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THE CHAMBER'S JOURNAL

Vol. VII | No. 10
July 2019

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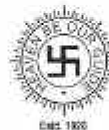

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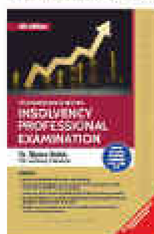

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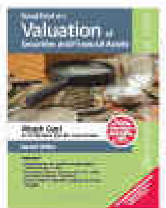

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CA Vipul K. Choksi, President addressing the members at the 92nd AGM

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Editorial

Dear Readers,

It is with great sense of humility and privilege that I pen my first editorial for The Chamber's Journal. In a way, it is a nostalgic moment as this journal, a brainchild of my father, Late Shri B. C. Joshi, was 'conceived' and launched by him during his tenure as President of this August Institution in 1975. A great visionary much ahead of his time, it will be in the fitness of the things if his message, as contained in the maiden issue of the journal, is reproduced verbatim here, as it reflects the vision with which this journal was launched. Incidentally, the critical observations contained therein regarding the state of affairs of the tax laws as then prevailing, sadly, still hold good for the present state of affairs, even 44 years therefrom.

Editorial - B. C. Joshi, *Advocate*

"Even though Income Tax has held the field for last over fifty years and even though the major part of Income-tax is being paid by the erstwhile State of Bombay and now Maharashtra and particularly the citizens of Bombay, there is no significant unison in the effort to understand the kaleidoscopic complications of the Income-tax Act. Periodic efforts by practitioners and conferences by groups do not serve the purpose of a concerted attempt to understand the Income-tax and allied laws and to represent against some of the invidious features in an organised way. Within the last over 50 years, the Income-tax laws have given birth to number of children; to mention a few mischievous children the Expenditure tax, the Estate Duty Act, Wealth Tax Act and the Gift Tax. The proliferation is much more complicated with host of allied and subsidiary legislation of Rules and Notifications. While tackling the problems of understanding the law or application of law to a given problem requires expertise and experience which has been the preserve of only a few so far, it is in the interest of the tax practitioners, taxpayers and the taxmasters alike that these laws should be understood by every taxpayer. It is equally important that some of the weak spots are highlighted, some ugly growth here and there recommended to be amputated and, wherever necessary, reform is made in the law not only with a view to deliver to the State the maximum tax with minimum bleeding, but with a view to achieving some of the social objectives which 25 years of Republic Democracy has failed to achieve.

It is indeed a happy moment, that one of the oldest institutions of the tax practitioners, i.e., The Chamber of Income-tax Consultants has taken up this task and started a periodical publication to deal with Income tax law and the allied laws and their problems, the practice and dealings with some pernicious thorny spots. It is in a sense a pioneering effort by a Chamber of Practitioners, because quite a few Income-tax Practitioners' Associations exist, but nonetheless there is none which is dedicated to the problems of taxpayers and the tax practitioners alike on a common platform. Indeed, these objectives cannot be achieved except by an organised association, with a band of selfless workers dedicated to these problems even at some personal sacrifice.

v

It is unfortunate that the Central enactments having far-reaching consequences and affecting citizens throughout the length and breadth of this vast country should still have some of its problems in a state of uncertainty and some in a state of suspended animation. It is equally unfortunate that by the time a point of law becomes clear, it is further adulterated with hybrid amendments with the result that the tax laws which, in principle should remain crystallised and clear so as to be understood by the common people at large, remain a labyrinth of multiple puzzles some of which still remain to be understood, sorted out and interpreted. It is equally unfortunate that law reporting in this country has taken roots in quantity and not in quality, because quite a number of decisions binding constitutionally remain unravelled, unnoticed and unreported. When an important judgment is embodied in a printed journal, it is already few months or few years past. The result has been that the people and the practitioners have been kept obliviously ignorant of binding decisions and the direct consequence is that the correct law may not be noticed by the tax-masters (most of whom learn the law by a process of trial and error). The resultant chaos has been responsible for a perennial crop of litigation. The cost in terms of money and waste of time being stupendous to the people, the taxpayers and the tax masters is in the final analysis a national waste.

This is our first step, towards our aim to have a common platform of the taxpayers and the tax practitioners to come together to discuss laws, exchange notes, to report the gist of recent decisions of the Supreme Court, High Court and the Tribunals, to give timely information on impending or hurriedly introduced changes in law. I am sure, the tax-and the tax practitioner well equipped with the latest law will unravel and cut the gordian knots. What we have in mind for launching this journal is not merely commercial reporting, but to provide for a vehicle of thoughts, which ultimately may turn out to be an exchange of thoughts between practitioners, the taxpayers and the tax officials to the ultimate benefit of all.

It is a proud moment for this Chamber and we dedicate this journal to the taxpayers, tax masters and the tax practitioners, aspiring that this vehicle of thoughts will serve useful purpose to one and all."

From the ensuing months, my endeavor would be to open the channel of communication with the readers, in pursuance to the aims for which the journal was launched in 1975.

The present issue contains the annual feature of the Journal, that is, analysis of the provisions of Finance Bill. Though the amendments proposed in the Finance (No. 2) Bill, 2019 can very well be taken as interim amendments, pending introduction of altogether new Income-tax Act, as envisaged, some of its provisions are worth taking note of.

Talking about the tax laws and the amendments being made therein, one needs to only read 'Preface to the Eight Edition' penned by the legendary Late Shri Nani A. Palkhivala, for the eight edition of his treatise Kanga and Palkhivala's 'The Law and Practice of Income Tax'. I strongly recommend each and every one to read this Preface as it has very strongly, yet very succinctly, captured the state of affairs of Indian Tax Laws as well as the high tolerance power of Indians. That was in 1990. Today, in 2019, almost after 30 years, alas, the state of affairs has not changed much! In fact, similar was the state of affairs even 44 years ago, as is evident from Message of the maiden issue of this journal, as reproduced above.

Old habits die hard!

Vipul B. Joshi
Editor

From the President

Dear Members,

Its indeed an Honour and privilege to be the President of The Chamber of Tax Consultants. I thank everyone for considering me worthy of this position and I accept the Office of President with all humility and sense of responsibility. Founders and the Past Presidents of this great Institute have nurtured it year-after-year for 93 years. I am therefore aware of the huge responsibility that I have on my shoulder. I am pretty confident of discharging the same with the support of the able team of my Council Colleagues and continuous guidance and support of the Past Presidents.

The Chamber is always in forefront in organizing seminars, workshops, RRCs, lecture meetings, webinars etc on the topics and subjects of Direct Tax, Indirect Tax, International Tax, Allied Law which are most relevant for the members. Needless to mention that Study Circles on all these subjects are equally vibrant and have been successfully holding meetings at regular intervals for the benefit of the members. This has been possible year-after-year due to the hard work by all the Chairmen of the Committees. I congratulate CA Hinesh Doshi, the outgoing President for a very eventful and vibrant term under his able leadership with quite a few new initiatives. The level of activities has still gone up during the year that has just passed by under his leadership and has set a stiff benchmark for me.

It shall be my endeavor to give my best and to maintain the quality and pace of activities with the support of able, experienced and enthusiastic team of my council colleagues.

While The Chamber is moving at a considerable pace, there is a need for better administration and infrastructure. Therefore this year focus will also be on overall consolidation by acquiring bigger premises and giving better support to the activities of The Chamber

Chamber is spreading its wings at various cities in India thanks to the quality programs which it does for the members. Therefore, besides the Pune and Bengaluru Study Groups, Hyderabad Study Group which has been approved shall have its first meeting in due course of time. Members are the lifeline of any organization and therefore while The Chamber is marching towards its 100th year, membership growth also would be one of the key areas of focus during the year. Outstation members do not get chance to attend all the programs held in Mumbai. Therefore a policy for concession to outstation members for Webinars is being formulated.

In the recent past our representations have received overwhelming response from some quarters of the Government. We will continue to voice concerns of members and public at large whenever

required. Our primary focus on representation has been on direct tax related matter. We also wish to make more representations on Indirect tax, Corporate Law, IBC, Securities Law, whenever required.

Chamber has been coming out with quality publication from time-to-time. Compliments to the International Tax Committee and the Research and Publication Committee for two publications viz., International Taxation - A Compendium and Rigors of Section 56(2)(x) which were released during the Annual General Meeting on 4th July, 2019. Befitting the vision of the Chamber. We also wish to undertake some research projects during the year.

Chambers' Journal is very popular amongst professionals due to its feature of Special Story. We have started subscription of E-Journal from this year so that we can reach out to more professionals and increase our readership base. First issue of International Tax Journal was released in June 2016. We have decent subscriber base but we wish to expand its base and make this Journal one of the most sought after Journals.

In the last couple of years, there have been good initiatives on information technology front by Chamber which would continue and more initiatives would be taken during the year to reach out to members more effectively and for their benefit.

We have successfully completed 13th Residential Conference on International Taxation at Surat from 20th to 23rd June with record participation of 306 delegates and 20 speakers of great eminence, thanks to tremendous efforts by the International Taxation Committee. Besides this, in the month of June we had very successful programs viz Study Course on Valuation, Students Orientation Course and Seminar on Bankruptcy Code, Workshop on New Benami Law and PMLA and filing of Tax returns for A.Y. 2019-20. We have lined up various programs for the month of July and August which are published in the July 2019 issue of Newsletter which you would have received by the time you read this. 5th Inter Firm Football tournament is arranged on 10th August by the Students' Committee. Like last year, I look forward to active participation from all the Firms.

The current issue of the Journal is on the Finance Bill, 2019. I compliment the Chairman of the Journal Committee, CA Bhadresh Doshi and his team for making this possible within a short time from presentation of the Finance Bill, 2019. I also thank all the authors for writing articles for the Journal at such a short notice.

We are here to serve the members and therefore I look forward to your suggestions that you have on programs, publications, journal or any other matter.

I end my communication with a Management Quote

"We are here to do our BEST. If we expect the best, we will be the best .Learn to use one of the most powerful laws in this world. Let us change our mental habits to belief instead of disbelief".

VIPUL K. CHOKSI
President

CA Mahendra Sanghvi

Proposals related to Tax Deduction at Source

Tax deduction at source mechanism is one of the means of tax collection whereby person responsible for payment of any specified sum to any person is required to deduct tax at source at the prescribed rate, if such payment exceeds the prescribed threshold limits. It gives hassle free, stable and regular source of revenue throughout the year, with least cost to the government while refraining people from avoiding taxes. In fact, has this mechanism not collected revenue or collected more revenue than which is not due to the Government…..? Thanks to the conflict between the intention while drafting the provisions and the law/rules vis-a-vis the working of Centralized Processing Centre (CPC).

The scope of tax deducted at source (TDS) has expanded over the years to widen tax base with stringent, complex and tedious compliances resulting into more disputes and litigations. At times, certain provisions are made merely in the guise of widening of tax base because either the payee is already an assessee and/or the trail of the transaction is available with the Government.

As one can witness there are several ongoing litigations w.r.t. interpretation and applicability of TDS provisions, differential tax rate applicable to different categories of transactions, allowability of credit of TDS to the payee, etc.

Unfortunately, in spite of recommendations of various organisations, institutions, committees formed by government, no efforts have been made to simplify the TDS provisions, as a result litigation will keep increasing. On the contrary this Finance Bill has proposed new TDS provisions not only to increase the scope of TDS provisions but also to deduct tax on transactions where there is no element of Income in the transaction. I have discussed the relevant clause relating to proposed insertion of section 194N on tax to be deducted @ 2 perc ent on cash withdrawal exceeding ₹ one crore in this article.

Let me deal with the clauses relating to TDS as under:

i) **Clause 44: Payment in respect of Life Insurance Policy (Section 194DA)**
Under section 194DA of the Act, a person is obliged to deduct tax at source, if it pays any sum to a resident under a life insurance policy, which is not exempt under sub-section (10D) of section 10. The present requirement is to deduct tax at

the rate of one per cent of such sum at the time of payment.

One per cent of tax was to be deducted on gross amount, in spite of the fact that an assessee has to pay tax on net income. The insurance premium paid by the assessee on the said policy was not reduced while deducting tax. The Insurance Company who is paying a sum is aware of the amount of insurance premium paid on the respective policy. Hence, Insurance Company can calculate the income comprised therein. Therefore, the bill proposes to amend section 194DA of the Act relating to payment in respect of life insurance policy. It is proposed to amend the said section so as to provide that the levy of tax deduction at source shall be on the income comprised in the sum payable by way of redemption of a life insurance policy, including the sum allocated by way of bonus on such life insurance policy, excluding the amount exempted under the said clause (10D) of section 10 at the increased rate of five per cent.

This will also reflect the correct taxable component of income in the Form 26AS of the assessee after correct TDS statement is filed by the Insurance Company (deductor).

This amendment will be effective from 1st September, 2019.

ii) **Clause 45: Payment on transfer of certain Immovable Property other than agricultural land (Section 194-IA)**

Section 194-IA of the Act relates to payment on transfer of certain immovable property other than agricultural land and provides for levy of TDS at the rate of one per cent on the amount of consideration paid or credited for transfer of such property. For the purpose of this section, the term 'consideration for immovable property' is not defined. In the transaction involving purchase of immovable property, there are various types of payments made besides the sales consideration and the buyer is contractually bound to make such payments to the builder/seller, either under the same agreement or under a different agreement. Some of such payments are those for rights to amenities like club membership fee, car parking fee, electricity and water facility fees, maintenance fee, advance fee etc. Accordingly, it is proposed to insert an *Explanation* to said section and provide that the term "consideration for immovable property" shall include all charges of the nature of club membership fee, car parking fee, electricity and water facility fees, maintenance fee, advance fee or any other charges of similar nature, which are incidental to transfer of the immovable property.

Clause 45 seeks to define "consideration for immovable property". Sub-section(1) of section 194-IA provides for tax deduction at source at the rate of one per cent on the amount of consideration paid for transfer of immovable property.

It is proposed to insert Explanation (aa) to the said section to clarify the expression "consideration for immovable property" to include all charges as mentioned above, which are incidental to transfer of the immovable property.

Buyer (deductor) needs to take care that the threshold limit of ₹ 50 lakhs will also include all charges as defined in *Explanation (aa)*.

This amendment will take effect from 1st September, 2019.

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iii) Clause 46: a) Payment by Individual/HUF to contractors and professionals (Section 194M) And b) TDS on cash withdrawal above Rupees One Crore (Section 194N)

a) Presently there is no liability, 1) on an individual or Hindu undivided family (HUF) to deduct tax at source on any payment made to a resident contractor or professional when it is for personal use and 2) if the individual or HUF is carrying on business or profession which is not subjected to audit, there is no obligation to deduct tax at source on such payment to a resident, even if the payment is for the purpose of business or profession.

It is proposed to insert new section 194M. Sub-section (1) of the proposed new section 194M seeks to provide for levy of tax deduction at source at the rate of five per cent. on any sum, or aggregate of sums, paid by an individual or a Hindu undivided family (other than those who are required to deduct income-tax as per the provisions of section 194C or section 194J) to a resident for carrying out any work (including supply of labour for carrying out any work) or by way of fees for professional services at the time of credit to the account of the payee or at the time of payment, whichever is earlier. However, no tax shall be deducted, if such sum or aggregate of such sums paid to a resident does not exceed fifty lakh rupees during the financial year.

However, such individuals or HUFs shall be able to deposit the tax deducted using their Permanent Account Number (PAN) and shall not be required to obtain Tax deduction Account Number (TAN) which will reduce the compliance burden of obtaining TAN and submitting the TDS statements.

Section 194C provides one or two percent of tax to be deducted for carrying out any work, whereas section 194M proposes five per cent for similar nature of payments. An Individual or an HUF who is required to deduct tax under section 194C will deduct one or two percent tax if payment pertains to business, whereas he will deduct five percent tax if the payment is for personal use though the payment is of similar nature.

This amendment will take effect from 1st September, 2019.

b) In order to discourage cash transactions, Clause 46 of the Bill proposes to insert a new section 194N in the Act to provide for levy of TDS at the rate of two per cent on cash payments in excess of one crore rupees in aggregate made during the year, by a banking company or cooperative bank or post office, to any person from an account maintained by the recipient. It is proposed to exempt payment made to certain recipients, such as the Government, banking company, cooperative society engaged in carrying on the business of banking, post office, banking correspondents and white label ATM operators, who are involved in the handling of substantial amounts of cash as a part of their business operation, from the application of this provision. It is also proposed to empower the Central Government to exempt other recipients, through a notification in the *Official Gazette*

in consultation with the Reserve Bank of India.

We are aware that tax is deducted on transactions which has or is likely to have income element. In the proposed new section 194N, there is no question of any income element. It is the assessee's own money which is withdrawn from his account.

Further, no amendment is proposed in Section 198. As per provisions of section 198, all sums deducted in accordance with the provisions of TDS chapter (which will include proposed section 194N) for the purpose of computing the income of an assessee, be deemed to be income received.

Also there are likely chances that Centralized Processing Center (CPC) may issue a notice u/s. 139(9) of the Income Tax Act, 1961 declaring the return of income filed as defective return as there is no corresponding income offered for which tax credit is claimed in the return of income.

Both above proposed amendments of section 194M and section 194N will be effective from 1st September, 2019.

iv) **Clause 47: Person responsible for paying to a non-resident.......... shall deduct income tax (Section 195)**

Under sub-section (2) of section 195 of the Act, a person can make an application to the Assessing Officer to obtain certificate for lower or nil withholding tax. At present the process of making an application is manual. It is proposed to amend the provisions so as to empower the Board to prescribe the form and manner of application to the Assessing Officer so as to use technology to streamline the process. Similar amendment is also proposed to be made in sub section (7) of section 195.

These amendments will be effective from 1st November, 2019.

v) **Clause 48: Certificate for deduction at lower rate (Section 197)**

It is proposed to amend sub-section (1) of the said section so as to provide that the sums on which tax deduction at source has been deducted under section 194M shall also be eligible for certificate for deduction at lower rate. This amendment is consequential in nature for the insertion of proposed new section 194M.

This amendment will take effect from 1st September, 2019.

vi) **Clause 49 and Clause 10: Consequences of failure to deduct or pay tax deducted (Section 210 and section 40(a))**

Section 201 of the Act provides that where any deductor, who is required to deduct tax at source on any sum in accordance with the provisions of the Act, does not deduct or does not pay such tax or fails to pay such tax after making the deduction, then such person shall be deemed to be an assessee in default in respect of such tax.

The first proviso to sub-section (1) of section 201 specifies that the deductor shall not be deemed to be an assessee in default if he fails to deduct tax on a payment made to a resident, if such resident has furnished his return of income under section 139, disclosed such payment for computing his income in his return of income, paid the tax due on the income declared by him in his return of income and furnished an accountant's certificate to this effect.

This relief is available to the deductor, only in respect of payments made to a

resident. In case of similar failure on payments made to a non-resident, such relief is not available to the deductor. To remove this anomaly, it is proposed to amend the proviso to sub-section (1) of section 201 to extend the benefit of this proviso to a deductor, even in respect of failure to deduct tax on payment to non-resident.

Consequent to this amendment, it is also proposed to amend the proviso to sub-section (1A) of section 201 to provide for levy of interest till the date of filing of return by the non-resident payee.

For the same above reason, it is also proposed to amend clause (a) of section 40 that no disallowance of certain expenses will be made if deductor is not deemed to be an assessee in default under first proviso to sub-section (1) of section 201.

Further, sub-section (3) of section 201 which prescribes the time limit for passing an order deeming a person to be an assessee in default, of seven years from the end of the financial year in which payment is made or credit is given currently does not consider cases wherein correction statements are filed. Amendment to sub-section (3) of section 201 is proposed that no order shall be made under sub-section (1) deeming a person to be an assessee in default for failure to deduct the whole or any part of the tax from a resident, at any time after the expiry of seven years from the end of the financial year in which payment is made or credit is given, or two years from the end of the financial year in which such correction statement is delivered under the proviso to sub-section (3) of section 200, whichever is later.

These amendments will take effect from 1st September, 2019.

Recommendations and suggestions to simplify the TDS provisions have been made by various organisations. Even Justice Easwar Committee has recommended that the procedures and provision related to TDS requires to be simplified in order to be more deductor and deductee friendly and to avoid unnecessary litigations. Unfortunately this finance bill does not address problems relating to compliances issues, fines, penalties, credit of taxes deducted and other issues.

The expectation was that in Finance (No. 2) Bill 2019, amendments would be proposed whereby the litigations will be reduced, compliance cost will reduce and there will be ease of doing business. Even this Finance Bill does not take any step towards reducing of litigations and making the law & procedure simple and hassle free.

An attempt has been made in the above article to put forward the amendments related to TDS. My sincere thanks to the Journal committee of The Chamber for giving me this opportunity. I must admit that but for this opportunity, I would not have gone through the finance bill provisions so minutely.

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Each man is only a conduit for the infinite ocean of knowledge and power that lies behind mankind.

— *Swami Vivekananda*

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CA Ketan L. Vajani

Procedural Amendments

The Finance (No. 2) Bill 2019 presented before parliament on 5th July, 2019 is unique in many ways. It is a Finance Bill of a government elected for the second term with improved seat tally, a government which is believed to be a performing government and focussing on the need of the citizens. This Finance Bill is the maiden Finance Bill presented by a full time lady Finance Minister. The unique aspect continues when one looks at the number of amendments on Direct Tax front. Unlike past few Finance Bills, this Finance Bill has much lesser amendments in number and there are no big fundamental and radical changes proposed in the Income-tax Act. The Finance Bill is dealing more with some of the procedural aspects where the amendments have been thought appropriate. This article seeks to deal with some of such procedural amendments proposed in the Finance Bill.

Mandatory Return of Income in certain cases – Section 139 of the Income-tax Act

Existing provisions

Section 139 of the Income-tax Act lays down provisions in connection with Return of Income. As sub-section (1) of the section, it is mandatory for a company and a firm to file its Return of Income. For other entities, it is mandatory to file the Return of Income in case where the taxable income exceeds the basic threshold limit of income which is not chargeable to tax. This is however subject to few provisos to the sub-section. Sixth proviso to sub-section (1) provides that in the case of every individual, HUF, AOP, BOI or artificial juridical person the income to be considered for determining the liability to file the Return of Income shall be the income before exemption u/s. 10(38) and the deductions under sections 10A, 10B, 10BA, or deductions under Chapter VI-A.

Proposed amendments

Clause 39 of the Finance Bill, seeks to amend the provisions of section 139. As per the proposed amendments, it is sought to be provided that the income to be considered for the purpose of determining the liability to file the Return of Income, the amount of exemptions under sections 54, 54B, 54D, 54EC, 54F, 54G, 54GA and 54GB shall also be ignored and the income before such exemption sections shall be reckoned.

The purpose of the amendment is to make furnishing of Return of Income compulsory for such persons whose income becomes non-taxable on account of roll over benefits provided in the specified exemption sections.

Clause – 39 of the Finance Bill further proposes amendment in section 139(1) of the Act so as to make it compulsory for a person (other than a company or a firm) to file a Return of Income if during the previous year, the person :

(i) has deposited an amount or aggregate of the amounts exceeding one crore rupees in one or more current account maintained with a banking company or a co-operative bank; or

(ii) has incurred expenditure of an amount or aggregate of the amounts exceeding two lakh rupees for himself or any other person for travel to a foreign country; or

(iii) has incurred expenditure of an amount or aggregate of the amounts exceeding one lakh rupees towards consumption of electricity; or

(iv) fulfils such other prescribed conditions, as may be prescribed.

Effective Date

Both the amendments to section 139 are made with effect from 1st April, 2020 and will accordingly apply from A.Y. 2020-21.

Inter-changeability of PAN and Aadhaar – Section 139A, Section 139AA and 272B of the Income-tax Act

Existing provisions

Section 139A of the Act lays down provisions in relation to Permanent Account Number (PAN). Sub-section (1) of the section provides that every person as specified therein shall apply to the assessing officer for allotment of PAN if it is not already allotted to him. Section also mandates that every person receiving a document relating to a transaction for which PAN is required to be quoted shall ensure that the PAN has been duly quoted in the document.

Section 139AA provides for quoting of Aadhaar number. As per sub-section (2) of the section, a person who has been allotted a PAN as on 1-7-2017 and who is eligible to obtain Aadhaar number is required to intimate his Aadhaar number to such authority in such form and manner as may be prescribed on or before a date to be notified by the Central Government, which is 30th September, 2019 as notified *vide* Notification No. 31/2019 dated 31-3-2019. The proviso to sub-section (2) provides that in case of failure to intimate the Aadhaar number, the PAN allotted shall be deemed to be invalid.

Section 272B of the Act provides for penalties in cases where there is failure to comply with the provisions of section 139A of the Act. The section provides for penalty of ₹ 10,000/- in cases where the person fails to obtain a PAN or quote the PAN as required under section 139A of the Act.

Proposed amendments

(a) Clause – 40 of the Finance Bill seeks to amend section 139A of the Income-tax Act so as to provide that every person who intends to enter into certain prescribed transactions and has not been allotted a PAN, shall also apply for allotment of a PAN. This amendment is proposed with a view to have an audit trail of transactions where persons entering into high value transactions such as purchase of foreign currency or huge withdrawals from the banks, do not possess a PAN. The amendment is aimed at widening and deepening of tax base.

(b) Further, amendments are also proposed in section 139A of the Act with a view to have ease of compliance. It is proposed to provide for inter-changeability of PAN with the Aadhaar number. The amendment seeks to provide as under:

- every person who is required to furnish or intimate or quote his PAN under the Act, and who, has not been allotted a PAN but possesses the Aadhaar number, may furnish or intimate or quote his Aadhaar number in lieu of PAN, and such person shall be allotted a PAN in the prescribed manner;
- every person who has been allotted a PAN, and who has linked his Aadhaar number with PAN as provided under section 139AA, may furnish or intimate or quote his Aadhaar number in lieu of a PAN.
- Sub-section (6A) is proposed to be inserted in section 139A so as to provide that every person entering into such transaction as may be prescribed shall quote his PAN or Aadhaar number in the documents pertaining to such transactions and also authenticate such PAN or Aadhaar number in such manner as may be prescribed.
- Sub-section (6B) proposed to be inserted in section 139A further provides that the person receiving a document relating to a transaction for which PAN is required to be quoted shall ensure that either PAN or Aadhaar number is quoted on the said document and also duly authenticated as prescribed.

(c) Clause 64 of the Finance Bill seeks to amend the provisions of section 272B of the Act as consequential amendments to ensure proper compliance of provisions of section 139A of the Act.

(d) Clause 41 of the Finance Bill seeks to amend the proviso to sub-section (2) of section 139AA so as to provide that in case of failure to intimate the Aadhaar number, the PAN allotted to the person shall be made inoperative after the date notified in such manner as may be prescribed. This amendment is proposed with a view to protect the validity of transactions previously carried out through such PAN.

Effective Date

All the above amendments have been proposed to be effective from 1st September, 2019.

Comment

Inter-changeability of PAN and Aadhaar number sounds a great idea as a theoretical concept and one tends to feel that it will be sufficient for a person to have either of the two numbers. However, when one reads the provisions of the Finance Bill, it emerges that even in a case where the person quotes his Aadhaar number in lieu of PAN, the authorities will allot PAN to the person in the manner to be prescribed. As such, the entire purpose seems to be lost. Eventually the person will have both Aadhaar and PAN and therefore nothing substantial is achieved in terms of so called ease of compliance. Further, the quoting of Aadhaar in lieu of PAN will have its own challenges in terms of software and utilities of the department to be upgraded/modified in line with the statutory provisions. Also one really wonders as to what will happen to the GST TINs which are linked to PAN and there is no role for Aadhaar in the syntax of GST TINs. These issues will

need to be addressed properly for successful implementation of the provisions proposed in the Finance Bill.

Amendments to Section 270A of the Income-tax Act – Penalty for under reporting and misreporting of income

Existing provisions

Section 270A has been inserted in the Income-tax Act by the Finance Act, 2016 with effect from 1st April, 2017 in place of the earlier provisions of penalty under section 271(1)(c) of the Act. With effect from A.Y. 2017-18, penalty will be levied u/s. 270A of the Act. The insertion of section 270A has changed the entire scheme of levy of penalty, which will be now levied on under-reporting of income and misreporting of income as against the earlier position where the penalty was being levied for concealment of particulars of income or furnishing of inaccurate particulars of income u/s. 271(1)(c).

Provisions of section 270A list down various situations are treated as under-reporting of income or misreporting of income. Further the section also has provisions for computing the quantum of under-reported income or misreported income. However, the section at present does not cover cases where the assessee has under-reported his income and the Return of Income is filed for the first time u/s. 148 of the Act. The current provisions result in an absolute anomaly in as much as an assessee who has not filed his Return of Income can include the income while filing the Return in response to notice u/s. 148 and can avoid the levy of penalty u/s. 270A.

Proposed amendments

Clause – 61 of the Finance Bill seeks to amend the provisions of section 270A of the Act. The amendments are proposed in clause (b) and (e) of sub-section (2) of section 270A so as to provide that a person will be considered to have under-reported his income if the income or deemed income u/s. 115JB or 115JC assessed is greater than the maximum amount not chargeable to tax, where no return of income has been furnished or where return is furnished for the first time under section 148.

Clause (i) in sub-clause (b) of sub-section (3) of section 270A is also proposed to be amended to provide that the amount of under-reported income in a case where no return of income has been furnished or where return has been furnished for the first time under section 148 shall be:

- The amount of income assessed in the case of a company firm or local authority; and
- The difference between the amount of income assessed and the maximum amount not chargeable to tax in other cases.

The amendment is also proposed in clause (a) of sub-section (10) of section 270A so as to provide that in a case where return is furnished for the first time under section 148, the tax payable in respect of under-reported income shall be the amount of tax calculated on the under-reported income as increased by the maximum amount not chargeable to tax as if it were the total income.

Effective Date

The above amendments are proposed with retrospective effect from 1st April, 2017 and accordingly the amendments will apply from A.Y. 2017-18 i.e., right from the introduction of section 270A in the Income-tax Act.

Statement of Financial Transactions – Amendments to Section 285BA and section 271FAA of Income-tax Act

Existing provisions

Section 285BA of the Income-tax Act provide for furnishing of statement of financial transaction or reportable account by persons specified in sub-section (1) of the section. Sub-section (1) of the section includes various persons who are obliged to file the statement of financial transaction – SFT. Sub-section (3) of the section provides for different categories of "specified financial transaction" which may be prescribed by the Rules. The second proviso to sub-section (3) provides that the value or aggregate value of such SFTs (i.e., threshold subject to which filing of SFT can be made mandatory) which may be prescribed under the Rules shall not be less than ₹ 50,000/-. Sub-section (4) provides that in a case where the statement furnished is found to be defective, the same will have to be rectified within 30 days of the authority pointing out the defect. If the same is not rectified within this period or the extended period as the case may be, the statement shall be treated as invalid statement and the provisions of the Act will apply as if the person has failed to furnish the statement.

Section 271FAA provides for penalty of ₹ 50,000/- for furnishing inaccurate statement of financial transaction or reportable account. The section provides for levy of penalty on a person referred to in clause (k) of sub section (1) of section 285BA. As such, as of now penalty is prescribed only on a prescribed reporting financial institution. The penalty is not prescribed in respect of other persons covered by clauses (a) to (j) of section 285BA (1) of the Act.

Proposed amendments

Clause 66 of the Finance Bill seeks to amend section 285BA of the Income-tax Act. The amendments seek to include one more clause (l) in sub-section (1) so as to provide that a person other than those referred to in clauses (a) to (k) as may be prescribed shall also be liable to file a statement of financial transaction or reportable account. The persons who will be liable for such filing are to be prescribed by way of notification. The amendment also seeks to delete the second proviso to sub-section (3). As such, the transactions having value of less than ₹ 50,000/- may also be prescribed under the Rules for which filing of SFT would be mandatory. Further amendment is also proposed in sub-section (4) to provide that in case where the defective statement is not corrected within the time allowed, instead of the statement being treated as invalid statement, the provisions of the Act will apply as if the person had furnished inaccurate information in the statement. As such, non-correcting of the defective statement will expose the assessee to the penalty u/s. 271FAA.

Clause – 63 of the Finance Bill also seeks to amend section 271FAA of the Act. As per the proposed amendment all the persons specified in sub-section (1) of the Act will be liable for the penalty and it will not be confined to person covered by clause (k) of sub-section (1) of section 271FAA.

Effective Date

The amendments to both the sections are proposed with effect from 1st September, 2019.

Reason for amendment

The government is planning to have the scheme of pre-filled Returns of Income for all the assessees in near future. The amendments are proposed in order to enable pre-filling of return of income. Further, with a view to ensure pre-filling of information relating to small amount of transactions as well, the limit of ₹ 50,000/- as provided by the second proviso to sub-section (3) is proposed to be done away with.

Amendment to Section 276CC of the Act – Prosecution for Failure to furnish Return of Income

Existing provisions

Section 276CC of the Act provides for prosecution on account of failure to furnish return of income. The existing provisions provide that prosecution proceedings for failure to furnish returns of income in due time shall not be resorted to if the tax payable by such person (other than a company) on the total income determined on regular assessment does not exceed three thousand rupees. This amount of ₹ 3,000/- is to be considered after reducing the advance tax and TDS if any in the case of the person. However, the existing provisions do not provide for taking into account tax collected at source and self-assessment tax for the purposes of determining the tax liability.

Proposed amendments

Clause 65 of the Finance Bill seeks to amend provisions of section 276CC so as to provide that while determining the tax payable, the amount of TCS and Self-assessment tax, if any, paid before the expiry of the assessment year shall also be reduced.

The amendment also seeks to increase the threshold of tax payable from the existing ₹ 3,000/- to ₹ 10,000/-.

Effective Date

These amendments will take effect from 1st April, 2020 and will, accordingly, apply in relation to assessment year 2020-21 and subsequent assessment years.

Reason for amendment

As per the memorandum explaining the provisions, the intent of said provision has always been to take into account pre-paid taxes, while determining the tax payable. The amendment has been proposed so as to make this legislative intention clear.

Comment

Considering the fact that the intent of the provision has always been to take into account pre-paid taxes in all forms while determining the tax payable, the amendment, permitting reduction of TCS and self-assessment paid, should have been made with retrospective effect instead of AY 2020-21. Prosecution has been used as a strong tool by the department in the recent past and many assessees have been facing prosecution notices even where the Self assessment tax and TCS is sufficient to cover up the final tax determined on assessment. In such a situation, it would have been appropriate that the amendment is made with retrospective effect considering the legislative intent of the provision. A retrospective amendment in this section would have been a welcome relief for the tax payers, who are any way facing the brunt due to prosecution proceedings.

Conclusion

The amendments made by the Finance Bill are limited this year. However, the procedural amendments are relevant to be thoroughly understood for a tax professional and also the tax payers at large. I express my sincere gratitude to the Journal Committee of The Chamber of Tax Consultants for giving me this opportunity to share some of my thoughts on the above provisions through this article. Due to this assignment, I have been made to go through the provisions in greater detail and educate myself on these amendments.

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CA Avan Badshaw

Financial Services

The Finance Minister on 05.07.2019 announced in her Budget Speech several policy and tax initiatives. This article specifically discusses proposals in the Bill to amend section 43B, 43D, section 9A, section 115UB, and section 111A and introducing section 10(4C) all of which impact the financial services sector.

Amendment to section 9A - Relaxation in conditions for special taxation regime of offshore funds

The provisions of section 9A, were initially introduced in the FA 2015 with a view to provide a safe harbour to offshore funds managed by Indian fund managers from constituting a business connection/ place of effective management in India. The safe harbour provided under the provisions of the section is subject to the compliance by the fund/asset manager of certain conditions stated therein. The section provides for 17 conditions in aggregate to be fulfilled – 13 by the eligible investment fund and 4 by the eligible fund manager.

Some of the conditions initially prescribed under section 9A were considered as onerous and posed significant challenges to offshore funds. Post various industry representation and consultations, the Government has made amendments, from time-to-time, to the provisions of section 9A to mitigate these impediments, with a view to facilitate the offshore funds to avail of the benefits under this regime.

The Bill proposes to further relax the following two eligibility conditions for availing of tax safe harbour:

1. Under the existing provisions of section 9A, the monthly average corpus of the eligible investment fund is required to be more than INR 100 crore by end of the financial year in which such fund is established/ incorporated. This provision posed practical challenges for otherwise eligible investment funds established/ incorporated close to the end of the tax year (say, in March).

   The Bill proposes to retrospectively amend the above requirement by providing that the cut-off date shall be (a) six months from the end of the month of fund's establishment or (b) end of previous year, whichever is later.

2. The existing provisions of section 9A state that the remuneration payable by an eligible investment fund to an eligible fund manager shall not be less than the arm's length price of the fund management activity.

This leads to certain limitations from a business perspective as explained below:

Where an eligible fund manager intends to manage an eligible investment fund that comprises entirely of third party investors, the fee for fund management is negotiated strictly on an arm's length basis and can be dependent on several factors such as track record of the Indian fund manager, size of the fund, investment strategy, types of investors, etc.

In an event where a transfer pricing adjustment is proposed by the Indian Revenue Authorities, at the time of assessment, given that the investors are independent third parties it would not be feasible for the eligible fund manager to *post facto* recover a higher fee from the eligible investment fund since the third-party investors would likely not commercially agree to bear a higher management fee.

The eligible investment fund is required to comply with all the eligibility conditions at all times. Given that arm's length nature of the remuneration is one of the eligibility conditions and the determination of such arm's length nature is typically undertaken with a lag of a few years, any alleged non-compliance with this condition down the years would defeat the purpose of conferring tax safe harbour (to the eligible investment fund) in the first place.

The Bill proposes to address the above difficulties by now mandating a minimum remuneration that would be prescribed by the Central Board of Direct Taxes. Since the amendment is proposed to be made retrospectively, the impact on safe harbour approvals already granted will have to be evaluated on case-to-case basis.

A progressive tax regime enabling the management of offshore funds from India will help to create an ecosystem for fund management, employment, talent, investment flows and nurturing of global best practices in the market.

While the amendments proposed by the Bill takes into consideration some of practical challenges faced by the industry; some of the other more stringent eligibility conditions such as monitoring and tracking of indirect ownership of Indian residents; requirement of the eligible investment fund and Indian fund manager not to be connected persons; continues to be a commercial challenge for offshore funds wishing to avail of the benefit of tax safe harbour.

Amendments to section 115UB – Taxation of Category-I and II AIFs

The taxability of Category-I and Category-II Alternative Investment Funds[1] (hereinafter referred to as 'investment funds') is based on whether the income is characterised as 'profits

1. The Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012 provides for three categories of Alternative Investment Funds (AIFs). The provisions discussed in this chapter apply only to Category I and Category II AIFs

and gains of business or profession' or 'capital gains'/'income from other sources'.

Any income of the investment funds characterised as 'capital gains'/'income from other sources' is exempt from tax at the fund level and taxable in the hands of the investors[2].

In such a case, the income accruing or arising to or received[3] by the investors out of investments made in the investment funds are chargeable to income-tax in their hands in the same manner as if it were the income accruing or arising to, or received by the investors had the investments by the fund been made directly by the investors. Further, income paid or credited by the investment funds are deemed to be of the same nature and in the same proportion in the hands of the investors as if it had been received by, or had accrued or arisen to the fund.

Income accruing or arising to, or received by, the investment funds, during a particular financial year, if not paid or credited to the investors, are deemed to be credited to the account of the investors, on the last day of the financial year in the same proportion in which such investors would have been entitled to receive the income, had it been paid in the same financial year.

Any income of the investment funds characterised as 'profits and gains of business or profession', are charged to tax in the hands of the investment fund at MMR. Such income of the fund is exempt from tax in the hands of the investors[4].

Any loss at the investment funds' level, irrespective of its character, is not allowed to be passed on to the investors but carried over at the fund level to be set-off against income of the next year.

Thus, in case of investment funds, for income other than income under the head 'profits and gains of business or profession' while the income is passed on to the investors and taxable in their hands, net losses at the year end are to be retained at the fund level only.

Given the above, year-on-year the investment funds can offset the earlier years' losses against the current year's gains and the consequential net gains distributed to the investors will then be subject to tax in their hands as such.

However, if the losses are incurred towards the end of the fund life or where the losses cannot be utilised completely at the fund level during the fund life, such losses would lapse, i.e., such losses cannot be then passed on to the investors, at the end of the fund life. This would result in higher effective tax rate for the investors as compared to a situation where such losses were permitted to be set-off against any other capital gains of the investor.

Accordingly, several representations were made by the Alternative Investment Funds' industry to the Government to allow pass through of the losses to the investors. Recommendations in this regard were also made by the Alternative Investment Policy Advisory Committee in its Second Report issued in 2016.

2. Section 10(23FBA) read with S. 115UB
3. Section 115UB
4. Section 10(23FBB) read with S. 115UB

Recognising the issue and the difficulties faced by the investors and the investment funds, the Finance Minister in the Budget presented on 05.07.2019 has proposed the following amendments to section 115UB.

1. Business losses of the investment fund, if any, shall be allowed to be carried forward at the investment fund level and it shall be set-off by it in accordance with the provisions of set-off of losses and shall not be passed on to the investors;

2. Losses, other than business losses, if any, shall also be ignored for the purpose of pass through to its investors, if such loss has arisen in respect of a unit which has not been held by the investors for a period of at least 12 months. Such losses will not be permitted to be carried forward and set-off in the hands of the investment funds even if the condition in relation to unit being held for 12 months has not been complied with by the investor and hence, the loss is not permitted to be passed on to the investor;

3. The loss other than business loss, if any, accumulated at the investment fund level as on 31.03.2019, shall be deemed to be the loss of an investor holding the unit as on 31.03.2019 in respect of the investments made by him in the investment fund and allowed to be carried forward by him for the remaining period calculated from the year in which the loss had occurred for the first time taking that year as the first year and it shall be set-off as per the provisions for set-off of losses.

These amendments are proposed to be effective from the AY 2020-21 and subsequent AYs. These proposals will require Presidential assent before they are enacted.

Where the aforesaid provisions are enacted as is, the losses (other than business losses) can be passed on to the investors, only in respect of units which have been held for a period of at least 12 months. This condition appears to have been inserted as an anti-abuse provision. However, the modality presently introduced for offset of losses could result in certain possibly unintended hardships for the fund and the investors in certain genuine cases.

With regard to the accumulated losses as on 31.03.2019, such losses are proposed to be allowed in the hands of the investors holding units as on 31.03.2019. A literal reading suggests that the investors holding units as on 31.03.2019 may be able to avail the losses even though such investors may not have held units in the year in which the loss is actually incurred by the investment fund or even where such investor exits from the investment fund post 31.03.2019.

Introduction of section 10(4C) - Enactment of exemption to non-resident on interest received on specified off-shore rupee denominated bonds

Presently, interest payable by an Indian Company or a business trust to a non-resident (including a foreign company) in respect of monies borrowed from a source outside India by issuance of Rupee Denominated Bonds (RDBs) before 30.06 2020 is subject to

5. By virtue of s. 115A(1)(iiaa) read with s. 115A(1)(BA)

withholding tax and taxable[5] in the hands of the non-resident at a concessional rate of 5%[6].

A Press Release dated 17.09.2018[7] announced that interest payable by an Indian company or a business trust to a non-resident in respect of RDBs issued outside India during the period from 17.09.2018 to 31.03.2019 shall be exempt from tax, and consequently, no tax to be deducted under section 194LC on the said interest payment.

While the Press Release stated that Legislative amendments to effect the above shall be proposed in due course, in absence of any amendment to this effect in the provisions of the law (prior to the Bill), uncertainty prevailed on availing the benefit basis the said Press Release.

The Bill proposes to incorporate the exemption announced through the said Press Release by insertion of section 10(4C) to exempt such interest in the hands of non-residents. The amendment is proposed w.e.f. 1.04.2019 (i.e. AY 2019-20 and onwards).

It is pertinent to note that the Bill has not proposed a corresponding amendment in section 194LC to relieve the payer of interest from the withholding tax obligation.

Payers would need to evaluate the technical merits of taking a holistic view of the provisions of the Act and not withhold taxes on such interest payment by placing reliance on the said Press Release and Memorandum to the Bill and jurisprudence supporting the view that the payer is not a 'person responsible for paying' as per s.204(iii) where the income of the payee is per se not chargeable to tax and in the absence of income chargeable to tax, no withholding is required.

It would be worthwhile to wait and watch if the necessary corresponding amendment is carried out section 194LC before the bill is enacted into law, which will help to avoid undue litigation.

Concessional rate of tax under section 111A extended to unitholders of equity oriented fund of funds

Section 111A provides for concessional rate of tax payable at 15% in respect of transfer of equity share in a company or units of 'equity oriented fund' or units of business trust where securities transaction tax is paid on transfer of such short-term capital asset.

The Bill seeks to amend the Explanation to section 111A by making reference to the definition of 'equity oriented fund' as provided in Explanation to section 112A. Presently, for the purposes of section 111A, the definition of 'equity oriented fund' is the same as an 'equity oriented fund' u/s. 10(38).

Section 10(38) exempted long-term gains arising from transfer of long-term capital assets being equity share in a company or units of equity oriented mutual fund or units of business trust subject to fulfilment of certain conditions.

The definition of the 'equity oriented fund' u/s. 10(38) covers only such funds which invested their investible funds in equity shares of domestic companies to the extent of more than sixty five per cent of their total proceeds are regarded as equity oriented fund.

6. Plus applicable surcharge and health and education cess
7. http://pib.nic.in/newsite/PrintRelease.aspx?relid=183520

The exemption in section 10(38) was withdrawn by FA 2018 and consequently, a new section 112A was introduced in FA 2018 where the long-term capital gains were made chargeable to tax. As part of this change, the *Explanation* to section 12A also expanded the definition of 'equity oriented fund'. The new definition of 'equity oriented fund' under section 112A included:

1. the funds which invested more than sixty five per cent of their total proceeds in equity shares of domestic companies; and
2. the funds which invested a minimum of ninety per cent of their total proceeds in the units of another fund and such other fund in turn investing a minimum of ninety per cent of its total proceeds in the equity shares of domestic companies

thereby, widening the definition of 'equity oriented fund' to include fund of funds within its fold.

However, s.111A (inadvertently) continued to refer to the old definition provided in s.10(38), resulting in the benefit of concessional rate of 15% as provided in s.111A not being available to fund of funds.

Accordingly, it is now proposed to amend section 111A so as to extend the concessional rate of 15% on short-term capital gains arising on transfer of units of such fund of funds. This amendment is proposed to be effective from AY 2020-2021 and onwards.

Amendment to section 43D - Extending of benefit of to certain NBFCs

Financial institutions, such as banks and NBFCs, engaged in lending activities, ordinarily account for and also offer to tax the interest income from lending activities on accrual basis.

However, banks and NBFCs account for the interest on bad or doubtful debts/ NPAs only at the time of actual receipt, basis the prudential norms prescribed by the RBI.

The provisions of section 43D presently provide that interest income in relation to the prescribed[8] bad and doubtful debts (i.e. NPAs) received by certain institutions[9] is taxable in the previous year in which such interest is credited to the profit and loss account or is actually received, whichever is earlier.

However, NBFCs are presently not specifically covered within the ambit of section 43D, and therefore, taxability of interest on NPAs for NBFC has been a subject matter of litigation with divergent rulings[10].

8. Rule 6EA and 6EB of the Income-tax Rules, 1962, provide for the determination of bad and doubtful debts for the purposes of s. 43D.
9. Section 43D presently covers – Public Financial Institutions, Schedule Banks, certain Cooperative Banks, State Financial Corporation, State Industrial Investment Corporation, and Housing Finance Companies
10. **Southern Technologies Ltd. [2010] (320 ITR 577)** – The Supreme Court upheld the constitutional validity of exclusion of NBFCs from section s. 43D; **Vasisth Chay Vyapar [2019] (410 ITR 244)** – The Supreme Court upheld the decision of the Delhi High Court (which was after considering the aforesaid Southern Technologies decision), that interest on NPAs accruing to the taxpayer NBFC, which is not received and not accounted for as per the extant RBI guidelines, cannot be said to be taxable in the hands of the NBFC.

    Other key rulings - Bajaj Finance Ltd. (ITA No. 237 & 485 of 2017) (Bom), Elgi Finance Ltd. (293 ITR 357) (Mad), M/s. KEC Holdings Ltd (ITA No. 221 of 2012) (Bom) – Non-recognition of income as per RBI guidelines is binding for income-tax purposes and unrecognized income does not represent 'real income'.

