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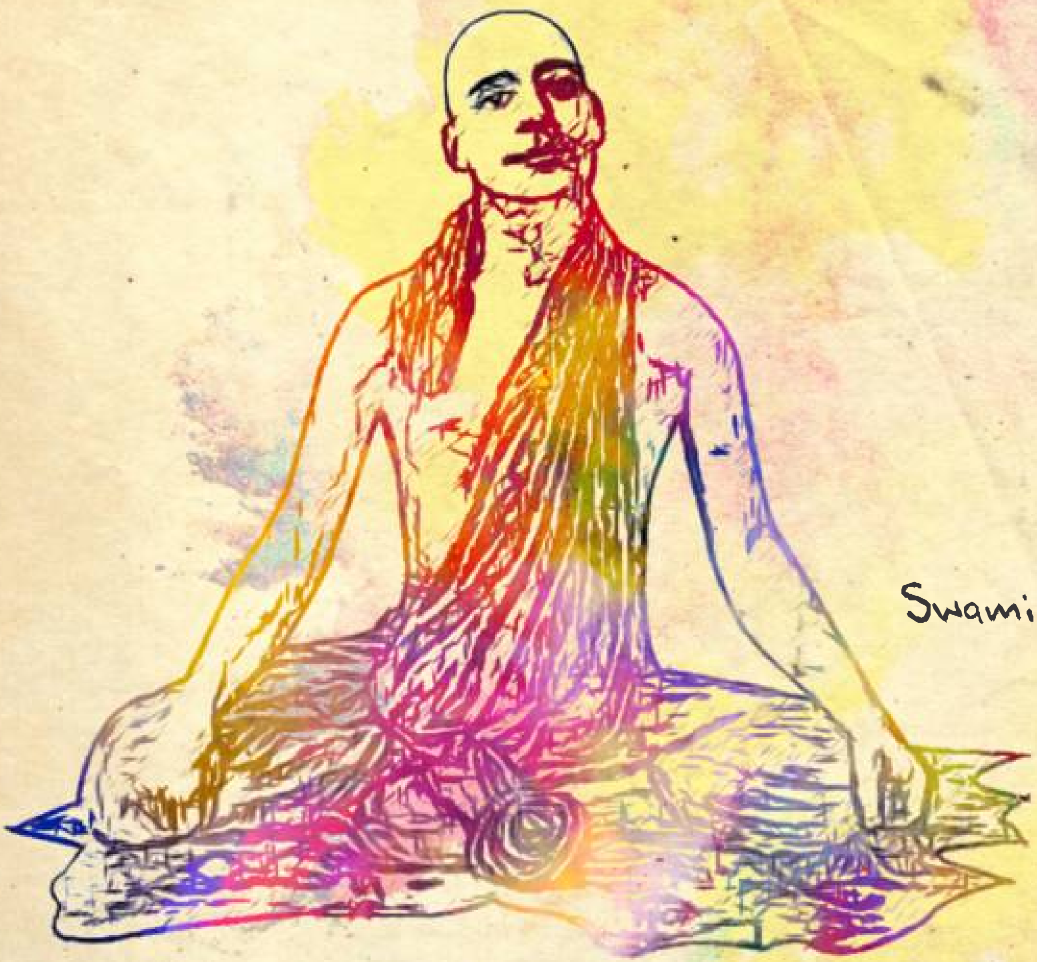

Swami Rama Tirtha

Chartered Accountants Association, Ahmedabad

A Passion to Perform

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

Published By

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Facebook - Social Networking or Social Compulsion

Facebook is well defined as a popular free social networking website that allows registered users to create profiles, upload photos and video, send messages and KEEP IN TOUCH. Mostly such social networking tools like Orkut, Facebook, etc. were created to contact your old acquaintances staying at distant places and try to build on the relations. The intention was beautiful but ARE WE MAKING THE CORRECT USE OF SUCH TOOLS. Aren't we replacing the word Social Networking with Social Compulsion. My neighbor, I don't care to meet or greet him regularly, but if he posts something then I have to be the first one to like share or comment on the post. My friend who stays far off from me, I don't call or meet him when I am in his city, but I have to like each and every of his silliest posts. Is it that the new age mantra to maintain a relation is a LIKE SHARE OR COMMENT only? Are we inspiring our next generations (online generation) to socialize using such tools rather than to have a real meaningful friend list which would be always by his side for life? Can a Big Birthday Cake Photo posted online with a long Birthday message replace a simple phone call saying HAPPY BIRTHDAY? We are not ready to bend to reconcile with our relatives but at the same time we very comfortable to share an old photo and write an emotional message so that the entire world perceives we have the best of the relations with our family members.

It does not end here though, the person posting something, expects that he gets the maximum LIKE SHARE OR COMMENT. In case you don't get the desired Likes, does that undervalue or demean your achievement? Did you work hard or did something in personal or professional life so that at the end of the day you get 500 Likes / 100 comments / 50 Shares on FB?

Perhaps in our quest to be technologically updated, we have somewhere forgotten our fundamentals to maintain a long term relationship. It is the personal touch which is the base of any relationship, isn't that missing in this online world. And who is to be blamed over here, the technology or the human being? I think it is neither of two; it is actually the mindset of the entire Society which has accepted to a larger extent that traditional methods are outdated and in this every changing fast world, online is the solution to everything. Perhaps all will not agree with this new trend. Perhaps somewhere we still value that smile, hug, greet or touch which we have when we meet in person. Perhaps a blessing taken by touching feet in person has more power than tons and tons of All the Best messages received online. Perhaps no message can impart the same intensity which a tear of joy can give to happy news. Perhaps no condolence message can replace a shoulder to cry upon. Perhaps all is not lost. Let's Keep in Touch Online but not maintain our relations in Online Mode.

Editorial

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GST Calling - Business & Profession

The central laws related to GST, the Central Goods and Service Tax Act - 2017 and the Integrated Goods and Service Tax Act - 2017 have got the nod from the Parliament and the President. It is now the states that have to enact the State Goods and Service Tax Act. Telangana is the first state to pass the State Goods and Services Tax (SGST) Bills. Rajasthan and Bihar have called special sessions of their respective Assemblies to pass the SGST Bill on April 24. It is expected that most of the states are likely to pass by the end of May-2017.

The new taxation regime of One Nation One Tax theory is going to throw many challenges but on the other end it will also bring enormous professional opportunities for all chartered accountants. It will provide a common platform as far as understanding the law is concerned. Being a new enactment, every practising chartered accountant will be at par and those who will be sincere and serious enough to learn the new law will have the advantage.

The basic exemption under the GST is turnover of Rs. 20 lacs and the turnover upto Rs. 50 lacs allows small and medium enterprises compliances with lowered rates of taxes without any credits. Initially we might see the firms understating their turnover to remain outside the purview or to avail the lowered rate of composite tax. However, increased compliance under GST will benefit firms in the long run by providing them access to cheaper capital and lower input costs, in the short term, the switch from the unorganised to organised sector may make them less competitive. Businesses making a switch to the organised sector would, in the short run, become less competitive with the rise in compliance costs. However, changing and coming in the mainstream should eventually be beneficial.

The advantage under the GST would be most of the registered entities would prefer to do business with other registered entities only. It will allow them to avail input tax credit and will also help when the charge is on the reverse mechanism. The objective of the reverse charge is to increase tax compliance and revenues. The concept is already present in service tax. In the GST regime, reverse charge may be applicable for both services as well as goods. It will have to be paid by the receiver of goods or services. In case an unregistered dealer sells or supplies to a registered dealer the registered dealer has to pay the GST on the supplied good or service. Hence, registered businesses will not want to deal with those entities in the unorganised sector. Non-compliance by small businesses, or any efforts to stay out of the organised sector, will only hurt their business over a period of time.

It is high time that be it business houses and practising professionals providing services to these businesses need to gear up. Times are changing, the day is not far. Let's get ready for it.

CA. Ashok Kataria

From the President

CA. Raju Shah
shahmars@gmail.com

Respected seniors and dear professional colleagues,

It is very well said that "To perform you need practice, to practice you need passion", and "Life is full of challenges, seen and unseen, so to look and feel great, you must hold your head up each day and project your inner confidence." With this in mind we could achieve our goals set for the year 2016-17.

A joint seminar with Service tax Division-1 Ahmedabad was arranged on 20th March, 2017 at Association's office on GST to understand "Goods & Service Tax in India- Implementation & Transition.

As part of sports activity we have played a CRICKET match on 18/02/2017 with Baroda Branch of WIRC of ICAI at Sabarmati Railway Ground, Ahmedabad. It was a very good sportsmanship match and happy to inform you that CA Association has won the match. 3rd T-10 Tennis Ball Cricket Tournament played on 18/03/2017 at Adani Shantigram Cricket Ground, Ahmedabad. Thanks to team sponsors Talati & Talati, Manubhai & Shah and R.S.Patel & Co. for their continued the support to the tournament.

A one-day picnic for members and their family was arranged at "Suryam Repose" on Sunday, 19th March, 2017. The program was organised after a gap of many years and it was a fun filled program with enjoyable recreational and gaming activities. The Association also jointly organized with Zebpay a programme on "The Bitcoin" at YMCA Banquets Green.

As this is my last communication as President of this prestigious Association, I look back and recollect the events of 2016-17. Our this year slogan **"A Passion to Perform"** could be very well executed because of enthusiastic efforts of all the young and experienced Executive Committee Members, Chairmen and conveners of all sub committees, coordinator, speakers. The Association provided wide range of programmes to its members throughout the year with a fine blend and balance of knowledge and entertainment. Residential Refresher Courses at Jodhpur, Mumbai and International RRC at Thailand, Brain Trust meetings, Study Circle Meetings on varied topics and intensive study courses were the highlights during the year. Apart from the educational programmes, the Association also arranged recreational programmes like its popular programme "Talent Evening" performed by Members and their family members and a Gujarati Drama *"Dost Hu Gujarat Chu"* a fun-filled Entertainment Evening, one day Picnic at Suryam Repose, Special Event Committee has arranged a programmed like "5 Pillars of Happiness", Celebration of CA Association foundation day in unique fashion with talk on Wellness and Health check up for members and Cricket Matches played with other organizations and between the members during the year. All sub committees have put in their persistent hard work in organizing these activities.

Before I conclude, I would like to place on record my deepest appreciation of the tireless effort of all EC members, crowns of Past presidents, Chairman-convenor and members of all committees, speakers of all the seminars and study circle meetings, paper writers and column writers of journals for their untiring support in working of the association activities. I draw solace that with such a wonderful team I have at the office bearer our shared aspiration is surely within reach. A finally, a special word of thank to all of you, our valued members, for their unstinted support and encouragement.

Be informed that the Annual General Meeting of the Association would be held on 6th May, 2017 at 5.30 pm at Shantinath Hall, "ICAI Bhavan" Ahmedabad Branch of WIRC of ICAI. I would request all members to attend.

"You win, not by defeating others, but by performing better than before."

I believe that a successful exit than a favorable entrance is better. Because, what matters is not being clapped when we arrive but being remembered when we leave.

With regards,
CA. Raju C. Shah
President

Need for speaking orders by Judicial Authorities

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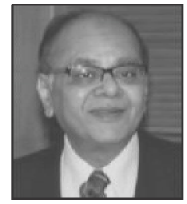

Introduction:

Whether the Quasi-Judicial bodies are required to record reasons in support of their decisions. The judicial authorities including Quasi-judicial authorities must pass speaking orders otherwise the orders passed by them is not valid and legal. The necessity for quasi-judicial Tribunals to give reasons for their decision came up in several cases. Recording reasons in support of the conclusions reached by judicial authorities is a requirement for both judicial accountability and transparency. Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights.

The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice. Judicial or even quasi-judicial opinions these days can be different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigant's faith in the justice delivery system.

Insistence on reason is a requirement for both judicial accountability and transparency. If a judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism. Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or 'rubber-stamp reasons' is not to be equated with a valid decision making process.

Ground realities:

It is seen that in number of cases A.O. and CIT(A) does not pass speaking orders. They following examples are indicative of the fact that the speaking orders are not being passed by judicial authorities including quasi-judicial authorities.

1. The appeal orders simply reproduce the conclusions/ observations of the A.O from the assessment order and thereafter written submissions of the counsel are reproduced and thereafter without recording reasons or dealing with the arguments the appeal is being dismissed by stating that the arguments are not acceptable.
2. Though the jurisdictional High court has given decision in favour of the assessee, the A.O prefers not to follow the decision on the ground that the department has not accepted the decision.
3. In respect of addition u/s 14A though the assessee relies on the decision of Gujarat high court in CIT vs. Gujarat state fertilizers and chemical ltd. 358 ITR 323. Wherein it is held that where assessee's interest free funds far exceeds investment made for earning exempt dividend income than no disallowance can be made u/s 14A of the I.T. Act 1961. The A.O as well as CITA do not discuss the judgment referred to at the time of proceedings. They do not give any reasons also for not following the jurisdictional high court decision.
4. It is further submitted that jurisdictional High Court in CIT vs. Raghuveer Synthetics Ltd. 354 ITR 222 has held that when interest free funds available with the assessee were far greater than loan advance to sister concerns and borrowed money was not utilized for the purpose of advance to the sister concern then interest is not to be disallowed merely on account of utilization of funds for non- business purposes and when no evidence is brought on record by the dept. that borrowed money was utilized for the purpose of advance to sister concerns.
5. In respect of disallowance of interest expenditure on loan taken for acquiring controlling interest

though it is pointed out that the decision of Bombay High Court in Amrita R. Shah was not followed by their Lordships of Bombay high court in CIT vs. shrishti securities 321 ITR 498 the Learned CIT(A) makes note of the later decision but does not follow nor differentiates an cursorily dismisses the argument

6. In yet another case the learned CIT(A) refuses to deal with the argument of A.R that household expenses of Rs. 20,000 is reasonable. He takes into account household expenses of Rs. 5000 per month and differences added to total income.
7. It was claimed before CIT(A) as under "Under [point no 3(a) of circular no 2/2016 dated 29th February 2016 issued by CBDT], it has been clarified that where the assessee itself irrespective of the period of holding the listed shared and securities opts to treat them as stock in trade the income arising from the transfer of such shared/securities would be treated as its business income."

"In my Financials, I have clearly shown the shares under Balance sheet as investment under current assets and not under Trading/Profit and Loss account as stock in trade. This again substantiates my intention to hold it as investment and not as trading item and which can only be treated as short term capital Gain and not business income as decided by learned AO."

The assessee relied on the judgement of Hon. ITAT in the case of Mr. Manish Ajmera ITA No. 5700/Mum/2013 decided on 26.08.2016. However, dismissing the appeal the learned CIT(A) relied on CBDT circular No. 4 of 2007 Dated 15.06.2007 and surprisingly the latest circular of 29th February,2016 as well as the decision in the case of Manish Ajmera was not referred to at all.

The above referred examples are only illustrative examples, there are number of other examples also and if details are reproduced here, this article will be too lengthy.

It is seen that when such examples are noticed and the assessee files misc. petition, they are not disposed off.

Exceptions:

It is important to note that every judicial order may not be supported by recording reasons. In court-martial cases, the Supreme Court in S.N. Mukherjee v Union of India, AIR 1990 held:

i. They do not belong to the judicial branch of the government.

ii. Court-martial are sui generis in nature and are dealt with differently by the constitution itself.

Thus, it is not necessary in such cases to record reasons by the authorities.

Speaking orders- Judicial Authorities

It is submitted that there are number of decisions which lay down that all the issues as per the assessee must be dealt with by judicial authorities. Let me refer to the decision of M/s ATM Forgings, Focal Point, Jalandhar……Appellant versus The Commissioner of Income Tax II, Jalandhar. ITA no. 598 of 2008 (O&M) Date of decision : 26.08.2013. the operative part of the decision of their lordships of Punjab and Haryana High court reads as under

"it would be apposite to refer to the order of the tribunal dated 27.02.2008 which would show that the Tribunal has in para 11 thereof noticed the contentions of the parties and accepted the appeal of the revenue without giving any cogent and convincing reasons. Therefore, the order dated 27.02.2008 does not satisfy the requirements as enunciated by the Court noticed herein above. Thus, the substantial question of law is answered in favour of the appellant-assessee and against the revenue. Accordingly, after setting aside the order of the tribunal dated 27.02.2008 which is passed in violation of the principles of natural justice as per the law laid down by the Court as mentioned above, the matter is remanded to the Tribunal to decide afresh after affording an opportunity of hearing to the parties in accordance with law. As a result, both the appeals are allowed."

Let me now refer to another important decision of Madras High Court which has also confirmed that Judicial Authorities must pass speaking orders. The citation of the decision is as under:

Tax case (Appeal) Nos. 202 and 203 of 2012 & M.P. Nos.1 and 1 of 2013

M/s. Altius securities Trading (P) Ltd., …….Appellant in T.C. (A) No. 202 of 2012

Shri C. Srikanth , ……Appellant in T.C. (A) No.203 of 2012

Vs.

The Deputy Commissioner of Income Tax, Company Circle I(1)

In this case, it was held as under:

"As far as the present case is concerned, the Tribunal has not adjudicated on the issue in the light of the materials projected by the assessee in support of his case.

In similar situation, in the decision reported in (1967) 66 ITR 462 (UdhavdasKewalram V. Commissioner of Income-tax), the Apex court pointed out "the Tribunal was undoubtedly competent to disagree with the view of the Appellate Assistant Commissioner. But in proceeding to do so, the Tribunal has to act judicially, i-e, to consider all the evidence in favour of and against the assessee. An order recorded on a review of only a part of the evidence and ignoring the remaining evidence could not be regarded as conclusively determining the questions of fact raised before the Tribunal."

In the unreported decision of this Court dated 13.2.2012 in T.C.(A)No.791 of 2004 (CIT V. GEC Alsthom India Ltd.), this Court referred to the decision of the Apex Court reported in 2010 (9) Scale 199 (M/s. Kranti Associates Pvt. Ltd and another V. Sh. Masood Ahmed Khan and others) and to the observation in paragraph 51. We need not reproduce the same, except to point out that recording of reasons is meant to serve wider principles of justice and the quasi-judicial authority must record reasons in support of his conclusions and insistence on reason is a requirement for both judicial accountability and transparency, it goes without saying that the order passed by the Tribunal on the mistaken impression that the assessee had not raised any dispute on the facts found by the Assessing Officer, calls for interference by this Court.

Thus, without going into the merits of the contentions made by the assessee, this Court has no hesitation to set aside the order of the Tribunal, thereby direct the Tribunal to hear the appeal de novo and pass orders in accordance with law."

On the issue of need for passing speaking orders by Judicial Authorities, we have landmark decision in the case of M/s. Kranti Associates Pvt. Ltd. &Anr. V/s Sh. Masood Ahmed Khan & Others WITH CIVIL APPEAL NO. _____ of 2010. The important principles laid down by their lordships of Supreme Court are as under:

"The Supreme Court in Kranti Associates Private Ltd. Case, summarized and laid down the following principles relating to 'speaking order'.

(i) Recording of reasons in support of a decision ensures that the decision is not a result of Caprice, whim or fancy but a decision arrived at is just and based on consideration of the relevant law;

(ii) When the order passed is subject to appeal, then the necessity to record reasons is even greater;

(iii) Mere giving an opportunity of hearing is not enough;

(iv) Reasons for decision being given is required for two grounds:

  (a) That the aggrieved person gets the opportunity to demonstrate that the reasons are erroneous; and

  (b) Obligation to record reasons operates as an effective deterrent against possible arbitrary action. The requirement of reasons is to prevent unfairness or arbitrariness in reaching conclusions and reasoned and just conclusions will also have the appearance of justice. In the absence of reasons, it would be difficult to know whether the decision is right or wrong.

(v) Reasons should not be a mere 'rubber stamp reasons' and they must disclose:

(a) How the mind was applied to the subject-matter for a decision (irrespective of the fact that it is purely administrative or quasi-judicial);

(b) The link between the materials which are considered and the conclusions which are reached and it should provide a national nexus between the two;

(vi) Requirement of 'reasons' in support of the order is as basic as the adherence to the principles of natural justice,

Principles of natural justice provides that it must be observed in proper spirit and a mere pretence of compliance would not satisfy the requirements of law.

(vii) When an action taken deprives or restricts fundamental right, the authorities must see that justice is not only done but manifestly appears to be done as well as this mandates the disclosure of reasons for the decision

(viii) Refusal to give reasons is an exercise of an exceptional nature and to be done sparingly and it should be fully justified by the exigencies of an uncommon situation. It should not be a mere motive to keep the reason away from judicial scrutiny

(ix) As observed by Justice *Krishna Iyer,* 'natural justice requires reasons to be written for the conclusions reached'

(x) Reasons being given for the principle enunciated in Ces-santa Ratione Legisces satipsm Lex (Reason for any particular law ceases, so does the law itself) and reason is considered as the soul of the law

(xi) Faith of the people in administrative Tribunals can be sustained only, if the Tribunal acts fairly and dispose of the matter before them by well-considered orders

(xii) The expression 'consider' means not to act mechanically but duly apply its mind and give reasons for the decision

(xiii) Disclosure of reasons provide for an opportunity for an objective review both by superior administrative heads and for judicial process

(xiv) Distinction has to be made between facts which are not in dispute and disputed facts. In the former case, non-recording of reasons may not violate the principles of natural justice but in the latter case, it would be a violation of natural justice

(xv) Mandatory for reasons to be given in the award affecting public interest as it would facilitate the High Courts to review the validity of the award

(xvi) Statutes like the Consumer Protection Act which is a benevolent piece of legislation intended to protect large body of consumers from exploitation and for consumer justice by summary trials must give conclusions based on reasons

(xvii) Even in cases where the Courts act in their discretion, there is a very strong reason in favour of disclosing of reasons. There is now increasing recognition towards the duty of the Court to give reasons in U.K.

(xviii) Unless the parties become aware of the reasons as to why one has won and the others has lost, justice will not be done

(xix) Decisions being supported by reasons imposes discipline contributing to the decisions being considered with care, the decisions rendered encourages transparency, and helps the Courts in performing their supervisory function and judicial review proceedings and

(xx) Considerations underlying the actions under review need a thorough scrutiny of the recorded reasons and also set up precedents for future adjudications.

