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THE CHAMBER'S JOURNAL

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September 2019

Your Monthly Companion on Tax & Allied Subjects

Estate & Succession Planning

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The Chamber of Tax Consultants

Latest releases [2019]

Guide to GST on Services – (HSN Code wise taxability of all services) (Second Edition)

The overarching purpose of the book is to provide a 360 degree overview of the GST provisions on services for easy understanding and quick reference of professionals.

The book has been divided into four parts.
Part A: Concepts of GST (Services)
Part B: HSN Code wise Guide on Services
Part C: Important legislation
Part D: Rates

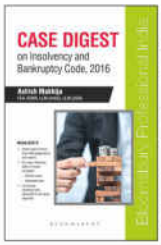
Rakesh Garg and Sandeep Garg;
INR 2,495/-; *1716 pages*

GST Law Manual (Acts, Rules and Forms) (Sixth Edition)

Contents of the book
Part A Central GST Act, Rules and Notifications
Part B Integrated GST Act, Rules and Notifications
Part C GST (Compensation to States) Act, Rules and Notifications
Part D Important GST Forms
List of Circulars and Orders

Rakesh Garg and Sandeep Garg;
INR 1,295/-; *722 pages*

Case Digest on Insolvency and Bankruptcy Code, 2016



This book consolidates the judgments and orders passed by the Supreme Court, High Courts across India and the Tribunal including Appellate Tribunal upto 31st December, 2018 in the form of a digest based on qualitative research.

The cases have been presented in a comprehensible manner under each provision giving the essence of the judgment in a concise manner. The insolvency practitioners, judicial officers, regulators and other stakeholders will find the IBC digest extremely useful in their endeavours.

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Part A: Important Reference Tables
Part B: Commentary
Part C: GST Rates

Rakesh Garg and Sandeep Garg;
INR 1,995/-; *1440 pages*

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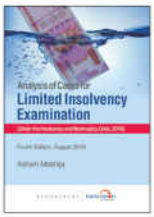
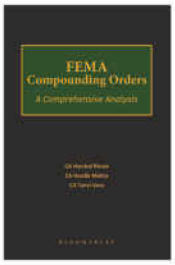


This book is a guide to a quick understanding of the Case Laws pertaining to the Insolvency and Bankruptcy Code, 2016 under the Limited Insolvency Examination syllabus effective from 1st July 2019. The book provides case analysis of 59 cases in a simplified manner followed by summary of cases in a tabular format for easy and better recall.

Ashish Makhija*; INR 1,195/-; *590 pages

FEMA Compounding Orders – A Comprehensive Analysis



The book provides a comprehensive analysis of all the compounding orders published by RBI during the period July 2016 to December 2018, to facilitate FEMA practitioners, companies and other persons in understanding the RBI's perspective.

CA Harshal Bhuta, CA Hardik Mehta and CA Tanvi Vora;
INR 1,995/-; *744 pages*

Bloomsbury's The Companies Act, 2013 and Rules (Updated upto 18 August 2019

As amended by The Companies (Amendment) Act, 2019 (No. 22 of 2019)

This book includes upto-date Companies Act, 2013, Companies (Auditor's Report) Order, 2016, Rules, Circulars and Orders along with list of updated notified forms updated till 18 August 2019.

INR 1,995/-; *1222 pages*

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The Chamber's Journal

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	(W.e.f. 1-7-2017)	₹	1200	0	1200
2.	Journal Subscription (Life Members)				₹ 15360
3.	Admission Fees – Ordinary Members	₹	500	90	590
		₹	2200	396	2596
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5.	Admission Fees – Associate Members	₹	1000	180	1180
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E-Journal Subscription - Life Members (Yearly)	700	126	826
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E-Journal Subscription - Student Members (Yearly)	700	126	826
E-Journal Subscription - Single Journal	200	36	236

Editorial

The Art of 'Maneuvering'!

The last month saw fast paced and gripping developments, like an action packed movie, which made many glue to the idiot box for considerable time! It was Kashmir to Chandrayaan 2 and back to Kashmir! For sports lovers, it was the do or die test match for the "The Ashes 2019" – between the two arch rivals, England and Australia, with the Third Test Match being regarded as the Best Test in Ashes history! For tennis lovers, it was US Open 2019, where there were quite a few ups and downs! And for badminton lovers, it was our own P V Sindhu becoming the first Indian to win gold at BWF World Championships. In fact, the developments were so frantic that, learning a lesson while penning editorial for the previous month, I reserved penning editorial till the last deadline, so as not to miss out any last minute developments!

On the Kashmir issue, there can be a lot to debate, from the point of view of politics and diplomacy – national and international, pre & post - independence Indian political history, constitutionality, national defense and security, human rights and liberty, freedom of expression, … the list is endless. However, one interesting aspect that merits discussion here, albeit briefly, is regarding the art of 'maneuvering' to achieve the desired goal!

Gone are the days….nay, should I say years, decades or centuries? ... when if your goal and intent was just and upright, you simply could go for it to achieve it, in a 'straight' way, without being bothered about other things. However, this was too simplistic and idealistic! Right from the era of Mahabharata, we witness that even if the goal is right, adopting the 'straight' way is not always possible or, to use often- used excuse, practical! One may require a little bit of maneuvering in order to achieve such goal; the extent and the degree differing from a case to case. The epic war of Kurukshetra is full of episodes of such 'maneuvering', some adopted even by Lord Krishna! It's a different matter that such little bit of maneuvering was justified in the name of "dharma", for adopting the righteous path! This, again, can be a debatable topic of discussion, especially by the scholars, which I certainly am not. But the point is, we have taken this art of 'maneuvering' quite seriously, if not other finer aspects of Mahabharata or, for that matter, of Gita. One very interesting observation made by a Western historian is that within India, barring few wars, kingdoms were lost and conquered more by the art of maneuvering than by actual battles! So this art has percolated through generations and now, very loosely and at ground level, in some quarters, it is represented by the slang – "jugaad"!

Anyway, on a serious note, the point is how far an end justifies the means adopted to achieve it! Is it so that in the name of 'righteous' end/cause, adopting any mean to achieve the same is justified? This phenomenon is one of the important facets of human psychology and behavior, which affects the acts of commission and omission at individual level, at national and international level. Such phenomenon is witnessed otherwise also everywhere, including in business and in profession. It is certainly a double

edged weapon, a very dangerous weapon in the hands of a self- proclaimed 'righteous' person or a group of persons! For the time immemorial, the humanity has been seriously affected by such phenomenon. Just look around –the world is full of such countless episodes of various – many times dubious - means adopted by self-proclaimed 'righteous' persons/group to achieve, what they claim, a just cause. On a larger scale, such phenomenon is witnessed since thousands of years, be it the religious wars – the crusades, Hitler's obsession to annihilate Jews, the Gulf war… the list is again endless. Unfortunately, it has become very easy to justify, and to in fact garner huge support for, adoption of even questionable means when the end – the cause – is given religious or political contour, by igniting religious or national 'patriotic' passion! In the name of religion or patriotism, every type of 'mean' is sought to be justified! With the media, including social media, being polarized most of the time, the public at large is clueless about authenticity of not only the means so adopted but about the very cause – the end – itself! And even assuming the cause is genuine, the most difficult aspect to resolve is about the type and the extent of the 'means' – the maneuverings - that are sought to be adopted to achieve such cause; where one has to draw the line!

In Mahabharata, it was Lord Krishna who set up the cause – the end – and also adopted various means to achieve it; the intention behind either was never questionable or doubted even by the opponent. Unfortunately, Lord Krishna was, perhaps, the last one to maneuver the delicate balance, in a 'righteous' way!

Hope you all had divine blessing from our beloved "Bappa" during his short sojourn!

Vipul B. Joshi
Editor

From the President

Dear Members,

The entire Nation was found united during the trying times for ISRO scientists due to inability of "Vikram Lander" to land at the south pole of moon, just few minutes before its scheduled time. According to the Chairman of ISRO, 95% of the objectives of "Chandrayan 2" mission have been achieved and therefore this small set back cannot be said to be a failure of the mission. While I am penning this communication, according to ISRO, Vikram Lander is spotted and efforts are being made to establish communication link with it. Nonetheless, The Prime Minister of India who was personally present to watch this special moment was all praise for the efforts of all the scientists of ISRO and lauded their incredible contribution to the Nation's progress. Everyone World over have appreciated the efforts of Indian Scientists. It's a known fact that such missions have not been successful in the first attempt even by the most developed nations. ISRO is raring for another shot at the moon with a mission bigger and better!

This year the rainfall has been much more than the normal in many states across the Country, resulting into floods in those states. This has resulted in loss of many lives and loss of property worth several thousands of crores of rupees. Rehabilitation of the affected population is a daunting task in front of the Government and will take quite some time. We, as professionals, are duty bound to make generous contribution for rehabilitation of affected flood victims. My appeal to all of you is to make generous donations to any known NGO of your choice.

It seems that our Country is passing through some trying time, as after Smt. Sushma Swaraj, we lost another great leader in Shri Arun Jaitley in the month of August. Shri Jaitly was a brilliant lawyer, a seasoned parliamentarian and a distinguished minister who contributed immensely to the nation building. He will be best remembered for reforms such as GST, Insolvency & Bankruptcy Code, implementing Jan Dhan and carrying through Aadhaar-based direct benefit transfer to as many as 55 schemes. He was a tall leader who would be fondly remembered for many years.

The general economic scenario continues to be bleak and there is an economic slow down as indicated by the GDP growth of mere 5% for the April to June 2019 quarter. This is one of the lowest GDP growth in the past several years. The Government has to really pull up its sleeves and take some bold measures to revive the economy.

With a view to revive economy, the Finance Minister has proposed series of measures such as rolling back surcharge on FPI, immediate infusion of ₹ 70,000 crores into Public Sector Banks, some measures to boost automobile industry, ₹ 100 lakh crores plan for infrastructure etc. The Union Cabinet also cleared major change in FDI regulations including easing of rules for overseas single-brand stores and permitting FDI through contract manufacturing and all areas of coal mining. This change in FDI policy is likely to result in making India a more attractive destination leading to growth and employment.

Another news which has made headlines is that the government will receive windfall from the Reserve Bank of India (RBI) in the current financial year by way of dividend of ₹ 1.76 lakh crore. It is expected that this money will be used to stimulate the economy. Let us hope that the measures initiated by the Finance Minister and the dividend from RBI will give much needed impetus to the economy.

It is so heartening to see the young girls in the field of sports bringing glory to our Country. After the five gold medals by Hima Das, it was the turn of P. V. Sidhu who became the first Indian to win badminton World Championships gold by beating rival Nozomi Okuhara of Japan in a game which lasted mere 38 minutes. Indeed a proud moment for India.

REPRESENTATIONS

The Law and Representation Committee continues to make representations wherever necessary for the benefit of the stakeholders.

1. Due to various problem faced by many professionals, request for extension of due date for filing of GST Annual Return & Reconciliation Statement (form GSTR-9, 9A and 9C) for F.Y. 2017-18 was made to Ms. Nirmala Sitharaman, Hon'ble Finance Minister/The Office of GST Council Secretariat. Much to the relief of the professionals, extension has been granted till 30th November'19.

2. Representation was also made to the CBDT for Stay of Recovery Proceedings under The Income Tax Act, 1961, wherein we had represented that First appeal, whether pending before the CIT (A) or ITAT, all assessees whose first appeal is pending be treated equally.

3. Various suggestions by way of representation were made to Ministry of Law & Justice to improve the efficacy of the judiciary system. These were (i) Setting up of E Benches at the Apex Court for speedier disposal of matter (ii) Setting up of an Authority under Prohibition of Benami Property Transactions Act, 1988 and The Prevention of Money Laundering Act, 2002 (iii) a mechanism to dispose of covered matters (iv) A digital system of issue of notices and uploading of orders on an All India basis for all forums of judiciary – with suitable enabling provision by which these digital orders can receive sanctity.

4. Representation is also made to Hon'ble Finance Minister on issues/concerns in respect of Sabka Vishwas (Legal Dispute Resolution) Scheme, 2019

5. We have got a lot of requests from the members for making representation for extension of due date of 30th September 2019 for filing of Tax Audit Reports. We are in the process of making the representation and will be done in due course of time.

EVENTS

Theme of the Chamber is **ज्ञानं परमं बलम्** which means knowledge is Supreme. Befitting this theme, various committees of the Chamber are always eager to do programs for the benefit of the members in a timely manner.

In the month of August Chamber organised many events which got very good response. August and September are the months for Tax Audit. This is one topic where members always need to refresh their knowledge and therefore half day workshop on Tax Audit was organised by the Direct Tax Committee and eminent professionals were the faculty for this workshop. Lecture meeting on Companies Amendment Act, 2019 and recent changes in the Companies Act by eminent speaker CS Savithri Parekh was organised by the Commercial and Allied Law Committee.

4th Narayan Varma lecture meeting was held on 23rd August jointly with BCAS Foundation, Dharma Bharthi Mission and Public Concern for Governance Trust. The Speaker was Shri Y. H. Malegam and the topic was 'The Future of Audit'. For the benefit of those who could not attend, the video recording of this lecture meeting has been mailed.

For the benefit of Student members, Student Committee organised half day workshop on GST Audit and Annual Return.

Direct Tax, Indirect Tax, International Tax and Capital Market Study Circles of the Chamber are very active and vibrant. They are the backbone of the educational activities of the Chamber. Six Study Circle/Study Group meetings were arranged during the month of August.

The fifth Inter Firm Football tournament organised by the Student Committee and Membership and P R Committee, was a very exciting and memorable event wherein 18 Boys Team and 2 Girls Teams from various Firms participated. All the teams participated with a lot of enthusiasm and in true spirit of the game. Mr. Pratik Chaudhari, Indian Super League Football player was the Chief Guest and gave away the prizes to the winning team, Best Goal Keepers and the players scoring maximum goals.

In the forthcoming months we have organised many programs for the benefit of the members, details of which you will find in the Newsletter. Some of the events which need mention are, four day well structured course on MLI covering all the important aspects. Members are requested to take benefit of this unique course. Other important programme are Lecture meeting on Tax issues in demonetisation period assessments and half day workshop on Prosecution under the Income Tax Act, a very relevant and important topic.

The flagship events of the Chamber *viz.* the three Residential Refresher Courses (RRC) are the most sought after events. RRC on Indirect Tax is scheduled from 9th to 12th January, 2020 at the Fairmont, Jaipur. The topics are most relevant and faculties are of great eminence. The Venue also

is palatial and participants will enjoy their stay as well as the technical deliberations. You may refer the Newsletter for the details. Please enrol fast as we have limited rooms available.

RRC on Direct Tax will be held at Coimbatore from 27th February to 1st March, 2020. The detailed announcement will follow soon.

This issue of the Journal is on the Estate and Succession Planning. I compliment and thank everyone involved in designing this issue and thank all the eminent authors for their valuable contribution.

I would like to end this communication with a Rigved Prayer, which emphasises on unity of thoughts and action for eternal progress.

"समानी व आकूतिः समाना हृदयानि वः

समानमस्तु वी मनः यथा वः सुसहासति"

Let our feelings, resolves and hearts be the same (on the same wave length) that would lead us to strong fellowship-unity, creating a mighty intellectual organization.

We are here to serve you better. Therefore I would be too happy to get any suggestion that you have at president@ctconline.org.

VIPUL K. CHOKSI
President

Succession – An overview

Dileep Choksi,
Advocate

Today the world has had an onslaught of technological development. It has made the world grow smaller and many believe that it has even shrunk the universe. In its aftermath it has affected the way of living for a few but fortunately has not affected the way of life for many. Steeped in India's culture is the resilience of its society to any onslaught - technology or otherwise, which has stood the tests of internal trials and external shocks. Throughout the ages this society has grown and matured, founded on the strength of economic drivers, thinkers and guardians of freedom and liberty. The political structure has stood a test of time, but economic challenges remain where businesses has played a unique role during this transition. It has been the manifestation of the family experience which has evolved from its origins as a joint family to value the principles of togetherness as private enterprise remains an important driver for growth and therefore material prosperity and economic change.

This is relevant because just as the understanding of a family's culture and values guides the running of business so does it drive the family in actions and doings. Business organisations have a pattern of their own abiding by a set of unwritten laws which guide the organisation in discharge of everyday functions. It is them which remain aligned to the culture and values of the organisation. In the past when families were joint it was taken for granted that family business would through lineage continue with the changing social norms. One of the fundamental questions being whether business is being set up for posterity or not or is opportunistic in nature. In dealing with issues such as this understanding the genealogical ancestry of the family is important and all the more if the family has branches. The bonding arising from the belonging to a certain branch is strong. It gives rise for a unique CEO "chief emotional officer" in the family which position is assumed by its members, be it the grand old man or the grand old ma, they are the glue which holds the family together. This is independent of wisdom which a family member or a trusted family friend brings. These individuals play a very important role in establishing the family business and in understanding consequences of the legal mechanism and tax implications that the family may face as business expands. For keeping the family together, fairness is a prime driver. It is individuals such as these that remain committed to fairness devoid of legal niceties. Their ability to communicate, clarity of thought and ability to modulate and promote the worthiness of family meetings is critically important in ensuring smooth succession.

This is a phenomenon which is happening all over the world as a result of which economic structures do not confine themselves to domestic ones. Most often these would therefore have an offshore entity driven by its own domestic laws

where administration is concerned but often treated by the home jurisdiction of ultimate beneficial owners, settlors and beneficiaries where tax matters are concerned. While geographical expansion is becoming common the days of having numerous entities in different countries is soon to vanish. This is primarily because of growing regulatory provision which has been accepted worldwide. FATCA was one of the first. The Foreign Account Tax Compliance Act is a tax law that compels U.S. citizens at home and abroad to file annual reports on any foreign account holdings. BEPS is another. Base Erosion and Profit Shifting refers to corporate tax planning strategies used by multinationals to "shift" profits from higher–tax jurisdictions to lower–tax jurisdictions, thus "eroding" the "tax–base" of the higher–tax jurisdictions. Linked to this is CRS. The Common Reporting Standard is an information standard for the Automatic Exchange Of Information (AEOI) regarding bank accounts on a global level, between tax authorities, which the Organisation for Economic Co-operation and Development (OECD) developed in 2014. Its purpose is to combat tax evasion. The idea was based on the US Foreign Account Tax Compliance Act implementation agreements and its legal basis is the Convention on Mutual Administrative Assistance in Tax Matters. Ninety-seven countries including India had signed an agreement to implement it, with more countries intending to sign later. In addition, there is the Automatic Exchange of Information by which the new global standard on Automatic Exchange of Information (AEOI) reduces the possibility for tax evasion. It provides for the exchange of non-resident financial account information with the tax authorities in the account holders' country of residence. Participating jurisdictions that implement AEOI send and receive pre-agreed information each year, without having to send a specific request. AEOI will enable the discovery of formerly undetected tax evasion. There is also the whistle blower policy which is being increasingly adopted. Such regulations and practices provide for whistle blowing which means calling attention to wrongdoing that is occurring within an organization.

An effective way of avoiding encounters with such legislation is to build in strong corporate governance. The Companies Act, SEBI and international reporting requirements have indicated the need for measures to be in place. Corporate governance will ensure checks and counter checks, disclosure and transparency, accountability, delegation, adoption of standard operating procedures, and the like. These are often available as public information readily accessible on social media. They are often referred to and play a significant role in individual evaluation of the families and their business standing. Whilst structuring the family business therefore these are relevant matters in the preparation of morally binding family agreements or legally binding contracts within the family.

Matters of corporate governance are a flavour while deciding on the structure of any business. Extracting value, raising finance, asset protection, succession, avoiding fragmentation, meeting conflicting demands of family members, deciding participation of the extended family are matters that are taken into account in suggesting a structure that ensures family continuity. A clear understanding of the tax implications of steps taken to satisfy family shareholders, rewarding talent and ensuring a standard of life to non-participating family members are important matters that decide a family structure.

While these may be matters of common occurrence the ones gaining greater importance are issues like non-family members occupying controlling position in family business, the segregation of ownership and control, the protection of assets and ease in succession. The key to success in effective estate planning and succession is transparency. Good intentions by themselves are often not enough to ensure continuity in the family if it be based on uninformed and ill understood consent of the stakeholders. While establishing the family

business and ensuring its succession it will be desirable to follow a predetermined path which will ensure free and frank discussion regarding ownership, anticipating social, economic and legal changes, agreeing on a mechanism by which unanimous consent is obtained and providing an effective dispute resolution mechanism for meeting the shortfall in expectation without roaming legal corridors,

Trusts and partnerships and similar such legal structures are today commonplace in affecting all that has been stated above. The setting up of trusts has several advantages. It can help consolidation of shareholding thereby ensuring control of the business while at the same time recognising different needs of the family to be able to treat them differently while providing benefit. They have an element of confidentiality and can serve a very important need of asset protection. Trusts have been often found useful in avoiding the contesting of wills and intestate distribution of assets. Fortunately, trusts can be used by almost every individual in India though there are different inheritance provisions that apply under different personal laws. Legislations like the Special Marriages Act and the Indian Succession Act can often apply particularly when there are inter-caste and interreligious marriages. The ability and desirability of availing of such methods is often found useful particularly as change in social norms like live-in relationships, birth and adoptions gain greater legal and social acceptance.

One should not look upon trusts as a panacea as they have their own limitations. Given the complexities in the tax laws there is a limitation to the extent beneficiaries can be selected during one's lifetime. A letter of wishes often serves as a guide but can sometimes often become an impediment e.g. if there are unforeseen social and economic changes. Given the fact that trustees have a fiduciary relationship, it must be recognised that their responsibility is substantial. There could be complications in the event there being dispute between the trustees not only as regards administration but also as regards taking responsibility for compliance.

Partnerships simpliciter and LLPs are also useful in the context of succession. LLPs provide protection against unlimited liability and given the corporate status that it enjoys can help in avoiding fragmentation of ownership. Such structures being creatures of contract lend themselves to different treatment as per the partnership deed. They could be effective in tax planning too but have their limitations as far as distribution and protection is concerned.

While considering possible structures it is not as if companies are less important. They are the most commonly accepted form of business organisation. A judicious combination of these structures is desirable. The result is that there is a more considered approach to the interplay between various entities. It is rather interesting to find that present day structures are often over engineered. This gives rise to unwanted recovery mechanisms if situations so arise and of outstanding and avoidable operational and tax consequences. In the totality of circumstances, the one goal for every family could be the setup of a structure which uses options to meet the more important objectives of governance, economic wellbeing and tax efficiency. Presently the family structure often tends to be driven more by tax, whether it be of recurring burden like income tax or a one-time levy like estate duty or inheritance tax. Changes in society coupled with the rise of the new generation has greatly impacted family businesses. The role of women has been much discussed but less appreciated. In addition to supporting their spouses, they have played their role in organizing social events, at times providing capital and more importantly transmitting family values to children and impressing family members of the need for getting along socially and in business. Traditions are changing and today daughters are increasingly taking the place of their fathers and bringing about a structural change in the workplace and outside.

If one single aspect is important to family unity and governance, it is communication. Efforts are made for promoting communication at the board meeting table and at the dining table, build consensual approach to family and business matters. They go a long way in building a code of conduct and making formal meetings productive. They promote transparency and help focus discussions by dealing with issues one at a time however interconnected they may be. Keeping the end objective in mind and for promoting transparency it is often felt necessary to seek the assistance of advisors. This is a principal position requiring the advisor to precisely understand what is the underlying issue that is being referred for advice. This will require an understanding of the business whilst at the same time ensuring that the advisor restricts himself to the point in reference.

One important dimension in business, particularly in the Indian context, is the role of philanthropy. The role of an advisor would often include adding the perspective of philanthropy and the establishment of suitable structures. Just as business structures have undergone a change, so has the concept of charitable trusts and foundations. The earlier basis of achieving goals of charity would be the earmarking of funds for an organisation. It might stop at that or may extend to undertaking such activities as the donor decides. It then extended to the undertaking of charitable programs under the aegis of the business enterprise. There would be delegated responsibility for ensuring appropriate utilisation. As is common knowledge today, charity has taken an entirely new dimension. It is an integral part of business structuring. It was not very long ago that non – profit organizations were formed under independent set ups to deliver succour. These gradually changed and gave rise to institutions for social change. There was little emphasis on reward. Legislation kept pace with these changes as did tax reforms. These gradually graduated themselves to the promotion of economic activity. Presently such institutions are controllers of economic power which requires the family business to be structured in a manner that recognizes the fact that ownership need not necessarily go with management.

Given the present-day environment, expectations of a family can vary substantially. It becomes necessary to understand fundamental dilemmas as they relate to family enterprises, their continuity and governance. It is a peep into the future which will enable family members consider their financial options, their careers etc. in the background of their personal circumstances. As long as the families are small, there may not be much to worry. But as a family grows and cousins, in – laws get added coupled with growing relevance of social standing and recognition, the logic and history of past decisions becomes ever so relevant. If past ownership and the trajectory of growth is not wholly appreciated, and the history of logic not revisited, a family business may find itself in the gap of unfulfilled expectations. Trust, communication and competence with a sprinkling of an understanding of family values and fairness to all can make for near permanence and peaceful enjoyment of family wealth.

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You must not lose faith in humanity. Humanity is an ocean; if a few drops of the ocean are dirty, the ocean does not become dirty.

– Mahatma Gandhi

Hindu Succession Act : Specific issues

Dr. Anup P. Shah

Introduction

The ***Hindu Succession Act, 1956 ("the Act")*** governs the law relating to intestate succession among Hindus. The Act overrides the erstwhile uncodified Hindu Law and has been an evergreen source of controversy and disputes within Hindu families!

This Act would have no application in case of a testamentary succession, i.e., in a case where there is a will. The Act would thus, only apply in a case where a Hindu male or female dies without making a will and leaves behind property. The Act lays down separate rules for succession for males and females. The moment a Hindu dies intestate, his heirs (in order of succession) become entitled to succeed to his property. A topic like the Hindu Succession Act is so vast and complex that it could merit a special Issue of the Chamber's Journal by itself and yet be left with some more. However, let us very briefly examine some of the key aspects of this very important and far reaching Family Law!

Male Intestate Succession

The rules governing intestate succession of a Hindu male are specified in ss. 8 to 13 of the Act. These rules are the substratum of the Act as they lay down how the property and the estate of a Hindu male will pass on to his heirs in case he fails to make a will or makes an invalid will – ***Manshan vs. Tej Ram (1980) Suppl SCC 367.*** The property of an intestate Hindu male devolves on the following heirs in the order specified below:

(a) Firstly, upon his **Class I heirs** – 12 heirs are classified as Class I heirs in the Act. These include the mother, widow, son, daughter, etc. of the deceased. Interestingly his father is not a Class I heir. Each of the Class I heirs take the property equally.

(b) Secondly, if there is no Class I heir, then upon his **Class II heirs** - heirs such as father, brother, sister, etc., are included in this list.

(c) Thirdly, if there is no Class II heir, then upon his **Agnates** - Two people are called Agnates of each other if they are related (by blood or by adoption) wholly through males. Agnates could be males or females.

(d) Fourthly, if there is no Agnate, then upon his **Cognates** - two people are called Cognates of each other if they are related (by blood or by adoption) but not wholly through males. Cognates could be males or females.

Succession is in the order specified above.

Female Intestate Succession

The rules governing intestate succession of a Hindu female are specified in ss. 14 to 16 of the Act. The Act provides that any property

acquired by a Hindu female shall be held by her as full owner and not as a limited owner. This includes property acquired by her purchase, gift, inheritance, skill, etc. The property of an intestate Hindu female devolves on the following heirs in the order specified below:

(a) Firstly, upon her sons and daughters (including the children of any predeceased children) and husband. Stepson of a deceased Hindu female is not a preferential heir. Her husband would get her entire property in preference to her step son – ***Bhagwandas vs. Prabhati Ram, AIR 2004 Del 137***. Further, a step daughter (i.e., daughter of her husband from a second marriage) of a deceased Hindu female is not a daughter within the meaning of s. 15 of the Hindu Succession Act – ***Raj Rani vs. Bimla Rani AIR 2011 Del 170.***

(b) Secondly, upon the heirs of her husband;

(c) Thirdly, upon her parents

(d) Fourthly, upon the heirs of her father

(e) Fifthly, upon the heirs of her mother

The succession is in the order specified above. Thus, the heirs in the first entry take the property simultaneously and in exclusion to all others and so on and so forth.

Position of certain relatives

It may be noted that the terms 'son' and 'daughter' used in the Act include both those which are natural and those which are adopted. The Hindu Adoptions and Maintenance Act, 1956 is a codified law which overrules any text, custom, usage of Hindu Law in the context of adoption by a Hindu. The effect of a valid adoption is that from the date of adoption the adopted child will be considered to be the natural child of the adoptive family and all his ties with the original family are severed.

The Supreme Court in ***Chandan Bilasini vs. Aftabuddin Khan, (1996) 7 SCC 13,*** has held that:

> *"Section 12 of the Hindu Adoptions and Maintenance Act clearly provides that an adopted child shall be deemed to be the child of his adoptive father or mother for all purposes with effect from the date of the adoption and from such date all ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family."*

The wordings of s.12 make it clear that an adopted child shall become the child of the adopted parent for all purposes. Hence, it stands to reason that he would also become entitled to inherit the properties of his adopted parents. The Supreme Court has also held so in ***Pawan Kumar Pathak vs. Mohan Prasad, CA 4456/2016.*** For this it relied upon s.3(57) of the General Clauses Act, 1897 which defines a 'son' as under:

> *"'son' in the case of any one whose personal law permits adoption, shall include an adopted son;"*

The Division Bench of the Andhra Pradesh High Court in ***Yarlagadda Nayudamma vs. Government of Andhra Pradesh, 1981 AIR(A.P.) 19*** has held that an adopted son continues to have a right in coparcenary property belonging to his natural family. However, in three separate cases, Single Judges of the Bombay High Court have given conflicting decisions both for and against this issue in the cases of ***Shivaji Anantrao Deshmukh vs. Anantrao Deshmukh, 1990 (1) Mh. LJ 598***; ***Devgonda Raygonda Patil vs. Shamgonda Raygonda Patil, 1991 (3) Bom. CR 165; Somanath Radhakrishna More vs. Ujjawala Sudhakar Pawar, 2013 (6) Bom. C.R. 397***. It is humbly submitted that the dissenting decisions require a reconsideration and the Division Bench decision of the Andhra Pradesh High Court is correct.

Further, children of void marriage are legitimate children of father for inheriting his property – ***Govind Jadhav vs. Smt Rukhminibai Jadhav AIR 2009 (NOC) 2366 (Bom).*** A question which often arises is that whether a step-son can be treated as a Class-I Heir for the purposes of the Act?

The Act does not define the term son. These issues were raised before the Bombay High Court in the cases of ***DudhnathKallu Yadav vs. RamashankarRamadhar Yadav, Suit No. 2219/2000/Mohinder Singh vs. Joginder Singh and Others, RSA No. 1350 of 1981***, Order dated 5.12.2008 and the Delhi High Court in ***Maharaja Jagat Singh vs. Lt. Col. SawaiBhawani Singh, I.A. NO.11365/2010,*** Order dated 05.12.2017. The Courts held that a step son could not be treated as a legal heir of the deceased male.

Again in ***Tarabai Dagdu Nitanware and Others vs. Narayan Keru Nitanware, WP No. 14090 /2017 Order Dated 15.01.2018,*** the Bombay High Court was faced with the issue of the succession pattern of a property of a Hindu female who died intestate. It held that that step-children are not children for the purposes of the Act.

HUF

A Hindu Undivided Family or an HUF is a creation of Hindu Law. It is a special feature to be found only in the case of Hindus. An HUF is formed by status and not by contract. Although there is no statutory recognition of an HUF, except under the Income-tax Act, the concept of an HUF is well known and accepted in all walks of life. In addition to Hindus, Jains, Sikhs and Buddhists can also have an HUF. A unique feature is that since there is no codified statute dealing with an HUF, the law is mainly judge-made and a majority of the decisions originate under the Income-tax Act or the Wealth-tax Act.

An HUF signifies a male descendant of the joint family who is the manager of the joint family business or estate. Under the Hindu Law as it existed till September 2005, only men could be coparceners of an HUF. Women could be members but not coparceners. However, an epic amendment in September 2005 to the Hindu Succession Act, 1956 (***"the Act"***) changed all of that. Hence, women can now become coparceners of their father's HUF and can also become a Karta of their father's HUF. However, even today, a Hindu lady cannot start an HUF; an HUF must always be in the name of a male member and would include his descendants, both male and female. Thus, there must be at least one male member for an HUF – ***Mangala vs. Jayabai AIR 1994 Karn 276.***

An HUF comes into existence by virtue of marriage of a Hindu and settling of property on such entity. Descendants become coparceners of the HUF by virtue of their birth into the family. Male, female, adults and minors are part of the HUF. However, some of them are coparceners while the rest are only members. All coparceners are members but all members need not be coparceners.

The Central Government amended the Hindu Succession Act, 1956 by the 2005 Amendment Act which was made operative from 9th September 2005. After the 2005 amendment to the Hindu Succession Act, both males and females can become coparceners and hence, also kartas. The Karta is the head of the family. He manages the HUF property and its business and other activities. He may also be called the manager of the HUF.

Till the 2005 amendment to the Act, only males could become coparceners and hence, also kartas of the HUF. The difference between a member and a coparcener is that a coparcerner can claim partition of an HUF whereas a member has no such rights.

S. 6 of the Hindu Succession Act, 1956 has been totally revamped. The new section provides that a daughter of a co-parcener shall:

a) by birth become a co-parcener in her own right in the same manner as the son;

b) have the same rights in the co¬parcenary property as she would have had if she had been a son;

c) be subject to the same liabilities in respect of the said co-parcenary property as that of a son;

Thus, the amendment has by one stroke put all daughters at par with sons and they can now become a co-parcener in their father's HUF merely by being born in that family. If her rights and obligations are at par with a son, then the daughter can also become a karta of her father's HUF even after her marriage. In ***Mrs. Sujata Sharma vs. Shri Manu Gupta, CS(OS) 2011/2006,*** Order dated 22nd December, 2015, the Delhi High Court has confirmed this position.

The Apex Court in its decision rendered in the case of ***Prakash vs. Phulvati, CA 7217/2013***, Order dated 16th October 2015 I has held that the rights under the Hindu Succession Act Amendment are applicable to living daughters of living coparceners (fathers) as on 9th September, 2005 irrespective of when such daughters are born and irrespective of whether or not they are married. Thus, in order to claim benefit, what is required is that the daughter should be alive and her father should also be alive on the date of the amendment, i.e., 9th September, 2005.

Ancestral Property

Under the Hindu Law, the term "ancestral property",as generally understood,means any property inherited from three generations above of male lineage, i.e.,from the father, grandfather, great grandfather. The Punjab and Haryana High Court has held that property inherited by a Hindu male from his father, grandfather or great grandfather is ancestral for him – ***Hardial Singh vs. Nahar Singh AIR 2010 (NOC) 1087 (P&H).*** One controversy in this area is whether ancestral property received by a person can be transferred away?

The Supreme Court in the case of ***CWT vs. Chander Sen (1986) 161 ITR 370 (SC),*** held that a son succeeded to the asset acquired on partition of his father's HUF in his individual capacity and not as a karta of his own HUF. In ***Bhanwar Singh vs. Puran (2008) 3 SCC 87,*** it was held that having regard to Section 8 of the Act, the properties ceased to be joint family property and all the heirs and legal representatives of the deceased would succeed to his interest as tenants-in-common and not as joint tenants. In a case of this nature, the joint coparcenary did not continue.

The Supreme Court in ***Uttam vs. Saubhag Singh, Civil Appeal 2360/2016 dt. 02/03/2016*** held that on a conjoint reading of Sections 4, 8 and other provisions of the Act, after joint family property has been distributed in accordance with section 8 on principles of intestacy, the joint family property ceases to be joint family property in the hands of the various persons who succeeded to it and they hold the property as tenants in common and not as joint tenants. The Delhi High Court in the case of ***Surender Kumar vs. Dhani Ram, CS(OS) No. 1732/2012 dt. 18/01/2016*** has considered all decisions and held that after the passing of the Hindu Succession Act, 1956, if a person inherits a property from his paternal ancestors, the said property is not an HUF property in his hands and the property is to be taken as a self-acquired property of the person who inherits the same. Inspite of all these decisions, there is yet a significant amount of ambiguity on ancestral property. A recent decision of the Supreme Court in ***Doddamuniyappa vs. Muniswamy, CA No 7141/2008 Order dt. 01/07/2019*** has not considered any of the above decisions and held that that the property inherited from the father by his sons becomes joint family property in the hands of the sons. Clearly, this is one controversial fire which continues to burn bright!

Conclusion

While over 60 years have elapsed since the passage of the Act, the number of issues and disputes refuse to die down. Maybe the time has come for a complete overhaul of this Act to bring it up to speed with the several unaddressed issues and scenarios. Probably, the proposed Uniform Civil Code could address them.

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Indian Succession Act

Dr. Anup P. Shah

Introduction

India does not (yet) have a Uniform Civil Code which would govern personal law for all its citizens and residents. Hence, different communities are governed by their respective personal laws. This is all the more true when one talks about succession to a person's properties after his death. Thus, Hindus are governed by the Hindu Succession Act, 1956, Muslims by their Muslim Law (***Shariyat Law***) and all other persons in India by the Indian Succession Act, 1925 (***"the Act"***). Thus, all Christians, Parsis, Jews, Anglo Indians, etc., residing in India would have their succession governed by the Act. Interestingly, the Act deals with intestate (i.e., *without leaving behind a valid Will*) succession by these communities and also testamentary (i.e., *by leaving behind a valid Will*) succession for everyone other than a Muslim. Hence, it is a two-in-one law!

To whom the Act applies?

When it comes to intestate succession, the Act carves out a negative list stating that it would not apply to any Hindu, Muhammadan, Buddhist, Sikh or Jain. Thus, intestate succession of all other communities other than the above would get covered. This covers Christians, Parsis, Jews, Anglo Indians, etc.

The Act applies to the succession to Indian immovable property wherever the deceased was located. As regards succession to movable property it is governed by the Indian law, provided the deceased had his domicile in India when he died. For instance, a person domiciled in France dies leaving behind Indian movable property and Indian immovable property. Since both his domicile as well as the movable property are in India, the whole estate is governed by the succession law of India.

Under the Act, the intestate succession provisions applicable to Christians, Jews, Anglo Indians, etc., is different from the intestate succession provisions applicable to Parsis. Thus, there are differences even in the Act for Parsis and others.

Intestate Succession for Christians, Jews, etc.

A person who dies without making a valid Will is called an intestate. In the case of Christians, etc., the property of devolves upon his spouse and his kindred, according to the order specified under the Act. Kindred or consanguinity is defined in s. 24 of the Act to mean the connection or relation of persons descended from the same stock or common ancestor. The Act only deals with relations flowing from legal wedlock – ***Emma Agnes Smith vs. Thomas Massey, (1906) 8 Bom LR 322***. In the case of ***Ram Kumar Sharma vs. Rajinder Nath Diwan, AIR 1987 Delhi 323*** it was held that the definition contained in s. 24 of the Act is based upon the principles of English statute of Distributions. The next of kin are those that are next to blood i.e., the nearest blood relations of the person in an ascending and descending line. The definition is borrowed from the principle

of English Law. It is applicable to Europeans who are domiciled in India, Native Christians etc., but not to Hindus. On this principle, it has been ruled that a gift to a next-of-kin under the English law does not include a husband or a wife: ***Watt vs. Watt (1796) 3 Ves. 244/Dinesh Chandra Roy Chowdhury vs. Biraj Kamini Dasee (1912) ILR 39 Cal 87.*** Degrees of kindred are also laid down under the Act. The Act provides for five degrees of kindred when counted upwards from the deceased and five of kindred when counted downwards from the deceased. Thus, a father would be the first degree upwards while a son would be the first degree downwards for the intestate.

Next, let us look at some of the rules for intestate succession for Christians, etc. as per the Act:

(a) If the deceased has left behind his widow and lineal descendants, then 1/3rd goes to his widow and the balance 2/3rd goes to the lineal descendants.

(b) If the deceased has left no lineal descendants but only kindred (parents, siblings, etc.), the widow gets ½ and ½ goes to the kindred as a whole.

(c) If he leaves behind no kindred, then his widow gets the whole estate.

(d) If there is no widow, his property shall go entirely to his lineal descendants and in the absence of lineal descendants, to those who are kindred to him who are not lineal descendants following the shares laid down under the Act. Kindred who would not be lineal descendants could include uncles, brothers, sisters, cousins, etc.

The Rules for distribution of the property of the Intestate under the Act when he leaves behind lineal descendants (i.e., children, grand children, great grand children, etc) are as follows:

(a) The share of the widow is to be computed first and foremost and deducted from the estate. For the balance rules have been provided under the Act.

(b) Where the intestate had died leaving children but no other remote lineal descendants through a deceased child, then his estate will belong equally to all his surviving children. For instance, John dies intestate and leaves behind 3 children. Each of them would inherit a 1/3rd share in John' estate.

(c) Where there are no children but he leaves behind grand children, then the estate will belong equally to all his surviving grand children. For instance, John dies intestate and leaves behind 6 grand children from his pre-deceased children. Each of them would inherit a 1/6th share in John' estate.

(d) Where he leaves behind only great grandchildren, then the property shall go the surviving great grand children where they are all in the same degree of relationship to him.

(e) Where there are lineal descendants who are not in the same degree of kindred to the intestate, then the property would be equally divided amongst the nearest degree of kindred. Each such share shall then be allotted to the surviving children of the deceased lineal descendants. For example, John dies leaving behind three children. One of the children, a daughter has pre-deceased John and she has left behind two daughters. Thus, John's estate would be divided into three equal parts and the pre-deceased daughter's 1/3rd share would devolve equally upon her two daughters, i.e., each would inherit a 1/6th share in their grandfather's estate.