With the objective of incentivising NBFCs and also as a step towards bringing parity in NBFC's tax treatment with that of banks and certain other FIs, the provisions of section 43D are now proposed to be extended to certain categories of NBFCs[11] (i.e. Deposit taking NBFCs and Systemically important non-deposit taking NBFCs[12]) (cumulatively referred to as Specified NBFCs).

These amendments, once enacted, shall be applicable with effect from 1st April 2020, i.e., from the AY 2020-21 onwards.

For NBFCs which are not covered by the proposed amendment, the position existing prior to the proposed amendment would continue to prevail and reliance may be placed on judicial precedents to conclude on the taxability of interest on NPAs.

However, the following concerns in relation to the provision of section 43D continue to persist:

Prescribed categories of bad and doubtful debts/NPAs

1. For the purposes of section 43D, the Act has prescribed Rule 6EA and 6EB to determine the bad and doubtful debts/ NPAs. However, at the same time, it uses the phrase "having regard to the guidelines issued by the RBI in relation to such debts".

   While the intent of prescribing Rules 6EA and 6EB was to be in sync with guidelines issued by the RBI from time to time, the Rules have not kept pace with the evolving RBI guidelines on NPAs, and this has resulted in litigation on account of difference of opinion between tax payers and tax authorities.

   Therefore, not only for banks and other FIs, but now also for specified NBFCs, who are proposed to be covered by s.43D, this procedural aspect needs utmost consideration to avoid the litigation.

Ind-AS implications

2. Unlike in pre Ind-AS era, where recognition of interest on NPAs was dependent upon reasonable certainty of ultimate collection, given that interest income on NPAs may be recognised in the books in compliance with Ind-AS requirements, such recognised interest income would become taxable in the year of such recognition, given the fact that even section 43D provides for taxation at the time of credit in Profit and Loss account or actual receipt, whichever is earlier.

   In such cases, NBFCs (including those other than specified NBFCs) would have to consider claiming deduction for such recognised interest under provisions for bad and doubtful debts under section 36(1)(viia) or write off the same under section 36(1)(vii).

   This aspect would also be relevant to banks once banks are required to comply with Ind-AS.

11. NBFC accepting or holding public deposits and registered with the RBI under the provisions of the Reserve Bank of India Act, 1934 (RBI Act)
12. NBFC which is not accepting or holding public deposits and having total assets of not less than INR 500 crore as per the last audited balance sheet and is registered with the RBI under the provisions of the RBI Act.

Extending section 43B to interest payments to NBFCs

As per the existing provisions of section 43B, interest on any loans or borrowings from specified FIs and scheduled banks, etc., is allowed as a deduction to the borrower only in the year in which the interest is actually paid.

However, deduction of the said interest is allowed in the year in which it was accrued if it is paid on or before the due date of filing the return of income) of that year or allowed in the year of actual payment.

At present, NBFCs are not covered under the provisions of section 43B. With the intention of bringing NBFCs at par with banks, amendments are proposed to section 43B, basis which the borrower shall get a deduction for the interest paid to Specified NBFCs on payment basis.

For interest paid on loans/ borrowings from NBFCs other than specified NBFCs, the position existing prior to the proposed amendment shall continue to prevail.

It is also clarified that if a deduction in respect of such interest is already claimed in the past (i.e. before 01.04.19) by the borrower, i.e. in the year in which the liability to pay had arisen, such sum cannot be claimed as a deduction again in the year of payment.

Further, interest which has been converted into a loan or borrowing will not be considered to have been actually paid for the purpose of s.43B; accordingly, no deduction will be allowed on the said conversion.

These amendments are applicable for AY 2020-21 onwards i.e. for interest expenditure accruing in financial year 2019-20 onwards though loans/ borrowings may be obtained earlier.

However, the following potential issues in relation to the amendments to section 43B will need to be addressed:

Coverage of interest payable

1. The proposed amendment covers interest payable only on 'loans or borrowings'. Thus, it may be construed that interest payable on bonds and debentures issued to NBFCs may not be governed by s.43B. Also, s.43B may not cover other types of financial payments such as finance lease rental, guarantee fees etc.

Capitalisation to asset cost

2. Interest paid in respect of capital borrowed for acquisition of an asset, which is capitalised to the cost of the asset, is not deductible as per s.36(1)(iii) read with ICDS IX. Given the proposed amendment, consequential effect of the deductibility of such interest would need to be evaluated.

Concluding remarks

The financial service sector is at the heart of growth of the economy and thus, while, some tax proposals like the one in section 115UB have been long due while others like section 9A are still 'work in progress' as only few industry players have been able to take benefit of this regime.

Proposals for significant increases in surcharge rates especially for the non-corporate AIFs/FPIs are a cause of concern and need to be addressed to maintain a positive influx of foreign exchange which is crucial to the economy. Overall the proposals are a welcome move but more could be done for this sector to bring about a greater growth fillip.

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CA Sanjeev Lalan

Corporate Taxation and Start-Ups

The maiden budget of the new Government may be seen as very upfront on the intent of the Government. The Finance Minister of India described the aim of tax proposals to stimulate growth and encourage start-ups by releasing entrepreneurial spirits. The underlying aim of the budget can be seen in the stated objective to be that of "ease of living" with affirmative steps towards it like interchangeability of Aadhaar and PAN, faceless e-assessment and larger focus on encouraging start-ups.

In light of this stated objectives, we try to evaluate the amendments proposed in respect of corporate taxation and for start-ups.

Reduced Tax Rate of 25% [First Schedule, Part III, Paragraph E of Finance Bill, 2019]

1. The benefit of tax rate of 25% has been extended to companies with turnover or gross receipt of up to INR 400 crore in FY 2017-18. Currently, only the companies having a turnover of up to INR 250 crore are the beneficiaries of this reduced rate of tax.

2. The Hon. Finance Minister in her speech has claimed that this benefit will cover 99.30% of the companies and only 0.70% of the companies will remain outside this rate.

3. It may be noted that the benefit of the reduced rate is available with reference to the turnover or gross receipts of the financial year ending on 31st March, 2018 and therefore companies incorporated after 1st April, 2018 shall not be able to avail the benefit of this concessional rate even if their turnover during the financial years 2018-19 or 2019-20 is less than ₹ 400 crore. Such companies may have to explore the benefit provided under section 115BA for companies' set-up and registered after 1st April, 2016. The benefit provided under section 115BA is subject to fulfilment of certain restrictive conditions, some of them being—

   a. It should be engaged in manufacturing or production of article or thing and research in relation to, or distribution of, such article or thing manufactured or produced by it;

   b. Income to be computed with availing certain defined beneficial deductions;

   c. Income should be computed without set-off of any loss carried forward from any earlier assessment year if such loss is attributable

to any of the defined beneficial deductions;

d. Option needs to be exercised so claiming benefit of reduced rate of tax under the said provisions while filing the return of income for the first year and once the option is exercised it cannot be subsequently withdrawn for the same or any other previous year.

4. There should have been no reason to deny the benefit of concessional rate of tax to new companies incorporated after 1st April, 2018 and representation needs to be made for extending the said rate benefit to them also. However, it may be noted that the benefit available under section 115BA is without any restrictive conditions of attaining turnover or gross receipts.

Measures for Resolution of Distressed Companies [Section 79(2)(d)]

1. The restrictions of section 79 are presently not applicable to a company where any change in shareholding takes place in a previous year pursuant to resolution plan approved under the Insolvency & Bankruptcy Code, 2016, subject to same being approved after providing opportunity of being heard to the Principal CIT or CIT as the case may be. Similar benefit is being proposed to be extended to where action under sections 241 and 242 of the Companies Act, 2013 is approved by the National Company Law Tribunal.

2. Under section 241 of the Companies Act, 2013, the Central Government, if it is of the opinion can apply to NCLT for relief and taking necessary actions, if it deems fit as may be required, like:

   - Suspension of the Board of Directors of such company and appointment of new directors, to be nominated by the Central Government, under section 242 of the Companies Act, 2013, and

   - Change in shareholding of such company, and its subsidiaries and the subsidiary of such subsidiary, pursuant to a resolution plan approved by NCLT under section 242 of the Companies Act, 2013

3. Under section 79 of the Income-tax Act, companies are allowed to carry forward and set off losses only if not less than 51% of the shareholding is held by the persons who beneficially held the shares carrying not less than 51% of voting rights on the last day of the year or years when the loss was incurred.

4. In order to revive the above mentioned companies, including their subsidiaries or subsidiaries of the subsidiaries, where provisions of section 241 of the Companies Act, 2013 are invoked, it is proposed under section 79(2)(d) that such companies will be exempted from conditions of section 79 for carry forward and set off losses i.e., such companies can carry forward and set of losses even if there is change in voting power of more than 51%, if such change is pursuant to resolution plan approved by NCLT under section 242 of the Companies Act, 2013 and jurisdictional Principal Commissioner or Commissioner, as the case may be, is provided a reasonable opportunity of being heard.

5. Also under clause (iih) of *Explanation* 1 to section 115JB(2) amendment is proposed, for calculating book profit, whereby in such cases also the aggregate amount of unabsorbed depreciation and loss

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(excluding depreciation) brought forward shall be allowed to be reduced in case of such companies. At present the above relaxation is available to companies where resolution plans are approved under Insolvency and Bankruptcy Code.

Tax on income distributed to shareholder in case of listed companies [sections 115QA & 10(34A)]

1. Section 115QA provides for the levy of income tax at rate of 20% of the distributed income on account of buy-back of unlisted shares by the domestic company. The distributed income has been defined to mean consideration paid by the company on buy-back of shares as reduced by the amount which was received by the company for issue of such shares, determined in the manner prescribed under Rule 40BB. Rule 40BB prescribes the method of calculation of amounts received by the company in various scenarios like subscription, ESOPs, amalgamation, demerger etc.

2. Therefore, currently an unlisted company pays an effective tax at the rate 23.30% (including surcharge and cess) on buy back. The consequential income arising in the hands of shareholders has been exempted under clause (34A) of section 10 of the Act.

3. It is now proposed to remove the benefit which was hitherto available to buy-back schemes of listed company and cover buy back of listed shares by such companies also under the purview of buy-back Tax under section 115QA and to exempt consequential income in the hands of shareholders under section 10(34A) with immediate effect from 5th July, 2019.

4. Hitherto, the shareholders of the listed companies were liable to pay tax on such buy-backs as per the normal provisions depending on whether the shares were held as capital asset or stock-in-trade. Further, in respect of the income from capital gains, the shareholder was also eligible to claim benefit available for long term capital gains, if such shares were long term capital assets. Also, benefit of concessional rate of tax under sections 111A and 112 was available if Securities Transaction Tax was paid on such buy-backs.

5. While the receipt of buy-back consideration is proposed to be exempted in the hands of the shareholder, the tax under section 115QA is to be paid on the distributed income, which is difference between the buy-back consideration and issue price of such shares received by the company. Same has no bearing to the price or consideration actually paid by the shareholder for acquiring such shares.

Relaxation of condition for Ind-AS compliant demerger for MAT [section 2(19AA)]

1. Currently, by virtue of section 47, any transfer of a capital asset on demerger to the resulting company or companies is exempt from tax if it meets the requirements of section 2(19AA). One of the conditions specified in section 2(19AA)(iii) for tax-neutral demerger is that the resulting company should record the property and the liabilities of the undertaking at the value appearing in the books of account of the demerged company. This requirement created dichotomy for Ind-AS compliant companies which are required to record the property and the liabilities of the undertaking at a Fair Value as per Ind-AS.

2. It is now proposed to add a proviso to the said clause (iii) to section 2(19AA) and provide that the conditions of the said clause will not apply in case of a resulting company, if it is required to record the

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property and liabilities of the undertaking at book value, in compliance to the Indian Accounting Standards specified in Annexure to the Companies (Indian Accounting Standards) Rules, 2015.

3. Thus, any demerger where the property and liabilities are recognised by a resultant company at a value different from the book value thereof in demerged companies and in compliance with Ind-AS rules then too the demerger will be treated as a demerger compliant for availing benefit of section 47. While the proviso is being proposed to be inserted w.e.f. 1st April, 2020 it is possible to argue that the same is clarificatory in nature for past demergers where the compliance with Ind-AS was required. However, it would have been better if the same could have been clarified in the amendment itself. However, it may also be noted that the said clause (iii) to section 2(19AA) reads as under—

"(iii) The property and liabilities of the undertaking or undertakings being transferred by the demerged company are transferred at values appearing in its books of account immediately before the demerger."

Presently, the requirement of the said condition is regarding value of transfer of property and liability by the demerged company only.

Carry-forward and set-off of losses of eligible start-ups [section 79(1)]

1. Section 79 of the Income-tax Act provides conditions for carry forward and set off of losses in case of a company, not being a company in which the public are substantially interested (closely held company), where a change in shareholding has taken place in the previous year.

2. Currently, under the said section, a loss incurred by a closely held eligible start-up, as referred to in section 80IAC, in any year prior to previous year can be carried forward and set-off against the income of the previous year, if –

   - All the shareholders of the company who held the shares carrying voting power on the last day of the year in which the loss was incurred continue to hold those shares on the last day of such previous year, and

   - Such loss has been incurred during the period of 7 years beginning from the year in which such company is incorporated

3. To further facilitate ease of doing business, it is proposed that in addition to above, a closely held eligible start-up shall be allowed to be carried forward and set-off against the income of the previous year even if they, like any other closely held company, satisfy the following condition.

   - On the last day of the previous year, the shares of the company carrying not less than 51% of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less than 51% of the voting power on the last day of the year or years in which the loss was incurred.

4. Thus, the eligible start-up company can satisfy any one of the conditions and still be eligible to claim the benefit of set-off and carry forward of losses. It may satisfy any one of the conditions for any of the assessment years for claiming the benefit of set-off and would not be bound by single condition for all the future year. That is to say, if the set-off benefit is claimed based on the condition

mentioned in (3) above in Year 1, it can still claim the benefit of the set-off in the Year 2 in regards to balance loss carried forward even if it satisfies the condition mentioned in (2) above.

5. This amendment will provide much needed flexibility to the eligible start-ups in planning for Venture Capital funding.

Extension of roll-over benefits in case of eligible start-ups [section 54GB]

1. The existing provisions of section 54GB of the Income-tax Act provide for benefit in respect of capital gain arising from transfer of a residential property owned by an eligible assessee, being individual or HUF, on subscription to more than 50% in equity shares of eligible company, subject to fulfilment of other conditions of the said section. Eligible company means

   (i) A company incorporated during the previous year in which the transfer of residential property takes place or before the due date for filing the return of income of income under section 139(1) for that year;

   (ii) It is engaged in the business of manufacturing or production of article or thing or in an eligible business (eligible start-up) as defined under *Explanation* to section 80IAC(4).

   (iii) It is a company in which such individual or HUF has more than 50% share capital or more than 50% voting rights after the subscription of shares by the assessee, and

   (iv) It is a company which qualifies to be a SME under the MSME Act, 2006.

2. It is now proposed to relax the condition of clause (b)(iii) of section 54GB(6), regarding minimum shareholding or voting rights from present 50% to 25%. Thus, if the eligible assessee now subscribes to 25% of the shares or holds more that 25% of voting rights after subscription in shares the benefit of the provisions of section 54GB shall be available.

3. The said benefit of the said provision was available to an assessee in respect of transfer of property made up to 31st March, 2019 by virtue of section 54GB(5). Same is now proposed to be extended up to 31st March 2021.

4. As per the present provisions contained in section 54GB(4), the benefit claimed shall be withdrawn if the shares or the new assets acquired by the company are sold or otherwise transferred within a period of 5 years from the date of their acquisition. It is now proposed to insert a proviso to sub-section (4) and reduce the lock-in period of 5 years, in case of eligible start-ups, whereby, in respect of new asset being computer or computer software the said lock-in period shall be reduced from 3 years from the current period of 5 years. It may be noted that only the eligible start-ups, being companies, which duly satisfy the conditions of *Explanation* (ii) to section 80IAC(4) are eligible to this benefit of reduced lock-in period for computers and computer software and other companies cannot avail this benefit.

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CA Kinjal Bhuta

Personal Taxation

The Finance Bill (No. 2), 2019 was presented on 05th July, 2019 which was the First budget of the incumbent Government and has proposed several amendments in both Direct and Indirect taxes. The budget amendments echoes the Government's vision and priorities towards e-commerce, digitalisation, green economy, pragmatic taxation etc. This article discusses the amendments made in taxation of individuals. There are no substantial changes in the budget for individuals or salaried and middle class except the ones stated here under.

Increase in the rate of Surcharge

The basic tax rates have **not** changed for Individuals. The only change which has been made is in the rate of surcharge. Currently, the surcharge rate for every Individual having total income exceeding ₹ 50 lakh but less than ₹ 1 crore is 10% and for total income exceeding ₹ 1 crore is 15%.

The Finance Bill (No. 2), 2019 has increased the rate of surcharge. The rationale of such increase stems from the speech of the Finance Minister where she has stated that owing to rising income levels, those in the highest income brackets, need to contribute more to the Nation's development.

This increase in rate is made for Individual, Hindu Undivided Family (HUF), Association of Persons (AOPs), Body of Individuals (BOIs) OPs, BOIs, and Artificial juridical person. The amended rates proposed are as under:

Total Income	*Surcharge Rate*
Exceeding ₹ 50 lakh but less than ₹ 1 crore	10%
Exceeding ₹ 1 crore but less than ₹ 2 crore	15%
Exceeding ₹ 2 crore but less than ₹ 5 crore	25%
Exceeding ₹ 5 crore	37%

The effective maximum marginal rates for Individuals having income up to ₹ 2 crore shall remain unchanged. However, the effective tax rate for total income exceeding ₹ 2 crore shall be as under:

Total Income	*Existing Rates*	*Proposed Rates*
₹ 2 crore to ₹ 5 crore	35.88%	39%
Exceeding ₹ 5 crore	35.88%	42.74%

The rate of 42.74% shall be the highest rate of tax at any income level in the current scenario.

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

It is to be noted that the calculation of advance tax for AY 2020-21 for the first quarter ending June, 2019 would have been made considering the old surcharge rates, the advance tax for the other three instalments shall now have to be done as per the increased surcharge rates. It will be interesting to know, whether the interest u/s. 234C levied for deferment in payment of advance tax will be leviable in such cases where, though there will be deferment in payment of first instalment of advance tax, however it is not due to the cause of the assessee.

Tax incentive for affordable housing

Currently, section 80 EE of the Income-tax Act, 1961 provides deduction of interest on housing loan up to ₹ 50,000 for residential house property of value less than ₹ 35 lakh. As a step further for achieving the government's objective of housing for all and affordable housing, a new section 80EEA has been inserted to provide that individual assessees shall be allowed deduction of interest payable on loan taken by him from any financial institution for the purpose of acquiring any residential house property. This deduction shall be allowed up to ₹ 1,50,000.

Deduction shall be allowed subject to the following conditions:

1. The loan has been sanctioned from period of 1st April, 2019 to 31st March, 2020.

2. The stamp duty value of the residential house does not exceed ₹ 45 lakh.

3. The assessee does not own any other residential house property as on the date of sanction of loan.

Once a deduction of interest is allowed under this section, the same interest will not be allowed under any other provisions of the Income-tax Act, 1961 for the same or any other assessment year. However, the speech of Finance Minister is very clear to state that this interest deduction is over and above the existing interest deduction available under section 24(b) of the Income-tax Act, 1961 for self-occupied property.

The words 'Financial institution' and 'Stamp duty value' are defined for the purposes of this section

Financial institution shall have the same meaning as mentioned in clause (a) of section 80EE (5). As per section 80EE (5), a 'financial institution' means a banking company, to which Banking Regulation Act, 1949 applies, or any bank or banking institution referred to in section 51 of that Act or a housing finance company. For this purpose, housing finance company means a public company formed or registered in India with the main object of carrying on the business of providing long term finance for construction or purchase of houses in India for residential purposes and 'Stamp duty' means the value adopted or assessed or assessable by any authority of the Central Government or a State Government for the purpose of payment of stamp duty in respect of an immovable property.

Since, the stamp duty value of property should be less than ₹ 45 lakh for availing this additional interest deduction, mostly the lower income borrowers in Tier 2 and Tier 3 cities shall benefit from this section.

This amendment is effective from AY: 2020-21.

Tax Incentive for Electric Vehicle:

As an initiative to conserve the environment and incentivise the purchase of electric vehicles, a new section 80EEB has been inserted to provide for deduction of interest up to ₹ 1,50,000 on loan taken by an individual assessee from any financial institution for the purchase of an electric vehicle.

The deduction shall be available only if the loan is sanctioned from the period starting from 1st April, 2019 to 31st March, 2023. Once a deduction of interest is allowed under this section, no deduction of such interest shall be allowed under any other provisions of the Income Tax Act, 1961 for the same or any other assessment year.

Further, the term electric vehicle and financial institution has been defined for the purposes of this section. 'Electric Vehicle' means a vehicle which is powered exclusively by an electric motor whose traction energy is supplied exclusively by traction battery installed in the vehicle and has such electric regenerative braking system, which during braking provides for the conversion of vehicle kinetic energy into electrical energy.

'Financial Institution' shall mean a banking company to which the Banking Regulation Act, 1949 applies, or any bank or banking institution referred to in section 51 of that Act and includes any deposit taking non-banking financial company or a systemically important non-deposit taking non-banking financial company (NBFC) as defined in clauses (e) and (g) of *Explanation* 4 to section 43B. It may be noted that the definition of Financial institution also includes NBFCs This is unlike the definition of financial institution as provided under section 80EE and section 80EEA.

Interestingly, the explanatory memorandum also states one more condition that to avail this deduction the assessee should not own any other electric vehicle as on the date of sanction of the loan. However, the Finance Bill is silent about any such condition and therefore there is a disconnect between the bill and memorandum as regards this. However, it is a trite law that Finance Bill shall always prevail over the memorandum. And further, the Finance Bill also seems correct with respect to the intent behind this provision, there is no reason why the Government would want to restrict benefit to only one vehicle.

This amendment will be effective from AY 2020-21

Incentive to subscribers of National Pension Scheme

There are three welcome amendments proposed with respect to contributions made and withdrawals or closures to National Pension Scheme.

1) The contribution made to the national pension scheme by employees is exempt u/s. 80CCD up to ₹ 50,000/- and the withdrawal of such amount on opting out or closure was exempt to a certain extent u/s. 10(12) of the Income-tax Act, 1961.

   Any amount standing to the credit of an assessee in his account in a notified pension scheme being amounts on which deductions has been allowed earlier together with amount accrued thereon received by him on closing or opting out is deemed to be income of the assessee. However, under the existing provisions of section 10 (12) of the Act, any payment from the National Pension Scheme (NPS) Trust to an assessee on closure of his account or on his opting out of the pension scheme, to the extent it does not exceed 40% of the total amount payable to him at the time of such closure or on his opting out of the scheme, is exempt from tax. With a view to enable the pensioner to have more disposable funds, it is proposed to amend the said section so as to increase the said exemption from 40% to 60% of the total amount payable to the person at the time of closure or his opting out of the scheme.

2) Under the existing provisions, any contribution made by an employer to the account of any employee in a notified pension scheme not exceeding 10% of the salary of employee in the previous year is allowed as deduction under

section 80 CCD (2) of the Act. The Central Government enhanced its contribution to the account of its employers in the National Payment Scheme from 10% to 14% as per Notification F.No. 1/3/2016-PR. dated 31st January, 2019. To ensure that the Central Government employees get full deduction in respect of the contribution made by the Central Government, the limit of deduction on respect of Central Government's contribution to NPS is now proposed to be increase to 14% of the salary of the employees in the previous year. The limit for deduction of other employees remains at 10% of annual salary only.

3) Central Government employees are now permitted deduction in respect of their contribution to the notified pension scheme under the Tier-II account within the overall limit available under section 80C.

In view of the above, sections 80C, 80 CCD and 10(12) are accordingly amended. These amendments are effective from AY 2020-21.

Provision of credit of relief provided under section 89

Section 140A provides that before furnishing a return of income, the assessee is required to compute self-assessment tax, which is the tax payable after allowing credit of prepaid taxes, and certain admissible reliefs u/s. 90 and credits etc. The existing provisions of section 140A (1A) which provides the manner of computation of self-assessment tax, does not specifically mention the deduction for relief u/s. 89 of the Act. Similarly, sub-section (1B) of section 140A which provides the mechanism of calculation of assessed tax, also does not provide for deduction of relief u/s. 89 of the Act.

Section 89 of the Income-tax Act contains provisions for providing tax relief where salary, profit in lieu of salary etc., is paid in arrears or in advance.

Section 234A, 234B and 234C provide for interest for delay in filing return of income, delay in payment of advance tax and deferment in payment of advance tax respectively. Since the relief under section 89 is not specifically mentioned in these sections, it has resulted into genuine hardship in the case of taxpayers who are eligible for this relief.

To correct and clarify this situation, it is proposed to amend sections 140A, section 143, section 234A, section 234B and section 234C so as to provide that computation of tax liability shall be made after allowing relief under section 89.

These amendments will take effect retrospectively from 1st April, 2007 and will apply in relation to the assessment year 2007-08 and so this amendment shall aid in reducing the pending litigation or pending rectifications regarding the deduction of relief u/s. 89 of the Act.

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The great secret of true success, of true happiness, then, is this: the man who asks for no return, the perfectly unselfish man, is the most successful.

— *Swami Vivekananda*

CA Naresh Ajwani

International Tax and Black Money Law

1. Assessment Order for modified return filed pursuant to Advance Pricing Arrangement - Section 92CD (Finance Bill clause 29)

Background

CBDT with the approval of Central Government can enter into an Advance Pricing Arrangement (APA) with a taxpayer. Pursuant to the APA, the taxpayer can submit his return in accordance with the Arm's Length Price as agreed in the APA. An APA saves litigation and ensures a smoother assessment.

APA by nature takes time to complete. It can take up to a year or even more to enter into an APA. The APA can be valid for up to 5 years at a time. It can also apply to past 4 years.

Once an APA is entered into, the assessee has to file a modified return within 3 months from the end of the month in which the APA is entered into, if he has already filed the return before the APA is finalised. The modified return has to be filed in accordance with and limited to the APA. Appropriate provisions are there for considering such modified return as filed under section 139 (i.e., within the permissible time).

It is possible that the assessment is completed before the time limit for filing the modified return is over. In such a case the Assessing Officer is required to assess, reassess or recompute the income pursuant to filing the modified return.

There were apprehensions that assessing officer can make an entirely fresh assessment on filing of the modified return.

Finance Bill provision

It has been proposed that the Assessing Officer has to pass an order to "modify" the income considering the APA. The power to "assess, reassess and recompute" has been removed.

A consequential amendment has been proposed in section 246A which provides for appealable orders before CIT(Appeals). In place of "assessment and reassessment" orders which can be appealed, the reference will be to "order" which will modify the assessment of income pursuant to filing the modified return.

The proposed amendments will be effective from 1st September 2019.

2. "Secondary adjustment" in Transfer Pricing - Section 92CE (Finance Bill, clause 30)

Background

2.1 In case of Transfer Pricing adjustment, the income of the tax payer is increased (or loss is reduced). The adjustment to the income submitted by the assessee pursuant to the determination of Transfer Price as per arm's length principle, is considered as "primary adjustment".

The **"primary adjustment"** can happen in different situations – *suo motu* by the assessee in the return of income; by the assessing officer in assessment; due to APA; on account of safe harbour rules or under a Mutual Agreement Procedure.

2.2 While the income is increased due to "primary adjustment" the funds are not received by the assessee whose income has been increased. For example, the Indian Holding company has sold goods to its US subsidiary. In assessment, the officer considers that the sale price does not reflect the Arm's Length Price. Hence the officer increases the sales price in the assessment of the Indian holding company by say ₹ 10 crore. This increase in the sale price is "primary adjustment". The amount of ₹ 10 ccrore however is not received in India. It is only an adjustment in the income on assessment.

With effect from AY 2018-19 it has been provided that the amount of "primary adjustment" will be considered as lying with the Associated Enterprise as loan. This is known as **"secondary adjustment"**.

If however within 90 days of "primary adjustment", the assessee brings the funds to India, then there will be no need of "secondary adjustment". In other words, there is no need to treat the funds lying with the Associated Enterprise as loan. If the funds are not brought into India within 90 days, the income of the assessee is further increased **assuming interest on the loan** at the prescribed rates.

If "primary adjustment" is **less than ₹ 1 crore,** "secondary adjustment" does not have to be made.

It should be noted that the amount of "primary adjustment" need not result in taxable income of the same amount. Taxable income may be same or less than the amount of "primary adjustment". This could be due to other adjustments or expenses which can be claimed, etc. If "primary adjustment" results in increase in income or reduction of loss, and it is more than ₹ 1 crore, "secondary adjustment" will apply.

2.3 Transfer Pricing rules are **subjective**. These adjustments are only for the purpose of collecting income-tax. It is accepted that any adjustment in income due to Transfer Pricing, does not mean that the parties have to undertake the transaction at that value. The contracted price does not have to be amended. However "secondary adjustment" has an effect as if the parties have to undertake contract at the arm's length price.

2.4 **Finance Bill provisions** - There were some controversies pertaining to secondary adjustment. Therefore changes have been proposed in the Finance Bill to remove the controversies. Some other changes are also proposed. These are as under:

i) It has been clarified that secondary adjustment can apply in case primary adjustment is on account of **APA** entered into **after 1st April 2017**. Thus if primary adjustment is made on account of APA signed before 1st April, 2017, no secondary adjustment is required.

ii) It has been proposed that "secondary adjustment" will not be made if i) the primary adjustment is up to ₹ 1 crore OR (ii) "primary adjustment" is for Assessment Year on or before AY 2016-17.

As the law stands today, the two conditions are cumulative. This gives rise to an unintended result that if the "primary adjustment" of any amount (even less than ₹ 1 crore) is made for assessment year AY 2017-18 or later, "secondary adjustment" must be made. It was never the intention that "secondary adjustment" has to be made if primary adjustment is of ₹ 1 crore or less. The proposed amendment will remove this unintended result.

It is further proposed that if any tax has been paid under this provision (before amendment by Finance Bill, 2019), **no refund of tax will be given**. This is unfair. If tax has been paid under the unintended interpretation, in all fairness tax should be refunded.

The prohibition of refund of tax will also apply to clause (i) above. If tax has been paid on account of "secondary adjustment" based on APA signed before 1st April 2017, it will not be refunded.

iii) **Background** - There was a debate as to which entity should reimburse the amount. It may happen that the Indian entity has transacted with several group companies. The "primary adjustment" may be made on an overall basis. For example, the Indian entity has charged a price of cost plus mark up of 10%. The officer considers a mark-up of 15%. Does it mean that all the Associated Enterprises should remit the funds proportionately? This will cause a lot of difficulties.

Finance Bill provision

It is now proposed that funds on account of "primary adjustment" can be remitted by **any group company** and not necessarily the entity with whom the international transaction was carried out.

FEMA

What will be the implications under FEMA? What will be the disclosure of such amount under FEMA?

If Indian company exports goods worth ₹ 10 crore, and the tax officer increases the sale price by ₹ 2 crore in Transfer Pricing assessment, the Indian company will receive ₹ 2 crore to avoid secondary adjustment. At the time of export, all documents would have been filed. The Transfer Pricing assessment will take place after 2-3 years. Will it be considered as under invoicing? Transfer Pricing is a subjective exercise. Any adjustment is an estimate by the tax officer. Any two people can have a different view. A difference of view should not lead to an assumption of under invoicing. At the same time, if there are facts and evidence available that there was deliberate under invoicing, then action can be taken under FEMA. Hence it depends on the facts of the case, whether Transfer Pricing adjustment will give rise to FEMA issues.

Further, the export bill would have been closed in the bank and RBI

system. The amount of ₹ 2 crore cannot be shown as export of goods as there would be no document to support it. It may have to be shown as "other income" in the information to be submitted to the bank.

Similarly in case of imports, the tax officer may have disallowed import cost by say ₹ 2 crore. When the Indian company receives the amount, what can it be considered as? It may have to considered as "refund/ rebates on imports". Does it mean over invoicing? As explained above, in case of subjective matters, it should not lead to any adverse conclusion under other laws. Under **Customs law**, import duty would have been paid on the original invoice. When the amount is received by the Indian company, will Customs duty be refunded?

To avoid continued litigation, the assessee may pay up the tax. However one assumption leads to another assumption. That further leads to FEMA issues or Customs issues. It becomes impossible for the assessee to comply with the laws.

Corresponding adjustment – When the non-resident group company makes a payment to the Indian company on account of "secondary adjustment", will the non-resident get a deduction (corresponding adjustment) in its country? The other country may not grant a deduction. Practically it becomes a difficult matter.

iv) There is a clarificatory amendment that "secondary adjustment" will apply to that part of "primary adjustment" amount which is not brought into India. Thus if part of the funds are brought into India, "secondary adjustment" will not apply to that part which is brought into India.

All the above amendments will be effective retrospectively from AY 2018-19.

2.5 **Alternative to interest on secondary adjustment**

It has been proposed that instead of considering interest on "secondary adjustment", the assessee can opt to pay tax @ 18% on the "primary adjustment" amount which is not brought into India. If he pays the tax of 18%, the provision of "secondary adjustment" will not apply from the date of payment of tax. No further interest will be deemed from the date of payment of tax. (The tax will be increased by surcharge and education cess.)

The tax is equal to Dividend Distribution Tax on dividend paid by the Indian companies.

The tax will be considered as final tax. No further credit will be given. Thus for example, the assessee has made a loss despite making "primary adjustment", the tax paid in this alternative provision will not be refunded. Unlike say if TDS is deducted, and the assessee has tax payable which is less than the TDS, then the excess TDS is refunded. Thus the tax of 18% is the final tax.

It is also provided that no deduction of any kind will be permitted from the amount on which tax has been paid. Thus the amount which is not repatriated to India, cannot be claimed as a deduction under section 37 as write off of the amount.

The amendment will apply from 1st September 2019.

3. Maintenance of information and documents under Transfer Pricing rules - Section 92D (Finance Bill clause 31)

Background

Section 92D provides for maintenance of documents and information for the purpose of Transfer Pricing. There are two categories of information.

The **first category** is for person who enters into international transaction with Associated Enterprise. Such a person has to maintain such information and documents to establish that the transactions are undertaken on Arm's Length basis. The details are prescribed under Rule 10D. The rule provides for exemption from maintaining the prescribed information and documents if the amount of international transactions is **up to ₹ 1 crore in a year.**

The second category is for **Multinational groups.** Under various anti-avoidance measures agreed under the Base Erosion and Profit Shifting action, for Transfer Pricing, a lot of data has to be maintained. The data includes information about the group, entities in the group, etc. in each country. This data has to be shared with all the countries where the MNC group operates. The countries can then take a view on Transfer Pricing risk. Rule 10DA prescribes the information which the Indian entity (known as constituent entity) of the MNC group has to maintain. This is known as Master file. This data has to be submitted to the tax department every year by the due date of filing the return. The rule provides for thresholds (e.g., the group's consolidated turnover is more than ₹ 500 crore) above which the documents are required to be maintained. This threshold is different from the threshold of ₹ 1 crore which applies to first category of information.

There was a view that the second category of information is required to be kept only if there is an international transaction. If there is no international transaction, Master file is not to be maintained. This was not the intention.

Finance Bill provision

It has been proposed that even if there is no international transaction, in case of an entity of an MNC group, the Master file should be maintained. This is of course subject to separate thresholds being crossed for the second category.

4. Meaning of "accounting year" for Maintenance of information and documents under Transfer Pricing rules - Section 286 (Finance Bill clause 66)

Background

As discussed in the above para, a lot of data has to be maintained. The parent company is required to maintain **Country-by-Country** report. This includes a lot of data of each entity pertaining to sales, profit, tax paid, etc. The data is required for entities in all countries. If the parent company is non-resident, and it designates an entity in India (part of the MNC group), then the Indian entity has to maintain the information. Such Indian company is referred to as **Alternate Reporting Entity (ARE).** While the ARE may be resident in India, it is required to maintain details of the parent company and its group companies. The information has to be submitted within 12 months of the end of the "accounting year".

The "accounting year" is defined as previous year if the parent company or the Alternative Reporting Entity is resident in India. If parent company is resident in India, "previous year" (1st April to 31st March) is alright as parent company is statutorily required to maintain

accounts as per "previous year". However if the ARE is resident in India, whose ultimate parent company is a non-resident of India, there is a difficulty as the year ending could be different from the "previous year" in the country where parent company is resident.

Finance Bill provision

It is now proposed that the "accounting year" in such cases will be the year which will be applicable to the non-resident parent company as per law of the country where the parent company is resident.

This being a clarificatory amendment, it is applicable from **1st April 2017.**

5. Tax Recovery in pursuance of agreement with foreign countries - Section 228A (Finance Bill clause 51)

India and various countries have entered into agreements which provide for assistance in recovery of tax from each other. If a foreign government sends a request to India for recovery of tax under the laws of the other country for person having property in India, the CBDT will send the request to the Tax Recovery Officer.

Finance Bill provision

It is now proposed that even if property details are not available but if a person is resident in India, assistance will be provided for recovery of tax.

Similarly, if Indian Government requires assistance for recovery of tax from the foreign country and the assessee has property in the other country, Tax Recovery Officer can send a request to the CBDT. Then CBDT will take such action as necessary.

Finance Bill provision

Here also it is proposed that if the person is a resident of the other country but the property details are not available, a request can be sent by the Tax Recovery Officer.

The amendment will apply from **1st September 2019.**

6. The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 - Sections 2, 10, 17, 84 (Finance Bill clauses 195 to 198)

Background

6.1 Section 2(2) provides that an assessee means a person who is a **"resident"** in India. "Non-Residents" and "Not Ordinarily Residents" are not considered as assessees.

The objective is to apply the Black Money Law to Indian residents who have undisclosed foreign income or undisclosed foreign assets. However the definition of the assessee leads to unintended situation. If in the year in which the department finds out undisclosed income or an undisclosed asset of a person, and the person is a non-resident in that year, then legally the person is not an assessee. Hence no further action can be taken against such person.

Consequence would be – an Indian resident who has earned substantial black money and kept it outside India will leave India and become an NRI. Then department cannot take any action against him under Black Money Law.

This is not the intention.

Finance Bill provision

It is now proposed that the assessee will include a "non-resident" and "Not Ordinarily resident" if he was a resident in the year to which the undisclosed

income pertains to, or in which undisclosed foreign asset was acquired.

Section 72(c) provides that where the asset has been acquired prior to the commencement of the Black Money Act, it will be considered to have been acquired in the previous year in which the notice under section 10 is issued by the assessing officer. The Finance Bill proposes that section 72(c) shall not be considered to determine the previous year for considering whether the person is an assessee or not.

Illustration

This provision can be explained with an illustration. Consider an Indian resident had earned black money in the year 2010. He kept it abroad. After passing of Black Money Law, he became an NRI in AY 2016-17. Hence he escaped the definition of an "assessee". Hence department could not take any action against him. If the tax department finds out the black money in 2017, it issues a notice under section 10. Under section 72(c) it will be considered as income of the year 2017 when the person was a non-resident. No action can be taken as the person is a non-resident. With the proposed amendment, the department can take action. It is further clarified that even though it will be considered as income of 2017, for determining the residence of the person, section 72(c) will not apply. Residence will be determined by section 6 of the Income-tax Act.

This amendment is proposed to be effective from 1st July 2015, when the Black Money Act became effective.

6.2 A few clarificatory amendments are proposed to provide for "reassessment". There was no reference to "reassessment" in section 10(3) and 10(4).

Finance Bill provision

It is now proposed to insert the words "reassess" and "reassessment" respectively.

This clarification will also operate from 1st July 2015.

6.3 Section 17 provides for powers of CIT (Appeals). Sub-section (1)(b) provides for power to confirm or cancel the penalty. There is no power to reduce or enhance the penalty.

Finance Bill provision

It is now proposed that the CIT (Appeals) can enhance or reduce the penalty also.

The amendment will apply from 1st September 2019.

6.4 Section 84 provides for various sections of the Income-tax Act will apply to Black Money Law with suitable modifications.

Finance Bill provision

It is proposed that section 144A of the Income-tax Act will apply to Black Money Law. Section 144A provides that the Joint Commissioner, on his own or on reference of the assessing officer, can give suitable directions to the assessing officer to complete the assessment. This has been provided considering the importance of the cases under the Black Money Law. Black Money Law involves several angles, legal issues, facts to be understood. Hence the Government has made this amendment.

The amendment will apply from 1st September 2019.

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Dharan V. Gandhi, *Advocate*

Amendments in Section 50CA and 56(2)

An interesting budget was delivered by the first full time female Finance Minister of the Country Mrs. Nirmala Sitharaman. The budget speech was bereft of any figures and was broadly highlighting the plan of the government for the 5 years to come. In the said Budget, there were some proposed amendments concerning the Income-tax Act, 1961 ('Act'). I have been entrusted to deal with the amendments proposed in section 50CA and section 56(2).

Section 50CA

Section 50CA was inserted w.e.f. 1.4.2018 by the Finance Act, 2017 and it applies in case of transfer of capital asset being share of a company other than a quoted share. This section is on similar lines as section 50C. It states that, where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being share of a company other than a quoted share, is less than the fair market value of such share determined in manner prescribed, the value so determined shall, for the purposes of section 48, be deemed to be the full value of consideration received or accruing as a result of such transfer.

Rule 11UAA has been prescribed in this regard. It states that fair market value shall be determined in the manner provided in Rule 11UA(1)(c)(b) which deals with determination of value in case of equity shares and Rule 11UA(1)(c)(c) which provides for the fair market value in case of shares other than equity shares [Rule 11UA(1) applies for computing the fair market value for the purpose of section 56(2)(x)].

Circular No. 2 of 2018 dated 15.02.2018, while explaining the rationale behind insertion of the said section states that the provision is inserted so as ensure that the full value of consideration is not understated.

No safeguards whatsoever, are provided for in section 50CA of the Act to exempt any genuine transaction. Further, only one method has been prescribed under Rule 11UAA read with Rule 11UA(1).This makes the section vulnerable. As, then the interpretation of section 50CA would be that all the transfer of unquoted shares of a company has to be at a value which is more than or equal to the value prescribed in the Rule and if not so, then adverse consequence of taxability of such fair market value would follow.

Firstly, the value as determined in the manner prescribed may not be the only fair market value. There are so many other methods available to determine the fair market value of

shares of a company, which may have driven the actual transaction. Further, based on the facts of each case and contingencies involved, the shares may be transferred at rates less than the prescribed fair market value, however, there is no room for such argument under existing section 50CA of the Act.

The Finance (No. 2) Bill, 2019 ('Bill') proposes to insert a proviso to section 50CA of the Act. As per the proviso, the Board is empowered to prescribe transactions undertaken by certain class of persons to which the provisions of section 50CA will not apply. A hint about such category of transaction is given by the Explanatory Memorandum to the Bill. It states that consideration for certain transfer of shares are approved by certain authorities and the person transferring the shares has no control over such determination. Determination of fair market value based on the prescribed rules may result into genuine hardship in such cases. For such type of cases, the amendment has been proposed by the Bill.

The said amendment is proposed to take effect from AY 2020-21. However, if the purpose of the amendment is to remove genuine hardship, then the transactions which would be exempted by the Board should also be outside the ambit of section 50CA since day one, meaning thereby, the proposed amendment and any prescription by the Board under the said amendment should be retrospective.

The above solution is actually not a solution. Because apart from the transaction whose consideration would be controlled by certain authorities, there may be many transactions where there would be no understatement of the consideration but still, section 50CA would require adoption of deemed fair market value as full value of consideration. Further, under the proposed power, the Board would not be able to exempt any other transactions, as the Board would be bound by the guidelines prescribed for the proposed amendment which is to exempt such transactions where the consideration is determined by certain authorities.

Further, there is no provision to enable the assessees to justify the consideration unlike section 50C where at least an option is given to refer the matter to the Department's Valuation Officer where the assessee disputes the stamp duty value. To worsen things, Rule prescribes only one method to determine the fair market value, which is not a full proof method catering to all situations. All the above make the section dangerous and constitutionally unviable.

However, the Supreme Court in case of *Bharat Hari Singhania vs. CWT* has held that Rule 1D (Break-up Value method) is perfectly valid and effective. The rule has to be followed in every case where unquoted equity shares of a company (other than an investment company or a managing agency company) have to be valued. All the authorities under the Act including the Valuation Officer are bound by the said rule. The Rajasthan High Court in case of *CWT vs. Seth Gokuldas Pradeep Kumar Rathi* [2009] 319 ITR 201 (Rajasthan) rejected yield method of valuation of shares as against break-up value method provided in the wealth rule and distinguished the two judgments delivered by the Supreme Court in *CWT vs. Mahadeo Jalan [1972] 86 ITR 621* and *CGT vs. Smt. Kusumben D. Mahadevia [1980] 122 ITR 38 (SC)* on the fact that it was delivered in cases where at that time rule 1D was not in existence.

Section 56(2)(viib)

Section 56(2)(viib) was introduced by Finance Act, 2012 w.e.f. 1.4.2013. It states that when such company receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, then the difference between the aggregate consideration received for such shares and the fair market value of the shares

as determined in the manner prescribed will be chargeable to tax.

However, not all transactions are covered by the said section. As per the proviso to section 56(2)(viib), such provision will not apply in the following scenarios:

i. When shares are issued by venture capital undertaking to a venture capital company or a venture capital fund or

ii. When shares are issued by company to a class or classes of persons as may be notified by the Central Government in this behalf.

The first amendment which is proposed by the Bill is insertion of second proviso after the first proviso. As seen earlier, the Central Government is empowered to notify that the provisions of this section shall not be applicable to consideration received by a notified company. Such exemption may be subject to fulfilment of certain conditions. Accordingly, second proviso is proposed to be inserted to provide that, in case where the conditions as specified by the Central Government while granting exemption is not fulfilled, then the consideration received for issue of shares which exceeds the face value of such shares shall be deemed to be the income of the company chargeable to income-tax for the previous year in which the failure to comply with any of the said conditions has taken place. Such amendment is proposed to be effective from AY 2020-21.

In this regard, it is important to note that, clause (ii) of the first proviso, wherein the power to exempt certain companies is given, does not empower the Government to prescribe conditions for granting exemptions. One may compare the wordings of clause (ii) of the said first proviso with the proviso proposed to be inserted in section 50CA. The latter specifically uses the term "subject to such conditions as may be prescribed" which words are not present in clause (ii) of the first proviso. Thus, one may argue that there is no power with the Government to prescribe conditions while granting exemption from section 56(2)(viib), and thus, the insertion of second proviso by the Bill makes no sense.

Also, there would be controversy as to whether the proposed amendment will apply to the notification issued by the Government in the financial year relevant to the AY 2020-21 or would apply to earlier notifications as well when the failure to fulfil the conditions happens in the financial year relevant to the AY 2020-21 or subsequent years.

The second amendment which is proposed by the Bill is to extend the exemption from section 56(2)(viib) to issue of share by a venture capital undertaking to a Category II Alternative Investment Fund which is regulated under the Securities and Exchange Board of India (Alternative Investment Fund) Regulations, 2012.

Section 56(2)(viii)

Section 56(2)(viii) taxes interest received on compensation or on enhanced compensation as referred to in clause (b) of section 145A of the Act. As per erstwhile section 145A(b), interest received by an assessee on compensation or on enhanced compensation was deemed to be the income of the year in which it is received. The Finance Act, 2018 substituted the provisions of section 145A with sections 145A and section 145B. As a result, such clause (b) of section 145A was shifted as sub-section (1) of section 145B. However, no consequential amendment was made in this section. The Bill, therefore proposes to amend section 56(2)(viii) of the Act, to provide the correct reference of section 145B(1), in place of the existing reference of section 145A(b). The said amendment is to take retrospective effect from AY 2017-18.

Section 56(2)(x)

Section 56(2)(x) needs no introduction. Briefly, it taxes, subject to certain conditions and limitations, receipt by any person from any person of the following:

i. Any sum of money without consideration

ii. Receipt of immovable property without consideration or for inadequate consideration, and

iii. Receipt of specified movable property without consideration or for inadequate consideration.

Proviso to clause (x) exempts certain transaction from the application of the said provision.

The first amendment which is proposed by the Bill is expansion of the exemption provision to include clause (XI). As per such clause, the provision of section 56(2)(x) will not apply to receipt of sum of money or property from such class of persons and subject to such conditions, as may be prescribed. Thus, the Board is proposed to be empowered to exempt certain transaction from the application of section 56(2)(x). Logic given for the proposed amendment in section 50CA also applies here i.e., determination of fair market value based on the prescribed rules may result into genuine hardship in certain cases where the consideration for transfer of shares is approved by certain authorities and the person transferring the share has no control over such determination and therefore, to give relief in such kind of transaction, the amendment is proposed. This amendment is to take effect from AY 2020-21.

