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91st Year

ज्ञानं परमं बलम्

A Monthly Journal of
The Chamber of Tax Consultants

THE CHAMBER'S JOURNAL

Vol. VI | No. 5 February 2018

YOUR MONTHLY COMPANION ON TAX & ALLIED SUBJECTS

Finance Bill 2018

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Indirect Taxes Committee

6th Residential Refresher Course on GST was held from 25th to 28th January, 2018 at The Ananta, Udaipur

Mr. Ajay R. Singh, Advocate (President) inaugurating the Course by lighting the lamp. Seen in the photo from L to R: Mr. Shailesh Sheth, Advocate, CA Hinesh Doshi (Vice-President), CA Bharat Oza (Convenor) and CA Ashit Shah (Course Coordinator)

Talk with luminaries Mr. Shailesh Sheth, Advocate, Mr. K. Vaitheeswaran, Advocate, Mr. Ajay R. Singh, Advocate (President) and CA Naresh Sheth (Chairman).

CA A. R. Krishnan (Speaker) addressing the delegates. Seen from L to R: CA Naresh Sheth (Chairman), Mr. Ajay R. Singh, Advocate (President), Mr. V. Raghuraman, Advocate (Speaker), CA Sunil Gabhawalla (Speaker) and CA Hemang Shah (Convenor)

Faculties

Mr. V. Raghuraman, Advocate

CA Sunil Gabhawalla

Mr. Rohan Shah Advocate

Mr. Ajay R. Singh, Advocate (President) giving opening remarks. Seen from L to R: CA Bharat Oza (Convenor), CA Ashit Shah (Course Co-ordinator), CA A. R. Krishnan (Advisor) and CA Naresh Sheth (Chairman)

CA Naresh Sheth (Chairman) welcoming the faculties and delegates. Seen from L to R: CA Bharat Oza (Convenor), CA Ashit Shah (Course Co-ordinator), CA A. R. Krishnan (Advisor) and Mr. Ajay R. Singh, Advocate (President)

Republic Day Celebration

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THE CHAMBER OF TAX CONSULTANTS
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The Chamber's Journal

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Editorial

The annual budget presented on the floor of the Parliament is an important event on the economic and financial calendar of the nation as well as the citizens. This gives an opportunity to the Government to underline its policy and provide emphasis to the same. However, over a period of time, the executive has tried to down play the importance of the same as the sole and only event of economic importance. Rightly so, a welfare Government cannot wait for the next budgetary session to bring out any urgent changes in the tax or fiscal laws. The media hype regarding Budget 2018 being the full budget of the present dispensation at the Centre before the next general elections has raised expectations of the citizens from the Government. The media is not disappointed. However, the citizens of the middle class are not too happy. Anyway, the details of the Finance Bill have been analysed by eminent professionals in the Special Story on Finance Bill, 2018. I refrain myself from commenting on the same. However, I cannot restrain myself from commenting that the amendment carried out especially with respect to the Income Computation and Disclosure Standards raises an important issue, whether the conduct of the executive of not to challenge the decision of the Hon'ble Delhi High Court in the case of *Chamber of Tax Consultants vs. Union of India 400 ITR 178* before the Apex Court but to dilute the impact of the decision through legislation falls for judicial review or not. This had been a consistent approach of the executive to overcome the unfavourable decisions of the courts through amendments to the Act. We strongly object to this approach.

The Hon'ble Finance Minister has rolled out many schemes to strengthen the social infrastructure. The Government's commitment to provide a strong social security network is a necessity if we aspire to be a super power in future. These steps should have been initiated along with the steps taken by the Government to liberalise the economy. However, it is never too late. We have seen the Hon'ble Finance Minister Justifying his budget on various channels. As professionals we agree with him on some points and may not agree with him on some points. Sufi wisdom says.

"First judge the one who judges within you –
the discriminating power
that calls this worthy and that worthless
within and among you.
If your inner judge acquits you
Who can lock you up?"

I thank all the contributors for taking out their valuable time for the Chamber's Journal.

K. GOPAL
Editor

From the President

Dear Members

Finance Minister Arun Jaitley presented Union Budget 2018 in Parliament on 1st February 2018, the BJP Government's last full Budget before the 2019 Lok Sabha elections. Jaitley's budget allocated billions of dollars for rural infrastructure and unveiled a health insurance programme for around 500 million poor. The main focus of the Budget has been on farmer empowerment, health care schemes, infrastructure and ease of living for the common man. The FM has granted various tax benefits to senior citizens. This is a welcome step. The Budget 2018 has been a mixed bag for individuals, but positive for senior citizens as it will provide much-needed funds for their retired life.

The numbers presented in the budget in terms of growth in direct taxes and increase in the taxpayer base means that the Government's mission to crack down on the parallel economy, an aim which was put in the BJP Manifesto in 2014 ("By minimising the scope for corruption, we will ensure minimisation of the generation of black money") is leading to the right results.

Finance Bill has decided to introduce a 10% tax on long term capital gains on equities and equity oriented mutual funds exceeding ₹ 1 lakh. Although this measure looks like a shocker in the short-term, it simply brings equity investments at par with other investment options available in the country from a taxability perspective.

The Budget 2018 defied expectations that it will be a popular one on account of the elections next year. The crash in the mother market – the Dow Jones plunging by 2,200 points in 2 days – has unnerved equity markets globally. The sell-off in the US has led to a global sell off. Indian market was in tune with global markets in this down turn. Spike in interest rates in US and inflation concerns led to an initial sell-off. But this is the right time to churn the portfolio in favour of quality stocks. Time to go shopping!

The Government has proposed to amend the Income-tax Act to reduce interface between the I-T department and taxpayers by widening the scope of e-assessment for greater efficiency and transparency. According to me the Government should have a proper mechanism and infrastructure to handle e-assessment otherwise it will lead to more litigation.

This year Chamber had organised its first Debate Competition jointly with H R College of Commerce on 22nd January, 2018 about 14 colleges participated in the competition.

The Indirect Tax RRC at Udaipur was a successful event and appreciated by all participants. The Chamber team will be at its 41st RRC on direct tax at Amritsar between 22nd February, 2018 and 25th February, 2018. Chairperson of RRC & SD Committee, Ms Charu Ved and her team is ready with full enthusiasm for welcoming all participants at Amritsar. This year too we have got overwhelming response of participants. Amritsar is a Holy city, the spiritual and cultural centre for all. The city is known for its rich cuisines, culture and Wagah Border being only 28 km away. Surely participant will have unique experience by itself.

Friends RRC is not merely about learning but it's an event where an individual takes a break from his daily routine practice and spends quality time with friends and colleagues. It is more about rejuvenating oneself and enriching knowledge from together irrespective of their seniority and designation to share their knowledge and wisdom with friends and colleagues. Fresh entrance to profession should be encouraged to attend RRC as they get a chance to interact with senior members and gain knowledge and develop their skills and personality. My best wishes to all the participants this RRC will be a worthwhile experience and broaden perspective.

Chamber is coming up with its National Moot Court in month of April for Law students jointly with Sir Jamshedji Kanga Moot in association with Government Law College and Rotary Club of Bombay.

Shri Dinesh Vyas Sr. Advocate passed away on 23rd January, 2018. He was a great person, always helpful and always the first one to stand up to situations. When the Chamber of tax Consultants honoured the highest taxpayers of Mumbai in the year 1996, he was one of the tax professionals who was conferred with such an honour. His vision about the tax laws and tax administration was published in the Journal of the Chamber (1996) August-P. 187. Shri Vyas has successfully appeared in numerous landmark decisions but, one outstanding appearance which will never be forgotten by the fraternity of ITAT is his appearance in the celebrated judgment of Hon'ble Supreme Court in the case of ITAT Through President vs. V.K. Agarwal – [1999] 235 ITR 175, where the independence and glory of ITAT has been affirmed. Shri Vyas will live forever and his memories will last long.

Our Core Group member Shri Satish Boob from Nashik passed away on 30th January, 2018. He was an active member of CTC and a cheerful personality. May the departed soul rest in peace.

The Special Story for the month is on "Finance Bill, 2018". I thank all the authors for sparing their valuable time and for their contribution to the Chamber's Journal for this month.

I end with a quote:

'There is nothing called "Problem"
it's just absence of an idea to find solution'.

Jai Hind.

AJAY R. SINGH
President

Chairman's Communication

Dear Readers,

One of the most awaited event from the Government is presentation of the Union Budget which was presented by the Union Finance Minister Shri Arun Jaitley on 1st February 2018. There have been mixed reactions on the Budget. Many consider it to be populist as it is considered pro poor and pro farmers. The Budget spending will focus on four main areas employment, education, agriculture and health. The FM has launched what could become world's largest hospital treatment scheme serving more than 10 crore families. Due to higher spending, overall there has been revision in fiscal deficit by the FM from 3.2% and 3% to 3.5% and 3.3% for the year, 2018 and 2019. The FM claims it to be a budget which would propel inclusive growth. Let us see how successful the Government is, in implementing various schemes proposed in the Budget and to what extent it actually helps the people for whom these schemes are intended!

Amendment of taxing long term capital gains on shares @ 10% has generated maximum debate. When the LTCG on shares was withdrawn, STT was introduced and therefore reintroduction of tax on LTCG along with STT has not gone well with the investors which resulted in sharp fall in the stock market. Investors have gained manifold in the last few years due to continuous upsurge of the stock market and therefore reintroduction of tax on LTCG should not really affect the investors. None-the-less representations would be made by various organisations on this amendment of course besides representations on other amendments too. In this year's Finance Bill, there have not been many amendments unlike other Finance Bills. We have invited experts to write on various amendments proposed in the Finance Bill, 2018.

In the recent Monetary Policy of the RBI, as expected the interest rates have not been changed. Due to the volatility in the global financial markets, the ability to fuel growth in the near future would be limited. However at the same time. there are signs of demand accelerating with pickup in loan disbursal. Let us hope that there is actual growth in economy which is being discussed and talked about in this Union Budget as well as in past so many monetary policies.

This issue is on Finance Bill, 2018 which has been designed jointly with the Research and Publication Committee. I would like to thank everyone involved in designing this issue and also CA Namrata Dedhia for her contribution in designing and overall co-ordinations of this issue. My gratitude to all the learned authors for sparing their valuable time despite their busy schedule and analysing various amendments proposed in the Finance Bill, 2018.

VIPUL K. CHOKSI
Chairman – Journal Committee

CA Sanjeev Pandit

The Budget 2018 and the Finance Bill, 2018 – An Overview

The Finance Minister, Mr. Arun Jaitley, presented the Budget for the financial year 2018-19 and introduced the Finance Bill, 2018 in the Parliament on 1st February, 2018. This was the first Budget after the rollout of Goods and Services Tax (GST) in July 2017 and completion of the controversial demonetisation exercise. Moody's Investor Service upgraded India's Government bond rating to Baa2 from Baa3 and changed the outlook from stable to positive. This upgrade has happened after a gap of over 13 years. The GDP growth for the current financial year is expected to be 6.5% and the Economic Survey predicts the GDP growth in the ensuing financial year to be 7% to 7.5%. The Government missed the fiscal deficit target of 3% of the GDP. It is expected to be 3.5% in the current financial year and for the financial year 2018-19 it is projected at 3.3% of the GDP. The elections to the Lok Sabha are due in early 2019. Therefore, possibly this is the last full Budget that this Government has presented. It is on this background that one needs to look at the Budget 2018 and the Finance Bill presented along with it.

The hallmark of this Budget has been the increased spending on development of rural infrastructure, agriculture and healthcare.

On the agricultural front, the Government has announced that Minimum Support Price (MSP) for the majority of rabi crops will be at least at 1.5 times the cost. Initiatives are proposed for the development of Gramin Agricultural Markets which will be electronically linked to e-NAM (National Agricultural Market, a pan-India electronic portal). The Government proposes to promote cluster-based development of agricultural commodities and regions and incentivise Farmer Producer Companies through tax holiday. The Budget has allocated ₹ 5,750 crore to National Rural Livelihood Mission. The total amount to be spent by various Ministries for creation of livelihood and infrastructure in rural areas is ₹ 14.30 lakh crore. The Finance Minister expects that this expenditure will create employment of 321 crore person days, 3.17 lakh kilometres of rural roads, 51 lakh new rural houses, 1.88 crore toilets and provide 1.75 crore new household electric connections.

So far as the healthcare sector is concerned, the Finance Minister has announced an ambitious and flagship programme to be called National Health Protection Scheme. It is proposed to cover 10 crore poor and vulnerable families providing coverage up to ₹ 5 lakh per family for secondary and tertiary care hospitalisation. This is a quantum jump from the annual coverage of ₹ 30,000 to poor families provided under Rashtriya Swasthya Bima Yojana. The proposed Scheme is expected to be the world's largest Government funded health care programme. The Finance Minister has promised to provide adequate funds for the smooth implementation of the programme. Various estimates have been made about the funds required to implement this ambitious Scheme. The CEO of Niti Aayog estimates that the total cost of the proposed scheme will be around ₹ 10,000 crore to ₹ 12,000 crore. Others have estimated the fund requirement at a much larger amount.

The Finance Minister, in his Budget speech, made a mention of various e-governance initiatives in the Central Ministries and Departments. It is also proposed to review the existing guidelines dealing with Outward Direct Investment (ODI) and bring out a coherent and integrated ODI policy. It is also proposed to formulate a comprehensive Gold Policy to develop gold as an asset class and a policy relating to hybrid instruments.

It is also proposed to make necessary changes to the Salaries, Allowances and Pension of Members of Parliament Act, 1954 to provide for automatic revision of emoluments of the Members of Parliament every five years and such revision will be indexed to inflation. One wonders why various deductions such as u/ss. 80C, 80D, 80DD and various exempt allowances etc. under the Income-tax Act, 1961 (Act) are also not linked to the inflation index.

Every Government, while presenting the budget, announces a large number of schemes, policy measures and initiatives. The budget creates a lot of excitement for a few days. However, citizens, including professionals, rarely spend time in reviewing what was announced in the earlier years and what has been achieved. It is also true that even if various schemes are implemented efficiently, their effect on the economy begins with only some time lag. Take for example, construction of roads; while the construction itself may create employment and consequential demand boosting the economy in the short-term, the more lasting beneficial effects of infrastructure development may begin only after 2 to 3 years after the construction of the road. This is true with most initiatives concerning the infrastructure. So far as measures pertaining to health and education are concerned, their positive as well as negative impact becomes visible with an even longer time lag. So often Governments choose to spend on schemes that offer low hanging fruits. While this is generally true, this Government has undertaken several measures with long term goals in mind while taking political risk. This Budget being the last one before the elections, the Government has strived to boost infrastructure and healthcare, and at the same time taken care to announce schemes that will impact the rural population immediately.

We tax professionals are more interested in the proposals relating to direct taxes in the Finance Bill. Let us take an overview of these.

The proposals in the Finance Bill, 2018, barring a few, are largely non-controversial. The Government has generally kept its promise of not making amendments with retrospective effect. The few retrospective amendments proposed in the Finance Bill are generally in the nature of clarification or to remove the unintended hardship to assessees.

The rate of income tax has generally remained the same. The tax rate for small and medium-sized domestic companies having annual turnover or gross receipts not exceeding ₹ 250 crore in the financial year 2016–17 has been reduced to 25%. Having brought down the tax rate for small and medium-sized domestic companies, section 115BA providing for tax rate of 25% subject to many onerous conditions has, in fact, lost its relevance. The Finance Minister could have simultaneously extended the lower tax rates to LLPs and partnership firms as well. These entities form a significant part of small and medium sector.

The Government had promised that the corporate tax rate will be brought down for all companies. This promise has not been kept. The trend the world over is reduction in tax rates. As a part of tax reforms corporate tax rate in USA has been brought down to 21% from the peak rate of 35%. Our own experience is that when tax rates are brought down, tax revenue goes up. Yet, the Finance Minister felt appropriate to continue with the present tax rates for the large corporates, LLPs and firms.

A new cess `Health and Education Cess' at the rate of 4% is being introduced in the place of existing Education Cess of 2% and Secondary and Higher Education Cess of 1%.

Out of all the provisions in the Finance Bill, the provisions introducing tax on long-term capital gains on transfer of shares in listed companies have attracted the maximum attention and also rocked the share market. Frankly, levy of tax on long-term capital gains on transfer of listed shares (LTCG) in itself is not irrational. However, while levying the new tax, the Security Transaction Tax (STT) has not been withdrawn. It may be recollected that the STT was levied when Section 10(38) was brought on the statute book exempting the LTCG. So it is only fair that when tax on the LTCG is reintroduced, STT ought to have been withdrawn.

Apart from this, one wonders whether the provisions relating to tax on the LTCG could have been drafted with more care and thought. The new section 112A does not override the provisions of section 48 of the Act. The proposed section 112A is for computing the tax payable by an assessee on his total income if the total income includes any income chargeable under the head "Capital gains". Thus, the provision as it is drafted lacks clarity and is open to different interpretations than what is intended. It also leads to several questions, e.g. if the computation u/s 48 on transfer of listed shares results in a loss, whether the provisions of the proposed section 112A will be attracted, or these provisions are attracted only when the computation u/s. 48 results in positive capital gains and only in such a case the tax will be computed in accordance with the provisions of the proposed section 112A. Another point that may be noted is that 112A(6) defines `cost of acquisition' only in respect of the long-term capital asset acquired by the assessee before the 1st February, 2018. There is no definition of cost of acquisition for assets acquired after that date. If it is accepted that section 112A provides a self-contained code for computation of the LTCG, then in such a case can one resort to the definition of 'cost of acquisition' contained in section 55(2) which is otherwise for the purposes of sections 48 and 49 and not for section 112A. The definition of cost of acquisition in section 55 provides for cost in case of bonus shares, rights shares, shares received on consolidation or sub-division of shares, conversion of one kind of shares into another kind etc. Lack of definition of `cost of acquisition' may lead to reviving old controversies with respect to cost of rights shares, bonus shares, etc. Allowability of brokerage, stamp duty, STT will also be debatable since the computation provision is not under section 48.

It is also proposed to amend section 115AD dealing with taxation of Foreign Institutional Investors (now known as Foreign Portfolio Investors) by adding a proviso to the effect that tax at the rate of 10% shall be levied on transfer of long-term assets referred in section 112A. However, neither the detailed provisions contained in section 112A have been incorporated in section 115AD nor have they been made applicable for the purposes of section 115AD. The Central Board of Direct Taxes (CBDT) clarified that in case of FIIs the gains up to 31st January will not bear tax.

The CBDT has already issued FAQs. These FAQs do not have the force of law. The appropriate thing would be to make necessary changes in the Finance Bill to incorporate the new provisions so far as they deal with the computation of the LTCG in sections dealing with the computation of income under the head Capital Gains. Section 112A and the amendments to section 115AD should deal with the rate of tax on such LTCG. This will bring clarity and avoid potential litigation.

Simultaneously with introduction of section 112A, section 115R is proposed to be amended for levying tax at the rate of 10% on income distributed by an equity oriented mutual fund. This amendment is proposed with a view to bring on parity the growth schemes of equity oriented mutual funds and corresponding dividend schemes of equity oriented mutual funds.

An interesting issue that may be considered is the impact on disallowance u/s. 14A due to the introduction of section 112A. Assessees who have invested in shares, presently face disallowance u/s. 14A. In case where such investors receive dividend in excess of ₹ 10 lakh which is taxable u/s. 115BBDA, can the disallowance u/s. 14A be made since the dividend as well as the capital gains from the shares would be chargeable to tax. Similar would be the impact in case of investment in equity oriented mutual funds.

Another significant amendment proposed in the Finance Bill is relating to the scope of 'business connection' in section 9 of the Act. The changes are twofold. First, the scope of business connection is being expanded to cover an agent who plays a principal role leading the conclusion of contracts. Presently, only if the agent has the authority to conclude the contracts, there would be a business connection. Further, under the present provisions there is an exception i.e. if the activities of the agent are limited to purchase of goods or merchandise for the non-resident, the agency does not result in a business connection. However, while expanding the scope of business connection by replacing clause (a) of the Explanation 2 to section 9(1)(i), this exception has been omitted. Consequently, an agent of a non-resident sourcing goods and merchandise for the non-resident may amount to business connection in India. The proposed amendment is based on the recommendations contained in Base Erosion and Profit Shifting (BEPS) Action Plan 7.

The other amendment expanding the scope of 'business connection' is introduction of the concept of 'Significant Economic Presence' through a new Explanation 2A to section 9(1)(i). Presently, to establish business connection, a physical presence in India or an agent in India is necessary. However, under new technology driven business models an entity may not have any physical presence or agent in the country and yet may generate revenue by use of modern technology and automated tools. This amendment has its roots in BEPS Action Plan 1 recommendation. It would cover (i) transactions in respect of any goods, services or property carried out by a non-resident in India including provision of download of data or software in India and (ii) systematic and continuous soliciting of business activities or engaging in the interaction with users in India through digital means. In the first case, it is proposed that a monetary floor limit for the aggregate of payments will be prescribed for attracting taxability. In the second case, floor limit for number of users with whom there is interaction will be prescribed for attracting the taxability. Income attributable to the transaction or activities indicated above shall be deemed to accrue or arise in India.

This provision may not have a significant impact immediately where India has entered into treaty for avoidance of double taxation.

However, these amendments will form the basis for renegotiating treaties with various countries for enabling India to tax entities having 'significant economic presence' in India on account of activities indicated above. Once the treaties are renegotiated or are amended through the Multilateral Convention to Implement Tax Treaty Related Measures (MLI), the amended provisions will have a significant impact. The major challenge then will be attribution of profits to transactions or activities. Unless reasonable guidelines are laid down for attribution of profit taxable due to the amended scope of business connection and these are implemented fairly, the amendments may give rise to substantial litigation as was witnessed when transfer pricing provisions were introduced.

A set of amendments have been proposed for validating the provisions of Income Computation and Disclosure Standards (ICDS) notified u/s. 145. The Delhi High Court in the writ petition filed by the Chamber *(Chamber of Tax Consultants vs. Union of India to 52 Taxman 77)* had struck down some of the ICDS and had also struck down some of the provisions of other ICDS. Consistent view of the assessees and professionals has been that various ICDS have only advanced taxability of various receipts or postponed allowability of expenses. Further, by deviating from accepted accounting practices there is increased divergence between the book profits and the taxable profits. It appears that the Government and the CBDT are keen that the ICDS are implemented. With a view to reversing the impact of the decision of the Delhi High Court and validate the provisions of the ICDS, amendments have been proposed to sections 36(1)(xvii) and 40A(3) dealing with marked to market loss, section 145 dealing with valuation of inventory and section 145A dealing with extension of inclusive method for valuation of services; section 43AA dealing with taxation of foreign exchange fluctuation, section 43CB dealing with income from construction contracts and service contracts and section 145B dealing with taxation of subsidies or grants, claim for escalation of price in a contract and export incentives are proposed to be introduced. The way these amendments are worded, a question may arise whether these are applicable even to those assessees to whom the ICDS otherwise do not apply. These amendments are being proposed with retrospective effect from assessment year 2017–18. It is widely expected that more ICDS will be issued. In May 2017, the CBDT issued draft ICDS on Real Estate Transactions. Considering the amendments proposed in the Finance Bill for ICDS, should one expect amendments to the Act every time a new ICDS is notified? One really wonders if this is necessary. Will it not be better to withdraw ICDS completely and make changes in the law wherever felt necessary?

The Finance Bill proposes two amendments dealing with companies in whose case application for insolvency resolution process has been admitted under the Insolvency and Bankruptcy Code, 2016 (IBC). So far as the application of Minimum Alternate Tax (MAT) u/s. 115JB is concerned, such companies will be able to reduce the book profits by the aggregate amount of the unabsorbed depreciation and the brought forward loss. This is certainly welcome. Logically, all companies should be able to reduce both, the unabsorbed depreciation and the brought forward loss.

Under the provisions of section 79, a closely held company can carry forward and set off loss only if the beneficial owners of the shares carrying not less than 50% of the voting power on the last day of the previous year in which the loss was incurred remain the same on the last day of the previous year. It is now proposed to introduce a proviso in section 79 providing that where the change in shareholding takes place pursuant to the resolution plan approved under the IBC, the above condition in section 79 shall not apply and the company shall be entitled to carry forward and set off the losses. The amendment to section 79 is with retrospective effect from assessment year 2017–18. These provisions are welcome and will help in finalising resolution plans.

There has been litigation in respect of taxation of `Deemed Dividend' u/s. 2(22)(e) Section 115-O is proposed to be amended by bringing dividend u/s. 2(22)(e) within the scope of Dividend Distribution Tax. Such dividend would be chargeable to tax at the rate of 30% in the hands of the company. Companies may face practical difficulties in implementing the amended provision. Further, a shareholder holding majority shares may misuse this provision by enjoying the funds of the company, while tax will be paid by the company to the detriment of the minority shareholders.

The Finance Minister spent considerable time while delivering his speech on the proposed standard deduction for the salaried class. The Finance Bill provides for standard deduction of ₹ 40,000 for persons earning salary. However, simultaneously, the exemption in respect of medical expenditure incurred up to ₹ 15,000 and exemption in respect of transport allowance up to ₹ 1,600 shall be withdrawn. As a result, the net gain for an average salary earner will not be substantial. However, it will reduce the compliance burden of the employers as they will not have to obtain evidence for medical expenditure, etc. for allowing the exemption while computing the TDS.

The Finance Bill has proposed some benefits to senior citizens in form of an enhanced limit of ₹ 50,000 for expenditure on health insurance premium or preventive health check-up or medical expenditure u/s. 80D and ₹ 1 lakh for deduction of medical expenditure in respect of certain critical illnesses u/s. 80DD. Under the new section 80TTB, senior citizens will get a deduction of ₹ 50,000 in respect of any interest on any deposit with a banking company, a co-operative society or post office. Consequential amendments have been proposed in section 194A for deduction of tax at source only when the amount of interest exceeds ₹ 50,000. While these measures are welcome, TDS provisions could have been further liberalised providing TDS only when interest from any source exceeded ₹ 50,000.

Presently, there is a provision in section 45(2) for taxation a capital asset is converted into stock-in-trade. However, there is no provision for taxing the conversion or treatment of inventory into a capital asset. A new sub-clause (xiia) is being inserted in the definition of 'income' in section 2(24) and sub-clause (via) is being inserted in section 28 to provide for taxation on such conversion. The fair market value (FMV) of the inventory as on the date of the conversion will be taxed as business income immediately on conversion. On subsequent transfer of the capital asset, tax will be charged under the head capital gains taking FMV as the cost. While this provision is otherwise acceptable, there could be situations where it would lead to unfair taxation if it is unreasonably interpreted. Take an example of a grain merchant withdrawing certain inventory for his own consumption. If such a withdrawal of inventory is treated as conversion of inventory into a capital asset, tax will be charged under the new provision although, the inventory withdrawn will never be sold. Possibly, one may argue that such withdrawal does not amount to conversion or treatment of inventory into capital asset.

Last year section 80-IAC was introduced providing for 100% deduction of profits of an eligible start-up. It is now proposed to amend the definition of 'eligible business'. The new definition enlarges the scope by including start-ups engaged in innovation, development or improvement of the products or processes or services or a scalable business model with a high potential of employment generation or wealth creation. The previous condition of the business being driven by technology or intellectual property is being deleted. Further, it is proposed that a company or an LLP Incorporated on or after 1st April, 2016 but before 1st April, 2021 will be eligible. The restriction on the turnover of not exceeding ₹ 25 crore is also being liberalised.

Section 80-JJA provides for deduction of 30% of emoluments paid to eligible new employee provided that the employee has been employed for a minimum period of 240 days. Amendment is proposed to provide that where an employee is employed in a previous year for less than 240 days but in the immediately succeeding previous year is employed for at least 240 days, he shall be deemed to have been employed in such succeeding year and the assessee will be entitled to the deduction under this section accordingly. The condition of employment for 240 days was relaxed to 150 days in case of apparel industry. This relaxation is being extended to footwear and leather industry as well. On one hand the Government wants to phase out deductions, while on other hand, new deductions are introduced each year though they may not achieve their stated purpose, but only complicate the law.

Section 40(a)(ia) provides for disallowance where TDS provisions are not complied with. Section 40A(3) provides for disallowance of any expenditure exceeding ₹ 10,000 made otherwise than by account payee cheque or account payee bank draft. These provisions are being made applicable to certain institutions specified in 10(23C) as well as to charitable trusts claiming exemption u/s. 11. Accordingly, while computing the application of income towards the objects, provisions of sections 40(a)(ia), 40A(3) and 40A(3A) will apply. While the objective of the amendment is laudable, it is difficult for charitable institutions doing work at grassroot level, in rural areas, dealing with persons from the lowest economic strata to abide by such provisions. Government needs to treat charitable institutions with more understanding. Over the years, law relating to charitable institutions has become extremely complex and one gets a feeling that the Government looks at these institutions with suspicion rather than appreciating the work done by various NGOs.

Last but not the least, section 143 is being amended for enabling formulation of a scheme for making assessments without personal interface and with dynamic jurisdiction. Generally, avoiding personal interface reduces chance for corruption. Assessment is a quasi-judicial proceeding. Principles of natural justice need to be complied with. At times, one must be able to demand a personal hearing. The scheme under the new provision should be formulated keeping in mind the experience of processing of returns by CPC. There are many issues that assessees face in getting proper credit for taxes paid or deducted at source but are unable get these resolved in absence any individual who can be approached for resolution.

Apart from various changes discussed above, the Finance Bill proposes a few other changes relating to direct taxes and indirect taxes. All the changes are discussed and analysed in detail in this issue of the Chamber's Journal.

As the economy matures, the tax laws should become more stable. Let us hope we are heading towards that.

CA Kinjal Bhuta

Rate of Taxes and MAT

Rates of income tax in respect of income liable to tax for the AY. 2018-19

In respect of all categories of assessees liable to be taxed for the AY. 2018-19, the rates of taxes shall remain the same as specified in the Part I of the First Schedule of the Finance Bill, 2018. They are the same as specified in the Part III of the First Schedule to the Finance Act, 2017.

Rates of Income Taxes in respect of income liable to tax for the AY: 2019-20

The below mentioned rates of taxes shall be used for deduction of income tax at source from salaries, for computation of advance tax payable during the year in case of all categories of assessees and charging of tax in certain special cases of accelerated assessments. These rates are specified in Part III of the Finance Bill, 2018.

The basic tax rates have not changed for Individuals, HUFs, AOP, BOI, Firms and co-operative societies. The only change made is in respect of tax rates for domestic companies who are having turnover up to ₹ 250 crore. Also education cess rate has been increased in respect of all assessees.

Following are the tax rates for all assessees.

i. In case of individuals, other than at (ii) and (iii) mentioned below, HUF, AOP/BOI:

Net Income Range	Rate of tax
Up to ₹ 2,50,000	Nil
₹ 2,50,001 to ₹ 5,00,000	5 per cent
₹ 5,00,001 to ₹ 10,00,000	20 per cent
Above ₹ 10,00,000	30 per cent

ii. In case of resident individuals who is of the age 60 years or more but less than age of 80 years at any time during the year.

Net Income Range	Rate of tax
Up to ₹ 3,00,000	Nil
₹ 3,00,001 to ₹ 5,00,000	5 per cent
₹ 5,00,001 to ₹ 10,00,000	20 per cent
Above ₹ 10,00,000	30 per cent

iii. In case of resident individuals who is of the age 80 years or more at any time during the year.

Net Income Range	Rate of tax
Up to ₹ 5,00,000	Nil
₹ 5,00,001 to ₹ 10,00,000	20 per cent
Above ₹ 10,00,000	30 per cent

iv. In case of co-operative society:

Net Income Range	Rate of tax
Up to ₹ 10,000	10 per cent
₹ 10,000 to ₹ 20,000	20 per cent
Above ₹ 20,001	30 per cent

v. In case of firm and local authority 30 per cent

vi. Tax rate in case of corporates are as under:

In the Union Budget of last year i.e. in Finance Bill, 2017, the Finance Minister had reduced the corporate tax rate to 25% for domestic companies whose turnover was less than ₹ 50 crore, also it was promised that the further reduction shall happen in a phased manner. In pursuance to that, the benefit of reduced rate is now extended to companies having turnover **up to ₹ 250 crore** in the financial year 2016-17. This is one of the positive moves for the entire class of micro, small and medium enterprises and is estimated to benefit almost 99% of companies filing their tax returns.

Particulars	Rate of tax
Domestic Company	
i. In case of companies having total turnover or gross receipts of the previous year 2016-17 does not exceed ₹ **250 crore**	25 per cent
ii In case of companies other than (i) above	30 per cent
Foreign Company	
i. In case of income of royalties received in pursuance of an Agreement entered after 31-3-1961 but before 1-4-1976	50 per cent
ii. In case of income of fees for technical services received in pursuance of an agreement entered after 29-2-1964 but before 1-4-1976	50 per cent
iii. All other balance incomes	40 per cent

vii. Surcharge

Surcharge rates have not been changed in the Finance Bill, 2018 and it continues to remain the same as applicable for AY. 2018-19 provided as under:

Type of Assessee	Rate of tax
Individual	
Income exceeding ₹ 50 lakh but not exceeding ₹ 1 crore	10 per cent
Income exceeding ₹ 1 crore	15 per cent
Firms and Co-operative Societies	
Income exceeding ₹ 1 crore	12 per cent
Domestic Company:	
Income exceeding ₹ 1 crore but not exceeding ₹ 10 crore	7 per cent
Income exceeding ₹ 10 crore	12 per cent
Foreign Company:	
Income exceeding ₹ 1 crore but not exceeding ₹ 10 crore	2 per cent
Income exceeding ₹ 10 crore	5 per cent

Marginal relief shall continue to be given for the said surcharge.

viii. **Education Cess and Higher Education Cess**

Education cess and higher education cess shall be discontinued. However, a new cess called as 'Health and Education Cess' shall be levied at the rate of **four per cent** of income tax including surcharge wherever applicable for all assessees. No marginal relief shall be available in respect of such cess. The additional cess of 1 per cent is levied to cater the health and education needs of below poverty line and rural families. This increased cess shall hurt the high income tax payers the most.

Relief from liability of Minimum Alternate Tax (MAT)

MAT regime has been rationalised for companies undergoing insolvency proceedings.

1. Section 115JB of the Act, provides for levy of a minimum alternate tax (MAT) on the "book profits" of a company. In computing the book profit, it provides for a deduction in respect of the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account. Consequently, where the loss brought forward or unabsorbed depreciation is Nil, no deduction is allowed. This non-deduction was a barrier to rehabilitating companies seeking insolvency resolution. It is hence now proposed to amend section 115JB to provide that the aggregate amount of unabsorbed depreciation and loss brought forward (excluding unabsorbed depreciation) shall be allowed to be reduced from the book profit, if a company's application for corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 has been admitted by the Adjudicating Authority.

   This amendment will take effect from 1st April, 2018 and will, accordingly, apply in relation to the assessment year 2018-19 and subsequent assessment years.

Reduction of AMT for International Financial Services Centre (IFSC)

The rate of MAT u/s. 115JB in case of company being a unit located in an IFSC was reduced to 9 per cent by the Finance Bill, 2016 and now a similar benefit is extended to assessees other than companies. Section 115JC of the Act provides for alternate minimum tax at the rate of 18.50 per cent of adjusted total income in the case of a non-corporate person. In order to promote the development of world class financial infrastructure in India, it is further proposed to amend the section 115JC so as to provide that in case of a unit located in an International Financial Service Centre, the alternate minimum tax under section 115JC shall be charged at the rate of 9 per cent.

This amendment will take effect, from 1st April, 2019 and will, accordingly, apply in relation to the assessment year 2019-20.

> It is good and very grand to conquer external nature, but grander still to conquer our internal nature
>
> — *Swami Vivekananda*

CA Usha Kadam

Personal Taxation – Income from Salary Deductions & Exemptions

The Finance Bill, 2018 presented in Parliament on 1st February, 2018 has proposed several amendments to the Income-tax Act, 1961. In line with the previous budget this budget also has proposed several schemes aimed at alleviating the rural distress and providing education and health to the underprivileged and infrastructure facilities for the rural sector and measures to boost the growth and the employment generation but no major tax reliefs for the individuals except for senior citizens.

This article proposed to deal with some of the amendments that the Finance Bill has proposed to the taxation of individuals. There is little in the budget for middle class and the salaried individuals except some benefits meted out to senior citizens. The following amendments proposed in the Finance Bill would be effective from A.Y. 2019-20 unless specifically mentioned otherwise.

Standard deduction to salaried employees (Sections 16 & 17 of the Income-tax Act)

Clause 7 of the Finance Bill seeks to insert clause (ia) to section 16 so as to provide standard deduction to salaried employees. Income chargeable under the head "Salaries" was entitled to Standard deduction up to A.Y. 2005-06. Standard deduction has been reintroduced to the extent of ₹ 40,000 or the amount of salary whichever is lower.

Clause 8 of the Finance Bill seeks to amend section 17 of the Income-tax Act. Clause (v) of the proviso occurring after sub-clause (viii) of clause 2 section 17 provides that any sum paid by the employer in respect of any expenditure actually incurred by the employee on his medical treatment or treatment of his family member not exceeding ₹ 15,000 in the previous year shall not be treated as perquisite in the hands of the employee. It is proposed to omit the said clause (v).

The Finance Minister while granting the Standard deduction says "However, income tax data analysis suggests that major portion of personal income-tax collection comes from the salaried class. ------- In order to provide relief to salaried taxpayers, I propose to allow a Standard deduction of ₹ 40,000/ in lieu of the present exemption in respect of transport allowance and reimbursement of miscellaneous medical expenses. ---------- Apart from reducing paper work and compliance, this will help middle class employees even more in terms of reduction in their tax liability. "

Thus Standard deduction is allowed in lieu of deduction of transport allowance of ₹ 19,200 per annum and ₹ 15,000 per annum for the medical reimbursement. In view of increase in cess by 1% and withdrawal of deduction of transport allowance and medical allowance there is no effective benefit to most salaried employees. Standard deduction shall benefit the pensioners who do not enjoy any exemption on account of transport allowance and medical expenses. The exemption of transport allowance would continue to be available to differently-abled persons.

Compensation received in connection with the termination or modification of a contract (Sections 2(24) and 56 of the Income-tax Act)

Clause 3 of the Finance Bill seeks to insert clause (xviib) to section 2(24) and also clause 21B of the Finance Bill seeks to insert clause (xi) in section 56(2) of the Income-tax Act so as to provide that any compensation or other payment due to or received by any person in connection with the termination of employment or modification of the terms and conditions relating thereto shall be chargeable to income tax under the head "Income from other sources".

NPS withdrawal exemption extended to non-employees

Section 10(12A) provides that amount received by an employee from National Pension Scheme (NPS) either on closure or opting out from scheme referred to in section 80CCD is exempt up to 40% of the total amount payable to employees at the time of such closure or opting out of the scheme. This exemption is not available to non-employee subscriber. It is proposed to extend the said benefit to all the subscribers to National Pension System Trust.

Deduction under section 80D

Clause 24 of the Finance Bill seeks to amend section 80D of the Income-tax Act relating to deduction in respect of health insurance premium. Currently, any payment towards medical insurance or preventive health check up of a senior citizen or medical expenditure of a very senior citizen was entitled for deduction up to ₹ 30,000.

The limit of said deduction in respect of payment of premium for all senior citizens is increased to ₹ 50,000. Further, the deduction available for medical expenditure only for a very senior citizen is now available for all senior citizens up to the limit of ₹ 50,000 subject to a condition that such senior citizen does not have a mediclaim policy.

As per section 80D any payment in lump sum to effect or to keep in force insurance on the health of a person, for more than a year was allowed as deduction, in the year of payment. It is proposed that in case of a single premium health insurance policies having cover of more than one year, deduction shall be allowed on proportionate basis for all those years for which health insurance cover is provided, subject to the specified monetary limit.

Deduction under section 80DDB

Clause 25 of the Finance Bill seeks to amend section 80DDDB of the Income-tax Act relating to deduction in respect of medical treatment etc. As per section 80DDB deduction was available to an individual and HUF in respect of payment made for medical treatment of specified diseases of senior citizen up to ₹ 60,000 and very senior citizen up to ₹ 80,000. The said deduction is proposed to be enhance to ₹ 1 lakh without any distinction between senior and very senior citizen.

Deduction in respect of interest on deposits for senior citizens

Keeping in view the fixed and restricted sources of income for senior citizens, a new section 80TTB is proposed to be inserted *vide* clause 30 of the Finance Bill. This provision allows a deduction up to ₹ 50,000 in respect of interest income of senior citizen from deposits with banks or post office or co-operative banks.

Further, corresponding amendment has been proposed in section 194A to provide that no tax shall be deducted at source from payment of interest to a senior citizen up to ₹ 50,000 w.e.f. 1st April, 2018.

Clause 29 of the Finance Bill seeks to amend section 80TTA of the Income-tax Act. It is proposed that deduction under section 80TTA shall not be available to senior citizens in respect of interest on saving deposits.

Certain Deduction not to be allowed unless return furnished

Clause 23 of the Finance Bill seeks to amend section 80AC of the Income-tax Act. As per existing provisions of section 80AC of the Act, no deduction would be admissible under section 80-IA or section 80-IAB or section 80-IB or section 80-IC or section 80-ID or section 80-IE, unless the return of income by the assessee is furnished on or before the due date specified under section 139(1). This burden of filing of return on time is not casted on other assesses who are claiming deductions under other similar provisions.

Therefore, to bring uniformity in all income-based deductions, it is now proposed that the scope of section 80AC shall be extended to all similar deductions which are covered in heading "C.—Deductions in respect of certain incomes" in Chapter VIA (sections 80HH to 80RRB). The impact of such amendment shall be that no deduction covered u/s. 80HH to 80RRB would be allowed to a taxpayer under these provisions if income-tax return is not filed on or before the due date. The deduction u/s. 80C would be allowed to taxpayer even if the return is filed after the due date. This amendment will take effect from the 1st April, 2018 and will accordingly apply in relation to assessment year 2018-19 and subsequent assessment years.

Take up one idea. Make that one idea your life--think of it, dream of it, live on that idea. Let the brain, muscles, nerves, every part of your body, be full of that idea, and just leave every other idea alone. This is the way to success, and this is the way great spiritual giants are produced. Others are mere talking machines.

— *Swami Vivekananda*


CA Devendra Jain & CA Sujoy Mehta

Amendments relating to Computation of Business Income and related Incentives

I. Conversion of Inventory into Capital Asset or Treatment of Inventory as Capital Asset

(i) Background of existing provisions in Capital Gains

We are aware of the provisions relating to the treatment of converting or treating a 'Capital Asset' into 'Stock-in-trade'. This transaction is governed by the provisions of Chapter IV-E relating to 'Capital Gains'. Similarly, *vide* Finance Bill 2018, the Parliament has proposed to bring into tax ambit, a reverse situation where 'Inventory' is converted into or treated as 'Capital Asset'. In order to further analyse the proposed amendment, let us first understand the background of existing provisions relating to converting or treating a 'Capital Asset' into 'Stock-in-trade' which was introduced by insertion of Sub-section (2) in Section 45 *vide* Finance Act, 1984 and other relevant amendments.

In *CIT vs. Bai Shirinbai K. Kooka (1962) 46 ITR 86*, the Honourable Supreme Court had held that, when a capital asset is converted into stock-in-trade and such converted stock-in-trade is subsequently sold, the difference between the fair market value of such capital asset on the date of conversion and the actual selling price is assessable as business income. There being no transfer of capital asset on the date of conversion of capital asset into stock-in-trade, no capital gains arise u/s. 45(1). To overrule this decision, a new sub-clause (iv) was introduced in Section 2(47) so as to regard such conversion or treatment of Capital Asset into stock-in-trade as 'Transfer'. It was further provided that the 'Fair Market Value' (FMV) of Capital Asset as on date of such conversion or treatment shall be regarded as the 'Full Value of Consideration' for computing the capital gains. However, as no actual gain is realised on the date of such conversion, the chargeability of capital gains to tax was deffered to the year in which such converted stock-in-trade is actually sold or otherwise transferred. This was the brief scheme of Section 45(2) r.w. Section 2(47)(iv), which has addressed the following issues:

a. Appropriate addition in definition of 'Transfer' u/s. 2(47).

b. Deemed 'Fair value of Consideration'.

c. Year of chargeability.

(ii) Need for amendments in 'Business Income'

There is no existing provision which specifically governs the chargeability to tax in case of Conversion/Treatment of Inventory into Capital Asset. As a result, there are disputes relating to the head in which the income is to be taxed on actual transfer of such capital asset, as also with regard to the determination of cost of acquisition and period of holding of such capital assets. Different High

Courts and Tribunals have taken different views in this matter.

In some cases, revenue had taken a stand that difference between FMV of Inventory as on the date of conversion less actual cost of acquisition shall be treated as 'Business Income', whereas difference between actual sale consideration on transfer of 'Capital Asset' and FMV on date of conversion shall be treated as 'Capital Gains'. Assessee in such cases had contended that,actual Sale consideration less indexed cost of acquisition (on actual cost) shall be charged as capital gains. In case of *ACIT vs. Bright Star Investment (P.) Ltd. [2008] 24 SOT 288 (Mumbai),* Hon'ble ITAT had held that in the absence of a specific provision, out of these two formulae, the formula which was favourable to the assessee, should be accepted. However, Delhi High Court in the case of *CIT vs. Abhinandan Investment Ltd. (2016) 282 CTR 466,* has approved the former treatment. Further it also held that the period of holding of capital assets is to be computed from the date of conversion and not from the original date of acquisition.