On the other hand, if the intestate does not leave behind any lineal descendants, then the order of succession (after deducting the widow's ½ share) is as follows:

(a) If his father is alive, then the father would inherit the entire ½ share.

(b) If only his mother and siblings are alive then each of them would get an equal share in the ½ share.

(c) Where mother, siblings/children of the pre-deceased siblings are left behind, then each of them would share equally on a per stirpes basis. Thus, beneficiaries would get the estate which their parents would have got if the parents were alive at the time of the intestate's death.

(d) If the intestate's father is dead but his mother is alive and there are no siblings or children of pre-deceased siblings, then the mother shall take the property.

Where the deceased has left behind no lineal descendants/no siblings/no parents then his estate (after deducting the widow's ½ share) shall be divided equally amongst those relatives who are in the nearest degree of kindred to him. For instance, Adam has left behind a grandfather and a grandmother and no other closer kindred. His grandparents stand in a closer degree to Adam than his uncles and aunts. Hence, the grand parents would inherit the entire ½ estate.

Intestate Succession for Parsis

The order of intestate succession under the Act for Parsis is different than that for others. The act lays down certain general principles for their succession:

(a) Those surviving the deceased and those in the womb at the time of death of the intestate are at par.

(b) A predeceased lineal descendant of an intestate, who died without leaving a surviving spouse or a without leaving a spouse of any of his own lineal descendants, shall not be taken into account for determining the shares of the intestate's property.

(c) However, if the predeceased lineal descendant leaves behind any such relatives, then he shall be taken into account for determining the shares of the intestate's property.

(d) If a widow/widower remarries in the lifetime of the intestate then he shall not be entitled to succeed to the estate of the deceased.

Keeping in mind, the above general principles, the key rules for division of an intestate Parsi's property are as follows:

(a) Where the intestate leaves behind a surviving spouse and children, the spouse gets ½ share and the children get ½ share. If there is no surviving spouse then all the children would share equally. This applies to both males and females.

(b) Where the intestate leaves behind his parents in addition to a surviving spouse and children, then each of the parents would get a share equal to ½ of what each child got. For instance, if a Parsi female dies intestate, leaving behind, her husband, a son, a daughter and both her parents. The husband would get ½ share in her estate. The balance ½ would be divided into 3 equal parts ~ 1/6th to her son, 1/6th to her daughter, 1/12th each to her mother and father (i.e., ½ of what each child got would go each parent).

(c) Where the deceased leaves behind a predeceased son, then his widow and children take shares as if the son died after his father's death, i.e., as if he was alive at the time of his father's death.

(d) Where the deceased leaves behind a predeceased daughter, then her share would be equally divided among all her children.

(e) Specific rules have been laid down where the intestate leaves behind no lineal descendant but leaves his own surviving

spouse as well as spouses of the lineal descendants.

Testamentary Succession for Christians and Parsis

The Act also deals with the making of Wills by all communities other than Muslims. The law relating to the making of Wills is being dealt with in a separate chapter in this Journal. However, some important facets under the Act to be borne in mind while preparing Wills for Christians and Parsis are as follows:

(a) Every Will made before marriage of the testator is revoked by his marriage.

(b) A Witness to the Will cannot be a beneficiary under the Will and any bequest to the witness shall be void. Even the spouse of the witness cannot be a beneficiary under the Will.

(c) A Probate is not mandatory for a Christian's Will, wherever he may be residing in India.

(d) A Probate is mandatory for a Parsi's Will if it has been made within the ordinary original civil jurisdiction of the High Courts of Calcutta, Madras and Bombay. Alternatively, if such a Will is made outside those limits, then a Probate is required in so far as the Will relates to immovable property situated within those limits.

Special Marriage Act Implications

The Special Marriage Act, 1954, as the name suggests is an Act to provide for a special form of marriage. Any person in India can marry under this Act, irrespective of their religion or faith. However, in addition to providing for a special form of marriage, this Act also changes certain conventional succession patterns. This Act applies to Any person, irrespective of religion as well as to **Inter-caste marriages registered under the Act**. For instance, a Hindu marrying a Muslim or a Parsi. Section 19 of the Act prescribes that any member of an Hindu Undivided Family who gets married under this Act automatically severs his ties with the HUF. Thus, if a Hindu, Buddhist, Sikh or Jain gets married under the Act then he ceases to be a member of his HUF. However, the severance from an HUF would take place only if a Hindu marries a non-Hindu.

The Act also changes the normal succession pattern laid down by succession law in case of any person whose marriage is registered under the Act. The succession to property of any person whose marriage is solemnized under the Act and to the property of any child of such marriage shall be regulated by the Indian Succession Act, 1925. Thus, it removes the bar imposed by the Indian Succession Act, 1925 not only for the couple married under the Act but also for the children born out of such wedlock. The biggest impact of the Special Marriage Act is in the case of Muslims. The Muslim Law prevents a Muslim from bequeathing his whole property in a will and allows him to make a will only qua 1/3rd of his estate. He can bequeath more than 1/3rd of his property if his heirs give consent to the same. However, the impact of a Muslim getting married under this Act is that the Indian Succession Act would apply to all cases of testamentary succession (i.e., through will) or intestate succession (i.e., without will) of such a Muslim.

Conclusion

The Rules laid down under the Act for Parsis, Christians, etc., for succession, both intestate and testamentary, are drastically different than what one generally comes across for Hindus. The importance of the Indian Succession Act is heightened by the fact that it also covers testamentary disposition by persons belonging to these communities as well as to Hindus. It would be extremely interesting to see how the Government intends to blend all these personal laws into one Uniform Civil Code!

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Muslim Law on Succession[1]

Shabnam Shaikh & Prajakta Joshi,
Advocates

Diversity is one of India's hallmarks and the varied cultures, traditions and religions contribute to this diversity. This also means that personal laws relating to succession, marriage, adoption, divorce etc vary for people depending on their faith. Aspects of certain personal law such as succession and adoption are codified for individuals who identify as Hindu, Buddhist, Jaina and Sikh. For Christians, Parsis and Jews, a separate law is applicable. However, so far as Muslims are concerned, the law relating to succession is governed by the Muslim Personal Law, i.e. Sharia. The Muslim Personal Law (Shariat) Application Act, 1937 (Shariat Act) is the legislation which codifies the application of Muslim Personal Law to Muslims residing India.

In order to understand the Muslim Personal Law relating to succession, it is essential to appreciate the history of Islam. Prophet Muhammad introduced Islam in the form of revelations from God. These revelations were embodied in the form of their holy book, the Quran. The most vital moment in Islamic history arose as to the right of succession to Muhammad after his death. This led to the division of the Muslim world into two sects:

(a) Sunnis; and

(b) Shias.

The sect who offered their allegiance to Abu Bakr, father-in-law of Muhammad, were Sunnis. Shias were the sect who believed that the true successor of Muhammad was his cousin Ali, a blood relative. The sects of Shia and Sunnis are further divided into separate schools of thought, which are as follows:

Sunnis	***Shias***
Hanafi	Isna-Ashari
Maliki	Ismaili
Shafei	Zaidi
Hanbali	

The personal matters of a Muslim vary depending upon whether such a Muslim is a Shia or Sunni – the most distinct being the law of inheritance.

General principles of inheritance under Muslim Personal Law

Unlike Hindu law, Muslim Personal Law does not have the concept of 'self-acquired property', 'joint family property' or 'ancestral property'. A Muslim is entitled to deal with his property (inherited, self-acquired, gifted, etc.) in the manner in which he likes during his lifetime. Thus, a transfer made inter vivos (i.e., during the lifetime of the

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transferor) cannot be challenged by the heirs of the transferor. A claim, if at all, can be made by the heirs in respect of property of a Muslim individual only after the death of such individual.

The devolution of any kind of property is uniform. However, so far as Shias are concerned, there are exceptions to this principle. A noteworthy exception is that a childless widow is only entitled to a share in movable property including debts owed to her husband. But she is not entitled to a share in the land owned by her deceased husband.

Intestate Succession

An intestate succession refers to succession of properties of a deceased where he/she has not left a Will. In such cases, the assets are inherited in accordance with the applicable inheritance law. The Muslim law of inheritance is a labyrinth of rules and detailed implications. In fact, the rules applicable to Sunnis and Shias are distinct in their foundational structure. Below is an overview of the inheritance laws applicable to a Sunni and a Shia.

A. Sunni

The Hanafi rules of succession are applicable to a Sunni. The legal heirs under this rule are divided into the following three classes:

(a) Sharers;

(b) Residuaries; and

(c) Distant Kindred.

After payment of funeral expenses, debts and legacies, the estate of a Sunni Muslim dying intestate is divided firstly amongst the sharers – who are entitled to a fixed share. The residuaries inherit the 'residual' estate, if any. However, if there are no sharers who are alive, then the residuaries succeed to all of the estate. Conversely, if there are no residuaries, the estate reverts to the sharers in the proportion to their original shares. The distant kindred's right to inheritance only accrues if there are neither sharers nor residuaries. However, where the sharer is a spouse of the deceased, the distant kindred inherits the property along with the sharer.

Before we delve into the relations who form part of each of the above class, the meaning of the following terms would help in putting things in perspective:

(a) A true grandfather is a male ancestor between whom and the deceased no female intervenes.

(b) A false grandfather is a male ancestor between whom and the deceased a female intervenes.

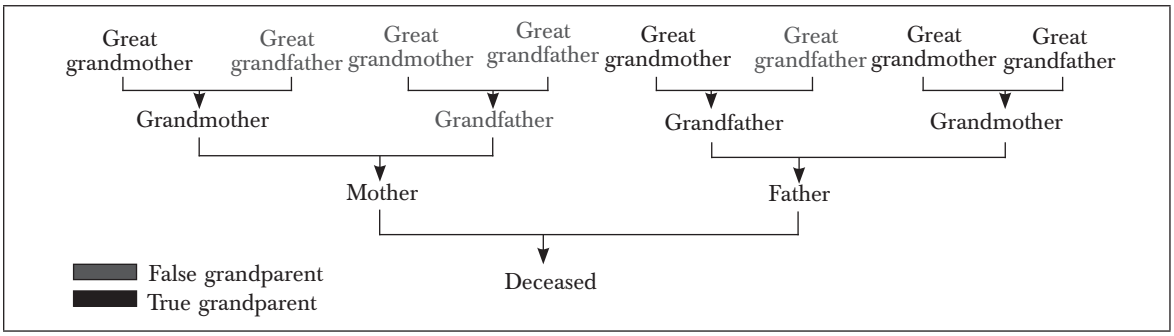
(c) A true grandmother means a female ancestor between whom and the deceased no false grandfather intervenes.

(d) A false grandmother means a female ancestor between whom and the deceased false grandfather intervenes.

(e) A uterine sibling refers to a half- sibling sharing the same mother but having a different father.

(f) A consanguine sibling refers to a half-sibling sharing the same father but having a different mother.

Below is pictorial representation of the terms true and false grandparent:



(a) Sharers

Sharers, also known as 'Quranic' heirs, are the persons who are first entitled to a fixed share of inheritance. The following table[2] illustrates the sharers and their share in inheritance of an estate of a deceased Sunni:

Sr. No.	***(1) Sharers***	***(2) Normal Share***	***(3) Conditions under which the normal share is inherited***	***(4) (A) Shares of Sharer No 3, 4, 5, 8 and 12 as varied by special circumstances (B) Conditions under which the Sharers Nos. 1, 2, 7, 8, 11 and 12 succeed as Residuaries***
1.	Father	1/6	When there is a child or child of a son how low so ever (hls)[3]	When there is no child or child of a son hls, the father inherits as a residuary
2.	True grandfather	1/6	When there is a child or child of a son hls and no father or nearer true grandfather	When there is no child or child of a son hls, the true grandfather inherits as a residuary, provided there is no father or nearer true grandfather
3.	Husband	1/4	When there is a child or child of a son hls	1/2 when no child or child of a son hls
4.	Wife	1/8	When there is a child or child of a son hls	1/4 when no child or child of a son hls
5.	Mother	1/6	(a) When there is a child or a child of a son hls; or (b) When there are two or more brothers or sisters, or even one brother and one sister, whether full consanguine or uterine	1/3 when no child or child of a son hls, and not more than one brother or sister (if any); but if there is also a wife or husband and the father, then only 1/3 of what remains after deducting the wife's or husband's share

2. Mulla – Principles of Mahomedan Law – 22nd Edition
3. Means descendants of any degree

Sr. No.	*(1) Sharers*	*(2) Normal Share*	*(3) Conditions under which the normal share is inherited*	*(4) (A) Shares of Sharer No 3, 4, 5, 8 and 12 as varied by special circumstances (B) Conditions under which the Sharers Nos. 1, 2, 7, 8, 11 and 12 succeed as Residuaries*
6.	True grandmother	1/6	(a) Maternal: When no mother, and no nearer true grandmother either paternal or maternal; (b) Paternal: when no mother, no father, no nearer true grandmother either paternal or maternal, and no intermediate true grandfather	
7.	Daughter	1/2 (to be divided equally if there is more than one daughter)	When no son	With the son she becomes a residuary
8.	Son's daughter hls (Please refer (i) and (ii) for instances)	1/2 (to be divided equally if there is more than one daughter)	When no (a) son; (b) daughter; (c) higher son's son[4]; (d) higher son's daughter; or (e) equal son's son	When there is only one daughter, or higher son's daughter but no (a) son; (b) higher son's son; or (c) equal son's son, the daughter or higher son's daughter will take 1/2 and the son's daughter hls (whether one or more) will take 1/6, i.e., 2/3 – 1/2) (with an equal son's son she becomes a residuary)
(i)	Son's daughter	1/2 (to be divided equally if there is more than one daughter)	When no (a) son, (b) daughter, or (c) son's son	When there is only one daughter the son's daughter (whether one or more) will take 1/6, if there be no son or son's son. (With the son's son, she becomes a residuary)

4. If there be a son's son and a son's son's daughter, the former is a higher son's son in relation to the latter. If there be a son's son and a son's daughter, the former is lower son's son in relation to the latter. And if there be a son's son and son's daughter or a son's son's daughter, the former is in equal son's son in relation to the latter, both being equally removed from the deceased

Sr. No.	*(1) Sharers*	*(2) Normal Share*	*(3) Conditions under which the normal share is inherited*	*(4) (A) Shares of Sharer No 3, 4, 5, 8 and 12 as varied by special circumstances (B) Conditions under which the Sharers Nos. 1, 2, 7, 8, 11 and 12 succeed as Residuaries*
(ii)	Son's Son's daughter	1/2 (to be divided equally if there is more than one daughter)	When no (a) son, (b) daughter, or (c) son's son, (d) son's daughter, or (e) son's son's	When there is only one daughter or son's daughter, the son's son daughter (whether one or more) will take 1/6, if there be no (a) son, (b) son's son, or (c) son's son's son. (With the son's son's son, she becomes a residuary)
9.	Uterine brother	1/6	When no (a) child, (b) child of a son hls, (c) father, or (d) true grandfather	
10.	Uterine sister			
11.	Full sister	1/2 (to be divided equally if there is more than one sister)	When no (a) child, (b) child of a son hls, (c) father, (d) true grandfather, or (e) full brother	With the full brother, she becomes a residuary
12.	Consanguine sister	1/2 (to be divided equally if there is more than one sister)	When no (a) child, (b) child of a son hls, (c) father, (d) true grandfather, (e) full brother, (f) full sister, or (e) consanguine brother	But if there is only one full sister and she succeeds as a sharer, the consanguine sister (whether one or more) will take 1/6, provided that she is not otherwise excluded from inheritance. (With the consanguine brother, she becomes a residuary)

(b) Residuaries

The 'Agnatic' heirs, viz., residuaries, are those heirs who take the 'residuary' of the estate of a deceased Sunni after the sharers have received their shares. In a situation, where there are no sharers, the entire inheritance devolves upon the residuaries. Residuaries are divided into four categories having the heirs[5] as described in the following table[6]; where each category inherits the estate to the exclusion of the other. Further, if the residuary form part of the same degree, then the property is divided *per capita*[7] and not *per stirpes*[8]:

5. If there is more than one residuary in one category and if they are of the same sex, then the distribution of property is equal amongst them
6. Mulla – Principles of Mahomedan Law – 22nd Edition
7. As per this rule, the division of estate is per person/according to total number of individuals
8. As per this rule, the division of estate is in equal shares to each member of a particular class. The share of a deceased member of a class divided proportionately among his or her beneficiaries

Sr. No.	*Descendants*	*Ascendants*	*Descendants of father*	*Descendants of true grandfather*
1.	Son. Daughter takes as a residuary with the son, the son taking a double portion	Father	Full brother. Full sister takes as a residuary with full brother, the brother taking a double portion	Full paternal uncle
2.	Son's son hls – the nearer in degree, excluding the more remote. Son's daughter hls takes as a residuary with an equal son's son. The son's son hls takes double the share of each son's daughter hls. There are other certain detailed ruled which have to be observed in this case	True grandfather how high so ever (hhs)[9] – the nearer in degree excluding the more remote	Full sister. In default of a full brother and other residuaries along-side, the full sister takes the residue, if any, if there be (a) a daughter or daughters, or (b) a son's daughter or daughter hls, or even if there be (c) one daughter and a son's daughter or daughters hls	Consanguine paternal uncle
(c)			Consanguine brothers. Consanguine sister takes it as a residuary with the consanguine brother, the brother taking a double portion	Full paternal uncle's son
(d)			Consanguine sister. In default of consanguine brother and other residuaries along-side, the consanguine sister takes the residue, if any, if there be (a) a daughter/s; (b) a son's daughter or daughters hls or even if there be (c) one daughter and a son's daughter or daughter hls	Consanguine paternal uncle's son

9. Means ascendants of any degree

Sr. No.	*Descendants*	*Ascendants*	*Descendants of father*	*Descendants of true grandfather*
(e)			Full brother's son	Full paternal uncle's son's son
(f)			Consanguine brother's son	Consanguine paternal uncle's son's son
(g)			Full brother's son's son	Male descendants of more remote true grandfather
(h)			Consanguine brother's son's son	
(e)			The remoter male descendants of (g) and (h) i.e., son of (g) then the son of (h) and so on in like order	

(c) Distant kindred

All relations by blood, male or female, other than the above-mentioned sharers and residuaries, are distant kindred. The distant kindred are, again, divided into four classes:

I. Descendants of the deceased: (i) daughter's children and their descendants; (ii) children of son's daughters hls and their descendants.

II. Ascendants of the deceased: (i) false grandfathers hhs; (ii) false grandmothers hhs.

III. Descendants of parents: (i) full brothers' daughters and their descendants; (ii) consanguine brothers' daughters and their descendants; (iii) uterine brothers' children and their descendants; (iv) daughters of full brothers' sons hls and their descendants; (v) daughters of the consanguine brothers' son hls and their descendants; (vi) sisters (full, consanguine or uterine) children and their descendants.

IV. Descendants of immediate grandparents (true or false): (i) full paternal uncles' daughters and their descendants; (ii) consanguine paternal uncles' daughters and their descendants; (iii) uterine paternal uncles and their children and their descendants; (iv) daughters of full paternal uncles' son hls and their descendants; (v) daughters of consanguine paternal uncles' son hls and their descendants; (vi) paternal aunts (full, consanguine or uterine) and their children and their descendants; (vii) maternal uncles and aunts and their children and their descendants.

There are two sets of rules determining the order of succession amongst the distant kindred. The first rule assists in determining the order of succession amongst the kindred (rule of exclusion)[10] and the second rule is for

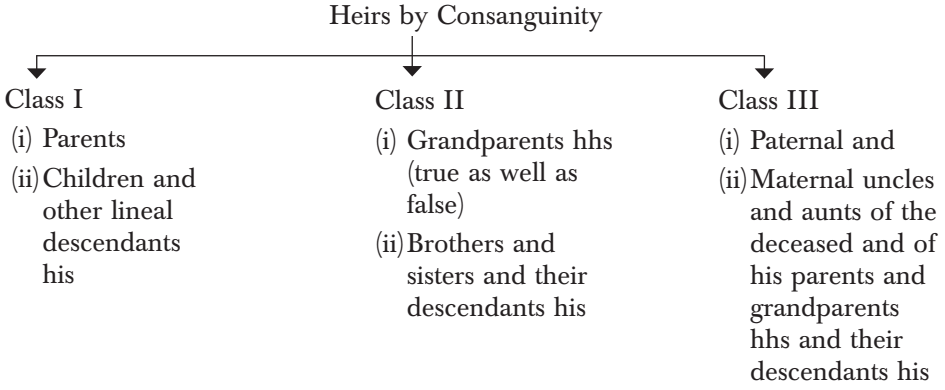
10. The nearer in degree excludes the more remote

determining the shares. The assignment of shares is further subject to other set of rules. There is some difference of opinion between Abu Yusuf and Imam Muhammad, the disciples of Abu Hanifa, on determination of succession and the shares amongst the distant kindred. In India, the doctrine of Imam Muhammad is followed for the said purpose and not that of Abu Yusuf for the purpose of determining the allotment of shares, order of succession between various classes of distant kindred.

B. Shia

Legal heirs under the Shia Law are divided into two groups: (a) heirs by consanguinity i.e., blood relations; (b) heirs by marriage., i.e., husband and wife. The spouse of a deceased Shia is never excluded from succession but inherits together with the heirs by consanguinity. The husband takes 1/4 or 1/2, and the wife taking 1/8 or 1/4 under some conditions (please refer to the table of sharers provided below).

The heirs by consanguinity are divided into three classes which are depicted below:



The order of succession amongst the three classes is that the first excludes the other. The heirs forming part of one class succeed together, but the nearer degree in each class excludes the more remote in that class. The share in the estate of a deceased Shia is determined by dividing the heirs further into (a) sharers; and (b) residuaries. Unlike the Sunnis, Shias do not have the concept of distant kindred.

In the context of Shia law of inheritance, the principle of representation is worth noting. The 'principle of representation'[11] is applied for the purpose of determining: (a) what persons are entitled to inherit; (b) the quantum of the share of any given person on the footing that he is entitled to inherit. For the purpose of (a), the rule of exclusion is applied both for Sunnis and Shias. Thus, if a Muslim dies leaving behind his son and grandson by a predeceased son, then the grandson is excluded from inheritance by his uncle. However, if both the sons predecease the Muslim leaving behind grandsons (children of both the predeceased sons), and if the Muslim was a Shia then applying the principle of representation – the grandsons will take the share in their deceased grandfather's estate *per stirpes*. This principle of representation is not applicable to a *Sunni Muslim*. The grandsons of a Sunni

11. Mulla – Principles of Mahomdedan Law – 22nd Edition

Muslim, in the above illustration, would inherit *per capita* and not *per stirpes*.

Another aspect for consideration is that if after the allotment of shares to the sharers, there are no residuaries, then the residue reverts to the sharer in their respective proportion, subject to three exceptions. First, a spouse is not entitled to the 'Return' if there is any other heir. Second, if the deceased left parents, one daughter and also (a) two or more brothers (full or consanguine); (b) one such brother and two such sisters; or (c) four such sisters, then the brothers and sister though Class II heirs, prevent the mother from participating in the Return and the surplus reverts to the father and the daughter. Third, if there are uterine brothers or sisters and also full sisters, the uterine brothers and sisters are not entitled to participate in the Return, and the residue goes entirely to full sisters.

The following table[12] illustrates the sharers and their share in inheritance of an estate of a deceased Shia:

Sr. No.	***(1) Sharers***	***(2) Normal Share***	***(3) Conditions under which the normal share is inherited***	***(4) Share as varied by special circumstances***
1.	Husband	1/4	When there is a lineal descendant	1/2 when no such descendant
2.	Wife	1/8	When there is a lineal descendant	1/4 when no such descendant
3.	Father	1/6	When there is a lineal descendant	If there is no lineal descendant, father inherits as a residuary
4.	Mother	1/6	(a) When there is a lineal descendant; or (b) When there two or more full or consanguine brother, or one such brother and two such sisters, or four such sisters, with the father	1/3 in other cases
5.	Daughter	1/2 (to be divided equally if there is more than one daughter)	When no son	With the son, she takes as a residuary

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Sr. No.	*(1) Sharers*	*(2) Normal Share*	*(3) Conditions under which the normal share is inherited*	*(4) Share as varied by special circumstances*
6.	Uterine brother	1/6 (to be divided equally if there is more than one sibling)	When no parent, or lineal descendant	
7.	Uterine sister			
8.	Full sister	1/2 (to be divided equally if there is more than one sister)	When no parent, or lineal descendant or full brother or father's father	The full sister takes as a residuary with the full brother and also with the father's father
9.	Consanguine sister	1/2 (to be divided equally if there is more than one sister)	When no parent or lineal descendant or full brother or full sister or consanguine brother or father's father	The consanguine sister takes as a sister with the consanguine brother and also with the father's father

(a) Distribution amongst heirs of Class I

The estate of a deceased Shia Muslim is first succeeded by the heirs mentioned in Class along with the spouse. The parents inherit together with the children, and failing children, with grandchildren, and failing grandchildren, with remoter linear descendants of the deceased. As noted above, due to the principle of representation, the descendants of children would succeed to the same shares which the person through whom they claim should, if alive, have inherited. After assignment of shares to the sharers, the residue of the estate is distributed amongst the residuaries (males taking double share).

(b) Distribution amongst heirs of Class II

If there are no heirs under Class I, then the estate is divided amongst the Class II heirs. The rules of the succession amongst the heirs in Class II is given below:

Class II Heirs
(Estate to be distributed minus the share assigned to the spouse)

Scenario 1 : When grandparents hhs are the only heirs

Claimant only on

Paternal side	Maternal side	Paternal and Maternal sides
		Whole estate
to be dividend - double share to the male	Whole estate to be dividend equally	- Assign 2/3rd of the estate to the paternal side - double share to the male - Assign rest of the estate to maternal side- divide equally

Scenario 2 : When brothers and sisters (or their lineal descendants) are the only heirs

<u>Brothers and sisters without any ancestor</u>

(i) Brothers and sisters of full blood exclude consanguine siblings

(ii) Uterine siblings are not excluded by silblings (full or consanguine) but they inherit with them - 1/6 of the total estate

(iii) Full brothers take as residuaries, so do consanguine brothers

(iv) Full sisters taken as shares unless there is full brother, in which case they take as residuary

(v) Consanguine sisters also take as shares unless there is a consanguine brother in which case they take the estate as residuary

(in case more than 1 sibling, then make take double share; same sex takes equally)

<u>Descendants of brothers and sisters without any ancestor</u>

Detailed rules have been provided for the same

Scenario 3 : When brothers and sisters (or their lineal descendants) exist with grandparents hhs are the only heirs

(i) Count each paternal grandfather as full as consanguine brother and paternal grandmother full or consanguine sister

(ii) Count maternal grandfather as a uterine brother and maternal grandmother as a uterine sister

And distribute the estate as per the table of shares

Testamentary Succession

Inheritance of property vide a lawful testamentary document, viz., Will, is called testamentary succession. A 'will' is a legal declaration of the intention of a testator regarding his property which he desires to be carried into effect after his death[13].

In India, the law in relation to testamentary succession is governed by the Indian Succession Act, 1925 (Act). However, so far as Muslims are concerned, the law relating to Wills is governed by the Muslim Personal Law.

As per the Muslim Personal Law, every Muslim of sound mind and not a minor can dispose of his property under a Will provided that the bequest is not in futuro (in future) or is contingent. Further, a Muslim can make an oral as well as a written Will. There is no particular form prescribed for the written Will; however, courts have held that if Will is reduced into writing then such Will should be executed in the manner provided under the Act and the judiciary should examine the statutory provisions of Indian law of evidence.

One of the staid concepts in Muslim Personal Law on Wills is the forced heirship rule. As per this rule, a Muslim cannot bequeath more than 1/3rd of its estate (as remaining after fulfilling the funeral and debt obligations) under a Will. Any bequest beyond 1/3rd of the estate under a Will requires the consent from the heirs of the deceased Muslim to allow distribution of such bequest. Further, if the bequest under a Will is being made to an heir by a Sunni Muslim (even though the bequest is within the 1/3rd limit), then the consent of all the other heirs is required for the disposition of the bequest after the demise of the testator. As regards Shia Muslim, a testator may bequeath his estate to his heir (to the extent of 1/3rd) and the disposition will not require any consent from other heirs of such testator. In the event, the disposition exceeds 1/3rd of the estate (to an heir or not an heir), the consent of all the heirs would be required, which may be given either before or after the death of the testator.

In case of Cutchi Memons and Khojas (a sect in India who were originally Hindus and accepted Islam), the above rule of forced heirship is not applicable. They can dispose of the whole of their property by Will (as governed by customs – being Hindu customary law). However, they have the option of being governed in the matters of succession by Muslim Personal Law provided they make a statutory declaration under Section 3 of the Shariat Act.

13. Section 2 (h), Indian Succession Act, 1925

❍□❍

Stand up, be bold, and take the blame on your own shoulders. Do not go about throwing mud at other; for all the faults you suffer from, you are the sole and only cause.

– Swami Vivekananda

Parsi Succession: A Personal Law Success Story

Aliff Fazelbhoy,
Advocate

Historical Overview of Legislation Governing Parsi Succession

Parsi succession laws dates back generations and even during the British rule, it is a tribute to the traditional ingenuity of India's Parsis that they were able to appreciate both the opportunity and the dangers of fully accepting or rejecting British Common Law provisions on succession.

Their exodus from Persia left the Zoroastrian community with a displaced and disjointed written jurisprudence.

The turning point was in the case law for restitution of conjugal rights in *Ardaseer Cursetjee Wadia vs. Perozeboye in 1854-1857*[1], up for appeal before Her Majesty's Privy Council, where it was contested that the Supreme Court of Bombay had no jurisdiction on matrimonial and succession-related disputes among Parsis.

Following the ensuing agitation, a Commission was set up under the presidency of Sir Joseph Arnould to codify Parsi Personal Law and bring it firmly under the jurisdiction of the courts.

Commission members included the likes of Parsi Law Association President Framjee Patel, and polymath Sorabjee Shapoorjee Bengallee. Consequently, the Government passed the Parsi Intestate Succession Act 1865 and the Parsi Marriage and Divorce Act 1865.

The Parsi Intestate Succession Act later came to be incorporated in the Indian Succession Act in 1925 (the **"Act"**). The Act sought as its object the consolidation and gradual harmonisation of personal laws.

Testamentary Succession

A Parsi desirous of making a Will (i.e. a testamentary disposition of his or her property upon his or her death), is governed by Part VI of the Act. The law in this aspect is common for all Indian except those specifically excluded such as Muslims and certain other communities who have their own personal law governing testamentary succession as well,

Testamentary succession amongst Parsis is thus straightforward. An adult Parsi can choose how to dispose of his or her estate in its entirety in their will so long as they are factio activa, i.e. legally capable of making a Will in terms of soundness of mind and majority.

All rules on essentials of a valid Will, execution and probate provided for under the Act will apply. There are no restrictions as to whom the beneficiary of the Will can be, be they related or not, Parsi or not, or even a religious or charitable institution. This is borne out in the case law *Shirinbai Maneckshaw and Ors. vs. Nargacebai J. Motishaw and Ors.*[2], where it was borne out that an adoptive mother can be the sole beneficiary under the Will of a testator.

Intestate Succession

Intestate succession, i.e. the laws governing succession amongst Parsis in the absence of a testamentary document or Will are laid down

1. *Ardaseer Cursetjee vs. Perozeboye (1856) 6 M.I.A. 848*
2. *Shirinbai Maneckshaw and Ors. vs. Nargacebai J. Motishaw and Ors. 1956 AIR 747, 1956 SCR 591*

in Chapter III of the Act under Sections 50 to 56 with the heading "Special Rules for Parsi Intestates".

These provisions are concise and precisely lay down the rights of persons interested in the property of the intestate.

The property of the Parsi intestate is to be divided into shares to be distributed amongst his/her heirs. The Act provides for various scenarios describing the entitlement of heirs who survive the intestate, which are discussed herein.

To begin with, section 50 of the Act lays down certain very interesting general principles governing a deceased Parsi who dies intestate (the "intestate/deceased'), which are unique to Parsis. These are

- Inclusion of a child in the womb, who is subsequently born alive, has the same rights as one who was actually born before the death of the person.
- Exclusion of lineal descendants (children and grandchildren) who pre-decease the deceased without having any spouse or lineal descendants of their own; and
- Exclusion of a widow or widower of a pre-deceased relative who marries again before the death the deceased.

Another important aspect of Parsi Personal Law is that it does not grant any legal status to children adopted by Parsi Parents. In fact, the Bombay Zoroastrian Jashan Committee opposed the Adoption of Children Bill, 1980, forming a special committee to exclude Parsis from the ambit of the Bill. The status of these parents and children are that of "Guardians" and "Wards" under the Guardians and Wards Act 1890. This means that, though a Parsi testate can bequeath their property to their ward, their ward has no automatic right to inherit under the Indian Succession Act or any other Act.

This article now discusses the rules regarding the division/shares of the relatives of a deceased intestate Parsi.

Spouse and/or Children

Following the landmark 1991 Amendment to the Indian Succession Act, there is no difference between the shares of daughters and sons in the case of Parsi intestacy, thus mainstreaming gender equality.

The most common case would be for an intestate to die, leaving behind a spouse and children. In this case, the property of the intestate would be split into equal shares and divided between the spouse and children. For instance, if the intestate was a male and had a spouse and two children then his property would be divided into three parts with one passing to his wife and one each passing to the two children. The same rule would apply to female intestates.

Where the intestate leaves behind a spouse and he had no children then the spouse is entitled to half and the remaining shares will go to their brothers and sisters and their lineal descendants, or failing that, to more distantly relations like cousins, second cousins, and so on. The order of preference and shares of such heirs is laid down in detail in Schedule II of the Act.

The rules get more complicated when a child has pre-deceased the intestate diseased with or without leaving his/her own spouse and/or children. These situations are also dealt with in Schedule II of the Act.

Parents

In the circumstance that a child predeceases his parents, the parents of the deceased intestate would also be entitled to a share of the property of the intestate along with the other heirs.

The share each of the parents would inherit shall be equivalent to half the share that a child of the intestate would inherit. This means that if both parents of the intestate are still living at the time of his death they will inherit one share each, while the spouse and each of the children of the intestate will inherit two shares. This measure does factor in intergenerational equity and the duty to maintain one's parents.

Where the intestate has living parents but no spouse and never had any children then the

entire property will go to the parents.

Where the intestate has living parents plus a spouse but no children then, the parents will get one share each, i.e. one fourth of the property each, while the spouse would get two shares or half the property.

Where the intestate has living parents and children but no spouse then, the parents will get one share each, while the children would get two shares each. In other words, each child will get twice of what each parent gets.

Spouse of deceased child and Grandchildren
A wife of a deceased child and/or his/her grandchildren (i.e. grandchildren of the deceased) inherit only where the son or daughter (as the case may be) of the deceased intestate has died. In that case the grandchild along with the widow of the pre-deceased child will inherit from the share that might have gone to the deceased child had he or she been alive at the time of the death of the deceased intestate.

Broadly speaking, where the child of the person dying intestate has left behind a spouse and/or children they will be entitled to inherit the share that the lineal descendant (son or daughter) of the intestate would have inherited.

Interestingly, here there is an instance of unequal treatment of men and women arises under section 53 of the Act which states that if the pre- deceased child was a son, his widow and children will inherit in the ratio of 1:2 shares for the widow and children respectively but if the pre-deceased child was a daughter her children alone will inherit, and not her widower.

Other relatives
Other relatives will inherit only in the entire property is not divided among the heirs as stated above. They will get a residue of the undivided share which could be a third or more or even 100% of the estate of the deceased intestate.

The Act contains a schedule being Schedule II which is itself divided into two parts listing out various categories of relatives who might inherit from a deceased intestate. These would include relatives such as brothers and sister, cousins, etc. The guiding principle in Schedule II is that parents would be the first beneficiaries, if neither spouses nor lineal descendants are in existence. Siblings and their lineal descendants would stand to inherit in situations where the intestate has no spouse or children and his/her parents too have died before them.

It would be too much to go into all details but to give an example, if a person is survived by both a widow/widower and one or more widows/ widowers of a lineal descendant then one-third of intestates property will pass to the former, the next one one-third will be equally split amongst the surviving widows (but not the widowers) of his lineal descendants and the residue will be divided as per Part I of Schedule II of the Act.

No direct descendants
In case a person leaves behind no spouse, no lineal descendants and no spouse of a lineal descendant, the entire property of the intestate will be divided as per Part II of Schedule II of the Act. This part adds a few items to the end of the list provided in Part I of the Schedule. Half-siblings and their heirs, widows and widowers of the same and a couple of additional classes have been included herein.

Conclusion
Like all personal laws, Parsi succession legislation too has its benefits and drawbacks. The benefits are manifold. Parsi Succession Law namely that it permits testamentary disposition without restriction and has detailed rules that leaves no ambiguity in the case of intestate succession. There are arguably some drawbacks in how the shares of a deceased intestate are divided among his/her relatives in cases out of the ordinary such as when he or she does not have children or has pre-deceased children. These are however, developed by tradition and incorporated into the Act and any change would have to be done in consultation with the community, unless of course India does at some point achieve a Uniform Civil Code.

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Law Relating to Succession

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"It may seem strange that of all men sailors should be tinkering at their last Wills and Testaments, but there are no people in the world more fond of that diversion"

- Herman Melville

Testamentary Succession/Probate of Will
How to prove a Will

- A will can be proven if there exists proof that following prerequisites have been satisfied:
  i. Valid Execution of Will-

     This primarily refers to whether if a Will has been validly attested or not and as to whether if all required rules and procedures have been complied with.

  ii. Testamentary capacity of the testator-

     This majorly pertains to whether if the testator was in sound and disposing state of mind at the time of execution of will, did he do so of his own free will and whether he knew what he was doing.
- The first step to proving a Will is the examination of the attesting witness. Sec 68 of the Evidence Act sets forth the requirement of 2 attesting witness at the time of execution of Will, however, to prove a Will both witnesses do not need to be examined. Examination of a single witness is sufficient.
- In 2015, the Hon'ble Bombay High Court held that the attesting witness must be examined first. Previously there was some ambiguity regarding this which led examining profounder/petitioner before the witness, however, in the matter of *Walter D'Souza 2015 AIR Bom. 90* clarifications regarding examination was given.
- The second step is to produce the Will from the Sub-Registrar's office if the Will is registered, and if the Will is not registered the original must be with the Prothonotary and Senior Master of the High Court and must be required to be shown to the attesting witness. Essentially the original Will must be shown to the attesting witness. The witness must identify his signature on the original Will along with all mentioned initials and any changes and correction made to the Will. Additionally, he must be questioned on the date mentioned, the address, the testator's signature, and his whereabouts at the time of signing the Will. The witness may also be questioned on who else was present during the signing of the Will.

- Cross examination of witness for the purpose of proving that the witness was not present at the time of signing the Will would, amongst other things pertain to his general whereabouts, place of work and general schedule, how he knew or met the testator. If the opposition wants to prove coercion of the testator by the petitioner, the cross-examiner may ask question regarding whether if the petitioner had any role in making the will or if he was present at the signing of the will.

- The third step in proving a Will pertains to the decision as to whether if the petitioner should take the stand and give a disposition or not. If the examination of attesting witness' substantially proves the valid execution of the will and that the testator was of sound mind and not coerced, the petitioner need not depose. This has been held by the Supreme Court of India in the matter of *Ramabai Patil 2003 AIR SC 3109* where it was stated that the onus concerning the testamentary capacity lies only initially on the petitioner as once the onus has been discharged by proper examination of attesting witness, the petitioner does not need to testify.

- Even if the issue of suspicious circumstances behind signing the will is raised by the caveator, the petitioner may settle the issue by supplying the court with documents that provide evidence against such claims or place someone else on the stand and so not take the stand himself (*H. Venkatchala Aiyangar vs. B. N. Thimmajamma 1959 AIR SC 443,* the Hon'ble Supreme Court laid suspicious circumstances). Further just vague allegations of suspicious circumstances are not sufficient; the caveator must provide details of the matter to raise enough doubt over the execution of the Will.

- As far as the matters of forgery or unsoundness of mind or undue influence go, the burden of proof lies on the caveator and he through submissions prove his case and lead evidence for the same.

  i. In case of forgery, a handwriting expert's opinion supporting the claim is mandatory.

  ii. For unsoundness of mind, gaining access to the testator's medical records to analyse his mental state at time of execution is necessary.

  iii. Undue influence as defined in *Charulata Lulla (2013) 2 ALL MR 261,* is pressure which would overpower the volition of the testator without convincing him. It was also stated that not all influence is undue in nature. Appeal to affection, persuasion, ties of kindred to sentiment of gratitude, possibility of future destitution, etc are not undue but if the testator is forced or pressured to execute a will against his own fair judgment, it is considered to be done through undue influence. In *Naresh Charandas Gupta AIR 1955 SC 363* the Hon'ble Supreme Court of India states that not every influence can be characterized as undue and a person may plead his case to the testator and to persuade him for a favourable disposition, and if the testator retains his mental capacity and there no element of fraud or coercion, it not undue influence.

- A caveator may also claim that a Will is unnatural due to certain inclusion or exclusion, however, this is not a sufficient ground for challenge as the whole point of a Will is to go against natural succession and to distribute your own property in a proportion and to those parties as a testator may desire. A will by its definition, design and intention disrupts the natural line of succession. The Hon'ble Supreme Court in *AIR 2013 SC 3109* held that simple

exclusion of a caveator does not amount to the will being invalid.

