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Happiness Unlimited

What is happiness where does it lie?
How does it look like and why is it so shy?
Chase of mankind always kept aloof,
Appearances in roses, hearts filled with gloom.

Life in bigger cities, despite better amenities, has become very hectic and stressful that a news item even reported that sale of anti depressants in India is growing by 17% annually. If we look around it is an appalling scenario. People seem or rather pretend to be happy but the actuality is far from being happy. Why is it so that in this era of technological advancements where almost everything has become possible upon a touch of a button, the mind is far away from serenity?

Life is referred as "*anubhav dhara*", stream of experiences. There is life as long as there are experiences. As the experiences cease, life also come to an end. There are two components of any experience, subject and object. The subjects are we as individuals and the object is the world. As the subject, we individuals deal with the world, we have experiences. As are the experiences, so is the life. If experiences are good, life is good and when there are sorrowful experiences, so is the life. To improve the experience, the options are either to improve the subject or the object. One set of school works for the betterment of the objects to provide greater happiness. The scientific developments play important role and indeed have made massive contribution. With each passing day, new and new captivating gadgets and equipments are becoming part of our life. The objects are truly facilitating, nevertheless people continue to be in a state of anguish and pain. No object till date has ever been able to overcome the sufferings and woes of any human being. This is an irony. Another set of thinkers concentrate on the subject. Vedanta provides that if we do not work on the improvement of the subject, we live a life of strain and disarray even in the world of prosperity and plenty.

We as human beings succumb to our desires. Desires of sense objects. The fulfillment of each desire; achievement of sense object, symbolizes happiness to us. Each time we get our desire fulfilled we appear to be happy. If we put happiness into an equation, mathematically, it would be:

$$\text{Happiness} = \frac{\text{Number of desires fulfilled}}{\text{Total number of desires entertained.}}$$

Obvious from the above formula, the two ways in which happiness can be increased are:

I) Either increase the numerator or

II) Decrease the denominator.

Getting along with the first option is very easy. We try to increase the numerator by fulfilling our desires and we do have a sense of happiness. For example: If there is a desire to go out for a dinner at a restaurant, then accomplishing the object makes us feel happy. But in the process of increasing the numerator, we find ourselves in a situation where many more desires have crept in. Every time we fulfill our desire, the number of desires in the wait list keeps on rising. Thus increase in the numerator automatically increases the denominator and in fact manifolds, severely affecting the equation of happiness downwards.

Concentrating on the subject, we achieve strength to raise ourselves. If we are able to control and confine our desires, there is decrease in the denominator. The removal of each desire would give us the power. Happy at all times. Swami Ramatirtha has said ***"If you are not happy as you are, where you are, you will never be happy."*** The day when we bring down the denominator to zero value, imagine the level of happiness, it shall be infinite. "Happiness Unlimited". It might seem to be difficult proposition, but we human beings do follow this practice. The question ahead is; are we willing to improve upon? How? Let's see.

It is a known fact that our composition is of matter and spirit. The body, mind and intellect referred to as the matter and *Atman*, the spirit. At the gross level it is body, mind being subtle. Intellect is subtler and Atman the subtlest. Eating an imported brand of chocolate and its taste is the cause of happiness to the body. When it comes to the emotional level

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Editorial

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Whether the hoarders of Black Money have a right to complain?

The Prime Minister of the country on 8th November announced the currency note of Rs. 500 and Rs. 1000 would not be a legal tender from the midnight of 9th November. He made this announcement at 8 pm and within 4 hours about 85 percent of the total currency in circulation ceased to exist as a legal tender.

Since the date of the announcement, almost in every corner of the country, demonization with its effect on economy is being debated. So many economists have come up from nowhere, thanks to 'whatsapp'. Few are occupied with discussing the effects while some are wondering at the queues, exchange, deposits and withdrawals. There is no question that there have been some practical problems in implementing this change-over but one needs to appreciate that such decisions are to be taken confidentially and cannot me made public even to the implementation agencies. This is the minimum we can contribute if we look as a citizen of this great nation that has started its journey on the path of development.

While the common man is facing some difficulties in getting his currency deposited or exchanged in the bank, the most worried in the country are the one who have hoarded huge non tax paid sums. These people are now looking for the various options that can help them save their money with minimum damage. One can understand the inconvenience of a common man standing in a queue to get his money's worth, but I firmly believe one who has evaded taxes and sitting on huge cash does not have a right to complain.

The BJP led NDA government came to power on the promise of removing corruption and the menace of black money from the country. The first and foremost cabinet decision taken by this government was forming the SIT on black money. This cleared the intent over the functioning of the government. Then, a year later came the Black Money and the Imposition of Tax Act - 2015. In 2016, there was a last call by way of Income Disclosure Scheme. Those who out of choice not boarded cannot now complain of missing the bus.

There is difference between tax planning and tax evasion. Those who are affected or losing money have wilfully defaulted in taxes. We as a chartered accountants have a role to play. Are we aiding these hoarders for our monetary gain or advising them to pay taxes? Let's not behave like agents of conversion of black money to white money, or for that matter, mediators for conversion of black money (old currency notes) to black money (new currency notes). Many quarters are preaching this, I humbly request, for nation's sake - Practice it.

Jai Hind.

CA. Ashok Kataria

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where mind plays, we rise and we give the chocolate to our child giving us much more joy and in fact for a longer duration. Our intellectual pursuits for study many times make us give up various desires and we happily let go desires for a cause something more important. That brings everlasting happiness. We need to lift ourselves because intellectual persist.

Giving away desires may not be that easy. The higher we move above, from body to mind to intellect and there above, it becomes more difficult. The higher is the pain; greater the happiness. The Lord Himself has said in the eighteenth chapter of The Bhagwad Gita: ***The true happiness is like poison in the beginning but nectar in the end – verse 37. False happiness is like nectar in the beginning but poison in the end – verse 38.***

In these times, full of hassle and haste, let us pause for a while; think where true happiness lies and how it can be achieved lies in not letting go the objective of our life and existence.

The way to happiness is on path of attitude,
Where hearts filled with sense of gratitude.
With all one has ever so content,
As divine gifts above from heavens.

From the President

CA. Raju Shah
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Respected seniors and dear professional colleagues,

Wishing you and your Family a prosperous Happy New Year

Once again, a historic moment for the Nation! Our Hon'ble Prime Minister Shri Narendra Modi Ji declared demonetization of the existing Rs. 500 and Rs. 1000 notes to take them out of circulation as a measure to curb financing of terrorism through the proceeds of fake Indian currency notes and to eliminate black money. I am sure the measure will help to curb/control black money, will eliminate fake currency and will immediately stop illegal activities like terrorisiom/drug trading/smugglings etc.

It will have a positive impact on the economic growth of the country. As more money will come in the mainstream, banks will have huge money to lend; RBI may reduce the interest rates making easy for the trade and industry. As majority of money will be in the system the collection of taxes will increase which will help the government to reduce the tax rates. All types of cash based transactions businesses will have immediate impact as no cash is available in the market. It may affect a segment of people for few days but I am sure it will ease out in week's time. The major impact will be to those who have accumulated huge black money. The ICAI President has appealed to support this initiative and we as a chartered accountant should not to indulge in helping persons doing wrong and be a partner in nation building.

It's really a matter of great pride that we could arrange a second Residential Refresher Course (RRC) at Mumbai jointly with Bombay Chartered Accountants Society, (BCAS) on 21st & 22nd October, 2016 at Kohinoor Hotel, Mumbai. It was a great experience to have quality learning with experienced and expert faculties from Mumbai. My special thanks to CA Uday Sathey, Mumbai and CA Chetan Shah-President BCAS for their support and co-operation in arranging the program. Diwali get to-gather was arranged on 12-11-2016 at Vishala Hotel. It was attended by more than 250 members and their families. As GST is now reality we have organized a class room study series with eight study lectures starting from 15th November, 2016. The registration was full within two days. It shows the importance of GST in the coming days.

Apart from study we have planned to have Cricket matches in the month of December. On 10th December, 2016 we have a cricket match of President XI vs. Secretary XI at Sardar Patel Stadium. Those who are interested may register themselves at the earliest.

The International Study tour is arranged from 5th January, 2017 to 13th January, 2017 at "Magical Thailand-Krabi (2N), Phuket (3N) and Bangkok (2N). A detailed circular is e-mailed.

The Associations' birthday is on 15th December, 2016. The managing committee has decided to celebrate this day with Health check up and other health awareness programmes. The same will be finalized very soon and detailed circular will be mailed to you. Our sincere request to all to keep yourself available and take benefit of the same.

My rules for success which I hope to follow and for which I solicit your continued support.

"Put success before amusement, Lean something every day, Cut free from routine. Concentrate on net profits. Make your services known. Never worry over trifles. Shape your decisions quickly. Acquire skill and technique. Deserve loyalty and co-operation. Value Character above all."

- Herbert N. Casson

With best regards,

CA. Raju Shah
President

Getting Ready for GST

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Q: So, far the government hasn't committed itself to a timeline. How realistic is April 1st 2017?

Hasmukh Adhia (Revenue Secretary): From our side we are fully geared to implement GST from April 1st 2017. We had some meetings with the business people and there were some doubts in the mind of some business people whether they will be able to cope up with the time schedule. Some of the business people told us that they need at least six months after the bill is frozen by GST council. That is what is worrying me now.

Q: How worried are you?

Adhia: I am worried about business people not being prepared for it. I am not worried about government not being prepared for it. Government is fully geared. We are all prepared for it. We have been preparing for it for last three years. It is not that we have started preparing for GST after the amendment has been passed. The IT system is getting ready for last three years. It is not happening today. It is there, so we are all set. It is for the business people to now accept it and to say that we are ready

Shaktikanta Das (Finance Secretary): Before that, just two quick comments on some of the points, which you made earlier. One is with regards to April 1, 2017. Revenue secretary has clarified and I would like to reiterate that administratively, the government — not only the central government but also the state governments — are well-positioned to introduce it from April 1, 2017. Now with regards to readiness of industry, you asked should they not be given six months time? Today, we are at the end of August, so there is still about seven months left and the draft legislation is already in the public domain. The draft bill is already in the public domain. What is not known today is the list of exempted items, exempted goods about which I will talk about and the rates. Therefore, what is the readiness? Readiness is to prepare the internal programme, your software, your computer systems and be ready. And in fact, I would join the revenue secretary in appealing to the industry through you and the business that there is enough time available and it should be possible. The government has taken it as a challenge to introduce it from April 1, 2017. There are challenges, but industries should come forward.

(Source: Moneycontrol.com 31st August, 2016 – CNBC-TV18's India Business Leader Awards)

GST: Industry Caught Woefully Unprepared By The Pace Of Political Executive

Subhomoy Bhattacharjee *- November 06, 2016, 10:06 am*

Suddenly the roles are reversed. Instead of the government, it is the industry or rather large chunks of it, which seem unprepared for the switch over to the Goods and Services Tax regime from 1 April 2017.

The sense of distress came to the fore at the jam packed session on GST organised in New Delhi on Friday, by industry chamber CII with tax consultants Deloitte. Speaker after speaker rose to ask "pretty elementary questions", as one of the government speakers put it. Those queries were whether there is even now a possibility of pushing back the date for making GST operational; the rates at which their goods or services will be taxed; about the IT systems they would need to handle the tax processing activities for their business.

(Source: Swarajya Magazine dt. 6th November, 2016)

Introduction:

One gets an impression that India Inc. is lagging behind in gearing itself in keeping pace with the Central and State Governments. Is it really so? If so, Why? A moot question that remains to be addressed – Are we, as taxpayers, ready for GST?

Till the release of Model Draft law of GST, it was not possible for the tax payers to take any concrete actions. However, with the release of Model Draft law, draft rules partially and rate of taxes, some guideline is available as to which direction the Government is working. It is true that these are not sufficient enough to enable the tax payers to take concrete steps for change over to GST. For example, there is no clarity about break-up of rate of tax i.e. CGST and SGST, various exemptions etc. However, release of various reports and policy statements made by Government officials give fairly good idea of shape of things to come.

Although in many respect GST looks like old wine in the new bottle, there are certain provisions requiring all the businessmen to have a re-look of their business model, internal processes, business strategy, cost structure, accounting system, Management Information System etc. Considering the fact that time left now for the businessmen of five months, it is high time an exhaustive analysis be carried out in this respect. The process to be followed is quite time consuming and involves all the employees of the organisation in one way or the other. One more point to be noted in this respect is that the action taken by any tax payer will have to be communicated to the supplier, buyer etc. In the same manner, other business entities will also be communicating changes on account of introduction of GST to others resulting into continuous many-to-many flow of information. Any delay and negligence in this respect may lead to serious issue of existence for the business itself.

What should a businessman do in this respect? Which areas should be looked into? What are the threats? Whether there will be any benefits in monetary terms? Should such benefits be passed on to the customers? If so, how much? What will happen if not done so? To what extent we are ready for it? These and many more questions arise to be answered by all of us.

An attempt has been made in this paper to examine various issues arising out of implementation of GST. It should be noted that in such type of cases there cannot be straight forward solution applicable to all. Each case and transactions are unique one requiring different treatment based on issues diagnosed. Carrying out an exhaustive diagnostic process can help in relieving major burden.

Let us start with the basics. Which areas should be looked into? One can briefly list down as under:

1) Structure Analysis
2) Transaction Analysis
a. Sales Revenue
i. Determining Nature of Transactions
ii. Classification of Goods / Services
iii. Additional burden on account of Exempt Transactions under ST
iv. Methodology for computing tax quantum
1. Timing of Supply – Goods
2. Timing of Supply – Service
3. Place of Supply – Goods
4. Place of Supply – Service
5. Place of Supply – Export of Goods and Services
6. Mode of Supply – Goods
7. Mode of Supply – Service
8. Value of Supply – Goods
9. Value of Supply – Services
b. Purchase of goods / services
i. Knowing Tax Characteristics of Commodities / Services
ii. Purchase – Goods
iii. Purchase – Services
iv. Assessing Credential of Suppliers
v. Assessing Tax Impact on Purchases
vi. Assessing Tax Impact of Branch Transfer
vii. Terms of Purchase
viii. Purchases – Import
c. Expenses
i. Purchases – Expenses
3) Impact Analysis
a. Impact on Cost of Goods / Services procured
b. Impact on Working Capital
c. Management Information System
d. Accounting System
4) Compliance Issues
5) Review of Contractual Commitments
6) Issues arising out of Transition
7) Human Resources Issues
8) Job Work

9) Value Addition Analysis
10) Zero Rated Commodities
11) Conclusion

1) Structure Analysis

Existing structure of indirect taxation for many years has compelled business entities to have branches, godowns, warehouses, agents and verticals etc. spread throughout the country. It is a product of complex tax structure evolved over a long period of time. With the proposed major changes in the method of determination of tax event i.e. from *"manufacturing"* or *"sales"* taking place etc. to *"supply"* of goods / services, require each businessman to have a re-look at the existing format / structure of the business. Extended definition of the term *"supply"*, making various transactions which were till date not subject to tax, all are required to examine the very foundation of the entity on which its structure is based. It may so happen that under the new environment, the complex structure evolved over a long period of time may become loosing proposition for various reasons.

While S. 3(1) of IGST is explicitly clear about taxing inter-state branch transfer, confusion still prevails about intra-state branch transfer of goods and services. One can have solace to some extent that in the case of inter-state branch transfer, ITC will be available to the receiving branch. However, taxation of intra-state transactions will drain heavy resources in terms of compliances. Even assuming such transactions are treated as Job Work and transfer of goods is not made subject to tax, the question of valuation and taxability of service rendered by the unit will always remain.

Captive Consumption

Another major area of concern for a business will be captive consumption. Under the Excise, goods which are subject to captive consumption are charged to ED. In the case of GST, since TE is *"supply"*, a question that will arise is whether supply of such goods will be subject to GST. Clause 5 of Schedule I of Draft law is vague leading one to presume that once such goods leave premises to other premises even of the same entity, it will be considered as supply. Clause 1 of Schedule III refers to supply by a supplier. It is silent about relation of the recipient of the goods with that of the supplier. ***Focus therein is on the activity of supply and not relationship between supplier and recipient.*** Hence, it may lead to interpretation that transfer of goods from one premises of the supplier to another place of the same supplier for captive consumption be treated as taxable transaction.

In view of above, all the businesses having satellite units under the same entity within the same State for further processing will have to take a closer look at such processes.

2) Transaction Analysis

Since GST proposes to change the very foundation of methodology of determining taxable event and permitting seamless tax credit, it becomes necessary to examine various types of transactions taking place and impact thereon and thereof. For any business, transactions will comprise of the nature of:

a) Sales Revenue
b) Purchase of Goods / Services
c) Expenses

Sales /Revenue

Determining Nature of Transactions

Sales / Revenue stream can be from sale of goods and rendering of services. Since by nature both the transactions i.e. sale of goods and rendering of services being of different nature requires different treatment. Draft Law contains different provisions for both the types of transactions. Therefore, varieties of transactions will have to be segregated in these two broad categories on the basis of definition as contained in S. 2(48), S. 2(88) and more particularly provisions of Schedule II.

Draft law make major changes in respect of various services. Provisions treating certain transactions both as sale of goods and provision of service will no longer be there. As per the draft law, a transaction will be either of supply

of goods or rendering of service. There will not be any overlapping. Many of the transactions which were considered as sale of goods will be considered as that of provision of service. At a first glance, it may sound advantageous. However, it is not so. Provisions of S. 5 and S. 6 of IGST relating to place of provision of goods and services may give unexpected result creating new difficulties. Similarly a glance at the provisions of S. 12 and S. 13 of CGST relating to time of supply of goods and service will reveal that the same are highly complex and its outcome might not have been visualised.

Classification of goods / service

Since there will be four types of rate of tax depending on nature of commodities and services, classification of goods and services will assume importance. It is not known whether existing classification of goods under the Central Excise will continue. Tariff will be based on HSN Code and appropriate item covering the commodity / service will have to be determined. This can be done only when tariff structure is made known to the tax payers.

Additional Burden on account of Tax Exempt Transactions under ST

As on today, in large number of cases, income like Commission, Annual Maintenance Charges, Rent etc. are not subject to ST as the quantum of the same being below threshold limit. However, with the introduction of GST, threshold limit being computed with reference to volume of *"supply"*, all these types of income will be subject to tax. This will be an additional burden which one should not loose sight off.

Methodology for Computing Tax Quantum

There are three important aspects for determining tax to be paid i.e. time, place and value.

Timing of Supply - Goods

As far as timing aspect is concerned, each transaction is required to be examined from its nature.

In the case of goods, timing will be with respect to delivery or supply of goods. However, S. 12(2) of CGST provides for extensive definition and covers various events like *"Making Available"* the goods, Issue of Invoice, Receipt of Goods in books of accounts of the recipient and receipt of advance payment. As can be seen, all these are new events for determining TE requiring the business to formulate a system whereunder triggering of the same update the database of taxable transactions. It should be noted that these are not the transactions relating to sales and / revenue and hence not recorded as such in the formal accounting system. Any system not taking cognisance of it will lead to incorrect payment of tax resulting into payment of interest and penalty. Apart from that any payment of tax at a later point of time for such transaction may result into dispute with the buyer at a future point of time.

Since sales can be intra-state, inter-state and export, different rules may apply. The internal information system should take cognisance of it and ensure that none of the transactions are missed out.

Timing of Supply - Service

In the case of services, S. 13(2) of CGST provides different rules for determining TE. In many respect, they are quite different from the provisions relating to the goods. In the case of businesses engaged into sales of goods and providing services, this will be a major exercise.

As in the case of goods, in the case of services also, there will be three types of transactions viz. intra-state, inter-state and export. For example, in the case of export of services, there are certain specific compliances to be made.

Place of Supply - Goods

GST law is based on the basic principle of levying tax at the place where the goods / services are consumed. It means that it is

destination based tax. Hence, determination of PoS of goods assumes importance. PoS will provide the basis on which the nature of transaction will be determined. If the PoS is intra-state, it will be governed by the provisions of SGST. If it is outside the state of the dealer, it will be governed by the provisions of IGST. Although the rate of tax under SGST and IGST will be same, certain compliances and utilisation of ITC will differ.

Application of wrong section while determining nature of supply may lead to depriving the buyer of ITC. For example, goods / services sold to a person of other state if classified as SGST will deprive him of ITC as he can avail ITC only for the transaction falling under IGST. **It should be remembered that simply because the supplier and buyer are registered in two different states does not mean that the transaction will be of IGST nature permitting the buyer to claim ITC.** For the purpose of treating a transaction of IGST, the basic condition to be satisfied is that it should satisfy two criteria i.e. (a) location of the supplier and (b) place of supply. In order a transaction to be of IGST nature both the legs should be in different states. Hence, S. 5 and S. 6 of IGST assume importance.

Place of Supply - Services

As in the case of PoS for goods, in the case of services also, S. 6 of IGST Act lays down rules for determining PoS for services. Rules herein are more complex. One has to be meticulous while determining PoS for services as any mistake in that respect can make a supply from IGST to SGST or vice versa. Since availment and utilisation ITC differs in SGST and IGST, it may so happen that wrong classification of transaction will result into loss of ITC for the buyer. For example, if in the case of a transaction with a party outside the state, by applying wrong rules, the PoS is determined as within the state, it will deprive the buyer of his right to claim ITC resulting into dispute between the parties.

A comparative analysis of the proposed rule in this respect and the provisions of PoPSR will reveal that in certain cases there are changes i.e. certain transactions which were taxable under ST due to PoS being in India may not be so and vice versa. Therefore, a detailed examination of nature of each type of transaction should be carried out.

Place of Supply – Export of Goods and Service

Export of both the goods and services are zero rated (i.e. exempt) and, hence, there is no question of any tax liability arising thereon. However, in the case of export of services, S. 2(44) lays down stringent conditions to be complied with. Exporter of services should be very careful about PoS of services. **It should be remembered that simply because the buyer of service is located outside India or receipt of proceeds in Convertible Foreign Currencies does not mean that the transaction will be of the nature of export.** In the eventuality of the transaction turning out to be provision of services locally, the question of tax, interest and penalty will arise. With the rate of tax @ 18.00% or more, it will result into heavy burden. What is more problematic is the fact that the buyer may not agree to compensate for tax borne by the Service Provider resulting into strained relationship.

Mode of Supply - Goods

S. 12(2) of CGST containing provisions relating to ToS lists various mode of supply. It provides for the Goods involving and not involving movement of goods, Goods delivered to third parties, Goods installed / assembled at site etc. Sub-clause No. 12(2)(a)(ii) and Explanation thereto of CGST are new and, therefore, it may skip attention of many tax payers. It should be noted that mode of supply may affect the ToS and PoS. Devising a system wherein such transactions are highlighted at the point of its occurrence itself assumes lots of importance.

Mode of Supply - Service

As in the case of goods, manner in which services are rendered assumes lot of importance.

In fact, S. 6 of IGST provides for different modes of provision of service and criteria for determining PoS of the services. Based on it, nature of transaction i.e. SGST, IGST or export are required to be determined.

Value of Supply – Goods and Services

Unlike the provisions under Central Excise and State VAT, S. 15 of CGST and Rule 3(1) of Valuation Rules provide for levying tax on *"Transaction Value"* and methodology to compute the same. It may sound simple and easier, however, it contains various provisions where under the valuation can be challenged. Rule 2 to 8 of Valuation Rules contain detailed provision for determining value under different set of conditions.

There is a tendency to avoid or under value the transaction by recovering expenses incurred separately as reimbursement. However, rules in this respect are stringent and rejection of any claim in this respect will result into heavy payment of tax, interest and penalty. It should be noted that with the rate of tax @ 18.00% or more and, interest and penalty linked thereto will not only wipe out profit element but lead to heavy losses. Apart from that, as it happens in such cases, the buyer may not agree to reimburse the tax burden, interest and penalty.

Purchases

With the provision of seamless ITC, purchases assume lots of information as ITC is inextricable part of it. With the rate of tax @ 18.00% or more, any disallowance thereof will add to loss of profit / add to losses.