Thus, firstly, under the proposed clause, the Board will provide for exemption only to transactions involving transfer of shares. Further, such exemption will only be applicable if the transaction has taken place at a value approved by certain authorities and the parties have no control over such determination of the value. Apart from the above scenario, the Board is not empowered to exempt any transaction under the proposed clause. Thus, in a way, the scope of the said amendment is very narrow.

Also, as discussed earlier while dealing with section 50CA, there is good case to argue that such amendment and the situations prescribed under such amendment may be made applicable retrospectively as the same is to remove genuine hardships.

It is pertinent to point out that the main purpose behind insertion of the said provision and its predecessor was to curb bogus capital building and money laundering transaction. It is in the nature of anti-abuse provisions. However, the wording of section 56(2)(x) are so wide that it brings into tax fold, receipt of either sum of money or property either without consideration or for inadequate consideration. Insertion of such a widely worded section has led to a drift from the main purpose itself i.e., anti-abuse provision. There is neither any need for the department nor any room for the assessee to prove that the transactions are anti-abuse or not. If the conditions of the section are fulfilled, then without going into the motive/ rationale behind insertion of the section, the transaction is brought to tax. Thus, something which is not chargeable to tax, as accepted by the Department, is brought to tax just because the section has been inserted as an anti-abuse measure, without the need for demonstration of the fact that the transaction is really for evasion purpose or not.

Because of such widely worded section, immense hardships are caused to the assessees in general in carrying out any commercial, business or personal transaction. Further, though exceptions are brought out in proviso to section 56(2)(x), however, the same are not sufficient to take care of all the genuine

transactions. Also, the amendment proposed by the Bill, though removes hardship, but is not sufficient to take care of many other genuine transactions.

The second amendment which is proposed in context of section 56(2)(x) is in the second proviso in sub-clause (b) of section 56(2)(x). First proviso states that, for the purpose of comparing the stamp duty value with the actual consideration, where the date of agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, the stamp duty value on the date of agreement may be taken. However, the second proviso states that the provision of first proviso will apply only in a case where the amount of consideration referred to therein, or a part thereof, has been paid by way of an account payee cheque or an account payee bank draft or by use of electronic clearing system through a bank account, on or before the date of agreement for transfer of such immovable property.

The Bill proposes to widen the provision of second proviso to include payment by any other electronic mode as may be prescribed by the Government. The said amendment is applicable from AY 2020-21.

Section 9(1)

The last amendment which is connected to section 56(2)(x) is proposed in section 9(1) of the Act.

Clause (viii) is proposed to be inserted in section 9(1), wherein it is provided that income of the nature referred to in section 2(24)(xviia) i.e., the income taxable u/s. 56(2)(x), arising from any sum of money paid, or any property situate in India transferred, on or after the 5th day of July, 2019 by a person resident in India to a person outside India shall be deemed to accrue or arise in India.

The explanatory memorandum has justified the above proposed amendment by stating that gifts made by persons resident in India to persons outside India are claimed to be non-taxable in India as the income does not accrue or arise in India. To ensure that such gifts made by residents to persons outside India are subject to tax, the proposed amendment is made. It also states that in a treaty situation, the relevant article of applicable DTAA shall continue to apply for such gifts.

Thus, the above amendment is proposed to tap all the gifts made by residents outside India under the Income-tax Act, 1961. It does not tamper with tax treatment under the treaty, as already specified in the explanatory memorandum. The effect of the same is elaborated hereunder:

i. Payment of any sum of money without consideration by a resident to a person outside India will become taxable in India. Thus, this would tax any sum of money taken by a resident from India to a place outside India and then transferred to another person. It would also cover, transfer of money from a bank account in India of the resident donor to a bank account outside India of the donee. It would surprisingly, also cover, transfer of money held outside India by the resident to a person outside India.

ii. Transfer of property situate in India by a resident to a person outside India would be deemed to accrue or arise in India. If the property is situated in India, and is transferred in India it would be otherwise taxable as receipt of such property would be in India. Further, in case of an immovable property, receipt of such property is always in India as such property, which is situated in India, can never be received outside India. The amendment proposes to tap the transfer

of property from India to a person outside India, like transfer of jewellery for inadequate consideration by a person resident in India to a person outside India, where receipt takes place outside India, i.e., the property in the goods is transferred outside India. However, if a property is taken outside India and then transferred, then it can no longer be stated that the property is situated in India. For example, jewellery purchased by a resident in India is taken outside India by such person and is gifted outside India, such transaction will not be covered by the proposed amendment, as once the property is taken outside India, such property cannot be said to be property situated in India.

The proposed amendment is worded ambiguously. Section 56(2)(x) uses the term 'receipt' whereas the proposed amendment uses the term 'paid' and 'transfer'. This may lead to some inconsistency.

Further, can one say that the proposed amendment and the explanatory memorandum is a tacit approval of the fact that transfer of sum of money or any property outside India by a resident to any other person would not accrue or arise in India and therefore, the same is deemed to accrue or arise in India. Such a position would enable a person to get a favourable treatment under the treaty, which provides for taxability of other income in the country where such income arises.

There is a different angle to the proposed amendment. Section 5 of the Act defines the scope of total income. Sub-section (1) of section 5 lays down the scope of total income of a resident person; whereas, sub-section (2) of section 5 lays down the scope of total income of a non-resident person. From the reading of the said section, it is clear that taxability of income depends upon two factors viz., receipt and accrual. If either the receipt of income or its accrual is in India, then the income will be taxable in India whether the person is resident or not. Whereas in case of resident, even if the income is neither accruing in India nor received in India, still the same is taxable under the Act.

Section 56(2)(x) taxes receipt of any sum of money or any immovable property or any specific movable property on fulfilment of certain conditions. Thus, situs of tax is on receipt of the said items. Here an important argument which one can raise is, where any income is taxable only on its receipt can there be a question of invocation of section 5(1)(b), 5(1)(c) and 5(2)(b)? In other words, one may argue that when any income is taxable on receipt basis, there is no question of looking at the conditions of accrual of income, as in any case, it is only on receipt the income is taxable. If this interpretation is accepted, then the present amendment becomes redundant as there will not be any requirement to look into the place of accrual of such income.

However, the other school of thought is that though the point of taxation is the receipt of any sum of money or property, the taxability will arise even if accrual of such income is in India. In other words, any income which is taxable in India u/s. 5(1)(b) or 5(1)(c) or 5(2)(b) would be taxable, though, the tax would be levied only on receipt of the said income. In fact, one may say that the latter viewpoint has been impliedly approved by the proposed amendment.

Conclusion

Now-a-days, it is seen that the amendments which are carried out in the Act are carried out hastily without proper application of mind. Further, they are also not properly worded or drafted thereby leading to various ambiguities and leaving a lot of scope of planning. The fate of the above amendments will only be known in the times to come.

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CA Kalpesh Katira & CA Prathmesh Pokharankar

Miscellaneous Amendments

The Modi Government has presented a Union Budget, after a pre-election populist budget in February, which aims to boost investment and provide growth to the economy. Some of the miscellaneous amendments proposed are summarised as under.

Changes in conditions for claiming deduction in respect of affordable housing projects

The existing provisions of section 80-IBA of the Act, *inter alia*, provide that where the gross total income of an assessee includes any profits and gains derived from the business of developing and building housing projects, there shall, subject to certain conditions, be allowed, a deduction of an amount equal to 100% of the profits and gains derived from such business.

The various conditions are provided in sub-section (2) for the housing project to be eligible for deduction. In order to align the definition of "affordable housing" under section 80-IBA with the definition of GST Act, it is proposed to amend the said section so as to modify certain conditions in respect of the projects that would be approved on or after 1st September 2019. The proposed amendment provides that the existing conditions mentioned at clause (d) to (i) of section 80-IBA(2) be replaced with the following conditions.

- the assessee shall be eligible for deduction under the section, in respect of a housing project if a residential unit in the housing project have carpet area not exceeding 60 square meter in metropolitan cities or 90 square meter in cities or towns other than metropolitan cities of Bengaluru, Chennai, Delhi National Capital Region (limited to Delhi, Noida, Greater Noida, Ghaziabad, Gurgaon, Faridabad), Hyderabad, Kolkata and Mumbai (whole of Mumbai Metropolitan Region);
- the project is the only housing project on the plot of aforesaid land;
- the carpet area of the residential unit does not exceed 60 sq. mt. in metropolitan cities or 90 sq. mt. in cities or towns other than metropolitan cities;
- the stamp duty value of such residential unit in the housing project shall not exceed ₹ 45 lakh;

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- where a residential unit in the housing project is allotted to an individual, no other residential unit in the housing project shall be allotted to the individual or the spouse or the minor children of such individual;
- the project utilizes at least 90% of the floor area ratio permissible in respect of the said plot of land in metropolitan cities or at least 80% in cities or towns other than metropolitan cities; and
- the assessee maintains separate books of account in respect of the housing project.

The above amendment is applicable in respect of the housing projects approved on or after 1st September 2019 and accordingly, it will be applicable from AY 2020-21.

Cancellation of registration of the Trust or Institution

Section 12AA of the Act prescribes for manner of granting registration in case of trust or institution for the purpose of availing exemption in respect of its income under section 11 of the Act, subject to conditions contained under sections 11, 12, 12AA and 13.

Section 12AA also provides for manner of cancellation of said registration. This section provides that cancellation of registration can be on two grounds:-

- the Principal Commissioner or the Commissioner is satisfied that activities of the exempt entity are not genuine or are not being carried out in accordance with its objects; and
- it is noticed that the activities of the exempt entity are being carried out in a manner that either whole or any part of its income would cease to be exempt.

Memorandum states that in order to ensure that the trust or institution do not deviate from their objects, it is proposed to amend section 12AA of the Income-tax Act, so as to provide that,-

- at the time of granting the registration to a trust or institution, the Principal Commissioner or the Commissioner shall, *inter alia*, also satisfy himself about the compliance of the trust or institution to requirements of any other law which is material for the purpose of achieving its objects;
- where a trust or an institution has been granted registration under clause (b) of sub-section (1) or has obtained registration at any time under section 12A and subsequently it is noticed that the trust or institution has violated requirements of any other law which was material for the purpose of achieving its objects, and the order, direction or decree, by whatever name called, holding that such violation has occurred, has either not been disputed or has attained finality, the Principal Commissioner or Commissioner may cancel the registration of such trust or institution by an order in writing after affording a reasonable opportunity of being heard.

The above amendment will be effective from 1st September, 2019 and accordingly, applicable from AY 2020-21 onwards.

With the proposed amendment Income-tax Act seeks compliance under other applicable laws. E.g. in case trust is not registered as per the applicable State or Central Charity laws, registration may not be granted Income-tax Act too.

Increase in time limit for sale of attached property under Rule 68B of the Second Schedule of the Act

The existing provisions of Rule 68B of the Second Schedule of the Act provide that sale of immovable property attached towards the

recovery of tax, penalty etc., should not be made after the expiry of three years from the end of the financial year in which the order in consequence of which any tax, penalty etc. becomes final.

In order to protect the interest of the revenue and provide more time, especially in those cases where demand has been crystallised on conclusion of the proceedings, it is proposed to amend so that the period of limitation is extended from three years to seven years.

It is further proposed to insert a new proviso in the said sub-rule so as to provide that the Board may, for reasons to be recorded in writing, extend the aforesaid period of limitation by a further period of three years so that the limitation of time period for sale of attached property may not be an impediment in recovery of tax dues and may not lead to permanent loss of revenue to the government.

The above amendments will be effective from 1st September 2019 and accordingly, applicable from AY 2020-21 onwards.

Rationalisation of the Income Declaration Scheme, 2016 ("the Scheme")

The existing provisions of section 187 of the Finance Act, 2016 provide, *inter alia*, that the tax, surcharge and penalty in respect of the undisclosed income, declared under the Scheme shall be paid on or before a notified due date.

In order to provide more time for the declarants who could not pay the amount due to their genuine concern, it is proposed to provide one more opportunity to certain notified class of persons who can make the payment of such amount on or before notified date, along with the interest @ 1% for every month or part of month on such amount from the date immediately following the due date and ending on the date of such payment.

Further, the existing section 191 of the Finance Act, 2016 provides, *inter alia*, that any amount of tax, surcharge or penalty paid in pursuance of a declaration made under the Scheme shall not be refundable.

It is proposed to amend the said section so as to provide that the Central Government may notify the class of persons to whom the amount of tax, surcharge and penalty, paid in excess of the amount payable under the Scheme shall be refundable.

The above amendment is retrospective with effect from 1st June 2016.

The Bombay High Court in case of *Sadhana R. Jain vs. CBDT [2019] 103 taxmann.com 70 (Bombay)* has held that where pursuant to declaration made under Income Declaration Scheme of 2016, assessee failed to deposit minimum 25 per cent of total amount declared within prescribed time limit due to personal reasons. In said circumstances CBDT took a decision not to grant any extension in case of individual hardship and such order rejecting assessee's application for condonation of delay did not require any interference. However the Supreme Court in case of *Hemalatha Gargya vs. Commissioner of Income Tax (2003) 259 ITR 1 (SC)* has held that the assessees are not entitled to the benefit of the Voluntary Disclosure of Income Scheme, 1997 (VDIS, 1997) since the payments made by them were not in terms of the Scheme, but directed the Revenue authorities to refund or adjust the amounts already deposited by the assessees in purported compliance with the provisions of the Scheme to the concerned assessees in accordance with law. The proposed amendment will provide relief in deserving cases.

Prescription of electronic mode of payments

The Digital India programme is a flagship programme of the Government of India with

a vision to transform India into a digitally empowered society and knowledge economy. "Faceless, Paperless, Cashless" is one of professed role of Digital India.

As part of promoting cashless transactions and converting India into less-cash society, various modes of digital payments are available such as Banking Cards, UPI, Mobile Wallets, Mobile Banking and much more. Also there are various provisions in the Income-tax Act, 1961 ("Act") which prohibit cash transactions and allow/ encourage payment or receipt only through account payee cheque, account payee draft or electronic clearing system through a bank account.

Presently the payment or receipt only through account payee cheque, account payee draft or electronic clearing system through a bank account are considered as the payment or receipt through permissible modes.

Hence, in order to encourage other electronic modes of payment, it is proposed to amend the relevant sections so as to include such other electronic mode as may be prescribed, in addition to the already existing permissible modes of payment or receipt.

The following are the relevant sections which are proposed to be amended so as to include such other electronic mode as may be prescribed in addition to the already existing permissible modes of payment. However, the other electronic modes are yet to be notified. The present provisions of the relevant sections are as under:

- Section 13A of the Act requires a political party to receive donation exceeding ₹ 2,000 only through the prescribed permissible modes of payment/ receipt.
- Section 35AD of the Act provides that the term 'any expenditure of capital nature' shall not include any expenditure in respect of which the assessee makes payment (or an aggregate of payments) exceeding ₹ 10,000 to a person in a day through any mode other than the prescribed permissible modes of payment/ receipt.
- Section 40A of the Act provides for disallowance of any expenditure for which the assessee makes payment (or an aggregate of payments) exceeding ₹ 10,000 through any mode other than the prescribed permissible modes of payment/ receipt.
- Section 43(1) of the Act provides the definition of the term "actual cost". The second proviso to the said section specifies that where the assessee incurs any expenditure for the acquisition of an asset or part thereof, and in respect of such acquisition, he makes a payment or aggregate of payments exceeding ₹ 10,000 in a day to a person in any mode other than the prescribed permissible modes of payment/ receipt then such expenditure shall not be included in the determination of the actual cost.
- Section 43CA of the Act provides that where the date of agreement fixing the value of consideration for the transfer of the asset and the date of registration of such transfer of asset are different, then the full value of consideration for transfer of such asset shall be the stamp duty value on the date of the agreement provided the amount of consideration or a part thereof has been received by way of the prescribed permissible modes of payment/receipt on or before the date of agreement for transfer of the asset.
- Similar provision is made in the second proviso to section 50C(1) and the second proviso to section 56(2)(x)(b).

- Section 44AD of the Act relates to presumptive taxation scheme for eligible businesses and provides that in case of an assessee engaged in an eligible business shall be eligible to avail the benefit of the presumptive taxation scheme if the profit from such business is declared @ 8% or higher of the total turnover or gross receipts in the previous year from such business. The proviso to section 44AD(1) provides that the eligible assessee can opt for the presumptive taxation scheme if he declares profit @ 6% or higher of turnover received through the prescribed permissible modes of payment receipt.
- Section 80JJAA of the Act provides for the deduction of an amount equal to @ 30% of additional employee cost incurred by an assessee in the previous year in the course of a business covered under section 44AB, for three years including the year in which such additional employment is provided. Sub-clause (b) of clause (i) of the *Explanation* to this section specifies that the additional employee cost in case of an existing business shall be nil if the emoluments are paid otherwise than by the prescribed permissible modes of payment/ receipt.

  However, similar amendment is not proposed u/s 80G for the purpose of the payment of donation.

  The amendments to the above sections will take effect from 1st April, 2020 and will, accordingly apply in relation to AY 2020-21 and subsequent assessment years.
- Similarly section 269SS of the Act prohibits a person from taking or accepting from a depositor any loan or deposit or any specified sum equal to ₹ 20,000 or more otherwise than by the prescribed permissible modes of payment/receipt.
- Section 269ST of the Act prohibits a person from receiving an amount of ₹ 2,00,000 or more in aggregate from a person in a day or in respect of a single transaction or in respect of transactions relating to one event or occasion from a person otherwise than by the prescribed permissible modes of payment/receipt.
- Section 269T of the Act prohibits a banking company or a co-operative bank and any other company or co-operative society and any firm or other person from repaying any loan or deposit made with it or any specified advance received by it, in any mode other than by the prescribed permissible modes of payment/receipt, if the amount being repaid is ₹ 20,000 or more.

The amendments in sections 269SS, 269ST and 269T will take effect from 1st September 2019 and accordingly, will apply from AY 2020-21 onwards.

Compulsory electronic payments for business with turnover above ₹ 50 Crore and its consequences

Acceptance of payments through prescribed electronic modes - new section 269SU

As discussed earlier, the aim of the Government of India is to make Indian economy more and more cashless through the Digital India programme. In order to achieve the mission of the Government to move towards a less cash economy to reduce generation and circulation of black money and to promote digital economy, it is proposed to insert a new section 269SU in the Act.

The new section 269SU inserted is with effect from the 1st November, 2019, which is as follows:

> *"Every person, carrying on business, shall provide facility for accepting payment through prescribed electronic modes, in addition to the facility for other electronic modes, of payment, if any, being provided by such person, if his total sales, turnover or gross receipts, as the case may be, in business exceeds fifty crore rupees during the immediately preceding previous year."*

The new section 269SU is inserted so as to provide that every person, carrying on business, shall, provide facility for accepting payment through the prescribed electronic modes, in addition to the facility for other electronic modes of payment, if any, being provided by such person, if his total sales, turnover or gross receipts in business exceeds ₹ 50 crore during the immediately preceding previous year.

The Hon`ble FM Ms. Nirmala Sitharaman in her budget speech said as under.

> *"Further, there are low-cost digital modes of payment such as BHIM UPI, UPI-QR Code, Aadhaar Pay, certain Debit cards, NEFT, RTGS etc. which can be used to promote less cash economy. I, therefore, propose that the business establishments with annual turnover more than ₹ 50 crore shall offer such low cost digital modes of payment to their customers."*

The new section, 269SU requiring large businesses to provide a facility for acceptance of payment through electronic modes will come into effect later this year from 1st November 2019.

Hence, it is proposed to make a consequential amendment in the Payment and Settlement Systems Act, 2007 so as to provide that no bank or system provider shall impose any charge upon anyone, either directly or indirectly, for using the modes of electronic payment prescribed under section 269SU of the Act.

Penalty u/s. 271DB for failure to comply with section 269SU

In order to ensure compliance of the provisions of section 269SU- Acceptance of payments through prescribed electronic modes levy of penalty under new section 271DB is proposed with effect from the 1st day of November, 2019.

The section says that if a person who is required to provide facility for accepting payment through the prescribed electronic modes of payment referred to in section 269SU, fails to provide such facility, he shall be liable to pay penalty of ₹ 5,000 for every day during which such failure continues. In other words, if the assessee with turnover more than ₹ 50 crore fails to provide facility for accepting payment through the prescribed electronic modes of payment, the penalty under section 271DB may be imposed by the Joint Commissioner. Therefore, all the business entities with turnover more than ₹ 50 crore would be required to demonstrate that the necessary facility for accepting payment through the prescribed electronic modes were made available to their customers so as to avoid the provisions of levy of penalty under section 271DB of the Act.

If the assessee fails to provide such facility and he proves that there were good and sufficient reasons for such failure, the penalty shall not be imposed under section 271DB of the Act.

It is also proposed that any such penalty shall be imposed by the Joint Commissioner.

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CA Paras K. Savla

Prevention of Money Laundering Act, 2002 and Prohibition of Benami Property Transactions Act, 1988

In continuation to the various recent actions undertaken by the Central Government to curb the usage of money illicit and terrorist activities, the Prevention of Money Laundering Act, 2002 (PMLA Act) has been proposed to be amended by the Finance (No. 2) Bill, 2019. Currently, the Supreme Court is hearing the matter wherein the amendments made to the PMLA Act since 2015 as a Money Bill has been challenged.

Enhance Due Diligence

New Section 12AA has been proposed to be inserted to the PMLA Act. It provides that every reporting entity [a banking company, financial institution, intermediary or a person carrying on a designated business or profession] shall, prior to the commencement of each specified transaction,—

- authenticate the identity of the clients undertaking such specified transaction
- take additional steps to examine the ownership and financial position, including sources of funds of the client
- take additional steps to record the purpose behind conducting the specified transaction and the intended nature of the relationship between the transaction parties.

If the client fails to fulfil the above-referred conditions, the reporting entity has been authorised not to allow the specified transaction to be carried out. In case any specified transaction or series of specified transactions undertaken by a client is considered suspicious or likely to involve proceeds of crime, the reporting entity shall increase the future monitoring of the business relationship with the client, including greater scrutiny or transactions in such manner as may be prescribed.

Authentication means the process as defined under sub-section (c) of section 2 of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016. Finance Bill has provided the authentication of PAN and Aadhaar number under the Income-tax Act too. Such Authentication will curb the misuse of the credential of other persons.

The information obtained while applying the enhanced due diligence measures shall be maintained for a period of five years from the date of the transaction between a client and the

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reporting entity.

Consequential amendments have been made:

- The Director u/s. 12A has the power to access the information generated under sections 11A(1), 12(1), and 12AA(1).
- Under section 15 the Central Government may, in consultation with the Reserve Bank of India, prescribe the procedure and the manner of maintaining and furnishing information by a reporting entity under section 11A(1), 12(1), and 12AA(1) for the purpose of implementing the provisions of this Act.
- The Central Government under section 73 is empowered to make rules in relation to
    - o the manner and the conditions in which authentication of the identity of clients shall be verified by the reporting entities under section 12AA(1)
    - o the manner of identifying the ownership and financial position of the client under section 12AA(1)(b)
    - o the additional steps to record the purpose behind conducting the specified transaction and the intended nature of the relationship between the transaction parties under section 12AA(1)(c)
    - o the manner of increasing future monitoring under section 12AA(3)

Inter-ministerial Co-ordination Committee

The new section 72A has been proposed to be inserted providing for the constitution of Inter-ministerial Co-ordination Committee. It is proposed to empower the Central Government to constitute an Inter-ministerial Co-ordination Committee for inter-departmental and inter-agency co-ordination for the following purposes:—

- operational co-operation between the Government, law enforcement agencies, the Financial Intelligence Unit, India and the regulators or supervisors;
- policy co-operation and co-ordination across all relevant or competent authorities;
- such consultation among the concerned authorities, the financial sector and other sectors, as are appropriate, and are related to anti money-laundering or countering the financing of terrorism laws, regulations and guidelines;
- development and implementing policies on anti money-laundering or countering the financing of terrorism; and
- any other matter as the Central Government may, by notification, specify in this behalf

The amendment has been proposed with a view to effectively implement Financial Action Task Force (FATF) standards recommendations and to draw, coordinate, monitor & review Anti-Money Laundering or Countering Financing of Terrorism policies.

THE PROHIBITION OF BENAMI PROPERTY TRANSACTIONS ACT, 1988

The Prohibition of Benami Property Transactions Act, 1988 (PBPT Act) that was activated two years ago to tackle the menace of holding properties and assets in someone else's name to escape tax, sidestep regulations and even fool creditors.

Prior Approval of the Approving Authority

Section 23 of the PBPT Act provides that the Initiating Officer, after obtaining prior approval of the Approving Authority, shall have the power to conduct or cause to be conducted any inquiry or investigation in respect of any person, place, property, assets, documents, books of account or other documents, in respect of any other relevant matters under this Act. However, it is not expressly provided that the prior approval of the Approving Authority shall not be required where the Initiating Officer has already initiated proceedings by issuing a notice under section 24(1).

The explanation is proposed to be inserted for clarifying that prior permission from the Approving Authority is not required where a notice under sub-section (1) of section 24 has been issued by the Initiating Officer. Section 24(1) of PBPT Act provides that where the Initiating Officer, on the basis of material in his possession, has reason to believe that any person is a benamidar in respect of a property, he may, after recording reasons in writing, issue a notice to the person to show cause within specified time in the notice why the property should not be treated as benami property.

This amendment will take effect retrospectively from 1st November, 2016.

Notice for provisional attachment of Property

Section 24(3) of PBPT Act provides that where the Initiating Officer is of the opinion that the person in possession of the property held benami may alienate the property during the period specified in the notice, he may, with the previous approval of the Approving Authority, by order in writing, provisionally attach the property, for a period not exceeding ninety days from the date of issue of notice under section 24(1).

It is proposed that for the purposes of issue of a notice time limit of ninety days shall be reckoned from the last day of the month in which the notice under section 24(1) is issued and not from the date of issue of notice.

This amendment will take effect from 1st September, 2019.

Order for attachment of property

Section 24(4) of PBPT Act provides that the Initiating Officer, after making such inquiries and calling for such reports or evidence as he deems fit and taking into account all relevant materials, shall, within a period of ninety days from the date of issue of notice under section 24(1) pass an order provisionally attaching the property or decide not to attach the property where provisional attachment has not been made; pass an order continuing the provisional attachment of the property or revoke the provisional attachment of the property where the provisional attachment has been made.

It is proposed that for the purposes of passing the order time limit of ninety days shall be reckoned from the last day of the month in which the notice under section 24(1) is issued and not from the date of issue of notice.

This amendment will take effect from 1st September, 2019.

Exclusion of stay period and deemed extension

The Explanation is proposed to be inserted to section 24 of PBPT Act stating that in computing the period of limitation, the period during which the proceeding is stayed by an order or injunction of any Court shall be excluded.

It also proposed that where immediately after the exclusion of the stay period, the period of limitation referred to in section 24(4) available to the Initiating Officer for passing an order of attachment is less than thirty days, such remaining period shall be deemed to be extended to thirty days.

Similarly it is also proposed that where immediately after the exclusion of the stay period, the period of limitation referred to

in section 24(5) available to the Initiating Officer, to refer the order of attachment to Adjudicating Authority is less than seven days, such remaining period shall be deemed to be extended to seven days.

This amendment will take effect from 1st September, 2019.

Penalty for failure to comply with notices or furnish information

Currently PBPT Act, provides penalties for entering into benami transaction or providing false information etc. No penalty can be levied for non-compliance of notice etc. Hence in order to have effective compliance, new Section 54A has been proposed to be inserted for levy of penalty of ₹ 25,000 on each failure, on any person who fails to

- comply with summons issued under sub-section (1) of section 19; or
- furnish information as required under section 21,

The penalty for non-compliance of summons shall be imposed by the authority who had issued such summons or called for the information. Further, no order shall be passed by the authority unless the person on whom the penalty is to be imposed has been given an opportunity of being heard and no penalty shall be imposed if, such person proves that there were good and sufficient reasons which prevented him from complying with the summons or furnishing information.

This amendment will take effect from 1st September, 2019.

Proof of entries in records or documents

The proposed new Section 54B provides that the entries in the records or other documents in the custody of an authority shall be admitted as evidence in any proceedings for the prosecution of any person for an offence under section 3 or this chapter, as the case may be, and all such entries may be proved either by—

- the production of the records or other documents in the custody of the authority containing such entries; or
- the production of a copy of the entries certified by the authority having custody of the records or other documents under its signature stating that it is a true copy of the original entries and that such original entries are contained in the records or other documents in its custody

This amendment will take effect from 1st September, 2019.

Previous sanction for prosecution

Section 55 of PBPT Act provides that no prosecution shall be instituted against any person in respect of any offence under sections 3, 53 or section 54 without the previous sanction of the Board. It is proposed to change the sanctioning Authority. It is now proposed that sanctioning authority shall be Competent Authority and "Competent Authority" means a Commissioner, a Director, a Principal Commissioner of Income-tax or a Principal Director of Income-tax as defined under the Income-tax Act, 1961.

This amendment will take effect from 1st September, 2019.

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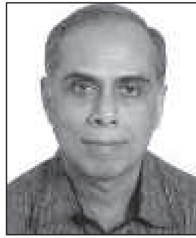
He (God) reveals himself to the pure heart.

— *Swami Vivekananda*



CA Rajkamal Shah

Amendments to GST Laws by Finance Bill (No. 2), 2019

Introduction

The Finance Minister has presented Finance Bill (No. 2) in Parliament after the new Government (Modi 2.0) has assumed office, *inter alia* covering the proposed amendments in Central Goods and Services Tax Act (CGST), and Integrated Goods and Service Taxs Act (IGST). It is important to note that as per One Hundredth Twenty Second Constitutional Amendment Act, the GST Council is supreme body empowered to suggest the amendments to these laws. Certain decisions of GST Council are notified by exercise of Executive Power through issue of notifications until Parliament is in session and carry out legislative functions to effectuate such changes. Thus, the power of Parliament is limited to effectuate the decisions of GST Council. The FM while presenting the budget to Parliament has sought to give effect to the decisions of the GST Council which have met from time-to-time in the intervening period.

In this article, attempt is made to analyse the proposed amendments to CGST and IGST laws along with the comments of the writer whenever found necessary.

Proposed amendments to CGST Act

Composition Scheme

Section 10 of the Act deals with 'Composition Levy Scheme' for the manufactures, Restaurant Service providers, caterers and the traders. The turnover limit specified under the Scheme was increased to ₹ 1.50 crore w.e.f. February 2, 2019 by the (GST Amendment) Act, 2018 by suitable amendment to first proviso to sub-section (1) of Section 10. Simultaneously, by CGST (Removal of Difficulties) Order, 2019 [Order No. 01/2019–CT dt. 1.2.2019] issued on the recommendation of the Council, by the Central Government under Section 172 of the Act.

The decision of the Council was subsequently implemented by issue of Notification No. 02/2019-CT (Rate) dated March 7, 2019 to be effective from April 1, 2019. The notification was later amended by Notification No. 09/2019-CT (Rate) dated March 29, 2019.

In this Budget, alternate Composition Scheme is provided for suppliers having an aggregate turnover up to ₹ 50 lakh in the preceeding financial year. For such taxpayers, a concessional rate of GST of 6% (3% CGST + 3% SGST) has

been provided (insertion of Section 2A to Section 10).

Another important amendment to Section 10 relates to the exclusion of 'casual taxable person' and 'non-resident taxable person' [Section 27] from the coverage of the scheme.

Further, that the option has to be exercised by all the registered persons having a same PAN.

For the purpose of determining the aggregate turnover the value of extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount shall not be taken into account.

Amendment to Registration Provisions for a supplier engaged in exclusive supply of goods

A Proviso and an explanation are proposed to be inserted in Section 22 of the CGST Act so as to provide powers to the Central Government at the request of the State and on the recommendations of the Council to increase the threshold exemption limit from INR 20 lakh to such amount not exceeding INR 40 lakh in case of a supplier who is engaged in exclusive supply of goods.

Further, a person shall be considered to be engaged exclusively in the supply of goods even if he is engaged in exempt supply of services provided by way of extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount.

Furnishing returns, monthly and annual statement

Amendments to Section 39

Regular taxable person to file monthly GST returns and pay taxes monthly.

Notified classes of persons to file GST return quarterly and pay taxes monthly.

Registered persons paying tax under Section.10 to file a yearly GST return and pay taxes quarterly.

Transfer of balances in e-Cash Ledger (Section 49)

A registered person shall now be allowed to transfer any amount of tax, interest, penalty, fee or any other amount available in the electronic cash ledger under the CGST Act to the electronic cash ledger for IGST, CGST, SGST, UTGST or cess, subject to prescribed conditions.

Such transfer shall be deemed to be a refund from the electronic cash ledger under the CGST Act. Further, where any amount has been transferred to the electronic cash ledger under the CGST Act, the same shall be deemed to be deposited in the said ledger as provided in sub-section (1) to Section 49.

Consequential to above amendment, the State and Central Government shall transfer the amount from one head to another head in the electronic cash ledger of the registered person (new Section 53A).

Similar amendment has been made under Integrated Goods and Services Tax, 2017.

Comment

The issue of cash flow is now resolved as the registered taxpayers would not be required to go through the hassles of claiming refund but will be able to utilise the excess balance in electronic cash ledger rather than payment of tax. An assessee can transfer the excess balance from electronic CGST Cash Ledger to the electronic cash ledger of IGST, CGST, SGST, UTGST or cess subject to the terms and conditions to be specified.

Interest on delayed payment of tax

New proviso is proposed to be inserted in sub-section (1) of Section 50 of the CGST Act so as

to provide for charging interest only on the net cash tax liability, except in those cases where returns are filed subsequent to initiation of any proceedings under Section 73 or 74 of the CGST Act.

Comment

The new provision shall put at rest the controversy generated by the decision of Telegana High Court in case of *Megha Engineering and Infrastructure Ltd vs. CCE* that even though there is sufficient balance in electronic credit ledger the interest would be payable unless the tax paid in cash.

Disbursal of SGST refund by the Central Government

Section 54(8A) is proposed to be added inserted to the CGST Act to specify that the Central Government may disburse the refund to the taxpayer in respect of the SGST as well.

Constitution of National Appellate Authority for Advance Ruling (NAAA)

The National Appellate Authority for Advance Ruling is proposed to be constituted for hearing appeals against conflicting advance rulings pronounced on the same question by the Appellate Authorities of two or more States or Union territories. The authority shall be constituted on the recommendations of the Council, by way of a notification with effect from such date as may be specified therein.

New Sections 101A, 101B and 101C are proposed to be inserted so as to provide for constitution, qualification, appointment, tenure, conditions of services of the National Appellate Authority for Advance Ruling.

The National Appellate Authority shall pass an order (as far as possible) within a period of ninety days from the date of filing of the appeal.

Applicants are required to file an appeal with the Authority within a period of thirty days from the date on which the ruling sought to be appealed against is communicated to the applicants, concerned officers and jurisdictional officers. The said time limit may be extended by thirty days.

Comment

This a welcome provision in view of conflicting Advance Rulings passed by the Advance Ruling Authority of different States. This will help the taxpayer to take a position based on the NAAA.

Anti-profiteering (insertion of Sub-Section 3A to Section 171)

In terms of the amendment any person who is held to be guilty, shall be liable to a penalty equivalent to 10 % of the amount so profiteered if such amount is not deposited within thirty days of the date of passing of the order by the National Anti-Profiteering Authority.

The expression "profiteered" is defined to mean the amount determined on account of not passing the benefit of reduction in rate of tax on supply of goods or services or both or the benefit of input tax credit to the recipient by way of commensurate reduction in the price of the goods or services or both.

The GST Council in its 35th meeting held at New Delhi on June 21, 2019 extended the tenure of the National Anti-Profiteering Authority by two years.

Comment

The Bombay and Delhi High Court have raised the questions about the validity of anti-profiteering provisions in absence of proper mechanism of measurement of the benefit.

Miscellaneous Provisions

Mandatory Aadhaar Authentication for Registration

Every registered person should undergo authentication or furnish proof of possession of Aadhaar number in such form and within such time as may be prescribed.

After issue of Notification, every individual in order to be eligible for grant of registration should undergo authentication or proof of possession of Aadhaar number.

After issue of Notification, every person other than individual shall undergo authentication or proof of possession of Aadhaar number of karta, MD, whole-time director, such number of partners, members of managing committee of association, board of trustees, authorised representative, authorised signatory in the manner specified.

If such persons have not been assigned Aadhaar, alternate and viable means of identification may be specified.

Facility of digital payment to the recipient (Insertion of Section 31A)

On recommendations of GST council, Government may prescribe certain classes of persons to provide prescribed modes of electronic payment to the recipient at his option, in such manner and subject to such conditions as may be prescribed.

Amendments to Section 52

New provisos are proposed to be inserted in sub-sections (4) and (5) of Section 52 of the CGST Act so as to empower the Commissioner to extend the due date for furnishing of monthly and annual statement by the person collecting tax at source.

Power to Commissioner to extend the time limit for furnishing Annual return:

On recommendations of the GST Council and for reasons to be recorded in writing, power to the Commissioner to extend the time limit for furnishing the annual return for notified classes of registered persons.

Proposed amendments IGST Act

A new Section 17A is proposed to be inserted under the IGST Act, which will prescribe the manner and the time limit as per which the Government will transfer an amount, equal to the amount transferred to the electronic cash ledger of the State or Union territory, to the State tax account or Union territory tax account. This amendment is being made consequential to the amendment in Section 49 of the CGST Act allowing transfer of an amount from one head to another head in the electronic cash ledger of the registered person.

Notification No. 2/2017-Integrated Tax (Rate) dated June 28, 2017, is being amended retrospectively so as to exempt "Uranium Ore Concentrate" from the levy of IGST w.e.f. July 1, 2017 to November 14, 2017.

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> If I am unhappy, it has been of my own making, and that very thing shows that I can be happy if I will.
>
> — *Swami Vivekananda*

CA Udayan Choksi & CA Kartik Solanki

Significant Proposals in Service Tax, Customs and Features of Sabka Vishwas (Legacy Dispute Resolution) Scheme 2019

A. SERVICE TAX & DISPUTE RESOLUTION SCHEME

1. Retrospective exemptions from service tax

A retrospective exemption from service tax has been provided in respect of the following taxable services:

a) Taxable service of grant of liquor licence provided by a State Government against consideration in the form of license fee or application fee.

Period of Exemption: 1st April 2016 to 30th June 2017.

b) Taxable service provided by the Indian Institutes of Management with respect to the taxable service of educational programmes, except the Executive Development Programme, viz. (i) two year full-time post-graduate programmes to which admissions are made on the basis of Common Admission test, (ii) fellow programme in Management and (iii) five year integrated programme in Management.

Period of Exemption: 1st July 2003 to 31st March 2016.

c) taxable service by way of granting long term lease of thirty years or more of plots for development of infrastructure for financial business, provided or agreed to be provided by the State Government Industrial Development Corporations or Undertakings or by any other entity having 50% or more of the ownership of the Central Government or the State Government or the Union territory, either directly or through an entity which is wholly owned by the Central Government or the State Government or the Union territory, against consideration in the form of an upfront amount called as premium, salami, cost, price,

development charges or by any other name.

Period of Exemption: 1st October 2013 to 30th June 2017.

There is a provision for Refund of all such service tax collected in the aforesaid cases, subject to the application for refund being made within the period of six months from the date of Presidential assent to the Finance (No. 2) Bill 2019.

2. SABKA VISHWAS (LEGACY DISPUTE RESOLUTION) SCHEME 2019

A dispute resolution scheme ('Scheme') by the name **SABKA VISHWAS (LEGACY DISPUTE RESOLUTION) SCHEME 2019 i**s being introduced in an attempt to reduce pending litigation from pre GST regime . The Scheme covers various disputes under Central Excise, Service Tax and specified cesses (including the Education cess, etc.). Disputes under customs are not covered under the Scheme.

2.1. Situations covered under the Scheme

- Appeal has been filed by the assessee or cross appeals have been filed by the assessee and the Department and such appeal is pending as on 30.6.2019 before the Appellate forum.
- Show cause notice has been received by declarant on or before 30.6.2019
- Investigation or audit or enquiry is pending against the assessee and the amount of duty/tax/cess liability ('Tax Liability') has been quantified on or before 30.6.2019
- Liability has been voluntarily disclosed by the assessee
- Amount in arrears - i.e., the amount of duty which is recoverable as arrears of duty under the indirect tax enactment, on account of
  - o no appeal having been filed by the declarant against an order or an order in appeal before expiry of the period of time for filing appeal
  - o an order in appeal relating to the declarant attaining finality
  - o the declarant having filed a return under the indirect tax enactment on or before the 30th day of June, 2019, wherein he has admitted a tax liability but not paid it

2.2. Disputes/persons specifically excluded from the Scheme

- Appeals or show cause notices finally heard on or before 30.6.2019
- Show cause notices for erroneous refund or refund
- Investigation or audit or enquiry pending against the assessee and the amount of tax liability has not been quantified on or before 30.6.2019
- Persons convicted for any offence punishable under any provisions of the indirect tax laws for the matter for which the declaration is intended to be filed
- Persons making voluntary disclosure after being subject to investigation, audit etc., or having filed a return which has an admitted liability remaining unpaid

- Applications filed before the Settlement Commission
- Declarations with respect to excisable goods set out in the Fourth Schedule to the Central Excise Act, 1944 (i.e., tobacco and mineral products)

2.3. Computation of tax dues for the purpose of the Scheme

Sr. No.	*Situation*	*Tax dues*
1	Appeal filed by assessee	Amount of duty/tax/cess disputed in the appeal
2	Appeal filed by both assessee and Department	Aggregate amount of duty/tax/cess disputed in appeals by assessee and by Department
3	Show cause notice received on or before 30.6.2019	Amount of duty/tax/cess demanded
4	Investigation or audit or enquiry ongoing against assessee	Amount of tax liability quantified on or before 30.6.2019
5	Liability voluntarily disclosed	Amount of liability disclosed
6	Arrears of Tax	Amount of tax in arrears

2.4. Computation of relief under the Scheme

Sr. No.	*Situation*	*Quantum of relief available*	
		Tax Liability equal to or less than ₹ 50 lakh	*Tax Liability more than ₹ 50 lakh*
1	Show cause notice or appeals pending on 30.6.2019	70% of tax	50% of tax
2	Show cause notice for late fee or penalty only where amount of duty has been paid or is Nil	Full relief	Full relief
3	Arrears of tax	60% of tax	40% of tax
4	Tax dues on account of investigation, audit or enquiry	70% of tax	50% of tax
5	Voluntary disclosure of liability	No relief	No relief

In addition, the relief under the Scheme will also include the amount of interest and penalty.

2.5. Procedure under the Scheme

- A declaration is to be filed electronically in prescribed form
- A designated committee will verify the correctness of the declaration made (except in cases of voluntary disclosure)
- If the amount payable as estimated by the committee equals the amount estimated by the assessee, the

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committee will issue a statement mentioning the amount payable by the assessee. This statement will be issued within 60 days from the date of receipt of the declaration

- In case the amount payable as estimated by the committee is higher than the amount estimated by the assessee, the committee will issue an estimate of the amount payable to the assessee within 30 days from the date of receipt of declaration, and after giving the assessee an opportunity of being heard, a statement mentioning the amount payable by the assessee will be issued within 60 days from the date of receipt of declaration
- The assessee is to pay the amount payable as indicated in the statement issued by the committee within 30 days from the date of issue of such statement
- Under the Scheme, all replies to show cause notices or appeals before appellate forums other than the High Courts or the Supreme Court will be deemed to be withdrawn. The assessee will need to file applications before the High Courts or the Supreme Court to withdraw any writ petition, appeal or reference and furnish proof of such withdrawal to the committee along with the proof of payment
- After the receipt of payment and proof of withdrawal of appeal, the committee would issue a discharge certificate within 30 days of payment and production of proof

2.6. Other salient features of the Scheme

- The discharge certificate will be conclusive for the matter and time period stated therein and the assessee will not be liable to pay any further duty/tax/cess, interest or penalty with respect to the matter and time period covered in the declaration. The assessee will also not be liable for prosecution for the matter and period covered in the declaration. Further, the matter and time period covered by such declaration would not be reopened in any other proceeding under the indirect tax laws
- The issue of discharge certificate will not preclude the issue of a show cause notice for the same matter for a subsequent time period or for a different matter for the same time period
- The amount paid under the Scheme cannot be paid through input tax credit. It is also not refundable under any circumstances. Further, such amount cannot be taken as input tax credit or entitle any person to take input tax credit as recipient of the excisable goods or taxable services with respect to the matter and time period covered in the declaration
- The relief shall be subject to the condition that any amount paid as pre-deposit at any stage of appellate proceedings under the indirect tax enactment or as deposit during enquiry, investigation or audit, shall be deducted when issuing the statement indicating the amount payable by the declarant. If the amount of pre-deposit or deposit already paid by the declarant exceeds the amount payable by the declarant, the declarant shall not be entitled to any refund.

- The Government has been empowered to issue rules for carrying out the provisions of this Scheme.

B. CUSTOMS

1. AMENDMENTS TO THE CUSTOMS ACT, 1962 – W.E.F. THE DATE OF ENACTMENT OF THE FINANCE BILL

1.1 Amendment in arrest provisions under the Customs Act – Section 104

The Bill provides for the arrest of a person even outside India or Indian Customs waters. The arrest provisions apply in respect of offences punishable under Section 132 (making, signing or using false declaration or document) or Section 133 (obstructing an officer of Customs) or Section 135 (evasion of duty or prohibition) or Section 135A (preparation to export goods in contravention of the Customs Act).

Under this Section, the offences of fraudulently availing drawback or exemption from duty where the amount involved exceeds ₹ 50 lakh, and of fraudulently obtaining an instrument, i.e., scrip, authorization or license issued under the Foreign Trade (Development and Regulation) Act, 1992 ('FTDRA') where such instrument is used and where the duty involved exceeds ₹ 50 lakh are also being made cognizable and non-bailable.

1.2 Custody of seized goods and provisional attachment of bank account – Section 110 & 110A

The bill provides for situations under which custody of seized goods can be given to the owner or other concerned person against an undertaking not to remove, part with or otherwise deal with the goods except with prior permission. Further, the Customs officer is being empowered to provisionally attach any bank account for a period not exceeding six months for protecting the interest of revenue and preventing smuggling. Such provisional attachment requires prior approval of the Principal Commissioner or Commissioner of Customs who can extend the period of attachment for a further period not exceeding six months. The bill also provides for release of a bank account provisionally attached under Section 110, as in the case of provisional release of goods and documents seized.

1.3 Penalty for fraudulent obtaining of instrument – Section 114AB

Where an instrument, i.e., scrip, authorisation or licence issued under the FTDRA has been obtained by fraud, collusion, wilful statement or suppression of facts and has been utilised by such person or any other person for discharging duty, the person to whom the instrument was issued shall be liable for penalty not exceeding the face value of the instrument.

1.4 Increase in maximum limit of general / residual Penalty – Section 117

The maximum penalty in respect of contraventions where no specific penalty is provided under the Act is increased to ₹ 4 lakh.

1.5 Fine in lieu of confiscation not applicable for deemed closure cases – Section 125

In respect of cases covered under the deemed closure provisions under Section 28, no fine in lieu of confiscation shall be imposed.

1.6 Imprisonment for fraudulent obtaining of instrument – Section 135

An instrument, i.e., scrip or authorization or licence issued under the FTDRA

obtained by fraud, collusion, wilful statement or suppression of facts, where such instrument is utilised, a punishable offence attracting imprisonment and a fine, like the other offences covered under the said section.

1.7 Increase in maximum limit of penalty for violation of rules or regulations – Section 158

The maximum penalty in respect of violation of any rule or regulation increased to ₹ two lakh.