- In case the Will is lost or not available at the time of probate, Sec 237 of Indian Succession Act along with Sec 63 and Sec 68 of Evidence Act provide for such a situation, stating that probate could still be granted of the photocopy of Will, provided that Sec 63 and Sec 68 of Evidence Act (secondary evidence) are complied with. In United Kingdom, if the original Will is lost, it is presumed that the testator has revoked the Will, but this is not followed in India because in the matter of *Durga Prasad (1979) 1 SCC 61*, the Hon'ble Supreme Court held that if a Will has been validly executed and registered by the testator but not found at the time of his death, the presumption as to whether if the testator had revoked the Will or not, may be drawn from the facts and circumstances of each case, and this presumption is a weak one in view of the habits and conditions of our people. The presumption is also a rebuttable one and can be rebutted by the slightest of evidence, whether direct or circumstantial. If it can be proved that the Will was of a strong disposition based off, of the absolute intention of the testator; and there was no occurrence or circumstance that could instigate a change in the intentions of the testator suddenly, the presumption is rebutted. The judgement further stated that in view of the fact that most of the population in our country is not highly educated and tend not to take sufficient care of documentation as a result of which, the possibility of the will getting lost, stolen or surreptitiously removed by an interested party cannot be excluded and the presumption should be applied carefully.

- Sec 69 and 70 of the Indian Succession Act, 1925 provide grounds for and circumstances under which a will stands revoked. Some are as follows:

  i. On marriage of a testator, a Will made before marriage stands revoked.

  ii. If a person makes another will or codicil, or in writing revokes the Will.

  iii. By burning tearing or destroying the Will by the testator or by some else who is under testator's directions.

- If attesting witness cannot be found, then the attestation can be proved by someone who is not a attesting witness, but has seen the attestation by the witnesses and signing of the Will by the testator. However, before such person's deposition is admissible, one must present to the court the efforts undertaken to search for the attesting witness and thereafter examine the additional person present at the time of execution of Will.

- There are certain established and well settled principles when it comes to granting of probate. Firstly, the court tends to lean towards an interpretation that upholds the will and not intestacy and in general favours probate of will over intestate succession. This was confirmed by the Hon'ble Supreme Court in its decision cited as *AIR 1963 SC 1703*. Secondly, testamentary jurisdiction is one of circumspection and suspicion. The courts do not look at wills with suspicion, but rather with caution to reach proper conclusion about the circumstances under which the testator signed the will and the possible difficulties which may exist. Thirdly, a Probate must appeal to the judicial conscience of the court. Judicial conscience of the court has been well said by the Hon'ble Bombay High Court in its judgment reported in *2017 2 BCR 439*, where the learned single judge observed that, *"One assess the will from the testator's perspective and the test is to see if suspicious circumstances have been sufficiently answered. The appeal is to judicial conscience, one that as we know, always makes allowance for a less than perfect handling for human facilities*

and foibles of an ordinary man. The test is not of absolute exactitude or great precision (refers to AIR 1959 SC 443). The initial burden is always on the pro-pounder. Even if there is delay, question to be asked is whether it has been explained. If yes, judicial conscience on which so much depends remains neither shaken nor stirred."

Revocation of the Grant

- Revocation of Grant is dealt under Sec. 263 of the India Succession Act.
- It provides several non-exhaustive grounds on which one may apply.
- Firstly, grant may be revoked for a just cause. A just cause shall be deemed to exist where a grant was defective in substance for instance - citations were not served to appropriate persons to whom it ought to have been served, etc.
- Secondly if grant is obtained fraudulently by making false suggestions or by concealing material information from the court or by means of false allegations or the grant has become useless or inoperative due to certain circumstances such as the discovery of a new and more recent will or codicil.
- All persons who have an interest in the estate of the deceased and are likely to succeed to the estate of the deceases and who have caveatable interest, may apply for revocation of grant.

Can a Probate Petition be settled through filing of consent terms?

- Probate petition can only be settled if settlement is inconsistent with the Will. If settlement is not in consonance with the Will it is deemed void and illegal. This was held by the Hon'ble Supreme Court in (2009) 2 SCC 315 where the court held, *"a probate when granted binds the whole world. It is a judgement in rem and the executor, therefore, has to administer the estate of the testator in terms of the will and not on the basis of settlement arrived at by and between the parties which would be inconsistent with the terms of the will. In case of a conflict between the terms of the will and settlement, the former i.e. the will shall prevail. The court in exercise of its jurisdiction u/s 302 of the act can only enforce the terms of the will and not the agreement."*

Limitation

- For filing Probate Petition the period of limitation is 3 years as contemplated under Article 137 of the Limitation Act, 1963.
- Period is not calculated from date of death of the deceased but from time when the right to apply accrues. This position is affirmed by the Hon'ble Bombay High Court in the judgment reported in *(2017) 2 BCR 439.*

Mechanism for enforcement of Intestate succession

Securing share in property of deceased through intestacy has been described under Indian Succession Act, 1925; and rules and procedures are found under the original Side Rules of the Bombay High Court in which details regarding forms to be filled, nature of petition, method of drafting petition and all requirements and compliances are mentioned.

- There are 5 kinds of grants based on the nature of the property under Indian Succession Act:
  - i. Heirship Certificate[1]
    - a) Heirship Certificate is a certificate or declaration given by the court that the person that hold the certificate is the rightful heir of the deceased.

1. Governed by Bombay Regulations Act, 1827

b) Historically, (pre 1992) it was the City Civil Court that awarded this certificate however, by its judgement reported as *1993 MhLJ. 408*, it was held that Bombay High Court is a deemed district court as far as the city of Bombay is concerned, and is empowered to award Heirship Certificates.

c) To obtain Heirship Certificate, one must file a petition under Testamentary and Intestate jurisdiction of the Bombay High Court, with minimum court fee of ₹ 200, however in a petition the schedule of the property need not be attached, as the petition does not specify the reason for which the certificate is being made. If the certificate is used to claim property, one must pay the regular court fee which is otherwise payable for Succession Certificate or Letters of Administration i.e. a maximum ₹ 75,000 along with regular court fee for civil matters i.e. up to ₹ 3,00,000.

d) Descendants and parents of deceased may apply for Heirship Certificate; however, it has limited applicability and purpose, usually helpful to claim salary from employer, provident fund or life insurance of deceased.

ii. Succession Certificate

a) This can be obtained by legal heir only for movable property of the deceased i.e. debts, securities and investments where immovable property is not involved.

b) A criterion for jurisdiction is the residence of the deceased (at the time of his demise) and not where the property may be found. However, foreign assets cannot be claimed through Succession Certificate.

c) When Succession Certificate is filed by one of the heirs (when there are multiple heirs), consent of other heirs is required. If other heirs do not consent, then the citation will be issued to that person. He may then file caveat and if contested, it will be converted as a testamentary suit. Further there will be trial in which the role of caveator will be limited to contesting the succession certificate by virtue of a Will existing and the need for probate. If some heir, except the citation, does not consent or does not file a caveat, then the applicant must file in court to justify surety to the extent of his share.

d) If other heirs are not consenting to rights of succession, then they are opposing it, and so the applicant for the certificate must justify the surety. Only upon depositing the value of your share with the court can you get the certificate.

iii. Letters of Administration

a) This pertains to both movable and immovable properties.

b) Any heir or legal representative who is otherwise entitled to intestate succession may apply. Upon receiving this letter, the applicant is appointed as administrator and becomes a trustee. His responsibility is to divide the property amongst heirs within 6 months of receiving the grant, in an amicable and agreeable manner.

c) Jurisdiction for filing letters of administration is the place of residence of the deceased or the location of the property. For property located in districts other than Bombay, one must gain leave from the relevant district court of that location. For Bombay however, since the High Court is a chartered court, its probates and letters of administrations apply to all districts of India. Probate/Letters of Administration is valid for any property of the deceased including property located abroad so long as the deceased is a resident of Bombay and a part of the property is in Bombay. Location of death of the deceased is not relevant when it comes to succession or intestate law.

d) If consent is not given by heirs of the deceased, and caveat is filed, then it is contested and is converted as a testamentary suit. If there no will, the law is very clear and specific about proportion of share and so, even in cases where intestate succession is contested, the only defence that stands is if the caveator can prove the existence of a Will. A Will, if it does exist upon probation is supreme and takes precedence over all other forms of succession.

iv. Letters of Administration with Will annexed

a) Probate can only be applied by an Executor named under the Will. If no executor is named, then even implied or expressed authority given to a person through the Will can qualify for that authorized person to be an executor and seek probate of Will. However, if no Executor is mentioned and no form of authority has been awarded to anyone, the heirs must seek a Letters of Administration with Will annexed.

b) Jurisdiction and process of grant along with opposition to it are identical to that of an ordinary Letters of Administration.

v. Probate with executors

a) In case whether the Executors of the Will are alive and are willing to file a petition for obtaining Probate of the Will, they may do so at the High Court. Maximum court fees for such proceedings in Bombay is ₹ 75,000/-. In case of any heir or any person filing a caveat in such proceedings, the matter gets converted into a Testamentary Suit.

b) Will prepared in Bombay, Calcutta and Madras is required to be compulsorily probated.

- Administration Suit is meant for the administration and protection of the property of the deceased till it is distributed amongst the rightful heirs. Administration suit can be filed during pendency of the probate too.
- Administration Suit can be filed by an Executor, Heir and even by creditor of the deceased if nobody else is there to do so.
- Partition Suit implies an intention to get separate from the Hindu undivided family. Whilst it is between living individuals and is in a nature of civil suit. It is usually based on the co-parcenor's testamentary disposition. Jurisdiction is same as Administration Suit.

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Essential Features of a Will

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1. Introduction

The law governing wills in India is contained in the Indian Succession Act 1925 (Act). A will is defined as the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death[1]. Bequests made under a will take effect only after the lifetime of the author of the will. A wider definition is seen in the General Clauses Act 1897, wherein "will" includes a codicil and every writing making a voluntary posthumous disposition of property[2]. Essentially, a will and a codicil are read together, unless the later of the two (duly executed) is intended to revoke the former.

A will which is written by the testator himself (handwritten will) is called a holograph will[3]. In the case of holograph wills, the presumption of genuineness is all the more, even bordering on actual proof of the date of the execution and attestation of the will[4].

2. Testamentary capacity

The Act provides that every person of sound mind not being a minor may dispose of his property by Will[5]. As to the testator's capacity, he must, in the language of the law, have a sound and disposing mind and memory. This phrase, "sound and disposing memory" is often included while drafting a will. Sound testamentary capacity means that the below conditions must exist at one and the same time-

a. The testator must understand that he is giving his property to one or more legatees;

b. He must understand and recollect this extent of this property; and

c. He must also understand the nature and extent of claims upon him both of those whom he is including in his will and those whom he is secluding from the will

A will, or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void[6].

A corollary to "soundness of the mind" as required of a testator may be drawn from the

1. Section 2(h), Indian Succession Act 1925.
2. K Kannan, The Indian Succession Act (Paruck, 12th edn, Lexis Nexis 2019) 22.
3. BB Mitra, The Indian Succession Act (Sukumar Ray ed, 15th edn, Eastern Law House 2013) 51.
4. *Joigee Primrose Prestor (Nee Vas) vs. Vera Marie Vas (1996) 8 SCC 324.*
5. Section 59, Indian Succession Act 1925.
6. Section 61, Indian Succession Act 1925.

Indian Contract Act 1872, wherein person is said to be of sound mind, if at the time he makes a contract, he is capable of understanding it and of forming a rational judgment as to its effect[7].

Similarly, coercion is the committing or threatening to commit, any act forbidden by the Indian Penal Code 1860 or the unlawful detaining or threatening to detain, any property to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement[8]. As regards wills, whatever destroys the free agency of the testator constitutes "coercion".

If a person whilst he is of sound mind makes a will and subsequently becomes insane, the will is not revoked by subsequent insanity. A mentally afflicted person may make a will during a lucid interval[9]. While it is advisable for the testator to sign the will in a uniform manner, a signature on each page of the will, where the last page is left unsigned, is not prima facie proof of insufficient execution[10].

Under exchange control laws as applicable for the purpose repatriation of assets, a person should have stayed in India for more than 182 days in the preceding year in order to be resident of India in a given year. Any person not covered in the preceding definition is said to be a non-resident Indian. The Act as such gives no guidance to emerging trends of testamentary and intestate succession that has a foreign element as regards the domicile of testator, propositus, or in relation to property held in a foreign country, or will executed in a foreign country, except in a very limited way[11]. However, under private international law, succession of an immoveable property is governed by the law of the land where it is situated (lex situs). However, it is the law of the testator's domicile at the time of making a will that governs succession of their moveable properties. Thus, NRIs and non-citizens may write a will in India governing the bequests of their assets in India.

3. Execution of a Will

Section 63 of the Act governs the execution of wills. It requires the testator to sign the will and two or more witnesses to attest the will. Further, each attesting witness must sign the will in the presence of the testator. The Supreme Court in *Jagdish Chand Sharma vs. Narain Singh Saini*[12] has reiterated that the will shall have to be attested by two or more witnesses each of whom has seen the testator sign or affix his mark in the presence and on the direction of the testator, or has received from the testator, personal acknowledgement of a signature or mark and that each of the witnesses has signed the will in the presence of the testator. As long as there are two witnesses, there is no requirement that both of them shall sign at the same time or be present at the same time[13].

3.1. Attesting witnesses

A minimum of two witness are required for a will to be validly executed. Any person[14], including a minor[15], can be an attesting witness. However, a person who signs the will on behalf of the testator

7. Section 12, Indian Contract Act 8972.
8. Section 15, Indian Contract Act 1872.
9. Explanation to Section 59.
10. Theobald, Law of Wills, 13th edn, 1971, 112.
11. K Kannan, The Indian Succession Act (Paruck, 12th edn, Lexis Nexis 2019) 2.
12. AIR 2015 SC 2149.
13. *Hari Narayan Khedkar vs. Dwarkabai Pandurand Khedkar 2004 (2) Bom CR 427.*
14. K Kannan, The Indian Succession Act (Paruck, 12th edn, Lexis Nexis 2019) 245.
15. Section 118, Indian Evidence Act 1872.

(who is illiterate) cannot also sign as an attesting witness[16].

It is not necessary that the witness should know the contents of the will which he is attesting. He is merely expected to witness the signature of the testator. All that the law requires is that there shall be two attesting witnesses[17]. Further, the attesting witness need not be present when the will is being written[18].

Section 67 of the Act provides that a will shall not be deemed to be insufficiently attested merely on account of benefit by way of a bequest or by way of appointment given to the person so attesting or to his or her wife or husband. However, the section explicitly provides that such a bequest or appointment shall be void so far as it concerns the person who has attested the will or the husband or wife of such a person, including to the extent of any person claiming an interest in the estate of the deceased through either of them. It must be noted that Section 67 does not apply to wills made by Hindus. Hence, the attesting witness to the will of a Hindu does not lose the legacy given to him by the will[19]. Further it is a settled position that attestation by a beneficiary is no ground to suspect the genuineness of the will[20].

Under the Indian Succession Act, there is no limitation on who can be a witness on account of residency or nationality of the individual. For the purpose of proving the will, testimony of one of the witnesses is required. Secondly, if a will requires a probate (explained below), it is prudent that the will is attested by a person likely to be present in the jurisdiction where the probate proceedings or administration of the will are to be conducted. Hence, it is practical to have an individual who is likely to be present in India for any such testimony or for attesting affidavits at the time of the will taking effect as the witness of an Indian will.

Section 63 of the Act lays down alternatives for execution of a will and it is sufficient to prove conformity with one of those alternatives. The mere fact that the will is registered is of no avail because the endorsement of the sub-registrar cannot be a substitute for attesting evidence[21]. Hence, the role of the witnesses is crucial.

3.2. Doctor's certificate

There is no statutory requirement for a valid execution of a will to be accompanied by a medical practitioner's certificate confirming good health and sound mind of the testator. Conventionally, in England, it was considered to be a golden rule that where a solicitor was drawing up a will for an aged testator or one who has been seriously ill, it should be witnessed or approved by a medial practitioner. There has been a departure from this conventional approach to the modern one where the medical personnel as a witness is not seen as necessary[22]. Therefore, under the current law, attestation as one of the witnesses, or otherwise an approval by a doctor, is not essential to a will.

3.3. Registration and Stamping

Wills are optionally registrable instruments[23]. A will can be rendered invalid on the grounds of forgery of will/signature of testator, coercion

16. *Radhakrishna vs. Suraya 40 Mad 550 (556).*
17. *Arun Kumar Dutta vs. Shankar Kumar Dutta 2006 (2) Hindu L.R 124.*
18. *Purushottam Haribhau Pijgade vs. Ambadas Sitaramji Pijgade 2010 (112) Bom LR 3608.*
19. Supra note 2, 246.
20. *Rur Singh (D) Th Lrs vs. Bachan Kaur (2009) 11 SCC 1.*
21. *Manmohan (deceased) through LR's vs. Baldev Raj 2013 SCC OnLine Del 4568.*
22. *Baker vs. Baker [2008] EWHC 977 (Ch): [2008] All ER (D) 312.*
23. Section 18, Registration Act 1908.

meted out to the testator or that the testator lacked testamentary capacity. A will, drawn up in any of these three situations may well be registered. Registration may take place without the executant really knowing what he was registering[24]. Just as no-registration cannot constitute an inference against the genuineness of the will, mere registration does not dispel the requirement of proof of will[25].

Registration only shows that a particular document exists in the office of the sub-registrar[26]. It is the last will of the testator which must take effect upon his demise. Moreover, a registered will could be revoked by an unregistered will[27]. As regards stamp duty, the law is clear that no stamp duty is chargeable on a will.

3.4. Unequal distribution under will

A will is one of the most solemn instruments known to law. The executant of the will cannot be called to deny the execution or to explain the circumstances in which it was executed[28]. The very application "will" suggests that the document should effect that which the testator would have done; it is his will, his intention to pass his personal and real property in the particular manner outlined in the testamentary document. The foundational testamentary interpretation relating to wills and codicils remain the specific intent expressed in the plain language of the will[29].

In *S. Sundaresa Pai vs. Mrs. Sumangal T. Pai*[30], the Supreme Court has held that a Will providing for uneven distribution of assets is valid. It further held that unequal distribution cannot lead to a conclusion of such a will being "unnatural". Quantum and manner of distribution lies squarely within the pure discretion of the executant of the will.

However, the Supreme Court has held that even though it cannot be said to be a hard and fast rule, yet when disinheritance is amongst heirs of equal degrees and no reason for exclusion is disclosed, then the standard of scrutiny is not the same and if the courts below (subordinate courts) fail to be alive to it, then their orders cannot be said to be beyond review[31]. Therefore, it is only prudent for a testator to explicitly give context to his actions (including exclusions of certain individuals and/or heirs from his estate) under the will. A will is executed to alter the ordinary mode of succession and by the very nature of things it is bound to result in either reducing or depriving the share of a natural heir[32]. It may be said to a certain extent that if a person intends his property to pass to his natural heirs in the proportion as specified under his personal laws, there is no necessity at all for executing a will.

4. Executor of a Will

Section 2(c) of the Act defines "executor" to be a person to whom the execution of the last Will of a deceased person is confided by way of the testator's appointment. Appointment of executor is not mandatory under law; however, owing to the crucial role the executor plays in disposing of the estate of a testator in accordance

24. *Dinesh Chandra Mitra vs. Bhawani Prasad Bhowmick AIR 1969 Assam 18.*
25. *Khanda Singh vs. Natha Singh (1994) 107 PLR 472.*
26. *Israel Ali vs. Rajkumar (2014) 144 DRJ 350.*
27. *Sunil Anand vs. Rajiv Anand 2008 (103) DRJ 165.*
28. *Kalyan Singh vs. Chhoti AIR 1990 SC 396.*
29. *Sreedevi vs. Radhakrishnan Nair 2018 (3) KLJ 196.*
30. (2001 (8) SCALE 309.
31. *Ram Piari vs. Bhagwant AIR 1990 SC 1742.*
32. K Kannan, The Indian Succession Act (Paruck, 12th edn, Lexis Nexis 2019) p 216.

with the last will of the testator, it is advisable to appoint an executor by express nomination in the body of the will. Where there is no executor, competent authority appoints a person being the "administrator" for administering the estate of the deceased person[33]. Generally, an executor can derive his office only from a testamentary appointment[34]. However, where a provision in a will confers on a person the power to collect the outstandings, pay the debts and manage the properties, it has been held that he is appointed executor by implication[35].

Unlike an attesting witness (depending on personal laws), the executor may well be a legatee so long as he proves the will or shows intention to act as the executor[36]. Reiterating the statutory requirement, it has been settled that where a legacy is given to a person who is named as executor, whether it is given to him in his character of executor (ie as a remuneration for his care and trouble) or independently of it, he cannot claim the legacy unless he accepts his office[37]. Further, there is no restriction on the no. of executors that may be appointed.

It is advisable to appoint a competent and reliable person who is available at the place where the will is to take effect. Probate is only granted to the executor named and appointed in the Will[38]. No restriction whatsoever exists upon the choice of an executor. Individual(s), partnership firm, a private limited company (provided the memorandum of the company contains a clause permitting it to accept appointment as an executor) or a bank maybe appointed as an executor to a will. From a practical perspective, it is always advisable to entrust an independent and trustworthy person (and one who may be reasonably believed to outlive the testator) with this responsibility, as well as to provide for contingent executors.

4.1. Role of Executor

Probate means the copy of a Will certified under the seal of a court of competent jurisdiction with a grant of administration to the estate of the testator[39]. Probate is mandatory in the case of wills made by any Hindu, Buddhist, Sikh or Jaina in the territories which were subject to the Lieutenant-Governor of Bengal, or are within the limits of the ordinary original civil jurisdiction of the high courts of Madras and Bombay or wills pertaining to immoveable assets situated in these territories. The general rule under Section 213 of the Act is that no right as executor or legatee can be established in any court of justice unless a court of competent jurisdiction in India has granted probate of the will under which the right is claimed or has granted letters of administration. This implies that no probate is necessary to establish right as executor or legatee in the case of other Hindu wills[40]. As stated above, probate is only granted to the executor.

Section 317 of the Act imposes a statutory obligation on executors and administrators to exhibit an inventory containing a full and true estimate of all the property in possession within six months of grant of probate or such other prescribed period. General powers of administration bestowed upon the executor

33. Section 2(a), Indian Succession Act 1925.
34. *Hamabai vs. Bamanji 7 BHCR 64 (ACJ).*
35. *Thenappa Chettiar vs. IO Bank AIR 1943 Mad 743.*
36. Section 141, Indian Succession Act 1925.
37. *Prosonno vs. Administrator-General 15 Cal 83 (87) (per Macpherson, J).*
38. Section 222, Indian Succession Act 1925.
39. Section 2(f), Indian Succession Act 1925.
40. BB Mitra, The Indian Succession Act (Sukumar Ray ed, 15th edn, Eastern Law House 2013) 8.

include his power to lawfully incur expenditure on such acts as may be considered necessary for the proper care or management of any property belonging to the estate being administered by him. Expenditure in lieu of religious, charitable and "other" objects and on such improvements as may be reasonable and proper in the case of the property of the estate requires sanction of the High Court exercising jurisdiction[41]. Further, Section 307 of the Act lays down wide powers of the executor (or administrator) in disposing property of the deceased. In all such acts with regard to the management of the property entrusted to him, he must act with the same degree of care as a man of ordinary prudence would in his own affairs[42]. It has been reiterated that a Hindu executor is entitled to deal with the property of his testator in the same manner as the testator himself would have dealt with it unless his powers are restricted or limited by the terms of the will[43]. Restrictions imposed by the will on the executor's statutory powers to alienate property may be express or implied[44].

4.2. Remuneration to executor

"Executorship expenses" in a will mean the same thing as "testamentary expenses". They are expenses incidental to the due discharge of duty of an executor. However, expenses incurred by the estate of the deceased or by the named legatees (indirectly) prior to taking their legacies on account of remuneration of executors is seen only in the case of corporate executors wherein professionals are appointed as executor to a will. Such remuneration is against their professional, administrative and/or legal services rendered towards the estate of the deceased and in giving effect to the will.

In our quasi-federal set up of the State, both the Union Government and State Governments are empowered to legislate on subjects of wills, intestacy and succession[45]. In 2016, the Goa Assembly cleared The Goa Succession, Special Notaries and Inventory Proceeding Act, 2012 (Goa Act 23 of 2016) ('Goa Act') to replace the Portuguese Civil Code 1867 which was applicable to the state of Goa until then and the same received the assent of the Governor on 19-September-2016. The Goa Act was enacted with an object to consolidate and amend the law of intestate and testamentary succession, notarial law and the laws relating to partition of an inheritance in the state of Goa. It, inter alia, lays down that the office of the executor is gratuitous, unless remuneration is provided for by the testator, in the will[46].

5. Legatee under a will

Any person capable of holding property can be beneficiary under a will. It may be said that a legacy under a will is not a natural right, it is a creature of law. Any person can be legatee, including minor and lunatic[47]. A corporation, a Hindu deity and any other juristic person can take a bequest[48]. This entails that a limited liability

41. Section 308, Indian Succession Act 1925.
42. *Lakhimchand vs. Kuvarbai (1905) ILR 29 Bom 170.*
43. K Kannan, The Indian Succession Act (Paruck, 12th edn, Lexis Nexis 2019) p 1106.
44. Supra note 40.
45. Item 5, List III – Concurrent List, The Constitution of India.
46. Section 265, Goa Succession, Special Notaries and Inventory Proceeding Act, 2012.
47. Nabhi Kumar Jain, How to Make a Will – Law, Procedure and Enforcement with Tax Planning (6th edn, Nabhi Publications, 1999) 21
48. Nabhi Kumar Jain, How to Make a Will – Law, Procedure and Enforcement with Tax Planning (6th edn, Nabhi Publications, 1999) 21.

partnership, a general partnership or a private company can validly take a bequest.

As regards grant of administration[49], courts have held that no administration can be granted in favor of a society, although a society could be a beneficiary under will executed by testator[50]. In *Illachi Devi vs. Jain Society, Protection of Orphans India*[51], emphasis was laid on the fact that a will in favour of a society is not totally unenforceable in law. It was held that a probate or letter of administration with will annexed although may not be granted in favour of a society but may be granted in favour of a person authorized by a society either in terms of the statute or a resolution adopted in this behalf by the society, as the case may be, so that such person may be answerable to the court. Upon grant of letter of administration, the person so nominated by the society shall carry out the wishes of the testator for the benefit of society.

Section 325 of the Act provides that debts of every description must be paid before any legacy is taken or enjoyed. The section lays down the rule of distribution that no legatee is entitled to anything until all the debts left by the deceased are discharged. The executor of a will cannot lawfully distribute the assets of the testator to the legal heirs without first having paid the debts of the testator in full.

5.1. NRIs and non-citizens as legatees

Any person capable of holding property may be a devisee under a will. There is no bar on permitted legatees on account of their residency. Section 6(5) of Foreign Exchange Management Act 1999 (FEMA) provides that a person resident outside India may hold, own or transfer Indian currency, security or any immoveable property situated in India, if such currency, security or property was inherited from a person who was resident in India. Thus, specified properties in India received on inheritance from a person resident in India can be held by a person resident outside India. Inheritance is often treated as a carte blanche exception to ownership of Indian assets.

5.2. Repatriation of inherited assets by NRI and foreign national

A PIO means a citizen of any country other than Bangladesh or Pakistan or such other country as maybe specified by the Central Government if:

a. He at any time held Indian passport; or

b. He or either of his parents or any of his grandparents was a citizen of India; or

c. The person is a spouse of an Indian citizen or of a person referred in (a) or (b) above[52].

Under the Foreign Exchange Management (Deposit) Regulations 2016, NRIs and foreign nationals (under certain conditions) are permitted to hold Non-Resident Ordinary (NRO) accounts in India[53]. Authorised Dealers[54] (AD) may allow NRIs/PIOs (foreign national being PIO), on submission of documentary evidence, to remit up to USD 1 million, per financial year (out of balances in their NRO accounts) acquired in

49. Under Section 2(a), Indian Succession Act 1925, "administrator" means a person appointed by a competent authority to administer the estate if deceased person when there is no executor.
50. Mantha Ramamurti, Law of Wills vol 1 (9th edn, Law Publishers India Pvt Ltd 2013) 382.
51. 2004 (1) HIR 75 at pp 78,80,88 (SC).
52. Regulation 2(xii) of Foreign Exchange Management (Deposit) Regulations 2016.
53. Regulation 5 read with Schedule 3, FEM(Dep) Regulations 2016.
54. A person may be authorised as an authorised dealer under Section 10(1), Foreign Exchange Management Act 1999.

India by way of inheritance/legacy[55]. A person being non-resident widow/widower who has inherited assets from his/her deceased spouse who was an Indian national resident in India may also specifically be permitted to remit assets overseas[56]. The remittance, however, shall not exceed USD 1 million. The remittance shall be subject to payment of applicable taxes, if any, in India[57].

Therefore, an NRI or a PIO may remit through an AD an amount not exceeding USD 1 million per financial year as assets acquired by him by way of inheritance/legacy on production of documentary evidence in support of such inheritance or legacy of assets by the remitter. Such remittance must be made out of the NRO account of the concerned NRI/PIO[58]. Further, from a practical perspective, the NRI/PIO must ensure that:

i. such repatriation, if intended in more instalments than one shall be made through the same AD;

ii. at the time of making such remittance, an undertaking shall be submitted to the AD to the effect that "the said remittance is sought to be made out of the remitter's balances held in the account arising from his/her legitimate receivables in India and not by borrowing from any other person or a transfer from any other NRO account and if such is found to be the case, the account holder will render himself liable for penal action under FEMA".

Remittances within the said USD 1 million cap may be freely remitted to the offshore bank account of the foreign citizen/NRI/PIO. These remittances may also be:

i. In respect of assets acquired under a deed of settlement made by either of his/her parents or a relative as defined in Companies Act, 2013. The settlement should take effect on the death of the settler.

ii. In case settlement is done without retaining any life interest in the property i.e. during the lifetime of the owner/parent, it would tantamount to regular transfer by way of gift and the remittance of sale proceeds of such property would be guided by the extant instructions on remittance of balance in the NRO account

In order to make any remittance exceeding USD 1 million (where the monies are received under bequest/inheritance or legacy), to his foreign bank account the concerned foreign citizen resident outside India, NRI or PIO is mandated to make an application to the RBI seeking its special permission for the same[59].

A grant of probate of a foreign will, proved in a competent court, can be resealed in India. This shall suffice as evidence of the authenticity of the will following which Indian courts are authorised to grant an ancillary probate, i.e., 'reseal' the probate, and grant letters of administration in India. However, it is important to note that although Indian courts do recognise private international law and even actively facilitate its application to foreign citizens/religions, in the event of

55. Master Direction no. 13/2015/16 dated 1-Jan-2016, as amended up to 28-Apr-2016 issued by Foreign Exchange Department, Reserve Bank of India.
56. Regulation 4 (1), Foreign Exchange Management (Remittance of Assets) Regulations 2016.
57. Regulation 8, Foreign Exchange Management (Remittance of Assets) Regulations 2016.
58. Regulation 4(2), Foreign Exchange Management (Remittance of Assets) Regulations 2016.
59. Regulation 7, Foreign Exchange Management (Remittance of Assets) Regulation 2016.

conflict, Indian law with respect to immoveable properties in India, will prevail.

6. Testamentary trusts

In several testaments, the word "executor" and "trustee" may be used interchangeably. In such cases, the trustee is regarded as an executor and an executor is regarded as a trustee. Under Section 3 of the Indian Trusts Act 1882 (Trusts Act), a trustee is a person who accepts the confidence declared by the "author of the trust" and under Section 5, a trust of movable and immovable property can be made by the will of the author of the trust. Unlike direct bequests, creation of a trust by way of a will may defer enjoyment of the asset by the intended beneficiary. When a trust is proposed to be created by will, the testator usually appoints his executors to be the trustees of the trust or he appoints executors to administer his general estate and trustees to administer the trust estate. The distinction between an executor and a trustee is that an executor after once accepting the office of the executor cannot retire by appointing someone in his place without fully administering an estate, but a trustee can retire by appointing a new trustee under Section 71 of the Trusts Act. An executor is not bound under law to inform about the legacy bequeathed but it is the duty of the trustee to give information to the cestui que trust.

The Trusts Act applies to a trust created by a will. In case of such trusts, being testamentary trusts, the actual trust is executed by the executor to the will. Where a trust is created by will the instrument need not be registered[60], nor is it necessary to transfer the trust property to the trustee[61]. Section 6 lays down the essentials for creation of trust. It is provided that a trust is created when the author of the trust indicates with reasonable certainty by any words or acts:

a. An intention on his part to create a trust;

b. The purpose of the trust;

c. The beneficiary;

d. The trust-property; and

e. Transferring of the trust property to the trustee.

However, this last condition is not applicable to trusts declared by will.

Section 5 of the Trusts Act lays down that no trust in relation to immoveable property is valid unless declared by the will of the author of the trust or of the trustee, or declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered. This implies that a testamentary trust having immoveable property among other assets does not require registration.

60. Section 5 Indian Trusts Act 1882.
61. Section 6 Indian Trusts Act 1882.

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Learn everything that is good from others, but bring it in, and in your own way adsorb it; do not become others.

– Swami Vivekananda

Nomination under various laws and its effect

Kumarmanglam Vijay & Bharat Bhushan,
Advocates

Recent news reports suggest that over ₹ 32,000 crore is lying as unclaimed deposits with banks and insurance companies. Any account not operated for 10 years is termed as unclaimed account and the amount deposited therein is considered as unclaimed deposit. This implies that either depositors have lost track of the accounts that they opened or have passed away and their legal heirs are unaware of the accounts.

Banks are required to transfer the unclaimed deposits to Depositor Education and Awareness Fund (DEAF) and Insurance companies are required to deposit the unclaimed amounts to Senior Citizens' Welfare Fund (SCWF). Such amounts can be retrieved and repaid by the banks or insurance companies to the person or his legal heirs after following the due process that can be time consuming.

A simple step of nominating a person could have helped the family members of the depositors who are no more to access the funds left behind by the depositor.

Who is a Nominee?

In Black's Law Dictionary, 10th edition, a nominee is defined as under:

1. Someone who is proposed for an office, membership, award, or like title or status. An individual seeking nomination, election or appointment is a candidate. A candidate for an election becomes a nominee after being formally nominated.
2. A person designated to act in place of another, usu. in a very limited way.
3. A party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others.

Second and the third definition can be relied to understand the meaning of nominee in the context of a person intending to appoint someone to step in his absence. These definition makes it clear that the nominee is required to act in the place of the person nominating him and holds title to the assets in a fiduciary capacity.

Accordingly, a ***nominee*** is a person who is appointed by the owner of the assets to step in his shoes of the owner as a custodian of assets and is required to transfer the assets to the legal heirs after the owner's death. Nominee can hold the assets if there are disputes until the successor is decided. A minor (person under 18 years old) can also be appointed as a nominee. Her guardian is required to sign the relevant documents on behalf of the minor.

What is nomination?

Nomination is a process, whereby, a person authorises someone to receive the assets on his/her behalf, after death. It comes into operation,

after the death of the owner. The specified asset is transferred in the name of the nominee upon the death of the owner.

What are the benefits of appointing a nominee?

Nomination provides clarity to the financial institutions and any other person holding on to assets of the owner as to the person they should entrust the assets held by them.

It is important to appoint a nominee to act as a custodian of assets in the event of death of the person. Nominee can then distribute the assets to the legal heirs as per the valid will or applicable succession laws. In absence of a nominee, all the legal heirs will have to get the court to determine their rights and prove their legal status before the respective institutions to get their rightful dues. One can appoint a nominee by filling the relevant application forms and submitting them to the respective institutions or companies at any time after opening the account or purchasing an asset. Similarly, nominees can be changed by following due process any time until death of the owner.

How is nominee different from a legal heir?

A legal heir is a person who is entitled to inherit the estate of the deceased individual who is the owner of the estate. The legal heirs can be named by the owner in will or decided by application of relevant succession laws.

The question as to whether nominee becomes the beneficial owner of the asset after the death of the owner or is required to act merely as a trustee in a fiduciary capacity for the legal heirs determined as per the applicable succession law has been a contentious one.

This issue has been contested before the courts over a period of time and barring a few exceptions courts have held that it is the responsibility of the nominee, to hand over the asset or the claim amount to the legal heirs. The Supreme Court, in the case of *Sarbati Devi and Others vs. Usha Devi*[1] held that the nominee is a trustee of the property and is liable to hand it over to the legal heirs. This applies to deposits in bank accounts, as well.

A contrary view in the context of shares was taken by High Court of Bombay, in the matter of, *Harsha Nitin Kokate vs. The Saraswat Co-operative Bank Limited and Others*[2], wherein the Court held that, *"nominee is entitled to all the rights in the shares to the exclusion of all other persons provided the prescribed procedure for nomination of shares is followed."*

The court relied on the provisions of the Companies Act, 1956 to hold that as the relevant section contains the non-obstante clause "Notwithstanding any other provisions in law" and also vests the asset in the nominee, the nominee takes the asset to the exclusion of the other heirs and becomes the owner of the asset.

Subsequently, in March 2015, while deciding case of *Jayanand Jayant Salgaonkar and Others vs. Jayashree Jayant Salgaonkar and Others*[3] the Division Bench of Bombay High Court held that judgement in Kokate's case was per incuriam (i.e. bad in law) as the same did not consider all the Supreme Court and High Court Judgments on the issue and nominee in effect serves as a trustee. Relevant extract of the order of the Division Bench is as under:

"39 ..... The Kokate view generates the very inconsistencies and conflicts that Sarbati Devi and, later, Khanchandani, Shipra Sengupta and the decisions of this Court (Nozer Gustad Commissariat and Antonio Joao Fernandes) were careful to avoid. Take for instance the example I referred to earlier, of a will being made

1. AIR 1984 SC 346
2. 2010(112) Bom. LR 2014
3. AIR 2015 Bom 296

after a nomination. In the ordinary law of succession, if the nomination is indeed a testamentary instrument, it would be displaced by a later will. Yet, in the formulation that Mr. Pai and Mr. Ghatalia commend, the nomination stands apart and is unaffected by any later will though they call the nomination a 'statutory' will.

Further, testamentary dispositive capacities are not all identical. There are, for instance, restrictions in Mohammedan law on how much can be disposed by will. The so-called 'statutory' testament would oust this personal law entirely, even though there is nothing in either of the corporate statutes to indicate that this was ever the legislative intent. Moreover, nominations when viewed as Kokate would have it, create insoluble problems: no such 'statutory testament' can be displaced on the one ground that can always be invoked in a challenge to a will, viz., that it is 'unnatural' and gives to an outsider to the exclusion of heirs, or prefers one heir over all others.

40. There are additional problems too. The 'statutory testament' is not subject to the rigour of the Succession Act. It does require witnesses, but not the discipline mandated by Section 63 of the Indian Succession Act. A nomination, though said to be a 'testament', requires no probate or other proof 'in solemn form'. Yet it is said to be a will. Witnesses need not be in the presence of the nominator. Yet it is said to be a will. Witnesses need not act at the instance of the nominator. Yet it is said to be a will. Witnesses need not see the nominator execute the nomination. Yet it is said to be a will. No nomination can be assailed on the ground of importunity, fraud, coercion or undue influence; Section 61 of the Indian Succession Act is wholly defenestrated, as is Section 59. Yet it is said to be a will. There can be no codicil to a nomination. Yet it is said to be a will. In short, a nomination, in the Kokate formulation, is some sort of 'super-will', one that partakes of none of the defining traits of a properly executed will and none of the tests of its validity, one that is never displaced by a later, properly made will that deals with the very same property.

Mr. Pai asks that we should place ourselves in the 'armchair of the nominator'. That, as it happens, is the same furniture used by a testator, and it simply cannot be that the view from that seat depends on the nature of the document before the executant. There is no particular form for a will, but there are requirements attendant to its proper making. These do not apply to all nominations: even the requirement of witnesses is a matter of prudence rather than statute. If that be so, no nomination per se requires attestation, and if that be so, it is admissible in evidence under Section 68 of the Evidence Act, 1872 without the evidence of any witness (simply because a witness to a nomination is not, in any sense, an 'attesting witness'). But no will can be so read in evidence without such evidence. From the fundamental definitions to the decisions cited, it is clear that a nomination only provides the company or the depository a quittance. The nominee continues to hold the securities in trust and as a fiduciary for the claimants under the succession law. Nominations under Sections 109A and 109B of the Companies Act and Bye-Law 9.11 of the Depositories Act, 1996 cannot and do not displace the law of succession, nor do they open a third line of succession. This is the consistent view of the Supreme Court in Khanchandai, Shipra Sengupta and of our Court in Nozer Gustad Commissariat and Antonio Joao Fernandes, all decisions that preceded Kokate; and the submission made in paragraph 9 of Kokate was correctly placed and was in line with those decisions. Those decisions were all binding on the Kokate Court. They were neither noticed nor considered. The Kokate Court could not have taken a view contrary to those decisions. Kokate is, therefore, per incuriam.

The Bombay High Court therefore held that notwithstanding the nomination and the supporting language under Companies Act 1956 , succession laws should prevail with regards to the real ownership of the assets held by the nominee who ought to act as a trustee. It recognised that nomination serves the purpose of providing a name or a person to deal with and in fact it helps the organisation (i.e. Bank, Insurance Company, etc.) so that they don't have to deal with diverse set of legal heirs of the deceased while discharging their obligations.

Nomination issues in the context of various investments and assets

Land

Typically, the concept of nominee is not relevant in case of a land. Land is generally inherited by way of succession, where special laws exist, based on religious affinity and bequests by way of testamentary document which may be Will or any other document executed by the owner of land.

Accordingly, succession rights are determined based on the personal law applicable to the deceased. The said laws will only be applicable, provided there are no testamentary document that have been executed by the owner of the land.

Under the Hindu Law, on demise of the owner of the land, without execution of any testamentary document, the property of deceased will be inherited as per Chapter 2 of Hindu Succession Act, 1956 (**"HSA"**).

As per Schedule of HSA, on intestate demise of the owner the land, the ownership will be inherited by Class I heirs as provided under the Schedule. In absence of Class I legal heirs of the deceased, the immovable property will be devolved to the Class II heirs. The order of succession in case of intestate demise for male and female is governed under Section 8 and Section 15 of HSA, respectively.