The ratio in *Kranti Associates Private Ltd*, case and the guidelines serve as a reference for all administrative and judicial (including quasi-judicial authorities) to exercise their powers of decision-making judiciously- judicial application of mind and the decisions rendered may receive public appreciation.

It is suggested that the copy of the judgment may be circulated to all decision-making authorities which may ultimately contribute to transparency in all spheres of administration. It is further suggested that CBDT should come out with circular directing AO and CIT(A) to pass speaking orders with reasons.

❋❋❋

Foreign Tax Credit-FTC

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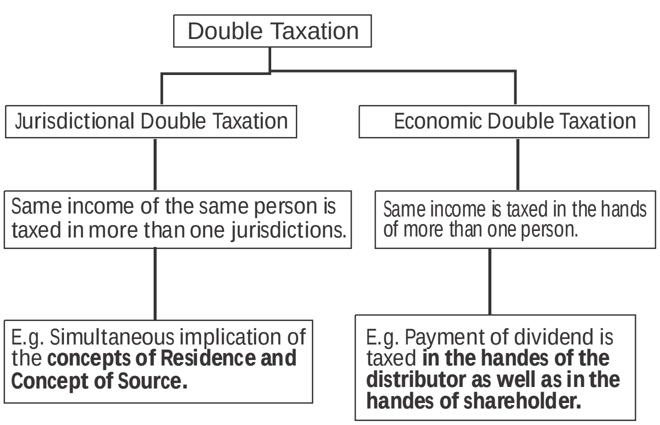
Preamble:

The world economies have moved forward and have come closer to each other making the border invisible across the globe for economic purposes in the recent past. Due to increasing liberalization and globalization there are many cross border economic transactions which are carried out in India. In such a scenario earnings of a person is not restricted to national boundaries and there are opportunities to earn money internationally and which may create controversy in the area of taxation. Most of the countries are now following a combination of source and residence based concept of taxation i.e. a country seeks to tax the worldwide income of a person who is a resident in that country as well as tax all the income which arises to a person (whether resident or non-resident) in its territory which results in double taxation of the income, firstly in the country of source of income and secondly in the country of residence of the person earning income which ultimately results into reduced effective income in hands of the assessee.

Double Taxation:

When the same income is taxed more than once, it suffers **double taxation**.



1. Jurisdictional Double Taxation:

This is generally addressed by Double Taxation Avoidance Agreement - DTAA. If a person is bound to pay tax on the same income which he had earned **in more than one jurisdiction** then it leads to double taxation. It may take place due to following circumstances:

A. Residence & Source Based:

In this concept, a resident country levies tax on the global income of its residents irrespective of its occurrence. Further, a source country also levies tax on such income which has arisen or accrued in it irrespective of the fact that the person is a resident of other country.

B. Triangular Taxation:

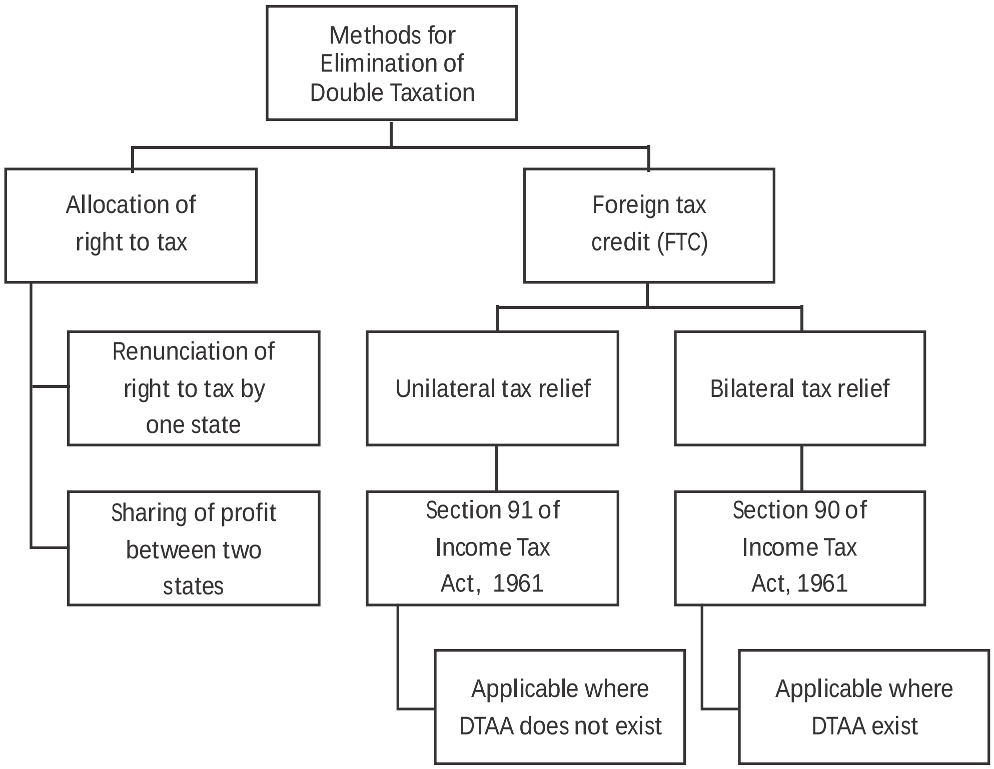
E.g.: Permanent Establishment – PE taxed in one state which receives income from various other states and it is consolidated at company source conflict with another State. For example, assume that Company A is a corporation resident in State A. It has an office in State level in a state. In some cases, a State may have a source-residence conflict with one State and a source- B and makes sales from that office into State C. Under their domestic laws, State A taxes income from those sales under the residence principle and State B and State C both tax that income under the source principle. A bilateral tax treaty between State A and State B is likely to solve the residence-source conflict but probably would not solve the source-source conflict. If State B and State C also have a bilateral tax treaty, however, the source-source conflict may also be solved.

2. Economic Double Taxation:

Economic double taxation refers to the **taxation of two different taxpayers with respect to the same income** (or capital). E.g. Payment of dividend is taxed in the hands of the distributor as well as in the hands of shareholder.

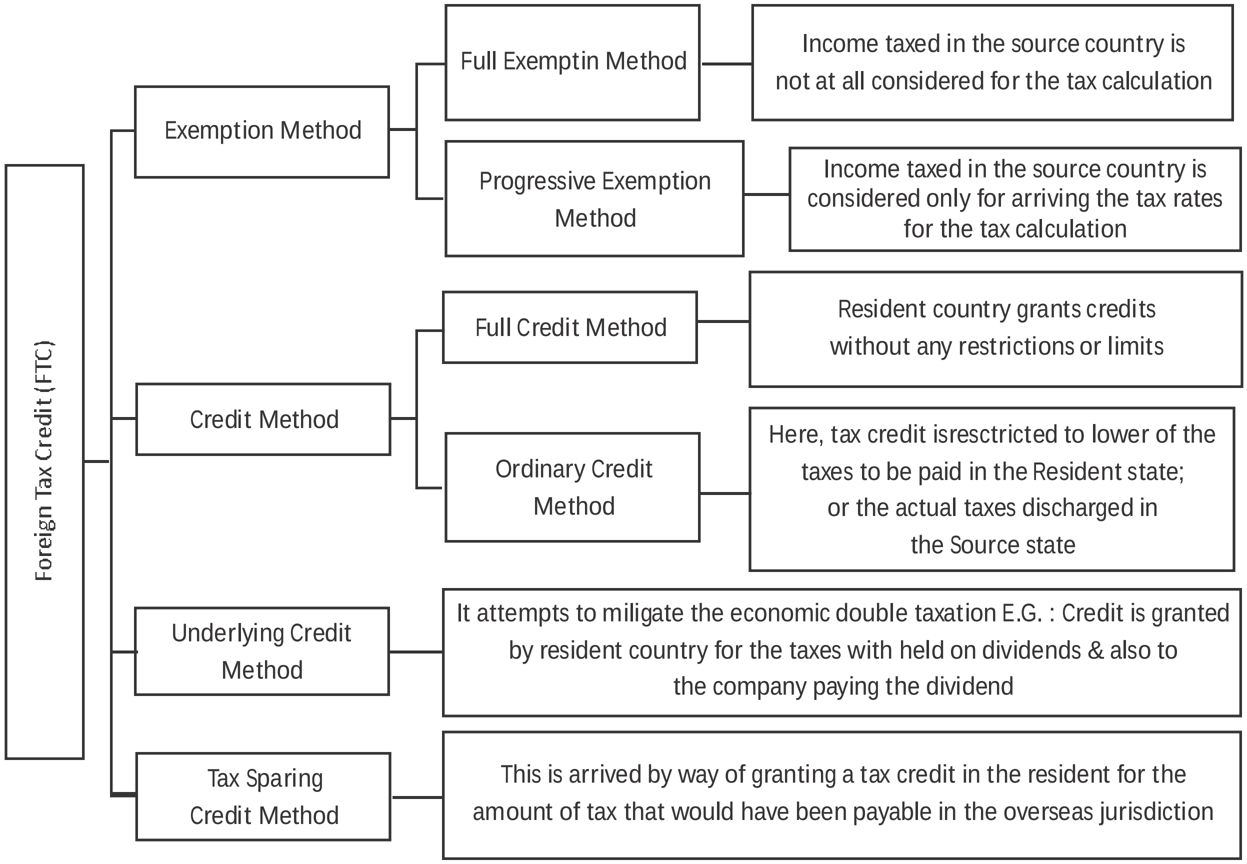
Methods of Eliminating Double Tax:

This double taxation restrains the economic activity of the entrepreneur, it influences the growth of prices or goods and services, it increases tax burden on juridical and physical subjects, and also it violates the principal of tax fairness.



Foregin Tax Credit – FTC:

To eliminate this double taxation, countries enter into bilateral treaties with each other to allocate the taxing rights of each other over the income earned by resident of one country in the other country's territory. Under this arrangement, the countries either exempt a particular income from tax in one country or stipulate a maximum rate of tax for a particular source of income (for e.g. most of the DTAA provide for a gross tax rate of 10% - 15 % for income in the nature of royalty or fees for technical services). Further, the tax which is paid in the source country by the person receiving income is allowed as a credit by the country of residence while computing the tax payable in the country of residence. Additionally, most countries also provide for unilateral relief under its domestic law, which would aid in eliminating tax cascading where no DTAA exists.



Methods of Recognising Foreign Tax Credit:

1. **Exemption Method:**

   This method involves providing exemption to the foreign income of the resident of country either wholly or partially.

   a. **Full Exemption Method:**

   - This is a method which completely ignores the income which has already been taxed in the source country at the time of computing tax payable in the resident country.

   b. **Progressive Exemption Method:**

   - Income which has already been taxed in the source county shall be considered for determination of tax rate at which the domestic income is going to be taxed.
   - In case, the if an assessee is a resident of a country which follows progressive tax slab rate system then as per this method the assessee may end up paying higher tax on its domestic income but not to pay again tax in domestic country on the foreign income.

     Case Study:

     X Ltd., resident of a state F, has earned total income of Rs. 2,00,000/-. Out of which Rs. 150,000/- has been earned from state G. State F is taxing the income of its resident at 5% of income upto Rs. 50,000/- and at flat 10% tax on the entire income in case of income above Rs. 50,000/-. State G is levying tax at 7.5% on the income accrued and arisen in India.

Payment of tax to different countries:

(Amount in Rs.)

Particulars	**Full Exemption Method**	**Partial exemption Method**
Income in resident country for Tax purpose		
Resident country income	50,000	50,000
Source country income		1,50,000
Net Income considered for tax rate purpose	50,000	2,00,000
Total Tax calculated	5%	10%
Tax in resident country	2,500	5,000
Tax in Source country	11,250	11,250
Total Tax outflow	13,750	16,250
Relief in Resident country		
Total Income of X Ltd.	2,00,000	2,00,000
Tax at 10% on total income	20,000	20,000
Net Relief gained in resident country	6,250	3,750

2. Underlying Credit Method

A method employed by a home country to provide fiscal incentives for outbound investments by home-based multi-national companies in which the total tax cost on foreign dividends is capped at the level of the home country's corporate tax rate. It focuses on mitigating economic double taxation.

Generally, this concept is implemented only in case of Dividend.

Example,

(Amount in Rs.)

Particulars	**Underlying tax credit not available**	**Underlying tax credit available**
Total income earned by X Inc.	**1,00,000**	**1,00,000**
Corporate Tax payable on income (1,00,000 x 20%)	**20,000**	**20,000**
Amount distributed as dividend	**80,000**	**80,000**
Withholding tax on dividend @ 10%	**8,000**	**8,000**
Income for the parent company *	**80,000**	**1,00,000**
Tax on the same @ 34%	**27,200**	**34,000**
Underlying tax credit (A)	**-**	**20,000**
Credit for withholding tax on dividend (B)	**8,000**	**8,000**
Total credit available	**8,000**	**28,000**
Balance Tax payable in India	**21,200**	**6,000**

* In order to give a credit on a comparable basis, parent company A Ltd. will gross up the income to include the foreign tax paid, and will start the calculation from the same income as that earned by the subsidiary company, X Inc. While the above illustration is just an example of method of computing underlying tax credit, different countries may actually have a separate method of computing the underlying tax credit.

Further, as the India-US DTAA has provisions for underlying tax credit, it may be possible for an US investor in India to claim credit for the Dividend Distribution Tax suffered under Section 115O of the Act, on the dividends received from its Indian investments. However, in case of DTAAs where there is no underlying tax credit available, the issue on whether ordinary foreign tax credit would be available for Dividend Distribution Tax or not is not free from doubt. India, however, does not have a tax system which allows credit of the underlying taxes paid by the overseas subsidiaries of Indian corporations. India generally taxes dividend without giving credit for any underlying taxes. However, there are certain exceptions such as the treaties signed with

Mauritius and Singapore, where credit is provided for the underlying taxes paid.

3. Credit Method

a. Full Credit Method:

Resident country grants straight away full credit of tax paid in foreign country without any limits or restriction.

b. Ordinary Credit Method:

This is a method which is generally adopted in DTAA. In this method, availment of credit of foreign tax paid is restricted to taxes paid in the overseas jurisdiction against each head of income as well. If the tax paid in overseas jurisdiction is in excess to the tax chargeable in resident country, it is ignored and no credit is given for the excess tax paid.

Case study:

Here the exemption method has been illustrated under different two assumptions on the basis of two different tax rates prevailing in the resident country:
(Amount in Rs.)

Particulars	**Tax @ 30 % in source Country**		**Tax @ 10 % in source Country**	
	Full Credit	**Ordinary Credit**	**Full Credit**	**Ordinary Credit**
Income in resident country for Tax purpose				
Resident country income	1,00,000	1,00,000	1,00,000	1,00,000
Source country income	25,000	25,000	25,000	25,000
Net Income considered for tax rate purpose	1,25,000	1,25,000	1,25,000	1,25,000
Total Tax calculated				
Tax rate in resident Country (b)	20%	20%	20%	20%
Tax in resident country	25,000	25,000	25,000	25,000
Tax in Source country	7,500	7,500	2,500	2,500
Tax Credit Available	7,500	5,000	2,500	2,500
Tax payable in country R after relief/tax credit	17,500	20,000	22,500	22,500

4. Tax Sparing Credit Method

This is the only method which grants a tax credit in the resident country for the amount of tax that would have been payable into the overseas jurisdiction. This method comes into play when the tax incentives offered by a particular overseas jurisdiction are deemed to have been paid as a foreign tax for the purpose of computing and granting foreign tax credit in the resident country.

Many Indian tax treaties contain tax sparing clauses which are now being renegotiated to eliminate treaty abuse by structuring transactions.

Case study:(Amount in Rs.)

Particulars Assumptions	Abbrevi-ations	Tax sparing – Absent Amount in Rs.	Tax sparing – Present Amount in Rs.
Income in State R (Residence Country)		80,000	80,000
Income in State S (Source Country)		20,000	20,000
Aggregate taxable income in State R		1,00,000	1,00,000
Tax rate in State R		35%	35%
Tax rate in State S (exempted 30%) - normal rate - special rate		30%0%	30%0%
Workings			
Tax payable in State R	(A)	35,000	35,000
Tax payable in State S	(B)	-	-
Tax credit (tax charged in State S)	(C)	-	-
Tax credit (tax exempted in State S) (20,000 * 30%)	(D)	-	6,000
Total tax credit (C) + (D)	(E)	-	6,000
Total tax after relief – (A) – (E)	(F)	35,000	29,000

FTC – Indian Perspective:

Computation of FTC with respect to doubly taxed income is always a contentious issue. In absence of well-defined rules with respect to framework/manner for granting FTC in India it has resulted into diversified practices and major controversial issues, some of them have been depicted here as below:

1. If the company in India is enjoying exemption under section 10 and earning foreign income, whether such company can claim foreign tax credit in India was a controversy.
2. When the company is claiming complete deduction from the total income as per income tax law, then whether such company can claim foreign tax credit in India was a controversy.
3. If the tax has not been paid in the foreign country, then whether credit can be claimed of such payable foreign tax in India.
4. There may be a foreign income which may not be considered as an income as per domestic tax laws, then in such case whether such assessee can claim credit of such tax paid in foreign on such foreign income.
5. It may be possible that in foreign the assessee is liable to pay tax on the foreign income to both the central as well as state government. Here the question arises that whether such assessee is eligible to claim credit of the tax paid both to the central government as well as state government.

Introduction to FTC Rules:

There are couple of judicial precedent which has attempted to clarify the issue of FTC in India. To provide respite from this, the Finance Act 2015, vide amendment to section 295 of the Act, empowered Central Board of Direct Taxes(‘CBDT’)to frame rules regarding ‘procedure for granting relief or deduction of any foreign tax paid against the Indian tax payable.’ Accordingly, the CBDT has notified on June 27, 2016 the Foreign Tax Credit Rules, 2016(‘Rules’) which provide clarity on the mechanism of obtaining foreign tax credit in India, of foreign taxes paid.

Applicability of the Rules:

- The rules shall come into force **from 1st April 2017**.
- Available only resident for the amount of **foreign taxes paid by him in a foreign country**.
- Credit is available only if **income corresponding to the taxes is offered for taxes** or assessed to tax in India **during the year in which the credit is claimed**.
- In the cases where the income for which the foreign taxes paid or deducted is offered to taxes for more than one year, the credit will be given across the years **in the same proportion to which the income is offered to tax in India**.

Detailed Interpretation of the Notified Rules:

Rule No.	Particulars	Notified Rules(Interpretation)
128 (1)	Allowance of FTC	An assessee can claim **foreign tax credit in a year in which he has offered his foreign income in India.** In case, the assessee doesn't offer his foreign income inane stroke but offers partially in more than one year than FTC is to be claimed in the proportion of the income offered in the respective year.
128 (2)	Meaning of 'Foreign Tax'	**The foreign tax is defined to mean:** a) Where any agreement for avoidance of double taxation avoidance agreement ('DTAA') in terms of Section 90 or 90A of the Income-tax Act, 1961 ('the Act') :-**Tax as covered under the respective DTAA.** b) In respect of any other country/ specified territory outside India: **-The tax payable under the law in force in that country or specified territory in the nature of Income-tax** referred to in clause (iv) of the Explanation to Section 91 of the Act.
128 (3)	Eligibility for claiming FTC	The FTC can be claimed **against the amount of income tax, surcharge and cess** but **not in respect of any sum payable by way of interest, fee or penalty**
128 (4)	Credit in respect of disputed foreign tax	The Notified Rules now **enable taxpayers to claim credit of disputed foreign tax** for the year in which the income is offered to tax or assessed to tax, **within six months from the end of the month in which the dispute is finally settled, provided following documents are furnished:** · Evidence of settlement of dispute (e.g. tax orders etc.); · Evidence to the effect that the liability for payment of disputed FTC has been discharged and · Undertaking that no refund in respect of such amount has directly or indirectly been claimed and shall be claimed.
128 (5)	Computation of FTC	The computation of FTC shall be done separately for each source of income and given effect to in the following manner: i. The **credit shall be the lower of the tax payable under the Act** on such income **and the foreign tax paid** on such income;

		ii. The credit shall be determined by **conversion of the currency of payment of foreign tax at the telegraphic transfer buying rate on the date on which such tax has been paid or deducted** · In case foreign tax paid exceeds the amount of tax payable in accordance with the provisions of DTAA, then, such **excess shall be ignored** while computing FTC.
128 (6)	Allowance of FTC against MAT/ AMT liability	FTC shall also be **available against** minimum alternate tax (**'MAT'**) / Alternate minimum Tax (**'AMT'**) provisions applicable to companies and other entities under the Act.
128 (7)	Computation of FTC, in case tax is paid under MAT / AMT provisions	Any **excess of FTC eligible against MAT/ AMT** over FTC available under the normal tax provisions, will **not be entitled for carry forward**
128 (8)	Documentation for claiming credit of foreign taxes	No FTC shall be allowed unless the following documents are furnished by the taxpayer: (i) a statement of income and amount of foreign tax deducted or paid on such income in prescribed form i.e.**Form no 67** (notified); (ii) Certificate or statement specifying the **nature of income and the amount of tax deducted therefrom or paid** by the taxpayer: a) From foreign tax authorities, or b) From the person, responsible for deduction of such tax; or c) Self-attested by the taxpayer. If the certificate / statement is self-attested, then, it shall be accompanied by · An acknowledgement of online payment or a bank counter foil or challan for payment of tax; or · Proof of deduction where the tax has been deducted.
128 (9)	Due date for submitting the prescribed form (i.e. Form no 67)	To be furnished **on or before the due date specified for furnishing the return of income under Section 139(1)** of the Act, in the manner specified for furnishing such return of income
128 (10)	Carry backward of loss resulting in refund of foreign tax in home country	**Form no 67 shall also be furnished** in a case where the carry backward of loss of the current year results in refund of foreign tax for which credit has been claimed in any earlier previous year or years.

Conclusion

FTC in India context is becoming more critical and important determinant factor to arrive group tax rate in cross border business horizons. Especially with Indian corporate going global by expanding its business presence across border, the rules notified are a positive step and gives certain clarity on the foreign tax credit eligibility. While it is a light of hope to the corporate to family estimate its global tax liability with some certainty, let's hope that issues untouched and those crop up out of the new rules will be addressed in the due course by necessary amendments to ensure a batter visibility of tax liability on global operation.