1.8 Other Amendments

a) ***Additional person to submit export manifest – Section 41***

Central Government is empowered to notify a person (in addition to the person-in-charge of the conveyance) to submit documents under section 41 to Customs. Section 41 deals with 'delivery of departure manifest, export manifest or export report'.

b) ***Verification of identity and compliance under the Customs Act***

A new chapter XIIB titled "Verification of Identity and Compliance" is being inserted. Section 99B thereunder empowers Customs to carry out verification of a person for the purposes of ascertaining compliance of the Customs Act *vis-à-vis* protecting the interest of revenue and preventing smuggling. The verification will be through Aadhaar or through any alternative means of identification. Where the Customs officer concludes, based on reasons recorded in writing, that a person has failed to comply with the verification requirements, or that his authentication has failed, the officer can suspend or deny, respectively, customs benefits of clearance, refund, drawback, exemption and licence or registration or other such benefits.

c) ***Power to issue regulation for amendment of any document – Section 149***

CBIC is empowered to make regulations specifying the form and manner for amendment of any document after it has been presented to Customs and the time limit and restrictions and conditions applicable.

d) ***Power to make regulations – Section 157***

CBIC is empowered to make regulations relating to newly inserted Section 99B and amended Section 149.

2. AMENDMENTS TO THE CUSTOMS TARIFF ACT, 1962 – W.E.F. THE DATE OF ENACTMENT OF THE FINANCE BILL

a) ***Extension of circumvention provisions to countervailing duty***

Section 9 of the Customs Tariff Act is being amended to extend the levy of countervailing duty to situations of circumvention by alteration of the description or name or composition of the article in question, or import in an unassembled or disassembled form, or by changing the country of origin or export or in any other manner.

b) ***Opportunity to file an appeal before CESTAT in certain cases***

Section 9C of the Customs Tariff Act is being amended to provide for an appeal against an order of determination of safeguard duty before the CESTAT, as in the case of countervailing duty and anti-dumping duty.

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Deepak Tralshawala

HOT SPOT

Compounding of Offences

What is compounding an Offence?

According to Advanced Law Lexicon by Justice Y. V. Chandrachud, 3rd edition, to compound a felony or offence is to "Forbear from prosecution for consideration or private motives". Compounding consists of a victim of an offence accepting anything of value under an agreement not to prosecute. The compounding of offences is a method to avoid litigation.

The CBDT periodically issues circulars or guidelines for compounding of offences. The purpose is to reduce or put an end to litigation in appropriate cases by listing those offences committed under the Income-tax Act ("Act" for short) that can be compounded, and those that cannot be compounded.

The latest **Circular is F. No. 285/08/2014-IT (Inv V)/147 dt. 14th June 2019**. The guidelines for compounding as described in this circular shall come into effect from 17th June 2019, and shall be applicable to all applications received for compounding after 17th June 2019. Applications received prior to this date shall be governed by the CBDT guidelines dated 23rd Dec. 2014. The latest guidelines have created a more stringent regime for prosecution, especially for the more serious offences like clear tax evasion, abetment to tax evasion, Benami Transactions Act, cases relating to Enforcement Directorate, CBI, thwarting recovery, etc. At the same time a clear leniency is given to assessees who have committed less serious offences, e.g., compounding is now allowed up to three occasions as compared to only once earlier, for offences like non-filing of returns, etc.

Can an assessee-defaulter insist on Compounding the offence instead of facing prosecution?

No. The Circulars clearly lay down that Compounding of offences is not a matter of right, but depends upon various factors such as nature of the offence, magnitude of the offence, conduct of the offender, facts and circumstances of the case and, above all, the category to which the offence belongs. As held in *Vikram Singh vs. UOI and Ors 401 ITR 307 (Del).*

Compounding of offences cannot be taken as a matter of right. It is for the law and authorities to determine as to what kind of offences should be compounded, if at all, and under what conditions. The power to compound cannot be completely unbridled inasmuch as the same could give rise to enormous

discretionary power, which could also lead to arbitrariness, discrimination, abuse etc. For this reason, and in order to maintain uniformity and consistency, circulars and guidelines are required to be issued for compounding of offences. Such guidelines and circulars ensure a degree of objectivity. The CBDT guidelines dt. 23rd Dec., 2014 are exhaustive in nature and provide different compounding charges for different offences. The CBDT, while issuing the said guidelines, has obviously borne in mind the various established principles for compounding of offences including gravity of the offences, conduct of the parties, manner in which the offence is sought to be committed, etc. Explanation to s. 279 clearly vests the CBDT with the powers to issue circulars, orders, instructions or directions "for proper composition" of offences. The circular does not suffer from any illegality. The guidelines do not reflect any exercise of power which is arbitrary or illegal, in as much as such guidelines are issued by authorities for compounding of various kinds of offences. In every case for imposition of tax, fee or levy, the element of *quid pro quo* is not a precondition. Compounding fee is a different concept and such fee, because of the nomenclature, cannot be equated with the types of fee payable where the *quid pro quo* doctrine is applicable.

Offences and Prosecutions are listed in Chapter XXII of the Act. The offences appear at sections 275A onwards till 280D, although some sections are procedural in nature. The latest circular dt 14th June, 2019 has divided the offences into Category "A" and Category "B", into non-compoundable and compoundable offences. There has also been a re-jig of categorization of offences as compared to the listing in the earlier circular dated 23rd Dec., 2014 on the subject.

Offences under the Income-tax Act as per the latest Circular are classed into two parts, i.e. Category 'A' and Category 'B' for the limited purpose of compounding of offences:

Category A

Offences punishable under the following sections are included in Category A:

1.	S. 276	Failure to make payments, deliver returns or statements or allow inspection
2.	S. 276B	Failure to deduct/pay tax.
3.	S. 276B	Failure to pay the tax deducted at source under Chapter XVII-B
4.	S. 276BB	Failure to pay the tax collected at source u/s. 206C.
5.	S. 276CC	Failure to furnish income tax returns
6.	S. 276CCC	Failure to furnish income tax returns in search cases in block assessment scheme
7.	S. 276DD	Failure to comply with the provisions of Section 269SS
8.	S. 276E	Failure to comply with the provisions of Section 269T
9.	S. 277	False statement in verification with respect to Category A offences
10.	S. 278	Abetment of a false return with reference to Category A offences

Category B

Offences punishable under the following sections are included in Category B hereunder:

• S. 276A	Failure to comply with the provisions of Section 178(1) and 178(3)

• S. 276AA	Failure to comply with the provisions of Section 269AB or Section 269I
• S. 276AB	Failure to comply with the provisions of Sections 269UC, Section 269UE and 269UL
• S. 276C(1)	Willful attempt to evade tax.
• S. 276C(2)	Willful attempt to evade tax payments
• S. 276D	Failure to produce accounts and documents
• S. 277	False statement in verification with respect to Category B offences
• S. 277A	Falsification of books of accounts/documents
• S. 278	Abetment of false return under Category 'B' offences

Offences under Section 275A (Contravention of Order u/s. 132(3), 275B (Failure to allow Inspection of e-records), and 276 (Attempt to Thwart Recovery by Transfer or Alienation of Property) of the Act will not be compounded.

Eligibility

ALL of the following conditions should be satisfied to be eligible for compounding an offence:

- Application is filed to the Pr. CCIT/CCIT/ Pr. DGIT/DGIT having jurisdiction over the case for compounding of the offences. The application must be prepared in the prescribed format in the form of an affidavit on a ₹ 100/- stamp paper.
- The application for compounding may be filed *suo-motu* at any time after the offence is committed, irrespective of whether or not it comes to the notice of the department. However, no compounding application can be filed after the end of 12 months from the end of the month in which the prosecution complaint has been filed in the court of law in respect of the offence for which the compounding is sought.
- Applications may be filed after 12 months but before 24 months from the end of the month in which such complaint was filed will be accepted due to reasons that are beyond the control of the applicant (subject to further conditions). However, in deserving cases this condition can be relaxed.
- The person has paid the outstanding tax, interest, penalty and any other sum due, relating to the offence for which the compounding has been sought before filing the application.
- However, if any related demand is found outstanding on verification by the Department, the same should be conveyed to the applicant, and if such demand including interest u/s. 220 is paid within 30 days of such intimation, then the compounding application will be deemed to be a valid application.
- The person undertakes to pay the compounding charges determined in accordance with these guidelines.
- The person undertakes to withdraw appeals filed by him concerning the offence(s) sought to be compounded. The person should have paid the outstanding tax, interest (including interest u/s. 220 of the Act), penalty and any other sum due, relating to the offence for which compounding has been sought, before making the application. However, if any related demand is found outstanding the Department should inform the same to the applicant; and if such demand including

interest u/s. 220 is paid within 30 days of the intimation by the Department, then the compounding application would be deemed to be valid.

- The person undertakes to pay the compounding charges determined by the Pr. CCIT/CCIT/Pr. DGIT/DGIT concerned in accordance with these Guidelines.
- The person undertakes to withdraw appeals filed by him, if any, related to the offence(s) sought to be compounded. In case such appeal has mixed grounds, one or more of which may not be related to the offence(s) under consideration, an undertaking shall be given for withdrawal of such grounds as are related to the offence to be.
- Any application for compounding of offence u/s. 276B/276BB of the Act by an applicant for any period for a particular TAN should cover all defaults constituting the offence u/s 276B/276BB in respect of that TAN for such period.

Offences normally not to be compounded

The following offences are generally not to be compounded:

i. **Category 'A' offence** on more than three occasions. However, in exceptional circumstances compounding requested in more than three occasions can be considered only on the approval of the Committee referred to in Para 10 of these guidelines. The 'occasion' is defined in Para 8.2.

ii. **Category 'B' offence** other than the first offence(s) as defined in Para 8.2 for the purpose of these guidelines.

iii. Offences committed by a person for which he was convicted by a court of law under Direct Tax Laws.

iv. Any offence in respect of which the compounding application has already been rejected, except in the cases where benefit of rectification is available in these guidelines.

v. The cases of a person as main accused where it is proved that he has enabled others in tax evasion such as, through entities used to launder money or generate bogus invoices of sale/purchase without actual business, or by providing accommodation entries in any other manner as prescribed in section 277A of the Act.

vi. Offences committed by a person who, as a result of investigation conducted by any Central or State Agency and as per information available with the Pr. CCIT/CCIT/Pr. DGIT/DGIT concerned, has been found involved, in any manner, in anti-national/terrorist activity.

vii. Offences committed by a person who was convicted by a court of law for an offence under any law, other than the Direct Taxes Laws, for which the prescribed punishment was imprisonment for two years or more, with or without fine and which has a bearing on the offence sought to be compounded.

viii. Offences committed by a person which, as per information available with the Pr. CCIT/CCIT/Pr. DGIT/DGIT concerned, have a bearing on a case under investigation (at any stage including enquiry, filing of FIR complaint) by Enforcement Directorate, CBI, Lokpal, Lokayukta or any other Central or State Agency.

ix. Offences committed by a person whose application for 'plea-bargaining' under Chapter XXI-A of 'Code of Criminal Procedure' in respect of any offence is pending in a Court or where a Court has

recorded that a 'mutually satisfactory disposition of such an application is not worked out' and such offence has bearing on offence sought to be compounded.

x. Any offence which has bearing on an offence relating to undisclosed foreign bank account/assets in any manner.

xi. Any offence which has bearing on any offence under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015.

xii. Any offence which has bearing on any offence under the Benami Transactions (Prohibition) Act, 1988.

xiii. Any other offence, which the Pr. CCIT/ CCIT/Pr. DGIT/DGIT concerned considers not fit for compounding in view of factors such as conduct of the person, nature and magnitude of the offence.

Offences under Section 275A (Contravention of Order u/s. 132(3), 275B (failure to allow inspection of e-records), and 276 (attempt to thwart recovery by transfer or alienation of property) of the Act will not be compounded.

Prosecution instituted under Indian Penal Code cannot be compounded. However, section 321 of Criminal Procedure Code, 1973, provides for withdrawal of such prosecution. In case the prosecution complaint filed under the provisions of both Income-tax Act, 1961 and the IPC are based on the same facts and the complaint under the Income-tax Act, 1961 is compounded, then the process of withdrawal of the complaint under the IPC may be initiated by the Competent Authority.

Notwithstanding anything contained in these Guidelines, the Finance Minister may relax restrictions above for compounding of an offence in a deserving case, on consideration of a report from the Board on the petition of an applicant.

On the issue of relaxation of restrictions, it would be worthwhile to see the judgment of the Madras High Court in *GOI and Anr vs. R. Inbavalli 249 Taxman 476 (Mad)*. The facts in that case were as follows:

A survey under s. 133A of the IT Act 1962, (in short, 'the IT Act') was conducted at the business premises of the assessee mainly because of non-filing of the returns. Admittedly, the assessee had not filed IT returns in time for three assessment year i.e., 1996-97, 1997-98 and 1998-99.

The Revenue, initiated prosecution proceedings, for all the three assessment years against the assessee, before the Chief Metropolitan Magistrate (E.O.), Chennai. After completion of trial, by order dt. 1st Nov., 2010, the Metropolitan Magistrate Court convicted and sentenced the assessee, under s. 276CC of the IT Act, to undergo six months rigorous imprisonment and imposed a fine of ₹ 10,000 for each of the three years. The assessee preferred appeals. The Principal Sessions Court, Chennai suspended the sentence of imprisonment, by an order dt. 30th Nov., 2010. However, the said appeals are still pending adjudication at the time of this judgment.

The assessee was 71 years old. Given her wherewithal and debilitating physical health, she moved the Revenue for compounding the offence under s. 276CC of the IT Act, by following the procedure for compounding the offence. The necessary petition to that effect was filed by the assessee on 24th March, 2015. However, the Jt. CIT, Government of India, Ministry of Finance, Department of Revenue (CBDT), on behalf of the Revenue rejected the assessee's request for compounding the offence as per parameters of para 7.2 of the guidelines dt. 16th May, 2008, issued by the Department, in respect of compounding of offences.

Challenging the said order dt. 3rd May, 2016, the assessee filed Writ Petition No. 24588 of

2016 before the Hon'ble Court. The learned Judge after hearing the writ petition, passed a detailed order, holding whether conviction by the Criminal Court should be the only reason for rejecting the petitioner's application for compounding the offence. The Hon'ble Judge went on to say that Cl 4.4 of the Guidelines for Compounding of Offences lists cases not to be compounded. It commences that notwithstanding anything contained in the guidelines, the category of cases mentioned in cls. (a) to (g) should normally not be compounded. Thus, the guidelines do not specifically place an embargo on the competent authority to consider the application for compounding merely on the ground when the assessee has been convicted by a Court of law. Therefore, the competent authority was entitled to examine the merits of each matter and to take a decision as to whether the facts make out a case for compounding even in cases where there is a conviction by a Court of law. The guidelines did not place any fetters on the power of the competent authority to examine cases for compounding.

This sentence of the Trial Court stood suspended in an appeal filed by the assessee which was still pending adjudication. The learned Judge, discussed this issue in detail, and after quoting at least two earlier instances, which were similarly circumstanced, ultimately, concluded that the power of compounding is exercisable even when criminal appeal against conviction was pending.

Held

"This is a case, where, the Revenue seeks to assail the directions issued by the learned Single Judge to the concerned statutory authority to exercise his powers of compounding the offence, in a case of an assessee, who is suffering from dementia and other physical ailments, is a widow, and has otherwise liquidated the demand raised against her, in its entirety. What surprises us is the vigour with which the Revenue is contesting this matter whereas, in at least two other instances, such power has been exercised by the Revenue, even when appeal against conviction was pending adjudication . . . . .

Given the overall factual matrix, we find that there is considerable force in the submissions made by the learned counsel appearing for the assessee that the direction issued by the learned Judge, is a well considered one, as the learned Judge took into account not only the circumstances of the assessee but also relied upon precedents of similar nature. Therefore, the mere pendency of the appeal against the conviction, in our view, could no longer be a reason for refusing the consideration for compounding of offence within the meaning of cl. 4.4(f) of the guidelines dt. 16th May, 2008.

Likewise, the reasoning given by the CBDT *via* its note dt. 30th March, 2016, which has subsequently been approved by the concerned Secretary to the Government of India as well as by the Hon'ble Finance Minister, in our view, in the present circumstances, cannot stand in the way of the Revenue re-visiting the issue of compounding the assessee's offence, as accordingly, has been directed by the learned Judge, *via* the judgment impugned".

Meaning of terms"occasion" and "first offence"

"Occasion"

If in one instance the assessee files multiple applications for one or more than one Assessment Year (AYs), all of these applications shall be treated as one "occasion".

"First offence" means, offence(s) under any of the Direct Tax Laws:

(a) Offences committed prior to any of the following-

i. The date of issue of any letter/notice in relation to the prosecution, or

ii Any intimation relating to filing of prosecution complaint sent by the Department to the person concerned, or

iii. Launching of any prosecution,

whichever is earlier.

Or

(b) Offence(s) not detected by the department but voluntarily disclosed by a person prior to the filing of application for compounding of offence(s) in the case under any Direct Tax Acts for one assessment year or more.

For this purpose, the offence is relevant if it is committed by the same person/entity. Further, the first offence is to be determined separately with reference to each section of the Act under which it is committed.

Relaxation of time

The time restrictions imposed in *Eligibility Conditions* of these guidelines for compounding of an offence in a deserving case may be relaxed, where application is filed beyond 12 months but before completion of 24 months from the end of month in which complaint was filed, by the Committee defined in Para 10 of these Guidelines, provided that such delay should be attributable to reasons beyond the applicant's control. However, a plea of pendency of appeal at any stage or before any authority cannot be treated as a reason beyond the applicant's control, because furnishing an undertaking to withdraw the appeal(s) having bearing on the offence is a prerequisite as per clause 7(v) above.

9.2 However, in all such cases where relaxation has been provided in this Para, the compounding charges would be 1.25 times the normal compounding charges as applicable to the offence on the date of filing of the original compounding application.

Authority Competent to Compound an Offence

1. The Pr. CCIT/CCIT/Pr. DGIT/DGIT having jurisdiction over the person, seeking Compounding of an Offence, is the Competent Authority for compounding of all Category 'A' and Category 'B' offences. However, an order in case of an application for compounding of an offence, involving compounding charges (as explained below) in excess of ₹ 10,00,000/- (Rupees ten lakh) shall be passed by the Pr. CCIT/CCIT/Pr.

DG1T/DGIT concerned only on the prior approval of a Committee comprising of three officers of the Region concerned, namely Pr. CCIT/CCIT/Pr. DGIT/DGIT having jurisdiction over the case and two other Officers of the rank of Pr. CCIT/CCIT/Pr. DGIT/DGIT constituted by the Pr. CCIT of the Region. In case such officers are not available within the Region, a suitable Officer of the rank of CCIT/DGIT from any nearby Region may be co-opted as Member by the Pr. CCU.

2. If a deductor has committed an offence u/s 276B/276BB of the Act for non-payment of TDS in respect of both resident and non-resident deductees and therefore the jurisdiction over such deductor lies with more than one Pr. CCIT/CCIT/Pr. DGIT/DGIT, then the Pr. CCIT/CCIT/Pr. DGIT/DGIT in whose jurisdiction compounding application has been filed will be the Competent Authority. However, he shall compound the offence only on the approval of Committee comprising of three Officers of the rank of CCIT from among the CCIT/DGIT/Pr. CCIT/Pr. DGIT having jurisdiction over the applicant, constituted by the Pr. CCIT of the region.

3. In case an applicant having more than one TAN lying in the jurisdiction of two or more Pr. CCIT/CCIT/Pr. DGIT/DGIT wants to file compounding application in respect of offences committed u/s. 276B/276BB in respect of two or more TANs falling in the jurisdiction of two or more Pr. CCIT/CCIT/Pr. DGIT/DGIT, the application shall be filed before the Pr. CCIT/CCIT having jurisdiction over the TAN of the region in which PAN jurisdiction of the applicant is falling. Such Pr. CCIT/CCIT having jurisdiction over such TAN will be treated as Competent Authority. For such cases the Committee will be constituted by the Pr. CCIT in whose region jurisdiction over PAN lies and will also be comprising of three members including Competent Authority. The report from all jurisdictional authorities concerned from different offender TANs shall be called by the Competent Authority.

4. The Competent Authority will act as the Member Secretary and convene the meeting, as well as maintain the records.

Compounding Procedure

i. On receipt of the application for compounding, the report on the same shall be obtained from the Assessing Officer/Assistant or Deputy Director concerned who shall submit it promptly along with duly filled in check-list as in Annexure-2, to the authority competent to compound, through proper channel.

ii. The Competent Authority shall duly consider and dispose of every application for compounding through a speaking order in the suggested format as in Annexure-3 either by rejecting or by intimating the compounding charges payable. Such order may be passed within six months from the end of the month of its receipt (excluding the time for payment of the compounding charges) as far as possible.

iii. Where compounding application is found to be acceptable, the Competent Authority shall intimate the amount of compounding charges to the applicant, requiring him to pay the same within one month from the end of the month of receipt of such intimation. On written request of applicant for further extension of time under exceptional circumstances, the Pr. CCIT/CCIT/Pr. DGIT/DGIT may extend this period by three months. Extension beyond three months shall not be permissible except with the previous approval in writing of the Committee defined in Para 10 of these guidelines. However, no extension beyond twelve months from the end of month in which intimation of compounding charges was given to the applicant shall be given except with the previous approval of Member (Inv.), CBDT on a proposal of the competent authority concerned.

iv. Whenever the compounding charges are paid beyond one month from the end of month in which it was intimated to the applicant, if extended by the Competent Authority, he shall have to pay additional compounding charge at the rate of 2% per month or part of the month on the unpaid amount of compounding charges up to three months and 3% if the Competent Authority has extended the payment period beyond three months.

v. The Competent Authority shall pass the compounding order within one month from the end of the month of payment of compounding charges. Where compounding charge is not deposited within the time allowed, the compounding application shall be rejected after giving the applicant an opportunity of being heard only in relation to compounding charges payable.

vi. The order of acceptance/rejection of application of compounding shall be brought to the notice of the Court, where the prosecution complaint was filed/or the complaint is

pending, immediately through prosecution counsel in all cases where prosecution proceedings have been instituted.

vii. Normally any offence in respect of which the compounding application has been rejected is not considered for compounding. However, if any compounding application has been rejected solely on account of late payment of compounding charges or shortfall in payment of compounding charges and if such shortfall is for some *bona fide* mistakes or on some other technical grounds, such compounding order can be rectified at the written request of applicant provided the payment of compounding charges was made before rejection or time allowed by the Competent Authority whichever is applicable. A decision to rectify such order can be taken by the Committee after considering various facts and circumstances of the case. However, the applicant will be required to pay interest as above, on the unpaid compounding charges from the due date of payment as per original intimation of compounding along with the shortfall in compounding charges.

viii. The timelines mentioned for processing the compounding applications prescribed in these guidelines are administrative and indicative for work management and do not prescribe a limitation period for disposal of the compounding application.

ix. Wherever the facility to perform any function relating to processing of any compounding application is available on ITBA, such function should be performed on ITBA.

Compounding Charges

The compounding charges shall include compounding fee, prosecution establishment expenses and litigation expenses, including Counsel's fee.

1. The compounding fee shall be computed as mentioned below of these guidelines for various offences. Prosecution establishment expenses will be charged at the rate 10% of the compounding fees subject to a minimum of ₹ 25,000/- in addition to litigation expenses including Counsel's fees paid/payable by the Department in connection with offence(s) compounded by a single order. In a case where the litigation expenses are not readily ascertainable, the competent authority may arrive at litigation expenses, *inter alia*, on the basis of rates prescribed by the Government and on the basis of existing records with the Government and the counsels.

2. In all cases where relaxation of time as provided in Para 9 of the Guidelines is allowed, the compounding charges shall be 1.25 times of the normal compounding charges.

3. Wherever, extension of time allowed to make compounding charges is allowed beyond one month from the end of intimation of compounding charges in accordance with Compounding guidelines, the applicant shall have to pay additional compounding charges @ 2% per month or part of month on the unpaid amount of the compounding charges up to three months and 3% for period beyond three months.

4. The compounding charges are payable in addition to the tax, interest and penalty, if any payable or imposable as per provisions of the Act. Such tax, interest and penalty as mentioned in Para 7(iii) are to be paid before filing the compounding application as required in these Guidelines.

Fees for Compounding

For the purpose of computation of the compounding fee, the word "tax" means- tax including surcharge and any cess by whatever name called, as applicable.

The fees for compounding of offences shall be as follows:

Section 276B—Failure to pay the tax deducted at source

Section 276BB—Failure to pay the tax collected at source

1. In respect of application for compounding of Offences, the compounding fee shall be calculated as under-

(i) 2% per month or part of a month of the amount of tax in default disclosed in the compounding application in those cases, where the assessee has suo-motu filed compounding application, before any offence u/s. 276B/276BB of the Act for any period is brought to his knowledge by the Department. Such type of offence would also constitute an "occasion" for the purpose of Para 8.1. Such offences which are detected in the course of any search and seizure or survey operation will not fall in this category.

However, the compounding fee under this clause shall not-exceed the TDS amount and interest u/s 201(1A) taken together, if the default in deposit of TDS is less than ₹ 1,00,000/- (Rupees One lakh).

(ii) 3% per month or part of a month of the amount of tax in default disclosed in the compounding application for first occasion in cases not covered in Para 13.1.1(i) above.

(iii) In respect of any application for subsequent occasion, the applicable rate for compounding of such an offence will be 5% per month or part of a month of the amount of tax in default.

2 The period of default for calculating compounding fee in this category shall be calculated from the date of deduction to the date of deposit of tax deducted at source as is done in respect of calculating interest under section 201(1A) of the Act in respect of compounding application filed.

Section 276C (1) — Wilful attempt to evade tax, etc.

(a) In the cases involving tax sought to be evaded (where evasion of interest and penalty may be consequential).

i. Where such tax sought to be evaded exceeds ₹ 25 lakh, 150% of the tax sought to be evaded.

ii. In any other case, 125% of the tax sought to be evaded.

(b) In cases involving attempt to evade only the penalty, 100% of penalty sought to be evaded. For example, penalties which are not directly related to tax evasion, such as penalty u/s. 271DA etc.

Section 276C(2)-Wilful attempt to evade payment of any tax, interest and penalty

3% per month or part of the month of the amount of tax, interest and penalty, the payment of which was sought to be evaded, for the period of default. The period of default for calculating the compounding fees shall be as under:

i) Where tax, interest or penalty as per notice of demand under section 156 of the Act is not paid, from the date immediately following the due date of payment till the date of actual payment.

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ii) Where the self-assessment tax was not paid as specified in section 140A of the Act, from the due date of filing of return of income u/s. 139(1) of the Act to the date of actual payment.

For computing the period of default, any period of stay of demand granted by any Income Tax Authority, the Appellate Tribunal or Court shall be excluded.

Section 276CC- Failure to furnish returns of income

1. (a) In case of default in furnishing the return of income on or before due date u/s. 139(1) of the Act, the default period will be computed from the due date u/s 139(I) to the date of actual filing of return or completion of assessment, whichever is earlier and compounding fees will be:

i Where tax on returned income as reduced by tax deducted at source and advance tax, if any exceeds ₹ 25 lakh, ₹ 4000/- per day.

ii. In any other case, ₹ 2000/- per day.

However, in cases where the difference between the aggregate of taxes paid/payable on the returned income and the aggregate of taxes already paid under any provision of the Act as enumerated in section 140A(1) of the Act, is less than ₹ 1,00,000/-, the compounding fees will be restricted to that said difference amount subject to a minimum of ₹ 10,000/-.

(b) In case of offence of non-compliance of notice u/s. 142(1)(i) of the Act, the compounding fees shall be charged at the rate of ₹ 4000/- per day where the tax on returned income as reduced by tax deducted at source and advance tax, if any exceeds ₹ 25 lakh and ₹ 2,000/- per day in other cases from the due date u/s. 139(1) to the date specified in the notice u/s. 142(1), and at the rate of ₹ 5000/- per day where tax on returned income as reduced by tax deducted at source and advance tax, if any exceeds ₹ 25 lakh and ₹ 3000/- per day in other cases, for the period between date specified in notice u/s. 142(1) to the date of filing of return of income or completion of assessment, whichever is earlier.

(c) In case of offence of non-compliance of notice u/s 148 of the Act, the compounding fees shall be charged at the rate of ₹ 5000/- per day where tax on returned income as reduced by tax deducted at source and advance tax, if any exceeds ₹ 25 lakhs and. ₹ 3000/- per day in other cases, from the date specified in such notice till filing of return or assessment whichever is earlier. In case, there was also default of not filing return of income within due date prescribed u/s. 139(1), then for the period between due date u/s. 139(1) to the date specified in the notice u/s. 148, compounding fees at the rate of ₹ 4000/- per day where the tax on returned income as reduced by tax deducted at source and advance tax, if any exceeds ₹ 25 lakh and ₹ 2,000/- per day in other cases from the due date u/s. 139(1) to the date specified in the notice u/s. 148 will also be Charged.

(d) In case of offence of non-compliance of notice us 153A/153C of the Act, the compounding fees shall be charged at the rate of ₹ 5,000/- per day where tax on returned income as reduced by tax deducted at source and advance tax, if any exceeds ₹ 25 lakh and ₹ 3,000/- per day in other cases, from the date specified in such notice till filing of return or assessment whichever is earlier. In case, there was also default of not filing return of income within due date prescribed u/s. 139(1), then for the period between due date u/s. 139(1) to the date specified in the notice u/s. 153A/153C, compounding fees at the rate of ₹ 4000/- per day where the tax on returned

income as reduced by tax deducted at source and advance tax, if any exceeds ₹ 25 lakh and ₹ 2,000/- per day in other cases from the due date u/s. 139(1) to the date specified in the notice u/s. 153A/153C will also be charged.

(e) In case where return of income filed is not only late but self Assessment Tax is not paid:

i. These constitute two separate offences which are to be handled separately under sections 276CC and 276C(2), and

ii. Action u/s. 276C(2) is to be undertaken only after the issue of demand notice u/s. 143(1)/143(3) etc.

2. In cases where no return of income was filed, the compounding fee is computed up to the date of completion of assessments. In such cases, for computing the slab prescribed on assessed income (as reduced by tax deducted at source and advance tax) will be adopted.

3 In case the income determined u/s 143(1) is more than the returned income, tax on the same will be applied for computing tax slab prescribed in Para 1 above.

4 Tax on returned income in the context of Para 13.4 means tax leviable (including surcharge and cess) on the returned income as reduced by tax deducted at source and advance tax.

Section 276CCC- Failure to furnish return of income as required under section 158BC

The fee for this offence shall be calculated in the same manner as for offences u/s. 276CC was prescribed in the Compounding Guidelines dated 16-5-2008.

Section 276DD-Failure to comply with the provisions of Section 269SS (prior to 1-4-89)

A sum equal to 20% of the amount of any loan or deposit accepted in contravention of the provisions of Section 269SS.

Section 276E- Failure to comply with the provisions of Section 269T (prior to 1-4-89)

A sum equal to 20% of the amount of deposit repaid in contravention of the provisions of Section 269T.

Section 277- False statement in verification etc.

Section 278 – Abetment of false return etc.

1 Where same set of facts and circumstances attract prosecution u/s. 277 as well as section 278, the compounding fee shall be charged for offences under these sections by treating them as one offence.

2 Where same set of facts and circumstances attract prosecution u/s. 277 in addition to another offence in connection with which prosecution u/s. 277 was attracted in case of the same person, no separate compounding fee shall be charged for offence u/s. 277. For example, where a person is charged with an offence u/s 276C(1) as also u/s. 277, in respect of the same facts and circumstances, the compounding fees shall be charged only for the offence u/s. 276C(l) at the rates prescribed for the said section.

3 Where same set of facts and circumstances attract prosecution under any offence as well as u/s. 277 and/or 278, normally, a compounding fee at the rate of 10% of the 'compounding fee for the main offence' shall be charged from each of the person charged under sections 278B or 278C. However, the authority competent to compound, after considering the extent of involvement of any or all co-accused or abettor, may enhance or reduce or waive the amount of compounding fee to be charged from any or all the co-accused or abettor. The compounding fees chargeable from the co-accused or abettor shall be in addition to the compounding fees which may be chargeable from the main accused.

It is further clarified that:

(a) In the case of prosecution proceedings under sections 278B or 278C of the Act unless the main accused i.e. Company/ HUF comes for compounding, the offence of the co-accused cannot be compounded separately.

(b) If one or more co-accused has not filed the compounding application or is not agreeable to the payment of compounding charges as the case may be, then unless the main accused, on an undertaking obtained and furnished from such co-accused, unequivocally undertakes to pay the compounding charges on his own behalf and on behalf of all such co-accused as well, the compounding of the Offence of the main accused cannot be accepted.

4 In case where no offence under any other sections of the Act is involved except u/s. 277 or 278 of the Act, the compounding fee shall be decided by the Committee as per Para 10 having regard to the amount of tax which would have been evaded as a result of such offence u/s. 277 or 278 subject to a minimum compounding fee of ₹ 1,00,000/-(Rupees One Lakh) which may be increased based on the assessment of loss caused to the revenue directly or indirectly for each of such offence on completion of assessment/ reassessment.

Offences, other than those described above: for which no compounding fee has been prescribed, the authority competent to compound may determine the amount of compounding fee having regard to the nature and magnitude of the offence, loss of revenue directly or indirectly attributable to such offence, subject to levy of a minimum compounding fee of ₹ 1,00,000/-(Rupees One lakh) for each such offence.

The prescribed compounding charges shall be applicable while compounding any offence. However, in extreme and exceptional cases of genuine financial hardship, the compounding charges may be suitably reduced with the approval of the Finance Minister.

In case any penalty proceedings which have bearing with the offence sought to be compounded are pending at the time of filing of the compounding application, efforts should be made to conclude such penalty proceedings expeditiously and recover demand before concluding the compounding proceedings.

Applicability of these guidelines to offences under other Direct Tax Laws

These guidelines shall apply *mutatis mutandis* to offences under other Direct Tax Laws and the compounding fee for offences under the other Direct Tax Laws will be same as prescribed supra for the corresponding provisions of offences under the Income-tax Act, 1961.

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All misery comes from fear, from unsatisfied desire.

— *Swami Vivekananda*

Keshav B. Bhujle, *Advocate*

DIRECT TAXES

Supreme Court

1. Appeal to High Court S. 260A – High Court dismissing appeal after hearing parties but without framing any substantial question of law or discussing or recording reasons why grounds of appeal not acceptable – Order unsustainable – Matter remanded

CIT vs. Rashtradoot (HUF); (2019) 412 ITR 17 (SC); (2019) 104 taxmann.com 16 (SC): Dated 27/02/2019.

Department had filed appeal before the High Court u/s. 260A of the Income-tax Act 1961 against the order of the Tribunal. The High Court dismissed the appeal. On further appeal by the Department the Supreme Court remanded the matter back to the High Court and held as under:

"i) Every order or judgment which decides a *lis* between parties must contain the reasons or grounds for arriving at a particular conclusion. Indeed, what is decisive for deciding the case is not the conclusion alone but the reasons or grounds assigned in support of such conclusion, which results in reaching such conclusion. In order to decide whether or not an order is legally sustainable, the appellate court is entitled to know what impelled the court below to pass such order in favour of one party and against the aggrieved party.

ii) The High Court had neither discussed nor assigned any reason in support of its conclusion for the dismissal of the appeal. The observation in paragraph 13 "In view of the above" did not lead anywhere because in paragraph 1 to 12 no reasons were mentioned except the facts and the submissions. Moreover, the High Court did not dismiss the appeal *in limine* but after hearing both the parties. The High Court while deciding the appeal had heard counsel for the parties, yet did not frame any substantial question of law arising in the case.

iii) The High Court should have framed the question or questions and answered them one way or the other assigning reasons exercising powers under sub-sections (4) and (5) of section 260A of the Act. In the absence of any discussion or reasoning why the order of the Tribunal did not suffer from any illegality and why the grounds of the Department were not acceptable and why the appeal did not involve any substantial

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question or questions of law or though framed could not be answered in the Department's favour, the order suffered from jurisdictional errors and was legally unsustainable for want of compliance with the requirements of sub-section (4) and (5) of section 260A of the Act.

iv) Decision of the Jaipur Bench of the Rajasthan High Court is set aside and appeal remanded to the High Court for decision afresh on the merits in accordance with law.

v) The High Court has jurisdiction to dismiss the appeal filed u/s. 260A of the Act on the ground that it does not involve any substantial question of law. Such dismissal is considered as dismissal of the appeal *in limine*, i.e., dismissal without issuing any notice of appeal to the respondent and without hearing the respondent. The High Court has also the jurisdiction to dismiss the appeal by answering the question or questions framed on the merits or by dismissing the appeal on the ground that the question or questions though framed does not or do not arise in the appeal.

vi) Though the High Court may not have framed any particular question at the time of admitting the appeal along with other question, it has the jurisdiction to frame additional questions at a later stage before final hearing of the appeal assigning reasons as provided in the proviso to section 260A(4) and (5) of the Act.

vii) Lastly, the High Court has jurisdiction to allow the appeal but this the High Court can do only after framing the substantial question or questions of law and hearing the respondent and answering the question or questions framed in the appellants favour."

2. Business expenditure – Disallowance – Ss. 37 and 40A(2) – Appropriation of profits – Excessive and unreasonable payments – Co-operative Society manufacturing sugar – Purchase sugarcane from member growers and non-members – Difference between price fixed by Central Government at beginning of season and that fixed by State Government taking into account probable profits – Has element of profit and amounts to sharing of profits – Entire difference cannot be treated as income – AO to decide extent of profit in payments and make disallowance

CIT vs. Tasgaon Taluka Sahakari Sakhar Karkhana Ltd.; (2019) 412 ITR 420 (SC); (2019) 103 taxmann.com 57 (SC): Dated 05/03/2019.

The assessees were co-operative societies engaged in the business of production of sugar and sale thereof. They purchased sugarcane from growers who were their members, as well as from non-members. For the purchase of sugarcane, the assessee paid to members and non-members a final price which was in excess of that payable under clause 3 and 5A of the Sugarcane (Control) Order, 1966. The Assessing Officer took the view that the difference between the price paid in terms of clause 3 of the Order, determined by the Central Government, and the price determined by the State Government under clause 5A of the Order (and consequently payed by the assessee to the cane growers) was a distribution of profits and not deductible as expenditure. Alternatively, the Assessing Officer also held that the excess cane price paid to the cane growers over the statutory minimum price was disallowable u/s. 40A(2) of the Income-tax Act 1961 as excessive and unreasonable.

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The Commissioner (Appeals) held that the price actually paid for the procurement of the sugarcane was to be allowed as business expenditure and could not be disallowed u/s. 40A(2) of the Act despite the fact that profits was one of the components in the price. The Tribunal confirmed the order of the Commissioner (Appeals). The Bombay High Court followed its decision in the case of *CIT vs. Manjara Shetkari Sahakari Sakhar Karkhana Ltd.; (2008) 301 ITR 191 (Bom)* and dismissed the appeal.

On appeal by the Revenue, the Supreme Court and held as under:

"i) While the statutory minimum price under clause 3 of the Order by the Central Government was determined at the beginning of the season, at the time when the additional purchase price was determined under clause 5A, the accounts were settled and the particulars as to the expenditure and profits, etc., were provided by the concerned co-operative society to the State Government. Therefore, the difference between the statutory minimum price determined under clause 3 and the State advised price or additional purchase price determined under clause 5A had an element of profit. The additional purchase price comprised not only the cost of cultivation, but profit as well. The price being paid on recovery of cane and profits made from sale of sugar thus was not the minimum but the optimum price which was paid to a cane grower. The additional cane price or additional State fixed price was paid as matter of incentive. The entire price structure of cane was founded on two basic factors, one, the recovery percentage and other the incentive for sharing profits arrived at by working out receipts minus expenditure. Therefore, to the extent of the component of profit which was a part of the final determination of the State advised price or the additional purchase price fixed under clause 5A there would certainly be an appropriation of profits.

ii) However, the entire difference between the statutory minimum price and the State advised price *per se* could not be said to be an appropriation of profit. For that an exercise had to be carried out by the Assessing Officer by calling upon the assessee to produce the statement of accounts, balance-sheet and the material supplied to the State Government for the purpose of fixing the additional purchase price under clause 5A of the Order. The Assessing Officer would have to take into account the manner in which the business worked, the modalities and the manner in which the additional purchase price was decided and to determine what amount would form part of the profit and after undertaking such an exercise whatever was the profit component was to be considered as distribution of profits and the balance as deductible expenditure u/s. 37 of the Act.

iii) Where the purchase of cane by co-operative sugar manufacturer was from non-members, the Assessing Officer on the material on record had to determine whether or not the amount paid was excessive or unreasonable applying section 40A(2) of the Act.

iv) The impugned orders passed by the High Court, Income-tax Appellate Tribunal, Commissioner of Income-tax (Appeals) as well as the Assessing Officers are hereby quashed and set aside and the matters are remitted to the respective Assessing Officers to undertake the exercise as stated hereinabove."

3. Hotel Business – Deduction u/s. 80HH – Computation – Deduction to

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be out of "profits and gains" without deducting therefrom depreciation and investment allowance – Not out of "income" as computed under Act – Section 80AB made applicable from AY 1981-82 and not before – Provisions relating to deductions in chapter VIA to be construed independent of chapter IV: (AYs. 1979-80 and 1980-81)

Vijay Industries vs. CIT; (2019) 412 ITR1 (SC); (2019) 103 taxmann.com 454 (SC): Dated 01/03/2019.

The relevant period is the AYs. 1979-80 and 1980-81. The question before the Supreme Court was, while computing the deduction u/s. 80HH whether it is to be available out of "income" as computed under the Act or out of "profits and gains", without deducting therefrom "depreciation" and "investment allowance".

The Supreme Court held as under:

"i) The scheme of the Income-tax Act 1961 draws a distinction between the concept of "income" on the one hand and "profits and gains" on the other hand. Chapter VIA is a standalone chapter *de hors* Chapter IV. Therefore, provisions relating to various kinds of deductions mentioned therein have to be construed independent of Chapter IV of the Act. Under Chapter VIA certain deductions are given by way of incentives. Assessee can earn these deductions on fulfilling the eligiblilty conditions contained therein, even when they are not in the nature of any expenditure incurred by the assessee.

ii) Section 80A of the Act provides that in computing the total income of the assessee, there shall be allowed from the gross total income, in accordance with the subject of the provisions of this Chapter, the deductions specified in sections 80C to 80U. Sections 80C to 80U contain different subject matters and also specify the particular percentage deductions for a particular period. Significantly, section 80A itself uses the expression "from his gross total income" as it states that the deduction is to be allowed to an assessee "from his gross total income". Moreover, different provisions from 80C to 80U, while mentioning the percentage at which and the period for which a particular deduction is allowable, also specifies how such a deduction is to be worked out, namely, the specific percentage of deduction of which component. These sections provide different parameters.

iii) In so far as section 80HH which grants deduction from profits and gains to an undertaking engaged in manufacturing or in the business of hotel is concerned, it specifically mentions the deduction at 20 per cent of "profits and gains". Thus, so far as deduction admissible under this provision is concerned it is from the profits and gains. Reading section 80HH along with section 80A would clearly show that such a deduction has to be from the gross profits and gains, i.e., before computing the income as specified in sections 30 to 43D of the Act.

iv) The deduction u/s. 80HH is to be computed on the "profits and gains", without deducting therefrom "depreciation" and "investment allowance".

v) Section 80AB, which was inserted by the Finance (No. 2) Act, 1980 w.e.f. 1/4/1981, is not clarificatory in nature. It is a provision made with prospective effect as the amendment Act says so. Therefore, it cannot apply to the AYs. 1979-80 and 1980-81. The change in the legal position is brought about only with the insertion of section 80AB and made applicable from AY 1981-82."

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4. Industrial undertaking in special category States – Deduction u/s. 80-IC – Unit availing of deduction of 100% for first five years and thereafter at 25% for next five years – Carrying out substantial expansion within 10 year period – Year of substantial expansion would be initial year for start of 100% deduction – But total period of deduction not to exceed 10 years

Principal CIT vs. Aarham Softronics; (2019) 412 ITR 62 (SC); (2019) 102 taxmann.com 4 (SC): Dated 20/02/2019.

The following question was decided by the Himachal Pradesh High Court.

"Whether an assessee who sets up a new industry of a kind mentioned in sub-section (2) of section 80-IC of the Income-tax Act 1961 and starts availing exemption of 100% tax under sub-section (3) of section 80-IC (which is admissible for 5 years) can start claiming the exemption at the same rate of 100% beyond the period of 5 years on the ground that the assessee has now carried out substantial expansion in its manufacturing unit?"

The High Court answered the question in the affirmative and held that when the assessee started availing exemption of 100% tax on the setting up of a new industry and carried out substantial expansion of its industry, from that year the assessee become entitled to claim exemption at 100% again.

On appeal by the Revenue, the Supreme Court upheld the decision of the High Court and held as under:

"i) According to the definition of "initial assessment year" contained in section 80-IC(8)(c), there can be an "initial assessment year", relevant to a previous year, in any of the following contingencies: (i) the previous year in which the undertaking or the enterprise begins to manufacture or produce article or things, or (ii) commences operation, or (iii) completes substantial expansion. The benefit of section 80-IC is, thus, admissible not only when an undertaking or enterprise sets up a new unit and starts manufacturing or producing articles or things. The advantage of this provision also accrues to existing units, if they carry out "substantial expansion" of their units by investing the required capital, in the previous year relevant to the assessment year. There can thus be another "initial assessment year" on the fulfilment of the condition mentioned in the definition, namely, completion of substantial expansion of the existing unit. This new event entitles that unit to start getting deduction at 100% of the profits and gains.

ii) At the same time, a new period of 10 years does not start. This is because the total period for which deduction can be allowed is capped at ten years, in as much as section 80-IC(6) in no uncertain terms stipulates that deduction shall not be allowed for a period exceeding ten assessment years. In fact, this period of ten years relates not only in respect of deduction u/s. 80-IC but under the second proviso to section 80-IB(4) as well. This would mean that the total deduction u/s. 80-IB as well as section 80-IC is for a period of ten years. The cap u/s. 80-IC(6) is on the ten assessment years. It is not on quantum.

iii) The purpose for which section 80-IC was enacted was to encourage undertakings or enterprises to establish and set up such units in specified States to make them industrially advanced States as

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well. Keeping in mind these objectives for which section 80-IC was enacted, the irresistible conclusion would be to grant 100% deduction of the profits and gains even from the year when there is substantial expansion in the existing unit."

5. SPECIAL LEAVE PETITIONS

5.1 Cash credit – Share application money

i) Supreme Court granted special leave to the Department to appeal against judgment of the Delhi High Court whereby the High Court upheld the order of the Tribunal affirming the order of the Commissioner (Appeals) directing the cancellation of an addition of ₹ 25,00,96,500 u/s. 68 holding that the materials clearly pointed to the share applicants' possessing substantial means to invest in the assessee.

Principal CIT vs. Goodview Trading Pvt. Ltd.; (2019) 411 ITR 2 (st): Dated 30/11/2018.

ii) Supreme Court granted special leave to the Department to appeal against judgment of the Delhi High Court whereby the High Court upheld the order of the Tribunal affirming the order of the Commissioner (Appeals) deleting the addition u/s. 68 of the Act and holding that unless the Assessing Officer had brought on record some material to show that confirmation and other evidence placed by the assessee was not genuine, he could not have simply discarded the documents produced by the assessee.

Principal CIT vs. A. R. Leasing Pvt. Ltd.; (2019) 411 ITR 2 (st): Dated 07/12/2018.

5.2 Charitable purpose – Society constituted by Government for training officials in criminal justice system

Supreme Court dismissed the Department's special leave petition against the judgment of the Punjab and Haryana High Court whereby the High Court held that the assessee was a society constituted by the Government for training officials involved in the criminal justice system with no profit motive at all and all funds generated or received in aid being utilized for this public purpose, it could not be said that there was any commercial motive and the direction of the Tribunal to grant registration to the assessee u/s. 12A was not erroneous.

CIT (Exemption) vs. Institute of Correctional Administration; (2019) 411 ITR 3 (st): Dated 14/01/2019.

5.3 Depreciation – Carry forward and set off after eight years – Effect of amendment

Supreme Court dismissed the Department's special leave petition against the judgment of the Bombay High Court whereby the High Court following 394 ITR 73 held in favour of the assessee on the question whether the Tribunal was right in holding that the unabsorbed depreciation pertaining to AY 1997-98 to AY 2001-02 could be carried forward and adjusted after the lapse of eight assessment years in terms of section 32(2) as amended by the Finance Act, 2001.

CIT vs. Bajaj Hindustan Ltd.; (2019) 411 ITR 3 (st): Dated 03/01/2019.

5.4 Income or capital – Grant-in-aid received from State Government, hundred percent shareholder in assessee

Supreme Court dismissed the Department's special leave petition against the judgment of the Calcutta High Court whereby the High Court confirmed the finding of the Tribunal that the amount of ₹ 4,60,00,000 received by the assessee from the State Government in the form of grant-in-aid utilized for clearing salary dues, provident fund dues and food relief was capital.

