of interpretation that while interpreting the taxing statute, construction shall not be adopted which renders particular provision *otiose*. When interpreting a provision in a taxing statute, a construction, which would preserve the purpose of the provision, must be adopted. Therefore, following this principle, it was held that since the parameters laid down in sub-section (1) are not fulfilled, there was no relationship of AE between assessee-company and JII and therefore, the provisions of Chapter X of the Act had no application.

21 Mrs. Shalini Seekond Vs. ITO [2016] 71 Taxmann.com 120 (Mum)

Assessment Year: 2007-08 Order Dated: 7th July, 2016

Basic Facts

The case of the assessee was selected for scrutiny by Revenue under CASS. It was observed by the AO from the CASS details that the assessee has purchased units of Mutual Funds. In response the assessee submitted that the assessee had sold property situated in Sri Lanka. As per theassessee the capital gain on sale of the aforementioned property falls within purview of Article 13 of the Double Taxation Avoidance Agreement (DTAA) between India and Sri-Lanka and hence was taxable in Sri Lanka and not in India. Further as pershe was resident of India under the provisions of the Act , but for the purposes of DTAA she wa resident of Sri Lanka for which she relied on Article 4(2)(c) of the DTAA. The AO rejected the contentions of the assessee in view of the fact that the assessee is a Resident of India u/s. 6 of the Act and any income arising in India or outside India is fully taxable u/s. 5 of the Act. The AO held that in view of Notification No. 91 of 2008. provides that any income of the resident of India “may be taxed” in the other country, such income shall be included in his total income chargeable to tax in India in accordance with the provisions of the Income Tax Actand relief shall be granted in accordance with the method for elimination or avoidance of double taxation provided in such agreement.” Upon further appeal the CIT(A) upheld the order of the AO.

Issue

Whether Income earned on capital gains on sale of immovable property situated in Sri Lanka shall be chargeable to tax only in Sri Lanka under India-Sri Lanka DTAA?

Held

The Tribunal held that the assessee was resident in India during the relevant previous year fulfilling condition of Section 6 of the Act is resident in India. The Tribunal noted that the conditions vide Article 4(2) of DTAA stipulates that the person shall be deemed to be resident of the State in which he/she has permanent home available to him/her , and if he/she has permanent home available to him/her in both States , he/she shall be deemed to be a resident of the State with which his/her personal and economic relations are closer(centre of vital interest). As it was emerging from the records, that the assessee is a married women , who is married to Indian national and living in India after her marriage with her husband who is an Indian National. She has now permanent home available to her in India being home of the husband after marriage. Her economic and personal relations had moved to India post-marriage with an Indian national, however post marriage she continued to own one immovable property in Sri-Lanka which is the sole immovable property owned by her in Sri-Lanka which also in-fact was sold during the relevant previous year. Her selling of the immovable property in Sri Lanka which is the sole property owned by her during relevant previous year and buying of Mutual funds in India as well as buying property in Goa clearly reflects strategic shift of vital economic interest to India from Sri Lanka She might not be owning an house in India as the condition as stipulated in Article 4 is regarding availability of permanent home in the state of residence and it no-where stipulates that the assessee should own an house in the State of residence. The assessee could not demonstrate by cogent evidences that her habitual abode now is in Sri-Lanka after her marriage with Indian national and more specifically in the relevant previous year except making a bald statement that her parents are living in Sri-Lanka and /or she also owned one immovable property in Sri-Lanka which also was sold during the relevant previous year. No details and /or description of actual stay in Sri Lanka or having economic and personal interests in Sri Lanka are demonstrated to prove her habitual abode in Sri Lanka. She is also holding Certificate of Registration as Overseas Citizen of India issued by Ministry of Home Affairs, Government of India issued on 10-03-2006 under the provisions of Section 7A of Citizenship Act , 1955 and holding of life long validity multiple visa issued by Government of India to enable her to stay in India indefinitely with her husband which also is reflection of her intention to stay permanently in India with her husband who is an Indian national with an intention to permanently settle in India. Hence accordingly to the Tribunal the assessee was resident in India during the relevant previous year under the DTAA between India and Sri-Lanka.

It is a well settled proposition of law that provisions of the Act or of the DTAA shall be applicable which-ever is beneficial to the assessee. The provisions of the Act as contained in Section 5 of the Act , inter-alia, stipulates that income of the resident which has accrued or arisen outside India during the relevant previous year shall be taxable in India. While Article 13 of the DTAA dealing with taxability of Capital Gains stipulates” 1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in paragraph 2 of Article 6 and situated in the other Contracting State may be taxed in that other State.

2 to 5 ** ** **

6. The term "alienation" means the sale, exchange, transfer or relinquishment of the property or the extinguishment of any rights therein or the compulsory acquisition hereof under any law in force in the respective Contracting States."Thus, as per Article 13(1) read with Article 13(6) of the DTAA,the capital gain arisen to the assessee from sale of immovable property situated in Sri-Lanka is taxable in Sri-Lanka as the Government of Sri-Lanka has right to tax the same because the immovable property is situated in Sri-Lanka , and the Government of India cannot bring the same to tax under the provisions of the Act as the provisions of DTAA will prevail being beneficial to the assessee over the provisions of the Act, even though the word 'may be taxed' is used in Article 13(1) of DTAA as the same is to be read in a manner that it takes away the power of the other Contracting State to tax the same income , of which power to tax is vested by virtue of DTAA in the Contracting State in which the immovable property is situated. The afore-said view's has been consistently held by various courts. The said notification no 91 of 2008 , dated 28.08.2008 is merely procedural in nature. The said notification merely stipulates the manner and procedure of granting the relief from tax to avoid double taxation without expanding scope of taxability of income from capital gains arising on sale of immovable property situated in Sri-Lanka nor is the same inconsistent with the provisions of the Act or the DTAA the said notification cannot be treated as prospective in nature and has to be read from the date of entering of DTAA . The Tribunal accordingly held that income of the assessee earned on capital gains on sale of immovable property situated in Sri Lanka during relevant previous year shall be chargeable to tax only in Sri Lanka while the same income shall be included in the income of the assessee chargeable to tax in India under the provisions of the Act and the relief shall be granted in the manner laid down in the notification no 91 of 2008 dated 28-08-2008 read with DTAA.

22 ADIT Vs. Baan Global B V [2016] TS-351-ITAT-2016 (Mumbai)

Assessment Years: 206-07 to 2008-09

Order Dated: 13th June, 2016

Basic Facts

The assessee-company is a non-resident company registered under the laws of Netherlands. It is engaged in the business of development and sale of computer software and provides other services in relation to its software product. In India the assessee had entered into a 'Distribution Agreement' with INFOR Global Solutions India Pvt. Ltd. which is an Indian subsidiary company for supply of its software to Indian customer on which it receives a fix percentage sum as per the agreement. INFOR India is an independent distributor of computer software which sells under the brand name of "INFOR" and is sold as "off the shelf" software in the market used by the customers in various businesses. Customer in India place order on INFOR who in turn pass the order to the assessee. The assessee has the exclusive right to accept or reject the order. However, once the order is accepted by the assessee, the CD containing the software is sent to India and in turn INFOR India distributes the CD to the customer in India. The assessee also delivers the license-key for the software directly to the customer and the customers pay the consideration for the sale of software to INFOR India, which in turn after retaining the distributor's margin remits the balance amount to the assessee. Since the assessee does not have aPE in India, therefore, only the amount received as 'OGS fee' was offered for tax in India as 'fees for technical services', however, so far as the income from sale of software products is concerned the same was treated as business profit. Hence, this amount was not shown chargeable to tax in India in absence of any PE in India. The Ld. AO examined the legal aspect in detail and ultimately held that, the payment received by the assessee for sale of software is nothing but "royalty" not only under the Income Tax Act but also within the meaning of India-Netherland DTAA and accordingly, assessed receipts @ 15% being tax rate applicable to 'royalty income' as per Article 12 of DTAA. Aggrieved, the assessee preferred an appeal with the CIT(A). The CIT(A) decided in favour of the assessee.

Issue

Whether the payment received by the assessee on sale of computer software product is to be treated as income by way of "royalty" or business income?

Held

Under the terms of the agreement, as noted by the CIT(A), there is no transfer of any copyright in the software product. The payment received by the assessee is purely towards a copyrighted software product as against the payment for any copyright itself. The assessee does not give any right to use the copyright embedded in the software. The main emphasis on the payment constituting 'royalty' in Para 4 of Article 12 are for a consideration for the 'use of' or the 'right to use' any copyright are important parameter for treating a transaction in the nature of "royalty".

The sale of software cannot be held to be covered under the word "use of process", because the assessee has not allowed the end user to use the process by using the software, as the customer does not have any access to the source code. What is available for their use is software product as such and not the process embedded in it.The Tribunal held that although definition of copyright has not been given under the Act or the DTAA, in view of consistent opinions of various courts, definition of the term "copyright" as given in the 'Copyright Act, 1957' has to be taken into account. The definition of 'copyright' in section 14 of the Copyright Act, 1957 is an exhaustive definition and it refers to bundle of rights. Thus, to fall within the realm and ambit of right to use copyright in the computer software programme, the aforesaid rights must be given and if the said rights are not given then, there is no copyright in the computer programme or software. The Tribunal also noted that under the terms of the agreement between the assessee and INFOR India, the agreement specifically forbids them from decompiling, reverse engineering or disassembling the software. The agreement also provides that the end user shall use the software only for the operation and shall not sublicense or modify the software. None of the conditions mentioned in section 14 of the Copyright Act are applicable. The Tribunal rejected the contention of the revenue that in wake of new Explanation 4 in section 9(1)(vi), new definition is to be read into Treaty holding that since the treaty has not been correspondingly amended in line with new enlarged definition of royalty, the alteration in the provision of the Act cannot per se be read into the treaty unless there is a corresponding negotiation between the two sovereign nations to amend the specific provision of "royalty" in the same line. A treaty has been entered into between the two sovereign nations and one country cannot unilaterally alter its provision. Thus, in view of the finding given above, the order of the CIT(A) was upheld and that the payment received by the assessee for sums does not amount to "royalty" within the meaning of Article 12(4) of Indo-Netherland DTAA and accordingly, the same is not taxable in India. Since, admittedly, the assessee has no PE in India; therefore, same cannot be taxed as business income under Article 7.

23 ACIT Vs. K.J. Somaiya Trust [2016] 158 ITD 57/68 taxmann.com 9 (Mum) Assessment Years: 2008-09 Order Dated: 6th January, 2016

Basic Facts

The assessee was a charitable trust. In the course of assessment, the AO denied carrying forward of deficit of earlier years being excess of application of income over the income of the assessee trust. The CIT(A) directed the AO to allow the brought forward deficit of earlier years and also to allow carry forward of aggregate deficit to succeeding year after verification. The revenue is in appeal.

Issue

Whether excess of expenditure over income in one year can be set-off in subsequent year against income under section 11 as and by way of application of income?

Held

Section 11(1)(a) doesnot limit that income should be applied for religious or charitable purpose only in the year in which it has arisen. The word 'applied' means 'to put to use' or 'to turn to use' or 'to make use' or 'to put to practical use'. Having regard to the provisions of section 11, it is clear that when the income of the trust is used or put to use to meet the expenses incurred for charitable purposes, it is considered to be applied for the purposes. The said application of the income for the purposes takes place in the year in which the income is adjusted to meet the expenses. In other words, even if expenses for charitable and religious purposes have been incurred for earlier year and the said expenses are adjusted against the income of the subsequent years. It is well settled that excess of expenditure over income in one year can be set-off in subsequent year against the income under section 11 as and by way of application of income. Hence the ground of revenue was dismissed.

24 ACIT Vs. Jindal Power Limited [2016] 70 taxmann.com 389 (Raipur) Assessment Year: 2008-09 Order Dated: 23rd June, 2016

Basic Facts

The assessee is engaged in the business of generation ofthermal power, and the assessee has also taken the coal mines on lease from theState Government.The assessee incurred expenditure on account of corporate social responsibility ('CSR') expenses by way of construction of school building, devasthan/temple, drainage, barbed wire fencing, educational schemes and distributions of clothes etc. AO disallowed the same by holding that expenses incurred were not mandatory and not for business purposes. The CIT(A) gave partial relief to the assessee. Being aggrieved by the relief so granted by the CIT(A), revenue filed appeal before the Raipur ITAT.

Issue

Whether CSR expenses can be disallowed on the ground that they were done voluntarily?

Held

The ITAT held that it is not necessary that every expense that could be allowed as a deduction should be such as a hardnosed, and perhaps devoid of senses ofcompassion, businessman alone would incur in furtherance of his business pursuits. The Tribunal noted that in view of insertion of Explanation 2 to Sec. 37(1) w.e.f. April 2015, the revenue's stand that it was clarificatory in nature and hence, applicable retrospectively was not sustainable legally since it would be disadvantageous to the assessee. Further the disabling provision, as set out in Explanation 2 to section 37(1), refers only to such CSR expenses as under section 135 of the Companies Act, 2013 and as such it cannot have any application for the period not covered by this statutory provision which itself came into existence in 2013. Explanation 2 to section 37(1) is, therefore, inherently incapable of retrospective application any further. Tribunal observed that disallowance under Explanation 2 to section 37(1) is restricted to statutory obligation u/s 135 of the Companies Act 2013, thus, there was a line of demarcation between expenses incurred on CSR under such a statutory obligation and under a voluntary assumption of responsibility, tribunal observed that for the voluntary expenses, there was no disabling provision. Thus it could be said to be wholly and exclusively for the purpose of business. The tribunal thus held that provision of Explanation 2 to section 37(1) did not apply to assessee's case.

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Unreported Judgements

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In this issue we are giving gist of two important decisions rendered by the Hon'ble Gujarat High Court recently. The first one in case of M/s Nirma Credit & Capital Ltd. deals with the issue whether when entire block of asset is not utilized during the previous year, whether assessee is entitled to depreciation on the WDV of entire block of assets.

The second decision in the case of Sahjanand Medical Technologies Pvt. Ltd. relates to reopening of assessment u/s 147 of the Act. In this case, the reopening was done in respect of three reasons out of which for two reasons the full investigation was made by the Assessing Officer (A.O.) in the course of original assessment proceedings while for the third item there was audit objection which was not accepted by A.O., but still to follow the dictate of audit party he had to reopen the assessment. Considering that reopening was done at the behest of the audit party, the same was quashed by the Hon'ble Gujarat High Court. Both the above decisions are as under, which we hope readers would find useful.

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In the High Court of Gujarat at Ahmedabad

Tax Appeal No. 1203 of 2006

With

Tax Appeal No. 1204 of 2006

With

Tax Appeal No. 1205 of 2006

With

Tax Appeal No. 71 of 2009

M/s Nirma Credit & Capital Ltd. ….. Appellant(s)

Versus

Asst. Commioner of Income Tax…. Opponent(s)

Appearance :

In Tax Appeal Nos. 1203/2006 TO 1205/2006

Mr. S N Soparkar, Sr. Advocate with Mrs. Swati Soparkar

Date : 28/06/2016

Gist only

Questions before Hon'ble High Court :

i) "Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the assessee was not entitled to depreciation on plant and machinery not put to use during the year under consideration?"

ii) "Whether on facts the Tribunal's finding and conclusion of upholding the disallowance of Rs.32,81,666/- towards claim of depreciation is 'vitiated' on facts and sustainable in law on interpretation of Section 32 ?"

Facts of the Case :

i) Briefly stated, the assessee company is engaged in the business of manufacture of detergents. During the year under consideration, manufacturing activity was not carried out by the assessee. Therefore, the assessee claimed depreciation on the block of Plant & Machinery from the earlier year. However, the Assessing Officer passed the assessment order on 05.01.1998 disallowing the depreciation. Against the said order, the assessee preferred appeal before the CIT(A). The CIT(A) partly allowed the appeal vide order dated 04.10.1999. Being dissatisfied with the same, the assessee filed appeals before the Tribunal. However, all the appeals filed by the assessee were dismissed.

Contentions of the Parties :

"5. Learned Counsel appearing on behalf of the assessee submitted that the authorities below as also the Tribunal did not allow deduction mainly on the ground that the assets for which depreciation was claimed, was not put to actual use for the year under consideration or that a part of the assets were not installed for undertaking the manufacturing process. It was submitted that the reasoning adopted by the Tribunal is erroneous since it is not necessary that all assets falling within plant and machinery have to be simultaneously used for being entitled to depreciation once it is found that the assets are used for business.

6. In support of the submission, learned Senior Advocate placed reliance upon a judgment of this Court rendered in the case of **Commissioner of Income-tax v. Sonal Gum Industries, (2010) 322 ITR542 (Guj)**, wherein it has been held that once that factory building is put to use, it is not possible to restrict the depreciation on the said building by stating that only a portion thereof had been put to use. Similarly, in relation to the block of assets, it is not possible to segregate items falling within the block for the purposes of granting depreciation or restricting the claim thereof and once it is found that the assets are used for business, it is not necessary that all the items falling within plant and machinery have to be simultaneously used for being entitled to depreciation. Reliance was also placed on an unreported decision of this court passed in Tax Appeal No. 429/2007 dated 18.12.2014."

Held :

The Hon'ble High Court held as under :

"8. The record reveals that the reason assigned by the Assessing Officer for rejecting the depreciation is that the assessee had stopped the manufacturing activity and therefore, the question of use of machinery does not arise. However, the CIT(A) reversed the findings of the Assessing Officer on the premise that individual items included in the block are not to be considered separately for the purposes of granting depreciation in light of the amended provisions. We do not find any legal infirmity in the aforesaid view adopted by the first appellate authority since the assessment order itself reveals that it is not the case of Assessing Officer that the assets were not put to use at all. Once the factory building is put to use, it is not possible to restrict the depreciation on the said building by stating that only a portion thereof has been put to use. Similarly, in relation to block of assets, it is not possible to segregate items falling within the block for the purposes of granting depreciation or restricting the claim thereof. Once it is found that the assets are used for business, it is not necessary that all the items falling within plant and machinery have to be simultaneously used for being entitled to depreciation.

9. In view of the above discussion, we hold that the Tribunal committed serious error in law in disallowing the depreciation. Thus, the question raised in these appeals is answered in the negative, i.e in favour of the assessee and against the Revenue. The appeals stand disposed of accordingly. No order as to costs."