In following case laws, even though shares were converted to investment from stock-in-trade, the whole of the transaction was taxed only under the head 'Capital Gains' and there was no bifurcation made with regards to 'Business Profits' and 'Capital Gains' out of the total actual gain earned by the assessee.

a. *CIT vs. Jannhavi Investments (P.) Ltd. [2008] 304 ITR 276 (Bombay)*

b. *Kalyani Exports & Investments (P.) Ltd. vs. DCIT [2001] 78 ITD 95 (Pune) (TM)*

To set at rest, these diverse judicial interpretations, certain amendments are proposed by the Finance Bill, 2018 with effect from Assessment Year 2019-20.

(iii) Relevant amendments

Unless any income/gain is covered by the definition of 'Income' under clause (24) of section 2, it cannot be said as 'income' earned and will also not form part of total income. Hence a new sub-clause (xiia) has been proposed to be introduced in Section 2(24) to include "the fair market value of inventory referred to in clause (via) of Section 28"in the definition of income. Further, it is proposed to introduce, a new clause (via) in Section 28 to include "the fair market value of inventory as on the date on which it is converted into, or treated as, a capital asset determined in the prescribed manner"into the chargeability under the head of business income. This clause specifies that FMV of inventory as on date of conversion/ treating it as Capital Asset shall be considered as income earned from business or profession. The terms FMV and inventory are briefly explained below:

a. 'Fair Market Value' (FMV)

FMV as on the date of conversion/ treatment as capital asset shall be taken into consideration. Definition of FMV in relation to 'capital asset' has been provided in clause (22B) of Section 2, however the same will not apply in this case as this clause requires FMV in relation to 'Inventory'. It has been mentioned in this clause that FMV of inventory shall be determined in prescribed manner. CBDT will notify the rules in this regard.

b. 'Inventory'

The term used by this clause is 'Inventory' which is a wider term, whereas Section 45(2) specifies only 'stock-in-trade' (relatively narrower term). Thus either following the definition of AS-2 or ICDS-2, inventory would also include 'raw-material', 'W.I.P' as well as 'Finished Goods'.

(iv) Relevant consequential amendments in Chapter IV-E relating to Capital Gains

Section 49 which deals with determination of cost with reference to certain modes of acquisition is proposed to bea mended to include new sub-section (9), which specifies that in case of transfer of Capital asset (which was earlier held as inventory) the cost of acquisition shall be the FMV which was adopted for the purpose of determining the income u/s. 28(via).

Further, in order to determine the period of holding in such cases, new sub-clause (ba) has been proposed to be inserted in clause (i) of *Explanation 1* to Section 2(42A). Accordingly the period of holding shall be reckoned from the date of conversion/treatment of Inventory as Capital asset [in confirmation with decision in case of *Deensons Trading Co. (P.) Ltd. vs. ITO [2017] 81 taxmann.com 71 (Chennai – Trib.)].* Accordingly, other provisions relating to computation of capital gains shall apply (E.g.: Indexation benefit under second proviso to Section 48 from the date of conversion)

(v) Illustration of above amendments

Suppose a person is a trader in a particular product, and he brought 1 unit of such product at ₹ 100/- in FY 2018-19 which has been held as inventory. As on 16-7-2019 FMV of such product is ₹ 120/-. Now on 16-7-2019 he decides to convert such inventory into investment. As per the application of Section 28(via) the whole of the FMV (₹ 120) as on date of conversion (i.e. 16-7-2019) shall be regarded as income from Business or profession and the actual cost of ₹ 100/- will be allowed as a deduction against such business income. Further, if such converted capital asset is sold on 25-8-2020 for ₹ 150, then full value of consideration shall be ₹ 150 whereas as per Section 49(9) cost of acquisition will be ₹ 120/- (FMV adopted for the purpose of Section 28(via)). The benefit of indexation will be dependent on Period of Holding.

(vi) Year of taxability?

One important aspect to note in these amendments is that although converting/treating Inventory as Capital asset is treated as income u/s. 28, however the year of chargeability has not been expressly provided for in the amendments, unlike Section 45(2) (i.e. year in which Stock-in-Trade is actually sold). The wordings of newly inserted clause (via) are totally silent as to the year of chargeability. Section 145(1) provides that profits and gains of business or profession shall be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee.

In case the assessee follows cash system of accounting then taxability under the head business income will arise in the year of actual receipts on sale of capital asset. However, in case assessee maintains books of account on mercantile basis, in the absence of express provision, a doubt may arise whether tax shall be levied on business income in the year of conversion itself. It is a settled principle of taxation that what is to be taxed is real income of the assessee, unless otherwise specified. On the act of conversion of inventory into capital asset no real income accrues to the assessee. Reference can be made to the decisions of *CIT vs. Balbir Singh Maini [2017] 86 taxmann.com 94 (SC)* and *Sir Kikabai Premchand v. CIT [1953] 24 ITR 506 (SC).*

In *Sir KikabaiPremchand vs. CIT [1953] 24 ITR 506 (SC),* assessee was trader in shares and silver bars, during relevant previous year he withdrew from business certain shares and silver bars and settled/ donated them on certain trusts. He, however, showed transfer of these shares and silver bars to trustees in his books of account at cost price. Revenue assessed the difference between cost price of said shares and silver bars and market value thereof on date of their withdrawal as income from business. It was held by the Honourable Supreme Court that the difference between the market value and the conversion price could not have been, at any rate, brought to tax, to the effect that no man can make or profit out of himself.The amendment now proposed to be made only specifies the manner of bifurcating the taxability under the head business income and capital gains. The ratio of the above decision will still apply so as to negate any such contention of taxing the FMV as business income in the year of conversion itself.

(vii) Conclusion

To sum up, we can say that the above mentioned amendments are mirror image of Section 45(2), however the year of taxability is one such area which requires further clarification, so as to avoid unwanted litigation.

II. Compensation/any payment received on termination/ modification of contract relating to business

Presently clause (ii) of Section 28 governs the chargeability of only certain specific classes of compensation received by a person, enumerated in Sub-clauses (a) to (d) thereof. However the said clause (ii) of Section 28 does not cover all kinds of compensation. If any compensation is received by a person in the course of his business, it has to be seen whether it is a compensation of a revenue nature or a capital in nature. If it is of revenue nature, it can be brought to tax under clause (i) of section 28. However, if it is of a capital nature it is neither covered by clause (i) nor by clause (ii). In the following case laws, it was held that if compensation received was in nature of 'Capital Receipt' then such sum shall not be charged to tax:

a. *Elegant Chemicals Enterprises (P.) Ltd. vs. ACIT [2004] 91 ITD 85 (Hyderabad)*

b. *HCL Infosystems Ltd. [TS-5594-HC-2015 (Delhi)-O]*

c. *CIT vs. MotilalChhadami Lal Jain [1997] 225 ITR 879 (Allahabad)*

To bring to tax such compensation of capital nature received in the course of business, a new sub-clause (e) is proposed to be inserted in section 28(ii) w.e.f. 1-4-2019. The reason given in the Explanatory Memorandum for this amendment is to avoid base erosion and revenue loss. The proposed Sub-clause (e) under clause (ii) of Section 28 shall govern the chargeability of any compensation or other payment which is received by/due to any person. However, it shall be in connection with the termination or the modifications of the terms and conditions of any contracts which is related to the business of the person receiving it. It is a very widely worded sub clause which shall cover all kinds of compensation in the course of business irrespective of the nomenclature of the said compensation. The only requirement is that it should relate to a contract relating to assessee's business. However, a doubt arises whether the proposed sub-clause is restricted in its applicability to compensation relating to business contracts or it will cover those contracts which provide compensation with respective a profession also. It does not refer to compensation received in the course of profession. The Honourable Supreme Court in the case of *G. K. Choksi and Co. (2007) 295 ITR 376* has held that the reference to the word 'business' in any provision of statute cannot be construed as a reference to the word 'profession'. Hence, one may argue that compensation received in the course of contracts relating to profession are outside the scope of the proposed amendment.

III. Amendments in Section 43CA

Section 43CA provides that in case of transfer of land or building or both (which are not held as capital assets), the value adopted or assessed or assessable by the stamp valuation authority for the purpose of payment of stamp duty shall be deemed as the full value of consideration for the purpose of computing profits and gains from transfer of such asset, if it is higher than the actual sale consideration. This causes undue hardship and litigation in a scenario where there was a small variation in the value adopted or assessed or assessable by the stamp valuation authority and the actual sale consideration. There are various judicial pronouncements which favoured the assessee in case the variation was up to 10% to 15%:

a. *M/s. LGW Limited vs. I.T.O.(ITANo.267/ Kol/2013)*

b. *ACIT vs. Suvarna Rekha(ITANo.743/Hyd/2009)*

c. *Rahul ConstructionCo. vs. ITO(2012) 51SOT192(Pune)*

In order to overrule these decisions and avoid undue hardship due to some minor variations in the two values, Parliament has proposed to insert a proviso below Sub-section (1) of Section 43CA which provides that in case if value adopted or assessed or assessable by Stamp valuation authority is higher by an amount which is up to 5% of the actual consideration, then no addition shall be made. This proviso is stated to be applicable from AY 2019-20. However, being a proviso inserted to avoid hardship to the assessees, it can be equally argued to have retrospective effect from A.Y. 2014-15 i.e., the year of introduction of Section 43CA.

However it is important to note that, by a literal interpretation, this 5% is not an exemption limit i.e., if the difference amounts to 6% of actual sale consideration then whole of 6% shall be added up in order to determine the fair value of consideration and not just 1% (6% - 5%). But on the principles of purposive construction, it may be very well argued that in such cases only the excess beyond 5% shall be added to the assessee's income. This is similar to the interpretation placed for the implication of second proviso to section 92C(2) in the context of Transfer Pricing provisions. However, these provisions was subsequently amended retrospectively to provide that ± 5% is a tolerance band rather than a standard deduction.

It should be noted that the proposed amendment does not cover sub-section (2) of section 43CA which provides for reference to the Valuation Officer. In other words, the benefit of 5% variation with the actual consideration is not proposed to be allowed with reference to the value adopted by the Valuation Officer on a reference under sub-section (2) of section 43CA.

Further, Sub-section(3) provides that in case where 'date of agreement (fixing sale consideration)' and 'date of registration of Transfer' are not same, then for the purpose of determining the variation with actual sale consideration as provided in Sub-Section (1), Value adopted by authority as on 'date of Agreement' shall be taken. However, Sub-section (3) will only apply in case where consideration has been received by 'any mode other than cash' on or before the date of agreement for transfer of the asset as provided in Sub-section (4).

Thus Sub-section (4) puts an additional requirement for the applicability of the beneficial provisions of sub-section (3) that the consideration or part of it is received otherwise than in cash on or before the 'date of agreement'. In order to have further check on various other modes resorted by a person and to have more traceability via banking channels; sub-section (4) is proposed to be amended to provide that consideration or part of it must have been received only by account payee cheque or an account payee bank draft or by use of ECS service for the purpose of Sub-Section (3).

IV. Amendments in Section 44AE

The intent of legislature to introduce presumptive based taxation u/s. 44AE was to benefit small transporters. Any person in business of plying, hiring or leasing goods carriages who owns up to 10 goods carriages can opt for presumptive taxation. Presently Section 44AE does not distinguish on the basis of type of goods carriage. The distinction between heavy and other than heavy goods vehicle as to the minimum rate of presumptive income was removed by the Finance (No. 2) Act, 2014. It has now been proposed to bring back the distinction between large capacity vehicles, being those whose gross vehicle weight exceeds 12,000 Kg. from others with effect from A.Y. 2019-20. Thus accordingly, for a transporter who owns up to 10 vehicles (whether heavy or other than heavy goods vehicle), the scheme has been bifurcated based on type of vehicle as follows:

For Heavy Goods Vehicle (gross vehicle weight > 12,000 Kg.)

– [₹ 1,000/tonne x gross vehicle weight/unladen weight] x no. of months/part thereof

Or

– Amount claimed to have been actually earned

whichever is higher.

For other than Heavy Goods Vehicle (gross vehicle weight <= 12,000 Kg.):

– ₹ 7,500 per month/part thereof

Or

– Amount claimed to have been actually earned

whichever is higher.

For the purpose of this section, 'Gross Vehicle Weight' shall be total weight of the vehicle and load certified and registered by the registering authority as permissible for that vehicle; as defined in clause 15 of Section 2 of Motor Vehicles Act, 1988.

V. Amendments in Section 80JJAA

(i) Existing provisions

Section 80JJAA allows a deduction of 30% of additional employee cost incurred in the previous year in the course of business, for 3 assessment years starting from the assessment year relevant to the previous year in which such employment is provided.

For claiming such additional deduction, one of the conditions was that eligible new employee needs to be employed for a minimum period of 240 days during the relevant previous year. However, in the case of apparel industry, the minimum number of days of employment is only 150 days instead of 240 days.

(ii) Issues in existing provisions

In case where employees were employed in the organization in later part of the year, the duration of employment may be less than 240 days or 150 days and hence, the assessee was not eligible for the deduction in that year. Further, in the succeeding year also, no deduction was available for such employees as they were not newly employed in the succeeding year.

(iii) Proposed amendments effective from AY 2019-20

Hence, it is proposed to insert a proviso to the effect that if new employees are employed for less than the minimum period during the first year of employment but continue to remain employed for the minimum period in subsequent year, such employees will be deemed to have been employed in the succeeding year. This will entitle the assessee to claim deduction of 30% of such employee cost incurred in such succeeding year as a deduction for three years beginning with such succeeding year.

It has been also proposed to reduce the minimum employment period of 240 days to 150 days in case of 'Footwear' and 'Leather' industry.

VI. Benefits to Farm Producer Companies – Section 80PA

(i) Existing provisions

Section 80P provides for 100 per cent deduction in respect of profit of co-operative society which provides assistance to its members engaged in primary agricultural activities.

(ii) Introduction to new Section 80PA

As Section 80P applies only to 'Co-operative societies', a Farm Producer Companies (FPC) registered under Companies Act, 1956 is not entitled to avail the benefit even though the nature of its activities are similar to those of co-operative societies. Thus to provide similar benefits to Farm Producer Companies (FPC), the Finance Bill proposed to insert a new section 80PA in the Act to provide 100% deduction of profit and gains attributable to the eligible business:

'Eligible Business' shall cover the following activities:

a) the marketing of agricultural produce grown by the members; or

b) the purchase of agricultural implements, seeds, livestock or other articles intended for agriculture for the purpose of supplying them to the members; or

c) the processing of the agricultural produce of the members.

(iii) Other conditions

1) Deduction can be claimed from A.Y. 2019-20 to A.Y. 2024-25 (i.e. 6 A.Ys.). Explanatory Memorandum to the Finance Bill 2018 states that deduction shall be available for 5 A.Ys, which seems to be erroneous as the wordings of the section provide for deduction for 6 A.Ys.

2) Turnover of such FPC should be less than Rs. 100 Crore in any previous year.

3) In case if such FPC also claims deduction under any other section of Chapter VI-A, then deduction under Section 80PA shall be allowed only in respect of that amount of profit which is derived after deducting the other deduction claimed under Chapter VI-A.

VII. Measures to promote start-ups

(i) Existing provisions

Section 80-IAC of the Act, *inter alia*, provides that deduction of one hundred per cent of the profits and gains derived from eligible business shall be available to an eligible start-up for three consecutive assessment years out of first seven years at the option of the assessee.

(ii) Proposed amendments

In order to improve the effectiveness of the scheme for promoting start-ups in India, it is proposed to make the following changes with effect from 1st April, 2018 (effective from A.Y. 2018-19):

Particulars	Existing provisions	Proposed provisions
Eligibility criteria w.r.t. incorporation	On or after the 1st day of April, 2016 but before 1st date of April, 2019	On or after the 1st day of April, 2016 but before 1st date of April, 2021
Total turnover	Does not exceed ₹ 25 crore in any previous year beginning on or after the 1st day of April, 2016 and ending on the 31st day of March, 2021	Does not exceed ₹ 25 crores in any seven previous years commencing from the date of incorporation
Eligible business definition expanded	A business which involves innovation, development, deployment or commercialization of new products, processes, or services driven by technology or intellectual property	A business carried out by an eligible start up engaged in innovation, development or improvement of products or processes or services, or a scalable business model with a high potential of employment generation or wealth creation. The word 'new' has been dropped meaning thereby that the product need not be new but there should be innovation, development or improvement of products. Further, no definition is provided of the term scalable business model

VIII. Provisions in relation to Companies under the ambit of Insolvency and Bankruptcy Code

A. Carry forward of losses

(i) Existing provisions

Section 79 of Act provides that carry forward and set off of losses in case of a closely held company shall be allowed only if there is continuity in the beneficial owner of the shares carrying not less than 51% of the voting power, on the last day of the year or years in which the loss was incurred and the last day of the previous year in which the loss is to be set off.

(ii) Proposed amendments

In the case of a company where a resolution plan is approved under the Insolvency and Bankruptcy Code, 2016, the change in the beneficial ownership of shares may be beyond 49% i.e. the maximum permissible limit under section 79.

In order to address this problem, it is proposed to relax the rigours of section 79 in case of such companies, whose resolution plan has been approved under the Insolvency and Bankruptcy Code, 2016, after affording a reasonable opportunity of being heard to the jurisdictional Principal Commissioner or Commissioner.

B. Verification of return of income

In cases where application for corporate insolvency resolution process has been admitted by the Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016, the powers of the board of directors stand suspended.

Hence, it is proposed to amend section 140 of the Act with effect from 1stApril, 2018 (i.e. from A.Y 2018-19), so as to provide that in such cases, the return of income of such company shall be verified by the insolvency professional appointed by the Adjudicating authority under the Insolvency and Bankruptcy Code, 2016.

C. Calculation of Book Profits for the levy of MAT

(i) Existing provisions and issues

Section 115JB of the Act, provides for levy of a minimum alternate tax (MAT) on the "book profits" of a company. In computing the book profit, reduction in respect of the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account is allowed.

Consequently, where the loss brought forward or unabsorbed depreciation is NIL, no reduction is allowed. And even in other cases, deduction is allowed only for lower of the two amounts i.e loss and depreciation. This is creating a hardship for companiesagainst whom an application for corporate insolvency resolution process has been admitted by the Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016.

(ii) Proposed amendments

In order to address above issue, it is proposed to amend section 115JB with effect from 1st April, 2018 (i.e. from A.Y. 2018-19), to provide that the aggregate amount of unabsorbed depreciation and loss brought forward (excluding unabsorbed depreciation) shall be allowed to be reduced from the book profit, if a company's application for corporate insolvency resolution process under the Insolvency and Bankruptcy code, 2016 has been admitted by the Adjudicating authority.

IX. Relaxation of Minimum Alternate Tax (MAT) provisions for certain Foreign Companies:

(i) Background

Income from business and profession of Foreign Companies availing benefit of presumptive taxation u/s. 44B (Shipping Business), 44BB (Mineral Oil Exploration), 44BBA (Operation of Aircraft), 44BBB (Turnkey Power Projects) are determined on the basis of specific percentage generally ranging between 5% to 10% of a sum specified in that section.

However if MAT provisions are applied to such companies, tax would be 18.5% of computed book profit. Thus in such cases, total income under the normal provisions of the Act will be relatively lower and accordingly the normal tax liability will be lower than 18.5% of book profits. Hence, foreign companies falling under the presumptive taxation under above mentioned sections were not benefited due to application of MAT provisions.

(ii) Proposed amendments

In order to overcome the above situation, a retrospective clarification effective from 1st April, 2001 is proposed to be inserted in section 115JB of the Act to provide that the provisions of section 115JB of the Act shall not be applicable and shall be deemed never to have been applicable to assessee, **being a foreign company,** if its total income comprises **solely** profits and gains from business referred to in section 44B or section 44BB or section 44BBA or section 44BBB and such income has been offered to tax at the rates specified in the said sections.

It is important to note that in case if the said foreign company is also engaged in any other business, other than those specified in above section, this explanation will not apply and provisions of MAT will be applicable.

Dharan Gandhi, *Advocate*

Amendments to incorporate Income Computation and Disclosure Standards

As expected, an amendment proposed by Finance Bill, 2018, to give legitimacy to Income Computation and Disclosure Standards ('ICDS') after the Delhi High Court ruling. However, no one ever expected a retrospective amendment especially in view of the staunch stand of the Government against retrospective amendments. In the present article, I shall be dealing with the amendments proposed in Finance Bill, 2018, to incorporate some of the provisions of the ICDS.

In the November 2017 edition of The Chambers Journal, Adv. Vipul Joshi along with CA Viraj Mehta and myself gave a detailed analysis of the history of ICDS, the petition filed by The Chamber before the Hon'ble Delhi High Court to challenge the validity of the ICDS and the order of the said Court *(Chamber of Tax Consultant vs. UOI – 400 ITR 178)* in an article titled "High Court puts a brake on the power of Central Government to issue ICDS!". Without going into the background, the important findings of the Court in the said order is summarised as under:

Findings of the Court

Court firstly, held that the essential legislative functions cannot be delegated and in context of income-tax law, following were held to be essential legislative function:

a. Changing the basic principles and method of accounting that have been recognized in various provisions of the Act for computation of income or according tax treatment to a particular transaction.

b. To make a validation law to override judicial precedents and that too by actually removing the defect pointed out by such precedent.

The High Court after considering the judgment of the Apex Court in case of *Tuticorin Alkali Chemicals and Fertilizers Limited vs. CIT (1997) 227 ITR 172,* held that Accounting Standards has hardly any role to play in the principles governing determination of income, which has been well settled by the provisions of the Act as well as by judicial precedents.

The Court, in order to preserve the Constitutional validity of the ICDS, read down section 145(2) of the Act as amended, to restrict power of the Central Government to notify ICDS that do not seek to override binding judicial precedents or provisions of the Act or Rules. Thus, it was held by the Court that the Central Government, under delegated legislation, cannot override any judicial precedents and also cannot amend or alter any basic principles governing the computation of income. After laying down the above important principles the Court gave specific findings *qua* each ICDS and struck down some part of Notification No. 87/2017 as unconstitutional. Corresponding amendments in Form 3CD and clarifications in the Circular were also struck down.

In so far as the above fundamental principles are concerned, there is no amendment proposed in the Act. However, there are several amendments proposed in the Bill to do away with the findings of the Court in respect of specific ICDS.

I shall be dealing with the amendments proposed in the Finance Bill clause by clause.

Concept of Prudence

The Chamber had challenged ICDS-I on the ground that the concept of prudence was done away with. The Court found merit in the contention that ICDS-I does away with the concept of 'prudence' which was present in AS-1 notified u/s. 145 (2) of the Act. A negative provision was in fact present in the ICDS stating that prudence is not to be followed unless it is specified. The Court also agreed with the arguments of The Chamber and held that concept of prudence is embedded in Section 37(1) of the Act which allows deduction in respect of expenses "laid out" or "expended" for the purpose of business. Further, it also held that the concept of prudence was recognised by the Courts. Accordingly, it held that ICDS-I which does away the concept of 'prudence' was contrary to the Act and binding judicial precedents and was struck down as unconstitutional.

To overcome the said findings of the Court, the Finance Bill, 2018, has proposed two amendments in clauses 10 and 11. *Vide* clause 10, the Finance Bill proposes to insert clause (xviii) in section 36(1). The said clause proposes to allow marked-to-market loss and other expected loss as computed in accordance with the income computation and disclosure standards notified u/s. 145(2). Further, *vide* clause 11, Section 40A(13) is proposed to be inserted, wherein it is provided that no deduction or allowance shall be allowed in respect of any marked-to-market loss or other expected loss, except as allowable u/s. 36(1)(xviii).

Thus, by inserting a specific clause in section 36(1), firstly the jurisdiction of section 37(1) recognised by the Delhi High Court is ousted. This is because section 37(1) would apply to any expenditure not being an expenditure of the nature described in sections 30-36. By giving specific recognition to marked-to-market loss and expected loss u/s. 36(1)(xviii), provisions of section 37(1) would not apply. Thus, the finding of the Court that the concept of prudence is embedded in section 37(1) is expressly overruled. Secondly, the effect of the proposed amendment is that marked-to-market loss or other expected loss would be allowed only to the extent such loss has been specifically allowed under various ICDS notified u/s. 145(2). If there is no specific allowance of such loss under ICDS, or where the ICDS specifically denies allowance of such loss, the same shall not be allowed as per section 40A(13). Similar was the effect of the provisions in ICDS-I. Thus, in so far as MTM loss and expected loss is concerned, the position prior to the order of the Court has been retained with the only difference that now there is an effective and binding legislation which has to be adhered to in preference over the judgments.

In so far as MTM gains are concerned, the CBDT in Circular No. 10, 2017, in reply to question number 8, had stated that same principle as contained in ICDS-I relating to MTM losses or an expected loss shall apply *mutatis mutandis* to MTM gains or an expected profit. This position should also prevail after the proposed amendments.

Foreign Exchange fluctuation

ICDS-VI was challenged on several grounds viz., under ICDS-VI, foreign exchange fluctuation as at the end of the year on loan taken for capital purpose would be treated as item of income or expenses in contradiction to the ruling of the

Hon'ble Supreme Court in case of *Sutlej Cotton Mills Limited vs. CIT (1979) 116 ITR 1 (SC);* ICDS VI also states that marked-to-market loss/gain in case of foreign currency derivatives held for trading or speculation purposes are not to be allowed which again was running against the ruling of Supreme Court in case of *Sutlej and Woodward Governor India P. Ltd. [312 ITR 254(SC)];* lastly the clarification prescribed under Circular 10 for Foreign Currency Translation Reserve Account balance as on 1st April, 2016, which was to be recognized as income/loss of the previous year relevant to the AY. 2017-18, was also challenged. The Court accepted all the three contentions of the Petitioners and in light thereof, ICDS-VI was struck down completely.

Vide Clause 13 of Finance Bill, 2018, section 43AA is proposed to be inserted with the sole motive of negating the above findings of the Court. Section 43AA states that subject to the provisions of section 43A, any gain or loss arising on account of any change in foreign exchange rates shall be treated as income or loss, as the case may be, and such gain or loss shall be computed in accordance with the ICDS notified u/s. 145(2). Section 43AA(1) is in the nature of charging provision. Further, the gain or loss u/s. 43AA would have to be computed in accordance with the ICDS notified u/s. 145(2). It should be noted that only the computation part has been delegated u/s. 145(2).

Section 43AA(2) states as under:

"For the purposes of sub-section (1), gain or loss arising on account of the effects of change in foreign exchange rates shall be in respect of all foreign currency transactions, including those relating to—

(i) Monetary items and non-monetary items;

(ii) Translation of financial statements of foreign operations;

(iii) Forward exchange contracts;

(iv) Foreign currency translation reserves."

Thus, section 43AA(2) states that sub-section (1) which is in effect a charging provision shall apply only to foreign currency transactions. Further, foreign currency transactions shall include all transactions as given in clauses (i) to (iv) above. Thus, the section only gives an inclusive list of foreign currency transaction and is definitely not restricted to these items. It can be seen that even the non-monetary items are proposed to be included as well as the translation of financial statement of integrated and non-integrated foreign operations. Though such terms are not defined anywhere in the Act.

It can be seen that sweeping changes are proposed to be brought in this regard. The impact is summarised as under:

a. Loss or gain arising on foreign exchange fluctuation in respect of any foreign currency transaction has to be recognised as income or loss. Only computation of such loss/gain is to be in accordance with the provision of ICDS notified u/s. 145(2). Thus, ICDS notified u/s. 145(2) cannot say as to which loss/gain is not to be recognised or *vice versa*. It can only provide for computation of such loss/gain.

b. Land mark judgment in case of Sutlej (supra) which was holding the field for about 40 years is given a go-by. The said judgment held that if a transaction is on capital account, then the foreign currency loss/ gain has to be treated as one on capital account and if a transaction is on revenue account, then foreign currency loss/ gain has to be treated as one on revenue account. The said judgment was subsequently followed by the same Court in case of Woodward Governor (supra). However, now except for the treatment provided for in section 43A, any gain or loss arising on any monetary item or non-monetary item has to be recognised as an item of income or loss without any distinction between a transaction on revenue account or capital account.

c. Marked-to-market loss/gain in case of foreign currency derivatives held for trading or speculation purposes is to be recognised as per section 43AA as gain or loss, since the same arises out of foreign currency transaction. Even if the ICDS notified u/s. 145(2) states that no such loss or gains should be recognised, the same shall run the risk of being contrary to section 43AA as the only thing which the ICDS can provide is the computation of such loss/gain.

d. Foreign currency translation reserve arises as a result of year end valuation of assets and liabilities of a non-integrated foreign operations. In Circular No. 10 of 2017, in answer to Question No. 16 the CBDT had clarified that Foreign Currency Translation Reserve Account balance as on 1st April 2016 has to be recognized as income/ loss of the previous year relevant to the AY 2017-18. No amendment has been proposed in this regard. The amendment proposed only treats the foreign currency translation reserve as a foreign currency transaction. This would in effect mean that any adjustment to reserve of this sort would be held to be gain or loss in the year of adjustment. However, the balance as on 1-4-2016 cannot be taxed in FY 2016-17. Firstly, because the Court held that such income is notional in nature, and in any case, such income pertains to earlier years and therefore, cannot be taxed in FY 2016-17.

e. Treatment provided in section 43A and section 43AA are contrary to each other. Section 43A deals with a case, where the assessee has acquired any asset from outside India and there is increase or reduction in liability to pay as a result of fluctuation in foreign exchange rate. In such a case, any increase or decrease in liability at the time of making payment has to be adjusted to the actual cost of the asset u/s. 43(1) or other sections as provided therein. Thus, section 43A applies to any asset purchased from outside India and it recognises the fluctuation which arises at the time of making payment. In all other cases section 43AA would apply. In other words, section 43AA would apply to any asset purchased from within India, but for the purchase of which a loan has been taken in foreign currency from outside India. Also, section 43A would apply only at the time of making payment, whereas section 43AA would apply for year-end valuations. Section 43A provides adjustment in the cost whereas, section 43AA provides that any exchange fluctuation has to be recognised at loss or gain as the case may be. Thus, contrary treatment are provided for similar nature of transactions. There is no intelligible difference between assets acquired from within India and from outside India if the payment has to be ultimately made in foreign currency. Also, now one can argue that gain or loss arising as at the year end on account of foreign exchange fluctuation has to be recognised as gain/loss as per section 43AA, even when the asset is purchased from outside India, since section 43A apply only at the time of payment. In such a case, a very peculiar situation would arise i.e., exchange fluctuation at the time of making payment would be required to be capitalised whereas the fluctuation arising on year end valuation would be required to be taken as income or loss.

Method for recognising revenue in respect of construction contract and service contract

The Chamber had challenged the provision of ICDS-IV which prescribed only one method for recognition of revenue from service contracts i.e., proportionate completion method. Various precedents had accepted the other method also viz., contract completion method. The Court accepted the plea of the petitioner and held that proportionate completion method as well as the contract completion method have been recognized as valid method of accounting under mercantile system of accounting. Accordingly, to the extent that para 6 of ICDS-IV permits only one of the methods, i.e., proportionate completion method, it was held to be *ultra vires* the Act. Though no reference was made to the Construction contracts under ICDS-III, the ratio would have squarely applied to those contracts also.

To nullify the above ratio of the Court, clause 15 of the Finance Bill, 2018, proposes to introduce section 43CB in the Act. Section 43CB(1) states that the profits and gains arising from a construction contract or a contract for providing services shall be determined on the basis of percentage of completion method in accordance with the ICDS notified u/s. 145(2). However, the proviso to section 43CB(1) states that in respect of service contracts, which takes less than 90 days for completion, the income has to be calculated as per project completion method. Similarly, a contract of service which involves indeterminate number of acts over a specific period of time has to be determined as per straight line method.

One has to note that ICDS-IV provided an option to the assessee in case where the service contracts took less than 90 days for completion to follow contract completion method; however, proviso to section 43CB(1) mandates the usage of project completion method. Thus, in case of all service contracts, irrespective of the method of accounting followed for maintaining books of account, one has to offer revenue to tax only on the basis of project completion method. Similar is the case of contracts which involve indeterminate number of acts for completion; ICDS-IV provided for an option to follow either the percentage completion method or straight line basis method. However, the proviso to section 43CB(1) mandates the usage of straight line basis method.

Also, where one follows project completion method while maintaining books of account and is required to follow percentage completion method for computing taxable income, there may arise MAT implications, as a result of which same income would be taxed doubly; one under the normal provisions and one under MAT. In this regard, one should refer to the judgment of the Hon'ble Andhra Pradesh High Court in case of *CIT vs. Nagarjuna Fertilizers & Chemicals Ltd. (373 ITR 252)*, wherein the Court has held that once an income has been taxed under normal provisions of the Act, the same cannot be taxed under MAT provisions.

Retention money and reduction of incidental income from contract cost

The taxability of retention money as per the percentage completion method in contravention of the settled legal principles laid down by various High Courts was challenged. The Court after considering the case laws held that the treatment to retention money under Paragraph 10(a) in ICDS-III will have to be determined on a case to case basis by applying settled principles of accrual of income and by deploying ICDS-III in a manner that seeks to bring to tax the retention money, the receipt of which is uncertain/conditional, at the earliest possible stage, the Government would be acting contrary to the settled position in law as explained in the above decisions. The Court accordingly, held that para 10(a) to the extent of treatment given to retention money was *ultra vires.*

ICDS-III was also challenged on the ground that not all incidental income are allowed to be reduced from contract cost viz., interest, dividend and capital gains. This treatment was not in consonance with the principles laid down by the Hon'ble Supreme Court in case of *CIT vs. Bokaro Steel Limited (1999) 236 ITR 315*. The Court held that such treatment cannot be sustained in light of the binding Supreme Court judgment.

The above findings of the Court are now proposed to be overruled. Clause 15 of Finance

Bill, 2018 proposes to introduce section 43CB. We have discussed section 43CB(1) earlier. Now we shall deal with section 43CB(2). It states that for the purposes of percentage of completion method, project completion method or straight line method the contract revenue shall include retention money and the contract costs shall not be reduced by any incidental income in the nature of interest, dividends or capital gains.

Thus, it is now provided that contract revenue shall include retention money and therefore, it has to be taxed as per relevant method. However, in this regard, it is necessary to refer to para 9 of ICDS-III. It states that contract revenue shall be recognised when there is reasonable certainty of its ultimate collection. Thus, this condition still prevails. Accordingly, even if retention money has to be included in contract revenue, if there is no reasonable certainty then the same should not be recognised as income. However, even if the payment of retention money is delayed or is to be made on fulfilment of certain conditions, but there is reasonable certainty of its ultimate collection then the same has to be recognised. In order to play safe, one can write off the amount so recognised and claim deduction u/s. 36(1)(vii).

Also, the proposed amendment provides that incidental income in the nature of interest, dividends and capital gains cannot be reduced from contract cost. In effect, the judgment of the Supreme Court in case of Bokaro and other judgments like *CIT vs. Karnal Co-operative Sugar Mills Ltd. [243 ITR 2(SC)]* are overruled to the extent of computation of contract cost. However, the above section i.e., 43CB(2) will not apply except for calculation of contract cost. Also, incidental income other than interest, dividends or capital gains can be reduced from contract cost like, rent income from temporary leasing of premises to the contractor etc.

Taxation of export incentives

Para 5 of ICDS-IV which necessitated the assessee to recognise income from export incentive in the year of making of claim was challenged on the ground that it was running contrary to the judgment of the Hon'ble Supreme Court in *CIT vs. Excel Industries Limited (2015) 358 ITR 295 (SC).* The Court held that in Excel Industries (supra), the Supreme Court held that it is only in the year in which the claim is accepted by the Government that a right to receive the payment accrues in favour of the assessee and the corresponding obligation to pay arises in the hands of the Government and only in such year the income from export incentive can be said to have accrued and can be recognized as income. Therefore, para 5 of ICDS-IV was held to be not consistent with the law explained by the Supreme Court. To that extent para 5 was held by the Court to be *ultra vires.*

Vide Clause 45 of the Finance Bill, 2018, entire section 145A is replaced by new section 145A and section 145B. Section 145B deals with three items of income viz., interest received on compensation or enhanced compensation, taxability of subsidy and taxability of claim for escalation of price in a contract or export incentives. At present we shall deal with the latter. Section 145B(2) states that any claim for escalation of price in a contract or export incentives shall be deemed to be the income of the previous year in which reasonable certainty of its realisation is achieved. Thus, the judgment in case of Excel Industries (supra) has been overruled to this extent and the export incentive has to be taxed in the year in which the claim has been made or any year thereafter if there is reasonable certainty of its ultimate collection without waiting for the claim to be accepted by the Government. Also, section 145B(2) should apply only if one follows mercantile system of accounting.

Subsidy

ICDS-VII provided that recognition of Government grants cannot be postponed beyond the date of receipt of Government grants. This was challenged. The Court held that the said treatment is contrary to and in conflict with the accrual system of accounting. Therefore, ICDS-VII was declared *ultra vires* to the above extent.

As already discussed above, *vide* clause 45 of the Finance Bill, 2018, it has been proposed to introduce section 145B. Section 145B(3) states that the income referred to in section 2(24)(xviii) i.e., subsidies and grants shall be deemed to be the income of the previous year in which it is received, if not charged to income-tax in any earlier previous year. Thus, it is proposed that recognition of subsidy or grants as income cannot be postponed beyond the previous year in which it is ultimately received.

Sections 145 and 145A dealt with the method of accounting and fell under the Chapter XIV - Procedure for Assessment. These sections were in the nature of machinery provision. However, now with the introduction of section 145B it can be seen that the nature of section has changed from machinery provision to charging provision. It provides for the point of taxation in respect of three items of income viz., interest on compensation, export incentives and subsidies.

Valuation of inventories and securities

ICDS-II was challenged on two grounds viz., diffusion of the ruling in case of *Shakti Trading Co. vs. CIT (2001) 250 ITR 871 (SC)* and futility of ICDS-II in light of the binding provisions of section 145A. Section 145A of the Act overrides the provision of section 145 in view of the specific *non-obstante* clause. ICDS have been notified u/s. 145(2) of the Act. Further, section 145A of the Act provides that inventory of goods shall be valued in accordance with the method of accounting regularly employed by the assessee. Therefore, if an assessee regularly follows a method for valuation of inventory, same would be sufficient to comply with the provisions of section 145A of the Act, even though such method is not in consonance with the provisions of section 145 and ICDS.

Both the above contentions were accepted by the Court and it was pleased to strike down ICDS-II in its entirety.

ICDS-VIII *inter alia* deals with valuation of securities held by a person as stock-in-trade. It has been divided into 2 parts. Part A deals with entities other than scheduled banks and public financial institutions whereas Part B deals with scheduled banks and public financial institutions. The method of valuation of stock of securities as at the end of the year on bucket system basis was challenged. The Court accepted the challenge and held that this change is not possible to be effectuated without a corresponding amendment to the Act and accordingly, the Court declared Part A of ICDS -VIII as *ultra vires.*

Both the above findings of the Court are proposed to be diffused by clause 45 of the Finance Bill, 2018. This clause replaces entire section 145A by new section 145A and section 145B. Proposed section 145A deals with valuation of inventories and securities for calculating business income. It briefly provides for as under:

i. The valuation of inventory shall be made at lower of actual cost or net realisable value (NRV) computed in accordance with the ICDS notified u/s. 145(2)

ii. The valuation of purchase and sale of goods or <u>services</u> and of inventory shall be adjusted to include the amount of any tax, duty, cess or fee (by whatever name called) actually paid or incurred by the assessee to bring the goods or services to the place of its location and condition as on the date of valuation

iii. The inventory being securities not listed on a recognised stock exchange, or listed but not quoted on a recognised stock exchange with regularity from time-to-time, shall be valued at actual cost initially recognised in accordance with the ICDS notified u/s. 145(2)

iv. The inventory being securities other than those referred to in clause (iii), shall be valued at lower of actual cost or net realisable value in accordance with the ICDS notified u/s. 145(2). Further, such comparison of actual cost and net realisable value of securities shall be made category-wise.

v. *Explanation 1* provides that for the purposes of this section, any tax, duty, cess or fee (by whatever name called) under any law for the time being in force, shall include all such payment notwithstanding any right arising as a consequence to such payment.

From the above proposed section, it can be seen that *prima facie* the *non-obstante* part of the erstwhile section 145A has been now removed. Therefore, 145A would not prevail over section 145. Secondly, it has been proposed that the inventory has to be valued at cost or net realisable value whichever is lower. Thus, the principle laid down by the Apex Court in *Chainrup Sampatram vs. CIT (24 ITR 481)* finally gets statutory recognition. Also, the valuation has to be made irrespective of the method of accounting followed by the assessee.

The computation of cost or NRV is as per the ICDS notified u/s. 145(2). Thus, the ICDS can only provide for the computation of cost or NRV and nothing more than that. The ICDS cannot prescribe under which scenario the inventory has to be valued at either cost or at NRV. Therefore, indirectly, the judgment of the Apex Court in case of Shakti Trading has received approval from the legislation. In fact the judgment of the Apex Court in case of A. L. A. Firm – [(1989) 189 ITR 285 (SC)], now stands overruled, because section 145A(i) clearly states that inventory has to be valued at cost or NRV whichever is lower without any exception. Therefore, even if on dissolution of the firm, the business is discontinued, the inventory has to be valued at cost or NRV whichever is lower.

Further, the erstwhile section 145A only dealt with purchase and sale of goods and inventory of goods and required the assessees to add the amount of tax to the same. However, the proposed section 145A also deals with services. In respect of services, the Hon'ble Bombay High Court in case of *CIT vs. Knight Frank (India) P. Ltd. (ITA No. 247 of 2014 and 225 of 2014)*, has held that section 145A(a)(ii) of the Act, would not apply to the service tax billed on rendering of services. Therefore, now the said judgment stands overruled. Even the service tax or GST amount on rendering of services has to be added to purchase and sale of services.

In so far as valuation of securities is concerned, proposed clauses (iii) and (iv) deal with the subject. Clause (iii) deals with the inventory being securities not listed on a recognised stock exchange, or listed but not quoted on a recognised stock exchange with regularity from time-to-time and states that it has to be valued at cost in accordance with the ICDS notified u/s. 145(2). Other than the inventories covered by clause (iii), the same has to be valued at cost or NRV whichever is lower and further, the same has to be valued in accordance with the ICDS notified. Recognised stock exchange is given the same meaning as assigned to it in clause (ii) of *Explanation 1* to section 43(5). Further such valuation would be as per the bucket system. Thus, the judgment of the Delhi High Court stands overruled to this effect.

The term securities has not been defined in section 145A. If we refer to the definition of the term securities in Section 2(h) of the Securities Contract Regulation Act, 1956, the definition of the term securities also includes derivatives. Thus, even the derivatives which are listed on a recognised stock exchange and quoted with regularity have to be valued at cost of market value whichever is lower. This, in effect means that the MTM loss on derivative contract held for trading purposes would be allowed u/s. 145A(iv), however, there would be no need to recognise MTM gains. The same view has been taken consistently by the Tribunal starting with the judgment in case of *Edelweiss Capital Ltd. vs. ITO [ITA No. 5324/M/2007]*. However, such valuation has to be done as per the bucket approach.

Other items not proposed to be amended

The Delhi High Court also held that to the extent ICDS-IX dealing with borrowing cost does not allow incidental income to be reduced from borrowing cost, the same is not in consonance with the judgment of the Supreme Court in case of Bokaro Steel (supra). To that extent, para 5 of ICDS-IX was struck down. There is no amendment proposed in the Finance Bill *qua* the said finding of the Court. Therefore, the same can be said to be the tacit approval of the legislation.

The Delhi High Court in some cases has struck down the entire ICDS and in some cases, some parts of the ICDS. Further, the corresponding amendments in Form 3CD and the clarifications in the Circular are also struck down. The amendments proposed in the present Finance Bill, 2018, provides life to certain issue of the entire ICDS struck down. It does not revalidate all the portion of the Notification which was struck down. The same are not brought back to life by any amendment. Accordingly, those aspects of ICDS still remain buried till the time the judgment of the Delhi High Court prevails. The said judgment can be overruled either by the Supreme Court or by bringing a new notification in line with the amendments and the findings of the Hon'ble Delhi High Court. Further, Notification No. 88/2017 dealing with the amendments in Form 3CD also needs to be reissued, however, in compliance with the amendments proposed.

Also, there are number of other issues wherein the ICDS has tried to bypass the judgments but which has not been dealt with specifically by this judgment. Further, there may also be judgment which may crop up in future years dealing with any issue for which the ICDS provides for a contrary treatment. In this regard it is important to note that the Court has clearly read down the provisions of section 145(2) to disentitle the Government to overrule any judgments of the Court. Further, the Court has held that aspects of computation of income and the power of overruling the judgments are essential legislative function which cannot be delegated to the Executive. Therefore, any act to the contrary, even if not dealt with by the judgment would not survive. The legislature has proposed amendment in the Finance Bill, 2018, only *qua* the issues dealt with by the Court in the judgment. Thus, in those cases, where no amendments are proposed in the Finance Bill, 2018, the position would be that the judgments would prevail over the ICDS.

Effect of striking down of certain ICDS

In the proposed amendments, the Government has referred to the ICDS notified u/s. 145(2). In so far as the ICDS notified *vide* Notification No. 87/2017 is concerned, some of them are struck down as unconstitutional while some parts of the others are struck down. Therefore, in so far as the status of said notification is concerned, the Delhi High Court ruling would still prevail till the time the same is reversed by the Supreme Court. The amendments proposed by the Finance Bill, 2017 as discussed above, does not bring to life the Notification struck down. In only provides for treatment of certain items and refers to the ICDS notified u/s. 145(2). Therefore, in my view, the Government has to come out with new notification to bring back to life the portion of ICDS struck down.