For better understanding, transactions in this respect will have to be classified in two parts viz. Goods and Services.

Knowing Tax characteristics of commodities / services

As explained above, ToS and PoS in respect of goods and services being different, it is necessary to know tax characteristics of each transaction of purchase. Draft law is very specific in this respect i.e. a transaction will be either of the goods or the services. It will not comprise of both as it is today in respect of various transactions.

Apart from that Chapter V of CGST relating to ITC contains detailed provision for availing and utilising ITC. Hence, knowing characteristics of the transaction assumes importance.

Purchases - Goods

S. 2(57) of CGST defining the term "Input tax" provides for entitlement of ITC in respect of goods supplied. It takes care of all the items to be purchased in course of business. It should be noted that ITC in respect of various items purchased e.g. stationery etc. which hitherto were not considered for ITC purposes, will also be eligible.

S. 2(54) contains definition of *"Input"* as *"any goods other than capital goods"*. However, S. 2(20) of CGST relating to CG restricts it to certain types of items only, in the process denying ITC on all other types of CG.

Purchases - Services

Provisions of S. 2(55) of CGST provides for entitlement of ITC in respect of almost all services availed.

However, S. 16(9) of CGST contains certain restrictions with respect to certain goods and services in respect of which ITC will not be permitted. The system devised should take care of these items so that wrong claim of ITC is not lodged.

Assessing Credentials of Suppliers

One of the heaviest burden cast on the buyer under GST is ensuring compliances with respect to filing of periodical returns and payment of tax by the seller / service provider. Any failure on the part of seller in this respect will result into denial of ITC to the buyer. In view of this, assessing credential of the supplier assumes lots of importance.

In the case of existing suppliers there may not be major problem. However, real challenge will be in the case of new supplier.

Apart from that all the suppliers can not be expected to be compliant of law all the time. Hence, there is a need for periodical review.

S. 116 of CGST contains novel provision regarding assigning compliance rating to each TP based on pre-defined parameters of compliances. Ratings are proposed to be placed in public domain. Purchase Department will have to devise a system by which ratings of each supplier is monitored periodically. This can help in lower chances of denial of ITC on account of potential delinquent suppliers.

Assessing tax impact on Purchase

Seamless availability of ITC may enthuse one to go for indiscriminate purchases. However, it has its own cost. If, for any reason, it is not possible to make use of ITC, it will result into blockage of working capital. It should be remembered that there is no provision of refund of excess ITC accumulated except in the case of export of goods / services and inverted rate structure. It means that purchases should be timed judiciously.

Assessing tax impact of Branch Transfer

In the case of branch transfer, tax will have to be paid on the value of goods transferred. Branch receiving the goods will be entitled to claim ITC in respect thereof. **However, there is no provision for set-off of tax liability of the HO against ITC accumulated at the Branch and vice versa**. Hence, indiscriminate branch transfer of goods can lead to serious funds problem.

In the case of business having branches scattered over various parts of the country, it may so happen that Head Office will receive many services part of which may be pertaining to the branches. In such cases, distribution of ITC assumes importance. While making purchases of services, this aspect should be kept in mind and to the extent possible, branch specific services should be billed accordingly avoiding issues arising out of distribution of ITC.

Terms of Purchase

It is common practice in the business to make payment of advance to the suppliers. Over a period of time it gets adjusted against the bills raised. However, with the extended definition of the term *"Time of Supply"* in respect of goods in S. 12(2), receipt of advance payment attracts tax liability. Since, the supplier will be paying the GST on advance received; the buyer will be entitled for ITC thereof. Here, following interesting issues will arise.

Firstly, buyer will be entitled to ITC without making any purchase. Should the buyer reflect the amount of advance paid as purchase in his return and claim ITC thereon?

Secondly, amount of advance paid will be on ad hoc basis and in round figure. Out of the amount paid, which amount should be considered as value of goods / services and towards tax?

Thirdly, if the advance paid is settled against a single bill, it will be simpler transaction. However, in real life, such advances get adjusted partly against future supply in part. In business there will be various suppliers and advances will be paid to many of them number of times. Supply will be taking place by them over a long period of time. How to keep track of all these? This is going to be a major challenge for all the businessmen.

Purchases – Expenses

Purchase will also involve buying of various commodities required by a business. These are not raw material or consumable stores. Its nature will be that of expense. In view of restricted ITC being made available under Central Excise and State VAT, not much attention was paid to tax element involved therein. However, in view of definition of ITC containing all sorts of purchase of these commodities, existing system will have to be modified in such a way that ITC therein is captured and claimed.

Purchase – Import

A novel feature of GST is levy of GST on goods and services imported. As on today, tax in the form of CVD is levied on limited number of items of goods imported. Service Tax is also levied on services imported. However, as per the provisions of Explanation 1 to S. 2(1)(c) of IGST, import of all the purchases of goods and services will be subject to tax. It will be considered as IGST and ITC for the same will be available on supply of these goods and services.

Generally goods are imported in bulk taking into consideration availability of the material globally, cost of transport, monthly requirements etc. With the payment of IGST at the point of import itself, additional requirement of the funds will arise. Hence, import of goods judiciously will assume importance.

3) Impact Analysis

As we have seen, under GST rate of tax will get changed, methodology of computing and timing of sales will get altered, ITC will be made available on liberal scale. At the same time, cost of purchase and expenses may go up resulting into higher cost. In the absence of any specific details in this respect it is not possible to generalise about its positive or negative impact. However, what is known is that there will be drastic change in the cost of goods procured and services availed.

Impact on Cost of Goods / Services procured

As on date, the GST Council has announced four rates of tax for different types of commodities. However, its break-up between CGST and SGST has not been announced. Moreover, rate of tax for various services are yet to be announced. Till complete details are made available, it may not be possible for the dealer / manufacturer to compute impact on the cost.

It should be remembered that the cost will get invariably be affected for three reasons viz. (1) Change in rate of tax (2) Change in methodology of computing the tax and (3) ITC being made available almost in respect of all the items and services.

An important aspect to be kept in mind in this respect is that revised cost can not be arrived at simply by adding the difference between the old rate of tax and the new one. If done so, it can lead to disastrous reasons.

There is a general tendency on the part of many businessmen not to pass on tax credit being made available. However, if done so, it can make final product prohibitive resulting into loss of business.

Due to varied type of compliances required under GST, administrative cost may also go up substantially. Changes in the Management Information System will also lead to additional cost for hardware and software.

One will also have to keep in mind the price charged by other dealer in the market. Gathering information in this respect will take time and till then uncertainty will remain.

Lastly, it should be remembered that in the new environment under GST, there is no alternative to re-computation of cost of each item manufactured / traded and examine its impact afresh. Cost so determined will provide bottom side limit while the price charged by the other dealer / manufacturer will provide the upper limit. Initially, at least for one year, there will be fluctuations within the range of these two limits resulting into fluctuations in performance of the business.

Impact on Working Capital

All the above said changes are bound to affect funds flow and working capital. In the initial stage there will be uncertainty leading to blockage of funds in working capital. Higher rate of tax will also lead to blockage of funds into ITC.

Re-visiting Management Information System

As we have observed, there will be changes in all the major processes requiring a re-look at

in-house MIS. For example, the existing system of identification of transaction for determining tax liability will not work. A new system which can identify all the taxable events will have to be installed. Following are the major areas where MIS will have to be strengthened.

- Tax Liability
  - Identification of Taxable Event
  - Determining Type of TE i.e. SGST or IGST
  - Quantification of Taxable Value
  - Computing Tax Liability
  - Reporting of Tax liability
- Tax Credit
  - Identification of the transactions eligible for ITC
  - Quantifying entitlement of ITC
  - Computation of ITC attributable to exempt activities
  - Claiming of ITC fully
  - Set-off of ITC against tax liability
  - Monitoring Accumulation of ITC
    - Mismatch in rate of tax
    - Mismatch due to inverted rate structure
  - Claiming refund of excess ITC

Review of Accounting System

Biggest challenge to be faced by the business will be from accounting system. This is for the reason that it will have to devise the ways for capturing TE at the appropriate time and incorporate in the formal accounting system. Moreover, track will have to be kept of the entitlement of ITC as most of the transactions of purchase of goods and services will be having tax element. Almost all the entries of expense will be having element of ITC and any mistake may result into loss. Since the entire process of filing of periodical returns will be driven by electronic system, existing human resources will face new challenges and will require intensive training.

With all these changes, existing accounting system will have to update otherwise there will be chaos. Some of the areas which will require modifications / amendments are as under:o

- **Tracking of transactions – Identification of**
  - Sales
    - Delivery of goods / services
    - Receipt of advance
  - Supply
    - External Parties
    - In-house
    - Deemed Supply
- **Structure of Account Groups and Ledger Accounts**
- **Monitoring of various types of**
  - tax liabilities under
    - CGST
    - SGST
    - IGST
  - tax to be deducted at source
  - entitlement of ITC
    - CGST
    - SGST
    - IGST
      - Inter-State Goods / service
      - Imported Gods / Service
  - Identification of transactions not entitled for ITC
  - Rejection of ITC
    - Issues with suppliers
    - Issues with tax Authorities
      - **Incorporating transactions in Accounting Records**
    - Vetting of transactions
      - **Payment of Tax**
  - Computation - Determining
    - Gross tax liability
      - CGST
      - SGST
      - IGST
  - Claim for ITC
    - CGST
    - SGST
    - IGST
- **Set-off of ITC against tax liability – Determining priority between**

CGST
SGST
IGST

o **Periodical Returns**

Compilation of data

Filing of Periodical Tax Returns
Monthly
Yearly

Rectification of Errors / Mistakes

4) Compliance Issues

The existing system of compliance will get changed. Considering the fact that the whole system is proposed to be technology driven, appropriate changes will have to be made to ensure that timely and correct compliances are made. It should also be noted that compliance under GST is comparatively high both in terms of efforts and cost.

5) Review of Contractual Commitments

Business is a continuous activity. Contracts with various parties are made on an ongoing basis. A delicate point that will arise as to how to handle the contracts which have already been entered into and not been executed as on the cut-off date of change to GST. Terms and conditions of the contract will not be appropriate to the provisions of GST resulting into additional cost to be borne. Points to be borne in mind and actions to be taken are as under:

- Contracts already executed
  - o Impact analysis
  - o Negotiations for review

  Purchases of
  Goods
  Capital Goods
  Services

  Sale of
  Goods
  Capital Goods
  Services
- Designing Policies for executing Contracts for future supply of
  - o Goods
  - o Capital Goods
  - o Services

6) Transitional Issues

With the introduction of GST, existing statutes will be repealed. However, issues with respect to transactions undertaken under the existing statute, benefits granted, entitlement of tax credit unutilised etc. will arise. Chapter XXV of CGST makes provision for the same. Some of the points requiring attention in this respect are as under:

- Carrying Forward of
  - o CENVAT Credit on
    Capital Goods
    Inputs
  - o VAT Credit
    Conditions to be satisfied

7) Human Resources Issues

When such a major re-structuring exercise is taking place, it is obvious that existing human resources may find it difficult to adjust to new realities. This is more particularly for the reason that role of technology will be substantially more than at present. Skill of the existing human resources of the organisation will have to be up-dated. Looking at the spectrum, introduction of GST will require re-skilling employees working in the Purchase, Sales, Accounts, Computer system, logistics etc. It will also impact right from the lowest rung to the highest level of hierarchy.

8) Job Work

Job Worker forms an integral part of large number of manufacturing units. Benefits, exemptions and relief granted under the existing provisions of Excise Duty will have to be provided for. S. 2(62) of CGST contains definition of JW. It is applicable to only those units which are registered under GST. Relaxations etc. to be granted in this respect will be applicable to Registered TP only. In view of this, all the manufacturing units will have to have re-look and initiate the process of sourcing the services from eligible persons only.

S. 43A of CGST contains provisions relating to removal of goods without payment of tax for JW. S. 16A contains provisions relating to taking ITC in respect of goods sent for JW. Manufacturing units availing services will have to ensure compliance in this respect otherwise tax liability can be heavy.

9) Value Addition Analysis

GST is called a game changer. In the long run, it will bring major structural changes in all the businesses. Each business will have to examine justification of branch, warehouse, verticals etc. and existing processes. Question which will have to be asked is whether this structure is adding any value or whether this process can be done away with? Justification of the past years will not work. Each product, process, unit will have to justify its existence on the basis of value addition made.

10) Zero Rated Commodities

It is proposed to declare certain essential commodities as *"Zero Rated Items"* meaning thereby that rate of tax on these commodities will be zero. S. 2(109) contains definition of the same as "*supply of any goods and/or services on which no tax is payable but credit of the input tax related to that supply is admissible"*. It should be remembered that such items are different from *"Exempt"* items. Although tax impact on account of supply of these items is the same as no tax is required to be paid herein on its supply. However, in the case of ZRC, the dealer is permitted to claim ITC on inputs as against in the case of *"Exempt"* items wherein no ITC is permitted to be claimed. This makes major difference for the dealer.

Many of the items proposed to be ZRC, at present, are exempt under VAT and Excise. As on today, credit for taxes paid on inputs is not available. However, there will be major change in all such cases as credit for tax on inputs will add to bottom-line. Of course, it will have additional cost of compliance under GST. Therefore, all the dealers dealing in exempt commodities under VAT will have to examine impact of this major change and re-structure business strategy.

11) Conclusion

The above analysis is not exhaustive. It gives panoramic view of the areas to be looked into. Each business is unique one. What is applicable to a particular business may not be so for the other one even though both of them are dealing in the same product. Each case requires independent in-depth analysis of its structure, product, processes etc.

It is true that without final format of the statute, rules, forms, rate of tax etc. one cannot take actions. Therefore, it is too early at this stage to make commitments and act upon. However, having fairly good idea of shape of things to come, one can carry out an exhaustive analysis and draw a blue print at this stage resulting into saving time of at a later point.

Abbreviations

CG	Capital Goods
CGST	Central Goods & Services Tax
ED	Excise Duty
GST	Goods & Services Tax
HO	Head Office
HSN	Harmonised System Number
IGST	Integrated Goods & Services Tax
ITC	Input Tax Credit
JW	Job Work
MIS	Management Information System
PoS	Place of Supply
PoPSR	Provision of Place of Supply Rules
SGST	State Goods & Services Tax
ST	Service Tax
TE	Taxable Event
TP	Taxable Person
ToS	Time of Supply
VAT	Value Added Tax
ZRC	Zero Rated Commodities

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Works Contract Services Under GST Regime

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Introduction:

The Goods & Service Tax (GST) is aimed at making India an unified market that would enable free flow of goods and services with clear and transparent picture of the incident of Indirect Tax on every transaction, proposed implementation of GST which is now expected to become into effect from 1st April 2017 would be win-win situation for the Central Government, the State Government and the tax payers and tax consultants.

It is a destination based tax on consumption of goods and services. It is proposed to be levied at all stages right from manufacture up to final consumption with credit of taxes paid at previous stages available as setoff. In a nutshell, only value addition will be taxed and burden of tax is to be borne by the final consumer.

The tax would accrue to the taxing authority which has jurisdiction over the place of consumption which is also termed as place of supply.

It is an assumption that the GST will have a simple structure and goods and services will be taxed at a uniform rate. However, if a careful analysis of the Indian Tax regime is conducted, convolutions in the law are easily identifiable. Different States have different needs, and, thus, it can be expected that different states would have different rates of taxation. This could lead to a more complex tax structure in the future.

Multiplicity in the rates of taxation is bound to lead us to retread the path of works contracts which, in turn, may culminate in complex interpretational and implementational issues.

I have selected this subject particularly in the GST Regime because the works contract activity has been considered by GST as a Service and therefore I am tempted to write this article to throw the light of the important provisions of the services which are incorporated in the GST Model Law. The practitioners those who are practicing in VAT and Income Tax are not much acquainted with Service Tax Laws and therefore I have chosen this subject for the benefit of the valued readers. In this article, I have not considered the current provisions of Works Contract under GVAT Act and also under the Service Tax Act, as the rebates and concession has been done away with the proposed GST Model Law and therefore my concentration is only on the provisions under the service tax more particularly for Works Contract Services.

[1] GST & Works Contract:

Having understood the conceptual bases surrounding the concept of works contracts, it finds itself at a juncture where the intersection between the peculiar taxation principles of works contracts with the proposed GST regime can be identified and evaluated.

The taxability of works contracts continues to be a contentious issue. We are yet to observe a mammoth reform in the forms of Goods and Service Tax. The 100th Constitutional Amendment Bill has retained the concept of 'deemed sale'. However, the concept of 'sale' is to be done away with under the GST regime. It is known that works contract is taxable on sale and provision of services under the current regime. However, under the GST regime all the taxable events will be merged and there will only be one taxable event, being supply of goods/service. If we look at the real estate sector, where works contracts find prevalence , compliances with multiple taxes constitutes a heavy burden. The GST seeks to remove these multiple taxes and bring in uniformity

wherein the taxes would, in all probability, be levied at one rate. Further, it is expected that the cascading effect of taxes would be eliminated at least in part owing to the GST.

[2] Services:

'Services" is defined in section -

"2(88) "services" means anything other than goods.

Explanation: Services include intangible property and actionable claim but does include money.

Services is defined in a rather expansive manner. The definition of service "anything other than goods" has been borrowed from the New Zealand GST Law. But as held in New Zealand in Case S65(1996) 18 NZTC 7408, howsoever wide the definition of service may seem, it has its limitation. In that case, payments made under an order of a disciplinary tribunal to reimburse the costs and expenses of the winning party were held not to be consideration for supply of any "services" since ordinarily a supply of services has to be for the benefit of the recipient and not against him.

[i] Supply of "Money' Excluded:

The definitions lf "goods" as well as "services" exclude "money". It is one of the fundamental principles of all VAT/ GST jurisdictions that supply of money is not to be taxed. This exclusion make sure that when monetary consideration is supplied for the supply of goods and services, that consideration itself is not to be taxed as supply of money.

[ii] Actionable Claim covered in Services:

The definitions of "goods" excludes "actionable claim". Sales tax law also excluded actionable claim from definition of "goods". But the definition of "services" here covers "actionable claim" specifically where as the service tax law excluded "actionable claim" from definition of "services" in that law. Actionable claim is defined in section 2(1) of the Model GST Law. Assignment of a debt is thus a service, debt being an actionable claim.

There is one more snag in the definition of "service". It seems wide enough to cover immovable property even though we have been always told that real estate will be kept outside the scope of GST. I expect some clarification one way or the other from the Empowered Committee on this in the coming weeks.

[3] Works Contract is Service (Schedule II Para 5f)

Works contract including transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract is 'supply of service'.

[i] Definition under GST:

'Works contract' means an agreement for carrying out for cash, deferred payment or other valuable consideration, building, construction, fabrication, erection, installation, fitting out, improvement, modification, repair, renovation or commissioning of any movable or immovable property – clause 2(107) of GST Model Law, 2016. (except maintenance).

[ii] Constitutional Meaning:

A tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract is deemed sale of goods under Article 366(29A) of Constitution of India[As inserted by 46th Amendment to Constitution in 1982].

Thus, the Constitution states that 'works contract' is deemed sale of goods, while

GST Model Law, 2016 states that it is 'supply of service' and therefore issues relating to place of supply or time of provision of services are to be taken into consideration as per Service Tax provisions incorporated under GST Model Law.

[iii] What is 'works contract' (Principle of accretion):

Works contract is essentially and inherently a contract of service, irrespective of legal fiction created by Article 366(29A) of Constitution of India – Larsen and Toubro Ltd. v. CST (2015) 318 ELT 633

Basically works contract is a contract for work, where supply of material is incidental to the contract for work.

When one purchases a flat for residential purpose, he proudly informs his relatives and friends that he has purchased a flat. He never says that he has purchased steel, cement, bricks, tiles or bathroom fittings (though he becomes owner of all those goods). This is because his intention was never to purchase those goods as 'goods' ['chattel' as chattel].

[iv] These are principles of works contract:

Contract of building is one, entire and indivisible. There is no sale of movables(building materials), it was held that the contract for building is not a contract for 'sale of goods' (Gannon Dunkerley).

It was held that taxable event in works contract is the transfer of property in goods involved in execution of a works contract.\

In the works contract, property in goods should pass on the principle of accretion, accession or blending when the works contract is getting executed. If property in goods pass after execution of works contract, it is 'sale' and not 'transfer of property in goods involved in execution of works contract.'

Accretion – movable goods are imbedded in immovable property (e.g. construction contract)

Accession – Movable goods attached to movable property (e.g. spare parts fixed in car or machinery)

Blending – Movable goods mixing with goods of contractee (e.g. printing, dyeing work)

If property in goods pass after execution of works contract, or as 'goods' as 'goods'(chattel as chattel), it is 'supply of goods' and not 'transfer of property in goods involved in execution of works contract'

[v] Dominant nature not relevant:

In following decisions, it was held that dominant nature of contract is not relevant.

However, under GST, it has been specifically defined as 'supply of service'. Hence validity of following decisions is doubtful under GST.

In Associated Cement Companies Ltd. it was held that even if the dominant intention of the contract is rendering of service, it will amount to a works contract. After 46th Amendment to Constitution, the state would now be empowered to levy sales tax on material used in such contract.

The aforesaid view has been confirmed in Bharat Sanchar Nigam Ltd, where it has been clearly held that after 26th Amendment, sale element of contracts covered under six sub-clauses of Article 366(29A) are separable and may be subjected to sales tax by the States. There is no question of the dominant nature test applying.

Dominant nature test is not relevant for 'works contract'. Even of dominant intention of contract is not to transfer the property in goods and rather it is rendering of service, then also sales tax can be imposed on material used in such contract if such contract otherwise has elements of works contract, even if minor material is transferred, it can be works contract. – Larsen Toubro v. State of Karnataka. This view is confirmed in Kone Elevator (India) Pvt. Ltd. (Larger Bench Supreme Court).

[vi] Examples of the Services:

Supply of SIM Card is not supply of goods but is service.

Electromagnetic waves transmitted through telephones is not 'goods'.

Intangible property is 'service'.

Duty credit scripts which are saleable is 'service'.

Development of software is service.

Beneficial interest in movable property.

Hire of operating lease of goods is 'service'.

Leasing or renting of land and building for commercial purposes is 'service'.

Construction Service:

Following is 'supply of service' as per para (b) of Schedule II of GST Model Law, 2016.

Construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or before its first occupation, whichever is earlier. In case of composite supply, rules shall be formed to provide for the percentage of abetment and valuation.

[4] Place of Supply of Services:

Basic Principles In respect of Goods:

The basic principle of GST is that it should effectively tax the consumption of such supplies at the destination thereof or as the case may at the point of consumption. So place of supply provision determine the place i.e. taxable jurisdiction where the tax should reach. The place of supply determines whether a transaction is intra-state or inter-state. In other words, the place of supply of Goods is required to determine whether a supply is subject to SGST plus CGST in a given state or else would attract IGST if it is an inter-state supply.

[i] In respect of Services:

The manner of delivery of service could be altered easily. For example telecom service could change from mostly post-paid to mostly pre-paid; billing address could be changed, billers address could be changed, repair or maintenance of software could be changed from onsite to online; banking services were earlier required customer to go to the bank, now the customer could avail service from anywhere;

For supplying a service, a fixed location of service provider is not mandatory and even the service recipient may receive service while on the move. The location of billing could be changed overnight.

Sometime the same element may flow to more than one location, for example, construction or other services in respect of a railway line, a national highway or a bridge on a river which originate in one state and end in the other state. Similarly a copy right for distribution and exhibition of film could be assigned for many states

in single transaction or an advertisement or a program is broadcasted across the country at the same time. An airline may issue seasonal tickets, containing say 10 leafs which could be used for travel between any two location in the country. The card issued by Delhi metro could be used by a person located in Noida, or Delhi or Faridabad, without the Delhi metro being able to distinguish the location or journeys at the time of receipt of payment.

Services are continuously evolving and would thus continue to pose newer challenges. For example 15-20 years back no one could have thought of DTH, online information, online banking, online booking of tickets, internet, mobile telecommunication etc.