II

In the High Court or Gujarat at Ahmedabad
Special Civil Application No. 3399 of 2016

Sahjanand Medical Technologies Pvt. Ltd.
…….. Petitioner(s)
Versus
Assistant Commissioner of Income Tax – Circle- 4& 1 …. Respondent(s)

Appearance :
Mr. R K Patel, Advocate for Mr Darshan R. Patel, Advocate for the Petitioner(s) No.1
Mr Sudhir M. Mehta, Advocate for the Respondent(s) No. 1 - 2

Coram : Honourable Mr. Justice Akil Kureshi
and
Honourable Mr. Justice A. J. Shastri

Date : 15/06/2016

Gist Only

Facts and Rival Contentions :

1. The petitioner is a Company registered under the *Companies Act* and is engaged in the business of manufacturing specialized medical equipments. For the *Assessment Year 2010-11*, the petitioner had filed return of income, which was taken by the Assessing Officer for scrutiny. In the Assessment Order dated 26.03.2013, the Assessing Officer made several additions and dis-allowances. In order to reopen such assessment, impugned notice came to be issued. The Assessing Officer had recorded reasons for issuance of such notice.

2. Upon receipt of the reasons recorded by the Assessing Officer, the petitioner raised objections to the process of reopening under a communication dated 09.01.2016. Such objections, were however, rejected by the Assessing Officer by order dated 05.02.2016. Hence, the petition.

3. From the reasons recorded by the Assessing Officer, the Court gathered that he had pressed in service three grounds in order to resort to the process of reopening of the assessment. Briefly stated, these grounds were *(1) that the assessee had claim deduction of Rs.1.63 crores (rounded off) under the provision of sales return. According to the Assessing Officer, the liability was not known nor accrued and the same therefore could not be claimed as deduction; (2) that the assessee had wrongly claimed bad debt of Rs.3.37 crores (rounded off), which claim was not eligible in terms of Section 36(1)(viii) of the Income Tax Act (the "Act" for short) and (3) that the assessee had claimed doubtful debts, doubtful loans, advances etc., totaling into 3.52 crores which was not a valid claim.*

3.1. On the basis of materials on record, learned counsel Shri R.K. Patel for the petitioner raised mainly two contentions; firstly, that the notice for reopening was issued under the instance of Audit Party and that therefore, there was no independent decision of the Assessing Officer that income chargeable to tax had escaped assessment. His second contention was that all three claims were scrutinized in detail during the original assessment proceedings and, therefore, reexamination of such claims even within four years from the end of the relevant assessment year, would not be permissible, on the mere change of opinion.

4. On the other hand, learned counsel Shri Sudhir Mehta for the Revenue opposed this petition contending that the Assessing Officer has recorded valid reasons for issuing notice for reopening. Notice has been issued within a period of four years from the end of Assessment Year.

Held :

The Hon'ble High Court in respect of first two reasons held that there was complete scrutiny of the claim of the assessee in the original assessment proceedings and therefore there was a change of opinion for which provisions of section 147 cannot be invoked. As regards the third reason in respect of the contentions of the assessee that it was only on the basis of objection of the audit party that the reopening was resorted to, the Hon'ble High Court observed as under:

"7. We notice that there is no direct evidence to demonstrate before us that this claim of the provision of sale return of Rs.1.63 crores came up for direct discussion before the Assessing Officer during the original assessment proceedings. However, in the context of the petitioner's contention regarding audit objections, we had summoned the original file of the Department. Perusal of the file would show that on 24.09.2014, the Audit Party had discussed this claim of the assessee and had referred it as a major irregularity in granting the same. In this note prepared by the Audit Party, we notice that this issue was taken up by the Audit Party with the Assessing Officer, who had replied that the assessee company is engaged in manufacturing stent and had

imported certain parts, which were used in manufacturing the final product which was supplied to the distributors. There were huge product complaints from the hospitals using the product. The company, therefore, stopped using the catheters which were found to be defective and returned unused catheters imported from abroad and also recalled the defective material from the market. Such material was received and destroyed because it was not safe for human use and that therefore, the liability was ascertained.

7.1. *The Assessing Officer, thus, clearly did not agree to the viewpoint of the Audit Party that the claim was irregularly granted. In fact, in his opinion, after going through the detailed explanation, the same was correctly allowed. Despite this, it appears that the Audit Party insisted upon corrective measures being taken by the Assessing Officer. The Assessing Officer, therefore, on 30.12.2013 wrote to the Director, Principal Director, Audit (Central) and once again gave detailed reasons why, in his opinion, when the company had recalled the material, it was ascertained liability or known liability and the same therefore, cannot be added back to the profit of the company. It was, in this background, that the Assessing Officer once again wrote to the Commissioner of Income Tax on 28.02.2014 completely disagreeing with the Audit Party and after giving detailed reasons, stated as under:*

When company recall the material, it is certain liability or known liability for which provision is made and as per the explanation [1] (c) of Section 115JB of I.T. Act "the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities;", need to be added in book profit. However, the provisions made for sales return are ascertained liabilities, Therefore, the same cannot be added back to book profit while calculating MAT.

4. *In view of the facts and circumstances of the case, the objection raised by the Revenue Audit is not acceptable. However, as per the Instruction No. 16 dated 31.10.2013 any remedial action under the Income Tax Act is to be taken within six months of the receipt of LAR of the Audit Party. The remedial action in this case is possible u/s.154/147/263. However, the most suitable remedial action would be reopening u/s.147 of the I.T. Act."*

8. *It can thus, be clearly seen that the Assessing Officer was completely against the principle of taxing these receipts. The Audit Party was of the opinion that the deduction for provision of sale return was claimed for liability which had not yet arisen nor ascertained. The Assessing Officer was steadfast in his belief that the liability had accrued and it was also ascertained.*

9. *Under the circumstances, as per the settled law, Notice for reopening could not have been issued. It was not the belief of the Assessing Officer that income had escaped assessment. In fact, he was compelled to go against his own legal belief and issue notice, which was wholly impermissible under law. This issue has come up before this Court on several occasions in the past, including in the case of* ***CadilaHealthcare Ltd. v. Deputy CIT*** *reported in* ***334 ITR 420*** *and in the case of* ***Adani Exports v. Dy. CIT*** *reported in* ***240 ITR 224****. The question was also considered by the Supreme Court in the case of* ***Indian & Eastern Newspaper Society v. CIT*** *reported in* ***119 ITR996****. It is not necessary to make detailed mention of long line of judgments in this regard. In fact, the spirited defence put forward by the Assessing Officer before the Audit Party gives credence to the petitioner's contention that his entire claim was minutely examined by the Assessing Officer during the original assessment proceedings.*

10. *On all the grounds thus, the impugned notice must fail and the same is, therefore, quashed. The petition is allowed and disposed of."*

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Controversies

CA. Kaushik D. Shah
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Issue:

Whether Interest paid by the partnership firm to the partners on their capital contribution can be disallowed on the ground that partnership firm has made investment in tax free securities?

M/s XY is a partnership firm consisting of partners X and Y. Firm has raised capital from partners on which interest of Rs 10 Lacs have been paid. Partnership firm has made investments in Mutual Funds to the extent of Rs 40 Lacs on which dividend of Rs 12 lacs is earned by the firm. The A.O. is of the view that interest paid by the firm of Rs 10 Lacs to the partners has to be disallowed under section 14A as the firm has earned tax free income of Rs 12 lacs.

Proposition:

· Let me refer to the provisions of **Section 14A**:

"(1) For the purpose of computing 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 total Income under this act.

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

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

· Now let me refer to provisions of **section 40(b):**

In the case of any firm assessable as such,—

(i) any payment of salary, bonus, commission or remuneration, by whatever name called (hereinafter referred to as "remuneration") to any partner who is not a working partner; or

(ii) any payment of remuneration to any partner who is a working partner, or of interest to any partner, which, in either case, is not authorised by, or is not in accordance with, the terms of the partnership deed; or

(iii) any payment of remuneration to any partner who is a working partner, or of interest to any partner, which, in either case, is authorized by, and is in accordance with, the terms of the partnership deed, but which relates to any period (falling prior to the date of such partnership deed) for which such payment was not authorised by, or is not in accordance with, any earlier partnership deed, so, however, that the period of authorization for such payment by any earlier partnership deed does not cover any period prior to the date of such earlier partnership deed; or

(iv) any payment of interest to any partner which is authorised by, and is in accordance with, the terms of the partnership deed and relates to any period falling after the date of such partnership deed in so far as such amount exceeds the amount calculated at the rate of 40[twelve] per cent simple interest per annum; or

(v) any payment of remuneration to any partner who is a working partner, which is authorised by, and is in accordance with, the terms of the partnership deed and relates to any period falling after the date of such partnership deed in so far as the amount of such payment to all the partners during the previous year exceeds the aggregate amount computed as hereunder:—

(a) on the first Rs. 3,00,000 of the book-profit or in case of a loss Rs. 1,50,000 or at the rate of 90 per cent of the book-profit, whichever is more;

(b) on the balance of the book-profit at the rate of 60 per cent;

- Lastly it is useful to refer to provisions of **section 36(i)(iii):**

  The amount of the interest paid in respect of capital borrowed for the purposes of the business or profession.

  Provided that any amount of the interest paid, in respect of capital borrowed for acquisition of an asset for extension of existing business or profession (whether capitalised in the books of account or not); for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use, shall not be allowed as deduction.

  It is respectfully proposed that interest paid to the partners by the partnership firm on the capital contribution cannot be disallowed u/s 36(i)(iii) nor u/s 14A.

<u>View against the Proposition:</u>

Referring to the Mumbai ITAT Judgment in the Case of ACIT v. PahilajraiJaikishin(2016)66 taxmann.com 30(Mum. Trib.),

"During the course of assessment of partnership firm the AO noticed that the firm has paid Rs. 1.39 crores as interest to the partners on the capital raised from them. The assessee made investment in the mutual funds to the tune of Rs 4.75 crores on which it received dividend which was exempt from Tax. The Firm has claimed various expenses including interest paid to the partners. It did not disallow any expense under section 14A. The A.O. disallowed the interest paid to the partners against which following arguments were given:

- The interest paid on capital of the partners is statutory allowance allowable under section 40(b) of the act and same cannot be held as an expenditure incurred for earning exempt income.

- Further according to Section 14A:

  "For the purpose of computing 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 total Income under this act"

  The section refers to the words "expenditure incurred" for earning exempt income. Interest paid on capital of the partners is appropriation of profit and not expenditure for the firm.

  However the Hon. ITAT held has under:

  (i) 'Expenditure' as envisaged by section 14A of the Act, duly includes interest paid to the partners by the assessee firm if the same is incurred in relation to the income which is not includible in the total income under section 14A of the Act.

  (ii) Interest paid to the partners is to be considered as allowable expenditure only against the exempt under section 14A of the Act provided other conditions are fulfilled.

  (iii) Deductions of expenditures against the exempt income under section 14A of the Act or in other disallowance under section 14A of the Act, will not entitle the partners to claim relief in their individual return of income which shall be chargeable to tax as per the existing and applicable provisions of sections 28(v) of the Act, read with sections 2(24)(ve) of the Act after including the aforesaid interest income in the hands of the partners.

  The Hon. Tribunal relied on the decision of the supreme court in Munjal Sales corporation vs. CIT reported in 298 ITR as well as decision of Ahmedabad ITAT in the case of Shankar Chemicals Works vs. DCIT reported in 47 SOT 121.

<u>View in favour of the Proposition:</u>

It is submitted that Hon. ITAT in the case of ACIT vs. PahilrajraiJaikishinhas relied on the observations of the Hon. Supreme Court in the case of Munjal Sales Corporation which was apparently an obiter dicta.

With respect it is submitted that the decision of Ahmedabad ITAT in Shankar Chemicals Works does not lay down the correct law. There are other two decisions of the Hon. ITAT , one Decided in favour of the assessee and other against the assessee and hence, judicial precedence required to follow the view in favour of the assessee.

Now question arises whether interest paid to the partners was for earning tax free income, whether there was a direct nexus of interest paid to the partners with a earning of tax free income? It also required to answer the meaning and scope of the expression "in relation to "used in section 14A. Does it envisage a direct nexus of expenditure with the exempt income or a distant relationship would also result in disallowance? In this regard one may refer to the judgment of the Hon. Karnataka State Industrial &Infrastructure development Corporation Ltd. wherein it was held that the A.O. has to establish direct nexus between borrowed funds and tax free investment for making disallowance under section 14A. Similar view can be found in several other cases.

Summation:

It is submitted that as per decision of the Hon. Supreme Court in case of Walfort Share & Stock Brokers (P) Ltd. interest paid to partner on capital contribution cannot be treated as an expenditure being incurred or attributable to earn exempt income under section 14A of the act as the said interest is itself not 'expenditure' but a 'statutory allowance'.

The Hon. Apex Court in Walfort Share & Stock Brokers (P)Ltd.'s case (supra) held that

1. The basic principal of taxation is to tax the net income i.e. gross income minus the expenditure. On the same analogy, the exemption is also in respect of net income. This is the purport of section 14A.
2. In section 14A, the first phrase is "for the purposes of computing the total income under this chapter" which makes it clear that various heads of income as prescribed under Chapter IV would fall within section 14A.
3. The next phrase is 'in relation to income which does not form part of total income under the Act". It means that if as income which does not form part of total income, then the related expenditure is outside the ambit of the applicability of section 14A.
4. The permissible deductions enumerated in sections 15 to 59 are now to be allowed only with reference to income which is brought under one of the above heads and is chargeable to tax.
5. Reading of section 14 in juxtaposition with sections 15 to 59, it is clear that the words 'expenditure incurred' in section 14A refers to expenditure on rent, taxes, salaries, interest etc. in respect of which allowances are provided for every payout is not entitled to allowances for deduction. These allowances are admissible to qualified deductions. These deductions are for debits in the real sense.

The decision of the Hon. Supreme Court in Walfort Share & Stock Brokers (P)Ltd.'s case (supra) was a later decision and should have been given judicial priority. Notwithstanding once it was held in this case that what is considered for disallowance under section 14A are only 'expenditure incurred' in section 14A refers to expenditure on rent, taxes, salaries, interest, etc. in respect of which allowances are provided for', and this interpretation of section 14A was not considered in Munjal Sales Corportion's case(supra) then it would have been appropriate on the part of the tribunal to recommend to the President of The ITAT to constitute a larger bench to consider the effect of two decisions of the Hon. Apex Court as in one case (Munjal Sales Corporation (supra)) discussion and effect of section A was missing while in other case (Walfort Share & Stock Brokers (P) Ltd.'s case (supra)) effect of section 40(b) was missing. Without a sustainable justification to follow one decision without sufficiently laying down the reasons for not following the other decision could not be judicially acceptable.

Lastly it is submitted that the decision of Hon. Supreme court in Walfort Shares and Stock Brokers Case is a later decision and should have been given judicial priority. Particularly in view of the fact that Munjal Sales corporation case contains an Obiter dicta and only the opinion expressed on a question discussed and deliberated for the determination of a case is only binding.

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Judicial Analysis

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CC / OD or Term Loan Account cannot be attached for recovery of unpaid taxes

Kaneria Granito Ltd. *v.* ACIT [2016] 71 taxmann.com 276 (Gujarat)

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The petitioner is a company registered under the Companies Act. For the assessment year 2011-12, the petitioner had filed a return of income declaring loss of Rs. 5.42 crores (rounded off). The Assessing Officer framed assessment under Section 143(3) of the Income Tax Act, 1961 ['the Act' for short] computing total income of the assessee for the said year at Rs. 12.10 crores. He raised a demand of Rs. 5.86 crores (rounded off). Against such order of assessment, the petitioner has filed appeal before the Appellate Commissioner which appeal is pending. At that stage, the Assessing Officer started the procedure for recovery of the unpaid tax. By way of coercive measures, he issued notice under Section 226(3) of the Act to the Allahabad Bank, Girdhar Chambers, Vadodara Branch, conveying to him that a sum of Rs. 5.86 crores is due from the petitioner to the Income Tax department for the assessment year 2011-12. He was called upon to pay to the department forthwith any amount due from the bank or held by the petitioner for or on account of the petitioner upto the limit of arrears of tax shown above. In such notice, the Assessing Officer had mentioned following three accounts of the petitioner maintained by the said bank:

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3. Case of the petitioner is that such accounts were either in the nature of cash credit account or term loan account and that, therefore, it cannot be stated that there was any money due to the petitioner from the bank which can be recovered in terms of sub section (3) of Section 226 of the Act.

4. Having heard learned counsel for the parties and having perused the materials on record we may notice that Section 226 of the Act pertains to other modes of recovery. Under sub section (1) of Section 226, where no certificate, as mentioned in Section 222 of the Act, is drawn up, the Assessing Officer may recover the tax by one or more of the modes provided in this section. The portion of Section 226, which is relevant for our purpose, reads as under:

"(3) (*i*) The [Assessing] Officer [or Tax Recovery Officer] may, at any time or from time to time, by notice in writing require any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee to pay to the [Assessing] Officer [or Tax Recovery Officer] either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due by the assessee in respect of arrears or the whole of the money when it is equal to or less than that amount.

(*ii*) A notice under this sub section may be issued to any person who holds or may subsequently hold any money for or on account of the assessee jointly with any other person and for the purposes of this sub section, the shares of the joint holders in such account shall be presumed, until the controversy is proved, to be equal.

(*iii*) … … … … …

(*iv*) Save as otherwise provided in this sub section every person to whom a notice is issued under this sub section shall be bound to comply with such notice and in particular where any such notice is issued to a post office, banking company or an insurer, it shall not be necessary for any pass book, deposit receipt, policy or any other document to be produced for the purpose of any entry, endorsement or the like being made before payment is made, notwithstanding any rule, practice or requirement to the contrary."