The other view would be that to the extent the Finance Bill, 2018 gives legitimacy to the ICDS, to that extent the ICDS struck down would come back to life. However, only to that effect and not anymore. In order to remove the confusion, it would be better if the Government issues new ICDS u/s. 145(2) in place of the existing one after taking into account the amendments proposed in the present Finance Bill and judgment of the Delhi High Court to the extent not proposed to be overruled.

Retrospectivity issue

All the amendments proposed to overcome the ICDS ruling of the Delhi High Court have been brought out retrospectively w.e.f. 1-4-2017. The reason given in this regard *in the* Explanatory Memorandum *is that "Recent judicial pronouncements have raised doubts on the legitimacy of the notified ICDS. However, a large number of taxpayers have already complied with the provisions of ICDS for computing income for assessment year 2017-18. In order to regularise the compliance with the notified ICDS by a large number taxpayers so as to prevent any further inconvenience to them, it is proposed to bring the amendments retrospectively with effect from 1st April, 2017 i.e. the date on which the ICDS was made effective and will, accordingly, apply in relation to assessment year 2017-18 and subsequent assessment years".*

This certainly is not the case. It was not clear even prior to the Delhi High Court judgment as to whether the ICDS would prevail over the binding precedents or not. Many assessees have preferred following the binding precedents of the Courts instead of the ICDS. Therefore, to bring the ICDS with retrospective effect is clearly unjustified especially by giving reasons that many taxpayers would have already complied with the provisions of ICDS. In fact, the judgment of the Court came on 7-11-2017 and most of the Returns whose due date was on 30-11-2017 were pending to be filed. Therefore, those assessees would have followed the Delhi High Court order. Therefore, it is unfair on the part of the Government to bring the amendment with retrospective effect especially when the present Government is strictly not in favour of retrospective amendments. Instead of introducing the amendments with retrospective effect, the Government could have given an option to the assessees to follow the ICDS for the AY 2017-18.

Here it would not be out of context to mention that in case where the amendment is made retrospectively as a result of which the tax liability is arising, the assessee would not be required to pay interest u/s. 234A and 234B of the Act [please see *CIT vs. Glenmark Pharmaceuticals Ltd. - 398 ITR 439 (Bom.)* and *CIT vs. National Dairy Development Board - 397 ITR 543(Guj.)]*

Conclusion

It may be perceived by many that because of the Delhi High Court judgment, the above discussed amendments are proposed in the Finance Bill, 2018 and once the same is passed, there would be no way to wriggle out. Had there been no judgment, the assessees would have had the chance to argue that the judgments would prevail over the notification.

However, it should be made clear that without the judgment of the Delhi High Court, the Government would have come out with many other ICDS to overrule favourable rulings, which is now barred. Litigation to that extent is avoided. In any case the Government was clear that the judgments so overruled were to be shown the door, however, at least the notification route is closed which was much simpler for the Government to come out with, without even the concurrence of the Parliament.

Fill the brain with high thoughts, highest ideals, place them day and night before you, and out of that will come great work.

— *Swami Vivekananda*

 

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Taxation on Conversion of Inventory into Capital Assets, Stamp Duty Valuation and Investment in Bonds as per Section 54EC

By the time this article is published, one would have definitely read and analyzed the budget, and also gauged whether it was a populous budget or was a corrective measure for the nation. Thankfully, the Government was fast enough to react to the concerns raised by various stakeholders, and has issued press releases on certain points to clarify the doubts raised. Hopefully, it would rectify drafting errors in the budget as well. In light of this, let us see as to what the budget has proposed on conversion of inventory into capital assets, property valuations and investment in bonds to claim exemption under section 54EC.

1. Conversion of inventory into Capital Asset

1.1 Amendment to sections 28 and 49 – Conversion of Inventory into Capital Asset

Section 45(2) of the Income-tax Act, 1961 ('Act') provides that gains arising from conversion of a capital asset into stock-in-trade is taxable as capital gains in the year in which the stock-in-trade is sold by an assessee. Thus, the point of taxability is when the assessee ultimately alienates and transfers the asset. However, the extant law does not provide for taxing the reverse situation i.e. conversion of stock-in-trade into capital asset. To cover such situations, concurrent amendments have been introduced to sections 2, 28 and 49 of the Act by the Finance Bill, 2018.

Clause (via) has been introduced to section 28 of the Act, to provide that the fair market value of the inventory/stock-in-trade, as on the date of its conversion or treatment as capital asset shall be chargeable to tax under the head "Profit and Gains of Business or Profession". The fair market value of the inventory, as on the date of conversion, will be determined in the prescribed manner. Parallel amendment has been made to the definition of 'income' in section 2(24) by introducing sub-clause (xiia), to include fair market value of inventory as referred to in section 28(via) of the Act.

Consequent amendments have been brought in for computation of capital gains as well. By virtue of introduction of sub-section 9 to section 49 of the Act, such fair market value will be taken as the cost of acquisition of such converted capital asset. Further, the period of holding of such capital asset will be calculated from the date of such conversion, as per amendment to *Explanation 1* to section 2(42A) of the Act.

These amendments will apply from Assessment Year 2019-20 onwards.

1.2 Taxing Fair Market Value, rather than the Profit / Gains

An anomaly exits in the drafting of section 28(via), which can been seen by simultaneously reading the relevant section in the Finance Bill along with the memorandum to the Finance Bill. While the intent has been to tax the "profits or gains" from the conversion of inventory into capital asset, the Finance Bill, unfortunately, states that the fair market value will be taxed as business profits. Similarly, section 2(24)(xiia) also states that the fair market value of the inventory would be considered as income. To the contrary, section 45(2) states that the profits or gains arising out of conversion of a capital asset into stock-in-trade is taxable as capital gains. Similar wording has not be considered while drafting section 28(via) and section 2(24)(xiia). We apprehend that this inconsistency will probably be rectified in the enacted law.

1.3 Point of Taxation

Another situation where the new provision of section 28(via) differs from section 45(2) is on the time of taxation. Section 45(2) taxes capital gains when the converted asset is finally sold i.e. in the year of transfer, and not in the year in which the capital asset is converted into stock-in-trade. To the contrary, the amended section 28 seems to tax the conversion of inventory into capital asset, in the year of conversion, rather than the year in which the asset is sold.

A conversion of inventory into capital asset or *vice versa*, is actually a transaction with oneself. It is the basic testament of tax law that one cannot earn income from oneself. Hence, the point of taxation should have been when the asset is ultimately alienated / sold/ discarded. Further, taxation at the time of conversion is taxing notional income, which is bound to cause undue financial hardship to an assessee. Without realization of any income, the amendment postulates that tax has to be paid on such estimated income.

The taxation of stock-in-trade, if used for other than to sell, has always been in dispute. Way back in 1953, the Hon'ble Apex Court in the case of *CIT vs. Sir Kikabhai Premchand*[1] had held that usage of stock for personal use cannot be taxed by the Tax Department. In that case, the assessee, a dealer of silver bars and shares had withdrawn some silver bars and shares and settled them in trusts, where he was a beneficiary. The department sought to tax the difference between the fair market value and the cost of purchase of such silver bars and shares. The case was referred to Full Bench of the Hon'ble Supreme Court. The majority view, dismissed the contentions of the Department and held that the Revenue could not assume that all stock had to be sold at the market value and compel the assessee to pay tax on notional gains, in case it is not sold. The Apex Court appreciated the method of accounting and held that when there was no sale of inventory, there cannot be tax on the notional value of transfer. The Court reiterated that there cannot be income earned from oneself and the amendment to section 28 is a blatant contradiction to this. However, Justice N. H. Bhagwati was of the view that even in the case of withdrawal of the asset, the business was entitled to credit in the goods account, the market value of the asset as at the date of its withdrawal, whatever be the method adopted by it for valuation of its stock-in-trade on hand, at the close of a year of account.

One can argue that the amendment i.e. section 28(via) is a deeming fiction and it can tax any

1. [1953] 24 ITR 506 (SC)

notional income. However, deeming fiction cannot be extended to tax a transaction with oneself. Considering the overall structure of the Act, never has there been any deeming fiction extended to transactions with oneself. This is for the first time that such a provision has been introduced to tax a transaction with oneself.

Apart from above, issues may also arise due to different methods of accounting followed by assessees. If the assessee follows mercantile system of accounting, the conversion will attract tax immediately, however, if one follows cash basis of accounting, then one may argue that taxation should be deferred due to application of section 145.

1.4 "Treatment" as a Capital Asset

Apart from including situations where inventory is actually converted into capital asset, the bill also brings into purview situations where inventory is "treated as" a capital asset. However, there is no clarity on when can an inventory be "treated" as capital asset. Will the accounting treatment of inventory in the books of account, or actual usage of stock-in-trade as a capital asset be taken into consideration to understand whether the inventory has been converted into capital asset? The Assessing Officer can always allege that retaining the stock-in-trade for a long duration, amounts to "treating" it as a capital asset. There is ambiguity in this aspect, and one can foretell that disputes are bound to arise while interpreting this clause, based on the facts of the case. What would be the rule of evidence to consider "treatment" as a capital asset is something that could be laid down only by the courts of law.

Consider a situation where an individual assessee withdraws stock-in-trade for his personal purpose. Capital asset is defined in the Act under section 2(14), to include any asset whether or not used for business, but excludes personal effects (except jewellery, work of art etc.). Suppose the assessee deals in an article (other than jewellery, work of art, archeological collection, etc.), and uses it for personal purposes, then the amended section 28(via) may not apply, since it would not be a capital asset. On the other hand, if the assessee was dealing in land or building or any work of art, then personal usage would automatically trigger section 28(via) and tax would be payable.

Gifting, within the purview of section 56(2), of inventory may be considered as sale at "NIL" value, thereby circumventing the application of section 28(via) of the Act. However, an interesting situation will arise in case a stock-in-trade is gifted to the minor child of an individual assessee. Since the gift will actually be transfer at NIL value, it would be reduced from an inventory in the books of the account of the assessee. The said asset, in the hands of the minor child, can be considered as capital asset and applying the provisions of section 47, the cost of acquisition will be the cost at which the assessee had purchased it as inventory and the period of holding in the hands of the minor child will be from the date on which the inventory was purchased by the assessee. The income of the minor child will be clubbed along with the income of the assessee and double benefit may arise to the assessee. However, one will have to keep in mind that the Assessing Officer can always trigger the omnipotent General Anti-Avoidance Rule.

1.5 Fair Market Value

The next ambiguity is the determination of fair market value of the inventory as on the date of conversion. The bill states that the method of determination of fair market value will be prescribed. One will have to wait for further guidance to understand the methodology that will be adopted by the Revenue for determining the fair market value.

One aspect to be considered is the conversion of inventory, which is a depreciable article. Upon conversion into capital asset, the fair market value may be lower than the cost of acquisition and it is possible that such conversion may result in a loss to the assessee. However, an asset, whose value is always appreciating, will lead to income taxable as business profits.

2. Amendment to sections 43CA & 50C – Stamp Duty Valuation

Stamp duty valuation has always been the Income-tax law's Achilles' heel. Section 43CA taxes the difference between the stamp duty value of an immovable property and the actual consideration received on the sale of it, as business profits, if the latter is lower. Further, section 50C also taxes such difference as capital gains in case land or building, being a capital asset, is transferred at a value lower than the stamp duty value. Last year, section 56 was also amended to bring to tax any difference as income from other sources, in case an immovable property is received by any person for a consideration less than the stamp duty value.

However, there were certain instances where stamp duty values varied due to the location of the property or size of the property or nature of property. The Government, as a measure to address practical difficulties, has now amended all the aforementioned sections to allow a 5% variation between the stamp duty value and the actual consideration. In case the stamp duty value does not exceed 105% of the actual consideration, then the difference will not be taxed under sections 43CA, 50C and 56. However, it was judicially held that 10% variation between the stamp duty value and the actual consideration would not trigger rigors of these sections.

This amendment is applicable only from assessment year 2019-20. Being a beneficial provision, this ought to be applied retrospectively and a change to this effect in the enacted law will contribute to reduction in litigation.

3. Amendment to section 54EC – Exemption only on sale of land or building

In another attempt to increase the collection of taxes, the Government has made sweeping amendments to section 54EC. Section 54EC allowed exemption of capital gains arising out of the transfer of any long term capital asset, if the resultant capital gains was invested in long term specified asset for a period of 3 years. These long term specified assets were bonds issued by the National Highways Authority of India and Rural Electrification Corporation Limited. This section was introduced in 2001 and did not see substantive changes, until now. The Finance Bill now seeks to limit the benefit of exemption to only transfer of land or building or both, instead of exempting long term capital gains arising out of any asset. Further, the term for investment of 3 years, has now increased to 5 years. Term 'Land & building' may not include leasehold rights, rights of a buyer of flat under construction, tenancy rights, development rights etc.

4. Conclusion

This budget has been a mixed bag; giving some and taking some, but if one takes an unbiased, pragmatic and rational view, these changes are not revolting or draconian, they are more to do with strengthening the economy and nix tax planning activities. However, in all their well-meaning actions, it appears that the Government has brought in more litigation than necessary.

CA Bhavik B. Shah

Amendments to Provisions related to "Income from Other Sources"

In this article, I propose to deal with the provisions contained in the Finance Bill, 2018 which pertain or relate to provisions under the head "Income from Other Sources".

1. Amendment to section 56(2)(x)(b)

The Parliament introduced a new Clause (x) in section 56(2) in the Finance Act, 2017 replacing sub-clauses (vii) & (viia) commonly referred to as tax on gifts.

Currently, in case where any person receives, in any previous year, from any person or persons any immovable property, –

1. *Without consideration, the stamp duty value of which exceeds fifty thousand rupees, such stamp duty value;*

   (i.e., whole of such 'Stamp Duty Value' of the said property shall be considered as 'Income From Other Sources').

2. *For a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration.*

   (i.e., if difference between 'Stamp Duty Value' and actual consideration is more than ₹ 50,000/-, then whole of such difference shall be considered as 'Income from Other Sources')

There have been several situations where the actual consideration paid is below the stamp duty valuation for various factors. This has caused genuine hardship to the assessees since the Assessing Officers have simply ignored the arguments of the assessee and adopted the stamp duty value and added the difference. It has been held in *ACIT vs. Harpreet Hotels Pvt. Ltd. ITA No. 1156-1160/PN/2007, ITO vs. Kaaddu Jayghosh Appasahebh* and recently Mumbai ITAT in the case of *John Fowler (India) Pvt. Ltd. vs. DCIT ITA No. 7545/Mum/2014,* that difference of up to 10% of sale consideration, between the actual sale consideration and stamp duty valuation should be ignored.

The Finance Bill proposes to substitute Item (B) of Sub-Clause (b) of Clause (x) of Section 56 above as follows:

"(B) for a consideration, the stamp duty value of such property as exceeds such consideration if the amount of such excess is more than the higher of the following amounts, namely:-

(i) The amount of fifty thousand rupees; and

*(ii) The amount equal to **five per cent** of the consideration."*

Accordingly, sub-Clause (b) of Clause (x) of Section 56 will be invoked only in case where:

(a) The value of the property exceeds ₹ 50,000 **and**

(b) The difference between the consideration paid and stamp duty value, exceeds 5% of such consideration paid.

This amendment is in line with the amendments being made to section 50C and section 43CA.

Effective Date:
This amendment is w.e.f. from 1st April 2019 and will accordingly apply in relation to AY 2019-20 and subsequent years.

2. Expanding the scope of taxing payments related to employment – new clause u/s. 56(2)(xi)

Under the existing provisions of the Act the assessing officers have attempted to bring to tax certain types of compensation received by an employee under section 17(3)(iii) under the head 'Income from Salaries'. Whereas, the appellate authorities, in certain cases, have held these receipts to be 'capital' in nature and hence cannot be taxed. Further, in certain cases where employer-employee relationship did not exist at the time of payment of such compensation and hence held that these would not be chargeable to tax under 'Income from Salaries'.

In *CIT vs. Pritam Das Narang (2016) 381 ITR 416 (Del.)* ***a case where there was no commencement of the employment and that the offer by prospective employer to the assessee was withdrawn even prior to the commencement of such employment—Amount received by the assessee was a capital receipt and could not be taxed under the head 'Profits in Lieu of Salary.'***

In *M. G. Mohan Kumar vs. DCIT in ITA No. 981/Bang/2010* the Bangalore ITAT ***a case where the compensation paid by the former employer was all about the future engagement of the assessee to provide its services of knowledge in the airlines business to third party and particularly to the competitor or prospective competitor was not held as 'Profits in Lieu of Salary' u/s. 17(3)(iii).***

In order to overcome all such judicial pronouncements where compensation received has not been charged to tax by the appellate authorities, the Finance Bill proposes to insert a new Sub-Clause (xi) Section 56(2) which provides the chargeability of any compensation or other payment which is received by/due to any person. However, it shall be in connection with the termination or the modifications of the terms and conditions of any contracts which is related to the employment of the person receiving it.

Consequential amendment has also been made to the definition of income u/s. 2(24) wherein a new Sub-Clause (xviib) has been inserted to define the amount specified in newly inserted Sub-Clause (xi) of Section 56(2) as 'Income'.

Henceforth, all payments received by any person which relates to either the termination of his employment or any variation of terms of employment whether capital or revenue would be chargeable to tax.

Effective Date
This amendment is w.e.f. 1st April, 2019 and will accordingly apply in relation to AY 2019-20 and subsequent years.

3. Benefit of NPS withdrawal to non-salary assessee – Amendment to section 10(12A)

Currently, under Clause (12A) of section 10 provides an exemption of up to 40% to an employee contributing to the National Pension Scheme (NPS) on withdrawal from the same at the time of closure of his account or on opting out.

In order to promote the National Pension Scheme and to bring about parity between an employee contributing to the National Pension Scheme and non-employee subscribers it is proposed to amend Clause (12A) of Section 10 by replacing the word ***"employee"*** with the word ***"assessee"***. Henceforth, the benefit of the exemption would be applicable to both employee as well as non-employee subscribers of National Pension Scheme.

Effective Date

This amendment is w.e.f. 1st April, 2019 and will accordingly apply in relation to AY 2019-20 and subsequent years.

4. Clarification in sub-section 2 of section 115BBE

Currently section 115BBE of the Income-tax Act provides for levy of tax at the rate of 60% on income referred to in Clauses (a) & (b) of sub-section (1).

Clause (a) relates to unexplained income referred to section 68, section 69, section 69A, section 69B, section 69C and section 69D of the Act and reflected in the return of income filed u/s. 139(1).

Clause (b) relates to unexplained income referred to in the above sections which have been determined by the assessing officer and not covered under Clause (a) above).

Sub-section (2) starting with a *non-obstante* clause provides that no deduction in respect of any expenses or allowances or set-off of any loss shall be allowed to the assessee under any provision of this Act in computing his income referred to in Clause (a) of sub-section (1) referred to above.

This bar on non-deduction of expenditure or allowance or set-off of any loss was applicable only to Clause (a) and not to Clause (b).

Therefore, in a case where the assessing officer himself charges tax on income referred to in the specified sections (Section 68 to Section 69D), then the assessee was entitled to claim the deductions of expenses or allowances as well as set-off of any loss. This seemed to be an unintentional anomaly.

The amendment in Finance Bill, 2018 seeks to correct this anomaly and hence proposes a retrospective amendment w.e.f. 1st April, 2017 to include income referred to in both Clauses (a) and (b) of sub-section (1) in sub-section (2).

5. 7.75% GOI Savings (Taxable) Bonds, 2018

The Government has introduced a new "7.75% GOI Savings (Taxable) Bonds, 2018" commencing from 10th January, 2018. Investment in this scheme is open only to resident individuals & HUF without any monetary ceiling. The bonds have a maturity period of 7 years. The rate of interest on these bonds is 7.75% and the same is taxable in the hands of the investors.

The Finance Bill proposes that TDS on interest paid/payable on these bonds shall be deductible u/s. 193 at rates in force (presently 10%) if the said interest exceeds ₹ 10,000/-.

Effective Date

This amendment will take effect from 1st April 2018 and is applicable from financial year 2018-19 onwards.

> The highest manifestation of strength is to keep ourselves calm and on our own feet.
>
> — *Swami Vivekananda*

CA Bhadresh Doshi

Taxation of Securities

Much awaited tax on long-term capital gains as indicated by Honourable Prime Minister has finally found its place in this year's budget proposals. It has been stated in the Budget speech that the total amount of exempted capital gains from listed shares and units is around ₹ 3,67,000 crores as per returns filed for A.Y. 2017-18. A modest tax of 10% is proposed to be levied on the long-term capital gains subject to grandfathering of accrued gains up to 31st January, 2018. It is expected to result into a revenue gain of about ₹ 20,000 crores in the first year.

In this article, the provisions proposed in the Finance Bill, 2018 relating to taxation of securities have been analysed in detail.

Reintroduction of tax on long-term capital gains arising from securities

Currently, long-term capital gains arising from transfer of certain securities is exempt under Section 10(38) subject to the conditions specified therein. The exemption is available to the following securities (referred as specified long-term capital assets in this article):

i. Equity share in a company

ii. Unit of an equity oriented fund

iii. Unit of a business trust

The exemption is available subject to the condition that transfer of such assets should be chargeable to Securities Transactions Tax (STT). In order to prevent abuse of exemption by entering into sham transactions, the Finance Act, 2017 imposed an additional condition for claiming exemption in respect of long-term capital gain arising from transfer of equity shares. As per the amended provision, the exemption is available only if the acquisition of equity shares, which were acquired on or after 1-10-2004, was also chargeable to STT. However, this additional condition for claiming exemption is not applicable in respect of certain acquisitions which may be notified for this purpose. Accordingly, a Notification No. 43/2017 dated 5-6-2017 was issued notifying the transactions of acquisition which are eligible for the purpose of exemption under Section 10(38), though not chargeable to STT.

Withdrawal of exemption under Section 10(38)

It has been proposed to withdraw the exemption available under Section 10(38) in respect of transfer of specified long-term capital assets made on or after 1st April, 2018. Thus, the exemption under Section 10(38) will no longer be available in respect of long-term capital gains from A.Y. 2019-20 onwards. The exemption continues to apply in respect of transfers made till 31st March, 2018 subject to fulfilment of relevant conditions.

As a result of withdrawal of exemption which was available hitherto under Section 10(38), the concerned long-term capital gains will now be chargeable to tax under Section 45. However, the assessee can claim exemptions against such long-term capital gains under the applicable provisions like Section 54EE, 54F etc. The loss arising upon transfer of specified long-term capital assets can be set off against any other long-term capital gain or may be carried forward to the subsequent assessment year in accordance with the provisions of Sections 70 & 74 respectively. The set-off of such long-term capital loss may be claimed even against that long-term capital gain which is otherwise taxable at a rate higher than 10%.

New Section 112A – applicability

A new Section 112A is proposed to be inserted in Chapter XII to deal with taxation of such long-term capital gains. The proposed provisions of Section 112A will apply if the following conditions are satisfied –

1. The total income of the assessee includes any income chargeable under the head "capital gains".
2. The capital gains arises from the transfer of a long-term capital asset being –
    a. an equity share in a company
    b. unit of an equity oriented fund
    c. unit of a business trust
3. Securities Transaction Tax has been paid on acquisition and/or transfer of such capital asset as mentioned below:

Type of Capital Asset	Whether STT should have been paid on acquisition?	Whether STT should have been paid on transfer?*
Equity shares	'	'
– Acquisitions covered by a notification	No	Yes
– Other acquisitions	Yes	Yes
Units of equity oriented fund or units of business trust	No	Yes

* If the transfer has taken place on a recognised stock exchange located in any International Financial Services Centre and the consideration is received / receivable in foreign currency, then payment of STT on transfer is not required.

Thus, in substance, the provisions of Section 112A will apply to that long-term capital gain which was hitherto exempt under Section 10(38). The condition of payment of STT on acquisition of equity shares is also retained in the proposed provisions of Section 112A subject to the exceptions to be notified for this purpose. It is clarified in FAQ[1] that the same notification, which has been issued under Section 10(38), is proposed to be reiterated for the

1. FAQ issued by CBDT dated 4th February, 2018 (F. No. 370149/20/2018-TPL)

purposes of new provisions of Section 112A after its enactment.

Section 10(38) expressly provides that the condition of payment of STT on acquisition is applicable only in respect of those equity shares which have been acquired on or after 1st October, 2004 i.e., the date on which STT came into force. Section 112A does not provide so expressly. However, it is but obvious that this condition should be read with the relevant provisions of Chapter VII of the Finance (No. 2) Act, 2004 which came into force from 1st October, 2004 only. If STT itself was not applicable prior to 1st October, 2004, the condition of payment of STT on acquisition cannot be made applicable to equity shares acquired before 1st October, 2004. This view is further fortified from the clarifications issued *vide* FAQ which clearly provides that STT is required to be paid even at the time of acquisition in case of equity shares acquired on or after 1-10-2004.

The definition of "equity oriented fund" is proposed to be amended for the purpose of Section 112A. As per the new definition, a fund which invests in another fund is also included in it provided it satisfies the following conditions –

i. Minimum 90% of the total proceeds of such fund is invested in the units of another fund which is traded on a recognised stock exchange; and

ii. Such other fund also invests a minimum of 90% of its total proceeds in the equity shares of domestic companies listed on a recognised stock exchange

Consequential amendments have also been proposed in the Finance (No. 2) Act, 2004 in order to bring sale of units of such fund within the chargeability of STT. Accordingly, sale of units of such fund would be chargeable to STT with effect from 1st April, 2018.

The provisions of Section 2(42A) which defines a "short-term capital asset" still refer to the old definition of "equity oriented fund" as provided in Section 10(38). Therefore, units of such fund which invests in another fund are required to be held for more than 36 months in order to be qualified as long-term capital assets unless suitable amendments have been made in Section 2(42A).

Impact of Section 112A on computation of long-term capital gains

Section 112A not only provides for computation of tax on the long-term capital gains but also provides for computation of long-term capital gains in a specified manner. The long-term capital gains to which Section 112A applies is required to be computed as per the normal provisions but subject to the following modifications –

i. The benefit of indexation as provided in the second proviso to Section 48 will not be allowed.

ii. The benefit of computation of capital gains in foreign currency in the case of a non-resident as provided in the first proviso to Section 48 will also not be allowed.

However, a non-resident Indian following special provisions of Chapter XII-A may compute the long-term capital gains in accordance with the first proviso to Section 48 and pay tax on it @10% under Section 115E[2].

2. But without considering Fair Market Value as provided in point (iii) below.

iii. In a case where the long-term capital asset is acquired by the assessee before 1st February, 2018, its cost of acquisition will be –

Higher of –	the actual cost of acquisition; and
	the lower of – a) the fair market value; and b) the full value of consideration received or accruing as a result of the transfer of such asset

The fair market value for this purpose will be determined as follows:

Type of capital assets	**Fair market value**
Capital assets which are listed on any recognised stock exchange and also traded on 31-1-2018	Highest price quoted on 31-1-2018
Capital assets which are listed on any recognised stock exchange but not traded on 31-1-2018	Highest price on a date immediately preceding 31-1-2018 when such asset was traded
Units which are not listed on any recognised stock exchange	NAV as on 31-1-2018

The impact of this adjustment can be understood with the help of following illustration:

Actual cost of acquisition	100	100	100	100	100	100
FMV as on 31-1-2018	130	130	130	70	70	70
Full value of consideration	150	120	90	120	90	50
Total Gain	50	20	(10)	20	(10)	(50)
Taxable Gain	20	–	(10)	20	(10)	(50)
Non-taxable Gain*	30	20	–	–	–	–

* It may be noted that this amount of capital gains is not exempt but not chargeable to tax because of the computation mechanism provided in Section 112A.

Thus, the gain due to appreciation in market price upto 31-1-2018 is not taxable. However, the loss due to depreciation in market price up to 31-1-2018 is protected and allowed to be claimed to the extent it has been actually incurred at the time of sale.

This mechanism of computing the cost of acquisition is applicable even in cases where the long-term capital asset has been acquired by way of bonus or in rights issue if they were acquired prior to 1st February, 2018.

This benefit of cost step-up is available only when the long-term capital asset is *acquired by the assessee before 1st February, 2018*. The issue may arise in getting this benefit in case where the 'previous owner' [referred to in Section 49(1)] has acquired such asset before that date but the assessee has acquired it subsequently and such other like cases. One will have to extend the principles as laid down by various Courts with regard to the indexation in respect of capital assets acquired by the modes specified under Section 49(1) and claim that reference to the assessee should include reference to the previous owner as well.

The actual cost of acquisition for this purpose should be computed in accordance with the applicable provisions. Thus, in respect of the assets acquired before 1st April, 2001, the fair market value of that asset as on 1st April, 2001 may be considered as actual cost of acquisition for the purpose of computing final cost of acquisition in the manner as provided above.

The moot question here is whether the computation mechanism as provided in Section 112A shall apply only if the tax is required to be computed on such long-term capital gains as it forms part of the total income or even otherwise. To understand the issue, let us assume that the long-term capital gains arising on transfer of equity share, if computed without indexation, is ₹ 2,00,000. However, it results into a long-term capital loss of ₹ 1,00,000 if it is computed after reducing the indexed cost of acquisition. Can the assessee claim set-off of loss of ₹ 1,00,000 against other long-term capital gains in accordance with the provisions of Section 70 or he has to compute the long-term capital gains in accordance with the provisions of Section 112A mandatorily?

Section 112A is proposed to be inserted in Chapter XII which is titled as "Determination of tax in certain special cases". Section 112A itself is also titled as "Tax on long-term capital gains in certain cases". It provides for determination of tax on such long-term capital gains which is included in the total income. This is clear from the reading of sub-section (1) of Section 112A. Therefore, the total income is required to be computed first as per the other provisions of the Act before applying the provisions of Section 112A. While computing the total income, due effect has to be given to all the provisions applicable for computation of long-term capital gains like Sections 48, 70 etc. It is only after computing the total income, one needs to see whether it includes the long-term capital gains as referred to in Section 112A(1). The question of applying provisions of Section 112A would arise only if the total income includes such long-term capital gains and not otherwise.

As per another view, the computation mechanism as explained above is provided in sub-sections (5) and (6) of Section 112A. Their application is not dependent upon applicability of sub-section (1) of Section 112A. Therefore, the long-term capital gains which satisfies the conditions of sub-section (1) is required to be computed always in accordance with the said provisions. This view appears to have more weightage as compared to the first view.

Like any other long-term capital gains, deduction under Chapter VI-A shall also not be available against the long-term capital gains to which Section 112A is applicable.

Impact of Section 112A on computation of tax long-term capital gains

Generally, tax on long-term capital gains is required to be computed in the manner laid down in Section 112. However, Section 112A provides for an exception to it in respect of long-term capital gains as mentioned above.

Sub-section (2) of Section 112A provides that the tax payable by the assessee shall be the aggregate of –

i. *the amount of income-tax calculated on such long-term capital gains exceeding ₹ 1,00,000 at the rate of 10%; and*

ii. *the amount of income-tax payable on the balance amount of the total income as if such balance amount were the total income of the assessee.*

It may first be noted that the amount of long-term capital gains is required to be included in the total income of the assessee irrespective of whether it exceeds ₹ 1,00,000 or not. Thus, the total income of the assessee, for all purposes like levy of surcharge, availability of rebate under Section 87A etc., will include the entire amount of long-term capital gains to which Section 112A applies. It is only when the tax is computed the amount of long-term capital gains will be relevant.

The long-term capital gains computed in the manner provided in Section 112A exceeding ₹ 1,00,000 is taxable @10% plus surcharge as applicable, if any, and plus cess @4%. Though the intention appears to not tax long-term capital gains up to ₹ 1,00,000 at all, the language used in the proposed provision creates confusion with respect to its taxability. Clause (ii) as reproduced above refers to "the balance amount of the total income" which may be interpreted as including the long-term capital gains up to ₹ 1,00,000 on which tax is not computed as per clause (i). Section 115BBDA provides for similar computation of tax on dividends exceeding ₹ 10,00,000. There, clause (b) of sub-section (1) of that Section expressly provides for computation of tax on the total income as reduced by the amount of dividends. Had the proposed provision of Section 112A used similar terminology, this confusion would not have arisen. Hoping that suitable amendment will be carried out to the Finance Bill avoiding such an interpretation, a small relief would be available for the long-term capital gains up to ₹ 1,00,000.

In case of resident individual or HUF, if their other income is below the maximum amount which is not chargeable to tax, then the long-term capital gains will be reduced by such balance amount. The tax will be computed only on the balance amount of long-term capital gains in the manner as explained above.

Further, it has been proposed that rebate under Section 87A shall not be allowed from the tax payable on the long-term capital gains as per Section 112A.

The provisions of MAT under Section 115JB continue to apply to such long-term capital gains. Also, in cases where the provisions of AMT under Section 115JC are applicable[3], the tax is required to be computed @18.5% even in respect of long-term capital gains which forms part of adjusted total income. This would result into undue hardships in such cases.

Taxability of long-term capital gains in the hands of FII

As a result of withdrawal of exemption under Section 10(38), the long-term capital gains become taxable even in case of a Foreign Institutional Investor (now referred as Foreign Portfolio Investor). In order to extend similar tax treatment of such long-term capital gains, Section 115AD is proposed to be amended to provide that long-term capital gains referred to in Section 112A exceeding ₹ 1,00,000 shall be taxed @10%.

The doubt was raised regarding grandfathering of gains up to 31st January, 2018 in case of FII as the corresponding provision allowing substitution of FMV over the actual cost of acquisition was not incorporated in Section 115AD. However, it is clarified in FAQ that there will be no tax on gains accrued up to 31st January, 2018 in case of FIIs also. Thus, it is hoped that the provisions of Section 115AD will be modified suitably.

Requirement to deduct tax at source

It has been clarified in FAQ that tax is required to be deducted at source in

3. Non-corporate assessees claiming certain deductions as specified in Section 115JEE

accordance with the provisions of Section 195 where the long-term capital gains has accrued to the non-resident assessee. Accordingly, rate of deduction has been prescribed in Part-II of the First Schedule to the Finance Act which is 10%. For this purpose, the capital gains will be required to be computed in accordance with Section 112A. However, there will be no deduction of tax at source from payment of long-term capital gains to a Foreign Institutional Investor in view of the provisions of Section 196D(2).

Impact of non-applicability of Section 112A

If the provisions of Section 112A are not applicable due to violation of any condition specified therein, then the long-term capital gains will be computed in accordance with the normal provisions and will be taxed in accordance with the provisions of Section 112. For instance, the listed equity shares have been sold off-market (without paying STT). In such case, the assessee may apply Proviso to Section 112 and compute the tax @10% of long-term capital gains without applying second proviso to Section 48 i.e., indexation. However, the assessee will not be able to compute the cost of acquisition in the manner provided in Section 112A in respect of assets acquired before 1st February, 2018.

Introduction of distribution tax in case of Equity Oriented Fund

Section 115R provides for tax on income distributed by the mutual funds. Currently, distribution of income by equity oriented fund is not chargeable to distribution tax under this Section.

It is proposed to levy tax @10%[4] on income distributed by an equity oriented fund to any person with effect from 1st April, 2018. The justification for levy of such tax as explained in the Memorandum is that it is necessary to provide a level playing field between growth oriented funds and dividend paying funds, in the wake of new capital gains tax regime for unit holders of equity oriented funds. For this purpose, equity oriented fund will have the same meaning assigned to it in the new section 112A as explained above. Thus, it will also include the fund which invests in another fund and satisfies the other conditions.

The tax is required to be paid on the entire amount of the income distributed without reducing it by the amount of dividend which the fund might have received from the investee companies. Thus, it will result into a cascading effect of distribution tax.

Extension of DDT to deemed dividend under Section 2(22)(e)

The loans or advances granted by a closely held company to certain shareholders or concerns wherein such shareholders have a substantial interest are considered as deemed dividend as per sub-clause (e) of Section 2(22). Presently, such deemed dividend referred to in Section 2(22)(e) is not subject to Dividend Distribution Tax (DDT) under Section 115-O and is taxable in the hands shareholder/recipient at the applicable rate.

Recently, Supreme Court has dealt with several issues regarding taxability of such deemed dividend like applicability of provision where the shares were issued in the name of Karta of HUF[5] and the person who should be taxed in case where loan was given to the concern in which the shareholder had the substantial interest[6]. Considering such extensive litigation with regard to taxability of deemed dividend under Section 2(22)(e), it is proposed to shift the burden of tax on

4. The effective rate will be 11.648% after adding surcharge and cess
5. Gopal & Sons (HUF) vs. CIT
6. CIT vs. Madhur Housing & Development Co.

it to the company in the form of DDT. The following amendments have been proposed with effect from 1st April, 2018 in this regard:

1. The definition of "dividend" in the Explanation below Section 115Q which referred in turn to Section 2(22) but other than its sub-clause (e) has been omitted. Thus, all types of dividends including deemed dividend falling under sub-clause (e) of Section 2(22) shall be subject to additional tax under Section 115-O.
2. The DDT @30%[7] is payable on such deemed dividend under Section 2(22)(e) but without grossing up.

Such deemed dividend will be exempt under Section 10(34). Further, provisions of Section 115BBDA are not applicable to deemed dividend falling under sub-clause (e) of Section 2(22).

The DDT is required to be paid within fourteen days from the date of payment of deemed dividend. In case of delay in making payment, the interest shall be charged @1% per month or part of month for the period of delay in making the payment. Further, if DDT is not paid in accordance with the provisions of Section 115-O, then the company and its principal officer shall be deemed to be the assessee in default. In such case, penalty may be levied under Section 221 and prosecution may also be launched under Section 276B.

'Accumulated Profits' in case of amalgamation

The distribution made by the company can be regarded as dividend as per Section 2(22) only if the company possesses 'accumulated profits'. In case of amalgamation, in several cases, the accumulated profits of the amalgamating company were converted into the capital of the amalgamated company. In such cases, subsequent reduction of capital of the amalgamated company did not result into 'deemed dividend' with respect to the payout from the accumulated profits of the amalgamating company as the same were converted into the capital. In order to prevent such abusive arrangements, it is proposed to widen the scope of the term 'accumulated profits' by inserting Explanation 2A so as to provide that in the case of an amalgamated company, accumulated profits, whether capitalised or not, or losses as the case may be, shall be increased by the accumulated profits of the amalgamating company, whether capitalised or not, on the date of amalgamation. This amendment is effective from A.Y. 2018-19 onwards.

Exclusion of agricultural commodities derivatives from 'speculative transaction'

Presently, the transaction in respect of trading in commodity derivatives carried out in a recognised association is excluded from the definition of 'speculative transaction' as per Section 43(5) subject to fulfilment of several conditions. However, such exclusion is applicable only if such transaction is chargeable to Commodities Transaction Tax (CTT). The CTT as introduced by the Finance Act, 2013 is applicable to transaction of sale of commodity derivatives in respect of all commodities but other than agricultural commodities. Since derivative contracts in agricultural commodities are not subject to CTT, they are not eligible for exclusion from 'speculative transaction' as provided in Section 43(5).

It is proposed to amend Section 43(5) to remove the condition of chargeability of CTT in respect of trading in agricultural commodity derivatives. Thus, trading in agricultural commodity derivatives will no more be regarded as 'speculative transaction' if it is an 'eligible transaction' otherwise and carried out in a 'recognised association'. This amendment is effective from A.Y. 2019-20.

7. The effective rate will be 34.944% after adding surcharge and cess

CA Viraj Mehta

Amendments relating to Assessment, Appeals, Penalty & Prosecution

Clasue 42 – Amendment to Section 139A of Income-tax Act, 1961 ('the Act') – Permanent Account Number (PAN) Mandatory for certain cases

Section 139A provides that every person specified therein shall apply to the Assessing Officer for allotment of a PAN.

Finance Bill, 2018 has proposed to extend the said requirement of PAN by virtue of clause (v) of Section 139A(1) of the Act to every person (not being an individual) which will enter into a financial transaction of an amount of ₹ 2,50,000/- or more in a financial year.

Further, by virtue of clause (vi) of Section 139A(1) of the Act it is also proposed that managing director, director, partner, trustee, author, founder, karta, chief executive officer, principal officer or office bearer or any person competent to act on behalf of above entities referred in clause (v) of Section 139A(1) of the Act shall also apply to the Assessing Officer for allotment of PAN.

Application of PAN shall be governed by Rule 114 of Income Tax Rules, 1962.

Financial Transaction has not been defined in Section 139A of the Act.

This amendment will take effect from 1st April, 2018.

Clause 43 – Amendment to Section 140 of Income-tax Act, 1961 ('the Act') – Return to be verified by whom where an application for insolvency has been admitted under Insolvency and Bankruptcy Code, 2016

Finance Bill, 2018 has proposed to amend section 140 of the Act by virtue of insertion of clause (c) to second proviso so as to provide that where for a company an application for corporate insolvency resolution process has been admitted by Adjudicating Authority under Section 7 or Section 9 or Section 10 of the Insolvency and Bankruptcy Code, 2016 then the return shall be verified by an Insolvency Professional appointed by the Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016.

For the meaning of 'Adjudicating Authority' and 'Insolvency Professional', reference be made to relevant provisions of Insolvency and Bankruptcy Code, 2016.

This amendment will take effect from 1st April, 2018 and will, accordingly apply to return filed on or after the said date.

Clause 44 – Amendment to Section 143(1) of Income-tax Act, 1961 ('the Act') – Rationalisation of *prima facie* adjustments

To restrict the scope of adjustment u/s. 143(1) of the Act, Finance Bill, 2018 has proposed to insert a proviso to section 143(1)(a) that provides that no adjustment shall be made under sub-clause (vi) while processing the return of income i.e. no addition shall be made to income appearing in Form 26AS or

Form 16A or Form 16 which has not been included in computing the total income in the return by the assessee.

This amendment will take effect from 1st April, 2018 and will, accordingly, apply in relation to the assessment years 2018-19 and subsequent years.

Clause 44 – Insertion of New Sections – 143(3A), 143(3B) and 143(3C) of Income-tax Act, 1961 ('the Act') – New Scheme for Scrutiny Assessment

Since year 2014 when Modi Government came into power, Government intended to bring transparency and accountability and further eliminate corruption in Income Tax Proceedings. In year 2016, CBDT initiated the concept of using e-mail-based communication for paperless scrutiny proceedings. It was decided to launch a pilot project, comprising non-corporate taxpayers in 5 cities, namely, Delhi, Mumbai, Bengaluru, Ahmedabad and Chennai. Few taxpayers would be identified in each of the cities from the cases which have been selected for scrutiny and with the consent of the selected taxpayers, tax officials would conduct the e-hearing through e-mails. The initiative was launched to reduce visits by taxpayers to I-T offices and their interface with the taxman, thereby curbing corruption.

On 29th September, 2017, CBDT issued Instruction No.8/2017 to conduct assessment proceedings electronically getting time barred during FY 2017-18. It said that as a part of Government's initiative towards E-governance, Income-tax Department has brought digital transformation of its business processes to a significant extent through the Income Tax Business Application (lTBA) project which provides an integrated platform to conduct various tax proceedings electronically through the 'e-Proceeding' facility available on it. CBDT has decided to utilize the digital platform in a widespread manner for conduct of proceedings in scrutiny cases electronically.

Further, Government's intention to roll out a pan-India "faceless and nameless" e-assessment procedure for income taxpayers was further confirmed in December 2017 when CBDT notified a nine-member committee–headed by a Principal Chief Commissioner rank officer and set for it a deadline of February 28, 2018, for submitting its report on concept of a faceless and nameless e-assessment procedure.

In lines of above, Hon'ble Finance Minister Mr. Arun Jaitley in its Union Budget 2018-19 speech stated as hereunder:

"We had introduced e-assessment in 2016 on a pilot basis and in 2017, extended it to 102 cities with the objective of reducing the interface between the department and the taxpayers. With the experience gained so far, we are now ready to roll out the E-assessment across the country, which will transform the age-old assessment procedure of the income tax department and the manner in which they interact with taxpayers and other stakeholders. Accordingly, I propose to amend the Income-tax Act to notify a new scheme for assessment where the assessment will be done in electronic mode which will almost eliminate person to person contact leading to greater efficiency and transparency."

Accordingly, Finance Bill, 2018 proposed to prescribe a new scheme for the purpose of making assessments so as to impart greater transparency and accountability, by eliminating the interface between the Assessing Officer and the assessee, optimal utilization of the resources, and introduction of team-based assessment.

New section 143(3A) of the Act states that the Central Government by way of notification in the Official Gazette may make a scheme, for the purposes of making assessment of total income or loss of the assessee under sub-section (3) so as to impart greater efficiency, transparency and accountability by—

(a) Eliminating the interface between the Assessing Officer and the assessee in the course of proceedings to the extent technologically feasible;

(b) Optimising utilisation of the resources through economies of scale and functional specialisation;

(c) Introducing a team-based assessment with dynamic jurisdiction.

It is further proposed to insert sub-section (3B) in the said section, enabling the Central Government to direct, by notification in the Official Gazette, that any of the provisions of this Act relating to assessment shall not apply, or shall apply with such exceptions, modifications and adaptations as may be specified therein. However, no such direction shall be issued after the 31st March, 2020.

It is also proposed to insert sub-section (3C) in the said section, to provide that every notification issued under the sub-section (3A) and sub-section (3B), shall be laid before each House of Parliament.

However, we will have to wait for the blue print of the scheme which the Government would come out with to attain its object of faceless, nameless, paperless and jurisdictionless assessments under the Income Tax law and would bring greater efficiency, transparency and accountability in the system.

Clause 50 – Amendment to Section 253 of Income-tax Act, 1961 ('the Act') – Appeal against penalty imposed u/s. 271J of the Act

Section 253 of the Act *inter alia* provides that any assessee aggrieved by any of the orders mentioned in sub-section (1) of the said section may appeal to the Appellate Tribunal against such order.

Finance Bill, 2018 has proposed to amend clause (a) of the said sub-section so as to also make an order passed by a Commissioner (Appeals) under section 271J appealable before the Appellate Tribunal.