Principal CIT vs. State Fisheries Development Corporation Ltd.; (2019) 411 ITR 4 (st): Dated 07/01/2019.

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5.5 Royalty – Payment for data transmission services whether royalty

Supreme Court granted special leave to the Department to appeal against the judgment of the Delhi High Court whereby the High Court dismissed the Department's appeal from the order of the Tribunal, following 382 ITR 114, and holding that payment for data transmission services did not amount to royalty in terms of article 12 of the DTAA between India and Thailand.

CIT(IT) vs. Thaicom Public Co. Ltd.; (2019) 411 ITR 6 (st): Dated 4/1/2019.

5.6 Search and seizure – Block assessment – Income from undisclosed sources – Disallowance for cash payments whether applicable – On-money – Distribution of profits amongst partners

Supreme Court dismissed the Department's special leave petition against the judgment of the Gujarat High Court whereby the High Court dismissed the Department's appeal on the question whether the Appellate Tribunal was correct in deleting the disallowance made u/s. 40A(3) of the Act stating that it is not applicable to block assessments and whether the Appellate Tribunal was correct in deleting the addition on account of on-money on basis of distribution of the profit among partners.

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DIRECT TAXES

High Court

1. Stay of Demand – Appeal pending before CIT(A) – CBDT instruction dt. 29-02-2016 – Circular No. 1914 dt. 02-02-1993 – 20% not mandatory

Shri Dalpatsinh Ukabhai Vasava vs. The PCIT – 2, R/Special Civil Application No. 9825 of 2019, Gujarat High Court, order dt. 24th June, 2019, AY 2016-17.

Assessee, filed his return of income for the Assessment Year 2016-17 on 16th October 2016 declaring the total income of ₹ 9,09,240/-. The case was selected through CASS under the limited scrutiny to verify the following issues: (1) whether the unsecured loans were genuine and from disclosed sources, and (2) whether the investment and income relating to the properties were duly disclosed. During the course of the assessment proceedings it was noticed that Assessee had purchased agricultural land situated at Tavra, Taluka and District Bharuch, for ₹ 3,79,92,500/-. The property was purchased from one Shri Melabhai Naglabhai. Upon verification of the details of the bank account of Shri Melabhai Naglabhai as well as of one M/s Reva Enterprise from whom Assessee claimed to have obtained the unsecured loan and also from one Narendrabhai Parmar from whom he claimed to have obtained the unsecured loan of ₹ 2,50,00,000/-, the transactions were found to be sham and bogus. Ultimately, the Assessing Officer added the amount of ₹ 3,79,92,500/- to the total income of the Assessee under the head 'Income from other sources' in accordance with the provisions of Section 56(2) of the Act. Against the assessment order an appeal was filed before CIT(A). The Assessee also filed an application for stay of demand before the Income tax officer, wherein he contended that the case was one of high pitched assessment and also explained his poor financial condition. It was further submitted that even the deposit of 20% of the total amount was beyond his financial capacity. The officer relying on office memorandum issued by the CBDT *vide* F.No. 404/72/93-ITCC dated 31.7.2017, disposed of the stay application directing to pay 20% of outstanding demand. The Assessee thereafter filed a stay application before the Principal CIT. This was also rejected and assessee was directed to pay 20% by 28th March, 2019. The again requested for instalments to pay 20% of demand which was also rejected. Aggrieved the Assessee filed a writ petition before the High Court. The High Court observed that the issue of granting stay pending appeal is governed

principally by the two circulars issued by the CBDT. The first circular was issued way back on 2nd February, 1993 being Instructions No. 1914. The circular contained guidelines for staying the demand pending appeal, wherein it was stated that the demand would be stayed if there are valid reasons for doing so and mere filing of appeal against the order of assessment would not be sufficient reason to stay the recovery of demand. The Court held that the instructions issued under the office memorandum dated 29th February, 2016 are not in supersession of the Instructions No. 1914 dated 2nd February 1993 but are in partial modification thereof. The Court observed that this circular lays down 15% of the disputed demand to be deposited for stay, by way of a general condition. The circular does not prohibit or envisage that there can be no deviation from this standard formula. In other words, it is inbuilt in the circular itself to either decrease or even increase the percentage of the disputed tax demand to be deposited for an assessee to enjoy stay pending appeal. The circular provides the guidelines to enable the Assessing Officers and Commissioners to exercise such discretionary powers more uniformly. Considering the facts in hand, the Court reduced the requirement of depositing the disputed tax dues to enable the assessee to enjoy stay pending the appeal before the appellate authority to 10%. This was on the basis that assessee had already so far deposited ₹ 5 lakh. The Court further clarified that this would, however, be on a further condition that the Assessee shall offer immovable security for the remaining 10% to the satisfaction of the Assessing authority.

2. Transfer pricing adjustment – Mere exclusion or inclusion of a comparable may not *per se* give rise to any substantial question of law – However ITAT not considering earlier order for same comparable, requires consideration – Matter restored to TPO for fresh consideration

Pyramid IT Consulting (P.) Ltd. vs. Addl. CIT - W.P. (C) NO. 5198 OF 2019, Delhi High Court, order dt. 14th May, 2019, AY 2010-2011.

Assessee, headquartered in the United States of America, was engaged in the business of providing value added IT Solutions and IT staffing services to global companies including growing mid-tier firms. Assessee claimed that it was primarily engaged in the provision of contract software development ('CSD segment') and recruitment/manpower services. However, the present case, concerned the issue of transfer pricing for its staffing segment. For AY 2010 – 2011, the Assessing Officer (AO) referred the case of the assessee to the Transfer Pricing Officer (TPO) for determining the arm's length price ('ALP') of the international transactions undertaken by the assessee. Before the TPO, the assessee had put forth two comparables as regards its staffing segment which was under scrutiny. Both these comparables were rejected by the TPO and instead introduced another comparable i.e., HCCA Business Services Pvt. Ltd. (HCCA) and after determining that the margin of the said comparable was 20.05%, recommended an adjustment of ₹ 1,03,61,078/- on the staffing services segment earnings of the assessee. Aggrieved by the draft assessment order, the assessee went before the Dispute Resolution Panel (DRP) and thereafter before the Income Tax Appellate Tribunal (ITAT) which rejected the Assessee's contention that HCCA was not a comparable as it was functionally different. The assessee then filed Miscellaneous Application (MA) before the ITAT under Section 254 (2) of the Act pointing out that in its order, the ITAT had noted that HCCA owns 'intangibles' and yet it was not excluded as a comparable. The case of the assessee was that a company owning intangibles like HCCA could not be compared with the assessee which admittedly does not own intangibles. The

assessee also pointed out that it had placed before the ITAT the decision of the ITAT itself in *LG Chemical India (P.) Ltd. vs. ACIT* [ITA No. 1819, Delhi 2015, dated 3-5-2016] where the same comparable i.e., HCCA had been excluded since it had a different functional profile from the Assessee. It was pointed out that the said decision was not even discussed by the ITAT in its order dated 11th July, 2018. The said MA was dismissed by the ITAT and therefore the Assessee filed a Writ Petition challenging the said order of the ITAT. Appeal was also filed against main order dt. 11th July, 2018. The High Court heard the writ petition and the appeal together. The High Court observed that while it is correct that the mere exclusion or inclusion of a comparable may not *per se* give rise to any substantial question of law, in the present case the Court finds that the only comparable on the basis of which the Transfer Pricing Adjustment has been recommended by the TPO is HCCA. The Court observed that the TPO rejected assessee's comparable, the DRP brought in new comparable but ultimately confirmed the addition on the ground that HCCA was comparable. The Court held that a question of law that arose for the determination as to whether the ITAT was justified in upholding the exclusion of the comparables suggested by the assessee and in approving the TP adjustment as proposed by the TPO only on the basis of one comparable objected to by the assessee on account of it being functionally different from the assessee? The Court observed that the ITAT in its order dated 11th July, 2018 did not discuss its earlier order in LG Chemicals India (P.) Ltd. where it was held that a company owning intangibles cannot be compared with one which does not. Also, the order dated 25th March, 2019 passed by the ITAT rejecting MA No. 632 clearly notes that the agreements referred to in the audit report concerning HCCA were not before the ITAT. The Court held that the ITAT overlooked the assessee's objections to inclusion of HCCA which according to the assessee was only providing pay roll processing services. The difference in functionality of the assessee and HCCA was not discussed by the ITAT. The Court held that since the entire TP Adjustment has hinged only on one comparable, *viz.*, HCCA, the objection to the inclusion of which by the Assessee required a detailed consideration, the order of the ITAT cannot be sustained in law. The Court noted that in the impugned order, the ITAT has remanded to the TPO the consideration of one of the comparables proposed by the Assessee viz., Ma Foi Management Consultants Ltd. and one other as suggested by the DRP i.e., Nirbhay Management Services Pvt. Ltd. Hence the Court restored entire issue of determining the TP adjustment in respect of the transactions in the staffing segment to the TPO afresh without being influenced by his earlier order.

3. Powers of Settlement Commission – After admitting the application u/s. 245D(1) Settlement Commission cannot relegate the matter to AO to decide on merits.

Samdariya Builders P. Ltd. vs. Income Tax Settlement Commission – Writ Petition 2907 of 2019, Madhya Pradesh High Court, Order dt. 7th May, 2019, AY 2008-09 to AY 2013-14.

The Assessee, a Private Limited Company, was part of Samdariya Group. On 16.5.2013 search and seizure under Section 132 and 133A by the Income-tax Act were conducted by the Department on the Samdariya Group, including Assessee Company, covering residential and business premises of the group including some brokers. So far as the Assessee Company was concerned, it was alleged, that no incriminating material was found against the company during the search and seizure operations, except 9 loose sheets of papers, allegedly relating to the company were seized from one broker Abhishek Gupta. In compliances of notices

issued under Section 153A of the Act for the A. Y. 2008-09 to A.Y. 2013-14 and 142(1) for the A. O. 2014-15, the Company filed the returns of income. During the assessment proceedings, assessee Company filed application under Section 245C(1) of the Act for settlement. The application was admitted to be proceeded with by the Settlement Commission under Section 245D(1) and after considering the submissions of the Department, the Settlement Commission proceeded ahead under Section 245D(2C) with the application for settlement. Thereafter, the Principal Commissioner filed the Rule 9 report. However, subsequently the Settlement Commission, by the order impugned under Section 245D(4) without deciding the application on merit, relegated the Assessee Company to the Assessing Officer. Hence, the Assistant Commissioner of Income Tax, Central-Circle Jabalpur issued notice dated 8.9.2017 to the Company to comply with the previous notice issued under Section 142(1) of the Act. The assessee filed a writ petition, to assail the order of the Settlement Commission. The Court observed that a new Chapter XIX-A was introduced in the Income Tax Act by the Taxation Laws (Amendment) Act, 1975 (in short "the Amendment Act") w.e.f. 1-4-1976 introducing provision for settlement of cases. The Commission is constituted by the Central Government for the settlement of cases. Scheme of Chapter XIX-A shows that the filing of application by the assessee is a unilateral act. When an application for settlement is filed under Section 245-C, it is not automatically admitted. Section 245-D deals with the procedure on receipt of an application under Section 245C. Under sub-section (1) thereof, the Commission after following the prescribed procedure can allow the application to be proceeded with or rejected. Only after the Commission allows the petition to be proceeded with, it exercises the power of settlement. The Court observed that a bare reading of Section 245D(6) shows that every order passed under sub-section (4) has to provide the terms of the settlement and also to provide that the settlement shall be void if it is found subsequently by the Commission that it has been obtained by fraud or by misrepresentation of facts. The decision whether the order has been obtained by fraud or misrepresentation of facts is that of the Commission. The foundation for settlement is an application which the assessee can file at any stage of a case relating to him in such form and in such manner as is prescribed. The statutory mandate is that the application shall contain "full and true disclosure" of the income which has not been disclosed before the assessing officer, the manner in which such income has been derived. The Court held that unlike Section 139 of the Act which provides for filing of revised return, there is no provision for revision of an application made in terms of Section 245C. That shows clear legislative intent that the applicant for settlement has to make a true and fair declaration from the threshold. It is on the basis of the application received that the Commission calls for the report to decide whether the application is to be rejected or permitted to be continued. The declaration contemplated in Section 245C is in the nature of voluntary disclosure of concealed income, but as noted above it must be true and fair disclosure. Voluntary disclosure and making a full and true disclosure of the income are necessary preconditions for invoking the Commission's jurisdiction. In the scheme of thing, the Court held that the assessee company was right in contending that the Settlement Commissioner could have either rejected the application or allowed it to be proceeded further. If the Commission felt that the matter required further inquiry, it could have directed the Principal Commissioner or Commissioner of Income Tax to enquire and submit the report to the Commission to take a decision. The Commission could not get round the application for settlement. When a duty is cast on the

Commission, it is expected that the Commission would perform the duty in the manner laid down in the Act, especially when no further remedy is provided in the Act against the order of the Settlement Commissioner. The Court thus allowed the writ petition and set aside the order with a direction to the Settlement Commission to proceed to decide the application for settlement afresh in accordance with law and pass order.

4. Conversion of Partnership firm into private limited company – land belonging to firm revalued and enhanced value credited to partners before conversion

K.T.C. Automobiles vs. The Dy. CIT, ITA No. 18 of 2014, Kerala High Court, dated 25th June, 2019

A partnership firm was converted into a private limited company. The firm was in existence till the date 20.4.2004. Before such conversion, the land which belonged to the company, which was valued at ₹ 1,81,63,856/- was revalued at ₹ 7,72,20,840/- and the enhanced value of the land was credited to the current account of the partners of the firm. When the company came into existence on 21.4.2004, the enhanced value of the land was shown as loan from the partners of the erstwhile firm in the account of the company as a liability. The Assessing Officer treated the enhanced value of land as capital gains of the firm and brought it to tax. The assessee firm filed appeal before the Commissioner of Income Tax (Appeals) against the assessment order but it was dismissed. The further appeal filed by the assessee before the Income Tax Appellate Tribunal was also dismissed. The assessee therefore challenged the Tribunal order before the High Court. The Court was posed with three questions;

i) Whether revaluation of a capital asset of the assessee firm before its conversion as a company and crediting the enhanced value of the asset to the current account of the partners and treating it as loan from the partners in the account of the company amounts to violation of clause (c) of the proviso to Section 47(xiii) of the Income-tax Act, 1961 and if so, whether the transaction amounts to transfer of a capital asset within the purview of Section 45 of the Act?

ii) Whether creating a liability on the firm and transferring such liability to the company amounts to violation of clause (a) of the proviso to Section 47(xiii) of the Act and if so, whether the transaction amounts to transfer of a capital asset within the purview of Section 45 of the Act?

iii) Whether the enhanced value of the capital asset credited to the current account of the partners of the firm, if treated as capital gains, can be brought to tax payable by the erstwhile firm?

The Court observed that the contribution towards a fixed asset would stand enhanced in case of its revaluation. No doubt, revaluation of the land before the conversion of the firm as a company was not illegal. But, crediting the enhanced value of the asset to the current account of the partners instead of the capital account and treating it as loan in the hands of the company would amount to receipt of a benefit indirectly by the partners, other than by way of allotment of shares in the company. The reason is that the partners could withdraw this amount from the company at any time. Therefore, there was violation of the provision contained in clause (c) of the proviso to Section 47(xiii) of the Act. In in order to take the transfer of a capital asset out of the purview of Section 45 of the Act, one of the conditions to be satisfied is that the partners of the firm shall not receive any consideration or benefit otherwise than by way of allotment of

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shares of the company. Receipt of any benefit by the partners need not be made directly. Receiving any benefit, in any form or manner, even indirectly would result in violation of the provision contained in clause (c) of the proviso to Section 47(xiii) of the Act and it would bring the transfer within the ambit of Section 45 of the Act. It was argued before the Court that the partnership firm was converted into a company on 21.4.2004 and all the assets and liabilities of the firm as on the date 20.4.2004 were transferred to the company and therefore, there was no violation of clause (a) of the proviso to Section 47(xiii) of the Act. To this, the Court held that what is mentioned under clause (a) of the proviso to Section 47(xiii) of the Act is that all the assets and liabilities of the firm immediately before the conversion of the firm as a company shall become the assets and liabilities of the company. However the action of the assessee firm was only a device adopted by the partners of the firm for evasion of tax. By adopting such a method, there was violation of the condition provided under clause (a) of the proviso to Section 47 (xiii) of the Act because a new liability was created on the firm which in turn created a new liability on the company. The proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it. It is neither fair nor desirable to expect the legislature to intervene and take care of every device and scheme to avoid taxation. It is up to the Court to take stock to determine the nature of the new and sophisticated legal devices to avoid tax and consider whether the situation created by the devices could be related to the existing legislation with the aid of emerging techniques of interpretation to expose the devices for what they really are and to refuse to give judicial benediction. Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. The Court thus held that there was violation of the provisions contained in clauses (a) and (c) of the proviso to Section 47(xiii) of the Act. The Court further observed that Section 47(A)(3) of the Act provides that on violation of the conditions provided in the proviso to clause (xiii) of Section 47 of the Act, when the transfer of the capital asset is brought within the ambit of Section 45 of the Act, the liability to pay tax on the profits and gains of such transfer of capital asset, falls not on the erstwhile firm but on the successor company. The Revenue argued, that applicability of Section 47A (3) of the Act would arise only at a stage subsequent to the assessment of tax, when it is later discovered that there was violation of the provisions contained in the proviso to Section 47(xiii) of the Act. The Court held that if the assessing authority finds at the time of assessment, that there is violation of the provisions contained in the proviso to Section 47 (xiii) of the Act, then transfer of capital assets made in that manner, comes within the ambit of Section 45 of the Act and assessment has to be done accordingly. In making such assessment, the authority concerned is obliged to take note of the provisions contained in Section 47A(3) of the Act and then the liability to pay tax has to be imposed not on the erstwhile firm but on the successor company. The Court thus held that the assessee firm was not liable to be assessed for the capital gains but the tax liability in that regard had fallen on the successor company.

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Neelam Jadhav, Neha Paranjpe & Tanmay Phadke, *Advocates*

DIRECT TAXES
Tribunal

Reported Decisions

1. Short Term Capital Gains – Section 50 r.w.s 72 and 74 – Brought forward Long Term Capital Loss and Business Loss can be set off against the Short Term Capital Gains computed u/s. 50 of the Act

ITO vs. Smart Sensors & Transducers Ltd. [ITA 6443/Mum/2016] (Assessment Year: 2011-12), [2019] 104 taxmann.com 129 (Mum.)

Facts

In the present case, the Assessee is a public limited company. During the year under consideration, the Assessee revised its return of income u/s. 139(5) of the Act and included the STCG amounting to ₹ 2.71 crore on the sale of factory building u/s. 50 of the Act in its income tax return. Thereafter, the Assessee claimed a set off of brought forward business losses of ₹ 73.46 lakh and brought forward LTCL of ₹ 28.18 lakh against the said STCG. During the course of assessment proceeding, the AO was of the view that as per the provisions of Section 74 of the Act, the brought forward LTCL can be set off against LTCG. The AO further noted that as per Section 72 of the Act, the brought forward business loss can be set off against the business income and not against the STCG computed u/s. 50 of the Act. Thus, the AO disallowed the claim of the said set off to the Assessee. Being aggrieved, the Assessee carried out the matter to the CIT(A) with success. Being aggrieved by the said order, the Revenue filed an appeal before ITAT. The Revenue contended that Section 74 does not permit the Assessee to claim a set off of brought forward LTCL against the STCG computed u/s. 50 of the Act. Similarly, Section 72 does not allow to claim a set off of a business loss against STCG computed u/s. 50 of the Act. On the other side, the assessee submitted that Section 50 is a deeming fiction which is restricted only for the purpose of computation of capital gains u/s. 48 and the same cannot alter the character of capital gains that of being LTCG. Further, it was submitted that the asset on which the STCG earned was a business asset and the depreciation was allowed to the assessee on the same. Thus, the income received on the sale of the said asset is to be treated as 'business income' thought the same is treated as STCG u/s. 50 due to the

deeming fiction. After hearing both the sides, ITAT held as under:

Held

ITAT after referring to the decision of Bombay High Court in the case of *CIT vs. ACE Builders Pvt. Ltd. [2006] 281 ITR 210 (Bom)* observed that there is nothing in section 50 to suggest that the fiction created by it is not only restricted to sections 48 and 49 but also applies to other provisions of the Act. On the contrary, section 50 makes it very clear that the said deeming fiction is restricted to the mode of computation of capital gains contained in sections 48 and 49 of the Act and cannot be extended further. Thus, the Assessee cannot be deprived from claiming a set off of the business loss and LTCL against the STCG. ITAT observed that the said ratio is laid down by Bombay High Court in the case of *CIT vs. Manali Investments [2013] 219 Taxman 113 (Bom)* wherein the Court held that the brought forward LTCL can be set off against the STCG computed u/s. 50 of the Act. As far as the claim of set off of a business loss is concerned, ITAT relied on the decision of its co-ordinate bench in the case of *Raj Shree Road lines Pvt Ltd. vs. ITO [ITA 1627/Mum/2012]*, order dated 23.3.2013 and accepted the contention of the assessee. Finally, ITAT upheld the action of the CIT (A) and dismissed the appeal of the Revenue.

2. Business expenses – Section 37 –The Assessee being engaged in the business of construction is entitled to claim a deduction of general expenses related to administration, selling, marketing, etc., in the light of AS-2

Facts

In the present case, the assessee is a builder. For the year under consideration, the Assessee undertook a construction project and incurred various expenses. While filing its return of income, the assessee capitalised all the expenses to work in progress except the general expenses like employee cost, administrative expenses and selling and marketing expenses which were debited to Profit and loss account. During the course of the assessment proceedings, the AO observed the same and was of the view that the Assessee is not entitled to claim the said expenses for the year under consideration and ought to have added the same to work-in-Progress. The AO disallowed the said expenses and framed the assessment order. Being aggrieved, the assessee carried out the matter before the CIT(A) but did not succeed. Thereafter, an appeal was preferred to ITAT. In a nutshell, it was submitted by the assessee before ITAT that it has followed the "Expert Advisory Committees Report" (EAC) which recommends a builder carrying on a construction activity on its own risk to follow the AS-2 and the expenses claimed by the Assessee and disallowed by the AO cannot form part of the inventory as per AS-2. ITAT heard both the sides and held as under:

Held

ITAT observed that the Assessee has been following mercantile system and offering its revenue on percentage completion method of accounting. It was noticed that in order to calculate the work in progress and for recording the transaction the assessee has relied on the "Expert Advisory Committees Report" (EAC) on "Applicability of revised AS-7 to enterprises undertaking the construction activities on their own account as a venture of commercial nature", wherein it was stated that AS-7 shall not be applicable to the builders undertaking the commercial activity on their own and it was also stated that the work in progress shall constitute inventory for the builders and shall be valued as per AS-2 issued by the Institute of Chartered Accountants of India (ICAI). ITAT observed that AS-2 has been consistently followed by the Assessee which is accepted by the Revenue in

other years. ITAT perused the text of AS-2 and noticed that the administrative expenses which are not related to bring inventories (work-in-progress) to their present location and condition are to be excluded from the inventories being work-in-progress and came to the conclusion that the treatment adopted by the Assessee is in accordance with AS-2. While accepting the stand of the Assessee, ITAT referred to certain decisions of its co-ordinate benches rendered on similar facts. Finally, the issue was decided in favour of the assessee and against the Revenue.

Unreported decision

3. Income from House Property – Section 23– Vacant flats/shops held as stock in trade by a builder/developer are not subject to notional rent.

Haware Infotech Ltd. vs. ACIT [ITA 281 & 291/Mum/2018] (Assessment Year: 2013-14 & 2014-15), order dated 8.5.2019

Facts

In the present case, the Assessee is engaged in the business of construction and development. During the year under consideration, the assessee developed a property i.e., Plot no. 16, 30-A, vashi under the name and style of Vashi Infotech which was shown as 'closing stock' for ₹ 87,46,11,119/-. During the assessment proceedings, the AO was of the view that Annual lettable value of the said closing stock of finished unsold completed units of the project is liable to be brought to tax under the head 'Income from house property' [IFHP] on account of notional rent. The AO further held that since the assessee is the owner of the said units and occupying the said properties with the full right to sell the same, the Annual lettable value of the said property is chargeable to tax under the head IFHP. Thus, the AO invoked the provisions of section 23 of the Act and thereby computed the IFHP on the basis of notional rent by allowing a standard deduction of 30% u/s. 24(b) of the Act. Being aggrieved, the Assessee filed an appeal before the CIT(A). The stand of the AO was confirmed by the CIT(A). Being aggrieved with the same, the assessee preferred an appeal before ITAT. After hearing both the sides, ITAT observed as under:

Held

ITAT observed that the Assessee is engaged in the real estate business. As on 31.3.2013, the Assessee was holding stock-in-trade of vacant unsold completed flats/shops amounting to ₹ 87,46,129/-. It was further held that since the assessee is engaged in the business of construction, the unsold flats/shops were treated as stock-in-trade by the assessee. Thus, the income received on the sale of same shall be treated as business income and no notional rent will be chargeable to tax under the head IFHP. Further, ITAT referred to the decision of Gujarat High court in the case of *CIT vs. Neha Builders (P) Ltd. [2008] 296 ITR 661 (Guj)* and observed that if the business of the Assessee is to construct the property and sell it or to let out the same, then the income derived from the immovable properties held as stock-in-trade cannot be assessed under the head 'IFHP. It was observed by ITAT that the said ratio laid down by Gujarat High Court is recently concurred by Bombay High Court in the case of *PCIT vs. M/s. Classique Associates Ltd.* [ITXA 1216 of 2016], dated 28.01.2019. Thus, relying on the aforesaid decisions, ITAT allowed the appeal of the Assessee.

4. Service of notice – Section 143(2) and Rule 127 – Service of notice cannot be considered at par with issuance of notice. They are materially different. Though under Rule 127 service of notice on the PAN address is valid even

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if it is different from the address in the Return, it does not give the jurisdiction to the AO if it is not delivered to the assessee

Anil Kisanlal Marda vs. ITO [ITA 1763/Pun/2013] (Assessment Year: 2009-10), order dated 01.07.2019

Facts

The return filed by the assessee on 31.10.2009 for the Assessment Year 2009-10 was selected for the scrutiny assessment and a notice u/s. 143(2) was issued to the assessee on 8.9.2010 on the address appearing in PAN and not on the address which was mentioned by the assessee in the return of income. The said notice returned unserved and another notice was issued on 11.11.2011. The AO passed the assessment order by making certain additions which finally reached ITAT. During the course of the appellate proceedings, an additional ground challenging the jurisdiction of the AO was preferred and it was argued that a notice u/s. 143(2) of the Act was never served on him within a time prescribed under the Act. Opposing to the said contention, the DR submitted that a notice was handed over to the postal authority for its service and issuance of the said notice on 8.9.2010 amounted to the service on the Assessee. To buttress the contention, the DR relied on various case laws. With regard to the address on which the first notice was issued, it was submitted before ITAT that the said notice was issued on the address mentioned by the Assessee in his PAN. The DR relied on Rule 127 of the Income Tax Rules, 1962 (Rules) for the same and requested ITAT to disregard the contention of the Assessee. After hearing both the sides, ITAT held as under:

Held

ITAT in the first place observed that a time limit to issue a notice u/s. 143(2) expired on 30.9.2010 and thereafter came to the conclusion that a second notice issued by the AO on 11.11.2011 was admittedly issued beyond the said period requiring no specific consideration at all. Coming to the first notice issued on 8.9.2010, ITAT observed that there is no dispute about the fact that the said notice was issued on the address appearing in the PAN and it returned unserved. ITAT thereafter perused the relevant sections and various case laws cited by both the parties. It came to the conclusion that the issuance of notice is different from its service and the two words cannot be used interchangeably. Subsequently, ITAT perused section 282 of the Act and Section 27 of the General Clauses Act, 1897. It was observed by ITAT that as per the said sections, the presumption of valid service on properly addressing, pre-paying and posting by registered post is rebuttable. Coming to the facts under consideration, ITAT noticed that it is an admitted position by the Revenue that the first notice issued on 8.9.2010 returned unserved and there is no question of its service on the Assessee. Dealing with the reliance of the DR on Rule 127, ITAT observed a notice etc. can be delivered to an assessee at any of the addresses given in rule 127(2)(a) which, *inter alia*, include address available in the PAN and also the address available in the income-tax return and it does not become invalid merely on the fact that it was served on the address mentioned in the PAN instead of the address provided in the return of income. It was further observed that Rule 127 does not dispense with other legal requirements. Simply issuing a notice at the address given in PAN etc., which is not delivered to the assessee, may satisfy the requirement of the initial issue of notice at the correct address but not that of service of such notice until such notice is actually delivered or served. On the aforesaid observations, ITAT came to the conclusion that no notice was served on the assessee within the prescribed time limit. Finally, the appeal was decided in favour of the assessee and against the Revenue.

5. Diversion of income by over-riding title - Payments made to retiring the partners and legal heirs of the deceased partners as per the partnership deed do

not constitute income of the partnership firm in the light of doctrine of diversion of income by over-riding title

Mulla & Mulla & Craigie Blunt & Caroe vs. Add. CIT [ITA 4451/Mum/2012] (Assessment Year: 2008-09), order dated 19.6.2019

Facts

The Assessee is a partnership firm of practicing advocates, solicitors and notaries. For the Assessment Year 2008-09, the return of the Assessee was selected for the scrutiny assessment and the AO asked the Assessee to justify non-taxability regarding the payment of ₹ 19,58,337/- made by it to its retiring partners and legal heirs of the deceased partners. Pursuant to the same, the Assessee submitted that the said payment was made in terms of a Partnership Deed entered dated 1.4.2001 and the same was in the nature of diversion of income by overriding title as income to that extent never accrued to the assessee firm but always belonged to the retiring partners and legal heirs of the deceased partners. It was further submitted that the issue under consideration has already been decided in favour of the Assessee in its own case by the Bombay High Court reported in [1991] 190 ITR 0198. However the AO was not impressed by the submissions and added back the amount on the contention that overriding title has been created voluntarily by the assessee itself and an overriding title cannot be created *suo motu* or voluntarily as per law. Being aggrieved by the order, the assessee preferred an appeal before CIT(A) but did not succeed. Thereafter, an appeal was preferred to ITAT. After hearing both the sides, ITAT held as under:

Held

ITAT noticed that a question under consideration is not about a deduction of the said amount but whether the same can be taxed as income in the hands of the assessee in the light of the doctrine of "diversion of income by over-riding title. The issue is covered by the decision of Bombay High Court in the Assessee's own case. It further noticed that due to the amendment in the Act w.e.f. 1.4.1993 to the effect that only payment made to working partners to the extent provided for under the Act is deductible and no other payment made to partners is deductible has no relevance while deciding the issue under consideration and the AO clearly erred in assigning the said reason for making an addition. Thereafter, ITAT perused various clauses of the Partnership deed and observed that clause No. 16 of the old agreement and clause nos. 13 and 14 of the new agreement, it is amply clear that in sum and substance the only difference is that in old agreement amounts payable to the retiring partners and legal heirs were not quantified and it only prescribed a method for quantification of amount, whereas in the new agreement the amount to be paid to the partners on retirement and otherwise is duly quantified. After observing the said clauses and considering the High Court decision, ITAT accepted the contention of the assessee and decided the issue in favour of the assessee and against the revenue.

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First build up your physique. Then only you can get control over the mind.

— *Swami Vivekananda*

CA Tarunkumar Singhal & Sunil Moti Lala, *Advocate*

INTERNATIONAL TAXATION
Case Law Update

A. HIGH COURT

1. Whilst determining Arm's Length Price for payment of royalty, TPO cannot replace the assessee and question its business decision for such payment

PCIT vs. SI Group India Limited [(TS-525-HC-2019(BOM)] - Income Tax Appeal No. 447 of 2017

Facts

1. The assessee was engaged in the manufacture and sale of organic chemicals and phenolic resins having wide range of industrial applications. It had entered into a royalty agreement with its holding company for exclusive license for production and sale of the abovementioned products and supply of all know how related to new technology for the same and agreed to pay 2% of the net sale amount by way of royalty.

2. The TPO held that the assessee had not used any technology which was purchased and for which royalty was paid and made adjustment by adopting the ALP as Nil primarily on the ground that the assessee had not derived any specific benefits out of such technology, nor the assessee had received any incremental benefits on account of payment of such royalty amount.

3. The CIT(A) held that the TPO could not have judged the justification for purchase of the knowhow and further based on benchmarking analysis showing arithmetic mean of royalty rates as a percentage of turnover of broadly comparable companies to be 4.31% (which was submitted as additional evidence), the CIT(A) held that the assessee had established that such purchase was at Arm's Length Price. Thus, it deleted the adjustment.

4. The Tribunal confirmed the view of the CIT(A) relying upon the Co-ordinate bench decision in the assessee's own case for earlier AY wherein it was held that it was not open to the TPO to simply brush aside the benchmarking done by the assessee and adopt nil value.

5. Aggrieved, the Revenue filed an appeal before the Court against Tribunal's order.

Held

1. The Court held that TPO could have applied any of the specified methods for determining Arm's Length Price of the transaction, in case he was of the opinion that

the purchase of knowhow made by the assessee from the AE was not at arm's length. Instead of carrying out any such scientific exercise, the TPO went on to the justification of the purchase made in the context of the incremental benefit earned by the assessee out of such knowhow. This was clearly not within the purview of the TPO. The TPO could not replace the assessee and question its business decision.

2. In the context of the purchase being at arm's length, it was noted that based on the benchmarking analysis submitted as additional evidence, it was proved that the price paid by the assessee was at arm's length.

3. Accordingly, Revenue's appeal was dismissed.

2. TPO was not justified in making adjustment to the entire segment of manufacturing activity without restricting the same to the international transaction

PCIT vs. Bunge India Pvt. Ltd. [TS-526-HC-2019(Bombay)] - ITA 445 of 2017

Facts

1. The Assessee-company was engaged in the business of processing of oil seeds, manufacturing and trading in edible oils, de-oiled cake, crude oil, refined oil, hydrogenated oil and dealing in other agricultural commodities. The assessee had imported raw material from its AE.

2. The TPO made an adjustment of ₹ 48.65 crores to the entire segment of manufacturing activities instead of making the adjustment to only international transactions, thus having the effect of reducing the import price by 54.27%.

3. The Tribunal, relying on *CIT vs. Tara Jewels Exports P. Limited (2016) 381 ITR 404 (Bom)*, held that the TPO was not justified in making adjustment to the entire segment of manufacturing activity without restricting the same to the international transaction.

4. Aggrieved, the Revenue filed an appeal before the Court against Tribunal's order.

Held

1. The Court upheld the Tribunal's finding noting that the decision in the case of Tara Jewels *Exports P. Limited (2016) 381 ITR 404 (Bom)* (followed by the Tribunal) had also been followed subsequently in the case of *CIT vs. Krupp Industries India P. Ltd. (2016) 381 ITR 413 (Bom)* and *CIT vs. Alstom Projects India Ltd. (2017) 394 ITR 141 (Bom).*

2. Accordingly, it dismissed Revenue's appeal.

3. SIP Technologies and Exports Ltd. is not a "persistent" loss making entity since it had suffered loss in only one out of three years. Genesys International Corporation Ltd., engaged in geospatial services, and Coral Hubs Ltd., having different operating model - not comparable to an entity providing design, engineering and testing services. Apitco Ltd., being functionally dissimilar - not comparable to an entity providing business support services

PCIT vs. John Deere India Pvt. Ltd. [TS-567-HC-2019(Bombay)] – ITA No. 63 of 2017

Facts

1. The assessee was engaged in providing software development services, ITES and sales support services to its group entities under three divisions viz. (i) Software Development; (ii) Design, Engineering & Testing, and

(iii) Business Support Services. The TPO made adjustment to all the three services rendered.

With respect to Software Development Services

2. The assessee had selected 23 comparables with average margin of 14.84%. The TPO retained 9 companies which were selected by the assessee and introduced 5 companies, resulting in operating margin of 24.63%. The DRP upheld the TPO's order. The Tribunal allowed assessee's appeal and excluded the following comparables –

— Bodhtree Consulting Ltd. as it was not engaged exclusively in Software development;

— eZest Solutions Ltd. as it was engaged more in ITES and that too in the nature of KPO services;

— Helios and Matheson Information Tech Ltd. and Kals Information Systems as the Co-ordinate Bench in assessee's own case for an earlier year had held them to be functionally different and there was no material change in the activities of the assessee and the functions of the comparables;

— FCS Software Solutions Ltd. as it was earning abnormally high profits in the assessment year under consideration as compared to the profits earned in earlier financial year

The Tribunal also included SIP Technologies and Exports Ltd. in the list of comparables, rejecting Revenue's contention that it was a persistent loss making entity. It held that 'persistent loss' means, continuous loss for more than 3 years and not loss in only one year.

With respect to Design, Engineering and Testing Services

3. The assessee had selected 11 comparables. The TPO accepted only 3 comparables and arrived at net operating margin of 31.62%. The DRP upheld TPO's order. The Tribunal allowed assessee's appeal and excluded the following comparables –

— Coral Hubs Ltd. noting that it had different business spheres and different operating models

— Genesys International Corporation Ltd. as it was engaged in geospatial services and thus, functionally different

With respect to Business Support Services

4. The assessee had selected 18 Companies as comparables. However, the TPO accepted only 7 comparables and included 2 more companies as comparables. The DRP upheld TPO's order. The Tribunal allowed assessee's appeal and excluded Apitco Ltd. as it was engaged in micro enterprises development, Skill development and Project Related Services, etc., including Infrastructure planning and development along with energy related service and cluster development, and thus, was functionally different.

5. Aggrieved, the Revenue filed an appeal before the Court against Tribunal's order

Held

With respect to Software Development Services

1. The Court upheld the Tribunal's order for exclusion of Bodhtree Consulting Ltd., E Zest Solutions Ltd., Kals Information System Ltd. and FCS Software Solutions Ltd., relying on its earlier decision in *PCIT vs Barclays Technology Centre India (P) Ltd* [ITA No. 1384 of 2015 decided on 26th June, 2018] wherein the said comparables were excluded under similar circumstance. It also upheld the Tribunal's order for exclusion of Helios and Matherson Information Technology Ltd. and Kals Information Solutions Ltd., relying on its earlier decision in *PCIT vs. John Deere India (P) Ltd* [ITA No. 902 of 2016 decided on 14th January, 2019]

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2. It also rejected Revenue's plea for exclusion of SIP Technologies and Exports Ltd., noting that it had suffered loss only in one out of the last three years under consideration and thus was not constantly loss making company.

With respect to Design, Engineering and Testing Services

3. The Court noted that Coral Hubs Ltd was engaged in E-Publishing which was different from activities carried out by assessee, had abnormally high profit margin and had different operating models. Accordingly, it upheld Tribunal's finding that the said company was functionally different and thus was to be excluded.

4. The Court noted that Genesys International Corporation Ltd. was engaged in geospatial services and thus the Tribunal had held it to be functionally different from the assessee. Accordingly, it upheld the Tribunal's finding.

With respect to Business Support Services

5. It upheld Tribunal's finding that Apitco Ltd. being functionally different from the assessee was to be excluded.

6. Accordingly, the appeal filed by the Revenue was dismissed.

4. Motilal Oswal Investment Advisory, Sundaram Finance distribution Ltd., Integrated Capital Service Ltd., Brescon Advisors, Khandwala Securities Limited and Axis Private Equity Ltd. - not comparable to an entity providing investment advisory services

Pr. CIT vs. Goldman Sachs (India) Securities Pvt. Ltd. [TS-428-HC-2019 (Delhi)] - ITA No. 1130 of 2018

Facts

1. The assessee-company was engaged in securities broking, investment banking, underwriting and other financial services business in India. For benchmarking the international transaction of providing investment advisory services to its AE, the assessee had selected 10 comparables. The TPO rejected comparables selected by assessee and selected his own 8 comparables which resulted in arithmetic mean of 62.50%. The DRP upheld TPO's order.

2. The Tribunal allowed assessee's appeal and excluded the following comparables selected by TPO

— Motilal Oswal Investment Advisory as it was engaged in merchant banking.

— Sundaram Finance Distribution Ltd as it did not have any employees and had outsourced its activities

— Integrated Capital Service Ltd. as it was rendering advisory and consultancy services in the area of merger acquisition and reconstruction of business. It also rejected Revenue's plea that the same should not be excluded as the assessee itself had included it in its TP study.

— Brescon Advisors as it mostly used its own fund for making investments and the overall profile of the company was not functionally similar.

— Khandwala Securities Limited as it was also engaged in corporate advisory services and was very akin as security and stock brokers. Also, the annual report of the company showed that its performance was affected by global crises and resultant market melt-down.

— Axis Private Equity Ltd as it was engaged in asset management services and its related party transactions were more than 90%.

3. Aggrieved, Revenue filed an appeal against Tribunal's order.

Held

1. The Court upheld the Tribunal's order excluding Motilal Oswal Financial Services as comparable, relying on the case of *PCIT vs. NVP Venture Capital India (P.) Ltd. (2018) 100 taxmann.com 3 (Bombay)* wherein it was held that the said company was engaged in Merchant banking business.

2. Similarly, it upheld exclusion of Sundaram Finance Distribution Limited relying on the decision in case of *PCIT vs. Aptara Technology (P.) Ltd. (2018) 92 taxmann.com 240 (Bombay)* wherein also the said comparable was excluded under similar circumstance.

3. The Court rejected Revenue's plea for inclusion of Integrated Capital Service Ltd. solely on the ground that the same was included by the assessee in its TP study. It held that it had been consistently taking the view that it was open for the assessee to bring correct facts on record and claim the exclusion of the said comparable.

4. It also upheld the exclusion of Brescon Advisors, Khandwala Securities Ltd. and Axis Private Equity Limited based on Tribunal's findings.

5. Accordingly, the appeal filed by the Revenue was dismissed.

B. Tribunal Decisions

5. Whether fees for executive search are not taxable as FTS or royalty under the India-Netherlands tax treaty – Held: No, in favour of the assessee

Spencer Stuart International BV vs. DCIT [TS-333-ITAT-2019(Mum)] Assessment Year 2014-15

Facts

i) The assessee, a non-resident company, had a wholly owned subsidiary in India. The assessee is engaged in the business of executive search services as well as providing Spencer Stuart Technology software and related services to its group concerns worldwide and third party franchisees. The assessee had two streams of income from India, namely, licence fee and executive search fee.

ii) The assessee entered into a 'licence agreement' with its subsidiary in terms of which subsidiary had been granted licence to use trademark, trade name, logos and the right to use the software owned by the assessee and certain other support services. In terms of the agreement, the assessee was entitled to receive a licence fee which was offered as royalty under the Act as well as under the tax treaty.

iii) The assessee had also entered into a service agreement in terms of which the subsidiary agreed to provide, on principal to principal basis, support services to each other in relation to executive search assignments. In terms of the said arrangement, the assessee received consideration which was treated as business income. The assessee claimed that the said income was not taxable as FTS under Article 12(5) of the tax treaty since the said services neither 'made available' any technical knowledge, experience, skill, know-how or processor did it constitute development and transfer of a technical plan or technical design. The assessee contended that income by way of executive search services were not for services which were ancillary or subsidiary to the property rights for which licence fees was paid.

iv) There was no dispute about the taxability of licence fee received by the assessee. However, with respect to executive search fee, the Assessing Officer (AO) observed that it was to be treated as FTS in terms of *Explanation* 2 to Section 9(1)(vi) of the Income-tax Act (the Act). Further, such fee was for services which are ancillary and for the application or enjoyment of the right, property or information for which

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the 'licence agreement' was entered into and, therefore, though it was in terms of a separate 'service agreement' yet it constituted FTS in terms of Article 12(5)(a) of the tax treaty.

v) The AO held that the amount of the executive search fee received by the assessee was in the nature of FTS under Article 12(5)(a) as well as under Article 12(5)(b) of the tax treaty. Alternatively, the AO held that it was to be treated as royalty under Article 12(4) of the tax treaty read with clause (iv) of Explanation 2 to Section 9(1)(vi) of the Act. The Dispute Resolution Panel (DRP) upheld the order of the AO.

Decision

On asseessee's appeal, the Tribunal relied on the assessee's own case of earlier year where it was held that:

i) The licence agreement which resulted in earning of royalty income (which has been offered to tax) and the service agreement (which resulted in earning executive search fee) were separate and distinct agreements constituting different sources of income.

ii) The principal business of the Indian subsidiary was to carry out or execute the mandate of executive searches and thus the executive search fee generating activities cannot be treated as ancillary or subsidiary to the licence agreement.

iii) The licence fee payable in terms of the licence agreement was a percentage of search fee, which was earned by the Indian subsidiary from the execution of executive search mandate during a particular year. Thus, the executive search fee was not taxable as FTS in terms of Article 12(5)(a) or (b) of the tax treaty.

iv) The Tribunal on reference to the Advance Pricing Agreement (APA) entered into by the subsidiary observed that the 'licence agreement' and the 'service agreement' between the assessee and the subsidiary are separate and distinct of each other. Further, in the context of the arm's length price (ALP) of the transactions, the APA makes a distinction between the payment of licence fee and executive search fee. There was a complete dichotomy between the nature and characterisation of transactions accepted in the APA in the context of Indian subsidiary *vis-à-vis* the tax authority in the present case. Ostensibly, it does not need any more emphasis that the nature and characterisation of the amount in the present case has correspond to what has been accepted by the tax authorities in the case of the payer of the same.

v) If the tax department was to contend that the executive search fee was nothing but licence fee, then even in the APA proceedings, the tax authority should have recharacterised such executive search fee as 'licence fee' to tax it as royalty under the APA. The Tribunal observed that considering the executive search fee as 'royalty' would make the APA redundant. Therefore, the executive search fee cannot be treated as FTS under Article 12(5)(a) as well as 12(5)(b) of the tax treaty. Further, it cannot be taxed as royalty under Article 12(4) of the tax treaty read with clause (iv) of *explanation* 2 to Section 9(1)(vi) of the Act.

6. Article 14- Fees for Independent Personnel Services- Foreign consultants' payment covered by article on 'Independent Personal Services', not taxable as FTS

DCIT vs. Hydrosult Inc [TS-43-ITAT-2019(Ahd)]
Assessment Year 2011-12

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Facts

i) Hydrosult Inc. (assessee) is a foreign company incorporated in Canada and is engaged in providing technical consultancy for development of irrigation and water resources in India in the State of Chhattisgarh and Orissa. The assessee was awarded contract by Chhattisgarh Government for providing consultancy services under the Chhattisgarh Irrigation Development Project. The assessee also had a PE in India.

ii) For AY 2011-12, AO noted that assessee had claimed consultancy expenses on which TDS was not been deducted. Assessee contended that the consultancy fees were paid to several independent professionals of foreign origin hired for technical services and the services are in the nature of independent personal services (IPS) governed by Article 14 of the respective Treaties.

iii) Assessee contended that IPS are different from fees for technical services' (FTS) and therefore income of the aforesaid consultants being IPS were not susceptible to tax in India in view of exceptions provided in the treaties in this regard.

iv) Moreover, assessee also submitted that the professionals rendering services have neither fixed base in India (source country) nor have any of the professionals stayed in India more than the threshold limit in terms of number of days (aggregate 90/183 days) of stay provided in the respective DTAA.

v) AO however observed that services rendered were admittedly technical/consultancy services by the professionals who are stated to be specialists in their respective domains and therefore, the services were in the nature of technical and consultancy services and would thus fall in the Article related to FTS. AO also contended that the professionals rendering consultancy services were not independent *per se* and their scope of work and activities were regulated by contractual obligations or other form of employment. AO thus concluded that in the absence of independence of such services, the assessee was under obligation to deduct TDS.

vi) On appeal, CIT(A) re-examined the agreements and found that independence of the non-resident consultants towards rendition of services remained intact and the employer-employee relationship was absent.