5. Under clause (i) of sub section (3) of section 226, the Assessing Officer has power to issue notice requiring any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee to pay to the Assessing Officer forthwith upon the money becoming due or being held or within the specified time, so much of the money as is sufficient to pay the amount due by the assessee in respect of the arrears or the whole of the money when it is equal to or less than the amount of arrears. In other words, in the process of seeking coercive recovery, the Assessing Officer would have power to recover the same to the extent of the arrears of the assessee from any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee. This power is essentially in the nature of garnishee order requiring the debtor of the assessee to make direct payment to the Assessing Officer of the arrears of tax instead of paying over such amount to the assessee. In essence, therefore, this power would be available when there is person from whom money is due or may become due to the assessee or there is a person who holds or may subsequently hold for or on account of the assessee any money.

6. In this case, admittedly, all the three bank accounts were in the nature of either the cash credit account or term loan account. In other words, the accounts were opened to enable the assessee to borrow the money from the bank for the purpose of its business. Any money, therefore, that the bank may make available to the assessee would necessarily be in the nature of a loan or a cash credit facility, in either case, would be in the nature of borrowing by the assessee from the bank. The bank and the assessee, therefore, do not have the debtor-creditor relationship.

7. Somewhat similar situation arose before the learned Single Judge of Madras High Court in case of *K.M. Adam* v. *ITO* [1958] 33 ITR 26. The Assessing Officer desired to invoke powers analogous to Section 226(3) of the Act for recovery of the tax dues of the assessee from the overdraft account that the assessee maintained with its bank. In such background, referring to similar provisions contained in Section 46 of the Income Tax Act, 1922, it was observed as under:

'It will be seen that this provision is analogous to an attachment of a debt or what is commonly terms a garnishee summons. The classes of persons to whom such notice could be served are two: (i) any person from whom money is due or may become due to the assessee; and (2) any person who holds or may subsequently hold money for or on account of the assessee. The question which arises for consideration in the present case is, as to whether a bank, which has afforded overdraft facilities to its customer, holds the amount, specified as that up to which the customer may draw as either "a debtor" of the customer or holds that money on behalf of or on account of the customer.'

8. This decision was followed by the learned Single Judge of Bombay High Court in reported judgement of Calcutta High Court in case of *Jugal Kishore Das* v. *Union of India* [W.P. No. 22899 of 2013, dated 8-10-2013]. In the said case, the Assessing Officer had tried to recover the tax dues of the assessee in exercise of powers under Section 226(3) of the Act by attaching the cash credit account of the assessee. Following the decision of Madras High Court in case of *K.M. Adam* (*supra*), it was observed as under:

"In view of the above, this Court does not find that the action on the part of the respondents in passing the order of attachment of Cash Credit Account would at all be sustainable in view of the ratio laid down in the above noted report; even the meaningful reading of the language employed in Section 226(3) of the said Act does not suggest that the account like the Cash Credit or the Overdraft is capable of being attached as the bank does not become a debtor."

9. Division Bench of Bombay High Court in case of *Sargam Foods (P.) Ltd.* v. *State of Maharashtra* [WP No. 4313 of 2008, dated 8-7-2010] also considered the similar issue and set aside the attachment of the petitioner's cash credit account for recovery of the unpaid taxes.

10. Such being the consistent view of various High Courts of the country, we have no hesitation in adopting similar line, also looking to the phraseology used in the statutory provisions contained in sub section (3) of Section 226.

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P. C. Chandra & Sons (India) Ltd. *v.* DCIT [2015] 63 taxmann.com 38 (Calcutta)

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12. I discharge the attachment with regard to the cash credit account of the petitioner with Allahabad Bank, Bowbazar Branch. In this, I am supported by a decision of the Madras High Court in *K.M. Adam* v. *ITO* [1958] 33 ITR 26 (Mad.) which opines that a loan fund cannot said to be a debt of the bank to the customer nor could it be said to be money on account of the customer. Hence, it cannot be attached.

13. I direct the Commissioner of Income-tax (Appeals) to dispose of the appeal by December 31, 2014. Other bank accounts of the writ petitioner with Union Bank of India, Sealdah Branch and Bank of India, Bowbazar Branch, will continue to remain attached with a rider that the Department will not be able to appropriate any sum therefrom till the disposal of the appeal before the Commissioner (Appeals).

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S.K. Agarwal*v.* UOI [2013] 35 taxmann.com 503 (Allahabad)

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SECOND POINT.

21. Now, we take up the second point which, in fact, is the main controversy between the parties. For the sake of convenience, the relevant portions of the second notice dated 22.2.2006 (paras-1 and 2) are reproduced below:-

"A sum of Rs. 41,43,342/- plus interest under section 220(2) is due from M/s. Singhal Casting Co. (Prop. Sri MukeshAgarwal) (assessee) of D-15 Kamla Nagar Agra on account of Income-tax/penalty/interest/fine. You are hereby required under section 226(3) of the Income-tax Act, 1961, to pay to me forthwith any amount due from you to or, held by you, for or on account of the said assessee upto the amount of arrears shown above.

I also request you to pay any money which may subsequently become due from you to him/them or which you may subsequently hold for or on account of him/them upto the amount of arrears still remaining unpaid, forthwith on the money becoming due or being held by your as aforesaid........"

The argument of the petitioner's counsel is that the said notice is in respect of the dues from M/s. Singhal Casting Company. M/s. Singhal Casting Company had no credit balance and Canara Bank was not the debtor of M/s. Singhal Casting Company. In reply, the learned counsel for the department submitted that the said notice on true and proper consideration is in respect of proprietor Mukesh Kumar Agrawal of M/s. Singhal Casting Company.

22. From the above quoted portion of the notice, it is crystal clear that the said notice was given in respect of dues from M/s. Singhal Casting Company, proprietor Mukesh Kumar Agrawal. The bank was having a bank account of M/s. Singhal Casting Company being account no. GA 15016 which account had a debit balance of Rs. 65,70,527.71 as on 22.2.2006. The bank in its reply has stated that the subject parties are enjoying open cash credit facility which is granted against hypothecation of stock such as raw material, work in progress, finished goods and stock in trade. The said facility is extended to a party to meet their working capital requirement. The position of balance on 22.5.2006 (on the date of reply) has been mentioned therein. For the sake of clarity, the relevant portion from the reply of the bank is reproduced below:-

"If you go through the clause (vi) of the sub-section (3) of section 226 once we inform you that the sum demanded or any part thereof is not due to the subject party from the bank or that we do not hold any money for or on account of the subject party, there is no obligation on our part to pay any such sum or part thereof unless it is discovered that the statement was false in any material particular. Only if the statement is discovered to be false the Act empowers the Assessing Officer/TRO to hold the recipient of the notice personally liable in the matter of the recovery of the demand in question. As such since our statement has not been established to be false in any material aspect, it is submitted that there is no cause for any further action like recovering the amount from the alleged debtor. In the circumstances we request you to withdraw your letter wherein you have threatened further action for which, we submit, you have no support from any provision in the Act. If any further step is taken, in pursuance of your letter dt.17.05.2006, it will be without the authority of law."

In this regard we further clarify that the subject parties are enjoying Open Cash Credit (OCC) facility from our branch. This facility is granted against the hypothecation of stock such as raw materials, work-in-progress, finished goods and stock in trade. OCC Account is a credit facility extended to a party to meet their working capital requirement. Hence, in general this account will be having debit balance and the credit balance, if any, should be adjusted against the liabilities of the party lying in various accounts. It may be noted that as a creditor bank has a lien on the account in respect of dues of the party. Hence, those who are enjoying OCC facility will be indebted to bank, not vice versa.

xxx…

24. Regarding your contention that no payments/ withdrawals/transfer should have been allowed in the party account, we submit that section 226(3) confer any such power on you. In this regard we invite your attention to the decision of the Madras High Court in the case of *K.M. Adam* v *ITO* [1958] 33 ITR 26 wherein the Hon'ble High Court has held that

". . . .when a bank lends money on overdraft and that customer is always in debit balance there is no stage at which the bank is a debtor to its customer, nor any point of time at which it holds any money of his on his account. Section 46(5A) of Income Tax Act, 1921, similar to section 226 (3) of the Income Tax Act, 1961 of the Act cannot on any construction be intended as a credit freeze, with this feature superadded, that is there was any thawing, the resultant credit released became immediately payable to the Department.."

There appears to be no dispute that there was debit balance in the bank account of M/s. Singhal Casting Company. The said difficulty has been tried to overcome by the respondent no. 2 by taking a resort to the Saving Bank Account of Mukesh Kumar Agrawal that is saving bank account No. 9319. It would be clear from a perusal of the impugned order that the Tax Recovery Officer has proceeded in the matter on the premise that Mukesh Kumar Agrawal on two occasions i.e. on 8th of May, 2006 and 6th of June, 2006 had credit balance of Rs. 20,04,727.44 and Rs. 10,02,045.44 respectively in his saving bank account. If the saving bank account and open cash credit account are clubbed together, there would be credit balance.

25. Firstly, we find that there being no garnishee notice in respect of the saving bank account of Mukesh Kumar Agrawal, the same cannot be clubbed with the account of M/s. Singhal Casting Company. The second garnishee notice is in respect of M/s. Singhal Casting Company and the bank itself was in the position of its creditor.

26. Section 226 of the Act provides other modes of recovery of income tax dues and its sub section (3) provides one of such modes to recover the income tax dues. It is apt to reproduce sub section (3) of section 226 in its entirety:-

xxx…

27. Sub section (3) of section 226 of the Act enables the Assessing Officer or the Tax Recovery Officer by notice in writing to require any person from whom money is due or may become due to the assessee or any person who owes or may subsequently owe money for or on account of assessee to pay to the Assessing Officer or Tax Recovery Officer. Proceedings under Sub section (3) of section 226 of the Act are in nature of what is commonly called garnishee proceedings.

28. Attachment of debts is a process by means of which judgement creditor is enabled to reach the money due to a judgment debtor which is in the hands of a third person. These are garnishee proceedings. To be capable of attachment, there must be in existence at the time when attachment becomes operative something which the law recognises as a debt. So long as there is a debt in existence, it is not necessary that it should be immediately payable. Where any existing debt is payable by future instalments, the garnishee order may be made to become operative as and when each instalment becomes due. The debt must be one which the judgment debtor could himself enforce for his own benefit. A debt is sum of money which is now payable or will become payable in future by reason of present obligation *Hyderabad Co-operative Commercial Corpn. Ltd.* v. *MohiuddinKhadir* AIR 1975 SC 2254.

29. The crux appears to be that the person to whom garnishee order/notice is issued must be in the position of a creditor with respect to the assessee in default.

30. In *ITO* v. *Budha Pictures* AIR 1967 SC 1547, a case under the old Income Tax Act, 1922, the Apex Court had occasion to consider similar provision as existed therein and said that a person to whom notice has been issued has only to object that the sum demanded or part thereof is not due to the assessee or that he does not hold any amount on account of the assessee. He has not to say that he is not likely to owe or to hold money. Interpreting the expressions “may become due” or “may subsequently hold money” suggests, in the context, a subsisting relationship between the person served with the notice and the assessee that is assessee’s employer, or banker or debtor etc. etc..

31. Sub-section (3) of section 226 of the Act is subdivided into ten clauses. It lays down the entire machinery with regard to the jurisdiction of the Assessing Officer/Tax Recovery Officer to issue garnishee notice requiring any person for money is due or may become due to the assessee, under clause (i). Clause (iv) lays down that every person to whom such notice is issued shall be bound to comply with the notice. Any claim respecting any property in relation to such a notice under this sub section shall be void as against the demand contained in the notice vide sub section (v). Under sub section (vii) it is provided that the person to whom such a notice has been issued may file objection on the ground that the sum demanded or any part thereof is not due to the assessee or that he does not hold any money for or on account of the assessee. Such objection shall be filed on affidavit. If such an objection is filed but it is ultimately discovered that such statement was false in any material particular such person shall be personally liable to the Assessing Officer or the Tax Recovery Officer to the extent of his own liability to the assessee on the date of notice. The other clauses of section 226 (3) provides the manner to amend or revoke the notice so issued by the Assessing Officer or the Tax Recovery Officer. Sub section (ix) further provides that any person discharging any liability to the assessee after receipt of the notice under sub section (3) of section 226 of the Act shall be personally liable to the Assessing Officer or the Tax Recovery Officer to the extent of his own liability to the assessee so discharged. Sub section (x) provides that if the noticee fails to make the payment in pursuance of the notice he shall be deemed to be an assessee in default.

32. For the present purposes clause (vi) is important. The use of words 'due to the assessee' is important. At the time of the garnishee notice, the sum must be due to the assessee. In this context the learned counsel for the petitioner submitted that on the date of second notice as also on the date of first notice, nothing was due from the bank to the assessee i.e. M/s. Singhal Casting Co. Ltd. The bank had provided open cash credit limit and there was debit balance in the account of the assessee namely M/s. Casting Co. Limited. This was so stated in reply to the first notice (which has not been pursued any further and is not basis of the impugned order). The basis of the impugned order is the second notice dated 22.2.2006 in reply whereof, the petitioner submitted that nothing was due from the bank to M/s. Singhal Casting Co. Limited, a fact which has not been found to be incorrect even in the order impugned in the writ petition, thus, stands unchallenged.

33. As pointed out herein above, and keeping the very nature of the garnishee proceedings in the background of mind, as also the observation by the Apex Court in the case of *Hyderabad Commercial Corpn.* (*supra*) as in the case of *Budha Pictures* (*supra*), we find sufficient force in the argument of the petitioner that on the date of garnishee notice, the bank was not in a position of a debtor of the assessee but was in the position of a creditor as the assessee had open cash credit limit and debit balance in its account.

34. In a very old case, *K.M. Adam* (*supra*) the Madras High Court has taken the similar view though under the Income Tax Act, 1922. There, the bank had afforded the overdraft facilities to its customers, a question arose whether the bank holds the amount, specified as that up to which the customer may draw as either "a debtor" of the customer or holds that money on behalf of or on account of the customer. The question has been answered in the following manner:-

"....In my judgment when a bank lends money on overdraft and the customer is always in debit there is no stage at which the bank is a debtor to its customer, nor any point of time at which it holds any money of his on his account. Section 46(5A) of the Act cannot on any construction be intended as a credit-freeze, with this feature superadded, that if there was any thawing, the resultant credit released became immediately payable to the Department. Of course, if at any stage the account of the customer is in credit, section 46(5A) would come into play and the sum so standing to the credit of the assessee might be directed to be paid over......."

Clause (i) of Sub section (3) of section 226 of the Act applies in four set of circumstances:-

(1) when money is due from a person to the assessee;

(2) when money may become due from a person to the assessee;

(3) when any person holds money for the assessee; and

(4) a person may subsequently hold money for or on account of assessee.

35. In all such eventualities, sine qua-non is that the person who is required to pay the amount to the department on behalf of the assessee must hold or possess the money of the assessee for or on account of the assessee on a plain and simple language of clause (i) of Sub section (3) of section 226 of the Act. Any other interpretation would be against the very basic nature of the garnishee proceedings.

36. Having said so as above, we find that the order impugned in the writ petition is based on incorrect premise and is somewhat contradictory. It twisted the facts to lend support to the impugned order. The very important fact which has been twisted is as follows:-

37. In paragraph-7 of the impugned order, the Tax Recovery Officer has reproduced the notice issued under section 226(3) of the Act dated 22.2.2006. The said reproduction, we are sorry to say, is not correct reproduction of the said notice and it goes to the very root of the matter. A photostat copy of the said notice dated 22.2.2006 has been filed as Annexure-4 to the writ petition, the correctness of which has not been disputed in the counter affidavit. It shows that in the said notice it is mentioned that "a sum of Rs. 41,43,342/- + interest under section 220(2) is due from M/s. Singhal Casting Company (Prop. Mukesh Kumar Agrawal) of ....While in the impugned order the things have been reversed and it reads as follows:-

"A sum of Rs. 41,43,342/- + interest under section 220(2) "is due from Mukesh Kumar Agrawal", Prop. "M/s. Singhal Casting Co....."

38. The learned counsel for the petitioner submitted that this mistake is intentional. The department had realized its mistake that in the second notice which is dated 22.2.2006 the garnishee order was passed against M/s. Singhal Casting Company which had, admittedly, a separate bank account no. GA 15016 having drawing of Rs. 65,70,527.71. It is not necessary for us to say anything further and we leave the matter as it is.

39. The Tax Recovery Officer while passing the impugned order appears to have been in confusion and was not sure as to whether the credit balance in the individual name of Sri Mukesh Kumar Agrawal could or could not be clubbed with the minus balance standing in the account of M/s. Singhal Casting Company. In para 11 (iii) he states that the Account No.SB 9319 was wrongly mixed with the cash credit account No.GA 15016 lying in the name of M/s. Singhal Casting Company. He goes on saying, legally correct, that the saving bank account is completely a distinct account and the money lying in this account is money of the account holder. So the money lying in the account number SB-9319 was the money of Sri Mukesh Kumar which become the property of the Income Tax Department after service of notice under section 226(3) dated 22.2.2006 vide page no.141 of the paper book. On the subsequent page, he clubbed the account numbers SB 9319 and GA No.15016. The said paragraph is reproduced below:-

xxx…

40. The above approach of the Tax Recovery Officer is faulty for the following reasons:-

1. The garnishee notice dated 22.2.2006 was with respect to the assessee namely Singhal Casting Company.
2. The bank was, in fact, a creditor of the assessee namely M/s. Singhal Casting Company as it had advanced money under open cash credit limit.
3. The bank was maintaining the various accounts of Mukesh Kumar Agrawal under different capacities/distinct entities which could not be clubbed together.

41. Mukesh Kumar was having bank account of Mukesh Kumar Agrawal HUF, Account No.GA 17105 in the name of M/s. Shivangi Steels Private Limited. The Tax Recovery Officer himself has noticed that these accounts belong to the separate entities and could not be clubbed and as a matter of fact, has raised objection on the ground that "the bank wrongly mixed the account Nos. SB 11738 and SB 21608 which are in the name of Mukesh Kumar Agrawal HUF and Account No.GA 17105 which is lying in the name of M/s. Shivangi Steels Private Limited. After saying so, he in the above quoted paragraph pointed out two instances by clubbing the saving bank account of Mukesh Kumar Agrawal with that of M/s. SinghalCasting Company, which under law according to the petitioner, could not have been done. We find sufficient force in the argument of the petitioner's counsel that the bank was maintaining multiple accounts of different natures and all these accounts belong to the respective entities. The garnishee notice dated 22.2.2006 being in the name of M/s. Singhal Casting Company, the bank was not supposed to attach the saving bank account of Mukesh Kumar Agrawal in pursuance of the said garnishee notice, even if Mukesh Kumar Agarwal happens to be proprietor of M/s. Singhal Casting Company, specially, when the first garnishee notice dated 5th of September, 2005 was in the name of Mukesh Kumar Agrawal, was not pursued any further by the department. No show cause notice was issued norfurther action was taken in pursuance of the first notice after passing of the judgment by this Court in Civil Misc. Writ Petition No.1356 of 2005 dated 7th October, 2005. The conduct of the department shows that the department left out the first garnishee notice and proceeded to recover the amount due from M/s. Singhal Casting Company by issuing the second garnishee notice dated 22.2.2006 which is the basis of the impugned order.