Section 271J of the Act *inter alia* provides for levying penalty for furnishing incorrect information in any report or certificate furnished under the provision of this Act or Rules by an accountant or a merchant banker or a registered valuer.

This amendment will take effect from 1st April, 2018.

Clause 51 – Amendment to Section 271FA of Income-tax Act, 1961 ('the Act')

Section 271FA of the Act provides that if a person who is required to furnish the statement of financial transaction or reportable account under sub-section (1) of section 285BA, fails to furnish such statement within the prescribed time, he shall be liable to pay penalty of one hundred rupees for every day of default.

The proviso to the said section further provides that in case such person fails to furnish the statement of financial transaction or reportable account within the period specified in the notice issued under sub-section (5) of section 285BA, he shall be liable to pay penalty of five hundred rupees for every day of default.

In order to ensure compliance of the reporting obligations under section 285BA, it is proposed to amend the section 271FA so as to increase the penalty leviable from one hundred rupees to five hundred rupees and from five hundred rupees to one thousand rupees, for each day of continuing default.

These amendments will take effect from 1st April, 2018.

Clause 52 – Amendment to Section 276CC of Income-tax Act, 1961 ('the Act')

Section 276CC of the Act provides that if a person wilfully fails to furnish in due time the return of income which he is required to furnish, he shall be punishable with imprisonment for a term, as specified therein, with fine. The sub-clause (b) of clause (ii) of proviso to the section 276CC further provides that a person shall not be proceeded against under the said section for failure to furnish return for any assessment year commencing on or after the 1st day of April, 1975, if the tax payable by him on the total income determined on regular assessment as reduced by the advance tax, if any, paid and any tax deducted at source, does not exceed three thousand rupees.

In order to prevent abuse of the said proviso by shell companies or by companies holding Benami properties, it is proposed to amend the provisions of the said sub-clause so as to provide that the said sub-clause shall not apply in respect of a company.

This amendment will take effect from 1st April, 2018.

CA Namrata Dedhia

Proposals on International Taxation and Transfer Pricing

The Union Budget 2018-19 was the last full budget before the upcoming general elections in 2019 and hence, was awaited with baited breath. While there were no populist proposals as was expected from an "election budget", there have been several key changes, especially on a policy level. Interestingly, a few proposals have also been introduced to prepare for alignment of the domestic tax provisions with global developments in international taxation such as Base Erosion and Profit Shifting ('BEPS') and Multilateral Instruments ('MLI'), which have been pro-actively adopted by India. However, there have not been any significant proposals in connection with the Transfer Pricing regulations, except for streamlining provisions relating to Country-by-Country Report ('CbCR').

This article deals with the proposals of the Finance Bill pertaining to International Taxation and Transfer Pricing. These proposed amendments dealt with in this article will be effective from AY 2019-20 unless mentioned otherwise.

A] Proposals relating to International Taxation

1. Expansion of scope of Dependent Agent Business Connection

Existing provisions

As per Section 9(1)(i), non-residents can be taxed in India in respect of their business income, if they have a business connection in India, to the extent of profits attributable to such business connection. Business connection includes business activity carried out through a dependent agent, who, *inter alia*, has and habitually exercises in India, the authority to conclude contracts on behalf of the non-resident, except where the activities are limited to purchase of goods.

Proposed amendment

Clause (a) of Explanation 2 to section 9(1)(i) is proposed to be substituted to provide that business connection will exist even in case of a dependent agent, who habitually plays the principal role leading to conclusion of contracts by the non-resident, where such contracts are in the name of the non-resident; or for transfer of ownership of or for granting the right to use the property of which the non-resident is the owner or has right to use; or for provision of services by the non-resident.

Rationale

Often, the affairs of non-residents and their agents in India are organised as commissionaire arrangements, whereby the agent carries out all activities including negotiations on behalf of the non-resident, but the contract is concluded by the non-resident outside India. Such arrangements remain outside the scope of a dependent agent business connection and are thus, not liable to tax in India even though substantial activities are undertaken in India. The proposed amendment seeks to widen the meaning of business connection to include such situations where significant activities prior to conclusion of a contract are carried out by the agent without concluding the contract, so as to avoid creation of a business connection.

Notably, the concept of Permanent Establishment ('PE') as per Article 5 of Double Tax Avoidance Agreements ('DTAA'), so far as a dependent agent is concerned, is broadly similar to the existing scope of business connection. The DTAAs will be modified pursuant to the MLI signed by India, resulting in a much wider scope of PE as per the DTAA. This would however, be rendered redundant if the narrower definition of dependent agent business connection under the domestic law continues since under section 90(2), the assessee would be able to apply the more beneficial provisions of the Act. The aforesaid budget proposal aims to prepare the domestic law for the anticipated modifications in the DTAA.

Analysis

Artificial avoidance of PE status is a matter of concern globally and forms the subject-matter of BEPS Action Plan 7. Circumvention of the existing PE definition by entering into commissionaire arrangements is an acknowledged avoidance measure. Further, avoidance is also resorted to by artificially splitting contracts to take advantage of the exclusion from PE in case of preparatory and auxiliary activities such as use of facilities or maintenance of stock solely for storage, display or occasional delivery of goods; maintenance of stock for processing by another entity; purchasing of goods or collection of information, etc. Both these are addressed in the recommendations of BEPS Action Plan 7, which are now a part of Article 12 of the MLI. To address the fragmentation of activities, Paragraph 4.1 introduced in Article 5 of the OECD Model Tax Convention states that the exclusion pertaining to preparatory and auxiliary activities shall not apply the same enterprise or its closely related enterprise carries on business in the other State through a PE or the combination of activities carried out by the same enterprise or along with its closely related enterprise is not preparatory or auxiliary in nature. Consequently, only intentional fragmentation of activities is targeted, while activities which are genuinely of a preparatory or auxiliary character will not be affected.

However, the proposed amendment under the Income-tax Act, 1961 ('Act') not only provides for dealing with agency structures where conclusion of contracts is deliberately avoided, but also deletes the phrase "unless his activities are limited to the purchase of goods or merchandise for the non-resident" from clause (a) of Explanation 2. Consequently, in the absence of any specific exclusion for preparatory or auxiliary activities under the Act, the limited exclusion available to purchasing activity will also be done away with. This will result in a much wider scope of business connection and will impact transactions with non-treaty countries.

2. Significant Economic Presence to constitute Business Connection

Existing provisions

The present concept of business connection focuses largely on physical presence of the non-resident in India, to tax the business profits of such non-resident.

Proposed amendment

Explanation 2A is proposed to be added to Section 9(1)(i) to provide that business connection shall include significant economic presence ('SEP') in India, which means –

a) Transaction in respect of any goods, service or property carried out by the non-resident in India, including provision of download of data or software in India, provided the aggregate payments during a previous year, arising from such transactions exceed the prescribed limit, or

b) Systematic and continuous soliciting of business or engaging in interaction with prescribed number of users, in India through digital means.

SEP shall be constituted even if the non-resident does not have a residence or place of business in India or does not render any service in India. Further, only income attributable to the aforesaid transactions or activities shall be deemed to accrue or arise in India.

Rationale

With the advent of technology and digital means of doing business, physical presence in a territory is no longer necessary to do business. This defeats the very basis of business connection as well as PE, which largely rely on the physical nexus to tax business profits. Acting on one of the recommendations of the BEPS Action Plan 1, the proposed amendment seeks to address this by tapping into "significant economic presence" of digital businesses in India, which exists by way of transactions carried out in India, download of data or software in India, solicitation of business or user interactions.

Analysis

BEPS Action Plan 1 on Taxation of Digital Economy has suggested taxation based on a new nexus that hinges on the concept of SEP as one of the approaches to meet the challenges put forth by digitization of businesses. This approach, however, could present several implementation challenges such as determining when are transactions "carried out" in India, determining the appropriate threshold, tracking activities of user interaction which does not culminate into any transaction, determination of income attributable to the SEP, etc.

It is pertinent to note that Equalisation Levy ('EL'), which was introduced on certain specified services by Chapter VIII of Finance Act, 2016, was also an alternate approach suggested by BEPS Action Plan 1 to address the same issue. EL was brought in as a separate tax outside the ambit of the Act, with a corresponding exemption under section 10(50) of the Act in respect of income arising from specified services, which are chargeable to EL. This ensured that no treaty benefits can be availed in case of such specified services, thereby, making it a unilateral levy. Interestingly, the amendment proposed is not by way of expansion of scope of specified services chargeable to EL, but instead, it seeks to widen the meaning of business connection. Consequently, till such time that the DTAAs entered into by India are not renegotiated to incorporate similar provisions in the PE Article, non-residents would be able to apply the more beneficial provisions of the applicable DTAAs. This has also been acknowledged in the memorandum explaining the Finance Bill, 2018.

While the SEP test has been introduced with the intention to bring into the tax net non-residents who have a digital presence but not a physical presence in India, the proposed amendment seeks to include transaction in respect of *any goods, service or property* carried out by the non-resident in India. The provision could, thus, potentially apply to any transactions, whether or not carried out digitally.

3. Exemption for Royalty and Fees for Technical Services in certain cases

Proposed amendment

New sub-section (6D) is proposed to be introduced in section 10 to exempt income in the nature of Royalty or Fees for Technical Services received by a non-resident or a foreign company, from National Technical Research Organisation ('NTRO').

Rationale

The NTRO is a technical intelligence agency under the National Security Advisor. The proposed amendment is introduced considering business exigencies of the NTRO. As a result, the NTRO will not be liable to deduct tax at source on such payments.

This amendment will be effective retrospectively from AY 2018-19 onwards.

4. Exemption for Royalty and Fees for Technical Services in certain cases

Existing provisions

Section 10(48B), introduced by Finance Act, 2017, provides exemption to income of a foreign company from sale of remaining stock of crude oil from its Indian facility, pursuant to expiry of notified agreement or arrangement entered into by such foreign company with the Central Government for storage and sale of crude oil.

Proposed amendment

The aforesaid section is now proposed to be amended to extend the exemption to income arising from sale of leftover crude oil in case of termination of the said agreement or arrangement.

Rationale

The agreements and arrangements referred to above are entered into by the Central Government to build up its petroleum reserves and are strategic in nature. In view of this, income from sale of crude oil while the agreement is still in force or upon expiry of the agreement is exempt from income-tax. However, income arising from sale of crude oil upon termination is not presently exempt, resulting in an inequitable treatment of such income, which the proposed amendment seeks to address.

5. Transfer of certain capital assets by Non-residents

Existing provisions

Section 47 of the Act provides tax neutrality to several transfers, upon satisfaction of specified conditions. *Inter alia*, it covers transactions of transfer of bonds, Global Depository Receipts referred to in Section 115AC(1), rupee denominated bonds of Indian companies issued outside India or certain Government securities, provided such transfers are made by a non-resident to another non-resident outside India.

Proposed amendment

New clause (viiab) is proposed to be introduced in section 47 to provide tax neutrality to the transfer of a capital asset, being bond or Global Depository Receipt referred to in Section 115AC(1), rupee denominated bond of an Indian company or derivatives, provided –

i) The transfer is made by a non-resident on a recognized stock exchange located in any International Financial Services Centre ('IFSC'), and

ii) The consideration for such transaction is paid in foreign currency.

The terms "International Financial Services Centre", "recognized stock exchange" and "derivative" have been defined for the purpose of this clause.

Rationale

Recent years have seen efforts to establish IFSCs in India to improve the financial infrastructure and encourage participation of non-residents in finance, financial products and services. In order to give an impetus to IFSC, it is proposed that transactions in certain assets undertaken by non-residents on a recognized stock exchange located in an IFSC, which is settled in foreign currency, shall not be considered as transfers. Consequently, such transactions shall not be liable to tax on the capital gains arising therefrom.

6. Rationalisation of provisions relating to Authority for Advance Rulings

Existing provisions

Section 245O lays down the constitution of Authority for Advance Rulings ('AAR') to deal with applications for advance rulings made under section 245Q. The AAR is presently empowered to deal with applications for advance rulings pertaining to matters under the Act or under Customs Act or under Excise Act or under Service Tax provisions contained in the Finance Act, 1994. Also, a revenue member from either the IRS or ICCES can be appointed as a revenue member of the AAR, irrespective of the matter on hand.

Proposed amendment

It is now proposed to provide that from the date of appointment of a new Customs Authority for Advance Ruling ('Customs AAR'), the AAR under section 245O of the Act shall not act as AAR for the purposes of Customs Act. It shall, however, act as the appellate authority for the purpose of Chapter V of the Customs Act.

Further, it is provided that in case of an application for advance ruling pertaining to any matter under the Act, only a revenue member from the IRS can be appointed as a revenue member of the AAR.

Rationale

A new Customs AAR is proposed to be set up under section 28EA of the Customs Act to deal with application for advance ruling under the Customs Act. Accordingly, to address the overlapping jurisdiction, the powers of AAR under section 245O of the Act are curtailed to that extent and replaced with powers to act as an Appellate Authority, from the date of appointment of the Customs AAR.

This amendment will be effective from 1st April, 2018.

7. Applicability of MAT to certain foreign companies

Existing provisions

Currently, MAT provisions apply uniformly to all foreign companies, except, those who are residents of countries with whom India has entered into a DTAA and who do not have any PE in India, or those who are residents of countries with whom India does not have a DTAA.

Proposed amendment

Explanation 4A is now inserted to section 115JB to clarify that the MAT provisions will not apply to foreign companies opting for presumptive scheme of taxation under sections 44B, 44BB, 44BBA or 44BBB, where the total income of the foreign company comprises solely of profits and gains from the business referred to in any of these sections and it has been taxed at the respective tax rates mentioned.

Rationale

Sections 44B, 44BB, 44BBA or 44BBB offer a scheme of presumptive taxation to foreign companies engaged in certain activities, prescribing a fixed rate of tax. Application of MAT at the higher rate of 18.5% to such companies, while tenable as per the provisions of the Act, was inequitable and not as per the intention of the legislature. This issue has now been sought to be addressed by way of the retrospective amendment.

This amendment will be applicable retrospectively from AY 2001-02 onwards.

B] Proposals relating to Transfer Pricing

1. Streamlining of provisions pertaining to CbCR

Existing provisions

Section 286 of the Act contains provisions for furnishing CbCR in respect of an international group, including the entity responsible for furnishing the report, the timelines for furnishing the same as well as the content of the report.

Proposed amendment

In order to streamline the provisions for furnishing CbCR, the following amendments are proposed to Section 286 –

a) In case the non-resident parent entity of an international group has no obligation to file CbCR in its country or territory, the group's constituent entity resident in India shall be required to furnish CbCR in India.

b) The report is required to be furnished within 12 months from the end of the reporting accounting year in all cases as against the due date of filing return of income.

c) Constituent entity in India of an international group is not required to furnish CbCR in India if an ARE of the group has furnished a CbCR with the tax authority of the country or territory, of which such ARE is a resident, within the due date specified by that country or territory as against the due date of filing return of income under section 139(1).

d) Definition of the term "agreement" is amended to include an agreement for exchange of CbCR as may be notified by the Central Government.

e) Similarly definition of the term "reporting accounting year" is amended to mean the accounting year in respect of which the financial and operational results are required to be reflected in the CbCR filed by the parent entity or ARE or constituent entity.

Rationale

The provisions for furnishing CbCR were introduced by Finance Act, 2016 based on the recommendations in BEPS Action Plan 13. There were, however, a few points of confusion in the provisions as to obligation to file and timelines for filing the CbCR. These are sought to be clarified by way of the proposals in Finance Bill, 2018.

This amendment will be applicable retrospectively from AY 2017-18 onwards.

Conclusion

The proposals in the Union Budget, 2018-19 pertaining to International Taxation and Transfer Pricing clearly reflect the attitude of keeping pace with the global developments and in some cases, even pioneering in incorporating certain recommended practices. The effectiveness with which these are implemented, will decide whether these changes will pave the way for better compliances and higher tax revenues for India or simply additional litigations.

> The great secret of true success, of true happiness, is this: the man or woman who asks for no return, the perfectly unselfish person, is the most successful.
>
> — *Swami Vivekananda*
>
> The idea of perfect womanhood is perfect independence.
>
> — *Swami Vivekananda*

CA Vipin Batavia

Proposals relating to Charitable Trusts

1. Introduction

The Hon'ble Finance Minister presented the Finance Bill, 2018 in Parliament on 1-2-2018. He has proposed many amendments in the direct taxes and like every year this year also the provisions pertaining to Charitable Trusts are proposed to be amended. In recent years the approach of the Government and tax department towards the Charitable and the nonprofit organizations is not lenient. The uncharitable approach of the Government results into cascading of charity itself. Moreover the perception of the Government is also changing towards NGOs and is becoming negative which is resulting in to the harsh provisions. This seems to be due to the fact that some of the black sheep are misusing the trust provisions which have set a chain effect between the Government and such people as a result the genuine trust and its humble activities are suffering.

2. Proposed Amendments

This year the Finance Minister has proposed two amendments applicable to Charitable Trusts in order to encourage a less cash economy and to reduce the generation and circulation of black money, it is proposed to insert a new explanation to the section 11 to provide that for the purpose of determining the application of Income under the provisions of sub-section (1) of the said section, the provisions of sub-clause (ia) of clause (a) of section 40 and of sub-sections (3) and (3A) of section 40A shall, *mutatis mutandis*, apply as they apply in computing the income chargeable under the head "Profits and Gains of Business or Profession".

It is also proposed to insert a similar proviso in clause (23C) of section 10 so as to provide similar restriction as above on the entities exempt under sub-clauses (iv), (v), (vi) or (via) of said clause in respect of application of income.

These amendments will take effect from 1st April, 2019 and will, accordingly, apply in relation to the Assessment Year 2019-20 and subsequent years.

These proposed amendments are briefly discussed in the following paragraphs.

3. Applicability of Section 40(a)(ia)

The existing TDS provisions, under chapter XVII-B, are applicable to Charitable Trust. But the provisions of section 40(a)(ia) were not applicable to the Charitable Trusts since the section 40(a)(ia) was applicable under chapter - IV for computation of business income and the income tax provisions are applicable to charitable trust are under chapter III of the Act therefore the section 40(a) (ia) was not applicable to Charitable Trusts. Therefore there was no disallowance in case of the defaults under Chapter XVII-B for TDS provisions.

Bombay High Court in the case of *Bombay Stock Exchange Ltd vs. Dy. DIT (Exp) (2014) 52 taxman.com 29 / (2015) 228 Taxman 195* has decided that provisions of section 40(a)(ia) are not applicable to Charitable trusts.

Now it is proposed that with effect from Assessment Year 2019-20 the provisions of section 40(a)(ia) will as it is *(mutatis mutandis)* apply to Charitable Trusts. It means the present provisions and any future amendments, circulars, changes, clarifications, notifications, litigations, case laws, disputes, interpretation of this section will also apply accordingly.

Section 40 – AMOUNTS NOT DEDUCTIBLE Reproduced herewith for better understanding.

"Notwithstanding anything to the contrary in sections 30 to 38 the following amounts shall not be deducted in computing the income chargeable under the head Profits and Gains of Business or Profession (now applicable to Charitable Trusts also for the purposes of determining the application of income.)

Sub-section (a) and sub clause (ia) says that in the case of any assessee

"thirty per cent" of any sum payable to a resident, on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date of filing of ITR as specified in section 139(1).

Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, (thirty per cent of) such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

Provided further that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII – B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso.

Now as per the proposed amendment if the Charitable Trust make any default under the provisions of Chapter XVII-B then in that case there will be disallowance of thirty per cent of such sum on which TDS either not deducted or after deduction is not paid on or before the due date of filing of return which is 30th September in case of Charitable Trust, provided the said disallowance of thirty per cent of such sum shall be allowed as a deduction in computing the income of the previous year in which such tax is paid."

4. Disallowance for cash payments exceeding prescribed limit (Sub Sections (3) and (3A) of Section 40A)

A) Section-40A(3) provides that where assessee incurs any expenditure in respect of which a payment or aggregate of payments made to a person in a day, otherwise than by an account payee cheque drawn on a bank or account payee bank draft or payment made by use of electronic clearing system through a bank account exceeds ₹ 10 000/- (₹ 20,000/- up to A.Y. 2017-18), the whole of such expenditure shall not be allowed as deduction in computing profits and gains of business or profession. (Now applicable to charitable trusts also for the purposes of determining the application of income). That is to say that payment of expenditure exceeding ₹10,000/- in cash will be disallowed.

B) Section 40A(3A) provides that if the expenditure is incurred in a particular year but the payment is made in any subsequent year of a sum exceeding ₹ 10,000/- (₹ 20,000/- up to A.Y. 2017-18) in a day otherwise than by an account payee cheque drawn on bank or account payee bank draft or payment made by use of electronic clearing system through a bank account, the payment so made will be deemed to be the profit and gains of business or profession and chargeable to tax in the year of payment. (Now applicable to Charitable Trusts also for the purposes of determining application of income). That is to say that if the payment of expenditure exceeding ₹ 10,000/- pertaining to any previous year will be disallowed in the subsequent year in which such payment is made in cash.

The first proviso provides exceptions to such payments prescribed under **Rule 6DD** for cases and circumstances in which a payment or aggregate of payments exceeds ₹ 10,000/- may be made to a person in a day, otherwise than by an account payee cheque drawn on bank or account payee bank draft or electronic clearing system through a bank account. This exception under Rule 6DD will also apply in the case of Charitable Trusts.

The second proviso provides the higher limit of ₹ 35,000/- for disallowance of expenditure made in cash in the case of transporters under section 40A(3) and (3A) from the monetary limit of ₹ 10,000/-. The limit of 20,000/- was reduced to ₹ 10,000/- from A.Y. 2018-19 but the higher limit of ₹ 35,000/- is unchanged.

5. Insertion of new proviso to section 10(23C) to cover similar provision of applicability of Sections 40(a) (ia), 40A(3) & (3A)

After the twelfth proviso to Section 10(23C) the following proviso shall be inserted with effect from 1st April, 2019 and will accordingly apply in relation to A.Y. 2019-20 and subsequent years.

"Provided also that for the purposes of determining the amount of application under item (a) of the third proviso, the provisions of sub-clause (ia) of clause (a) of section 40 and sub-sections (3) and (3A) of section 40A, shall, mutatis mutandis, apply as they apply in computing the income chargeable under the head "Profits and Gains of Business or Profession".

It is proposed to insert similar proviso in clause (23C) of section 10 so as to provide similar restrictions on the entities covered under item (a) of the third proviso which refer to only sub-clauses (iv), (v), (vi) or (via) of said clause in respect of application of income. Even the memorandum explaining the provisions speaks only about sub clauses (iv),(V),(vi) or (via). This means the proposed amendment will not apply to other fund/institution/trust covered under sub-clauses (i) to (iiiae) of clause (23C) of section 10 since the amendment will apply only to sub-clause (iv) to (via).

The sub-clauses (i) to (iiiaaaa) are pertaining to certain funds created by the Central

Government like Prime Minister, Chief Minister relief funds and such other funds. But sub-clause (iiiab), (iiiac) (iiiad) and (iiiae) are applicable to educational and medical institutions which are falling under certain criteria or within certain prescribe limits are fully exempted but these are not covered under the proposed amendment.

The proposed amendment is applicable for determining the application of income which will be restricted to the extent of disallowance. The impact of these provisions will not be very effective since the whole income of the Trust even after the reduction in application of income will be exempt.

6. The impact of these proposed amendments on the scheme of taxation of Charitable Trust

Now let us consider the impact of these proposed amendments:

As per the proposed amendments the disallowance u/s. 40(a)(ia) and sub-sections (3) and (3A) of section 40A will apply for the purpose of determining the application of income u/s. 11(1). In other words the application of income will be reduced to the extent of disallowance. It means it will not be treated as application of the income for that year.

So in this situation a question arises whether a charitable trust can get the benefit of the existing provision of the deemed application of income by exercising the option available under explanation (2) to Section 11(1) for spending the income in the next year and/or the trust can opt for accumulation of income for specific purpose u/s. 11(2) to spend it in next 5 years. According to me there is no any amendment is proposed in these both the sections therefore these options of deemed application of income should be available to Charitable Trust.

Even in the case of excess spending by the trust it will not have any effect on tax liability since no tax will be required to pay if the excess spending is more than the disallowance. On the contrary, in the case of default in the payment of TDS, the benefit of the application of income will be available in the year in which such TDS is paid.

7. Miscellaneous amendment to section 10(46)

Clause 46 of section 10 of the Act empowers the Central Government to exempt, by notification, specified income arising to a body or authority or Board or Trust or Commission.

Under the existing provisions, the Central Government is required to notify each case separately even if they belong to the same class of cases. Consequently, the whole process of approval is considerably delayed. Therefore it is proposed to amend the said clause so as to enable the Central Government to also exempt, by notification, a class of such body or authority or Board or Trust or Commission (by whatever name called).

This amendment will take effect from 1st April, 2018 and is applicable to A.Y. 2018-19.

8. Conclusion

The aforesaid proposed provisions were earlier not applicable to the Charitable Trusts therefore to bring this situation at par with the provisions applicable to business entities these provisions are brought in to achieve the intentions of the Government in order to encourage a less cash economy and to reduce the generation and circulation of black money and to stop expenses incurred in cash to mitigate the misuse of providing non-genuine expenses.

CA Jayesh Gogri

Amendments proposed in Customs Duty Law

1. Expansion of scope of Customs Act

Current position of law

Currently, the provisions of Customs Law are limited to the Indian customs waters. The limit of 'Indian Customs waters' is limited to 24 nautical miles from the baseline. The offences committed within such limits were punishable under the law. Moreover, if any person commits any violation of the provisions of customs law could escape by moving out of India.

Proposed Changes in law

- The definition of 'Indian customs waters' has been amended to extend up to 200 nautical miles
- It has been proposed that, along with India, the Act would be applicable to any person who has committed any offence or contravention mentioned under the Customs Act outside India also
- Also, a new section 151B is proposed to be inserted to empower Central Government to enter into an agreement with Government of other countries or such competent authorities for
  - i. Facilitation of trade
  - ii. Enforcing provisions of Customs Act
  - iii. Exchange of information for facilitation of trade, risk analysis, verification of compliance and prevention, combating and investigation of offences
  - iv. Use the information so received as evidence for the proceedings under the Act
- Board is authorised to provide for procedures

2. Prohibited goods in other laws to be notified by Customs Act

Regulatory requirements relating to import or export of goods or class of goods or clearance thereof, in any other law/rules/regulations/order/notifications shall not be effective under the said law unless it is also notified under the Customs Act.

3. Exemptions for goods imported for repairs, further processing or manufacture

New section 25A is proposed to be inserted to empower the Government to provide exemptions in respect of goods imported for repair, further processing or manufacture, subject to certain conditions. Also, similar exemption is granted *vide* Section 25B in respect of reimported goods which were exported for the purposes of repair, further processing or manufacture, subject to certain conditions.

4. Pre-notice consultation

Current position of law
Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful misstatement or suppression of facts, the proper officer could serve notice u/s. 28 – Recovery of duties not levied or short-levied or erroneously refunded on the person chargeable with the duty or interest within two years from the relevant date requiring him to show cause why he should not pay the amount specified in the notice.

Proposed amendment
It has been proposed that before issue of demand notice in cases not involving collusion, suppression, etc., the proper officer should conduct pre-notice consultation. Pending proceedings where showcause notice has been issued after the 14th May, 2015, but before enactment of Finance Bill, 2018 shall continue to be governed by the provisions of section 28 as it stood immediately before the date of enactment and would not require pre-notice consultation.

5. Time limit for adjudication

Current position of law
There is a time limit for adjudication of 6 months in normal cases and 1 year in cases where reasons of collusion or any wilful misstatement; or suppression of facts are involved. However, time limit was applicable 'where it was possible to do so'!

Proposed amendment
It is proposed that the time limits shall be strictly followed and the words 'where it was possible to do so' are omitted. These time limits shall be further extended by six months or one year as the case may be. If demand notice is not adjudicated within the extended period, it would be deemed as if no demand has been issued. This time limit shall not be applicable where the proper officer is unable to determine amount of duty or interest because of the following cases:

i. Appeal in similar matter is pending in court

ii. An interim order of stay has been issued

iii. Board has an order/direction to keep such matter as pending

iv. Settlement Commission has admitted an application of the assessee

6. Advance Ruling

Following amendments have been proposed in respect of 'Advance Rulings'

- Definition

  It has been proposed to amend the definition of advance ruling as "advance ruling" means a written decision on any of the questions referred to in section 28H raised by the applicant in his application in respect of any goods prior to its importation or exportation

- Question on which Advance Ruling can be sought for:

  i. classification of goods

  ii. applicability of a notification issued under section 25(1), on the rate of duty

  iii. the principles to be adopted for determination of value

  iv. applicability of notifications issued in respect of duties or taxes under this Act or any duty chargeable under any other law for the time being in force.

v. determination of origin of the goods

Central Government is now empowered to provide by notification any other matters

- Currently, applicant for advance ruling could be any of the below persons

i. a non-resident setting up a joint venture in India in collaboration with a non-resident or a resident

ii. a resident setting up a joint venture in India in collaboration with a non-resident

iii. a wholly owned subsidiary Indian company, of which the holding company is a foreign company, who or which, as the case may be, proposes to undertake any business activity in India

iv. a joint venture in India

v. a resident falling within any such class or category of persons, as specified by notification

It has been proposed to remove 'a wholly owned subsidiary Indian company, of which the holding company is a foreign company, who or which, as the case may be, proposes to undertake any business activity in India' from the definition of as applicant.

Now, it has been proposed to add the following persons in the definition of applicant

i. holding a valid IEC

ii. exporting any goods to India

iii. with a justifiable cause to the satisfaction of the Authority who makes an application for advance ruling under section 28H

7. Powers of Commissioner (Appeals)

Current position of law

Presently, the Commissioner (Appeals) after making further inquiry as may be necessary has powers to pass such order as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against.

Proposed amendment

Power is proposed to be granted to Commissioner (Appeals) to remand back the matters to original adjudicating authority with directions for fresh adjudication in the below cases:

i. where an order or decision has been passed without following the principles of natural justice

ii. where no order or decision has been passed after reassessment

iii. where an order of refund has been issued crediting the amount to the Fund without recording any finding on the evidence produced by the applicant

8. Empowerment of Board to make regulations

It is proposed to empower the Board to make regulations on the following matters:

i. time and manner of finalisation of provisional assessment

ii. manner of conducting pre-notice consultation

iii. circumstances under which supplementary notice can be issued

iv. form and manner in which an application for advance ruling or appeal shall be made, and the procedure for the authority, under Chapter VB

v. manner of clearance or removal of imported or export goods

vi. documents to be furnished in relation to imported goods

vii. conditions, restrictions and the manner for deposits in electronic cash ledgers, the utilisation and refund , maintaining such ledger

viii. conducting audit

ix. goods for controlled delivery

x. measures and the simplified or different procedures or documentation for a class of importers or exporters or categories of goods or on the basis of the modes of transport of goods

9. Electronic Cash Ledger (ECL)

Current position of law

Currently the importer or exporter does transaction wise payment. There is no concept of ECL currently under customs.

Proposed amendment

It is proposed to introduce a new Chapter VIIA with respect to ECL in Customs Act :

i. To make deposit online in ECL to be utilised for any payment of duty, interest, penalty, fees or any other sum payable under the Act.

ii. To provide for refund of balance in ECL

iii. That board may exempt the deposits made by such class of person or such category of goods as may be specified by notification from all or any of the provisions of this section.

10. Introduction of controlled delivery

"Controlled delivery" means movement of goods under knowledge or supervision of the officer. Currently, any officer of customs appointed for any area adjoining the land frontier of India may require any person in possession of any goods which have been imported into India by land, to produce the order made under section 47 permitting clearance of the goods. It is proposed to insert section 109A for introducing the concept of controlled delivery on specified goods as may be provided in the regulations of any consignment of goods to any destination in India or a foreign country.

11. Seizure of goods

As per section 110 If the proper officer has reason to believe that any goods are liable to confiscation under this Act he may seize such goods. The proper officer should issue the show cause notice within six month of seizure of the goods in case of seized goods. The above period can be extended for a additional period of six months. If the SCN is not issued within the specified time then the goods shall be returned to the person from whose possession they were seized.

It is proposed to amend section 110 to provide that for additional 6 months officer should also record the reasons in writing and inform the person from whom such goods were seized. It is proposed to amend section 110 to provide that in case of provisional release of goods time limit of 6 months for issue of SCN will not apply, in other words SCN can be issued any time.

12. Option to pay fine in lieu of confiscation

In case of goods which are not prohibited if the officer thinks fit may grant option to pay fine in lieu of confiscation of goods and such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

It is proposed to amend section 125 to provide :

i. That where the demand proceedings against a notice/co notices have been closed on grounds of having paid the dues mentioned in section 28, the fine need not be paid.

ii. That where fine has not been paid within 120 days from the date of option, then the option shall become void except in case of pending appeal.

iii. In case order to pay fine is passed before the date of assent of the Finance Bill and no appeal is pending against such order, then 120 days will be counted from the date of on which assent is received

13. Exemption from IGST

It is proposed to give retrospective effect to Notification No. 65/2017-Customs dated 8th July, 2017 amending Notification No. 50/2017-Customs dated 30th June, 2017 so as to exempt IGST leviable under section 3(7) of the CTA, 1975 on aircraft, aircraft engines and other aircraft parts imported under cross-border lease during the period from the 1st July, 2017 to the 7th July, 2017.

Application for claim of all such integrated tax which has been collected, shall be made within a period of six months from which the Finance Bill, 2018 receives the assent of the president.

14. Miscellaneous amendments

- Import Manifest and Export Manifest is proposed to be substituted as 'arrival manifest or import manifest' and 'departure manifest or export manifest' respectively
- It has been proposed to authorise the Board for providing time limit for the importer or exporter to submit relevant documents and to the proper officer to finalise provisional assessment under section 17
- Name of the Board is proposed to be changed from 'Central Board of Excise and Customs' to 'Central Board of Indirect Tax and Customs'
- Amendment in section 30 - Delivery of import manifest or import report, so as to include export goods in addition to imported goods as part of the information provided in the manifest. It also seeks to provide by regulation the manner of delivery of manifest.
- Similarly amendment in section 41 – Delivery of export manifest or export report, so as to include imported goods in addition to export goods as part of the information provided in the manifest and provide penalty provisions of late filing of manifest and the manner of delivery of manifest, by regulations
- It has been proposed that where an order for refund is modified in any appeal and the amount of refund so determined is less than the amount refunded, the excess amount so refunded shall be recovered along with interest thereon at the rate fixed by the Central Government under section 28AA, from the date of refund up to the date of recovery, as a sum due to the Government.
- Measures undertaken for facilitation of trade

  The Board is empowered to prescribe trade facilitation measures or separate procedure or documentation for a class of importers or exporters or for categories of goods or on the basis of the modes of transport of goods for:

  i. maintenance of transparency in import and export documentation and procedure

  ii. expeditious clearance or release of goods entered for import or export

  iii. reduction in the transaction cost of clearance of importing or exporting goods

  iv. maintenance of balance between customs control and facilitation of legitimate trade
- In section 122 it is proposed to empower the Board to fix monetary limits for adjudication of cases by officers below the rank of Joint Commissioner by way of notification.

B. V. Jhaveri, *Advocate*

DIRECT TAXES
Supreme Court

S. 80-IB: The incentive meant for small scale industrial undertakings cannot be availed by undertakings which do not continue as small scale industrial undertakings during the relevant period. Each assessment year is a different assessment year. The fact that the object of legislature is to encourage industrial expansion does not mean that the incentive should remain applicable even where on account of industrial expansion, the small scale industrial undertakings ceases to be small scale industrial undertakings. The fact that in the initial year eligibility was satisfied is irrelevant

DCIT, Bangalore vs. M/s. ACE Multi Axes Systems Ltd. Civil Appeal No. 20854 of 2017

(Arising out of Special Leave Petition (Civil) No. 4565 of 2015) dated 5th December, 2017

1. In this case, the respondent assessee was in the business of manufacture and sale of component parts of CNC lathes and similar machines. Income of the respondent assessee was assessed to tax. However, CIT interfered with the assessment u/s. 263 in respect of applicability of deduction u/s. 80 IB(3) of the Act. Accordingly, the AO completed the assessment by disallowing the deduction u/s. 80 IB(3) of the Act. CIT(A) and ITAT upheld the order of the AO. However, the High Court reversed the said orders and upheld the claim of the assessee.

2. The Supreme Court considered the following question in an appeal filed by the Department:

> *"When once the eligible business of an assessee is given the benefit of deduction under Section 80 IB on the assessee satisfying the conditions mentioned in sub-sec. (2) of Section 80 IB, can the assessee be denied the benefit of the said deduction on the ground that during the said 10 consecutive years, it ceases to be a small scale industry?"*

3. The Supreme Court discussed the relevant provisions of section 80 IB in detail and held as under:

> *"13. On examination of the scheme of the provision, there is no manner of doubt that incentive meant for small scale industrial undertakings cannot be availed by industrial undertakings which do not continue as small scale industrial undertakings during the relevant period. Needless to say, each assessment year is a different assessment year, except for block assessment."*

4. The Hon'ble Supreme Court discussed and distinguished the decision of *Bajaj Tempo vs. CIT (1992) 196 ITR 188 (SC)* and held as under:

> *"15. …… **Construing liberally does not mean ignoring conditions for exemption**……"*

"16. The principle of law considered in Bajaj Tempo (supra) is certainly a valid principle of interpretation where there is ambiguity or absurdity or where conditions of eligibility are substantially complied. In the present case, the scheme of the statute is clear that the incentive is applicable to a small scale industrial undertaking. The intention of legislature is in no manner defeated by not allowing the said incentive if the assessee ceases to be the class of industrial undertaking for which the incentive is provided even if it was eligible in the initial year. Each assessment year is a separate unit."

5. The Apex Court further observed that in *Citizen Co-operative Society Limited vs. Assistant Commissioner of Income Tax, Circle-9(1), Hyderabad (391 ITR 1)* it had considered the incentive under Section 80-P meant for a primary agricultural credit society or a primary co-operative agricultural and rural development bank. The assessee was held not to be entitled to the said incentive as business of the assessee was held to be finance business to which the incentive was not admissible even though the principle of liberal interpretation in terms of Bajaj Tempo (supra) was applied.

6. The decision of *State of Haryana vs. Bharti Teletech Ltd. [(20014) 3 SCC 556]* was considered, wherein the issue under consideration was eligibility of an assessee to get benefit of exemption from tax. It was observed that while the exemption notification should be liberally construed, the beneficiary must fall within the ambit of the exemption and fulfil the conditions thereof. In case such conditions are not fulfilled, the issue of application of the notification does not arise. It was also observed that similar view was taken in cases such as *Commission of Customs vs. M. Ambalal & Co. [(2011) 2 SCC 74]* and *State of Jharkhand vs. Ambay Cement [(2005) 1 SCC 368]*

7. Considering the ratio in the above judgments, the Apex Court held as under:

"21. In view of the above judgments, we do not see any difference in the situation where the assessee, is not initially eligible, or where the assessee though initially eligible loses the qualification of eligibililty in subsequent assessment years. In both such situations, principle of interpretation remains the same.

22. Thus, while there is no conflict with the principle that interpretation has to be given to advance the object of law, in the present case, the assessee having not retained the character of 'small scale industrial undertaking', is not eligible to the incentive meant for that category. Permitting incentive in such case will be against the object of law.

23. For the above reasons, we hold that the assessee is not entitled to benefit of exemption if it loses its eligibility as a small scale industrial undertaking in a particular assessment year even if in initial year eligibility was satisfied."

Where in sales Tax Deferral Scheme, option was given to assessee to approach State Industrial and Investment Corporation (SICOM) for premature payment and discharge of liability by paying out its NPV, doing so would not amount to remission or cessation of liability u/s. 41 of the Act.

[(2017) 88 taxmann.com 273 (SC)] Supreme Court of India Commissioner of Income Tax-6, Mum. vs. Balkrishna Industries Ltd. Civil Appeal No. 19587 of 2017 and Others November 21, 2017

Under the Industrial Backward Area Scheme of the Government of Maharashtra, the assessee company was entitled to defer the Sales Tax liability for a period of 6 years under the Deferral Scheme of 1988. Thereafter a Notification was issued by the Government of Maharashtra regarding premature repayment of deferral Sales Tax at Net Present Value (NPV), in pursuance of which the assessee made a repayment of NPV of the total liability and the balance amount (total liability less NPV of the total liability) was remitted and credited to the capital reserve account. Relying on Circulars of the Central Board of Direct Taxes being Nos. 496 and 674, the assessee claimed that the deferral Sales Tax under the Deferral Scheme was required to be treated as actually paid for the purposes of section 43B of the I.T. Act. Further, the conversion of Sales Tax liability into loans would be taken as discharge of the liability of Sales Tax and, therefore, the deferral amount was in the form of a loan and not a trading receipt. On this basis, the assessee contended that the remission of a loan cannot be treated as a revenue receipt and taxed as its income.

The AO, however, rejected the claim of the assessee and considered the amount as 'income' u/s. 41 of the Act.

3. In appeal, the Commissioner of Income Tax (Appeals) dismissed the appeal of the assessee. On further Appeal before the Tribunal, in view of the difference of opinion of the two Co-ordinate Benches on this issue, a Special Bench was constituted. The Special Bench decided the case in favour of the assessee and allowed the appeal. It was this judgment, which had been upheld by the High Court in the case of *CIT vs. Sulzer India Ltd. (369 ITR 717, Bom.)* which was one of the appellants before the Special Bench.

4. While deciding the case the Bombay High Court had held:

> *"Therefore Section 43B has no application. Insofar as applicability of section 41(1)(a), there also the applicability is to be considered in the light of the liability. It is a loss, expenditure or trading liability. In this case, the scheme under which the Sales Tax liability was deferred enables the assessee to remit the Sales Tax collected from the customers or consumers to the Government not immediately but as agreed after 7 to 12 years. If the amount is not to be immediately paid to the Government upon collection but can be remitted later on in terms of the Scheme, then, we are of the opinion that the exercise undertaken by the Government of Maharashtra in terms of the amendment made to the Bombay Sales Tax Act and noted above, may relieve the assessee of his obligation, but that is not by way of obtaining remission. The worth of the amount which has to be remitted after 7 to 12 years has been determined prematurely. That has been done by finding out its NPV. If that is the value of the money that the State Government would be entitled to receive after the end of 7 to 12 years, then, we do not see how ingredients of sub-section (1) of section 41 can be said to be fulfilled. The obligation to remit to the Government the Sales Tax amount already recovered and collected from the customers is in no way wiped out or diluted. The obligation remains. All that has happened is an option is given to the assessee to approach the SICOM and request it to consider the application of the assessee of premature payment and discharge of the liability by finding out its NPV. If that was a permissible exercise and in terms of the settled law, then, we do not see how the assessee can be said to have been benefited and as claimed by the Revenue. The argument of Mr. Gupta is not that the assessee having paid ₹ 3.37 crore has obtained for himself anything in terms of section 41(1), but the assessee is deemed to have received the sum of ₹ 4.14 crore, which is the difference between the original amount to be remitted with the payment made. Mr. Gupta terms this as deemed payment and by the State to the assessee. We are unable to agree with him. The Tribunal has found that the first requirement of section 41(1) is that the allowance or deduction is made in respect of the loss, expenditure or a trading liability incurred by the assessee and the other requirement is the assessee has subsequently obtained any amount in respect of such loss and expenditure or obtained a benefit in respect of such trading liability by way of a remission or cessation thereof. As rightly noted by the Tribunal, the Sales Tax collected by the assessee during the relevant year amounting to ₹ 7,52,01,378/- was treated by the State Government as loan liability payable after 12 years in 6 annual/equal installments. Subsequently and pursuant to the amendment made to the 4th proviso to section 38 of the Bombay Sales Tax Act, 1959, the assessee*

accepted the offer of SICOM, the implementing agency of the State Government, paid an amount of ₹ 3,37,13,393/- to SICOM, which, according to the Assessee, represented the NPV of the future sum as determined and prescribed by the SICOM. In other words, what the assessee was required to pay after 12 years in 6 equal installments was paid by the assessee prematurely in terms of the NPV of the same. That the State may have received a higher sum after the period of 12 years and in installments. However, the statutory arrangement and vide *section 38, 4th proviso does not amount to remission or cessation of the Assessee's liability assuming the same to be a trading one. Rather that obtains a payment to the State prematurely and in terms of the correct value of the debt due to it. There is no evidence to show that there has been any remission or cessation of the liability by the State Government. We agree with the Tribunal that one of the requirement of section 41(1)(a) has not been fulfilled in the facts of the present case."*

5. The Revenue was before the Supreme Court. Approving the decision of the High Court, the Apex Court held:

"After hearing the counsel for the parties at length, we are of the view that the aforesaid approach of the High Court is without any blemish, inasmuch as all the requirements of Section 41(1) of the Act could not be fulfilled in this case."

Taxability of subsidies: A subsidy granted by the Government to achieve the objects of acceleration of industrial development and generation of employment is capital in nature and not revenue. The fact that the incentives are not available unless and until commercial production has started, and that the incentives are not given to the assessee expressly for the purpose of purchasing capital assets or for the purpose of purchasing machinery is irrelevant. The object has to be seen and not the form in which it is granted.

CIT-I, Kolhapur vs. M/s. Chaphalkar Brothers Pune [Civil Appeal Nos. 6513-6514 of 2012, dated 7th December, 2017]

In this case, in the state of Maharashtra, the subsidy scheme of the State Government was deployed in the form of exemption of entertainment duty for the newly set up Multiplex Theatre Complexes for a period of 3 years and thereafter payment of entertainment duty at the rate of 25% for the subsequent 2 years. The subsidy scheme was introduced by way of amendments carried our *via* ordinance to the Bombay Entertainments Duty Act and ultimately became part of the Amendment Act. The AO held that the said subsidy was in the nature of revenue receipt.