[ii] Concept of assumptions in determination of the Place of Supply:

The various element involved in a transaction in services can be used as proxies to determine the place of supply. An assumption or proxy which gives more appropriate result than others for determining the place of supply, could be used for determining the place of supply. The same are discussed below.

[a] location of service provider;

[b] the location of service receiver;

[c] the place where the activity takes place/place of performance;

[d] the place where it is consumed, and

[e] the place/person to which actual benefit flows

[iii] Separate rules for B2B Supply:

In respect of B2B transactions, the taxes paid are taken as credit by the recipient so such transactions are just pass through. GST collected on B2B supplies effectively create a liability for the government and an asset for the recipient of such supplies in as much as the recipient is entitled to use the input tax credit for payment of future taxes. For B2B transactions the location of recipient takes care in almost all situations as further credit is to be taken by recipient. The recipient usually further supplies to another customer. The supply is consumed only when a B2B transaction is further converted into B2B transactions. In respect of B2C transactions, the supply is finally consumed and the taxes paid actually come to the government.

The terms used in the IGST Act are registered taxpayers and non-registered taxpayers. The presumption in case of supplies to registered person is the location of such person. Since the recipient is registered, address of recipient is always there and the same can be taken as proxy for place of supply.

[iv] In case of unregistered recipient:

In respect of unregistered recipients, the usual place of supply is location of recipient. However, in many cases, the address of recipient is not available, sin such cases, location of the supplier of services is taken as proxy for place of supply.

[v] In case of Immovable property/boat/vessel:

Where the immovable property is located in more than one state, the supply of service shall be treated as made in each of the states in proportion to the value for services separately collected or determined, in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other reasonable basis as may be prescribed in this behalf. (The

Explanation clause to section 6(5) of the IGST Act).

[vi] In case of event held in multiple state:

In case of an event, if the recipient of service is registered, the place of supply of services for organizing the event shall be the location of such person.

However, if the recipient is not registered, the place of supply shall be the place where event is held. Since the event is being held in multiple states and a consolidated amount is charges for such services, the place of supply shall be taken as being in each state in proportion to the value of services so provided in each state. (The Explanation clause to section 6(8) of the IGST Act).

[vii] In case of Travelling:

If the person is registered, the place of supply shall be the location of recipient. If the person is not registered, the place of supply for the forward journey from Mumbai to Delhi shall be Mumbai, the place where he embarks.

However, for the return journey, the place of supply shall be Delhi as the return journey has to be treated as separate journey. (The Explanation clause to section 6(11) of the IGST Act).

[viii] In case of Mobile Connection:

The location of supplier of mobile services cannot be the place of supply as the mobile companies are providing services in multiple states and many of these services are inter-state. The consumption principle will be broken if the location of supplier is taken as place of supply and all the revenue may go to a few states where the suppliers are located.

The place of supply for mobile connection would depend on whether the connection is on postpaid or prepaid basis.

In case of post-paid connections, the place of supply shall be the location of billing address of the recipient of service.

In case of pre-paid connections, the place of supply shall be the place where payment for such connection is received or such pre-paid vouchers are sold. However if the recharge is done through internet/e-payment, the location of recipient of service on record shall be taken as the place of service.

[ix] Travel Insurance:

The location of the recipient of services on the records of the supplier of insurance services shall be the place of supply. So Gurgaon shall be the place of supply. (Proviso clause to section 6(14) if the IGST Act).

The Chart shows a clear picture of Place of Supply:

Place of Supply – Services:

Type	Place of Supply
Made to a registered person	Location of such person
Made to other than a registered person	Location of the recipient where the address on record exists. If not, location of supplier
Immovable property / boat / vessel	Location of such property / boat / vessel
Restaurant and other personal services like beauty treatment	Location where the services are actually performed
Training and performance appraisal	Location where the services are actually performed
Admission to events	Place where event is actually held

Organization of events / transportation of goods & passengers	Location of person if registered or where event is held if not registered
Services on board a conveyance	The first scheduled point of departure
Telecommunication services	Place of installation, post-paid; billing address, prepaid; place of sale (internet banking, place of recipient on record).
Banking and other financial services	Place of recipient of service on record.

[5] Time of Supply of Service:

[i] Invoice Base:

The time of supply of services shall be – [a] the date of issue of invoice or the date of receipt of payment, whichever is earlier, if the invoice is issued within the prescribed period; or (b) the date of completion of the provision of service or the date of receipt of payment, whichever is earlier, if the invoice is not issued within the prescribed time; or (c) the date on which the recipient shows the receipt of services in his books of account, in a case where the provision of clause (a) or (b) do not apply.

In case of continuous supply of services, the time of supply shall be – (a) where the due date of payment is ascertainable from the contract, the date on which the payment is liable to be made by the recipient of service, whether or not any invoice has been issued or any payment has been received by the supplier of service (b) where the due date of payment is not ascertainable from the contract, each such time when the supplier of service receives the payment, or issues an invoice, whichever is earlier (c) where the payment is linked to the completion of an event, the time of completion of that event.

For the purposes of sub-section (3) above, the Central or a State Government may on the recommendation of the Council, specify, by notification, the supply of services that shall be treated as continuous supply of services.

[ii] Time supply when service tax payable under reverse charge – In case of supplies in respect of which tax is paid or liable to be paid on reverse charge basis, the time of supply shall be the earliest of the following dates namely (a) the date of receipt of services, or (b) the date on which the payment is made, or (c) the date of receipt of invoice, or (d) the date of debit in the books of account.

[iii] Time of supply in case of Change in rate of tax in respect of supply of services - The provisions are identical with present rules 5 and 7 of Point of Taxation Rules.

[6] Valuation Method and their Rules:

[i] Transaction Value:

If the price only consideration and supply to unrelated parties, the transaction value will be value of supply.

The transaction value will include following –

[a] Any amount liable to be paid by supplier but not paid by recipient

[b] Value of goods/services supplied by recipient free of cost or at discounted rate

[c] Taxes other than GST

[d] Royalties and license fees related to supply

[e] Incidental expenses such packing and commission etc.

[f] Any reimbursable expenditure or cost

[g] Any discount or incentive that may be allowed after supply

The transaction value will not include any post supply discount linked with agreement or discount at the time of supply linked to invoice

[ii] In following circumstance, the valuation will be governed by valuation rules.

[a] The consideration is not in money wholly or partly;

[b] The supplier and recipient are related persons and prince is influenced by such relationship

[c] There is reason to doubt the truth or accuracy of transaction value

[d] Business transaction such as pure agent, money changer, insurer, air travel agent and distributor or selling agent of lottery

[iii] Such other supplies as notified by Government

Value Rules – Value can be determined by following sequentially rule 4 to 6

Rule – 4 : Value by comparison of goods/ services of like kind and quality.

Rule – 5: Value of computed value method i.e. cost, charges for design and brand and profit and general expenses.

Rule –6 : Residual Method i.e. value determined by reasonable means consistent with the principles and general provisions of these rules.

Rule – 7: Provides the mechanism, where the declared value can be rejected.

Rule – 8: Provides the mechanism for value in special case of pure agent, money changer.

[iv] Provision of Section 15 for Valuation of Services (Common):

Section 15 is common for all three taxes and also common for goods and services.

Contract price is more specifically referred to as 'transaction value' and that is the basis for computing tax. However when the price is influenced by some factors like relationship of parties or certain transactions are deemed to be supply, which do not have a price, it is required to overcome these factors to determine the transaction value correctly.

Reference to Valuation Rules is required only in cases listed under section 15(4) i.e. where consideration payable is not money, or parties to the transaction are related.

Section 15(2) provides the list of adjustments that may be made to make the price of a transaction reliable for purposes of determining tax payable.

It can be accepted after examining for inclusions in section 15(2). Furthermore, the transaction value can be accepted even where the supplier and recipient are related, provided the relationship has not influenced the price.[Rule 3(4) of draft GST valuation rules].

Unless the post-supply discount is established as per the agreement and is known at or before the time of supply and specifically linked to relevant invoice.

Provided it is allowed in the course of normal trade practice and has been duly recorded in the invoice.

Valuation Rules are applicable when (i) Consideration not in money terms; (ii) parties are related or supply by any

specified category of supplier; and (iii) transaction value declared is not reliable.

[v] Valuation of Flats given free to Land owner:

Valuation of flats given free to land owner – Value of service in respect of flats given free to land owner will have to be found out on basis of value of service of identical or similar flat/shop or on basis of cost of construction plus reasonable profit.

In Southern Properties v. CCE (2015) 49 GST 695 = 54 taxmann.com 116 (CESTAT), a prima facie view has been held that valuation should on basis of value of similar flats and not on basis of value of land.

Conflict Views:

As per CBE&C circular dated 10.02.2012, the first method i.e. value of similar service should be used.

The Education Guide on 20.06.2012, explaining salient aspects of the new provisions relating to negative list of service tax. In para 6.2.1 of the Education Guide, valuation of flats given to land owner shall be on basis of value of land.

Thus there was conflict in views expressed in circular dated 10.02.2012 and the Education Guide released on 20.06.2012.

The issue was discussed by High Level Committee set up by Ministry of Finance. On basis of their opinion, it has been clarified that valuation of flats given to land owner should be on basis of value of similar/identical flats or on basis of cost plus profit, as stated in circular dated 10.02.2012.

This principle should apply under GST also.

[vi] Joint Development by landowner and builder/developer:

In some cases, the land owner and builder/developer may have a joint venture for the construction project. In some cases, they may form a separate legal entity or they may operate as UJV (Unincorporated Joint Venture). In such cases, GST will be payable.

Para 2.7 of CBE&C Circular No. 151/2/2012-ST dated 10.02.2012 states as follows.

Joint Development Agreement Model; Under this model, land owner and builder/developer joint hands and may either create a new entity or otherwise operate as an unincorporated association, on partnership/joint/collaboration basis, with mutuality of interest and to share common risk/profit together. The new entity undertakes construction, on behalf landowner and builder/developer.

[7] Conclusion:

I have not taken into consideration the procedural part in respect of services and in case of need I have considered the provision of goods where they are applicable to the services also. According to me, there are plenty of issues which required clarification from the high power committee. Let us hope, this new regime establishes confidence between tax payer and tax collector with the help of tax practitioners.

(Sources : : FAQ on GST and Book of Shri V. S. Datey)

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From the Courts

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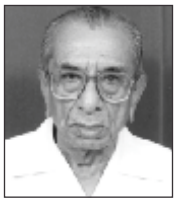

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52 Retrospective or prospective
Coimbatore District Central Co-Op. Bank Ltd. v/s. ITO
(2016) 382 ITR 266 (Mad)

Issue :

If an amendment is made to the Act,when can it be said to be prospective / retrospective?

Held :

Court had an occasion to interprete amendment to Sec. 194A w.e.f. 01/06/2015 by Finance Act 2015.

On that amendment Court has held as under :

"Once an amendment is introduced, for the purpose of removing an anomalous situation or for the purpose of removing confusion both in the manner in which the provisions stood and the manner in which they were understood, the amendment could be taken only to have prospective effect. An amendment can only be prospective unless it is made retrospective by express language or necessary implication.".

53 Order without reasoning is invalid
M. Bala Narsimha Reddy v/s. Principal CIT (2016) 382 ITR 307 (T & AP)

Issue :

Whether an order passed without giving reasons for justifying the decision taken is valid?

Held :

The settled legal proposition is that an order itself shall contain reasons justifying the decision taken and they cannot be supplemented by way of an affidavit.

That in as much as the order was bereft of any reasons and further it had not dealt with the contentions raised by the petitioner in his application for waiver of interest filed under section 220(2A) of the Income Tax Act, 1961, the order could not be sustained.

54 Search and third person's assessment : requirements
Smt. Rajkumari Chandak v/s. Asst. CIT
(2016) 382 ITR 312 (Mad)

Issue :

What are the requirements when the assessments are to be made in the case of third person i.e. person other than the one in whose case search proceedings have been taken?

Held :

The condition precedent for invoking a block assessment is that a search has been conducted under section 132 of the Income tax Act, 1961, or documents or assets have been requisitioned under section 132A. The provision would apply in the case of any person in respect of whom search has been carried out under section 132A or documents or assets have been requisitioned under section 132A. Section 158BD, however, provides for recourse to a block assessment in terms of section 158BC in respect of any other person, the conditions precedent wherefore are : (i) satisfaction must be recorded by the Assessing Officer that any undisclosed income belongs to any person, other than the person with respect to whom search was made under section 132 of the Act. (ii) the books of account or other documents or assets seized or requisitioned have been handed over to the Assessing Officer having jurisdiction over such other person : and (iii) The Assessing Officer has proceeded under section 158BC against such other person.

55 Re-opening : supply of reasons recorded Bayer Material Science Pvt. Ltd. (2016) 382 ITR 333 (Bom)

Issue :

Whether delay in furnishing reasons recorded for reopening and without disposing the objections to reasons recorded, if the order is passed, is it valid?

Held :

Pursuant to notice dated February 6, 2013 to reopen the assessment of the assessee for the assessment year 2007-08, the assessee filed a return of income and on March 15, 2013, sought to be furnished with the reasons for reopening the assessment. The Department did not furnish reasons recorded till March 19, 2015 in spite of repeated requests by the assessee. The assessee filed objections on March 30, 2015. The Assessing Officer passed a draft assessment order on March 30, 2015 without disposing of the objections filed by the assessee. On a writ petition by the assessee in which the Department stated that the delay in furnishing the assessee with the reasons, was the pendency of the matter before the Transfer Pricing Officer :

Held, allowing the petition, that the passing of the draft assessment order without having disposed of the objections filed by the assessee to the reasons recorded in support of the notice was in defiance of the Supreme Court decision in GKN Driveshafts (India) Ltd, v/s. ITO [2003] 259 ITR 19 (SC). The draft assessment order was not sustainable being without jurisdiction. Moreover, no reason was forthcoming for the delay in furnishing to the assessee the reasons for the reopening, except that it was only after the Transfer Pricing Officer had passed his order on transfer pricing that the reasons for reopening were provided to the assessee. The Transfer Pricing Officer could not enter upon enquiry on the reopening notice before the Assessing Officer disposed of the objections. Besides the recording of reasons for issuing the reopening notice was to be on the basis of the Assessing Officer's reasons. The Transfer Pricing Officer's reasons on the merits much after the issue of the reopening notice would not have any bearing on serving the reasons recorded upon the party whose assessment was being sought to be reopened.

56 Power of CIT on application of a Trust u/s 12AA. Shree Anjaneya Medical Trust v/s. CIT (2016) 382 ITR 399 (Ker)

Issue :

What are the powers of CIT on application by a Trust for registration u/s 12AA of I.T. Act?

Held :

(1) Taxing statutes are to be interpreted strictly. The court cannot supply or detract from the provisions contained in the statute. Where the provisions of the Act are clear, courts have no power to examine the purpose behind the enactment. The projected futility and inconvenience that may arise out of the application of a provision of law cannot, in a taxing statute, be a ground to deny a benefit which is evident from a plain reading of the statute.

It is clear from a plain reading of section 12A and 12AA of the Income Tax Act, 1961 that what is intended thereby is only a registration simpliciter of the entity of a trust. This has been made a condition precedent for claiming the benefits of exemption. No examination of the modus of the application of the funds of the assessee or an examination of the ethical background of its settlers is called for while considering an application for registration. The stage for consideration of the relevance of the object of the assessee and the application of its funds arises at the time of the assessment. Where benefits are claimed by assessee in terms of sections 11 and 12 of the Act, the question as to the nature of such contribution and income can be looked into. At the time of registration of the assessee what is to be looked into is whether the assessee is a genuine one or whether it is a sham institution floated only to avail of the benefits of exemption under the Act.

(2) The grounds stated by the registering authority and upheld by the appellate authority for rejection of registration to the assessee could not be sustained. The authorities could have examined only the genuineness of the trust and its activities. There was no material to show that the trust was not genuine or that its activities were not as professed in the deed of trust. There was no finding that the trust was a sham. [Direction to Commissioner to grant registration to assessee].

57 Power of Tribunal to confirm addition when Department did not file cross-objection or Appeal.
Sheo Kumar Mishra v/s. Deputy CIT
(2016) 382 ITR 424 (Cal)

Issue :

Whether Tribunal has power to make addition of an amount allowed by a CIT(A) and when Department did not file appeal or cross objection before I.T.A.T.?

Held :

Pursuant to a search and seizure in the office of the assessee who was the sole proprietor of a concern, a block assessment was made making an addition in respect of excess transportation charges claimed to the tune of Rs. 2,02,36,984/-. The Assessing Officer also opined that the assessee had shown bogus expenditure and bogus creditors in a sum of Rs. 1,59,38,774/- though he did not make a separate addition thereof as undisclosed income as it was less than the amount of excess billing. The Commissioner (Appeals) partly allowed the assessee's appeal restricting the addition to Rs. 2.02 crores but refused to add the sum of Rs. 1,59,38,774/-. The assessee appealed to the Tribunal. The Department did not appeal or file a cross-objection before the Tribunal. The Tribunal held that the addition of Rs. 2.02 crores could not be made in the assessee's hands but confirmed the addition of Rs. 1,59,38,774/- on account of bogus expenses.

High Court held that :

It was not open to the Tribunal to confirm the addition of the sum of Rs. 1,59,38,774/- because no such addition was made. When the Department had not filed cross objections against the order of the Commissioner (Appeals) in respect of the sum of Rs. 1,59,38,774/-, there was no basis for the Tribunal to confirm the addition. The addition made by the Tribunal for the first time was in excess of its jurisdiction.

58 General Principles : Rights of Assessee
CIT v/s. State Bank of Hyderabad
(2016) 382 ITR 499 (T & AP)

Issue :

Generally what are the rights of Assessee in Income Tax matters?

Held :

In taxation matters, a citizen is entitled to have certainty with regard to his or her liability and issues which were settled long back should not be reopened as it would lead to upsetting the entire financial planning of the individuals who would have accepted orders or judgments as final and arranged their affairs based on the orders or situations prevailing at the relevant point of time.

59 Re-opening : Requirement
Munjal Showa Ltd v/s. Dy CIT
(2016)382 ITR 555 (Delhi)

Issue

What are the requirements for a valid reopening of a case?

Held

Once a discretion is vested with a certain authority, he alone should exercise that discretion vested under the statute and if he acts in accordance with "the direction or in compliance with some higher authority's instruction" it would be a case of failure to exercise discretion altogether. The Assessing Officer must apply his mind and record reasons before reopening an assessment.

The reasons for reopening the assessment have to be confined to those set out in the order. They cannot be improved upon by filing subsequent affidavits. The assumption of jurisdiction cannot sought to be justified by supplying reasons extraneous to the recorded reasons.

60 Reopening : Service of notice is a mandatory requirement
CIT v/s. Chetan Gupta
(2016) 382 ITR 613 (Delhi)

Issue :

Whether service of notice for reopening is a mandatory requirement in case of reassessment u/s 148?

Held :

Under section 148 of the Income Tax act, 1961, the issue of notice to the assessee and service of such notice upon the assessee are jurisdictional requirements that must be mandatorily complied with. They are not mere procedural requirements. For the Assessing Officer to exercise jurisdiction to reopen an assessment, notice under section 148(1) has to be mandatorily issued to the assessee. Further the Assessing Officer cannot complete the reassessment without service of the notice so issued upon the assessee in accordance with section 282(1) of the Act read with Order V rule 12 and Order III rule 6 of the Code of Civil Procedure, 1908. Although there is change in the scheme of sections 147, 148 and 149 of the Act from the corresponding section 34 of the 1922 Act, the legal requirement of service of notice upon the assessee in terms of section 148 read with section 282(1) and section 153(2) of the Act is a jurisdictional pre-condition to finalizing the reassessment. The onus is on the Department to show that proper service of notice has been effected under section 148 of the Act on the assessee or an agent duly empowered by him to accept notices on his behalf. The mere fact that an assessee or some other person on his behalf not duly authorized participated in the reassessment proceedings after coming to know of it will not constitute a waiver of the requirement of effecting proper service of notice on the assessee under section 148 of the Act. Reassessment proceedings finalized by an Assessing Officer without effecting proper service of notice on the assessee under section 148(1) of the Act are invalid and liable to be quashed.

61 Validity of a partnership firm when a partnership firm is a partner in a partnership firm
Megatrends Inc. v/s. CIT
(2016) 383 ITR 53 (Mad)

Issue :

Whether a partnership firm can be a partner in another partnership firm and hence the main partnership firm is valid?

Held :

The fact that the appellant has been assessed in the status of a partnership so far is not in dispute. The fact that even the order of assessment passed under section 143(3) by the Assessing Officer, treated the assessee as a partnership is also not in dispute.

But, in the appeal filed by the assessee before the Commissioner of Income Tax (Appeals), the appellate authority thought that a firm cannot be a partner in another firm and that only natural legal persons can be partners in a partnership. This fundamental error, committed by the Commissioner of Income-Tax(Appeals) has led to the disallowance of an expenditure claimed towards remuneration and interest paid to partners.

There is no law, which says that a firm cannot be a partner in another firm.

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Tribunal News

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36 Damodar Valley Corporation Vs. DCIT [2016] 160 ITD 78 (Kolkata) Assessment Year: 2011-12 Order Dated: 15th July, 2016

Basic Facts

The assessee is a public sector undertaking engaged in the business of generation and distribution of electricity. The AO had granted claim of additional depreciation. The Ld. CIT issued show cause notice seeking to revise the assessment framed u/s 143(3) of the Act on the grounds that the additional depreciation could be granted only with effect from AY 2013-14 as the assessee was engaged in the business of generation and distribution of electricity pursuant to the amendment brought in by the Finance Act 2012 in section 32(1) (iia) of the Act. The assessee submitted that Sec. 32(1) (iia) has come in force with effect from 01.04.2005 and its activity of generation of power amounted to production of an article or thing. The Ld. CIT stated that there was no enquiry conducted by the AO with regard to allowability of additional depreciation which had made the order erroneous and prejudicial to the interest of the revenue and accordingly passed an order u/s 263 of the Act. Aggrieved, the assessee filed an appeal before the ITAT.

Issue

Whether generation of electricity amounted to manufacture of an article or thing? Whether assessee who had set up hydel power and thermal power plants would be entitled to additional depreciation?

Held

The Hon'ble ITAT held thatfor the purpose of manufacture, an element of transformation is a pre-requisite. Herein, the transformation from mere coal to electricity and from mere water to electricity happens pursuant to the manufacturing process and the electricity so produced or generated becomes a separate marketable commodity. The Hon'ble ITAT relying on the co-ordinate bench decision of this tribunal in the case of ACIT vs Ankit Metal & Power Ltd in ITA No. 517/Kol/2012 for AY 2008-09, held that the assessee is entitled for claiming additional depreciation u/s 32(1)(iia) of the Act even prior to the amendment brought in by Finance Act 2012. The ITAT further held that the AO had adjudicated this issue on a right footing in so far as he has followed the judicial discipline in following the various decisions of the Hon'ble Apex Court, High Court, and Tribunal and allowed the claim of additional depreciation to the assessee. Hence passing an assessment order by following the various judicial decisions would not in any manner make the assessment order erroneous. The ITAT further held that the CIT erred in concluding that lack of enquiry with regard to allowability of additional depreciation on the part of the AO without giving the assessee opportunity of being heard. Resultantly, the Hon'ble ITAT quashed the order passed by the CIT u/s 263 of the Act and allowed the assessee's appeal.

37 DCIT (TDS) Vs. Laqshya Media Pvt. Ltd. [2016] 160 ITD 35 (Mumbai) Assessment Year: 2010-11 Order Dated: 27th May, 2016

Basic Facts

The assessee company is engaged in providing outdoor media advertising services to leading Indian and multinational brands.The AO issued notice under section 133(6) to the assessee and asked for information on various expenses incurred by it and the TDS deducted thereon. From the details furnished by the assessee the AO noted that, the TDS has not been deducted on certain payments. He treated the assessee as 'assessee-in-default' for alleged failure to deduct taxes on the payment of "Processing Fee" paid to nationalized banks for obtaining loans. The Ld. CIT(A) held the issue in the favour of assessee.