Jointly owned property and beneficial owner

Jointly owned property will be inherited either by way of succession where special laws exist based on religious affinity and bequests or by way of testamentary document which may be Will or any other document executed by the co-owner of land. In such a scenario, only the interest of the co-owner (i.e., deceased) in the land will be transferred in favour of his/her legal heir(s) who will be entitled to enjoy the benefits related to the same.

It may be noted, that all the beneficial owners are not owner of the land. For instance, father by way of Will, bequeaths all his assets to his son, subject to a condition that it will be transferred in his favour after the demise of his wife. Therefore, wife will be the beneficial owner of the land, till she is alive and the ownership of the same shall vest upon the son, after demise of her mother.

Further, in the matter of *Shipra Sengupta vs. Mridul Sengupta and Other*[4], the Supreme Court of India has held, "nomination does not confer any beneficial interest on the nominee. In the instant case amounts so received are to be distributed according to the Hindu Succession Act, 1956."

Co-operative Society

As per the seventh schedule of Constitution of India[5], a Co-operative society is a State subject, therefore, every State is empowered to enact its own legislations, rules and regulations governing the Co-operative Society.

Generally, a share certificate is issued by the co-operative society to every allotee who owns a flat or commercial unit in a society. This share certificate is a document evidencing ownership of the premises by the member in a society. Further, every member of the society has a right to nominate a person, who shall act upon his/her behalf after the demise of the member, to whom the share certificate was issued.

Misconception has been prevalent that upon death of the owner, once the share certificate is transferred by the Co-operative Society in nominee's name, the ownership of the property is vested with the nominee and he has the absolute right to transfer the property to the third party, as it may deem fit. Section 30 of the Maharashtra Cooperatives Societies Act 1961 deals with process

4. (2010) ILLJ 857 SC.
5. Entry 32 of State List.

of transfer of membership interest on death of the member. The society is legally allowed to transfer the property in the name of the nominee, in case the owner has submitted the nomination form to the society, in respect of that property. In case of *Ramdas Shivram Sattur*[6] the Bombay High Court ruled that the Section 30 of the Maharashtra Cooperative Societies Act, 1960 does not provide for a special rule of succession altering the rule of succession laid down under the personal law. Therefore a nominee, despite being registered as the owner of the property in the records of the housing society, represents the legal heirs.

The Supreme Court of India in a recent judgment of *Indrani Wahi vs. Registrar of Co-operative Societies and Others*[7], considered the provisions of nomination under the West Bengal Co-operative Societies Act, 1983, wherein, the co-operative society is required to transfer the shares and interest of such member in the name of the nominee. The conclusion drawn by the Supreme Court, was that a co-operative society under the West Bengal Cooperative Societies Act, 1983, was bound by the nomination made by the member. Therefore, in case of a nomination, the society has no option but to transfer the shares in the name of the nominee, after the death of the member. However, at no point had Court decided that the rights of the nominees will prevail over that of the successors. In the aforementioned case, the Supreme Court had observed that it would be open for other members of the family of the deceased, to pursue their case of succession or inheritance.

The Supreme Court in the concluding paragraph of its judgment held as under:

> *"In so far the present controversy is concerned, we therefore hereby direct the 'the Cooperative society' to transfer the share and interest of the Society in favour of the Appellants – Indrani Wahi. It shall be open to the other members of the family (presently only the son of Biswa Ranjan Sengupta – Drubha Jyoti Sengupta; we are informed that his mother Parul Sengupta has died), to pursue his case of succession or inheritance, if he is so advised, in consonance with Law."*

Thus, even the Apex Court, despite directing the Society to transfer the shares or interest to the Nominee (Indrani Wahi in this case), left it specifically open to other members of the family to pursue their case of inheritance in accordance with law thereby making it clear that it has neither scripted nor suggested an alternate route to succession. Accordingly, it appears that legal heirs are entitled to claim the title to the shares in the society on the basis of inheritance and transfer of shares in a co-operative housing society in the name of nominee is a temporary arrangement until succession issues are resolved.

Condominium

Condominium is a group of housing units where owner of each home owns individual unit space and ownership of common areas is shared by all. Every unit is called "apartment" and owners the apartment owner(s). In the State of Maharashtra, condominium is formed under Maharashtra Apartment Ownership Act, 1970. Accordingly, in the other States, similar provisions are made for condominium under similar statues.

As opposed to the concept of nominee in the Co-operative Society, no such facility is available in a Condominium and an apartment can be transferred to a person whom the apartment owner bequeaths or to his legal heir(s).

Companies Act 2013 and various laws dealing with securities, insurance and savings instruments

Various Acts that deal with shares, bank deposits, mutual funds, saving instruments, and insurance

6. 2009 (111) BOM LR 1578
7. AIR 2016 SC 1969

provide for rules governing nomination by the person who owns such assets or is required to entrust his assets to the institution governed by such Acts. However, rules governing nomination under the different laws vary. For example, Section 72(3) of Companies Act 2013 (which is pari-materia Section 109A of the erstwhile Companies Act 1956) reads as under:

(3) Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of the securities of a company, where a nomination made in the prescribed manner purports to confer on any person the right to vest the securities of the company, the nominee shall, on the death of the holder of securities or, as the case may be, on the death of the joint holders, become entitled to all the rights in the securities, of the holder or, as the case may be, of all the joint holders, in relation to such securities, to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.

Owing to non-obstante clause overriding the testamentary laws in force, a plain reading of the above provision gives an impression that a nominee is entitled to rights in the shares of the company in exclusion to all others. Similar provisions are contained in Banking Regulation Act, 1949[8], Government Saving Banks Act, 1873[9], Depositories Act, 1996[10], Securities Exchange Board of India (Mutual Fund) Regulations 1996[11] as well.

Bombay High Court had an occasion to examine the overriding nature of such provisions in case of *Shakti Yezdani and Others vs. Jayanand Jayant Salgaonkar and Others*[12]. It held that succession laws should apply notwithstanding the non-obstante clauses in respective laws that seems to regard nominee as the owner of the assets. Relevant extracts of the said judgement are reproduced below.

"…The object of the provisions of the Companies Act is not to either provide a mode of succession or to deal with succession. The object of the Section 109A is to ensure that the deceased shareholder is represented by someone as the value of the shares is subject to market forces. Various advantages keep on accruing to shareholders. For example, allotment of Bonus shares. There are general meetings held of the Companies in which a shareholder is required to be represented. The provision is enacted to ensure that the commerce does not suffer due to delay on the part of the legal heirs in establishing their rights of succession and claiming the shares of a Company.

35. Considering the consistent view taken by the Apex Court while interpreting the provisions relating to nominations under various Statutes (including the view in the recent decision in the case of Indrani Wahi), there is no reason to make a departure from the consistent view. The provisions of the Companies Act including Sections 109A and 109B, in the light of the object of the said Enactment, do not warrant any such departure. The so-called vesting under Section 109A does not create a third mode of succession. It is not intended to create a third mode of succession. The Companies Act has nothing to do with the law of succession. We have gone through every decision and material relied upon by the Appellants to which we have not made a specific reference in this Judgment. We hold that there was no reason to take a view which is contrary to the view taken in the long line of the decisions of the Apex Court on interpretation of provisions regarding nominations. Hence, the view taken in Kokate's case is not correct. We answer the first question in the negative and the third question in the affirmative. The second question is answered accordingly."

8. Section 45ZA(2)
9. Section 4
10. Section 26 of Depository Act read with Bye Law 9.11.7
11. Regulation 29A
12. 2010 (112) Bom LR 2014

From the reading of the above, it appears that though the aforesaid legislations contain the specific language with non-obstante clause overriding the testamentary succession, the Courts are of the view that the above laws cannot override the succession laws and entitlement to inheritance (whether testamentary or intestate) should only be governed only by respective succession laws.

It is also worth noting that years before the law was settled by Bombay High Court, the Reserve Bank of India (RBI) vide its communication addressed to Scheduled Banks[13] dated June 9, 2005 has instructed that banks should clarify to the nominee that nominee is entitled to receive the balance from the deceased's account, as a trustee of the legal heirs of the deceased and that such payment by the bank shall not affect the right or claim of any person against the nominee.

Life insurance

In 2015, Section 39 of Insurance Act 1938 was amended to introduce the concept of a "beneficial nominee". Sub-section 7 of the Section 39 provides that if a policy holder names his parents, or spouse, or his children, or his spouse and children, or any of them, as the nominee, such person(s) shall not act as a mere caretaker or trustee but shall in fact be treated as the ultimate beneficiary of the monies payable by the insurer, to the exclusion of other legal heirs.

It is submitted that in spite of the amendment in the Insurance Act 1938 rationale on the basis of which provisions of various laws have been overruled and considered as not amounting to statutory testament still remain i.e. peculiarities of various succession laws cannot be set-aside by nomination even where such nomination is made in favour of parents, spouse or children. As such, Hindu Succession Act 1956 regards father of the deceased as a Class 2 heir and a nomination in his favour cannot operate to dilute the rights of the Class 1 heir.

Conclusion

On a holistic interpretation of judicial precedents rendered over the years, it can be reasonably argued that the position of law on the rights of nominee vis a vis the legal heirs seems settled now. While it is the nominee of the property of the deceased is entitled to actually receive and hold such property upon death of the owner, his capacity is that of a trustee and he ought to cede the ownership over the property in favour of legal heir who is the ultimate, rightful owner of the property of a deceased individual (either through intestate or testamentary succession). Nomination therefore only ensures that the relevant organisation has an identified person to deal with on the demise of the individual and until the matter of succession or inheritance is decided.

The ownership of a property lies with legal heirs of the deceased. Therefore, to pass on the property to a desired person executing a valid Will that specifies the exact intention of the testator with respect to the succession of her properties seems to be a pragmatic choice.

13. RBI/2004-05/490 DBOD.No.Leg. BC.95 /09.07.005/2004-05

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That man has reached immortality who is disturbed by nothing material.

– Swami Vivekananda

Death and Income Tax

CA Paras K Savla

1.0 Background

1.1 Benjamin Franklin said that "... The only things certain in life are death and taxes...". The above lines by Benjamin Franklin reflect the sacrosanct universal truth that we all have to live with. Section 139 of the Income-tax Act 1961 (the Act) casts a duty on every person to file a return of income (ROI). It states that every person (other than company, firm or category of person as expressly provided), is required to ROI if the income of such person exceeds the maximum amount not chargeable to tax. Section 139 provides no exception for filing of ROI, in case of a deceased person. Unlike as said by Benjamin Franklin, tax law doesn't stop when life stops. It applies even after death.

1.2 Death of the person would give rise to technical and procedural issues in case of the following situation:

i. Income earned by the deceased till the date of his death and received by him;

ii. Income of the deceased received upon his death received by legal heirs, executors or administrators;

iii. Upon death, income earned by the heirs or legatees in specie or in specified share from the assets transmitted by virtue of testate (where a valid will was made) or intestate (where no will made) succession.

iv. Upon death, the estate vests in the executors or administrators for the purpose of administration and pending such administration, the executors or administrators are in receipt of an income of the estate.

1.3 Chapter XV provides for liability in special cases. A various situation specified in para 1.2 supra would be covered by the provisions of –

- Section 159,
- Section 168 &
- 176(3A)/(4)

There is no provision in the Act obligating the legal representatives of the deceased assessee to voluntarily inform the tax authorities about the death of an assessee[1] or take steps to cancel PAN[2]. In this write-up, we shall attempt to answer the few key issues arise with respect to the assessment, filing of return of a deceased assessee from the above-specified situations.

1. *ITO vs. Inder Singh & Joginder Singh [IT Appeal No, 608 (Asr.) of 2014]*
2. *Alamelu Veerappan vs. ITO [2018] 95 taxmann.com 155 (Mad)*

2.0 Section 159 Legal Representative

2.1 This section provides that where a person dies his legal representative shall be liable to pay any sum which the deceased would have been liable to pay if he had not died, in the like manner and to the same extent as the deceased. This section further provides that any proceeding which could have been taken against the deceased if he had survived, may be taken against the legal representative and all the provisions of the Act shall apply accordingly. The legal representative of the deceased shall, for the purposes of the Act, be deemed to be an assessee. Section 159 creates legal fiction and provides for machinery provision for assessment or giving of refunds in respect of the income of deceased persons[3]. Provisions of section 159 are complete code in itself. The legal representatives of the deceased assessee will be treated as deemed assessees[4] and will be personally liable in respect of any taxes payable in the same manner and to the same extent as the deceased assessee would have been had he not died. The proceedings under Section 159 of the Act can be invoked only if the proceedings have already been initiated when the assessee was alive and was permitted for the proceedings to be continued as against the legal heirs. Deeming fiction which creates liability of legal representative under section 159(3) will be available to revenue if it issues a notice to the legal heir and not otherwise.

2.2 Act confers power on the revenue to make the assessment and determine the tax payable by the deceased on the basis of the assessment and for that purpose to issue appropriate notice which would have had to be served upon the deceased had he survived and in that behalf to require from the legal representative of the deceased person any accounts, documents or other evidence which he might under the provisions of law require from the deceased person[5]. The words "his legal representative shall be liable to pay" occurring in the section are not words creating a charge or an additional liability, but it merely indicates the person or persons by whom the tax payable by a deceased person is to be paid.

2.3 The legal representative for the purposes of this section cannot be construed to mean only the legal heirs of the deceased. Legal representatives have a much wider connotation and will also include the executor and administrator of the estate. An executor is undoubtedly a legal representative. The expression "legal representative" in the Act takes in the plurality of legal representatives. If a person dies executing a will appointing more than one executor or dies intestate leaving behind him more than one heir, the Income-tax Officer shall proceed to assess the total income of the deceased against all the executors or the legal representatives, as the case may be. If all the executors or some of them administered the estate of a deceased without obtaining the probate, all of them or some of them who have administered the estate may be held to be the legal representatives of the deceased and liable to the extent of the property taken possession of by them[6]. The definition of a legal representative under section 2(11) of the Code of Civil Procedure also runs on the same lines: it means a person who in law represents the estate of a deceased person, and

3. *Arvind Bhogilal vs. CIT [1976] 105 ITR 764 (Bom.)*
4. *Rudra Gouda vs. ACIT [2018] 93 taxmann.com 333 (Kar.)*
5. *Estate of Late Rangalal Jajodia vs. CIT [1971] 79 ITR 505 (SC)*
6. *First Addl. ITO vs. Mrs. Suseela Sadanandan [1965] 57 ITR 168 (SC)*

includes any person who intermeddles with the estate of the deceased. It has been held that one who intermeddles with the estate of a deceased person, even though it may be only with a part thereof, is a legal representative within the meaning of section 2(11) of the Code of Civil Procedure and is liable to the extent of the property taken possession of by him.

2.4 The liability of the legal representatives under this section is restricted to the previous year in which the demise has taken place[7]. Further, the liability under this section is only restricted up to the date of demise and only in respect of the income that has accrued to the deceased assessee up to the date of death[8]. The tax liability under this section in respect of which the legal representatives are liable is restricted not only to self-assessment tax but also includes liability towards advance tax and interest. A legal representative who submits ROI of the deceased person is also liable for a penalty in cases falling u/s 271(1)(c)[9]. It is specifically provided that liability of a legal representative under this section shall be limited to the estate is capable of meeting liability and is not a personal liability[10]. However, in certain circumstances, it shall be a personal liability of the legal representative where, legal representative pending tax liability, disposes of or parts with any assets of the estate of the deceased. The liability is restricted to the value of assets parted or disposed of. Upon the death of the assessee, prosecution proceeding initiated against him will abate. The prosecution could not be launched against the legal representative for the offence committed by the deceased. If the legal representative, after he had inherited the assets of the deceased, had converted the asset into a different form, the department will be entitled to proceed against the substituted asset in the same way as it could have had against the original asset of the deceased[11]. The Assessing Officer has no right in adjusting the refund amount payable to the legal representative (son) against the outstanding dues of his late father by relying on section 159(4) of the Act. The refund which has become payable to him is out of his personal case having no connection or/and nexus with that of the case of his late father[12]. If the deceased has not left any asset, the liability of the legal representative has to be "nil". It makes the legal representative liable to pay to the extent to which the estate is capable of meeting the tax assessed on the deceased[13].

2.5 For the purposes of the assessment of the income of deceased notice is required to be issued in the name of the legal representative. Notice issued in the name of the dead person is not enforceable in law[14]. On the face of the notice, it should specifically state that notice is issued in the capacity of the legal representative of deceased person and assessment is proposed to be made in respect of the income of the deceased[15]. An omission to serve or any defect in the service of notices provided by procedural provisions does not efface or erase the liability to pay tax where such liability is created by distinct

7. *CIT vs. Hukumchand Mohanlal [1971] 82 ITR 624 (SC)*
8. *Raghunathdas Kakani vs. ACIT [1979] 2 Taxman 584 (MP)*
9. *Sukumar Mukherjee vs. CIT [1958] 33 ITR 231 (Cal); Maddula Appa Rao vs. ITO [1959] 36 ITR 140 (AP)*
10. *UOI vs. Sarojini Rajah [1974] 97 ITR 37 (Mad)*
11. *M. Abdul Khalick & Co. vs. ITO [1975] 101 ITR 43 (Mad.)*
12. *Hasmukhlal vs. ITO [2001] 251 ITR 511 (MP)*
13. *UOI vs. Mrs. Sarojini Rajah [1974] 97 ITR 37 (Mad.)*
14. *Alamelu Veerappan vs. ITO [2018] 95 taxmann.com 155 (Mad.)*
15. *CIT vs. Sumantbhai C. Munshaw [1981] 128 ITR 142*

substantive provisions [charging sections]. Any such omission or defect may render the order made irregular - depending upon the nature of the provision not complied with - but certainly not void or illegal[16]. An error or omission in taking one or more of the various procedural steps prescribed under the section 159 or even a breach of the statutory injunction contained therein does not necessarily affect the inherent jurisdiction of the taxing authority and that, in certain cases subject to other just exception open under law, the resultant defective assessment can be substituted by a fresh assessment undertaken pursuant to a finding or direction of a higher authority without any inhibition of time limit and that, in others the assessment would still be valid and effective, notwithstanding the defect, depending upon the conduct of the parties other relevant circumstances[17].

Further in respect of the assessment made on the legal representative, the name of such legal representative must be specified on the assessment order. It will not suffice to describe him as successor-in-estate[18]. Post completion of assessment on the deceased or legal representative, reassessment can be initiated against a legal representative. Further notice of assessment or reassessment on the deceased person can be continued once notice was issued during his lifetime. However, a continuation of such proceeding is possible only after bringing all the legal representatives on record by the issue of notice to them. Otherwise, such assessment can be set aside but not annulled. Under Order 22, rule 6 of the Code of Civil Procedure, if death occurs between the conclusion of hearing and pronouncement of judgment, judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place. Principle underlying rule 6 is founded on public policy, for, time taken by an authority or Court for doing a thing which is incumbent on it shall not cause prejudice to the parties. Accordingly, the assessment order made without notice to the legal representative is not null and void where the death of the assessee occurs between the conclusion of the hearing and making of the assessment order[19].

2.5 The issue of a notice under Section 148 of the Act is a foundation for reopening of assessment. The sine *qua* non for acquiring jurisdiction to reopen an assessment is that such notice should be issued in the name of the correct person. This requirement of issuing a notice to a correct person and not to a dead person is not merely a procedural requirement but is a condition precedent to the impugned notice being valid in law. Thus, a notice which has been issued in the name of the dead person is also not protected either by provisions of Section 292B or 292BB of the Act. This is so as the requirement of issuing a notice in the name of the correct person is the foundational requirement to acquire jurisdiction to reopen the assessment. This is evident from Section 148 of the Act, which requires that before a proceeding can be taken up for reassessment, a notice must be served upon the assessee. The assessee on whom the notice must be sent must be a living person i.e legal heir of the deceased assessee, for the same to be responded. This, in fact, is the intent and purpose of the Act. Therefore, Section 292B of the Act cannot be invoked to correct a foundational/substantial error as

16. *CIT vs. Jai Prakash Singh [1996] 219 ITR 737 (SC)*
17. *CIT vs. Sumantbhai C. Munshaw (decd.) [1981] 128 ITR 142 (Guj)*
18. *Shasrangshu Kanta Acharya c Collector Malda [1963] 47 ITR 754 (Cal.)*
19. *Md. Zafrulla, Legal Representative of Md. Rafiulla vs. CIT [1994] 72 Taxman 231 (Gau.)*

it is meant so as to meet the jurisdictional requirement[20]. However in view of the provisions of section 159(2)(b) of the Act, it is permissible for the Assessing Officer to issue a fresh notice under section 148 of the Act against the legal representative, provided that the same is not barred by limitation; he, however, cannot continue the proceedings on the basis of an invalid notice issued under section 148 of the Act to the dead assessee[21].

3.0 Section 168 Executors

3.1 This section comes into effect from the date of death and continues to remain in effect in respect of every year or part thereof from the date of death up to the date of complete distribution of the estate. The section makes obligatory that the estate of a deceased person is charged to tax in the hands of an executor. The provision in section 168(1) does not leave any discretion to the income-tax authorities in respect of assessing the income of the estate of a deceased person to tax. Such income is to be taxed in the hands of the executor only[22]. In short, Section 168 of the Act deals with the income of the estate of a deceased person and it provides that the said income shall be chargeable to tax, in the hands of the executor, and further by sub-section (3) it provides that separate assessments shall be made under this section on the total income of each completed previous year or part thereof as is included in the period from the date of death to the date of complete distribution to the beneficiaries of the estate according to their several interests.

The language of the provisions of section 168 of the Act and section 159 of the Act are clear and unambiguous. Section 159 and section 168 of the Act operate in different fields. Section 159 of the Act is concerned with the income of the deceased while section 168 of the Act is attracted only in certain circumstances in regard to the income of the estate of the deceased[23].

3.2 Section 168 provided that the income of the estate of a deceased person shall be chargeable to tax in the hands of the executor, if there is only one executor, then, as if the executor were an individual and if there are more than one executors then, as if the executors were an association of persons. It further provides that residential status of the executor shall be derived from the residential status of the deceased person during the previous year in which his death took place.

3.3 The 'estate' referred to in section 168 is an estate succession to which is governed by a will executed by the deceased and is not the estate of a person who dies intestate. The applicability of this section arises only in the event where the deceased assessee has passed away testate[24]. In other words Section, 168 is inapplicable to income from the estates of persons who have died intestate. The estate of the deceased situated within and outside the country is to be treated as one and indivisible for the purposes of the levy of tax under section 168, irrespective of the fact that there are separate sets of executors appointed under two different wills in respect of the property situate within and without the country[25].

3.4 The word "executor" is not to be understood in the restricted sense of the term because by the Explanation it

20. *Sumit Balkrishna Gupta vs. ACIT [2019] 103 taxmann.com 188 (Bom)*
21. *Chandreshbhai jayantibhai Patel vs. ITO [2019] 101 taxmann.com 362 (Guj)*
22. *CIT vs. Usha D Shah [1981] 127 ITR 850 (Bom)*
23. *Raghunathdas Kakani vs. ACIT [1979] 2 Taxman 584 (MP)*
24. *CIT/CWT vs. P. Manonmani [2000] 245 ITR 48 (Mad.) (FB)*
25. *Maharani Vijaykunverba Saheb vs. CIT [1982] 8 Taxman 60 (Guj.)*

has been given an extended meaning to include an administrator or other person administering the estate of a deceased person. A person who is actually administering the estate of a deceased person, therefore, would for the purposes of section 168 be an executor in whose hands the income of the estate of the deceased person must be charged to tax. The extended definition is intended to include a person who is in de facto management of the property of the deceased person. The assessment of an executor under this section shall be made separately from any assessment that may be made on him in respect of his own income.

3.5 Separate assessments shall be made under this section on the total income of each completed previous year or part thereof as is included in the period from the date of the death to the date of complete distribution to the beneficiaries of the estate according to their several interests. In computing the total income of any previous year under this section, any income of the estate of that previous year distributed to, or applied to the benefit of, any specific legatee of the estate during that previous year shall be excluded. But the income so excluded shall be included in the total income of the previous year of such specific legatee.

3.6 Executor is responsible for filing of ROI and payment of taxes under the Act. Only for statistical purposes that the executors of the estate of the deceased are assessed as AOP otherwise, as already stated, for the purpose of rates, etc., the assessment has to be deemed to be on the assessee or the actual beneficiaries. In other words, Assessment made on the executor is a continuation of assessments on the deceased. The executors are entitled to claim the set-off of loss incurred by the deceased against their income from the estate of the deceased notwithstanding their status as AOP as against the deceased's status as an individual[26].

4.0 Section 176(3A)/(4)

4.1 In case of a person carrying on a profession is discontinued due to his death, any sum received after the discontinuance would be taxed as the income of the recipient and charged to tax accordingly in the year of receipt. Similarly, the income of the discontinued business would also be taxed in the hands of recipient in the year of receipt. This sub-section, thus, creates a legal fiction. It is intended to resolve all doubts in regard to taxability of such income on account of discontinuance of business in the year of receipt. Or to put it differently, it makes an exception to the general rule that in order to hold the receipts chargeable to tax, in the year of its receipt, the business must be in existence in that year[27].

4.2 The statutory provision in sub-section (3A) is clear that the income so received should be charged to tax accordingly in the year of receipt. The words 'charged to tax accordingly', is indicative of the head of income under which the receipt is to be charged to tax. In other words, the income should be deemed to be income falling under the head 'Profits and gains of business or profession', i.e., head 'D' coming under section 14 of the Act. When it is specifically provided that the sum received after the discontinuance of the business should be deemed to be the income of the recipient and charged to tax accordingly, it can only mean that the said amount received should be treated as income from business and should be taxed accordingly. This is made more clear

26. *CIT vs. G B J Seth [1981] 6 Taxman 318 (MP)*
27. *CIT vs. Star Andheri Estate [1994] 75 Taxman 340 (Bom.)*

by the latter half of sub-section (3A). The latter half of sub-section (3A) states that the sum received should be charged to tax if such sum would have been included in the total income of the person who carried on the business had such sum been received before such discontinuance. It means that the said income shall be charged to tax in the year of receipt, if such sum would have been included in the total income of the person had it been received before such discontinuance. 'Total income' has been defined in section 2(45) of the Act as 'means the total amount of income referred to in section 5 computed in the manner laid down in the Act'. So, as per the fiction incorporated in sub-section (3A), the sum received after the discontinuance of business shall be deemed to be the income and charged to tax accordingly if it would have been included in the total income of the person during the year of receipt. This means that the entire receipt is not to be taken as income of the recipient as exigible to tax. Only that portion of the receipt which would have been included in the total income of the person during the accounting year as computed in the manner laid down in the Act alone can be charged to tax[28].

5.0 Search, appeals

5.1 No search warrant u/s 132 can be issued in the name of the dead person and if issued, such warrant shall be invalid and void ab initio. Further, no assessment can be made on the basis of such an invalid search warrant[29]. Further search warrant along with alive persons also includes the name of the dead person may not be invalid. Similarly, when no assessment can be carried upon a non-exiting person, the launching of prosecution also may not arise.

5.2 Any person can file an appeal in accordance with the provisions of the Act. Post filing appeal if assessee dies, his legal representative may continue with the appeal. In case CIT(A) passes an order in the name of a dead person, then matter requires re-adjudication by the CIT(A)[30]. However, no appeal can be filed against the name of the deceased assessee. In case revenue files appeal in the name of the deceased person, such appeal is null[31]. However, the name of the deceased person needs to be substituted with the name/(s) of legal representative. Similarly, if Tribunal under ignorance, disposes of appeal in the name of the deceased person, fresh hearing is required to do by Tribunal post substituting deceased assessee with legal heirs[32].

6.0 Intestate demise

The issue may now arise how tax liability is determined in case the intestate demise of the assessee. In case of intestate demise unlike section 168(3) & (4) no specific protection is available to legal heirs i.e. as to taxability in the hands of legal heirs only on the distribution of income and not otherwise. In case of intestate demise, the property would get devolved on the legal heir immediately on death. Hence each legal heir would be assessable on the income from his share of the property from the date of death. However such intestate death would give rise to various legal and practical complications for filing of ROI.

28. *United Construction Contractors vs. CIT [1994] 208 ITR 914 (Ker)*
29. *CIT vs. Rakesh Kumar, Mukesh Kumar [2009] 313 ITR 305 (Punj. & Har.)*
30. *Ramesh M. Mehta vs. Asstt. CIT [2014] 41 taxmann.com 76 (Mad.)*
31. *CIT vs. Smt. Santosh Rani [1996] 88 Taxman 209 (MP)*
32. *Deepak Chhabra vs. ITO [2006] 154 Taxman 215 (Del.)*

Above legal provisions can be summarised as under:

Sr. No.	*Particulars*	*Tax treatment*
1	Income arising to and received by the deceased during his lifetime	Would be assessed in the hands of the legal representative u/s 159
2	Income arising to and received by the legal representative form the date of death	i) In the case where estate needs to be administered – would be taxed in the hands' estate u/s 168 ii) In case of where assets are directly inherited – would be taxed on their hands
3	Income has arisen in the hands of deceased but received after his death by the legal representative	It would be assessed in the hands of legal representative u/s 159 along with the other income of the deceased which is received before the end of the accounting year in which he died.
4	In the case of a person carrying on business/profession is discontinued due to his death	Any sum received after the discontinuance would be taxed as the income of the recipient, in the year of receipt u/s 176(3A)/(4)

7.0 Period of filing of return of income

7.1 In case of demise of the assessee, two ROI is required to be filed in the year of demise. The period & scope of filing of ROI is as under:

Sr. No.	*Onus of tax payment & filing of ITR*	*Scope of income*	*ITR*
1	Legal Representatives	Income arising between April 1 XXXX and up to the date of demise	Depending upon nature of income
2	Testate Demise - Executor(s)of the estate; Intestate Demise - Legal heirs	Income accruing to the deceased between from date of demise and March 31 XXXX	ITR – 2/3/4/5 depending upon status and nature of income. All ITR except ITR 1 has been enabled to be filed by the representative assessee. In ITR 5 required the details of the members. However, in case of return is filed by the Executor of AJP details of Executor is required to be provided and not that of members.

7.2 When the return of income is filed by a representative assessee, the following information is required to be provided

- Name of the representative assessee
- Address of the representative assessee
- PAN of representative assessee
- Status of the representative assessee. It has to be chosen from the drop-down list – "Legal Heir/Manager/guardian/ others". In most cases, it would be the legal heir.

Section 168 provided that the income of the estate of a deceased person shall be chargeable to tax in the hands of the executor, if there is only one executor, then, as if the executor were an individual and if there are more than one executors then, as if the executors were an association of persons.

8.0 Procedural aspects for filing the ITR electronically

8.1 To be able to file the ROI of a deceased assessee, the legal representatives are first required to get themselves registered on portal www.incometaxindiaefiling.gov.in. The following are the steps involved in the process of registration of the legal representative on the portal:

8.1.1 Access the Income Tax e-filing portal, www.incometaxindiaefiling.gov.in and logon to the e-filing application under the legal heir's login credentials.

8.1.2 Go to 'My Account' tab and select the option 'Authorise/Register as Representative'.

8.1.3 Select the 'Type of Request – New Request' and select ' Register yourself on behalf of another person'

8.1.4 In the 'Category to Register' select the appropriate option from the drop-down list.

8.1.5 Enter the details of the deceased i.e. PAN, surname, middle name, first name and date of death

8.1.6 Enter details of the bank account of the legal heir i.e. Bank account number, Account type, IFSC and Bank name

8.1.7 Attach the following documents in pdf format (max. 1 MB):

a. Copy of death certificate

b. Copy of PAN card of the deceased assessee

c. Copy of PAN card of the legal heir

d. Legal Heir Certificate

In case legal heir certificate is not available, a letter issued by the banking or Financial Institution on their letterhead with seal and signature mentioning the particulars of the legal heir as a nominee or joint account holder to the account of the deceased at the time of death can be submitted. In such a case, registration is done as a 'Temporary Legal Heir'.

The documents that can be accepted as legal heir certificate are:

1. Legal Heir Certificate issued by the court
2. Legal Heir Certificate issued by Local Revenue Authorities
3. Surviving Family Members Certificate issued by Local Revenue Authorities
4. Registered Will
5. Family Pension Certificate issued by Central/State Government

8.1.8 Documents in regional language should be translated to Hindi or English. The translated document should be notarized (Both the original and translated document should be uploaded).

8.1.9 Click on submit to update and send the details to the e-filing administrator who will review and accordingly approve/reject the registration of legal heir. A confirmation mail for the same will be sent to the registered e-mail ID.

8.1.10 Once the application for registration has been submitted, the status of the same can also be checked from the 'My Request List' tab.

8.1.11 e-Filing Administrator may approve as Temporary Legal Heir or Permanent Legal Heir, based on the documents uploaded. An e-mail is sent to the registered e-mail ID with the details of approval/rejection.

Temporary Legal Heir: A person is treated as a Temporary Legal Heir when fails to submit any one of the five Legal Heir certificates as specified

Permanent Legal Heir: A person is treated as a Permanent Legal Heir when the person submits any one of the five Legal Heir certificates mentioned above.

8.2 Following are the steps to register as "Estate of deceased":

8.2.1 Enter the details such as:

i. PAN of the estate of the deceased

ii. Name of the estate of the deceased

iii. Date of Incorporation of the Estate of the deceased

iv. PAN of the deceased

v. Surname, middle name, first name of the deceased

vi. Date of death of the deceased

8.2.2 Following documents to be uploaded in PDF format:

a) PAN card of the Estate of the deceased

b) PAN card of the executor

c) Court order appointing the executor or will of the deceased in which the executor particulars have been furnished or written agreement of the survivors appointing the Executor

d) Copy of death certificate of the deceased

8.2.3 Click on 'Submit'

9.0 GST

9.1 A person carrying on the business dies and the business is continued by its legal heirs then the liability to discharge the taxes vests in the legal representatives of the person. Section 93(1)(a) of the CGST Act, 2017 states that "if a business carried on by the person is continued after his death by his legal representative or any other person, such legal representative or other person, shall be liable to pay tax, interest or penalty due from such person under this Act".

9.2 Further in case of succession, as per the section 22(3) of the CGST Act, 2017 registration is required " Where a business carried on by a taxable person registered under this Act is transferred, whether on account of succession or otherwise, to another person as a going concern, the transferee or the successor, as the case may be, shall be liable to be registered with effect from the date of such transfer or succession"

There are various issues that may arise under GST pursuant to death and succession.

Conclusion

In the end, I would like to leave with the quote from Herman Wouk Pulitzer Prize-winning American author. He said that "Income tax returns are the most imaginative fiction being written today".

(CA Prity Dharod has contributed to the article)

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Properties which can be Bequeathed and which Cannot

Avikshit Moral & Prasham Shah,
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Introduction

In the last decade, there has been a huge swell in the number of High Networth Individuals in India. Majority of businesses in India are family-run and most Indian business families do not have effective and efficient succession plans in place for personal or business wealth.

Effective planning of succession balances the needs of businesses with the interests of family members and a smooth transition of leadership of businesses between generations of families. A well drafted will ensures a smooth transition from one generation to another without getting tangled in legal formalities.

Some challenges that are usually encountered in estate and wealth planning include restrictions imposed by personal laws, limits on transfer of wealth abroad, tax related issues and various related compliances. However, the basic issue encountered by most individuals is the kind of asset that can be bequeathed and the kind of assets that cannot be bequeathed.

Keeping in mind the aforesaid primary concern, this article aims to provide an overview of assets that can and cannot be bequeathed. "Bequeath" means leaving a property to a person or other beneficiary by a will[1]. The definition of 'will' in Section 2(h) of the Indian Succession Act, 1925, would show that it is the legal declaration of the intention of a testator with respect to his property, which he desires to be carried into effect after his death.

Before moving on to the more intricate aspects, it is essential to analyse the provisions of section 6 of the Transfer of Property Act, 1882-

> *"Section 6. What may be transferred- Property of any kind may be transferred, except as otherwise, except as otherwise provided by this Act or by any other law for the time being in force –*
>
> *a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred;*
>
> *b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby;*
>
> *c) An easement cannot be transferred apart from the dominant heritage;*
>
> *d) All interest in property restricted in its enjoyment to the owner personally cannot be transferred by him;*
>
> *e) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred;*

1. See Advanced Law Lexicon by P. Ramanatha Iyer, 3rd Edn., 2005, referred in AIR 2009 SC 1194 at 1196.

f) A mere right to sue cannot be transferred;

g) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable;

h) Stipends allowed to military naval, air-force and civil pensioners of the Government and political pensions cannot be transferred; and

i) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872 (9 of 1872), or (3) to a person legally disqualified to be transferee.

Nothing in this section shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate, under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee."

The section deals with what may be the subject of transfer under the Act. It proceeds on the maxim "expression *"unius exclusio alterius"* in that every property except those specified in the section may be transferred. The word 'property' as here used includes interest in property.

I. Tenancy Rights

The divesting of tenancy rights by way of a will is a highly debated topic and is subject to the tenancy laws of the State concerned. In general, tenancies are to be regulated by the governing legislation, which favour that tenancy can be transferred only to family members of the deceased original tenant. However, in absence of any specific provision, general laws of succession shall apply[2].

Under the provisions of the Maharashtra Rent Control Act, upon death of a tenant, tenancy rights would pass on to:

(a) A member of the family of the deceased tenant who was residing in the tenanted premises at the time of death of the tenant in case the premises have been let for residence; and

(b) If the premises have been let for education, business, trade or storage, a family member who was using such premises for any such purpose at the time of death of the tenant gets the tenancy rights.

In either case, in the absence of such family member so residing or so carrying on business, heir of the deceased tenant would get tenancy rights. In case of more than one heir, in the absence of agreement amongst heirs as to who should become tenant, competent court will decide as to who should become tenant.

In *Gian Devi Anand vs. Jeevan Kumar,* four Judges of a five-Judge Constitution Bench held that the rule of heritability extends to statutory tenancy of commercial as well as residential premises in States where there is no explicit provision to the contrary and tenancy rights are too devolve according to the ordinary law of succession unless otherwise provided in the statute.

The Hon'ble Supreme Court in *Vasant Pratap Pandit vs. Anant Trimbak Sabnis*[3] while deciding upon the rights of a statutory tenancy under the Bombay Rent Control Act was of the opinion that bequest of tenancy rights is impermissible and stated that it is obvious that the legislative prescription is first to give protection to members of the family of the tenant residing with him at the time of his death. Therefore, all the heirs are liable to be excluded if any other member of the family was staying with the tenant at the time of his death.

2. *Gaiv Dinshaw Irani and Others vs. Tehmtan Irani and Others, (2014) 4 SCC (Civ) 318.*
3. SCC p. 488, para 14.

In *H.C. Pandey vs. G.C. Paul*, the Hon'ble Supreme Court has held that (SCC p.79, para 4):

> *"It is now well settled that on the death of the original tenant,* ***subject to any provision to the contrary either negativing or limiting succession,*** *the tenancy rights devolve on the heirs of the deceased tenant. The incidence of tenancy are the same as those enjoyed by the original tenant"*

Furthermore in *Parvinder Singh vs. Renu Gautam,* it has been held by the Hon'ble Supreme Court that: (SCC p. 799, para 6)

> *"Tenancy is a heritable right unless a legal bar operating against heritability is shown to exist."*

The aforementioned cases indicate that in general tenancies are to be regulated by the governing legislation, which favour that tenancy be transferred only to family members of the deceased original tenant. However, in the light of the majority decision of the Constitution Bench in *Gian Devi Anand vs. Jeevan Kumar*, the position which emerges is that in absence of any specific provisions, general laws of succession to apply. This position is further cemented by the decision of the Hon'ble Supreme Court in State of *W.B. vs. Kailash Chandra Kapur* which has allowed the disposal of tenancy rights of Government-owned land in favour of a stranger by means of a will in the absence of any specific clause or provision.

Therefore, in the State of Maharashtra, bequeathing tenancy rights would be subject to the provisions of the Maharashtra Rent Control Act, 1999. The provisions of the Model Tenancy Act, 2019 have not been factored as it is still not in force.

Share in Partnership Firm/LLP

When a partner dies, subject to any contract to the contrary, partnership is dissolved. Section 42 of the Indian Partnership Act, 1932 provides for dissolution of partnership on occurrence of certain contingencies which includes 'death of the partner' as one of those contingencies. Plain reading of the Section 42 would show that, subject to the contract between the partners, a firm stands dissolved by death of a partner. However, in cases where the terms of the partnership deed are silent on continuation of partnership's business, a contract to continue the partnership after the death of a partner may be implied from the conduct of the parties. This means that where it is evident that such an intention was present, the nominee or legal representative of the deceased partner can take the place of deceased partner and business of the firm can be continued with the presumption that the partnership was never dissolved on the death of that partner. The above legal position is based on two assumptions- (a) there are more than two partners in the firm, and (b) the legal representatives are interested in taking forward the business of the firm.

Therefore, it can be concluded that share in a partnership firm as a partner can be bequeathed subject to conditions, if any, in the Partnership Deed.

Section 42 of the Limited Liability Partnership Act, 2008 deals with the provisions related to assignment and transfer of partnership rights in a LLP. The relevant section is extracted herein:

> ***"42. Partner's transferable interest.-***
>
> *(1) The rights of a partner to a share of the profits and losses of the limited liability partnership and to receive distributions in accordance with the limited liability partnership agreement are transferable either wholly or in part.*
>
> *(2) The transfer of any right by any partner pursuant to sub-section (1) does not by itself cause the disassociation of the partner or a dissolution and winding up of the limited liability partnership.*
>
> *(3) The transfer of right pursuant to this section does not, by itself, entitle the transferee or assignee to participate in the management or conduct of the activities of the limited liability partnership, or access*

information concerning the transactions of the limited liability partnership."