42. The upshot of the above discussion is that the garnishee notice dated 22.2.2006 in respect of which the petitioner has been held deemed assessee in default being in respect of assessee M/s. Singhal Casting Company who was having debit balance with the petitioner's bank, the petitioner cannot be held as deemed assessee in default in view of the fact that the bank was not debtor of the said assessee on the date of garnishee notice. The position of the bank qua the assessee M/s. Singhal Casting Company was that of creditor of the assessee. The assessee company was indisputably enjoying the open cash credit limit and had debit balance at the relevant point of time. The saving bank account no. 9313 which had even if a credit balance on 8th of May, 2006 or 6th June, 2006 belongs to Mukesh Kumar Agrawal, a separate entity, who was not assessee in default, could not be clubbed with the bank account of M/s. Singhal Casting Company.

43. From the above discussion, it is clear that the assessee with respect to whom garnishee notice has been served on a person, here the bank, the person to whom the notice has been served (here the bank) could say only this much that no money is due from it (bank) to the assessee. To put it differently, it is crystal clear that the noticee must be in the position of a creditor of the assessee with respect to whom the garnishee notice has been served, which as found is not so here.

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FEMA Updates

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18 Foreign Exchange Management (Foreign Currency Accounts by a person resident in India) Regulations, 2015

In line with the Government of India's startup initiative, it has been decided that an Indian startup, having an overseas subsidiary, may open a foreign currency account with a bank outside India for the purpose of crediting to the account the foreign exchange earnings out of exports/sales made by the said startup or its overseas subsidiary. The balances held in such accounts, to the extent they represent exports from India, shall be repatriated to India within the period prescribed for realization of exports, in Foreign Exchange Management (Export of Goods and Services) Regulations, 2015 dated January 12, 2016, as amended from time to time.

In addition, payments received in foreign exchange by an Indian startup arising out of sales/ export made by the startup or its overseas subsidiaries will be a permissible credit to the Exchange Earners Foreign Currency (EEFC) account maintained in India by the startup.

A startup will mean an entity which complies with the conditions laid down in Notification No. GSR 180(E) dated February 17, 2016 issued by Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India.

Further, the existing facility of opening foreign currency account outside India, available to the Life Insurance Corporation of India or the General Insurance Corporation of India and their subsidiaries for the purpose of meeting the expenditure incidental to the insurance business carried on by them has now been liberalised. Accordingly, any insurance/ reinsurance company registered with the Insurance Regulatory and Development Authority of India (IRDA) may open a foreign currency account with a bank outside India to carry out insurance/ reinsurance business.

A.P. (DIR Series) Circular No. 77, dated June 23, 2016

For Full Text refer tohttps://rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10457

19 Permitting writing of options against contracted exposures by Indian Residents

As announced in the Bi-Monthly Monetary Policy Statement on April 7, 2015, in order to encourage participation in the Over the Counter (OTC) currency options market and improve its liquidity, it has been decided to permit resident exporters and importers of goods and services to write (sell) standalone plain vanilla European call and put option contracts against their contracted exposure, i.e. covered call and covered put respectively, to any AD Cat-I bank in India subject to operational guidelines, terms and conditions given in Annex I to this circular.

A.P. (DIR Series) Circular No. 78, dated June 23, 2016

For Full Text refer to https://rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10458

20 External Commercial Borrowings (ECB) – Approval Route cases

In terms of paragraph no. D.15 of Annex to A.P. (DIR Series) Circular No.32 dated November 30, 2015 and paragraph no. 2.11 of Master Direction No.5 dated January 1, 2016, cases coming under the approval route were required to be considered by an Empowered Committee set up by the Reserve Bank based on the parameters stated therein.

With a view to rationalizing and expediting the process of giving approval, it has been decided that ECB proposals received in the Reserve Bank above a certain threshold limit (refixed from time to time) be placed before the Empowered Committee. The Reserve Bank will take a final decision in the cases taking into account the recommendation of the Empowered Committee.

All other aspects of the ECB policy shall remain unchanged. AD Category - I banks may bring the contents of this circular to the notice of their constituents and customers.

A.P. (DIR Series) Circular No. 80, dated June 30, 2016

For Full Text refer tohttps://www.rbi.org.in/scripts/BS_CircularIndexDisplay.aspx?Id=10472

21 Discontinuation of Reporting of Bank Guarantee on behalf of service importers

In terms of para no. 5 of the Master Direction No.8 dated January 01, 2016 on 'Other Remittance Facilities', AD Category-I banks were permitted to issue guarantees in favour of a non-resident service provider on behalf of their resident customers importing services, subject to the conditions laid therein. AD Category-I banks were also advised vide para no.1, Part X of the Master Direction on 'Reporting under Foreign Exchange Management Act, 1999' dated January 1, 2016, to report to the Chief General Manager-in- Charge, Foreign Exchange Department, Foreign Investments Division (EPD), Reserve Bank of India, Central Office, Mumbai-400001 details about invocation of bank guarantee for service imports.

On a review of the reporting requirements and to reduce the burden of compliance, AD Category I banks are advised to discontinue submission of such reports with immediate effect. They may, however, maintain records of such invocations and furnish the required details to RBI whenever sought.

A.P. (DIR Series) Circular No. 1, dated July 07, 2016

For Full Text refer tohttps://www.rbi.org.in/scripts/BS_CircularIndexDisplay.aspx?Id=10489

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Congratulations

CA. Marzun E. Jokhi, Membership No. 104238, members of the Association has completed his PhD studies as per UGC Regulations and obtained **Doctorate Degree** under faculty of Commerce from KSKV University, Bhuj-Kutch. His thesis is on "**A study to Uncover Financial Shenanigans**".

Service Tax Decoded

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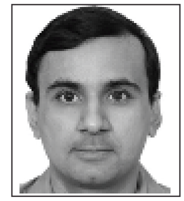

Service by Government and Local Authority – Part I

Whether Government provides any service or not is itself a moot question, we assume that the Governments in India provide services and discuss the taxability thereof.

Through the Finance Act, 2015 (yes, 2015 and not 2016), scope of taxability of services provided by Government or Local Authority to business entities are broaden. However, implications of such amendment were too wide to handle and implementation were postponed till 1st April, 2016. Notification No. 6/2016-ST Dated 18/02/2016 and Notifications No. 15/2016-ST, 16/2016-ST and 17/2016-ST all dated 01/03/2016 are issued and now such amendments are implemented w.e.f. 01/04/2016.

W.e.f. 01/04/2016, services provided by the Government or local authority is made taxable and mostly such services are subject to Reverse Charge Mechanism and hence person receiving such services is required to discharge the service tax liability on services received from the Government or Local Authority. Governments are providing various services (or rather to say doing various activities) for business and almost each and every business is receiving such services. Hence, each and every business entity is required to go through the provisions of the service tax law to ascertain service tax liability, if any. Various issues are discussed herein for services provided by the Government or Local Authority.

1. Are the services provided by the Government subject to service tax?
   - In terms of Section 66D(a) of the Finance Act, 1994 (the Act), services provided by the Government or a Local Authority are in Negative List and hence not subject to service tax. However, there are four exceptions to this provision.
     i. 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 a Government.
     ii. Services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport.
     iii. transport of goods or passengers.
     iv. Any service, other than services covered under clauses (i) to (iii) above, ***provided to business entities.***
2. Mr. Ismeetsingh has purchased a new car for his personal use and paid various registration and other fees to the Road Transport Office. Is service tax payable on registration and other fees?
   - From the Section 66D(a) as discussed above, following proposition can be drawn.
     i. If recipient of service is a business entity, services provided by the Government or Local Authority are not covered under Negative List and thus subject to service tax.
     ii. If recipient of service is not a business entity, services provided by the Government or Local Authority is not subject to service tax.

   As Mr. Ismeetsingh has purchased a car, not for his business, but for personal use, he is not working as a business entity and hence service of providing registration and allied services are covered under Negative List as provided under Section 66D(a) of the Act and hence service tax is not payable thereon.

3. Now, suppose, M/s. Ismeetsingh is running a business of running of motor cabs and has paid various fees and charges to the Government or Local Authority for registration, tourist permission etc. Are such services subject to service tax?

- Yes. As discussed in earlier paragraph, services provided by the Government or Local Authority are excluded from levy of service tax only if it is provided to non-business entity. Thus, such services are subject to levy of service tax (subject to exemption, if any).

4. Now, in above example, suppose service tax is payable, who is required to pay service tax?

- Generally service tax is payable by the service provider. However, under Section 68(2) of the Act, the Central Government has power to notify taxable services for which service tax is to be paid by other person. Recipient of services is notified through Notification No. 33/2012-ST as person who is liable to pay service tax where services are provided by the Government or Local Authority. Rule 2(1)(d)(E) of the Service Tax Rules, 1994 is also amended accordingly and service recipient is made liable to pay service tax.

  Hence, in this case Shri Ismeetsingh is liable to pay service tax.

5. M/s. Jitendra Marketing Ltd. has availed services of Department of Post, Government of India to send notices to share holders through speed post and paid Rs. 50000. Is M/s. Jitendra Marketing Ltd. required to pay service tax thereon?

- Generally, all taxable services, unless exemption is provided, are subject to RCM. However, there are four exceptions to this rule as prescribed in Rule 2(1)(d)(E) of the Service Tax Rules, 1994.

  i. Renting of Immovable Property

  ii. 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 a Government.

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

  iv. transport of goods or passengers

  As speed post services by the Department of Posts are not subject to RCM, Department of Post will have to pay service tax on speed post and M/s. Jitendra Marketing Ltd. is not required to pays service tax thereon.

6. Mr. Rahul Vandha has booked a Community Hall owned by Ahmedabad Municipal Corporation on rent for two different purposes on two different dates as follows.

  a. During July, 2016 for his Swayamvar, a personal and non business usage.

  b. During August, 2016 for his Business Exhibition.

  Please Guide him about tax liability?

  - Services provided by the Government or a Local Authority is service in Negative List as provided under Section 66D(a). Four exceptions to this rule are provided therein and renting of immovable property is not covered therein unless it is provided to a business entity.

  - In simple words, unless it is provided to a business entity, it is a service in Negative List and it is not subject to service tax at all and no one, neither service recipient nor service provider, is required to pay service tax thereon.

  - If service of renting of immovable property is provided to a business entity, it will be covered by exception (vi) of the Section 66D(a) (exception to Negative List) and hence it is subject to service tax.

  - Further, in terms of Rule 2(1)(d)(E) of the Service Tax Rules, 1994, service of renting of immovable property by Government or Local Authority is not subject to reverse charge mechanism and hence service provider is required to pay tax, if any.

- Thus, in first case, where immovable property is let out by the Ahmedabad Municipal Corporation for non-business use, question of payment of service tax doesn't arise at all. And in second case, where immovable property is let out for the business, it is taxable and as RCM is not applicable, service provider, i.e. Ahmedabad Municipal Corporation itself is required to pay service tax and no service tax can be demanded from Mr. Rahul Vandha.

7. What is meaning of Government, Local Authority and Governmental Authority?

- Above terms are defined as under.

- Section 65B(26A) of the Act defines the Government as the Departments of the Central Government, a State Government and its Departments and a Union territory and its Departments, but shall not include any entity, whether created by a statute or otherwise, the accounts of which are not required to be kept in accordance with article 150 of the Constitution or the rules made thereunder.

- Section 65B(26A) of the Act defines the Local Authority as

  (a) a Panchayat as referred to in clause (d) of article 243 of the Constitution;

  (b) a Municipality as referred to in clause (e) of article 243P of the Constitution;

  (c) a Municipal Committee and a District Board, legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund;

  (d) a Cantonment Board as defined in section 3 of the Cantonments Act, 2006 (41 of 2006);

  (e) a regional council or a district council constituted under the Sixth Schedule to the Constitution;

  (f) a development board constituted under article 371 of the Constitution; or

  (g) a regional council constituted under article 371A of the Constitution;

- Paragraph 2(s) of the Notification No. 25/2012-ST defines the Governmental Authority as an authority or a board or any other body;

  (i) set up by an Act of Parliament or a State Legislature; or

  (ii) established by Government,

  with 90% or more participation by way of equity or control, to carry out any function entrusted to a municipality under article 243W of the Constitution

8. Are taxable services received from the Governmental Authority subject to RCM?

- No, services received from the Governmental Authority are not subject to RCM under Rule 2(1)(d)(E) of the Service Tax Rules, 1994. Taxable services received from Government or a Local Authority only are subject to RCM.

9. Can Public Sector Undertakings (PSUs), like ONGC and Nationalised Banks, be considered as Governmental Authority for levy of service tax?

- From the definitions discussed in earlier paragraph, it is clear that generally, PSUs are neither Government nor Governmental Authority for the purpose of levy of service tax. Hence, services received from such entities will not be subject to RCM.

10. Taxable service is provided by Government to a business entity which is located outside India. Is service tax payable thereon? If yes, who is required to pay service tax?

- In terms of Section 66D(a) of the Act, services provided to business entity are excluded from Negative List and made taxable irrespective of the fact that recipient business entity is located in taxable territory or outside taxable territory. However, in terms of Rule 2(1)(d)(E) of the Service Tax Rules, 1994, services received by the Government or Local Authority, by the business entity located in taxable territory only is subject to RCM. Hence, in such case, if service tax is payable, a Government is liable to pay service tax.

11. Mr. Karodimal CA owns an office and uses the same for his profession and has paid the Rs. 60000 as Property Tax and Rs. 2000 as Professional Tax to Ahmedabad Municipal Corporation for the year 2016-17. Is he required to pay service tax thereon?

- In terms of Section 65B(44) of the Act, "service" means any activity carried out by a person for another **for consideration**, and includes a declared service. To constitute any activity as service, it is pre-condition that there should be consideration. Term consideration is not defined under the Finance Act, 1994 but definition given under Section 2(d) of the Indian Contract Act, 1872 may be referred which defines the word "consideration" as follows.

- *"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise."*

- Thus, consideration means which is to be received or receivable in return. As tax is to be paid irrespective of any activity which government may perform, tax paid or payable is not the consideration for that activity. Government is not under contractual obligation to do any specific activity on payment of any tax, duty, cess etc. Hence, tax is not a consideration but a statutory obligation only and one is bound to follow the same.

- In absence of consideration, there is no service and there is no question of payment of service tax.

- CBEC, vide Paragraph No. 3 of the Circular No. 192/02/2016-ST Dated 13/04/2016, has also clarified that taxes, cesses or duties levied are not consideration for any particular service as such and hence not leviable to Service Tax. It further clarifies that 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.

12. Mr. Malia has paid penalty of Rs. 1 crore for evasion of Income Tax. Is he required to pay service tax on penalty paid under Income Tax Act?

- As discussed forgoing paragraph, in this case also, consideration is missing.

- Further, it is clarified in the Paragraph No. 4 of the Circular No. 192/02/2016-ST Dated 13/04/2016 that fines and penalty chargeable by Government or a local authority imposed for violation of a statute, bye-laws, rules or regulations are not leviable to service tax.

13. M/s. Maggi Doodles Ltd. has got their product tested in a Government laboratory and paid fee of Rs. 15000/-. Are they liable to pay service tax thereon under following assumptions?

    a. They have got the testing on their own without any statutory obligation.

    b. They were under statutory obligation to get their product tested.

- Services provided by the government or local authority to a business entity are subject to tax and RCM. When a business entity avails services of the Government without any obligation to do so, it is an activity for consideration and service tax is required to be paid thereon.

- If there is statutory obligation, one can argue that there is compulsion to do that act and hence there is no question of option or will of the recipient of the service and hence amount paid for such activity can't be termed as consideration.

- However, the definition of the term "consideration", as provided in Section 2(d) of the Indian Contract Act, 1872 may be referred which is as follows.

"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise."

- From the above definition, it is clear that desire of the *promisor*, i.e. the provider of the service is necessary and not the desire of the *promisee*. Once, the *promisee* does something (pays fee) for that service, that act (paying of fees) is consideration and hence in such case there is consideration.

- In the case of tax, duty, cess etc., such payment is not on any promise of the Government. But, in the case of fees, such a payment is required to be made when, at the desire of the Government, *promisor* i.e. service recipient makes payment. In simple words, fee is linked to the particular service or product, where as taxes are not against the particular services or product. Thus, there is no *quid pro quo* (in return) in the case of taxes, but in the case of testing fees is *quid pro quo* (fees) by the service recipient for testing.

- Further, in Paragraph 5 of the Circular No. 192/02/2016-ST Dated 13/04/2016 it is clarified that 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. Thus, it shows the intention of the Government to tax such activity even if it is statutory requirement.

- Hence, even if such testing is required to be done under statutory obligation, service tax is required to be paid thereon.

14. Mr. Malia has also paid late fee of Rs. 20,000 for late filing of service tax return. Is Mr. Malia required to pay service tax thereon?

- Late fee is mandatory and statutory liability of a person and it can be argued that it is not a consideration. Further, although it is named as fee, it is nothing but a penalty for late filing of return. It is penal in nature and hence it should not be considered as a consideration and no service tax is payable thereon.

- Paragraph 5 of the Circular No. 192/02/2016-ST Dated 13/04/2016 states that 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. However, it also clarifies that 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. Thus, even if in the case of statutory requirement, character of service should be present.

- In my view, it is not a service at all and no service tax is payable on such late fee.

15. M/s. Highrisk Ltd. doing a business and required to obtain a permission from Government for doing certain business activity and required to make payment for such permission. Is M/s. Highrisk required to pay service tax thereon?