Issue

Whether loan processing fee paid to bank would be liable to section 194A TDS?

Held

The Hon'ble ITAT held that"loan processing fee" is charged by the banks for processing the application when a borrower approached the bank for a loan. Such a service fee or charge has been included in the definition of "interest", as given in section 2(28A), therefore, it cannot be reckoned as payment for rendering of any managerial services by the bank, as held by the AO. Despite being a payment falling within the ambit of "interest" under section 2(28), the TDS provisions under section 194A are not applicable, because it falls within the exclusionary provisions as laid down in sub-section (3) of section 194A, specifically sub clause (iii)(a) which envisages that, the income credited or paid to any banking company to which Banking Regulation Act, 1949 applies, the provision of section 194A(1) will not apply.Accordingly, the finding of the CIT(A) deciding in favour that the payment of processing fee does not require deducting of TDS is upheld and revenue's ground on this score is dismissed.

37 Amul Research and Development Association Vs. ITO [2016] 73 Taxmann.com 175 (Ahmedabad) Assessment Year: 2010-11 Order Dated: 18th August, 2016

Basic Facts

The assessee was a registered society under section 12A. The main object of assessee was to provide for research, establishment and running of veterinary hospitals, laboratory services, artificial insemination centre and veterinary help to cattle for improving livestock health. During relevant year, assessee collected cess at rate of 12 paise per litre from milk producers members in lieu of providing them research, animal nursery, fertility, vaccination and breed improvement facilities *etc*. The Assessing Officer took a view that aforesaid activity carried out by assessee was in the nature of trade, commerce or business including profit motive. He thus invoked proviso to section 2(15) and denied exemption of income claimed by assessee under section 11(1). The CIT(A) confirmed the addition made by the AO.

Issue

Whether term 'medical relief' as mentioned in section 2(15) includes aforesaid relief made available by assessee to milch animals in lieu of a nominal cess at rate of 12 paise per litre?

Whether, therefore, assessee could not be regarded as an entity advancing any other object of general public utility covered by proviso to section 2(15)?

Held

There is no dispute that the assessee is not in any way involved in a trade, commerce or business. Hence, the provisions of Section 2(15) have wrongly been resorted to as the assessee neither carries out any activity in the nature of trade, commerce business nor renders any service in relation to the same whilst collecting the impugned cess @ 12 paisa per liter from milk producers in lieu of making them avail the above stated facilities.

The tribunal further adjudicated on the point whether the activity constitutes 'medical relief' u/s 2(15), or any other object of general public utility since the as per revenue medical relief was restricted to application in case of humans only and not to animals.The Tribunal referred to corresponding provisions and their interpretation contained in the Constitution of India. Article 265 stipulates non-imposition of taxes except by authority of law. Chapter IV contains Directives Principles of State Policy with a clear stipulation in Article 37 that provisions in this chapter would not be enforceable by the court, but the principles therein are nevertheless fundamental in the governance of the country and it shall be duty of the State to apply these principles while making laws. This is followed by Articles 48 and 48A. Former one enjoins an obligation on the State for making endeavor to organize agricultural and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds and prohibiting the slaughter of cows and calves and other milch and drought cattle. Latter article further specifies State's efforts to protect and improve the environment and safeguard the forest and wild life of the country. In Tribunal's view the activities of

the assessee squarely comes within the four corners of the article 48 of the Act amounting to taking steps for preserving and improving the breeds of cows and calves and other milching animals. As perthe tribunal this Act gives rise to a safe inference that the State makes all its laws keeping in mind these Directive Principles contained in Chapter IV hereinabove including those under Article 265. The Tribunal further noticed that similar provisions are also there in chapter IV (A) incorporating fundamental duties of every Indian citizen Article 51(*g*) inter alia prescribes to have compassion for living creatures. The Tribunal deemed it appropriate to opine that in their view all these constitutional provisions that the same hold good for interpretation of the Income Tax as well since neither the Constitution nor the Act contains any specific distinction between living beings for the purpose of providing medical relief to humans or animals.In view of the aforementioned Constitutional provisions the tribunal concluded that 'medical relief' in section 2(15) very much includes the above relief made available by the assesse to the milch animals.

38 Rolls Royce Industrial Power (India) Ltd. Vs. DDIT [2016] 73 Taxmann.com 37 (Delhi)
Assessment Year: 2006-07 Order Dated: 11th August, 2016

Basic Facts

The assessee is a company incorporated under the laws of United Kingdom and is one of the group companies of Rolls Royce Group. The principle activities of the assessee are relating to Erection, Commissioning, Supervision, Installation and Operations & Maintenance of huge power plants and other projects. The style of functioning of the assessee is that it negotiates an agreement and thereafter to execute the same sets project offices. Later on, the case was reopened by issuing the notice u/s. 148 of the Act. Thereafter, the AO referred the matter to the TPO u/s. 92CA of the Act for determination of Arm's Length Price in respect of the activities of the Liaison Offices (LO) of the assessee. The AO held that the LO's of the assessee are PE within the meaning of Article 5 of DTAA. The AO therefore subjected to tax the gross receipts from works contract@ 30% by invoking section 44D read with section 115A of the Income Tax Act. Aggrieved, the assessee was in appeal.

Issue

Whether, taxing of a non-resident UK company in a manner which was more burdensome vis-à-vis an Indian company would lead to discrimination as per article 26 of DTAA between India and U.K.

Held

Article 26 of the India-UK Treaty provides that the taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on the enterprises of that other State on the same activities in the same circumstances or under the same conditions. In view of the above provision taxing of a non- resident U.K. company in a manner which is more burdensome vis-à-vis an Indian company would lead to discrimination. This would also amount to unfavourable treatment being meted out to a U.K. company vis-à-vis the Indian company doing identical business in India. Accordingly the assessee is entitled to protection of Article 26 of the Indo-UK Treaty and should not have been subjected to tax on gross basis, but on net basis. The net profit must be determined in accordance with the Indian Income Tax Act provisions for determining profits and gains of business from sections 28 to 43 -B of the Income Tax Act i.e. limits laid down in the domestic law of allowance of expenditure must be taken into account. In tribunal's view that was the purport of Article 7(5) read with Article 26 of the DTAA between India and UK.

39 Cummins Inc. vs ACIT73 taxmann.com 207 (Pune - Trib.)
Assessment Year: 2005-06 Order Dated: July 29, 2016

Basic Facts

The assesse, a foreign company, had entered into the transactions with its associate enterprises in India for providing user rights in software and provision of related support services.The value of the services were

determined by allocating cost based on cost estimates. However, the TPO adopted the actual cost incurred by the assessee in order to determine the adjustment, if any, to be made on account of international transactions. The variation over cost allocation estimate was 3.8%, which was less than 5% as provided under section 92C of the Act. Also assessee raised a plea that cost allocation based on cost estimates was an accepted method for the purpose of determining the arm's length price and if the actual cost allocation resulted in any erosion of overall base of India, then no adjustment was required to be made to the value of international transaction. The CIT(A) confirmed the order of the AO.

Issue

Whether where assessee, a foreign company, was recipient of income, then charging of higher amounts from Indian entities, would result in reduction of overall tax base of India, and, in such circumstances, could the transfer pricing provisions be applied?

Held

The ITAT considered that if assesse had charged higher amounts from Indian entities, same would result in reduction of overall tax base of India. In such circumstances, the Indian Transfer Pricing provisions are not to be applied. The DRP in assessment year 2007-08 and the Assessing Officer in assessment year 2009-10 has not made any adjustment in the hands of assessee on account of internet mail service charges and desktop/laptop service charges though identical international transactions were carried out in the later years also. So in totality the ITAT held that the TP provisions could not be applied in the present case and the issue was in favour of the assesse.

40 Nanubhai Keshavlal Chokshi HUF V ITO 73 Taxmann.com 113 (Ahd)(SMC) Assessment Year 2008-09, Order dated 1st August 2016

Basic Facts

The assessees had shown income from long-term capital gain from sale of property. The assessees claimed deduction of certain amount paid to their brothers for vacating the house as expenditure incurred for improvement of asset.

The AO declined the claimed deduction on the ground that the assessees were the sole occupant of their property and the assessee's brothers were neither living in capacity of a tenant nor were paying any rent. On appeal, the CIT (A) affirmed the findings of the AO. The assessee is in further appeal.

Issue

Whether the assessee is entitled for deduction of the amounts paid by him to his brothers for getting the premises vacated while computing the capital gains on sale of house-property.

Held

The assessees' brothers were residing in the house owned by them and while selling the house in order to get vacant possession, certain payment was made to them. As far as payment part is concerned, there is no dispute. The payment was made through account payee cheques. Both brothers have confirmed receipt of money. They had also filed affidavit to this effect. Their statement was also recorded. They were residing in the house, but not making payment of any rent. As per the Tribunal the revenue authority had approached the controversy in strictly mechanical way, whereas the situation was required to be appreciated, keeping in mind social circumstances and the relationship of the brothers. If both the brothers, who were residing in the house had refused to vacate the house, then, the assessee would have had to file a suit for possession which would have consumed time in our judicial process of at least more than ten to fifteen years. The prospective buyers may not be available in such circumstances. The brothers were candid in their statement that they were residing in these houses along with their brothers. The brother though had not been paying any rent, but one of them was paying electricity bills. It could be said that the payment was made for improvement of title of the property and hence was entitled to claim deduction of cost of payment.

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Unreported Judgements

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In this issue we are giving gist of a decision by SMC Bench of Ahmedabad Tribunal in the case of Dharamshibhai Sonani, wherein the Hon'ble Tribunal has held that amendments made to section 50C by way of insertion of two provisos w.e.f. 1/4/2017 are to be considered as retrospective and benefit can be given to the assessee where there is time lag between agreement to sell and the execution of final sale deed.

We hope the readers would find the same useful as many a times in the real life situation it happens that agreement to sell is executed in the earlier year and final sale deed is executed after considerable time either because of litigation or otherwise due to which the value of property has gone up and the Assessing Officer by invoking provision of section 50C levies tax on higher value of deemed consideration because of higher valuation by the stamp authorities on the date of execution of final deed.

In the Income Tax Appellate Tribunal
Ahmedabad SMC Bench, Ahmedabad

[Coram :Pramod Kumar AM]

I.T.A. No. 1237/Ahd/2013
Assessment Year : 2008-09

Dharamshi bhai Sonani
22,Kamalpark Row House 4
Kapodara, Varachha Road
Surat-395 006
[PAN : BAOPS 8772 A] ……Appellant

Vs.

Asstt. Commissioner of Income Tax
Circle-9, Surat ……Respondent

Appearances by :

Manoj N. Makhania, for the appellant
Satish Solanki, for the respondent

Date of pronouncing the order : 30.09.2016

Gist Only

Facts :

1. During the course of reopened assessment proceedings, the Assessing Officer took note of fact that the assessee, alongwith a co-owner, had sold certain land at Village Behstan, Surat, on 24/4/2007 at stated consideration of Rs.45,00,000/- whereas on that day, according to the stamp duty valuation authority, this land was valued at Rs.76,21,800/-. It was in its backdrop that the Assessing Officer sought to add Rs.15,60,900/-to the value of sale consideration, for the purpose of computing capital gains, received by the assessee. It was explained by the assessee that though a registered "agreement to sell" was executed on 29/6/2005, the sale deed of land could finally be executed only on 24/4/2007 since the land was agricultural land, since the buyer was a private limited company, which could have purchased only non-agricultural land, and since land was required to be converted into non-agricultural land before execution of sale deed. The stamp duty valuation as on 24/4/2007 was therefore, according to the assessee, not relevant for ascertaining whether the sale consideration was suppressed which is what is relevant for the purpose of section 50C. This explanation was, however, rejected. What, according to the Assessing Officer, was relevant was the date of which sale deed is executed. The Assessing Officer proceeded to adopt sale consideration, under section 50C, at stamp duty valuation rate. Aggrieved, assessee carried the matter in appeal before the learned CIT (A) but without any success.

Held :

2. The Hon'ble Tribunal being seized of the above controversy explained the rationale of

introduction of provision to section 50C by Finance Act, 2016 in the following words:

"(4) …….. Section 50C(1) provides that, "where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government (hereafter in this section referred to as the "stamp valuation authority") for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall, for the purposes of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer". The trouble, however, is that while the sale consideration is fixed at the point of time when agreement to sell is entered into, there is sometimes considerable gap in parties agreeing to a transaction (i.e. agreement to sell) and the actual execution of the transaction (i.e. sale deed), and yet, it is the value as on the date of execution of sale deed which is recognized by section 50C for the purpose of computing the capital gain because that is what is relevant for the purpose of computing stamp duty for registration of sale deed. The very comparison between the value as per sale deed and the value as per stamp duty valuation, accordingly, ceases to be devoid of a rational basis because these two values represent the values at two different points of time. In a situation in which there is significant difference between the point of time when agreement to sell is executed and when the sale deed is executed, therefore, should ideally be between the sale consideration as per registered sale deed, which is fixed by way of the agreement to sell, vis-à-vis the stamp duty valuation as at the point of time when agreement to sell, whereby sale consideration was in fact fixed, because, if at all any suppression of sale consideration should be assumed, it should be on the basis of stamp duty valuation as at the point of time when the sale consideration was fixed. ……"

"(5) ……..So far as section 50C is concerned, the Finance Act 2016, with effect from 1st April 2017, inserted the following provisos to section 50C:

***Provided** that where the date of the agreement fixing the amount of consideration and the date of registration for the transfer of the capital asset are not the same, the value adopted or assessed or assessable by the stamp valuation authority on the date of agreement may be taken for the purposes of computing full value of consideration for such transfer.*

***Provided further** that the first proviso shall apply only in a case where the amount of consideration, or a part thereof, has been received by way of an account payee cheque or account payee bank draft or by use of electronic clearing system through a bank account, on or before the date of the agreement for transfer".*

[6] This amendment was explained, in the Memorandum Explaining the Provisions of Finance Bill 2016, as follows:

Rationalization of section 50C in case sale consideration is fixed under agreement executed prior to the date of registration of immovable property.

Under the existing provisions contained in section 50C, in case of transfer of a capital asset being land or building on both, the value adopted or assessed by the stamp valuation authority for the purpose of payment of stamp duty shall be taken as the full value of consideration for the purposes of computation of capital gain.

The Income Tax Simplification Committee (Easwar Committee) has in its first report, pointed out that this provision does not provide any relief where the seller has entered into an agreement to sell the property much before the actual date of transfer of the immovable property and the sale consideration is fixed in such agreement, whereas similar provision exists in section 43CA of the Act i.e. when an immovable property is sold as a stock-in-trade. It is proposed to amend the provisions of section 50C so as to provide that where the date of the agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, the stamp duty value on the date of the agreement may be taken for the purposes of computing the full value of consideration. It is further proposed to provide that this provision shall apply only in a case where the amount of consideration referred to therein, or a part thereof, has been paid by way of an account payee cheque or account payee bank draft or use of electronic clearing system through a bank account, on or before the date of the agreement for the transfer of such immovable property. These amendments are proposed to be made effective from the 1st day of April, 2017 and shall accordingly apply in relation to assessment year 2017-18 and subsequent years.

[7]while the Government has thus recognized the genuine and intended hardship in the cases in which the date of agreement to sell is prior to the date of sale, and introduced welcome amendments to the statue to take the remedial measures, this brings no relief to the assessee before me as the amendment is introduced only with prospective effect from 1st April 2017. There cannot be any dispute that this amendment in the scheme of section 50C has been made to remove an incongruity, resulting in undue hardship to the assessee, as is evident from the observation in Easwar Committee report to the effect that ***"The*** *(then prevailing)* ***provisions of section 50C do not provide any relief where the seller has entered into an agreement to sell the asset much before the actual date of transfer of the immovable property and the sale consideration has been fixed in such agreement"*** *recognizing the incongruity that the date agreement of sell has been ignored in the statute even though it was crucial as it was at this point of time that the sale consideration is finalized. The incongruity in the statute was glaring and undue hardship not in dispute. Once it is not in dispute that a statutory amendment is being made to remove an undue hardship to the assessee or to remove an apparent incongruity, such an amendment has to be treated as effective from the date on which the law, containing such an undue hardship of incongruity, was introduced.……".*

3. The Hon'ble Tribunal also relied on the decisions of CIT v/s Ansal Landmark Township Pvt. Ltd. 377 ITR 635 (Del.) and also CIT v/s Alom Extrusion Ltd. 319 ITR 306 (SC) to ultimately hold the view that when legislature has introduced some amendments to remove hardship to the assessee, the same should be considered as retrospective and ultimately held as under :

"(9)So far as the amendment to section 50C being retrospective in effect is concerned, there is no doubt about the legal position. I hold the proviso to section 50C being effective from 1st April 2003. This is precisely what the learned counsel has prayed for. In his detailed written submissions, he has made out of a strong case for the amendment to section 50C

contd. to page 469

Controversies

CA. Kaushik D. Shah
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Issue

When depreciable asset forming part of block of asset is sold and new depreciable asset of the same block is acquired at the Fag end of the financial year and is not put to use whether such asset is includable in the block of asset for the purpose of sec 50.

Whether such new asset will be entitled to depreciation on the ground that such asset is ready for use?

Proposition

Wherever any depreciable asset is purchased during the year, it is not necessary that the new asset should be put to use for such asset to be included in the block of asset for the purpose of Sec 50. It is proposed that there will not be any liability of short term capital gain under section 50 as the new asset goes into the block of asset though the same is not used before the end of the financial year.

It is further proposed that in case of existing business, when a new asset is purchased, then for the purpose of depreciation allowance, if the asset is ready to use, then the claim of depreciation has to be allowed.

View against the proposition

Now, the question arises whether when asset is ready for use, depreciation will be allowed or not. It has been decided in the case of Sri Hanuman Sugar & Industries Ltd. v. CIT 266 ITR 106 (Cal.) that the depreciable asset has to be actually used for the purpose of claiming depreciation and thus it appears that if the asset is ready for use the condition of sec 32 as well as sec 50 is not satisfied and the short term capital gain liability will arises in this case.

It is important to refer to the following decision.

- In Ulka Advertising (P.) Ltd. v. Dy. CIT [2005] 94 ITD 282 (Mum.-trib.) the assessee acquired gas cylinders which were eligible for 100% depreciation in the year of acquisition itself. At the time of acquisition and claim of depreciation, the block asset concept of allowing depreciation was not in vogue. On subsequent sale after 3 years the assessee claimed that the gain is a long term capital gain since the cylinders do not form part of the block of assets at the beginning of the year, in which it was sold. The tribunal held that the definition of block of assets given in section 2(11) and the expression 'prescribed' appearing therein is to be construed not only to mean the rate of depreciation prescribed under the income tax rules but also the rate [prescribed under the substantive provisions of the Act [Proviso to section 32(1)(ii), then]. Accordingly, even if the asset is eligible for 100% depreciation in the year of acquisition or use, upon transfer, provisions of section 50 would apply.

- In M. Raghavan v. Asstt. CIT [2004] 266 ITR 145 (Mad.) the Madras High Court gave a decision favouring the revenue. The assessee, a senior advocate sold books whose written down value was reduced to 'nil' already in view of section 32(1) of the Act as it stood between 1-4-1984 and 1-4-1996. The assessee realized Rs. 1.25Lakhs. He paid Rs 15,500 as commission to the book seller and claimed the balance Rs. 1,09,500 as not liable to tax as the indexed cost of the asset was more than the sale proceeds. The court held that the objective of introducing sec 50 is to provide a different method of computing capital gains for depreciable assets. It disentitles the owners of

the depreciable assets from claiming the benefit of indexation. The value of depreciable assets comes down in the most cases over a period of time although the sale proceeds exceeds the cost of acquisition. If the indexing were to be allowed, it would mean the cost of acquisition as being very much higher than what it actually is to the assessee. If such boosted cost of acquisition is deducted from the amount realized, it would result in negative figure enabling the assessee to claim capital loss. Clearly, it could not have been the intention of the legislature to give multiple benefits to assessee for transferring depreciable assets.

- Finally, it is submitted that if the asset is not used at all then with respect it cannot enter into the block and hence, the depreciation cannot be allowed as well as liability of tax u/s 50 will also arise.

View in favor of the Proposition

Useful reference can be made to the following judicial authorities in support of the propositions that if the asset is acquired though it is not used the same has to be included in the block of asset and hence, short term capital gain liability u/s 50 will not arise. Further when asset is ready to use depreciation has to be allowed.

Section 32 of the Income tax Act says that a depreciable asset owned by the assessee for the purpose of business is eligible for depreciation. The word 'used' will include both passive and active user of the asset. In CIT v. Dalmia Cement Ltd. [1945] 13 ITR 415 (Pat) it was held that the depreciation might be allowed even when machinery was not in use or kept idle.

The Kerala High Court in CIT v. Geo Tech Construction Corporation (2000) 17 DTC 751 (Ker-HC): (2000) 244 ITR 452 (Ker.) discussed the active and passive user of the asset in respect of depreciable claim. There are certain assets which could be put to use only in certain instances. For example, fire extinguishing equipment will be put to use only to put off fire and only when a fire breaks out it will be put to use. However, depreciation will be available as soon as the equipment is ready for use by assessee. Hence, in the above case, the eligibility for depreciation cannot be denied merely on the surmise that the assessee might not have used the asset.

The opening WDV plus acquisition minus the sale value will be the closing WDV of the block and on this depreciation eligibility has to be looked into. Hence, there would be no short term capital gain because of the new asset acquisition despite the fact that it has not been put to use by the assessee. [Oceanic Investments Ltd. v. Asstt. CIT [1997] 57 TTJ (Bom-Trib) 549].

Summation

Sec 50 read as under:

1. Where the full value of consideration received or accruing as a result of the transfer of the asset together with the full value of such consideration received or accruing as a result of the transfer of any other capital asset falling within the block of assets during the previous year, exceeds the aggregate of the following amounts, namely-

   - Expenditure incurred wholly and exclusively in connection with such transfer or transfers;

   - The written down value of the block of assets at the beginning of the previous year;

   - The actual cost of any asset falling within the block of assets acquired during the previous year;

   Such excess shall be deemed to be capital gains arising from the transfer of short term capital assets;

2. Where any block of assets ceases to exist as such, for the reason that all the assets in that block are transferred during the previous year, the cost of acquisition of the block of assets

shall be the written down value of the block of assets at the beginning of the previous year, as increased by the actual cost of any asset falling within that block of assets acquired by the assessee during the previous year and the income received or accruing as a result of such transfer or transfers shall be deemed to be the capital gains arising from the transfer of short term capital assets.

Section 2(11) defines block of assets as a group of assets falling within a class of assets, being buildings, machinery, plant or furniture, in respect of which the same percentage of depreciation is prescribed. Sec 50 refers to a capital assets "forming part of a block of assets in respect of which depreciation has been allowed". This means that the asset which is sold and capital gains relating to which is the subject matter of computation must have been used in a business carried on by the assessee. The requirement of sec 50 (1)(iii) is that the addition to the block of assets must be in respect of an asset falling within that block of assets which means that it should be an asset of same class and bearing same depreciation rate. There is no explicit or express requirement that the new asset should be put to use in any business carried on by the assessee. Hence, it is not necessary that in respect of an addition to the block of assets, it must be put to use and hence no short term capital gain would arise. This view has been taken by the Mumbai Bench of ITAT in the case of Artic V.ACIT 64 TTJ 291.

Mumbai bench of ITAT in the case of Indogem v. ITO [2016] 72 taxmann.com 315 through its order dated 24th August,2016 held that the distinction between possession and occupation has to be kept in mind, which is relevant only for the purpose of determining the question of "use" with regard to claiming depreciation under section 32 of the act, but not for the purpose of acquisition contemplated in sec 50(1)(iii) of the Act dealing with the actual cost of any asset falling within the block of assets acquired during the previous year, and hence liability u/s 50 for short term capital gain will not arise.