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Glimpses of Supreme Court Rulings

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20 Power to Remand Case:

In absence of any pleadings for remand before High Court or first appellate court, matter cannot be demanded to lower court. Where the parties to appeal never complained at any stage of proceedings that trial of suit was unsatisfactory resulting in prejudice, under such circumstances remand cannot be made. If High Court did not frame substantial question of law as to remanding matter while admitting second appeal, then it cannot exercise power to remand the matter. Party seeking the remand must make out case under R.23 or R.23A o R.25 of Or. 41 CPC. While remanding the matter, appellate court needs to assign its reason for such remand. In absence of any pleadings regarding remand or where party fails to state as to why remand is justified under R.23 or R.23A o R.25 of Or. 41 CPC.

[Syeda Rahimunnisa Vs. Malan Bi (Dead) by Legal Representatives and another (2016) (10 SCC 315)]

21 'Question of law' and 'Substantial question of law' :

To constitute question of law, there must be pleadings regarding question of law involved in matter. Such legal question should emerge from substantial findings of fact recorded by courts of fact. It must be necessary to decide that question of law for just and proper decision of the case. Substantial question of law means question of law having substance, essential, real, of sound worth, important or considerable. Fairly arguable question of law, where there is room for difference of opinion on it or where court thought it necessary to deal with that question at some length and discuss alternative views, then such question would be substantial question of law. Question of law must be debatable and not previously settled by law of land or a binding precedent and it must have material bearing on decision of case, if answered either way in so far as rights of parties concerned. It however does not mean application of settled legal principles. Substantial question of law on which second appeal shall be heard need not necessarily be substantial question of law of general importance.

Tests for determination whether a question of law is substantial or not is

(i) whether it is of general importance

(ii) whether it is directly and substantially affects rights of parties and if so, whether it is either an open question not being finally settled by highest court or is not free from difficulty or calls for alternative views. However, application of principles settled by highest court or the general principles would not amount to substantial question of law.

Whether question of law is substantial or not depends upon the facts and circumstances of each case. Need for striking judicious balance between indispensable obligation to do justice at all stages and impelling necessity to avoid prolongation of litigation should be of paramount consideration.

[Syeda RahimunnisaVs. Malan Bi (Dead) by Legal Representatives and another (2016) (10 SCC 315)]

22 Section 138-Negotiable Instruments Act, 1881-dishonor of post-dated cheque:

The crucial question to determine applicability of section 138 of the Act is whether the cheque represents discharge of existing and enforceable debt or liability or whether it represents advance payment without there being subsisting debt or liability. We are of the view that the question whether a postdated 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.

[Sampelly Satyanarayana Rao Vs. Indian Renewable Energy Development Agency Ltd. (2016) (10 SCC 458)]

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From the Courts

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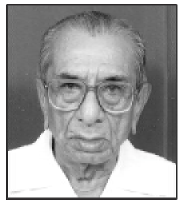

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101 Payment of Bonus : Sec. 36(1)(ii), Sec. 43B(b) and Sec. 40A(9)
Shasun Chemicals And Drugs Ltd. v/s. CIT (2016) 388 ITR 1 (SC)

Payment of Bonus and Sec. 36(1)(ii), Sec. 43B(6) and Sec. 40A(9). How to be interpreted?

Held:

Under section 36(1)(ii) of the Income Tax Act, 1961 expenditure incurred on account of payment of bonus to employees is allowable as business expenditure. Section 43B, however, mandates that certain deductions would be allowed only on actual payment. Section 40A(9) deals with deductions in respect of the amount paid by the assessee as an employer towards the setting up or formation of or as contribution to, any fund, trust, company. etc. The condition is that such sum has to be paid for the purpose and to the extent provided by or under clause (ii) or clause (iva) or (v) of sub-section (1) of section 36. However, the payment of bonus is not covered by any of the clauses of sub-section (1) of section 36 but is allowable as deduction under clause (ii) of sub section (1) of section 36. Therefore, section 40A (9) has no application. The provisions of section 43B are also not applicable in as much as clause (b) of section 43B refers to sums payable by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees. Thus, this provision also does not mention bonus. Section 36 enumerates various kinds of expenses which are allowable as deduction while computing the business income under section 28 of the Act. The amount paid by way of bonus is one such expenditure which is allowable under clause (ii) of sub section (1) of section 36.

That there was no dispute that the amount representing bonus was paid by the assessee to its employees within the stipulated time. The embargo specified under section 43B or section 40A(9) of the Act would not come in the way of the assessee. Therefore, the High Court was wrong in disallowing this expenditure as deduction while computing the business income of the assessee and the decision of the Tribunal was correct.

102 Duty to pass a reasoned order
CIT v/s. Banarasi Sweets P. Ltd. (2016) 387 ITR 172 (P & H)

Issue :

Why it is necessary to pass a reasoned order?

Held :

There is a need for passing a well reasoned order after examining the entire evidence as is expected of a administrative , Quasi –Judicial or judicial decision. Hon. High Court has listed out the duties of a Tribunal giving 15 points for guidance and reasons why an order should be reasoned order. Hon. High Court has listed fifteen points enumerating the requirement to pass a reasoned order.

Note: Hon High Court has listed fifteen points (a) to (o) in the decision, giving the guidance.

103 Sec. 263 Erroneous and prejudicial to the interests of the Revenue.
CIT & Anr. v/s. Saravana Developers (2016) 289 CTR 550 (Kar)

Issue :

For the purpose of Sec. 263, how the words “erroneous and prejudicial to the interests of the revenue” are to be interpreted?

Held :

The CIT proceeded to initiate proceedings under S. 263 only on the ground that the AO has not assigned any reasons for accepting the valuation of the work in progress declared by the assessee. As per the materials placed before the Tribunal in the records pertaining to the assessment year in question, a detailed examination is made by the Tribunal. Tribunal is of the view that the AO has applied his mind before accepting the figure declared by the assessee in the work in progress report. Such an order cannot be held to be erroneous and prejudicial to the interests of the Revenue. It is not a case of 'lack of inquiry'. Further inquiry ordered by the CIT would amount to fishing/rowing inquiry in the matter already concluded.

104 Notice u/s 158 BC in search case when no incriminating material found : Dr. Gautam Sen v/s. Chief CIT and Ors. (2016) 289 CTR 478 (Bom)

Issue:

Can assessment proceedings be taken when no incriminating material is found during search proceedings?

Held :

From the appraisal report also, it is clear as day light that no incriminating documents were found during the course of search nor was it found that the assessee was in any manner involved in the bank account with his name in the bank. Thus, it appears that the Revenue took search and seizure proceeding in respect of the assessee on account of mistaken identity. In any case the appraisal report would indicate that no notice under S. 158BC could be issued to the assessee as the condition precedent issue notice under S. 158BC. Viz. undisclosed income found during the search proceedings, is not satisfied.

Action on the part of the Revenue to issue the impugned notice ignoring the appraisal report is highly deplorable. We live in a county governed by laws. The officers of the I.T. Department are obliged to proceed in accordance with the statutory provisions and not on their whim and fancy. The officers hold power in trust and must ensure that no citizen is harassed by sending him notices, when on the basis on its own record, such notices are not sustainable. The IT Department would adopt a standard operating procedure which would provide for appropriate safeguards before issuing notices under Chapter XIV-B. This alone would ensure that officers of the Revenue act in terms of the mandate provided in the Act.

Counsel for the Revenue informed that the Revenue seeks to press the impugned notice and seek dismissal of the present petition. In the above view, this is the fit case where costs should be awarded to the assessee. The Revenue i.e. the jurisdictional Chief CIT is directed to pay the costs of Rs. 20,000/- to the assessee within four weeks.

105 Interpretation of Statues IVRCL-JL (JV) v/s. Asstt. CIT (2016) 386 ITR 564 (T & AP)

Issue :

How the Rules and Provisos are to be interpreted?

Held :

It is settled law that Rules made under the Act should be interpreted in conformity with the provisions of the Act.

It is a fundamental rule of construction that a 'Proviso' must be considered in relation to the principal matter to which it stands as a proviso. It is to be construed harmoniously with the main enactment.

106 Validity of Notice u/s 271(1)(c) CTR v/s. SSA's Emerald Meadows SLP (C) No. 23272 of 2016 386 ITR Supreme Court Reporter @ P13

Issue :

When notice is not specific, whether the same is valid?

Held :

Hon. Supreme Court in the above case has dismissed the special leave petition against the judgment of Karnataka High Court , holding that the notice issued by Assessing Officer u/s 274 read with section 271(1)(c) of the I.T. Act, 1961 was bad in law as it did not specify under which limb of section 271(1)(c) the penalty proceedings had been initiated i.e. whether for concealment of income or for furnishing inaccurate particular of income.

107 Re-opening : Reasons to be recorded and reference to the materials that form basis of reasons. Agya Ram v/s. CIT (2016) 386 ITR 545 (Delhi)

Issue

Necessity of recording reasons and reference to the materials that form the basis of reasons.

Held :

Although the Assessing Officer may not have fresh tangible material to form reasons to believe that income has escaped assessment, he should have, after examining the returns and the documents accompanying the returns, set out at least, the prima facie, reasons for arriving at the reason to believe that income has escaped assessment for the assessment year in question. The requirement of the law is that reasons, even prima facie, and not conclusions, needed to be recorded by the Assessing Officer for reopening the assessments. Reference has to be made to the materials that form the basis of such reasons even if such materials are not fresh ones but already form part of the record. The reasons recorded by the Assessing Officer to believe that income had escaped assessment should have a link with an objective fact in the form of information or materials on record to reopen an assessment.

108 Jurisprudence : Binding nature of High Court and Supreme Court decisions : Kaira Dist. Co.Op. Milk Producers Union v/s. Dy. CIT (2016) 386 ITR 633 (Guj)

Issue :

What is the effect of High Court and Supreme Court decisions on the lower authorities?

Held :

The law laid down by the High Court must be followed by all authorities and subordinate Tribunal and they cannot ignore it either in initiating proceedings or deciding the rights involved in such a proceeding. If in spite of the earlier exposition of law by the High Court having been pointed out and attention being pointedly drawn to that legal position, proceedings are initiated, it must be held to be a willful disregard of the law laid down by the High Court and would amount to civil contempt as defined in section 2(b) of the Contempt of Courts Act, 1971.

109 Powers of Commissioner of Income Tax u/s 264 and Benefit to assessee. Vijay Gupta v/s. CIT (2016) 386 ITR 643 (Delhi)

Issue :

Whether powers u/s 264 given to the CIT can be used for the benefit of the assessee?

Held :

The powers conferred under section 264 of the Income tax Act, 1961 are very wide. The Commissioner is bound to apply his mind to the question whether the assessee was taxable on that income. Since section 264 uses the expression "any other", it would imply that the section does not limit the power to correct errors committed by the subordinate authorities but could even be exercised where errors are committed by the assessee. There is nothing in section 264 which places any restriction on the Commissioner's revisional power to give relief to the assessee in a case where the assessee detects mistakes because of which he is over assessed after the assessment was completed. When the substantive law confers a benefit on the assessee under a statue, it cannot be taken away by the adjudicatory authority on mere technicalities.

110 Search and effect on third person : Principal CIT v/s. Nikki Drugs and Chemicals P. Ltd. (2016) 386 ITR 680 (Delhi)

Issue :

How and to what extent the search on assessee, has effect on the third person and what is the duty of the Search ITO?

Held :

It was necessary for the Assessing Officer of the person in respect of whom search was conducted to record his satisfaction that the specified seized documents belonged to the assessee to initiate proceedings under section 153C of the Act. The Department failed to confirm whether such note was prepared prior to the initiation of the proceedings under section 153C of the Act and also failed to controvert the contention of the assessee that such note was not disclosed despite its request. Moreover, the documents seized could not be considered to be belonging to the assessee.

Since the Assessing Officer of the person in respect of whom search was conducted did not record his satisfaction that the specified seized documents belonged to the assessee, the initiation of proceedings under section 153C of the Act, in respect of the assessee was without jurisdiction and hence the proceedings were not valid.

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Tribunal News

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67 Uniphos Environtrocnic Pvt. Ltd. Vs. DCIT CPC- TDS [2017] 79 taxmann.com 75 (Ahmedabad) Assessment Year: 2013-14 Order Dated: 6th Feb, 2017

Basic Facts

The assessee has received legal services from a law firm havingprincipal place of business at Germany. The assessee had in accordance with article 12 - Fee for technical services of DTAA between India and Germanythe assessee had deducted TDS @ 10%. The AO held that the assessee had deducted TDS at lower rate of 10% instead of 20.6%. On appeal, the Ld. CIT(A) has rejected the appeal of the assessee. The assessee preferred an appeal before the ITAT.

Issue

Whether provisions of section 206AA could be invoked when tax had been deducted on fee for legal services to a German company on strength of beneficial provisions of DTAA?

Held

The Hon'ble ITAT held that it is only elementary that, under the scheme of the Income Tax Act 1961- as set out under section 90(2) of the Act, the provisions of the applicable tax treaties override the provisions of the Income Tax Act 1961- except when the provisions of the Act are more beneficial to the assessee. The provisions of the applicable tax treaty, in the present case, prescribe the tax rate @ 10%. This rate of 10% is applicable on the related income whether or not the assessee has obtained the permanent account number. In effect, therefore, even when a foreign entity does not obtain PAN in India, the applicable tax rate is 10% in this case. Section 206AA, which provides a higher tax burden- i.e. taxability @ 20% in the event of foreign entity not obtaining the permanent account number in India, therefore, cannot be pressed into service, as has been done in the course of processing of return under section 200A. To that extent, short deduction of tax at source demand, raised in the course of processing of TDS return under section 200A, is unsustainable in law. Accordingly they quashed short deduction of tax at source demand. And since the grievance of the assessee was justified, it was accepted.

68 Sun Pharmaceuticals Industries Ltd. Vs. DCIT [2017] ITA No. 360/Ahd/2017 (Ahmedabad) Assessment Year: 2012-13 Order Dated: 14th March, 2017

Basic Facts

The assessee sought for a stay on collection/recovery of disputed tax and income tax demands in the matter of assessment under section 143(3) r.w.s. 144C of the Income Tax Act, 1961. The AO rejected the stay petition of the assessee and asked to pay the demand in instalments. The assessee, without availing the opportunities available to it by way of appeal to the higher authorities, i.e. Add. CIT and Jurisdictional Pr.CIT, filed the stay petition before the Hon'ble ITAT. The assessee submitted that since it was fag end of the financial year, there was considerable pressure on the Revenue to achieve their annual revenue collection targets and thus approaching all the administrative authorities was not practical.

Issue

Whether assessee was correct in directly approaching the ITAT without exhausting alternative remedies available to him?

Held

The Tribunal found merits in the objection raised by Department, as also in the apprehensions raised by the assessee. According to the Tribunal on a procedural note, the assessee should indeed have exhausted all the alternate remedies available to them. But they also observed that it was harsh reality that sometime, particularly in end of the year, the income tax authorities behave in such a high handed manner so as to, in effect, render the right to seek remedies against recovery of such demands nugatory and infructuous. If no time, or very little time, is allowed to the assessee to seek remedies against any coercive action to recover the disputed demands, the assessee's right to approach the tribunal will indeed become meaningless. The apprehensions raised by the assessee are also quite in tune with the ground realities.

In this background the Hon'ble ITAT held that a balance indeed needs to be struck between procedural requirements to be followed by the assessee and substantive legal rights of the assessee. The Hon'ble ITAT directed the assessee to approach the Pr. CIT within three working days of this order being pronounced in the open court, and direct the Pr. CIT to consider the request of the assessee in a judicious manner as early as possible, after giving the assessee a fair opportunity of hearing and by way of a speaking order. The ITAT also directed the AO to not take any coercive action for collection or recovery of the demandstill one week from the date on which the order on such a stay petitionif filed, is communicated to the assessee. The ITAT restored the matter to the file of Pr. CIT.

69

ITO (Intl. Taxation) Vs. Cadila Health Care Ltd. [2017] 78 taxmann.com 330 (Ahmedabad)
Assessment Year: 2008-09 Order Dated: 6th Feb, 2017

Basic Facts

The assessee had made remittance for technical consultancy and professional services without withholding tax in terms of section 195 of theact. The AO passed order holding that payments made by the assessee were in the nature of fees for technical services within the meaning of section 9 (1)(vii) of the Act. The AO held that the payment made to the foreign parties were taxable in India within the language of the DTAA with USA andCanada as the services were made available in the form of report onanalytical study as per the agreements and the services provided by the Belgium parties were fees for technicalservices as per article 12(3)(b) of the Belgium DTAA. Therefore, the AO concluded that assessee was liable to pay tax on the entire amount remitted. On appeal, the CIT(A) held in favour of the assessee that the payments did not fall within the purview of included services as per India – US & India Canada treaty and hencethere was no liability on the assessee to deduct TDS u/s. 195. In respect of the Belgium Treaty the CIT(A) upheld the assessee's contention that in view of "Most Favoured Nation" (MFN) clause the restricted meaning for included services as per India USA and India Canada Treaty needs to be applied to the India Belgium treaty and according to which since no technical knowledge is made available by the Belgium firms the payment to them cannot be considered as fees for technical services. Aggrieved by the order of CIT(A), revenue is in appeal.

Issue

Whether MFN clause in DTAA between India and Belgium, language of article 12 of DTAA between India and USA would apply to remittances made by assessee to Belgian company?

Held

The Hon'ble ITAT held that the servicesprovided by non-resident did not involve any transfer of technology. The ITAT held that non-resident parties have no PE in India and since the non-resident parties did not 'make available' any technical knowledge, Article 12(4)(b) of the DTAAs with USA and Canada is not applicable. Further, the ITAT held that the AO failed to prove that the Belgiumnon-resident parties have made available any technical knowledge orknow-how to the assessee. Also, the ITAT considered the findings of the CIT(A) and held that because of the Most Favoured Nation clause,the scope of fees for technical services under the India- Canada DTAA and the India-USA DTAA was more restricted thanthat under India-Belgium DTAA, therefore, the language of article 12of the aforesaid two treaties shall apply to the DTAA between Indiaand Belgium. In view of the above, the ITAT upheld the findings of the CIT(A).

70 Shapoorji Pallonji & Co. Ltd. Vs. DCIT 79 Taxmann.com 39(Mumbai) Assessment Year: 2011-12 Order Dated: 3rd March 2017

Basic Facts

The assessee during the concerned year has computed the disallowance u/s 14A r.w.r. 8D(2)(ii) and 14 r.w.r. 8D(2)(iii) and made a suo-moto disallowance of Rs. 1.10 crores and Rs. 1 lakhs respectively. The AO vide his assessment order disallowed Rs. 60 crores u/s 14A r.w.r. 8D(2)(ii) and a consequent disallowance of Rs. 4.6 lakhs u/s 14A r.w.r. 8D(2)(iii). The assessee contended that the own funds substantially covers the investment made by the assessee as per the position settled in law. Further, the method of calculation followed by the assessee has to be accepted for making disallowance u/s 14A of the Act as has been accepted by the Revenue in the past several years, thus, rule of consistency requires that similar view should be taken in the present year also.

However, instead of following the rule of consistency, the Ld. Commissioner of Income Tax (Appeal) enhanced the disallowance under Rule-8D(2)(ii) for an amount of Rs.60,04,84,033/-, which is under challenge.

Issue

Whether Rule 8D of 1962 Rules is not attracted automatically to an assessee who earns exempt income, rather, in a case, where Assessing Officer after examination of books of account under section 14A(2), records his satisfaction that disallowance or 'nil' disallowance made by assessee is found to be unsatisfactory, he is authorized to compute amount to be disallowed under rule 8D of 1962 Rules?

Held

Under sub-section (2) of Section 14A of the Act, the AO is required to examine the accounts of the assessee and only when he is not satisfied with the correctness of the claim of the assessee in respect of expenditure in relation to exempt income, the AO can determine the amount of expenditure, which should be disallowed in accordance with such method as prescribed i.e. Rule-8D of the Rules, therefore, the AO at the first instance must examine the disallowance made by the assessee or the claim of the assessee that no expenditure was incurred to earn the exempt income. If and only if the AO is not satisfied on the count after making reference to the accounts only then he is entitled to adopt the method as prescribed under Rule-8D of the Rules, thus, Rule-8D is not attracted and applicable in a situation, where, the assessee has voluntarily computed the disallowance as per Rule-8D of the Rules.

The Tribunal upheld the assessee's contention that since the appellant's claim was accepted in the earlier years, the same should be accepted in the year under consideration also since the department has not brought on record any new facts, the tribunal directed the AO to follow the decisions of earlier years. As far as disallowanceas per Rule 8D(iii) was concerned the tribunal found that as against assessee disallowance of Rs.1 lakh, the tribunal had upheld the disallowance of Rs.10 lacs. The Tribunal following the rule of consistency directed the AO to consider disallowance as pre Rule 8D(iii) at Rs.10 lakhs.

71 Cairn UK Holdings Limited vs. DCIT 79 taxmann.com 128 Assessment year 2007-08

Basic Facts:

Cairn Energy Plc ('CPLC') is a company incorporated outside India and has 9 wholly-owned subsidiaries, which have oil and gas assets located in India. Assessee was incorporated in UK. Thereafter, it entered into a share exchange agreement with CPLC, wherein the entire issued share capital of the 9 subsidiaries of CPLC were transferred to the Assessee in exchange for issuance of the share capital of the Assessee. Thereafter, Cairn India Holdings Limited ('CIHL') was incorporated in Jersey and post incorporation, it entered into a share exchange agreement with the Assessee. As per the said agreement, the Assessee transferred all the shares of the 9 subsidiaries to CIHL in exchange for the issuance of shares of CIHL. The said agreement was entered into in financial year 2006-07.Further, vide a Debt Conversion Agreement, the debt owed by Cairn

Energy Hydrocarbons Limited to CPLC, was assigned to the Assessee for a consideration in the form of shares of the Assessee. The said debt was further assigned by the Assessee to CIHL for a consideration in the form of shares of CIHL. Finally, Cairn India Limited ('CIL') was incorporated in India as a wholly-owned subsidiary of the Assessee. Vide a subscription and share purchase agreement and a share purchase deed, the entire share capital of CIHL was transferred by the Assessee to CIL during the financial year 2006-07 for a consideration which was partly paid in cash and partly as shares of CIL. Subsequently, CIL floated an initial public offer ('IPO') in the Indian capital market and the shares of CIL were listed on various stock exchanges in India.The AO alleged that the impugned transaction entered into by the Assessee is governed by the provisions of section 9(1)(i) read with explanation 5 of the Act as there is a transfer of share or interest in a company which derives its value substantially from assets located in India. The AO therefore held that the gains from the sale of shares of CIHL by the Assessee to CIL are short term capital gains chargeable to tax in India.