- First of all it should be ascertained that if there is a service. To determine whether such activity constitute service or not and whether such payment constitutes consideration or not, principals discussed in the forgoing paragraphs should be applied. It may happen that such permission is required under statutory obligation and payment is also a statutory requirement. Even in such case, it may be considered as service and service tax is required to be paid thereon.

- Paragraph 5 of the Circular No. 192/02/2016-ST dated 13/04/2016 clarifies that service tax is leviable on any payment, in lieu of any permission or license granted by the Government or a local authority.

To be continued……………

Service Tax - Recent Judgements

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16 **[2016] 71 taxmann.com 109 (New Delhi - CESTAT) CESTAT, NEW DELHI BENCH Chhattisgarh State Industrial Development Corporation Ltd. v. Commissioner of Central Excise & Service Tax, Raipur.**

Facts:-

Assessee was engaged in business of leasing Government land and also collecting charges for maintenance of street light and repair and maintenance of roads, etc. from entrepreneur allottees of land. It submitted that (i) activities carried out by it would fall under category of 'commercial or industrial construction' defined under section 65(25b), and (ii) it performed statutory functions on behalf of State Government and so was not liable to service tax.

Held:-

Where assessee was engaged in business of leasing Government land and also collecting charges for maintenance of street light and repair and maintenance of roads, etc. from entrepreneur allottees of land, activities carried out by assessee would fall under category of 'management, maintenance or repair'.

There is no doubt that the service was provided by the assessee in relation to maintenance or repair of immovable property in terms of the written agreement (lease deed) and, therefore, is covered under section 65(64). Thus the service rendered by the assessee is squarely covered in the definition of management, maintenance or repair. Therefore, the activities carried out by the assessee are taxable under section 65(64).

Further it is seen that the charges collected by the assessee are on account of the taxable service provided by it and, therefore, constitute consideration for taxable service. Once the taxable service is being provided against a consideration, service tax becomes payable.

17 **[2016] 71 taxmann.com 70 (Gujarat) HIGH COURT OF GUJARAT General Manager-Food Corporation of India v. Union of India.**

Facts:-

FCI availed cargo handling services from KE for handling 'wheat' (agricultural produce). Though services were exempt, KE collected service tax from FCI. Owing to deficiency in services and other disputes, FCI invoked bank guarantee and made recoveries from KE. Since KE did not pay service tax, department initiated garnishee proceedings from FCI.

Held:-

Garnishee proceedings cannot be initiated against service recipient to recover service tax, if service recipient did not owe anything to service provider owing to deficiency in provision of service.

Further it was held that since FCI had already made payment to KE, there was no further liability of FCI to pay anything to Government, particularly, when no service tax was ever payable on such service. Recovery made by FCI from KE was not entirely towards service tax, but, was also towards deficiency in service. Since FCI did not owe anything to KE, no garnishee proceedings can be initiated against FCI.

18 **[2016] 71 taxmann.com 141 (New Delhi - CESTAT) CESTAT, NEW DELHI BENCH Radico Khaitan Ltd. v. Commissioner of Service Tax, Delhi.**

Facts:-

Assessees owned various brands of Indian Made Foreign Liquor (IMFL) Assessee was getting IMFL manufactured under its brand, under contract arrangement with contracted distilleries or contract bottling units (CBU). Department argued that assessee had promoted business of CBUs and was liable to service tax under business auxiliary services on 'profit earned/retained' from business.

Held:-

Assessee was getting IMFL manufactured from CBUs/distilleries and for that purpose, assessee was providing its expertise. CBUs were acting as job-workers and were getting fixed amount per case for manufacture of liquor. After amendment from 1-10-2009, CBUs started paying service tax under Business Auxiliary Services. Hence, it was CBUs who were providing services to assessee not other way around; hence, it cannot be said that assessee was promoting business of bottlers and no service tax can be levied upon assessee.

Brand Owner getting liquor manufactured on job-work basis cannot be said to be 'promoting business of job-worker'; hence, profit earned/retained by Brand Owner cannot be charged to service tax.

19 [2016] 71 taxmann.com 250 (New Delhi - CESTAT) CESTAT, New Delhi Bench Vinayak Industries v. Commissioner of Central Excise & Service Tax, Jaipur.

Facts:-

Assessee was engaged in chilling of milk for a co-operative milk producer society. Department demanded service tax under Business Auxiliary Services. Assessee argued that it amounts to 'deemed manufacture' being 'any other treatment to render product marketable' as per Note 6 of Chapter 4 of First Schedule to Central Excise Tariff; hence, not liable to service tax. Department argued that words 'any other treatment' would only cover activity similar to 'labelling or relabelling of containers or repacking from bulk packs to retail packs'.

Held:-

Words 'any other treatment' cannot be restricted in view of words 'labelling/repacking, etc.' and any treatment to render product marketable is deemed manufacture. Chilling of milk is a 'treatment' which renders milk 'marketable' to consumer i.e., chilling makes it possible to market/sell milk to consumers at distant places. Hence, as per Note 6 ibid, chilling of milk is manufacture and not liable to service tax.

20 [2016] 71 taxmann.com 278 (Kerala) High Court of Kerala V.K. Rakesh v. Commissioner of Customs & Central Excise (Appeals).

Facts:-

Assessee was letting out contract carriage vehicles on hire. Department demanded service tax under 'tour operator' service arguing : (a) 'contract carriages' fall under definition of 'tourist vehicle' as per section 2(43) of Motor Vehicles Act, 1988; (b) vehicles were used for marriage parties, excursions and group trips; and (c) assessee was not merely hiring vehicle, but, its staff including driver was operating trips and tours. Assessee filed writ challenging demand.

Held:-

In Secretary Federation of Bus Operators Association of Tamil Nadu v. Union of India [2007] 6 STT 49 (Mad.), matter was remanded back with right to contest demand and hence, right of assessing authority to consider on facts as to whether assessee was tour operator or not, was not curtailed. It was found that assessee was not merely hiring vehicles but was operating tours and department relied upon 'conditions printed on specimen order form' for this purpose. Since decision of adjudicating authority was based on facts and was not illegal or perverse, High Court could not interfere in writ jurisdiction.

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VAT - From the Courts

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Whether sale effected from Domestic Tariff area to unit in SEZ, can be said to be export out of India?
Lalitha Murlidharan v. CCT reported in 91 VST 175 (KER)

Background of the case:

The petitioner-dealer ran a unit in an export processing zone in Chennai and was an exporter of articles like sandalwood chips and chips powder procured from the domestic tariff area and then exported to various countries against export orders placed by foreign buyers. As part of its business operations, dealer purchased sandalwood in auctions conducted by the Forest Department of the State of Kerala. The bids were formally confirmed in favor of the dealer and were asked to pay the value of the goods as also the applicable tax under the Kerala Value Added Tax Act, 2003 in respect of the goods. Dealer paid the sums and took delivery of the goods but filed a writ petition praying for a declaration that a sale effected to a unit in the special economic zone established under the Special Economic Zones Act, 2005 by any dealer in the domestic tariff area, was an export sale and no value added tax could be levied or collected in respect of such a sale:

Only if a sale or purchase occasions the movement of goods to a place outside the territory of India, or is affected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India, can it be said that there is a sale or purchase that takes place in the course of import or export. The phrase "crossing the customs frontiers of India" is defined in section 2(ab) of the Central Sales Tax Act, 1956 indicates that the meaning to be attributed to the word " export", as also the phrase " crossing the customs frontiers of India" is the same as attributable under the Customs Act, 1962. A sale affected to a unit in a special economic zone cannot, therefore, on a plain reading of the 1956 Act, be deemed to be an export for the purposes of the Act. The Special Economic Zones Act, 2005 is a special law enacted with the specific object of providing an internationally competitive environment for exports and there are specific provisions therein that are tailored to provide tax exemptions and other benefits to the units situated in the special economic zone a status other than what is contemplated for the purposes of their functioning under the Act. The words "export" and "import" have a different connotation under the 2005 Act, when compared with the definition of the same words under the Customs Act. While "export" is defined as including a supply from a unit in the domestic tariff area to a unit in the special economic zone, the word also includes the activity of taking goods or providing services out of India from a unit in the special economic zone. Similarly, the word "import" does not include the bringing of goods into a unit in the special economic zone, from the domestic tariff area. Section 7 of the 2005 Act that deals with exemption from taxes, duties and cesses does not specifically grant an exemption from Customs duties or Central sales tax or State value added tax levies. The exemption from state value added tax levies is separately contemplated under section 50 of the 2005 Act and is left to the discretion of the State Legislatures. It is apparent, therefore that while enacting the 2005 Act, Parliament did not intend to treat a supply from the domestic tariff area to a unit in the special economic zone as an export for the purposes of the 1956 Act or article 286 of the Constitution. As a matter of fact, even under the 1956 Act, through an amendment that was brought in with effect from September 10, 2004, section 8(6) of the Act was amended to provide an exemption from Central sales tax in cases where there is an inter-state sale effected to registered dealers who are permitted to set up units in special economic zone. Similarly, under the 2003 Act, there is a provision that grants exemption in respect of sale of goods to units in a special economic zone, under certain circumstances. This suggests that the legislative intention under the special economic zones Act was to treat sales to units in the special economic zone as taxable sales, subject to specific exemptions.

Held that, (i) that in the absence of any exemption, sales effected from the domestic tariff area to a unit in the special e economic zone would not quality to be export sales for the purposes of section 5(1) of the 1956 Act or for the purposes of articles 286 of the Constitution of India. The movement of the goods from Kerala to the unit of the dealer in the export processing zone in Chennai could not be considered an "export" of the goods outside the territory of India.

(ii) that the express terms of the e-auction of sandalwood clearly contemplated that prevalent rates of value added tax would be applicable to all successful bidders irrespective of destination of transportation of materials and purpose

(iii) that there was no material to substantiate the contention that, even if the sale did not qualify as an export sale for the purposes of section 5(1) of the 1956 Act, the sale could be viewed as a penultimate sale prior to export for the purposes of section 5(3) of that Act or even qualify for an exemption in terms of section 8(6) of that Act.

7 Whether petroleum coke used in manufacturing of cement, can be termed as raw material or fuel?

State of Gujarat V. Balram Cement Ltd. 91 VST 250 (Guj)

Background of the case:

Section 2(19) of the Gujarat Value Added Tax Act, 2003 defines the expression " raw materials" to mean the goods used as ingredient in the manufacture of other goods and includes processing materials, consumable stores and material used in the packaging of the goods so manufactured but does not include fuels for the purpose of generation of electricity. Section 11 of the Act makes provision for "tax credit". By virtue of sub-section (1) and clause (a) of sub-section (3) of section 11 of the Act, a dealer is entitled to tax credit in respect of the raw materials used in the manufacture of taxable goods as specified therein. However, clause (b) of sub-section (3) of section 11, interalia, provides that the amount of tax credit in respect of a dealer shall be reduced by the amount of tax calculated at the rate of four percent. On the taxable turnover of purchases within the State of the fuels used for the manufacture of goods therefore, in respect of fuels used in the manufacture of goods, the tax credit is required to be reduced by four percent of the taxable turnover of purchases of such inputs.

The respondent- dealer carried on the business of manufacture and sale of cement within the state of Gujarat as well as outside the State. For the assessment period 2007-08 and 2008-09, the dealer claimed input-tax credit on purchases of petroleum coke contending that considering that petroleum coke was used as a raw material; the tax credit was not required to be reduced by four per cent. As contemplated under section 11(3)(b)(iii) of the Act in respect of the petroleum coke used by it in the manufacture of cement. The Deputy Commissioner called for audit assessment for the year 2007-08 and after due verification of all the evidence and books of account produced by the dealer, worked out the input – tax credit as eligible. He observed that the entire dealer had purchased petroleum coke which could be used as a substitute for coal, a fuel, and therefore, four percent. Of the purchase price was required to be reduced under section 11(3) of the Act. He reduced the dealer's claim to input –tax credit and levied penalty under section 34(7) of the Act. The dealer appealed before the Joint Commissioner who confirmed the reduction of input-tax credit by four percent. Under section 11(3)(b)(iii) of the Act in relation to petroleum coke used by the dealer in the manufacture of cement. The tribunal was of the view that fuel was one that produced some kind of energy but did not form part of the product and set aside the orders passed by the authorities in respect of reduction of tax credit in respect of petroleum coke under section 11(3)(b)(iii) of the Act and consequentially, also the order charging interest and levying penalty. On appeals:

Held, dismissing the appeals, (i) that the process of the dealer showed that the vertical shaft was heated through an external electricity heater. The petroleum coke was mixed with lime stone, silica, red oxide and bauxite in definite proportion as per formula. The mixture was then crushed into a homogeneous powder which was then heated in a vertical shaft kiln, wherein an exothermic reaction took place and the powder was converted into a compound called clinker which consisted of all the chemical elements of the raw material. Therefore, the chemical elements contained in petroleum coke also formed part of the compound called clinker. There was no material to show that petroleum coke used in the manufacture of clinker was consumed or burnt up. Even if petroleum coke was consumed or burnt up in the manufacturing process, it would still not cease to be a raw material as the end-product, viz., cement depended upon its presence in the manufacturing process. The petroleum coke used in the manufacture of cement, during the course of the manufacturing process gave rise to an exothermic reaction, as a result whereof it lost its apparent identity and formed part of the end-product. Essentially therefore, petroleum coke formed one of the ingredients of cement and merely because there was an exothermic reaction in the preparation of cement which may be facilitated by its presence, petroleum coke would not cease to be a raw material. The petroleum coke used in the manufacture of clinker clearly fell within the ambit of the expression " raw material" as contemplated in section 2(19) of the Act.

(ii) that for the purpose of manufacture, the raw material should ultimately get a new identity by virtue of the manufacturing process either on its own or in conjunction or combination with other raw materials. The input would not cease to be raw material by reason alone of the fact that in the course of the chemical reactions, the ingredient was consumed or burnt up. All the same, it would still remain a raw material. In the present case, petroleum coke was used as a raw material for the manufacture of clinker and formed an ingredient thereof.

8 Release of godown seized in search and seizure by department

Mahesh Eelectronics V. Assistant Commissioner of Commercial Taxes and another. 91 VST 126 (Guj)

Background of the case:

When the state tax authorities raided the godowns of the petitioner, a partnership firm engaged in dealing television and other electronic goods, sale of goods without billing came to light. Common statement of partners of the firm was recorded in which, they agreed that certain goods were found at the godown not covered by any of the bills in their possession but denied that such goods were not purchased under bills. Assessment was made along with penalty at 150 per cent. The partners were also confronted with the materials according to which the firm had also received certain LED TVs which were not accounted for. The partners denied having received any such goods, declined any tax liability on the same but agreed to issue postdated cheques representing principal tax liability. The competent authority, however, proceeded to seal the godowns in exercise of powers under section 45 of the Value Added Tax Act. On an application:

Held, that in view of the prima facie materials produced by the Department it was not possible to directly lift the seals on the godown without further conditions. At the same time, the estimate of the Department on possible duty and penalty liability was also based on 150 percent. Penalty which was maximum imposable under the statute and not necessarily imposed always.

The seizure of the goods would be lifted and the seals of the godowns be removed upon fulfillment of following conditions as under:

1. Cheques already issued by the firm are presented for realization by the department, the same would be honoured.
2. The petitioner shall deposit further sum of Rs. 20 lacs.
3. In additions to the above, dealer will maintain minimum stock of Rs. 75 lacs.

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VAT - Judgements and Updates

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Statute Updates
Value Added Tax (VAT)

[I] **Important Circular/Notification:**

GST at First Sight:

It is likely that GST will be introduced from 1st April 2017. In this respect, I would like to highlight some aspects of GST at first sight:

[1] Be ready for 36 to 49 returns per year.

[2] Lumpsum Turnover Limit 50 Lacs.

[3] Input Tax Credit available only if Electronic data matches.

[4] 15 Digit Pan based GST No.

[5] Penalty for return per day Rs. 100/- and maximum Rs. 5000/-.

[6] Output, Input and summary based returns submission.

[7] Tax Credit only available if sellers tax shows online.

[8] Liquors, Petroleum products out of GST net.

[9] Return filing limit 10, 15, 20 days after due date for type of return.

[10] Threshold turnover limit Rs. 10.00 Lacs and for North East Rs. 5.00 Lacs.

[11] Jammu and Kashmir is also included in GST regime.

[12] TDS Limit Rs. 10.00 Lacs

[13] Existing TIN will be migrated and issue Provisional GST valid for 6 months. If documents submitted within 6 months, then final GST will be allotted.

[14] Tax Audit figure and GST data have to be reconciled in annual return.

[15] If any mismatch in data, then data will be transferred to IT Department.

[II] **Important Judgment: Pre Audit System May go:**

The Hon. Gujarat High Court has observed that whether outside agency has power to control the discretion of the statutory appellate authority by outside agency and also observe that an Appellate Authority has a statutory duty and function to perform. He is acting as a quasi-judicial authority and in case of such quasi-judicial authority who is entrusted with statutory power, duty and function. The Hon. Gujarat High Court in delivering the judgment of TANUJ AGENCY PVT. LTD. vs. State of Gujarat, has decided the issue that the Pre-Audit was illegal and it is going to be stopped.

This judgment is very important and therefore few paragraphs are reproduced hereunder for the benefit of the readers.

[i] The Gujarat Value Added Tax Act makes detailed provisions for filing of return and assessment of tax of the assessee. Once competent authority passes an order, an aggrieved person would have a right to appeal in terms of sub-section (1) of section 13, in all cases other than those which are termed as non-appealable orders specified in section 74. Under sub-section (2) of section 73, under certain circumstances, a second appeal would be available to the Tribunal against the order of the appellate authority. Against the order of the Tribunal, an appeal would be available to the High Court on substantial question of law. Section 75 grants power of revision to the Commissioner as well as to the Tribunal.

[ii] Having made such elaborate provisions of assessment, appeal and revision, the fundamental question is, can an outside agency control the discretion of the statutory appellate authority? In the present case, we may recall, the appellate authority i.e. Joint Commissioner upon remand of the proceedings by the Tribunal heard the petitioners and decided to grant refund. He was however under directives from the Government not to finalize the order, which he therefore, kept at draft stage and sent for what is referred to as a pre-audit. The Additional Commissioner, thereupon inquired into various details and directed him to verify three aspects and to amend his order and pass a fresh order. In the above noted communication dated 16.7.2013, he in fact, conveyed to the Joint Commissioner that after making such changes, he is permitted to pass the order. He was also asked to forward a copy of such order to the Additional Commissioner.