The CIT(A) dismissed the appeal of the assessee and the ITAT held in favour of the assessee. The Bombay High Court dismissed the appeal of the Revenue considering the decisions in the cases of *Sahney Steel & Press Works Ltd. vs. CIT [(1997) 7 SCC 765]* and *CIT vs. Ponni Sugar and Chemicals Ltd. [(2008) 9 SCC 337].*

The Supreme Court considered the Bombay Entertainments Duty Amendment Act in detail and perused its objects and reasons. The Supreme Court dismissing the appeal of the Revenue held as under:

"What is important from the ratio of this judgment (Ponni Sugar and Chemicals Ltd.) is the fact that Sahney Steel was followed and the test laid down was the "purpose test". It was specifically held that the point of time at which the subsidy is paid is not relevant; the source of subsidy is immaterial; the form of subsidiary is equally immaterial."

"Applying the aforesaid test contained in both Sahney Steel as well as Ponni Sugar, we are of the view that the object, as stated in the statement of objects and reasons, of the amendment ordinance was that since the average occupancy

in cinema theatres has fallen considerably and hardly any new theatres have been started in the recent past, the concept of a Complete Family Entertainment Centre, more popularly known as Multiplex Theatre Complex, has emerged. These complexes offer various entertainment facilities for the entire family as a whole. It was noticed that these complexes are highly capital intensive and their gestation period is quite long and therefore, they need Government support in the form of incentives qua entertainment duty. It was also added that Government with a view to commemorate the birth centenary of late Shri V. Shantaram decided to grant concession in entertainment duty to Multiplex Theatre Complexes to promote construction of new cinema houses in the State. The aforesaid object is clear and unequivocal. The object of the grant of the subsidy was in order that persons come forward to construct Multiplex Theatre Complexes, the idea being that exemption from entertainment duty for a period of three years and partial remission for a period of two years should go towards helping the industry to set up such highly capital intensive entertainment centres. This being the case, it is difficult to accept Mr. Narasimha's argument that it is only the immediate object and not the larger object which must be kept in mind is that the subsidy scheme kicks in only post construction, that is when cinema tickets are actually sold. We hasten to add that the object of the scheme is only one there is no larger or immediate object. That the object is carried out in a particular manner is irrelevant, as has been held in both Ponni Sugar and Sahney Steel."

"Mr. Ganesh, learned Senior Counsel, also sought to rely upon a judgment of the Jammu and Kashmir High Court in Shri Balaji Alloys vs. C.I.T. (2011) 333 I.T.R. 335. *While considering the scheme of refund of excise duty and interest subsidy in that case, it was held that the scheme was capital in nature, despite the fact that the incentives were not available unless and until commercial production has started, and that the incentives in the form of excise duty or interest subsidy were not given to the assessee expressly for the purpose of purchasing capital assets or for the purpose of purchasing machinery."*

"After setting out both the Supreme Court judgments referred to hereinabove, the High Court found that the concessions were issued in order to achieve the twin objects of acceleration of industrial development in the State of Jammu and Kashmir and generation of employment in the said State. Thus considered, it was obvious that the incentives would have to be held capital and not revenue….."

"We have no hesitation in holding that the finding of the Jammu and Kashmir High Court on the facts of the incentive subsidy contained in that case is absolutely correct. In that once the object of the subsidy was to industrialize the State and to generate employment on the State, the fact that the subsidy took particular form and the fact that it was granted only after commencement of production would make no difference."

S. 68 Bogus share capital: Law laid down in Rajmandir Estates 386 ITR 162 (Cal.) and other cases that the CIT is entitled to revise the assessment order u/s. 263 on the ground that the AO did not make any proper inquiry while accepting the explanation of the assessee insofar as receipt of share application money is concerned, cannot be interfered with

Deniel Merchants P. Ltd. & Anr. vs. ITO & Anr Petition(s) for Special Leave to Appeal (C) No(s). 23976/2017, dated 29th November, 2017

In this case, before the Hon'ble Culcutta High Court dismissed the appeal of the assessee on the basis that the assessee sought to raise certain points of law which were subject matter before the Court in four appeals already decided and therefore the appeal and stay application was dismissed. In all the four appeals the issue pertained to validity of revision proceeding u/s 263 when the AO had not made proper enquiries during the assessment proceedings in relation to share capital/premium. In all the said four appeals, it was found that the questions raised were not substantial questions of law and were decided against the assessee. These 4 decisions were:

- *Rajmandir Estates Private Limited vs. Principal Commissioner of Income Tax, Kolkata-III reported in (2016) 386 ITR 162 (Kol.)*
- *M/s. Pragati Finance Management Private Limited vs. CIT-II in ITAT No.178 of 2016 (decided on 7th March, 2017)*
- *Success Tours and Travels Private Limited & Anr. vs. Income Tax Officer, Ward- 9(4) Kolkata & Ors. in ITAT No. 178 of 2015 (decided on 23rd March, 2017)*
- *M/s. AIM Fincon Pvt. Ltd. vs. Commissioner of Income Tax, Kolkata-III in ITAT No.137 of 2016 which is decided today itself.*

In *Pragati Financial Management Pvt. Ltd vs. CIT (2017) 394 ITR 27 (Cal.)* and *Rajmandir Estates Private Limited vs. Pr. CIT (2016) 386 ITR 162 (Cal.)* the Calcutta High Court held as under:

(i) On bogus share capital: Mere fact that payment was received by cheque or that the applicants were companies borne on the file of the Registrar of Companies does not prove that the transaction was genuine. Even under the unamended s. 68, the onus is on the assessee to prove the creditworthiness of the subscribers. Argument that the amendment to sec. 68 is not retrospective is not required to be considered.

(ii) Even if the AO has conducted an inquiry into the taxability of share capital receipts u/s. 68, the CIT is entitled to revise u/s. 263 if the AO has not applied his mind to important aspects. Law in *Lovely Exports 299 ITR 268, Sophia Finance 205 ITR 98* etc. does not apply as they are prior to the Money Laundering Act, 2002. However, questions whether receipt towards share capital is taxable prior to introduction of sec. 56(2)(viib) & whether proviso to sec. 68 is retrospective, were left open.

On similar issue, on appeal by the assessee to the Supreme Court, the Apex Court held dismissing the SLP:

> *"In all these cases, we find that the Commissioner of Income Tax had passed an order under Section 263 of the Income-tax Act, 1961 with the observations that the Assessing Officer did not make any proper inquiry while making the assessment and accepting the explanation of the assessee(s) insofar as receipt of share application money is concerned. On that basis the Commissioner of Income Tax had, after setting aside the order of the Assessing Officer, simply directed the Assessing Officer to carry thorough and detailed inquiry. It is this order which is upheld by the High Court. We see no reason to interfere with the order of the High Court."*

Therefore, cases where the AO has not applied his mind with regard to share capital, share application or share premium during the assessment proceedings, the CIT is entitled to revise the assessment u/s. 263 of the I.T. Act, 1961.

S. 11(1)(a) vs. 32: Even if the entire expenditure incurred for acquisition of a capital asset is treated as application of income for charitable purposes u/s. 11(1)(a) of the Act, the assessee is also entitled to depreciation u/s. 32. The argument that the grant of depreciation amounts to giving double benefit to the assessee is not acceptable. S. 11(6) which bars depreciation on expenditure applied for charitable purposes is prospective and applies only from AY 2015-16.

Commissioner of Income Tax-III, Pune vs. Rajasthan and Gujarati Charitable Foundation, Poona

[Civil Appeal No. 7186 of 2014, dated 13th December, 2017]

1. These are the petitions and appeals filed by the Income Tax Department against the orders passed by various High Courts granting benefit of depreciation on the assets acquired by the respondents-assessees. All the assessees are charitable institutions registered under Section 12A of the Income-tax Act. The view taken by the Assessing Officer in disallowing the depreciation which was claimed under Section 32 of the Act, was that once the capital expenditure is treated as application of income for charitable purposes, the assessees had virtually enjoyed a 100 per cent write off of the cost of assets and therefore, the grant of depreciation would amount to giving double benefit to the assessee.

2. In most of these cases, the CIT (Appeals) had affirmed the view, but the ITAT reversed the same and the High Courts had accepted the decision of the ITAT thereby dismissing the appeals of the Income Tax Department. From the judgments of the High Courts, it could be discerned that the High Courts had primarily followed the judgment of the Bombay High Court in *'CIT vs. Institute of Banking Personnel Selection (IBPS)' [(2003) 264 ITR 110 (Bombay High Court)].* In the said judgment, the contention of the Department about double benefit was turned down following the decision of the Bombay High Court in the case of *CIT vs. Munisuvrat Jain [(1994) Tax LR 1084].* The court held as under:

> *"3. ….. In that matter also, a similar argument, as in the present case, was advanced on behalf of the revenue, namely, that depreciation can be allowed as deduction only under section 32 of the Income-tax Act and not under general principles. The Court rejected this argument. It was held that normal depreciation can be considered as a legitimate deduction in computing the real income of the assessee on general principles or under section 11(1)(a) of the Income-tax Act. The Court rejected the argument on behalf of the revenue that section 32 of the Income-tax Act was the only section granting benefit of deduction on account of depreciation. It was held that income of a Charitable Trust derived from building, plant and machinery and furniture was liable to be computed in normal commercial manner although the Trust may not be carrying on any business and the assets in respect whereof depreciation is claimed may not be business assets. In all such cases, section 32 of the Income-tax Act providing for depreciation for computation of income derived from business or profession is not applicable. However, the income of the Trust is required to be computed under section 11 on commercial principles after providing for allowance for normal depreciation and deduction thereof from gross income of the Trust. In view of the aforestated judgment of the Bombay High Curt, we answer Question No. 1 in the affirmative i.e., in favour of the assessee and against the Department."*

3. Considering the above decision of the High Court, the Apex Court held:

> *"After hearing learned counsel for the parties, we are of the opinion that the aforesaid view taken by the Bombay High Court correctly states the principles of law and there is no need to interfere with the same."*
>
> *"It may be mentioned that most of the High Courts have taken the aforesaid view with only exception thereto by the High Court of Kerala which has taken a contrary view in 'Lissie Medical Institutions vs. Commissioner of Income Tax'."*
>
> *"It may also be mentioned at this stage that the legislature, realising that there was no specific provision in this behalf in the Income-tax Act, has made amendment in Section 11(6) of the Act* vide *Finance Act No. 2/2014 which became effective from the Assessment Year 2015-16. The Delhi High Court has taken the view and rightly so, that the said amendment is prospective in nature."*
>
> *"It also follows that once assessee is allowed depreciation, he shall be entitled to carry forward the depreciation as well. For the aforesaid reasons, we affirm the view taken by the High Courts in these cases and dismiss these matters."*



Paras S. Savla, Jitendra Singh, Nishit Gandhi
Advocates

DIRECT TAXES
High Court

1. Reassessment u/s. 147 – Notice u/s. 148 on dead person – Invalid

Bhaskar Sharma L/H Late Smt. Tara Bhardwaj vs. CIT [W.P. No.17529 of 2017, Rajasthan High Court]

The Assessing Officer issued notice u/s 148 on one Smt. Tara Bhardwaj on 29-3-2017. However, she had already expired on 11-10-2010 and this fact was also informed to the Department *vide* letter dt. 3-9-2013. The Legal Heir of Smt. Tara Bhardwaj challenged the reassessment notice u/s. 148 and subsequent notices issued on her as being null and void. The Hon'ble High Court while allowing the Writ Petition held that the factum of Tara Bhardwaj death on 11-10-2010 is not in dispute. Further from the record, it was evident that the petitioner *vide* letter dated 3-9-2013 had informed the Income Tax Department of Ms. Tara Bhardwaj's death on 11-10-2010. That information was mechanically receipted and overlooked. Further, the death certificate of Ms. Tara Bhardwaj was admittedly submitted to the Income Tax Department testifying of her death on 11-10-2010. It is thus apparent that the notices impugned have been issued to a dead person and cannot sustain. Resultantly, the petition was allowed and all subsequent notices were quashed and set aside.

2. S.92 : Computation of ALP – A comparable cannot be excluded on the ground that turnover is double than that of the tested party – Whether a comparable can be comparable or not is a factual issue – No substantial question of law

CIT vs. Same Deutz-Fahr India P. Ltd. – (Tax Case Appeal No. 567 of 2017, Madras High Court)

The assessee had certain international transactions in respect of purchase of raw materials, etc. from its associated enterprises. The respondent assessee adopted Transactional Net Margin Method (TNMM) as the appropriate method to determine the ALP of its international transactions of purchase of raw materials and components. The assessee identified five comparables and made adjustment on account of idle capacity on comparables in order to arrive at ALP of its purchase transaction. The respondent assessee arrived at weighted average. However, the TPO searched new comparables and found that M/s. HMT Limited functional similar to that of the Assessee. However, the TPO found that the turnover of M/s. HMT Limited was more than twice the turnover of the assessee company and, thus, could not be considered as a comparable. Against the same, the assessee filed appeal before the CIT(A) contending that HMT should have been included. The CIT(A) dismissed the appeal. The Tribunal held that HMT Ltd. is functionally comparable and the TPO should not have rejected it merely on the ground that its turnover was twice as that of the assessee and thereby directed its inclusion in comparable for determining the comparable margin. The Department filed a further appeal to the Hon'ble High Court which by its detailed order, held that for determining arm's length price as per the Transfer Pricing Regulations, whether a particular company is a comparable or not is a question of fact not a substantial question of law. In the present case when after analyzing facts the Tribunal held that a particular entity is a comparable, it cannot sit on the factual judgment of the Tribunal. The Department sought exclusion of the said comparable on another ground of HMT Ltd. (the comparable) being a Government Owned Company and that functions performed by a Government owned company are different from those performed by private companies. The said argument was also rejected by the Hon'ble High Court. Interestingly, the High Court also delved into what is the meaning of the term "a substantial question of law" for the purpose of section 260A of the Income-tax Act. The Hon'ble High Court ultimately held that when statute confers a limited right of appeal restricted only to cases which involve substantial questions of law, it is not open to this Court to sit in appeal over the factual findings arrived at by the Appellate Tribunal.

3. Presumption u/s. 132(4A) – Expenditure incurred for improving the land – Allowable – Presumption could have effect only to the extent of documents seized and nothing further

CIT vs. Damac Holdings P. Ltd. – [2018] 89 taxmann.com 70 (Kerala)

Pursuant to search u/s. 132 of the Income-tax Act, 1961 ["the Act"] certain documents were seized by the Department. While framing the assessment, the Assessing Officer disallowed the claim of certain expenditure made by the assessee on the ground that even vendors of the property have expended some amount and hence the expenditure incurred by the assessee is excessive. The assessee claimed the said amounts as expenditure based on the presumption u/s. 132(4A) that the documents seized at the time of search evidenced the said expenditure. However, the said claim was denied on the ground that the assessee had not proved the expenditure. The said claim was allowed by the Tribunal. On an appeal by the Department to the Hon'ble High Court, it was held that the claim for benefit of presumption under Section 132(4A) has to be considered at first. Section 132(4A) provides for presumption, *inter alia*, of the contents of books of account and other documents found in the possession or control of any person in the course of search to be true, and the presumption applies both in the case of the Department and the assessee and could be rebutted by either. The Assessing Officer as has been noticed by the Tribunal did not endeavour to carry out an enquiry as to the source of investment and genuineness of the expenditure. The Assessing Officer proceeded on mere conjectures and totally ignored the seized documents. The seized documents contained evidence of cheque payments and vouchers of cash payments effected in pursuance to the development of the lands. The Assessing Officer also did not verify the source of income for such expenditure. The fact that the sale price was astronomical as against the purchase price again raises a valid presumption in favour of the contention of the assessee that, but for the development of the property to a considerable extent this would not have been possible. Especially when there was no unusual spurt in land prices during that short period. The Assessing Officer also did not embark on an enquiry to that end. In such circumstances, it cannot be said that the presumption in favour of the assessees cannot be permitted, insofar as the expenditure revealed from the books seized from the assesses. As such the Hon'ble High Court held that in the teeth of the presumption as to the truth of the documents seized, no further proof was required under Section 37 of the Act once the department failed to rebut such presumption. It was further held that once the presumption under Section 132(4A) of the Act applies in favour of the assessees insofar as the expenditure being supported by the documents seized at the time of search, there is no need for a further proof under Section 37. Since AO did not endeavor to carry out an enquiry and investigation into the source of investment or the genuineness of the expenditure made disallowance was rightly deleted. However, the High Court cautioned that the presumption can have effect only to the extent of the documents seized and nothing further.

4. Reopening u/s. 147 – Reassessment on the grounds other than mentioned in the reasons recorded – Not permissible. A.Y. 2010-11

Vijay Harishchandra Patel vs. ITO [2018] 400 ITR 167 (Guj.)

During the previous year relevant to impugned assessment year the assessee has earned income from the sale of immovable property valued at ₹ 40,00,000/-. However, the assessee has not filed any return of income for the year under consideration. The assessee, therefore, filed an application dated 3-9-2013 before the Principal Commissioner of Income Tax pursuant to which notice dated 27-9-2013 under section 148 was issued to the assessee. The assessee in reply to the same filed his return of income and disclosing income from sale of immovable property valued at ₹ 40,00,000/- which has been accepted by the Assessing Officer by passing the order dated 25-2-2015 under section 143(3) r.w.s. 147 of the Act. Subsequently another Assessing Officer issued notice dated 31-3-2017 under section 148 of the Act recording the reasons that as the assessee has not filed his return of income for the assessment year 2010-11, his income derived from the sale of immovable property valued at ₹ 40,00,000/- is required to be considered as income from the undisclosed sources. The assessee in reply to the same filed his objections stating that he has already disclosed the said income in response to earlier notice issued under section 148 of the Act. The assessee, therefore, requested the Assessing Officer to drop proceedings initiated against him. However, the Assessing Officer rejected the objection of the assessee and proceeded to frame the reassessment order. The assessee being aggrieved by the order passed by Assessing Officer approached the Hon'ble Gujarat High Court. The Court allowed the Writ Petition filed by the assessee observing that the Assessing Officer had sought to reopen the assessment to once again to examine the very aspect which had been gone into by his predecessor-Assessing Officer in the first round of proceedings under section 147. When an Assessing Officer had applied his mind to an issue in the assessment proceedings, the successor-Assessing Officer could not have sought to reopen the proceedings on the same ground as it amounted to a mere change of opinion.

5. Computation of Business Income – Section 28(va) of the Income-tax Act, 1961 – Amount received for not sharing skills, expertise and knowledge – Is capital receipt not chargeable to tax

Pr. CIT vs. Satya Sheel Khosla [ITA 289 of 2016 order dated 29-1-2018 Delhi High Court]

The assessee was Promoter and Director of Integra Overseas Pvt. Ltd. On account of shareholding transfer, the assessee was appointed as Managing Director of Integra. M/s. Suzuki Motor Corporation became a major shareholder in Integra and eventually that company's name was changed to M/s. Suzuki Motorcycle India Pvt. Ltd. The assessee terminated his relationship as a joint venture partner in M/s. Suzuki Motorcycle India Pvt. Ltd. and stepped down as Managing Director of that company. The assessee entered into an agreement whereby Suzuki India agreed to pay ₹ 1.32 crore to him for not providing "the benefit of his knowledge of regulatory matters, negotiating skills and strategic planning expertise to any other person in India in the two wheeler segment for a period of two years from the date of the Agreement". The assessee claimed that this amount received is exempt. However, the Assessing Officer while finalizing the assessment order held that the amount received by the assessee is revenue in nature and therefore added the same to the income of the assessee. On appeal the First Appellate Authority upheld the action of the Assessing Officer. The assessee being aggrieved filed further appeal before the Hon'ble Appellate Tribunal. The Appellate Tribunal relying on the decision of Hon'ble Supreme Court in the case of *Guffic Chem (P.) Ltd vs. CIT [2011] 239 CTR 225 (SC)* allowed the appeal of the assessee. The department being aggrieved by the order of the Appellate Tribunal carried the matter before the Hon'ble Delhi High Court. Hon'ble High Court *vide* impugned order quashed the appeal filed by the revenue by observing that in the present case, it is apparent that the assessee received ₹ 1.32 crore for only 2 years. Concededly, there can be two ways of looking at such receipts. In all such cases, there cannot be a straitjacket black and white formula; the analysis to be conducted by the tax authorities or administration has to be a fact dependent one. The assessee had a dual role – both as shareholder and as Managing Director. As Managing Director, he received only the non-compete amounts for two years. It is quite possible that he could have been given this amount as a capital receipt at one go for whatever reasons and that the amount be spread over two years. Undoubtedly, the Parliament has intervened and deemed that such amounts – so far as they relate to consideration for professionals should be treated as income by virtue of the amendment of 2017. However, with respect to the Revenue's contention that regardless of that amendment even in the pre-existing law, this amount had to be treated as receipts and therefore taxable as income, cannot be accepted.

6. Stay of demand – Where assessee's stay of demand application was accepted with a condition, assessee could not retract said condition subsequently on account of financial incapacity – Principle of promissory estoppel applied

Kalaignar TV (P.) Ltd. vs. Pr. CIT -10, Chennai [2017] 88 taxmann.com 183 (Madras)

The petitioner, which is a private limited company incorporated under the Companies Act, 1956, was engaged in the business of broadcasting of Tamil channels through television. It filed a writ petition challenging an order passed by the AO rejecting the petitioner's prayer for stay of the entire demand. The AO had accepted the offer given by the petitioner to pay at the rate of ₹ 50 lakh per month till 15% of the demand is collected or the First Appeal is decided, whichever is earlier. It was urged that the AO did not consider the three cardinal principles, which are required to be taken note of while passing an interim order namely; (i) *prima facie* case, (ii) balance of convenience and (iii) irreparable hardship. The Court observed that, the contentions advanced before the Court, on merits, were never pleaded before the AO while arguing the stay petition. In fact, the assessee's submissions were extracted in the impugned order, from which, it is seen that the assessee, in unequivocal terms, agreed that they are prepared to pay ₹ 50 lakh by 25th of every month till the appeal before the Commissioner is decided. The assessee was confident that the appeal will be decided in their favour and that the tax paid will be refunded to them. These submissions were taken note of by the AO and an order to the said effect was passed permitting the petitioner to pay the arrears in monthly instalments of ₹ 50 lakh till 15% of the demand is collected. The AO directed to withdraw the attachment of the assessee's bank accounts and debtors attachments. However, the petitioner did not keep up their commitment and they were able to pay only a sum of ₹ 3.5 crore. After the said order was passed, which is based on the concession given by the AO, once again, the petitioner approached the AO by way of representation dated 5-7-2017 expressing their financial difficulties and seeking stay of the collection of taxes. Subsequently, another representation has been given on 20-9-2017 seeking to pay ₹ 20 lakh per month instead of ₹ 50 lakh. The Court found that when the petitioner had agreed to comply with the payment of disputed tax at the rate of ₹ 50 lakh per month, they are bound to comply with such an undertaking. Now arguing before the Court pleading their financial incapacity or requesting the Court to examine the merits of the assessment is unsustainable, as hence the Court found that there is no error in the impugned order. Thus the writ petition was dismissed. However, the Court accepted the plea for earlier hearing and directed the Commissioner to expedite disposal of the appeals.



Neelam Jadhav, Keerthiga Sharma &
Neha Paranjpe, *Advocates*

DIGEST OF CASE LAWS
Tribunal

REPORTED DECISIONS

Unexplained money – Section 69A of the Act – Gross weight of jewellery disclosed in returns is in excess of the weight of jewellery found in search – No seizure / addition is permissible

Mrs. Nawaz Singhania vs. DCIT [ITA 3979/Mum/2017], [2017] 88 taxmann.com 327 (Mumbai – Trib.), dated 22-12-2017 – Assessment Year 2012-13

Facts

A search action was carried out at the residence of the Directors/Promoters of Raymond Group under section 132 of the Income-tax Act ('Act'). During the course of search operation certain jewellery, diamond jewellery, personal wear jewellery and household silver utensils were found at the residence of the assessee. The same was valued at ₹ 2.3 crore. The Assessing Officer ('AO') observed that the items of diamond jewellery found in search did not match with items disclosed in valuation report for the year 2000 which forms the basis of Wealth-tax returns of assessee. Further, in the course of search the entire ornaments and jewellery found were clubbed together ignoring the fact that it belonged to three members, the assessee, her husband and minor daughter. Accordingly the entire amount was added under section 69A of the Act. On appeal, the Commissioner of Income-tax (Appeals) ('CIT(A)') had given partial relief to the extent of ₹ 19,28,323 by observing that the jewellery of ₹ 19,28,323 was received by the assessee over a period of time. Further, the CIT(A) confirmed the balance of ₹ 22.58 lakh. The assessee aggrieved by the appellate order preferred an appeal before the Income-tax Appellate Tribunal ('ITAT'/'Tribunal').

Held

On appeal to the Tribunal, it was held that for Wealth-tax returns, it needs to be understood that there was always a cyclical kind of rotation between the item being re-made, gifts received etc. This was recognized by the CBDT in their Instruction No. 1916 dated 11-5-1994. When CBDT gave powers to the department of taking into account the status of the family, customs and practices of the community to which the family belongs, the rejection in the manner done by the appellate authority was not justified at all. The CBDT Instruction No. 1916 dated 11th May 1994, in particular clause (iii) had to be looked into in background perspective of Raymond Group to which assessee belonged. A necessary concomitant was remaking of the jewellery; for repetition of the same items in any Indian society, including that of assessee, was bound to be looked down upon. Another necessary corollary was the spate of gifts that were received and, frequently, these ornaments and jewellery were often high value items. Keeping the status of assessee's family in mind as well as customs and practices of the community to which the family belonged, the benefit of CBDT Instruction No. 1916 dated 11th May 1994 was warranted for assessee. In view of the same, the Tribunal held that there ought not to be any addition made on account of gold and diamond jewellery.

UNREPORTED DECISIONS

Penalty – Section 271(1)(c) r.w.s 147 of the Act – Capital Gains not disclosed in the original returns – if tax on the same is paid after the assessment order under section 147 is passed – no loss to the Revenue and it also shows the bona fides of the assessee – No penalty can be levied

Pankaj Kumar Gupta vs. ITO [ITA No. 486/Lkw/2016] (Lucknow-Trib.), dated 16-1-2018 – Assessment Year : 2012-13

Facts

The assesse was an individual, filed the returns on 12-3-2013 declaring total income of ₹ 1,98,040. Subsequently, reassessment proceedings were initiated by issuance of the notice under section 148 of the Act to examine the capital gains from sale of immovable property. The income of capital gains were not shown by the assessee, as he was unaware of the tax on sale of property. However, during the course of assessment proceedings, the assessee himself agreed to pay taxes on the capital gains on account of transfer of property. The assessment order was passed accepting the disclosure made by the assessee. The AO, thereafter, levied the concealment penalty on the basis of agreed addition made in the assessment order. On appeal, the CIT(A) confirmed the penalty. The assessee, therefore, aggrieved by the said penalty preferred an appeal before the Appellate Tribunal.

Held

The ITAT observed that the assessee had not shown capital gains in his returns. However, the same was declared during the course of assessment proceedings and the taxes were also paid thereon on the same date when the assessment order was finalized. This element of behaviour on the part of the assessee showed that when he had filed the return, there was some omission on the part of the assessee to include the tax on the sale of property. However, when he received notice under section 148 of the Act, he was very eager to know what mistake has been committed by him and therefore, on coming to know about the amount of tax payable, he had immediately paid tax on the same date. Therefore, there was no loss to the Revenue. In the instant case, nothing was on record to show that there was any malafide intention on the part of the assessee to conceal the income or furnish inaccurate particulars of income and there was an omission while filing the return of income which was rectified. Thus, there was neither concealment of income nor filing inaccurate particulars of income. Thus, the penalty levied under section 271(1)(c) of the Act was to be deleted.

Penalty – Section 271(1)(c) of the Act – The AO has not recorded any satisfaction in terms whether the assessee has concealed particulars of income or has furnished inaccurate particulars of income – The levy of penalty is invalid

Mrs. Indrani Sunil Pillai vs. ACIT [ITA 1339/Mum/2016], dated 19-1-2018 – Assessment Year: 2010-11

Facts

The assessee is an individual, filed her returns on 14-10-2010 declaring total income at ₹ 79,47,520. The assessment was finalized *vide* assessment order under section 143(3) of the Act by making addition of ₹ 6,05,717 without recording satisfaction with respect to initiation of penalty proceedings. The AO, thereafter, levied the penalty of ₹ 1,87,167 under section 271(1)(c) of the Act wherein the penalty was imposed for furnishing inaccurate particulars of income. On appeal, the CIT(A) upheld the action of the AO. The assessee, therefore, being aggrieved by the appellate order preferred the appeal before the Appellate Tribunal.

Held

The Appellate Tribunal observed that a reading of the assessment order makes it clear that the AO had initiated penalty proceedings under section 271(1)(c) without recording any satisfaction as to whether the assessee has furnished inaccurate particulars of income or concealed particulars of income. He had simply mentioned "the penalty proceedings u/s. 271(1)(c) are initiated". In the first show cause notice issued under section 274 r.w.s. section 271(1)(c) the AO had not specified the specific limb of section 271(1)(c) on which penalty sought to be levied. Thus, it was clear that the AO had failed to record satisfaction with regard to the exact nature of offence committed by the assessee in terms of section 271(1)(c). Further, not striking off the inappropriate words in the show cause notice issued under section 274 of the Act by not mentioning the exact charge for which he intended to impose penalty under section 271(1)(c), the assessee was deprived of a fair and reasonable opportunity to effectively deal with the issue of imposition of penalty. Therefore, the imposition of penalty in the present case could not be supported. Further, the Appellate Tribunal while deciding the issue distinguished the decision of Bombay High Court in the case of *M/s. Maharaja Garage & Co. vs. CIT [ITXA 21 of 2008].*

A similar issue was also held in the case of *Pennzoil Quaker State India Ltd. vs. DCIT (ITA No. 7503 & 7386/Mum/2014).*

No Capital Gains on sale of agricultural land as such land does not fulfil the conditions of sub clauses (a) & (b) of s.2(14)(iii) (r.w.s. 48 & 50)

ITO vs. Anusuya R. Gupta (ITA No. 3915/Mum/2016) dt.24/1/2018 – Assessment Year: 2010-11

Facts

The assessee had inherited agricultural land at Bhoomidari Arazi, Distt. Uttar Pradesh. The assessee and her relatives were carrying on cultivation activity and growing crops till the year 1972 and then shifted to Mumbai. The assessee allowed land to "Kamdaars" to cultivate and remit money and grain after deducting their share for cultivation in the financial year 2007-08. Some of the cultivators had sold the said land by means of forged documents. The assessee could not fight with them and sold such agricultural land. Since the property was under encroachment, the stamp duty was paid by the buyer on the fair market value at circle rate due to being near to the developed village road.

During the assessment, the Assessing Officer asked why not capital gains attracted to said sale transaction of agricultural land. The assessee submitted before Assessing Officer that the land was agricultural land and cultivation was still going on said land. Therefore, land was covered under the provisions of section 2(14)(iii) of the Act, which excludedit from the definition of capital assets and said land did not attract sections 48 or 50C of the Act for calculating the capital gains. The Assessing Officer assessed the sale consideration received by the assessee as long term capital gains in the hands of assessee.

Held

The issue was whether the impugned land was covered by clause (b) of s.2(14)(iii), as this section prescribed that any area within such distance, not being more than 8 km, from the local limits of any municipality or cantonment Board as referred to in sub-clause (a) of s.2(14)(iii) was considered as a capital asset. Sub-clause (b) of s.2(14)(iii), even under the amended definition of expression 'capital asset', provided that agricultural land situated in rural areas continued to be excluded from that definition.

The ITAT held that as the agricultural land was outside the municipal limits of Unnao Municipality and that it was also far away i.e., more than 8 kms. from the outer limits of the said Municipality, the Assessee's land did not come within the purview of s. 2(14)(iii) either under sub-clause (a) or (b) of the Act. Therefore, the sale consideration received from the agricultural land could not be considered as capital asset within the meaning of s.2(14), and capital gains could not be taxed on sale of land.

Penalty u/s. 271(1)(c) cannot be confirmed, once the addition was set aside to the AO for re-adjudication.

Late Sh.Gokuldas H.Parikh vs. ITO (ITA No. 2466/Mum/2015) dtd.24/1/2018 – Assessment Year: 2009-10

Facts

The quantum was framed by the AO u/s. 144 r.w.s. 147 and on which penalty u/s. 271(1)(C) was levied. The penalty was levied against addition on account of certain undisclosed 'capital gains' earned by the assessee. The issue of undisclosed 'capital gains' was restored to the AO for re-adjudication by the ITAT.

Held

When the addition was made on account of undisclosed capital gains and the same was restored to the Assessing Officer as the same confirmed without hearing of assessee, then penalty levied on same quantum cannot survive.

Revision u/s. 263 cannot be done when there is a conflicting of judgment of two High Courts on the same issue which relates to the merits of the case (r.w.s.22 & 28)

M/s. Kamala Brothers vs. CIT (ITA No. 7134 & 7135/Mum/2014) dt. 29-1-2018 – Assessment Years: 2008-09 & 2010-11

Facts

The assessee was a builder and developer, and had shown closing stock of unsold flats in the balance sheet. As per the decision of *CIT vs. Ansal Housing Finance & Leasing Co. Ltd. (2013) Taxmann 143(Del.)(HC)* the ALV of the unsold flats is to be taxed as income from house property. Therefore, the Commissioner of Income-tax ('CIT') issued notice u/s. 263 of the Act to the assessee only on the issue of closing stock of unsold flats shown under Stock in trade and same had to be treated under the head "Income from House Property". Against the said notice, the assessee before the CIT had submitted that in the case of *CIT vs. Neha Builders (P) Ltd. (2008) 296 ITR 661 (Guj.)(HC)* held that if the property was used as stock-in-trade then said property would become or partake character of stock and any income derived from stock would be 'income from business' and not 'income from property'. The CIT did not consider the same and confirmed revision order.

Held

The ITAT held that when there was a conflict between the judgments of two High Courts on the same issue, then the CIT was not justified for invocation of s.263 for revision of order. Accordingly, the revisionary proceedings under section 263 of the Act were quashed.

Section 115JB & Section 37 – Revenue expense to be allowed in the year in which it is incurred, unless the Assessee defers it by following the principle of matching concept. Any disallowance / adjustment on this account cannot be made to the income under the provision of section 115JB.

Scrabble Entertainment Ltd. vs. ACIT (ITA No. 1742, 2808/Mum/2016) dated 31-1-2018 Assessment Year: 2011-12

Facts

The Assessee was engaged in the business of selling DLF projectors and related accessories for deployment of digital cinema. The assessee has treated subsidised cost on sale of projectors and its accessories as deferred revenue expenditure and amortised over a period of agreement. During the year under consideration, the assessee has changed its accounting policy so as to charge total subsidised cost incurred to the P&L Account in the year in which such cost has been incurred and such changes has been disclosed in the notes to accounts. The AO made addition to the book profit computed u/s. 115JB on the ground that the assessee has failed to make positive adjustments towards amortisation of subsidised cost even though such expenditure is not deductible during the year under consideration because of its own treatment in the earlier financial year. The AO further observed that the assessee itself has considered subsidised cost as deferred revenue expenditure and amortised over a period of agreement by following matching concept principles of accounting. However, without any material changes in facts, changed its accounting policy to charge subsidised cost in the year of incurrence. Therefore, he opined that its financial statements were not in accordance with Parts II and III of Schedule VI of the Companies' Act and hence made adjustments towards amount written off to the book profit. The addition was upheld by the CIT(A).

Held

On appeal filed by the assessee, the Tribunal held in favour of the Assessee. The ITAT held that revenue expenditure are usually allowed in the year in which they are incurred. However, in the present case, due to the continued benefit, the assessee had wanted to follow the principle of matching concept and allowed the entire expenditure over the period of the agreement. The Tribunal held that if the assessee claimed a benefit based on the normal rule i.e., claiming revenue expenditure incurred in a particular year is to be allowed in that year, then it cannot be denied by the department. However, in case the assessee himself wants to spread the expenditure over a period of ensuing years, it can be allowed only if the principles of matching concept were satisfied. The assessee had disclosed its change in accounting policy in its financial statements, prepared in accordance with Parts II and III of Schedule VI of the Companies Act, 1956, and was audited by the statutory auditors and approved by the Board of Directors. Once the accounts were prepared as per the Companies Act and approved by the Board and audited, the AO cannot make any adjustment towards book profit computed u/s. 115JB of the Act. Such adjustment would not be in accordance to Explanation 1 to the said section. Accordingly the appeal of the assessee was allowed.

Section 50C – Provisions of section 50C did not apply if the value as per the stamp duty authority was less than the sale consideration.

Thinga & Contractor v. ACIT (ITA No. 5618/Mum/2012) dated 24-1-2018 – Assessment Year: 2007-08

Facts

The assessee, a chartered accountant firm, had sold office premises for ₹ 45 lakhs. While computing the short term capital gains, the gross sale consideration was reduced by the cost of improvement incurred of ₹ 8 lakhs. The net sale consideration was taken as ₹ 37 lakhs, from which the written down value of the block was reduced. The Assessing Officer observed that the value as per section 50C of the Act, determined by the stamp valuation authority, should be taken as the deemed sale consideration. The AO referred the matter to the Departmental Valuation Officer ('DVO') to determine the fair market value of the property, who determined the value as ₹ 39.99 lakhs and the differential short term capital gains was taxed by the AO.

Held:

The Tribunal observed that as per the sale agreement, the stamp duty authority had determined the value as Rs. 42.60 lakhs, which was less than the sale consideration of Rs. 45 lakhs. Accordingly, it was held that *prima facie* the provisions of section 50C did not apply since the sale consideration was less than the stamp duty value and no addition could be made merely on basis of the fair market value determined by the DVO.

 

CA Tarunkumar Singhal & Sunil Moti Lala, *Advocate*

INTERNATIONAL TAXATION
Case Law Update

A. AUTHORITY FOR ADVANCE RULINGS

1. Where the condition provided in Explanation 6 to Section 9(1)(i) of the Act was not satisfied, gains from transfer of shares of a German company which in turn held 100 per cent of shares in an India company would not be taxable in the hands of the German shareholders under the provisions of Act. Further as per Articles 13(4) and 13(5) of the India-Germany DTAA, gains from alienation of shares/rights arising on sale of shares of a Germany company would be liable to tax in Germany and not in India

GEA Refrigeration Technologies GmbH – AAR No. 1232 of 2017

Facts

1. The applicant viz., GEA Refrigeration Technologies GmbH was engaged in the business of industrial refrigeration. In order to gain access to a wider range of cooling applications/to enhance its know-how with regard to environment friendly solutions, it entered into a Share Purchase Agreement to acquire an unrelated German company viz., Bock GmbH for a consideration of Euro 40,504,000 i.e. INR 2,533 million, which in turn held 100 per cent shareholding in Bock India along with other subsidiaries in Germany, China, England, Singapore etc. As per the valuation reports the fair market value of Bock India was INR 136.70 million and that of Bock GmbH was INR 2,533 million.

2. Considering that the transfer of shares of Bock GmbH in turn led to transfer of shares of Bock India, the applicant sought the Ruling of the AAR on the following two questions:

i) Whether the income derived from the shareholders of Bock GmbH from the sale of shares of Bock GmbH was chargeable to tax in India under the Act along with the provisions of the India-Germany Double Tax Avoidance Agreement ('DTAA') where Bock GmBH held 100 per cent share capital of Bock India?

ii) If the answer to the above question is negative, whether on facts and circumstances of the case, the applicant was liable to deduct tax at source under Section 195 of the Act read along with the India-Germany DTAA on the payments made by it to the shareholders of Bock GmbH, Germany on account of purchase of shares from these shareholders in Bock GmbH, Germany?

Held

1. The AAR referred to Section 9(1)(i) read with Explanations 5 and 6 thereto and observed that i) all income accruing or arising in India whether directly or indirectly through or from any property/asset in India would be taxable in India, ii) an asset or capital asset being a share or interest in a company registered outside India would be deemed to be situated in India if the share derives its value substantially from the assets located in India, and iii) for a share or interest to derive its value substantially from the assets in India a) the value of such assets should exceed INR 10 crore, and b) the value of such shares should represent at least 50 per cent of the value of all the assets owned by the company. It noted that as per the Valuation Report filed by the applicant, the FMV of the shares of Bock India (INR 136.7 million) was merely 5.40 per cent of the FMV of Bock GmbH (INR 2,533 million) without even taking into account the liabilities of Bock India which would further reduce its value (which was far less than the 50 per cent condition stipulated in Explanation 6 to Section 9(1)(i). Therefore, it held that the said transfer of shares would not be subject to tax in India under the Act.

2. Though the taxability under the DTAA was academic in light of the AAR's findings on taxability under the Act, the AAR held that even as per Article 13(4) of the DTAA, the gains from alienation of shares of Bock Germany (company resident of Germany) would be taxable only in Germany. It further held that even if a view was taken that some other rights other than the shares of Bock GmbH were alienated then as per Article 13(5), gains from alienation of such rights would be taxable only in the Contracting State of which the alienator was resident i.e., the shareholders of Bock GmbH – Germany.

3. *Vis-à-vis* deduction of tax at source under Section 195 of the Act, relying on the decision fo the Apex Court in *GE Technology Centre vs. CIT 327 ITR 456 (SC)*, it held that since the income was not chargeable to tax under the Act (the gains arising from alienation of shares was not chargeable to tax in India) the applicant had no obligation to withhold tax on payments to the shareholder of GmbH.

2. Where there were separate / distinct agreements for the supply of equipment and rendering of supervision services after installation between the applicant and its associated company and the applicant had separately carried out the installation of the equipment supplied through third parties, the agreements with the associated company could not be read as a whole to allege that it was for a turnkey project also covering the installation of equipment

Michelin Tamil Nadu Tyres Pvt. Ltd. – AAR No. 1218 of 2011

Facts

1. The Applicant viz., Michelin Tamil Nadu Tyres Pvt. Ltd., a Chennai based company started taking steps to set up a factory for production of bus and truck tyres and for manufacturing mixtures and semi-finished products necessary for the production of such tyres for which it entered into an Umbrella Agreement / Equipment Purchase Contract in 2011 with a closely associated group company viz., MFPM for design, engineering, manufacturing, inspection and packing, forwarding and dispatch of machinery and equipment from outside India. Subsequently, in 2013 it also entered into a Services Agreement with MFPM for providing supervisory services during installation of machinery after the completion of supply (on which the Applicant deducted taxes at Source while making

payments). The installation services were rendered by different third party suppliers and its own employees.

2. The applicant approached the AAR on the following questions:

i) Whether the amounts payable to MFPM by the applicant for Offshore supply of machinery and equipment were liable to tax in India under the Act and the India-France DTAA read with the Protocol to the India-France DTAA

ii) If the answer to question i) was affirmative whether the applicant was required to withhold tax in accordance with the provisions of Section 195 of the Act and at what rate?

Held

1. The AAR, dismissing the contention of the Revenue (that the agreement for supply of equipment and the Service Agreement were to be read as one and that MFPM not only supplied the equipment but also installed the same and supervised the installation in the capacity of a turnkey project) observed that

i. The two agreements were entered into by the applicant at different points of time (supply of equipment in 2011 and services agreement in 2013) and had independent scope of work.

ii. That the TPO himself had accepted that the payment for such import of equipment was at ALP which further indicated that the price paid by the applicant was only for the purchase of equipment and not for the installation or any services post shipment other than those covered under the Umbrella Agreement.

iii. That the Service Agreement was merely for supervision of the installation of the equipment by the employees of MFPM and that there was no mention of installation services.

iv. On further examination of the Umbrella Agreement, it noted that the Price Schedule contained therein listed down all the cost incurred by MFPM which was charged to the applicant but there was no mention of installation costs.

v. That the Revenue was unjustified in contending that third party contractors to whom payment for installation were made were merely assisting MFPM in installation and that the installation work was actually done by MFPM.

vi. That the employees carried out the installation and commissioning work were technical persons suitably qualified for the work and therefore the Revenue was not justified in questioning their competence.

vii. That there was nothing on record to prove that the employees sent by MFPM in respect of supervision were also involved in providing installation services.

viii. That there was no evidence to prove that MFPM dealt with the Applicant on a turnkey basis

Accordingly, it held that the Revenue was not justified in alleging that the Agreements were to be read as a whole and that MFPM provided the applicant installation services.

2. *Vis-à-vis* the taxability of supply of equipment, referring to Section 9 of the Act, the AAR held that the present case was that of a sale of goods outside India, simplicitor and the same would not give rise to taxable income in India even though the said goods were to be utilized within India and therefore held that no part of the income from the offshore supply of equipment could be brought to tax in India.

3. Accordingly, it held that the applicant was not liable to deduct tax at source under Section 195 of the Act on payments made for the offshore supply of equipment.

4. Since the income from offshore supply of equipment was held not to be taxable under Section 9 of the Act the AAR held that there was no necessity to examine the issue with reference to the India-France DTAA.

5. However, *vis-à-vis* the Service Agreement, the AAR held that the income derived by MFPM would be taxable in India as the employees of MFPM would constitute a Service PE In India.