According to aforesaid section, a member of a Limited Liability Partnership can transfer/assign his interest to another. One way to do this is by bequeathing it after death. However, what can be transferred is limited. A member can only transfer his financial interests in the business or the ability to claim any distributions from the business. The managerial rights that the original member had cannot be granted to another without the approval and support of the other members. In case, the members want to be able to transfer full managerial and financial rights to their decedents, the LLP agreements would have to be drafted to reflect that desire. Transfer of full rights to a beneficiary after a member's death is one thing that the LLP agreement can permit.

Share in HUF as coparcener

The expression "Hindu Undivided Family" has not been defined under the Income Tax Act or in any other statute. When we dissect – essentials are (1) One should be a Hindu, Jain, Sikh or Buddhist but not Muslim or Christian; (ii) There should be a family i.e. group of persons and (iii) They should be undivided i.e living jointly and having commonness amongst them. All these three essentials are cumulative to constitute a Hindu Undivided Family. It is a body consisting of persons lineally descended from a common ancestor and include their wives and unmarried daughters. The daughter, on her marriage, ceases to be a member of her father's HUF and becomes a member of her husband's HUF. However, after 1st September 2005, daughter married or unmarried, is a co-parcener like a son.

A Hindu Coparcenary is a much narrower body within Hindu Undivided Family. Generally speaking, it is a body of individuals who acquires interest by birth in the joint family property.

There is a specific provision under the Hindu Succession Act, 1956 by which any Hindu can dispose of, by will or other testamentary disposition any property which is capable of being so disposed of by him. It is specifically mentioned under section 30 of the Hindu Succession Act, 1956 that the interest of a male Hindu in a Mitakshara

co-parcenary property shall be deemed to be property capable of being disposed of by such Hindu. After the amendment to the Hindu Succession Act, 1956 in 2005, even daughters who are now coparceners can make a will bequeathing her share in joint family property.

Therefore, a share in HUF as a co-parcener can be bequeathed by way of a will. However, on devolution of the estate, the HUF shall stand dissolved.

Share in Private Trust where share is determinate/share is indeterminate

A private trust is set up for the benefit of specific individuals i.e. individuals who are defined and ascertained individuals or who within a definite time can be definitely be ascertained. A private trust does not work in perpetuity and essentially gets terminated at the expiry of purpose of the trust or happening of any event or at any rate eighteen years after the death of the last transferee living at the time of creation of the trust.

A trust can be set up either as:

(a) *Revocable*: A trust that can be revoked by its settlor at any time during his life;

(b) *Irrevocable*: A trust will not come to an end until the term/purpose of the trust has been fulfilled;

(c) *Discretionary*: An arrangement where the trustee may choose, from time to time, who (if anyone) among the beneficiaries is to benefit from the trust, and to what extent;

(d) *Determinate*: The entitlement of the beneficiaries is fixed by the settlor at the time of settlement or by way of a formula, the trustees having little or no discretion; and

(e) *Indeterminate*: The entitlement of the beneficiaries is not fixed by the settlor and the share of each of them is ambiguous and is to be decided by the trustee.

A private trust is governed by the Indian Trusts Act, 1882.

Section 58 of the Indian Trusts Act, 1882 states that:

> ***"Right to transfer beneficial interest****- The beneficiary, if competent to contract may transfer his interest, but subject to the law for the time being in force as to the circumstances and extent in and to which he may dispose of such interest:*
>
> *Provided that when property is transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in this section shall authorise her to transfer such interest during her marriage."*

Further, section 69 of the Indian Trusts Act, 1882 states that:

> ***"Rights and liabilities of beneficiary's transferee****- Every person to whom a beneficiary transfers his interest has the rights and is subject to the liabilities, of the beneficiary in respect of such interest at the date of the transfer"*

Therefore, on conjoint reading of section 58 and 69 of the Indian Trusts Act, 1882, it can be concluded that an interest in a private trust can be bequeathed. This became even clearer in the case of *Canbank Financial Services Ltd. vs. Custodian*[4]. However, it is pertinent to note that whoever receives the beneficial interest also acquires the rights and liabilities of the beneficiary at the date of the transfer.

Life Interest in a property

In order to understand life interest, let us assume that an owner of an estate transfers that estate to a person. In normal circumstances that person to whom that estate is transferred will have all the rights over the estate including the right to transfer that estate to someone else. In a life interest, however, you can transfer the estate to a person for his lifetime after which the property gets vested in the next generation or as defined in the will or deed. The person in whose favour a life interest is created can be considered a life tenant. Such person can enjoy the property as the owner but he cannot transfer it to someone else.

A two Judge Bench in the matter of *Shivdev Kaur vs R.S. Grewal*[5] held that if a Hindu has been given only a "life interest", through will or any other deed, the said rights would not stand crystallised into absolute ownership and such a Hindu cannot acquire absolute title.

In this context reliance is also placed on the following observations contained in a decision of a Bench of two Judges of the Hon'ble Supreme Court in *Ranvir Dewan vs. Rashmi Khanna*[6] where, A.M. Sapre, J. explained the concept of life interest in the following terms:

> *"It is a settled principle of law that the "life interest" means an interest which determines on the termination of life. It is incapable of being transferred by such persons to others being personal in nature. Such person, therefore, could enjoy the "life interest" only during his/her lifetime which is extinguished on his/her death"*

Therefore, it can be concluded that life interest does not result into absolute ownership and is extinguished on the death of the person. Hence, it is an interest which cannot be bequeathed in favour of any individual.

4. 2004 (8) SCC 355.
5. Civil Appeal No. 5063-5065 of 2005
6. Civil Appeal No. 21784 of 2017

Agricultural land- if the holding for the beneficiary goes beyond the limit prescribed by the applicable statute

The Maharashtra Agricultural Lands (Ceiling on Holdings) Act,1961 was introduced to impose a maximum limit (or ceiling) on the holding of agricultural land in the State of Maharashtra so as to provide for the acquisition and distribution of land held in excess of such ceiling. The necessity of limiting the size of agricultural holdings is to reduce inequality in the present distribution of agricultural land which still forms the main livelihood of the majority of the people in this country.

The ceiling limit differs from State to State. In this article, we have restricted our analysis to the provisions of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 (**"Act"**).

Section 3 of the Act imposes a prohibition on holding agricultural land in excess of the ceiling area[7] and any land held in excess of the ceiling limit shall be surplus land and the same shall be taken back by the State.

Further as per section 10 of the Act, if any land is possessed, on or after the commencement date, by a person, or as the case may be, a family unit in excess of the ceiling area, or if as a result of acquisition (by **testamentary disposition, or devolution on death**, or by operation of law) of any land on or after that date, the total area of land held by any person, or as the case may be, a family unit, exceeds the ceiling area, the land so in excess **shall be surplus land**.

Therefore, any land held in excess of the ceiling limit shall be considered as surplus land and liable to be taken away by the State.

In view thereof, testamentary disposition of agricultural land is permitted. However, if the beneficiary is holding land in excess of the ceiling limit as per the provisions of the Act, then the same is liable to be taken away by the State in accordance with the Act.

Therefore, agricultural land in Maharashtra can be bequeathed subject to compliance with the ceiling limit because if it exceeds the ceiling limit as per applicable statute then, such land may have to be given up by the holder.

It is also pertinent to keep in mind the provisions of the Maharashtra Tenancy and Agricultural Lands Act, 1948 (**"MTAL Act"**). Under section 63 of the MTAL Act, transfer of agricultural land to non agriculturists is barred subject to the provisions as stated thereunder. It has been held via catena of judgements of various courts of India that the landholder cannot part with the agricultural land through execution of will by way of testimonial disposition to defeat the intent of the legislature. Therefore, an agricultural land cannot be bequeathed to a non agriculturists except as provided under section 63 of the MTAL Act.

7. Ceiling Area has been more particularly defined under Section 5 of the Act.

❍□❍

Prayer is not asking. It is a longing of the soul. It is daily admission of one's weakness.

It is better in prayer to have a heart without words than words without a heart.

– Mahatma Gandhi

THE DASTUR ESSAY COMPETITION 2019

Hetvi Valia

"Feminism: A Misunderstood Concept Today"

"If the woman has the right to an abortion, why shouldn't a man be free to use his superior strength to force himself on a woman? At least a rapist's pursuit of sexual freedom doesn't (in most cases) result in anyone's death."

- **Lawrence Lockman** (Republican)

Yes, you read it right. These are actual words uttered. Unapologetically. Not to mention, this is a snippet from a letter in 1995. Only 25 years ago. At least if it was during the stone-age one could say that humans were not evolved; still phasing from their baser instinct. Unfortunately, for this "gentleman", we are in the 21st century where man is said to be advanced in all facets of life – whether social, economic or technological. And we do not take kindly to such ideas or people. Yes, Mr. Lawrence Lockman, was made to resign from his post at the Maine Democratic Party; but what is worth accentuating is the fact that after going through about 3,00,000 years of evolution, the "most advanced race in the entire cosmos" has managed to elect such a "gentleman" as a lawmaker who would voice their interests and opinions.

Unlike other politically incorrect statements that have space for ambiguity and interpretation and a maybe 'He didn't mean to say this!' or 'You have to read it in *this* way…', Mr. Lawrence does not mince his words. He clearly advocates rape and sexual assault, sexual harassment or whatever name you want to call it. What is nerve-wracking is that he is not the only one. I don't wish to quote the other 'gentlemen' for the fear of that you might just tear this sheet(s) of paper simmering in rage. However, there is a sliver of silver lining in this situation. Does the **#MeToo** movement ring a bell? Who am I kidding? This global movement has amassed force enough to upstage an India – Pakistan cricket match.

Started by Tarane Burke in 2006, this movement was founded to help survivors of sexual violence, particularly non-white young women, who were not so well off to come out of the trauma they had suffered. Essentially, the movement aimed to propagate the sentiment of "Empowerment through Empathy" - you are not alone. Majority of 2017 was bombarded with **'#MeToo'** on Twitter and Facebook – two of the most active social media platforms. Just to shed light on how swiftly the numbers multiplied, here are some facts for you:

– The phrase "**#MeToo**" was tweeted by Milano around noon on October 2017 and had been used more than 200,000 times by the end of the day and tweeted more than 500,000 times within 24 hours.

– On Facebook, the hashtag was used by more than 4.7 million people in 12 million posts

Having intrigued you with some overwhelming statistics, it is time to turn your heads towards the pertinent matter – i.e. its essence. This movement focused on the ubiquity of sexual harassment, assault and rape spotlighting the assailants and their horrific crimes, numerous cover-ups, eventual ousting and, sometimes, professional resilience. It gave women strength to come forward and be heard. It gave women a chance to stand tall in society without cowering in fear of oppression and judgement. It gave women the power to punish their oppressors. It gave women the courage to shut people up.

No wonder it gained world-wide recognition and became a global success; not just in terms of punishing the atrocious exploits but as an act of portrayal of upliftment of women who were made to believe that the pseudo-superiority of men was the truth. This success touched parts of our country too. From members of the film fraternity to politicians, almost every sector has been accused of using power of dominance to subdue women.

But like every fabric, while one side is woven in a mesh of colourful bright colours that are attractive and eye appealing, the underside is a picture of browns, greys and depressing blacks. **#MeToo** undoubtedly sparked a fever of awareness and justice being sought when it was launched. But things started taking an ugly turn when the number of people tweeting

#MeToo multiplied ten-fold with women falsely accusing rape, merely to get attention and recognition. According to a study, the estimated number of false rape accusations can go beyond 10% of the reported cases. This has not only undermined the entire movement but also dampened that sliver of hope to be heard and acknowledged seriously in the patriarchal society. The gross abuse of #MeToo has led to doubting of innumerable genuine cases of assault and rape.

Imagine this scenario: You – a woman - are a part of society where even if you shout you are barely audible. So, you along with a bunch of similar people band together to **make** yourself be heard. Suddenly people who were despairing and had taken their way of life for granted get hope and join you too. Just when it becomes impossible to tune you out, a discordant group starts singing a different song to a different tune and chaos reigns again. You lose. They win. Now, instead of just not hearing you, they are suppressing your voice too.

This is a classic case of feminism abused today; not just the scenario I asked you to imagine but the status of the **#MeToo** movement too.

This is only a one-of example; the appetizer before the scrumptious main course, if I may. But before having the fine meal, table etiquettes should be polished. Thus, to intensely debate the status of the **#MeToo** movement, the fundamental question that needs an answer is "What is feminism?" The nation wants to know!

Disclaimer (ideally which should have been at the start, but nonetheless)

All characters and episodes portrayed in this essay are real and a part of my life and any resemblance to anyone else's life is purely coincidental. Neither the content of this essay nor the writer intends to outrage, insult, wound, offend or hurt any religion or religious sentiments beliefs or feeling(s) of anyone; nor do they intend to malign defame or slander any place, religion, country, community, or class of person(s) in anyway. The writer explains her point of view through real life incidents and is averse to formal definitions. Proceed with caution. Events may seem isolated, but they all connect so, kindly be patient.

Only the other day, all of my family members were generally pulling each other's leg; parents asking typically embarrassing questions that none of the kids would want to answer truthfully. My father turned to my cousin and asked him, "You boys don't drink right?" (implicating only my two guy cousins excluding us four girls). To him, we

were never considered because as girls you are obviously not allowed to drink. Because if you do, what impression would you have before the society? Drinking for girls is clearly looked down upon. Admittedly drinking is not advocated, but for boys, it is not a taboo in the society. If a boy is consuming alcohol, society rationalizes this act saying 'He must be having a glass of wine very occasionally. As long as he is not a drunkard, it is okay!'. Had it been a girl doing the same, people would have spoken about her morals and how her parents have not taught her right. It's ironic how society has a drastically different view for two different sets of people for the same thing. And instead of tailoring the view so that it applies to all, they conveniently choose to make their minds narrower because it is obviously the easy way out. My point in this little-everyday-episodes is that my father should have asked the question to all of us – the girls and the boys. Incidentally, the answer to this question is no. Then why bother with a rant if ultimately the answer is in negative? Well, it is a matter of principle. If for an inconsequential matter, a picture using the shades of misogyny and sexism is painted, the edifice where this painting is hung would rival the Leaning Tower of Pisa – an architectural extravaganza.

I present to you another episode that has eternally been a topic of debate and will continue to remain so, at least for India – periods. Save the few progressive households, most of India has a fixed rule to ostracize women when they are on their period. Just when one thinks that nothing more can be added to this negative list, new covenants spring up. The very basic unwritten guidelines include not entering the kitchen, no going to temples or any religious place, eating from different utensils and so on and so forth. Just about anything that makes a woman feel like an untouchable is the icing on the cake. The funny part here is that these views are majorly propagated by the females themselves. Out here, men will obviously not play the second fiddle and thus, they join hands with these female propagators. When I asked my grandmother the reason for following these so-called rules, she told me that this has always been the way of life. A custom to be diligently followed so as to speak. Unsatisfied with the answer and a tad bit indignant about it, I asked the same question to my mother. She too said that it flows from the past. But then she explained to me why it was that in the past in the first place. She said that women were the CEOs of the house; but planning and execution was both done by them. There was no concept of paid or unpaid leave during those days and Saturdays and Sundays were working. They were expected to work 365 days diligently; and knowing no other way of life, they did not think to fight for their rights. In this backdrop, knowing that you cannot overwork these people, the society came up with a fool proof plan to relive women for at least 3 days a month. They dictated that during that time of the month, women take rest and retire from all of their execution duties – whether it was cleaning, or cooking. This structure was sensible and compensatory for all the hard work put in by women. Ideally, the same should be carried down through generations. But what people did out of choice at that time, has become a compulsion today. The 'why' of the things has given way to 'it is custom of today'. Logically, yes, the no cooking no cleaning rule for 3 days was an absolute delight. But as this concept has been handed to the current generations, added embellishments have taken away the spirit of the structure. Women were not treated as untouchables then, but they are treated as untouchables now. The choice to not cook or clean is no longer available to generation today. They have to do as they are told.

Some might wonder how on earth is this topic connected to feminism. It's an 'only-girl- thing' because boys can obviously not get periods. And for feminism there always has to be a male counterpart over whom we can establish superiority, right?

And, I solemnly swear that I am not exaggerating when I say that feminism is construed as female

dominance over men by some. This sect of persons is entirely against the concept of feminism – some because they cannot wrap their head around women empowerment; while some because they do not know what feminism is. Today, the word 'feminism' is tossed about almost everywhere; and wherever used, it is sensationalized. In a world where everyone, save a select few, is a feminist today (because she said, I said), the word seems to have lost its allure. Everybody just assumes that their version and definition of feminism is a hundred per cent correct and when you ask them what it is, they stare at you baffled as though you have asked them for their kidney. Because, *everyone* knows what feminism is. No matter whether you actually believe in that principle or not, hear-say prompts you to pledge yourself to the good cause of feminism. If this is the scene today, then why am I harping about the fact that there are a few people who stand on the other side of the line?

While there are *bona fide* feminists – people who actually devote themselves to understanding before believing, there is a whole list of the non-*bona fide* feminists which comprises non-feminists, people who think they are feminists but do not know what feminism is and feminists for the sake of the word. Non-feminists, as I was talking about earlier, are once again divided into two sub-classes; one being adamantly narrow minded and shockingly orthodox, and the other that do not know what true feminism actually stands for.

The adamantly narrow minded and shockingly orthodox non-feminists are too loyal to their belief that it is the birth right of man to project command over women. And even if not hammered into their mind from the day they were born, they simply revel in exuberance of subduing women. Instead of winning the hearts and being at a position you are respected and looked up at, these men choose to eliminate competition and instil fear to prove dominance. I was recently reading a novel called 'The Forty Rules of Love' by the internationally acclaimed author – Elif Shafak wherein a verse of the Qur'an particularly stood out to me. The al-Nisa. As explained by the author, the verses of the Qur'an are merely words that borrow colour and texture from he who reads it. The al-Nisa is construed to mean that: "Men are maintainers of women because Allah has made some of them to excel others and because they spend out of their property; good women are therefore obedient, guarding the unseen as Allah has granted; and (as to) those on whose part you fear desertion, admonish them, and leave them in the sleeping-places and beat them; then if they obey you, do not seek a way against them, surely Allah is High, Great." However, the same verse in a different translation reads, *"Men are the support of women as God gives more means than others, and because they spend of their wealth (to provide for them). So women who are virtuous are obedient to God and guard the hidden as God has guarded it. As for women you feel are averse, talk to them suasively; then leave them alone in bed (without molesting them) and go to bed with them (when they are willing). If they open out to you, do not seek an excuse for blaming them. Surely God is sublime and great."*

The stark difference in the translation and interpretation of the Qur'an for the same verse – al- Nisa - is palpable. I agree with Elif Shafak when she equates the Qur'an to a gushing river. According to her, you can only tell there is one river from a distance. Only when you swim in it do you realise that there are four currents. Those who like to swim on the surface are content with the outer meaning of the Qur'an. They take the verses too literally thereby reading al-Nisa to mean that men are superior to women. Because, that is exactly what they want to see. Only when one delves into the depths and goes deeper can one attempt to get a grasp of the Qur'an.

Reflecting upon this, I came to the conclusion that people are so hell-bent on clinging on to beliefs that they think are correct, that they refuse to see, hear or think otherwise. Some people hide behind religion stating that God or Allah is giving them the right of superiority. Amidst this fervent, almost fanatical, devotion, they seem to forget their

humanity. How do you explain to such people that you need to plunge into the river and not swim on the surface? How do you explain to such people that man used in ordinary lingo means both man and woman and does not mean God made man superior? How do you explain to such people that their brain cells need to be replaced?

Those who do not know what true feminism means and are thus vehemently non-feminists, are either plagued with unawareness or believe it to be exactly opposite of male dominance i.e. female dominance. Today the world has been swept in a gust of feminism with the #MeToo movement being the most recent. Being at a global scale, it is hard to imagine that it has not reached every nook and cranny of the world. But certain tier three cities and villages, especially in developing countries like India and Brazil, do face a disconnect from the rest of the world. For people living here, they are simply unaware that a concept of feminism exists. However, one cannot presume that they would be in a patriarchal society. People can get lucky at times. Coming back to people who know of the concept, I believe that they know of an imbalance that exists between men and women in the society. Though they want to bring balance in society, the solutions they advocate do not revolve around getting women to subdue men. And because they believe that that is what feminism stands for, they want no part in it. Thus, they protest against feminism rallies. To turn the people who do not know what true feminism means is relatively easier as compared to the adamantly narrow minded and shockingly orthodox non-feminists. Just educate those who are unaware about feminism and preach the right principles of feminism to those who want to make a change. Already charged with positive energy to right the society, they just need a current to revolutionize the world.

Just like black and white, call and put, husband and wife, non-feminists who do not know what true feminism means are contrasted with people who think they are feminists but do not know what feminism is. A twist to the non-feminist angle is when they support female dominance. All facts and circumstances remaining the same, these feminists staunchly advocate that feminism is associated with women being superior to men. One can co-relate these peculiar feminists to those obnoxiously loud uncles present at every family gathering – with raucous laughter and a know-it-all attitude (not to mention that these uncles are usually presumptuous and therefore almost wrong). To my mind, non-feminists who do not know what true feminism means, are usually men whereas people who think they are feminists but do not know what feminism is, are categorically women. These women are not necessarily motivated by female dominance, they just have a stilted view of feminism. And with this they step into the society and are aggressively feminists. Things where feminism as a concept only would not apply are turned into a hue-and-cry depreciating the movement where, when used right, it can create a positive impact.

People who proclaim themselves to be feminists only for the sake of it are as equally poisonous as people who think they are feminists but do not know what feminism is. For-the- sake-of-it-feminists are people who engage in publicity stints to build a good image for themselves. While they do not deliberately broadcast anything harmful to the movement, they

do not anything to contribute to the movement either. The laid-back attitude coupled with no interest in actually understanding and standing up for advocating women's right create a void in the atmosphere. This may unnecessarily lead to sexists commenting against people making these statements; thereby giving an opportunity to people who want to shut down the movement. I believe some for-the-sake-of-it-feminists do consciously believe in equality of men and women on a bigger front such as politics and economics. However, their actions don't go hand in hand with their stand. A fact that I have particularly noticed is while these men harp about equal rights, in day to day things they still

take women for granted. These little things go unchecked at times because, well, overall you are a feminist, right?

I personally feel that for-the-sake-of-it-feminists belong to the set of 'the-biggest-hypocrites- on-planet-earth'. The ensuing episodes will make you roll your eyes and possibly engage in mild violence too.

Episode 243: Office scenes

The girls to boys ratio at my firm is in favour of the boys. This is usually not a problem unless any event related to sports comes up. Usually, every other month the boys book a turf and play cricket or football amongst themselves. We are never involved in these plans. It is understandable that if they already reach the upper limit they choose to not ask us. What is not okay is the fact that they presume that we don't want to play and that we don't know how to play. Of course, the presumption is based on the 'unwritten rule' that girls cannot play sports. My blood boils hearing this statement. How dare they presume such a fact and generalize girls like that? So, instead of ranting, I approached them and asked them why is it that the girls were not included in these plans. They legitimately said that they don't believe I can play because of my stature and the others were not interested at all. My only resentment was that they didn't give me a chance to decide for myself whether I can play or not. And I would like to mention that the boys we are talking about are not Tendulkars or Pogbas. They themselves are quite average. I don't see how a girl added to their team would make them lose when they were already losing in the first place. Anyway, even after I communicated the same practise has continued. And these are the same guys who have maintained that women ought to get equal rights. I wish it stopped there. It gets worse. We had a counterstrike video game match organised at office. All employees interested were urged to submit their names. I was one of the first ones to sign up for this. Later, it came to my notice that I was the only female employee. I didn't think much of it until the day teams were being decided. My name was not in any team despite my repeated insistence that I wanted to play. It escalated to the extent that one of the male employees asked me to withdraw my name (indirectly of course). When I didn't and went to the IT team to get the game installed on my laptop, they went out of the way to avoid it, which was the last straw for me. If this is the state of affairs in a well- reputed progressive firm for such a small matter, how do we promote gender equality on a large scale?

Episode 520: Technology

This is another male predominant sector where I have experienced sexism first hand. In the course of CA classes, we had a subject – information technology. The professor who taught us this was brilliant at his job and well-qualified. But every sub-topic he explained started with some sexist statement about girls and how it would be slightly more difficult to understand as compared to boys. He is clearly misogynist to claim that females are dense in the head when it comes to technology. The fact that he just assumed facts without any actual proof ticked me off. What if his daughter was interested in pursuing anything related to technology? Would he hold on to the same belief? Or would he take a different view considering that it is his daughter?

Ranging from non-feminists to for-the-sake-of-it-feminists, none of these people actually guess the flavour of feminism. My pick for closest guess of the right flavour would be the *bona fide* feminists who equate feminism to equality. This according to me is the underlying idea behind the entire movement. Equality here means to give an equal opportunity to both men and women for any particular event. Whatever a girl can do, a boy can; and vice versa. There should be absolutely no bias basis to differentiate the two. I would go a step further and say feminism stands for equality even amongst the same gender. To bridge the gap between two women from vastly different backgrounds so that each can get an

opportunity is what feminism stands for. Very simply, feminism to me is that device which does not see race, caste, gender, religion and applies universally to every individual in an unbiased manner. To put it in a fanciful way, it is a colourless device equally applicable to men as women and that is why should be accepted by all. Equal rights is the main ingredient in the dish that people forget. If the main/secret ingredient of the dish is missing, how can you expect the person to savour the taste of it?

Feminism seeks to level the imbalance in the rights available to and within each gender. Looking back at the 'only-boys-can-drink' episode, feminism makes sure that if boys drink, girls will drink too. Both abstaining from drinking works too. Likewise, in the 'periods' episode, feminism is standing up for abolishing these 'unwritten rules' and treating all women the same; with or without their period. This fight requires more tolerance and grit as you are against your fellow soldiers and friends. And as Dumbledore said, "It takes a great deal of bravery to stand up to our enemies, but just as much to stand up to our friends."[1]

True feminists know that when I use enemies to mean 'men', we are not man-hating self- righteous women using controversial statements to gain attention. Emma Watson, the renowned UN Women Goodwill Ambassador speaks on behalf of all *bona fide* feminists when she said that, "The more I have spoken about feminism, the more I have realised that fighting for women's rights has too often become synonymous with man-hating. If I know one thing for certain, it is that this has to stop."

Feminism is uncomplicated and simple. But unfortunately, it has been turned into a foreign concept today. The way this word is tossed in the air, it is overused – *'ghisa pita'* (giving a feel to the word). People decided that being a thorough feminist is too much effort; too much pain; why not tweak it to our advantage? So, the concept of selective feminism was born. As the name suggests, you support feminism when it supports you i.e. media attention or to get away with things; and do away with it when you are the target of controversial topics. Superb idea, isn't it?

This is just one of the ways feminism is misused. I don't believe that feminism is 'misunderstood' per se. For that to happen, people need to understand it in the first place. And once you understand and know what feminism is, there is no scope for misunderstanding. At all.

The story I put before you is what the future looks like. Some might say it is cynical[2] and too dark. But it's a possibility nonetheless:

8:00 am: I made a snowman.

8:10 am: A feminist passed by and asked me why I didn't make a snow woman. 8:15 am: So, I made a snow woman, too.

8:17 am: My feminist neighbour complained about the snow woman's voluptuous chest saying it objectified snow women everywhere.

8:20 am: The homosexual couple living nearby threw a hissy fit and moaned it could have been two snow men instead.

8:22 am: The transgender man..wom...person asked why I didn't just make one snow person with detachable parts.

8:25 am: The vegans at the end of the lane complained about the carrot nose, as veggies are food and not to decorate snow figures with.

8:28 am: I am being called a racist because the snow couple is white.

8:31 am: The Muslim gent across the road demands the snow woman wear a burqa. 8:40

1. Harry Potter and the Philosopher's Stone – J. K. Rowling.
2. Excerpts from a social media message thread.

am: The Police arrive saying someone has been offended.

8:42 am: The feminist neighbour complained again that the broomstick of the snow woman needs to be removed because it depicted women in a domestic role.

8:43 am: The council equality officer arrived and threatened me with eviction.

8:45 am: TV news crew from the ABC shows up. I am asked if I know the difference between snowmen and snow-women? I reply, "Snowballs" and am now called a sexist.

9:00 am: I'm on the News as a suspected terrorist, racist, homophobic, sensibility offender, bent on stirring up trouble during difficult weather.

9:10 am: I am asked if I have any accomplices. My children are taken by social services. 9:29 am: Far left protesters offended by everything are marching down the street demanding for me to be beheaded.

Moral: There is no moral to this story.

It's just a view of the world in which we live today, and it is only going to get worse.

To ensure that this is not my future, I did a survey and interviewed people from different age groups – both male and female – to understand what the general notion about feminism is.

(A guide to the interview: Hetvi is the interviewer (anonymous) and every other person whose name is used is the interviewee)

Hetvi: Are you a feminist?

Devanshi[3]: Yes, I am a feminist.

Neelay[4]: Yes, I am proud to be a feminist and I think everyone should be one.

Supriya[5]: Partially. I don't appreciate how loosely that word is used today.

Chintan[6]: Yes. Definitely.

Kinnari[7]: Yes. But it depends on the definition used.

Sandeep[8]: Yes.

Jagruti[9]: Yes. I mean to say I am an independent woman.

Hetvi: What is does feminism mean to you?

Devanshi: Equality of women with men and not women over men

Neelay: Feminism is simple. It is a tool to thrust the scales of justice back to equality. Feminism in that sense, to me, is a misnomer, because of the prejudice associated with the word. Not only that, it has led to senseless entanglement. Feminism has been accused of exaggerating the rights in favour of women whereas it is just a mechanism to be equal.

Supriya: I don't like to use the word feminism. But as a concept, it is when you acknowledge that something is amiss, and you do something to make sure that the situation is heard; howsoever small or big the matter is. There needn't be a perfect solution or even get resolved. You just need to step in the right direction.

3. 18 years. College student.
4. 21 years. CA article.
5. 26 years. Qualified CA and working as a senior associate.
6. 35 years. Father of two sons.
7. 47 years. Homemaker and raised two sons.
8. 51 years. Father of two daughters.
9. 62 years. Bharatanatyam teacher.

Chintan: Equal status on all grounds.

Kinnari: I am not sure what the definition is. I wouldn't partake in aggressive feminism which involves revolts and morchas and the like. I believe in personal feminism which means to speak up for my rights and to be my own independent person.

Sandeep: To respect woman – all spans of feminism across all ages whether its your mother, wife or daughters.

Jagruti: Not depending on any one. Females should be self-sufficient and be able to do everything by themselves. This extends to men as well.

Hetvi: Do you think feminism as a concept is misunderstood today?

Devanshi: Definitely yes. Both men and women think that feminism means woman > man. This was clearly seen from the #MeToo movement.

Neelay: Feminism is wretchedly misunderstood today. And in my opinion, a part of it ought to be attributed to the equivocating character of the term; what was intended to underpin the law of equality has come to be known as an over-exploited pretentious nonsense to gain publicity and recognition.

Supriya: I believe that the correct word is 'misused' and not misunderstood. I believe so because females use it to get away with a lot of things.

Chintan: I believe that feminism is vastly accepted in all strata of the society. In India, though, I feel that tier 1 cities have a higher capacity for feminism as compared to the villages. Today, people understand what feminism is. Only in the #MeToo trend, it was an I said she said situation. People didn't come out in the past because society was not that accepting, but I still feel that views are misplaced. Rather than feminism, #MeToo was more character oriented. But as a holistic view, feminism is not misunderstood.

Kinnari: Sometimes yes, I feel it is misunderstood. In the modern world are well aquatinted with feminism. I think it was misused during the #MeToo movement. Why did people wake up now? And you need to see both sides of the story. Other than genuine things such as maternity leave, everything seems to be irrational.

Sandeep: I don't think it is misunderstood. Females are career oriented today. A chance maybe they did not have before and were taken for granted. Feminism has played its role and is currently ruling India.

Jagruti: It is misuse not misunderstood. Feminist women may take their independence too far. For example, leave everything to the care of servants.

Hetvi: If you had kids, what is the most simplistic way in which you would explain feminism?

Neelay: I believe that nurturing the spirit of tolerance and equality is feminism. Or better still, the said done right shall not need us to have a separate feminist belief.

Supriya: It means gender equality wherein equal opportunities for both girls and boys without any bifurcation in any aspect of life so that both can live in peace.

Chintan: What you (5 years old son) can do, Nysha (4 years old niece) can do.

Sandeep: Respect achievements of women.

Jagruti: I tell my students it means independence where nobody can take you for granted.

Hetvi: What is you substitute for the word feminism?

Devanshi: Since 'feminism' is too *ghisa pita*, it should be female equality.

Neelay: Masculinism. The root is to abandon any dominance or subjugation of one sex to the other, that again brings me to, equity.

Chintan: Empowerment. But it could be misconstrued to support female status not equal status. But I don't see the need for a different word.

Jagruti: Independence and education.

Hetvi: Thank you for being such wonderful guests.

To sum up the opinions of various persons; majority was pro feminism as a concept but not as a definition. Everyone had their own element to it. But this was a representative sample of seven from a population of trillions. If each added a different spice to the dish, it would be more complicated than *'bhel'* in the literal sense. The glimpse of the bleak future that I showed you guys does not seem to pose an immediate threat according to me. Undoubtedly, there is a good probability of the future working out in that manner with the way our world is already progressing. But we have the odds in our favour. We are in the now and have all the power to make sure that society does not tilt in that direction.

Feminism is like a see-saw. Man on one side, woman on the other. If the man is heavier, the see saw tilts in his direction and vice versa. The trick to prevent this is to balance at the fulcrum – a standstill. Well weight-wise it would be impossible to give a fool proof suggestion. The man may weight more. The woman may diet. And all other hundred and eighty-six permutations and combinations. My ground-breaking solution is to share the weight. Simple, right?

The weight borne by man and woman signify the 'choice' they have. Woman whose feet don't touch the ground, are deprived of the choices that are weighed in man's favour. To balance the squatting man and the flying woman, you pass this weight as necessary. In this situation, man has to uplift the woman by helping her to get the choice she was always entitled to. Everyone knows how a see-saw works. It is not biased towards any side. Thus, man and woman have an equal power and responsibility and capability for 'jugaad' to balance the see-saw.

Metaphorically speaking, the design of the see-saw has greatly evolved from the past. Better workmanship and quality of wood is now creating wonderful designs. The progress report showing an A+. Gone are the days of the 19th century where women were not allowed to vote. They were regarded as meek and domestic creatures capable only of taking care of people. In the United Kingdom of Great Britain and Ireland at least, politicians had thoroughly deliberated on the subject of women's suffrage and decided that they never should be allowed to vote because[10]:

1. Women's tiny brains had no capacity for logical thought. Their emotional nature made them incapable of understanding politics.
2. If women were to get involved in politics, they would be too busy to marry and have children, and the entire human race would die out, which would be very bad indeed.
3. If women got involved in politics, they would be on an equal footing with men, thus creating the appalling condition of equality of the sexes and putting an end to all need for male chivalry and gentlemanly behaviour, which would be even worse.
4. All government ultimately rested on brute force. Since the gentle nature of women made them incapable of that, they were simply not suited for politics.

Well, it would be an understatement to say that there is definitely progress today. Women have been involved in politics and the human race is,

10. Reference drawn from Storm and Silence by Rob Their.

lo behold, still alive. And I think female assassins are scarier than mercenaries.

Before I sign off, my penultimate plea to the parents of the Indian society is that equality starts at home. A girl is taught how to cook, how to clean and everything else involved in the running of a household. Why? Because she is going to get married and will go to her husband's house where she is going to be responsible for all this. A boy is taught none of these basic survival skills. Why? Because he is going to get married and his wife will do all this for him. Sounds like feminism done absolutely done right, doesn't it?

There are so many things wrong with the way of life in current households. Teach your girls all of these activities, not because she is handed over responsibility and it's her wifely duty; but because it is a part of the Basic Survival Toolkit. She should be taught these things with the intent to make her independent and self-sufficient. Then give her the choice of whether she wants to accept the same or not instead of thrusting it upon her and taking away her right of saying 'No!'. And the boys, they do not need the Basic Survival Toolkit at all because it is their birth right to order their wives to do everything while they trot off to work. I am sorry but that sentiment does not work today. The Basic Survival Toolkit is as much as a necessity for boys as it is for girls. Teach your boys independence and how to stand on their own two feet.

As I said, feminism or equality or whatever it is you associate yourself with, starts at home. You don't need to conduct rallies. You don't need interviews in the newspapers as headliners. You don't need to be known in the society. You don't need opportunities to proclaim yourself as a feminist. All you need, is the belief that everyone is equal, so everyone has a choice. Knowing that something is not quite right and taking that step forward to right it is all that is required. Nobody cares whether you are a feminist or not as long as you pledge yourself to equality; except for Emma Watson because for her:

"If you stand for equality, then you're a feminist. Sorry to tell you."

And I say the same to you.

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DIRECT TAXES
Supreme Court

Keshav B. Bhujle,
Advocate

1 ***Peerless General Finance and Investment Co. Ltd. vs. CIT;***
(2019) 416 ITR 1 (SC): [2019] 107 taxmann.com 228 (SC): dated 09/07/2019:

Income – Capital or revenue receipt – S. 4 of ITA, 1961 – Non-banking finance company – Subscriptions received from public at large under collective investment schemes floated by assessee-company constitute capital receipts, and hence not taxable – The fact that the assessee treated sums as income in accounts not determinative: (A.Ys. 1985-86 and 1986-87)

The assessee-company had floated various schemes which require subscribers to deposit certain amounts by way of subscriptions in its hands, and, depending upon the scheme in question, these subscribed amounts at the end of the scheme are ultimately repaid with interest. The scheme at hand also contains forfeiture clauses as a result of which if, midway, a certain amount is forfeited, then the said amount would immediately become income in the hands of the assessee. The Assessing Officer treated these amounts as income inasmuch as under the accounting system followed by the assessee, these amounts were credited to the profit and loss account for the years in question as income. The Tribunal allowed assessee's appeals relying on *Peerless General Finance and Investment Co. Ltd. vs. RBI [1992] 2 SCC 343; 75 Comp Cas 12 (SC)* wherein it was held that on general principles, such amounts must be treated as capital receipts or otherwise they would violate the provisions of the Companies Act.

On appeal by revenue, the Calcutta High Court held that a perusal of the subscription scheme of the appellant company would show that since forfeiture of the amounts deposited is possible, this amount should be treated as income and not as a capital receipt. Further, it relied heavily upon the fact that the assessee had itself treated such amounts as income and credited them to its profit and loss account for the years in question and would, therefore, be estopped by the same.

The Supreme Court allowed the assessee's appeal and held as under:

"i) The subscriptions were received in the years in question from the public at large under a collective investment scheme, and these subscriptions were never at any point of time forfeited. Indeed, the supplementary affidavit filed before this Court states this as a fact, being based on an interim order of the High Court which obtained during the assessment years in question. This being the case, and surrendered certificates not being the subject matter of the appeal, it is clear that

even on general principles, deposits by way of amounts pursuant to these investment schemes made by subscribers which have never been forfeited can only be stated to be capital receipts.

ii) While it is true that there was no direct focus of the Court on whether subscriptions so received are capital or revenue in nature, still it is a fact that this Court has also, on general principles, held that such subscriptions would be capital receipts, and if they were treated to be income, this would violate the Companies Act. It is, therefore, incorrect to state, as has been stated by the High Court, that the decision in *Peerless General Finance and Investment Co. Ltd. (supra)* must be read as not having laid down any absolute proposition of law that all receipts of subscription at the hands of the assessee for these years must be treated as capital receipts.

iii) Though the Court's focus was not directly on this, yet, a pronouncement by this Court, even if it cannot be strictly called the ratio decidendi of the judgment, would certainly be binding on the High Court. Even otherwise, as stated, it is clear that on general principles also such subscription cannot possibly be treated as income. It has been rightly stated that in cases of this nature it would not be possible to go only by the treatment of such subscriptions in the hands of accounts of the assessee itself.

iv) The 'theoretical' aspect of the present transaction is the fact that the assessee treated subscription receipts as income. The reality of the situation, however, is that the business aspect of the matter, when viewed as a whole, leads inevitably to the conclusion that the receipts in question were capital receipts and not income.

v) In the circumstances, the judgment of the High Court is set aside and that of the Income Tax Appellate Tribunal is restored. The appeal is allowed."

2 ***CIT Vs. Laxman Das Khandelwal;***
[2019] 108 taxmann.com 183 (SC): dated 13/08/2019:

Presumption of service u/s. 292BB of ITA, 1961 – If assessee had participated in proceedings, by way of legal fiction, notice u/s. 143(2) would be deemed to be valid even if there be infractions as detailed in said section – Scope of provision is to make service of notice having certain infirmities to be proper and valid if there was requisite participation on part of assessee –Section does not save complete absence of notice – For section 292BB to apply, notice must have emanated from department – It is only infirmities in manner of service of notice that section seeks to cure – Section is not intended to cure complete absence of notice itself and thus, issue of notice u/s. 143(2) for completion of regular assessment is a statutory requirement as per provisions of Act and non-issuance thereof is not a curable defect

The assessee is an individual carrying a business of brokerage. Search and seizure operation was conducted u/s. 132 of the Income-tax Act, 1961 on 11/03/2010 at the residential premises of the assessee. The assessment was made u/s. 143(3) read with section 153A of the Act, making certain additions. The Commissioner (Appeal) partly allowed the assesee's claims. The Revenue filed appeal before the Tribunal. The Assessee filed cross objection on the ground of jurisdiction of Assessing Officer regarding non-issue of notice u/s. 143(2) of the Act. The Tribunal upheld the cross objection and quashed the entire reassessment proceedings on the finding that the same stood vitiated as the Assessing Officer lacked jurisdiction in absence of notice u/s. 143(2) of the Act of 1961. The Tribunal observed:

"17. In conclusion, we find that there was no notice issued u/s 143(2) prior to the completion of assessment u/s 143 (3) of the Act by the AO; that the year under consideration was beyond the scope of the provisions of Section 153A of the Act, it being the search year and not covered in the six year to the year of search as per the assessment scheme/procedure defined u/s 153A; that the AO has passed regular assessment u/s 143(3) of the Act; although the Id. CIT has mentioned the section as 143 r.w.s. 153A and that the department had not controverted these facts at the stage of hearing. It is noted that issue of notice u/s 143(2) for completion of regular assessment in the case of the assessee was a statutory requirement as per the provisions of the Act and non-issuance thereof is not a curable defect. Even in case of block assessment u/s 158BC, it has been so held by the apex Court in the case of *'ACIT vs. Hotel Blue Moon'[(2010] 321 ITR 362 (SC).*"

In appeal, the issue that arose before the Madhya Pradesh High Court was the effect of absence of notice u/s. 143(2) of the Act. The Respondent-assessee relied upon the decision of the Supreme Court in *Assistant Commissioner of Income Tax and Another vs. Hotel Blue Moon [2010] 3 SCC 259*. On the other hand, reliance was placed by the Appellant-Department on the provisions of section 292BB of the Act to submit that the Respondent-assessee having participated in the proceedings, the defect, if any, stood completely cured. The High Court upheld the decision of the Tribunal.