[iii] Under the circumstances, procedure adopted by the respondents can be countenanced. Respondents have not produced any instructions issued by the Government in this regard. Sources of powers to issue such direction is also not shown. The Joint Commissioner, as an appellate authority had statutory duties and functions to perform. He was acting as a quasi-judicial authority. In case of such a quasi judicial authority who is entrusted with statutory powers, duties and functions, it is his judgment alone which must prevail. No other outside agency or authority can direct him to act in a particular manner. Merely because the Additional Commissioner happens to be placed higher in rank as per administrative hierarchy or set up, would not give him any authority to govern the discretion of the Joint Commissioner vested in him as per statute while exercising appellate powers.

[iv] It is well settled position that the Income Tax Officer, while deciding to re-open the assessment previously framed must record his reasons for formation of a belief that income chargeable to tax has escaped assessment. It is the opinion of the Income Tax Officer alone which in this context would prevail. It is in this background the Supreme Court in the case of Indian and Eastern Newspaper Society vs. Commissioner of Income Tax, New Delhi 119 ITR 996 opined that the opinion of the internal audit party cannot be regarded as opinion within the meaning of section 147 of the Income Tax Act, 1961.

[v] In more recent judgment in the case of Hussein Ghadially @ M.H.G.A.Shaikh and others v/. State of Gujarat, reported in 2015 (1) GLR 559, Supreme Court has observed as under.

"18 Secondly, because exercise of the power vested in the District Superintendent of Police under section 20A(1) would involve application of mind by the officer concerned to the material placed before him on the basis whereof, alone a decision whether or not information regarding commission of an offence under T.A.D.A. should be recorded can be taken. Exercise of the power granting or refusing approval under section 20A(1) in its very nature casts a duty upon the officer concerned to evaluate the information and determine having regard to all attendant circumstances whether or not a case for invoking the provisions of T.A.D.A. is made out.

Exercise of that power by anyone other than the designated authority viz. The District Superintendent of Police would amount to such other authority clutching at the jurisdiction of the designated officer. No matter such officer or authority purporting to exercise that power is superior in rank and position to the officer authorized by law to take the decision."

[vi] The lone issue is thus sufficiently clear. The Joint Commissioner of Commercial Tax who is an appellate authority was duty bound to hear and decide the proceedings without any outside interference or insistence. The entire structure of appeal and revision would break down if superior officer in the Government set up is allowed to control the statutory powers of the competent authority, be it the assessing officer or an appellate authority. In the present case, Additional Commissioner insisted that Joint Commissioner who was in charge of the appeal as the appellate authority modifies his order and only thereafter he would have permission to pass the order.

On all counts, the procedure adopted by the department was wholly unauthorized and impermissible in law. To be bound by an order of higher authority in an administrative set up is entirely different from the discretion of a statutory authority being governed by an outside agency.

[vii] The issue can be looked from a slightly different angle. The Additional Commissioner was acting as a representative of the Government. He was protecting the interest of revenue. This was also the main defence argument of the Assistant Government Pleader. We may recall, the appropriate proceedings before the Joint Commissioner were between the petitioner as an assessee and the respondent as tax collector of revenue as is popularly referred. Thus the directions issued by the Assistant Commissioner were in essence by the department who was the litigating party before the Joint Commissioner. In effect therefore, the directions to pass the order in a particular manner came to be issued by an authority who was a party in the appeal and therefore was a person interested in tax litigations. He disapproved the draft order passed by tax appellate authority and asked him to modify his order and forward a copy of fresh order to him. This would be in grossest breach of natural justice and the order would be tainted by bias.

[viii] The Joint Commissioner had already passed a draft order which contained detailed discussion, reasons and ultimate conclusions including directions to be issued. It is true that an order which is not yet signed by the competent authority would remain as a draft and ordinarily and for valid reasons it would always be open for the authority to pass another or different order before it is signed. However, in the present case, the order remained at a draft stage only on account of wholly unauthorized interference by the external authority. We, therefore, direct the Joint Commissioner to proceed to pass the order.

[ix] The Government agencies are not without any remedy in case an erroneous or even palpably wrong order being passed. Statute provides for sufficient safeguards in terms of the appeals and revisions. It is always open to the Government to have any such order legally scrutinized and resort to such legal remedy as is provided in the statute.

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Mergers and Acquisition Corner

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1. **Nirma to buy Lafarge India assets from LafargeHolcim for $1.4 billion[1]**

Nirma Limited has agreed to buy Lafarge India's cement assets from LafargeHolcim at an enterprise value of $1.4 billion (around Rs.9,400 crore), in what could be the largest deal financed by bonds in India. The company, best known for its success in the detergent business in the 1970s and 1980s—it was a formidable competitor to Hindustan Unilever Ltd—plans to raise about Rs.4,000 crore from the domestic corporate bond market to part-finance its purchase, said three bankers familiar with the matter. One of the three said another Rs.4,000 crore would be raised through loans. None of the bankers wanted to be identified.

Bonds issued to raise money to buy a company are usually backed by cash flows expected from theassets being acquired. Such acquisitions are called leveraged buyouts, or LBOs. Barclays Plc., Credit Suisse and IDFC Ltd are advising Nirma, which said in a statement that it would "fund the acquisition through equal proportion of equity and target level financing".

The seller

LafargeHolcim said in a statement on Monday that it has entered into an "agreement with NirmaLimited subject to approval by the Competition Commission of India (CCI) for the divestment of its interest in Lafarge India for an enterprise value of approximately $1.4 billion". Arpwood Capital and Citibank advised LafargeHolcim on the transaction. At $1.4 billion, the deal will be close to LafargeHolcim's initial price expectation. A third person directly involved in the earlier rounds of deal talks, and who spoke on condition of anonymity, said LafargeHolcim expected Rs.10,000 crore from the asset sale. Lafarge operates three cement plants and two grinding stations with a total capacity of around 11 million tonnes per annum (mtpa). In its statement, the company said LafargeHolcim will continue to operate in India through its subsidiaries ACC Ltd and Ambuja Cements Ltd with a combined cement capacity of more than 60mtpa. In April 2015, LafargeHolcim was directed to sell 5.15 mt of its east India assets in order to comply with competition rules in India. This was a prerequisite for the global merger of Holcim and Lafarge to be consummated in India. In August 2015, the company agreed to sell its east India cement assets to Birla Corp. Ltd for Rs.5,000 crore. However, the deal was called off in February due to regulatory hurdles over the transfer of mining rights with these assets. Such a transfer was not permitted at the time under the provisions of the Mines and Minerals (Development and Regulation) Act. The Act has since been amended to allow such transfers. LafargeHolcim restarted the process to sell its entire 100% stake in Lafarge India even before the amendment. The sale attracted the interest of several potential buyers, given the size of the assets on offer. JSW Cement Ltd, Piramal Group, a few foreign cement companies and some private equity funds expressed interest.

The buyer

So did eventual buyer Nirma, promoted by the Ahmedabad-based Karsanbhai Patel. The group has about 18,000 employees, with an annual turnover of more than Rs.7,000 crore, according to the company's website. "Nirma already has 2mtpa cement capacity in Rajasthan and is putting up a new plant in Gujarat. It was very keen to buy this asset," said a person familiar with the transaction. The purchase of LafargeHolcim's cement assets will help Nirma become a prominent cement producer. With 13.28mtpa of capacity, the company will figure among the top 10 cement producers in the country. "This acquisition is a landmark and transformational step for the group's cement business. With a strong platform like Lafarge's India business, we plan to take the cement business to the next level," said Hiren Patel, managing director, Nirma, in a statement.

2. BPO firm Minacs sold to US based Synnex for $ 420 million[2]

Synnex said it has agreed to buy business process outsourcing company Minacs from its private equity owners for $420 million, the second largest deal the United States headquartered information technology supply chain services company has made in India. It said it will merge Minacs with its Concentrix BPO unit. In 2013, Synnex had acquired IBM's Daksh business for over $500 million.

"Minacs has been able to establish itself as a high value unique player in business services. Their investments in IoT and marketing optimisation stand out as solutions with growing market demand, which we believe we will be able to leverage across our combined client base," Chris Caldwell, president of Concentrix, said in a statement.

Synnex said Minacs will add about $400 million in revenue to Concentrix, which reported $335.9 million in revenue for the quarter ended May 2016.The deal will also add about 21,000 employees to Concentrix, which has more than 70,000 employees at present. Minacs CEO Anil Bhallawill stay with the combined entity and join Concentrix's senior executive ranks. Analysts said the deal will help Concentrix improve its highervalue offerings.

"Given that the Concentrix analytics story has not been very vertically focused, Minacs' strong industry aligned analytics may help Concentrix develop analytics expertise in key industries such as automotive, telecom, media and hitech," Melissa O'Brien, analyst with HFS Research, said in a note. She said the deal will also help Concentrix add digital capabilities in marketing services.

The deal offers a significant return to Minacs' private equity owners. CX Partners and Capital Square Partners had bought the BPO from the Aditya Birla Group for $260 million in 2014. The owners then spent two years improving the business, setting the stage forthe sale. The PE firms appointed investment bank Rothschild to seek buyers earlier this year and received 11 term sheets before settling on Concentrix as the buyer. "We made a lot of changes over the two years. We built the analytics business, developed our proprietary technology platform and worked on margin improvement. We saw more than 400 basis points (4 per cent points) improvement in margins by taking out a lot of costs, while improving the quality of revenues," JayantaBasu, managing partner at CX Partners He said the private equity firm made a return of about 2.5 times on its investment.

The Minacs deal is the latest in the ITBPO sector. In April, Blackstone bought a majority stake in IT firm Mphasis from HP. Last year, the private equity firm repurchased BPO firm Intelenet from Serco Group for £250 million.

3. Verizon to buy Yahoo's core business for $4.83 billion[3]

Verizon Communications Inc (VZ.N) said it would buy Yahoo Inc's (YHOO.O) core internet properties for $4.83 billion in cash to expand its digital advertising and media business, in a deal that ends a lengthy sale process for the fading Web pioneer. The purchase of Yahoo's operations will boost Verizon's AOL internet business, which it bought last year for $4.4 billion, and give it access to Yahoo's ad technology tools, BrightRoll and Flurry, and assets such as search, mail and messenger. The deal, expected to close in early 2017, marks the end of Yahoo as an operating company, leaving it with a 15 percent stake in Chinese ecommerce company Alibaba Group Holding Ltd (BABA.N) and a 35.5 percent interest in Yahoo Japan Corp (4689.T). "The sale of our operating business, which effectively separates our Asian asset equity stakes, is an important step in our plan to unlock shareholder value for Yahoo," Yahoo Chief Executive Marissa Mayer said in a statement. Yahoo will continue as an independent company until the deal receives shareholder and regulatory approval, the companies said. In a Tumblr blog post, Mayer said she planned to stay at Yahoo, but Verizon's Marni Walden, who will head the combined company, told CNBC the new leadership team has yet to be determined. Group Holding Ltd (BABA.N), shares in Yahoo Japan, Yahoo's convertible notes, certain minority investments or Yahoo's noncore patents. The Alibaba and Yahoo Japan investments are worth about $40 billion, while Yahoo had a market value of about $37.4 billion. Verizon prevailed over rival bidders for Yahoo, including AT&T Inc (T.N)~a group led by Quicken Loans founder Dan Gilbert and backed by billionaire Warren Buffett~ private equity firm TPG Capital LP~ and a consortium of buyout firms Vector Capital and Sycamore Partners. Under pressure from activist investor Starboard Value LP, Yahoo launched an auction of its core business in February after shelving plans to spin off its stake in Alibaba. In premarket trading, shares of Verizon were up slightly at $56.30, while shares of Yahoo were down 1.5 percent at $38.80.

(Reporting by Anya George Tharakan in Bengaluru~ Editing by Bernadette Baum)

4. Alibaba, Abof, Future Group to join race to acquire Jabong[4]

Chinese ecommerce giant Alibaba, Aditya Birla's new ecommerce venture Abof along with homegrown ecommerce companies Myntra and Snapdeal, besides brickandmortar retailer Future Group are all in separate buyout talks with Rocket Internetincubated fashion ecommerce venture Jabong. Quoting unnamed sources close to thedevelopments, The Economic Times reported that the asking price for Jabong is $250-300 million, but the final deal size could be lower. The company has held talks with at least three possible suitors, but none of the negotiations have reached the final stages. However, a deal is expected tomaterialise within six months. According to another report by Mint, the negotiations are led by Swedish investment firm Kinnevik's chief executive Lorenzo Grabau. It further said Kinnevik is seeking a valuation of $100-150 million for Jabong in cash and stock, but the deal could be closed at a much lower valuation of $50-75 million.

1. http://www.livemint.com/Companies/hGXG78x0Jqvbo8iS1eokPP/Nirma-to-buy-Lafarge-India-assets-from-LafargeHolcim-at-14.html
2. http://economictimes.indiatimes.com/tech/ites/bpo-firm-minacs-sold-to-us-based-synnex-for-420-million/articleshow/53177235.cms
3. http://www.reuters.com/article/us-yahoo-m-a-verizon-idUSKCN1040U9
4. http://www.vccircle.com/news/technology/2016/07/04/alibaba-abof-future-group-join-race-acquire-jabong

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Corporate Law Update

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<u>MCA Updates:</u>

1. Companies (Acceptance of Deposits) Amendment Rules, 2016.

Following changes have been effected under the Companies (Acceptance of Deposits) Amendment Rules, 2016.

Clause No.	**Companies (Acceptance of Deposits) Rules, 2014**	**Companies (Acceptance of Deposits) Amendment Rules, 2016.**	**Change effected**
Rule 2(1)(c) (ix)	ix. Any amount raised by the issue of: a) Bonds b) Debentures Secured by a charge on any assets referred to in Schedule III of the Act excluding intangible assets of the company c) Bonds or debentures compulsorily convertible into shares of the company within **five years**	ix. Any amount raised by the issue of: a) Bonds b) Debentures Secured by a charge on any assets referred to in Schedule III of the Act excluding intangible assets of the company c) Bonds or debentures compulsorily convertible into shares of the company within **ten years**	Substituted
Rule 2(1)(c) (ixa)	--	"(ixa) any amount raised by issue of nonconvertible debenture not constituting a charge on the assets of the company and listed on a recognized stock exchange as per Applicable regulations made by Securities and Exchange Board of India.	Inserted
Rule 2(1)(c) sub-clause (xi)	Any non-interest bearing amount received **or** held in trust	any non-interest bearing amount received **and** held in trust;"	Substituted
Rule 2(1)(c) (xii) (e), (f) and (g)	--	"(e) as an advance towards consideration for providing future services in the form of a warranty or maintenance contract as per written agreement or arrangement, if the period for providing such services does not exceed the period prevalent as per common business practice or five years, from the date of acceptance of such service whichever is less;	Inserted

		(f) as an advance received and as allowed by any sectoral regulator or in accordance with directions of Central or State Government; (g) as an advance for subscription towards publication, whether in print or in electronic to be adjusted against receipt of such publications; "	
Explanation to Rule 2(1)(c)(xii)	For the purposes of this sub-clause the **amount referred to in the first proviso** shall be deemed to be deposits on the expiry of fifteen days from the date they become due for refund.	For the purposes of this sub-clause the amount shall be deemed to be deposits on the expiry of fifteen days from the date they become due for refund	The word “referred to in the first proviso” will be **omitted**.
Explanation to Rule 2(1)(c)(xiv)	(b) any additional contributions, over and above the amount under item (a) above, made by the company as part of such promise or offer, shall be **treated** as deposits;	any additional contributions, over and above the amount under item (a) above, made by the company as part of such promise or offer, shall be **considered as deposits unless specifically excluded under this clause;**	Substituted
Rule 2(1)(c)(xv),(xv) and (xvii)	--	(xv) any amount received by way of subscription in respect of a chit under the Chit Fund Act,1982 (40 of "1982). (xvi) any amount received by the company under any collective investment schema in compliance with regulations framed by the Securities and exchange Board of India, (xvii) an amount of twenty five lakh rupees or more received by a start-up company, by way of a convertible note (convertible into equity shares or repayable within a period not exceeding five years from the date of issue) in a single tranche, from a person. **Explanation:**- For the purpose of this sub clause- I. "**start-up company**" means a private company incorporated under the Companies Act, 2013 or Companies Act, 1956 and recognized as such in accordance with notification number C.S.R. 180(E) dated 17th February, 2016 issued by the Department of Industrial Policy and Pr('motion, Ministry of Commerce and industry;	Inserted