3. Payments received/to be received by the assessee for rendering, lighting and searchlight services to the Organizing Committee, Commonwealth Games 2010, Delhi would be taxable in India as the assessee had a fixed place PE

Production Resource Group Avenue Edison – AAR No. 1330 of 2012

Facts

1. The assessee, a company registered in Belgium was engaged in the business of providing technical equipment and services for events including lighting, sound, video and LED technologies. It entered into a Service Agreement with the Organizing Committee of the Commonwealth Games, Delhi, (OCCG), for a term commencing on 9th July 2010 and expiring on 30th October 2010, on a turnkey basis to provide lighting and searchlight services during the opening and closing ceremonies of the Commonwealth Games Delhi, 2010 i.e. 3rd October 2010 and 14th October 2010 respectively. Its employees and equipment were in India for a period of only 66 days for preparatory, installation and dismantling of equipment from 2-8-2010 to 24-10-2010.

2. The applicant approached the AAR on the following questions:

Whether the payments received/to be received by it for rendering, lighting and searchlight services to the Organizing Committee, Commonwealth Games 2010, Delhi (hereinafter referred to as "ÖCCG") would be taxable in India under the provisions of the Income-tax Act, 1961 ("the Act").

If the payments received by the applicant for rendering lighting and searchlight services to OCCG, were taxable in India under the provisions of the Act, whether the same would not be taxable in India in view of the DTAA between India and Belgium read with the Protocol between India and Belgium read with DTAA between India and Portugal?

Held

The AAR examined the taxability of the said receipts as business receipts, royalties and fees for technical services and held that

1. *Vis-à-vis* business receipts, it noted that in providing the impugned services, the appellant had to do all related activities, such as abiding by and obtaining all authorizations, permits and licences; engaging personnel with the requisite skills, ensuring their availability; supply and/or procure all necessary equipment for its business; subcontracting; and shipping and loading, insurance etc. Further, as per Schedule 2 of the agreement, the applicant had also been provided among other facilities, office space as well as on-site space which was not merely for storage alone, but was for carrying out the business itself, and hence could not be discarded or excluded. The AAR held that the above facilities provided to the Applicant showed that there was a clear link between the place of business and an identifiable geographical point, from where its business would be done.

As regards the applicant's plea that its presence was of a transient nature, and not an enduring one, as mentioned in the case of Visakhapatnam Port Trust, it held that the same could not be accepted on the facts of this case as the establishment need not be enduring or permanent in the sense that it should be in its control forever but the degree of permanence had to be considered from the context in which the business was carried out. Relying on the decision of the Apex Court in Formula One it held that the length of time had to be necessarily tied to the nature and requirements of the business under consideration.

Further, the AAR noted that it had to provide 3 phase supply, multiple synchronized generators, mains distribution and mains cabling, till its equipments were handed over or shipped and therefore held that all these functions were part of the turnkey project, and hence it was not correct to say that it provided services only during the opening and closing event. It was also noted that as per Schedule 1 of the agreement, insurance was taken by it for the period from the date of signing the Agreement till 31st December, 2010. Therefore, considering all the aforesaid factors, the AAR held that the Applicant had a fixed place PE in India as it met each of the criterion for establishing a PE i.e., place of business, power of disposition, permanence of location, business activity and business connection and that its profits were taxable as per Article 7 of the DTAA. Further, even as per the Act, the AAR held that the aforesaid income would be covered within the meaning of Section 9(1)(i) of the Act since the same had arisen and accrued from a business connection India.

2. Vis-à-vis taxability as royalty, it held that the amounts received by it did not constitute royalty income as no assignment of any right to use the knowhow, technical experience, skill, processes and methodology, or even the copyright, patent, trade mark, design or model, or any intellectual input comprised therein were provided by the Applicant. The Applicant merely assigned the rights to use the final product which could not be taxed as royalty.

3. As regards fees for included services, it held that since the Applicant did not 'make available' any technology as per the India Belgium DTAA, read with its Protocol and also read with the DTAA between India and Portugal, the receipts would not constitute fees for included services though the services were technical in nature.

B. HIGH COURT

4. Where the assessee benchmarked its international transactions under 'any other method' for the first time during the relevant year, the Tribunal ought to have provided its findings on the issue instead of remitting the matter to the TPO for fresh adjudication.

Springer (India) Pvt Ltd vs. ACIT – TS-1062-HC-2017 (Del.) – TP - ITA 1148/2017

Facts

1. The assessee, a subsidiary of its AE specialised in scientific and technical journals. It paid a sum to its AE towards cost contribution for costs incurred by a Swiss based fellow subsidiary, the allocation of which was based on the number of articles and subscriptions of the assessee. For all the prior years, the assessee used to follow TNMM and benchmark its transactions on a consolidated basis. However for the year under review, the assessee sought to adopt the residual method viz. 'any other method' which was brought into force in the concerned AY.

2. The AO rejected the assessee's application of the other method and proceeded to benchmark the transactions under TNMM and made a TP addition.

3. On appeal, the DRP called for a remand report of the AO which it rejected as perverse. However, it confirmed the addition.

4. On further appeal, the Tribunal held that the issue required re-verification. It held that since the assessee had determined ALP based on TNMM under a consolidated basis in all prior years and the facts remained the same there was a heavy burden on the assessee to prove that its change in approach during the relevant year was warranted. Accordingly, it remitted the issue of re-verification.

5. Aggrieved, the assessee filed an appeal before the Hon'ble High Court.

Held

1. The High Court held that the Tribunal should have determined the applicability of the other method itself without remitting it to the file of the TPO. Accordingly, it directed the Tribunal to proceed with the matter afresh.

C. Tribunal Decisions

5. Whether the consideration for provision of comprehensive cementing services through equipment, material and personnel will qualify as FTS under Explanation 2 to section 9(1)(vii) of the Act – Held: No; Whether the provisions of section 44BB of the Act being more specific are applicable and prevail over section 44DA of the Act – Held Yes; Such services are taxable u/s 44BB of the Act

M/s National Oil Well Maintenance Company vs DCIT Assessment Year : 2013-14 2017 (12) TMI 183 – ITAT Jaipur

Facts

1. The assessee a foreign company entered into agreements with Oil & Gas companies in India (Indian Entities) for the provision of cementing services in respect of exploratory and development wells planned to be drilled through equipment, material and personnel during the contractual period in India.

2. For the AY 2012-13, the assessee filed its return of income offering the income from cementing services under section 44BB of the Act.

3. The Tax Officer (TO) passed an order pursuant to the directions of Dispute Resolution Panel (DRP) and held that income from cementing service was liable to be taxed under section 44DA and not under section 44BB of the Act, considering the fact such income would qualify as FTS as defined under Explanation 2 to section 9(1)(vii) of the Act.

4. Aggrieved by the order of the TO, the assessee filed an appeal before the Tribunal.

5. The assessee contended that the cementing services were not in the nature of technical services, as it fell under the exclusion clause as provided under Explanation 2 to section 9(1)(vii) of the Act relying on decision of *ONGC Ltd. vs. CIT (2015) 59 taxmann.com 1 (SC).*

6 Further, the cementing services were part of construction of mineral oil and gas wells and were inextricably linked with prospecting for or extraction or production of mineral oil and accordingly revenue from such services would be taxable under section 44BB of the Act and not under the provisions of section 44DA of the Act. In addition, section 44BB of the Act, was more specific in the instant case, the provisions of section 44DA of the Act would not apply relying on decision of *DIT vs. OHM Ltd. (2012) 28 taxmann.com 120 (Delhi HC).*

7 The Tax Officer considered to tax income from services under section 44DA of the Act considering the services provided by the assessee were in the nature of FTS as defined under Explanation 2 to section 9(1)(vii).

Tribunal decision

1. The contracts provides for provision of comprehensive cementing services, and relying on the ruling of Supreme Court (SC) in case of *ONGC Ltd. vs. CIT (2015) 59 taxmann.com 1 (SC),* based on the test of pith and substance, Tribunal ruled that services as mentioned in the contracts are directly associated with drilling operations and inextricably connected with prospecting, extraction or production of mineral oil.

2. Tribunal further observed that the above decision of the SC holds good even in the instant case but for the fact that the said decision was rendered in the context of section 44D of the Act and the TO has failed to apply the principles of above ruling in the present case which is in the context of section 44DA of the Act.

3. Further, as per CBDT Circular No. 1862 dated 22nd October, 1990, which is still operative and has not been withdrawn by the CBDT, mining or like projects occurring in the exclusion part of Explanation 2 to section 9(1)(vii) covers rendering of services such as drilling operations for exploration of and extraction of oil and natural gas. As the cementing services are related to mining or like project, it will fall under the exclusion from FTS as defined under Explanation 2 to section 9(1)(vii) of the Act.

4. The section 44DA of the Act presupposes the nature of income as FTS. As cementing services do not qualify as FTS, or like project and qualifies for exclusion from fees for technical services, and thus, were covered under the presumptive the applicability of section 44DA is ruled out and income is rightly been offered to tax under section 44BB of the Act.

5. Further, placing reliance on the decision of Hon'ble Delhi High Court in case of *DIT vs. OHM Ltd. (2012) 28 taxmann.com 120 (Delhi HC)* the Tribunal held that even if it is assumed that consideration received by assessee for such services rendered qualifies as FTS, the provisions of section 44BB being more specific shall prevail over general provisions contained in section 44DA.

6. India-UAE DTAA – Payment of technical/professional services – Whether taxable as "Business Income" under Article 7 – Held No – No Service PE in India under the India-UAE tax treaty since the period of working of employees is less than nine months

Booz & Company (ME) FZ-LLC vs. DDIT [TS-27-ITAT-2018(Mum.)] Assessment Year 2011-12

Facts

1. The assessee is a UAE based company that belongs to the Booz group. It is engaged in the business of providing management and technical consultancy services. During the year under consideration, the assessee provided technical/professional personnel to its Indian associated enterprise named Booz & Company India Private Limited (Booz India).

2. The assessee received a fee of INR 112.83 lakh from Booz India. However, the assessee did not offer the same for taxation since the tax treaty does not have any specific clause on taxability of Fees for Technical Services (FTS) and therefore the said receipt is taxable as business income. However, since the assessee did not have a Permanent Establishment (PE) in India, fees received are not taxable in India.

3. The Assessing Officer (AO) noticed that some of the group companies of the assessee approached Authority for Advance Ruling (AAR) in order to determine the taxability of their receipts from Indian entities. The AAR in the case of Booz Group Companies [2014] 362 ITR 134 (AAR) held that the assessee's group companies have a PE in India and income received by them from Indian companies are taxable as business profit under Article 7 of the tax treaty.

4. The group of companies which obtained AAR ruling included Booz & Company (ME). The AO held that the assessee is a 100 per cent subsidiary of Booz & Company (ME) Ltd. Hence the AO, by following the decision of AAR, held that 'Booz India' (Indian AE) to whom services were provided is the PE of the assessee. Accordingly, the AO held that the income is taxable as business income of the assessee. The CIT(A) confirmed the order of the AO.

Tribunal's decision

1. The tax department relied on the AAR ruling in respect of certain group companies. However, the assessee contended that the question of availability of PE has to be examined on the basis of facts available in the present case. The assessee contended that the AAR ruling is binding only on those parties and not on others.

The Tribunal finds merit in the contentions of the assessee. The Tribunal held that the AAR ruling in the group concern's case should not have been taken by the tax authorities as the basis for determining the existence or otherwise of PE of the assessee

2. There is no dispute between the parties that the fees received by the assessee from Booz India for the provision of technical/professional personnel are in the nature of business receipts. As per Article 7 of the Indian-UAE tax treaty, the business receipts are taxable in India only if the assessee has a PE in India.

3. On reference to Article 5 of the tax treaty, the Tribunal observed that the working of the employees in India does not exceed nine months. Hence, Article 5(2)(i) of the tax treaty shall not apply to the facts of the present case.

4. It has been observed that Booz India has also not earmarked any specific place under the control or disposal of the assessee. Hence, it cannot be said that the assessee did carry on any business in India through the fixed place of business. Since the assessee has provided service to Booz India and did not receive any service, the question of dependent agent PE also does not arise in India.

5. Accordingly, the Tribunal held the assessee does not have a PE in India and consequently, the receipt is not taxable in India.

Comments

1. The issue with respect to consideration of *solar days vs man days* for determination of service PE has been a matter of debate before the Courts. Some of the Courts have held that for the purpose of determining the service PE, 'solar days' and not 'man days' are to be considered. For example, the day on which more than one person was present in India should be counted as one single day. Multiple counting of days could lead to absurd results for example, if 20 employees are present in India for 20 days then as per multiple counting the presence in India would go up to 400 days. Therefore, courts have held that multiple counting is to be avoided. However, the tax department in many cases determined the PE on the basis of 'man days'.

In line with the above decisions, the Mumbai Tribunal in the present case held that 'solar days' would be considered for the purpose of determining a service PE in India. Such cases are:

- *Worley Parsons Services (P) Ltd. [2009] 312 ITR 317 (AAR),*
- *J. Ray Mcdermott Eastern Hemisphere Ltd. vs. JCIT [2010] 39 SOT 240 (Mum.),*
- *ADIT vs. Valentine Maritime (Mauritius) Ltd. [2011] 45 SOT 34 (Mum.),*
- *Clifford Chance vs. DCIT [2002] 76 TTJ 725 (Mum.),*
- *Electrical Material Center Co. Limited vs. DDIT (IT)(TP) A No. 1104 (Bang.) 2013, dated 28th September, 2017*

2. The Courts/Tribunal have extensively dealt with the issue with respect to taxability of services in the absence of specific FTS article in the tax treaty. Some of the Courts have held that in the absence of FTS article in the tax treaty, services should be taxable under 'Business Profit' article if the assessee is having a PE in India. If the assessee does not have a PE in India, such services would not be taxed in India. However, in some of the cases, the tax department (in addition to the above point) contended that if the assessee does not have a PE in India, taxability of such services needs to be examined under the residuary article. Such cases are:

- *McKinsey Business Consultants vs. DDIT [2015] 54 taxmann.com 300 (Mum.),*
- *Bangkok Glass Industry Co. Ltd. vs. ACIT [2013] 34 taxmann.com 77 (Mad.)*

3. The Bangalore Tribunal in the case of *IBM India Private Limited vs. DDIT [I.T. (IT) A. Nos. 489 to 498/Bang/2013*] observed that 'other income' article provides that income which is not

dealt with in any of the articles of the tax treaty, shall be taxable in 'other income' article. An item of income is said to have been dealt with other articles of the tax treaty if such income can be classified as taxable or not under any of the articles of the tax treaty. If the payments are dealt with by Article 7 of the tax treaty, Article 23 has no application. Therefore, such services cannot be taxed under 'other income' article of the tax treaty.

4. The AAR in the case of *Lanka Hydraulic Institute Ltd. [2011] 11 taxmann.com 97 (AAR)* observed that since there is no specific article for taxation of FTS in the tax treaty, it would be directly governed by Article 22 of the tax treaty which is a residuary article in the tax treaty. The AAR has not examined the 'Business Income' article for such income.

5. It is pertinent to note that the Bangalore Tribunal in the case of *Spice Telecom vs. ITO [2008] 170 Taxman 82 (Bang.)* observed that since services provided by the assessee are not covered under the India-Mauritius tax treaty, the same are not taxable in India. Accordingly, it is also possible to argue that in the absence of FTS article, the services would not be taxed in India.

6. The tax department has been arguing that when FTS article is missing in the tax treaty, the taxability of services should be under the Act. The Chennai Tribunal in the case of *DCIT vs. TVS Electronics Ltd. [2012] 52 SOT 287 (Chennai)* held that only for a reason that the tax treaty is silent on a particular type of income, it could not be said that such income will automatically become business income of the recipient. When the tax treaty is silent on a particular article, the provisions of the Act have to be considered.

7. The Mumbai Tribunal in the present case dealt with the issue of taxability fees received from the Indian company for the provision of technical/professional personnel under the India-UAE tax treaty where FTS clause is missing. The Tribunal held that fees received from the Indian company are not taxable in India in the absence of a PE in India.

There is considerable litigation on the above issue, and the Courts/Tribunal have rendered contrary decisions on the same. Therefore, one needs to make an informed decision based on facts of each case, analysis of the above decisions and the language of a particular tax

 

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Exim Trade (Goods) & Export of Services under GST – Part II

Introduction

Part I of this article published in January 2018 issue covered an in-depth analysis of the export of goods side of the transactions in foreign trade. The gamut of export-import (EXIM) trade covers within its scope not just export and import of goods or services *per se*, but also various trades that happen in the course of import and export. These transactions typically include high seas sales, sale from bonded warehouse, deemed exports and the like. This article provides an in-depth analysis of the export of services and import side of transactions in EXIM trade.

Export of Services under GST

Similar to export of goods, export of services are also treated as zero rated supplies under section 16 of the IGST Act. As explained in the earlier article the zero rating of export of services is founded under the principle of destination based consumption tax. Similar as is in the case of goods under GST law, export of services has been treated as:

- Inter-State supply and covered under the IGST Act.
- 'Zero Rated Supply' i.e. the services exported shall be relieved of GST levied upon them

Definition of Export of services

Export of Services is defined under as per Section 2(6) of the IGST Act. The definition itself identifies certain basic conditions to classify a service transaction as export. These conditions as encompassed in the definition are enumerated below:

a) The supplier of service is located in India

b) The recipient of service is located outside India

c) The place of supply of service is outside India

d) The payment for such service has been received by the supplier of service in convertible foreign exchange

e) The supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8

All these five conditions as specified in the definition above are cumulative and are to be fulfilled in totally to consider a transaction of service as an export transaction. In the subsequent paragraphs we have analysed each of these conditions in detail

Condition (a): The supplier of service is located in India

This condition *prima-facie* requires the supplier of services to be located in India. Most of the times, identifying the location of supplier is not a difficult task but considering the advanced technology and the modes of communication like telephone, video conferencing, etc. used in modern times for providing services makes it difficult to identify the location of supplier and the location from where the services are actually provided. Let us take an example of a Chartered Accountant who is having an office in Mumbai and is therefore, registered with Maharashtra State Code GSTIN. He is giving advice to his client over the phone when he is in Dubai for a vacation with his family. In this case, the CA happens to supply service from Mumbai or from Dubai for GST purposes? While practical approach may give an answer but it is important to understand that how location of a supplier of service is defined in the GST law. 'Location of supplier of service' is defined in section 2(71) of the IGST Act to mean:

a) Where a supply is made from a place of business for which the registration has been obtained, the location of such place of business;

b) Where a supply is made from a place other than the place of business for which registration has been obtained (a fixed establishment elsewhere), the location of such fixed establishment)

c) Where a supply is made from more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the provisions of the supply; and

d) In absence of such places, the location of the usual place of residence of the supplier

The above clarifies that the place of business which is registered by the assessee for GST purposes and the place which is most directly concerned with the supply becomes the location of supplier of service. Therefore, in the above example while the CA has given advice over the phone from Dubai, the place of business which is most directly concerned with the provision of supply i.e., Mumbai, where he is registered for GST purposes becomes the location of supplier of service.

Condition (b): The recipient is located outside India

This condition requires the location of recipient of service to be outside India. However, in some cases, it is observed that while the recipient is located outside India for business purposes but the actual performance of service happens in India. Let us continue with the example of the CA who is based out in Mumbai, Maharashtra and is supplying services to his client who is based out in Dubai. But in this case, the client personally visits CAs office in Mumbai to take the advice. The client does not have any place of business in India. In this case, the recipient's location can be said to be Mumbai or Dubai? 'Location of recipient of service' is also defined under the Act under section 2(70) of the IGST Act to mean:

a) Where a supply is received at a place of business for which the registration has been obtained, the location of such place of business

b) Where a supply is received at a place other than the place of business for which registration has been obtained (a fixed establishment elsewhere), the location of such fixed establishment

c) Where a supply is received at more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the receipt of the supply

d) In absence of such places, the location of usual place of residence of the recipient

The above definition clearly states that the place of business which is most directly concerned with the receipt of supply and which is registered for GST purposes becomes the location of recipient of supply. In the given example, while the client had come down to Mumbai for taking advice, but because he does not have a place of business in India and the service was in relation to his office in Dubai, the 'location of recipient of service' becomes Dubai in this case. The point to highlight over here is that in some cases (apart from the exceptions carved out in Place of Supply Provisions) even though the actual performance of service is in India, but because the recipient is based outside India and does not have any place of business in India, the location of recipient of service can be said to be outside India.

Condition (c): The place of supply of service is outside India

This condition plays a very vital role in identifying, whether a service supplied is export or not. As discussed supra, in cases where location of performance and location of recipient is different, then the location of recipient is of relevance. Therefore, in relation to certain services where the place of performance can be identified, are specifically carved out in Place of Supply provisions, to determine taxability for those services.

Section 13(2) of the IGST Act, 2017 states that except for the services which are mentioned in sub-section (3) to (13), the place of supply of service shall be location of the recipient. Further, the proviso states that where the location of recipient is not known, the place of supply shall be location of supplier of service. The services which are specifically identified in sub-sections (3) to (12) are tabulated below:

Sub-Section	Description of Service	Place of Supply
3	Services in respect of goods which are required to be made physically available by the recipient of service to supplier of service	Location where the services are actually performed
4	Services in relation to immovable property like hotels, guest house, etc	Location of immovable property
5	Services in relation to admission to an event	Location of event
6	Services in relation to sub-sections 3, 4 and 5, if supplied at more than one location, including a location in taxable territory	Location in the taxable territory
7	Services in relation to sub-section 3, 4 and 5, if supplied in more than one State or Union Territory	Location of each State or Union Territory
8	Services supplied by banking company or financial institution or NBFC to account holders, intermediary and services in relation to hiring of transport	Location of supplier of service
9	Service of transportation of goods other than by way of mail or courier	Location of destination of goods
10	Passenger transportation service	Location where passenger embarks for journey
11	Services provided on board a conveyance	First scheduled point of departure of that conveyance for the journey
12	Online information and database access or retrieval service	Location of recipient of service

Therefore, for these special services, irrespective of the location of recipient, to consider a transaction as export of service, the place of supply should be outside India.

Condition (d): Payment should be received in foreign convertible exchange

The condition of receiving foreign exchange existed even under the service tax law. Services, unlike goods are inherently intangible in nature. While the movement of export of goods can be tracked through the customs procedures it is rather impossible to track export of services. This may be one of the reasons for this condition to exist. The receipt of foreign exchange is often misunderstood with reflecting Dollars or Pounds in the Indian bank account and there are lot of controversies attached to it. In practical scenarios, some business entities who export services raise invoices to their foreign clients in INR and also receive consideration in their bank account in INR from the foreign bank account of their customer. In this case, whether this can be said be consideration received in INR or in foreign convertible exchange? The Hon'ble Mumbai Tribunal in the case of *Sun-Area Real Estate Pvt. Ltd. vs. Commissioner of Service Tax, Mumbai-I [2015 (5) TMI 885 - CESTAT MUMBAI]* has analysed this aspect and findings of the court are as under:

- Foreign Inward Remittance Certificate (FIRC) is issued only when in respect of Foreign Exchange as per Clause 3A.6(i) of Exchange Control Manual
- When a person receives in India, payment in rupees from the account of a bank situated in any country outside India maintained with an authorised dealer, the payment in rupees shall be deemed to have repatriated the realized foreign exchange to India as per para 4 of Notification No. FEMA 9/2000-RB, dated 3rd May 2000.
- From Notification No. FEMA 14/2000-RB, dated 3rd May 2000, it is clear that payment in rupees from account situated in any country (other than a member country of Asian Clearing Union or Nepal or Bhutan) is a manner of receipt of foreign exchange.
- Referring to the judgment of the Apex Court in case of J. B. Boda & Company, the Hon'ble Mumbai Tribunal has expressed an opinion that "when a foreign bank is maintaining Indian rupees in their account obviously, such Indian rupee was obtained in lieu of foreign exchange."

The tribunal has held, in this case, that the amount received in INR from a foreign bank fulfils the condition regarding the receipt in foreign exchange. Therefore, the condition of receiving payment in foreign currency is fulfilled if the transactions are in line with the Notification No. FEMA 14 /2000-RB dated 3rd May 2000, Notification No. FEMA 9/2000-RB, dated 3rd May 2000.

Further, it has been *inter alia* clarified[1] that export proceeds may be realised in Indian Rupees provided it is through a freely convertible vostro account of a non-resident bank situated in any country other than a member country of ACU or Nepal or Bhutan.

Condition 5: Supplier and recipient should not be establishment of distinct persons

'Distinct Persons' have been defined in *Explanation I* to Section 8(2) of the IGST Act, 2017 to mean, an establishment of an entity in India and his establishment outside India. What this condition basically means is that if an Indian office of the entity is providing services to its

1. Circular No. 8/8/2017-GST, dated 04-10-2017

branch outside India, then it won't be considered as an export transaction and therefore, GST will be payable on the same. Taking an example of a consultancy firm having branch in India and Dubai. The branch in Dubai has entered into contract with the client in India. Since, Dubai office had a branch in India it sub-contracted work to the office in India for servicing client in India. Now, since the Dubai office has entered into contract with the client in India, they will raise invoice on Indian client from Dubai. However, for the execution part which was done by Indian branch, they will cross-charge the Dubai branch for the support provided by them. Now, in this case since Indian and Dubai branches are establishments of a single entity, the service supplied by Indian branch to Dubai branch will not be considered as export of service and hence, GST will be payable by the Indian branch on the amount of cross-charge to Dubai branch.

Export of Services without payment under LUT/Bond

The condition and requirement for LUT/ Bond as applicable in the case of export of goods also apply in case of export of services. These are discussed in detail in the earlier article in the January, 2018 issue of the journal

Exim Trade in the course of import into India High Seas Sales

In the previous article we have already discussed that the territory of India is extended by deeming fiction up to 200 nautical miles into the sea. Oceans, seas and waters beyond 200 nautical miles are known as "High Seas" and are outside the national jurisdiction of the country. The Convention on the High Seas, signed in 1958, which has 63 signatories, defined "high seas" to mean "all parts of the sea that are not included in the territorial sea or in the internal waters of a State" and where "no State may validly purport to subject any part of them to its sovereignty." The Convention on the High Seas was replaced by United Nations Convention on the Law of the Sea, signed in 1982, which recognised Exclusive Economic Zones extending 200 nautical miles from the baseline, where coastal States have sovereign rights to the water column and sea floor as well as the natural resources found there. The area beyond 200 nautical miles in the sea is termed as international waters or 'high seas'

It is common trade practice to transfer the ownership of imported goods while they are still on High Seas. Such transactions of sale are popularly known as "High Seas Sales ('HSS')". Technically it means a sale that is carried out by the carrier document consignee to another buyer any time after the goods have left the port of departure or when they are yet on high seas but before their arrival at the port of destination (perhaps before they enter the EEZ). Typically a HSS transaction would involve following steps:

a) The Original Importer/ Buyer in India places an order to an overseas supplier of goods

b) On completing export procedures at port of departure the overseas seller presents documents to his bank

c) Original Importer enters into a HSS agreement with the HSS buyer in India while the goods are on high seas but before they enter the EEZ

d) Original Importer receives the documents from his bank and depending on payment terms would remit the amount to the overseas supplier

e) In terms of the HSS agreement the original importer raises an Invoice on the HSS buyer in India in INR

f) Original Importer endorses the Bill of Lading (carrier document) in favour of the HSS Buyer and hands over the same along with other documents to him

g) HSS Buyer files a Bill of Entry with the custom authorities along with other documents and clears the goods from customs on payment of Duty and IGST

Article 286 of the Constitution imposes a restriction on powers of the States as far as levy of tax on supply of goods in the course of import into India is concerned. In terms of the powers conferred under this Article the Central Sales Tax Act, 1956 ('CST Act') was enacted and section 5(2) was incorporated therein which states that sale in the course of import either where such sale or purchase occasions the import or where such sale is effected by way of transfer of documents of title before the goods cross the customs frontier of India. The term 'customs frontiers of India' used in section 5(2) was matter of huge litigation in the past. HSS are effected by transfer of documents of title and hence covered by the second limb of section 5(2) of the CST Act. In view of section 3 of the CST Act sale in the course of imports were not liable for payment of CST since the sale was not in the course of movement of goods from one State to another State and accordingly, HSS were not liable to tax under the pre-GST regime

In this backdrop let us understand the treatment of HSS under the GST Law. We need to analyse the same in two parts, namely:

1. Determine the nature of supply
2. Determine the levy under the charging provisions

The nature of supply (i.e. Intra-State or Inter-State) is to be determined in terms of section 7 of the IGST Act. Provisions of section 7(2) apply for determining the nature of supply in case of import of goods into India. The provisions are reproduced hereunder:

*"7(2) Supply of **goods imported** into the territory of India, **till they cross the customs frontiers** of India, shall be treated to be a supply of goods in the course of inter-State trade or commerce."*

The supply by the original importer takes place while the goods are on high seas. Accordingly, the transaction of supply (by transfer of document of title) between the original importer and HSS buyer would get covered under section 7(2) and hence shall be classified as an interstate transaction.

Once the nature of supply is determined we need to examine when the charge or levy is triggered. Section 5 of the IGST Act creates a charge of IGST on all inter-state supplies of goods or services. The relevant extract is reproduced hereunder:

5. (1) ......, there shall be levied a tax called the integrated goods and services tax on all inter-State supplies of goods or services or both, ... and shall be paid by the taxable person:

Provided that the integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975 (51 of 1975) on the value as determined under the said Act at the point when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962.

The proviso to the charging section 5 of the Act in effect gifts the charge in respect of imported goods to the Customs law. On a conjoint reading of the above provisions it is clear that HSS transactions of supply of goods are inter-state supplies and fall within the ambit of IGST Act. The charge to levy IGST on such goods is created only **at the point when duties of customs are levied on the said goods.** Accordingly, in case of HSS, IGST shall be payable only when the last buyer clears the goods from customs on filing a Bill of entry since that is the point in time when the customs duty becomes payable

With the advent of the GST regime there was confusion in the trade with respect to payment of IGST in case HSS of import goods. The issue was whether the IGST shall be levied twice, i.e. at the time of customs clearance under section 3(7) of the Customs Tariff Act, 1975 and also under section 5 of the IGST Act. The issue was deliberated at the GST Council meeting and it has been now clarified[2] by the board that all taxes (i.e., duties, taxes, cesses, etc.) shall be

2. Circular 33/2017-Cus, dated 1-8-2017

levied and collected at the time when import declarations (i.e., Bill of Entry) are filed with the customs authorities for the purpose of clearing the goods. The board has also clarified as under:

1. HSS are inter-state transactions
2. The IGST shall be levied and collected at the time of filing of Bill of Entry for clearance purposes
3. The last HSS buyer shall furnish the entire chain of documents to establish the first contract price of the goods and the last transaction
4. As per the earlier customs circular[3] the actual high seas sale contract price paid by the last buyer would constitute the transaction value under Rule 4 of Customs Valuation Rules, 1988

A question that arises at this juncture is what would be the position in case the HSS agreement is entered at the time when the goods are situated on the vessel located in the exclusive economic zone. On a reading of the law it is clear that the charge is created only at the time when duties of customs become payable. In that case the location of the vessel carrying the imported goods should not be material for deciding the liability to pay IGST. In view of the fact that 'India' has been very widely defined under the GST Law as discussed in the earlier article such transactions may become a matter of litigation. Accordingly, it is the author's view that on a conservative footing HSS shall be viable only when the goods are beyond 200 nautical from the baseline.

Reflection of HSS in Form GSTR-3B or GSTR-1

Having said that no IGST shall be paid in respect of HSS as far as the transaction between the original importer and the HSS buyer is concerned the next issue that comes up is the manner of furnishing the details in Form GSTR-3B or GSTR-1. As discussed the IGST is to be levied on the last contract price paid by the HSS buyer and hence the entire value is taxed under the IGST Act. Hence, care should be taken that these transactions are not recorded as exempt or non-GST since they are surely taxable outward supplies. In view of the author till such time that a clarification in this regards is issued by the Government HSS should not be reported in returns but would form part of the annual reconciliation statement

Bond Transfer Sale/ Tow Sales

At times imported goods are **removed** from the customs port or airport to a customs bonded warehouse without payment of duty by filing an in-bond Bill of Entry. This removal is allowed as per the provisions contained Chapter IX of the Customs Act. Subsequent to bonding the importer may **clear the goods** by payment of duty. Section 59(5) of the Act also allows the importer to transfer the ownership of the warehoused goods to another person while the goods remain deposited in the warehouse. Sale of goods to a third party from the warehouse is known as Bond transfer sale or transfer of ownership sale.

Accordingly, once the goods are warehoused under an in-bond Bill of Entry the importer may choose to do any of the following

- File an Ex-Bond Bill of Entry at a later date and **clear the goods himself** for home consumption by making payment of duty, or;
- **Sell part or whole of the warehoused goods to a third party** as provided under section 59(5) of the Customs Act. Such third party would file the ex-Bond Bill of Entry and clear the goods on payment of duty

3. Circular No. 32/2004, dated 11-05-2004

In case importer himself files the Ex-Bond Bill of Entry

Where the importer chooses to clear the goods himself from the bonded warehouse he can do so by filing an ex-bond bill of entry and paying the appropriate duty of customs including IGST. In terms of section 14 of the Customs Act, 1962 the value of the imported goods for the purpose of calculating duty is to be determined as the value at the time of import i.e., the date of In-Bond Bill of entry. However, the rate of duty applicable at the date on which the Ex-Bond Bill of entry is filed is to be adopted in terms of section 15 of the Act. Hence, if the importer chooses to clear the goods himself at a later date, he shall file an ex-bond bill of entry and clear the goods on payment of duty (including IGST) at the rate applicable as on the date of filing the ex-bond bill of entry on the value assessed as per the In-Bond Bill of Entry

In case the importer transfers the ownership to a third party and such third party files the ex-Bond Bill of Entry

The complication starts (or rather is created) when the importer chooses to transfer the ownership of the warehoused goods to one or more than one buyer while the goods are warehoused. In case where the importer chooses to sell the goods to a third party there would be two identifiable transactions in the chain:

- Import of goods by the importer who has warehoused the goods under an in-Bond Bill of Entry
- Supply of such warehoused goods to a third party before they cross the customs frontier

The question that arises here is whether both the above transactions shall be liable for payment of IGST or only one of the transactions would be liable for payment of IGST. Before moving forward let us recapitulate provisions relevant for this discussion:

- Import of goods means bringing goods into India from outside India *[S. 2(10) IGST]*
- Supply of goods imported into India, till they cross the customs frontiers of India, shall be treated as supply of goods in the course of inter-state trade *[S. 7(2) IGST]*
- Customs frontiers of India means the limits of a customs area as defined under section 2 of the Customs Act, 1962 *[S. 2(4) IGST]*
- Customs area means the area of a customs station or a warehouse[4] and includes any area in which imported goods or export goods are ordinarily kept before clearance by Customs Authorities *[S. 2(11) Customs Act]*
- IGST on goods imported into India shall be levied and collected at the point when duties of customs are levied under section 12 of the Customs Act, 1962 *[Proviso to S. 5(1) IGST]*
- IGST on imports shall be levied and collected as additional duty of customs in accordance with the provisions of section 3 of the Customs Tariff Act, 1975 on the value determined under the said Act *[Proviso to S. 5(1) IGST]*
- The provisions of the Customs Act and the rules and regulations made there under, including those relating to drawbacks, refunds and exemption from duties shall, so far as may be, apply to the duty or tax or cess, as the case may be, chargeable under this section as they apply in relation to the duties leviable under that Act *[S. 3(12) of the Customs Tariff Act]*

It would also be important to take note of certain landmark decisions and clarifications issued by

4. Inserted by Taxation Laws (Amendment) Act, 2017 w.e.f. 1-7-2017

the board on this subject delivered during the pre-GST era.

- Hon'ble Supreme Court in the case of *M/s Kiran Spinning Mills vs. Collector of Customs*[5] has held that taxable event in case of imported goods occurs when the customs barriers are crossed. In case of warehoused goods the customs barrier (i.e. the bonded warehouse) is crossed **when they are cleared** from the warehouse and brought into the mass of goods in the country. The import is complete only when the barrier is crossed and that is when duty of customs becomes payable.

- Hon'ble Madras High Court in the case of *Tarajyot Polymers vs. DCTO*[6] it was held that mere storage of goods in a warehouse is not entry into local area and no entry tax can be imposed.

- The Board has clarified[7] that in the case of sale of imported goods after they are warehoused on Indian Territory, the value at which such transaction (sale after being warehoused) took place will not qualify as the transaction value, as per Section 14.

In relation to High Seas Sales it was clarified[8] by the board that in view of provisions of section 3(12) of the Customs Tariff Act, 1975 **all duties, taxes, cesses shall be collected** at the time of importation i.e. **when the import declarations are filed** before the customs authorities **for the purpose of clearance**. In terms of section 47 of the Customs Act states that clearance of goods for home consumption is permitted on payment of customs duty. When the **goods are warehoused they are only removed** (and not cleared) from the port of importation and not cleared from customs authorities. On a conjoint reading of the provisions, decisions and the circular relating to High Seas Sales following view may be taken:

- Bonded warehouse licensed under the Customs Act is an area of customs in terms of section 2(11) of the Customs Act

- While the goods are kept in the bonded warehouse they are still in the customs area and hence they have not crossed the customs frontiers

- Accordingly, transfer of ownership of warehoused goods should get categorised under section 7(2) of the IGST Act as interstate supply

- In terms of proviso to section 5(1) the levy of IGST in case of imported goods is attracted only at the time of customs clearance i.e. filing of Bill of Entry for home consumption

- The principles enunciated in customs circular 33/2017 relating to High Seas Sales should equally apply to supply of goods that have been warehoused under the Customs Act

- Since the duties can be levied only on value determined at the time of importation (filing of in-bond Bill of Entry) the value addition between the in bond Bill of Entry and ex bond sale may escape duties of customs (including IGST) if only one leg of the transaction (i.e. the second leg) is taxed. However, it would be best to amend the custom provisions in order to set the equation right rather than introducing double taxation

5. (1999) 113 ELT 753 (SC)
6. (2005) 140 STC 239 (MAD)
7. Para 7 of Circular No. 11/2010-Customs, dated 03-06-2010
8. Circular No. 33/ 2017-Customs, dated 01-08-2017

Board Clarification relating to Bond Transfer Sales

However in this regards the Board has clarified[9] as under:

- In case of bond sales there may be two taxable events
- When goods deposited in the warehouse are transferred by the importer to another person such a transaction shall be subject to payment of IGST.

The above circular does not seem to be in consonance with the principles laid by the courts and Circular No 33/2017

Disclosure of Bond Sales in returns

As per the Board clarification the supply of warehoused goods to a third party shall be liable for payment of IGST. This would lead to following issued in compliance:

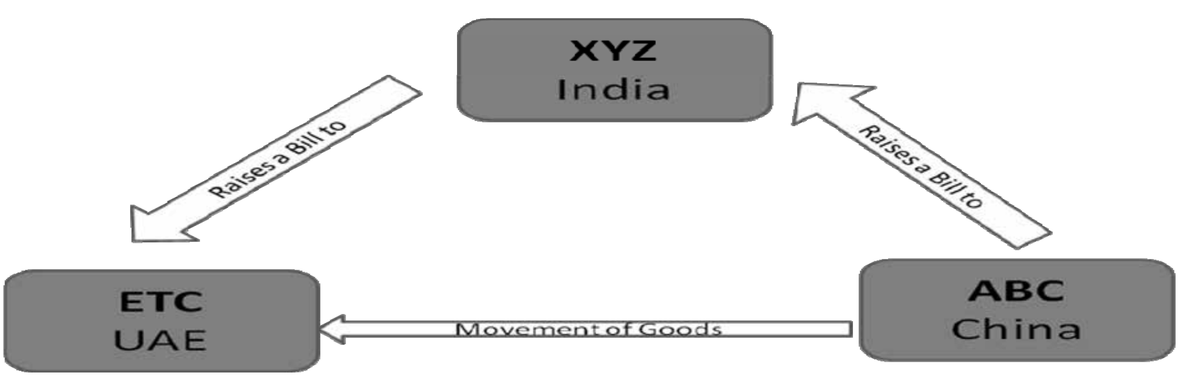
- Where the original importer and the buyer are in the same State the portal may not allow to mention IGST amount since the GSTIN of the original importer and the buyer would pertain to the same State
- It would amount to reporting the purchase twice by the buyer, namely, reporting of the import (Bill of entry for Home Consumption) and the Tax Invoice issued by the original importer for the transfer of ownership

Out and Out Sales / Third Country Exports

International trade takes various forms. There are many such supplies in international merchandising trade where a person in India purchases goods from one country and exports the same to a third country without the goods physically being brought inside India. These transactions are nothing but an international bill-to-ship-to model. Such transactions are popularly known as out and out sales or third country exports or cross trade. Such transactions are allowed even by the Reserve Bank of India without any requirement of submitting exchange control copy of the Bill of entry. Prior to the GST regime since these goods were not physically present in India there was no issue relating to applicability of sales tax on such transactions.

At the outset on a logical front GST being a consumption tax based on destination principle such trade cannot be taxable under the GST regime as well. However, as the law matures it seems that such transactions are bound to get hit by interpretational issues which we have analysed in the subsequent paragraphs. Typically such transactions comprise of following two legs:

1. Purchase of goods by XYZ (India) from say ABC, China
2. Supply of goods by XYZ, India to ETC, UAE



9. Circular No. 46/2017-Customs, dated 24-11-2017

Various enactments under the GST umbrella extend to the whole of India except Jammu and Kashmir[10]. Taxable Territory is defined under section 2(109) of the CGST Act to mean the territory to which the provisions of this Act applies. Hence, for the charging provisions to get triggered the transaction should take place in taxable territory. Intra-state transactions of supply are covered within the charging section of section 9 of the CGST Act and the corresponding provisions of the State Acts for levy of SGST. Inter-State transactions are covered by section 5 of the IGST Act. The nature of supply ('Intra-State or Inter-State) is to be determined in terms of section 7 and 8 of the IGST Act

Purchase Leg of the transaction

Let us discuss the purchase side of the transaction. There is no doubt that the import supply of goods from China (ABC) to India (XYZ) cannot be considered as an Intra State supply in terms of section 7(1) of the IGST Act. Whether the transaction can be considered as an import of goods within the meaning as defined under section 2(10) of the IGST Act. The obvious answer is 'NO' since the goods are not physically brought inside India. Section 7(5)(c) states that supply of goods in the taxable territory, not being an intra-State supply and not covered elsewhere shall be treated as an 'inter-state' supply. It may be noted that the opening words of the clause (c) are "in the taxable territory". Since the supply is not in taxable territory the incidence of GST cannot arise. Further, since the goods do not cross the customs frontier there would be no charge created in terms of proviso to section 5 of the IGST Act.

Sales/ Supply leg of the transaction

Let us now move to the supply side of the transaction. The transaction of supply of goods by XYZ (India) to ETC (UAE) cannot qualify as an 'export' in terms of section 2(5) of the IGST Act since there is no physical movement from India. The goods move from ABC (China) to ETC (UAE) on the direction XYZ (India). If XYZ in India is considered as the third person in terms of section 10(1)(b) of the IGST Act the place of supply shall be the place of business of XYZ in India. However, it must be appreciated that for the place of supply provisions to become applicable the supply should take place in taxable territory. Having said that the sales side of the transaction cannot qualify as an export it would be interesting to note the provisions of section 7(5)(a) of the Act. The provisions are reproduced here under:

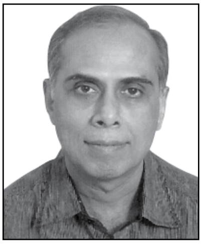
(5) Supply of goods or services or both –

(a) when the supplier is located in India and the place of supply is outside India;

Shall be treated to be a supply of goods or services or both in the course of inter-state trade or commerce

In our example XYZ is located in India and hence the location of supplier is in India. The buyer ETC is located in UAE, that is outside India and hence the place of supply is located outside India. On a plain reading of the provisions contained in section 7(5)(a) it seems the sales side of the transaction may get covered and become taxable as inter-state supply of goods. It must be appreciated that the tax is on supply of goods. Tax is to be levied on supply of goods in the taxable territory. Taxable territory[11] means the territory to which this Act applies. The Act applies to the whole of India except the State of Jammu and Kashmir[12]. In the case of third country exports the goods (being the subject matter of tax) move from one country to another without entering India. Hence, there is no taxable event in India that creates a jurisdiction to tax such a supply. An action to levy tax on such transactions would amount to creating extra territorial nexus.

10. Section 1(2) of the IGST Act, 2017
11. Section 2(22) of the IGST Act, 2017
12. Section 1(2) of the IGST Act, 2017




CA Rajkamal Shah & CA Bharat Vasani

INDIRECT TAXES

GST – Legal Update

NOTIFICATIONS

Central Goods & Services Tax (CGST)

Rates under Composition Scheme revised (Notification No. 01/2018 dt. 1-1-2018)

- CGST rate reduced to 0.5% (i.e. 1% total GST) for manufacturer.
- For dealers/traders GST leviable only on taxable supplies.
- CGST rate of 2.5% (i.e. 5% total GST) on Turnover for restaurants to continue.

1st Amendment, 2018 to CGST Rules (Notification No. 03/2018 dt. 23-1-2018)

- Time limit for filing of FORM GST ITC-03 by a registered person opting for Composition Scheme increased from 90 days to 180 days.
- In case of voluntary registration, cancellation of registration now to be allowed within a period of 1 year from the date of registration.
- Last date for filing of cancellation of registration in FORM GST REG 29 for migrated assessee extended up to 31st March, 2018.
- Rule 31A added to provide valuation rule for supply in case of lottery, betting, gambling and horse racing.
- Explanation to Rule 43(2) amended to provide full credit on capital goods as per Rule 43 as well for Rule 42 also used for providing services by way of accepting deposits, extending loans or advances in so far as the consideration is represented by way of interest or discount except for banking companies, FIs and NBFCs.
- Rule 54(1A) inserted to provide that a registered person having same PAN and State Code as that of ISD can issue an invoice, debit or credit note to transfer the credit of common input services to the ISD with specified particulars.
- Rule 55A inserted to provide that the transporter shall carry copy of a tax invoice for supplies where e-way bill is not mandatory.
- FORM GST RFD-01A amended to include statement for refund of Export of Services – with payment of IGST/ without payment of IGST by furnishing LUT and for supplies to SEZ with payment of tax.
- Refund provisions contained u/r 96 is amended to restrict its application to exporter of goods (including SEZ developer/unit, deemed exporters) only.
- E-Way Bill provisions are notified u/r. 138, 138A, 138B.