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

"i) A closer look at section 292BB shows that if the assessee has participated in the proceedings it shall be deemed that any notice which is required to be served upon was duly served and the assessee would be precluded from taking any objections that the notice was (a) not served upon him; or (b) not served upon him in time; or (c) served upon him in an improper manner. According to Mr. Mahabir Singh, learned Senior Advocate for the Department, since the Respondent-assessee had participated in the proceedings, the provisions of Section 292BB would be a complete answer.

ii) On the other hand, Mr. Ankit Vijaywargia, learned Advocate, appearing for the Respondent-assessee submitted that the notice u/s. 143(2) of the Act was never issued which was evident from the orders passed on record as well as the stand taken by the Appellant in the memo of appeal. It was further submitted that issuance of notice u/s. 143(2) of the Act being prerequisite, in the absence of such notice, the entire proceedings would be invalid.

iii) The law on the point as regards applicability of the requirement of notice u/s. 143(2) of the Act is quite clear from the decision in Blue Moon's case. The issue that however needs to be considered is the impact of Section 292BB of the Act.

iv) According to Section 292BB of the Act, if the assessee had participated in the proceedings, by way of legal fiction, notice would be deemed to be valid even if there be infractions as detailed in said Section. The scope of the provision is to make service of notice having certain infirmities to be proper and valid if there was requisite participation on part of the assessee. It is, however, to be noted that the section does not save complete absence of notice. For section 292BB to apply, the notice must have emanated from the Department. It is only the infirmities in the manner of service of notice that the section seeks to cure. The section is not intended to cure complete absence of notice itself.

v) Since the facts on record are clear that no notice u/s. 143(2) of the Act was ever issued by the Department, the findings rendered by the High Court and the Tribunal and the conclusion arrived at were correct. We, therefore, see no reason to take a different view in the matter. The Appeals are, therefore, dismissed."

3 *Snowtex Investment Ltd. vs. Principal CIT*

(2019) 414 ITR 227 (SC): [2019] 105 taxmann.com 282 (SC): dated 30/04/2019

Speculative transaction – Set off of loss – Ss. 43(5) and 73 Explanation of ITA 1961 – Transactions in derivatives – Specific exclusion from definition of speculative transaction w.e.f., 01/04/2006 – Exclusion of trading in shares from deeming provision in Explanation to s. 73 w.e.f., 01/04/2015 – Amendment not retrospective – Losses from trading in shares in A. Y. 2008-09 cannot be set off against profits from trading in futures and options (A. Y. 2008-09).

Assessee is a non banking financial company trading in shares and securities. For the A. Y. 2008-09, the assessee had loss from share trading and profit from trading in futures and options. The assessee claimed set off of the loss from share trading from the profits from trading of futures and options. The Assessing Officer disallowed the claim. The Assessing Officer held that the loss from share trading was a speculation loss and in view of the provisions of section 43(5)(d) of the Income-tax Act, 1961, the assessee's activities pertaining to futures and options could not be treated as speculative transactions so as to allow the losses from share trading to be set off against profits therefrom. The Tribunal held that the assessee must be allowed to set off the loss from share trading against profits from transactions in futures and options, since the character of the activities was similar and that the assessee which was in the business of share trading had treated the entire activity of purchase and sale of shares which was comprised both of delivery-based and non-delivery-based trading, as one composite business.

The Calcutta High Court held that the profits which had arisen from trading in futures and options were not profits from a speculative business and the loss from trading in shares cannot be set off against the profits arising from the business of futures and options.

The Supreme Court dismissed the appeal filed by the assessee and held as under:

"i) While on one hand, Parliament amended section 43(5) w.e.f. 01/04/2006 as a result of which trading in derivatives on recognised stock exchanges fell outside the purview of the business of speculation, a corresponding amendment to the Explanation to section 73 in respect of trading in shares was brought in only w.e.f. 01/04/2015. While amending the provisions of section 43(5) w.e.f. 01/04/2006, Parliament indeed was cognizant of the provisions which were contained in section 73(4). Having introduced an amendment to section 73(4), Parliament would have, if it intended to bring about parity with the provisions of section 43(5) introduced a specific amendment. Parliament, however, did not do so by the Finance Act, 2005. It was only with effect from 01/04/2015 that an amendment was brought about to exclude trading in shares from the deeming provision contained in the Explanation to section 73. Parliament may have had reasons to allow the situation to continue until the amendment was brought into force, including its view in regard to the stability of the stock market. In its legislative wisdom, Parliament amended section 43(5) w.e.f. 01/04/2006 in relation to the business of trading in

derivatives, but brought about a specific amendment in the Explanation to section 73, in so far as trading in shares is concerned, w.e.f. 01/04/2015. The later amendment was intended to take effect from the date stipulated by Parliament and there is no reason to hold either that it was clarificatory or that the intent of Parliament was to give it retrospective effect.

ii) The Principal business of the assessee was not of granting loans and advances during the assessment year. As a consequence, the deeming fiction u/s. 73 would be attracted. Hence, the finding of the High Court could not be faulted.

iii) For the A. Y. 2008-09, the loss which occurred to the assessee as a result of its activity of trading in shares (a loss arising from the business of speculation) was not capable of being set off against the profits which it had earned in the business of futures and options since the later did not constitutes profits and gains of a speculation business."

4 *Special Leave Petitions*

4.1 Advance tax – Interest – Liability where income arises from retrospective operation of statute

Supreme Court granted special leave to the Department to appeal against the judgment of the Calcutta High Court whereby the High Court held that imposition of interest u/ss. 234B and 234C of the Income-tax Act, 1961 on the income which arises from retrospective operation of any statute or decision was not justified as the assessee was unable to know and assess his income and pay advance tax accordingly.

Principal CIT vs. Haldia Petrochemicals Ltd; (2019) 416 ITR 73 (st): Dated 02/07/2019.

4.2 Capital gains – When transfer took place

Supreme Court dismissed the Department's special leave petition against the judgment of the Bombay High Court (Reported in 409 ITR 7) whereby the High Court held that the sale or transfer was not complete on the date of the execution of the agreement and that merely because it was registered, it did not partake of the character of a conveyance or a sale deed automatically.

Principal CIT vs. Talwalkars Fitness Club.; (2019) 416 ITR 75 (st): Dated 04/07/2019.

4.3 Exemption – Export oriented undertaking – Merger of firms owning undertakings – Effect

Supreme Court granted special leave to the Department to appeal against the judgment of the Karnataka High Court whereby the High Court held that as long as the undertakings remained eligible for deduction u/s. 80-IB of the Act, the deduction could not be denied merely on the ground that there had been a merger of the firms which owned the undertakings.

CIT vs. Trident Minerals (100% EOU); (2019) 416 ITR 76 (st): Dated 04/07/2019.

4.4 Export – Computation of special deduction – Whether on total income after excluding deduction available u/s. 80-IB

Supreme Court dismissed the Department's special leave petition against the judgment of the Bombay High Court whereby the High Court held in favour of the assessee on the question whether the assessee was entitled to deduction u/s. 80HHC of the Income-tax Act, 1961 on the total income after excluding the deduction available u/s. 80-IB and the provisions of section 80-IB(13) read with section 80-IA(9) had no

application to section 80-HHC of the Act and that the assessee was entitled to full deduction u/ss. 80HHC and 80-IB of the Act, subject to its gross total income.

ACIT vs. IPCA Laboratories Ltd.; (2019) 416 ITR 76 (st): Dated 03/07/2019.

4.5 Financial Corporation – Provision for doubtful and loss assets – S. 36(1)(viia)(c)

Supreme Court dismissed the Department's special leave petition against the judgment of the Madras High Court whereby the High Court answered in favour of the assessee the question whether the Tribunal was right in holding that the assessee was entitled to deduction of the provision made in respect of doubtful and loss assets u/s. 36(1)(viia)(c) of the Income-tax Act, 1961 in terms of the proviso to that section, even though the assessee did not have any positive profits to set it off against:

CIT vs. Tamilnadu Industrial Investment Corporation Ltd.; (2019) 416 ITR 77 (st): sated 04/07/2019:

4.6 Interest on refund – Refund of self-assessment tax

Supreme Court granted special leave to the Department to appeal against the judgment of the Bombay High Court whereby the High Court, following its order in the assessee's case, dismissed the Department's appeal on the question whether the assessee was entitled to interest u/s. 244A of the Income-tax Act, 1961 on the excess self assessment tax refunded to the assessee.

Principal CIT vs. Bank of India; (2019) 416 ITR 78 (st): dated 05/07/2019.

4.7 Penalty – Concealment of income

Supreme Court dismissed the Department's special leave petition against the judgment of the Madhya Pradesh High Court whereby the High Court held that the return having been revised much prior to the date of issuance of notice u/s. 153C of the Income-tax Act, 1961 and the Assessing Officer having nowhere recorded his satisfaction that the assessee had concealed the particulars of such income, that there is no illegality in the order of the Tribunal to the effect that there was neither any concealment of income nor furnishing of any inaccurate particulars thereof and no penalty u/s. 271(1)(c)was leviable.

Principal CIT vs. Prabhjot Kaur Chhabra; (2019) 416 ITR 78 (st): Dated 02/07/2019.

4.8 Reassessment – Limitation – Effect of amendment

Supreme Court dismissed the Department's special leave petition against the judgment of the Delhi High Court whereby the High Court held that the subsequent amendment made to section 149 of the Income-tax Act, 1961 could not be invoked for revival of the period of limitation for the A. Y. 1998-99 in the year 2012, i.e., more than 8 years after expiration of limitation on 31/03/2005.

ACIT vs. Brahm Datt; (2019) 416 ITR 79 (st): dated 05/07/2019.

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DIRECT TAXES
High Court

Paras S. Savla, Jitendra Singh, Nishit Gandhi, *Advocates*

1 ***M/s L & T Thales Technology Services Pvt. Ltd. vs. CIT(CC-3),***

Tax Case Appeal 547 of 2019, Madras High Court, order dt. 06th August, 2019

Time limit for passing final assessment order u/s 144C – The Tribunal remanded back to DRP who asked the TPO to recompute the margins – the time limit under 144C(5) after the TPO passes the order and not from the date of DRP order

The Assessee Company filed its return of income for the assessment year 2008-09 claiming a loss of ₹ 3,06,16,652/-. Along with the return of income, the international transactions of the assessee were duly reported in the accountant's report in form No.3CEB adopting Transactional Net Margin Method (TNMM). The Assessing Officer referred the case to the TPO u/s. 92CA of the Act for determination of the arm's length nature of the assessee's international transactions. The TPO rejected the transfer pricing documents and made an upward adjustment of ₹ 6,72,00,000/-. A draft assessment order was passed under Section 143(3) r.w.s. 144C(1) of the Act in conformity with the adjustment made by the TPO. The assessee filed their objections before the DRP. DRP on 09.8.2012 rejected the objections raised. Final assessment order was passed on 31.10.2012. On further appeal, the Tribunal by order dated 22.5.2013, set aside the order of the DRP and restored the matter back to the file of the DRP to pass a speaking order stating all the objections of the assessee and disposing them of by giving cogent reasons for adjudication of the objections of the assessee after giving reasonable and proper opportunity of hearing to the assessee. The Tribunal further directed that after receiving the order of the DRP, the Assessing Officer would again pass an order under Section 144C(13) of the Act. The DRP, by order dated 12.3.2014, modified its earlier order by stating that the TPO would compute margins of the comparables based on the annual reports of the respective comparable company, that M/s.KALS Information Systems Limited was to be excluded and that M/s.VJIL Consulting Limited was to be included in the comparable set. The order passed by the DRP dated 12.3.2014 was marked to the assessee, the Assessing Officer and the Transfer Pricing Officer concerned. Thereafter, the giving effect to order was passed on 10.2.2015 and the final assessment order was passed on 26.2.2015 by the Assessing officer. Against the final assessment order dated 26.2.2015, the assessee filed an appeal before the Tribunal on the ground that it was time barred.

The Tribunal rejected the contention advanced by the assessee. Before the High Court it was argued that the Assessing Officer received the directions issued by the DRP on 21.3.2014, the same date, on which, the TPO received the directions. Since the due date for passing the final assessment order as per Section 144C(13) of the Act was 30.4.2014, whereas the final assessment order was passed on 26.2.2015, the order was clearly beyond the time limit prescribed under Sub-Section (13) of Section 144C of the Act. It was further submitted that in the first round of litigation, the TPO understood the legal position in a proper manner and passed orders giving effect to the directions issued by the DRP and the final assessment order was passed by the Assessing Officer within the time limit under Sub-Section (13) of Section 144C of the Act. However, in the second round, both the TPO as well as the Assessing Officer slept over the matter and they cannot extend the time limit thereby acting prejudicial to the interest of the assessee. The High Court observed that interestingly, the DRP in the remand order dated 12.3.2014, did not compute determine the arm's length price and whether there was an upward adjustment or otherwise. Instead the DRP directed the TPO to compute margins of the comparables based on the annual reports of the respective comparable company and issued two other directions as well. The assessee fully understood that the directions were to the TPO and not to the Assessing Officer since, obviously, the computation could not be done by the Assessing Officer. The Court observed that the assessee submitted before the TPO a representation dated 10.4.2014 requesting to take on record their submissions and give effect to the directions of the DRP. The TPO passed the order dated 10.2.2015 and communicated the same to the Assessing Officer, who, in turn, passed the final assessment order dated 26.2.2015. The Court held that the Tribunal was right in holding that there is no jurisdictional error to invalidate the proceedings in toto and the communication of a copy of the directions of the DRP dated 12.3.2014 to the Assessing Officer, stated to have been received by the Assessing Officer on 21.3.2014, was not a direction within the scope of Sub-Section (5) of Section 144C of the Act. The directions issued by the DRP were to the TPO, who was, in turn, required to do the computation after considering the objections of the assessee and it is thereafter they mature into directions under Sub-Section (5) of Section 144C of the Act. The Court thus dismissed the Assessee appeal.

2 ***Harjeet Surajprakash Girotra vs. Union of India,***
Writ Petition no. 513 of 2019, Bombay High Court, order dt. 08th July, 2019

Issuance of notice u/s. 148 on time – Address as per the PAN was incorrect – Notice not served - Revenue should have served to notice to address as mentioned in the bank – Reopening bad in law

Assessee was an individual, a widowed lady. She had challenged a notice u/s 148, assessment order and the recovery action taken by the Department directly before the High Court. Assessee was allotted a Permanent Account Number ('PAN' for short) by the Income Tax Department. However, she being a housewife had never filed return of income since she did not have any taxable income. After the death of her husband, she resided mostly with her sisters at Jabalpur. The Assessing officer had issued a notice of reopening of the assessment for the Assessment Year 2011-2012. The said notice dated 15.3.2018 was dispatched for delivery through post. It was returned by the postal authority on 23.3.2018 with a remark "left". According to the Department, the address in the said postal communication was as stated by the assessee in her PAN which she never requested to be changed. On the basis of such notice and the postal despatch, the Assessing Officer carried

on the assessment for the said Assessment Year. During the assessment, however, he attempted to serve notices to the Assessee at the address given by her in her bank account, the details of which were with the Department. As per the Department, Assessee had entered into various high value transactions such as cash deposits in the bank account, purchase of mutual funds, sale and purchase of immovable properties, etc, basis which the assessment order was completed on 28.12.2018. The Department thereafter issued a recovery notice dated 1.2.2019 seeking recovery of the petitioner's tax dues. Assessee contented that she was completely unaware and oblivion to such proceedings since she was no longer residing at the address indicated in her PAN card and the entire assessment thus proceeded ex-parte. Only upon being telephonically informed about certain despatches by the Department, she rushed from Jabalpur to Mumbai and gathered basic information. It was further submitted that mere issuance of notice of reopening of the assessment by the Department is not sufficient. Service thereof is also necessary. The Assessee urged that Department should have followed the procedure prescribed under the Income Tax Rules, 1961 ('Rules' for short) to serve such notice and same has not been done. Without valid service of notice, reassessment could not have been done. On the other hand, the Department opposed the petition, contending that the notice of reopening of assessment was issued by the Assessing Officer, which is sufficient compliance with the requirement of section 148 of the Income Tax Act ('the Act' for short). The notice was also despatched for service at the petitioner's address given by her in her PAN card and the assessee never intimated the change in address. The department further alleged that the Assessee was systematically dodging the service of notice and that several notices were issued during the reassessment proceedings also, which the Assessee did not accept. The Court observed that as per section 148(1) of the Act, before making reassessment under section 147, the Assessing Officer had to serve on the assessee the notice requiring him to furnish a return. Service of notice is necessary and not its mere issuance. In terms of provisions contained in section 149 of the Act, such notice could have been issued latest by 31.3.2018. Placing reliance on various decisions the Court held that the notice of reassessment under section 148 of the Act had to be served on the assessee. The Court held that after receiving the envelope containing the notice from the postal department as 'left', till 31.3.2018 which was the last date for service of such notice, the department took no further steps. In this background, the question is can the Department contend that there was due service of the notice. After referring to section 282 and rule 127 pertaining to service of notice or summons, etc. Court observed that, the addresses to which a notice or a summons, etc. may be delivered or transmitted, shall be as per the sub-rule (2) of Rule 127. Clause (a) of sub-rule (2) of Rule 127 includes four sources of address for such transmission. First one being the address available in PAN database of the addressee and in case it is cannot be delivered or transmitted to the said address then it can be address of the assessee as available with the Banking company or a cooperative bank to which Banking Regulations Act, 1949 applies. The Court held that in the present case since the delivery of the notice could not be made at the address of the assessee available in PAN database, by virtue of the further proviso to sub-rule (2) of Rule 127, the communication had to be delivered at the address as available with the banking company. It was observed that the Department had access to the petitioner's bank account. It is precisely from the activities in such bank account that the department had gathered the material prima facie believing that the income chargeable to tax had escaped assessment. Since no such steps were taken to serve the notice at the address mentioned at Bank account, service of notice, was not complete. The Court held that in absence of

service of notice before the last date envisaged under section 149 of the Act, the Assessing Officer could not have proceeded further with the reassessment proceedings. Thus all the subsequent steps of attempting to serve the notices of scrutiny assessment were of no consequence. The Court thus held that reopening of assessment was invalid and the consequential order of reassessment was set aside. All subsequent steps for coercive recovery of the tax dues arising out of such order of assessment are also set aside.

3 ***CIT vs. Salgaocar Mining Industries (P.) Ltd.,***

Tax Appeal 4 of 2018, Bombay High Court at Goa, order dt. 09-07-2019

Business Expenditure – section 37(1) of the Income Tax Act, 1961 – contribution made to State Government for construction of a bridge which would be used for transportation of goods - Assessee, by spending for construction of new bridge, had not acquired any property or right of permanent character - Expenditure is revenue in nature

State Government had asked mining companies in and around an area to contribute towards construction of the bridge since it would be used by them for transportation of mineral ore. Accordingly, in AY 2008-09, Assessee contributed ₹ 1.38 crores as its share of contribution to be paid to Goa Infrastructure Development Co. Ltd [GIDCL] for construction of the new bridge. The assessee claimed this contribution as a revenue expenditure. However, AO treated it as capital expenditure. On appeal, CIT(A) confirmed the order of the AO. On further appeal, the Appellate Tribunal allowed the claim of the assessee by observing that the construction of new bridge had resulted in revenue for the assessee in terms of cost per ton transported as well as increase in the quantity of ore exported/sold. The department being aggrieved by the order preferred an appeal before the Hon'ble Bombay High Court. The High Court observed that contribution made by the assessee towards the construction of the new bridge facilitated the business of the assessee, enabling it being carried on more efficiently or more profitably and yet, at the same time, the fixed capital of the assessee was left untouched. In the premises, the expenditure was clearly on revenue account and not on capital account, though it resulted into an advantage of enduring nature for the assessee. When reliance was placed on *Empire Jute Co. Ltd. vs. CIT [1980] 124 ITR 1 (SC),* by the department, the High Court observed that in the present case, Assessee, by spending for construction of the new bridge, had not acquired any property or right of permanent character the possession of which was a condition of carrying on its trade at all. What it thereby achieved was reduction of the cost of operating its profit-making apparatus. It was, thus, in the nature of expenditure as part of the process of profit earning, as explained by the Supreme Court in *Empire Jute Co. Ltd.* (supra). The Court thus dismissed the departmental appeal.

4 ***M/s P. H. Kumar & Co. vs. ITO,***

Income Tax Appeal 918 of 2015, Delhi High Court, order dt. 05-08-2019

Business loss – Shortage of goods – As per the franchise agreement loss to be borne by the assessee - No details of shortage provided – No dispute on payment made by Assessee to the company and hence loss allowed

The Assessee had a showroom in Delhi. It entered into a franchisee agreement on 12th July, 1995 with Coats Viyella India Limited and it was appointed to sell "Allen Solly" brand of products at its showroom in Karol Bagh, New Delhi. As a franchisee, the Assessee was obliged to stock and sell the products supplied by the aforementioned company only. Under clauses 21 and 22 of the

Franchisee Agreement, it was the Assessee which was accountable to the company in case of loss of goods. In November, 2000, the franchise agreement was cancelled and in the final account prepared by the company, a sum of ₹ 2 lakhs on account of stock shortage was debited and recovered from the assessee. In the return filed for AY 2001-2002, in computing the income, the Assessee claimed shortage of ₹ 2,22,080/- which included shortage of ₹ 2 lakhs debited by the company in the final account. Though, Assessee had asked from the company, details of shortage of stock, it was informed by the company that there was fire accident at the premises of agents of the company, therefore, the company could not provide the details of shortage of stock. The company accordingly issued a certificate to that effect. Before the Assessing Officer (AO), despite the Assessee producing the said certificate, the claim of ₹ 2 lakhs on account of shortage of stock was disallowed on the ground that the Assessee had failed to furnish details of either the nature of or period of shortage. On Appeal, the CIT(A) dismissed the appeal observing that the company had wrongly recovered the loss from the Assessee. The CIT (A) further observed that the Assessee should have raised a dispute with the company instead of claiming it as a deduction. On further appeal, the Tribunal, disagreed with CIT (A) that the loss on account of shortage of stock was the liability of the company and not of the Assessee. However the ITAT upheld the disallowance on the ground that the Assessee had failed to substantiate such loss by furnishing details of the shortage. On further appeal the High Court observed that Assessee had placed on record the agreement under which it was obliged to bear the loss for shortage of stock. The Assessee also placed on record the statement of account in terms of which it had to pay the company ₹ 2 lakhs towards shortage of stock. It is not as if the Assessee did not make an effort to ascertain the details. It was informed that on account of fire, those details could not be provided as the records had been destroyed. This as per the Court, was not something in the control of the Assessee. On its part it gave the full details to the AO including the FIR number reporting the loss of records due to the fire. The Court further held that what could the Assessee have done anything more to substantiate the fact that it had to pay ₹ 2 lakhs to the company towards the shortage of stock. The fact of the Assessee having actually paid the company the said amount was also not in dispute. The Revenue had submitted that even in earlier AYs deductions have been claimed by the Assessee on account of shortage of stock for the varying amounts. The Court observed that being in the business of running a showroom for wearing apparels, shortage of stock is not an unusual phenomenon. The Court thus reversed the Tribunal decision and allowed Assessee's appeal.

5 ***GE Energy Parts Inc vs. DCIT,***
Writ Petitions 5577/2018, Delhi High Court, order dt. 20-08-2019

Time limit u/s. 275 to pass penalty orders – Penalty order passed beyond six months from the date ITAT order served to commissioner – mandatory period of limitation cannot be defeated by delaying the dispatch to jurisdictional CIT – Penalty order quashed

The Assessee and its sister companies had filed various writ petitions challenging the penalty orders dt. 26th April, 2018 passed by the AO u/s. 271(1)(c). The Assessee i.e., M/s GE Energy Parts Inc. (GEPI) was a company incorporated in United States of America (USA). It was also a tax resident of USA. GEPI was engaged in the business of manufacture and offshore sale of highly sophisticated equipment such as gas turbine parts and sub-assemblies. GEPI sold its products offshore on a principal to principal basis to customers all over the world, including those in India and the title to the goods sold to Indian

customers passes from GEPI outside India. On 2nd March, 2007 a survey under Section 133A was conducted at the Liaison Office of General Electric International Operations Company Inc. (GEIOC) at New Delhi. Based on the above survey, the Assessing Officer (AO) initiated re-assessment proceedings of GEPI for Assessment Years (AYs) 2002-03 to 2006-07 by issuing notices under Section 148 of the Act. Subsequently by an order dated 30th December, 2008 the AO completed the assessment proceedings under Section 147 r.w.s. 143(3) of the Act holding that GEPI had a fixed place of Permanent Establishment (PE) and dependent agent PE (DAPE) in India. The AO deemed 10% of the value of supplies made to the clients in India as the profits arising out from such supplies and attributed 35% of such profit to GEPI's PE in India. In essence, the AO attributed 3.5% of the total value of supplies made by GEPI to customers in India, as the income of the GEPI. Simultaneously the AO also initiated penalty proceedings against GEPI under Section 271(1)(c) of the Act for the aforementioned AYs. Aggrieved by the above assessment order dated 30th December 2018, GEPI filed separate appeals before the CIT(A). By an order dated 30th September, 2010 the CIT (A) upheld the order of the AO in so far initiation of proceedings under Section 147/148 of the Act, existence of PE and attribution of income were concerned. However, the appeal was allowed on the issue of levy of interest under Section 234B of the Act. For AY 2007-2008 the return of GEPI was selected for scrutiny. The AO passed a draft order which was challenged before the Dispute Resolution Panel (DRP). The draft assessment order was upheld by the DRP and subsequently, the final assessment order for AY 2007-2008 was passed by the AO on 13th October, 2010. The AO initiated penalty proceedings under Section 271(1)(c) for the said AY as well. Aggrieved by the orders of the CIT (A) and the DRP, GEPI preferred appeals before the ITAT. By the order dated 27th January, 2017 following its decision in the case of GE Energy Parts (GEEP) for AY 2001-2002, the ITAT disposed of the appeals filed by the GEPI upholding the order of the AO and CIT (A) except lowering the rate of attribution of profit from 35% to 26%. The appeals against the Tribunal order were pending before the High Court. Pursuant to the above order of the ITAT passed on 27th January, 2017, the AO issued a penalty Show Cause Notice (SCN) dated 16th February, 2017. In response, GEPI filed a reply inter-alia raising an objection that the said notice was barred by limitation in terms of Section 275(1)(a) of the Act. The AO on 22nd May, 2017 passed separate orders under Section 254/143(3) of the Act for the aforementioned AYs giving appeal effect to the order dated 27th January, 2017 of the ITAT. The AO passed penalty orders dated 26th April, 2018 for the aforementioned AYs. In the said orders AO observed that the order dated 27th January, 2017 passed by the ITAT had been received in his office only on 1st November, 2017. Thereafter, GEPI filed an application under the Right to Information Act, 2005 (RTI) before the Central Public Information Officer (CPIO) of the ITAT seeking to know when a copy of the order dated 27th January, 2017 was in fact served upon the Revenue. In response to the said application, GEPI received a reply from the CPIO of the ITAT confirming that the order dated 27th January, 2017 of the ITAT was served on the Commissioner of Income Tax (Judicial), [CIT(J)] on 17th April, 2017. Based on the above fact, GEPI filed writ petitions before the High court challenging the penalty orders. The Department contented that the limitation expired only on 30th May, 2018 since the order of the ITAT was received by the 'jurisdictional' CIT i.e. CIT International Taxation-1 only on 1st November, 2017. It was contended that till the time the jurisdictional CIT receives the copy of the order of the ITAT, the period of limitation for initiating penalty proceedings does not commence. The

Court after going through section 275(1)(a) observed that similar expression i.e. 'Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner' is used in Section 260A of the Act which also finds place in Section 275(1)(a). The limitation begins to run on the expiry of six months from the end of the month in which the order of the ITAT is received by any of the above officers. There are two periods of limitation within which the penalty proceedings have to be completed. One is the expiry of the financial year in which the proceedings in the course of which the action for imposition of penalty has been initiated are completed. The second is the expiry of six months from the end of the month in which the order of the ITAT is received by the above officers. Whichever period expires later becomes the limitation period for issuing an order of penalty. The Court further observed that the title of Section 275 reads as "limitation for imposing penalties". Section 275 (1) opens with the line "no order imposing penalty under this chapter shall be passed" thus, indicating the mandatory nature of the provision. The Court held that in the present case an SCN was issued to the Assessee on 16th February, 2017 itself by the AO under Section 271(1)(c) of the Act and this could not have happened if the AO was not already aware of the order of the ITAT. The appeal effect order passed on 22nd May, 2017 could not have been issued without a copy of the order of the ITAT. Therefore, in any event, the six-month period of limitation in terms of Section 275(1)(a) of the Act would begin to run from 22nd May, 2017. The Court observed that to support its contention the Revenue had made reference to a communication dated 1st November, 2017 addressed by the ITO, Judicial-II, to the CIT (IT) simply enclosing a copy of the order of the ITAT dated 27th January, 2017. The letter stated that the ITO Judicial II received the order only on 31st October 2017 and it bared the date stamp of 1st November, 2017 of the office of the CIT (IT) to show that it was received by the CIT (IT) on that date. The Court held that the claim that the ITO, Judicial-II received the copy of the order dated 27th January 2017 of the ITAT only on 31st October, 2017 contradicted the fact that an appeal effect was given to the ITAT order by an order dated 22nd May, 2017 itself which clearly meant that the ITAT order was already available on that date. Further in the replies received by the Assessee in response to the application filed by it under the RTI, the CPIO has clearly stated that the said order of Hon'ble ITAT was dispatched by the Registry of the ITAT on 11th April, 2017 and received by the office of the CIT (Judicial) on 17th April, 2017. These facts were not denied by the Department. The Court held that if an officer of the Department is allowed to choose a date on which a copy of the order which has to be given effect to or acted upon is sent to the officer concerned, it will defeat the very purpose for which the legislature has stipulated definite time limits in various provisions of the Act for the authorities to perform their statutory tasks in a time bound manner. In other words, the mandatory period of limitation under Section 275(1)(a) of the Act cannot be sought to be defeated by delaying the dispatch of the relevant order of the ITAT to the concerned 'jurisdictional' CIT. The Court further held that relevant date was when the CIT (Judicial) representing the Department before the ITAT received the order, which in any event is generally made available in the public domain soon after the order is pronounced. The Court thus held that the penalty orders dated 26th April 2018 were issued far beyond the six-month period of limitation in terms of Section 275(1)(a) of the Act and were, therefore, invalid and were without jurisdiction.

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INTERNATIONAL TAXATION CONFERENCE 2019

JOINT CONFERENCE BETWEEN
FOUNDATION FOR INTERNATIONAL TAXATION, INDIA
&
INTERNATIONAL BUREAU OF FISCAL DOCUMENTATION, AMSTERDAM
IN CO-OPERATION WITH THE ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, PARIS
DECEMBER 5-7, 2019, ITC MARATHA HOTEL, MUMBAI
(Provisional : August 07, 2019)

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GLOBAL TAX REFORM: AN IMPOSSIBLE DREAM?
KEYNOTE SPEAKER - PASCAL SAINT-AMANS, OECD, PARIS

Our 24th Annual Conference in 2019 is making a major shift in our focus from Base Erosion and Profit Sharing to a broader topic of Digitization of the Economy. The theme of our conference is **ADDRESSING THE TAX CHALLENGES OF DIGITALIZATION OF THE ECONOMY**. Our keynote topic remains **AN OVERVIEW OF CURRENT AND LIKELY NEW ISSUES ON THE OECD AGENDA ON DIGITAL ECONOMY (ACTION ONE).**

Our first speaker at the Conference will be **Murray Clayson** from the UK, President of International Fiscal Association – Worldwide, with **Porus Kaka**, our Past President of International Fiscal Association, Worldwide, from India, as the Session Chairman. Our keynote **("Klaus Vogel")** speaker is **Pascal Saint-Amans,** Director of the OECD's Center for Tax Policy, Paris. He heads the BEPS Project and reports regularly to the G20 Finance Ministers on its progress. He plans to submit a draft of OECD framework of a programme to the G20 Finance Minister to regulate and allocate taxing rights for use by countries around the world in October and which will be released for public consultation in November. Our conference is perfectly timed for a discussion of the proposal. We also intend to invite several other experts from his OECD Team in Paris to support him. The conference will be attended by experts from around the world.

Our proposed speakers this year include **Murray Clayson**, Worldwide IFA President, UK - **William Morris**, Deputy Global Tax Policy Leader with PricewaterhouseCoopers, USA - **Robert Danon**, Professor at University of Lausanne, Switzerland - **Mike Williams**, UK Treasury, United Kingdom - **Sol Picciotto**, Emeritus Professor of Lancaster University, United Kingdom - **Jeffery Owens**, Professor & Director, Global Tax Policy Center at Vienna University, Austria - **Marc Levey**, Partner, Baker & McKenzie, USA - **Akhilesh Ranjan**, Member of Central Board of Direct Taxes & Principal Chief Commissioner of Income Tax (International), India.

As last year, this conference will be held jointly with **IBFD** - Amsterdam in co-operation with **OECD**, Paris. IBFD is the sister organization of **International Fiscal Association**. It was set up as its publications, research and training arm in 1938. As a charity, it is the largest institution of its kind in its field. **Foundation for International Taxation** is also a charity and today runs one of the leading conferences annually on international taxation in India.

On behalf of the organisers of this Conference, we welcome **Belema Obuoforibo**, Director, International Bureau of Fiscal Documentation, Amsterdam to share the responsibility as Joint Director for this Conference from this year onwards.

We look forward to your participation at our 24th Annual Conference

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DIRECT TAXES
Tribunal

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

Reported Decisions

1 ***ACIT vs. Jai Kumar Gupta (HUF)***
(ITA: 5303/Mum/2017) [Assessment Year: 2013-14], Order dated 28.02.2019, [2019] 107 taxmnn.com 180 (Mumbai – Trib)

Section 54 – A deduction u/s. 54 cannot be denied merely on the fact that the Assessee by ignorance of law or mistake has claimed a deduction u/s. 54F instead of Section 54. Further the Assessee is entitled for a deduction once he makes investment in purchase of flats and flats are allotted in its name

Facts

The Assessee is a Hindu Undivided Family. During the year, the Assessee had sold various residential as well as commercial properties and derived capital gain. With regard to a sale of the residential house, the Assessee had claimed a deduction u/s. 54F of the Act. The return was selected for the scrutiny assessment and the Assessee was asked to justify its claim. Pursuant thereto, the Assessee filed a letter with the AO mentioning that he had inadvertently claimed a deduction u/s. 54F instead of Section 54 of the Act. However, the AO could not appreciate the claim of the Assessee and denied the said deduction on the ground that on the date of transfer of the capital asset, the Assessee was the owner of more than one residential house other than the new asset. Further, the AO observed that insofar as the investment in new flats was concerned, the assessee had only received the allotment letter from the real estate development company and complete rights in the property vests with the owner only when he receives possession of the said property. On appeal, the CIT(A) observed that the Assessee had initially claimed a deduction u/s. 54F of the Act by ignorance of law or mistake and the AO could not take advantage of it. He further observed that the Assessee would be eligible to claim a deduction u/s. 54 if it had invested the capital gain within the period prescribed u/s. 54 and flats had been allotted in its name. Accordingly, he allowed the contentions of the Assessee. Being aggrieved, the Revenue has preferred an appeal before the ITAT. After hearing both the sides, the ITAT held as under:

Held

The ITAT observed that if the assessee invests the capital gain in purchase/construction of a new residential house, it is eligible to claim a deduction u/s. 54 o the Act. Merely because the Assessee, by ignorance of law or mistake, had claimed a deduction u/s. 54F instead of Section 54, such ignorance of law/mistake on the part of the Assessee cannot be utilized to its disadvantage by the AO It further observed that

the duty of the AO is to correctly compute the real income of the assessee in accordance with the statutory provisions. While the A.O is empowered to disallow any deduction claimed by the assessee if it is not in accordance with provisions of Act, in the same manner, he is duty bound to allow a deduction to the assessee if the assessee is eligible for such a deduction under the provisions of the Act. Since, the Assessee is entitled for a deduction u/s. 54, the AO erred in applying the conditions of Section 54F to the present facts. Further, the ITAT observed that once the assessee makes investment in purchase of flats and flats are allotted in its name, the conditions of section 54 are satisfied. It observed that the judicial precedents and the CBDT circulars clearly support this view. It further held that in any case of the matter, the materials placed on record clearly prove that not only the flats were allotted to the Assessee in the assessment year but the sale deeds relating to the flats purchased were executed and registered in favour of the assessee before the end of the financial year relevant to the assessment year under dispute. On the aforesaid observations, the ITAT dismissed the appeal filed by the Revenue and confirmed the order of the CIT(A).

2 ***ITO- 10(3)(2), Mumbai vs. Kantilal G Kotecha***

(ITA: 205/Mum/2016) [Assessment Year: 2009-10], Order dated 05.07.2019, [2019] 108 taxmnn.com 119 (Mumbai-Trib)

Section 271(1)(c) – No penalty u/s. 271(1)(c) can be levied for furnishing inaccurate particulars of income when the full and true facts and information with respect to the claim u/s. 47(xiv) are provided in the return of income

Facts

The Assessee was a Proprietor and had been running his business under the name "M/s. Overseas Plastic Moulders (OPM) since the last thirty year." During the year under consideration, the Assessee converted a proprietary concern into a public limited company named "M/s. Overseas Plastic Moulders India Limited (OPMIL)." On succession of the said business from a proprietary concern to a public limited company, the Assessee transferred all the assets including self-generated goodwill and liabilities of the proprietary concern against the consideration of 33,59,064 fully paid up equity shares of face value of ₹ 10/- each of the public limited company. The Assessee claimed that the said consideration received for the same is not chargeable to tax under the head capital gains as per the provisions of Section 47(xiv) of the Act. During the course of the assessment proceedings, the AO was of the view that the Assessee is not entitled to claim an exemption u/s. 47(xiv) to the extent of the self-generated goodwill amounting to ₹ 2,29,84,701/- for the reason that the same was never mentioned in the books of the proprietary concern and in turn does not satisfy the condition of Section 47(xiv) of the Act. The AO disallowed the claim of the Assessee in part to the extent of the self-generated goodwill. Thereafter, the AO initiated the penalty proceedings and finally levied the penalty u/s. 271(1)(c) of the Act on the observation that the Assessee had filed inaccurate particulars of income. The AO invoked the explanation 1 to Section 271(1)(c) of the Act. On appeal, the CIT(A) accepted the contentions of the Assessee and deleted the penalty on the observation that the Assessee had not furnished any inaccurate particulars of income by claiming an exemption u/s. 47(xiv) of the Act. Being aggrieved, the Revenue has preferred an appeal before the ITAT. During the course of the hearing, the DR relied on the order of the AO and argued that the CIT(A) had deleted the penalty on the basis of mercy ignoring the fact that the Assessee had indeed furnished inaccurate particulars of income. He also placed the reliance on the decision of the Apex Court in the case of *"Mak Data (P.) Ltd. vs. CIT. [2013] 358 ITR 593 (SC)"*. On the other hand, it was submitted on behalf of the Assessee that the AO did not disallow the entire claim of the Assessee u/s. 47(xiv) of the Act and accepted all other capital assets except self-generated good will. It was pointed out that

the Assessee was in the business for the last thirty years and the business of the Assessee had earned substantial amount of goodwill. It was further mentioned that the Assessee was under the bonafide belief that since there was no value for the self-generated goodwill in terms of sec 55(2) of the Act, the allotment of shares for the same pursuant to conversion of the proprietary concern into the public limited company would also not be considered as a transfer within the meaning of section 2(47) of the Act, as the computation mechanism fails in the absence of cost of the goodwill which was accepted by the AO meaning thereby there was existence of self-generated goodwill in the hands of the Assessee. Hence the claim of an exemption u/s. 47(xiv) of the Act for the transfer of self-generated Goodwill with the other assets and liabilities cannot be treated as wrong/incorrect. After considering the arguments of both the sides, the ITAT held as under:

Held

The ITAT held that the Assessee had offered the bonafide explanation before the the AO pertaining to his claim of an exemption u/s. 47(xiv) of the Act. The ITAT observed that it is well settled that the discharge of consideration by way of issue of shares is a valid consideration. Thus, the shares allotted by the Assessee in the public limited company on transfer of the self-generated goodwill should have been treated as a valid consideration for the transfer together with other assets and liabilities. While coming to the said conclusion, the ITAT relied on the decision of the Kerala High Court in the case of the "*Commonwealth Trust India Ltd. vs. CIT [2008] 306 ITR 356 (Kerala)*". It is further, observed that the entire facts relating to the said issue which are material for the computation of the total income were duly disclosed by the Assessee before the AO No explanation furnished by the Assessee was found to be false. The ITAT held that it was only a genuine difference of opinion between the Assessee and the AO in not allowing the claim of exemption u/s 47(xiv) of the Act regarding the self-generated goodwill. The ITAT further, relied on the decision of the Supreme Court in the case of "*CIT vs. Reliance Petroproducts (P.) Ltd. [2010] 322 ITR 158 (SC)*" and held that when no information given in the return was found to be incorrect or inaccurate, the Assessee cannot be held guilty of furnishing inaccurate particulars of income. It may at best result in making an incorrect claim in law. Thus, the ITAT upheld the action of the CIT(A) and dismissed the appeal of the Revenue..