Decision

On Revenue's appeal, the Tribunal held in favour of the assessee as under:

i) The assessee referred to the contractual agreement entered into with one of the consultants of Netherlands as specimen contract. Assessee contended that as per one of the clauses in contract, the contract cannot be assigned nor the services of the consultant can be assigned by him unlike employment in ordinary course. Assessee contended that the consultants were also made liable for certain losses or damage which was ordinarily not there in contract of employment .

ii) The Tribunal found merit in assessee's contention that the none of the non-resident individuals providing IPS have a fixed base available to them in India and none of them have stayed in India for a period exceeding aggregate 183 days in the AY concerned. Thus the Tribunal affirmed assessee's contention that services rendered by the non residents are covered by Article 14 of DTAA with the respective country where the respective non-residents are residents of. The Tribunal thus upheld the eligibility of DTAA benefit under Article relating to IPS in view of the undisputed facts towards absence of fixed base and period of stay below threshold.

iii) The Tribunal rejected Revenue's contention that the services rendered are not independent in character. In this regard, the Tribunal stated

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that a bare look at the specimen agreement entered into between the assessee and one of the consultants gives an unmistakable impression that as per the agreement, the non-resident has been contracted as an 'Advisor' for providing consulting services related to the project to the assessee. The Tribunal noted that the responsibility or the risk for the results with non-resident was to a greater degree, moreover the obligations arising from the contract cannot be assigned to some other persons unlike in the case of an employer.

iv) The Tribunal stated that it was difficult to read that the contracts entered into by the non-residents for their services lack independence. The Tribunal remarked that, "In view of risk fastened with the non-residents for their services, it is clear that the services are of independent nature. We do not see any trappings of alleged dependence in the contract."

7. India-UK DTAA - Taxation of FTS - Article 13 – Whether 'Make available' condition relevant for supply of design/drawing; Applies *'ejusdem generis'*- Held: Yes, in favour of the assessee

Buro Happold Limited vs. DCIT [TS-76-ITAT-2019(Mum)] Assessment Year: 2012-13

Facts

i) Buro Happold Limited (assessee), a company, registered in UK is a tax resident of UK for AY 2012-13. The assessee is involved in the business of providing engineering design and consultancy services. During the assessment proceedings, AO observed that, the assessee had earned an amount of ₹ 1,09,03,039, from the provision of consulting engineering services to Buro Happold Engineers India Pvt. Ltd. (BHEI).

ii) Moreover, the assessee had also received an amount of ₹ 1,01,44,808 from BHEI as a cost recharge towards Head Office expenses.

iii) The Assessing Officer observed that, as per Article 13(4)(c) of subject Treaty, payment received for development and transfer of a technical plan or technical design would be in the nature of FTS, irrespective of the fact, whether it also 'makes available' technical knowledge, experience, skill, knowhow, etc.

iv) Interpreting the provisions of Article 13(4)(c), the Assessing Officer observed that the words "*make available*" go with technical knowledge, experience, skill, knowhow, etc., but do not go with "*the development and transfer of a technical plan or a technical design*".

v) He observed that, the second limb of clause-(c) of Article 13(4) of subject treaty can be invoked when the amount is paid in consideration for rendering of any technical and consultancy services consisting of development and transfer of a technical plan or technical design. Thus the AO levied tax @ 15% on the gross amount as per Article 13(2)(a)(ii) of the India-UK tax treaty.

vi) Upon appeal, CIT observed that the amount received towards consulting engineering services are in the nature of fees for technical services not only u/s 9(1) but also under Article-13(4)(c) of the India-UK tax treaty. Further he observed that technical services in the form of designing and planning could not have been rendered by the assessee without locating technical personnel, wherein they needed thorough application of mind in India for execution of the designs and drawing. Thereby CIT (A) upheld the order of AO and held that amount received towards consulting engineering services is in the nature of fees for technical services and taxable in India.

Decision

On Asseessee's appeal, the Tribunal held in its favour, as under:

i) The assessee argued that consultancy services provided, are project based and

the consultancy services for one project cannot be used for any subsequent project. Further, it was contended that the words "*consists of the development and transfer of technical plan or technical design*" in the second limb of Article 13(4)(c) could not be read disjunctively but had to be read along with the first limb, and thus could not be treated as FTS.

ii) On the other hand, Revenue contended that the employees of the assessee worked closely with the employees of the Indian company and supported/advised them and provided assistance to them on various technical and engineering matters. Therefore, technical knowledge, experience, etc., were made available to the Indian companies, and thus they are of such nature that they are capable of being used in future.

iii) Upon perusal of rival submissions, the Tribunal noted that the main issue under consideration was whether the amount received by the assessee towards supply of technical designs, drawings, plans, etc., under the consulting engineering services was to be treated as fees for technical services under the India-UK tax treaty. The Tribunal held that once the above issue was decided, the issue of whether cost recharge was in the nature of FTS, would automatically get resolved.

iv) Upon careful examination of facts, the Tribunal observed that the assessee was entrusted the work of providing consulting services for a twin city project by the Pune Municipality as well as other building projects in Mumbai. Further, on perusal of the sample copies of the agreement, it was seen that the work of the assessee was to provide consultancy services relating to the projects. Thus, it was a fact on record that the technical designs/drawings/plans supplied by the assessee under contract were project specific and could not be used in the future.

v) The Tribunal remarked, *"On a careful reading of Article 13(4)(c) of the India-UK tax treaty it becomes clear that the words "or consists of the development and transfer of a technical plan or technical design", appearing in the second limb has to be read in conjunction with "make available technical knowledge, experience, skill, knowhow or processes". The reasoning of the Assessing Officer that the second limb of Article-13(4)(c) of the India- UK tax treaty has to be read independently, in our view, cannot be the correct interpretation of the said Article. As per the rule of ejusdem generis, the words "or consists of the development and transfer of a technical plan or technical design" will take colour from "make available technical knowledge, experience, skill, knowhow or processes".*

vi) Having held so, the Tribunal further went on to adjudicate whether by supply of technical, designs, drawing, plans, the assessee has made available technical knowledge, experience, skill, know-how or processes. The Tribunal stated, *"...... the technical knowledge, experience, skill, knowhow or processes, must remain with the service recipient even after rendering of the services has come to an end. The service recipient must be at liberty to use the technical knowledge, experience, skill, knowhow or processes in his own right. Undisputedly, in the present case, as revealed from the material on record, the technical design/drawings/plans supplied by the assessee to the Indian entity are project specific, hence, cannot be used by the Indian entity in any other project in future."* Therefore, the Tribunal accepted the claim of the assessee that it had not made available any technical knowledge,

experience, skill, knowhow or processes while developing and supplying the technical drawings/designs/plans.

vii) The Tribunal placed reliance on Pune Tribunal decision in case of Gera Developments Pvt. Ltd. [TS-462-ITAT-2016 (PUN)], wherein a dispute of identical nature under which definition of FTS as per Article 12(4)(b) which is identically worded like Article 13(4)(c) of the India-UK tax treaty was adjudicated, wherein the Pune Tribunal had held that unless there is transfer of technical expertise skill or knowledge along with drawings and designs and if the assessee cannot independently use the drawings and designs in any manner whatsoever for commercial purpose, the payment received cannot be treated as FTS. Thus the Tribunal concluded by ruling that, *"Therefore, in our considered opinion, the amount received by the assessee has to be treated as business profit and in the absence of a PE in India, it cannot be brought to tax in India."*

viii) With regards to the second issue of cost recharge, the Tribunal applied the stated that, *"the very same reason on the basis of which we have held the amount received towards consulting engineering services to be not in the nature of fees for technical services as discussed above, we hold that the amount received towards cost recharge cannot be brought to tax in India in the absence of PE."*

8. Taxability of certain payments as FTS – payments made to foreign agent in Ecquador for services rendered outside India, which assessee was contractually required to perform, were not taxable as FTS u/s. 9(1)(vii) and hence, payments were not subject to TDS u/s. 195; however payment for market survey, being for managerial, technical or consultancy services, was subject to TDS u/s. 195.

Shri Jogendra L. Bhati [TS-183-ITAT-2019 (Ahd)] Assessment Year 2013-14

Facts

i) Assessee, proprietor at "Bion Healthcare" was engaged in trading/exporting medicines through his proprietorship concern. Assessee had made a payment of ₹ 1.79 crore to CACMILSA/ Carlos Avila Guilermo Celi. Additionally assessee also paid ₹ 77.99 lakh to Carlos Avila Guilermo Celi for "Market Survey Charges for three months" and "Registration fees, evaluation & analysis charges, transaction and notarisation of dossiers, market analysis & tender survey" respectively. Thus, total payment of ₹ 2.57 crore was made to CACMILSA/ Carlos Avila Guilermo Celli.

ii) The assessee contended that Ecquadorian Institute of Social Security ("IESS") had entered into a contract with assessee for supply of 62 drugs. As per the contract, assessee was to carry out geographical, logistical support for the delivery of imported drugs in the warehouse of different health units of "IESS". Similarly, the assessee was under the obligation that it would pay notarizing fees, contract registration fees, cost of the copies of the contract, the cost of storage, transportation etc. Further assessee undertook to deliver the drugs acquired through this contract in all the medical units of "IESS". The assessee was also required to provide space for storage, repackaging and all other necessary logistics. Assessee required physical presence in Ecuador to carry out all these activities/ works and thus he entered into a contract with non-resident agent, viz. CACMILSA through its director, Carlos Avila Guilermo Celi.

iii) The AO opined that since the assessee failed to deduct TDS on managerial and

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consultancy services, provided by CACMILSA, the expenditure was to be disallowed. Aggrieved, assessee was in appeal before CIT (A) who concurred with AO. Thus assessee filed an appeal before ITAT.

iv) The assessee contended that both the Revenue authorities failed to construe the meaning of expression "managerial, technical and consultancy services" employed in *Explanation* to section 9 while harping that such payment involved such services. Assessee argued that had any consultancy/opinion given by CACMILSA being used by the assessee within India for enhancing its business, then payment *qua* that could be at most in the field of managerial and consultancy services. But here the payments have been made to CACMILSA for fulfilment of obligations of different services required to be rendered outside India by assessee. Assessee bifurcated the payments made to such CACMILSA under four different categories out of which expenditure for (a) local logistic cost at Ecuador, (b) supply of goods to various hospitals across Ecuador, and (c) custom clearance at Ecuador were in nature of reimbursement. Fourth category was liaisoning and commissioning. Assessee submitted that foreign agent had no permanent establishment in India and had not provided any services in India. Therefore, any commission paid by the assessee to the foreign agent for the purpose of duty outside India would not be taxable in India and no TDS was required to be deducted.

v) For fulfilment of the contractual obligation with Government of Ecuador the assessee had hired services of CACMILSA. Assessee argued that the payment made to CACMILSA could not be considered as an income or deemed income as defined under section 9 of the Income-tax Act and was not chargeable to income-tax in India. On the other hand, stand of the AO which concurred by the CIT(A) was that a perusal of this agreement would indicate that CACMILSA provide services of specialized nature in the field of pharmaceutical sector, hence it fell within the ambit of expression "management, technical and consultancy services" used in *Explanation* 2 to section 9.

Decision

i) The Tribunal held that as per section 9 "fee for technical services" means any consideration for rendering of any "managerial, technical or consultancy services", but does not include consideration for any construction, assembly etc. CIT(A) construed the agreement between assessee and the CACMILSA for harping a belief that services rendered by the foreign agent was in the nature of "managerial, technical or consultancy services". For this purpose, the CIT(A) has observed that first clause of the agreement itself mention that commercial advisory i.e., CACMILSA has agreed to provide services which consisted of support, management, general advice and other actions require during the process of supply of drugs to the Government of Ecuador.

ii) The Tribunal observed that in order to fulfil all the activities as per agreement, liaison with the local authorities according to the requirement of drugs, had to be kept.

iii) The Tribunal further noted that ordinarily, "managerial services" means managing the affairs by laying down certain policies, standards and procedures and then evaluating the actual performance in the light of the procedures so laid down. The managerial services contemplate not only execution but also the planning part of the activity to be done, and if overall planning aspect is missing, and one has to follow a direction from the other for executing particular job in a particular manner, then, it could not be said that the former is managing that affair. The Tribunal stated that consultancy services would fall within the expression "fees for technical services" if some consideration was given for rendering some advice, opinion etc. for the execution of any work. Now consideration was equivalent to 45% of the value of the order from Ecuador out of which 15% was allocated for liaison

and commission for the purpose of fulfilment of these activities. According to the assessee, these are simplicitor reimbursement of actual expenditure as well as commission to foreign agents for performing these activities on behalf the assessee. The assessee had not debited any other expenditure separately in his account, more so, the AO himself did not raise any doubt about incurrence of expenditure. The Tribunal observed that all these services were rendered in Ecuador out of Indian territory. No information supplied by the commercial agent was used except to some extent the market research of pharma products in Vietnam given by said advisor.

iv) The Tribunal relied on a plethora of rulings where it was unanimously held that if services rendered by foreign agent are simplicitor for procurement of some contract, and fulfilment of certain export obligations like logistic, warehousing etc. then these will not be termed as service in the nature of technical services or managerial and consultancy services. The Tribunal found that these activities will not generate or invent any information which could be used in India for augmentation of manufacturing of drugs and held that no element of managerial consultancy or technical services were being rendered by the commercial agent and thus the assessee was not required to deduct TDS on receipt of ₹1.79 crores, as per break up given below:

Nature of expenditure	Head of Expenditure in P&L	FCN $	INR
Local Logistic cost at Ecuador	Logistic cost @8%	60,765	3,372,438
Supply of goods to various Hospitals across Ecuador	Distribution & Admin cost @10%	75,956	4,215,547
Custom clearance at Ecuador	Importation & Custom clearing	75,956	4,215,547
Liaisoning and Commission	Commission @15%	113,9	6,170,229
		326,6	**17,973,760**

v) The Tribunal relied on Gujarat HC ruling in case of *CIT vs. Torrent Pharmaceuticals Ltd., (2013) 29 taxmann.com 405 (Guj)*; where it was held that expenses incurred by the assessee in foreign country for registration of its products for marketing and promoting sales was to be allowed as revenue expenditure. The Tribunal thus allowed expenses incurred by the assessee towards registration fees, evaluation and analysis charges, translation & notarization of dossiers.

vi) The Tribunal found that market research of new pharma products and market survey would provide the assessee with information used for exploring new business venture and enhancing its capacity to conduct new business. Certainly, such information would fall within the managerial, technical consultancy services, therefore, the tribunal held that the assessee was required to deduct TDS on a sum of ₹ 11.92 lakh and ₹ 7.63 lakh paid to Allegens Co. Ltd. and ₹ 5.56 lakh paid to Mr. Carlos Avila Guilermo Celi. ITAT held that since the assessee failed to deduct TDS on these payments, they deserved to be disallowed.

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INDIRECT TAXES

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GSTR-9: Gateway to Endless Litigation?

The Goods and Services Tax (GST) law is a landmark piece of legislation introduced in Indian history having wide ramifications on business, industry, commerce, governments, tax professionals and the common man at large. It was implemented from 1.7.2017. The F. Y. 2017-18 has concluded almost a year back. The CBIC finally notified the GST Annual Return in Form GSTR 9 and GST Audit Report in Form GSTR 9C in September 2018 *vide* Notification No. 39/2018 dated 4.9.2018. From then, the annual return in Form GSTR-9 has been a point of continuous deliberation and debate. The industry at large had made several representations and had expected a series of changes in the format of GSTR-9. However, only minor modifications have been made to the form and revised GSTR-9 was introduced *vide* Notification No. 74/2018 dated 31.12.2018.

In light of the above background, the tax payers are required to file GSTR-9 as per the format available as on date and the due date has been extended till 31st August 2019 in the latest 35th GST council meeting. On this note, I shall discuss the specifics of GSTR-9 hereunder.

The GSTR-9 is broadly divided into 19 tables with each table consisting of significant details such as outward supply, inward supply, amendments, tax payable, HSN details, etc. The format of GSTR-9 is such that it requires tax payers to present a comparison report of returns filed *vis-à-vis* the position in books of account, unlike VAT regime which allowed replacement of figures of books of account in the annual return. Thus, while filing GSTR-9, it becomes very important to have details of all variations between the books and the GST returns filed.

One would come across multiple issues while filling up GSTR-9 and reconciling the same with books of account. Many of such anomalies faced by the taxpayers are encapsulated hereunder in this article:

Manner of disclosure of sales details, outward liabilities in Table 4 & Table 10 & 11 of GSTR-9

There has been a great confusion towards the basic approach and source data to be used while filing of GSTR-9. There has been some confusion over using FORM GSTR-1, FORM GSTR-3B or books of account as the primary source of information. It is important to note that both FORM GSTR-1 and FORM GSTR-3B serve different purposes. While, FORM GSTR-1 is an account of details of outward supplies, FORM GSTR-3B is where the summaries of all transactions are declared and payments are made.

Vide press release on Clarifications on filing of Annual Return (FORM GSTR-9) and Instruction No. 4 to GSTR-9, it may be inferred to show the outward supply details as under:

- If the tax on supply was paid through FORM GSTR-3B between July 2017 to March 2018 then such supply shall be declared in Table No. 4 of GSTR-9
- If the tax on supply was paid through FORM GSTR-3B between April 2018 to March 2019 then such supply shall be declared in Table No. 10 & 11 of GSTR-9
- Any additional outward supply which was not declared by the registered person in FORM GSTR-3B shall be modified in Table No. 4 of GSTR-9. Such additional liability shall be computed in Table No. 9 and the gap between the "tax payable" and "Paid through cash" column shall be paid through FORM DRC-03.

Thus, outward details in GSTR-9 is essentially driven by GSTR-3B filed for the period. This runs contrary to the several instructions to GSTR-9 which states that outward details in GSTR-9 has to be filled up basis the GSTR-1 filed for the period. Furthermore, the auto populated figures in GSTR-9 are essentially figures of GSTR-1 and not GSTR-3B. This poses a great confusion while reconciling figures as per GSTR-3B, GSTR-1 and books of account. However, the said issue is clarified in the press release and made clear that auto population figures are worth reference value only and can be manually modified, if required.

Thus, it may be concluded that GSTR-3B filed for the period is of utmost importance while filing GSTR-9 for the purpose of outward supply. However, while providing reconciliation between books and GSTR-3B, one may face following challenges which is not clarified as on date:

- Difficulty while providing break up of outward supply into B2C, B2B, credit notes because such details were never made mandatory while filing GSTR-3B.
- While GSTR-9 for 2017-18 has been filed based on GSTR-3B, the credit to be passed to the taxpayer happens by way of GSTR-1 i.e., GSTR-2A of a tax payer is auto populated basis GSTR-1 field by the vendor. Therefore, one cannot rule out a case wherein sales is not shown in GSTR-3B, GSTR-9 and books of accounts but for the purpose of passing ITC, wrong value has been entered in GSTR-1.

Additional output liability/additional ITC

It is quite possible that while undertaking filing of GSTR-9, a person may discover that certain turnover has skipped disclosure or there had been an extra disclosure resulting in additional liability or refund. Similar situation may arise while reconciling ITC.

It has been made amply clear by way of notes to annual return that additional liability if any may be declared in the GSTR-9 but taxpayers cannot claim additional ITC unclaimed for 2017-18 through this GSTR-9. Thus, GSTR-9 enables a taxpayer to align his latest sales figures as per audited final accounts with the GSTR-9 but the taxpayer has to rely on GSTR-3B for the purpose of ITC details.

There may be a probable mismatch in ITC as per GSTR-9 and as per the books. The only option to provide this reconciliation is through GSTR-9C, if applicable.

Therefore, in a nutshell, a company having to pay more tax on output side may disclose the same in GSTR-9 and is advised to pay incremental tax through DRC-03. A company having a refund of tax paid may disclose the same in GSTR-9 and apply for refund in Form RFD-01A (subject to conditions specified for refund).

Any ITC to be reversed will have to be compulsorily done through DRC-03 without disclosure in GSTR-9. Any ITC to be availed will have to be undertaken in subsequent period GSTR-3B subject to time period specified under GST Law.

Unclaimed ITC and reversal of ITC

Having dealt with variations in turnover, there may be a situation where ITC has remained unclaimed on few invoices. How to deal with the same in GSTR-9 is a of great concern.

Table 6 & Table 7 of GSTR-9 pertains to ITC claimed and based on the instructions to the GSTR-9, it may be concluded that Table 6 & Table 7 ought to be filled up basis the ITC details inserted in GSTR-9. Therefore, there is no appropriate column to cover a situation of claiming of extra ITC or reversing of any ITC.

It should be borne in mind that the due date of claiming unavailed ITC of 17-18 was due date of filing of GSTR-3B of March, 2019 i.e., 23rd April, 2019. Therefore, any unclaimed/missed ITC discovered at the time of filling GSTR-9 may lapse and cannot be availed. The same cannot be claimed in GSTR-9 if the due date is missed.

Further, the form is even not designed to provide for reversal of ITC claimed in F.Y. 2017-18. The same will need to be reported only in GSTR-9C if applicable.

However, any ITC of F.Y. 2017-18 claimed or reversed from April 2018 to March 2019 GSTR-3B, the same may be disclosed in Table Nos. 12 & 13 which is just for presentation purpose and does not affect the computation of liability.

Incremental liability on account of reverse charge

Further, there are majority of cases wherein, taxpayers have no correctly discharged their RCM liability and are faced with a situation of incremental liability on account of reverse charge. However, the GSTR-9 does not envisage to provide a column for disclosure in cases where it is discovered that there is additional liability on account of reverse charge, not discharged in GSTR-3B of F.Y. 2017-18. The same is explained by way of various scenarios hereunder.

Additional RCM liability of F.Y. 2017-18 paid in GSTR-3B of F.Y. 2018-19

Table 4J – Disclosure in this column may not lead to increase in tax liability in Table 4 as well as Table 9 of GSTR-9. Accordingly, if shown in Table 4J, GSTR-9 will reflect tax payable,

but such tax is already paid in GSTR-3B of F.Y. 2018-19.

Table 10 – This table is essentially for outward supplies/tax i.e., outward supplies i.e. under forward charge. Hence, this may not be appropriate for disclosing additional RCM tax. However, if one may take a stand that supplies/tax should include RCM as well, then also the form poses a challenge in disclosing the same in Table 10. Column 5Q of GSTR-9C will pick up figures as reflecting in Table (5N + 10). Therefore, if RCM taxable value is inserted in Table 10, it may lead to disruption and unreconciled turnover in GSTR-9C.

Therefore, in view of the author, there is no appropriate column to disclose additional RCM paid post F.Y. 2017-18 but up to F.Y. 2018-19. The same will have to be reconciled only in GSTR-9C if applicable.

Additional RCM liability of F.Y. 2017-18 not paid in GSTR-3B till date

Such details may be disclosed in Table 4J and Table 9 of GSTR-9 and accordingly tax may be paid by filing DRC-03.

GSTR 2A figures as per column 8A of GSTR-9

Some taxpayers have reported that figures of Input Tax Credit (ITC), as pre-populated in Table 8A of Form GSTR-9, do not match with the figures as appearing in their Form GSTR-2A. In this regard, the GSTN has issued an advisory note stating the reasons for difference (for e.g.- GSTR-1 status saved/submitted/filed, error in mentioning place of supply, etc.). One will have to refer to the said advisory issued by GSTN

Another fundamental challenge arises wherein, figure as per column 8A i.e., 2A is less than column 8B and the GSTR-9 displays the same as negative balance and accordingly there is an apprehension that such GSTR-9 will attract departmental scrutiny.

With respect to this issue, it should be noted that merely on account of mismatch in GSTR-2A should not result into a tax demand. What has to be essentially seen are the conditions for claiming ITC as per Section 16 of CGST Act, which *inter alia* provides for filing of GST return as per Section 39. The Section 39 provides for filing of GSTR-1, 2, 3/3B. The filing of GSTR 2 & 3 has not been activated and further there may be cases that appropriate GSTR-3B is filed and tax has been paid but GSTR-1 is not accurately filed. Thus, GSTR-2A is just an auto population based on GSTR-1 filed and should not be considered as a conclusive evidence of non-filing of return or non-payment of tax. The mismatch can very well be a starting point of scrutiny but the resulting tax demand may rest upon the merits of the case.

Further, various writ petitions have been filed at several High Courts challenging the conditions states in Section 16 of CGST Act and it would be interesting to witness the judgements pronounced by the court.

Furnishing of details which were not asked for at the time of filing of monthly GST returns

It has been observed that many taxpayers are facing a lot of challenge in reporting information that was not being explicitly reported in their regular monthly returns in Form GSTR-3B and GTR-1. The GSTR-9 requires reporting of various details such as under:

- Break up of outward HSN code at 6 digit level with break up of GST rate. However, GSTR-1 required reporting of maximum 4 digit HSN code without GST rate wise breakup. Accordingly, the tax payers who have not identified HSN code up to

6 digits will require to do the same now. It should be noted that exemption from HSN reporting is provided to taxpayers whose aggregate turnover in preceding year is less than ₹ 1.5 Crore.

- Breakup of inputs, input services and capital goods in Table 6. Further, this details are required to be provided based on GSTR-3B filed. However, the tax payers while filing GSTR-3B would not have considered breaking up the ITC into these baskets since the same were not to be provided in GSTR 3B. The bifurcation reporting is merely for presentation purpose and does not affect the computation in any ways. However, in absence of any beneficial clarification, tax payers will be forced to dig deeper and provide bifurcation of ITC claimed in GSTR 3B, in order to accurate filing of GSTR-9.

Based on the above, it would not be surprising to witness a situation where a particular GSTR-9 is not 100% accurate. The Government has also clarified through press release that some of the information in GSTR-9 are informative and reasonable/explainable variations in the information reported in these tables will not be viewed adversely.

Conclusion

While above are few of the anomalies faced while filing GSTR-3B, it is worth highlighting that the taxpayers who have filed accurate GSTR-1 and GSTR-3B, filing of GSTR-9 may be extremely simple and less time consuming. However, where there are discrepancies in filing of GST return vs. the books of account, one may need to have a detailed working and reconciliation which will form basis at the time of departmental scrutiny.

Lastly, it should be borne in mind that it would be challenging for taxpayers to present a correct picture with the existing format of GSTR-9 in front of the GST authorities. One will have to finally rely upon the working file read with audited accounts to finally assess a taxpayer.

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Any action that makes us go *Godward* is a good action, and is our duty; any action that makes us go downward is evil, and is not our duty.

— *Swami Vivekananda*

Unchaste imagination is as bad as unchaste action. Controlled desire leads to the highest result. Transform the sexual energy into spiritual energy.

— *Swami Vivekananda*

CA Ashit Shah and CA Kush Vora

INDIRECT TAXES
GST – Legal Update

A. CGST NOTIFICATIIONS

1. Extension of the time period for blocking and unblocking the e-Way Bill facility. *(Notification No. 25/2019-Central Tax, dated 21.6.2019)*

The CBIC has extended the applicability for blocking and unblocking the E-Way Bill facility in case of non filing of GSTR returns to 21st August 2019.

2. Extension of the time period for filing of Form GSTR-7 *(Notification No. 26/2019 – Central Tax, dated 28.6.2019)*

The CBIC has extended the time period for filing of Form GSTR-7 i.e. form for deduction of TDS under GST, for the month of October 2018 to July, 2019 till 31st August, 2019.

3. Notifying due dates for Form GSTR 1 & GSTR-3B for the period July 2019 to September 2019. *(Notification No. 27/2019, 28/2019 & 29/2019-Central Tax, dated 28.6.2019).*

The CBIC has notified the time period for filing of Form GSTR-1 & GSTR-3B for the month of July 2019 to September 2019, as under:

Particulars	*Due Date*
Form GSTR-1 (Turnover Less than ₹ 1.5 crore)	31st October 2019
Form GSTR-1 monthly (Turnover more than 1.5 Crores)	11th of Succeeding month
Form GSTR-3B	20th of the Succeeding month

4. Exemption from filing of Annual Return GSTR-9 and reconciliation statement Form GSTR-9C. *(Notification No. 30/2019 -Central Tax, dated 28.6.2019).*

The CBIC has exempted the suppliers providing Online Information Database Access and Retrieval Services ("OIDAR services") from a place outside India to a

person in India, from filing Annual Return GSTR-9 and reconciliation statement Form GSTR-9C.

5. **Fourth Amendment Rules** *(Notification No. 31/2019-Central Tax, dated 28.6.2019).*

The CBIC has made several amendments in CGST Rules, mainly pertaining to following:

— Bank account details in Rule 10A of the CGST Rules.

— Value of supply in case where Kerala Flood Cess is applicable.

— Provision of Quick Response (QR) code on the tax invoice and bill of supply.

— Amendment in Rule 66 and Rule 67 regarding Form GSTR-7 and Form GSTR-8.

— Amendment in Rule 87 regarding Form GSTR-02 and Form GST PMT-09.

One may refer the actual notification for detailed amendments in the CGST Rules and its impact thereon.

6. **Extension of the time period for filing of Form GST ITC 04** *(Notification No. 32/2019-Central Tax, dated 28.6.2019).*

The CBIC has extended the time period for filing of Form GST ITC-04 i.e. return for the purpose of disclosing details of goods sent for job work, for the period July 2017 to June 2019 till 31st August, 2019.

B. CGST (RATE) NOTIFICATIONS

1. **Person specified for claiming refund on supply of tax free goods to an outgoing international tourist.** *(Notification No. 11/2019-Central Tax, Dated 29.6.2019).*

The Central Government has specified to establish retail outlets in the departure area of an international airport, beyond the immigration counters, making tax free supply of goods to an outgoing international tourist, as class of persons entitled to claim refund as per Rule 95A of CGST Rules.

C. CGST CIRCULARS

1. **Clarification regarding applicability of GST on additional/penal Interest** (*Circular No. 102/21/2019-GST, dsted 28-6-2019)*

The Central Government has clarified that additional/penal interest levied on the overdue loan/advances would not be liable to GST in terms of Sl No. 27 of Notification No. 12/2017.

Only penal interest recovered in terms of supply of taxable goods or services would be liable to GST in terms of Section 15 of CGST Act.

2. **Clarification on place of Supply in certain cases**. *(Circular No. 103/22/2019 – GST, dated 28-6-2019)*

The Government has clarified regarding place of supply of services for the following two scenarios:

— Supply of some of the services provided by ports and

— Services rendered on goods temporarily imported in India

3. **Clarification on processing of refund applications in Form GST RFD-01A submitted by taxpayers.** (*Circular No. 104/23/2019-GST, dated 28-6-2019)*

It has been clarified that in cases, where reassignment of refund applications to the correct jurisdictional tax authority is not possible on the common portal, the processing of the refund claim should not be held up and it should be processed by the tax authority to whom the refund application has been electronically transferred by the common portal. After the processing of the refund application is complete, the refund processing authority may inform the common portal about the incorrect mapping with a request to update it suitably on the common portal so that all subsequent refund applications are transferred to the correct jurisdictional tax authority.

4. **Clarification on treatment of secondary or post sales discounts under GST** (*Circular No. 105/24/2019-GST, dated 2806-2019)*

In pursuance to various representation, CBIC has clarified the treatment of secondary and post sales discounts under various scenarios. For e.g., it is clarified that if the post-sale discount is given by the supplier of goods to the dealer without any further obligation or action required at the dealer's end, then the post sales discount given by the said supplier will be related to the original supply of goods and it would not be included in the value of supply, in the hands of supplier of goods, subject to the fulfilment of provisions of sub-section (3) of section 15 of the CGST Act. However, if the additional discount given by the supplier of goods to the dealer is the post-sale incentive requiring the dealer to do some act like undertaking special sales drive, advertisement campaign, exhibition etc., then such transaction would be a separate transaction and the additional discount will be the consideration for undertaking such activity and therefore would be in relation to supply of service by dealer to the supplier of goods. The dealer, being supplier of services, would be required to charge applicable GST on the value of such additional discount and the supplier of goods, being recipient of services, will be eligible to claim ITC of the GST so charged by the dealer.

5. Laying down procedure for the purpose of refund of taxes paid on inward supply of indigenous goods by retail outlets established at departure area of the international airport beyond immigration counters when supplied to outgoing international tourist against foreign exchange *(Circular No. 106/24/2019 – GST, dated 29-6-2019)*

The CBIC has issued detailed procedure and guidelines for the purpose of claiming refund of taxes paid on inward supply of indigenous goods by retail outlets established at departure area of the international airport beyond immigration counters when supplied to outgoing international tourists against foreign exchange, in terms of Notification No. 11/2019 dt. 29.6.2019 summarised above.

D. CGST 'Removal of Difficulty Orders'

1. **Extension of due date for furnishing Form GSTR-9, GSTR-9A and Form GSTR-9C.** *(Order No. 6/2019GST, dated 28-6-2019)*

The Central Government on recommendations of the Council has extended the due date for filing Forms GSTR-9, GSTR -9A and Form GSTR-9C till 31st August, 2019.

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CA Naresh Sheth & CA Jinesh Shah

INDIRECT TAXES

GST – Recent Judgments and Advance Rulings

A. Writ Petitions

1. JSW STEEL LIMITED (2019-TIOL-1236-HC-MUM-GST)

Facts, Issue involved and Contention of Petitioner

JSW Energy Limited (JEL), the petitioner, which is engaged in the business of generation and sale of electricity proposed to enter into an arrangement with JSW Steel Limited (JSL) involving *inter alia* **conversion of coal and other inputs into electricity and conversion of electricity into Steel** on job work basis.

Petitioner has sought for ruling of the AAR whether the proposed arrangement qualifies as "job work" as defined under section 2(68) of the Central Goods and Services Tax Act, 2017 (CGST Act) and consequently whether the petitioner is entitled to benefits under the CGST Act and MGST Act.

AAR ruled that the proposed arrangement did not qualify as 'job work' primarily because the same amounted to 'manufacture' as defined u/s. 2(72) of the CGST Act.

Being aggrieved by AAR ruling, the petitioner appealed to Appellate Authority ('AAAR'), emphasizing that an arrangement amounts to 'job work' even though there may arise an element of 'manufacture' therein. The terms 'job work' and 'manufacture' are not mutually exclusive.

AAAR agreed with the contention of petitioner. However, AAAR dismissed the appeal relying upon two **different and distinct grounds** (hereinafter referred to as **"new grounds"**).

Petitioner's submissions

At the outset, it was submitted that since the statute has provided for no further appeal against the orders of Appellate Authority, this Court, should examine the impugned orders on the basis of substantive merits. Appellate Authority, in any case, clearly exceeded jurisdiction in relying upon 'new grounds', which were never raised before AAR by the Revenue.

It was submitted that at no stage the petitioner was intimated regarding 'new grounds'. The petitioner was not offered any opportunity to place documentary evidences with regard to the 'new grounds'. Appellant submitted that despite this, the Appellate Authority, has

ruled against the petitioner by observing that petitioner failed to produce the documentary evidences in relation to the 'new grounds'. All this clearly amounts to violation of principles of natural justice and on this ground, Appellate Authority's impugned order is required to be set aside and the matter remanded to Appellate Authority for reconsideration.

Discussions, Observations and Decision of High Court

At the outset, it was made clear that court did not propose to examine the impugned orders on their substantive merits or demerits, merely because statutes in question have not provided for any further appeal against the decision of the Appellate Authority. The circumstance that the statutes in question have provided for no further appeal against the decision of the Appellate Authority, will have to be respected and the validity or otherwise of the impugned orders will have to be examined by applying **the principles of judicial review** and not the principles which apply in case of an appeal.

Hon'ble High Court set aside the impugned order of the Appellate Authority and remanded the petitioner's appeal to the Appellate Authority for reconsideration on its own merits and in accordance with law. Hon'ble High Court granted the petitioner liberty to produce, before the Appellate Authority, documentary evidences within 1 month which might have bearing upon the new grounds relied upon by the Appellate Authority.

As matter of abundant caution, it was clarified that Hon'ble High Court has not gone into the merits of the rival contentions on the issue as to whether the petitioner's proposed arrangement attracts GST or not and therefore, all such contentions are left open for the Appellate Authority to decide.

B. Rulings by Authority for Advance Rulings

1. CUMMINS INDIA IMITED - AAR MAHARASHTRA (2019-TIOL-62-AAR-GST)

Facts, Issue involved and Query of the Applicant

Applicant is engaged in business of manufacturing diesel and natural gas engines. Applicant executes an Annual Maintenance Contact (AMC) with end customers to provide maintenance services to their customers. AMC is provided for a fixed charge based on nature of maintenance activity that may be required. AMC primarily includes carrying out routine maintenance, preventive maintenance, inspection of parts, supply of consumables and other repairs and replacements.

Applicant has engaged dealers which provide maintenance services to the end customers. Consumables consumed while providing maintenance services are recovered by dealer from the applicant.

Applicant sought a ruling with respect to *determination of GST liability by deciding principal supply of the composite supply qua maintenance contracts executed between the customer and the Applicant.*

Applicant's submissions

Composite supply as defined under GST law includes multiple supplies of goods or services or both, supplied together in ordinary course of business. AMC covers in its scope supply of maintenance services and supply of parts/ consumables as may be required. Supply of service and parts is naturally bundled and intrinsically linked with each other. Both the conditions prescribed u/s. 2(30) of the Act are fulfilled and the said transaction constitutes a composite supply.

ML-933

Principal supply basically signifies the supply of service/ good which form substantial or pre-dominant element of composite supply. Even though AMC covers rendition of service as well as supply of goods, the very intention of the applicant is to provide maintenance services and supply of goods is a part and parcel of providing maintenance services. Supply of services is the dominant intention and partakes the character of principal supply.

There is no intention to transfer the property in goods to the customer. The engine on which maintenance activity is carried out already belongs to customer. Further maintenance contracts are executed by experienced professional. Purpose behind executing AMC is to keep engines unimpaired and operative all the times. They are executed to prevent large failures by periodic and systematic inspection. Principal supply of the transaction is supply of service.

Discussions by and observations of AAR

Composite supply means that there is supply of two or more goods or services or both in normal course of business. In present case, there is definitely multiple supply and these supplies are made in normal course of business. AMC covers both, services as well as goods. However, pre-dominant intention is to provide maintenance services for proper upkeep of engines belonging to customers. Supply of goods follows as a consequent to the supply of maintenance services. Hence supply of maintenance services can be considered as 'principal supply'.

Supply of services/goods in present case is naturally bundled with supply of goods being incidental to the supply of services where principal supply is supply of services.

Ruling of AAR

It is held that the principal supply in the present case between the applicant and the customer is one of supply of service.

2. M/s. ALLIED DIGITAL SERVICES PRIVATE LIMITED – AAR (2019-TIOL-61-AAR-GST)

Facts, Issue involved and Query of the Applicant

The Government of Maharashtra (hereinafter referred to as 'GOM') has envisaged to setup a comprehensive CCTV based City Surveillance System for the city of Pune and Pimpri-Chinchwad (hereinafter referred to as "Surveillance Project").

The GOM published the tender to seek services of a reputed IT *firm as a System Integrator* for Design, Development, implementation & maintenance of CCTV based Surveillance System for Pune and Pimpri-Chinchwad areas. Accordingly, the applicant has submitted its proposal for the same. The agreement dated 28th October 2013 is made between the Home Department of GOM and the applicant. Applicant is referred to as 'Systems Integrator' in the contract document.

The term of the agreement shall be a period of 5 years and 10 months from the date of execution of this agreement. This includes the estimated period of 42 weeks for implementation of the project and 60 months from the date of successful go live of the project.

GOM will pay Systems Administrator the total fees in following manner:

(a) 20% - against project go live;

(b) Remaining 80% in 20 equal instalments per quarter (inclusive of all taxes, as applicable).

Entire project cost is ₹ 224,31,50,106. Capital cost i.e. goods used in project is ₹ 90,35,70,545 and balance operation cost for 5 years of entire project is ₹ 133,95,79,561.

As per the contract project went "Go live" on 27th October 2015 i.e., before GST regime. Ownership of all assets of ₹ 90,35,70,545 are transferred to GOM on 16th June 2015 and

applicant has also raised invoice on GOM in this regard. Applicant also paid applicable VAT on the entire amount of ₹ 90,35,70,545.

The Applicant submitted that prior to the GST regime service tax was exempted on the contract. According to applicant, the contract in question is a composite supply of works contract as defined in section 2(119) of the CGST Act and hence it will be liable for tax @6% under the CGST Act.

Considering the above facts and circumstances, the applicant raises the following questions before the honourable Advance Ruling authority for its kind consideration and decision:

1. *Whether the amount received for supply of services during the post GST period to GOM as per contract in question are taxable under SGST/CGST Act?*

2. *If answer to question No. 1 is in affirmative then what is rate of tax under SGST/CGST?*

Discussions by and observations of AAR

Answers to both aforesaid questions asked by applicant depend on determination of nature of activity being carried out by applicant. To determine the nature of activity it is required to be determined whether the contract involves composite supply as defined under the SGST/CGST Act and further whether such supplies constitute a Works Contract as defined in **clause (119) section 2** of the GST Act.

The perusal of clauses of the agreement leads to the inference that various supplies made by applicant under the contract are integrated in such way that all of them constitute a supply to set up a comprehensive CCTV based city surveillance system, therefore, constitute a composite supply as defined **u/s. 2(30)** of CGST Act.

The next issue to be decided is whether this composite supply is ' Works Contract' as defined in Section 2(119) of the CGST Act. In the present contract, liability of the applicant does not end with the supply of goods but it extends till the successful testing, commissioning and also maintenance of the system. The present contract is a works contract as it involves provision of services and goods for setting up and maintaining comprehensive 'CCTV based City Surveillance System', which can be termed immovable property. To understand the term 'immovable proerty', decision in case of *TTG Industries Limited vs. CCE (2004)4 SCC 751* and *Triveni Engg. & Industries Ltd v. CCE (2000) 7 SCC 29* can be referred.

Since applicant is providing works contract services, it will be taxed at GST @ 18% under Sr. No. 3(ii) of N/N. 11/2017-CT(R) dated 28-6-2019. This entry was amended at various point of time to tax works contract services @ 12% in case same is provided to Government.

However, the reduced rate of tax is available only if the work is of the type of original work. The 'Original Works' has assigned meaning under the CPWD Works Manual 2014. In the present case, the contract is not related to any original work and is in the nature of composite supply of Works Contract. Hence it is held that the activity of the applicant in the present case is nothing but a composite supply of works contract, not being original works and they will be covered under Sr. No. 3(ii) of N.N. 11/2017-CT(R) dated 28-6-2017 as amended by Notification No. 1/2018 dated 25-1-2018 and attract 18% GST.

Ruling of AAR

In respect of question 1, the activity of the applicant is works contract as defined in section 2(119) of CGST Act and being a composite supply, it shall be treated as supply of service as per para 6(a) of Schedule II of CGST Act. It will be liable to be taxed under GST legislation.

In respect of question 2, as per Sr. No. 3(ii) of Notification No. 11/2017-CT(R) dated 28th June 2017, the tax rate is **SGST**- 9% & **CGST**- 9%.

ML-935

3. GANDHAR OIL REFINERY – AAR MAHARASHTRA (2019-TIOL-169-AAR-GST)

Facts, Issue involved and Query of the Applicant

Applicant is engaged in trading of non-coking coal and manufacturing of petroleum products from plant located at Silvassa and Taloja (Maharashtra). The trading activity of non-coking coal is carried on from various States. Applicant is importing coal at various ports situated in various states registered under GST.

Applicant has sought an advance ruling on following questions:

1. *Whether they can adopt the procedure to raise the invoice from Mumbai HO for imports received at various ports, located in various States and charge IGST from Mumbai to their customers in various States;*
2. *Whether if they cancel the separate registrations in various States can they do the transaction on Mumbai HO GSTN and in the E-Way bill mention the GSTN of Mumbai?*

Applicant's submissions

In the VAT regime, it was mandatory to take registration where the goods were imported and sales made from there on the basis on movement of goods. All the directors and executives are situated in State of Maharashtra. All decision making and documentation is done in Maharashtra.

(a) Agreement terms and conditions,

(b) Letter of credit and other facilities,

(c) Commercial import invoice,

(d) Bill of lading,

(e) Certificate of origin,

(f) Agreement with vessel owner - all these are entered in name of registered office in Maharashtra.

When the goods reach the port, applicant unloads the same at port warehouse and removes the goods from the port warehouse to customer directly. They do not have any godown or storage facility in the state.

Applicant proposes to cancel the registration at Andhra Pradesh, Orrisa, West Bengal, etc. and carry out its trading activity from Maharashtra. Place of supply of goods when imported into India is the location of importer i.e. Head office registered in Maharashtra and all the documents such as Bill of lading , Commercial Invoices etc. is raised on head office registered in Maharashtra.

As per Section 22 of CGST Act, supplier is liable to be registered in state "from where" he makes a taxable supply. Registration is not required in the state "to which" taxable supplies are made. Location of supplier is relevant for registration. Location of supplier (Importer) of goods is where business is ordinarily carried on. It is the place where supplier holds control over the goods ready to deliver. The word 'location' refers to the site or premises (geographical point) where the supplier is situated, with the goods in his control, ready to be supplied. So in applicant's case taxable supply is made from the state of Maharashtra (Head Office).

Discussions by and observations of AAR

Applicants have submitted that their entire transactions are done from Maharashtra (Head Office). They intend to clear goods from the warehouse/ godowns (located in various states) in name of their Mumbai Head Office.

As per Section 7(2) of the IGST Act, 2017 supply of goods imported into India shall be treated as supply of goods in the course of inter-State trade or commerce. As per Section 11(a) of IGST Act, place of supply shall be location of importer. In present case, importer is registered in Mumbai and hence place of supply shall be Maharashtra. Hence, the applicant will be clearing the goods by paying IGST from their GSTIN issued in Mumbai, Maharashtra.

Since the applicant will be storing the goods, after import, in various States for further sales, whether that would be inter-State or intra-State supply would depend upon the place of supply of goods as per Section 10 and Section 11 of the IGST Act, 2017.

Hence, the place from where the applicant makes a taxable supply of goods shall be his location. In this case, the Mumbai Head Office shall be location of supplier. Even if the applicant has godowns in different States, applicant can clear the goods based on invoices issued by the Mumbai Head Office on payment of IGST in the State of Maharashtra. Therefore, applicant need not take separate registration in other States.

Ruling of AAR

In respect of question 1, applicant is not required to have separate registration in each state.

AAR did not respond to question 2 as it is not covered u/s. 97 of the Act.

4. M/S. JALARAM FEEDS – AAR MAHARASHTRA (2019-TIOL- 170-AAR-GST)

Facts, Issue involved and Contention of Applicant

M/s. Jalaram Feeds (hereinafter referred as "the firm") is engaged into manufacturing of Compound Animal Feed (exempted goods). The Firm contends that it is into supply of only exempted goods, therefore, it is not liable to take registration under GST legislation as per Section 23 of CGST Act, 2017 ('the Act'). For its business, it procures services of GTA for which it is liable to pay GST under RCM.

Section 24 of the Act mandates GST registration if a person is liable to GST under RCM. The firm is of the opinion that Section 23 is not overruled by Section 24 of the Act. Therefore, it is not liable for GST registration.

Section 24 of the Act specifically starts with **"Notwithstanding anything contained in sub-section (1) of section 22,"** so it overrules Section 22 and not Section 23 of the Act.

Section 23(1)(a) of the Act gives relaxation to a person from liability to take GST registration if that person is engaged exclusively in the business of supplying goods or services or both that is not liable to tax or wholly exempt from tax under this Act or under the IGST Act, 2017.

Section 22(1) of the Act *mandates that every supplier shall be liable to be registered under this Act in the State or Union territory, other than special category States, from where he makes a* ***taxable supply*** *of goods or services or both, if his aggregate turnover in a financial year exceeds twenty lakh rupees.*

It is a clear interpretation that if a person is in the business of supply of Exempt Goods irrespective of Turnover exceeding the Limits specified in the section he is not liable to take registration because the turnover criteria is only applicable for taxable supply.

Applying the interpretation rules of law, it can be very well concluded that the legislation has chosen consciously Section 24 to override the provisions of Section 22(1) and has deliberately left-out Section 23. If Section 24 overrules Section 23, then majority of the persons in the business of exempted goods will be liable for registration as they obtain GTA services for transportation of these goods.

Based on aforesaid facts and contentions, applicant has sought ruling as t*o whether the firm is liable to take registration under section 24 or is exempted from registration under section 23?*

Contention of the concerned officer

Even if applicant is supplying exempted goods and exempted from registration u/s. 23 of the Act, he has to register himself under the Act to pay his tax liability under RCM by virtue of Section 24.

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As per N/N 05/2017-CT dated 19-6-2017, Suppliers exclusively involved in providing services notified for payment of tax under RCM have been exempted for taking Registration. If contention of the applicant is accepted then neither the supplier of GTA service nor recipient would pay service tax and government would lose revenue. This will defeat the basic purpose of RCM. Thus, the applicant shall be required to be registered as per Section 24(iii) of CGST Act, 2017.