Issue:

Is the assessee liable to pay capital gain tax on shares in India?

Held:

The first contention taken by the Assessee was that the retrospective amendment to section 9(1)(i) of the Act by the Finance Act, 2012, is bad in law and ultra vires. The Tribunal held that it is not the right forum to challenge the validity of the provisions of the Act and thus rejected the contention of the Assessee.

On the argument of the Assessee that the transaction of transfer of shares by the Assessee to CIL is an internal reorganization of the group and there is no change in the controlling interest, the Tribunal held that part of the purchase price was paid by CIL from the proceeds of IPO and the balance consideration was paid through issue of shares of CIL to the Assessee. Therefore, the said transaction is not merely a business reorganization process. Further, the Tribunal was not convinced with the argument of the Assessee that there is no increase in the wealth of the Assessee. The Tribunal held that the value of the holdings of the Assessee in CIL has been unlocked due to the IPO and value is derived by the book building process. On the argument that no real income accrued to the Assessee, the Tribunal looked into the financial statements of the Assessee and held that the Assessee has earned substantial gain on sale of shares and has also gained on account of taxes as the said gains were not chargeable to tax in UK and thereby, the Assessee earned real income on account of sale of shares of CIHL to CIL.

On the additional ground raised by the Assessee that for the purpose of taxability of capital gains, the domestic law should be seen as it was in existence on the date on which the India-UK tax treaty was notified, the Tribunal held that provisions of the tax treaty cannot make the domestic law static with respect to taxability of a particular income when unequivocally, both states have left it to the domestic laws of the countries.

The Tribunal observed that since both the Assessee and the AO had determined same amount of sale consideration, it did not get into the controversy of whether the transaction is of exchange or sale. The tax payer argued that the cost of acquisition should be stepped up to the fair value of the shares of CIHL on the date of acquisition. Further, when any asset is transferred in lieu of another asset and no specific amount for consideration is agreed between the parties, in such cases while computing capital gains fair market value of the asset received in consideration for the assets transferred, should be considered as full value of consideration. The Tribunal held that merely because the consideration is not stated in monetary terms in the agreement, it cannot be said that sale consideration and cost cannot be determined. In this case, the price of shares in each agreement was identified and the amount of acquisition recorded in the books of account, also proves the amount paid for the acquisition of the shares. The Assessee further argued that as per the AO's stand even the earlier transfers were taxable and the cost of acquisition for the transfer of shares by the Assessee, will be the sale consideration determined in earlier transfers. Since there is no difference of time between the transfers, the cost of acquisition will be same as the sale consideration in the hands of the Assessee and there will not be any capital gains. The Tribunal did not agree with the contention of the Assessee. The Tribunal held that the provision of section 48, 49 and 55(2) of the Act does not allow such treatment as it does not fall under any of the clauses which provide for considering cost to previous owner as cost to the Assessee.

72 Veer Gems Vs. ACIT 77 Taxmann.com 127(Ahmedabad)

Assessment Year: 2008-09 Order Dated: 3 January 2017

Basic Facts

The Assessee was engaged in business of manufacture and saleof the polished diamonds.It sold the diamonds both in domestic as well as exports. During AY 2008-09, the Assessee had entered into certain international transactions with an entity named Blue Gems BVBA, Belgium. The Assessee's contention was that the said entity was not an associated enterprise of the Assessee as per section 92A, as the conditions specified in the said section were not satisfied. The AO however, contended that the said entity was an associated enterprises, for the purposes of section 92A(2)(j) and made an adjustment of

INR 5.22 crores. On appeal, the CIT(A) even before deciding whether the assessee and Blue Gems BVBA could indeed be held to be 'associated enterprises', proceeded to examine correctness of the ALP adjustment impugned in appeal before him on merits and held it to be unsustainable on the facts of the case.

Both the Assessee and Revenue have preferred appeal.

Issue

Whether as long as provisions of one of clauses in section 92A(2) are not satisfied, even if an enterprise has a de facto participation in capital, management or control of other enterprise, two enterprises cannot be said to be associated enterprises?

Whether clause (j) of section 92A(2) requires that to be associated enterprise, both enterprises should be controlled by an 'individual' or his relative?

Whether where assessee was a partnership concern, it could not be said to be controlled by an 'individual' and thus, aforesaid clause (j) could not be invoked to hold assessee firm and Belgium enterprise run by relatives of partners associated enterprise?

Held

The Hon'ble ITAT held that in order to invoke the transfer pricing provisions and deal with the determination of arm's length price, it is absolutely essential that the international transaction in question must be between the associated enterprises.

The Hon'ble ITAT specifically mentioned that there is no merit in the approach adopted by the Commissioner (Appeals). The first thing that needs to be adjudicated upon is whether or not the assessee and Blue Gems BVBA are associated enterprises.

Further, the Hon'ble ITAT held that the basic rule for treating the enterprises as associated enterprises is set out in section 92A(1). The illustrations in which basic rule finds application are set out in section 92A(2). Section 92A(1) lays down the basic rule that in order to be treated as associated enterprise one enterprise, in relation to another enterprise, participate, directly or indirectly, or through one or more intermediaries, 'in the management or control or capital of the other enterprise' or when 'one or more persons who participate, directly or indirectly, or through one or more intermediaries, in its management or control or capital, are the same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise'. Section 92(A)(2) only provides illustrations of the cases in which such an enterprise participates in management, capital or control of another enterprise.

Section 92A(2) governs the operation of section 92A(1) by controlling the definition of participation

contd. to page 797

Unreported Judgements

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In this issue we are giving full text of a decision by ITAT, Ahmedabad Bench on the issue of allowability of Foreign Tax Credit in respect of dividend and interest income earned outside India and brought to tax in India. Also the Hon'ble Tribunal discussed about the allowability of portfolio handling expenses for the portfolio managed by the overseas mutual funds while calculating income of the assessee in India from such interest and dividend earned overseas. Observations of Hon'ble Tribunal in para 8 & 18 are worth noting.

We hope the readers would find the same useful.

In the Income Tax Appellate Tribunal
Ahmedabad "I" BENCH, Ahmedabad

[Coram: Pramod Kumar AM and Rajpal Yadav JM]

ITA No.933/Ahd/2013
Assessment year: 2009-10

Bhavin A Shah..........................……Appellant
22, Amar kadamb Society
Ramdev Nagar Road, Satellite
Ahmedabad 380 015 [PAN: AYIPSS5534P]

Vs.

Assistant Commissioner of Income Tax
Circle 14, Ahmedabad....................Respondent

Date of concluding the hearing : January 18 2017
Date of pronouncing the order : March 29, 2017

O r d e r

Per Pramod Kumar AM:

1. By way of this appeal, the assessee appellant has challenged correctness of order dated 1st January 2013 passed by the learned CIT(A), in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2009-10.

2. Ground no. 1 is general and it does not call for any specific adjudication. It is dismissed as such.

3. In ground no. 2, the appellant has raised the following grievances:

   2. The learned Commissioner of Income Tax (Appeals) erred in law andon facts in confirming the disallowance of portfolio managementexpenses and interest charges (called as safeguarding charges) amounting to Rs.1,79,506 claimed deductible under section 57 of the Act.

   2.1 The learned Commissioner of Income Tax (Appeals) erred in law and on facts by holding that the portfolio management expenses and interest charges incurred have no nexus with the overseas dividend and interest income.

   Alternatively and without prejudice to ground number 2 and 2.1, the portfolio management expenses and the interest charges amounting to Rs.1,79,506 should have been allowed as deductible expenses from the overseas capital gains income offered to tax under the head"Capital Gains" by the learned CIT(A). The learned CIT(A) failed toconsider this alternative ground taken before him.

4. The appellant is an individual, resident in India, and is in employment of JP Morgan India Pvt Ltd as Managing Director and Global head of technology research of the company. He had entered into transactions for sale and purchase of variousforeign securities and the income arising from such transactions was offered to tax as capital gains. These transactions are said to have taken place through non discretionary trading accounts maintained in this regard with the portfolio managers i.e. Credit Suisse (Zurich and Singapore branch) and UBS (Singapore branch). The assessee had also offered to tax income from interest and dividend on the

sesecurities. During the relevant previous year, the assessee had incurred total management expenses of Rs 6,37,828 and he claimed a deduction, of 25% ofexpenses so incurred i.e. Rs 1,59,459, on account of, as portfolio managers termedit, 'safeguarding expenses' and of Rs 20,046 on account of interest paid to the port folio managers. It was also explained that since income from dividends and interest arising from these securities is duly offered to tax, these expenses are admissible as deductions. The Assessing Officer declined the claim, and, while doing so, observed as follows:

"4. In the return of income the assessees has claimed expenses under section57 of the IT. Act amounting to Rs.1,79,506/-. The assessee was asked to submit details and evidence of expenses claimed along with justification forclaim. The assessee vide submission dt. 20.12.2011 submitted copy of advices issued by 'Credit Suisse' towards safe custody charges for securities.The expenses u/s.57 are allowable only if it is laid out or expended wholly and exclusively for the purpose of making or earning such income. In the assessee's case the expenses claimed has no connection/nexus with the income earned. The assessee has also not submitted any justification for thesame. In view of the same, expenses claimed u/s.57 amounting to Rs.1,79,506/- are disallowed and added to the total income."

5. Aggrieved, assessee carried the matter in appeal before the CIT(A). It was submitted by the assessee that entire expenses, on account of fees paid to portfolio managers, was deductible, as a measure of abundant caution, the assessee has claimed only 25% of these expenses. The assessee also furnished evidences of fees paid to the portfolio managers. However, when a remand report was called from the Assessing Officer in respect of these submissions, the Assessing Officer is said tohave stated that "expenses were incurred for earning of income but 25% of total expenses is hypothetical and on the higher side considering the nature of transactions". It was in this backdrop that the CIT(A) also rejected the claim of the assessee. His line of reasoning, for doing so, was as follows:

'6.3I have carefully perused the assessment order, the remand commentsand also the counter comments offered by the appellant. The AO in the assessment order has pointed out that the expenses claimed must have connection or nexus with the income earned. Subsequently, in the remand proceedings, the AO, on the basis of letter filed from Credit Suisse, has agreed that such expenses might have been incurred by the assessee. However, the basis of claim made by the assessee @ 25% of the total expenditure is not explained. The assessee himself has admitted that he has claimed 25% of the total expenses being the expenses in relation to the income earned by him. In this context, the narration of expenses by the Credit Suisse is notice worthy. The Credit Suisse has termed these expenses as'safeguarding expenses'. The nexus or connection with the income as pointedout by the AO remained unanswered, even at the appellate stage. I am of theview that mere certificate from Credit Suisse will not entitle the appellant tomake a arbitrary claim of expenses @ 25% of the total amount paid. Accordingly, the action of the AO in making an addition of Rs.1,79,506/- is confirmed."

6. The assessee is aggrieved and is in further appeal before us.

7. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of applicable legal position.

8. We find that there is no dispute, as evident from the stand taken by the Assessing Officer in remand report and as recorded by the CIT(A) in paragraph 6.2 of his order, that "expenses were incurred for earning of income but", the objection ofthe Assessing Officer was that "25% of total

expenses is hypothetical and on thehigher side considering the nature of transactions". Once it is an undisputed position that the expenses were incurred for earning of income, the mere fact that the expenses are high or that the expenses are claimed only in part cannot be reason enough to make the disallowance. We have noted that the related securities were held by Credit Suisse and UBS and that these entities have charged the assessee for "safekeeping of securities……and their administration". The copies of invoices, as also letter confirming the charges, are filed before us, and we find no infirmities in these documents. The expenses so incurred by the assessee are in the nature of expenses incurred on portfolio manager. As the expenses so incurred by theassessee admittedly related to the safekeeping and administration of securities inquestion, income from which has been offered to tax by the assessee, we do not find any reason to disallow the partial claim of the assessee to the extent of 25%, as claimed, of the expenses so incurred by the assessee. The Assessing Officer has not brought on record any material to establish, or even indicate, that the claim of 25%, or for that purpose even any part of these expenses, is inadmissible. If the expenses are on the higher side, that does not imply the expenses are fictitious or inadmissible. There is reasonable evidence of the expenses having been incurred as copies of related bank documentation is placed on record before us. When the assessee is earning income from foreign securities held by its portfolio managers abroad, and duly offering it to tax as 'income from other sources', the safekeeping and administration fee, paid in respect of such securities to its portfolio managers, cannot be declined deduction under section 57(iii). The nexus between earning of dividend and interest income and incurring of these expenses is clear, and since, inour opinion, these expenses are incurred for the purposes of earning income taxable as 'income from other sources', the deduction for expenses is duly admissible undersection 57(iii) of the Act. We, therefore, uphold the plea of the assessee. The Assessing Officer is, accordingly, directed to grant deduction of Rs 1,79,506.

9. Ground no. 2 is thus allowed.

10. In ground no. 3, the assessee has raised the following grievances:

    3. The learned Commissioner of Income Tax (Appeals) erred in law andon facts in disallowing relief by way of tax credit amounting toRs.3,72,698 claimed deductible u/s 90 of the Act in respect of the dividend income earned outside India.

    3.1. The learned Commissioner of Income Tax (Appeals) erred in law aswell as on facts in disallowing the relief by way of tax credit claimedunder section 90 in accordance with the DTAA between India and USA in respect of the foreign taxes withheld from the overseas dividend income solely on the ground that the evidences do not bear the name of the appellant and are not signed by appropriate person from Credit Suisse/ issuing authority defying the evidentiary value of the same. It is submitted that it be so held now and credit for Rs 3,72,698 as claimed by the appellant be granted to him.

    3.2. The learned Commissioner of Income Tax (Appeals) erred in law as well as on facts by accepting the overseas dividend income from the evidences furnished by the appellant but not the figures of the foreign taxes withheld from the same thereby only partly accepting the evidentiary value of the furnished statements.

    3.3. Without prejudice to the above, the appellant contends that in case the evidences submitted are not perceived to be authentic, the overseas dividend income shall also be reduced from the taxable income of the appellant.

11. During the course of scrutiny assessment proceedings, the Assessing Officer declined the tax credit claim of the assessee, in respect of tax of Rs 3,72,698 deducted from its dividend earnings in the United States, on the ground that

"relief will be available on actual payment made in the return of income filed in USA and taxpaid thereon" and that "tax credit cannot be given on simply TDS deducted fromforeign dividend income". Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. It was explained by the assessee that he is'resident' in India for this assessment year, and that even his income earned in USA is subject to tax in his hands. There is thus double taxation of the US dividend income- in US as also in India, and the assessee is, therefore, entitled to relief from double taxation under article 25 of India United States Double Taxation Avoidance Agreement [(1991) 187 ITR (St) 102; Indo US tax treaty, in short]. None of these submissions, however, impressed the learned CIT(A). He confirmed the action of the Assessing Officer and declined to interfere in the matter. He also noted that some of the evidences do not bear the name of the appellant, are not signed by responsible persons from Credit Suisse or the authority issuing these evidences. It was also noted that the taxes withheld in US work out to almost 30% of the gross receipts. The assessee is not satisfied by the stand so taken by the CIT(A) as well, and is in further appeal before us.

12. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of applicable legal position.

13. We find that, at page 59A of the paper-book, the assessee has given details of the dividend earnings from its foreign securities and the taxes withheld from these earnings. As long as the assessee has shown all these incomes in his income offered to tax, the tax credits are also be granted in respect of the taxes with held in the United States. As to the manner in which tax credits are to be computed, we find guidance from the text of art. 25(2)(a) of the Indo-US DTAA which is as follows :

> *"Where a resident of India derives income which, in accordance with theprovisions of this Convention, may be taxed in the United States, India shall allow a deduction from the income of that resident an amount equal to income-tax paid in the United States, whether directly or by way of deduction. Such deduction shall however not exceed that part of income-tax (as computed before the deduction is given) which is attributable to the income which is taxed in the United States"*

14. So far as the rates at which dividend income of resident of India can be brought to tax, in accordance with Indo US tax treaty, we find guidance from article10 of the said tax treaty which is as follows:

Article 10- Dividends

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident, and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed :

(a) 15 per cent of the gross amount of the dividends if the beneficial owner is a company which owns at least 10 per cent ofthe voting stock of the company paying the dividends;

(b) 25 per cent of the gross amount of the dividends in all other cases.

Sub-paragraph (b) and not sub-paragraph (a) shall apply in the case dividends paid by a United States person which is a Regulated Investment Company. Sub-paragraph (a) shall not apply to dividends paid by a United States person which is a Real Estate Investment Trust, and sub-paragraph (b) shall only apply if the dividend is beneficially owned by an individual holding a less than 10 per cent interest

in the Real Estate Investment Trust. This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. **The term "dividends" as used in this Article means income from shares or other rights, not being debt-claims, participating in profits, income from other corporate rights which are subjected to the same taxation treatment as income from shares by the taxation laws of the State of which the company making the distribution is a resident; and income from arrangements, including debt obligations, carrying the right to participate in profits, to the extent so characterized under the laws of the Contracting State in which the income arises.**

4. **The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State, of which the company paying the dividends is a resident, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the dividends are attributable to such permanent establishment or fixed base. In such case the provisions of Article 7 (Business profits) or Article 15 (Independent personal services), as the case may be, shall apply.**

5. **Where a company which is a resident of Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company except insofar as such dividends are paid to a resident of that other State or insofar asthe holding in respect of which the dividends are paid is effectively connected with a permanent establishment or a fixed base situated in that other State, nor subject the company's undistributed profits to a taxon the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arisingin such other State.**

15. What follows from an analysis of these provisions of the Indo US tax treaty is this. As long as a person, resident in India in terms of the treaty provisions, has been taxed in respect of his dividend earnings in the United States, whether directly or by way of tax withholdings, in accordance with the provisions of article 10, the tax credit will be available to him, against his tax liability in India in respect of such dividend income, subject to the condition that such tax credit will not exceed the Indian income tax liability in respect of the income in question. As we deal with this aspect of the matter, it is also essential to bear in mind the fact that in order to avail the treaty benefits, it is not sufficient that the assessee is a 'resident' of India under the Income Tax Act. The assessee is also required to satisfy the requirements of Article 4 for being termed as 'resident of a contracting state', i.e. India. In order to grant the tax credit, therefore, the Assessing Officer has to first examine whether the assessee is a resident of India under article 4 of the Indo US tax treaty, that amounts shown as dividends are actually in the nature of dividends, that US tax with holding is in accordance with the provisions of article 10, and, if that be so, grant a foreign taxcredit for the amount of such tax with holding or Indian tax liability in respect of the related income- whichever is less. In case the US tax actually levied is in excess of the rate specified under article 10, the amount eligible for tax credit will remain confined to the amount computed on the basis of the rate prescribed under the IndoUS tax treaty.

17. The assessee has filed detailed paper-book before us which has supporting evidences for tax with holding and the bank advices. These details were also filed before the CIT(A), the CIT(A) called for a remand report on the same but did not deal with the specifics of the matter beyond making generalized observations to the effect that "some" of these tax with holding certificates did not mention the name of the assessee or were not signed by responsible persons. These objections are too vague and too generalized. In any case, one of things noticed during the hearing was that though the assessee has filed these details, there are some apparent in consistencies. We find, for example, that clearly the aggregate of these tax withholdings is much more than 25% of US dividend income, which, according to the provisions of Indo US tax treaty, is the maximum permissible tax withholding under article 10. When we pointed out the above inconsistency to the learned counsel for the assessee, learned counsel for the assessee did accept that the tax credit claim is almost 30% of the amount of related dividend earnings, but submitted that the tax credit may be restricted to 25% only.

18. The course of action suggested by the learned counsel does seem an easy option but it will not be a judicially correct option. There is no scope of sweeping generalizations while computing tax credit. The tax credit computation is to be done on a case to case basis, dealing with the tax levied in the other contracting state (i.e.US) and the income in respect of which such tax is levied. As for 25% tax withholding from US dividend income, it is not the applicable withholding rate but the maximum tax withholding rate. It is, therefore, not essential that the entire US taxlevy in respect of dividend income is @ 25% only. As a corollary to the this position, the actual admissible withholding under article 10 is bound to be an amount lower than 25% because in some of the cases, the applicable US tax rate could even be 15%. These factors apart, in the case before is, there are some tax deductions atrates other than 15% and 25%. For example, in the case of Vanuguard, at page 59Aof the paper-book filed before us, the tax withholdings are @ 20%. The tax credit in respect of this tax withholding- as also other similarly placed securities, therefore, cannot be more than 20% of dividend income in any event, even though the basis of 20% tax withholding is not at all clear. It is also not clear which are the cases in which tax withholding rate is 10% and in which cases the tax withholding rate is 25%. While computing the admissible tax credits, all these aspects need to be examined including whether the characterization of income as dividend is correct, so as to ensure correct tax credit computation. We are, therefore, not inclined to accept the learned counsel's suggestion for restricting the tax credit to 25% of the dividend income, nor do we think that it is proper to examine all these evidences, in detail, for the first time at the stage of proceedings before this Tribunal. In our considered view, all these issues and evidences should be examined properly at the stage of the Assessing Officer in accordance with the scheme of the Act as set out above. In our considered view, the right course of action will be to remit the matter to the file of the Assessing Officer with the directions to compute the admissible tax credit in accordance with our observations above. The assessee is directed to furnish all the requisite evidence before the Assessing Officer, and will also be at liberty to raise such legal and factual issues as he may be advised to. The Assessing Officer will decide the matter a fresh in accordance with the law, in the light of our observations above, by way of a speaking order and after giving yet another opportunity of hearing to the assessee.