Reduction in late filing fees *(Notification No. 04, 05, 06, 07/2018 dt. 23-01-2018)*

- Late fees for delay in filing of GSTR 1, GSTR 5, GSTR 5A and GSTR 6 reduced to ₹ 25 per day under CGST (i.e. total ₹ 50 per day).
- In case of Nil return (other than GSTR 6) late fees reduced to ₹ 10 per day under CGST (i.e. total ₹ 20 per day).

Due date for filing of GSTR 6 extended *(Notification No. 08/2018 dt. 23-1-2018)*

Due date for filing of FORM GSTR 6 by an Input Service Distributor for the period July'17 to February'18 extended up to 31-3-2018.

E-way bill website notified *(Notification No. 09/2018 dt. 23-1-2018)*

The website for e-way bills is notified - www.ewaybillgst.gov.in w.e.f. 16-1-2018.

Cross-empowerment of State tax officers for processing and grant of refund *(Notification No. 10/2018 dt. 23-1-2018)*

State tax officers are now empowered to process and grant refund including refund of IGST paid on exports as per rule 96.

(Also, similar Notification No. 1/2018 is issued under IGST)

Central Goods & Services Tax (CGST) Rates

Amendment in rates of services (Notification No. 01/2018 dt. 25-01-2018)

- GST @ 12% provided for composite supply of Works Contract in following cases :

  i) civil structure or any other original works pertaining to the "In-situ" redevelopment of existing slums using land as a resource, under the Housing for All (Urban) Mission/ Pradhan Mantri Awas Yojana (Urban),

  ii) civil structure or any other original works pertaining to the "Economically Weaker Section (EWS) houses" constructed under the Affordable Housing in partnership by State or Union territory or local authority or urban development authority under the Housing for All (Urban) Mission/ PradhanMantriAwasYojana (Urban),

  iii) civil structure or any other original works pertaining to the "houses constructed or acquired under the Credit Linked Subsidy Scheme for Economically Weaker Section (EWS)/ Lower Income Group (LIG)/ Middle Income Group-1 (MlG-1)/ Middle Income Group-2 (MlG-2)" under the Housing for All (Urban) Mission/ PradhanMantriAwasYojana (Urban),

  iv) a building owned by an entity registered under section 12AA of the Income Tax Act, 1961 (43 of 1961), which is used for carrying out the activities of providing, centralised cooking or distribution, for mid-day meals under the mid-day meal scheme sponsored by the Central Government, State Government, Union territory or local authorities,

  v) low-cost houses up to a carpet area of 60 square metres per house in an affordable housing project which has been given infrastructure status vide notification of Government of India, in Ministry of Finance, Department of Economic Affairs vide F. No. 13/6/2009-INF, dated the 30th March,2017

  vi) Construction, erection, commissioning, or installation of original works pertaining to monorail and metro also.

- GST @ 5% on transportation of petroleum crude, motor spirit (commonly known as petrol), high speed diesel or aviation turbine fuel

- GST @ 5% on renting or leasing of time charter of vessels for transport of goods, Provided that credit of input tax charged on goods (other than on ships, vessels including bulk carriers and tankers) has not been taken

- GST @ 5% on supply of housekeeping services by unregistered person through electronic commerce operator subject to prescribed conditions

- Nil GST on agriculture support services by way of fumigation in a warehouse of agricultural produce

- GST @ 12% on service of exploration, mining or drilling of petroleum crude or natural gas or both

- GST @ 5% on jobwork relating to tailoring services and specified manufacture of leather goods or foot wear

- GST on services by way of admission to amusement parks reduced from 28% to 18%, however entertainment events or access to amusement facilities including exhibition of cinematograph films, casinos, race club, any sporting event such as Indian Premier League & the like will continue to be taxed at 28%.

- Supply of tour operator service to be taxed at 5% provided that credit of input tax charged on goods and services used in supplying the service (other than the input tax credit of input service in the same line of business (i.e. tour operator service procured from another tour operator) has not been taken.

Amendment in exemptions to services (Notification No. 02/2018 dt. 25-1-2018)

- Composite supply of goods and services where value of supply of goods does not exceed 25% of the value of the said composite supply provided to the Central Government, State Government or Union territory or local authority or a Governmental authority or a Government Entity in relation to any function entrusted to a panchayat under article 243G of the Constitution or in relation to any function entrusted to a Municipality under article 243W of the Constitution are exempted.

- Exemption to services provided to the Central Government, by way of transport of passengers, by air, embarking from or terminating at a regional connectivity scheme airport, against consideration in the form of viability gap funding is extended from 1 year to 3 years from the date of commencement of operations.

- Services by way of transportation of goods by an aircraft or vessel from customs station of clearance in India to a place outside India are exempted up to 30-9-2018.

- Hiring of motor vehicle for transport of students, faculty and staff, to a person providing services of transportation of students, faculty and staff to an educational institution providing services by way of pre-school education and education up to higher secondary school or equivalent is exempted.

- Services of life insurance by the Naval Group Insurance Fund to the personnel of Coast Guard are exempted.

- Exemption to life insurance under life micro-insurance product scheme extended to schemes having maximum cover up to ₹ 2,00,000/-.

- Services by way of reinsurance of the insurance schemes specified are also exempted.
- Services by specified intermediary of financial services located in a multi services SEZ to a customer located outside India for international financial services in currencies other than Indian rupees (INR) are exempted.
- Legal services provided to the Central Government, State Government, Union territory, local authority, Governmental Authority or Government Entity are exempted.
- Services by way of fumigation in a warehouse of agricultural produce are exempted.
- Services by a specified organization in respect of a religious pilgrimage whether or not facilitated by the Ministry of External Affairs are exempted.
- Services by way of providing information under the Right to Information Act, 2005 are exempted.
- Services provided by educational institution by way of entrance examination against consideration in the form of entrance fees are exempted.
- Services by an educational institution relating to admission or conduct of examination are now exempted for even above high secondary level.
- Services provided by educational institution by way of supply of online educational journals or periodicals are exempted for institutions other than those providing pre-school education up to higher secondary school or equivalent and those providing education as a part of an approved vocational educational course.
- Limit for exemption for admission to events referred to in entry 81 is provided at ₹ 500/- per person. Also, admission to planetarium is added in the entry.
- Exemption limit for re-imbursement of charges or share of contribution collected by society increased from ₹ 5,000/- to ₹ 7,500/-.

Amendment in services covered under RCM *(Notification No. 03/2018 dt. 25-1-2018)*

Services provided by way of renting of immovable property by Central Government, State Government, Union Territory or local authority to a person registered under GST is now payable under RCM by any person registered under CGST Act.

Amendment under Notification No. 04/2018 dt. 25-1-2018

1. A registered person supplying development right to a developer against consideration, wholly or partly in form of construction service of complex, building or civil structure………….. And
2. The registered person who supplies construction service of complex, building or civil structure to the supplier of development right against the consideration, wholly or partly in form of transfer of development right

The liability to pay CGST shall arise at the time when the said developer transfer possession or right in the constructed complex, building or civil structure to the person supplying development right by entering into conveyance deed or similar instrument (for example, Allotment letter)

Seeks to exempt Central Government's share of Profit Petroleum from Central tax *(Notification No. 05/2018 dt. 25-1-2018)*

Intra-state supply of services by way of grant of license or lease to explore or mine petroleum crude or natural gas or both exempted to the extent of Central Government's share of profit petroleum.

Amendments in rates of Goods ***(Notification No. 06/2018 dt. 25-1-2018)***

HSN	Description	Present total Rate	Revised total Rate
7102	Diamonds and precious stones	3%	0.25%
8702	Buses, for use in public transport, which exclusively run on bio-fuels	28%	18%
2201	Drinking water packed in 20 litres bottles	18%	12%
1704	Sugar boiled confectionery		
2809	Fertilizer grade Phosphoric acid		
29 or 38	Bio-diesel		
38	Specified Bio-pesticides		
4418	Bamboo wood building joinery		
8424	Drip irrigation system including laterals, sprinklers		
8424	Mechanical Sprayer		
2711	LPG supplied for supply to household domestic consumers by private LPG distributors	18%	5%
13	Tamarind Kernel Powder		
1404/3305	Mehendi paste in cones		
88 or any other chapter	Scientific and technical instruments, apparatus, equipment, accessories, parts, components, spares, tools, mock ups and modules, raw material and consumables required for launch vehicles and satellites and payloads		
5801	Velvet fabric *(No refund of ITC)*	12%	5%
4601, 4602	Articles of straw, of esparto or of other plaiting materials; basketware and wickerwork		
2302	Rice bran (other than de-oiled rice bran)	0%	5%
56012200	Cigarette filter rods	12%	18%
73239410	Ghamella	0%	18%

Amendments in exempt Goods ***(Notification No. 07/2018 dt. 25-1-2018)***
It exempts Vibhuti sold by any person under Puja Samagri under Entry 148 and parts for manufacture of hearing aids under entry 151.

Amendments in rates of motor vehicles *(Notification No. 08/2018 dt. 25-1-2018)*

Specification of Motor Vehicle	Total GST Rate
Old and used LPG or CNG driven motor vehicles with engine capacity 1200 cc or more and of length of 4000 mm or more	**18%**
Old and used diesel driven motor vehicles with engine capacity 1500 cc or more and of length of 4000 mm or more	**18%**
Old and used SUVs including utility vehicles of engine capacity exceeding 1500 cc	**18%**
All old and used vehicles other than those mentioned above	**12%**

Under the said notification, the rate of tax is to be applied on the margin, i.e. the consideration received for supply of above motor vehicles less the depreciated value in the books of the supplier when depreciation is claimed on such vehicles. However, negative margin is to be ignored.

Rate of compensation cess on all old and used motor vehicles is reduced to Nil subject to condition of non availment of input credit. *(Notification No. 01/2018 dt. 25-1-2018 refers)*

Notification No. 45/2017 amended *(Notification No. 09/2018 dt. 25-1-2018)*
Notification providing for concessional rate @ 5% for specified scientific and technical equipments supplied to public funded research institute is amended

Integrated Goods & Services Tax (IGST) Rates

Exemption to royalty and licence fee *(Notification No. 06/2018 dt. 25-1-2018)*
GST on royalty and license fee is exempted from IGST to the extent it is paid on the consideration attributable to royalty and license fee included in transaction value under Rule 10(1)(c) of Customs Valuation (Determination of value of imported Goods) Rules, 2007 on which the appropriate duties of Customs have been paid.

(Notification No. 1, 2, 3, 4, 5, 7, 8, 9/2018 issued are in line with those issued under CGST (Rate) and are covered above)

> Do not repent, do not brood over past deeds, and do not remember your good deeds; be azad (free). You cannot undo, the effect must come, face it, but be careful never to do the same thing again.
>
> — *Swami Vivekananda*

Janak C. Pandya, *Company Secretary*

CORPORATE LAWS
Company Law Update

Case Law # 1

C.P No. 08/59/HDB/2017 Order dated 1st January, 2018

[In the National Company Law Tribunal Hyderabad Bench at Hyderabad.]

Web Link: 64.100.158.181/Publication/Hyderabad_Bench/2018/111_111_A/index.html

Lanka Venkata Naga Muralidhar vs. M/s Vestal Educational Services Pvt. Ltd. & Others.

In the interest of the justice and to protect small investors an unwilling shareholders cannot be forced to accept the shares contrary to the law. The shares of the company have to be offered after duly following prescribed procedure under the Memorandum and Articles of Association of the Company and extent provisions of Companies Act, 2013.

Brief facts

This company petition is filed by Mr. Lanja Venkata Naga Muralidhar ("Petitioner") against M/s Vestal Educational Services Pvt. Ltd ('Company") and Others ("Respondents") under sections 59 and 62 of the Companies Act, 2013 ("CA 2013").

The facts of the petition is as follows:

1. The petitioner is one of the shareholders of the Company. He was also a director of the Company for some brief period.
2. The Company had taken a loan of ₹ 10 crore from SBI, Hyderabad for which the petitioner stood as one of the personal guarantors.
3. As the said loan became a NPA, the Company has entered into a onetime settlement with SBI and as per the settlement letter, the loan amount of ₹ 7.25 crore was settled for ₹ 5.50 cr. The said amount was to be paid in five installments.
4. As Company defaulted in payment of installment and that SBI had threaten to cancel the settlement, Company approached the Petitioner to lend a sum of ₹ 1.54 cr.
5. Petitioner had paid ₹ 1.54 crore to the Company for making payment to SBI.
6. Petitioner had sent several reminders to the Company for repayment of amount paid by him as above. Petitioner also sent two legal notices under sections 433 and 434 of the CA 2013 to the Company and its directors. The said notices were returned undelivered.
7. The Company and its directors have not responded to any of the notices.
8. Subsequently, the Petitioner has received a letter showing the Shareholding pattern

of the Company. Upon checking, it was noticed that loan of ₹ 1.54 crore by Petitioner has been converted into equity shares.

9. The issue of equity shares in lieu of loan given was without the knowledge or consent of the Petitioner.

10. The shares were issued in total violation of the provisions of the CA 2013.

11. The Company has filed Form PAS-3 after 30 days period is over.

12. Petitioner has filed a complaint with the Registrar of Companies ('RoC'), Hyderabad.

13. The Company has replied to the said letter stating that allotment was made as per the provisions of CA 2013.

14. The Company has not followed the process under section 62 as to giving Letter of Offer the Petitioner has accepted the same.

15. The amount was transferred to an operational account and not to any special account for the purpose of Right Issue.

The petitioner is seeking the following reliefs.

1. To declare the allotment of shares by the Company to the petitioner as null and void as the same is contrary to Section 62 of the CA 2013;

2. To direct the Company to rectify its register of members for the allotment of above shares and

3. To direct the Company to repay the amount due to the Petitioner with interest @ 18% p.a.

The Submission from the Company and other Respondents is as follows:

1. Petition has filed after 1 ½ years from the date of allotment in 2016, thus, its lacks *bona fides* and is liable to be rejected.

2. The petition is not maintainable as the petitioner is one of the Co-promoters, Subscribers to the Memorandum and Articles of Association and he cannot file such frivolous and fictitious Petitions, which is nothing but abuse of Process of Law.

3. Petitioner has not produced any loan agreement or any documentary evidence to establish that transaction is a Loan Transaction.

4. The Company is running an educational institution and its business is with sole objective to achieve the Mission of Cent Percent Literacy and thus this petition needs to be adjudicated keeping in mind the cascading effect on the Company and its students that are running in large number.

5. The promoters are under obligation to provide the necessary personal guarantee and security in form of immovable property for securing SBI loan. Thus, Petitioner has offered his personal properties held through his another company.

6. Due to agitation and bifurcation of the State of Andhra Pradesh, the admissions into school being run by the Company has come down drastically. Also due to continuous agitation, most of the students have migrated to other States which has affected the business and hence default in repayment of loan.

7. The SBI has initiated the recovery process under the SARFAESI Act and also initiated the legal proceedings against the Company and its promoters which includes the Petitioner before the Debt Recovery Tribunal, Hyderabad.

8. To avoid the distress sale of their immovable properties given as security to SBI, the Company and promoters have decided to go for one-time settlement.

9. The Board of Directors in their meeting has decided to go for right issue and make equal call to all equity shareholders and to allot shares.

10. All promoters including the petitioner has brought their respective shares to enable the Company to pay its dues to SBI.

11. As per Section 62 of the CA 2013 and other applicable provisions, the Company has issued and allotted equity shares on proportionate basis. The amount was remitted to Company's bank account through RTGS.

12. That unsubscribed portion of Right issue was subscribed by the Petitioner.

13. Due to above issue, shareholding pattern of the Petitioner has been increased from 1.64% to 12.14% which is more than what he was holding at the time of availing bank loan.

14. Due to inadvertence, the Company could not file the return of allotment and same was filed later with additional fees as provided in the CA 2013.

15. In view of the collective decision taken in the Board meeting, no mandatory notice as per section 62(2) of the CA 2013 for right issue has been circulated. Further, the petitioner has voluntarily remitted the amount.

The Petitioner has replied to the above as follows:

1. The amount given by the Petitioner was always meant to be a Loan. This can be verified as whenever amounts were transferred by all guarantors to operative bank account, they were immediately used for payment of dues against one time Settlement dues. The usage is illegal, if assuming the said amount was given towards subscription of shares.

2. There is no bar by limitation. As soon as Petitioner came to know of the alleged impugned allotment, he has filed a complaint with the RoC, Hyderabad and also approached the NCLT to adjudicate the same.

3. There was never any offer nor any acceptance of further issue of shares as alleged. Petitioner has never consented to the subscription of further shares.

4. Petitioner has resigned as director in 2011. After which, he is just remain as a shareholder. Thus, he is not liable for any action of the Company post his resignation.

5. As per section 62 (1)(a) of the CA 2013, the offer shall be made by notice specifying the number of shares offered etc., same has to be made via registered post or speed post or through electronic post. In this case, the Company had never made any offer or issued notice to that effect. Further, Company has not filed any postal acknowledgements with its reply to substantiate its claim. The offer letter was created after the two legal notices sent to the Company.

6. Even, we assume the existence of offer letter, as per CA 2013, it requires the acceptance of such offer. Company has not produced any such evidence.

7. The Company has failed to answer various questions on compliances of section 62 under CA 2013 as to Issue of Letter of Offer, dispatched of notice as per Section 62(2), Share Application form with letter of Offer, and whether same was signed by the shareholders etc.

8. If, there was any renunciation of offer, whether another letter of offer sent to the remaining shareholders, who are interested for allotment of shares by the Company.

9. In the extracts of the minutes of the Company filed with ICSI and with the RoC, it is mentioned that Respondent No 2 and 3 did not participate in the quorum as they were not interested in the resolution. However, they failed to realise that Only Respondent No 2 and 3 were the only directors on the Board. Thus, there could not be any resolution for further issue of shares as it same could not be passed without their presence. To cover this, they have created a back dated resolution.

10. There can never be a waiver of statutory notice as mandated by Section 62 for making the offer, and limiting a time not less than 15 days and not exceeding 30 days.

11. The petitioner has relied on the Judgment of this bench which was upheld by the Hon. NCLAT in re C.P No. 20 / 75 / HDB / 2016 dated 7th July, 2017 in the case of *Sri Chavali Gayathri Praveen & Others vs. Sri Lakshmi Prasanna Agro Industries Limited & Ors*, which has similar facts as this case.

Judgment

The NCLT has allowed all three reliefs sought by the Petitioner as follows:

1. Declared that the allotment of shares as Null and Void.

2. Directed the Company to rectify its Register of members and

3. Declared the amount given by the Petitioner as loan and directed the Company to pay the same with interest @ 12%.

The Bench has also analysed submission made by both the parties. Bench has noted that the Contention of the Company that offer was accepted on Phone is not tenable and thus there was no offer and acceptance for the issue of impugned shares. It also observed that Company Secretary while certifying the Form PAS-3 failed to verify the documents such as Share Application form of Complainant, letter of acceptance / renunciation / decline received from the Applicants, specific amount as per the letter of Offer were deposited by the shareholders within the offer period. It has also noted that ICSI Director (Discipline) concluded that *prima facie,* Company Secretary is deemed to be guilty of professional misconduct for not exercising due diligence while certifying the form PAS-3. The Bench also has reviewed the Judgment on the case of Re; Sri Chavali Gayathri Praveen & others, as referred above which was also upheld by the Hon'ble NCLAT. In both the cases, the Company has allotted the shares without consent of parties by contending that same was for issue of shares of the companies.

CA Bhavesh Vora

CORPORATE LAWS – RECENT DEVELOPMENTS

Peer-to-Peer Lending Platforms

1. Introduction

Peer-to-Peer ["P2P"] lending also known as "social lending", lets individuals lend and borrow money directly from each other. It removes the middleman from the process, connecting borrowers to investors with attractive interest rates, and at the same time it also involves less time and efforts than the historical lending scenarios. P2P loans give borrowers' access to financing and a more favourable interest rate that they may not have availed from other financial intermediaries. It creates a market place where investors who wish to lend funds can find potential borrowers and provide credit through web-based P2P platforms thereby opening up the feasibility of direct lending to a wider range of lenders and borrowers than before. These platforms use online technologies to facilitate efficient interactions between investors and borrowers. Debt based crowd funding, also known as peer-to-Peer lending, is witnessing impressive growth in India, owing to increase in the demand of online loans, alternate credit instruments and growing fintech platforms. Post issue of regulations by Reserve Bank of India ["RBI"], the online lending sector has been streamlined and increased its growth potential. The outlook of P2P lending platforms will only get better, by RBI taking this sector under its wing.

2. Regulatory Aspects and Compliances

The legal Constitution of NBFC – Peer-to-Peer lending platforms ["NBFC-P2P"] was established by a notification in the Gazette of India dated 24th August 2017, wherein such business was notified to be regulated by the Reserve Bank of India ["RBI"] as a Non-Banking Financial Company ["NBFC"], under Chapter III-B of the Reserve Bank of India Act, 1934. In lieu of the abovementioned notification, RBI, *vide* Master Direction dated 04th October 2017 (as updated on 9th November 2017) has prescribed the regulations and guidelines, that shall be applicable to the NBFC-P2P. The direction has laid emphasis on the onboarding of various NBFC-P2Ps already carrying on the business, along with regulations for companies desirous to commence the same in future. *Vide* the said master direction, RBI has prohibited any Non-Banking Financial Institution, other than a Company, to commence / carry on the business of NBFC-P2P. The guidelines put forward by RBI are aimed at primarily facilitating growth and expansion of the peer-to-peer lending industry in India. However, it is pertinent to note that existing NBFCs regulated by Reserve Bank of India are not permitted to commence / carry on the business of NBFC-P2Ps, unless approval to this effect has been obtained.

Further, the guidelines have been made applicable to entities conducting the business of loan facilitation via both online and offline modes. With the new RBI regulations, P2P lending platforms need to have a minimum Net Owned Fund of ₹ 2 crore (i.e. ₹ 20 million). This requirement is expected to bring confidence in the lenders who are expected to accept P2P lending as the new asset class and invest in the platform to lend on them, offering more opportunities to serious players in the business.

The directions have also capped the leveraging to two times the owned funds for the purpose of operational aspects, and not for the activities of P2P platform, as clarified under the FAQs by RBI. RBI has released clarifications in the form of FAQs, which state that if the platform is providing its services only to regulated lenders like Banks, NBFCs and AIFIs, such platform would not fall within the ambit of the said guidelines.

3. Operational Aspects

The NBFC-P2Ps are permitted to operate a Fund Transfer Mechanism between the participants on P2P lending platform only through escrow accounts, to be operated by trustees. To reduce the threat of mis-utilisation of funds, the funds raised by the P2P platform are to be held in an escrow account and seperate escrow account is to be maintained for the purpose of collections from borrowers.

Another key highlight of the direction is that the lending of funds are to be unsecured and 'clean' in nature. A cap on maximum borrowing per borrower of ₹ 10 Lakhs has been prescribed. Also, aggregate exposure of a lender to a single borrower has been capped at ₹ 50,000/- across all P2Ps. A cap on the tenure of such loans has been fixed at maximum thirty six months. A prohibition has also been prescribed for giving guarantees for the lending / borrowing activities by the NBFC-P2P.

Outsourcing any service by NBFC-P2P does not diminish its obligations and it must conduct a self-assessment, as outsourcing is supposed to help the company grow and not adversely impact the company. NBFC-P2Ps are also to become members of all Credit Information Companies. Such free flow of information about borrower profiles will help to bring down the instances of borrower default. However, it is essential to address the necessity of de-duplication of reporting of NPAs, in case the lender is a Financial Institution.

4. Challenges

As Peer-to-Peer lending provides unsecured credit facilities *via* an online platform, a proper and secure IT infrastructure is a prerequisite to commencing business operations. NBFC-P2Ps are also expected to have enough technological, entrepreneurial and managerial aspects to conduct their activities smoothly and offer great quality of services to their participants.

An NBFC P2P is not only required to maintain and collect details of the borrower but also that of the lender as to confirm that the sources of the fund are legal. The most important thing about maintaining and collecting the data is that it must take prior approval for accessing the information and providing their information to the other participants. It may also form such criteria for lenders and borrowers that helps them to filter those lenders and borrowers which do not involve great amount of risk. Setting up such criteria not only helps to protect the company and participants from risk but also helps to maintain certain operational standards of the company.

5. Conclusion

Considering the growing significance of the online industry, quicker easier and tailor-made transactions and the emergence of low and mid-ticket size borrowers' become determinant factors for vast potential growth this industry holds. This business model transforms lending into a virtual, contactless lending system, having both its pros and cons. P2P platform is gaining traction and seems certain to become more popular. It may eventually disrupt the traditional lending sector in India. Although still very young, regulations of P2Ps in India would transform the entire landscape of our economy in the years to come.

CA Mayur Nayak, CA Natwar Thakrar &
CA Pankaj Bhuta

OTHER LAWS
FEMA Update and Analysis

In this article, we have discussed recent amendments to FEMA through Circular and notification issued by RBI:

1. Refinancing of External Commercial Borrowings (ECBs)

In terms of the extant provisions in paragraphs 2.15 and 2.16 (xiii) of Master Direction No.5 dated January 1, 2016 on "External Commercial Borrowings, Trade Credit, Borrowing and Lending in Foreign Currency by Authorised Dealers and Persons other than Authorised Dealers", as amended from time to time, Indian corporates are permitted to refinance their existing External Commercial Borrowings (ECBs) at a lower all-in-cost. The overseas branches/subsidiaries of Indian banks are however, not permitted to extend such refinance.

Hence, in order to provide a level playing field, overseas branches/subsidiaries of Indian banks are now also permitted to refinance ECBs of highly rated (AAA) corporates as well as Navratna and Maharatna PSUs, provided the outstanding maturity of the original borrowing is not reduced and all-in-cost of fresh ECB is lower than the existing ECB. Partial refinance of existing ECBs will also be permitted subject to same conditions.

All other aspects of the ECB policy remain unchanged.

[RBI/2017-18/116 A.P. (DIR Series) Circular No.15 dated 4th January, 2018]

2. Master Direction on Foreign Investment in India under Foreign Exchange Management Act, 1999

RBI had issued the Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000 (Notification No. FEMA 20) which was amended from time to time. However, no Master Direction was issued on Foreign Investment in India till 4th January 2018 even though yearly Master Circular on the same was discontinued from 1st January 2016. RBI has now issued Master Direction on Foreign Investment in India dated 4th January 2018.

Major changes are on account changes due to *Notification FEMA 20(R)/ 2017 dated 7-11-2017 (reissued in suppression of existing Notification No. 20)*

Foreign Investment in India is regulated in terms of clause (b) sub-section 3 of section 6 and section 47 of the Foreign Exchange Management Act, 1999 (FEMA) read with Foreign Exchange Management (Transfer or Issue of a Security by a Person resident Outside India) Regulations, 2017 issued *vide* Notification No. FEMA 20(R)/2017-RB dated November 7, 2017. These Regulations are amended from time to time to incorporate the changes in the regulatory framework and published through amendment notifications.

The master direction *inter alia* lists out prohibited sectors/ persons, entry routes, permitted sectors, permitted investments by persons resident outside India, mode of payment, pricing guidelines, downstream Investment, taxes and remittance of sale proceeds etc.

The master direction comprises of ten Annexures containing directions on the following:

Annexure-1	Purchase/ Sale of capital instruments of an Indian company
Annexure-2	Purchase/ Sale of capital instruments of a listed Indian company on a recognised stock exchange in India by Foreign Portfolio Investors
Annexure-3	Purchase/ Sale of Capital Instruments of a listed Indian company on a recognised stock exchange in India by Non Resident Indian (NRI) or Overseas Citizen of India (OCI) on repatriation basis
Annexure-4	Investment on non-repatriation basis
Annexure-5	Purchase and sale of securities other than capital instruments by a person resident outside India
Annexure-6	Investment in a Limited Liability Partnership (LLP)
Annexure-7	Investment by a Foreign Venture Capital Investor (FVCI)
Annexure-8	Investment by a person resident outside India in an Investment Vehicle
Annexure-9	Investment in Depository receipts by a person resident outside India
Annexure-10	Issue of Indian Depository Receipts (IDRs)

[RBI/FED/2017-18/60 FED Master Direction No. 11/2017-18 dated 4th January 2018]

3. Changes in FDI Policy by the Government of India through Press Note No.1 dated 23rd January 2018

The Government of India has reviewed the existent FDI policy on various sectors and made the following changes in the Consolidated FDI Policy Circular of 2017 effective from 28th of August, 2017, and as amended from time to time.

3.1 Prohibition of restrictive conditions regarding audit firms

Amendment in para 5.2 of the FDI Policy provides that wherever the foreign investor wishes to specify a particular auditor/audit firm having international network for the Indian investee company, then audit of such investee companies should be carried out as joint audit wherein one of the auditors should not be part of the same network

Extant Para 5.2 (h) shall be renumbered as 5.2(i).

3.2 Foreign investment into an Indian company engaged only in the activity of investing in the capital of other Indian company/ies

Foreign Investments in Investing Companies registered as Non-Banking Financial Companies (NBFC) with the Reserve Bank of India, being overall regulated, under the extant provisions of the FDI policy, was under Government Approval route. Now, after amendment, it has been liberalized and such foreign investments would be under 100% automatic route.

3.3 Competent Authority for FDI proposals examining countries of concern

Competent Authority for *"Applications involving investments from Countries of Concern which presently include Pakistan and Bangladesh, requiring security clearance as per the extant FEMA 20, FDI policy and security guidelines, amended from time to time"* was Ministry of Home Affairs.

After amendment Competent Authority for the same has been split as follows:

Sr. No.	Activity/sector	Administrative Ministry/ Department
(ix)(a)	Applications involving investments from Countries of Concern falling under automatic sectors/activities, requiring security clearance as per the extant FEMA 20, FDI Policy and security guidelines, as amended from time to time	Department of Industrial Policy and Promotion
(ix)(b)	Cases pertaining to Government approval route sectors/activities requiring security clearance as per the extant FEMA 20, FDI Policy and security guidelines, as amended from time to time	Nodal Administrative Ministries/Department

3.4 Civil Aviation

Note (iii) at Para 5.2.9 (Civil Aviation) of FDI Policy provided that the policy mentioned at para (c) was not applicable to M/s Air India Limited. The note stands deleted now.

Following to that new clause (d) under Other Conditions for FDI in Civil Aviation Sector is added at Para 5.2.9 of FDI Policy has liberalised the conditions for M/s Air India Ltd.:

"(d) In addition to the above conditions, foreign investment in M/s Air India Ltd. shall be subject to the following conditions:

(i) Foreign Investment(s) in M/s Air India Ltd., including that of airline(s), shall not exceed 49% either directly or indirectly.

(ii) Substantial ownership and effective control of M/s Air India Ltd. shall continue to be vested in Indian Nationals."

3.5 Construction Development: Townships, Housing, Built-up Infrastructure and Real Estate Broking

Following new clause (vi) is added after Note (v) at Para 5.2.10.2 (Conditions for FDI in Construction Development: Townships, Housing, Built-up Infrastructure and Real Estate Broking) which clarifies that real estate broking services does not constitute as real estate business and 100% FDI cap is allowed under FDI Policy:

"(vi) Notwithstanding anything contained in Para 5.2.10 above, it is clarified that real-estate broking service does not amount to real estate business and 100% foreign investment is allowed in the activity under automatic route.

3.6 Power Exchanges

Para 5.2.24.2 regarding "Other Conditions" for foreign investment in Power Exchange sector/ activity, the present clause (i) under other conditions *"FII/FPI purchases shall be restricted to secondary market only;"* stands deleted.

3.7 Pharmaceuticals

Definition of 'Medical Device' as contained in Note (ii) of Para 5.2.27.3 (other conditions for FDI in Pharmaceuticals sector) is amended and the Note (iii) of Para 5.2.27.3 of FDI Policy which presently reads that *"the definition of medical device at Note (ii) above would be subject to the amendment in Drugs and Cosmetics Act"*, is deleted.

3.8 General Conditions mentioned under Para 6(iv) of Annexure-3

General Conditions mentioned under Para 6(iv) (Conversion of ECB/Lump sum fee/ Royalty etc. into equity) of Annexure-3 (Provisions relating to issue/transfer of shares) of FDI Policy has an addition of point (iii), in terms of issuing shares against import of goods, machinery, equipment and pre-incorporation expenses, stated as below:

"(iii) for sectors under automatic route, issue of equity shares against import of capital goods/machinery/equipment (excluding second-hand machinery) and pre-operative/pre-incorporation expenses (including payments of rent etc.) is permitted under automatic route subject to compliance with respective conditions mentioned above, and reporting to RBI in Form FC-GPR as per procedure prescribed under FDI policy."

3.9 Single Brand Product Retail Trading (SBRT)

FDI Cap on Single Brand Product retail trading is 100% and the entry route for such FDI was previously 'Automatic route till 49% and Government Approval route beyond 49%' is now amended as ***'100% Automatic route'.***

Para (3) under Para 5.2.15.3 (Conditions under SBRT) of FDI Policy stands deleted as the entry routes are now amended to 100% Automatic route.

Additional condition (g) has been added in conditions related to FDI in Single Brand Product Retail Trading in Para 2 of Para 5.2.15.3 of FDI Policy, regarding setoff for incremental sourcing of goods against mandatory sourcing requirements, stated as below:

"Single brand retail trading entity would be permitted to set off its incremental sourcing of goods from India for global operations during initial 5 years, beginning 1st April of the year of the opening of first store, against the mandatory sourcing requirement of 30% of purchases from India. For this purpose, incremental sourcing will mean the increase in terms of value of such global sourcing from India for that single brand (in INR terms) in a particular financial year from India over the preceding financial year, by the non-resident entities undertaking single brand retail trading, either directly or through their group companies. After completion of 5 years period, the SBRT entity shall be required to meet the 30% sourcing norms directly towards its India's operation, on an annual basis."

Extant condition (d) relates to permission regarding undertaking SBRT for a particular brand in the country has been amended in conditions related to FDI in Single Brand Product Retail Trading in Para 2 of Para 5.2.15.3 of FDI Policy, stated as below:

"(d) A non-resident entity or entities, whether owner of the brand or otherwise, shall be permitted to undertake 'single brand' product retail trading in the country for the specific brand, either directly by the brand owner or through a legally tenable agreement executed between the Indian entity undertaking single brand retail trading and the brand owner."

[D/o IPP File No.: 5/2/2018-FDI Policy, dated 23rd January, 2018

The above mentioned changes are according to the Press Release issued by the Government of India and FEMA notification on the same would be notified by the RBI soon.]

4. Master Direction – Export of Goods and Services

Under Part C of the Master Direction which relates to Obligations of Authorized Dealers, Grant of EDF (Export Declaration Form) waiver (Under Para C.1) was amended, provisions for export of goods free of cost, for export promotion was liberalized industry wise.

The extant provisions are stated as below:

"AD Category – I banks may consider requests for grant of EDF waiver from exporters for export of goods free of cost, for export promotion up to 2 per cent of the average annual exports of the applicant during the preceding three financial years subject to a ceiling of ₹ 5 lakhs. For Status Holder exporters, this limit as per the present Foreign Trade Policy is ₹ 10 lakhs or 2 per cent of the average annual export realization during the preceding three licensing years (April-March), whichever is lower.

Exports of goods not involving any foreign exchange transaction directly or indirectly requires the waiver of EDF procedure from the Reserve Bank."

The above provision after amendment is stated as below:

"AD Category – I banks may consider requests for grant of EDF waiver from exporters as under:

Status holders shall be entitled to export freely exportable items (excluding Gems and Jewellery, Articles of Gold and precious metals) on free of cost basis for export promotion subject to an annual limit of Rupees One crore or 2% of average annual export realisation during preceding three licensing years, whichever is lower. For export of pharma products by pharmaceutical companies, the annual limit would be 2% of average annual export realisation during preceding three licensing years. In case of supplies of pharmaceutical products, vaccines and lifesaving drugs to health programmes of international agencies such as UN,WHO-PAHO and Government health programmes, the annual limit shall be up to 8% of the average annual export realisation during preceding three licensing years. Such free of cost supplies shall not be entitled to Duty Drawback or any other export incentive under any export promotion scheme.

Exports of goods not involving any foreign exchange transaction directly or indirectly requires the waiver of EDF procedure from the Reserve Bank."

[RBI/FED/2015-16/11 FED Master Direction No. 16/2015-16(updated as on January 12, 2018)]

5. Master Direction – Direct Investments by Residents in Joint Venture (JV)/Wholly Owned Subsidiary (WOS) Abroad

Under Para B.14 [Obligations of Indian Party (IP) and Resident Individual (RI)], Sub-Para 3 has the provisions relating to filing of APR where the host country does not mandatorily require auditing of books of accounts. The above Sub-Para 3 has an addition of point (c) which is stated as below:

"The above exemption from filing the APR based on unaudited balance sheet will not be available in respect of JV/WOS in a country / jurisdiction which is either under the observation of the Financial Action Task Force (FATF) or in respect of which enhanced due diligence is recommended by FATF or any other country / jurisdiction as prescribed by Reserve Bank of India."

[RBI/FED/2015-16/10 FED Master Direction No. 15/2015-16 dated January 1, 2016 (Updated as on January 4, 2018)]

CA Amit A. Purohit

In Focus – Accounting and Auditing

Related Parties – Interplays and Comparatives under Companies Act, SEBI Law, Accounting Standards, and Income-tax Act

1. Background

1.1 Related party relationships or transactions are a normal feature of Trade and Commerce. Quite often, business enterprises carry certain parts of their activities either with or through subsidiaries / associates or entities in which certain directors / shareholders are interested. Similarly, enterprises also routinely enter in to transactions with the directors or similar key management personnel, especially for their services, borrowings etc. Because of the fiduciary nature of their relationship with the enterprise, these types of transactions merit proper approval process and disclosures to all the stake holders. At times, related party transactions ("RPTs") are viewed with skepticism due to possibilities of profit and base shifting, though they may have been entered for creating operational synergies within the group. Over the years, the transactions amongst related parties have assumed greater significance for various stakeholders such as shareholders, financial institutions, tax authorities, lenders etc. As a result, there are various legislations / regulations which regulate such transactions and also mandate suitable disclosures in the financial statements /other documents.

1.2 There is a general presumption that transactions reflected in financial statements are conducted on an arm's length basis between independent or unrelated parties. However, that presumption may not be valid as sometimes related parties ("RPs") enter into transactions with each other which may not be entered with the unrelated parties or transactions with the RPs may not be effected at the same terms and conditions as between unrelated parties. In view of the same, RP relationship could have an effect on the financial position and operating results of the reporting enterprise.

1.3 Considering the importance of RPTs and to bring transparency and provide checks and balances in conducting RPTs, Regulators / Taxation Laws provide specific provisions / rules / regulations / disclosure requirements. This Article deals with overview of RPs, RPTs along with legal requirements under the Companies Act, 2013, SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, as amended from time to time, Accounting Standards and Income-Tax Act, 1961 and its interplay and comparison.

2. Legislations / Regulations

2.1 In the Indian context, Companies Act, 2013 ('the Act") is the chief legislation which governs RPTs in the context of Companies. In case of listed entities, SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 as amended from time to time ("SEBI Guidelines") provide for additional compliances. Further, Accounting Standards issued by the Institute of Chartered Accountants (ICAI) / Ministry of Corporate Affairs ("MCA") also require specific disclosures of RPTs in the financial statements. From the fiscal point of view, Income Tax Act, 1961 also has certain provisions dealing with RPTs so as to ensure that RPTs are at arms' length and there is no shifting of profits or tax avoidance.

2.2 There is no common definition of RPs or RPTs which applies across these Legal frameworks as each of them identify RPs as well as RPTs differently though with some degree of commonality. Further, each law has its own compliance and disclosure requirements. Thus, for the purpose of identification and compliance, one needs to examine the individual legal framework and understand the compliance and reporting requirement.

2.3 RPT Framework

There are four key elements in dealing with RPT:

- Identification of Related Parties
- Identification of transactions with such parties
- Approval process as mandated under the Act / SEBI Guidelines
- Disclosures to be made in Financial Statements / Annual Report.

3. RPTs under the Companies Act, 2013 ("the Act")

Considering the importance of RPTs, the Act defines Related parties and provides for approval process or mechanism for RPTs either through Board Meeting / Audit Committee Meeting / Shareholders Meeting [Section 177/ Section188] and also disclosure requirements.

3.1 Related Party defined

Section 2(76) of the Act defines RP as under:

(i) a director or his relative;

(ii) a key managerial personnel or his relative;

(iii) a firm, in which a director, manager or his relative is a partner;

(iv) a private company in which a director or manager or his relative is a member or director;

(v) a public company in which a director and manager is a director and holds along with his relatives, more than two per cent of its paid-up share capital;

(vi) any body corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;

(vii) any person on whose advice, directions or instructions a director or manager is accustomed to act: provided that nothing in sub-clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity;

(viii) any body corporate which is—

  (A) a holding, subsidiary or an associate company of such company;

  (B) a subsidiary of a holding company to which it is also a subsidiary; or

  (C) an investing company or the venturer of the company;";

(ix) a director [other than an independent director] or key managerial personnel of the holding company or his relative with reference to a company;

3.2 **Section 2(77) defines a relative** *qua* an individual as meaning his HUF, spouse, parents, children, siblings and spouses of children. Step-father, step-mother, step-son, step-brother and step-sister are also relatives.

3.3 **Section 2(51) defines Key managerial personnel"** as under—

(i) the chief executive officer or the managing director or the manager;

(ii) the company secretary;

(iii) the whole-time director;

(iv) the Chief Financial Officer;

(v) such other officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board; and

(vi) such other officer as may be prescribed

3.4 **RPTs and approval matrix**

Section 188 of the Act though not specifically defines RPT, but specifies various contracts or arrangements with a RP, which constitute a RPT.

The contracts or arrangements constituting a RPTs are as follows:

(a) sale, purchase or supply of any goods or materials;

(b) selling or otherwise disposing of, or buying, property of any kind;

(c) leasing of property of any kind;

(d) availing or rendering of any services;

(e) appointment of any agent for purchase or sale of goods, materials, services or property;

(f) such RP's appointment to any office or place of profit in the company, its subsidiary or associate company; and

(g) underwriting the subscription of any securities or derivatives thereof, of the company.

The above referred to RPTs cannot be entered into by the Company (whether Private or Public limited company) except with the consent of the Board of Directors.

3.5 **Cases where shareholders' approval required**

In respect of following RPTs exceeding prescribed threshold, approval of the shareholders is required [refer Rule 15 of the Companies (Meetings of the Board and its Powers) Rules, 2014, as amended from time to time]:

(i) sale, purchase or supply of any goods or material, directly or through appointment of agent, amounting to ten per cent or more of the turnover of the company or rupees one hundred crore, whichever is lower;

(ii) selling or otherwise disposing of or buying property of any kind, directly or through appointment of agent, amounting to ten percent or more of net worth of the company or rupees one hundred crore, whichever is lower;

(iii) leasing of property of any kind amounting to ten per cent or more of the net worth of company or ten per cent or more of turnover of the company or rupees one hundred crore, whichever is lower;

(iv) availing or rendering of any services, directly or through appointment of agent, amounting to ten per cent or more of the turnover of the company or rupees fifty crore, whichever is lower.

(v) for appointment to any office or place of profit in the company, its subsidiary company or associate company at a monthly remuneration exceeding two and a half lakh rupees.

(vi) for remuneration for underwriting the subscription of any securities or derivatives thereof, of the company exceeding one percent of the net worth.

Notes:

1. The above-mentioned requirement of passing resolution is not applicable for transactions entered into between a holding company and its wholly owned subsidiary whose accounts are consolidated with such holding company and placed before the shareholders at the general meeting for approval.

2. No member of the company is eligible to vote on such resolution, to approve any contract or arrangement which may be entered into by the company, if such member is a RP except in case of a company in which ninety per cent or more members, in number, are relatives of promoters or are RPs.

3.6 Exceptions

The compliance requirement under the Act depends upon whether the RPT is in the **Ordinary Course of Business** and **on an Arm's Length Basis**. Where a transaction does not meet either one of the two criteria, approval of the Board of Directors is required in a duly conveyed meeting.

What is ordinary course of business is not defined. The same needs to be determined on case to case basis. A transaction in the ordinary course of business may have other comparable transactions with multiple unrelated parties thereby making RPTs comparable. In this regard, the Memorandum of Association, Board Minutes, history of past transactions, Financial Statements, etc., could be some of the indicators of what is ordinary course of business for a Company.

Explanation to Section 188 defines Arm's length transaction" as a transaction between two RPs that is conducted as if they were unrelated, so that there is no conflict of interest. It is the responsibility of the Company to demonstrate that the RPT is on an ALP. In this regard, the Company may consider comparable uncontrolled prices (CUP) or such other available data which would demonstrate that the transaction has been carried out on an arm's length price.

In case of companies required to constitute Audit Committee under Section 177, all RPT require approval by this committee, irrespective of value, arm's length price or whether the transaction is carried out in the ordinary course of business.

3.7 Disclosure by interested directors

Every director of a company who has any direct or indirect interest involved in the contract or arrangement entered into or about to be entered in to must disclose the nature of his concern or interest at the meeting of the board in which such contract or arrangement is discussed.