In respect of second question i.e. whether if the asset is ready for use but not actually used whether depreciation will be allowed. In this regard it would like to refer to the decisions of Bombay High Court and Karnataka. The Bombay High Court while passing the decision in the case of Dineshkumar Gulabchand Agrawal v. CIT (2004) 267 ITR 769 (Bom), distinguished its earlier decision in case of Whittle Anderson Ltd. by holding that the said decision was rendered in the context of interpretation of the expression "use or used" and subsequent to the said decision there has been an amendment in sec 32 of the Act which provides for the word "used".

Further, the Karnataka High Court has also held that kept ready theory is not workable for depreciation benefit. The machinery and other assets must be actually used to claim depreciation U/s 32 [Dy CIT v. Yellamma Dasappan Hospital (2007) 159 taxmann 58 (Karn)].

In view of the above in my humble opinion when asset is acquired but is not actually used it is possible to claim that the same is includible in the block for the purpose of Sec 50 but depreciation U/s 32 may not be allowed.

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Judicial Analysis

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Demand arising from Protective Assessment Order cannot be coercively recovered.

LaljiHaridasv. ITO [1961] 43 ITR 387 (SC)

xxx…

We would, however, like to add one direction in fairness to the appellants. The proceedings taken against both the appellants should continue and should be dealt with expeditiously having regard to the fact that the matter is fairly old. In the proceedings taken against Lalji the Income-tax Officer should make an exhaustive enquiry and determine the question as to whether Lalji is liable to pay the tax on the income in question. All objections which Lalji may have to raise against his alleged liability would undoubtedly have to be considered in the said proceedings. Proceedings against Chhotalal may also be taken by the Income-tax Officer and continued and concluded, but until the proceedings against Lalji are finally determined no assessment order should be passed in the proceedings taken against Chhotalal. If in the proceedings taken against Lalji it is finally decided that it is Lalji who is responsible to pay tax for the income in question it may not become necessary to make any order against Chhotalal. If, however, in the said proceedings Laljiis not held to be liable to pay tax or it is found that Lalji is liable to pay tax along with Chhotalal it may become necessary to pass appropriate orders against Chhotalal. When we suggested to the learned counsel that we propose to make an order on these lines they all agreed that this would be a fair and reasonable order to make in the present proceedings.

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P.K. Trading Co. v. ITO [1970] 78 ITR 427 (CAL.)

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On behalf of the petitioner it was submitted that the assessment in respect of the years 1962-63 and 1963-64 were made on the petitioner as a ' protective measure and the assessment orders show that the Income-tax Officer has not finally made up his mind. In any event, it being an admitted fact that neither in the assessments of Dunichand Sons & Co. nor in the individual assessments of the two husbands has it been held that the income derived by the petitioner-firm was the benami income of either the firm or the two husbands and as such the income was liable to be included in the total income of the firm or of the husbands, there is nothing to support the contention raised by the respondent No. 1 that the business of P.K. Trading Company, the petitioner, has been found to be a benami business of the said Jaidayal Rateria and Dewanchand Rateria and/or of the said Dunichand Sons & Co. It is further submitted that while protective assessment might be permissible, realisation of tax in such a case from both the assessee on whom protective assessment has been made and the assessee in whose total income, the income assessed under the protective assessment is intended to be included, is not permissible. This has been settled since the decision of this court in Jagannath Hanumanbux v. Income-tax Officer [1957] 31 ITR 603 (Cal.).

On the wording of section 226(3) itself it is clear that a garnishee order as contemplated in that sub-section can only be issued where any tax or penalty is due from a taxpayer on the persons from whom money is due or may become due to the said taxpayer. In this case the taxpayer is M/s. Dunichand Sons & Co. and merely by assuming that the business of the petitioner-firm is the benami business of the partners of M/s. Dunichand Sons & Co. no garnishee order contemplated by the above sub-section could be issued to the debtors of the petitioner-firm. The payment by the persons on whom such order of notice has been served to the Income-tax Officer would not legally effect a discharge of the liability of such person to the petitioner who is not the

taxpayer in respect of whose default the notices have been issued. A reference was made to the decision of a single judge of the Andhra Pradesh High Court in P. Rajeswaramma v. Income-tax Officer, Nellore [1960] 39 ITR 654 which was on section 46(5A) of the repealed Act. The learned judge held that the provisions of that sub-section were intended to apply only to an admitted liability. Where a person admitted by word or conduct that any money was due to the assessee or was held by him for or on account of the assessee, he became liable to pay it and might well be exposed to the penal provision which enabled the Income-tax Officer to take further proceedings for realisation of the amount. Where, however, the person on whom the notice was sent denied that any money was due from him, then the Income-tax Officer could not take any further proceedings under that sub-section though the denial might not be true. This decision was followed and similar observations were made by the Madras High Court in Mohamedaly Sarafaly & Co. v. Income-tax Officer, Central Circle III, Madras [1968] 68 ITR 128, in a case under section 226(3) of the present Act, namely, that the Income-tax Officer would be powerless to proceed under that section where the third party did not admit or denied that the debt was owing to the assessee as the officer could not sit in judgment over the denial and come to his own conclusion. It was, therefore, submitted that the respondent-Income-tax Officer has thoroughly misappreciated the provisions of section 226(3) in issuing the impugned notices and/or orders and they should, accordingly, be quashed.

Mr. D.K. Sen, learned counsel for the respondents, pointed out that the impugned notices were issued in pursuance of the findings made in the assessment orders of the petitioner-firm. The department has all along proceeded on the basis that the petitioner is a benamidar for Dunichand Sons & Co. and/or its partners. Mr.Sen submits that if this contention of the department is accepted then P.K. Trading Company and Dunichand Sons & Co. are the same person trading in two different names and the income-tax liability of Dunichand Sons & Co. would also be the liability of the petitioner-firm and as such the respondent-Income-tax Officer was justified in issuing the impugned notices and/or orders. It is further contended by Mr.Sen that if there is some basis or reason for the department's finding or conclusion that the two firms are really one and the same, this court would not go into the sufficiency of such reason. It is not necessary for me to consider the contention of the department as to whether the petitioner-firm is the benamidar of Messrs. Dunichand Sons & Co. or whether the two ladies were carrying on business in the benami of their husbands. In my opinion the words of section 226(3) are clear and a notice or order thereunder can only be issued in respect of the income-tax liability of a taxpayer to persons from whom money is due or may become due to the assessee or who may subsequently hold money for or on account of the assessee. In this case the taxpayer and/or the assessee is Dunichand Sons & Co. and any such notice can be issued only on a debtor of the taxpayer, namely, of Dunichand Sons &Co. By treating some other firm as the benamidar of the assessee-firm or of the partners of the assessee-firm the Income-tax Officer is not entitled to issue notices under section 226(3) on persons who might owe or hold money for and on behalf of the firm held to be the benamidar. The issue of the impugned notices do not seem to be justified by the provisions of section 226(3) and must, therefore, be quashed.

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Sunil Kumar v. CIT [1983] 139 ITR 880 (BOM)

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The main and important question that arises in this petition is as to what would be the effect of the protective assessments, particularly, when the income covered by those assessments has been finally included in the assessments of respondent No. 5. Mr.Deshpande, however, contended that such income had not yet been finally included in the assessments of respondent No. 5. We are, however, not able to accept this contention in as much as in para. 7 of the petition, the petitioner has made the following averments:

> "The petitioner further submits that only protective assessments were made against the firm, M/s. Ramkrishna Ramnath Sons, Kamptee, the income of which protective assessments have

been added duly every year to the income of M/s. Ramkrishna Ramnath, Kamptee, against whom regular assessments in respect of very same income have been made, completed and already finalised."

This particular averment has not been denied by the Department in their return. Similarly, the petitioner has made the following allegations in para. 17(b):

"The petitioner has already pointed out that the alleged amount of taxes sought to be recovered from the petitioner as the dues of the fourth respondent firm, M/s. Ramkrishna Ramnath Sons, could not be recovered for the reason that the very same income has already been the subject-matter of a regular assessment in the case of the fifth respondent firm, M/s. Ramkrishna Ramnath, which according to the Department was the real firm of which the fourth respondent firm was merely a benamidar. The petitioner has also pointed out that the assessments against respondent No. 5 have already been finalised and no proceedings challenging the said assessment are pending at any stage."

This averment is also not specifically denied. In view of this position, it will be very difficult for the respondents to contend that the assessment proceedings against respondent No. 5 are not finalised or that the income of respondent No. 4 has not been included in the assessment of respondent No. 5 on the basis that the said respondent No. 4 is a benamidar for respondent No 5.

It is true that the I.T. Act has not made any specific provision about the protective assessments or precautionary assessments. But this aspect has been considered by the Supreme Court in the case of Lalji Haridas v. ITO [1961] 43 ITR 387 . In that case, the two brothers, Lalji and Chhotalal, had submitted the return of their respective incomes. The Department felt that the income, shown to be that of Chhotalal, was actually the income of Lalji. The proceedings went on before the I.T. authorities and, ultimately, the matter reached the Supreme Court. The question arose as to what should be done in such a contingency and the Supreme Court has held as follows (p. 392):

"In cases where it appears to the income-tax authorities that certain income has been received during the relevant assessment year but it is not clear who has received that income and prima facie it appears that the income may have been received either by A or B or by both together, it would be open to the relevant income-tax authorities to determine the said question by taking appropriate proceedings both against A and B. That being so, we do not think that Mr.Nambiar would be justified in resisting the enquiry which is proposed to be held by respondent No. 1 in pursuance of the impugned notice issued by him against the appellant...

We would, however, like to add one direction in fairness to the appellants. The proceedings taken against both the appellants should continue and should be dealt with expeditiously having regard to the fact that the matter is fairly old. In the proceedings taken against Lalji, the Income-tax Officer should make an exhaustive enquiry and determine the question as to whether Lalji is liable to pay the tax on the income in question. All objections which Lalji may have to raise against his alleged liability would undoubtedly have to be considered in the said proceedings. Proceedings against Chhotalal may also be taken by the Income-tax Officer and continued and concluded, but until the proceedings against Lalji are finally determined no assessment order should be passed in the proceedings taken against Chhotalal. If in the proceedings taken against Lalji it is finally decided that it is Lalji who is responsible to pay tax for the income in question it may not become necessary to make any order against Chhotalal."

Thus in taxation proceedings a question would arise as to whether an income said to have been earned by B is really earned by him or it is an income of A. The I.T. Department has to make an assessment within the prescribed period of limitation and, hence, it would not delay long the making of an assessment on B. Simply because the enquiry as to whether the income of B should be treated to be that of A is pending, there could not be an assessment of the said income on both A and B. The very purpose of such an enquiry would

be to assess the income of B separately or to include it in the income of A. But if the proceeding is held only against A, it may still be possible that after necessary enquiry the concerned authority may come to a conclusion that the income of B should not be clubbed with the income of A and by the time this finding is given, the limitation for making the assessment against B would already be over. In such a contingency the income shown to have been earned by B will go untaxed. To avoid such a contingency a protective assessment is to be made even against B. But the recovery on the basis of such protective assessment would depend upon the ultimate decision as to whether the income shown to have been earned by B belonged to A. If the finding is in the affirmative, the protective assessment will cease to be operative as the income covered by that assessment would be included in the income of A.

It was contended on behalf of the respondents that the fact that only protective assessments were issued against respondent No. 4, would not come in the way of the Department to make a recovery of the tax on the basis of such assessment. In our opinion, such recovery would be permissible only if ultimately the income of respondent No. 4, is found to be its own separate income and not the income as a benamidar of respondent No. 5. We have already observed that the assessment proceedings against respondent No. 5 have been completed and in those proceedings the income of respondent No. 4, has been included as the income of respondent No. 5. Thus, that income has already been taxed as the income of respondent No. 5. We are not able to accept the contention of the Department that in spite of this position the protective assessments that were made against respondent No. 4 would still remain operative, so as to enable the Department to proceed to recover the tax levied by those assessments.

In view of the above position, it is clear that the petitioner who was admitted to the benefits of respondent No. 4 firm would not be liable to pay any tax on the basis of the protective assessments made against that firm. In fact, those assessments have become a nullity on account of the final finding that the said respondent No. 4 firm was a benamidar of respondent No. 5 firm. Not only that, but the income of that benamidar firm has been included in the income of respondent No. 5 while assessing this latter firm. Under these circumstances, we are of the opinion that the recovery proceedings on the basis of the protective assessments are not tenable.

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Jagannath Bawri v. CIT [1998] 234 ITR 464 (GAU.)

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As regards the contention of Ms. Hazarika, learned counsel for the petitioners about income-tax returns, on perusal of annexure-A series it can only be said that those documents are only intimation which is sent to the assessee specifying the sum so payable under section 143(1)(a). At any rate, the assessments made are only protective assessments. Under the law it is open to the Department to make assessments on two persons in respect of the same income, where there is some ambiguity as to the liability to charge. Such assessments are made to protect the interest of the Revenue so much so, unless such protective or alternate assessment is made, assessment proceedings against the party finally found to be liable may become barred by time. It has now become an established practice that in the case of doubt as to the person who will be and deemed to be in receipt of the income, it is open to the Department to make protective or alternative assessment. In Lalji Haridas v. ITO [1961] 43 ITR 387, the Supreme Court observed at page 392 as follows:

> "In cases where it appears to the income-tax authorities that certain income has been received during the relevant assessment year but it is not clear who has received that income and prima facie it appears that the income may have been received either by A or by B or by both together, it would be open to the relevant income-tax authorities to determine the said question by taking appropriate proceedings both against A and B."

It may however be added that while a protective assessment is permissible, a protective recovery is not.

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Applicability of Transfer Pricing on Marketing Intangibles - Part 1

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1. Introduction

In recent years, the Indian Revenue Authority('IRA') has been in continuous spotlight for taking aggressive positions in the audit proceedings particularly with respect to Transfer Pricing ('TP') matters. The key focus of the IRA has been on the most contentious issue of Advertisement Marketing and Sales Promotion ('AMP') expenditure incurred by Indian affiliates of the Multinational Enterprises ('MNEs'), operating as a manufacturer and/ or distributor.

Given the magnitude and importance of the issue, we have provided our detailed analysis in two articles, brief details of the same is as under:

1. Overview of AMP issue and Analysis of Special Bench and High Court ruling
2. India update post High Court ruling and Global update ie BEPS and UN TP Manual

The current article covers our analysis described in point 1 above.

2. Background

The IRA has been claiming that by incurring of "excessive" AMP expenditure compared to its comparables, the Indian affiliate have created a marketing intangible for its foreign parent/ Associated Enterprise ('AE') which legally owns the brand and for which it was required to compensate the Indian affiliate for such brand building services along with an arm's length mark-up.

Distinctly, the said issue has been taken up aggressively by the IRA resulting in large amount of TP adjustments in the hands of MNEs which adversely affected the investment sentiment in India.Having regard to the considerable importance of the issue, the Special Bench had been constituted in 2013 which had delivered its ruling, deciding the issue in favour ofRevenue.

Being aggrieved by the Tribunal rulings which were on the similar lines of the Special Bench rulings, a group of litigants/ taxpayers, with a lead case being that of *Sony Ericsson Mobile Communications India Pvt. Ltd [TS-96-High Court-2015 (Delhi)-TP].*, had filed an appeal before the Delhi High Court. The Delhi High Court on pronounced the landmark verdict in March 2015 on the most vexed issue of AMP expenditure, setting up clear directions on principles on which adjustment could be made, which has been discussed in detail as under:

3. Ruling of the Delhi High Court

The Delhi High Court, in its landmark verdict, has addressed the controversies surrounding the TP adjustment on marketing intangible i.e. AMP expenses, arising out of the ruling of the Special Bench in the case of LG Electronics India Pvt. Ltd ('LG India'), and answered several vexed questions related to TP of Marketing Intangible. It is pertinent to note that even though LG India was not the subject matter of challenge before the High Court, the High Court in its ruling has extensively referred to the case to indicate points on which it concurs with the Special Bench and on which it disagrees.

Before discussing ruling of the High Court, for reader's understanding we have given below an overview of AMP issue along with summary

of Special Bench ruling i.e. the article has been divided as under:

1) ***Background of AMP issue***

2) ***Summary of Special Bench ruling***

3) ***Overview of case before the High Court;***

4) ***Analysis of High Court ruling***

3.1. Background of AMP issue

A. Corporate tax audit proceedings

In past, the IRA in the course of corporate tax audit proceedings while dealing with deductibility of 'marketing spend', had disallowed certain percentage of AMP expenses on the ground that a portion of such expenditure benefits the brand owner and hence, such portion does not relate to business of the Indian affiliates.

However, above adjustment has been struck down by the courts in cases of Nestle India, Star India, Sony India and Adidas India Marketing on the ground that the expenses incurred by the taxpayers were solely for the benefit of its business and benefits derived by the foreign affiliates if any, were merely incidental and hence, such expenses are fully deductible.

B. Transfer pricing audit proceedings

This issue had been first considered by the IRA few years ago in TP assessment proceeding of some of the Indian affiliates of MNEs.The IRA had held that the AMP incurred by Indian affiliates are excessive and such excessive expenses results in creation/ enhancement of Marketing Intangibles which are owned by foreign MNEs. In such cases, the IRA applying the Bright Line Test ('BLT') held that such excess AMP expenditure compared to comparable companies should be reimbursed to Indian affiliate by overseas AEs owning such intangibles. Further, the IRA had also applied an ad hoc percentage of mark-up (in the range of 10% - 12%) to such excess expenditure to be recovered from overseas AEs for rendering services.

The IRA had not considered/ given due cognizance to the fact that the Indian affiliates have incurred AMP spend to boost up their sales and profit, and proceeded with their preconceived notion that such excess AMP expenditure results in creation/ enhancement of Marketing Intangibles with respect to the brands legally owned by the MNEs. Pursuant to which the IRA had contended that non-routine marketing efforts of a subsidiary of the MNEs should be categorized as "service " rendered to their AE and accordingly, it should be compensated for the same along with an arm's length mark-up. This focus has intensified and has resulted in severe adjustments in case of several Indian affiliates of MNEs in recently concluded transfer pricing audit proceedings.

3.2. Summary of Special Bench Ruling

Considering growing importance of AMP issue in enormous taxpayers and to examine the sanctity of action of the IRA, a Special Bench of the Delhi Tribunal had been constituted in the case of LG India to examine the highly vexed issue pertaining to TP adjustment AMP expenditure.

The Special Bench, vide its order dated January 23, 2013, in a majority decision[1], largely ruled in favor of the IRA, a summary of key observations of the Special Benchis as under:

Issue	Key Observation of the Special Bench
Transaction And International Transaction	Given the fact that the Taxpayer promoted its products and brand owned by the foreign AE coupled with excessive AMP expenditure implied an agreement between the Taxpayer and its AE.Accordingly, in the case of Taxpayer, incurring AMP expenses towards brand legally owned by the foreign AE constituted an 'international transaction' subject to TP provisions and was in the nature of provision of service.
Bundled Approach for bench marking purpose	The Special Bench held that since the transactions of purchase of goods from foreign AE and provision of brand building services were not closely linked, the same could not be bundled for benchmarking purpose under the Transactional Net Margin Method (TNMM).
Bright Line Test (BLT)	The Special Bench held that BLT is not a method to determine arms' length price ('ALP') but a mechanism to determine cost/ value of transaction related to ALP. However, the Special Bench has rejected Transfer Pricing Officer's ('TPO') choice of comparables for applying the BLT and further listed down various factors that need to be considered while determining the presence of a transaction and quantification of the same.
Expenses to be excluded from AMP	The Special Bench held that expenses incurred *'in connection with sales'* do not lead to brand promotion and hence cannot be brought within the ambit of AMP expense.
Arm's Length Mark-up to be charged	The Special Bench also upheld that since the transaction was in the nature of services and hence markup needs to be applied on the same.However, it rejected mark-up considered by the Dispute Resolution Panel ('DRP') and directed the TPO to determine the quantum of mark-up based on the mark-up that would be charged by a third party for provision of similar services.

3.3. Overview of case before the High Court

Being aggrieved by the Tribunal rulings which were on the similar lines of the Special Bench rulings, a group of litigants/ taxpayers, with a lead case being that of *Sony Ericsson Mobile Communications India Pvt. Ltd.*, had filed an appeal before the Delhi High Court. Summarized below is a background of the case and question of law involved before the High Court:

A. Background of case

- The litigants are engaged in import, distribution and marketing of products manufactured by their foreign AEs under their brands and further the marketing intangible were owned and controlled by the foreign AE.
- The litigants had benchmarked their international transactions of import of finished goods for resale, by adopting TNMM with profit level indicator ("PLI") of operating profit / total cost ratio, or Resale Price Method ("RPM") with PLI of gross profit/ sales.
- The TPO considered that incurrence of substantial AMP expenses by the taxpayers, in relation to the marketing intangibles owned by the foreign AE, were in the nature of services for creation or improvement of marketing intangibles and, therefore, the same

have been for the benefit of respective foreign AEs. Thus, the TPO concluded that the taxpayers should have been compensated by the foreign AEs, at arm's length.

- The litigants have filed an appeal before the DRP as well as Tribunals wherein the Tribunal have in principal followed the path of Special Bench and directed the TPO to give effect to the same.
- Aggrieved, the taxpayers as well as the Revenue filed appeals under section 260A of the Income-tax Act, 1961 ("Act") before the High Court.

B. Question of law raised before the High Court

Following are the substantial questions of law raised by the litigants/ Revenue before the High Court:

- Whether TPO had jurisdiction to examine the AMP expenses when no specific reference was made to him by the Assessing Officer ("AO").
- Whether AMP expenses can be treated and categorized as an international transaction under section 92B of the Act.
- Whether TP adjustments can be made in respect of AMP expenses, and if so, under what circumstances.
- Whether the Tribunal was right in holding that TP adjustment in respect of AMP expenses should be computed by applying Cost Plus Method.
- Whether the Tribunal was right in directing that fresh benchmarking / comparability analysis should be undertaken by the TPO by applying parameters laid down in paragraph 17.4 of the Special Bench Ruling.
- Whether the Tribunal was right in distinguishing and directing that selling expenses, such as trade / volume discounts, rebates and commission, etc., cannot be included in AMP expenses.

3.4. Analysis of High CourtRuling

The Delhi High Court, in its landmark ruling, has accepted as well as rejected various ratios applied by the Special Bench in the case of LG India. Given below is a brief overview of the ruling along with detailed analysis:

In brief

The High Court while holding that AMP spend may be considered an international transaction,has concluded that the compensation for AMP expenses may be included or subsumed in the purchase price of goods imported from AEs or a lower charge for royalty.

The High Court has held that the arm's length nature of the arrangement may be tested by way of an aggregate or bundled analysis with other transactions relating to the distribution activity. If the IRA seeks to unbundle the transactions, they should elucidate its reasons for doing so. The High Court emphasized that transfer pricing is an income allocating exercise and should not result in over or double taxation.

The High Court also rejected the application of the so called "Bright Line Test" advanced by the IRA for determining whether the Taxpayer needs to be compensated for its promotional efforts.

The High Court has restored the matters back to the Appellate Tribunal for a final determination taking into account the principles laid down by the Court.

In detailed

Given below is our detailed analysis of the key aspects dealt in by the High Court.

i. Jurisdiction of the Transfer Pricing Officer

The High Court, in its ruling, held that after the retrospective amendment inserted in the Finance Act, 2012, the Special Bench was correct in stating that the TPO was empowered to examine the ALP of the international transaction which came to his notice during the course of audit proceedings and that were not reported or furnished by the assessee in Form 3CEB. The High Court also held that no specific reference was required to be made to the Assessing officer for the same.

ii. AMP expenses treated as International Transaction

The High Court, in its ruling, has accepted the ratio of the Special Bench and held that the expenditure of AMP will be treated as an International Transaction and also held that the AMP expenditure towards promotion of brand constituted a transaction of Provision of services as per section 92B.

iii. Bundling of the transaction and Application of TNMM

The Taxpayer had argued that their operating margins were higher than those of comparables and while arriving at an operating margin of tested party, AMP expenditure has already been subsumed for. Accordingly, once the IRA had accepted the ALP of the reported international transactions, they cannot be allowed to segregate the AMP expenditure and benchmark the same separately. Further, the Taxpayers had also contended that the higher profitability earned by them meant that their AE supplied goods at lower prices to compensate Indian affiliates for their efforts towards advertising and marketing.