19. Ground no. 3 is thus allowed for statistical purposes.

20. Ground no. 4 does not require any specific adjudication and is dismissed assuch.

21. In the result, the appeal is partly allowed in the terms indicated above.

❋❋❋

Controversies

CA. Kaushik D. Shah
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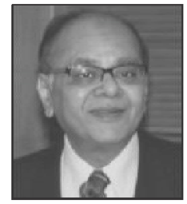

Whether Interest paid on borrowed funds for acquiring a Controlling Interest in a company be allowed as deduction?

The allowance of deduction u/s 57(iii) for interest paid on loan availed for acquiring the controlling interest by purchasing shares of the company is matter under debate.

Issue:

When loan is taken for making investment in shares of the company which results into acquiring of the controlling interest of that company, whether deduction of interest paid on such loan would be allowed as per sec 57(iii) of the Act?

Proposition:

It is submitted that the interest expenditure incurred on loan taken for acquiring the shares to be allowed as deduction under sec 57(iii) as the interest and dividend income earned against such expenditure was chargeable to the tax. As per sec 57 of the Act, the income chargeable under the head 'Income from other Sources' shall be computed after making following deductions; wherein sub-section (iii) states that any other expenditure (not being an expenditure of capital nature) laid out or expended wholly and exclusively for the purpose of making or earning such income would be allowed as deduction.

View against the Proposition:

1. When the primary intention of acquiring the shares was having a control over the other company and not earning interest or dividend income, the expenditure incurred for acquiring the control would constitute to be of capital nature and accordingly to be disallowed u/s 57(iii).

2. It is provided in sec 57(iii) that 'expenditure laid out or expended wholly and exclusively for the purpose of making or earning such income' would be allowed as deduction. However. in present case, the investment in shares was made to acquire the control along with earning interest income and thus the investment was not fully and exclusively for earning interest and dividend income.

   Let me now refer to the decision of CIT Vs. Amrita R. Shah 238 [ITR] 777 (Bom). Their lordship of Bombay high court decided that the interest paid by the assesse in this case does not fall within the purview of Section 57(iii) of the Act and hence, the same is not an allowable deduction in computation of the income of the assesse. Deduction under Section 57(iii) is allowable only if an expenditure laid out or expended wholly or exclusively for the purpose of making or earning the income referred to in that section, i.e., "Income from Other Sources". The object of the acquisition of shares being acquisition of controlling interest in the company, the expenditure incurred on the loan obtained for that purpose could not be regarded as expenditure incurred wholly and exclusively for the purpose of making or earning income from other sources.

View in Favour of Proposition:

It is submitted that as the income arising is taxable under the Act, the expenditure related to such income should be allowed as deduction.

The Supreme Court in the case of Vodafone International Holdings B.V. Vs. UOI, held that if the dividend income is taxable during the year under consideration, the interest is allowable as deduction under section 57(iii).

It was observed by the Hon'ble Supreme Court that:

· Controlling interest forms an inalienable part of the share itself and cannot be traded separately unless otherwise provided by the statue.

- The argument that controlling interest is an identifiable or distinct capital asset independent of holding of shares, cannot be accepted
- It was inherently a contractual right and not a property right and cannot be considered as a capital asset unless the statue stipulates otherwise.
- Acquisition of shares may carry the acquisition of controlling interest, which is purely a commercial concept and tax is levied on the transaction, not its effect.

Further, the Bombay High Court in case of CIT Vs. Srishti Securities Pvt. Ltd. did not agree with their previous decision and held that the object of the loan was irrelevant and the interest on investment would be allowed as deduction.

Let me now refer to the decision of CIT Vs. Srishti Securities Pvt. Ltd. (2010) 321 ITR 498 (Bom). Their lordships of Bombay High Court held as under:

"The learned tribunal addressed itself to the question, as to whether the assese is entitled to deduction in respect of interest liability either under Section 36(1)(iii) or under Section 57(iii) of the Income Tax Act. Reliance was placed on the judgment of this court in the case of Commissioner of Income Tax Vs. Lokhandwala Construction Industries Ltd.

260 ITR 579 (Bom) for the proposition that when the assessee claims deduction of interest paid on capital borrowed, all that the assese has to show is that the capital which was borrowed was used for the business purpose in the relevant year of account and it does not matter whether the capital was borrowed or not to acquire revenue asset or capital asset. The learned tribunal also relied on the judgment of the Calcutta High Court in the case of CIT Vs. Rajeeva Lochan Kanoria 208 ITR 616 (Cal) where the Calcutta High Court took a view that under the provisions of Section 36(1)(iii) of the Income Tax Act, the only enquiry to be made is whether the payment of interest was in respect of capital borrowed for the purpose of assessee's business or profession. Such amount borrowed, if for the purpose of business of profession may be utilized for the purpose of acquisition of stock in trade or for the purpose of acquisition of capital asset.

The learned court took a view that under Section 36(1)(iii) there is no bar for allowance of interest paid in respect of capital borrowed which has been utilized for the purpose of acquisition of capital assets. Considering this the learned I.T.A.T. held that if the funds are borrowed by an investment company for making investment in shares which may be held as investment or as stock in trade or for the purpose of controlling interest in other companies, interest paid on such borrowed funds will be deductible u/s 36(1)(iii) of the Income Tax Act."

After recording this finding, it held that the interest expenditure is allowable under Section 36(1)(iii) and therefore, disallowance to the extent sustained by the C.I.T.(A) was directed to be deleted."

Following authorities have also taken the same view:

a) CIT Vs. Lokhandwala Construction inds Ltd [2003] 260 ITR 579 (Bombay)
b) India Cements Ltd. Vs. CIT [1996] 60 ITR 52 (SC)

Summation:

At the outset, it is submitted that the interest expenditure is to be allowed as deduction and there is no question of treating the same as capital expenditure.

In the case of Srishti Securities Pvt Ltd, the Bombay High Court, relying on the decision of Lokhandwala Construction Inds Ltd Vs. CIT [2003] 260 ITR 579 (Bom) and the decision of India Cements Ltd Vs. CIT [1966] 60 ITR 52 (SC) held that the object of the Loan was irrelevant and the interest which was disallowed to the extent of investment would have to be allowed.

The decisions relied in the case of Srishti Securities Pvt Ltd were applicable to the facts of the present case since in those cases also the loan was taken for acquiring the controlling interest in the company. In the present case also, the loan was taken for acquiring shares of the company and after acquiring shares of the company, the taxpayer had got controlling interest of the company.

In the decision of the Amitaben R. Shah the Bombay High Court held that interest was not allowable if the loan was taken for acquiring controlling interest. However, when two views were possible then the view beneficial to the taxpayer had to be considered as held by the Supreme Court in the case of Vegetable Products Ltd [1973] 88 ITR 192 (SC)

In the case of Vodafone International Holdings B.V. the Supreme Court has observed that

- Controlling interest forms an inalienable part of the share itself and cannot be traded separately unless otherwise provided by statue.
- Control is an interest arising from holding a particular number of shares and cannot be separately acquired or transferred.
- Controlling interest was not an identifiable or distinct capital asset independent of holding of shares.
- It was inherently a contractual right and not a property right and cannot be considered a capital asset unless statute stipulates otherwise.
- Acquisition of shares may carry the acquisition of controlling interest, which is purely a commercial concept and tax is levied on the transaction, not on its effect.
- Controlling interest which stood transferred to Vodafone from HTI (BVI) Holdings Ltd. accompanied the CGP (Cayman Islands company) share and cannot be dissected so as to be treated as transfer of controlling interest of Mauritian entities and then that of Indian entities and ultimately that of Hutchison Essar Ltd (The Indian Telecom Company).
- Thereafter, the Supreme Court held that capital gain chargeable under section 45 and their computation is to be in accordance with the provisions that follow section 45 and there is no notion of indirect transfer in section 45.

The ratio in case of Vodafone International Holdings B.V. was applicable to facts of the present case since acquiring of controlling interest in the company does not bear any income or expenditure, to be assessed or not to be allowed

Since the interest was paid on borrowed funds for acquiring the shares of a company and the dividend income was taxable during the last year under consideration, the interest was allowable as deduction under section 57(iii) or under section 36(1)(iii) of the Act.

Our Comment:

In present case the Tribunal relied on the decision of the Supreme Court in the case of Vodafone where it was held that the controlling interest forms an inalienable part of the share itself and it cannot be traded separately unless otherwise provided by the statue. Accordingly, the Tribunal did not accept the contention of the tax department that the main purpose for making investment was to acquire controlling interest in the company and not to earn dividend. Consequently, the Tribunal held that the interest, of a company is allowable as deduction under section 57(iii) or under section 36(1)(iii) of the Act.

In the case of Off Shore India Ltd. Vs. DCIT [1996] 59 ITD 652 (Cal), the Calcutta Tribunal held that the motive to acquire the controlling interest of a company by acquiring shares of such company by the taxpayer was a wholly irrelevant consideration for judging allowability of interest payment on borrowings under section 57(iii) of the Act. Accordingly, the interest paid by the taxpayer on borrowings for purchasing shares was allowable as deduction even though no dividend was received on those shares during the year under consideration.

In the case of Model Manufacturing Co. (P) Ltd Vs. CIT[1980] 122 ITR 767 (Cal), the Calcutta High Court held that though ultimate motive of the taxpayer might have been to acquire controlling interest, yet immediate purpose for acquisition of shares was to earn income from dividends thereof and therefore, the taxpayer was entitled to deduction under section 57 of the Act. Further, the Mumbai Tribunal in the case of Ultimate & Pigments Ltd Vs. ACIT (ITA no. 2775/Mum/2005) held that interest on borrowings made for acquiring shares in Malaysian company along with controlling interest is allowable under section 57(iii) of the Act.

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હિન્દુસ્તાન પાઈપ
ISI
બોર તથા ઈરીગેશન માટેના એ.સી. પ્રેશર પાઈપ
૮,૧૦,૧૨ ઈંચ ક્લાસ ૧૦,૧૨ તથા ૧૫
અમદાવાદ સીમેન્ટ પાઈપ્સ
વડાગામ, તા.ધનસુરા, સાબરકાંઠાઃ © ૯૫-૨૭૭૪-૨૭૭૨૩૧
અમદાવાદ : © ૦૭૯-૨૬૪૪૪૭૭૭
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સાઈઝમાં પાઈપ્સ પણ ઉપલબ્ધ છે.

Judicial Analysis

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Can Corporate Veil be lifted while applying the provisions of S. 179 of the Act? – Part II

Dhaval N. Patel v. CIT [2014] 44 taxmann.com 211 (Gujarat)

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7. As could be noticed from the materials on record, the petitioner herein was the director of the company which was originally incorporated as RavitVinimay with the Registrar of Companies, Gujarat on 19.8.1992. It obtained certificate of commencement of business on 17.9.1992. The company changed its name from RavitVinimay to Lanzorate Finance (India) Limited and was registered with Registrar of Companies vide certificate dated 14.12.1995. The petitioner also brought on record a certificate issued by the ROC, being the certificate of incorporation as also the certificate of commencement of business and further changed the name to Lanzorate Finance (India) Limited. It appears that the company thus from the very incorporation was a public limited company and its public issue also were out on 18.6.1996. The petitioner was the promoter/director and continued to be with the company till he resigned from the post on 31.5.2000.

8. The arrears of tax demand raised on the petitioner in his capacity of Director by issuance of the impugned notice under section 179 is for the assessment year 1996-1997. The provision of section 179 permits recovery of such tax arrears of a company from the director of the company which is a private company or a private limited company. The provision makes it amply clear that when the company is a public company or a public limited company, such provision would not be applicable. Relevant here would be to refer to the provisions of law and some of the well pronounced judgments on the subject.

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10. As contained in the said provision, where any tax is due from a private company in respect of any income from the said company or any other company in respect of any income of the company of the previous year during which year such company was a private company, if the Revenue is not in a position to recover, every person who was a director of the private company, during such relevant previous year would be jointly and severally liable for the payment of such tax, unless he proves that non-recovery could not be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company. Sub-section (2) of section 179 of the Act also provides the situation that where the private company converted into public company and the tax in respect of private company could not be recovered, nothing contained in sub-section (1) would be applicable to any person who was a director of such private company in relation to any tax due in respect of any income of such private company assessable for any assessment year commencing before the 1st day of April, 1962.

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12. In wake of such legal position, the only factual contention that requires to be dealt with is the reference of code no. 13 in the return of income filed by the company as it is the code applicable to a domestic company which is a company in which the public is substantially not interested. This solitary circumstance can never be the ground for the Revenue to not recognise other substantive and cogent evidences which are far more pronounced and for which no disputes have been raised at any stage. Mere mentioning of the code as contended by the Revenue could be hardly a ground to allow it to pursue the notice impugned. It is also necessary to note at this stage that the earlier petition preferred before this Court was not entertained on the ground that necessary documents for the Court to arrive at a decision, whether the company was a public limited company or not, were absent. That ipso facto itself cannot be the ground for the concerned authority not to examine the subject matter on merits in the revision petition. Therefore, both, the order under section 179 and the consequential order under section 264 in the revision application, in light of the above discussion, must fail.

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PadmashiDevjiVithlaniv. CIT [2014] 44 taxmann.com 231 (Gujarat)

9. Whether discarding the concept of private and public limited company contained in the Companies Act, 1956 recovery under section 179 (1) can be made from the director of a public company is a question we need not answer in this petition. This is so because even assuming for a moment that it was so, the Revenue had to lay a foundation of facts to come to the conclusion, as canvassed before us by the counsel that despite its lag of a public limited company, for the purpose of the Companies Act, in reality the said company was a closely held company with all its characters of a private limited company. Even for lifting of the corporate veil as within the narrow confines permitted in the case of Pravinbhai M. Kheni (supra), the foundational facts must be found in the notice giving sufficient opportunity to the assessee to deal with the allegations and present his own material to convince the Assessing Officer to hold otherwise.

10. In the present case, the show cause notice is bereft of any such details. It merely calls upon the petitioner to show cause why tax recovery, which could not be made from the company be not made from him under Section 179 (1) of the Act. We would therefore hold that even otherwise, in absence of any previous material indicating that the show cause notice and any bipartite hearing on such issues by the Income Tax Officer, such question need not be gone into. Even from the order under section 179, we do not find that the Assessing Officer had based his case of lifting the corporate veil, as was referred to by this Court in case of Pravinbhai M. Kheni (supra) in which, we had observed as under :—

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11. In the result, subject to above observations, writ petitions are allowed. Impugned orders under Section 179 of the Income-tax Act, 1961 and the further revision orders are quashed. Rule made absolute.

Gaurav V. Shah v. ACIT [2014] 44 taxmann.com 65 (Gujarat)

6. Upon thus hearing both the sides and on considering the material on record, the question that needs to be addressed to is as to whether the Directors of the company mainly incorporated in the year 1994 are liable for payment of tax dues from the company for the assessment year 1996 - 1997 in accordance with the provisions of Section 179 of the Income Tax Act (the 'Act' hereinafter). At the outset the provisions of Section 179 of the Act requires reproduction, which reads as under :

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7. Sub-section (1) and Sub-Section (2), when read together, Sub-Section (1) brings within its sweep Directors of the private company and Sub-Section (2) confers power on the Revenue to recover tax arrears from the Directors of private company.

8. Thus, Section 179 of the Act applies to a case of private company. In the event of any tax due from a private company in respect of the income of any previous year or of other company in respect of any previous year during which such company was a private company, all those persons who were the Director of the company at the relevant point of time, are responsible for payment of such arrears of the tax unless the person concerned proves that the non-recovery cannot be attributed to any gross negligence, misfeasance or breach of duty in his part in relation to the affairs of the company.

9. Sub-section (2) of Section 179 of the Act makes it amply clear that where a private company converts into public company and the tax assessed of any previous year or during which such company was a private company, cannot be recovered, the provisions of sub-section (1) of Section 179 of the Act would not apply to a person, who was a Director of such company in relation to such arrears of the tax before the 1st day of April, 1962.

10. We notice that the petitioner herein, while replying to the show cause notice dated 18.09.2003 under Section 179 of the Act had contended of her being a salaried employee, so also of her not having any role vis-a-vis financial transactions in the affairs of the company. However, at the time when the Revision Application was preferred by the petitioner, after impugned order under Section 179 of the Act was passed, a contention was raised of the provision of Section 179 of the Act not being applicable in the instant case for M/s Asian Finstock Limited not being a private company, but, a public limited company from 05.12.1994 undisputedly, this company has become a public limited company from Dec. 1994.

10.1 We notice that learned counsel for the Revenue had raised the contention that such company is closely held company where the public is not substantial interested. However, the revenue neither in show cause notice under Section 179 of the Act nor in the order passed under such provisions has laid any factual foundation thereby disputing the status of such company of that a public limited company. In absence of any such foundational facts and in wake of clear and eloquent evidences reflecting the status of company as that of a public limited company, the contention of the petitioner, though raised in the revision application, shall need to be regarded that in a case of Director of a public limited company, the provisions of Section 179 cannot be made applicable. Such being a factual matrix in the instant case, we uphold the version of the petitioner that the issuance of show cause notice and the consequently proceedings under Section 179 in case and all the petitions must surely fail.

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Pravinbhai M. Kheniv. ACIT [2012] 28 taxmann.com 111 (Gujarat)

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10. It is not in dispute that despite such efforts no recovery could be made. It can thus be straightway seen that despite several attempts made by the respondents, no recovery could be made from the company. Counsel for the petitioner therefore, would be wholly incorrect in suggesting that revenue did not establish that tax could not be recovered from the company.

11. With respect to the finding that such recovery cannot be attributed to any gross negligence, misfeasance or breach of duty on part of the petitioner also we are afraid such a contention cannot be accepted. This is so because in our view such condition is expressed in the negative terms namely, that unless the Director proves that non recovery cannot be attributed to any of the above-noted causes. In other words, once it is established that tax dues could not be recovered from the company and that a certain person was a director of the said private company at the relevant time, his joint and several liability would arise. It would be upto him then to establish that such liability should not arise since the non recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to affairs of the company. In the present case, the petitioner never putforth any such defence, did not urge any grounds or bring any material before the respondents to contend that his case should fall within exclusion clause of sub-section(1) of section 179. The contention that onus was on the Revenue to establish that such non recovery was attributable to gross negligence, misfeasance or breach of duty on his part, is not borne out from the plain language used in sub-section(1) of section 179 of the Act. In a recent decision dated 25,26/09/2012 passed in Special Civil Application No.3910/2012 and allied matters in case of MaganbhaiHansrajbhai Patel v. Asstt. CIT [2012] 211 Taxmann 386/26 taxmann.com 226 (Guj.) Division Bench of this Court had observed as under :

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12. This brings us to the central and most hotly contested issue of piercing corporate veil. The fact that the company is a public company is not in dispute. The Revenue authorities while applying principle of lifting corporate veil have principally pressed in service the following factors which emerge from the impugned order of the Assistant Commissioner dated 15.4.2002. Such factors are :

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13. Question is if these facts are established should the corporate veil be lifted?

14. The principle of lifting or piercing the corporate veil is neither new nor unknown. It is however, not possible of any precise definition or application in a straitjacket formula. We may notice some of the authorities dealing with such a concept.

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15. From the above judicial pronouncements, it can be seen that concept of lifting or piercing the corporate veil as some times referred to as cracking the corporate shell, is applied by

Courts sparingly and cautiously. It is however, recognised that boundaries of such principle have not yet been defined and areas where such principle may have to be applied may expand. Principally, the concept of corporate body being an independent entity enjoying existence independent of its directors, is a well known principle. Its assets are distinct and separate and distinct from those of its members. Its creditors cannot obtain satisfaction from the assets of its members. However, with ever developing world and expanding economic complexities, the Courts have refused to limit the scope and parameters or areas where corporate veil may have to be lifted.

16. Howsoever cautiously, the concept of piercing of corporate veil is applied by the Courts in various situations. Two situations where such principle is consistently applied are, one where the statute itself so permits or provides for and second where due to glaring facts established on record it is found that a complex web has been created only with a view to defraud the revenue interest of the State. If it is found that incorporation of an entity is only to create a smoke screen to defraud the revenue and shield the individuals who behind the corporate veil are the real operators of the company and beneficiaries of the fraud, the Courts have not hesitated in ignoring the corporate status and striking at the real beneficiaries of such complex design.

17. Section 179 of the Act itself is a statutory creation of piercing of corporate veil. Ordinarily, directors of a company even that of a private company would not be answerable for the tax dues of the company. Under sub-section(1) of section 179 of the Act, however, subject to satisfaction of certain conditions, the directors can be held jointly and severally liable to pay the dues of the company.

18. In the present case, however, the Revenue desired to apply the principle of lifting the corporate veil in case of a public company and seeking to resort to provisions contained in section 179 of the Act. In our view if the factors noted by the Assistant Commissioner are duly established, there is no reason why such double application of lifting the corporate veil one statutorily provided and other due to emergent need of the situation, cannot be applied. As noted above, the factors recounted by the Assistant Commissioner in the impugned order are glaring. The company had defaulted in tax for more than Rs.155 crores. Same was unearthed during search operations carried out by the Revenue Authority. The attachment of the assets of the company could lead to recovery of not more than Rs. 5 crores from such huge outstanding dues. The company was formed for taking over business of the partnership. The members of the partnership firm and other family members of the same family became the directors of the company. Shares of the company were held by them and not by any members of the public. The directors had amassed huge wealth in the form of immovable property. The Assistant Commissioner therefore, was of the opinion that the company was only a conduit for creation of unaccounted money and appropriating in directors.

19. If these facts are duly established, we have no hesitation in holding that principle of lifting the corporate veil should be applied. By application of section 179 of the Act, the recovery of the tax dues of the company can be sought from the directors.

20. With respect to the finding of the Assistant Commissioner however, we have two reservations. Firstly, it is nowhere pointed out from where or on basis of which material such findings have been arrived at. There are some far reaching observations and conclusions which would require thorough investigation and support from materials on record. For example, the Assistant Commissioner has recorded that the directors of the company have amassed substantial wealth in the form of immovable property. Full details of such properties, when they were acquired and whether there was any known source out of which the same were acquired is not known. This and many other observations of the Assistant Commissioner require further scrutiny and investigation.