Unreported Decisions

3 ***ACIT vs. Shri Anil Gulabdas Shah***

[ITA No. 5134/ Mum/2017] (Assessment Year 2012-13) order dated 09/08/2019

Section 45 r.w.s. 48: compensation for relinquishment of 'Right to Sue' does not give any rise to capital gains chargeable to tax

Facts

The Assessee is an individual and a lawyer by profession. During the year under consideration, The Assessee transferred a plot of land at Andheri, Mumbai on 31.12.2011 for a sale consideration of ₹ 4 crores. The Assessee offered ₹ 33.34 lakhs as long-term capital gains on sale of this property computed by considering the total consideration of ₹ 4 crores. The aforesaid land was under dispute and a subject matter of extensive litigation which ultimately got culminated by consent terms dated 03.01.2012 between the the Assessee and the purchaser before the Supreme Court. As per the consent terms, the Assessee received additional sum of ₹ 9 crores as compensation for giving up on the litigation and for not pursuing the litigation further before the Supreme Court. The said sum of ₹ 9 crores was not considered as a part of sale consideration while computing the capital gains. The AO took a view that the said compensation of ₹ 9 crores was towards transfer of the said land and accordingly formed part of the total sale consideration. On appeal filed by the Assessee, the CIT(A) held that the compensation of ₹ 9 crores was for relinquishment of 'right to sue'

which is not transferable under Indian laws and therefore, such consideration being a capital receipt is not chargeable to tax u/s. 45 of the Act. Further, the CIT(A) observed that the cost of acquisition of such right are indeterminable and consequently, even on account of failure of computational mechanism u/s. 48 of the Act, the same cannot be brought to tax. Accordingly, the CIT(A) allowed the appeal of the Assessee and deleted the addition made by the AO Being aggrieved, the Revenue has preferred an appeal before the ITAT against the said decision of the CIT(A). After hearing both the sides, the ITAT held as under:

Held

The ITAT perused the records and gave a thoughtful consideration to the detailed reasoning given by the CIT(A) in his order as well as the contentions of both the sides. The ITAT noted that the additional compensation of ₹ 9 crores was towards time, cost and effort of the assessee in pursuing the litigation pertaining to the said plot of land and rejected the contention of the Revenue, that the said compensation was part and parcel of the sale consideration for the sale of property. The ITAT further observed that the CIT(A) had rightly held that there could not be any transfer of a "right to sue" under Indian Law and any capital receipt arising from a right to sue cannot thus be considered capital gains u/s. 45. Further, relying on the decision of the Supreme Court rendered in the case of "*CIT vs. B.C. Srinivasa Shetty [1981] 128 ITR 294 (SC)*", the ITAT observed that the cost of acquisition of the said right being indeterminable, the charging mechanism would fail. The ITAT further referred to the decisions of the co-ordinate benches in the cases of *"Sushmita Sen vs. ACIT" [ITA No. 4351- 52/Mum/2015 dated 14/11/2018*] and "*ACIT vs. Jackie Shroff" [ITA No.2792/Mum/2016 dated 23/05/2018*] while upholding the contention of the Assessee. Accordingly, the ITAT upheld the order of the CIT(A) and dismissed the Revenue's appeal.

4 *Mr. Trilok Chand Chaudhary vs. ACIT*

(ITA 5870/Del/2017) [Assessment Year: 2009-10], Order dated 20.08.2019

Section 153A r.w.s 153C – The completed assessment cannot be interfered by the AO except to the extent of the incriminating material found at the Assessee's premises. An addition on the basis of an incriminating material found at the premises of a third person is unsustainable u/s. 153A and the AO ought to have done the Assessment u/s. 153C for the same after concluding the assessment u/s. 153A of the Act

Facts

The Assessee is an Individual and had filed a Return of Income for the year under consideration on 31.03.2011 declaring the total income at ₹ 19,01,580/-. Subsequently, search and seizure proceedings were carried out in the case of "AKN" group on 11/09/2013 and 17/09/2013. A consequential search was carried out in the case of the Assessee. During the course of search, the Assessee had surrendered the income of ₹ 1.2 crore on account of the amount spent on the marriage of the daughter in the impugned assessment year. Consequent to the search, a notice u/s. 153A of the Act was issued to the Assessee on 30.06.2014 asking him to file a return of income. In response to the said notice, the Assessee filed the Return on 22.09.2015 declaring the total income at ₹ 1,39,01,580/-. The assessment was completed in the case of the Assessee after making the protective addition of ₹ 3.3 crore on the basis of the material seized in the premises of Shri Ashok Chawdhary (Third party). The substantive addition was made in the hands of Shri Ashok Chawdhary for the same assessment year. Further, the AO also made an addition of ₹ 6 lacs holding that the said amount was received by the Assessee from the company M/s. Rosemary properties Pvt. Ltd as deemed dividend u/s. 2(22)(e) of the Act. Being aggrieved, the Assessee preferred an appeal before the first appellate authority. On appeal, the Assessee

challenged the legality of the said additions made by the AO and also challenged the issues on merits. However, the Assessee did not find any success. Being aggrieved, the Assessee has preferred an appeal before the ITAT. During the course of the hearing, it was submitted that for the year under consideration, the Assessment has attained finality and the completed assessment cannot be interfered by the AO u/s. 153A except on the basis of incriminating material found at the premises of the Assessee. The Assessee submitted that a limitation period for issuing a notice u/s. 143(2) already expired for the year under consideration and thus, in absence of any notice issued u/s. 143(2) of the Act, the proceedings for the year under consideration got completed before the date of the search. To buttress his submission, the Assessee relied on the decision of the Delhi High Court in the case of *"CIT vs. Kabul Chawla [2016] 380 ITR 573 (Delhi)"*. It was submitted that the AO cannot make an addition in the hands of the Assessee relying on the incriminating material seized at the searched premises of the third party since it is beyond the jurisdiction of the AO The Assessee further, relying on decision of *"PCIT vs. Jignesh P. Shah (2018) 99 taxmann.com 111 (Bombay)"* submitted that no addition can be made u/s. 2(22)(e) of the Act without having any incriminating material with respect to the same. On the other hand, the DR heavily relied on the orders of both the authorities. After hearing both the sides, the ITAT held as under:

Held

The ITAT held that on perusal of the panchnama drawn, it is clear that the search warrant was issued in the name of Ashok Chowdhary and the panchnama does not contain the name of the Assessee. Thus, it is evident that the material relied upon for making an addition in the case of the Assessee was not found at the searched premises of the Assessee. The ITAT held that for using any material found from the premises of a third party during the course of the search in the assessment proceeding, the AO of a third party was required to record the satisfaction as the material belongs to the Assessee in terms of Section 153C of the Act and then was required to proceed as per the provisions of section 153C of the Act. In the present case, it is evident that the addition in dispute has been made u/s. 153A of the Act. The CIT(A) while upholding the addition made u/s153A observed that there cannot be two simultaneous assessments u/s. 153A and 153C of the Act. With regard to the same, the ITAT held that this reasoning given by the CIT(A) is not correct. The assessment u/s. 153C could have been made after completion of the assessment u/s. 153A of the Act. It was observed by the ITAT that the Act has provided separate provisions for making assessments in case of material found in the course of the search from the premises of the Assessee as well as the third party. The AO is required to follow the procedure laid down in the Act for making an assessment and cannot create his own procedure for shortcut methods. It was further held that the AO was required to first complete the proceedings u/s. 153A of the Act and thereafter, he could have taken an action u/s. 153C of the Act with regard to the material found from the premises of Shri Ashok Chawdhry. In the present case, the AO has made an addition of ₹ 3.30 Crores in the hands of the Assessee u/s. 153A of the Act based on the incriminating material found at the searched premises of Shri Ashok Chawdhary which is not permissible under the law. Thus, the ITAT held that the said addition made by the AO in violation of the procedure provided under the Act is bad in law and void ab initio. With regard to the issue of the deemed dividend, the ITAT observed that there was no incriminating material found during the course of search proceedings at the premises of the Assessee and as per the ratio laid down by Delhi High Court and the Bombay High Court in the cases relied upon by the Assessee, the said addition of ₹ 6 Lacs is unsustainable in law. On the aforesaid observations, the ITAT deleted both the additions and allowed the appeal of the Assessee.

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INTERNATIONAL TAXATION
Case Law Update

CA Tarunkumar Singhal & Sunil Moti Lala,
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A. SUPREME COURT

1 ***PCIT vs M/s S.G. Asia Holdings (India) Pvt Ltd.***
[TS-775-SC-2019] – Civil Appeal No. 6144 of 2019

In View of Instruction No. 3/2003 dated 20.05.2003 issued by CBDT, where the aggregate value of International transactions during the year exceeds ₹ 5 crores AO should mandatorily make a reference them to TPO for computation of ALP.

Facts

1. The assessee company was engaged in the business of brokering and dealing in shares and other securities. Return of income was filed on 31.10.2005 declaring total income at ₹ 24,31,82,750/- In the impugned AY it had received certain amount of brokerage from its parent company. After considering the material on record, AO noted that brokerage charged by the assessee was only 0.05% which was lower rate as compared to the prevalent rates in market. The AO, therefore, while computing the Income under Section 143(3) of the act, made an addition of ₹ 2,89,82,746/- under Section 92 of the Act.

2. The CIT(A) confirmed the addition made by AO and dismissed the appeal.

3. On further appeal, the Tribunal set aside the findings rendered by the first two lower authorities and held that transfer pricing adjustment made by the AO was contrary to the mandatory instructions issued by CBDT in its Instruction No. 3/2003 dated 20.05.2003 as no reference was made to the TPO. It also rejected the argument of DR that the case may be set aside to the file of the AO so that he may refer the matter to the TPO holding that the Tribunal being an Appellate authority cannot interfere in the administrative matters which are mandatory as per the provisions of the Act. As reference to the TPO was an administrative matter which was supposed to be followed by the AO which he had failed to do so, the Tribunal cannot make good the such lapse made by the AO.

4. The view so taken by the Tribunal was affirmed by the High Court

5. Aggrieved, the Revenue filed an appeal before the Supreme Court.

Held

1. The Apex Court observed that Instruction No.3/2003 issued by the CBDT contained the following requirement :

"If there are more than one transaction with an associated enterprise or there are transactions with more than one associated enterprise the aggregate value

of which exceeds ₹ 5 crores, the transactions should be referred to the TPO. … …".

2. Thus, Tribunal was right in observing that by not making reference to the TPO, the Assessing Officer had breached the mandatory instructions issued by the CBDT.

3. However, it held that Tribunal ought to have accepted the submission made by the DR and the matter ought to have been restored to the file of the AO so that appropriate reference could be made to the TPO. It would therefore be up to the authorities and the Commissioner concerned to consider the matter in terms of Sub-Section (1) of Section 92CA of the Act.

4. Accordingly, the appeal filed by the Revenue was allowed to the aforesaid extent and AO was directed to take appropriate steps in terms of Instruction No. 3/2003.

B. HIGH COURT

2 *PCIT v Transacend MT Services Pvt. Ltd*

[TS-734-HC-2019] (Del) –ITA 263/2019

Assessment made by AO on an entity which had ceased to exist due to amalgamation was held to be void ab initio

Facts

1. The Assessee was primarily engaged in the provision of IT enabled services in the area of medical transcription to its parent company in the USA and other AE's.

2. The AO had passed final assessment order on 22nd February, 2011 after making Transfer pricing adjustment in conformity with the order of TPO.

3. On assessee's appeal, the CIT (A) directed inclusion of 4 comparables in the final set of comparables and directed the TPO to calculate the ALP accordingly.

4. Aggrieved by the order of the CIT (A), the Revenue filed an appeal in the Tribunal. Also, the Assessee filed Cross Objections before the Tribunal contending that Heartland Delhi Transcription & Services Pvt. Ltd. (HDTS) in whose name the assessment was framed had been amalgamated with Heartland Information & Consultancy Services Pvt. Ltd. (HICS) pursuant to the order dated 25th July 2008 passed by Delhi High Court. Further, the name of the new amalgamated entity got changed to Transcend MT Services Private Limited (TMTS) i.e. the respondent assessee in present appeal. Thus, the assessment framed by AO on 22nd February 2011 on a company that had ceased to exist from 25th July 2008, was void ab initio.

5. The Tribunal relying on *PCIT vs. Maruti Suzuki India Limited (2017) 397 ITR 681 (Del)* as well as *Spice Infotainment vs. CIT (2012) 247 CTR (Del) 500* [which was affirmed by the Supreme Court in C.A. 285 of 2014 *CIT vs. Spice Enfotainment*] held that the assessment framed by the AO on a non-existent company would be void ab initio. Thus, Tribunal quashed the assessment whilst allowing the cross objections of the Assessee.

6. Aggrieved, the Revenue filed an appeal before the High Court

Held

1. The Court noted that there was indeed a letter dated 19th October, 2008 filed with the AO informing him that pursuant to the order dated 25th July, 2008 of Delhi High Court, HDTS had amalgamated with HICS. The said information was also given to the CIT (A). Copies of those letters were also placed before the Tribunal. Despite this, the assessment order was framed on 22nd February, 2011 against the erstwhile company i.e. HDTS.

2. Thus, the Court held that clearly there was no question of a mere clerical error warranting invocation of Section 292B of the Act. There

was a sea change with the original entity against which the assessment was framed viz., HDTS as it had long ceased to exist at least three years prior thereto and had got amalgamated with HICS and then amalgamated entity was re-named as TMTS.

3. Accordingly, it dismissed Revenue's appeal as no substantial question of law arose.

3 *PCIT vs Torus Business Solution Pvt Ltd* *[TS-756-HC-2019(Del)] - ITA 207 of 2019*

Infosys BPO Ltd., TCS E-serve International Ltd, TCS E-serve Ltd, Accentia Techonologies Ltd, E4e Healthcare Business Services Pvt. Limited were held to be not comparable to a Captive Simple ITes service provider

Facts

1. The Assessee was engaged in the business of knowledge process outsourcing, data processing service and rendering back office support services to Torus group.

2. The assessee had selected 13 Comparables in its TP Study report and arrived at a margin of 14.13%. The TPO rejected all comparables selected by assessee and selected 10 new comparables thereby arriving at a margin of 31.73%. DRP rejected the objection raised by the assessee for exclusion of the comparables. Thus final assessment order was passed by AO in conformity with the order of TPO.

3. The Tribunal allowed assessee's appeal and excluded following comparables - Infosys BPO Ltd TCS E-serve International Ltd, TCS E-serve Ltd, Accentia Techonologies Ltd, E4e Healthcare Business Services Pvt Limited

4. Aggrieved, the Revenue filed an appeal before the High Court.

Held

1. The Court noted that it had in a recent judgement [*M/s. Avaya India Pvt. Ltd. vs. ACIT, ITA 532 of 2019*] given detailed reasons as to why on the facts of that case, which were more or less similar to the facts on hand, such comparables ought to have been excluded. It also noted that Tribunal had in the impugned order explained in detail as to why these comparables were be excluded. Following were the reasons for exclusions :-

- Infosys BPO Ltd – as it was engaged into high end integrated services and Infosys brand resulted in higher operating profits.
- TCS E-serve International Ltd – as annual report of the company did not provide any segmental information related to ITES as well as software development services. Also it owned intangibles of substantial amount and it was making payment for the use of Tata Brand.
- TCS E-serve Ltd – as in addition to BPO services, it was also engaged in technical services such as software testing, verification and validation. Also, Segmental data was not available and it was making payment for the use of Tata Brand
- Accentia Techonologies Ltd – as it was engaged into diversified activities such as Knowledge Process outsourcing(KPO), Legal process outsourcing(LPO), Data process Outsourcing(DTO) and high end software services. Also, Segmental data was not available and company had undergone business restructuring during the year under consideration thereby giving rise to extraordinary circumstances.
- E4e Healthcare Business Services Pvt Limited - as it was also into software development services and segmental information was not available. The company was also a 100% EOU

2. Accordingly, it dismissed Revenue's appeal as no substantial question of law arose.

4 ***PCIT vs. Symphony Marketing Solutions India Pvt Ltd***
[TS-783-HC-2019 (Del)] - ITA No.414 and 717 of 2018

Infosys BPO cannot be considered as comparable to an entity providing simple ITes services captively

Facts

1. The assessee was engaged in the business of providing marketing data management services to customers of Symphony Marketing Solutions, USA.

2. The assessee included 8 comparables in its TP Study with an average profit margin of 14.34% on cost. Thus the margin earned by the Assessee at 15.95% on total costs was treated as being at arm's length. The draft order of the Assessing Officer (AO) on the basis of TPO's order proposing additions was passed. The Assessee filed objections before the DRP who confirmed the action of the TPO in selecting new comparables.

3. On appeal by assessee, the Tribunal directed the exclusion of the comparables agreeing with the Assessee that they were not functionally similar to the Assessee.

4. Aggrieved, Revenue filed an appeal before the High court for exclusion of Infosys BPO Ltd .

Held

1. The Court noted that Infosys BPO provided business process management services to organisations over a wide range of industries whereas the Assessee was a routine captive service provider. The valuation of goodwill of Infosys BPO for AY 2009-10 and 2010-11 was INR 19.03 crores and there was no comparable value for the Assessee. The brand promotion expense for Infosys BPO for AY 2009-10 was INR 70.26 lacs and for 2010-11 INR 69.16 lacs and the corresponding figures for the Assessee were Nil. Also, Infosys BPO had incurred significant selling and marketing expenses for the two AYs in question whereas there was no such expense incurred by the Assessee.

2. The Court also noted that the Assessee provided IT services only to its US based AEs whereas Infosys was among top 10 third party BPO companies in India. Thus, even the risk profiles of both the companies were different as Infosys BPO was a full-fledged risk taking enterprise, whereas the Assessee undertook minimal risks as 100% services were being provided to its AEs.

3. The Court further noted that in case of *PCIT vs. M/s.Sanvih Info Group Pvt. Ltd. [ITA 420 of 2019*] which had similar facts Infosys BPO Ltd was excluded.

4. Accordingly, the appeal filed by the Revenue was dismissed.

5 ***Pr.CIT vs. Nomura Structured Finance Service Pvt Ltd.***
[TS-816-HC-2019(BOM)-TP] – ITA NO. 738 OF 2017

The Court derided Revenue for filing routine appeals and directed CBDT to issue appropriate directions. Ruled on comparability for entity providing ITeS services to its AE by excluding Coral Hubs (Vishal Informations) and including CG VAK as comparables

Facts

1. The assessee was engaged in the business of providing information technology enabled services (ITeS) to its AEs. During AY 2009-10, assessee adopted TNMM and used operating profit by operating cost (OP/OC) as PLI to benchmark its international transaction. The PLI of the assessee company was computed by the assessee at 16.25% whereas the average PLI of the comparables was computed at 16.22% as per the analysis in the transfer pricing report. Thus, assessee claimed its international transactions to be at ALP.

2. On a reference being made to TPO, a revised search process was conducted with the final list having several comparables and the PLI was computed at 29.16%. The TPO had included Coral Hubs (Vishal Information Technology Ltd.) as comparable and excluded CG Vak Software & Exports as comparable noting that it was a consistently loss making company.

3. The DRP and the Tribunal ruled on selection of comparables and excluded Coral Hubs and included CG Vak Software as comparables.

4. Aggrieved, the Revenue filed an appeal before the High Court.

Held

1. The Court noted that the Tribunal had rightly noted that assessee sought exclusion of Coral Hubs (Vishal Information) from the list of comparables, since this company's business model was radically different from the industry norms, as evident from the fact that employee cost was only 2% of total cost, which implied that work was being outsourced. Thus, the Tribunal accepted assessee's submissions and stated that various co-ordinate benches including in the case of Maersk Global Service Centre had held this company to be incomparable, inter alia, on the ground that it had outsourced ITeS work and directed exclusion of this comparable.

2. Regarding comparability of CG-VAK Software, the High Court stated that the concurrent finding of fact by DRP and the Tribunal i.e CG-VAK software could not be excluded from the list of comparables as it has made profits in financial year 2008-09 had not been shown to be perverse. Therefore, the question as framed did not give rise to any substantial question of law.

3. Further, the Court also held that the above appeal by department was filed in a normal course, without considering whether the issue gave rise to a substantial question of law, to be challenged in appeal. The Court referred to co-ordinate bench ruling in case of Barclays Technology Centre India where Revenue's appeal was dismissed since it failed to show any perversity in Tribunal's orders. The Court noted that despite the same, Revenue continued to file appeals in respect of the TP issue as a matter of routine and/or standard operating procedure even when no substantial question of law arose. The Court thus stated that *"We trust that the authorities would examine this issue at the highest level and ensure that no unnecessary appeals such as this, which are factual in nature, without being perverse are, filed to this Court"*. The Court thus directed the Registry to forward a copy of this order to the CBDT, so that the appropriate directions could be given to the Commissioners of Income Tax.

4. Accordingly, the appeal filed by the Revenue was dismissed.

6 *Pr.CIT vs. Nokia Siemens Network India P Ltd*

[TS-733-HC-2019 (Delhi)] - ITA No. 692 of 2019

The Court upheld inclusion of loss making comparables considering industry trend of declining revenues and held mere loss or decline in revenues could not be a ground to reject otherwise comparable companies from the set of comparables

Facts

1. The assessee, was engaged in the business of inter alia manufacturing and trading of telecom equipment and other related services. On reference to TPO, it excluded three companies viz., ITI Ltd., Punjab Communications and Himachal Futuristic Communications Ltd. on the grounds of persistent losses and declining revenues and the same was upheld by CIT(A).

2. On appeal by assessee, the Tribunal differed from the view expressed by the TPO and directed inclusion of the three companies.

3. Aggrieved, Revenue filed an appeal before the High court.

Held

1. The Court upheld Tribunal's decision which had accepted assessee's submissions that the finances of these companies with reference to its annual report, did show that there was a general trend in the industry of either loss-making or declining revenues. However, in the absence of any dissimilarity as to the functions performed, assets utilized and reasons undertaken, mere loss making or decline in revenues could not be a ground to reject otherwise comparable companies from the set of comparables and the Tribunal had followed jurisdictional HC ruling in Chryscapital Investments Advisors. Thus, the Court opined that the opinion expressed by the Tribunal was a plausible one in the light of facts and circumstances of the case.

2. Accordingly, the appeal filed by the Revenue was dismissed.

7 ***Bank of Tokyo Mitsubishi Ltd. vs. Commissioner of Income-tax, (International Taxation)*** -

[2019] 108 taxmann.com 242 (Calcutta) -ITR NO. 39 OF 1998

Since clause 24(2) of DTAA agreement between Indian and Japan provides that a permanent establishment of an entity of one country in other country shall not be subjected to less favourable terms than an assessee carrying on similar activities in other country, assessee a permanent establishment of a Japanese company was liable to pay tax at the same rate as Indian companies carrying on same activities for relevant assessment year and not 65%

Facts

1. In the instant case, the assessee was a permanent establishment of a Japanese company in India and in respect of assessment year 1991-92, the assessee herein was assessed as not being a domestic company and the tax rate of 65% was imposed. The same view was upheld by the Commissioner and the Tribunal.

2. Aggrieved, the Assessee filed an appeal before the High Court.

Held

1. The Court held that there was no dispute that an Indian company which was a domestic company would have been charged to tax at a lower rate than the 65% which was imposed on the assessee by virtue of it not being regarded as a domestic company. The disparity between the rates applicable to Indian and foreign companies was not in issue. However, since clause 24(2) of the DTA agreement between the two countries i.e India and Japan provided that a permanent establishment of an entity of one country in the other country shall not be subjected to less favourable terms than an assessee carrying on similar activities in the other country, the assessee in this case was liable to pay tax at the same rate as the Indian companies which were carrying on the same activities for the relevant assessment year.

2. The Court concluded that the stand taken in the Tribunal's order could not be appreciated or accepted since a similar clause in the double taxation avoidance agreement between India and the Netherlands was similarly interpreted by the Central Board for Direct Taxes and a circular was issued to that effect. The Tribunal in the present case had held that since there was no similar circular for DTAA of India and Japan, the said benefit could not be extended to the assessee under the India- Japan Treaty.

3. The Court in response concluded that when there was no dispute that there was a double taxation avoidance agreement in place between India and the country of origin of the assessee in the present case and when such agreement contains a lucid clause as apparent from Article 24(2) and when Section 90 of the Act itself recognises such an agreement and creates a special status for the relevant permanent establishments, there was no room for either the Commissioner to wait for any dictat from the high command of the CBDT or for the Tribunal

to demonstrate similar servile conduct in not appropriately interpreting and giving effect to the clear words of the agreement between the two countries

4. Thus, the Court held that the Tribunal was incorrect in holding that the rate of tax applicable to the assessee was 65% and concluded that the Tribunal ought to have held that the rate applicable to the assessee was such rate as applicable to a domestic company carrying on similar activities.

C. Tribunal Decisions

8 *Adidas India Marketing (P.) Ltd vs. ITO [TS-439-ITAT-2019(DEL)]*

Assessment Year: 2010-11

Insurance compensation received by a Foreign Parent Company to protect its financial interest in Indian subsidiary is not taxable in India

Facts

i) The Assessee, a resident Indian company, was engaged in the business of sourcing, distribution and marketing of products under brand name 'Adidas' in India. During the tax year under consideration, the Assessee received insurance claim from an Indian insurer on account of loss of stock and fixed assets by fire in its premises in India.

ii) F Co, a German company, is the ultimate parent/holding company of the Assessee. Under a global policy, F Co has entered into various GIPs with a foreign insurer to protect the financial interest in subsidiaries world-wide, including India.

iii) In respect of loss incurred by the Assessee, F Co also received insurance compensation under GIP from its insurer in Germany for loss in economic value of the financial interest in the Assessee. The compensation received was reduced by the amount of compensation received by the Assessee from Indian insurer. Further, F Co paid taxes in Germany on the compensation received under GIP.

iv) The Assessing Officer contended that the insurance compensation received by F Co was in respect of loss of stock of the Assessee. Further, the e-mail correspondences of between the Assessee and F Co indicated that all receipts from insurance, relating to physical loss, business interruption and mitigation cost belongs to the Assessee. Thus, the Assessing Officer contended that there is a direct business relationship of the overseas compensation received with the business activities of the Assessee and insurance claim received abroad should be taxed in India in the hands of the Assessee.

v) The Dispute Resolution Panel (DRP) also held that insurance compensation was taxable in the hands of the Assessee as the profit foregone on the lost stock and loss suffered on other assets are part and parcel of the business of the Assessee in India.

vi) Aggrieved by the above, Assessee preferred an appeal before the Tribunal.

Decision

The Income-tax Appellate Tribunal held in favour of the assessee as follows:

1. The Assessee contended before the Tribunal as under:

   a) The insurance compensation received by the Assessee and the F Co were under two separate and distinct contracts of insurance with unrelated third-party insurers. The premium was paid separately by the respective claimants without any cross charge.

   b) The GIP covered only the financial interest of F Co in the Assessee and not the assets owned by the Assessee. Whereas, the insurance policy taken by the Assessee exclusively covered

the risk arising out of loss of stock and fixed assets owned by it.

c) The privity of the insurance contract in India was with the Assessee and the GIP was with F Co. The Assessee was not a contracting party to the GIP.

d) Income "accrues" to the Assessee only when the Assessee acquires the right to receive it. In the present case, in the absence of actual or constructive receipt, such income should not be taxable in India in the hands of the Assessee.

e) Further, no income accrued to the Assessee as the Assessee had not acquired any unconditional and absolute right to receive claim of compensation under the GIP.

f) F Co had undertaken the GIP with the foreign insurer for all its investments worldwide, including India.

2. The Tribunal held that insurance compensation received by F Co under GIP was not taxable in India in the hands of Assessee for the following reasons:

a) Insurance policy between the Assessee and the Indian insurer was to secure stock-in-trade which is a tangible asset, whereas the GIP between the F Co and the foreign insurer was for securing investment made or financial interest in subsidiaries, which is an intangible asset. Thus, the interest insured by the Assessee and F Co are two different interests.

b) The insurance contracts entered by Assessee and F Co were separate and independent, as i) the premium was paid separately by the claimants and no part of the premium on GIP was allocated to the Assessee; ii) the privity of contract was with respective parties.

c) As the Assessee does not have any right or obligation in GIP and was not a party to the GIP, the Assessee did not have any right to receive the claim of insurance or the said claim was not vested in the Assessee for the same to be regarded as accruing in the hands of the Assessee. Reliance was placed on the Supreme Court's decision in the case of ED Sassoon [26 ITR 27(SC)].

d) The claim under GIP was in respect of insured financial interest of F Co in its subsidiaries and compensation was also settled for diminution in financial interests. Merely because the computation of the claim was with reference to loss on fire of the stock or profit which could have been earned if such stock was sold cannot be construed to mean that the claim was in respect of loss of tangible property in the form of stock of the Assessee. The claim was in respect of the intangible asset in the form of financial interest of F Co and thus the claim of insurance cannot be said to have any "business connection" in India.

e) The insured interest of F Co in its subsidiaries cannot be said to be through or from any property in India or through or from any asset or source of income in India. F Co has entered into contracts in Germany for insuring the intangible asset in the form of financial interest in its subsidiaries, which is quite distinct from the physical stock-in-trade of the Assessee, lost in fire. Thus, the claim received by F Co cannot be treated as

income deemed to accrue or arise in the hands of the Assessee in India.

f) Further, the e-mail correspondences were exploring the modes of transfer of money from F Co to the Assessee, in order to restore the financial interest in the Assessee and the same cannot determine the tax liability. Such correspondences were related to application of money and do not indicate in whose hands the same was taxable.

g) The GIP was taken to cover the contingent losses that may or may not arise in future. Further, as F Co has actually paid premium in respect of GIP from time to time and also paid tax in Germany in relation to the insurance claim, there was no colorable device adopted by the Assessee for evading taxes in India.

9 *CAE Flight Training (India) Pvt. Ltd vs. ACIT*

[TS-440-ITAT-2019(Bang)]

Whether CCDs are Debts or equity and interest on it is allowable or not? - Tribunal Rejects TPO's application of 'Thin Capitalisation' principle to disallow interest, in the absence of specific thin capitalization rules in India, and held that re characterization of Debt Capital as equity Capital and disregarding of interest was not in order - Tribunal rejects TPO's reliance on RBI's FDI policy which reckons fully and mandatorily convertible debentures within a specified time as equity, observes that RBI's definition of convertible debentures is in context of FDI policy to exercise control on future repayment obligations in convertible foreign currency and was inapplicable in the context of allowability of interest on CCDs

Assessment Years: 2009-10 to 2013-14

Facts

a) Assessee (CAE Flight Training (India) Pvt Ltd) paid interest at the rate of 15% upon issue of Compulsory Convertible Debentures (CCDs) to its three associated enterprises (AEs) namely, Flight Training Mauritius, Emirates Dubai and CAE Hungary during AYs 2009-10 to 2013-14. These three international transactions, in respect of such interests paid, were referred by the AO to the TPO for determination of their respective arm's length prices. TPO characterised CCDs as equity capital and disallowed interest thereon.

b) Aggrieved by TPO's addition, assessee filed an appeal before CIT(A) for AY 2009-10 and 2013-14, who held that CCD's were debt and not equity and allowed interest of 12.62% and @ 13.25% respectively, instead of assessee's claim of 15%. For AY 2010-11, assessee approached DRP who similarly held that CCD's were debt and not equity and determined the ALP at LIBOR Plus rate and granted additional risk adjustment of 1%. For AY 2011-12 and 2012-13, however DRP held that the CCD's were equity and not debt and held that interest on CCDs was not allowable.

Aggrieved, both the assessee and the Revenue filed appeal before the Tribunal.

Decision

The Tribunal held in favour of the assessee as under:

A) Re: Applicability Thin Capitalisation Principle invoked by the TPO/AO.

i) The Tribunal noted the CIT (A)'s finding that Mumbai ITAT in case of Besix Kier Dabhol, SA [TS-19-ITAT-2010(Mum)] ruled in assessee's favour holding that in the absence of specific thin capitalization rules in India, re characterization of Debt Capital as equity Capital and disregarding of interest was not in order. Tribunal held that even if thin capitalization Principle was on Statute book of the other country,

no disallowance could be made in India by applying this principle. Tribunal thus upheld the finding of CIT (A) by respectfully following this order.

B) Re: Applicability of RBI's comments on CCDs under FDI policy

ii) However Tribunal observed that the objections of AO/TPO were not merely on the basis of thin capitalization principle but on the basis of FDI policy of RBI. TPO had relied on certain comments of RBI in 2007 Policy on convertible debentures in which it was stated that fully and mandatorily convertible debentures into equity within a specified time would be reckoned as equity under FDI policy. Noting that TPO's decision was based on RBI policy of FDI, Tribunal observed that RBI policy of FDI was governed by future repayment obligation in convertible foreign currency and since, CCDs did not have any repayment obligation, RBI considered the same as equity for FDI policy. In view of this RBI Policy, the TPO had concluded that these CCDs were equity and not debt and therefore, interest on it was not allowable u/s 36(1)(iii).

iii) Tribunal held that such treatment given by RBI for FDI policy cannot be applied in every aspect of CCDs. Tribunal stated that holder of CCDs did not have voting rights nor could it receive any dividend on such CCDs before its conversion. Applying the same logic, Tribunal opined that till the date of conversion, for allowability of interest u/s 36(1)(iii) also, such CCDs are to be considered as Debt only and interest thereon has to be allowed and it cannot be disallowed by saying that CCDs are equity and not debt.

iv) Thereafter, Tribunal noted that Revenue relied on Special Bench ruling in case of Ashima Syntex Ltd where the issue in dispute was allowability of expenses incurred on issue of such debentures unlike in case of assessee, which is allowability of interest on CCDs for a period before conversion. ITAT thus opined that the ratio in case of Ashima Syntex Ltd was not applicable to assessee's case.

v) Tribunal noted that Revenue reiterated the same arguments which were adopted by the TPO in its order i.e. regarding RBI Master Circular on Foreign Investment in India dated 02.07.2007 and 01.07.2008. Tribunal observed that such circular in the context of FDI policy of RBI was in a different context i.e. regarding future re-payment obligations in convertible foreign currency and to have control over such future re-payment obligations, the RBI was exercising strict control so that such future re-payment obligations do not go beyond a point. Tribunal held that since in the case of fully convertible debentures, there was no future re-payment obligation, the same was considered as equity for the purpose of FDI policy.

vi) Tribunal opined that any definition of any term is to be considered keeping in mind the context in which such definition was given. ITAT stated that this definition of convertible debentures given by RBI was in the context of FDI policy to exercise control on future re-payment obligations in convertible foreign currency and was inapplicable in assessee's case where the context was allowability of interest or payment of dividend or granting of voting rights to the holders of such convertible debentures before the date of conversion.

vii) Tribunal held that dividend cannot be paid on such convertible debentures in a period before the date of conversion and such holders of convertible debentures cannot be granted voting rights at par with voting rights of shareholders during pre-conversion period. On the same analogy,

Tribunal opined that interest paid on convertible debentures for pre-conversion period cannot be said to be interest on equity. ITAT thus held that interest on debentures was allowable u/s. 36(1) (iii).

C) Re: ALP of interest on CCDs

i) Tribunal noted that for the initial year i.e. AY 2009-10, there was no discussion or decision on ALP aspect by TPO and AO. Tribunal observed that CIT (A) in that year had held in a very cryptic manner that 15% interest claimed by the assessee was not at arm's length because as per SBI Corporate Office Website, it was 12.25% on 01.01.2009 and 13.00% as on 10.11.2008. Tribunal found that CIT (A) directed the AO/TPO to rework the ALP at 12.62% which appeared to be average of these two lower and upper rates of SBI PLR as noted. ITAT further found that in later years, DRP adopted ALP of interest at LIBOR plus but in those years also, TPO had not decided the ALP aspect.

ii) Tribunal noted assessee's claim that ALP of interest should be decided in AY 2009-10 itself, being the initial year in which CCDs were issued. Tribunal found that there was no decision of any of the lower authorities in any year. Tribunal thus considered it appropriate to restore the issue of ALP to AO/TPO for all of these years for a decision as per law after providing adequate opportunity of being heard to the assessee.

iii) Tribunal thus remitted the issue of whether interest should be bench marked in A. Y. 2009-10 only being the year of issue or in each year, whether it should be bench marked on the basis of LIBOR plus or PLR and if LIBOR is adopted then whether Risk Adjustment is to be allowed or not and if it is to be allowed, at what rate.

10 *AGR Matthey of Western Australia Through representative assessee PEC Limited vs. ADIT*

[TS-456-ITAT-2019(DEL)]

Article 11(2) of India-Australia DTAA- Interest on Letter of credit (LC) (with respect to bullion sale to Indian entity) as 'income from other sources' (IFOS) without allowing deduction for discounting charges on LCs- interest had not arisen out of a loan facility, but it was part of transaction of high-seas sale of bullion and assessee had discounted LCs within day or two of usance of LCs for which it incurred identical amount of discounting charges- held that "such interest partakes of the character of the purchase price itself and could not have been put to tax under the residual head of income from other sources- Revenue erred in ignoring live link between interest income and discounting charges and grossly picked one ignoring the other - Article 11(2) cannot be invoked as relevant credit does not qualify as 'interest' within the meaning of Sec 2(28A) so as to allow taxation under Article 11(2) India Australia DTAA – Held: In favour of the assessee

Assessment Year: 2005-06

Facts

i) AGR Matthey of Western Australia (assessee), a foreign company sells gold/bullion to PEC Ltd, a Govt. of India undertaking against issuance of letters of credit (LC). PEC Ltd is also the representative assessee for filing the return of the assessee. During the AY 2005-06 PEC Ltd issued LC's against the supply of gold by the assessee, which are accepted through the assessee's bankers in Australia. The assessee was entitled to charge an interest on the LCs at the rate LIBOR +0.5% margin p.a.

ii) The assessee, in its return of income for AY 2005-06 declared interest income of ₹ 25.71 Cr and claimed an equal amount against such income as discounting charges on various LC's issued by PEC Ltd. The AO disallowed the claim of the discounting charges on the LC's discounted and taxed the entire interest income under the head "Income from Other Sources".

iii) Upon appeal, CIT(A) agreed with the AO's contention of taxing the interest income in terms of Article 11(2) of the India-Australia DTAA, in the source country (i.e. India) and dismissed the appeal of the assessee.

Decision

On assessee's appeal, the Tribunal held in favour of the asseessee as under:

i) Tribunal noted that there is no interest credit arising to the assessee as the LC's are discounted with the bankers at Australia within two days of Usance of LC. Tribunal observed that the AO himself admitted in the assessment order that "…Interest in this case is not interest simplicitor, i.e., it does not arise out of a loan liability. The interest is in the context of a transaction of high-seas sale of bullion, a part of the cost of such bullion itself. Thus, the same is in the nature of business expenditure and incurred only to facilitate the transaction of sale of bullion."

ii) Tribunal opined that the revenue authorities erred in giving findings contrary to their own narration of the facts. ITAT noted the live link between the interest income and discounting changes Relying on the SC judgement in the case of Coconada Radhaswami Bank Ltd and Delhi HC's judgement in the case of Cargill Global Trading (P) Ltd., Tribunal further noted that such interest forms part of the transaction value itself and could not be taxed under the head 'income from other sources' as contended by the Revenue.

iii) Further, Tribunal observed that the revenue disregarded Article 7 of DTAA between India and Australia, as per which no tax liability can be determined in the absence of a permanent establishment in India. Tribunal noted that in order to invoke Article 11(2) of the DTAA, an onus is cast to establish how the income is taxable "according to the laws of the state" which in this case is India. Tribunal observed that the relevant receipt was not covered under the definition of interest under section 2(28A) and hence, cannot be taxed as income from other sources.

❍□❍

CA Vishal Poddar

INDIRECT TAXES

GST Gyan – Significant Features of New GST returns Formats

One Nation – After Abrogation of Article 370 this is a near reality

One Tax – I don't believe so

One Return – Only a Myth

Very soon the above Jargon may find place on every GST Flyer & material. But is it really the case? A modest attempt is made through this article to apprise the readers about the new jigsaw that the law makers have proposed.

The 27th GST Council Meeting Approved Simplified Return Scheme and the 31st Meeting decided to implement it from April 2019 on a trial basis (now July 2019). The formats along with detailed instructions were made available on the GST portal on 8th March 2019 and the last press release on the issue dt. 11th June 2019 has enunciated the 'Transitional Plan' making the new formats compulsory from October 2019. To implement the new system Revised Sec 39 & New sec 43A has been incorporated in the CGST Act however there are no rules notified yet.

1. What the Law Provides!

The CGST Amendment Act, 2018 has inserted Section 43A to provide for the modalities for furnishing return and availing of input tax credit. It has created an overriding effect on certain existing provisions as under: -

- Section 16(2) – Conditions for availment of ITC, which includes payment of taxes and filing of returns under Section 39
- Section 37 - Furnishing details of outward supplies
- Section 38 - Furnishing details of inward supplies
- Section 41 - Claim of input tax credit and provisional acceptance thereof
- Section 42 - Matching, reversal and reclaim of input tax credit
- Section 43 - Matching, reversal and reclaim of reduction in output tax liability

The new provision also casts a joint and several liability on both the supplier and the recipient, in relation to outward supplies for which the details have been furnished but return thereof has not been furnished.