Discussions by and observations of AAR

As per the scheme of CGST Act, to be registered a person satisfies two conditions namely:

- Supply of taxable goods or services or both; and
- Aggregate turnover in a financial year exceeds prescribed threshold limit.

The expression 'taxable supply' has been defined u/s 2(108) of the Act to mean a supply of goods or services or both which is leviable to tax under this Act.

From the N/N 13/2017-Central Tax (Rate) dated 28th June 2017 it is found that GTA Service is covered by the notification. Applicant being a recipient of supply is liable to pay tax under RCM and as per Section 9(3) of the Act, all the provisions of this Act shall apply to such recipient, as if they are the persons liable for paying the tax in relation to such supply. Thus from conjoint reading of Section 9 and section 24 of the Act, they have to compulsorily register under GST.

Applicant's argument that Section 23 of the Act is standalone section and the provisions of Section 24 pertaining to compulsory registration are applicable to a person liable for registration under sub-section (1) of the Section 22 of the GST Act, **makes the Section 24 of the Act redundant.** In this context it is pertinent to remind a well settled principle of law that the law should not be interpreted in such a way to make any part of the statute redundant.

By application of the above principles of jurisprudence namely **the rule of harmonious construction** and **the rule against redundancy**, the applicant would go out of the scope of Section 23 of the Act because he is making certain quantity of taxable supply of goods transport service by way of reverse charge mechanism and would fall within the scope of section 24 of the GST Act for the purpose of registration.

Ruling of AAR

In respect of aforesaid question, applicant is liable to take registration u/s 24 of the CGST Act, 2017.

5. MOHANA GHOSH – AAR WEST BENGAL (2019-TIOL-160-AAR-GST)

Facts, Issue involved and Contention of Applicant

Applicant is in the business of supplying cabs on rental basis.

Applicant sought a ruling on whether *credit is admissible of the input tax paid on the purchase of motor vehicles for the supply of above-referred service.*

Applicant's submissions

Applicant supplies rent-a-cab service. Section 17(5)(a)(B) of CGST Act allows credit of input tax paid on the purchase of motor vehicles when used for supplying passenger transportation service.

Applicant submits that people take car on rent for transportation of passengers. Rent-a-cab service provided by the applicant is, therefore, essentially associated with the transportation of passengers. GST paid on the purchase of motor vehicles for supplying rent-a-cab service should, therefore, be admissible in terms of section 17(5)(a)(B) of the CGST Act. Applicant submitted photocopies of sample invoices, which showed rent being charged based on the distance travelled.

Revenue's submissions

Post 1-2-2019, admissibility of input tax paid on purchase of motor vehicles to be used for supply of rent-a-cab services should be examined in terms of Section 17(5)(a)(B) of CGST Act. As renting of cab is done for the sole purpose of transporting passengers, the applicant is eligible to claim input tax credit on purchase of motor vehicles for supplying rent-a-cab service.

Discussions by and observations of AAR

Before amendment (1-2-2019), the provisions of section 17(5)(b)(iii) of the Act did not allow credit of GST paid on inputs for supply of rent-a-can service, except under certain specific conditions. It rules out credit of input tax paid on the purchase of motor vehicles used for supply of rent-a-cab service if the transaction was effected before 1-2-2019.

Amended provisions of section 17(5)(b)(iii) of the CGST Act does not contain specific reference to rent-a-cab service. Input tax credit is not available in respect of supply of the service of renting or hiring of motor vehicles in terms of section 17(5)(b)(i) of the GST Act, unless the inward and the outward supplies are of the same category (either standalone or as an element of a taxable composite or mixed supply).

Section 17(5)(a) disallows input tax credit in respect of inward supply of motor vehicles for transportation of persons having approved capacity of not more than thirteen persons. Input tax credit of such motor vehicles is allowed only when it is used for supplying transportation of passenger services.

Passenger transportation service is classified under SAC 9964. Transportation of passengers, with or without accompanied belongings, is taxable under Sr. No. 8 of Notification No. 11/2017- CT (Rate) dated 28-6-2017 ('rate notification'). As obvious from reference to the accompanied belongings, the recipient of the service is a passenger travelling from one place to another. In passenger transportation service, the recipient of the service is a passenger and he pays the consideration for the distance travelled, whatever be the degree of control he enjoys over the vehicle.

Renting of any motor vehicle is classified under SAC 9966. It is taxable under Sr. No. 10(i) of the rate notification. The recipient of this service is not a passenger. In renting or hiring of a motor vehicle, the recipient receives the right to use the vehicle over a specified duration, whether he is a passenger or not. For recovering the fuel cost, Applicant considers the distance travelled. However, travelling a certain distance is not the essence of the service.

CGST Act does not define "Rent-a-cab". Therefore, one needs to derive nature of the Applicant's service from the Application filed and invoices submitted by the applicant. The Applicant provides cab rental service *inter alia* to institutions like West Bengal Postal Service. The recipient has to pay the applicant a certain amount per month as consideration irrespective of distance travelled by the cab. Additional amount is charged if the cab is retained for extra hours or requisitioned on holidays. One needs to consider the distance only for recovering the fuel cost and if the cab has crossed a certain threshold.

Ruling of AAR

Nature of the service provided by the applicant is classifiable under SAC 9966 as renting of a motor vehicle. Credit of GST paid on purchase of motor vehicles or other inputs for the supply of the applicant's service is not admissible in terms of section 17(5)(b)(i) of the CGST Act, 2017.

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ML-939

CA Rajiv Luthia & CA Keval Shah

INDIRECT TAXES
Service Tax – Case Law Update

Citation: 2019-TIOL-1582-CESTAT-AHM

Case: ***Deendayal Port Trust vs. CST & ST-Ahmedabad***

Facts of the Case

The appellants being a Government of India enterprise rendered port services and had paid service tax under the heading of Immovable Property Service. The department demanded Service tax for "Port Services" and also imposed penalty for non-payment even though the same amount was paid under the head "Immovable Property Service".

Arguments Put Forth

By Appellant

a) There is no dispute that the appellant has paid the Service tax under the head of "Renting of Immovable property" whereas the same should have been paid under the head "Port Service". Merely because the service tax is paid under the incorrect head, it does not amount to non-payment of service tax and department can adjust the payment made in the incorrect head against the same.

b) They relied on Circular No. 165/16/2012-ST, wherein it is stated that the category-wise classification of services is only for the purpose of statistical analysis. Also, the proof of payment of the whole amount along with interest under the head of "Immovable property Service" was submitted. Moreover, the appellant being a Government of India undertaking, hence there is no intention to evade payment of Service tax.

By Respondent

a) The respondent reiterated the findings from the original impugned order.

Decision

a) Since 2012, the negative list of services was introduced. Thereafter all the taxable services fall under one accounting head and service-wise sub-code is only for statistical purposes. Therefore in view of circular dated 20th November, 2012 even if the Service tax is paid under the head of "Immovable Property Service " instead of "Port Service" still no demand can be raised separately for recovering Service

tax again, the tax paid under the incorrect head must be adjusted against the same.

b) The department is free to make internal adjustment in the account and the appellant cannot be suffered from a charge of non-payment. Further, since the appellant has paid the whole tax with interest and is a Government of India Undertaking, *mala fide* intention to evade payment of service tax cannot be alleged. The penalty is wrongly imposed and the order was modified to that extent.

Citation: 2019-TIOL-1162-HC-MAD-ST

Case: ***Vendhar Movies vs. Joint Director – GST Intelligence, Chennai***

Background Facts of the case

Facts of the Case:

The petitioners, being producers/purchasers of cinematographic films, have assigned some part of their copyrights in the cinematographic films to television channels. The Assessing Authority states that if the film was transferred in entirety, then the transfer would amount to a perpetual transfer. The cinematographers here have transferred only a part of rights, for television broadcast and thus are the owners of the copyright in the cinematographic films. The conjoint reading of the Finance Act, 1994 and the Copyright Act, 1957 and their interpretation needs to be taken into account to correctly assess and determine the taxability of the transaction. SCN was issued to producers of film who have assigned some part of their copyright in cinematographic film to television channel, hence liable to service tax under Intellectual right services.

Arguments by Petitioner

a) The petitioners are engaged in the production of cinematograph films. In the regular course of business, the petitioners enter into various agreements with distributors, exhibitors and television channels assigning to them exclusive rights for broadcast and exhibition of various cinematograph films, both produced as well as purchased by them. The rights include satellite television broadcast, direct to home broadcast, direct satellite service, terrestrial television broadcast and all other rights connected therewith including exhibition of the film by means of wireless diffusion and by wire for communication to the public through television broadcast.

b) The petitioners transfer a part of their rights to the broadcasting companies for promotion of a film and earn revenue from the same. The agreement entered with the company mentions the word "transfer until perpetuity" and thus it does not amount to service to use the rights but as an absolute sale and thus not liable to service tax.

Decision

a) Vendhar Movies is a cinema production company engaged in producing films and engaged in purchase, market and distribution of films. They are the absolute copyright holder engaged in transfer of Copyrights for the films produced by them in respect of satellite rights, audio rights, FMS rights, etc., and also temporarily transferred or permitted the use/ enjoyment of copyrights of the film for various satellite channels;

b) Vendhar Movies have produced two films, under the production agreement entered for transfer of satellite rights of the film and they earned consideration on the same.

c) Vendhar Movies have temporarily assigned and permitted the use and enjoyment of the copyright and the Satellite rights of the Tamil feature film for a perpetual period for a consideration. They have clearly retained the ownership with respect to the other rights except the rights assigned. Though the intention of Vendhar Movies was to assign temporary transfer, the terms

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'perpetual' has been mentioned only to claim exemption from payment of service tax. It appears that, the temporary transfer of satellite rights is also classifiable and liable to Service tax under the category of taxable services. However, Vendhar Movies have not paid the Service tax on the consideration received by them in connection with temporary transfer of copyrights.

d) Vendhar Movies had not obtained service registration for providing such taxable service at the material time and had not assessed the Service tax payable on such taxable services.

e) From the above provisions of the Acts and from various clauses of the agreement it is clear that the activities of the Vendhar fall under the Copyright service. However in order to know the taxability of the service the nature of such transfer has to be decided. In Copyrights of Cinematographic films, the producer of the film make commercial exploitation of these rights in many ways including but not limited to theatre rights (both distribution & exhibition), Satellite & Television rights, DVD rights, dubbing and remake rights. Further, these rights will be granted to various people simultaneously for exploitation in different regions, each active in one or more regions and need to be licensed those separately. As per the Copyright Act, a transaction constitutes 'permanent transfer of copyright' only in a case where entire copyright (all modes of commercial exploitation) is transferred or leased to the exclusion of all persons including owner of such copyright. On perusal of the agreements, it is seen that, the entire bundle of rights is not transferred as the copyright is capable of being exploited by different entities for earning revenue.

f) From the above clauses of the assignment agreement it is clear that it is only a temporary transfer of copyright or permission to broadcast the film in a specified territory for a specified period of time.

g) Further these transactions cannot be called as absolute sale as in the case of sale the buyer will acquire all the rights of the seller which will enable him to exploit such acquired rights for unrestricted exploitation and the seller would cease to have any rights which are not the case in the transactions discussed above. In the case of first copy sale, all forms of rights in respect of the films in question are transferred to the Buyer, to the exclusion of the seller/producer. This is clearly not the case in the impugned agreements as the producers do not cease to hold rights on the films. While the producer retains his right to exploit that film, there is no transfer of right to use the goods amounting to sale within the meaning of Article 366(29A). On the other hand, it is a temporary transfer of copyright or permitting its use or enjoyment by the lessee. As long as the producer does not fully relinquish his right over the copyright held by him, transfer of right to use is purely temporary and levy of service tax for such transfer of copyright would apply.'

h) From the above discussion, it is inferred that it was the duty of the service provider to properly classify their service, get themselves registered for the taxable services provided by them, file ST-3 returns and to determine and pay their correct tax liability, which they failed. Had the officers of DGCEI not conducted the detailed inquiry, the said rendering of taxable services by them would have escaped assessment and resulted in non-payment of service tax. They were aware of the facts regarding payment of service tax

on the above services rendered by them and disguised such temporary transfer of copyright as transfer for perpetual period to claim the same as permanent transfer of copyright.

i) Taxability of IPR and copyright service has to be strictly within the contours and prescription of section 65(105) (zzzzt) of the Act read in tandem with the relevant provisions of The Copy Right Act. The purpose of charging provision under the Act is only to bring to tax income from those services that constitute a 'temporary transfer' of IPR. The provision thus addresses, apparently, an intangible right.

j) The petitioners have admittedly transferred independent rights relating to the exhibition of Cinematograph films to the Television Channels. According to the Assessing Authority, it is only if the film was transferred, in entirety, that the transfer would amount to a 'perpetual' transfer and nothing short thereof. The transfer of any part of the copyright relating to a specific aspect of the cinematographic film would only be temporary in nature. This, in essence, is the argument of the respondent.

k) It is well settled, that an asset, such as a cinematograph film, comprises of a bundle of rights. Setting this principle against the context and purpose of Section 65(105) (zzzzt), the 'right' mentioned therein, relates to the right in the film as well as each of such rights comprised in the film. The interpretation accorded by the Department tends to ignore the fact that the taxable service under Service Tax Law is of 'any copyright' denoting all rights, that which vests in film as a whole, or any of the smaller but equally important rights comprised in the making of the film itself.

l) The respondent appears to have entirely missed the ambit and scope of Section 21 extracted above. Section 21 deals with the 'relinquishment' or the 'giving up' of a right and not the 'assignment' thereof. The two are different concepts. The assignment of a copyright is by way of transfer, dealt with under section 18 and 19 of The Copy Right Act. On the other hand, Section 21(1) entitles the author to 'relinquish' the whole or any part of the rights comprised in the work. This cannot be equated with a 'transfer' of a copyright which is what is dealt with under the Act for the purposes of levy of Service tax.

m) In the present case admittedly, all agreements use the term 'perpetual transfer' and some transfer the asset specifically for a period of 99 years, both in excess of the period of 60 years set out under the provisions of The Copy Right Act. The assignment is, simplicitor, permanent/perpetual and seen not temporary. In this backdrop, the conclusion of the respondents to the effect that a perpetual transfer or a transfer for 99 years, though in excess of the period stipulated in the Act, is temporary, appears, to me, fundamentally unsound and defies logic.

n) The SCN (WP No. 30085 of 2018) and orders-in-original (WP Nos. 29206 & 14425 of 2018, 1199 & 5131 of 2019) were set aside. The Department is given full liberty to initiate proceedings afresh, bearing in mind the observations and conclusions as above, in accordance with law. The aspect of limitation shall also be gone into afresh bearing in mind the burden that is imposed upon the Department in terms of Section 73 and specifically the proviso thereto, in the facts and circumstances of the present assessee. The writ petitions are allowed in the above terms. Consequently, connected miscellaneous petitions are closed with no order as to costs.

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Janak C. Pandya *Company Secretary*

CORPORATE LAWS

Company Law Update

Case Law # 1

Before the National Company Law Appellate Tribunal, New Delhi

Company Appeal (AT) No. 176 of 2018.

In the matter of Andhra Pradesh Housing Board (to be referred as "APHB" thereafter)

vs.

IJM (India) Infrastructure Ltd., Swarnandhara IJMII. (Integrated Township Development Company Private Limited.

The provisions of the Companies Act make it necessary for a company to hold Annual General Meeting ("AGM") regularly and that if, any member is unable to nominate its representative - on the board or appoint a nominee or representative to attend the AGM is its internal affairs and such members are not allowed to stop the holding of the AGM,

Brief

This appeal was filed against the impugned order dated 27th February, 2018 by Hon. National Company Law Tribunal ("NCLT"), Hyderabad Bench. The said order was passed under section 97 of the Companies Act, 2013 ("CA13")

The facts are as follows:

1. APHB and IJM (India) Infrastructure Ltd ("R1") has jointly promoted M/s Swarnandhara IJMII Integrated Township Development Company ("SITCO" or "R2") for integrated township and other construction work.
2. There was a dispute on certain financial transactions for the period 2011-12 between APHB and R1.
3. On this, earlier, NCLT had given the direction as to holding 9th AGM.
4. On similar ground, the company application was filed for holding 10th AGM of R2.
5. Before NCLT, appellant (which was originally a respondent No. 2) has submitted that it is a successor to erstwhile APHB after the split of the State.
6. The appellant informed the R2 that approval for financial statements for

2011-12 can be conducted upon receipts of its remarks on its objection to the financial statements.

7. It also submitted that the above approval can also be considered only, if it appoints fresh member by the State of Telangana on the Board of R2.

8. Appellant claimed that consequent to the bifurcation of the State and in absence of the appointment of fresh members, it is not possible for them to attend either board meeting or shareholders meeting.

9. NCLT has considered the submission of both sides pursuant to the relevant provisions for convening of AGM under the Companies Act, 1956 and the Companies Act, 2013 and decided to allow R2 to conduct AGM.

Aggrieved by the said order, the Appellant has filed this appeal application and submitted as follows.

1. The appellate is a statutory body and still awaits direction from the State of Telangana.

2. Due to bifurcation of State, appellant is still required to nominate Director on the Board of R2.

3. Due to dissolution of the assembly, the appellant has difficulty in participating in the AGM of R2.

4. It has some grievances on the financial transactions as mentioned in the accounts.

From R1 side, the submission was made that the as per the erstwhile Companies Act, 1956, it is necessary that AGM should be regularly held and it does not want R2 to be in default. Further, any grievances in relation to accounts, the appellant would be free to raise its concerns and that same can be considered in the AGM at the time of adopting the accounts.

Judgment

NCLAT has upheld the NCLT's order and observed that there is no reason for it to interfere with the said order. However, it has provided that 60 days mentioned in the NCLT order for conducting AGM should be considered from the date of this order.

The NCLAT has perused the order of the NCLT and observed that considering the provisions of the erstwhile Companies Act, 1956, which make it necessary for the Company to hold AGM regularly, the order of NCLT for conducting AGM shall be carried out. It also observed that it is appellant itself who is required to put its house in order. The appellant is directed to appoint nominee as per order.

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Let men have light, let then be pure and spiritually strong and educated, then alone will misery cease in the world, not before.

— *Swami Vivekananda*

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 Circulars and Notifications issued by RBI as well as some recent compounding orders:-

I) Replacement of submission of FLA Return by Foreign Liabilities and Assets Information Reporting (FLAIR) system on June 28, 2019

1. Objective of the introduction of new web-based system

The present e-mail-based reporting system for submission of the FLA return has been replaced by the web-based system online reporting portal interface https://flair.rbi.org.in with the objective to improve data quality and enhancement of data security level.

2. Main features of FLAIR system

a. Reserve Bank introduced web-portal interface https://flair.rbi.org.in to the reporting entities.

b. The existing mechanism of e-mail based submission of FLA forms will be discontinued.

c. The requirement shall come into force with immediate effect and would be applicable for reporting of information for the year 2018-19.

3. Entities required to file FLA Return

All Indian companies/LLPs which have received FDI and/or made FDI abroad (i.e. overseas investment) in the previous year(s) including the current year, should file the annual return on Foreign Liabilities and Assets (FLA).

4. Filing of FLA Return

Particulars	Before 28th June 2019	w.e.f. 28th June 2019
Procedure of Filing	To be submitted in Excel based and file FLA return by e-mailing to the RBI at fla@rbi.org.in	To be submitted online via registration in web-portal https://flair.rbi.org.in and it will enable users to generate RBI-provided login-name

Particulars	Before 28th June 2019	w.e.f. 28th June 2019
		and password for using FLA submission gateway and would include system-driven validation checks on submitted data.
Acknowledgement	Acknowledgement will be forwarded to e-mail address of authorized person	System generated acknowledgement receipt upon successful submission of the form
Due Date	FLA Return to be submitted by July 15 every year.	FLA Return to be submitted by July 15, every year.
Dummy CIN	LLPs and AIF need to send a request mail to get a dummy CIN number which will enable them to file the Excel based FLA Return	LLPs and AIFs will no longer be required to use dummy CIN

5. Non-Compliance

Non-filing of the return before due date will be treated as a violation of FEMA and penalty clause may be invoked for violation of FEMA (A.P. (DIR Series) Circular No. 29, dated February 02, 2017)

6. Exemption from Filing FLA Return

If an Indian company/LLP/Others does not have any outstanding investment in respect of inward and outward FDI as on end-March of reporting year, the company need not submit the FLA Return.

7. Revision in FLA Return

RBI allows for revision in the current year. It also allows for submission of FLA returns of the previous year(s). For this, the reporting company needs to make a request to RBI to enable the same in the portal. The portal has a provision to make such a request. Or else, the reporting company can also write to RBI (surveyfla@rbi.org.in) for seeking approval for accessing submitted return for revision in the submitted information.

8. One can go through the FAQs and User Manual for filing in the FLAIR system https://flair.rbi.org.in/fla/

B. We have discussed below few recent compounding orders issued by RBI

1. Transfer or Issue of Security by a Person Resident Outside India (Inbound Investment) (FEMA 20(R)/2017-RB)

Delay in refund of the amount of consideration against which equity shares were not issued

Applicant	Yayue India Private Limited
Compounding Application Number	C.A. No. NDL 386/2019

Compounding Authority Name	Foreign Exchange Department, New Delhi
Amount imposed under Compounding Order	₹ 72,568/-
Date of order	29th May, 2019
Facts of the case	The applicant received inward remittance amounting to ₹ 45,31,533/- on 9th October 2018 from its foreign investor towards application money for issue of equity shares. The applicant, therefore, sought approval from RBI for refund through their AD bank. Approval for refund was granted and the unutilised share application money was refunded on 28th February 2019.
Contravention	Delay in refund of consideration against which equity shares were not issued: Paragraph 2(3) of Schedule 1 to FEMA 20(R)/2017-RB states as "where such capital instruments are not issued within sixty days from the date of receipt of the consideration the same shall be refunded to the person concerned by outward remittance through banking channels or by credit to his NRE/FCNR(B) accounts, as the case may be, within fifteen days from the date of completion of sixty days." In this case the applicant had delayed in refunding the share application money within the stipulated time period. Thus, the applicant had contravened the provision of paragraph 2(3) of schedule 1.

2) Transfer or Issue of Security by a Person Resident Outside India (Inbound Investment) (FEMA 20/2000-RB)

Delay in submission of form FC-TRS on transfer of shares from Resident to Non-Resident

Applicant	Coincept Accounting Solutions Private Limited
Compounding Application Number	C.A. No. MUM 847/2019
Compounding Authority Name	Foreign Exchange Department, Mumbai
Amount imposed under Compounding Order	₹ 10,417/-
Date of order	10th May, 2019
Facts of the case	An Indian Resident transferred equity shares of M/s. Coincept Accounting Solutions Private Limited, held by her to M/s. Bokoredo AB, Sweden on 28th September 2017. The form FCTRS was filed on 27th June 2018.

Contravention	<u>Delay in submission of form FC-TRS on transfer of shares from Resident to Non-Resident:</u> Paragraph 10A(b)(i) of r.w. paragraph 10 of schedule 1 to Notification No. FEMA 20/2000-RB provides that in case of transfer of shares or convertible debentures of an Indian company by way of sale from a person resident in India to a person resident outside India or *vice versa*, the transferor/transferee, resident in India, shall submit to the AD bank a report in the form FC-TRS specified by the RBI within 60 days from the date of receipt or payment of the amount of consideration. The onus of submission of the form FC-TRS within the specified time shall be on the transferor/transferee resident in India.
Comments	Foreign Exchange Management (Transfer or Issue of Security By a Person Resident Outside India) Regulations, 2000 has been replaced by revised regulations; Regulation 13.1 (4) of extant FEMA 20(R)/2017-RB dated 07/11/2017 corresponds to Regulation 10A(b)(i) of erstwhile FEMA 20/2000- RB dated May 3, 2000. The application for compounding was filed by the company on behalf the resident Indian shareholder who was liable to file the FCTRS form.

3) Transfer or Issue of any foreign Security (Outbound Investment) (FEMA 120/2004-RB)

1) Issuance of guarantee on behalf of step-down subsidiary, when it was not permitted under the ODI Regulations

Applicant	Laqshya Media Limited
Compounding Application Number	C.A. No. 4818/2018
Compounding Authority Name	Foreign Exchange Department, Mumbai
Amount imposed under Compounding Order	₹ 1,20,67,671/-
Date of order	9th May, 2019
Facts of the case	The applicant company incorporated WOS namely, Laqshya Media International, Mauritius (LMI) which is an investment (holding) company. LMI held 75% of the share capital of ***Gulf Media Holding, Mauritius (GMH) which is also an investment (holding) company.*** The remaining 25% of the equity share capital of GMH is held by AK VII Limited (Amwal). GMH holds 100% stake in Arab Media Holding (AMH), Mauritius, which further holds 100% stake in Right Angle Media FZ-LLC (RAM), UAE.

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	At the time of Amwal's investment in GMH, RAM was a directly held WOS of GMH and subsequently was indirectly held subsidiary since 2009-10. Pursuant to the Share Subscription Agreement (SSA), dated 28-5-2007, entered into among GMH, Amwal, LMI, RAM, Mr. Alok Jalan (promoter of the applicant company) and Mr. Anup Jalan (former promoter of the applicant company, who is no longer associated with the applicant company), Amwal invested AED 137.5 million in GMH for acquisition of 25% of its share capital. A Shareholders' Agreement (SHA) was signed on 3-6-2007 which was amended on 17-6-2009. Under the SHA, Amwal had the right to exercise a put option if the IPO of GMH was not successfully completed before the fifth anniversary of signing of SHA (i.e. June 4, 2012). Upon exercise of the put option, the applicant was required to purchase Amwal's share capital of GMH for an amount equal to AED 137.5 million. In furtherance of the SHA, applicant executed an Indemnity Agreement on 17-6-2009 undertaking to indemnify Amwal against all losses (up to a maximum of AED 137.5 million less any realized distribution amounts) in relation to or as a result of failure of the applicant or GMH to comply with any of their respective obligations under the SHA.
Selected Contravention	Issuance of guarantee on behalf of step-down subsidiary when it was not permitted under the ODI Regulations: Regulation 6(4)(i) of Notification No. FEMA 120/2004-RB as then applicable stated that an Indian Party may extend a loan or a guarantee to or on behalf of the Joint Venture/Wholly Owned Subsidiary abroad, within the permissible financial commitment, provided that the Indian Party has made investment by way of contribution to the equity capital of the Joint Venture. In this case entering into the Indemnity Agreement was akin to issuing a guarantee. Issuance of a guarantee on behalf of step down subsidiary which is a holding company (in this case GMH) was not permitted in the year 2009. Thus, the applicant had contravened the provision of regulation 6(4)(i).

4) Non-submission of APR within the stipulated time period and disinvestment with write-off and without submission of all the APRs.

Applicant	Torrent Pharmaceuticals Limited
Compounding Application Number	C.A. No. 4827/2018
Compounding Authority Name	Foreign Exchange Department, Mumbai

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Amount imposed under Compounding Order	₹ 2,96,038/-
Date of order	17th May, 2019
Facts of the case	On 1st June 2001 the applicant company had invested in an overseas Joint Venture (JV) namely, Charter Therapeutics Ltd., by way of capitalization of services rendered. In December 2003, the applicant informed RBI about the weak financial position of the overseas JV and its decision to wind up its operations. In July 2010, a liquidator was appointed to conduct winding up of the overseas JV, and the liquidation was taken on record in the meeting dated February 18, 2013. However, APRs for the years 2002 to 2013 were not submitted by the applicant.
Selected Contravention	Non-submission of APR within the stipulated time period and disinvestment with write-off and without submission of all the APRs: Regulation 15(iii) of Notification No. FEMA 120/2004-RB states that "An Indian Party which has acquired foreign security in terms of the Regulation in Part I shall submit to the Reserve Bank, through the designated Authorized Dealer, every year on or before a specified date, an Annual performance Report (APR) in Part III of Form ODI in respect of each JV or WOS outside India…..". Further, Regulation 16(1)(v) of the FEMA Notification No. 120/2004-RB, allows for disinvestment with write off provided, "the overseas concern has been in operation for at least one full year and the Annual Performance Report together with the audited accounts for that year has been submitted to the Reserve Bank". In this case the applicant had not submitted APRs within the stipulated time period and also, carried out disinvestment of the overseas JV without submission of APRs. Thus, the applicant had contravened the provision of regulation 15(iii) and Regulation 16(1)(v).

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Nine tenths of our life's energy is spent in trying to make people think us that which we are not. That energy would be more rightly spent in becoming that which we would like to be.

— *Swami Vivekananda*

CA Hasmukh B. Dedhia

In Focus – Accounting and Auditing

Important amendments under the Companies Act, 2013 relevant for Accounts and Audit

1. Background

The process for recodification of Companies Act, 1956 ('the old Act') had begun sometimes in 2006 and it took several draft bills and vetting/ discussions at Parliamentary Committees and other forums. In the process, several Bills (including 2008, 2009, 2011 and 2012) were prepared and published for debate on the matter of enacting the new law. The new Act i.e., the Companies Act, 2013 ('the Act') was finally passed in 2013; about 98 sections of the Act came into effect from September 12, 2013 and numerous other Sections were made effective from April 1, 2014. Despite such prolonged period in process of recodification, the Act has undergone several amendments through (i) Amendment Act, 2015, (ii) Amendment Act, 2017 as also (iii) Amendment Ordinances in Nov, 2018 (lapsed now) and in March, 2019. Several Rules and Schedules also have undergone changes since passing of the Act. The reasons or rationale of such frequent changes/amendments included (i) ease of doing business (ii) reduce the burden of compliance (iii) protection of stakeholders' interest (iv) harmonisation with other relevant Act/Regulations (iv) addressing difficulties in implementation of stringent compliance (v) rectifying omissions and inconsistencies in the Act/Rules. **The changes are far too numerous to deal with in one brief write-up.** Hence, only changes or amendments which are relevant and important from perspective of Accounts and audit are attempted to be briefly covered in this article.

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2. Relevant/Major Changes/amendments

Ref. of Section/ Rule	*W.E.F.*	*Particulars of change/amendment*	*Remarks*
S. 2(6) & 2(87)	7/5/2018	• While defining the terms 'Associate Company' and 'Subsidiary' control of at least 20% and more than one-half of total voting power respectively is criteria. Earlier it was 'total share capital. • The term 'Joint Venture' wasn't defined earlier; now defined as "joint arrangement whereby the parties that have joint control of the arrangement have the rights to the net assets of the arrangement".	Preference capital is not to be considered for this purpose
Rule 9A of Prospectus of Securities Rules	10/9/2018	W.E.F. 2/10/2018, every unlisted public co to issue all its securities in dematerialized form only. Further, all such co's to facilitate dematerialization of its existing securities under Depositories Act, 1996 & obtain ISIN for securities issued by it. Transfer of securities of unlisted public co from one holder to another can only be done in d-mat form after 2/10/2018.	Due compliance of the requirements would have to be ensured by unlisted public Companies.
Sec. 139(1)		Ratification of appointment of auditors made for block of 5 years, is not required *vide* 2017 Amendment Act.	
Rule 8 of Co. Accounts Rules	31/7/2018	• In addition to Chairman/2 Directors (incl. MD where there is one), CFO and CS, it is required by the amendment that CEO, even if not a member of BoD, should also sign Financial Statements. • The report of BoD to include following additional items: (i) applicability and maintenance of cost accounting records u/s. 148(1) and (ii) Status	

Ref. of Section/ Rule	*W.E.F.*	*Particulars of change/amendment*	*Remarks*
		of compliance by the co of Sexual Harassment of Women (Prevention Prohibition and Redressal) Act, 2013.	
Sec 135		Corporate Social Responsibility: Threshold net worth (>=500 Cr.) or turnover (>=1000 Cr.) or net profit (>=5 Cr) **"in any financial year"**. Company required to constitute CSR Committee. "In any financial year now replaced by **"immediately preceding financial year"**	
Sec. 136		Listed Companies to place separate audited account of its each subsidiary on its website. (Earlier **every** Company having subsidiary or subsidiaries)	
Sec. 134(3)(a) & 92(3)		Extract of Annual return (Form MGT-9) not required in Directors Report. Instead, copy of annual report to be placed on Company's website and web address/link to be mentioned in Board Report.	
Rule 5 of Appointment of Directors Rules	7/5/2018	Relatives of 'Independent Directors' not to be indebted to Company, its holding or subsidiaries or Associates or promoters/ directors. Such relatives also shouldn't have been guarantors for borrowings by any third party from these entities for sum exceeding ₹ 50 Lakhs at any time during 2 Previous years and in current year.	One more criteria for independence of ID's added as even their Relatives not to be indebted
Rule 16 of Appointment of Directors Rules	7/5/2018	If a Director resigns from his office, now an option is given to him/her to forward to the ROC a copy of his resignation along with reasons for the same within a period of 30 days from date of resignation.	
Rule 4 of Meetings of BoD Rules	7/5/2018	The restriction, that specified matters not to be dealt with in meeting through Video conferencing, is relaxed; if there is quorum through physical presence of Directors, any other Director can now participate through video or other such means and participate in the meeting.	

Ref. of Section/ Rule	*W.E.F.*	*Particulars of change/amendment*	*Remarks*
Rule 6 of Meetings of BoD Rules	7/5/2018	The Board of Directors of every listed public company (earlier every listed Company) is required to constitute an 'Audit Committee' and a 'Nomination & Remuneration Committee'. Noteworthy here that earlier even Private Companies, which have their debt securities listed, also got covered by this requirements of having such committees of BoD.	Pvt. Co's which have their Debt securities listed are now not covered by such requirements
KYC of Directors	Before 31/8/2018	All Directors having DIN allotted and showing 'approved' status before 31/3/2018, are mandated to file DIR-3 (KYC) on or before 31/8/2018, giving particulars required in KYC form including personal mobile number and personal e-mail ID etc. In addition to other consequences for not filing such KYC by any Director before the specified date, their DIN would be deactivated till regularized upon payment of specified fees.	
Rule 25A of Incorporation Rules ACTIVE Co tagging	19/2/2019	Every Company formed before 31/12/2017 is required to file specified particulars with ROC in e-form ACTIVE on or before 25/4/2019. Delayed filing of this form would attract addl. fees of ₹ 10,000. Noteworthy that Co's who haven't filed their FS or Annual return or both, wouldn't be able to file e-form ACTIVE.	
Rule 8: Satisfaction of charges	5/8/2018	Satisfaction of any charge registered earlier under Chapter VI of the Act, can be filed with ROC by the Company or the Charge holder within 300 days (earlier 30 days) from the date of repayment or satisfaction of the dues to lender/charge holder.	

Ref. of Section/ Rule	*W.E.F.*	*Particulars of change/amendment*	*Remarks*
		Condensation for delay above 300 days in filing the satisfaction of charge, rests with CG.	
Chapter V & CADR, 2014	15/8/2018	• Companies (Acceptance of Deposit) Rules, 2014 and the relevant Section contained requirement of manner and extent of deposit insurance. This requirement is now removed. • Deposit repayment reserve to be created for sum at least equal to 20% of deposits maturing during the financial year (FY) and such sum to be retained in earmarked scheduled bank deposit (earlier 15% of deposits maturing during FY & in next FY).	
	27/1/2019	• Sum received by Company from 'Real Estate Investment Trust' is exempted from CADR.	
	13/6/2017	• Section 73(2) (a) to (e) will not apply to following private companies: (i) Which accepts deposits from members not exceeding 100% of paid up share capital, free reserves and **securities premium** (ii) Which is a **start up** for 5 years from date of incorporation.	
Rule 16A of CADR	27/1/2019	• 'Return of Deposit' (DPT-3) for Co's other than Govt Co's – it is required that particulars of deposits or transactions not considered as deposit or both are to be contained in the 'one-time' e-form, which is to be filed for particulars/transaction for YE/as at 31/3/2019 before 30/6/2019.	

Ref. of Section/ Rule	*W.E.F.*	*Particulars of change/amendment*	*Remarks*
Sec 197 & Sch. V and Appointment & Remuneration of managerial personnel Rules	12/9/2018	• For public companies, requirement of CG's approval done away with pertaining to payment of remuneration to directors including MD, WTD and Manager even exceeding 11% of net profits, but special resolution by members is needed in such cases. Further If Company has defaulted in payment dues to bank, FI's, NCD's or secured Debts, prior approval of such entities to be obtained before passing Special Resolution for remuneration. • Schedule V which pertains to conditions to be fulfilled for appointment of MD or WTD is further amended to provide for disqualification for offence under three additional laws: — Insolvency & Bankruptcy Code, 2016 — GST Act, 2017 — Fugitive Economic offenders Act, 2018 • Sick Companies under revival *vide* order of BIFR or NCLT and Companies in SEZ's have been relaxed from limits of remuneration to managerial person under Schedule V • Sub-section 16 of Sec 197 mandates auditors to mention in their main audit report whether the provisions of Sec 197 are duly complied with	

Ref. of Section/ Rule	*W.E.F.*	*Particulars of change/amendment*	*Remarks*
Section 185 Loans to Directors etc	7/5/2018	Company may advance loan or give guarantee/provide security for any loan taken ***to any person in whom any of the director is interested,*** subject to: i. Special Resolution passed (giving full details in Explanatory Statement) ii. Loans utilized by borrowing entity for its principal business activities *For this purpose, 'any person in whom any of the director is interested' means:* *i. Pvt. Co. of which such Director is Director or member* ii. Any Body corporate in which 25% or more of voting power is exercised by such director or by 2 or more such directors together	S. 185 from its original version, is now substantially relaxed.
Section 186		Shareholders' approval not required where loan or guarantee given or security provided to wholly owned subsidiaries or JV or Acquisition of wholly owned subsidiary by the Holding Company. Disclosures required in annual Financial Statement u/s. 186(4) should be ensured to be made.	Provisions now substantially realigned to match with Section 372A of the old Act
Section 188 Related party transactions		• No restriction on voting by interested member at General Meeting of the Company in which 90% or more members are relatives of promoter or related parties. • Non ratification of RPT voidable at option of the Board or **Shareholders** (Earlier Board only).	

Ref. of Section/ Rule	*W.E.F.*	*Particulars of change/amendment*	*Remarks*

Section 143(3)(i)	7/5/2018	• Auditors' Report on ICFR to state existence of **internal financial controls w.r.t. financial statements** and its operating effectiveness; earlier it was **Internal Financial Control System.**
		• ICFR not applicable to such Private Co's which:
		  • Are OPC or Small Company
		  • Have T/o < ₹ 50 cr. per last audited FS, OR
		  • Have aggregate borrowings from Banks/FI/or Body corporate < ₹ 25 cr.	

Rule 9 of Audit Rules	7/5/2018	This Rule stated that criminal liability of any audit firm, other than for fine, would devolve only on concerned partner(s), who acted in fraudulent manner. <u>This Rule now has been ommitted.</u>	
Sec. 132 NFRA	1/10/2018	Much debated Section 135 has been made effective from 1/10/2018 & Authority is constituted to: ✓ Make recommendations to Govt. on accounting/auditing maters ✓ Monitor/enforce compliance with AS & SAs ✓ Oversee the quality of service of profession associated with compliance of such standards ✓ Investigate either suo-motu or on ref by CG into professional or other mis-conduct of CA or any firm of CAs	

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Ref. of Section/ Rule	*W.E.F.*	*Particulars of change/amendment*	*Remarks*
		NFRA Rules apply to all listed entities, Banking and Insurance Companies and such unlisted public Co's having paid up cap of ₹ 500 cr. & more OR Annual T/O of ₹ 1000 cr. & more OR O/s Loans/Deb/ Deposits of ₹ 500 cr. & more	
Sec. 90	13/6/2018	**Significant Beneficial Ownership Rules** These Rules provide that persons holding ultimate beneficial interest of, at least, 10% in a Company but whose name is not entered in register of members of that Co, are mandated to file declaration in prescribed form. The declaration aforesaid is to be filed in form Ben-1 within 90 days of commencement of Rules and for such fresh acquisitions of shares within 30 days from such acquisition.	
Section 247 Valuation Rules	25/9/2018	For Valuations to be carried under the Act Rules have been prescribed. ICAI has issued 8 (eight) Valuation Standards, (Ind VS).	

3. Matters other than Company Law affecting Accounts and Audit for FY 2018-19

3.1 Auditors Resignations

Numerous cases of auditors resigning in midst of their tenure, some just before the conclusion of the audit, created huge debate amongst stakeholders. MCA has issued notices in some cases to audit firms.

ICAI issued Implementation Guide on the matter in Dec., 2018. In substance, auditors withdrawing from the assignment giving vague/ambiguous reasons for resignation is not favoured; and in cases where substantial audit work completed, auditors are advised to complete the reporting with modification and/ or disclaimer rather than resorting to resignation at the last moment.

3.2 Compliance for payment of dues to MSMEs

Compliance with Micro, Small and Medium Enterprises Development Act, 2006 is being tightened *vide* notification of CG dated 2/11/2018. The dues payable to MSME's are to be disclosed on the main page of Balance Sheet with requisite details in the notes to financial statements.

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Every company is required to file form MSME-1 containing details of o/s dues to MSMEs (exceeding 45 days) existing on date of the notification (now, 21/2/2019 being deployment of e-form on ROC website) within 30 days. Further every specified company should file half yearly return i.e. for April to Sept by 31st Oct. and for Oct. to March by 30th April every year.

3.3 Ruling of Supreme Court pertaining to PF contribution by the employers

In Feb. 2019, SC gave ruling on the long debated matter of what is 'Basic Pay' for calculating contribution of the employer under the provisions of Provident Fund Act, 1952. The decision is expected to have impact on the provisioning by some companies towards additional liability, if the allowances to employees are not earlier considered as part of 'basic' for calculating employer's contribution. The review petition seeking some more clarification on effective date and quantification of allowances etc., is admitted by SC – pending to be heard. Auditors need to review and inquire about the impact of this matter and suitably act upon the same while finalizing the audit for Y.E. 31/3/2018.

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Rahul Sarda, *Advocate*

Best of the Rest

Whether suit in respect of immovable properties situated in different jurisdictions can be filed in Court having jurisdiction over one such property?

A suit was filed before the District Judge, Indore praying *inter alia* for (i) declaration of certain transfer documents relating to some of the suit properties as null and void; (ii) declaration that some other properties being subject matter of the suit were joint family properties. One of the properties in question was situated at Indore and the other was situated in Mumbai. Some of the defendants filed an application before the court for striking out pleadings and dismissal of the suit against them as the District Judge, Indore had no territorial jurisdiction over the property situated in Mumbai.

An order was passed by the Trial Court deleting the property situated in Mumbai and the relief sought with regard to the said property on the ground that separate cause of actions cannot be combined in a single suit. The High Court upheld the order of the Trial Court.

The arguments advanced by the Advocate for the appellant was that the High Court did not correctly interpret Section 17 of CPC and that the partition suit filed by the appellant with regards to the suit property was fully maintainable. He also stressed upon Order II Rule 2 of CPC as per which the Paintiff must include the whole claim in respect of a cause of action in the suit. Section 39(1)(c) of the CPC itself contemplated that there can be a decree of an immovable property, which is situated outside the local limits of the jurisdiction. It was further submitted that it is accepted that with regard to separate properties situated in different jurisdictions, separate suits have to be filed that shall result in conflicting findings of different Courts and shall involve the principles of res judicata.

Whereas the arguments advanced by the Defendants was that Section 17 of the CPC contemplate filing of a suit with respect to immovable property situated in jurisdiction of different courts only when any portion of the property is situated in the jurisdiction of a Court, where suit has to be filed. The words “any portion of the property” indicate that property has to be one whose different portions may be situated in jurisdictions of two or more Courts. He further submitted that there is no common cause of action with regard to the suit property.

The Apex Court observed that Section 17 of CPC applies when a composite property spread in jurisdiction of two Courts. It was further held that as per Section 13 of the General Clauses Act, 1897, the word “property” as occurring in Section 17 shall also include the plural. Hence, in a schedule of the Plaint, two more properties located in different jurisdictions can be mentioned. Thus, interpretation of

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word "portion of the property" cannot only be understood in a limited and restrictive sense of being portion of one property situated in jurisdiction of two courts.

The point to be noted is that the permissibility of instituting suit in one Court, where properties, which are subject matter of the suit are situated in jurisdiction of different courts have been permitted with one rider, i.e., cause of action for filing the suit regarding property situated in different jurisdiction is one and the same.

However, in the present case, the suit filed contained three different sets of defendants with different causes of action for each set of defendants. The plaint encompasses different causes of action with different set of defendants. The cause of action relating to Indore property and Bombay property were entirely different with different set of defendants, and hence, the suit as framed with regard to Bombay property was clearly not maintainable in the Indore Courts. Therefore, the Trial Court and the High Court did not commit any error in allowing the application of the defendants.

Shivnarayan (D) By LRS vs. Maniklal (D) THR. & Ors., Civil Appeal No. 1052 of 2019 dated 6/2/2019, Supreme Court.

Whether a complaint for dishonour of cheque issued by a Trust is maintainable against the Trustees of the Trust?

The Petitioners were accused in a complaint filed under section 138 of the Negotiable Instruments Act, 1881. The petitioners were trustees of a trust and the trust was also arraigned as an accused. The petitioners prayed for quashing of complaint and further proceedings against the petitioners for dishonour of cheque issued by the Trust.

The Counsel for the petitioner argued that since "Trust" is not an association of individuals no successful prosecution against the petitioners, invoking the provisions under section 141 of the Negotiable Instruments Act, 1881 can be sustained. Whereas the Complainants contended that the Trust is an "association of individuals" and hence the petitioners are vicariously liable under Section 141 of the Act.

The Court studied in depth Section 141 and observed that a trust was not a "firm", the question that was posed before the Court was whether a trust is a body corporate or not. And also, whether the trust was a juristic person or not.

A juristic person is also known as a legal person or a legal entity. A juristic person is one to which law attributes legal personality. A juristic person is capable of suing and being sued in a Court of law. Section 3 defines a "Trust" as contained in the Indian Trust Act, 1882. Section 11 deals with duties and obligations of the Trustees. Section 13 empowers the Trustees to defend all suits and (subject to the provisions of the instrument of trust) to take such other steps as, regard being had to the nature and amount or value of the trust property, may be reasonably requisite for the preservation of the trust – property and the assertion or protection of the title thereto.

Held, all the trustees are the owners of the property, but they are obliged to use the same in a particular manner. If a number of trustees exist, they are the joint owners of the property. The trustees are bound to maintain and defend all suits, for the preservation of the trust - property and the assertion or protection of the title thereto. The "Trust" is not capable of suing and being sued in a Court of law, even though the trustees can maintain and defend suits for the preservation and protection of the trust property. Therefore, a "Trust" is not a juristic person or a legal entity, as the juristic person has legal existence of its own and hence it is capable of suing and being sued in a Court of law. Thus, it appears that a "Trust" is not like a body corporate, which has a legal existence of its own and therefore can appoint an agent.

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As regards the question whether the trust is an association of person, the Court held that that a mere combination of persons or coming together of persons, without any intention to have a joint venture or carry on some common activity with a common understanding and purpose to achieve some common benefit, would not convert two or more persons into a "body of individuals/association of persons". Therefore, trustees are not the beneficiaries and hence the trustees do not have any common benefit. The "Trust" is not a "body corporate" or an "association of individuals" as provided in the explanation to section 141 of the Negotiable Instruments Act, 1881. Therefore, no prosecution against the trustees, invoking these provisions can be maintained.

Also, in the present case since the petitioners did not sign the cheque (the trustees who signed the cheque were not before the Court), no successful prosecution against the Petitioners under section 138 could be sustained on that ground also.

Crl. M. C. No. 3799, 3801, 3804, 3827, 3832, 3843, 3844, 3847, 3852 of 2018 – Kerala High Court dated 6th February 2019.

Whether contract labourers are direct employees?

The Appellant had challenged the judgment and a review dismissal from the judgment of the High Court by which the High Court had dismissed a Writ Petition against a labour court Award. The question for consideration before the Court was whether contract labourers were to be treated as direct employees of the principal employer. Under the extended definition of "employer" in the Uttar Pradesh Industrial Disputes Act, 1947, even if the workmen are regarded as workmen of a contractor, they would yet be workmen of the appellant as the appellant was within the extended definition of "employer" under the Act.

The test for determining whether contract labourers were to be treated as direct employees was two-fold i.e., whether the principal employer pays the salary instead of the contractor and whether the principal employer controls and supervises the work of the employee?

Relying on precedents, the Court held that if the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employee of the principal employer, if the salary is paid by a contractor, if the right to regulate the employment is with the contractor, and the ultimate supervision and control lies with the contractor.