21. Second dispute that we have with the Assistant Commissioner's order is that same suffers from gross violation of principles of natural justice. In his notice under section 179(1) of the Act, he only put the petitioner to notice that he proposed to hold him liable for recovery of the tax dues of the company. He neither mentioned nor disclosed any tentative reasons why he may also invoke the principle of lifting of corporate veil. When the petitioner replied to such a show cause notice and contended that the company being a public company, section 179 of the Act would not apply, the Assistant Commissioner while passing his final order, rejected such a contention by making detailed observations on the grounds on which principle of lifting the corporate veil should be applied.

22. To our mind entire procedure was defective. Large number of observations have been made by the Assistant Commissioner in the said order without ever putting the petitioner to alert that because of certain prima facie materials at his command, he proposed to hold that the situation was such where the principle of lifting of corporate veil should be applied. It is true that after the Assistant Commissioner passed the said order on 15.4.2002, the petitioner made a detailed representation to the Assistant Commissioner raising several contentions why such principle could not be invoked. To our mind this would not cure the defect committed by the Assistant Commissioner. Firstly, the concept of post decisional hearing is not always accepted by the Courts and found to be rather unsatisfactory manner in which requirement of natural justice can be stated to have been fulfilled. Secondly, even the Assistant Commissioner did not take into account such objections after passing his order and such objections thus remained pending. The petitioner did file revision against the order of the Assistant Commissioner and the Commissioner did examine his objections, however, there was no opportunity whatsoever to the petitioner to demonstrate before the authorities that the factors which have weighed with the Assistant Commissioner to invoke the principles of lifting the corporate veil do not arise at all. Thirdly, in the matter of this nature where due to its extreme complexity of the transactions and law required to be applied, it would be highly unsatisfactory manner of eliciting the response from a citizen and dealing with the same. In the context of conflicting theories of requirement of hearing before taking adverse decision and for not insisting on such requirement rigidly when no prejudice is caused by non hearing, the Apex Court in case of Canara bank v. Debasis Das AIR 2003 SC 2041, referred to Lord Ackner who had stated that "'useless formality theory' is a dangerous one and, however inconvenient, natural justice must be followed" because, "convenience and justice are often not on speaking terms".

As held by series of decisions including in case of Canara bank (supra), in a case where breach of natural justice is noticed, the proceedings cannot be terminated for all times to come, but would have to be revived from the stage where the defect is noticed.

23. Our conclusions therefore, are as follows :

(1) The respondent authorities did establish that it was not possible to recover the tax dues from the company.

(2) The petitioner neither pleaded nor succeeded in establishing that such non recovery was not attributable to any gross neglect, misfeasance or failure in discharging duty on his part in connection with the affairs of the company.

(3) Being a public company, ordinarily, provisions of section 179(1) of the Act cannot be applied. However, if the factors noted by the Assistant Commissioner in his impugned order dated 15.4.2002 and highlighted by us in this judgment are duly established, it would certainly be a fit case where invocation of principle of lifting of corporate veil would be justified.

(4) We however, hold that the Assistant Commissioner proceeded to record such findings without giving sufficient opportunity of hearing to the petitioner and without disclosing the necessary materials for coming to such a conclusion.

(5) The impugned orders dated 15.4.2002 and revisional order dated 9.4.2003 are quashed.

(6) The proceedings are however, placed back before the Assistant Commissioner for proceeding further in accordance with law after giving a notice to the petitioner indicating his tentative grounds why he desires to invoke the concept of lifting of corporate veil, giving sufficient opportunity to the petitioner to meet with such allegations. After giving opportunity of hearing to the petitioner and following the principles of natural justice it would be open for the Assistant Commissioner to pass fresh orders in accordance with law as may be found appropriate on the basis of material on record.

* * *

The evolution of Permanent Establishment concept

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A. Background

Formulating anti-BEPS (Base Erosion and Profit Shifting) measures for cases where companies were deemed to not have a Permanent Establishment (PE) despite substantial business activity, was a key priority for the Organization for Economic Cooperation and Development (OECD) in its BEPS project.

B. Recommendation of Action Plan 7

Action Plan 7 of the BEPS project, titled "Preventing the Artificial Avoidance of Permanent Establishment Status", involved significant work by OECD and associated countries to arrive at suitable recommendations. Action Plan 7 has proposed to revise the PE standard predominantly to prevent the misuse of the following arrangements:

- Commissionaire and other similar arrangements

  Amendments have been proposed in a manner that widen the scope of what would be considered dependent agent activities, while also narrowing down the independent agent exception, such that agents who play a key role in the conclusion of contracts, or in the conclusion of contracts without material modification by the enterprise, or those who provide services to multiple related parties may now result in the formation of PE for the foreign enterprise.

- Use of preparatory or auxiliary activity exemptions

  As per the current practice and language of the treaties, certain activities are objectively exempted from creating a PE on the assumption that such activities are preparatory and auxiliary by their very definition.

  It is proposed to narrow these exemptions for fixed place of business PE by requiring activities to subjectively pass the test of actually being preparatory or auxiliary in character. For instance, storing and delivering goods to fulfil online sales may not be considered as preparatory or auxiliary activities for the business.

- Artificial fragmentation of activities

  It has been proposed to incorporate a new anti-fragmentation rule to prevent misuse of specific activity exemptions. Under the new rule, it is proposed that a PE may exist if the enterprise or a closely related enterprise carries on business activities at the same location, or different locations in the same country and such activities constitute complementary functions that are part of a cohesive business operation, and such activities, when combined, exceed what may be considered preparatory or auxiliary.

- Splitting up of contracts between closely related parties:

  An automatic rule requiring aggregation of the time spent by closely related enterprises at the same site or project to calculate the threshold, or Principal Purpose Test (PPT) would apply to long-duration construction/installation contracts to avoid artificial avoidance of PE by splitting up of contracts.

C. Current importance

Besides the criticality of the PE status of foreign corporations for Governments and tax authorities for calculation of tax on business profits, the heightened importance of the consequences of this Action Plan at this point is also attributable to the following:

- Pace of growth of the digital economy, which exacerbates the possibility of enterprises not having physical presence in another country
- First signing of the Multilateral Instrument by a group of countries in June 2017, which would commence the process of bilateral tax treaty amendments, including PE-related changes.

D. <u>India's response</u>

- India has a varied tax treaty policy, and many of its treaties already contain a wider agency PE rule. Essentially, this means that some OECD proposals echo the approach currently followed by the Indian tax authorities and might also result in a positive revenue impact.
- However, how India chooses to implement changes in relation to the preparatory/ auxiliary test and contract split or applies the anti-fragmentation rules remains to be seen. This is the area likely to affect Engineering, Procurement and Construction (EPC) projects and arrangements, which include activities such as storage, distribution and delivery, the most. Accordingly, it may be relevant for companies to review their operating structures in India to assess the changes that may arise once the recommendations are implemented in tax treaties.
- India's OECD patterned treaties, such as those with Brazil, China and Japan, may stand to be most impacted by the Action Plan 7 recommendations.

E. <u>Treaty amendments and the Multilateral Instrument</u>

- Action Plan 7 recommendations are not a minimum standard that must be adhered to by countries. Accordingly, both the choice and the mode of implementation have been left as an option, and a country that chooses to do so may undertake either of the bilateral or multilateral routes.
- The text of the Multilateral Instrument, released in November 2016, contains the PE-related articles in pursuance of Action Plan 7 that may be incorporated into tax treaties. However, it is also possible for artificial splitting of contracts to also be covered by the PPT clause of a treaty, which is likely to be adopted by India and most countries in terms of their obligations to implement measures of Action Plan 6 dealing with treaty abuse.
- PE taxation is an area that may witness action and developments in the near term on account of the Multilateral Instrument, growth of the digital economy and the pace at which BEPS-related changes are being enacted across jurisdiction.

F. <u>Concluding remarks</u>

- The Action 7 Report sets forth specific amendments modifying paragraphs 4, 5 and 6 of Article 5 of the OECD Model, together with proposed Commentary to provide guidance on the new rules.
- Once implemented, the Action 7 Report amendments will have implications for how companies operate global businesses going forward as current operating models could create new PEs in other countries for these companies. New PEs would mean additional tax filing obligations and increased potential for controversy. Moreover, the issue of profit attribution to these new PEs is an important matter for businesses, and the work on that issue has not yet been done.
- Companies should evaluate how the proposals may affect their global businesses. Companies also should stay informed about PE developments in the countries where they operate or invest, as well as developments in the OECD related to the ongoing work on profit attribution to PEs.

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FEMA Updates

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Issuance of Rupee denominated bonds overseas – Multilateral and Regional Financial Institutions as Investors

In order to provide more choices of investors to Indian entities issuing Rupee denominated bonds abroad, it has been decided to also permit Multilateral and Regional Financial Institutions where India is a member country, to invest in these Rupee denominated bonds.

A. P. (DIR Series) Circular No. 31, dated February 16, 2017

For Full Text refer to https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=10865

Master Direction – Money Transfer Service Scheme (MTSS)

Money Transfer Service Scheme (MTSS) is a quick and easy way of transferring personal remittances from abroad to beneficiaries in India.

The directions relating to Money Transfer Service Scheme are being issued in a consolidated form through the Master Direction enclosed to the master direction. Reporting instructions can be found in the Master Direction on Reporting.

FED Master Direction No.1/2016-17 dated February 22, 2017

For full text refer to https://www.rbi.org.in/Scripts/BS_ViewMasDirections.aspx?id=10868

Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Second Amendment) Regulations, 2017

A. In the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000, (Notification No. FEMA 20/2000-RB dated 3rd May 2000), in Regulation 5, for the existing sub-regulation (9), the following shall be substituted, namely:

   "5 (9) A person resident outside India (other than a citizen of Pakistan or Bangladesh) or an entity incorporated outside India (other than an entity in Pakistan or Bangladesh), not being a Foreign Portfolio Investor or Foreign Institutional Investor or Foreign Venture Capital Investor registered in accordance with SEBI guidelines, may contribute foreign capital either by way of capital contribution or by way of acquisition / transfer of profit shares in the capital structure of an LLP under Foreign Direct Investment, subject to the terms and conditions as specified in Schedule 9"

B. Schedule 9 shall be substituted (excerpts below):

   The Scheme shall be called Foreign Direct Investment (FDI-LLP) in Limited Liability Partnerships (LLP) formed and registered under the Limited Liability Partnership Act, 2008.

   1. Eligible Investors:

      A person resident outside India (other than a citizen of Pakistan or Bangladesh) or an entity incorporated outside India (other than an entity in Pakistan or Bangladesh), not being a Foreign Portfolio Investor or Foreign Institutional Investor or Foreign Venture Capital Investor registered in accordance with SEBI guidelines, may contribute foreign capital either by way of capital contribution or by way of acquisition / transfer of profit shares in the capital structure of an LLP.

   2. Eligible investment

      Contribution to the capital of an LLP would be an eligible investment under the scheme.

Note: Investment by way of 'profit share' will fall under the category of reinvestment of earnings

3. Eligibility of a LLP

FDI in LLPs is permitted, subject to the following conditions:

i. FDI is permitted under the automatic route in LLPs operating in sectors / activities where 100% FDI is allowed through the automatic route and there are no FDI linked performance conditions. For ascertaining such sectors, reference shall be made to Annex B to Schedule 1 of these Regulations.

ii. An Indian company or an LLP, having foreign investment, will be permitted to make downstream investment in another company or LLP engaged in sectors in which 100% FDI is allowed under the automatic route and there are no FDI linked performance conditions. Onus shall be on the Indian company / LLP accepting downstream investment to ensure compliance with the above conditions.

iii. FDI in LLP is subject to the compliance of the conditions of Limited Liability Partnership Act, 2008.

iv. A company having foreign investment can be converted into an LLP under the automatic route only if it is engaged in a sector where foreign investment up to 100 percent is permitted under automatic route and there are no FDI linked performance conditions.

4. Pricing

FDI in a LLP either by way of capital contribution or by way of acquisition / transfer of profit shares, would have to be more than or equal to the fair price as worked out with any valuation norm which is internationally accepted / adopted as per market practice (hereinafter referred to as "fair price of capital contribution / profit share of an LLP") and a valuation certificate to that effect shall be issued by the Chartered Accountant or by a practicing Cost Accountant or by an approved valuer from the panel maintained by the Central Government.

In case of transfer of capital contribution / profit share from a resident to a non-resident, the transfer shall be for a consideration equal to or more than the fair price of capital contribution / profit share of an LLP. Further, in case of transfer of capital contribution / profit share from a non-resident to resident, the transfer shall be for a consideration which is less than or equal to the fair price of the capital contribution / profit share of an LLP.

5. Mode of payment

Payment by an investor towards capital contribution in LLPs shall be made:

(i) by way of inward remittance through banking channels; or

(ii) by debit to NRE / FCNR(B) account of the person concerned, maintained with an AD Category - I bank in accordance with Foreign Exchange Management (Deposit) Regulations, 2016, as amended from time to time.

6. Reporting

(i) Reporting of foreign investment in LLPs and disinvestment/transfer of capital contribution or profit shares between a resident and a non-resident may be made in a manner as prescribed by Reserve Bank of India from time to time.

(ii) All LLPs which have received Foreign Direct Investment in the previous year(s) including the current year shall submit to the Reserve Bank of India, on or before the 15th day of July of each year, a report titled 'Annual Return on Foreign Liabilities and Assets' as specified by the Reserve Bank from time to time."

Notification No. FEMA.385/2017-RB dated March 03, 2017

For full text refer to https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=10876&Mode=0

Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Fourth Amendment) Regulations, 2017

In the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000, (Notification No. FEMA 20/2000-RB dated 3rd May 2000), in Regulations 2,

i. after the sub-regulation (ii dd) and before the existing sub-regulation (ii e), the following sub-regulations shall be inserted:

"(ii E) E-commerce:

a. 'E-commerce' means buying and selling of goods and services including digital products over digital & electronic network.

b. 'E-commerce entity' means a company incorporated under the Companies Act, 1956 or the Companies Act, 2013 or a foreign company covered under section 2 (42) of the Companies Act, 2013 or an office, branch or agency in India as provided in Section 2 (v) (iii) of FEMA 1999, owned or controlled by a person resident outside India and conducting the e-commerce business.

c. 'Inventory based model of e-commerce' means an e-commerce activity where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly.

d. 'Market place model of e-commerce' means providing of an information technology platform by an e-commerce entity on a digital & electronic network to act as a facilitator between buyer and seller."

3. Amendment of Schedule 1

In the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000, (Notification No. FEMA 20/2000-RB dated 3rd May 2000), in Schedule 1, in the existing Annex B, the existing entry 16.2 shall be substituted by the following:

16.2	E-Commerce	% of equity/ FDI Cap	Entry route
16.2.1	B2B E-commerce activities	100 %	Automatic
	Such companies would engage only in Business to Business (B2B) e-commerce and not in retail trading, inter alia implying that existing restrictions on FDI in domestic trading would be applicable to e-commerce as well.		
16.2.2	Market place model of e-commerce	100 %	Automatic

Other conditions are stipulated in para 16.2.3. FDI is not permitted in inventory based model of e-commerce. Sale of services through e-commerce shall be under automatic route subject to the sector specific conditions, applicable laws/regulations, security and other conditionalities.

Notification No. FEMA.387/2017-RB dated March 09, 2017

For full text refer to https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=10884&Mode=0

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CONGRATULATIONS!!!

CA. Anjali Choksi, member of our Association has completed her PHD on **"Derivative Trading Strategies in Indian Stock Market"**.

Service Tax - Recent Judgements

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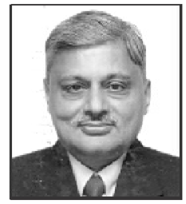

58 Safety Retreading Company Pvt. Ltd vs. Commissioner of Central Excise [2017],

Facts:-

The issue involved in the present appeal is whether in a contract for retreading of tyres, service tax is leviable on the total amount including the value of the material used and sold in the execution of the contract. The said matter before the Tribunal was referred to a third Member wherein it was held that there is no evidence of sale of materials in rendering the service of "Maintenance and Repairs" and the conditions of Notification 12/2003-ST are not proved to be satisfied. Further, it was held that maintenance and repair service being a specific service cannot be treated as a works contract and the concept of deemed sale is applicable only under works contract services. Aggrieved by the said order the present appeal is filed.

Held:-

The Court noted that the provisions of section 67 of the Finance Act, 1994 [as it read prior to 2006] specifically excludes the cost of parts or other material if any sold while providing maintenance and repair service and Notification 12/2003-ST also provides for such exclusion. The invoices issued clearly provide that service tax is discharged on the labour component after deducting 70% towards material cost under the State Act. No dispute is raised with regard to assessment under the State Act where VAT is discharged on 70% of the total value. The Court observed that the contention of the respondent that there was no proof of incurring of expenses on goods appears to be an afterthought and on merits is wholly unsustainable. Accordingly, It was held that service tax is payable only on the service component which under the State Act is quantified at 30% and the majority order of the Tribunal is incorrect in law.

59 Shree Pandurang SSK Ltd vs. Commissioner of Central Excise, Pune-III [2017]

Facts:-

Appellants availed CENVAT credit on input services related to erection, installation of capital goods. The same was capitalised and depreciation was claimed. The department contended that this was a case of double benefit of CENVAT credit and depreciation and therefore CENVAT credit should not be allowed in terms of Rule 4(4) of the CENVAT Credit Rules, 2004.

Held:-

The Tribunal noted that restriction in availing credit if depreciation is claimed is only in respect of capital goods under Rule 4(4). There is no explicit provision in the said rules to restrict credit on input services, if depreciation is claimed. Therefore, CENVAT credit cannot be denied and the appeal is allowed.

60 Infosys Technologies Ltd. vs. Comm. Of C. Ex., Pune-I [2017].

Facts:-

The appellant is engaged in providing services domestically as well as export of services. A refund claim was filed for refund of accumulated unutilised CENVAT credit. First Appellate and lower authorities denied the refund claim on the ground that service which was exported was not taxable but was exempt service and since refund of CENVAT credit pertaining to such exempt service is claimed, refund claim under CENVAT Credit Rules 2004 was rejected.

Held:-

The Tribunal observed that the refund mechanism was provided in the law so that taxes would not get exported. In the instant case, the appellant had obtained registration under applicable categories of services and had been depositing service tax and filing service tax returns showing services as 'taxable'. The Tribunal observed that the CENVAT Credit Rules are not the mechanism for implementing duty exemption but a manner for meeting tax obligations. The appellant was discharging tax and hence CENVAT credit cannot be denied. It was further held that nowhere a challenge was made for 'allowability' or otherwise of "input service" at the first place and hence tax paid on input services being eligible credit, it was held that the credit rejection is not valid.

61 Khanna Plymers Vs. Comm. Of Central Excise Noida [2017].

Facts:-

The appellant a selling agent represented suppliers and sold goods on their behalf and collected payment from respective purchasers. Commission was received against sale of goods on which the appellant has discharged service tax. In certain cases, the appellant from his own account made payment to his principals before due dates and for which principals gave early payment incentives to the appellant. Department confirmed service tax demand on such incentives received.

Held:-

It was held that incentive received was in nature of cash discounts and had no relation with the consideration for the service rendered by the appellant.

62 Comm. of C.Ex.Delhi-III VS. Suzuki Motorcycle India Pvt. Ltd., Bombay [2017].

Facts:-

The appellant availed insurance service for its employees and garden maintenance service at its factory. Demand was confirmed on the ground that post 2011, such activities were not "INPUT SERVICES" for the purpose of CENVAT Credit Rules, 2004.

Held:-

It was held that appellant was entitled to avail CENVAT credit of insurance service in respect of medical insurance of its employees which was statutorily required under ESIC Act and therefore insurance service was held to be integrally connected to the manufacturing activity.

For garden maintenance service availed, it was held that since Appellant was compulsorily required to maintain garden in its factory to fulfill pollution control norms and without it, factory cannot run and hence such service being directly related to manufacturing activity, was eligible for CENVAT.

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in management or capital or control by one of the enterprise in the other enterprise. If a form of participation in management, capital or control is not recognized by section 92A(2), even if it ends up in de facto or even de jure participation in management, capital or control by one of the enterprise in the other enterprise, it does not result in the related enterprises being treated as 'associated enterprises'.

Sections 92A(1) and (2), in that sense, are required to be read together, even though section 92A(2) does provide several deeming fictions which prima facie stretch the basic rule in section 92A(1) quite considerably on the basis of, what appears to be, manner of participation in 'control' of the other enterprise. It is thus clear that as long as the provisions of one of the clauses in section 92A(2) are not satisfied, even if an enterprise has a de facto participation capital, management or control over the other enterprises, the two enterprises cannot be said to be associated enterprises.

Further, the Hon'ble ITAT held that the case of the revenue hinges on application of clause (j) of section 92A(2).That is the only clause invoked by the Assessing Officer, and if this clause does not apply to the facts of this case, that is end of the matter. This clause provides that 'where one enterprise is controlled by an individual, the other enterprise is also controlled by such individual or his relative or jointly by such individual and relative of such individual'. In the present case, the assessee is a partnership concern and the assessee firm, therefore, cannot be said to be controlled by 'an individual' which is starting point for section 92A(2)(j) being invoked.

Therefore, the assessee and Blue Gems BVBA cannot be said to be associated enterprises. As these enterprises are not associated enterprises, the ALP adjustments in respect of the transactions between these enterprises were wholly unwarranted.

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VAT - Judgements and Updates

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Important Judgments:

[1] In case of Prabhat Body Builders v/s State of Gujarat: (GVAT Tribunal)

Issue:

[i] Deduction under Rule 42 for URD assessments;

[ii] Enhancement of Turnover in case of determined from the sales bills;

[iii] Penalty u/s.34(7) and 29(5) in case of URD.

Facts:

The facts of the case as stated by the appellant is that the appellant was engaged in the business of building, fabricating, assembling bodies on the motor chassis by way of works contract. The business premises of the appellant was surprisingly searched by the officials of the Commercial Tax Department on 21.09.2000. On that day he was not registered dealer under the Act. It is stated that he had commenced procedure to obtain registration, and the time limit within which a dealer has to apply for registration was also when he became liable to tax was also available to him. It is further stated that the visiting authority had issued a Notice in Form No. 302 and Form No. 309 to frame assessment. It is further stated that the visiting authority had seized sales bill book and had recorded statement of the appellant. Thereafter, in pursuance to search and notices, the assessment for the un-registered period was conducted. The Assessing Authority had raised the demand of Rs. 3,85,200/- which inter-alia includes amount of tax of Rs. 1,54,080/- and penalty under section 34(7) of Rs. 2,31,120/-. It is further stated that the assessment was framed by accepting sales figure from the said sales bills, however, the Authority had further added 100% of the amount total sales as per sales bills and determined the total turnover of sales. The appellant being aggrieved by the order of assessment had filed First Appeal before the Ld. First Appellate Authority and raised ground that the Authority had erred in deciding the total turnover of sales by adding said 100% amount. He had also disputed that the authority has not granted deduction of Rs. 5,00,000/- threshold limit available to him. He had also disputed the levy of penalty under section 34(7) and total to at 150%.