Findings of the High Court

i) Bundling of Transaction

The High Court held that as per section 92C(1) of the Act, a class of transaction can include a number of closely linked transactions and clubbing of such transactions for benchmarking purpose is permissible under the Indian TP regulations.

Since in the present case, distribution and marketing are intertwined and thereby may be examined as bundled/inter-connected transactions and thereby no segregation is required for bench marking purpose subject to the fact that functionally similar comparables are available. However, the High Court has also observed that in a case where a taxpayer is undertaking manufacturing, distribution and marketing, it may not be appropriate to combine and benchmark all three transactions together under TNMM. In such a scenario, the appropriate approach may be to bench mark manufacturing separately and distribution and marketing separately.

ii) Application of TNMM

The High Court also acknowledged the fact if the IRA accepts and adopts TNMM as the most appropriate method and choses to treat the AMP expenditure separately and not as a bundled transaction, it would lead to incorrect results due to the reason that while computing the margins under the TNMM, the treatment of AMP expenditure would already have been taken care of.

The High Court noted that under the TNMM analysis, once the comparables pass the functional analysistest and profit margin of the taxpayer is commensurate with that of arithmetic mean of comparables, it leads to an affirmation of the transfer price as the ALP and post which it is not permissible to make acomparison of a particular item of costs without segregation of profits as well. However, the High Court also noted that when suitable comparables are not available and/ or it is not possible to make suitable

adjustments, it would be advisable to adopt and apply other methods.

The High Court also stated that the set off in the case of aggregation or bundling of transactions is well accepted by the OECD guidelines and UN Transfer Pricing Manual, if the transactions are closely interlinked.

iv. Brand Building

The IRA had been bifurcating AMP expenditure into routine and non-routine expenditure and considering non-routine expenditure to be towards brand building for the AE for which the Taxpayer was required to be compensated.

Against which the Taxpayers had argued that the AMP expenditure have been incurred to enhance sales of Taxpayers only and thereby increase their profitability and not to improve the value of the brand and accordingly, they could not be asked to get compensation of the same from its AEs.

Findings of the High Court

The High Court ruled that value of a Brand reflects the reputation which the Brand owner has earned over a period of time and largely depends upon the nature and quality of goods and services sold or dealt with and thereby treating brand building as direct resultant of AMP expenditure would be largely incorrect. The High Court also acknowledged the fact the Taxpayers do not undertake advertisement with a purpose to increase the value of brand but to increase their sales and thereby earn higher profits.

The High Court, giving credence to the Taxpayer's argument that there was a benefit to the taxpayer from the increase in sales, provided substantial guidance in this landmark ruling on how the Taxpayer and IRA should approach the issue on marketing intangibles.

v. Bright Line Test

The BLT concept had been espoused by the US Tax Court in the case of *DHL Inc and Subsidiaries v Commissioner* (TCM 1998-461). Taking principles from the same, the IRA applied the BLT for determining the ALP of AMP expense, as the difference between AMP expenses to sales ratio of Taxpayer vis-à-vis AMP expenses to sales ratio of comparable companies.

The Taxpayer had contended that the BLT used by the IRA to determine the ALP of an international transaction was not one of the recognized methods under the Indian TP regulations and hence, need to be rejected.

The Special Benchhas held that the IRA had not used BLT to determine the ALP of the transaction but used it to determine the value/cost of the transaction as the Taxpayer had not provided any assistance in determining the value of the international transaction.

Findings of the High Court

The High Court, overturning the ruling of the Special Bench, rejected use of BLT as a way of identifying a cost/ value of an international transaction. The High Court noted that it is difficult to compartmentalize promotion of product or promotion of brand expenses and record them as separate from each other.

The High Court held that direction of the Special Bench of applying BLT on basis of parameters prescribed in paragraphs 17.4 and 17.6 of its ruling tantamount to prescribing a mandatory procedure which has not been stipulated under the Act or Rules. Given the fact that there was nothing in the Act or Rules to that effect, the High Court noted that AMP could not be subject to BLT and thereby the IRA

could not consider non-routine AMP expenditure as separate transaction.

Manifestly, the High Court, relying on the OECD TP Guidelines,held that when a subsidiary engaged in distribution and marketing activities incurs AMP expenses, the compensation may be in the form of lower purchase price, no or reduction in royalty or by way of direct compensation to ensure an adequate profit margin. Further, the High Court reiterated the observations of the Delhi tribunal in the case of BMW India Pvt. Ltd.wherein it has been held that net profit under the TNMM may be a sufficient proof of adequate compensation to the Taxpayer from the AE.

vi. Concept of Economic ownership

The Special Bench held that the Income Tax Law recognizes only legal ownership of intangibles and economic ownership exists only in a commercial sense and further held that in the instance of sale of brand by the AE, the Taxpayer would not be entitled to a share in the total consideration towards sale of brand by virtue of it being an economic owner.

Findings of the High Court

The High Court, contrary to the Special Bench ruling, has well appreciated that economic ownership of brand and marketing intangibles is important factor for determining the pricing mechanism of distributors, having long term distribution licenses. The High Court also ruled that the need for TP valuation to determine an exit charge would arise upon termination of the distribution-cum-marketing agreement or upon transfer of economic ownership to a third party.

4. Concluding Remarks

The Delhi High Court has pronounced a landmark ruling providing clarity on legal aspects related to Transfer Pricing treatment for Marketing Intangible and also laid down significant albeit broad principles of law to be applied to facts of each case.

The key principles emanating from the High Court ruling is that a related party that makes contribution i.e. incurs AMP expenses particularly to develop or enhance the value of intangible such as a trademark or a brand name owned by AE is entitled for arm's length compensation for such contribution. However, the High Court acknowledge the fact that such compensation may be in the form of lower purchase price, non or reduced payment of royalty or by way of direct payments to ensure adequate profit margin which will ensure proper payment of taxes and curtails avoidance or lower taxes of the Indian subsidiary.

The High Court has also clarified that TP regulation is an anti-avoidance regulation and thereby the IRA should take care that it must not end up in 'double taxation'. The High Court while acknowledging the fact the Act and Rules are supreme, reliance can be placed on international guidance ie OECD TP Guidelines, UN TP Manual and the ATO guidelines.

As mentioned above, update post the High Court ruling and analysis of BEPS Action Plans and UN TP Manual on the AMP issue is covered in our article part 2 to be published in next month.

(Footnotes)

[1] The Special Bench ruling is the view of two out of the three members of the bench. The Judicial Member (JM), who did not concur with the majority view, has issued a dissenting order.

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FEMA Updates

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22 Import Data Processing and Monitoring System (IDPMS)

In order to enhance ease of doing business and facilitate efficient data processing for payment of import transactions and effective monitoring thereof, Import Data Processing and Monitoring System (IDPMS) has been developed in consultation with the Customs authorities and other stakeholders.

Customs department has modified the Bill of Entry (BoE) format to display the AD Code of bank with effect from April 1, 2016 and SEZ from June 1, 2016 respectively.

The User Acceptance Test (UAT) of IDPMS was launched on August 19, 2016 and banks were requested to login and familiarise themselves.

The detailed operational procedures are available at Help Menu on EDPMS Portal under "Import process" tag.

A.P. (DIR Series) Circular No. 5, dated October 06, 2016

For Full Text refer to https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10633

23 Review of sectoral caps and simplification of Foreign Direct Investment (FDI) Policy

The Central Government had reviewed the extant FDI Policy on various sectors and has made amendments in the Consolidated FDI Policy, some of the salient features are as under:

a. In all sectors where there is a limit/cap on foreign investment, such limit/cap shall be reckoned in a composite manner.

b. "Total foreign investment" in an Indian company will be the sum total of direct and indirect foreign investments.

c. Portfolio investment up to aggregate foreign investment level of 49% or sectoral/statutory cap, whichever is lower, will not be subject to either Government approval or compliance with the sectoral conditions, as the case may be, provided such investment does not result in change in ownership leading to control of Indian entities

d. The onus of compliance with the sectoral/ statutory caps on foreign investment and attendant conditions, if any, shall be on the company receiving foreign investment.

e. A company shall be considered as owned by resident Indian citizens if more than 50% of the capital in it is beneficially owned by resident Indian citizens and/or Indian companies, which are ultimately owned and controlled by resident Indian citizens.

f. 'Control' shall include the right to appoint a majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreement or voting agreement.

g. Foreign investment in LLP is permitted under the automatic route if the LLP is engaged in sector where 100% FDI is allowed and there are no attendant FDI linked performance conditionalities to the sector.

h. Foreign investment by way of swap of shares has been permitted provided the resident company in which the investment is made is engaged in an automatic route sector, subject to conditions.

i. Investment by an NRI, including a company, a trust and a partnership firm incorporated outside India and owned and controlled by NRI, on non-repatriation basis under Schedule 4 of

notification ibid, will be deemed to be domestic investment at par with the investment made by residents.

j. Foreign investment up to 100 percent under the automatic route has been permitted in the plantation sector which includes tea plantations, coffee plantations, rubber plantations, cardamom plantations, palm oil tree plantations and olive oil tree plantations.

k. "Real estate business" shall mean dealing in land and immovable property with a view to earning profit therefrom and does not include development of townships, construction of residential / commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships. Further, earning of rent income on lease of the property, not amounting to transfer, will not amount to "real estate business".

l. Manufacturing has been given a precise definition and foreign investment up to 100% under the automatic route is permitted in manufacturing subject to the conditions of the FDI policy.

m. An entity engaged in single brand retail trading operating through brick and mortar stores, is permitted to undertake retail trading through e-commerce.

A.P. (DIR Series) Circular No. 6, dated October 20, 2016

For Full Text refer tohttps://rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10648

24 Investment by a Foreign Venture Capital Investor (FVCI) registered under SEBI (FVCI) Regulations, 2000

Investment in India by Foreign Venture Capital Investors (FVCI), registered with SEBI, is governed by the provisions of Schedule 6 of the Principal Regulations. In order to further liberalise and rationalise the investment regime for FVCIs and to give a fillip to foreign investment in the startups, the extant regulatory provisions have been reviewed.

As per the Amendment Notification referred to above, any FVCI which has obtained registration under the Securities and Exchange Board of India (FVCI) Regulations, 2000, will not require any approval from Reserve Bank of India and can invest in instruments and sectors mentioned in the circular.

A.P. (DIR Series) Circular No. 7, dated October 20, 2016

For Full Text refer to https://rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10649

25 Foreign investment in Other Financial Services

At present, paragraph F.8 of Annex B to Schedule 1 of the Principal Regulations permits foreign investment up to 100%, under the automatic route, in Non-Banking Finance Companies (NBFCs) engaged in the 18 activities listed therein. Such investment is subject to the conditions, including minimum capitalisation norms.

On a review, in consultation with the Government of India, it has been decided to allow foreign investment up to 100% under the automatic route in 'Other Financial Services'. Other Financial Services will include activities which are regulated by any financial sector regulator viz. Reserve Bank of India, Securities and Exchange Board of India, Insurance Regulatory and Development Authority, Pension Fund Regulatory and Development Authority, National Housing Bank or any other financial sector regulator as may be notified by the Government of India in this regard. Such foreign investment shall be subject to conditionalities, including minimum capitalisation norms, as specified by the concerned Regulator/ Government Agency.

A.P. (DIR Series) Circular No. 8, dated October 20, 2016

For Full Text refer to https://rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10650

26 External Commercial Borrowings (ECB) – Extension and conversion

Under the extant ECB guidelines, designated AD Category-I banks can approve requests from borrowers for changes in repayment schedule during the tenure of the ECB, subject to following conditions

Further, powers are also delegated to designated AD Category – I bank to approve cases of conversion of matured but unpaid ECB into equity subject to conditions.

A.P. (DIR Series) Circular No. 10, dated October 20, 2016

For Full Text refer to https://rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10652

27 Foreign Exchange Management (Manner of receipt and payment) Regulations, 2016

In consultation with the Government of India, the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2000; Foreign Exchange Management (Receipt from, and payment to, a person resident outside India) Regulations, 2000 and Foreign Exchange Management Notification (Transactions in Indian rupees with residents of Nepal or Bhutan) Regulations 2000, as amended from time to time have been repealed and superseded by the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2016 notified vide G.S.R. No.480 (E) dated May 03, 2016.

A.P. (DIR Series) Circular No. 11 [(1)/14(R)], dated October 20, 2016

For Full Text refer to https://rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10653

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contd. from page 452

being treated as retrospective and with effect from 1st April, 2003. The plea of the assessee is indeed well taken and deserves acceptance. What follows is this. The matter will now go back to the Assessing Officer. In case he finds that a registered agreement to sell, as claimed by the assessee, was actually executed on 29/6/2005 and the partial sale consideration was received through banking channels, the Assessing Officer, so far as computation of capital gains is concerned, will adopt stamp duty valuation, as on 29/6/2005, of the property sold as it existed at that point of time. In case the assessee is not content with this value being adopted under section 50C, he will be at liberty to seek the matter being referred to the DVO for valuation, again as on 29/6/2005, of the said property. As a corollary thereto, the subsequent developments in respect of the property sold (e.g. the conversion of use of land) are to be ignored. It is on this basis that the capital gains will be recomputed. With these directions, the matter stands restored to the file of the Assessing Officer for adjudication de novo, after giving an opportunity of hearing to the assessee and by way of a speaking order. I order so."

4. Before parting with the decision, the Hon'ble Tribunal also pondered over the idea as to whether the amendments made to section 50C can also be considered optional for the assessee that whenever they feel that they are better off by invoking the amended law they can use it at their discretion or else they may like to be governed by the main provisions of section 50C, when the situation is otherwise.

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Service Tax - Recent Judgements

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32 Commissioner of Central Excise & Service Tax, Kolhapur Commissionerate v. Karan Agencies [2015] 64 taxmann.com 374 (Bombay)

Facts:-

Assessee took over running/management of business of KSM's distillery unit and carried out business in name of KSM. KSM was paid Rs. 30 lakhs per annum for use of its infrastructure, etc. Balance profits and losses belonged to assessee. KSM paid service tax on said amount under franchise services. Assessee booked profit in its books as 'conducting charges'. Department demanded service tax on 'conducting charges' under Business Support Services.

Held :-

It was held that : (a) taking over management of business is not 'service'; and (b) Business Support Services are in nature of 'support' to 'main activity'; since, in this case, KSM was not doing any business activity, there cannot be Business Support to KSM. It was further held that assessee had taken over management/running of business and profits/losses were to be on account of assessee. It was assessee who was paying consideration to KSM and not KSM paying consideration to assessee. Assessee was not providing any support for business/ commerce of KSM and, therefore, same was not liable to service tax.

33 Gondwana Club *vs.* Commissioner of Customs & Central Excise, Nagpur [2016] 68 taxmann.com 240 (Mumbai - CESTAT)

[A] Facts:-

Assessee a club received various sums (including entrance fees and periodical subscription) from members towards sporting, recreational and infrastructural facilities. Department demanded service tax.

Held:-

Since Services by club to members are governed by mutuality and outside charge of service tax. Without ascertaining which receipt related to which identified service, demand is bad.

[B] Facts:- Department demanded service tax on subscription received by club from its members**.**

Held:-

In above case, Club incurs expenses (including maintenance, staff, etc.) to keep it as a going concern and such expenses are collected from members in form of 'periodical subscription'. Such contribution to common expenditure is not a consideration for services, more so, when clubs charge individually for use of facilities offered by it. Hence, subscription is not liable to tax.

34 Bharat Bhushan Gupta & Company *vs.* State of Haryana [2016] 74 taxmann.com 223 (Punjab & Haryana)

Facts:-

Assessee a contractor received contract from State Housing Board for construction of flats for BPL category. Assessee claimed exemption under Entry 12(a) or Entry 12A(a) of Mega Exemption Notification 25/2012-ST on ground that construction was 'non-commercial' in nature and services were provided to 'governmental authority' (State Housing Board constituted under State Act). Assessee alternatively claimed exemption under Entry 14, as house was for BPL category having carpet area less than 60 sq. mtr.

Held:-

It was held, that State Housing Board is a "governmental authority" because : (a) it is set up under a State Act; and (b) it is wholly controlled by State Government . Secondly, BPL houses constructed by assessee are meant for residential purpose and not for commerce, industry or any other business or profession. Hence, non-commercial construction services provided by assessee to governmental authority being State Housing Board are exempt under erstwhile Entry 12(a) or 12A(a) or section 102.

35 Chola Business Services Ltd. *vs.* Commissioner of Service Tax, Chennai P.K. Choudhary [2016] 75 taxmann.com 37 (Chennai - CESTAT)

Facts:-

Assessee was providing services of payroll preparation to their Group companies. Due to invoicing error, assessee raised excess bill and paid excess service tax. During subsequent period, assessee adjusted such excess service tax. On this Department argued that excess payment cannot be adjusted without refunding excess value (along with service tax). Assessee argued that excess tax was paid due to invoicing error, without service being provided and client had made correct payment only; hence, adjustment was valid.

Held:-

Since this is not a case where amount sought to be adjusted falls under category of excess payment on account of wrong classification, valuation or claiming of an exemption. This is a plain and simple case of payment of tax where no tax is required to be paid as no service was provided on which fact, there is no dispute. Since issue of refund was not raised in show-cause notice, said issue is not being addressed. Hence, adjustment was allowed.

36 Hyundai Heavy Ind. Co. Ltd. *vs.* Commissioner of Central Excise, Mumbai. [2016] 74 taxmann.com 266 (Mumbai - CESTAT)

Facts:-

Assessee paid service tax on service portion of turnkey contract. Later, assessee sought refund of such service tax on ground that since composite contract could not be vivisected, and hence, no service tax was payable thereon for period prior to introduction of Works Contract Services.

Held:-

It was held that since vivisecting of contract was done by assessee himself and service tax was paid accordingly, hence, now, assessee cannot turn around and say that said contract cannot be vivisected.

37 Malwa Engineering Works *vs.* Union of India [2016] 75 taxmann.com 48 (Punjab & Haryana)

Facts:-

Assessee was lifting dry leaves/horticulture waste/ solid waste under contract with Municipal Corporation. Tender was floated and work was allotted to assessee in May 2012 and since service tax was leviable at time of acceptance of tender, price quoted in tender was inclusive of all taxes (including service tax). Later, service was exempted from service tax from 1-7-2012 - Thereupon, Municipal Corporation started deducting service tax component from composite price and was paying net amount only to assessee. Now Assessee argued that since price was composite price, same was payable in full irrespective of actual quantum of service tax.

Held:-.

It was held that once 'tender price' included all taxes and levies and subsequently, levy of service tax was withdrawn by Government, then, since service tax was one of component of 'tender price', assessee cannot claim that from Municipal Corporation. In case, service tax component is paid to assessee, then, since assessee is not required to pay same to department, hence, assessee will be unjustly enriched. Hence, deduction made by Municipal Corporation was valid.

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VAT - From the Courts

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15

Entries in Schedule:
Packing material are not raw material, component [arts or inputs used in manufacturing of finished goods.
Hindustan Lever Ltd V. State of Karnataka reported in 95 VST 1(SC)

Background of the case:

The question before Hon'ble Supreme court was whether packing material is liable for entry tax or not.

The definition of "goods" in section 2(A)(4a) of the Karnataka Tax on Entry of Goods into Local Areas for Consumption, Use or Sale therein Act, 1979 is an exhaustive one **including all kinds of movable property** and livestock.

This is for the reason that anything that is tangible, without more, and enters a local area for consumption, sale or use therein is taxable, the taxable event being "entry" and not "manufacture" of goods, which brings in the concept of marketability in the context of a duty of excise, which is absent in the context of entry tax.

Section 2(A)(8a) wherein the "value of the goods" is defined, also makes a distinction between "goods" as such, and "packing material", making it clear that charges borne by a dealer as cost of packing would have to be included in the "value of goods". In the context of the Entry Tax Act, the difference between "goods" used in the manufacture of goods and "packing material" is also brought out by Schedule I. Packing materials are separately defined in entry 66. On the other hand, raw materials, component parts and inputs, which are used in the manufacture of an intermediate or finished product, are separately and distinctively given in entry 80 thereof.

The notification dated September 23, 1998 issued under section 3 of the Karnataka Tax on Entry of Goods into Local Areas for Consumption, Use or Sale Therein Act uses identical language as that contained in entries 66 and 80 of Schedule I to the Act. Equally, notification dated March 31, 1993 is an exemption notification issued under section 11A which also uses the identical language of entry 80 of Schedule I. This being the case, it is clear that neither notification can be read to include "packing material" as "raw materials, component parts or inputs used in the manufacture" of tea.

Packing material, and raw materials, component parts and inputs are separately provided for under the Schedule to the Act. It is also true of the notification dated September 23, 1998. Packing material is contained in entry 3 of the table whereas raw materials, component parts and inputs are contained in entry 4. The rate at which they are taxed is also different—packing materials at two per cent., whereas raw materials, components parts and inputs are taxed at one per cent. This being so, the reason for inclusion of Explanation II of notification dated September 23, 1998 appears to be that goods which are liable to tax, being finished goods in themselves, may yet be brought into a local area for use or consumption as raw material, component parts and inputs in the manufacture of an intermediate or finished product. It is only such goods that are liable to be taxed at the rate of one per cent. It cannot be said that though packing materials may be liable to tax at two per cent., yet if they fall in Explanation II, they would be liable to tax at the rate of one per cent. This would go against the scheme of Schedule I of the statute which makes it clear that in no case can packing materials be said to be raw materials, component parts or inputs used in the manufacture of finished goods.

In the exemption notification dated March 31, 1993 there is no Explanation like Explanation II in notification dated September 23, 1998. This being

the case, if one accepts the contention that packing materials are covered by "raw materials, component parts or inputs", they would be liable to tax at the rate of one per cent. under the 1998 notification but would not be exempt under the 1993 notification, thus rendering packing material liable to tax at the rate of two per cent. in the case of the exempted unit and one per cent. in the case of all other units. This would lead to an anomalous situation.

Held that: Under section 5A of the Karnataka Sales Tax Act, 1957, it is only for the purpose of "industrial inputs" that packing materials are included, and form a separate scheme of taxation under the sales tax statute. De hors the context of the Entry Tax Act, it cannot be said that industrial inputs include packing materials and that therefore, by parity of reasoning, **"inputs" under the Entry Tax Act should also include packing material.**

Decision of the Karnataka High Court affirmed.

16 Constructing of taxing statutes

Tiger Steel Engineering I P LTd v/s State of Gujarat reported in 95 VST 54 (Guj)

Background of the case:

The appellant who had applied for composition under section 55A of the Gujarat Sales Tax Act, 1969, and also obtained permission there for submitted all the monthly, quarterly and annual returns and paid sales tax accordingly. Subsequently, the Sales Tax Officer, without cancelling the composition permission granted to the appellant, assessed it as if such composition permission was never issued to the appellant. The revisional authority, issued notice under section 67 of the Act, proposing to cancel the composition permission orders granted to the appellant and passed an order cancelling the permission. On a revision application by the appellant challenging that order on ground of limitation the Tribunal held that the exercise of revisional powers was not time-barred as the period of limitation would start when any purported mischief was noticed by the Commissioner. On an appeal the Department contended that since the applications were not filed within one month, the composition permission could not have been granted :

Held, allowing the appeal, that in the light of the clear language of clause (a) of sub-section (1) of section 67 of the Act, the period of three years for exercising powers under section 67(1)(a) of the Act would commence from the date of order, i.e., from December 19, 2000. Therefore, such period would come to an end on December 18, 2003. In the present case, it was an undisputed position that the Deputy Commissioner had taken the order dated December 19, 2000 in revision by issuing notice dated February 2, 2005. Evidently therefore, the exercise of powers under section 67 of the Act by the Commissioner was beyond the period of limitation. The Tribunal, to meet with a hard case, had tried to stretch the law by interpreting the provisions of section 67 of the Act in a manner not contemplated by the clear language of the statute, which was clearly not permissible in law. The interpretation made by the Tribunal on the basis of equitable considerations, that the period of limitation for exercise of powers under section 67 of the Act would commence from the date of knowledge of the Deputy Commissioner was inconsistent with the language of section 67(1)(a) of the Act, which clearly and unambiguously provided for a period of limitation of three years from the date of the order, for invoking revisional jurisdiction. Thus the Tribunal, was not justified in holding that the notice for revision was not time-barred. Therefore the orders passed by the Tribunal as well as the Deputy Commissioner were quashed and set aside and the composition order dated December 19, 2000 was restored.