		II. "**convertible noted**" means an instrument evidencing receipt of money initially as a debt, which is repayable at the option of the holder, or which is convertible into such number of equity shares of the start-up company upon occurrence of specific events and as per the other terms and conditions agreed to and indicated in the instrument. (xviii) any amount received by a company from Alternate Investment Funds, Domestic Venture Capital Funds and Mutual Funds registered with the Securities and Exchange Board of India in accordance with regulations made by it."	
Rule 3(3)	3) Acceptance & Renewal of deposits by company other than Eligible Company: From the Members shall not exceed **25%** per cent of the aggregate of the paid up share capital and free reserves of the company. The amount of **25%** limit is to be computed considering such deposit together with the amount of deposits outstanding as on the date of acceptance or renewal of such deposits.	3) Acceptance & Renewal of deposits by company other than Eligible Company: From the Members shall not exceed **35%** per cent of the aggregate of the paid up share capital and free reserves of the company. The amount of **35%** limit is to be computed considering such deposit together with the amount of deposits outstanding as on the date of acceptance or renewal of such deposits.	Substituted
Proviso to Rule 3(3)	--	"Provided that a private company may accept from its members monies not exceeding **one hundred per cent** of aggregate of the paid up share capital, free reserves and securities premium account and such company shall file the details of monies so accepted to the Registrar in such manner as may be specified.	Inserted
Rule 3 (8)	--	(a) Every eligible company shall obtain at least once in a year, credit rating for deposits accepted by it and a copy of the rating shall be sent to the Registrar of Companies along with the return of deposits in Form DPT-3, (b) The credit rating referred to in clause (a) shall not be below the minimum investment grade rating or other specified	Inserted

		credit rating or fixed deposits, from any one of the approved credit rating agencies as specified for Nonbanking Financial Companies in the Non-Banking Financial Companies Acceptance of Public Deposits (Reserve Bank) Directions, 199g, issued by the Reserve Bank of India, as amended from time to time.	
Rule 4(2)	Every Eligible Company intending to invite deposits from public shall issue a circular in the form of advertisement in Form No. DPT-1 (English and Vernacular) in the state where registered office of company is situated.	"(2) Every eligible company intending to invite deposits shall issue a circular in the form of an advertisement in form DPT-1 for the purpose in English language in an English newspaper having country wide circulation and in vernacular language in a vernacular newspaper having wide circulation in the State in which the registered office of the company is situated, and shall also place such circular on the website of the company, if any."	Substituted
Rule 5(1)	(1) Every company referred to in subsection (2) of section 73 and every other eligible company inviting deposits shall enter into a contract for providing deposit insurance at least thirty days before the issue of circular or advertisement or at least thirty days before the date of renewal, as the case may be. Explanation. For the purposes of this sub rule, the amount as specified in the deposit insurance contract shall be deemed to be the amount in respect of both principal amount and interest due thereon.	"Provided that the companies may accept deposits without deposit insurance Contract till the 31st March, 2017 or till the availability of a deposit insurance product whichever is earlier.”	Substituted
Rule 16A	--	**"16A. Disclosures in the financial statement:-** (1) Every company, other than a private company, shall disclose in its financial statement, by way of notes, about the money received from the director. (2) Every private company shall disclose in its financial statement, by way of notes, about the money received from the directors, or relatives of directors."	Inserted

Para in Principal Rules, in the Annexure, in Form DPT-1	--	"**6. DISCLAIMER-** It is to be distinctly understood that filing of circular or circular in the Form of advertisement with the Registrar should not in any way be deemed or construed that the same has been cleared or approved by the Registrar or Central Government. The Registrar or Central Government does not take any responsibility either for the financial soundness of any deposit scheme for which the deposit is being accepted or invited or for the correctness of the statements made or opinions expressed in the circular or circular in the Form of advertisement. The depositors should exercise due diligence before investing in the deposits schemes."	Inserted

[File No. 1/8/2013-CL-V dated 29th June, 2016]

2. Companies (Appointment and Remuneration of Managerial Personnel) Amendment Rules, 2016.

Following changes have been effected under the Companies (Appointment and Remuneration of Managerial Personnel) Amendment Rules, 2016:

Clause No.	Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014	Companies (Appointment and Remuneration of Managerial Personnel) Amendment Rules, 2016	Change effected
Rule 3	A company shall file a return of appointment of a Managing Director, Whole Time Director or Manager, **Chief Executive Officer (CEO), Company Secretary and Chief Financial Officer (CFO)** within sixty days of the appointment, with the Registrar in Form No. MR.1 along with such fee as may be Specified for this purpose.	A company shall file a return of appointment of a Managing Director, Whole Time Director or Manager, within sixty days of the appointment, with the Registrar in Form No. MR.1 along with such fee as may be Specified for this purpose.	Expressions 'Chief Executive Officer (CEO), Company Secretary and Chief Financial Officer (CFO)' have been omitted
Rule 5(1)(v), (vi), (vii) and (ix to (xi)	(v) the explanation on the relationship between average increase in remuneration and company performance; (vi) comparison of the remuneration of the Key Managerial Personnel against the performance of the company;	--	Omitted

	(vii) variations in the market capitalization of the company, price earnings ratio as at the closing date of the current financial year and previous financial year and percentage increase over decrease in the market quotations of the shares of the company in comparison to the rate at which the company came out with the last public offer in case of listed companies, and in case of unlisted companies, the variations in the net worth of the company as at the close of the current financial year and previous financial year; (ix) comparison of the each remuneration of the Key Managerial Personnel against the performance of the company; (x) the key parameters for any variable component of remuneration availed by the directors; (xi) the ratio of the remuneration of the highest paid director to that of the employees who are not directors but receive remuneration in excess of the highest paid director during the year; and		
Rule 5(2)	The board's report shall include a statement showing **the name of every employee of the company, who-**	The board's report shall include a statement showing **the names of the top ten employees in terms of remuneration drawn and the name of every employee, who-**	Substituted
Rule 5(2)(i)	if employed throughout the financial year, was in receipt of remuneration for that year which, in the aggregate, was not less than **sixty lakh rupees**;	if employed throughout the financial year, was in receipt of remuneration for that year which, in the aggregate, was not less than **one crore and two lakh rupees;**	Substituted

Rule 5(2)(ii)	if employed for a part of the financial year, was in receipt of remuneration for any part of that year, at a rate which, in the aggregate, was not less than **five lakh** rupees per month;	if employed for a part of the financial year, was in receipt of remuneration for any part of that year, at a rate which, in the aggregate, was not less than **eight lakh and fifty thousand** rupees per month;	Substituted
Return of appointment of managerial personnel in Form MR-1 also has been substituted.			

[F. No. 1/5/2013 CL-V dated 30th June, 2016]

3. Companies (Removal of Difficulties) Third Order, 2016.

To remove the difficulties arisen regarding compliance with the provisions of third proviso to sub-section (2) of section 1 39 in so far as they relate to the period within which companies would comply with provisions of sub-section (2) of section 139 of the Companies Act, 2013, the Central Government has substituted the following proviso in section 139 (2) for the third proviso, namely:-

"Provided also that every company, existing on or before the commencement of this Act which is required to comply with the provisions of this sub-section, shall comply with requirements of this sub-section within a period which shall not be later than the date of the first annual general meeting of the company held, within the period specified under sub-section (1) of section 96, after three years from the date of commencement of this Act."

[F. No. 1/33/2013-CL-V dated 30th June, 2016]

4. Companies (cost records and audit) Amendment Rules, 2016.

Following changes have been effected under the Companies (cost records and audit) Amendment Rules, 2016:

Clause No.	Companies (cost records and audit) Rules, 2014	Companies (cost records and audit) Amendment Rules, 2016	Change
Rule 2(d)	"cost audit report" means the report duly audited and signed by the cost auditor including attachment, annexure, qualifications or observations etc. to cost audit report;!	"cost audit report" means the duly signed cost auditor's report on the cost records examined and cost statements which are prepared as per these rules, including attachment, annexure, qualifications or observations attached with or included in such report;	Substituted
Rule 3	Table (A) for Regulated Sectors and Table (B) for Non-regulated Sectors have been substituted.		
Rule 4(3)(iii)	--	"(iii) which is engaged in generation of electricity for captive consumption through Captive Generating Plant. For this purpose, the term "Captive Generating Plant" shall have the same meaning as assigned in rule 3 of the Electricity Rules, 2005"	Inserted

Proviso to Rule 6(1)	--	"Provided that before such appointment is made, the written consent of the cost auditor to such appointment, and a certificate from him or it, as provided in sub-rule (1A), shall be obtained";	Inserted
Rule 6 (1A)	--	"(1A) The cost auditor appointed under sub-rule (1) shall submit a certificate that- (a) the individual or the firm, as the case may be, is eligible for appointment and is not disqualified for appointment under the Act, the Cost and Works Accountants Act, 1959 (23 of 1959) and the rules or regulations made there under; (b) the individual or the firm, as the case may be, satisfies the criteria provided in section 141 of the Act, so far as may be applicable; (c) the proposed appointment is within the limits laid down by or under the authority of the Act; and (d) the list of proceedings against the cost auditor or audit firm or any partner of the audit firm pending with respect to professional matters of conduct, as disclosed in the certificate, is true and correct.";	Inserted
Provisos to rule 6(3)	--	"Provided that the cost auditor appointed under these rules may be removed from his office before the expiry of his term, through a board resolution after giving a reasonable opportunity of being heard to the Cost Auditor and recording the reasons for such removal in writing; Provided further that the Form CRA-2 to be filed with the Central Government for intimating appointment of another cost auditor shall enclose the relevant Board Resolution to the effect: Provided also that nothing contained in this sub-rule shall prejudice the right of the cost auditor to resign from such office of the company.";	Inserted

Rule 6 (3B)	--	"(3B) The cost statements, including other statements to be annexed to the cost audit report, shall be approved by the Board of Directors before they are signed on behalf of the Board by any of the director authorized by the Board, for submission to the cost auditor to report thereon";	Inserted
Rule 6(5)	"(5) Every cost auditor shall forward his report to the Board of Directors of the company within a period of one hundred and eighty days from the closure of the financial year to which the report relates and the Board of Directors shall consider and examine such report particularly any reservation or qualification contained therein;	"(5) Every cost auditor shall forward his **duly signed** report to the Board of Directors of the company within a period of one hundred and eighty days from the closure of the financial year to which the report relates and the Board of Directors shall consider and examine such report, particularly any reservation or qualification contained therein.";	Substituted
Rule 6(6)	Every company covered under these rules shall, within a period of thirty days from the date of receipt of a copy of the cost audit report, furnish the Central Government with such report along with full information and explanation on every reservation or qualification contained therein, in form CRA-4 along with fees specified in the Companies (Registration Offices and Fees) Rules, 2014.	"(6) Every company covered under these rules shall, within a period of thirty days from the date of receipt of a copy of the cost audit report, furnish the Central Government with such report along with full information and explanation on every reservation or qualification contained therein, in Form CRA-4 in Extensible Business Reporting Language format in the manner as specified in the Companies (Filing of Documents and Forms in Extensible Business Reporting language) Rules, 2015 along with fees specified in the Companies (Registration Offices and Fees) Rules, 2014."	Substituted

[File No. 1/40/2013-CL-V dated 14th July, 2016]

For Details please refer the following link:

http://www.mca.gov.in/Ministry/pdf/Rules_15072016.pdf

5. Companies (Share Capital and Debentures) Third Amendment Rules, 2016.

Following changes have been effected under the Companies (Share Capital and Debentures) Third Amendment Rules, 2016:

Clause No.	Companies (Share Capital and Debentures) Rules, 2014	Companies (Share Capital and Debentures) Third Amendment Rules, 2016	Change
Proviso to Rule 4(1)(g)	--	"Provided that a company may issue equity shares with differential rights upon expiry of five years from the end of the financial Year in which such default was made good."	Inserted
Second Proviso to Rule 8(4)	--	"Provided further that a startup company, as defined in notification number GSR 180(E) dated 17th February, 2016 issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry' Government of India, may issue sweat equity shares not exceeding fifty percent of its paid up capital up to five years from the date of its incorporation or registration.".	Inserted
Proviso to Rule 12(1)(c)(ii)	--	"Provided that in case of a startup company, as defined in notification number GSR 180(E) dated 17th February, 2016 issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, Government of India, the conditions mentioned in sub-clause (i) and (ii) shall not apply up to five years from the date of its Incorporation or registration.".	Inserted
Rule 13(2) (c)	The securities allotted by way of preferential offer shall be made fully paid up at the time of their allotment.	--	Omitted
Rule 13(2) (h)	(h) where convertible securities are offered on a preferential basis with an option to apply for and get equity shares allotted, the price of the resultant shares shall be determined beforehand on the basis of a valuation report of a registered valuer and also complied with the provisions of section 62 of the Act;	"(h) where convertible securities are offered on a preferential basis with an option to apply for and get equity shares allotted, the price of the resultant shares pursuant to conversion shall be determined- (i) either upfront at the time when the offer of convertible securities is made, on the basis of valuation report of the registered valuer given at the stage of such offer, or (ii) at the time, which shall not be earlier than thirty days to the date when the holder of convertible security becomes entitled to apply for shares, on the basis of valuation report of the registered valuer given	Substituted

		not earlier than sixty days of the date when the holder of convertible security becomes entitled to apply for shares: Provided that the company shall take a decision on sub-clauses (i) or (ii) at the time of offer of convertible security itself and make such Disclosure under sub-clause (v) of clause (d) of sub-rule (2) of this rule.".	
Rule 15	Where a company alters its share capital in any manner specified in sub-section (1) of section 61, or an order is passed by the Government increasing the authorized capital of the company in pursuance of sub-section (4) read with sub-section (6) of section 62 **or a company redeems any redeemable preference shares,** the notice of such alteration, increase or redemption shall be filed by the company with the Registrar in Form No. SH.7 along with the fee.	Where a company alters its share capital in any manner specified in sub-section (1) of section 61, or an order is passed by the Government increasing the authorized capital of the company in pursuance of sub-section (4) read with sub-section (6) of section 62 **or a company redeems any redeemable preference shares, "or a company not having share capital increases number of its members"** the notice of such alteration, increase or redemption shall be filed by the company with the Registrar in Form No. SH.7 along with the fee.	Substituted
Rule 18(1)(b)	such an issue of debentures shall be secured by the creation of a charge, on the properties or assets of the company, having a value which is sufficient for the due repayment of the amount of debentures and interest thereon;	Such an issue of debentures shall be secured by the creation of a charge on the properties or assets of the company or its subsidiaries or its holding company or its associates companies, having a value which is sufficient for the due repayment of the amount of debentures and interest thereon.";	Substituted
Rule 18(1)(d)(i)	(i)any specific movable property of the company (not being in the nature of pledge);or	"(i) any specific movable property of the company or its holding company or subsidiaries or associate companies or otherwise";	Substituted

Rule 18(7)(b) (ii) & (iii)	(ii) For NBFCs registered with the RBI under Section 45-IA of the RBI (Amendment) Act, 1997, 'the adequacy' of DRR will be 25% **of the value of debentures** issued through public issue as per present SEBI (Issue and Listing of Debt Securities) Regulations, 2008, and no DRR is required in the case of privately placed debentures. (iii) For other companies including manufacturing and infrastructure companies, the adequacy of DRR will be 25% **of the value of debentures** issued through public issue as per present SEBI (Issue and Listing of Debt Securities), Regulations 2008 and also 25% DRR is required in the case of privately placed debentures by listed companies. For unlisted companies issuing debentures on private placement basis, the DRR will be **25% of the value of debentures**.	(ii) For NBFCs registered with the RBI under Section 45-IA of the RBI (Amendment) Act, 1997, 'the adequacy' of DRR will be 25% **of the value of outstanding debentures** issued through public issue as per present SEBI (Issue and Listing of Debt Securities) Regulations, 2008, and no DRR is required in the case of privately placed debentures. (iii) For other companies including manufacturing and infrastructure companies, the adequacy of DRR will be 25% **of the value of outstanding debentures** issued through public issue as per present SEBI (Issue and Listing of Debt Securities), Regulations 2008 and also 25% DRR is required in the case of privately placed debentures by listed companies. For unlisted companies issuing debentures on private placement basis, the DRR will be 25% **of the value of outstanding debentures**.	Substituted
Proviso to Rule 18(7)	--	"Provided that where a company intends to redeem its debentures prematurely, it may provide for transfer of such amount in Debenture Redemption Reserve as is necessary for redemption of such debentures even if it exceeds the limits specified in this sub-rule."	Inserted

[F. No. 01/04 /2013 CL-V (part-II) dated 19th July, 2016]

contd. on page no. 297

Allied Laws Corner

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Class Action Law Suits

1. Introduction :

A class action law suit is a type of law suits whereby a group of people having similar grievances are represented collectively by a member of that member and they as a group sue the company and its management. In a traditional or typical law suits, one party sues another party for redress of a wrong, whereas, in a class action a plaintiff sues a defendant or a group of defendant on behalf of a group or a class.

2. Class Action Suit in India :

The class action originated in the United States and is still predominantly a U.S. phenomenon; however, eventually many Countries have made legal changes in recent years so as to bring class action against the Corporate Sectors. After the Satyam fiasco, 3,00,000 Indian shareholders of the Satyam came together and sued the Company and claimed damages of Rs.5,000/- Crores. The shareholders went from the National Consumer Dispute Redressal Commission to the Apex Court, however, their claims were rejected. But the US shareholders of the Satyam were able to claim $125 Million (around 675 Crores) from the Company, as the US had enabling laws for class action law suits. The Government of India recognized the importance of the protection of minority shareholders from oppression and mismanagement and included the concept of class action suit in the new Companies Act, 2013 by introducing provisions of S.245 of the Act.

3. What is a class action suit and who can file in pursuant to S.245 of the Companies Act, 2013?

Section 245 has been introduced in the Companies Act, 2013 for providing right to the members and depositors to bring an action against the company, its directors, auditors, audit firm, experts, advisors, or consultants, if they believe that the affairs of the company are being conducted in a manner prejudicial to the interest of the company itself, or members or depositors. It requires at least 100 members or depositors to file such a class action suits.

4. A class action suit can be filed for following orders :

(a) To restrain the company from committing an action which is *ultra vires* the articles or memorandum of the company;

(b) To restrain the company from committing breach of any provision of company's memorandum or articles;

(c) To declare a resolution altering the memorandum or articles of the company as void if the resolution was passed by suppression of material facts or obtained by misstatement to the members or depositors;

(d) To restrain the company and its directors from acting on such resolution;

(e) To restrain the company from doing an act which is contrary to the provision of this Act or any other law for the time being in force;

(f) To restrain the company from taking action contrary to any resolution passed by the members;

(g) To claim damages or compensation or demand any other suitable action from or against-

(i) the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part;

(ii) the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or

(iii) any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part;

5. Accountability and Liability of Auditor in Class action :

Sub-section (2) to S.245 of the Act provides that where the members or depositors seek any damages or compensation or demand any other suitable action from or against an audit firm, the liability shall be of the firm as well as of each partner who was involved in making any improper or misleading statement of particulars in the audit report or who acted in fraudulent, unlawful or wrongful manner.

6. Procedure before the National Company Law Tribunal (NCLT) :

6.1 Enforcement of S.245 of the Act and Constitution of NCLT :

Provisions of S.245 of the Companies Act, 2013 were not yet enforced, until the Notification S.O.1934(E) came to be issued on 1st June, 2016 by the Ministry of Corporate Affairs, enforcing the provisions of S.245 of the Act with effect from 1st June, 2016 alongwith the issue of Notification S.O.1934(E) for constitution of National Company Law Tribunal (NCLT) with effect from 1st June, 2016.