The Ld. First Appellate Authority allowed deduction of Rs. 5,00,000/- from the total turnover. He has also allowed 20% deduction by way of labour charges and reduced the rate of penalty to 50%. In all the Ld. Appellate Authority reduced the liability of the appellant to the tune of Rs. 94,896/-.

The Ld. Government Representative appearing for the respondent on the other hand, has relied on the order passed by the Ld. First Appellate Authority. He has further submitted that the appellant would not have applied for registration and would have evaded tax if the Authority had not visited the premises of the appellant. Therefore, according to him, the present case is the case of tax evasion and enhancement in turnover, is just and proper. He further submitted that the Ld. Visiting Authority has observed that the appellant has not maintained regular books of accounts, therefore in the absence of books of account, the authority had reasons to make enhancement. He further submitted that the demand was paid willingly by the appellant, without any dispute, and therefore, it is not now open for the appellant to challenge the liability. So far as the issue relating to deduction under section

42 is concerned, he submitted that the Rule is applicable only in case of registered dealer. The appellant being unregistered dealer at the time of sale, he had no right to collect tax on such sales, therefore, submission of the appellant that the sales were inclusive of tax, is not at all acceptable.

The Hon. Tribunal considered the rival submissions and the facts of the case and has also gone through the orders passed by the Authorities below and the documents produced before this Tribunal. It appears from the assessment order that the Authority has determined the turnover on the basis of sales bills seized from the premises of the appellant. However, at the time of search the statement of the appellant was recorded and as per the said statement, the Bank statement was submitted to the Authority. In absence of books of account, the authority had relied on said documents and determined the total turnover of sales. However, the learned assessing authority has not doubted any of the documents and has also not mentioned any reason to make addition in said turnover. Therefore, the Authority has no reason to enhance further turnover. However, the Assessing Authority has enhanced the turnover. In view of the Hon/ Tribunal, such enhancement in turnover was not proper; hence the Hon. Tribunal removes the enhancement.

Held:

This second appeal is partly allowed. The enhancement in turnover, as mentioned in body of the judgment is removed. The penalty levied by the Ld. Assessing Authority and partly confirmed by the Ld. First Appellate Authority is entirely removed. The appellant being unregistered dealer not entitled to claim deduction of tax element from the turnover under Rule 42. The Assessing Authority is directed to pass consequential order and grant refund to the appellant.

[2] **Case of Ashima Ltd.**

Issue:

Tax Credit in respect to by-products cotton waste and cotton yarn waste is held admissible u/s. 11 of the Vat Act:

Held:

The appellant engaged in the business of manufacturing of cotton fabrics and denim fabrics purchased cotton and cotton yarn on payment of tax. The cotton fabrics and denim fabrics were exempted from tax. However the by-products cotton waste and cotton yarn waste were liable to tax under the Vat Act. The claim of tax credit of the appellant in respect to taxable sale of by-products was rejected while passing assessment order for the period 2009-10 to 2010-11. The appellant contended that the waste generated during the manufacturing process is altogether a new marketable product because there is a commercial market of such cotton waste and cotton yarn waste. The appellant referred section 11(3)(a) of the Vat Act. The Hon'ble Tribunal referred the judgment of Hon'ble Gujarat High Court in the case of M/s. Jayant Organic Ltd. and held that the appellant is entitled to claim tax credit on the purchase of cotton and cotton yarn in proportion to the taxable sale of cotton waste and cotton yarn waste.

[3] Case of Prabhat Industries

Issue:

The interest u/s. 54(1)(aa) of the GST Act is held admissible on the amount of refund arise in deciding of the appeal.

Held:

The refund of Rs. 3,358/- and Rs. 1,65,652/- was held admissible under the GST Act and under the CST Act respectively in deciding of the appeal. The request of the appellant of granting interest on refund was not considered. The appellant contended before the Hon'ble Tribunal that in view of the judgment in case

contd. to page 814

Mergers and Acquisition Corner

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1. Airtel acquires Tikona's 4G business for Rs. 1,600 crore[1]

The ongoing consolidation in the telecom space has forced Tikona Digital Networks to sell its 4G spectrum to Airtel seven years after acquiring it. Though both companies declined to share the financial details, investment banking sources pegged the deal at around Rs. 1,600 crore. Tikona, a company controlled by former Reliance Communications CEO Prakash Bajpai, had acquired the spectrum in 2010 for Rs. 1,058 crore. However, the company could not utilise the spectrum all these years due to lack of funding. The deal, which is expected to be completed in 60 days, includes 350 telecom towers owned by Tikona. Bharti Airtel will also assume Tikona's debt of about Rs. 450-500 crore, said sources close to the development. For Tikona, the deal will allow it to be debt free and focus on its existing business of providing broadband services using unlicensed spectrum. Bajpai had tried to use the 4G spectrum to expand the business but could not raise funds. The deal with Airtel, therefore, provides the company a good exit.

"Now, 4G is the mainstay in the market. The spectrum we had acquired was very valuable, but it took sometime for the industry and technology to mature and devices to become available. Obviously the spectrum can generate a lot of value now," Bajpai told BusinessLine.

More 4G airwaves

For Airtel, the deal means more 4G spectrum to take on Reliance Jio. Tikona holds 20 MHz of spectrum in the 2300 MHz band in the Gujarat, Uttar Pradesh (East), Uttar Pradesh (West), Rajasthan and Himachal Pradesh circles.After the deal, Airtel will hold 30 MHz in the 2300 MHz band in 13 circles. This is the fourth major acquisition by Airtel in the last year. The telecom industry is consolidating from 10-12 operators to 4-5 players.

"After the Vodafone-Idea deal, this is another step towards consolidation in the Indian telecom sector. Future expansion and growth will depend on the quantum of spectrum held and the quality of services offered. Such acquisitions help operators address these issues," said Rishi Tejpal, Principal Research Analyst at Gartner.

2. Oncology chain HCG to buy majority stake in Kenyan firm[2]

Bangalore-based Healthcare Global Enterprises Ltd (HCG) has agreed to purchase a majority stake in a cancer-care centre in Kenya in its first overseas acquisition.HCG will buy a 93.66% stake in Nairobi based Cancer Care Kenya Ltd for 93.15 million Kenyan shillings (about $905,000) in cash, the Indian company said in a stock-exchange filing. HCG will acquire the stake through step-down subsidiary HealthCare Global (Kenya) Pvt Ltd.HCG added that it has also signed a pact with Nairobi-based MP Shah Hospital and Cancer Care Kenya's promoters to subscribe to shares of the target company. After this pact is concluded, HCG will have a 77.5% stake in Cancer Care Kenya while MP Shah Hospital will have 10%. The target company's promoters will have the remaining 12.5% stake."We expect to bridge the demand-supply gap existing in the cancer care space in Kenya, where patients have to travel out of the country for availing cancer care services due to inadequate treatment facilities in Kenya," HCG said.The transaction is subject to approval from the Competition Authority of Kenya and is likely to be completed by the end of June, the company said. This is the first major takeover deal by HCG in more than three years. In 2013, HCG had acquired a 50% stake in Bengaluru-based fertility care provider Bangalore Assisted Conception Centre Pvt Ltd.HCG is backed by PremjiInvest, the investment arm of Wipro Ltd chairman Azim Premji, and World Bank arm International Finance Corporation. Earlier this month, PremjiInvest sold a 2.54% stake in the company.

1. http://www.thehindubusinessline.com/info-tech/airtel-acquires-tikonas-4g-business-for-1600-crore/article9598163.ece
2. http://www.vccircle.com/news/banking/2017/02/15/cabinet-clears-state-bank-india-s-merger-five-subsidiarieshttps://www.vccircle.com/oncology-chain-hcg-to-buy-majority-stake-in-kenyan-firm/

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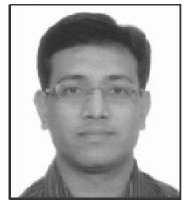
Corporate Law Update



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MCA Updates:

1. **Companies (Transfer of Pending Proceedings) Amendment Rules, 2017.**

Effect of the amendment rules, 2017 is as under:

Rule/ Clause	Provisions under the Companies (Transfer of Pending Proceedings) Rules, 2016	Provisions under the Companies (Transfer of Pending Proceedings) Amendment Rules, 2017	Effect of the amendment
Proviso to sub-rule (1) of Rule 5	Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with Rule 7, required for admission of the petition under sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal within **sixty days** from date of this notification, failing which the petition shall abate.	Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with Rule 7, required for admission of the petition under sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal within **six months** from date of this notification, failing which the petition shall abate.	The words "sixty days" have been substituted by the words "six months".

[F. No. 1/5/2016- CL-V dated 28th February, 2017]

2. **Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Amendment Rules, 2017:**

The following amendments have been made:

Rule/ Clause	Provisions under the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016	Provisions under the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Amendment Rules, 2017	Effect of the amendment
Sub-rule (d), in sub-rule (1), in Rule 2	"Company" means company as defined in sub-section (20) of section 2 of the Act and includes 'corresponding new bank' as defined in sub-section (d) of section 2 of the	"Company" means a company defined in sub-section (20) of section 2 of the Act and includes 'corresponding new bank' as defined in sub-section (d) of section 2 of the Banking Companies	**Substituted**

	Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970) and clause (b) of section 2 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 (40 of 1980).	(Acquisition and Transfer of Undertakings) Act,1970 (5 of 1970) and clause (b) of section 2 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 (40 of 1980) and 'subsidiary bank' as defined in clause (k) of section 2 of State Bank of India (Subsidiary Bank) Act, 1959 (38 of 1959);	
Sub-rule (da), in sub-rule (1), in Rule 2	—	"Corporate action" means any action taken by the company relating to transfer of shares and all the benefits accruing on such shares namely, bonus shares, split, consolidation, fraction shares etc., except right issue to the Authority	**Inserted**
Rule 3(2)(g)	All amounts payable as mentioned in sub-section (3) of section 10B of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and section 10B of Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980; and	All amounts payable as mentioned in sub-section (3) of section 10B of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, section 10B of Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 & section 40A of the State Bank of India (Subsidiary Bank) Act, 1959;and	**Substituted**
Rule 6	Manner of transfer of shares under sub-section (6) of section 124 to the Fund	Please refer the notification for the full text.	**Substituted**
Rule 7	Refund to claimants from Fund	Please refer the notification for the full text.	**Substituted**

Few amendments have been brought about in Form IEPF-3, IEPF-5 and IEPF-6 also.

[F. No. 5/23/2016- IEPF dated 28th February, 2017]

3. COMPANIES (INDIAN ACCOUNTING STANDARDS) (AMENDMENTS) RULES, 2017.

The following amendments have been made in the principal rules, in the "Annexure", under the heading "B. Indian Accounting Standards (Ind AS) 102, *Share-based payment*:

Paragraph	**Provisions under the Companies (Indian Accounting Standards)(Amendment) Rules, 2017**	**Effect of the amendment**
Paragraph 19	A grant of equity instruments might be conditional upon satisfying specified vesting conditions. For example, a grant of shares or share options to an employee is typically conditional on the employee remaining in the	**Substituted**

	entity's employment for a specified period of time. There might be performance conditions that must be satisfied, such as the entity achieving a specified growth in profit or a specified increase in the entity's share price. Vesting conditions, other than market conditions, shall not be taken into account when estimating the fair value of the shares or share options at the measurement date, Instead, vesting conditions, other than market conditions, shall be taken into account by adjusting the number of equity instruments included in the measurement of the transaction amount so that, ultimately, the amount recognised for goods or services received as consideration for the equity instruments granted shall be-based on the number of equity instruments that eventually vest. Hence, on a cumulative basis, no amount is recognised for goods or services received if the equity instruments granted do not vest because of failure to satisfy a vesting condition, other than a market condition, for example, the counterparty fails to complete a specified service period, or a performance condition is not satisfied, subject to the requirements of paragraph 21.	
Paragraph 30	For cash-settled share-based payment transactions, the entity shall measure the goods or services acquired and the liability incurred at the fair value of the liability, subject to the requirements of paragraphs 31-33D. Until the liability is settled, the entity shall remeasure the fair value of the liability at the end of each reporting period and at the date of settlement, with any changes in fair value recognised in profit or loss for the period	**Substituted**
Paragraph 31	For example, an entity might grant share appreciation rights to employees as part of their remuneration package, whereby the employees will become entitled to a future cash payment (rather than an equity instrument), based on the increase in the entity's share price from a specified level over a specified period of time. Alternatively, an entity might grant to its employees a right to receive a future cash payment by granting to them a right to shares (including shares to be issued upon the exercise of share options) that are redeemable, either mandatorily (for example, upon cessation of employment) or at the employee's option. These arrangements are examples of cash-settled share-based payment transactions. Share appreciation rights are used to illustrate some of the requirements in paragraphs 32-33D; however, the requirements in those paragraphs apply to all cash-settled share-based payment transactions.	**Substituted**
Paragraph 33	The liability shall be measured, initially and at the end of each reporting period until settled, at the fair value of the share appreciation rights, by applying an option pricing model, taking into account the terms and conditions on which the share appreciation rights were granted, and the extent to which the employees have rendered service to date subject to the requirements of paragraphs 33A-33D. An entity might modify the terms and conditions on which a cash-settled share-based payment is granted. Guidance for a modification of a share-based payment transaction that changes its classification from cash-settled to equity-settled is given in paragraphs B44A-B44C in Appendix B	**Substituted**

Paragraph 33A	A cash-settled share-based payment transaction might be conditional upon satisfying specified vesting conditions. There might be performance conditions that must be satisfied, such as the entity achieving a specified growth in profit or a specified increase in the entity's share price. Vesting conditions, other than market conditions, shall not be taken into account when estimating the fair value of the cash-settled share-based payment at the measurement date. Instead, vesting conditions, other than market conditions, shall be taken into account by adjusting the number of awards included in the measurement of the liability arising from the transaction.	**Inserted**
Paragraph 33B	To apply the requirements in paragraph 33A, the entity shall recognise an amount for the goods or services received during the vesting period. That amount shall be based on the best available estimate of the number of awards that are expected to vest. The entity shall revise that estimate, if necessary, if subsequent information indicates that the number of awards that are expected to vest differs from previous estimates. On the vesting date, the entity shall revise the estimate to equal the number of awards that ultimately vested.	**Inserted**
Paragraph 33C	Market conditions, such as a target share price upon which vesting (or exercisability) is conditioned, as well as non-vesting conditions, shall be taken into account when estimating the fair value of the cash settled share-based payment granted and when remeasuring the fair value at the end of each reporting period and at the date of settlement.	**Inserted**
Paragraph 33D	As a result of applying paragraphs 30-33C, the cumulative amount ultimately recognised for goods or services received as consideration for the cash-settled share-based payment is equal to the cash that is paid.	**Inserted**
Paragraph 33E	Tax laws or regulations may oblige an entity to withhold an amount for an employee's tax obligation associated with a share-based payment and transfer that amount, normally in cash, to the tax authority on the employee's behalf. To fulfil this obligation, the terms of the share-based payment arrangement may permit or require the entity to withhold the number of equity instruments equal to the monetary value of the employee's tax obligation from the total number of equity instruments that otherwise would have been issued to the employee upon exercise (or vesting) of the share-based payment (i.e. the share-based payment arrangement has a 'net settlement feature').	**Inserted**
Paragraph 33F	As an exception to the requirements in paragraph 34, the transaction described in paragraph 33E shall be classified in its entirety as an equity-settled share-based payment transaction if it would have been so classified in the absence of the net settlement feature.	**Inserted**
Paragraph 33G	The entity applies paragraph 29 of this Standard to account for the withholding of shares to fund the payment to the tax authority in respect of the employee's tax obligation associated with the share-based payment. Therefore, the payment made shall be accounted for as a deduction from	**Inserted**

	equity for the shares withheld, except to the extent that the payment exceeds the fair value at the net settlement date of the equity instruments withheld.	
Paragraph 33H	The exception in paragraph 33F does not apply to (a) a share-based payment arrangement with a net settlement feature for which there is no obligation on the entity under tax laws or regulations to withhold an amount for an employee's tax obligation associated with that share-based payment; or (b) any equity instruments that the entity withholds in excess of the employee's tax obligation associated with the share-based payment (i.e. the entity withheld an amount of shares that exceeds the monetary value of the employee's tax obligation). Such excess shares withheld shall be accounted for as a cash-settled share-based payment when this amount is paid in cash (or other assets) to the employee."	**Inserted**
Paragraph 52	If the information required to be disclosed by this Standard does not satisfy the principles in paragraphs 44, 46 and 50, the entity shall disclose such additional information as is necessary to satisfy them. For example, if an entity has classified any share-based payment transactions as equity-settled in accordance with paragraph 33F, the entity shall disclose an estimate of the amount that it expects to transfer to the tax authority to settle the employee's tax obligation when it is necessary to inform users about the future cash flow effects associated with the share-based payment arrangement.	**Substituted**
Paragraph 53-59, 59A and 59B	**"Transitional provisions"**[Refer Appendix 1]	**Inserted**
Paragraph 60-63C	**"Effective date"**[Refer Appendix 1]	**Inserted**
63D	Amendments to Classification and Measurement of Share-based Payment Transactions under Ind AS 102 amended paragraphs 19, 30-31, 33 and 52 and added paragraphs 33A-33H, 59A-59B, 63D and B44A-B44C and their related headings. An entity shall apply those amendments for annual periods beginning on or after 1 April, 2017	**Inserted**
Paragraph B44A, B and C in Appendix B	"Accounting for a modification of a share-based payment transaction that changes its classification from cash-settled to equity-settled"	**Inserted**
Paragraph 5 in Appendix 1	Paragraphs 53-59 and 60-63C in IFRS 2 have not been included in Ind AS 102 as these paragraphs relate to Transitional Provisions and Effective date, respectively. However, in order to maintain consistency with paragraph numbers of IFRS 2, the paragraph numbers are retained in Ind AS 102.	**Inserted**

The following amendments have been made in the principal rules, in the "Annexure", under the heading "B. Indian Accounting Standards (Ind AS) 7, "Statement of Cash Flows":

Paragraph 44A	**"Changes in liabilities arising from financing activities"** An entity shall provide disclosures that enable users of financial statements to evaluate changes in liabilities arising from financing activities, including both changes arising from cash flows and non-cash changes.	**Inserted**
Paragraph 44B	To the extent necessary to satisfy the requirement in paragraph 44A, an entity shall disclose the following changes in liabilities arising from financing activities: (a) changes from financing cash flows; (b) changes arising from obtaining or losing control of subsidiaries or other businesses; (c) the effect of changes in foreign exchange rates; (d) changes in fair values; and (e) other changes.	**Inserted**
Paragraph 44C	Liabilities arising from financing activities are liabilities for which cash flows were, or future cash flows will be, classified in the statement of cash flows as cash flows from financing activities. In addition, the disclosure requirement in paragraph 44A also applies to changes in financial assets (for example, assets that hedge liabilities arising from financing activities) if cash flows from those financial assets were, or future cash flows will be, included in cash flows from financing activities.	**Inserted**
Paragraph 44D	One way to fulfil the disclosure requirement in paragraph 44A is by providing a reconciliation between the opening and closing balances in the balance sheet for liabilities arising from financing activities, including the changes identified in paragraph 44B. Where an entity discloses such a reconciliation, it shall provide sufficient information to enable users of the financial statements to link items included in the reconciliation to the balance sheet and the statement of cash flows.	**Inserted**
Paragraph 44E	If an entity provides the disclosure required by paragraph 44A in combination with disclosures of changes in other assets and liabilities, it shall disclose the changes in liabilities arising from financing activities separately from changes in those other assets and liabilities.	**Inserted**
Paragraph 53-59	**"Effective date"**[Refer Appendix 1]	
Paragraph 60	Paragraphs 44A-44E have been added. When the entity first applies these amendments, it is not required to provide comparative information for preceding periods. An entity shall apply those amendments for annual periods beginning on or after 1 April, 2017.	**Inserted**
Paragraph 6 in	Paragraphs 53-59 in IAS 7 have not been included in Ind AS 7 as these paragraphs relate to Effective date. However, in order to maintain	**Inserted**

Appendix 1 consistency with paragraph numbers of IAS 7, the paragraph numbers are retained in Ind AS 7

[F. No. 01/01/2009-CL-V (Part VI) dated 17th March 2017]

4. Companies to Disclose details of Specified Bank Notes in Balance Sheet and Audit Report:

1. In Schedule III, in Division I, in Part I under the heading "General instructions for preparation of Balance Sheet" in paragraph 6, after clause 'W', the following clause shall be inserted namely:-

"X. Every company shall disclose the details of Specified Bank Notes (SBN) held and transacted during the period from 8th November, 2016 to 30th December, 2016 as provided in the Table below:-

	SBNs	**Other denomination notes**	**Total**
Closing cash in hand as on 08.11.2016			
(+) Permitted receipts			
(-) Permitted payments			
(-) Amount deposited in Banks			
Closing cash in hand as on 30.12.2016			

Explanation:

For the purposes of this clause, the term 'Specified Bank Notes' shall have the same meaning provided in the notification of the Government of India, in the Ministry of Finance, Department of Economic Affairs number S.O. 3407(E), dated the 8th November, 2016.".

2. In Schedule III, in Division II, in Part I under the heading "General instructions for preparation of Balance Sheet" in paragraph 6, after clause 'J', the following clause shall be inserted namely:-

"K. Every company shall disclose the details of Specified Bank Notes (SBN) held and transacted during the period 08/11/2016 to 30/12/2016 as provided in the Table below:-

	SBNs	**Other denomination notes**	**Total**
Closing cash in hand as on 08.11.2016			
(+) Permitted receipts			
(-) Permitted payments			
(-) Amount deposited in Banks			
Closing cash in hand as on 30.12.2016			

Explanation:

For the purposes of this clause, the term 'Specified Bank Notes' shall have the same meaning provided in the notification of the Government of India, in the Ministry of Finance, Department of Economic Affairs number S.O. 3407(E), dated the 8th November, 2016.".