3.8 Disclosures in Board report:

Every RPT or a contract or an arrangement needs to be disclosed in the board`s report along with the justification for entering into such contract or arrangement.

3.9 Consequences of non-compliance

Any RPT which is not in compliance with Section 188 is voidable at the option of the Board. The director or the employee concerned who authorised such contract or arrangement with the RP party is liable to indemnify the company for any loss incurred by it. Further, the company can also act against the concerned director or employee for recovery of any loss it sustains due to such RPT.

The punishment for non-compliance of s.188 on a director / employee in case of a listed company is imprisonment for a term of up to 1 year and / or fine of ₹ 25,000 to ₹ 5 lakh. In case of an unlisted company the punishment is a fine of ₹ 25,000 to ₹ 5 lakh.

4. RTPs under SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015

4.1 Regulation 23 of the SEBI Guidelines deals with RPTs in respect of the listed entities. Before understanding the requirements of said regulation, let us first take a look at the definitions of RP, Relative and RPT under the SEBI Guidelines.

4.2 **RP**

As per Regulation 2(1)(zb) "RP" means an RP as defined under sub-section (76) of Section 2 of the Act or under the applicable accounting standards. The applicable accounting standard here means AS-18 / Ind-AS-24.

Relative

Regulation 2(1)(zd) refers to relative as defined under sub-section (77) of section 2 of the Act and the rules issued thereunder (already discussed earlier).

RPT

As per Regulation 2(1)(zc) "RPT" means a transfer of resources, services or obligations between a listed entity and a RP, regardless of whether a price is charged and a "transaction" with a RP shall be construed to include a single transaction or a group of transactions in a contract provided. It can be seen that the definition of RPT under the SEBI Guidelines is more or less similar with the definition under the Standard.

4.3 **Compliance Requirements under Regulation 23 of SEBI Guidelines**

- Unlike the Act, all the RTPs of the listed entities require prior approval of the Audit Committee irrespective of the fact whether transactions are in the ordinary course of business and on an arm's length.

- The listed entity is required to formulate a policy on materiality of RPTs and on dealing with RPTs. For this purpose, transaction with a RP is considered material if the transaction(s) to be entered into individually or taken together with previous transactions during a financial year, exceeds ten per cent of the annual consolidated turnover of the listed entity as per the last audited financial statements of the listed entity.

- The audit committee is required to lay down the criteria for granting the omnibus approval in line with the policy on RPT of the listed entity and such approval shall be applicable in respect of transactions which are repetitive in nature. The audit committee needs to satisfy itself regarding the need for such omnibus approval and that such approval is in the interest of the listed entity.

- The Audit Committee is also required to review on a quarterly basis the details of the RPTs for which such omnibus approval is given. Omnibus approval is valid for one financial year and requires fresh approval after the expiry of the financial year.

- All material RPTs require approval of the shareholders through resolution and the RPs should abstain from voting on such resolutions whether the entity is a RP to the particular transaction or not.

- Government Companies and Holding and Subsidiary Companies (whose accounts are consolidated) are exempted from the requirement of Audit Committee approval and shareholders' approval.

4.4 Interplay between RPTs under the Act and the SEBI Guidelines:

Particulars	Companies Act, 2013	SEBI Guidelines
Related parties	Defined under Section 2(76)	As defined under Section 2 (76) and Accounting Standards [AS-18 / Ind-AS-24]
Meaning and Coverage of RPT	As referred to in Section 188	Transfer of resources, services or obligations between a company and an RP, regardless of whether a price is charged
Approval Matrix	Approval of Audit Committee (wherever applicable), Prior approval of Board and Shareholders approval (wherever applicable)	Prior approval of Audit Committee and Shareholder's approval (wherever applicable)
Carveouts from approval matrix	Transactions in the Ordinary course of business and at Arm's length are out of compliance requirements of S.188	No such exception of Arm's length transaction / Ordinary course of business
Materiality threshold	10% of the turnover / networth as the case may be (refer Rule 15 of the Companies (Meetings of the Board and its Powers) Rules, 2014, as amended from time to time	10% of annual consolidated turnover
RPTs below materiality threshold	Audit Committee / Board approval	Audit Committee approval
RPTs above materiality threshold	Prior approval by the Members required for material RPTs (not required if RPTs in Ordinary course of business and at Arm's length)	Prior approval by the members (not relevant whether RPTs in in Ordinary course of business and at Arm's length)
Voting by Related parties	Related parties which are parties to the transaction to abstain from voting (not applicable to Private Companies or companies in which 90% or more members, in numbers, are relatives of the promoters or are related parties)	Al related parties to abstain from voting
Policy for Material RPTs	No requirement to formulate policy for material RPTs	Policy to be formulated for dealing with material RPTs
Review of Omnibus approval by Audit Committee	As decided by the Audit Committee	Quarterly review

5. RPs under Accounting Standard 18 – Related party disclosures

Accounting Standard (AS) -18 is a disclosure Standard requiring disclosure of RPTs in the Financial Statements [Standalone as well as Consolidated (if applicable)] of the reporting enterprise. Unlike the Act or SEBI Guidelines, AS-18 does not prescribe any approval process for the RPTs. Further the Standard does not provide any accounting principles in relation to the RPTs. The objective of AS-18 is to establish requirements for disclosure of RP relationships and transactions between the reporting enterprise and its RPs thereby improving the transparency in disclosing financial transactions with the RPs.

5.1 The Standard defines Related parties, RPTs (unlike the Act) and lays down the disclosure requirements in the financial statements. However, it also provides exemption from disclosures, if such disclosure conflicts with duties of confidentiality as specifically required in terms of a statute or by any regulator or similar competent authority.

5.2 RPs under AS-18

As per the Standard, parties are considered to be related if at any time during the reporting period one party has the ability to control the other party or exercise significant influence over the other party in making financial and/or operating decisions. The Standard also defines control as ownership (direct or indirect) over more than half of the voting power or controlling the composition of Board of the entity. Significant influence has been defined to mean participation in the financial and/or operating policy decisions of an enterprise, but not control of those policies.

The Standard also requires disclosure of RPTs with Key Management Personnel (KMP) and relatives of such personnel and the entities which are controlled by them. KMPs have been defined as those persons who have the authority and responsibility for planning, directing and controlling the activities of the reporting enterprise. For example, in the case of a company, the managing director(s), whole time director(s), manager and any person in accordance with whose directions or instructions the board of directors of the company is accustomed to act, are usually considered key management personnel. Thus, non-executive directors are not covered as KMPs.

5.3 RPT under AS-18

RPT has been defined to mean a transfer of resources or obligations between related parties, regardless of whether or not a price is charged.

5.4 Relatives under AS-18

Relatives have been defined in relation to an individual to mean the spouse, son, daughter, brother, sister, father and mother who may be expected to influence, or be influenced by, that individual in his/her dealings with the reporting enterprise.

5.5 Coverage of the Standard

Broadly speaking, the Standard covers following entities / persons as Related parties:

- Holding Company
- Subsidiary (including fellow Subsidiaries)
- Joint Ventures / Associates
- KMPs
- Relatives of KMPs
- Entities controlled by KMPs or their relatives

5.6 Disclosure requirements

Following disclosures are required to be in the financial statements:

- Name of the RP and nature of the RP relationship where control exists should be disclosed irrespective of whether or not there have been transactions between related parties (for example, Holding

Company or a subsidiary). This disclosure is required because the existence of control relationship may prevent the reporting enterprise from being independent in making its financial and/or operating decisions. This disclosure is required if there is RP relationship any time during the reporting period.

- If there have been transactions between RPs during the reporting period when RP relationship exists, the reporting enterprise should disclose the following:
  - The name of the transacting RP
  - A description of the relationship between the parties
  - A description of the nature of the transaction
  - Volume of the transactions either as an amount or as an appropriate proportion
  - Any other elements of the RPTs necessary for an understanding of the financial statements
  - The amounts or appropriate proportions of outstanding items pertaining to related parties at the balance sheet date and provisions for doubtful debts from such parties at that date
  - Amounts written off or written back in the reporting period in respect of debts due from or to related parties
- While giving disclosure, the Standard allows aggregation of items of a similar nature by type of RP.

5.7 **Interplay between the Standard and the Act**

- The Act does not define RPTs (but gives the list of transactions) whereas, RPTs have been specifically defined under the Standard. The coverage of Standard is wider than the Act. Further certain RPTs such as loan / borrowings are not covered under S. 188 but are covered under the Standard and required to be disclosed.
- The definition of relative as per the Standard is narrow as compared to the definition given in the Companies Act, 2013 which includes HUFs, spouses of children etc.
- The Standard uses the term Key Management Personnel whereas the Act uses the term Key Managerial Personnel.
- The definition of Key Managerial Personnel is wider under the Act (e.g. Company Secretary, Chief Financial Officer is also included). The same are not treated as Key Management Personnel under the Standard.
- Directors, Key Managerial Personnel and his relatives, of the Holding companies are treated as RP under the Act, whereas the same are not related parties under the Standard.
- Firm in which director, manager or his relative is a partner is treated as a RP under the Act, where as the same is not treated as RP under the Standard.
- Private company in which director or manager or his relative is member or director is a RP whereas the same is not treated as RP under the standard (unless criterion of control / significant influence is met).
- Public company in which a director and manager is a director and holds along with his relatives, more than two per cent of its paid-up share capital is a RP under the Act, but not under the Standard.
- The Act regulates RPTs by providing approval mechanism whereas Standard deals only with identification and

disclosure of RPTs in the financial statements.

- Non-compliance in respect of RPTs attracts penal provisions under the Act, whereas non-compliance with the disclosure requirements under the Standard may invite Qualification in the Auditors' report for which Board of directors is required to give response in the Board Report.
- S. 188 of the Act refers to the terms "Arm's length" and "Ordinary Course of Business" and provides relaxation from compliance requirements in those cases, whereas Standard requires disclosure of all the RPTs whether or not in ordinary course of business or at arm's length.
- The thrust of the Standard is on Control and significant influence in identifying RP whereas the Act lists certain entities as RPs irrespective of control or significant influence.

6. RPTs under Ind-AS 24

Though the tone of AS-18 and Ind-AS 24 is mostly similar, there are, however certain major differences between AS-18 and Ind-AS 24.

Sr. No.	Nature of Difference	AS-18	Ind-AS 24
1.	Definition of Relative	Definition refers to the term – *relatives of an individual.*	Definition refers to the term – *a close member of the family of a person*
2.	Coverage of Relative	the spouse, son, daughter, brother, sister, father and mother	Children, spouse or domestic partner, brother, sister, father and mother; children of that person's spouse or domestic partner; and dependents of that person or that person's spouse or domestic partner.
3.	Key Management personnel (KMP)	KMPs of only reporting entity are considered	KMPs of holding company are also covered as definition refers to directly or indirectly
4.	Post-employment benefit plans	Post-employment benefit plan of the entity or of a RP of the entity is not specifically covered as a RP.	Post-employment benefit plan of the entity or of a RP of the entity is considered as a RP.
5.	Exemption for certain entities	Entities are exempt from disclosures if such disclosures conflict with an entity's duties of confidentiality as specifically required in terms of a statute or by any regulator or similar component authority. Entities under the control of Government are not required to disclose RP relationship and transactions with other Government controlled entities.	Certain minimum disclosures are required by Government entities, such as: 1. The name of Government and the nature of its relationship with the reporting entity. 2. The nature and amount of each individually significant transaction. 3. For other transactions that are collectively, but not individually significant, a quantitative or qualitative indication of their extent.

7. RPTs under the Income-tax Act, 1961 (ITA)

ITA contains certain provisions dealing with RTP transactions, chief amongst them are Section 40A(2)(b) and Transfer Pricing provisions (Specified Domestic Transactions as well as International Transactions).

7.1 Payments to persons specified under Section 40A(2)(b)

Section 40A(2)(b) is applicable to all the assessees (corporate as well as non-corporates irrespective of method of accounting followed) and deals with payments made to certain specified persons. These persons are generally termed as 'Related Parties' under AS-18 / Ind-AS 24. It may be noted that relationships/parties covered under this section and those covered under AS-18 / Ind-AS 24 are not exactly identical. These accounting standards cover all types of transactions, whereas Section 40A(2) covers only expenditure and hence limited in scope. As per this section, if in the opinion of the Assessing Officer, such expenditure is found to be excessive/unreasonable having regard to the fair market value of the goods/services/ facilities, then such excessive or unreasonable expenditure is disallowed. However, disallowance is not attracted in case of specified domestic transactions ("SDT")as referred to in Section 92BA, if such transactions are at arm's length price.

7.2 Specified persons [Section 40A(2)(b)]

Following are the Specified Persons under Section 40A(2)(b):

Sr. No.	Assessee	Specified person (in relation to Assessee)	
1.	Individual	(a)	Any Relative [husband, wife, brother, sister or any lineal ascendant or descendant of that individual].
		(b)	Any Person, in whose business or profession, assessee or his relative has substantial interest
2.	Firm (Firm includes LLP as well)	(a)	Any Partner of Firm
		(b)	Any relative of the Partner
		(c)	Any person, in whose business or profession, the assessee (firm) or any partner of such firm or relative of any partner has substantial interest
3.	Company	(a)	Any Director of the Company
		(b)	Any relative of the Director
		(c)	Any person, in whose business or profession, the assessee (Company) or any Director of such Company or relative of any Director has substantial interest
4.	Association of Persons (AOP)	(a)	Any member of such AOP
		(b)	Any relative of the Member of AOP
		(c)	Any person, in whose business or profession, the assessee (AOP) or any member of such AOP or relative of any member has substantial interest

Sr. No.	Assessee	Specified person (in relation to Assessee)	
5.	Hindu Undivided Family (HUF)	(a)	Any member of such HUF
		(b)	Any relative of member of HUF
		(c)	Any person, in whose business or profession, the assessee (HUF) or any member of such HUF or relative of any member has substantial interest
6.	Any Assessee (this category is applicable to all assesses listed above)	Additional List of specified persons applicable to all categories listed above:	
		(a)	Individual who has substantial interest in the business or profession of the Assessee or any relative of such individual
		(b)	Company, firm, AOP or HUF having substantial interest in the business; or profession of the Assessee or any director, partner or member of such company, firm, AOP or HUF; or any relative of such director, partner or member; or any other company carrying on business or profession in which the first mentioned has substantial interest
		(c)	Company, firm AOP or HUF of which a director, partner or member, as the case may be, has a substantial interest in the business or profession of the assessee; or any director, partner or member of such company, firm, AOP or HUF or any relative of such director, partner or member

7.3 **Substantial Interest**

For the purpose of Section 40A(2)(b), a person shall be deemed to have substantial interest in the business or profession:

(a) **In case of Company:** If such person is, at any time during the previous year, the beneficial owner of shares carrying not less than 20% of voting power (i.e. Equity Shares).

(b) **In other cases:** If such person is, at any time during the previous year, entitled to 20% of the profits of the business or profession.

7.4 **Transfer Pricing provisions**

Chapter X of the ITA contains elaborate provisions as regards Transfer Pricing (International as well as SDTs). The intention behind Transfer Pricing (TP) regulations is to prevent tax avoidance or evasion of tax by the assessee by entering into transactions (which are not at arm's length) with persons on whom they have influence or control or vice versa ("Associated Enterprises"). The law thus aims that all controlled transactions (with the Associated Enterprises (AEs) should be at arm's length price (ALP).

The ITA defines AEs, provides methods for calculation of ALP and also defines International transactions as well as SDTs.

7.5 For the purpose of TP provisions, Section 92A deems two enterprises to be AEs in certain situations. These AEs are generally RPs under the Act or the Standard. However, the scope of AEs is much wider under Section 92A. Given below are the situations in which two entities are treated as AEs:

- one enterprise holds, directly or indirectly, shares carrying not less than twenty-six per cent of the voting power in the other enterprise; or

- any person or enterprise holds, directly or indirectly, shares carrying not less than twenty-six per cent of the voting power in each of such enterprises; or
- a loan advanced by one enterprise to the other enterprise constitutes not less than fifty-one per cent of the book value of the total assets of the other enterprise; or
- one enterprise guarantees not less than ten per cent of the total borrowings of the other enterprise; or
- more than half of the board of directors or members of the governing board, or one or more executive directors or executive members of the governing board of one enterprise, are appointed by the other enterprise; or
- more than half of the directors or members of the governing board, or one or more of the executive directors or members of the governing board, of each of the two enterprises are appointed by the same person or persons; or
- the manufacture or processing of goods or articles or business carried out by one enterprise is wholly dependent on the use of know-how, patents, copyrights, trade-marks, licences, franchises or any other business or commercial rights of similar nature, or any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process, of which the other enterprise is the owner or in respect of which the other enterprise has exclusive rights; or
- ninety per cent or more of the raw materials and consumables required for the manufacture or processing of goods or articles carried out by one enterprise, are supplied by the other enterprise, or by persons specified by the other enterprise, and the prices and other conditions relating to the supply are influenced by such other enterprise; or
- the goods or articles manufactured or processed by one enterprise, are sold to the other enterprise or to persons specified by the other enterprise, and the prices and other conditions relating thereto are influenced by such other enterprise; or
- 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; or
- where one enterprise is controlled by a Hindu undivided family, the other enterprise is controlled by a member of such Hindu undivided family or by a relative of a member of such Hindu undivided family or jointly by such member and his relative; or
- where one enterprise is a firm, association of persons or body of individuals, the other enterprise holds not less than ten per cent interest in such firm, association of persons or body of individuals; or
- there exists between the two enterprises, any relationship of mutual interest, as may be prescribed.

7.6 As can be seen from the above list, apart from control which is generally the case in the Act as well Standards and SEBI Guidelines, ITA goes beyond control and specifies certain relationships where two enterprises are deemed to be AEs. The examples are loan transactions exceeding thresholds, guarantees, procurement of substantial amount of raw materials, manufacture of goods total dependent upon use of know how, patent, copy rights belonging to other enterprise etc.

7.7 **International Transaction**

As per Section 92B of ITA, International transaction includes:

- the purchase, sale, transfer, lease or use of tangible property including building, transportation vehicle, machinery, equipment, tools, plant, furniture, commodity or any other article, product or thing;
- the purchase, sale, transfer, lease or use of intangible property, including the transfer of ownership or the provision of use of rights regarding land use, copyrights, patents, trademarks, licences, franchises, customer list, marketing channel, brand, commercial secret, know-how, industrial property right, exterior design or practical and new design or any other business or commercial rights of similar nature;
- capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;
- provision of services, including provision of market research, market development, marketing management, administration, technical service, repairs, design, consultation, agency, scientific research, legal or accounting service;
- a transaction of business restructuring or re-organisation, entered into by an enterprise with an associated enterprise, irrespective of the fact that it has bearing on the profit, income, losses or assets of such enterprises at the time of the transaction or at any future date.

7.8 **Specified Domestic Transaction (SDT)**

Section 92BA defines SDT as any of the following transactions, not being an international transactions, where the aggregate of such transactions entered into by the assessee in the previous year exceeds a sum of twenty crore rupees:-

- o any transaction referred to in section 80A;
- o any transfer of goods or services referred to in sub-section (8) of section 80-IA;
- o any business transacted between the assessee and other person as referred to in sub-section (10) of section 80-IA;
- o any transaction, referred to in any other section under Chapter VI-A or section 10AA, to which provisions of sub-section (8) or sub-section (10) of section 80-IA are applicable; or
- o any other transaction as may be prescribed,

7.9 Thus it can be seen that scope of RPTs under TP provisions is far wider and the enterprise (assessee) should ascertain whether it has any RP (AE) and if yes then whether it has entered into any RPT (i.e. International transaction or SDT). If yes, then the ITA mandates such transactions at ALP with sufficient documentation and Audit requirements.

8. Conclusion

RPTs are now subject to greater scrutiny and disclosures. All RPTs are expected to have proper business rationale, necessary approvals to substantiate arm's length and appropriate disclosures in the financial statements and annual reports. If the same are not conducted as per the requirement of the law or other regulations, it may create doubt on the corporate governance structure of the entity.

Non-compliance may lead to substantial penal action against the promoters and management, involved in the transaction and may also affect business prospects of the entity.

Further, the definition of RP, RPT is different under different law / regulations and one needs to be very careful while identifying RP, following procedural and disclosure requirements. The business entity needs to have a robust mechanism for such identification and collection of information so that it remains on the right side of the law.

Kishor Vanjara, *Tax Consultant*

Tax Articles for Your Reference

Articles published in Taxman, Current Tax Report (CTR), Income Tax Report (ITR), The Bombay Chartered Accountant Journal (BCAJ), The Chamber's Journal (C J), The Chartered Accountant Journal (CAJ), All India Federation of Tax Practitioners Journal (AIFTPJ), Sales Tax Review (STR), Times of India and Economic Times for the period December 2017 to January 2018 has been arranged and indexed topic-wise.

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First time implementation of Ind AS	Jay Gosar & Gautam Shah	CJ	VI/No.4	186
In Focus	Khurshed Pastakia	CJ	VI/No.3	145
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Learnings from Phase 1- Implementation tips for a smooth Implementation	Dolphy D'souza	BCAJ	49-B/Part 3	14
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Accumulated Profit	Bharath Janarthanan	CJ	VI/No.4	24
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Jurisdiction for filing Appeals	Pushya Sitaraman	ITR	399	92
Monetary limit of appeals : retrospective of Departmental Instructions	Tarun Jain	ITR	400	44

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The rejuvenated law relating to Benami Property Transactions	T. N. Pandey	Taxman	251	1
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Bankruptcy Act is no substitute for penal code	M. C. Govardhana Rangan	ET	12/4/2017	11
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Disruption in Consumer Finance peer to peer lending	Mukesh Bubna	CAJ	66/No.7	994
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Section 115JB of the Income-tax Act,1961-Audit by the CAGs- Findings in the CAG's audit on the working of section 115JB of the Income-tax Act,1961, which imposed MAT on companies	T. N. Pandey	ITR	399	24
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Loan or Advance to Specified 'Concern' by closely held company which is Deemed as Dividend u/s.2(22)€-Whether can be Assessed in the hands of the 'concern'?-Part I	Kishor Karia & Atul Jasani	BCAJ	49-B/Part 3	55
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Framing the new direct tax code needs diligence: The author urges the hon'ble Finance Minister to realise that a new Income-tax Act cannot be provided by a headless part-time task force of seven persons in six month's time	T. N. Pandey	ITR	400	33
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Debt equity distinction induces problems both at domestic and international level- A study from UK perspective	Sweekar Bhardwaj	Taxman	251	25
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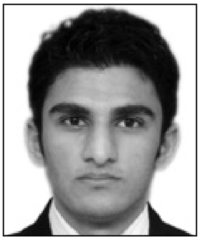

Rahul Sarda, *Advocate*

BEST OF THE REST

1. Insolvency & Bankruptcy Code – Meaning of "dispute" – Operational creditor – operational debt – Breach of contract

Once an operational creditor files an application, the adjudicating authority (i.e., the NCLT) must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. All that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to reject a spurious defence which is mere bluster. However, in doing so, the NCLT does not need to be satisfied whether the defence is likely to succeed. The NCLT does not, at this stage, examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the NCLT has to reject the application.

Mobilox Innovations Private Limited vs. Kirusa Software Private Limited (2018) 1 SCC 353

2. Companies Act, 2013 – Appeal u/s. 421 – Appeal filed beyond limitation period – Not maintainable

The appellant before the Supreme Court was the appellant before the NCLT against an order dated 31st July, 2017 passed by the NCLT. The appeal was dismissed by the NCLT as not maintainable, in as much as the appeal had been filed 9 days after the period of limitation of 45 days had expired and a further period of another 45 days had also expired. Held, reading of Section 421(3) makes it clear that the proviso provides a period of limitation different from that provided in the Limitation Act, and also provides a further period not exceeding 45 days only if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period. Also held that Section 433 could not come to the aid of the appellant because the provisions of the Limitation Act only apply "as far as may be". Since there was a special provision contained in Section 421(3) proviso, Section 5 of the Limitation Act would not apply.

Section 421(3) did not merely contain the initial period of 45 days, but goes on to state that another period of 45 days, being a grace period given by the legislature which cannot be exceeded, alone would apply, provided sufficient cause is made out within the aforesaid grace period. It is the second period, which is a special inbuilt kind of Section 5 of the Limitation Act in the special statute, which lays down that beyond the second period of 45 days, there can be no further condonation of delay.

Bengal Chemists & Druggists Assn. vs. Kalyan Chowdhury [2018] 90 taxmann.com 112 (SC)

[Contd... on page 147]

 

CA Ketan Vajani & CA Nishtha Pandya
Hon. Jt. Secretaries

The Chamber News

Important events and happenings that took place between 7th January, 2018 and 7th February, 2018 are being reported as under:

I. Admission of New Members

1) The following new members were admitted in the Managing Council Meeting held on 17th January, 2018.

Life Membership

1.	Mr. Maity Bipul Bishnupada	Advocate	Mumbai
2.	Mr. Bathiya Haseet Pankaj	Advocate	Mumbai

Ordinary Membership

1.	Mr. Desai Sandeep Satyawan (Half Yearly)	ITP	Mumbai
2.	Mr. Deshpande Kishore Madhukar (Half Yearly)	CA	Raipur
3.	Mr. Maheshwari Sureshchandra (Half Yearly)	CA	Raipur
4.	Mr. Shah Shrenik Ashwin (Half Yearly)	CA	Mumbai

Student Membership

1.	Mr. Yadav Prashant Pramod	IPCC	Mumbai
2.	Ms. Samje Komal Kishor	Final	Mumbai
3.	Mr. Jain Mahavir Indralal	IPCC	Mumbai
4.	Mr. Patil Onkar Jagdish	Final	Mumbai
5.	Vashika Shroff	Student	Mumbai

II. Past Programmes

1. CORPORATE CONNECT COMMITTEE

Lecture Meeting on Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 was held on 16th January, 2018 at Walchand Hirachand Hall, 4th Floor, IMC, Churchgate. The Lecture Meeting was addressed by Ms. Samriti Makkar Midha, Psychologist, Ms. Shivangi Prasad, Advocate and Ms. Sana Hakim, Advocate.

2. **DIRECT TAXES COMMITTEE**

- Lecture Meeting on TDS Procedures with Income Tax Department was held on 19th January, 2018 at Walchand Hirachand Hall, 4th Floor, IMC. The meeting was addressed by Mr. V. K. Gupta, Commissioner of Income Tax TDS-1, Mr. Arun Shenoy Addl. CIT, Mr. R. K. Mishra, Director of Income Tax CPC Bangalore, Mr. P. S. Thuingaleng, JCIT, CPC Gaziabad and Mr. Purushottam, CPC Gaziabad.
- Public Meeting on Budget Jointly with Investors' Grievances Forum, Matunga Gymkhana, Welingkar Institute of Management, Matunga CPE Study Circle of WIRC – ICAI and Forum of Free Enterprise was held on 2nd February, 2018 at Matunga Gymkhana, Matunga East (CR), Mumbai. The meeting was addressed by CA Kanu Doshi, Shri Mehraboon Irani, Equity Analyst and Dr. Kirit Somaiya, MP, President IGF.
- Public Union Budget Meeting 2018 Jointly Ghatkopar CPE Study Circle of WIRC, Forum of Free Enterprises and 14 other Organizations was held on 4th February, 2018 at K. J. Somaiya Institute of Management Studies and Research, Vidyavihar (East), Mumbai. The meeting was addressed by CA Rajiv Luthia, CA Mehul Shah and Ms. Sarika Rachuri.

3. **INDIRECT TAXES COMMITTEE**

- Workshop on GST Law jointly with AIFTP (WZ), BCAS, GSTPM, MCTC and WIRC of ICAI for the year 2017-18 has started and few sessions are held on 17th, 24th, 31st January, 2018, 7th, and 14th February, 2018 at GSTPAM, Mazgaon Library, Mazgaon. The Workshop was addressed by CA Rajiv Luthia, CA Ashit Shah, Mr. Ratan Samal, Advocate, CA Janak Vaghani, CA Mayur Parekh, CA Jinit Shah, CA Jayesh Gogri and CA S. S. Gupta.
- 6th Residential Refresher Course on GST was held from 25th January, 2018 to 28th January, 2018 at The Ananta, Udaipur. Panel discussions on the papers were made at the RRC. The Panelists for the panel discussions were Mr. V. Raghuraman, Advocate, CA Sunil Gabhawalla and CA A. R. Krishnan. Shri Rohan Shah, Advocate presented a paper on the subject of Interpretation of Tariff Classification under GST. The RRC was attended by more than 200 delegates and interesting discussions were held at the RRC.

4. **IT CONNECT COMMITTEE**

- Workshop on Information Technology for a Small-Medium CA Office was held on 20th January, 2018 at ICAI Bhavan, 1st Floor, Solapur. The workshop was addressed by CA Mayur Jain, CA Alok Jajodia, CA Maitri Chheda and CA Uday Shah.
- Seminar on E-Way Bill under GST was held on 23rd January, 2018 at Jai Hind College, A. V. Room, Churchgate. The seminar was addressed by CA Manish Gadia and CA Mitesh Katira. Considering the overwhelming response to the Seminar, the same was repeated on 30th January, 2018 at RVG Hostel, Andheri (West), Mumbai with the same speakers.

5. **STUDENT COMMITTEE**

- Chamber's Inter College Debate Competition in association with H. R. College of Commerce and Economics was held on 22nd January, 2018 at H. R. College, A.V. Room, Churchgate. Thirteen colleges participated in the competition. The winner of the debate competition was H. R. College. K. C. College was the 1st runner up and Nari Gursahani Law College was the 2nd runner up.

- Industrial visit to Jawaharlal Nehru Port was held on 31st January, 2018. Lecture Meeting on provisions of Finance Bill, 2018 was held on 5th January, 2018 at H. R. College, A.V. Room, Churchgate. The meeting was addressed by CA Uday Ved.

II. Future Programmes

1. DELHI CHAPTER

Two days Intensive Study Course on Foreign Exchange Management Act (FEMA) is scheduled to be held on 23rd and 24th March, 2018 at India International Centre Lecture Room I/II, New Delhi.

2. DIRECT TAXES COMMITTEE

Half Day Seminar on Charitable Trusts scheduled to be held on 23rd March, 2018 at Babubhai Chinai Committee Room, 2nd Floor, IMC, Churchgate.

3. INDIRECT TAXES COMMITTEE

The remaining sessions in the Workshop on GST Law jointly with BCAS, MCTC, GSTPAM, AIFTP (WZ) & WIRC OF ICAI are scheduled to be held on 21st, 28th, February, 2018, 7th and 14th March, 2018 at GSTPAM, Mazgaon Library, 1st Floor, 104, Vikrikar Bhavan, Mazgaon, Mumbai - 400 010

4. INTERNATIONAL TAXATION COMMITTEE

12th Residential Conference on International Taxation, 2017 is scheduled to be held from 21st June, 2018 to 24th June, 2018 at The Grand Bhagwati, Indore.

5. MEMBERSHIP & PUBLIC RELATIONS COMMITTEE

Second Triangular Box Cricket Tournament Jointly with The Malad Chamber of Tax Consultants and The Goods And Services Tax Practitioner's Association of Maharashtra will be held on Saturday, 10th March, 2018 at The Turf Club, Kandivali (East), Mumbai.

(For details of the future programmes, kindly visit www.ctconline.org or refer The CTC News of December, 2017)

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3. Insolvency and Bankruptcy Code – Application filed under representative capacity – Whether maintainable

The petitioner filed a petition under section 9 of the Insolvency and Bankruptcy Code, 2016 as an authorised representative of 284 workers of the respondent. The NCLT observed that the 284 workers had authorised the petitioner to pursue their case before the NCLT. Held, that such authorisation did not mean that the workers had assigned their debts to the petitioner. A person could file a petition regarding the debt of other persons, only in case debt is assigned or transferred to him. Further held that the word 'operational creditor' used in section 8 showed that it was used in singular form and there was no provision for 'joint application' in sections 8 and 9 as was provided under section 7. Therefore, the application filed by petitioner on behalf of several workers in the representative capacity as an operational creditor was held not maintainable on this ground.

Suresh Narayan Singh vs. Tayo Rolls Ltd. [2018] 89 taxmann.com 347 (NCLT – Kolkata)

Direct Taxes Committee

Webinar on Appeals before CIT (Appeals) was held on 19th January, 2018.

Mr. Rahul Hakani, Advocate addressing the participants

Webinar on Recovery Proceedings under the Income Tax Act was held on 29th January, 2018

Mr. Jitendra Singh, Advocate addressing the participants

International Taxation Committee

Webinar on Do's and Don'ts for NRI under FEMA was held on 11th January, 2018

CA Harshal Bhuta addressing the participants

Webinar on Taxation of Foreign Shipping Company was held on 24th January, 2018

CA Natwar Thakrar addressing the participants

Study Circle and Study Group Committee

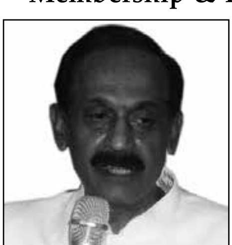
Study Group on Recent Judgments under Direct Tax was held on 11th January, 2018 at SNDT Committee Room, Churchgate

CA Yogesh Thar addressing the participants

Study Circle on Penalty Provisions u/s. 270A and 270AA of Income Tax Act, 1961 was held on 30th January, 2018 at Walchand Hirachand Hall, 4th Floor, IMC, Churchgate,

CA Jagdish Punjabi addressing the participants

Membership & Public Relation Committee



Self Awareness Series Meeting on Lost of Asian Secrets of being healthy was held on 15th January, 2018 at SNDT Committee Room.

Dr. Pankaj Naram addressing the participants

CTC Pune Study Group

Study Group on Contemporary Issues on Recent Decisions on International Tax & TP was held on 20th January, 2018 at ELTIS Auditorium, Pune

CA Bhaumik Goda addressing the participants

Indirect Taxes Committee

Study Circle Meeting on Classification of Goods under GST and its Implication under GST was held on 18th January, 2018 at SNDT Committee Room, SNDT College, Churchgate

Mr. Nitin Shah, Advocate (Chairman) addressing the participants

Mr. Ishaan Patkar, Advocate (Group Leader) addressing the participants

Student Committee

Public Lecture Meeting on Budget 2018 was held on 5th February, 2018 at H. R. College, Churchgate, Mumbai.

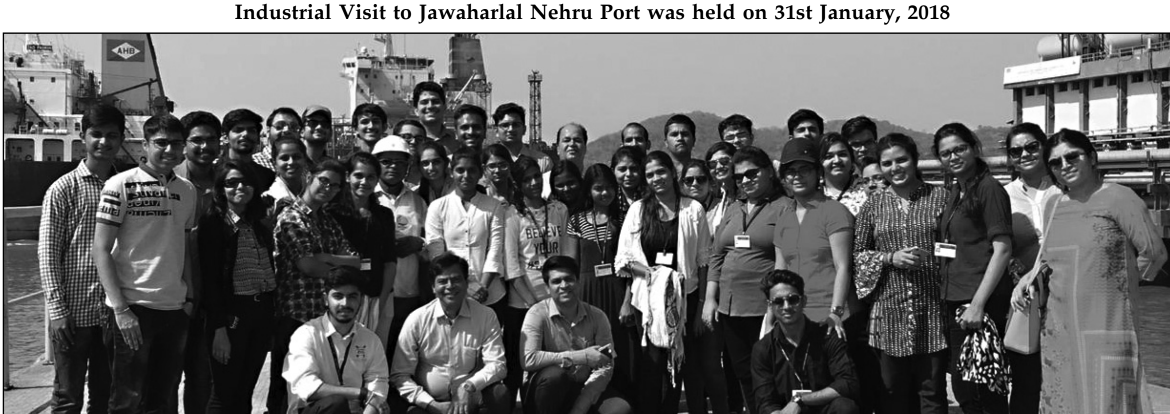
Dignitaries on dais. Seen from L to R: Mr. Parag Thakkar, Principal H. R. College, CA Uday Ved (Speaker), Mr. Ajay Singh, Advocate (President) and CA Sanjeev Lalan (Chairman)

CA Sanjeev Lalan (Chairman) welcoming the Speaker

CA Uday Ved addressing the participants

Section of delegates

Industrial Visit to Jawaharlal Nehru Port was held on 31st January, 2018



Group Photo of students

IT Connect Committee

E-Way Bill under GST was held on 23rd January, 2018 at Jai Hind College, A. V. Room, Churchgate, Mumbai.

Dignitaries on dais. Seen from L to R: CA Dinesh Tejwani (Chairman), CA Manish Gadia (Speaker), Mr. Ajay R. Singh, Advocate (President), CA Uday Shah (Convenor) and CA Mitesh Katira (Speaker)

CA Dinesh Tejwani (Chairman) welcoming the speakers

CA Manish Gadia addressing the participants

CA Mitesh Katira addressing the participants

E-Way Bill under GST was held on 30th January, 2018 at RVG Hostel, Andheri (West)

Dignitaries on dais. Seen from L to R: CA Parag Ved (Hon. Treasurer) giving opening remarks, CA Dinesh Tejwani (Chairman), CA Mitesh Katira (Speaker) and CA Alok Jajodia (Convenor)

CA Mitesh Katira addressing the participants

CA Manish Gadia addressing the participants

Section of Delegates

Indirect Taxes Committee

Workshop on GST Law jointly with AIFTP (WZ), BCAS, GSTPAM, MCTC & WIRC of ICAI for the year 2017-18 was held on 17th, 24th, 31st January, 2018 and 7th February, 2018 at GSTPAM, Mazgaon Library, Mumbai.

Mr. Ajay R. Singh, President – CTC lighting the lamp and inaugurating the workshop. Seen from L to R: CA Deepak R. Shah (Chairman–WZ, AIFTP), CA Vipul Somaiya (President – MCTC), CA Deepak Thakkar (Chairman – GSTPAM), CA Pranav Kapadia (President – GSTPAM), CA Narayan Pasari (President – BCAS), CA Premal Gandhi (Convenor – GSTPAM).

Speakers

CA Rajiv Luthia

CA Ashit Shah

Dignitaries on dais. Seen from L to R: CA Deepak R. Shah (Chairman –WZ, AIFTP), CA Narayan Pasari (President – BCAS), CA Vipul Somaiya (President – MCTC), Mr. Ajay R. Singh, Advocate (President – CTC), CA Pranav Kapadia (President – GSTPAM) and CA Deepak Thakkar (Chairman – GSTPAM)

Corporate Connect Committee

Lecture Meeting on Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 was held on 16th January, 2018 at Walchand Hirachand Hall, 4th Floor, IMC.

Mr. Ajay R. Singh, Advocate (President) giving opening remarks. Seen from L to R: CA Anish Thacker (Chairman), Ms. Samriti Makkar Midha, Psychologist (Speaker), Ms. Shivangi Prasad, Advocate (Speaker), Ms. Sana Hakim, Advocate (Speaker) and CA Tanvi Vora (Committee Member)

CA Anish Thacker (Chairman) welcoming the speakers

Speakers: Seen from L to R: Ms. Samriti Makkar Midha, Psychologist, Ms. Shivangi Prasad, Advocate, Ms. Sana Hakim, Advocate.

Group Photo

Student Committee

Inter College Debate Competition was held on 22nd January, 2018 at H. R. College of Commerce and Economics, Churchgate, Mumbai

Mr. Ajay R. Singh, Advocate (President) and CA Hinesh R. Doshi (Vice-President) presenting Memento to CA Parag Thakkar (Principal – H. R. College)

Final round Judges – Seen from L to R: Ms. Ela Dedhia and Ms. Reeta Shah

1st Runner up N. M. College participants receiving their Trophy and Certificate from the Judges. Seen in the photo CA Sanjeev Lalan (Chairman)

Preliminary round Judges – Seen from L to R: CA Sanjeev Lalan (Chairman), CA Anand Bathia, CA Vipul Choksi and CA Dinesh Tejwani

Winner H. R. College participants receiving their Trophy and Certificate from the Judges. Seen from L to R: CA Hinesh R. Doshi (Vice-President), CA Parag Thakkar (Principal – H. R. College), Mr. Ajay R. Singh, Advocate (President) CA Sanjeev Lalan (Chairman)

2nd Runner up Nari Gursahani Law College participants receiving their Trophy and Certificate from the Judges. Seen from L to R: CA Hinesh R. Doshi (Vice-President) and Mr. Ajay R. Singh, Advocate (President)

Group Photo

Direct Taxes Committee

Lecture Meeting on TDS Procedures with Income Tax Department was held on 19th January, 2018 at Walchand Hirachand Hall, 4th Floor, IMC.

Mr. Ajay R. Singh, Advocate (President) giving his opening remarks. Seen from L to R: CA Ashok Mehta (Chairman), Mr. V. K. Gupta (Speaker), Mr. Pratap Singh (Speaker) and Mr. Arun Shenoy (Speaker)

CA Ashok Mehta (Chairman) welcoming the speakers

Faculties

Mr. V. K. Gupta (CIT TDS 1)

Mr. Arun Shenoy (Addl. CIT)

Mr. R. K. Mishra (Director of Income Tax CPC Bengaluru)

Mr. P. S. Thuinaleng (JCIT)

Mr. Ashwani Narwal (ITO)

Mr. Purushottam (Inspector)

Mr. Pratap Singh (CIT TDS 2)

Mr. K. R. Narayanan (JT. Director CPC Bengaluru)

Mr. Sajit Kumar (Deputy Director CPC E-filing unit Bengaluru)

Public Union Budget Meeting 2018 jointly with Ghatkopar CPE Study Circle of WIRC, Forum of Free Enterprises and 14 other Organisations was held on 4th February, 2018 at K. J. Somaiya Institute of Management Studies And Research, Vidyavihar.

Dignitaries on dais

CA Rajiv Luthia addressing the participants

Student Committee

Live Screening of Budget, 2018

Live screening of the Finance Minister's speech and presentation of Budget 2018 held on 1st February, 2018 at CTC Office. The screening was covered by Mumbai local New's Channel Zee Gujarati.

IT Connect Committee

Workshop on Information Technology for a Small-Medium CA Office jointly with WIRC Solapur Branch was held on 20th January, 2018 at ICAI Bhavan, Solapur

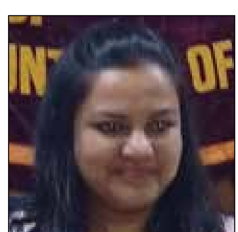
Inauguration Session. Seen from L to R: CA Maitri Chheda (Speaker), CA Alok Jajodia (Speaker), CA Uday Shah (Convenor – IT Connect Committee), CA Mayur Jain (Speaker), CA Chandrakant Injamuri, CA Hinesh Doshi (Vice-President) and Mr. Sunil Ingle (Chairman – WIRC Solapur Branch)

CA Hinesh Doshi (Vice-President) giving opening remarks. Seen from L to R: CA Chandrakant Injamuri, Mr. Sunil Ingle (Chairman – WIRC Solapur Branch) and CA Mayur Jain (Speaker)

Speakers

CA Mayur Jain

CA Alok Jajodia



CA Maitri Chheda

CA Uday Shah

Delhi Chapter

Seminar on Stinging Implications of Benami Transactions Law – Overview & Issues; Implication of Sections 56, 68 & 69 of Income-tax Act – Effective Representation before Appellate Authorities; & Prevention of Money Laundering Act – Concept and Issues was held on 20th January, 2018 at India International Centre, Lecture Room I, New Delhi.

CA Suhit Aggarwal (Chairman – Delhi Chapter) giving opening remarks

CA Vijay Gupta (Vice-Chairman – Delhi Chapter) welcoming the delegates

Dignitaries on dais. Seen from L to R: Mr. Ashwani Taneja, Advocate (Faculty), Mr. Prashant Mehrishi (Faculty), Mr. Amit Shukla (Faculty), Mr. G. C. Mishra, CA Anil Agarwal (Faculty) and Mr. Vivek Bansal

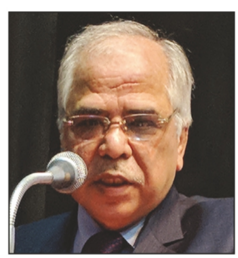
Dignitaries on dais Seen from L to R: Mr. Ashwani Taneja, Advocate (Faculty), Mr. R. K. Panda (Faculty), Mr. P. K. Malhotra (Faculty), Mr. G. C. Mishra, CA Anil Agarwal (Faculty) and Mr. V. P. Verma (Advisor, Delhi Chapter)

Budget Talk 2018 was held on 2nd February, 2018 at Aiwan E-Ghalib Auditorium, New Delhi

Faculties

Dr. Girish Ahuja

Dr. Ravi Gupta



CA Ahok Batra

CA Atul Gupta

Dignitaries at the session

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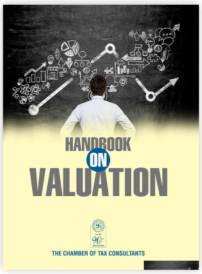

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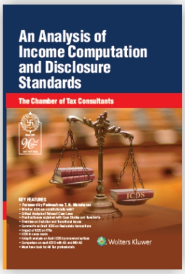

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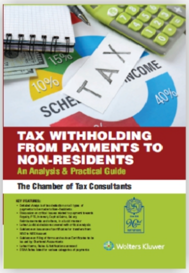

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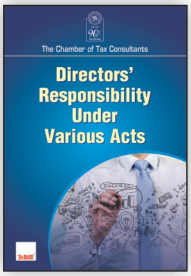

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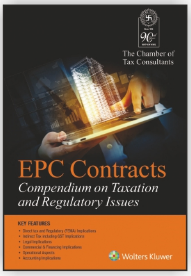

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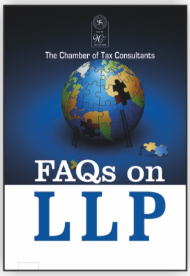

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