6.2 Sub-section (4) to S.245 of the Act provides that the Tribunal would take into consideration following points while considering the application :

(1) Whether member or depositor is acting in good faith in making application seeking an order?

(2) Any evidence before it as to the involvement of any person other than directors or officers of the company on any of the matters provided in clauses (a) to (f) of sub-section (1);

(3) Whether the cause of action is one which the member or depositor could pursue in his own right rather than through an order under this section?

(4) Any evidence before it as to the views of the members or depositors of the company who have no personal interest, direct or indirect, in the matter being proceeded under this section;

(5) Where cause of action is an act or omission that is yet to occur, whether the act or omission in the circumstances is likely to be-

a. Authorised by the company before it occurs; or

b. Ratified by the company after it occurs; or

(6) Where the cause of action is an act or omission that has already occurred, whether the act or omission in the circumstances is likely to be ratified by the company.

6.3 Sub-section (5) to S.245 of the Act provides that of an application filed is admitted, then the NCLT shall have regard to the following,

(*a*) Public Notice shall be served on admission of the application to all the members or depositors of the class in such manner as may be prescribed.

(*b*) Similar applications prevalent in any jurisdiction should be considered into a single application and the class members or depositors should be allowed to choose the lead applicant. In the event the members or depositors of the class are unable to come to a consensus, the Tribunal shall have the power to appoint a lead applicant, who shall be in-charge of the proceedings from the applicant's side.

(*c*) Two class action applications for the same cause of action shall not be allowed.

(*d*) The cost or expenses connected with the application for class action shall be defrayed by the company or any other person responsible for any oppressive act.

6.4 The order passed by the Tribunal shall be binding on the company, binding on all of its members, binding on depositors, binding on auditors and audit firm. It shall also be binding on expert or consultant or advisor or any other person associated with company.

6.5 Any company which fails to comply with an order passed by the Tribunal shall be punishable with fine which shall not be less than Rs.5,00,000/- but which may extend to Rs.25,00,000/- and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 3 years and with fine which shall not be less than Rs.25,000/- but which may extend to Rs.1,00,000/-.

6.6 Where application filed before the Tribunal is found to be frivolous or vexatious, it shall reject the application by recording reasons in writing and make the order to pay to opposite party such cost which shall not be in excess of Rs.1 lakh, as may be specified in the order.

6.7 The Ministry of Finance has issued National Company Law Tribunal Rules, 2016 vide Notification F.NO.1/30/NCLAT/CL-V/2013, dated 21/07/2016. Rules 85 of the said Rules provides for the conducting a Class action suit; Rule 86 provides for opt-out of a member from the proceedings at any time after the institution of the class action with the permission of the Tribunal and Rule 87 provides for the rules of publication of notice in Form No. NCLT – 13.

6.8 A party in person or the Advocate or the Authorized Representative as provided u/s 432 of the Act can appear on behalf of the member or depositor in a class action suit. Provision of S.432 of the Act provides that the Chartered Accountants or Company Secretaries or Cost Accountants can appear before the Tribunal.

7. Conclusion :

Class action suit will minimize litigation by avoiding multiple suits and will have further several advantages. The shareholders being members of the Company and depositors can approach the NCLT by filing class action suits, however, at the same time the Act has failed the recognize the concerns of other stakeholders such as Unsecured Creditors, Debenture Holders etc. The Act provides for the compensation or damages to the members or depositors who have filed class action law suit, however, it is not clear as to whether such compensation or damages will also be provided to the members or depositors who have not joined hands in such class action law suit. However, the introduction of provisions of Class Action in the Companies Act is a welcome move and a step forward to ensure that the Company and its management as well as its advisor, consultants, auditor do not act in a manner which is prejudicial in the interest of the stakeholders.

❊ ❊ ❊

From Published Accounts

CA. Pamil H. Shah
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AS 15 Employee Benefit
Annual Report 2015-16

Significant Accounting Policies and Practices

HOV Services Limited

a) Gratuity:

The Company provides for gratuity, a defined benefit retirement plan, covering eligible employees. Liability under gratuity plan is determined on actuarial valuation done by the Life Insurance Corporation of India (LIC) at the beginning of the year, based upon which, the Company contributes to the Scheme with LIC.

b) Provident Fund:

Retirement benefits in the form of Provident Fund / Pension Fund is a defined contribution scheme and the contributions are charged to the Statement of Profit and Loss of the year when the contributions to the respective funds are due.

c) Leave Entitlement:

Liability for Leave entitlement for employees is provided on the basis of Actuarial Valuation done at the year end.

Triveni Turbine Limited

i) Short term Employee Benefits

All employee benefits payable wholly within 12 months after the end of the period in which the employees render related services are classified as short term employee benefits and are recognised as expenses in the period in which the employees render the related service. The Company recognises the undiscounted amount of short term employee benefits expected to be paid (including compensated absences) in exchange for services rendered, as a liability.

ii) Post-employment benefits

(a) Defined contribution plans:

Defined contribution plans are retirement benefit plans under which the Company pays fixed contributions to separate entities (funds) or financial institutions or state managed benefit schemes. The Company's contributions under the Employees' Provident Fund Scheme, Employees' State Insurance Scheme and Officers' Pension Scheme for certain employees are defined contributions plans. The Contributions paid/ payable under the schemes are recognised during the period in which the employees render the related service.

(b) Defined benefit plans:

Defined benefit plans are plans under which the Company pays certain defined benefits to employees following their retirement/ resignation/ death based on rules framed for such schemes. The Employees' Gratuity Scheme is a defined benefit plan. The present value of the obligation under a defined benefit plan is determined based on the actuarial valuation using the Projected Unit Credit method, which recognises each period of service as giving rise to an additional unit of employee benefit entitlement and measures each unit separately to build up the final obligation. The obligation is measured at the present value of the estimated future cash flows. The discount rate used for determining the present value of the obligation under a defined benefit plan is based on the market yields on Government securities as at the balance sheet date, with maturity periods approximating the terms of the related obligation.

Actuarial gains and losses are recognised immediately in the statement of profit and loss.

Gains or losses on the curtailment or settlement of any defined benefits plan are recognised when the curtailment of settlement occurs. Past service cost is recognised as an expense on a straight-line basis over the average period until the benefits become vested.

iii) Other long-term employee benefits

Compensated absences which are not expected to occur within twelve months after the end of the period in which the employee renders related services are recognised as a liability at the present value of the defined benefit obligation at the balance sheet date on the basis of an actuarial valuation. The discount rates used for determining the present values of the obligation under defined benefit plans, are based on the appropriate market yields on Government securities as at the balance sheet date.

iv) Employee Stock Options:

Compensation cost in respect of stock options granted to eligible employees is recognised using the intrinsic value of the stock options and is amortised over the vesting period of such options granted.

<u>Ashok Leyland Limited</u>

12.1 Employee benefit expenses include salary, wages, performance incentives, compensated absences, medical benefits, and other perquisites. It also includes post-employment benefits such as provident fund, superannuation fund, gratuity, pensionary benefits etc.

12.2 Short term employee benefit obligations are estimated and provided for.

12.3 Post-employment benefits and other long term employee benefits

- Defined contribution plans:

  Company's contribution to provident fund, superannuation fund, employee state insurance and other funds are determined under the relevant schemes and/ or statute and charged to the Statement of Profit and Loss in the period of incurrence when the services are rendered by the employees. In respect of provident fund, contributions made to a trust administered by the Company, the interest rate payable to the members of the trust shall not be lower than the statutory rate of interest declared by the Central Government under the Employees Provident Fund and Miscellaneous Provisions Act 1952 and shortfall, if any, shall be contributed by the Company and charged to the Statement of Profit and Loss.

- Defined benefit plans and compensated absences:

  Company's liability towards gratuity (funded), other retirement benefits and compensated absences are actuarially determined at each balance sheet date using the projected unit credit method. Actuarial gains and losses are recognised in the Statement of Profit and Loss in the period of occurrence.

12.4 Termination benefits

Expenditure on termination benefits (including expenditure on Voluntary Retirement Scheme) is recognised in the Statement of Profit and Loss in the period of incurrence.

<u>Claris Lifesciences Limited</u>

Contributions to provident and other funds accruing during the accounting period are charged to the Statement of profit and loss. Provision for liabilities in respect of gratuity and leave encashment are accrued and provided at the end of each accounting period on the basis of actuarial valuation.

<u>Tata Consultancy Services Limited</u>

(i) Post-employment benefit plans

Contributions to defined contribution retirement benefit schemes are recognised as expense when employees have rendered services entitling them to such benefits.

For defined benefit schemes, the cost of providing benefits is determined using the Projected Unit Credit Method, with actuarial valuations being carried out at each balance sheet date. Actuarial gains and losses are recognised in full in the statement of profit and loss for the period in which they occur. Past service cost is recognised immediately to the extent that the benefits are already vested, or amortised on a straight-line basis over the average period until the benefits become vested.

The retirement benefit obligation recognised in the balance sheet represents the present value of the defined benefit obligation as adjusted for unrecognised past service cost, and as reduced by the fair value of scheme assets. Any asset resulting from this calculation is limited to the present value of available refunds and reductions in future contributions to the scheme.

(ii) Other employee benefits

The undiscounted amount of short-term employee benefits expected to be paid in exchange for the services rendered by employees is recognised during the period when the employee renders the service. These benefits include compensated absences such as paid annual leave, overseas social security contributions and performance incentives.

Compensated absences which are not expected to occur within twelve months after the end of the period in which the employee renders the related services are recognised as an actuarially determined liability at the present value of the defined benefit obligation at the balance sheet date.

<u>GVK Power & Infrastructure Limited</u>

(i) Retirement and other employee benefits

(i) Retirement benefit in the form of Provident Fund is a defined contribution scheme. The company has no obligation, other than the contribution payable to the provident fund. The company recognizes contribution payable to the provident fund scheme as expenditure, when an employee renders the related service. If the contribution payable to the scheme for service received before the balance sheet date exceeds the contribution already paid, the deficit payable to the scheme is recognized as a liability after deducting the contribution already paid. If the contribution already paid exceeds the contribution due for services received before the balance sheet date, then excess is recognized as an asset to the extent that the pre payment will lead to, for example, a reduction in future payment or a cash refund.

(ii) Gratuity liability is defined benefit obligation and is provided for on the basis of an actuarial valuation on projected unit credit method made at the end of each financial year.

(iii) Short term compensated absences are provided for based on estimates. Long term compensated absences are provided for based on actuarial valuation. The actuarial valuation is done as per projected unit credit method at the end of each financial year.

(iv) Actuarial gains/losses are immediately taken to the Statement of Profit and Loss and are not deferred.

(v) The company presents the entire leave as a current liability in the balance sheet, since it does not have an unconditional right to defer its settlement for 12 months after the reporting date.

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From the Government

CA. Kunal A. Shah
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Income Tax

1) **<u>Clarification regarding attaining prescribed age of 60yrs/80yrs on 31st March itself in case of senior/very senior citizens whose date of birth falls on 1st April for the purpose of Income Tax Act</u>**

CBDT hereby clarifies that a person born on 1st April would be considered to have attained a particular age as on 31st March the day preceeding the anniversary of his birthday. In particular the question of attainment of age of eligibility for being considered a senior/very senior citizen would therefore be decided on the basis of the above criteria.

(Circular No.28, dated 27th July,2016)

2) **<u>Notification regarding Amendment in Income Declaration Rules,2016</u>**

The Central Board of Direct Taxes, makes the following rules further to amend the Income Declaration Scheme Rules, 2016 (hereinafter referred to as the principal rules) namely:-

1. (1) These rules may be called the Income Declaration Scheme, (Amendment) Rules, 2016. (2) These rules shall come into force from the date of their publication in the Official Gazette.

2. In the principal rules, in Form-1, for serial numbers 1 and 2 and entries relating thereto the following serial numbers and entries shall be substituted, namely:- "1. Name and address of the declarant (a) Name ……………………………

(b) Address:

Office…………………………………
………………………………………….

E-mail…………………………….

TelephoneNo……………………… Residence………………………………

Mobile No. …………………….

Telephone No………………………..

2. Filing status (a) Whether the declaration is original or revised

(b) If revised- (i) Enter receipt No. and Date of filing original Form-1 (DD/MM/YYYY) / / (ii) Reasons for revised declaration (not exceeding 100 words)". …………………

(Notification No. 60, dated 20th July,2016)

3) **<u>Notification regarding due dates for payment of tax under IDS</u>**

The Central Government hereby amends the notification of the Ministry of Finance dated 19th May,2016 by substituting clause (ii) as under-

"(ii) the date on or before which the tax and surcharge is payable under section 184, and the penalty is payable under section 185 in respect of undisclosed income shall be as follows, namely:-

(a) the 30th day of November, 2016, for an amount not less than twenty-five per cent. of such tax, surcharge and penalty;

(b) the 31st day of March, 2017, for an amount not less than fifty per cent. of such tax, surcharge and penalty as reduced by the amount paid under clause (a);

(c) the 30th day of September, 2017, for the whole amount payable under section 184 and 185 as reduced by the amounts paid under clause (a) and (b);".

(Notification No. 59, dated 20th July,2016)

4) <u>Clarification on Income Declaration Scheme, 2016</u>

The Income Declaration Scheme, 2016 (hereinafter referred to as 'the Scheme') came into effect on 1st June, 2016. To address further doubts and concerns raised by the stakeholders, the Board has vide this circular issued FAQs over and above the three sets of FAQs vide Circular Nos. 17, 24 & 25 of 2016.

(For full text refer circular No. 27, dated 14th July,2016)

5) <u>Amendment in sec 206C of the Income Tax Act</u>

The Board has issued FAQS vide this circular for clarification of the issue as regards applicability of the provisions relating to levy of TCS where the sales consideration received is partly in cash and partly in cheque

(For full text refer Circular No. 23, dated 24th June,2016)

* * *

contd. from page 289

6. National Company Law Tribunal Rules, 2016 and National Company Law Appellate Tribunal Rules, 2016.

The Central Government has made National Company Law Tribunal Rules, 2016 and National Company Law Appellate Tribunal Rules, 2016.

[F. No. 1/30/2013/CL-V and F. No. 1/30/NCLAT/CL-V/2013 dated 21st July, 2016]

For details please refer the following link:

http://www.mca.gov.in/Ministry/pdf/Rules_22072016_1.pdf

http://www.mca.gov.in/Ministry/pdf/Rules_22072016.pdf

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Association News

CA. Dilip U. Jodhani
Hon. Secretary

CA. Riken J. Patel
Hon. Secretary

1 Forthcoming Programmes

Date/Day	Time	Topic	Speaker	Venue
16.08.2016 Tuesday	8.15 pm to 12.30 pm	Talent Evening	By members, Family members of Members and staff/article team of firms-Singing, Dancing, Solo or Group Performance	Tagore Hall, Paldi, Ahmedabad
19.08.2016 Friday	5.00 pm to 7.30 pm	Seminar on "Unveiling Statutory power of Release 5.4 of Tally.ERP9". FREE for all - Followed by DINNER	Dhaval Mehta – Global Software Shri Daksh Patel - Globle software Shri Pankaj Gilra - Tally Solution Pvt.Ltd.	Hotel President, Off. C. G. Road, Ahmedabad
23.08.2016 Tuesday	9.00 am to 3.00 pm	Full Day Seminar Jointly with BCAS on CARO/IFC/ Fraud Reporting- Fees For members Rs.200/- for Non Members Rs. 400/- and for Students Rs.100/- (Students restricted to 50)	Eminent Speakers	Shantinath Hall, ICAI Bhawan, 123, Sardar Patel Colony, Naranpura, Ahmedabad

Glimpses of Past Events

JODHPUR RRC

IDS Interactive session at GCCI

Programme on Personal Financial Planning

IT Programme on Tally as Audit Tool

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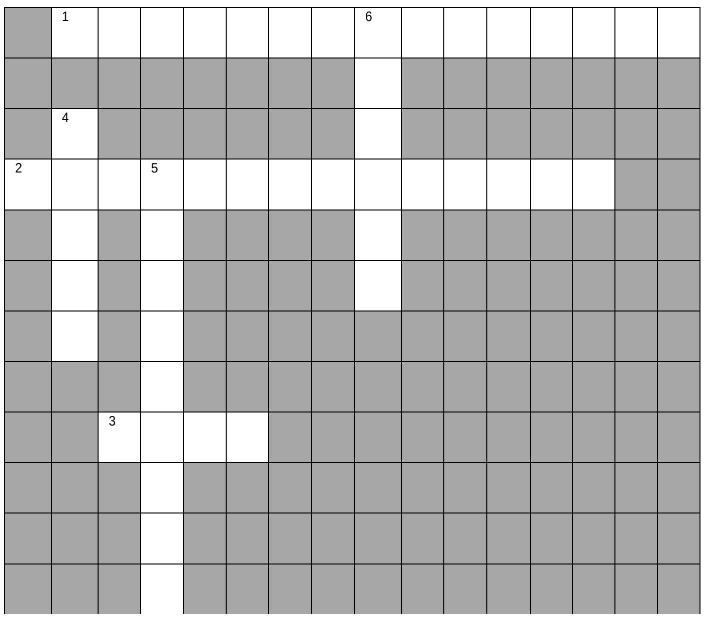
ACAJ Crossword Contest # 27

Across

1. When both parties are taxed at ______________ rate, Section 40A(2) cannot be invoked.
2. Section 50C is a deeming provision and it is only applicable in respect of capital assets which are ________________ or both.
3. The limit for collection of tax at source at 1% on sale of Jewellery in cash is ____ lakhs.

Down

4. Today we may possess all the luxuries in life, but we may not be _____.
5. POEM is defined as a place where key management and commercial __________ that are necessary for the conduct of the business of an entity as a whole, are in substance made.
6. The Valuation report is after all statistical hypothesis and leaves room for error and hence the same can be challenged on ______.



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 23/08/2016.
5. The decision of Journal Committee shall be final and binding.

Winners of ACAJ Crossword Contest # 26

1. CA. Bhadresh Mehta
2. CA. Hitesh Mandani

ACAJ Crossword Contest # 26 - Solution

Across

1. Investments
2. Reduction
3. Penalty

Down

4. Virtual
5. Credited
6. Agent

❇ ❇ ❇