[F. No. 17/62/2015-CL-V (Vol.I) dated 30th March, 2017]

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Allied Laws Corner

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A practicing Chartered Accountant but actively carrying on business through Companies, Trusts and Firms found to be guilty of professional misconduct and his name is removed from Registrar of Members of the Institute of Chartered Accountants of India for a period of two years.

Recently, the Delhi High Court in the case of **Council of Institute of Chartered Accountants of India vs. Subodh Gupta** reported in **79 taxmann.com 9** held that since being a chartered accountant, he was actively carrying on business through companies, trusts and firms, respondent and accordingly was guilty of professional misconduct and his name was to be removed from Register of Members of the Institute of Chartered Accountants for a period of two years.

A. Facts of the case :

1. A complaint was received from the Punjab National Bank alleging that the respondent : a practicing Chartered Accountant, had incorporated three companies and a trust, with he being the founder director/ president and had opened accounts in the name of the companies and the trust with the complainant's branch at Agra. The three companies incorporated were : M/s. Seeroo Foods Pvt. Ltd., M/s. G.K. Consultant Ltd. and M/s. Jagrook Builders Pvt. Ltd. The trust set up was M/s. Nirogi Charitable and Medical Research Trust. It was further alleged that in connivance with the Branch Manager, funds were diverted to companies and firms in which the respondent was associated directly as a director or as a partner. The said entities were : M/s. Radha Raman Plastic Concern Ltd., M/s. Himalayan Production & Estate (P) Ltd., M/s. A.B.Metal Industries (P) Ltd., M/s. SAMD Cast (P) Ltd., M/s. Pratikar Finlease Pvt. Ltd., M/s. Subodh Gupta & Associates, M/s. Utkarsh International and M/s. Formex Forms (P) Ltd.

2. The Disciplinary Committee issued notice to the respondent to appear before the Committee. The record of the Disciplinary Committee would show that from August 25, 2004 the respondent, on one pretext or the other, took adjournments and successfully managed to drag on the proceedings till July 29, 2006. On a date which is not emerging from the record the Committee heard the complainant and the respondent and submitted a report on October 03, 2006 holding the respondent guilty of professional misconduct within the meaning of Clause 11 of the First Schedule to the Chartered Accountants Act, 1949 and with respect to the charge of other misconduct observed that the same shall be decided after the outcome of the verdict by the CBI Court. The reason being that investigation qua the fraud committed by the Branch Manager was investigated by CBI and a charge sheet was filed in the Court of Competent Jurisdiction in which amongst others, the respondent was named as an accused.

3. The report of the Disciplinary Committee was considered by the Council which referred the matter to the Disciplinary Committee for further inquiry and to submit a complete report.

B. Findings of the Disciplinary Committee as noted in their Report :

1. The Committee noted that the respondent was signing the Balance Sheet of various companies i.e. M/s. G.K. Consultants Limited, M/s. Seeroo Foods Private Limited, M/s. Radha Raman Plastic Concern Ltd. etc. in the capacity of as a Director of the said Companies. Further, it is an admitted fact that the respondent was also operating the bank account of the Companies.

2. The Committee noted that and it is an admitted fact that the respondent was Director in several companies i.e. M/s. Seeroo Foods (p) Ltd., M/s. Nirogi Charitable & Medical Research Ltd., M/s. G.K. Consultant Ltd. etc. However, the respondent have taken permission from the Institute to be a Director only in one Company i.e. M/s. G.K. Consultant Ltd.

3. The respondent submitted that he was honorary Director in all the Companies and for that no specific permission was required from the Institute. But **the Committee is not convinced with the contention of the respondent as the respondent was actively involved in the day to day operation of the Companies as he was involved in signing the balance Sheets of the various Companies in the capacity of a Director, operating the Bank account9s) signing the Loan application/documents etc.** The Complainant has submitted the copies of resolution of the Companies, authorizing the respondent to operate the Bank accounts, Copies of the Memorandum & Article of Association of various Companies in which the respondent was shown as a promoter of the Companies. Further, **the respondent was actively involved in the Company's activities relating to bank's transaction and he signed the documents for over draft facility as well**.

4. **In view of the above, it is evident that the respondent was involved in day to day activities of various Companies** namely, M/s. Seeroo Foods (P) Ltd., M/s. Nirogi Charitable & Medical Research Trust, M/s. G.K. Consultant Ltd., M/s. Jagrook Builders (P) Ltd., M/s. Radha Raman Plastic Concern Ltd., M/s. Himalayan Production & Estate (P) Ltd., M/s. A.B. Metal Industries (P) Ltd., M/s. SAMD Cast (P) Ltd., M/s. Pratikar Finlease Pvt. Ltd., M/s. Subodh Gupta & Associates, M/s. Utkarsh International and M/s. Formex Forms (P) Ltd. without obtaining the prior permission of the Institute.

5. Thus, in view of above the Committee holds **the respondent guilty of professional misconduct falling with the meaning of Clause (11) of Par 1 of First Schedule to the Chartered Accountants Act, 1949**.

6. The Committee noted that **the second charges is that the respondent is connivance with the then Branch Manager had defrauded the Bank. It is an admitted fact that the Bank has been cheated by the Companies in which the Respondent was the Director and the branch manager was actively involved in the said fraud**. The Committee noted that the bank has been defrauded to the tune of Rs. 3.50 crores and for the same the Bank has filed recovery suit. The said suit has been withdrawn as the Bank has entered into a compromise with the Companies. The Committee noted that the Branch Manager had allowed the clean overdraft to the Companies superseding his statutory powers.

7. The Committee noted that the criminal suit is still pending in the Court and the charges have not been framed despite the fact that

more than 9 years have elapsed. The Committee noted that the Respondent's contention was that he was given clean overdraft based on the creditworthiness of the Companies and he has not furnished any wrong document.

8. The Committee observed that the contention raised by the Respondent is not at all tenable as **the charge sheet which has been filed by the CBI wherein the Respondent is one of the accused along with others**, namely, Deepak Kumar Nayyar, Manager, Punjab National Bank, (under suspension). It has been pointed out in the charge-sheet that Nirogi Charitable & Medical Research Trust was neither availing any credit facility/loan nor there was any OD account in the name of the said Society in the Punjab National Bank, Kamla Nagar Branch, Agra. Further, it was mentioned that Mr. Deepak Kumar Nayyar, Manager, Punjab National Bank had abused his position as Branch Manager by conspiring with the respondent to cause wrongful loss to the Bank and wrongful gain to themselves by fraudulent means and in furtherance of the said conspiracy, the said Branch Manager debited a sum of Rs. 85,12,750/- to a non-existence OD account of the Society on 27th April, 1998 and got issued 11 demand drafts for a total sum of Rs. 85 lacs drawn on CDPC, New Delhi favouring various beneficiaries of Delhi on the basis of draft application forms submitted by the respondent.

9. The Committee also observed that it was alleged in the charge-sheet that M/s. Seeroo Foods Pvt. Ltd. represented by the respondent as its Director was having an Anupam Fixed Deposit Account No. 489 and corresponding OD account which was operated by the respondent himself. On 16th December, 1997 while the Anupam Account was showing a credit balance of Rs. 2,25,98,910/-, Mr. Nayyar fraudulent made an excess credit of Rs. 7,11,715/- as interest on 19.9.97. The said Manager further two fake credits for Rs. 5,24,96,50/- on 13.11.97 and Rs. 80,50,000/- on 18.11.97 showing the same as being the amounts against FDR No. 589/97 and FDR No. 603/97 respectively. It was further alleged that all the aforesaid three entries were made by Mr. D.K. Nayyar in connivance with the Respondent without receipt of funds from or on behalf of M/s. Seeroo Foods Pvt. Ltd. and the amount was withdrawn from Anupam OD A/c. No. 49 on the various dates by the respondent.

10. **On perusal of the aforestated charge-sheet and the involvement of the respondent in the entire matter, the Committee felt that the respondent's contention that he was not at all involved in this entire episode is not acceptable**. The Committee further noted that the respondent at each stage was aware of the fact as to how the amounts were credited to the Society's account and only at his instance 11 demand drafts were issued to various beneficiaries for which the respondent himself had submitted the draft applications.

11. Though the Committee noted that the Complainant has not submitted any specific document before the Committee yet the Committee on perusal of the charge-sheet along with the various correspondence which has been exchanged by the respondent with the Bank is of the view that the respondent was dealing with the bank on day to day basis and he was well aware about the security available to the Bank and despite knowing that he enjoyed the clean overdraft facility in contravention of the Rules of the Bank. **It is apparent that the Respondent was in connivance with the then Branch Manager and**

enjoyed the clean overdraft facility without any security. Therefore, the Committee is of the view that the Respondent is guilty of 'Other Misconduct' under Section 22 read with Section 21 of the Chartered Accountants Act, 1949.

C. Findings of the Delhi High Court on reference made by the Council of ICAI :

1. There is evidence on record that the respondent was operating the bank accounts of the three companies. There is evidence on record that the respondent was signing the balance sheet of various companies in the capacity as a director and was also operating the bank accounts and signing various applications submitted to the bank. Memorandum and article of associations of various companies show the respondent to be the promoter of the companies. There is also evidence that the respondent had signed as the introducer when accounts of other companies were opened and significantly the address of these other companies was the same from where the respondent carried on his profession as a Chartered Accountant. We shall be noting, in some detail, one such act of the respondent which is indicative of what he was indulging in.

2. Relevant would it be to highlight that pertaining to the indictment of having committed other misconduct, there is evidence that the applications to issue eleven demand drafts were submitted by the respondent. The trust was not enjoying any credit or loan or an overdraft facility. There being no money in the account. The manager debited a sum of Rs. 85,12,750/- in the account treating the same as having an overdraft facility. Eleven demand drafts were issued favouring various facilities.

3. There is evidence that M/s. Seeroo Foods Pvt. Ltd. of which the respondent was acting as a director had an Anupam Fixed Deposit Account No. 489 in which account, on December 16, 1997 there was a credit balance of Rs. 2,25,98,910/-. Excess credit of interest in sum of Rs. 7,11,715/- was made in the account on September 19, 1997. Two other credits in sum of Rs. 52,49,650/- and Rs. 80,50,000/- were made against two fixed deposit receipts. The money was withdrawn from the Anupam Accounts on various dates without actual receipt of funds.

4. It is thus not a case where the respondent has established his involvement with the companies in an honorary capacity.

5. The second contention urged by learned counsel for the respondent was that trial before the CBI Court is not get over. Nothing turns on that because the charge in the criminal proceedings is one of conspiracy and cheating. **Instant proceedings relate to the charge of the respondent being a Chartered Accountant and without permission from the Institute of Chartered Accountant acting as a director in various companies. No doubt the professional misconduct encompasses the acts of cheating, but that was the subject matter of a separate indictment against which the appeal filed by the respondent in this Court was withdrawn.**

6. To bring home one illustrative point as to how the respondent was involved, overlooking the names of the persons who were responsible, for the reason this would relate to the charge of conspiracy, evidence shows that on advise from Foreign Exchange Office of PNB, two FDRs under FCNR Account No. 12 were issued in sum

of Rs. 99,62,526/- and Rs. 47,34,921/- in the name of Tajinder Singh Sahni and Mrs. Jasbeer Kaur Sahni. Two parallel sets of FDRs in same amount were also issued but pertaining to FCNR Account No. 11. The modus operandi was to tag the name of Mrs. Jasbeer Kaur Sahni, wife of Surinderpal Singh and that of Tajinder Singh Sahni. The actual beneficiaries ought to have been Tajinder Singh and Jasbeer Kaur. A document was then introduced in the record, allegedly pointing out aforesaid anomaly and the result was five FDRs being issued in the correct names. The two sets of FDRs in the joint name of Tajinder Singh and Jasbeer Kaur, which were required to be cancelled outright, were not cancelled. **Who did what would not be relevant for the purposes of the present proceedings, but relevant would be the fact that this siphoned-off funds was used for making 11 demand drafts, 9 out of which in sum of Rs. 81 lacs were deposited in Current Account No. 130 maintained by Indian Overseas Bank, Preet Vihar in the name of M/s. S.A. Casting Industries Pvt. Ltd. The respondent was the person who introduced the account holder. The address of M/s. S.A. Casting Industries Pvt. Ltd. is the same as that of M/s. Seeroo Foods Pvt. Ltd., which account with Indian Overseas Bank, being Current Account No. 117, was operated by the respondent. Aforesaid shows respondent actively participating in businesses, which as a practicing Chartered Accountant the respondent could not indulged in**.

7. The third submission advanced by learned counsel for the respondent was predicated on a decision dated August 16, 2016 delivered by a Division Bench of this Court in Chat. A. Ref. No. 4/2012 Council of Institute of Chartered Accountants of India v. Gurvinder Singh [2016] 72 taxmann.com 197/242 Taxman 36 in which the view taken was that a Chartered Accountant would not be amenable to any disciplinary proceedings while acting as an individual and dealing with a complainant in a commercial matter. : A Chartered Accountant enters into an agreement to sell and receives an earnest money which he claims to have forfeited alleging default by the buyer. The buyer takes the stand that the Chartered Accountant never intended to sell the property and thus has cheated the buyer. This dispute cannot form the subject matter of a disciplinary proceedings because the Chartered Accountant is not acting as a Chartered Accountant. He is acting as the owner of the property.

8. **In the instant case the admitted position is that the respondent is registered with the Council to practice as a Chartered Accountant. He cannot be a director of a company without the permission of the Council. The appellant is the promoter of various companies of which he is a director as per the evidence on record. Being a Chartered Accountant the respondent cannot actively carry on business through companies, trusts and firms. There is evidence that the respondent is doing so**.

9. **Affirming the verdict of guilt and keeping in view the gravity of the misconduct we answer the reference by imposing the penalty of removal of respondent's name from the Register of Members of the Institute of Chartered Accountants for a period of two years.**

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From the Government

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Income Tax

1) Press Release relating to mandatory Quoting of Aadhaar For PAN Applications & Filing Return of Income

Section 139AA of the Income-tax Act, 1961 as introduced by the Finance Act, 2017 provides for mandatory quoting of Aadhaar / Enrolment ID of Aadhaar application form, for filing of return of income and for making an application for allotment of Permanent Account Number with effect from 1st July, 2017.

It is clarified that such mandatory quoting of Aadhaar or Enrolment ID shall apply only to a person who is eligible to obtain Aadhaar number. As per the Aadhaar Act, 2016, only a resident individual is entitled to obtain Aadhaar. Accordingly, the requirement to quote Aadhaar as per section 139AA of the Income-tax Act shall not apply to an individual who is not a resident as per the Aadhaar Act, 2016

(Press Release dated 5th April,2017)

2) Notification regarding amendment in sec 269ST

The Central Government hereby notifies that the provision of section 269ST shall not apply to receipt by any person from an entity referred to in sub-clause (b) of clause (i) of the proviso to section 269ST. The notification shall be deemed to have come into force with effect from 1st day of April, 2017.

(Notification no.28, dated 5th April, 2017)

3) Press Release regarding New Income Tax Return Forms for AY 2017-18

The Central Board of Direct Taxes has notified Income-tax Return Forms (ITR Forms) for the Assessment Year 2017-18.

One of the major reforms made in the notified ITR Forms is the designing of a one page simplified ITR Form-1(Sahaj). This ITR Form-1(Sahaj) can be filed by an individual having income upto Rs.50 lakh and who is receiving income from salary one house property / other income (interest etc.) . Various parts of ITR Form-1 (Sahaj) viz. parts relating to tax computation and deductions have been rationalised and simplified for easy compliance.

The number of ITR Forms have been reduced from the existing nine to seven forms. The existing ITR Forms ITR-2, ITR-2A and ITR-3 have been rationalized and a single ITR-2 has been notified in place of these three forms. Consequently, ITR-4 and ITR-4S (Sugam) have been renumbered as ITR-3 and ITR-4 (Sugam) respectively.

Whereas there is no change in the manner of filing of ITR Forms as compared to last year. All these ITR Forms are to be filed electronically.

The following persons have an option to file return in paper form where the return of income is furnished in form ITR 1 (Sahaj) or ITR 4 (Sugam):-

(i) an individual of the age of 80 years or more at any time during the previous year; or

(ii) an individual or HUF whose income does not exceed five lakh rupees and who has not claimed any refund in the return of income.

The notified ITR Forms are available on the department's official website www.incometaxindia.gov.in

(Press Release dated 31st, March,2017)

4) Clarification on Income Computation and Disclosure Standards (ICDS) notified under section 145(2) of the Income – tax Act, 1961.

Central Government vide notification no. 87 dated 29th September, 2016 notifies the income computation and disclosure standards to be followed by all assessees (other than an individual or a Hindu undivided family who is not required to get his accounts of the previous year audited in accordance with the provisions of section 44AB of the said Act) following the mercantile system of accounting, for the purposes of computation of income chargeable to income-tax under the head "Profits and gains of business or profession" or "Income from other sources".

The CBDT hereby issues clarifications regarding the provisions of ICDS by way of FAQs and accordingly vide notification no. 87, dated 29th September,2016, the central government notified amended ICDS w.e.f. AY 2017-18.

(Full text refer circular no. 10/2017 , dated 23rd March,2017)

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contd. from page 799

of M/sd. Saurashtra Cement Ltd. S.A. No. 603 of 2007 decided on 01.08.2014, the appellant was entitled to get interest on the amount of refund. It was further submitted that the issue of granting of interest on the amount of refund arise in deciding of the appeal is decided by the Hon'ble Gujarat High Court in the case of M/s. Doshi Printing Press. The Hon'ble Tribunal referred section 54(1)(aa) and also referred judgments relied on by the appellant and held that the appellant is entitled to get interest on the amount of refund.

[4] Transasia Bio Medical Ltd. v/s. Deputy Commercial Tax Officer: (Madras High Court)

Issue:

Late submission of 'C' Forms are to be accepted considering the provisions of Rule 12 of the CST Rules, 1956.

Facts:

The assessee is engaged in business of medical equipments and registered dealer under the local Act as well as the CST Act. The assessee sold goods in the course of inter-state trade and commerce as well as transferred goods to the branches outside the State. The assessee filed its returns accordingly and claimed the transactions accordingly. However, the assessee could not file the declaration forms C & F within the time. The assessing authority issued a notice for reversal of exemption claim in absence of statutory forms. The assessee requested for time for filing the declaration forms and thereafter, filed such forms also. The assessing authority accepted Forms 'C' but rejected Form 'F'. Being aggrieved, the assessee filed present writ petition before the Madras High Court.

Held:

The Madras High Court held that on account of the fact that the Rule itself encapsulates the principle that if, declarations are filed, they should be accepted unless the request made is delayed beyond reasonable time and without sufficient cause. Acceptance of genuine declarations should be the norm and not an exception, so that, the dealers are not put to unnecessary trouble and deprived of their legitimate benefits. As a matter of fact, the Assessing Officer, should concentrate more on whether or not, the declarations filed are original and genuine, rather than, adopt a pedantic approach, vis-à-vis, the time frame, within which, declarations are to be filed. Such an approach will stem the flow of cases to this Court. The impugned assessment order and the notices for each of the assessment years came to be set aside and the writ petition filed by the assessee came to be allowed accordingly.

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Association News

CA. Dilip U. Jodhani
Hon. Secretary

CA. Riken J. Patel
Hon. Secretary

Glimpses of the Past Events

Joint Programme with Service Tax Department

T10 Cricket Tournament

Talk on Bitcoin

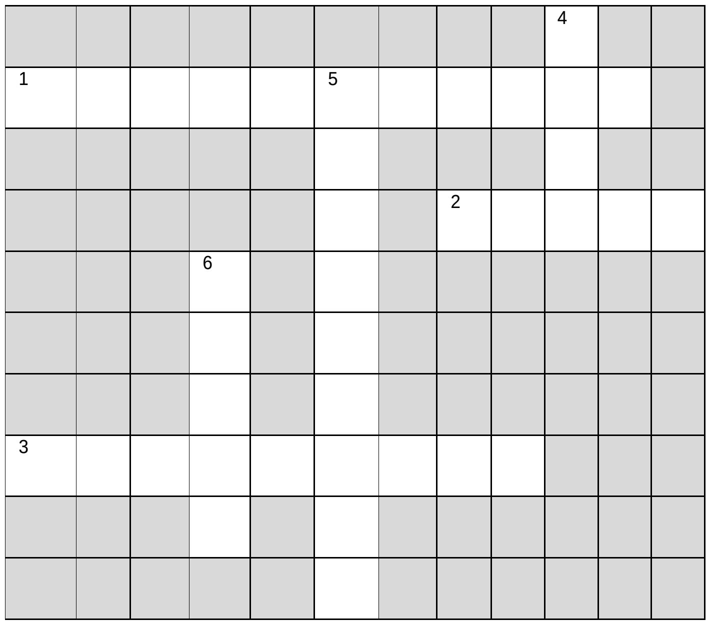
ACAJ Crossword Contest # 35

Across

1. Notice issued u/s 148 without __________ of mind or proper satisfaction of escapement of income is not valid.
2. The ________ Property Bill 2016 guards against the claims of succession or transfer of the properties left by people who migrated to Pakistan and China after wars.
3. To claim additional depreciation, the assets need to be acquired and ________ as per the wordings of section 32(i)(iia).

Down

4. ________ is like oxygen passing through a ventilator giving enormous strength to survive.
5. In case of R.B. Jessaram Fatehchand, it was held that if records of addresses are not kept in respect of __________, then books of account cannot be rejected on this account.
6. In the case of Zydus Infrastructure Pvt. Ltd., it was held that expenditure incurred on software license valid for long term is eligible at _________ percent of depreciation.



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 30/04/2017.
5. The decision of Journal Committee shall be final and binding.

Winners of ACAJ Crossword Contest # 34

1. CA. Arvind Gaudana
2. CA. Priyank Dave

ACAJ Crossword Contest # 34- Solution

Across

1. Hyatt Regency
2. Ketto
3. Refund

Down

4. Statute
5. Gratitude
6. Notional

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