It is a settled legal position of law that in a taxing statute one has to go by the clear language of the statute and equity has no role to play while interpreting a taxing statute. One can only look fairly at the language used. To try to stretch the law to meet hard cases is not merely to make bad law but to run the risk of subverting the rule of law itself.

17 Entries in Schedule

State of Gujarat v/s Standard Radiators Pvt. Ltd. Reported in 95 VST 35 (Guj)

Background of the case:

Different types of oil coolers, i.e., oil cooler for backhoe loader, oil cooler for wheel loader and oil cooler for soil compactors are principally used in chain mounted equipments and other equipments used for cutting of iron and steel sheets, etc. They are in the nature of accessories of machinery used in execution of works contract. The fact that such oil coolers are being used in loaders which are tyre mounted vehicles required to be registered under the Motor Vehicles Act would be of no consequence. Admittedly, there is no separate entry for motor vehicles. If an accessory satisfied description of being an accessory to machinery used in execution of works contract, the fact that it also happened to be an accessory to motor vehicle, would not change this fundamental feature which would be sufficient to bring the equipment within the purview of entry 35 of notification issued under section 5(2) of the Gujarat Value Added Tax Act pertaining to machinery including parts and accessories thereof used in the execution of the works contract. Therefore the oil cooler, i.e., accessory being used in a motor vehicle would, fall within entry No. 35 of the notification issued under section 5(2) of the Gujarat Value Added Tax Act. However by virtue of an amendment with effect from February 15, 2010, entry 35 includes the exclusion clause providing for excluding machinery in form of a motor vehicle or attached or mounted to a motor vehicle. Therefore its parts and accessories which were included in entry No. 35 would automatically stand ejected out of such entry with effect from February 15, 2010.

State of Gujarat v. Yantraman Automac Pvt. Ltd. [2016] 93 VST 423 (Guj) applied.

[The request by the assessee that that this judgment might be made prospectively applicable was rejected by the court.]

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contd. from page 471

38 Southern Investments (P.) Ltd. *Vs* . Commissioner of Service Tax, T.S. Sivagnanam. [2016] 74 taxmann.com 159 (Madras)

Facts:-

Assessee filed writ against order of Commissioner (Appeals). Department challenged writ on ground of alternate appeal remedy before Tribunal. Assessee argued that writ was filed because department had invoked extended period without any reasons/justification.

Held:-.

It was held, that question of limitation or applicability of extended period or to ascertain whether there was 'suppression of facts' is essentially a 'question of fact'. Since Tribunal is empowered to appreciate and re-appreciate facts, therefore, appeal before Tribunal is efficacious remedy. High Court cannot interfere under its Writ Jurisdiction, as disputed question of facts are to be examined. Hence, writ petition was dismissed as not maintainable.

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VAT - Judgements and Updates

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GST, VAT Judgments and Updates

[I] Key Points From Model GST Law: (Contd):

[11] Payment:

Any tax, interest, penalty, fee etc. shall be paid via internet banking or by using credit/debit cards or NEFT or RTGS. This amount shall be credited to the electronic cash ledger of dealer.

[12] TDS:

The Central or a State Government may mandate certain departments (viz. local authority, Govt. agencies) to deduct tax at the rate of one per cent on notified goods or services, where the total value of such supply under a contract exceeds Rs. 10 Lakhs.

[13] Refund:

A person can claim refund of any tax and interest by making an application in that regard to the prescribed officer of IGST/ CGST/SGST. The application can be made before the expiry of two years from the relevant date as may be prescribed. It has been provided that the limitation of two years shall not apply where such tax or interest or the amount has been paid under protest.

[14] Returns:

Dealers shall be required to furnish following returns –

[a] **Monthly Return:** Every registered taxable person shall have to e-file a monthly return for inward and outward supplies of goods and/or services, input tax credit availed, tax payable, tax paid and other particulars within 20 days at the end of such month.

[b] **Return for Composition Scheme:** Dealers paying tax under composition scheme shall have to furnish a return for each quarter or part thereof electronically within 18 days at the end of such quarter.

[c] **TDS Return:** Every dealer who is required to deduct tax at source shall furnish a return electronically within 10 days at the end of month in which deduction is made.

[d] **Return for Input Service Distributor:** Every Input Service Distributor shall file e-return for every calendar month or part thereof within 13 days at the end of such month.

[e] **First Return:** Every registered taxable person paying CGST/SGST on all intra-State supplies of goods and/or services shall have to furnish the first return from the date on which he became liable to registration till the end of the month in which the registration has been granted.

[f] **Annual Return:** Every registered taxable person shall have to furnish an annual return for every financial year electronically on or before the 31st day of December following the end of such financial year.

[g] **Final Return:** Every registered taxable person who applies for cancellation of registration shall have to furnish a final return within three months of the date of cancellation or date of cancellation order, whichever is later in a prescribed form.

[15] **Transitional Provisions:**

[a] Under the Model GST Law, a registered taxable person will be entitled to take amount of Cenvat Credit/Value Added Tax carried forward in a return furnished by him in respect of the period ending with the day immediately preceding the appointed day.

[b] As per Model GST, a registered taxable person shall be entitled to take in his electronic credit ledger/ credit of the unavailed Cenvat Credit/ unavailed input tax credit in respect of capital goods not carried forward in a return furnished by him for the period ending with the day immediately preceding the appointed day.

[c] If a person registered under GST was not liable to be registered under the earlier law or if he was manufacturing exempted goods under the earlier law which were not taxable, then he will be allowed to take credit of eligible duties and taxes in respect of inputs held in stocks or semi-finished/finished goods.

[d] Every claim for refund of any duty/ tax and interest, if any, paid on such duty/tax or any other amount filed by any person before the appointed day shall be disposed of in accordance with the provisions of the earlier law and any amount eventually accruing to him shall be paid in cash. However, where any claim for refund is fully or partially rejected, the amount so rejected shall lapse.

[2] **Important Judgments Delivered by Hon. GVAT Tribunal:**

[i] **In case of M/s. Mohit Industries Ltd. v. Deputy Commissioner of Commercial Taxes decided on 13.08.2015:**

Facts:

The Tax Credit is not required to be reduced u/s. 11(3)(b) of the goods transferred outside the State of Gujarat for job work which was received back and sold in the State of Gujarat.

Held:

The appellant engaged in the business of twisting and texturising of yarn transferred POY Yarn to the processing unit at Silvassa outside the State of Gujarat for job work process which was received back and was sold in the State of Gujarat. The assessment order was passed u/s. 34(2) in which the tax credit was reduced @ 4% u/s.11 (3)(b)(ii) of the POY Yarn transferred outside the State of Gujarat for twisting and texturising job work process. The first appeal preferred against the assessment order was summarily dismissed.

The second appeal was preferred before the Hon. Tribunal which was remanded back to the Ld. Appellate Authority for deciding it on merit. The Ld. Appellate Authority affirmed assessment order reducing the tax credit u/s. 11(3) (b) and hence the second appeal was preferred before the Hon. Tribunal in which it was contended that the provision of reduction of tax credit u/s. 11(3) (b)(i) and (ii) is applicable to clause (iii) of section 11(3)(a) of the Vat Act. It was also contended that there is no restriction in section 11 of transferring goods outside the state of Gujarat for job work purpose. In this regard, the reliance was placed on the judgment of Hon. Supreme Court in the case of M/s. Polestar Electronics Pvt. Ltd. 41 STC 409 and the Tribunal judgment in the case of M/s. Modela Steel and Alloys Ltd. 1982 GSTB338 and M/s. Danish Syntex Pvt. Ltd. 1988 GSTB 708. As regard judgment of Hon. Tribunal in the case of JCT Ltd. it was contended that the Hon. Tribunal hasa distinguished it in the

subsequent judgment in the case of M/s. Madhusudan Texturizers Pvt. Ltd. The Hon, Tribunal referred section 11(3)(b) and the judgments relied on by the appellant and held that the tax credit is not required to be reduced of the goods transferred outside the state of Gujarat for job work purpose which was received back and sold in the State of Gujarat.

[ii] **In case of M/s. Siddhi Export Packing and Packing Enterprise v. Deputy Commissioner of Commercial Taxes.**

Facts:

The amount of penalty prescribed not exceeding Rs. 10,000/- in Rule 19(9) is outer limit. However the authority has still power to levy penalty within outer limit of Rs. 10,000/-.

Held:

The appellant could not submit return for the period 01.01.2009 to 31.03.2011 on account of illness of mother in law who was suffering from cancer. The penalty u/s. 29(5) read with rule 19(9) was levied to the tune of Rs. 1,56,000/- which was reduced to Rs. 78,000/- in the first appeal. The second appeal was preferred in which the amount of penalty retained to the tune of Rs. 78,000/- was requested to be set aside. The appellant relied on Supreme Court judgments in the case of M/s. Hindustan Steels Ltd. 25 STC 211, M/s. Sanjeev Fabrics 35 VST 1, M/s. Shree Krishna Electricals 23 VST 249 and the Hon. Patna High Court in the judgment in the case of M/s. Food Corporation of India 45 VST 9. It was submitted by the Government Representative that no discretion is available to the departmental authority to levy less penalty than what is provided in section 29(5) of the Vat Act.

The cross objection was filed stating that the ld. Dy. Commissioner has committed a grave error while reducing the penalty from Rs. 1,56,000/- to Rs. 78,000/- which was contrary to the statutory provision. The Hon. Tribunal referred section 29(5) and rule 19(9) along with the judgments relied on by the appellant. The Hon. Tribunal also referred earlier judgment delivered in case of M/s. Prakash Jewellers and M/s. Pooja Exports, 2013 GSTB Part I Page 385 in which relying on various judgments it was held that the authority has discretion to levy lesser amount of penalty than what is provided in section 29(5) of the Vat Act. Accordingly, in view of the facts of the case the amount of Penalty of Rs. 78,000/- retained by the Appellate Authority is further reduced to Rs. 20,000/-.

[iii] **In case of M/s. Krishna Industries v. Deputy Commissioner of Commercial Taxes decided on 25.08.2015:**

Facts:

Penalty levied u/s. 29(5) read with rule 19(9) is reduced from Rs. 78,100/- to Rs. 16,100/- in view of Supreme Court judgment in the case of M/s. Hindustan Steels Ltd.

Held:

The Penalty u/s. 29(5) with rule 19(9) was levied for late submission of returns for the tax period Oct. – 13 to July – 14. It was levied @ Rs. 10,000/- for each return for the tax period Oct-13 to Mar-14. The total amount of penalty was to the tune of Rs. 78,100/-. As the first appeal was rejected, the second appeal was preferred in which the levy of penalty was contended relying on the judgment of Hon. Supreme Court in the case of M/s. Hindustan Steels Ltd. 25 STC Page 211. The Hon. Tribunal considering the facts of the case and relying on the judgment to reduce the amount of penalty from Rs. 78,100/- to Rs. 16,100/-.

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Mergers and Acquisition Corner

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1. MakeMyTrip to buy Ibibo Group's India travel business for $ 720 million[1]

Online travel firm MakeMyTrip Ltd has agreed to buy Ibibo Group's travel business in India in an all-stock deal, creating the country's largest online travel firm which, according to a note by Morgan Stanley, is worth $1.8 billion. The deal value wasn't announced, but the $1.8 billion valuation and the fact that Ibibo's owners, Naspers and Tencent, end up with a 40% stake in the merged entity, translate into a transaction worth $720 million. Naspers owns a third of Tencent, its most valuable investment. Naspers and Tencent jointly held a 91% and 9% stake in Ibibo respectively. They will become the single largest shareholder in the company.

China's Ctrip, which in January committed to invest $180 million (about Rs1,200 crore) in MakeMyTrip through convertible bonds, will now see those instruments being converted into equity and end up with a stake of around 10% in the merged entity. The deal will bring all brands of the Ibibo Group such as Goibibo, redBus, Ryde and Rightstay under MakeMyTrip. Together, Ibibo and MakeMyTrip processed 34.1 million transactions in 2015-16, the latter said in a statement.

MakeMyTrip shares rose more than 42% on Nasdaq in early trades, valuing the company at about $1.2 billion. MakeMyTrip founder Deep Kalra will remain group chief executive and executive chairman of MakeMyTrip Group and cofounder Rajesh Magow will remain chief executive of MakeMyTrip's India business. Founder and chief executive of ibibo Group, Ashish Kashyap, will join MakeMyTrip's executive team as a co-founder and president of the organization, the statement added.

"We expect this deal to create an even more scalable business with the expertise to transform the booking experience for Indian travellers," said Kalra. He added that the merged entity would retain and work through all brands, including Ibibo and MakeMyTrip. The transaction is expected to close by the end of December. "India is a key market for Naspers, and this deal reinforces our commitment to the country," said Bob van Dijk, chief executive of Naspers. The consolidation will "unlock value for shareholders", result in cost efficiency and mean wider product offerings for customers, Kalra said.

The merged entity will have 10 directors. Naspers (and Tencent) will nominate four, Ctrip one, and MakeMyTrip's promoters two. The other three will be independent directors. Morgan Stanley acted as the financial advisor to MakeMyTrip. Goldman Sachs acted as financial advisor to Ibibo and Naspers.

2. Ruias sell Essar Oil, Vadinar Port for Rs. 86,100 crore[2]

The Ruias of the Essar group signed a binding agreement to sell 98 per cent stake in EssarOil and related infrastructure such as captive port and power units at an enterprise valuation of Rs 86,100 crore, including debt, to a group led by Russian oil major, Rosneft, and comprising Singapore based commodity trader, Trafigura, and Russian fund, United Capital Partners. "This is the largest foreign direct investment (FDI) into India and wipes off half of the Essar group's debt," Prashant Ruia, director of Essargroup, said in Panaji, Goa. The transaction was announced in the presence of Indian Prime Minister NarendraModi and

Russian President Vladimir Putin on the sidelines of the BRICS Summit in Goa. The company said 49 per cent of Essar Oil's stake will be picked up by Rosneft, while the remaining 49 per cent stake will be sold to Trafiguraand UCP equally at an enterprise valuation of Rs 72,800 crore. An additional Rs 13,300 crore will be paid for the acquisition of Vadinar Port. The transaction also involves 2,700 retail outlets currently owned and operated by Essar Oil.

"It was our strategy to construct world class assets and then sell it at the right time. Till date, the deals we havedone have led to an FDI infusion of more than $30 billion into India," Ruia said. "As we were getting the right valuation, we decided to sell our entire stake," Ruia said, adding that the promoters will not get any non-compete fee. The deal value would be far higher than the delisting price of Rs 262 a share at a valuation of around $6 billion. Minority shareholders will get the differential amount, Ruiapromised. The group had delisted the company in December after it signed a nonbinding agreement with Rosneftin July 2015. The proceeds of the sale will be used to repay loans of both foreign and local lenders, which was around Rs88,000 crore, Ruia said. Earlier, the Ruias had sold their 33 per cent stake in the wireless telephony company to Vodafone Plc for $5.4 billion.

ChandaKochhar, MD & CEO, ICICI Bank, said, "I welcome the announcement. This deal is the largest ever foreign acquisition in India. It proves the attractiveness of the Indian energy market to foreign investors as India is one of the fastest growing fuel consuming economies in the world. This deal is also a significant step in the process of deleveraging the balance sheets of Indian corporates. ICICI Bank has been closely working with various companies, including the Essar Group, to help them deleverage their stressed balance sheets. We will continue working towards this objective with others.

" Investing in EOL, which operates one of the world's most complex refineries and runs India's largest private sector retail network, gives the new stakeholders a strong foothold in the Indian market that will witness robust demand growth for petroleum products in the long term. The growth for refined petroleum products in the Indian market for the next five years is expected to be in the five to seven per cent range. EOL's value has also been strengthened by the integrated nature of its business and the strategic positioning of its assets. Its 20 million tonne (mt) oil refinery in Vadinar, which accounts for nine per cent of India's total refining output, is supported by a 1,010 Mw captive power plant. The additional Rs 13,300 crore that the new stakeholders have agreed to pay is for the 58mt deep draft port in Vadinarthat helps in importing crude and exporting finished products. "This is a significant milestone for us. Rosneftis entering one of the most promising and fast growing world markets. At the same time, this project provides unique opportunities for synergies with the existing assets of the company and is consistent with Rosneft'senhanced presence in fastgrowingmarkets of other countries, such as Indonesia, Vietnam and the Philippines," said Igor Sechin, CEO of Rosneft— the world's largest petroleum company with revenues around $80 billion (around Rs 5.33 lakh crore). Trafigura Group is one of the world's leading independent commodity trading and logistics group with revenues of about $100 billion (around Rs 6.67 lakh crore). United Capital Partners (UCP) is a large independent Russian private investment group with investments of around $3.5 billion (Rs around 23,349 crore) in various industrial sectors. "It is a historic day for Essar. The transaction demonstrates our unique ability to build worldclass assets and create immense value in our businesses. The monetisation of our stake in Essar Oil will help drive the next level of growth for our other businesses," Essar Group Chairman ShashiRuia

said. After the transaction, the Essar group will be left with its power projects, port operations, Stanlow refinery in the United Kingdom and shipping operations. The group's revenues will shrink 30 per cent.

A WIN-WIN DEAL

- Ruias sell Gujarat refinery to Rosneft, Trafigura, UCP for Rs 86,100 cr
- Transaction includes Rs 72,800 cr for Essar Oil's refining and retail assets, Rs 13,300 cr for Vadinar Port
- and related infrastructure
- It is India's largest FDI deal
- Ruias to use proceeds to cut debt by half
- Rosneft to get access to Indian markets, customers for its crude oil
- Deal to be closed by early 2017

3. Hero MotoCorp buying up to 30% stake in Tiger Global-backed Ather Energy[3]

Hero MotoCorp Ltd, the country's largest two-wheeler maker, is making its biggest bet in the electric vehicle segment after deciding to invest Rs 205 crore ($30.5 million) in Ather Energy Pvt. Ltd. The investment will give Hero MotoCorp a stake of 26-30% in Bengaluru based Ather, which had previously raised funding from Flipkart founders Sachin Bansal and Binny Bansal and US hedge fund titan Tiger Global.

Hero MotoCorp chairman PawanMunjal said in a statement that, in addition to investing in Ather, the company aims to enhance its own electric vehicles programme. Hero MotoCorp has released Rs 180 crore of the total and will inject the balance amount later. Ather said it will use the funds to accelerate its infrastructure for product development. "The funding is a strong validation of our product roadmap and technology capability, endorsed by one of the biggest automotive players," said TarunMehta, co-founder and CEO of the company. Ather was incubated at IIT Madras and founded by the institute's alumni Tarun Mehta and Swapnil Jain in 2013.

The company is testing and finalising vendors for its first product,The deal, which is subject to certain conditions, is also the first time that the PawanMunjalis backing a direct competitor of Hero Electric, an e-vehicle maker run by his cousin Vijay Munjal. Hero Electric, part of the group which also makes Hero Cycles, had entered the market around a decade ago in a joint venture with UKbased e-vehicle tech firm Ultra Motors. It later scrapped its JV and bought Ultra out. Apart from Ather, a few other electric two-wheeler makers have also raised funding in India over the past couple of years.

In April, electric bike startup Tork raised angel funding from a group of investors led by Bhavish Aggarwal and Ankit Bhati, co-founders of cab aggregator Ola. In May, electric bike company Ampere Vehicles Pvt. Ltd raised funding from Infosys cofounder and former CEO Kris Gopalakrishnan and Venk Krishnan, CEO of NuWare. The duo along with Vineet Agarwal, managing director at Transport Corporation of India, and former Wipro executive SudipNandy last year invested $1.2 million in Ampere. The company also got the backing of Ratan Tata in July last year. Another player is YO Bykes, run by Mumbai listed firm Electrotherm. Mahindra Group has a USbased venture Genzeinvolved in electric two-wheelers, which is separate from Mahindra Two Wheelers. Mahindra Group also sells electric cars through Mahindra Reva Electric Vehicles.

1. http://www.livemint.com/Companies/W9atx25k79RpQcdbRxWuTP/MakeMyTrip-to-buy-rival-ibibo-Group.html
2. http://www.business-standard.com/article/companies/ruias-sell-essar-oil-vadinar-port-for-rs-86-100-crore-116101500711_1.html
3. http://www.vccircle.com/news/engineering/2016/10/27/hero-motocorp-invest-305-mn-ather-energy?logintype=premium

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Corporate Law Update

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MCA Updates:

1. Companies (Incorporation) Fourth Amendment Rules, 2016:

Following changes have been effected under the Companies (Incorporation) Fourth Amendment Rules, 2016:

Clause	Companies (Incorporation) Rules, 2014	Companies (Incorporation) Fourth Amendment Rules, 2016	Change Effected
Rule 33(2)	A copy of the competent authority approving the alteration, shall be filed with the Registrar in Form No. INC-27 with fee together with the printed copy of altered articles within fifteen days from the date of receipt of the order from the Central Government. Explanation: For the purpose of this sub-rule the term "competent authority" means, the Central Government.	Subject to the provision of sub-rule(1) for effecting the conversion of a public company into a private company, a copy of order of the Tribunal approving the alteration, shall be filed with the Registrar in Form No. INC-27 with fee together with the printed copy of altered articles within fifteen days from the date of receipt of the order from the Tribunal.	Substituted.
Rule 38	—	Simplified Proforma for Incorporating Company Electrnically (SPICE):	Inserted.
		1) The simplified integrated process for incorporation of a company in Form No. INC-32 along with e-Memorandum of Association in Form No. 33 and e-Articles of Association in Form No. 34.	
		2) The provisions of sub-rule (2) to sub-rule (13) of Rule 36 shall apply *mutatis mutandis* for incorporation under this rule.	
		Provided that for the purpose of references to form numbers INC-29, INC-30 and INC-31 in rule 36 with Form No. INC-32, Form No. INC-33 and Form No. INC-34 shall be substituted respectively.	
Rule 39	—	**39. Conversion of a company limited by guarantee into a company limited by shares.**	Inserted.
		1) A company other than a company registered under section 25 of the Companies Act, 1956 or section 8 of the Companies Act, 2013 may convert itself into a company limited by shares.	

		2) The Company seeking conversion shall have a share capital equivalent to the guarantee amount.	
		3) A special resolution is passed by its members authorizing such a conversion omitting the guarantee clause in its Memorandum of Association and altering the Articles of Association to provide for the articles as are applicable for a company limited by shares.	
		4) A copy of the special resolution shall be filed with the Registrar of Companies in Form no. MGT-14 within thirty days from the date of passing of the same along with fee as prescribed in the Companies (Registration Offices and Fees) Rules, 2014.	
		5) An application in Form No. INC-27 shall be filed with the Registrar of Companies within 30 day from the date of the passing of the special resolution enclosing the altered Memorandum of Association and altered Articles of Association and a list of members with the number of shares held aggregating to a minimum paid up capital which is equivalent to the amount of guarantee hither to provided by its members.	
		6) The Registrar of Companies shall take a decision on the application filed under these rules within thirty days from the date of receipt of application complete in all respects and upon approval of Form No. INC-27, the company shall be issued with a certificate of incorporation in Form No. INC-11B.	
Form No. INC-11A	—	Certificate of Incorporation pursuant to conversion of a company limited by guarantee into a company limited by shares.	Inserted
Form No. INC-27	—		Substituted
[F. No. 1/13/2013 CL-V dated 01st October, 2016]			

2. Date of establishment of Insolvency and Bankruptcy Board of India notified:

The Central Government has appointed 01st October, 2016 as the date of establishment of Insolvency and Bankruptcy Board of India.