The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/allotted/sent to him. But, it is the contractor as employer, who chooses whether the worker is to be assigned/allotted to the principal employer or used otherwise. In short, worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor.

The said test was applied to the facts of the present case and it was held that the first test is not met with as the wages were paid by the contractor to the workers. Secondly, mere directions to the workers as to what is to be done is not considered as control and supervision. Hence, the Apex Court terming the Labour Court's Award and High Court's approval as perverse, set aside the award of the Labour Court.

Bharat Heavy Electricals Ltd. vs. Mahendra Prasad Jakhmola & Ors., Civil Appeal No.1799-1800 of 2019 dated 20/02/2019, Supreme Court.

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List of Top Ten Students of Dastur Essay Competition 2019

Sr. No	*Rank*	*Participant Name*	*Topic*	*College Name*	*Firm Name*
1	1st	SUSHANT ARSH MASSEY KHALKHO	Trade wars or Territorial wars, the next global battle	National Law School of India University (NLSIU), Bangalore	
2	2nd	SANCHI DHAMIJA	Feminism, a misunderstood concept today	Vivekananda Institute of professional studies, New Delhi	
3	3rd	HETVI SANJAY VALIA	Feminism, a misunderstood concept today	HR College of Commerce and Economics, Mumbai	
4	4th	PRINSU MISHRA	Right to Privacy, its sanctity in India	Law college Dehradun, Uttaranchal University	
5	5th	DIKSHA BHALLA	Feminism ,a misunderstood concept today	Law college Dehradun, Uttaranchal University	
6	6th	JAGRAT BISHAN SHAH	Right to Privacy, its sanctity in India	Gujarat National Law University	
7	7th	RONAK CHETAN THAKKER	Trade wars or territorial wars, the next global battle		Vyas & Associates, Mumbai
8	8th	SAYAN BANERJEE	Trade wars or Territorial wars, the next global battle		AGSS & Co., Koklata
9	9th	ASTHA SRIVASTAVA	Right to privacy,Its sancity in India	Fairfield Institute of Management and Technology, Delhi	
10	10th	JOSHITA CHOPRA	Feminism, a misunderstood concept today.		GBCA & Associates LLP, Mumbai

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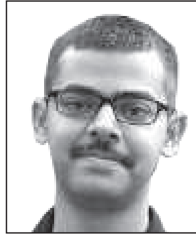

Sushant Arsh Massey Khalkho

Trade Wars or Territorial Wars, the Next Global Battle? Evaluating the Nature and Probability of Conflicts in the 21st Century

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TRADE WARS OR TERRITORIAL WARS, THE NEXT GLOBAL BATTLE?: EVALUATING THE NATURE AND PROBABILITY OF CONFLICTS IN THE 21ST CENTURY†

INTRODUCTION

It has been observed that *'war doesn't determine who's right, only who's left'*.[2] War is not inevitable, that is a truism indeed. However, it is an undeniable fact of the 21st century, that the possibility of war(s) breaking out is a threat that looms over the heads of all modern democratic nation-states, somewhat akin a Damocles' sword. Therefore, it is in these hard-fought for times of peace that nation-states should expediently ponder on the nature of mitigating mechanisms and institutions to be put into place, to deal with any event that may spark conflicts, on a global-scale, in the near future.

The motivation behind this essay arose from an abiding curiosity to *peer into the crystal ball* and dispel the feeling of sheer and absolute confusion on the manner and form of crisis that may give rise to such a transnational picking up of arms, both metaphorical and literal. It is very much possible that conventional conflicts on a global scale may suck all countries into its fold and the development of a contingency plan to deal with such an eventuality is the need of the times. This can only be achieved if it is known what kind of global conflict need we prepare for.

§I. THE PROPOSITION OF THE ESSAY

The salience of this essay thus lies in reaching a conclusion on the question: *'Which is the next global battle, trade wars or territorial wars?' or is the answer something absolutely different than we expect?* This essay, shall thus be arguing the proposition that *'considering the case made for the improbability of large-scale pan-global territorial wars in the 21st century, the phenomenon of territorial wars shall be subsumed by the greater probability of other, more complex, forms of conflicts like trade wars, information warfare, and terrorism, etc., with the next global battle primarily being trade wars'*.

§II. AIM AND OBJECTIVE OF THE ESSAY

The author of the essay (hereinafter *'author'*) shall prove the proposition stated in the previous section, by fulfilling *four* objectives throughout the course of this essay:

(i) Emphasize through the use of *'Neoliberal'* and *'Institutionalism Approach'* in international relations how modern democratic nation-states participating in certain cross-border functional-transactional activities like trade, investment, etc., paves the way for higher degree of co-operation and complex interdependence in other related areas like social/cultural exchange, communication, political relations among governments, etc. An attempt shall also be made to show how such intense form of *'international cooperation'* and the international institutions arising thereof lend to the exercises of *'strategic restraint'* by nation-states, thereby ensuring a more stable and pacifist world order[3];

† The Oxford University Standard for the Citation of Legal Authorities (4th edn, Hart Publishers 2009) has been used throughout the essay for purpose of maintaining uniformity in citations and bibliography.

2. Des McHale, Ready Wit: A Treasury of the Cleverest Things Ever Said on Any Subject (Prion Books Ltd. 2006) 44.

3. John A Kroll, 'The Complexity of Interdependence' (1993) 37(3) International Studies Quarterly 321, 321-22.

(ii) Elaborate through the use of the military doctrine of '*Mutual Assured Destruction*' (MAD) how, by offering a *'Hobson's choice'* between (a) exercising nuclear restraint by all nation-states or (b) perishing in a thermonuclear retaliatory attacks, led to the maintenance of a *status quo* called the *'Balance of Power'* (BOP) in the international arena. Furthermore, this section shall highlight how the MAD doctrine curbed the escalation of conventional means of warfare into a full blown war, nuclear or otherwise;

(iii) Establish through the absence of any major conventional warfare in the past seven decades, the success of the above *deterrence rather than defend and defeat* strategies in maintain international peace;

(iv) Demonstrate how the vacuum left by the improbability of territorial wars shall be subsumed by the greater probability of other, more complex, forms of conflicts like trade wars, information warfare, and terrorism, etc. Moreover, the author's intention is to predict and provide justifications for why trade wars are the most likely form of war in the foreseeable future.

Furthermore, the essay will appraise these elements from the vantage point of power politics with an emphasis on changes in nuclear deterrence strategy since World War II. The essay shall engage with the socio-political, historical and ethical elements of the debate on territorial conflicts, trade wars as well as other forms of wars. Therefore, the author's attempt throughout the length of this essay will be to bridge that gap in contemporary scholarship on the subject. How successfully and to what degree the author achieves this is left for the reader to decide.

However, a caveat is warranted. As is with every argumentative essay, it is understandable and at times even expected, that an author's worldview, preferences and predilections may colour their analysis and get reflected in the arguments and conclusions that are drawn. With this realization in mind, at the very outset, the author of this essay feels it incumbent on him to declare that he shall strive to examine the central question in faithful adherence to the principles of scholarly integrity and dialogue, while maintaining the greatest standards of objectivity.

§III. THE ARGUMENTS FOR THE PROPOSITION

This essay proposes *the improbability of large-scale pan-global territorial wars in the 21st century and predicts that the phenomenon of territorial wars shall be subsumed by the greater probability of other, more complex, forms of conflicts like trade wars, information warfare, and terrorism, etc., with the next global battle primarily being trade wars'*. This proposition shall be substantiated on the basis of *three* arguments:

A. The Neo-liberal and Institutionalism Approach Argument

Since 1950 onwards, a phenomenon of increasing regional integration could be observed among all sovereign nation-states of the world. The regional integration being referred to in this section is an intense form of *'international co-operation'* in cross-border trade and investment activities, relations and transactions (over and above the transactional links between business corporations), leading to higher levels of social/ cultural exchange, communication, political relations among governments, etc. What is interesting to note is that this picture is in consonance with the *neoliberal school of international relations*, but it stands in stark contrast to the *realist theorization*

of international relations as a struggle for power based on *'national interest'*[4].

This line of thinking is characterized by an *'absence of hierarchy among issues'* (i.e., military security does not dominate the agenda anymore). Military force is no longer used as an instrument of foreign policy. With the rise of other actors in a *'pluralist'* democracy, there is a realization among said actors that violent conflicts clearly do not bear fruit on the international front. Therefore, it may be surmised that there is now a move away from some forms of *hard power* (particularly, military force no longer being in vogue as an instrument of foreign policy) and is being progressively substituted for complementing combinations of *hard* (e.g., trade, investments, etc) and *soft power* (e.g., diplomacy, culture exchanges, shared political and moral valued, philanthropic activities, etc.).

In this changing milieu, transnational and transactional relations become important as international relations are now seen to be supplemented by relations among private individuals, groups, and societies. This higher degree of transnational ties and transactions leads to peaceful relations, that in turn adds to more than a mere absence of war. A sense of community is achieved: people come to agree that their conflicts can be resolved without resort to large-scale physical force. A number of conditions are encouraged and buttressed the emergence of a *'cobweb'* of security communities: increased social communication, greater mobility of persons, stronger economic ties, a wider range of mutual human transactions, better access to electronic means of communication and ease of foreign travel, etc.

According to the *institutionalism approach to international relations*, there has also been a shift in focus from state-state relations to transnational relations between people, groups and organizations belonging to different nation-states. This has contributed to a world society that focuses and emphasizes on the emergence, spread, consolidation and internalization of institutional norms, practices and conventions considered *'legitimate'* for participation in global politics and governance.[5] Case-in-point in the Indian context may be the recent incident of China condemning the Pulwama terror attack in February 2019.[6] Even though China is a known ally of Pakistan, it chose to condemn the incident in order to safeguard its trade interests with India as well as not escalate tensions near the Pakistan-occupied Kashmir region that is home to China's Ambitious *One-Belt-One-Road* initiative.

To give effect to this shift towards a high degree of international co-operation and complex interdependence, nation-states set up international institutions to deal with *'common problems'* like postwar development, economic recession, global healthcare, world peace, etc. and more recently, terrorism, tragedy of commons and climate change. With the growing involvement of transnational actors (TNAs), non-governmental organizations (NGO's), multinational corporations (MNC's), and philanthropic foundations are increasingly being seen as representatives of an emerging global civil society who can reduce democratic deficits by strengthening participation, accountability and transparency, thus leading to a more peaceful and stable world order. This plurality of different actors other than national governments has been termed as *'pluralism'*.

4. Robert Jackson and Georg Sørenson, Introduction to International Relations: Theories and Approaches (5th edn, Oxford University Press Reprinted 2014) 46-48.
5. Jonas Tallberg et al, 'Explaining the Transnational Design of International Organizations (2014) 68(4) International Organization 741, 741.
6. 'China Condemns Strike Sans Naming Pakistan' The Daily Pioneer (New Delhi, 17th February 2019) <https://www.dailypioneer.com/2019/page1/china-condemns-strike-sans-naming-pakistan.html> accessed 14th March 2019.

Numerous empirical studies and international theorists have based their analysis on the basis the post-world war, mass-consumption, welfare state structures existing in the United States of America, Japan and Western Europe, etc. Such interconnection of activities helped create common values and identities among the civil society from different states through the *'common sense'* of globalization. As a result, paving the way for peaceful, cooperative relations by making the opportunity cost associated with war and the concomitant loss of trade, exceedingly costly.

B. The M.A.D Argument for Maintaining the Balance of Power: Through the Nuclear Strategic Looking Glass

This section shall elaborate on maintenance of the Balance of Power (hereinafter *'BOP'*) amongst nation-states *via* nuclear deterrence and its contribution to ensure a more pacifist future. For this section the author shall be employing an argument based on a nuclear deterrence doctrine popularly dubbed as *'Mutual Assured Destruction'* (hereinafter *'MAD'*).[7] The basic outline of MAD doctrine was formulated in the early years of the Kennedy administration in the United States.[8]

This military doctrine offered a *'Hobson's Choice'* of sorts, stating that in the event that a large-scale conventional conflict escalates into a full-scale use of nuclear weapons by two or more opposing sides, there are only *two* possible outcomes: *One*, it shall result in the complete thermonuclear annihilation of both the attacker and the defender as each side shall be prepared to destroy the other's cities and society in a retaliatory strike. The alternate was to resolve the conflict through other means.

In the former scenario, it was concluded that the outcome would be so dreadful that both sides would be deterred from starting a nuclear war or even taking actions that might lead to it. Thus, a situation was reached, quite unique in the history of military deterrence, where the world's most powerful nuclear states have been locked in a military stalemate for almost half a century.

By the early 1960s, the nuclear arsenals of the United States and the Soviet Union had grown so large and sophisticated that neither country could entirely destroy the other's retaliatory force by launching first, even with a surprise attack. Starting a nuclear war was therefore tantamount to committing suicide. This *'stalemate'* entered into by the United States and Soviet Union after careful nuclear posturing and increasing military capabilities was meant to achieve a bipolar BOP to protect the security of the participant nation.[9] The *'equilibrium'* reached thus prevented *'Gramscian hegemony'*.[10]

During the Cold War, many scholars and international affairs analysts believed that MAD would make the world comparatively stable and peaceable because it warranted great vigilance and caution in international politics and restrained use of threats nuclear or otherwise to resolve disputes.[11] What is indeed interesting to note is that throughout large

7. Percy Löwenhard and Norman C Freund, 'Nuclear Deterrence: The Rationality of the Irrational Nuclear Deterrence: The Rationality of the Irrational [with Comment and Rejoinder]' (1987) 4(3) International Journal on World Peace 73, 73-75.
8. Donald M. Snow, 'Current Nuclear Deterrence Thinking: An Overview and Review' (1979) 23(3) International Studies Quarterly 445, 446-7.
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10. Mark McNally, 'The Organization of Balance and Equilibrium in Gramsci's Hegemony' (2008) 29(4) History of Political Thought 662, 665-67.
11. Keir A. Lieber and Daryl G. Press, 'The Rise of U.S. Nuclear Primacy' (2006) 85(2) Foreign Affairs 42, 44.

parts of the Cold War, the declared policy of the United States closely approximated MAD. To many, MAD prevented the Cold War from turning hot.[12]

Therefore, lending credence to the argument that if the United States could not have threatened to escalate a conflict by using nuclear weapons, then the Soviet would have had free rein to fight and win a conventional war in Europe. Was it not for all these efforts, it is highly probable that a conventional war in Europe or, even more likely, the limited use of nuclear weapons would have prompted a full-scale nuclear. Therefore, this theory prevents the world from going down in a glorious ball of fire, so long as no one pulls this trigger.

C. The Historical and Contemporary Precedents against Territorial Wars

This debate on nuclear primacy, balance of power and thermonuclear Armageddon may now seem like ancient history, but it is actually more relevant than ever-because the age of MAD is nearing its end. The cold war has ended and so has the bipolar system of world order. The 21st Century is characterized by a *'multipolar'* system where the Mutual Assured Destruction (MAD) defence strategy has become a SAD (i.e., Self-Assured Destruction) potential.[13] The contemporary situation is vastly different. The United States no longer possesses strategic superiority. The weapons balance between the superpowers is now one of rough parity, with the United States *'ahead'* in some measures of capability and China, Russia, France, Germany, etc., having other numerical advantages and strengths.

Revealingly, the last intense nuclear standoff, i.e., the 1962 Cuban missile crisis, occurred at the dawn of the MAD era. Because of this nuclear stalemate, optimists argued, the era of intentional great-power wars has come to an end. In third world and developing countries, in certain scenarios, MAD deterrence still works to some degree. Take for instance the recent spate of the Indian military staged *'surgical strikes'* against targets just across the border in Pakistan.[14]

It would be suicidal for Pakistan to retaliate against India with nuclear weapons. Some have commented that a nuclear war could begin if the Indian Government launched a large military incursion aimed at destroying terrorist camps or punishing Pakistan for supporting terrorist groups such as *Jaish-e-Mohammed*. However, the threat of escalation also makes *deterrence* preferable to *defend and defeat*. Therefore, the presence and prevalence of high intensity localized warfare shall always be an option but nothing on the scale of a nuclear apocalypse.

§IV. THE NEXT GLOBAL WAR: PREDICTIONS AND PROTECTIONS

There are two kinds of wars that the world shall have to be prepared for and a *third* that are gaining immense notoriety post 9 September 2011, namely, *Information Warfare, Trade Wars* and the *War against Terrorism*.

A. Information Warfare

We live in what is popularly known as the *'Information Age'*. It was said that the Library

12. Robert Wilde, 'Mutually Assured Destruction' (ThoughtCo, 28 December 2017) <https://www.thoughtco.com/mutually-assured-destruction-1221190> accessed 14 March 2019.
13. Dean Babst, 'Self-Assured Destruction (SAD)' (1989) 21(3) Peace Research 41, 41-44.
14. Jeffrey Gettleman, 'India Threatens a New Weapon against Pakistan: Water' The New York Times (New Delhi, 21 February 2019) <https://www.nytimes.com/2019/02/21/world/asia/india-pakistan-water-kashmir.html> accessed 13 March 2019.

of Alexandria housed the sum of human knowledge. Today, there is enough information in the world to give every person alive 320 times as much of it as historians think was stored in Alexandria's entire collection–an estimated 1,200 exabytes' worth.[15] Using such great volumes of information requires profound changes in how we approach data.

Today, civilian as well as military matters are more dependent on electronic information systems. Modern societies are extremely dependent on information systems, and civilian information infrastructure like commercial communications, broadcasting networks, financial data systems, transportation control systems, and so on. Unsurprisingly, these public information systems are often the target of cyber attacks.

This has portentous implications for the 21st century, as warfare in contemporary times, takes place in a technology context that brings with it newer complexity into the fabric of military-strategic planning. Strategic information warfare (hereinafter '*IW*') depends on exploiting vulnerabilities in the information infrastructure in time of peace, crisis, or war by state or non-state actor(s) so as to deny potential or actual foes–countries, terrorist groups, multinational corporations, and so on–the ability to exploit the same means against it.[16]

Not only is this strategy of attacking civilian information infrastructure more effective in crippling or hurting an opponent, but it often has some special advantages of its own. It is easier, less expensive and certainly less risky than sabotage, assassination, hijacking, hostage-taking or terrorism.[17] Entry costs to IW are low,[18] thus making IW threats an aggressor's strategy of choice.[19] That such a scenario has been portrayed in recent Hollywood spy fictions such as *Johnny English Strikes Again* (2018) and *James Bond: Sceptre* (2015)[20] only speaks to the underlying sense of unease at the overlapping jurisdictions of cyber, national and data security.

One way to guard ourselves against the impact of IW is not just an adjustment in military thinking but a complete rethinking of how to wage war. One of the greatest difficulties in deterring IW threat is the information technology is sufficiently advanced to let an attacker remain anonymous but not enough so the perpetrator can be identified.[21]

B. Trade Wars: A Misguided Method of Economic Coercion

A form of economic warfare, trade wars are often retaliatory and coercive trade sanctions intended to have undesirable effects on the target country. The most recognized user has been the United States which has in the past

15. Kenneth Neil Cukier and Viktor Mayer-Schoenberger, 'The Rise of Big Data: How it's Changing the Way We Think about the World' (Foreign Affairs, 2013) <https://www.foreignaffairs.com/articles/2013-04-03/rise-big-data> accessed 12 March 2019.
16. Stephen J Cimbala, 'Chasing its Tail: Nuclear Deterrence in the Information Age' (2012) 6(2) Strategic Studies Quarterly 18, 18.
17. ibid 177.
18. Berkowitz (n 15) 182.
19. Bruce D Berkowitz, 'Warfare in the Information Age' in John Arquilla and David Ronfeldt (eds), In Athena's Camp-Preparing for Conflict in the Information Age (RAND Corporation 1997) 175.
20. In the movie, *James Bond: Sceptre* (Metro-Goldwyn-Mayer and Columbia Pictures 2015), Agent 'M' commented that-
    ('*… I'm frightened because our enemies are no longer known to us. They no longer exist on a map, they're not nations. They are individuals. Now look around you, who do you, fear? Can you see a face, a uniform, a flag? No, our world is not more transparent now, it is more opaque. It's in the shadows. That's where we must do battle.*')
21. Roger C. Molander *et al*, Strategic Information Warfare: A New Face of War (RAND Corporation 1996) 1-2.

imposed economic sanctions most notoriously on Cuba, on the Russian Federation for the annexation of Crimea and most recently on Chinese steel in particular and Chinese trade practices in general, but these are hardly the only ones.[22]

Skepticism concerning the judiciousness of imposing trade sanction arises from several quarters. It has been observed that the undesirable effects of retaliatory trade sanctions negatively affect not only the target country but also on the country imposing the sanctions and sometimes even third, unrelated countries. Not to mention that unilateral sanctions rarely work. Therefore it should come as no surprise that there is a widespread feeling that unilateral economic sanctions have been greatly misused in the past primarily for scoring political points by appeasing the vocal domestic political constituency or for other rhetorical purposes in the home country.

What is to be realized is that increasing integration of the world's economies makes it exceedingly impossible for any economy to urge a trade war without *'shooting itself in the foot'*. The same process of globalization that drives companies to buy raw materials where they are cheapest, also push them to make finished goods where the costs are lowest (which very often is in the one and the same country). As such, it is hard to tell who wins and who loses in a trade war.

Multilateral trading arrangements in the future must therefore, take a fresh look at the rationale of permitting economies to impose several unilateral trade measures such as anti-dumping duty, countervailing duty, safeguard measures and find an efficient alternative to sanctions in the interest of safeguarding free trade as a basis of international trade.[23]

Whatever may be the judiciousness or lack thereof, of trade wars, what is certain that imposition of unilateral economic sanctions remains a *fan favourite, easy, emotionally satisfying, feel-good unilateral* and *lazy* way of doing something serious against foreign regimes that run afoul of (most often a 'developed') country's delicate sensibilities, without putting military troops in harm's way. However, what is indisputable is that economic sanctions are used widely and frequently and if current trends are to be believed seem to be used in like manner for the predictable future. Therefore, trade wars are likely to be the method by which the subsequent battles shall be fought.

C. The War against Terrorism

As the 21st century began, it was clear that no one was safe from terrorist insurgencies. After 9/11 terrorism became the leading preoccupation of politicians, police chiefs, journalists, and writers. The very fact that makes terrorism so terrifying is its tendency to defy the logic of conventional warfare. Terrorist and insurgent groups, who seek to mobilize a population toward a vision of the future believed to be unachievable without violence.[24] Terrorist insurgencies constitute the primary warfare threat facing the international community.[25]

22. 'A Quick Guide to the US-China Trade War (BBC World News, 7 January 2019) <https://www.bbc.com/news/business-45899310> accessed 15 March 2019.
23. C. Satapathy, 'Trade Sanctions and Other Barriers to Free Trade' (1999) 34(51) Economic and Political Weekly 3583, 3583-5.
24. James JF Forest, 'Influence Warfare and Modern Terrorism' (2009) 10(1) Georgetown Journal of International Affairs 81, 81.
25. Joshua Sinai, 'How to Define Terrorism' (2008) 2(4) Perspectives on Terrorism 9, 9.

Terrorism has been defined as-

> *'A tactic of warfare involving premeditated, politically motivated violence perpetrated by sub national groups or clandestine agents against any citizen of a state, whether civilian or military, to influence, coerce, and, if possible, cause mass casualties and physical destruction upon their targets. Unlike guerrilla forces, terrorist groups are less capable of overthrowing their adversaries' governments than on inflicting discriminate or indiscriminate destruction that they hope will coerce them to change policy.'*[26]

State-sponsored terrorism has not disappeared. History shows that terrorism more often than not has little political impact, and that when it has an effect, it is often the opposite of the one desired. The 1991 assassination of Rajiv Gandhi as he campaigned to retake the prime ministership did not inhibit the Indian National Congress from gaining power, on the contrary the wave of sympathy provided a much needed fillip launching the Congress into a new era of a record absolute majority in Parliament.

Finally, the common wisdom holds that terrorism can spark a war or, at least, prevent peace, but that is true only where there is preexisting inflammable material: as in Sarajevo in 1914, the Middle East, etc.[27]

CONCLUSION(S)

In conclusion, it may be said that the colossal wave of globalization, democratization, interdependence and digitization has indeed challenged conventional conceptions of how war is done and disputes resolved. It is in this manner the essay attempted to explain (*See* sections I and II) and resolve (*See* sections III and IV) this seemingly intractable *Gordian Knot* of predicting the next global war. The essay concludes that liberal democracies enhance peace and do not go to war against each other because they adhere to the *three* pillars of economic co-operation, common moral values, and peaceful conflict resolution among democratic states. Through this process of cooperation there is a legitimate and optimistic expectation among nation states that there will be a steadily expanding *'zone of peace'*, even though occasional setbacks are inevitable.[28]

It is also concluded that the era of MAD doctrine which hitherto curbed the escalation of conventional conflicts into full blown global warfare by maintaining the BOP in a bipolar world, may very soon be circumscribed in a multipolar world due to the emergence of newer more complex, forms of conflicts like trade wars, information warfare, and terrorism, etc which operate in the abstract or even the virtual. Furthermore, this essay also throws light on how of the *three* forms of conflicts examined, trade wars remains the instrument of choice, widely used and frequently employed. Trade wars remain most likely of the three methods by which the subsequent battles shall be fought globally due to the *maximum ease and effectiveness and minimum sacrifice* with which goals of an economy can be achieved.

Finally, this essay points to a world that is driven more by mutually beneficial cooperation than by antagonistic conflict. However, this should by no means to be interpreted to mean that conflicts will absolutely cease. Newer forms and arenas of conflict shall emerge. Conflicts will be muted to a certain extent, however, conflicts there shall be. Therefore, the presence and prevalence of high intensity localized warfare shall always be an option but nothing on the

26. ibid 11.
27. Walter Laqueur, 'Postmodern Terrorism' (1996) 75(5) Foreign Affairs 24, 28.
28. ibid 103-4.

scale of a nuclear apocalypse. The future has always belonged to the brave and the bold. We have to take our chances and therefore, evidently, the future belongs to those who embrace these challenges. How we respond to this proposition will determine whether the present generation lodges its name in the pages of history, or risk being forever forgotten as an irrelevant footnote in the tomes of history.

Therefore, in this manner, the essay concludes by proving the initial proposition that *'considering the case made for the improbability of large-scale pan-global territorial wars in the 21st century, the phenomenon of territorial wars shall be subsumed by the greater probability of other, more complex forms of conflicts like trade wars, information warfare, and terrorism, etc., with the next global battle primarily being trade wars'.*

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> The more this power of concentration, the more knowledge is acquired, because this is the one and only method of acquiring knowledge.
>
> — *Swami Vivekananda*

> Things that used to make me miserable when I was a child, do not do so now. The subject changed, so the object was bound to change; so says the Vedanta. The world will change if we change.
>
> — *Swami Vivekananda*

CA Ketan L. Vajani & CA Haresh P. Kenia, *Hon. Jt. Secretaries*

The Chamber News

BRIEF REPORT OF 92ND ANNUAL GENERAL MEETING

At the 92nd Annual General Meeting held on Thursday, 4th July, 2019, the following business was transacted:

i) The Annual Report for the year 2018-19 was approved & adopted.

ii) The Accounts for the year ended 31st March, 2019 were adopted.

iii) Mr. J. L. Thakkar, Chartered Accountant, was appointed as Auditor for the year 2019-20 and will hold office up to the next AGM.

iv) Results of the elections for the year 2019-20 were declared by the Election Officer, Shri Keshav Bhujle, Past President as follows :

- CA Vipul K. Choksi was elected as President
- The following fourteen members were elected to the Managing Council

1.	Mr Anish M. Thacker	8.	Mr. Mehul R. Sheth
2.	Mr. Bhadresh K. Doshi	9.	Mr Parag S. Ved
3.	Mr. Devendra H. Jain	10.	Mr. Pranav P. Kapadia
4.	Mr. Haresh P. Kenia	11.	Mr. Rahul K. Hakani
5.	Mr. Heneel K. Patel	12.	Mr Rajesh L. Shah
6.	Mr Ketan L. Vajani	13.	Mr. Rajesh P. Shah
7.	Ms. Maitri P. Savla	14.	Ms. Varsha Galvankar

THE DASTUR ESSAY COMPETITION

Hon'ble Shri Justice D. S. Naidu, Bombay High Court was the Judge to decide the final winner of the Eassy Competition.

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The Top 3 Winners of the Essay Competition are:

Rank	*Participant Name*	*Topic*	*Associates/College*
1	Mr. Sushant Arsh Massey Khalkho	Trade wars or Territorial wars, the next global battle	National Law School of India University (NLSIU), Bangalore
2	Ms. Sanchi Dhamija	Feminism, a misunderstood concept today	Vivekananda Institute of Professional Studies, New Delhi
3	Ms. Hetvi Sanjay Valia	Feminism, a misunderstood concept today	HR College of Commerce and Economics, Mumbai

The winner of the Dastur Essay Competition viz Ms. Hetvi Sanjay Valia (3rd Winner) was felicitated by offering Trophy, Memento, Certificate and Cheque. Mr. Jagrat Bishan Shah (6th Winner), Mr. Ronak Chetan Thakker (7th Winner), Mr. Sayan Banerjee (8th Winner) & Ms. Joshita Chopra (10th Winner) were also felicitated by offering Appreciation Certificate and Mementos.

RELEASE OF PUBLICATIONS

Hon'ble Shri Justice D. S. Naidu, Bombay High Court released the publication "International Taxation – A Compendium" and Dr. Y. P. Trivedi, Past President released the publication "Rigors of Section 56(2)(X)".

THE NEW TEAM FOR 2019-20

i) In the First Managing Council Meeting held on Thursday, 4th July, 2019, the following members were elected as Office Bearers:

Sr. No.	*Name*	*Designation*
1.	Mr. Anish M. Thacker	Vice President
2.	Mr. Ketan L. Vajani	Hon. Jt. Secretary
3.	Mr. Haresh P. Kenia	Hon. Jt. Secretary
4.	Mr. Parag S. Ved	Hon. Treasurer

ii) The following nine members were Co-opted to the Managing Council for the year 2019-20:

1. Mr. Ashok Sharma
2. Mr. Hitesh R. Shah
3. Mr. K. Gopal
4. Mr. Kishor Vanjara
5. Mr. Mahendra Sanghvi
6. Mr. Nilesh Vikamsey
7. Mr. Paras K. Savla
8. Mr. Paresh P. Shah
9. Mr. Yatin Desai

iii) EDITOR & EDITORIAL BOARD OF THE CHAMBER'S JOURNAL

Mr. V. H. Patil was appointed as the Chairman of Editorial Board and Mr. Vipul B. Joshi was appointed as the Editor of "The Chamber's Journal".

Asst. Editors

1. Mr. Ajay Singh
2. Mr. Ameya Kunte
3. Mr. Haresh Chedda
4. Mr. Manoj Shah
5. Mr. Nishit Gandhi
6. Mr. Paras K. Savla
7. Mr. Rakesh Upadhyay
8. Mr. Sanjay Parikh
9. Mr. Yatin Vyavaharkar
10. Mr. Vikram Mehta

Editorial Board Members:

1. Mr. A. S. Merchant
2. Mr. K. Gopal
3. Mr. Keshav Bhujle
4. Mr. Kishor Vanjara
5. Mr. Pradip Kapasi

iv) COMMITTEES

The following Committees were formed and their Chairman, Chairperson were appointed:

	Committees	*Chairman/Chairperson*
1.	Accounting & Auditing	Mr. Heneel Patel
2.	Allied Laws	Mr. Rahul Hakani
3.	Direct Taxes	Mr. Devendra Jain
4.	Indirect Taxes	Mr. Pranav Kapadia
5.	International Taxation	Mr. Rajesh L. Shah
6.	I.T. Connect	Ms. Maitri Savla
7.	Journal	Mr. Bhadresh Doshi
8.	Law & Representation	Mr. Mahendra Sanghvi
9.	Membership & Public Relations	Mr. Rajesh P. Shah
10.	Office Premises Committee	Mr. Kishor Vanjara
11.	Research & Publication	Mr. Paras K. Savla
12.	Residential Refresher Course	Mr. Mehul Sheth
13.	Student	Ms. Varsha Galvankar
14.	Study Circle & Study Group	Mr. Ashok Sharma
15.	International Taxation Journal	Mr. Paresh P. Shah

DELHI CHAPTER

The following members were appointed as the Chairman, Vice-Chairman and Office Bearers of Delhi Chapter:

1. Mr. Vijay Gupta — Chairman
2. Mr. Sanjiv Chaudhary — Vice Chairman
3. Mr. Deepender Kumar — Jt. Hon. Secretary
4. Mr. Prakash Sinha — Jt. Hon. Secretary
5. Mr. Harpreet Singh — Hon. Treasurer

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Important events and happenings that took place between 1st June, 2019 to 1st July, 2019 are being reported as under:

I. ADMISSION OF NEW MEMBERS

1) The details of new members who were admitted in the Managing Council Meeting held on 2nd July, 2019 are as under:-

Type of Membership	No. of Members
Life Member	8
Ordinary Member	23
Student Member	6
Associate Member	4

II. PAST PROGRAMMES

1. ACCOUNTING & AUDITING COMMITTEE & CORPORATE CONNECT COMMITTEE

A "Study Course on Valuation" was held on 8th June, 2019 at Babubhai Chinai Hall, 2nd Floor, IMC, Churchgate. The course was addressed by CA Ravishu Shah, CA Pinkesh Billimoria, CA Devarajan Krishnan, CA Aseem Mankodi and CA Bhakti Shah.

2. COMMERCIAL & ALLIED LAWS AND CORPORATE CONNECT COMMITTEE

A Seminar on Issues related to the Insolvency & Bankruptcy Code and Resolution of Distressed Assets was held on 15th June, 2019 at Babubhai Chinai Hall, 2nd Floor, IMC, Churchgate. The seminar was addressed by CA Satish Kumar Gupta, Dr. Rajendra Ganatra, CA Amrish Shah and Mr. Siddharth Suri. The panel discussion in the seminar was moderated by Ms. Richa Roy, Advocate and the panellists were Mr. Kumar Saurabh Singh, Advocate, Ms. Veena Sivaramakrishnan and CA Vijay Iyer.

3. COMMERCIAL & ALLIED LAWS AND DIRECT TAXES COMMITTEE

A Workshop on the Benami Transactions Amendment Act, 2016 and Prevention of Money Laundering Act 2002 was held on 29th June, 2019 at Hotel West End, Churchgate, Mumbai. The workshop was addressed by Dr. Dilip K. Sheth, Mr. Ashwani Taneja, Advocate, Mr. Rajendra, CA T. P. Ostwal and CA Jagdish Punjabi. All the speakers were part of panel discussion as well.

4. DIRECT TAXES COMMITTEE

A Half Day Workshop on Return Filing provisions under the Income-tax Act was held on 28th June, 2019 at IMC, Churchgate. The workshop was addressed by CA Nihar Jambusaria and CA Avinash Rawani. There was a panel discussion where CA Avinash Rawani, CA Atul Suraiya and CA Apurva Shah were the panel members.

5. INTERNATIONAL TAXATION COMMITTEE

The "13th Residential Refresher Course on International Taxation", 2019 was held from 20th June, 2019 to 23rd June, 2019 at The Grand Bhagwati, Surat. The course was inaugurated by Hon'ble Justice (Retd.) Shri P. P. Bhatt, President ITAT. The course was addressed by Hon'ble Shri G. S. Pannu, Vice-President ITAT, Mumbai, Hon'ble Shri Pramod kumar, Vice-President ITAT, Ahmedabad, CA Padamchand Khincha, CA Karishma Phatarphekar,

CA Anish Thacker, CA Gautam Doshi, CA Sanjay Tolia, CA Sanjeev Sharma, IRS, CA P. V. Srinivasan, Dr. K. Sheth, Mr. G. C. Srivastava, IRS, Mr. S. Ganesh, Senior Advocate, CA Yogesh Thar, CA Dilip Thakkar and CA Rashmin Sanghvi.

6. **MEMBERSHIP & PUBLIC RELATIONS COMMITTEE**
A Full Day Seminar on Direct Taxes at Nagpur was held on 29th June, 2019 at Hotel Centre Point, 24, Central Bazar Road, Nagpur. The seminar was addressed by CA Devendra Jain, CA Abhitan Mehta, CA Anish Thacker and Mr. Ajay Singh, Advocate.

7. **PUNE STUDY GROUP**
A Full Day Seminar on Contentious Issues in Real Estate Related Transactions was held on 15th June, 2019 at ELITS, Plot No. 419, Model Colony, Gokhale Cross Road, Pune. The seminar was addressed by CS Sunil Nanal and CA Shreedhar Phathak. The panel discussion in the seminar was moderated by CA Anish Thacker and the panellists were CA Jayesh Gandhi, CA Yogesh Thar and CA Parind Mehta.

8. **STUDENT COMMITTEE**
A Student Orientation Course was held from 13th June to 15th June, 2019 at Juhu Jagruti Hall, Mithibhai College, Vile Parle, Mumbai. The course was addressed by CA Ashok Mehta, CA Hemang Shah, CA Sumit Jhunjhunwala, CA N. Jayendran and CA Kalpesh Katira.

III. FUTURE PROGRAMMES

1. **ACCOUNTING & AUDITING COMMITTEE**
Half Day Workshop on Amendments to SEBI Listing Regulations is scheduled to be held on 20th July, 2019 at IMC, Churchgate.

   Workshop on Assurances & Compliances is scheduled to be held on 7th September, 2019 at Babubhai Chinai Hall, 2nd Floor, IMC, Churchgate.

2. **DIRECT TAXES COMMITTEE**
Workshop on Direct Tax Provisions of Finance Bill (No. 2), 2019 (jointly with WIRC OF ICAI) is scheduled to be held on 13th July, 2019 at West End Hotel, Near Bombay Hospital, New Marine Lines, Churchgate.

   Half Day Workshop on Practical & Legal Issues in Tax Audit is scheduled to be held on 17th August 2019 at Walchand Hirachand Hall, 4th Floor. IMC, Churchgate.

3. **INTERNATIONAL TAXATION COMMITTEE**
Full Day Seminar on TDS u/s. 195 on foreign remittances including procedural aspects is scheduled to be held on 3rd August, 2019 at West End Hotel, Near Bombay Hospital, New Marine Lines, Churchgate.

4. **STUDENTS COMMITTEE AND MEMBERSHIP & PUBLIC RELATIONS COMMITTEE**
The 5th CTC Football Cup is scheduled to be held on 10th August, 2019 at Dr. Antonio Da Silva High School, Dadar West.

(For details of the future programs, kindly visit www.ctconline.org or refer The CTC News of July, 2019)

ML-981

92nd AGM held on 4th July, 2019 at Garware Club House, Churchgate

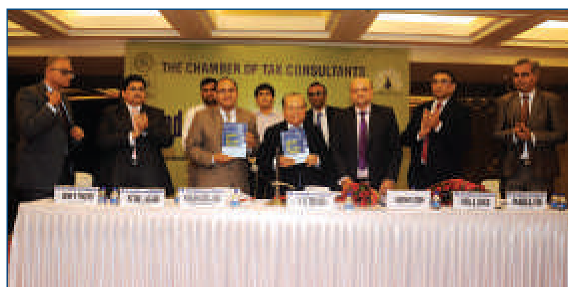
CA Hinesh R. Doshi, Imm. Past President offering Bouquet to incoming President CA Vipul K. Choksi

Shri Keshav Bhujle, Election Officer announcing the election results for the year 2019-2020.

Hon'ble Shri Justice D. S. Naidu addressing the members. Seen from L to R: CA Anish Thacker (Vice-President), CA Ketan L. Vajani (Hon. Jt. Secretary), CA Hinesh R. Doshi (Imm. Past President), CA Vipul K. Choksi (President) and CA Parag S. Ved (Hon. Treasurer)

Winners of 8th The Dastur Essay Competition, 2019

Hon Shri Justice D. S. Naidu, Bombay High Court releasing the publication "International Taxation – A Compendium"



Dr. Y. P. Trivedi releasing the publication "Rigors of Section 56(2)(X)"

92nd AGM held on 4th July, 2019 at Garware Club House, Churchgate

Dr. Y. P. Trivedi addressing the members. Seen from L to R: CA Anish Thacker (Vice-President), CA Ketan L. Vajani (Hon. Jt. Secretary), Hon. Shri justice D. S. Naidu, Bombay High Court, CA Hinesh R. Doshi (Imm. Past President), CA Vipul K. Choksi (President) and CA Parag S. Ved (Hon. Treasurer)

Seen from L to R: CA Sunil Gabhawalla, President BCAS, CA Hinesh R. Doshi, Imm. Past President, CTC, CA Vipul K. Choksi, President, CTC and CA Manish Sampat, Vice-President, BCAS

CA Vipul K. Choksi (President) with Office Bearers of GSTPM

CA Hinesh Doshi (IPP) and CA Vipul K. Choksi (President) with Office Bearers of AIFTP.

Office Bearers with Past Presidents

President of ICAI and Chairperson of WIRC and others

CA Vipul K. Choksi (President) with Office Bearers of MCTC and others

Office Bearers with CTC Staff

92nd AGM held on 4th July, 2019 at Garware Club House, Churchgate

Members at 92nd AGM

Members at 92nd AGM

Commercial & Allied Laws Committee and Corporate Connect Committee

Seminar on Issues related to IBC and Resolution of Distressed Assets held on 15th June, 2019 at Babubhai Committee Hall, IMC, Churchgate

Mr. Rahul Hakani, Advocate (Chairman) welcoming the speakers

CA Paras K. Savla (Chairman) welcoming the delegates

Faculties

CA Amrish Shah

CA Vijay Iyer

Ms. Veena Sivaramakrishnan

Ms. Richa Roy (Moderator)

Mr. Kumar Saurabh Singh, Advocate

DR. Rajendra Ganatra

CA Satish Kumar Gupta

Mr. Siddharth Suri

ML-984

13th Residential Refresher Course on International Taxation 2019 held on 20th-23rd June 2019 at Surat

Inaugural Session of RRC

Hon'ble Justice P. P. Bhatt, President, ITAT Inaugurated the RRC by Lighting the Lamp.
Seen from L to R: Hon'ble Mr. Mahavir Singh, ITAT Member, Hon'ble Mr. O. P. Meena, ITAT Member, Hon'ble Mr. Pramod Kumar, Vice President-ITAT (WZ), CA Hinesh R. Doshi, President, Hon'ble Mr. G. S. Pannu, Vice President-ITAT, CA Vipul Choksi, Vice President, CA Rajesh P. Shah (Chairman) & CA Shreyas Shah, Convenor

Dignitaries at Inaugural Session

CA Hinesh R. Doshi, President giving opening remarks

CA Hinesh R. Doshi, presenting Memento to Hon'ble Justice P. P. Bhatt, President, ITAT

13th Residential Refresher Course on International Taxation 2019 held on 20th-23rd June 2019 at Surat

CA Rajesh P. Shah, Chairman Welcoming the Speakers

Hon'ble Justice P. P. Bhatt, President, ITAT, delivering Keynote address

Panel Discussion – seen from L to R : CA Rajesh P. Shah, Chairman, CA Karishma Phatarphekar, Mr. G. S. Pannu, Vice President, ITAT, Mr. Pramod Kumar, Vice President, ITAT (WZ), CA H. Padamchand Khincha, Panellists, CA Hinesh R. Doshi, President,

Group Photo during Inaugural Session

Membership &Public Relation Committee

Full Day Seminar on Direct Taxes jointly with Income Tax Bar Association, Nagpur was held on 29th June, 2019 at Hotel Centre Point, Ramdaspeth, Nagpur

Chief Guest Hob'ble Shri Nitin Gadkari, Union Minister inaugurating the seminar by lighting the lamp.

CA Anish Thacker (Hon. Jt. Secretary) welcoming the Chief Guest and Speakers

Chief Guest Hob'ble Shri Nitin Gadkari, Union Minister delivering key note address

Faculties

Mr. Devendra Jain, Advocate

CA Abitan Mehta

CA Anish Thacker

Mr. Ajay Singh, Advocate

Study Circle and Study Group Committee

SC on "Issues in connection with transactions in immovable property – Part II" was held on 3rd July, 2019 at Jai Hind College, Churchgate

CA Jagdish Punjabi addressing the delegates

Direct Taxes Committee

ISG on "Recent Important Decisions under Direct Taxes" was held on 24th June, 2019 at CTC Conference Room

CA Bhadresh Doshi addressing the delegates

Commercial & Allied Laws Committee and Direct Taxes Committee

Workshop on The New Benami Law and of Money Laundering Act
held on 29th June, 2019 at Hotel West End, Churchgate

Faculties

Mr. Rahul Hakani, Advocate (Chairman)welcoming the speakers.

Dr. Dilip K. Sheth

Mr. Ashwani Taneja, Advocate

CA T. P.Ostwal

Accounting & Auditing Committee and Corporate Connect Committee

Study Course on Valuation was held on 8th June, 2019 at Babubhai Committee Hall, IMC, Churchgate

CA Parag Ved, Hon. Secretary welcoming the speaker

CA Heneel Patel (Chairman) giving opening remarks

CA Paras K. Savla (Chairman) welcoming the speakers and Delegates

Faculties

CA Ravishu Shah

CA Pinkesh Billimoria

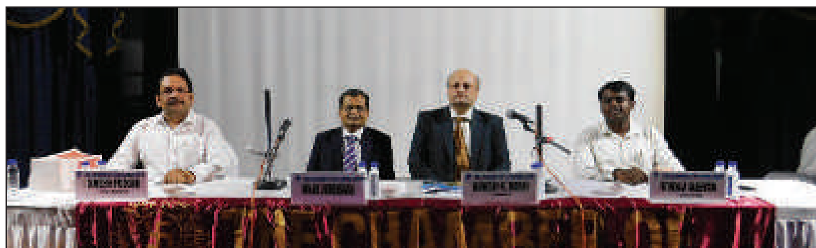
CA Devarajan Krishnan

CA Aseem Mankodi

CA Bhakti Shah

Direct Taxes Committee

Half day Workshop on Return Filing Provisions under the Income-Tax Act was held on 28th June, 2019 at Jai Hind College Auditorium, Churchgate



CA Hinesh Doshi (President) giving his remarks. Seen from L to R: CA Dinesh Poddar (Vice-Chairman), CA Avinash Ravani (Speaker) and CA Viraj Mehta (Convenor)

Faculties

CA Avinash Rawani addressing the delegates

Panel Discussion: Seen from L to R: CA Nihar Jambusaria, CA Atul Mehta, CA Apurva Shah (Panelists), CA Vipul K. Choksi (Vice-President) and CA Ketan Vajani (Hon. Treasurer)

CA Nihar Jambusaria addressing the delegates

Student Committee

Student Orientation Course was held on 13th to 15th June, 2019 at Juhu Jagruti Hall, Vile Parle East

CA Nishtha Pandya welcoming the speakers and participants

Faculties

CA Ashok Mehta

CA Hemang Shah

CA Jatin Lodaya

CA Kalpesh Katira

CA N. Jayendran

CA Sumit Jhunjhunwala

ML-989

International Taxation Committee

FEMA SC on Discussion on upcoming RRC Panel questions held on 4th June, 2019

CA Naresh Ajwani addressing the delegates

CA Harshal Bhuta addressing the delegates

Indirect Taxes Committee

IDT SC on "Important Decisions and Advance Rulings relevant for GST Audit" held on 7th June, 2019 at AV Room, Jai Hind College, Churchgate

CA S. S. Gupta addressing the delegates

CA Jinesh Shah addressing the delegates

Membership & PR Committee

Lecture Meeting on "Destin(y)ation of Life-Choosing the path to success" was held on 18th June, 2019 at IMC, Churchgate

CA Hinesh Doshi (President) giving his opening remarks.
Seen from L to R: CA Darshak Shah (Convenor),
Dr. Sundeep Kochar (Speaker) and CA Ashita Shah (Member)

Dr. Sundeep Kochar addressing the delegates

Study Circle and Study Group Committee

SC on "Important Issues on ICDS" was held on 22nd June 2019 at Banquet Hall, Dadar Club, Dadar East

Mr. K. K. Chythanya, Advocate addressing the delegates

SG on "Recent Judgments under Direct Taxes" was held on 13th June, 2019 at Babubhai Chinai Hall, IMC, Churchgate

CA Yogesh Thar addressing the delegates

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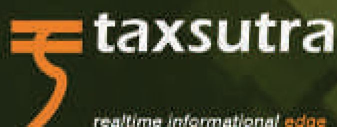

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