[F. No. 30/2/2016-Insolvency Section dated 01st October, 2016]

3. Relaxation of additional fees and extension of the last date in filing of AOC-4, AOC-4 (XBRL), AOC-4 (CFS) and MGT-7 forms:

The Ministry has extended the last date for filing of financial statements and annual return using e-forms AOC-4, AOC-4 (XBRL), AOC-4 (CFS) and MGT-7 without payment of additional fees till 29th November, 2016.

[F. No. MCA 21/153/2012 E-Gov Cell dated 27.10.2016]

SEBI Updates:

1. **Clarifications on raising of further capital and the process of exit of Exclusively Listed Companies (ELCs) from the Dissemination Board (DB):**

   The SEBI has clarified about the followings:
   - Designated stock exchange,
   - Raising capital for listing on Nationwide Stock Exchanges,
   - Procedure to provide exit to investors,
   - Action against companies remaining on the DB,

   Please refer the following link for full text:

   http://www.sebi.gov.in/cms/sebi_data/attachdocs/1476076928746.pdf

   [Circular No. SEBI/HO/MRD/DSA/CIR/P/2016/11 dated 10th October, 2016]

2. **Facilitating transaction in Mutual Fund schemes through the Stock Exchange Infrastructure:**

   In order to broad base the reach of this platform, the SEBI has been decided to allow SEBI Registered Investment Advisors (RIAs) to use infrastructure of the recognised stock exchanges to purchase and redeem mutual fund units directly from Mutual Fund/Assets Management Companies on behalf of their clients, including direct plans.

   [Circular No. SEBI/HO/MRD/DSA/CIR/P/2016/113 dated October 19, 2016]

3. **Freezing of Promoter and Promoter group Demat accounts for Noncompliance with certain provisions of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015:**

   In order to ensure effective enforcement, the SEBI has decided in consultation with recognized stock exchanges to freeze the holdings of their promoters and promoter group entities in the manner specified below:

   1. Where a non-compliant listed entity fails to pay fine levied as per the notice issued by the concerned recognized stock exchange in terms of paragraph 4 of Annexure I of the aforesaid circular, the concerned recognized stock exchange shall, upon expiry of the period indicated in the notice issued by it, freeze holdings in other securities in the demat accounts of promoter and promoter group to the extent of liability which shall be calculated on a quarterly basis.
   2. In case of non-compliance for two consecutive periods, and failure to comply with the notice issued by the concerned recognized stock exchange as per paragraph 3 of Annexure II of the aforesaid circular, as per the current practice, the concerned recognized stock exchange shall forthwith intimate the depositories to freeze the entire shareholding of the promoter and promoter group in such listed entity. In addition to the freeze of shares in the non-compliant listed entity, the holdings in the demat accounts of promoter and promoter group in other securities shall also be frozen to the extent of liability which shall be calculated on a quarterly basis.
   3. .While freezing the holdings as per paragraphs 2.1 and 2.2 above, the recognized stock exchange shall have discretion in determining which of the securities and holdings of which promoter or promoter group entity are to be frozen.

   The depositories, shall furnish to the exchange upon receipt of request, all such information pertaining to holdings in the demat accounts of promoter and promoter group of such listed entities.

   [Circular No. SEBI/HO/CFD/CMD/CIR/P/2016/116 dated October 26, 2016]

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Allied Laws Corner

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Provisions of the Negotiable Instrument Act shall get attracted when Post dated cheque given for repayment of loan is dishonoured.

Recently, the Supreme Court in the case of **Sampelly Satyanarayan Rao vs. Indian Renewable Energy Development Agency Ltd.** reported in **74 taxmann.com 68** held that dishonour of post dated cheques issued for discharge of existing liability shall be covered by section 138 of the Negotiable Instrument Act.

A. Facts of the Case :

1. The appellant is Director of the company whose cheques have been dishonoured and who is also the co-accused. The company is engaged in the field of power generation. The respondent is engaged in development of renewable energy and is a Government of India enterprise. *Vide* the loan agreement dated 15th March, 2001, the respondent agreed to advance loan of Rs.11.50 crores for setting up of 4.00 MW Biomass based Power Project in the State of Andhra Pradesh. The agreement recorded that post-dated cheques towards payment of installment of loan (principal and interest) were given by way of security. **The cheques carried different dates depending on the dates when the installments were due and upon dishonour thereof, complaints including the one dated 27th September, 2002 were filed by the respondent in the court of the concerned Magistrate at New Delhi**.

2. **The appellant approached the High Court to seek quashing of the complaints arising out of 18 cheques of the value of about Rs.10.3 crores**. Contention of the appellant in support of his case was that the cheques were given by way of security as mentioned in the agreement and that on the date the cheques were issued, no debt or liability was due. Thus, dishonour of post-dated cheques given by way of security did not fall under Section 138 of the Act. Reliance was placed on clause 3.1 (iii) of the agreement to the effect that deposit of post-dated cheques toward repayment of installments was by way of "security". Even the first installment as per the agreement became due subsequent to the handing over of the post-dated cheque. **Thus, contended the appellant, it was not towards discharge of debt or liability in *presenti* but for the amount payable in future.**

3. The High Court did not accept the contentions of the Appellant and held that,

> *"10. In the present case when the post-dated cheques were issued, the loan had been sanctioned and hence the same fall in the first category that is they were cheque issued for a debt in present but payable in future. Hence, I find no reason to quash the complaints. However, these observations are only prima facie in nature and it will be open for the party to prove to the contrary during trial."*

B. Provisions of S.138 of the Act reads as under:

"138. Dishonour of cheque for insufficiency, etc., of funds in the account. — Where any cheque drawn by a person on an account

maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless -

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation. - For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability. "

C. Findings of the Hon'ble Supreme Court:

1. The relevant clause of the agreement for consideration before the Hon'ble Apex Court reads as under :

"3.1 SECURITY FOR THE LOAN

The loan together with the interest, interest tax, liquidated damages, commitment fee, up front fee prima on repayment or on redemption, costs, expenses and other monies shall be secured by ;

*(i) ****

*(ii) ***'*

(iii) Deposit of Post dated cheques towards repayment of installments of principal of loan amount in accordance with agreed repayment schedule and installments of interest payable thereon."

2. The Appellant placed reliance on the decisions the Apex Court in **Indus Airways (P.) Ltd. v. Magnum Aviation (P.) Ltd. [2014] 12 SCC 539**. Referring to the said decision, the Apex Court noted that the question therein was whether post-dated cheque issued by way of advance payment for a purchase order could be considered for discharge of legally enforceable debt. The cheque was issued by way of advance payment for the purchase order but the purchase order was cancelled and payment of the cheque was stopped. This Court held that while the purchaser may be liable for breach of the contract, when a contract provides that the purchaser has to pay in advance and cheque towards advance payment is dishonoured, it will not give rise to criminal liability under Section 138 of the Act. **Issuance of cheque towards advance payment could not be considered as discharge of any subsisting liability.** View to this effect of the Andhra Pradesh High Court in Swastik Coaters (P) Ltd. v. Deepak Bros. [1997] Cr. LJ 1942 (AP), Madras High Court in Balaji Seafoods Exports (India) Ltd. v. Mac Industries Ltd. [1999] 1 CTC

6 (Mad.), Gujarat High Court in Shanku Concretes (P.) Ltd. v. State of Gujarat [2000] Crl LJ 1988 (Guj.) and Kerala High Court in Supply House v. Ullas [2006] Crl. LJ 4330 (Ker.) was held to be correct view as against the view of Delhi High Court in Magnum Aviation (P.) Ltd. v. State [2010] 172 DLT 91 and Mojj Engg. Systems Ltd. v. A.B. Sugars Ltd. [2008] 159 DLT 579 which was disapproved.

3. After considering the arguments from both side and considering the decision of the Apex Court in *Indus (supra)*, the Apex Court held that **the question whether a post-dated cheque is for "discharge of debt or liability" depends on the nature of the transaction. If on the date of the cheque liability or debt exists or the amount has become legally recoverable, the Section is attracted and not otherwise.**

4. By referring to the facts of the case from the agreement, the Apex Court noted that though the word "security" is used in clause 3.1(iii) of the agreement, the said expression refers to the cheques being towards repayment of installments. The repayment becomes due under the agreement, the moment the loan is advanced and the installment falls due. It is undisputed that the loan was duly disbursed on 28th February, 2002 which was prior to the date of the cheques. Once the loan was disbursed and installments have fallen due on the date of the cheque as per the agreement, dishonour of such cheques would fall under Section 138 of the Act. The cheques undoubtedly represent the outstanding liability.

5. The Apex Court held that the judgment in Indus (supra) is distinguishable. As already noted, it was held therein that liability arising out of claim for breach of contract under Section 138, which arises on account of dishonour of cheque issued was not by itself at par with criminal liability towards discharge of acknowledged and admitted debt under a loan transaction. Dishonour of cheque issued for discharge of later liability is clearly covered by the statute in question. Admittedly, on the date of the cheque there was a debt/liability in presenti in terms of the loan agreement, as against the case of Indus Airways (P.) Ltd. (supra) where the purchase order had been cancelled and cheque issued towards advance payment for the purchase order was dishonoured. In that case, it was found that the cheque had not been issued for discharge of liability but as advance for the purchase order which was cancelled. Keeping in mind this fine but real distinction, the said judgment cannot be applied to a case of present nature where the cheque was for repayment of loan installment which had fallen due though such deposit of cheques towards repayment of installments was also described as "security" in the loan agreement. In applying the judgment in Indus Airways (P.) Ltd. (supra), one cannot lose sight of the difference between a transaction of purchase order which is cancelled and that of a loan transaction where loan has actually been advanced and its repayment is due on the date of the cheque.

6. ***Crucial question to determine applicability of Section 138 of the Act is whether the cheque represents discharge of existing enforceable debt or liability or whether it represents advance payment without there being subsisting debt or liability***. While approving the views of different High Courts noted earlier, this is the underlying principle as can be discerned from discussion of the said cases in the judgment of this Court.

7. In *Balaji Seafoods (supra)*, the High Court noted that the cheque was not handed over with the intention of discharging the subsisting liability or debt. There is, thus, no similarity in the facts of that case simply because in that case also loan was advanced. It was noticed specifcally therein - as was the admitted case of the parties - that the cheque was issued as "security" for the advance and was not intended to be in discharge of the liability, as in the present case.

8. In *HMT Watches Ltd.* v. *M.A. Abida* [2015] 130 SCL 511/56 taxmann.com 328 (SC), relied upon on behalf of the respondent, this Court dealt with the contention that the proceedings under Section 138 were liable to be quashed as the cheques were given as "security" as per defence of the accused. Negativing the contention, this Court held:-

'10. Having heard the learned counsel for the parties, we are of the view that the accused (Respondent 1) challenged the proceedings of criminal complaint cases before the High Court, taking factual defences. Whether the cheques were given as security or not, or whether there was outstanding liability or not is a question of fact which could have been determined only by the trial court after recording evidence of the parties. In our opinion, the High Court should not have expressed its view on the disputed questions of fact in a petition under Section 482 of the Code of Criminal Procedure, to come to a conclusion that the offence is not made out. The High Court has erred in law in going into the factual aspects of the matter which were not admitted between the parties. The High Court further erred in observing that Section 138(b) of the NI Act stood uncomplied with, even though Respondent 1 (accused) had admitted that he replied to the notice issued by the complainant. Also, the fact, as to whether the signatory of demand notice was authorised by the complainant company or not, could not have been examined by the High Court in its jurisdiction under Section 482 of the Code of Criminal Procedure when such plea was controverted by the complainant before it.

11. In *Suryalakshmi Cotton Mills Ltd.* v. *Rajvir Industries Ltd.* [2008] 13 SCC 678, this Court has made the following observations explaining the parameters of jurisdiction of the High Court in exercising its jurisdiction under Section 482 of the Code of Criminal Procedure: (SCC pp. 685-87, paras 17 & 22)

17. The parameters of jurisdiction of the High Court in exercising its jurisdiction under Section 482 of the Code of Criminal Procedure is now well settled. Although it is of wide amplitude, a great deal of caution is also required in its exercise. What is required is application of the well-known legal principles involved in the matter.

** ** **

22. Ordinarily, a defence of an accused although appears to be plausible should not be taken into consideration for exercise of the said jurisdiction. Yet again, the High Court at that stage would not ordinarily enter into a disputed question of fact. It, however, does not mean that documents of unimpeachable character should not be taken into consideration at any cost for the purpose of finding out as to whether continuance of the criminal proceedings would amount to an abuse of process of court or that the complaint petition is filed for causing mere harassment to the accused. While we are not oblivious of the fact that although a large number of disputes should ordinarily be determined only by the civil courts, but criminal cases

are filed only for achieving the ultimate goal, namely, to force the accused to pay the amount due to the complainant immediately. The courts on the one hand should not encourage such a practice; but, on the other, cannot also travel beyond its jurisdiction to interfere with the proceeding which is otherwise genuine. The courts cannot also lose sight of the fact that in certain matters, both civil proceedings and criminal proceedings would be maintainable."

12. In *Rallis India Ltd.* v. *Poduru Vidya Bhushan* [2011] 13 SCC 88, this Court expressed its views on this point as under: (SCC p. 93, para 12)

"12. At the threshold, the High Court should not have interfered with the cognizance of the complaints having been taken by the trial court. The High Court could not have discharged the respondents of the said liability at the threshold. Unless the parties are given opportunity to lead evidence, it is not possible to come to a definite conclusion as to what was the date when the earlier partnership was dissolved and since what date the respondents ceased to be the partners of the firm."'

9. The Apex Court agreed to the above made observations. In the present case, reference to the complaint (a copy of which is Annexures P-7) shows that as per the case of the complainant, the cheques which were subject matter of the said complaint were towards the partial repayment of the dues under the loan agreement (para 5 of the complaint).

10. As is clear from the above observations of this Court, it is well settled that while dealing with a quashing petition, the Court has ordinarily to proceed on the basis of averments in the complaint. The defence of the accused cannot be considered at this stage. The court considering the prayer for quashing does not adjudicate upon a disputed question of fact.

11. In ***Rangappa v. Sri Mohan [2010] 100 SCL 389 (SC)*** this Court held that **once issuance of a cheque and signature thereon are admitted, presumption of a legally enforceable debt in favour of the holder of the cheque arises. It is for the accused to rebut the said presumption, though accused need not adduce his own evidence and can rely upon the material submitted by the complainant. However, mere statement of the accused may not be sufficient to rebut the said presumption. A post dated cheque is a well recognized mode of payment** Goaplast (P.) Ltd. v. Chico Ursula D'Souza [2003] 44 SCL 472 (SC).

12. Dishonour of cheque in the present case being for discharge of existing liability is covered by Section 138 of the Act, as rightly held by the High Court.

13. Since the Apex Court have only gone into the question whether on admitted facts, case for quashing has not been made out, the appellant will be at liberty to contest the matter in trial court in accordance with law

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From the Government

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Income Tax

1) Amendment in rule 114B and 114E of the Income Tax Rules,2016

In rule 114B sr. no 10 has been substituted as under:-

Nature of transaction	Value of transaction
Deposit with,- (i) a banking company or a cooperative bank to which the Banking Regulation Act, 1949 (10 of 1949), applies (including any bank or banking institution referred to in section 51 of that Act); (ii) Post Office.	Cash deposits,- (i) exceeding fifty thousand rupees during any one day; or (ii) aggregating to more than two lakh fifty thousand rupees during the period 09th November, 2016 to 30th December, 2016.".

CBDT hereby amends rule 114E by inserting the reporting requirements of cash deposits between 9/11 to 30/12 as under:-

a) Cash deposits of Rs 2.5 lacs or more in one or more accounts (other than a current account) of a person;

b) Cash deposits of Rs 12.5 lacs or more in one or more currents account of a person.

The statement of financial transaction in respect of the above deposits shall be furnished on or before 31st January,2017.

(For full text refer Notification No. 104/2016, dated 15/11/2016)

2) Notification regarding amendment in rule 5 of the Income Tax Rules

In rule 5, after sub-rule (1), the following proviso shall be inserted with effect from 1st day of April, 2016, namely:-

"Provided that in case of a domestic company which has exercised option under sub-section (4) of section 115BA, the allowance under clause (ii) of sub-section (1) of section 32 in respect of depreciation of any block of assets entitled to more than forty per cent. shall be restricted to forty per cent. on the written down value of such block of assets." In the New Appendix I, in the Table, in the second column, for the figures " '50', '60', '80', '100' ", wherever they occur, the figure "40" shall be substituted with effect from the 1st day of April, 2017.

(Notification No. 103/2016, dated 07/11/2016)

3) Circular regarding deductions on enhanced profits under chapter VI-A.

Chapter VI-A of the Income Tax Act, 1961 provides for deductions in respect of certain incomes. In computing the profits and gains of a business activity, the Assessing Officer may make certain disallowances, such as disallowance out of specific expenditure claimed may also be made. The effect of such disallowances is an increase in the profits. Doubts have been raised as to whether such higher profits would also result in claim for a higher profit-linked deductions under Chapter VI-A.

In view of the above, the board has accepted the settled position that the disallowances made under section 32, 40(a)(ia), 40A(3), 43B, etc. of the Act and other specific disallowances,

related to the business activity against which the Chapter VI-A deduction has been claimed, result in enhancement of the profits of the eligible business, and that deduction under Chapter VI-A is admissible on the profits so enhanced by the disallowances.

(For text refer Circular No. 37/2016, dated 02/11/2016)

4) Circular regarding applicability of TDS provisions of section 194I of the Income Tax 1961 on lumpsum lease premium paid for acquisition of long term lease

Regarding applicability of TDS u/s 194I on 'lump sum lease premium' or 'one-time upfront lease charges' , CBDT vide this circular clarifies that lump sum lease premium or one time upfront lease charges which are not adjustable against periodic rent, paid or payable for a acquisition of long term lease hold rights over land or any other property are not payments in nature of rent within the purview of sec 194I and therefore such payments are not liable for TDS u/s 194I of the Act.

(Circular No. 35/2016, dated 13/10/2016)

Service Tax

1) Circular regarding withdrawal of exemption from service tax on cross border B2C OIDAR services provided online/ electronically from a non-taxable territory to consumers in taxable territory in India

At present services received in taxable territory in India from outside the taxable territory by Government, a local authority, a governmental authority or an individual in relation to any purpose other than commerce, industry or any other business or profession are exempted [*cross border B2C (business to consumer) services provided in taxable territory*]. On the other hand, services received by other persons in taxable territory from non-taxable territory [*cross border B2B (business to business) services*] are taxable under reverse charge i.e. service recipient in taxable territory pays tax. Further, in view of Place of Provision of Service Rules, 2012 rule 9(b), with respect to online information and database access or retrieval services [*OIDAR*], the place of supply is location of service provider and thus such cross border B2B/B2C services provided by a person in non-taxable territory and received by a person in taxable territory are outside the levy of service tax.

In this context, kind attention is invited to notification No. 46/2016-ST, 47/2016-ST, 48/2016-ST and 49/2016-ST all dated 9th November, 2016. These notifications shall come into force with effect from 1st December 2016, whereby service tax would be chargeable on online information and database access or retrieval [*OIDAR*] services provided by any person located in non-taxable territory and received by Government, local authority, governmental authority, or an individual in relation to any purpose other than commerce, industry or any other business or profession [*cross border B2C (business to consumer) OIDAR services provided in taxable territory*]. Online information and database access or retrieval [*OIDAR*] services have been re-defined in Service Tax Rules, 1994 to include electronic services. In this regard, there may be many questions in the mind of service providers in the non-taxable territory, recipients in the taxable territory and other stakeholders, in respect of various aspects pertaining to the taxation of such services.

(For Full text refer Circular No. 202/12/2016, dated 09/11/2016.)

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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
01/12/2016 Thursday	4:00 p.m. to 6:00 p.m.	Input GST - Tax Credit, Eligibility of Input Tax Credit, Matching of Credit, ISD, Conditions for Taking Credit	Adv. Jigar Shah	H.K.Conference Room, H. K. College Campus, Ashram Road, Ahmedabad
02/12/2016 Friday	4:00 p.m. to 6:00 p.m.	GST - Transitional Provision	CA Avinash Poddar (Surat)	
06/12/2016 Tuesday	4:00 p.m. to 6:00 p.m.	GST - Registration, Invoice, Credit and Debit Note, Payment of Taxes, Returns	CA Rashmin Vaja	
09/12/2016 Friday	4:00 p.m. to 6:00 p.m.	GST - Construction and Works Contract	CA Sandesh Mundra	
10/12/2016 Saturday	8.30 a.m.	Cricket Match President XI v/s Secretary XI		Sardar Patel Stadium, Navrangpura, Ahmedabad

Its our pleasure to inform you that CA Association has made arrangement for sale of BCAS publications. At present our association is having Few copies available for sale :-

"Reporting under CARO 2016" by CA Viren Shah – CA Jeyur Shah Price Rs.150/- and

FEW COPY LEFT! HURRY, TO AVOID DISAPPOINTMENT !!!!

Glimpses of Past Events

Diwali Get together

RRC at Mumbai

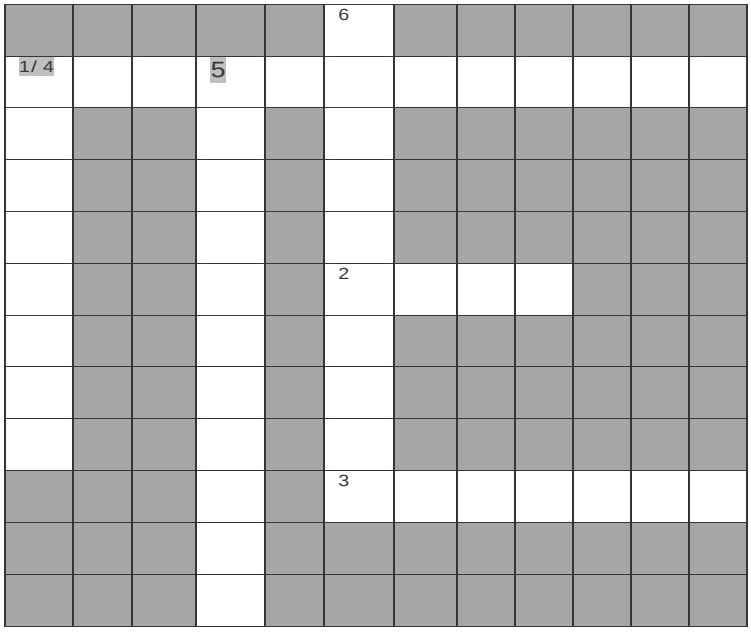
ACAJ Crossword Contest # 30

Across

1. The legislature, u/s 115JB has no intention to impose MAT on _____ enacted by an Act of Parliament.
2. Form No. 3CD is amended to cover compliances of _____
3. In case of Sourav Ganguly vs. UOI it is held that remuneration from writing articles does not attract _____ tax.

Down

4. The Insolvency and Bankruptcy Code 2016 will shift focus to _____driven insolvency resolution.
5. Every registered person in the present law will be granted registration in GST on _____ basis
6. The Mananam for the month of September talked about "Friendship for _____".



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 02/12/2016.
5. The decision of Journal Committee shall be final and binding.

Winners of ACAJ Crossword Contest # 29

1. CA. Chandrakant Pamnani
2. CA. Monish S. Shah

ACAJ Crossword Contest # 29 - Solution

Across

1. Mumbai
2. Think
3. Profession

Down

4. Salary
5. Balance Sheet
6. Business

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Actual site photo

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Library • Carrom / Chess • Air Hockey • Volley Ball • Home Theater • Badminton • Walking Track • Children Play Area

Actual site photo

Actual site photo

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Nr. Vaishnodevi Circle, S.G. Highway, **KHORAJ**

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