2. New Returns – Face off

Present Returns for Composition Dealers (GSTR 4), NRTP (GSTR 5), ISD (GSTR 6), TDS (GSTR 7), TCS (GSTR 8), and CTP (GSTR 11) would continue as it is. Remaining Registered Persons are categorised as Large Taxpayers (Turnover in Previous Year > R. 5Cr) & Small Registered

Dealers (Turnover in Previous Year < R.5Cr). Return are broadly RET-1: Regular(Monthly/ Quarterly), RET-2: Sahaj & RET-3: Sugam. Besides these all the dealers are required to file ANX–1 & ANX–2 summaries. Further for quarterly return filers tax payment is always monthly through PMT-08. Even if turnover during current year exceeds Rs.5Cr Registered Person may continue to file quarterly returns.

3. Let's get acquainted with the forms

Form	*Frequency*	*Transaction Type*
RET-1	Monthly (Above Rs. 5 crores turnover) Quarterly (Up to Rs. 5 crores turnover)	B2B, B2CS, RCM, Exports, E-commerce, Nil rated, exempt. (All Types)
RET-2 Sahaj	Quarterly (up to Rs. 5 crore)	B2C & RCM(except imports), Nil rated, exempt, non-GST supply allowed.
RET-3 Sugam	Quarterly (up to Rs. 5 crore)	B2C, B2B & RCM(except imports), Nil rated, exempt, non-GST supply allowed.
ANX 1	Quarterly/ Monthly (This covers all supplies creating liability and no merely outward)	Similar to GSTR 1 with additional reporting of imports, and inward supplies attracting reverse charge.
ANX 2	Quarterly/ Monthly	Similar to GSTR 2. Detailed of auto-drafted inward supplies

A noteworthy feature in the new return formats is that even though there are 3 different types of returns i.e. Form GST RET-1, 2 & 3 and corresponding annexures, the format of all the returns are similar, albeit that only those fields as are applicable for the said return type would be visible. To elaborate, Form GST ANX-1, GST ANX-2 and the return GST RET are similar for all the return types except that the tables 3A (B2C supplies) and 3H (RCM inward supplies) will only exist in the Form GST ANX-1 corresponding to Form GST RET-2. Further if the return type selected is RET-3 further table 3B (B2B) shall also exist. This ensures that the taxpayer is not faced with a different and new set of forms when he shifts his choice of return.

4. Return Filing Procedure

Under the new scheme the registered person can on daily basis upload in Form GST ANX-1 details of the outward and inward supplies on which tax is payable and also take action on the inward supplies which are auto-populated in Form GST ANX-2. Once this is done he can proceed to file the main return in FORM GST RET-1/2/3, as the case may be, which is a summary return into which majority of the data is auto-populated from Form GST ANX-1 and Form GST ANX-2 and the remaining data is required to be manually entered. Additionally, the forms GST ANX-1A and GST RET-1A/2A/3A, as applicable, are required to be filed in case of amendments to certain details reported in earlier tax periods. The quarterly return filers are required to file Form PMT-08 in the month in which Form GST RET1/2/3, as applicable, is not filed in order to pay the monthly tax liability.

5. Profile Updation/Intimation of category of Return

At beginning of every financial year, a profile updation form needs to be filled online by the registered person to intimate the department about type of GST return he wishes to file.

6. Change of Category

The registered dealer is allowed to switch from one type of return to another, subject to restrictions, in the following scenarios. A simple logic is that where you want to switch to a return with greater degree of reporting due to change in your business supplies type it can be done more than once during a financial year. In reverse scenario there is restriction on more than once.

- Category A - Have the option to change while filing first return in next FY.
- From Quarterly/Monthly (RET-1 Normal) TO Monthly/Quarterly (RET-1 Normal)

Here it is obvious that the supplier's turnover last year is up to Rs. 5Cr and has all types of transactions. He can select his preference between monthly/quarterly once at the start of F.Y.

- Category B - Have the option to change once in a FY at beginning of any quarter.
- From Quarterly (RET-1 Normal) TO Quarterly (RET-2/3 Sahaj/Sugam)
- From Quarterly (RET-3 Sugam) TO Quarterly (RET-2 Sahaj)

Here the possibility is that the supplier has wrongly opted for higher disclosure return so he is allowed once during the year to rectify his mistake.

- Category C - Have the option to change More than once in a FY at beginning of any quarter.
- From Quarterly (RET-2 Sahaj) TO Quarterly (RET-3 Sugam)/(RET-1 Normal)
- From Quarterly (RET-3 Sugam) TO Quarterly (RET-1 Normal)

Here as the nature of supplies increases he has to upgrade to higher level returns hence the option is more than once.

7. Differentiating Features in New Returns as compared to Existing System

ANX 1 vs. GSTR 1

- ***Real Time Updation:*** Supplier shall be able to upload details in ANX on real time basis and the Recipient shall also be able to take action (Accept, Reject, Pending) in ANX 2 on real time basis. However, following days shall be blocked for uploading: - For Monthly filers 18th to 20th of next month & for Quarter filers 23rd to 25th for next month following the quarter. Further last date for uploading shall be earliest of due date for September Return of next Financial year & date of filing Annual Return.
- ***RCM Supplies:*** Supplies attracting reverse charge will be reported in ANX 1 by the recipient and not by the supplier. Such supplies shall be reported GSTIN wise (Invoice wise details not required) specifying the HSN, amount of tax and taxable value (net of debit & credit note), GSTIN of the supplier. In case supplier is unregistered then PAN shall be compulsorily reported.
- ***Import transactions:*** In respect of import of goods details of the bill of entry need to be disclosed until ICEGATE is integrated with GST portal. With respect to import of services POS and tax dates are to be specifically reported.
- ***Editing/Amending*** details of Invoice shall be only the prerogative of the supplier. This can be done until recipient has accepted it. After acceptance editing can be done only after the recipient unlock/ reset the invoice.
- ***Shifting of documents:*** Where document details are entered correctly but it has been reported in wrong table then it can be shifted to right table after rejection by the recipient.

- Negative values shall be acceptable in ANX 1. Hence where the value of credit notes exceeds the value of outward supply the same can be reported as a negative value. Further the Negative tax liability, arising therefrom, to be available for adjustment against tax liability of the next tax period.
- Advance received shall not be reported in ANX 1.
- Reporting of HSN: All registered persons with annual aggregate turnover of more than Rs. 5 crores will report six digit HSN code for goods and SAC Code for services. Other taxpayers whose turnover is up to Rs. 5 crores shall have an option to report or not to report HSN or SAC code in GST Return forms. HSN reporting is required only in B 2 B cases & not B 2 C.

ANX 2 vs. GSTR 2

- Where recipient fails to take any action:(Accept, Reject, Pending) in ANX 2, the document shall be deemed to be accepted by recipient on filing of Return and corresponding ITC shall be accounted for. Similarly, ANX 2 shall be deemed to be filed with auto populated data by recipient on filing of main return.
- Status of Return filed/not filed by the supplier shall be known to recipient in ANX 2 after due date of filing return has elapsed. In case supplier has not filed previous two returns (monthly filer) or previous one return (quarterly filer) the recipient shall not be eligible to avail ITC.
- Missing Invoice: Recipient can claim Provisional ITC even of those invoices which supplier fails to upload in ANX 1. This facility is not available for Taxpayers opting to file 'Sahaj' or 'Sugam' Returns. Future the Act has proposed a capping of 20% of the auto populated ITC that could be availed against such missing invoices. Such invoices should be reported by the supplier in next two tax period (if monthly Return filer) or next tax period (if quarterly Return filer) failing which the recipient shall reverse the provisional ITC in ANX 1 along with Interest.
- In case recipient wish to reject an accepted document on which credit has already been availed separate functionality would be provided to search and reject. Input tax credit availed on such document shall be liable for reversal with interest.

RET 1/2/3 vs. GSTR 3B

- Nil Return (not containing any outward or inward supplies) can be filed through SMS.
- Interest for late payment or uploading prior period documents and late fee shall be computed by the system automatically. However, interest on reversal of ITC shall be calculated by the dealer and entered in the system.
- At the time of final payment, the system will suggest utilisation of ITC which the dealer can change.
- ***Amendment in Returns:***- Form GST ANX-1 can be amended through Form GST ANX-1A and Form GST RET-1/2/3 can be amended through Form GST RET-1A/2A/3A respectively subject to restricting on what information could be amended in each form. However, no amendment possible in GSTR 4,5 & 6. Further there appear to be no limit on number of times amendment is made subject to the time limit allowed.
- ***Monthly Payment for All***:- Even if a taxpayer is opting to file return on quarterly basis, he has to make the payment of tax on monthly basis through PMT-08. PMT 08 is an abridged version of 3B. Even for Composition dealer monthly payment through CMP-08.

8. Reporting missed transactions of earlier period in new Returns

Data of period falling under existing returns filing system failed to be reported shall be reported in new system as under: -

Possibility 1: Details neither reported in GSTR-1 nor tax paid in Form GSTR-3B - In such a case the document shall be uploaded and tax shall be paid under the new system in ANX 1 & RET 1/2/3 along with interest.

Possibility 2: Document has been reported in Form GSTR-1 but tax has not been paid through Form GSTR-3B - In this case, document shall not be uploaded in ANX 1 but adjustment of taxes so paid shall be made in GST RET-1/2/3.

Possibility 3: Tax has been paid through Form GSTR-3B but document not reported in GSTR 1 - In this case, document shall be uploaded in ANX 1 and adjustment of taxes so paid shall be made in GST RET-1/2/3.

There appears to be no clarity for situation where some amendment is required in respect of details entered in any prior period in GSTR 1

9. Areas to look out for in New Return System

- In case recipient has taken action on wrongly reported invoices, the supplier cannot edit/amend until recipient resets/ unlocks the same. This can be a big procedural issue if a recipient accepts invoice wrongly reported to him and is not ready to unlock.
- Recipient has to thoroughly check the auto populated data in ANX 2 before filing RET since even if no action taken on such data filing of RET will lead to deemed acceptance. If found incorrect in future reversing will be possible through a separate special utility and may also attract interest.
- In case of supplies to SEZ with payment of tax, the supplier shall have option to select whether supplier or the SEZ recipient shall claim refund. In this situation a wrong selection may lead to disputes between them specially if this could not be amended.
- Amendments are not possible for all types of mistakes. For instance, if B2B supplies have been short reported in Form GST ANX-1 and tax has been paid accordingly, the taxpayer would have to wait till the next tax period for amending the said incorrect reporting. Interest exposure on such short reporting would continue, as it exists in the current return forms.
- Also Amendment return provides opportunity to only amend previously reported supplies. If some supply is entirely missed out it cannot be reported in Amendment returns.
- With respect to reporting of missing invoices and availing ITC on provisional basis it is not clear whether 20% criteria would be on total reported ITC or ITC reported supplier wise. In latter case it could be a severe challenge.
- If recipient has not availed credit of earlier period but supplier has reported in his GSTR 1, availing credit in RET could be a litmus test.
- Auto calculation of Interest by the portal

10. If someone is hearing!

- New Returns to be implemented from next financial year.
- For next year as well old return forms should continue parallely for making amendments pertaining to current year.
- The transition period should be greater than that proposed.
- For Initial period there should be relaxation in time lines of filing returns and late fees should be waived.
- Alongside Industry & Consultants the current IT Infrastructure and GST Portal should also be upgraded & compeer.

I cannot comment whether the new returns would turn out to be a "Good & Simple" compliance but for sure you have got to have a '56" ka Seena' to handle its nitty gritties.

❍□❍

CA Naresh Sheth & CA Jinesh Shah

INDIRECT TAXES

GST – Recent Judgments and Advance Rulings

A. Rulings by Appellate Authority for Advance Ruling

1. BAJAJ FINANCE LIMITED – AAAR MAHARASHTRA (2019-TIOL-54-AAAR-GST)

Facts, Issue involved and Query of Appellant
Appellant, being an NBFC, is engaged in providing various types of interest bearing loans to customers. EMI paid by the customer is a fixed amount, which includes both interest and principal amount. In case of delay in repayment of EMI, appellant collects penal interest for the number of days of delay in terms of the agreements executed by the customers. The % of penal interest ranges between 2% to 4% per month depending on the product.

The relevant extract of clauses of sample loan agreement in respect of penal interest is reproduced below:

"I. Definitions and Abbreviations

*r. **"Penal charges"** shall mean and include overdue charges on non-payment of installment on the due date.*

II. Terms of the Loan

3. The borrower agrees and confirms that:

.....

(iv) BFL is entitled to levy penalty as follows on default

(a) for continuing non-payment of amount due, a penalty not exceeding 3% per month on the amount due calculated on pro rata basis from due date till actually paid as per clause B of the schedule.

.....

(B) Penal charges for bounce up to ₹ 350/- per default/per month & late payment penalty not exceeding 3% on amount due."

Appellant is of the view that penal interest collected is in the nature of additional interest, therefore, it is not subject to GST levy.

However, considering the ambiguity in GST law, appellant had filed an application to authority of advance ruling ('AAR') on 09.05.2018 on following questions:

1. *Whether the penal interest is to be treated as interest for the purpose of exemption under Sr. No. 27 of Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017?*

2. *If the answer to the above is negative, whether the activity of collecting penal interest by*

appellant would amount to a taxable supply under the GST regime?

Appellant submitted that penal interest represents the time value of money for the period of delay in making payment of installment. It is nothing but additional interest on loan. Therefore, the penal interest shall be given similar treatment as that of the principal interest which is factored in EMI/Installment amount, and, hence, shall also be covered under definition of interest as defined under Notification No. 12/2017-Central tax (rate):

"(zk) ***"interest" means interest payable in any manner in respect of any moneys borrowed or debt incurred*** *(including a deposit, claim or other similar right or obligation) but does not include any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised."*

Appellant submitted that service of providing loans is exempt under the GST regime, in so far consideration is represented by way of interest. Therefore, penal interest would be exempt from GST levy.

It is further submitted that the expression agreeing to tolerate an act used in entry 5(e) of Schedule II, should be understood to cover instances where the consideration is being charged by the person in order to allow another person to undertake any particular activity.

Contrary to the above, the penal interest is collected on happening of event of default by the customers in making the payment of loan installments. It was submitted that Intention of the parties entering into loan agreement is to grant/avail the loan and not to tolerate non-payment of loan dues. Therefore, merely because of existence of the clause of penal interest in the contract for breach of the performance of the contract, it does not mean that the parties have entered into the contract for the penal interest. Therefore, the collection of penal interest does not even fall under the ambit of deemed supply under clause 5(e) of Schedule II of CGST Act.

However, contention of the proper officer was based on the ground of clause 5(e) of Schedule II of CGST Act and according to him, bounce/penal charges on non-performance of a contract is an activity or transaction which is treated as a supply of service and appellant is receiving consideration in form of charges, liquidated damages and is accordingly required to pay tax on such amount.

Discussions by and Observations of AAR

Appellant has agreed to do an act (the act of tolerating of delayed payment of EMIs by their customers) and such act, by appellant, squarely falls under clause 5(e) of Schedule II of CGST Act and therefore, amount received by appellant for having agreed to do such an act, would attract tax liability under GST laws.

Further appellant stated that penal interest is part of interest and therefore, eligible for exemption. However, penal interest is received by appellant only because their customer/s have defaulted in repaying the due EMIs. This amount is over and above the interest amount received on account of extending deposits, loans, etc.

Further, assumption by appellant that EMI is nothing but a new loan amount is not only fallacious but also devoid of merit because from the agreements it is seen that rate of interest on loan advanced and rate of penal charges are collected on so called new loan amount (i.e. defaulted EMI) are also different. Further, as per facts of the case, the rate of penal interest ranges between 2% to 4% i.e. not fixed as in case of interest on loan.

Thus, it is very clear that in case of default of EMI by the customer, appellant would tolerate such act of default or situation and the defaulting party was required to compensate appellant by way of payment of extra amounts in addition to the principal and interest.

Ruling of AAR

In respect of question (1), penal interest is not to be treated as interest for the purpose of exemption.

In respect of question (2), the aforesaid activity squarely falls under clause 5(e) of Schedule II of the CGST Act and, therefore, construes as "supply" and would attract tax liability under GST.

Appeal to the AAAR

Aggrieved by above-referred ruling, appellant preferred an appeal to AAAR against the same. Appellant reiterated the grounds stated in the application including following:

(i) Penal interest is to be included in value of main supply u/s 15(2)(d) of CGST Act, 2017. Main supply, being interest, is exempt from GST, therefore, penal interest will also be exempt.

(ii) Penal interest can't be covered under entry 5(e) of Schedule II as said entry is applied when there is **an agreement to obligation to tolerate an act or situation.** The word **'obligation'** implies a duty or liability on the person agreeing to such obligation, with a corresponding right to other person. However, in present case there is no obligation on appellant as it can take legal action against borrower and borrower can't sue it for such action taken.

(iii) Compensation received for termination/ breach of contract is not treated as supply, therefore, is not subjected to GST/VAT levy in most of other countries.

E.g. Relevant extract of **UK VAT Notice 701/49-Finance** issued under UK Vat law states that "where you agree to defer payment beyond time of supply and make additional charge for doing so, such a charge will be consideration for an exempt supply of credit."

Australian GST legislation includes within its ambit "an obligation to tolerate an act". However, it also states that damages, loss or injury is not a supply and liquidated damages are not liable to GST. Further following references are important to be noted:

a) **New zealand case S65 (1996) 17 NZTC 7408**

b) ***Societe Thermale vs. Ministere de I'Economie*** **[2007] S.T.I 1866, Celex No. 605J0277**

c) ***M/s. Vehicle Control Services Limited*** **(2013) EWCA Civ 186**

Thus, based on above rulings, it can be concluded that penal interest is not taxable, as the same does not amount to consideration for any supply.

AAR order was silent on the above submissions and failed to provide any reason for not accepting the aforementioned grounds. The absence of reasons has rendered the order not sustainable. In this regard, reliance is placed on following judgements of Apex court:

(i) ***State of Orissa vs. Dhaniram Luhar*** **(2004) 5 SCC 568**

(ii) ***Oryx Fisheries Pvt. Ltd. vs. Union of India,*** **2011 (266) E.L.T. 422 (SC)**

(iii) ***Commercial Tax Department vs. Shukla & Brothers*****, 2010-TIOl-131-SC-CT**

(iv) ***Commissioner of CGST & Central Excise vs. M/s Development Credit Bank Ltd.,*** **2018-TIOL-2313-HC-MUM-CX**

It was submitted that penal interest reflects time value of money. Penal interest is charged for use of money by borrower beyond the stipulated period, therefore, it is an interest only. Loan agreements can use various terms such as penal interest, late payment penalty, etc. It is a settled principle that nomenclature alone would not

determine the nature of transaction. Reliance can be placed on following judgements in this regard:

(i) ***Moped India Limited* 1986 (23) ELT 8 (SC)**

(ii) ***Hindustan Gas & Industries Ltd. vs. CCE* 1991 (54) ELT 383 (Tri.)**

It was further submitted that overdue installment on default would virtually be treated as new loan transaction and penal interest so charged would be the interest for such loan. Further, mere difference in rate of interest and penal interest does alter the nature of transaction as such rate is at discretion of lender and based on various other risk factors. Therefore, finding of AAR is erroneous.

Without prejudice to above, it was submitted that if penal interest is treated as penalty or liquidated damages for default committed by customers, then it is not leviable to GST. Since penalty or liquidated damages is not a Consideration u/s 2(31), therefore, there is no supply as defined u/s 7 of CGST Act, 2017.

Concept of **"Consideration"** is based on phrase "quid pro quo" which means "something in return of something". Damages for breach of contract is not a consideration. It is a **legal/statutory right provided u/s 73 and 74 of Indian Contract Act, 1872** and even without an clause in the contract for damages or compensation payable upon breach of contract, the party suffering breach has the statutory right to claim damages from the party who broken the contract terms.

Discussion and Observations of AAAR

AAAR closely examined the loan agreements and observed that the terms 'Default interest, 'Penal charges' and 'Bounce charges' are defined separately and exclusive to each other and whatever amount is recovered by appellant is only penalty for delay payment of EMI under the term ' Penal charges'.

Further as mentioned above, the term 'Interest' is defined under para (zk) of Notification No. 12/2017-Central tax (rate). The definition is not inclusive of specifically mentioned therein service fees or **other charge** which further proves the legislative intent to exempt only interest. Penal charges are also covered by the said term **"other charge"**.

Appellant while relying upon various judgements contended that any consideration, in lieu of use of money, is nothing but interest only. However, it is to be noted that 'interest' is defined in the notification and one cannot opt meaning in common parlance.

Further Section 15(2)(d) will not apply in present case, as it is applicable where interest is not defined separately anywhere else in specific context. In present case, the term 'interest' is defined separately, therefore, general meaning of Section 15 is not applicable.

International rulings, as contended by appellant, are not applicable to AAAR.

It is observed that while interpreting entry 5(e) of Schedule II, appellant has tried to play with the words by contending that **"agreeing to the obligation"** is a prefix to all the three expressions in 5(e). However, it is evident that all three expressions namely **"agreeing to the obligation to refrain from an act; or to tolerate an act or situation; or to do an act"** are separated with semicolon followed by 'or' showing that they are inextricably connected. In this regard, reference can be made to judgement of **Hon. Supreme Court in case of PIL of *Shri Jayant Verma vs. Union of India*** dated 16.02.2018 related to the expressions separated by semicolons. Hence, it is concluded that "agreeing to tolerate an act or situation" is a separate expressions and toleration of delay in payment of EMI is covered by entry 5(e).

Ruling of AAAR

The AAAR upheld the order passed by AAR and dismissed the appeal filed by appellant.

2. BAJAJ FINANCE LIMITED – AAAR MAHARASHTRA (2019-TIOL-53-AAAR-GST)

Maharashtra AAR through its order No. GST-ARA-21/2018-19/B-84 dated 06.08.2018 stated that bounce charges are liable to GST in terms of entry 5(e) of Schedule II.

Subsequently, applicant filed appeal with AAAR against aforesaid order and AAAR upheld the AAR order for taxing bouncing charges based on exactly same grounds which it used for passing its another order in case of ***Bajaj Finance Limited – AAAR Maharashtra (2019-TIOL-53-AAAR-GST)*** as discussed above. Therefore, same have not been discussed here further.

3. SABRE TRAVEL NETWORK INDIA PRIVATE LIMITED – AAAR MAHARASHTRA (2019-TIOL-58-AAAR-GST)

Facts, Issue involved and Query of Appellant

Appellant ('Sabre India') is subsidiary of Sabre Asia Pacific Pte. Ltd. ('Sabre APAC'), a leading provider of travel solutions and services across the globe. Sabre GLBL Inc., an affiliate of Sabre APAC and Sabre India, has developed a global distribution system which uses a computer reservation system software ('CRS Software') owned by it. The said CRS software performs various functions including airline seat reservations, scheduling, booking for a variety of air, car and hotel services, automated ticketing and fare displays, etc. Sabre GLBL Inc. had granted to Sabre APAC a non-exclusive right to market and promote CRS software and authorized to sub-license certain part of its marketing rights and obligations to local country distributors. Accordingly, under a marketing agreement, appellant has obtained such right from Sabre APAC to distribute CRS software in India and to promote access of CRS software to end subscribers viz. travel agent in India.

Marketing agreement and its operations

Appellant identifies potential subscribers, informs them about the features of CRS software and also scans credentials and business potential of subscribers. If any subscriber is interested then appellant requests to Sabre APAC through a website ('SCMS') to create Pseudo City Code which is used for tracking the subscriber. Pseudo City Code is allotted to subscriber only when criteria set by Sabre APAC is met by the him. Then, appellant's engineers install the user interfaces to access of CRS software.

Therefore, appellant's responsibility stands completed on identification of potential subscribers and analysis of their potential. Subsequently, their responsibility to provide marketing support services arises when Sabre APAC accepts the request of subscribers based on analysis of appellant. Appellant's responsibility also includes marketing support services such as PR, promotions, sponsorship, special events and trade shows as well as any other related support services.

Appellant raises a consolidated monthly invoice (cost plus a mark-up basis) for all such services and receives consideration in convertible foreign exchange.

As per Article 11 of agreement, the relationship of appellant and Sabre APAC is on principal to principal basis and there is no relationship by way of an agent, broker, etc.

In light of the aforesaid facts, appellant sought answers to following:

Whether the marketing, promotion and distribution services provided to Sabre APAC would be subject to GST or would remain excluded from GST payable as the said activities

qualify as export of services u/s. 2(6) of IGST Act, 2017?

Ruling of AAR

In respect of aforesaid question, AAR declared that the marketing, promotion and distribution services provided to Sabre APAC is subject to tax under GST legislation.

Appeal to the AAAR

Aggrieved by the above-referred ruling, appellant preferred an appeal to AAAR based on following grounds:

(i) Services provided by appellant would not qualify as an intermediary service;

(ii) Services rendered to Sabre APAC qualify as export of services;

(iii) The services rendered by appellant is classifiable as a composite supply.

Services provided by appellant would not qualify as an intermediary service in terms of section 2(13) of IGST Act

Appellant submitted that they undertake sales promotion and marketing support activities to advance the business of Sabre APAC in India and to strengthen the subscribers' trust in the brand 'Sabre'.

It was submitted that the use of technology and hardware connectivity are the crucial elements for any interaction with the principal and **the use of digital infrastructure cannot ipso facto mean that the activity is as a broker or agent and cannot be regarded as facilitating the service.** AAR has completely ignored the fact that the marketing agreement has clearly stated that the relationship is on principal-to-principal basis.

Appellant invited kind attention to the ruling issued by West Bengal AAR in ***Global Reach Education Services Pvt. Ltd.*** *vide* GST-ARA15/2017-18/8-30 dated 08.05.2018 wherein it was held that appellant was providing intermediary service. Appellant is paid consideration in the form of Commission, based on performance in recruiting students, as a percentage of the tuition fee. Appellant aggrieved by the said ruling appealed to the AAAR wherein decision of AAR was upheld.

Appellant also invited attention to decision of AAAR in **Five Star shipping (Maharashtra) at para 67 of its order No. MAH/AAAR/SS-RI/11/2018-19** dated 23.10.2018 reported in 2018 (10) TMI 1517.

Appellant submitted that the tests laid down in above rulings answers as to whether the consideration is received as a function of sale or independent of the sale. In present case, there is no obligation to generate any sale and this is the most distinguishing feature vis-a-vis the other two AARs mentioned above.

It is also a well settled law that the expression in the document that is construed cannot be ignored as held by the Hon'ble Andhra Pradesh He in ***G. S. Lamba & Sons vs. State of A.P*** **2012-T/C'L-49-HC-AP-CT.**

The ruling made on the ground that appellant is not providing services on their own, **because they do not own the software**, is legally untenable in as much as appellant has no role in negotiating the terms of subscription or conclude the same. **The role of appellant is to popularize the brand, which induces the customers to show interest.**

Further, it is relevant to note that Section 2(13) of CGST Act, which defines Intermediary, intends for participation of three parties, namely supplier, recipient and a facilitator, which is absent in present case.

The AAR observed that the customers come on their own to appellant, however, there is no evidence to state this. This is unsustainable in as much as appellant utilizes the advertising and promotion techniques. Sabre APAC only

undertakes the business analysis and decides as to whether allot the Pseudo City Code or not. The Agreement does not facilitate nor does it enable the facilitation of any supply of services between Sabre APAC and the Subscriber.

Appellant also gave reference to ruling in case of In Re Godaddy India Web Services Pvt Ltd [2016 (46) STR 806 (AAR)] and **Re: Universal Services Indio Pt Ltd [2016 (42) STR 5855 (AAR)]** in this regard.

The views expressed by the ruling of AAR have great persuasive value as held by Hon'ble Tribunal in ***The Bombay Flying Club vs. Commr. of Service Tax Mumbai-II*** **2012 TIOL 841 CESTAT Mum** at para 5.9 and the Hon'ble Supreme Court in ***Columbia Sportswear Co vs. Director of Income Tax, Bangalore*** **2012 (383) ELT 321 (SC)** at para 9.

In view of the above, the finding of the AAR that appellant is facilitating service between travel agents and Sabre Singapore cannot render them as intermediary.

In view of above, it was submitted that appellant would interact with the travel agents cannot take away the relationship with Sabre APAC from that of a principal-to-principal basis and bring them within the scope of intermediary.

Services provided by appellant would qualify as an Export of Service in terms of section 2(6) of IGST Act

It was submitted that in the impugned findings that the supply of appellant to Sabre APAC is intermediary in nature and hence concluding that the said services cannot be treated as export of services is completely erroneous and unsustainable.

Based on the facts stated above, the objective and the intent of the parties under the Marketing Agreement was that the services are to be rendered from India to Sabre APAC situated in Singapore. This is an inter-state supply as defined u/s 13 of the IGST Act, 2017 read with Sec 2(57) of the CGST Act, 2017.

Said services would be excluded from taxation if they are treated as "export of services" u/s 2(6) of the IGST Act which is defined as under:

"export of services" means the supply of any service when–

(i) the supplier of service is located in India;

(ii) the recipient of service is located outside India;

(iii) **the place of supply of service is outside India;**

(iv) the payment for such service has been received by the supplier of service in convertible foreign exchange; and

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

In said case, AAR observed that **condition (iii) is not satisfied** as place of supply will be location of supplier of services (i.e. India) u/s 13(8)(b) of IGST Act, 2017.

However, appellant submitted that place of supply have to be determined u/s 13(2) and place of supply should be location of recipient of services i.e. Singapore. Therefore, such services will fall under the definition of "export of services" and appellant will be entitled to claim the benefit of zero-rated supplies. Application of Section 13(8)(b) of IGST Act, 2017 was erroneous.

The services rendered by appellant is classifiable as a composite supply u/s 2(30) of the CGST Act

As per facts stated above, appellant provides a bundle of services in relation to marketing and promotion of CRS Software within the territory of India which includes advertising, identification of

potential business opportunities and other related support services as per agreement.

Considering the nature of the services, these are a bundle of services and is a **"composite supply"** as defined u/s 2(30) of the CGST Act which reads as follows:

*"Composite supply means a supply made by a taxable person to a recipient consisting of **two or more taxable supplies** of goods or services or both, or any combination thereof, which are **naturally bundled** and supplied **in conjunction** with each other in the ordinary course of business, **one of which is a principal supply**".*

It was submitted that in present case, service of marketing access to the CRS Software is of principal nature with the other services being supplementary to it.

Discussion and Observations of AAAR

AAAR closely examined the marketing agreement and facts stated by appellant and observed that by carrying out all the activities as per the said agreement, appellant is arranging for the supply of services, which, in the instant case, is on line information and database access and retrieval services' (OIDAR Services) provided by Sabre APAC, by way of identifying the potential subscribers.

To understand the significance of the role of appellant, AAAR considered the activities carried out by appellant, from the chain representing the supply of OIDAR services provided by Sabre APAC to the Subscribers and it observed that there is no provision of this OIDAR Services at all. Thus, AAAR noted that it is abundantly clear that appellant is arranging as well as facilitating the supply of services between Sabre APAC and the potential subscribers.

Now question arises that whether the above discussed activities of appellant are in the nature of the intermediary or not. For anyone, seeking to be qualified as an intermediary u/s 2(13), the following conditions are required to be satisfied:

(i) He should be a broker, an agent or any other person, by whatever name called;

(ii) He arranges or facilitates the supply of goo ds or services or both, or securities, between two or more persons; and

(iii) He should not supply such goods or services or both or securities on his own account.

Now coming to the condition (i) above, it is relevant to note the meaning of broker, or agent. It is observed that 'broker' is not separately defined in the GST Act. However, the meaning of 'Agent' is provided in Section 2(5) of the CGST Act, 2017 according to which he is the person who carries on the business of supply or receipt of goods or services or both on behalf of another.

In the instant case, it is revealed that appellant is carrying on the business of supply of services, in this case OIDAR Services, which is actually provided by Sabre APAC, by performing the activities of 'identification of potential subscribers' and initiating the process of subscription with respect to CRS Software, by logging request on the Sabre APAC website and by providing the outcome of the organizational and work flow analysis as well as background check of their credentials on behalf of Sabre APAC. Thus, appellant is acting as an "agent".

Now coming to the condition no. (ii), it has been established that appellant is arranging as well as facilitating the supply of services viz.- OIDAR Services between Sabre APAC and OIDAR service recipient.

Further, coming to the condition no. (iii), AAAR observed that appellant is not providing the main service (OIDAR Services), on its own account as the said OIDAR service is provided by Sabre APAC.

As regards appellant contention that they do not facilitate or undertakes any such arrangements to supply goods or services referring to article 11 of the said agreement, AAAR observed that appellant has intentionally entered into such agreement to escape from the Principal - Agent relationship and thereby refraining from the liability to pay tax.

Further, as regards the High Court Judgement in case of ***G. S. Lamba & Sans vs. State of A. P.*** **(2012-TIOL-49-HC-AP-CT)** cited by appellant, it is seen that Hon'ble High Court has, *inter alia*, clearly distinguished that in the event of the intrinsic incongruities and inconsistencies flowing from the words and language used in the document, "the intention would prevail over the words used." Thus, above contention is devoid of any merit and substance and hence not tenable.

AAAR further stated that based upon **ejusdem generis** it has arrived on conclusion that the activities of appellant are primarily in the nature of those of intermediary.

As regards the above cited advance rulings, it was opined that the said rulings do not have any implication in the instant case as the facts of the case is different.

As regards appellant 's question as to whether services rendered to Sabre APAC qualify for exclusion as an export of service, it was stated that for deciding any supply of services as export of services, place of supply of service has to be determined. However, on perusal of the provisions related to the set of questions qualified to sought for the Advance Ruling as laid out in Sect ion 97(2) of the CGST Act it is seen that question regarding the determination of the supply of goods or services or both is not mentioned in the above said provision.

Thus, from the above, it is apparent that AAAR do not have jurisdiction to decide whether any particular supply of service is export or otherwise. However, AAR has commented on the place of supply of service, transcending their jurisdiction.

As regards appellant's contention regarding the entire gamut of activities carried out eligible to be classified as a composite supply, AAAR agreed with the exception that principal supply is intermediary services.

Ruling of AAAR

In respect of question of appellant, AAAR held that it does not have jurisdiction to decide the place of supply of service, which is one of the prerequisites to determine the export of services u/s 2(6) of the IGST Act, 2017.

B. Rulings by Authority for Advance Rulings

1. CHOWGULE INDUSTRIES PRIVATE LIMITED – AAR GOA (2019-TIOL-225-AAR-GST)

Facts, Issue involved and Query of the Applicant

Applicant is an authorised dealer for Maruti Suzuki India Limited for sale of motor vehicles and spares. It carries out servicing for Maruti as well as some other commercial vehicle manufacturers. Applicant purchases vehicles against tax invoices which are reflected in the books of accounts as Capital Assets. These vehicles are used as demo cars for providing trial run to customers to understand the features of the vehicle.

Applicant has sought an advance ruling as to "Whether GST charge on Motor Vehicle purchased for demonstration purpose be availed as credit on Capital Goods and set off against output tax payable under GST?"

Discussions by and observations of AAR

As per the dealership norms, every sales outlet is bound to maintain at least one demo vehicle of

each model per location. The vehicles are usually held for two years or 40,000 kms., whichever is earlier and then sold. When the demo vehicles are sold applicable GST is paid on the selling price.

As per section 16(1) of the GST Act, every person shall be entitled to take input tax credit on every supply of goods or services or both which are used or intended to be used in course or furtherance of business.

As per section 2(19) of the GST Act, Capital goods means the value of which is capitalize in the books of accounts of the person claiming the input tax credit and which are used or intended to be used in the course or furtherance of business.

Applicant purchases vehicles from the supplier against tax invoices after paying taxes. The vehicles purchased from the supplier are capitalized. The capital goods which are used in the course or furtherance of business is entitled for input tax credit.

As per section 17(5) of the CGST Act, input tax credit shall not be available in respect of motor vehicle except when they are used for making taxable supply or for transportation of goods or passengers or imparting training on driving such vehicles. The taxable supply includes further supply of such vehicles. The demo vehicles are being used only for a specified period. Later on when the demo vehicles are sold at the written down value GST is charged at applicable rate at that point of time. GST Act does not prescribe the time within which time further supply is to be effected. Hence the provision of section 17(5) will not be applicable. The applicant is entitle for input tax credit on demo vehicles.

Availability of input tax credit shall be subject to the provisions of section 18(6) of the CGST Act. In case of supply of capital goods on which input tax credit has been taken, the register person shall pay an amount equal to the input tax credit on the said capital goods reduce by such percentage of points as may be prescribed or the tax on transaction value of such capital goods determined as value of taxable supply, whichever is higher.

Ruling of AAR

Input Tax Credit on the Motor Vehicle purchased for demonstration purpose can be availed and set off against output tax payable under GST.

2. E-DP MARKETING PRIVATE LIMITED – AAR MADHYA PRADESH (2019-TIOL-196-AAR-GST)

Facts, Issue involved and Query of the Applicant

Applicant is engaged in the trading of various edible oils. Applicant intends to import crude soyabean oil on CIF basis (Cost + Insurance + Freight) which includes the component of ocean freight in the price of imported goods. Applicant is required to authorize the seller who is a person located in non-taxable territory for transporting the goods by a vessel from supplier's place up to the place in Indian Custom Territory. Ocean freight will not be paid by the applicant because the seller is supposed to collect the ocean freight while deciding the price of the goods payable by the applicant. The payment of ocean freight would be made by the seller located outside India.

Applicant has sought advance ruling as to whether the applicant is liable to pay IGST under Reverse Charge Mechanism on Ocean Freight component when IGST is paid by him on full value of goods Imported on CIF Basis?

Applicant's submissions

At the time of import of goods into India, applicant is required to pay aggregate customs duties on CIF value of the imported goods, which is considered as assessable value for the purpose of levying the import duties on such goods. Since the CIF value of the imported goods includes

the component of ocean freight, therefore, the applicant is required to pay IGST on this ocean freight component also along with other duties of customs. This is a first incidence of payment of IGST on the component of ocean freight by the applicant.

Further, Notification No. 10/2017-lntegrated Tax (Rate) dated 28th June, 2017, applicant is again required to pay IGST under reverse charge mechanism on ocean freight component in respect of imported cargo. If this is paid by applicant/ importer, it will amount to double taxation of IGST on the same component of ocean freight of the imported goods which apparently is illegal and against the basic principles GST of law.

Discussions by and observations of AAR

Applicant intends to import crude soya bean oil on CIF basis, which includes the component of ocean freight in the price of imported goods. Obviously, in case of such imports the seller being located in non-taxable territory, the ocean freight is collected by the seller from the importer located in the taxable territory. However, as per Notification No. 10/2017-lntegrated Tax (Rate) dtd. 28.06.2017, [Sr. No. 10], the 'Services supplied by a person located in non-taxable territory by way of transportation of goods through a vessel from a place outside India up to the customs station of clearance in India' have been put under Reverse Charge Mechanism and the recipient of service viz. 'Importer, as defined in clause (26) of Section 2 of the Customs Act 1962 (52 of 1962), located in the taxable territory' is made liable to pay GST.

Further, in terms of Notification No. 08/2017-Integrated Tax (Rate) dtd. 28.06.2017, read with Corrigendum dtd. 30.06.2017, the taxable value is deemed to be 10% of the CIF value of imported goods.

In view of the above two notifications, AAR did not find any ambiguity regarding payment of IGST on ocean freight. As per existing law, IGST on ocean freight has to be paid by the importer under reverse charge mechanism, irrespective of the fact that such freight charges are included in the intrinsic CIF value.

Ruling of AAR

Applicant shall be liable to pay IGST on ocean freight paid on imported goods [CIF value] under Reverse Charge Mechanism in terms of Notification No. 10/2017-IT(R) and Notification No. 8/2017-IT(R).

3. SPACELANE OFFICE SOLUTIONS PRIVATE LIMITED – AAR KERALA (2019-TIOL-255-AAR-GST)

Facts, Issue involved and Query of the Applicant

Applicant is engaged in business of sub-leasing of office spaces as 'co-working spaces' to its clients. Lease agreement between applicant and landlord permits sub-leasing and accordingly applicant obtained NOC from landlord for registering its customers under GST. In 'co-working space model', the applicant offers dedicated distinct and identifiable space, tables and chairs to each client working there. The clients maintain their financial records in electronic form.

Applicant has sought advance ruling that can GST registrations be allowed for multiple companies from same address, provided they follow all GST rules related to principle place of business?

Discussions by and observations of AAR

Many start-ups prefer co-working solution. Start-up companies working in shared business places are facing difficulties in GST registration. The registration application was rejected by the authority for the reason that 'already another company is registered in the address'. These companies have same address and electricity bill except suit/desk number.

There is no prohibition under GST law for obtaining GST registration to a shared office

space or virtual office, if the landlord permits sub-leasing as per agreement. Each 'co-working space' is demarcated with different suit/desk number. As GST registration is PAN based, identification of tax payers is not difficult.

While applying for GST registration for the co-working space, rental agreement with landlord and lessee along with agreement between lessee and sub-lessee must be uploaded as proof of address of principal place of business of respective desk/suit number. In addition to this, upload monthly utility bill – electricity charges/water charges, etc. If so, there is no hindrance in taking GST registration for co-working space. GST number and certificate of each co-working space must be displayed at prominent place and books of accounts are to be maintained at principal place of business.

Ruling of AAR

Separate registration can be allowed to multiple companies functioning in a co-working space and which provide services alone. Such companies shall upload rental agreement of landlord and lessee alongwith sub-lease agreement as proof of principal place of business. In addition to this, applicants can upload copy of monthly utility bill.

4. SPECSMAKERS OPTICIANS PRIVATE LIMITED – AAR TAMIL NADU (2019-TIOL-245-AAR-GST)

Facts, Issue involved and Query of the Applicant

Applicant is importing as well as locally procuring lenses, frames, sun glasses, contact lenses, etc. and are engaged in re-selling them. They have their office in Tamil Nadu at Chennai and have branches outside the state of Tamil Nadu. Goods imported and re-sold by the applicant are also transferred to their branches located outside the State for subsequent supply to ultimate customers.

Applicant has sought advance ruling as to what value to be adopted in respect of goods transferred to branches located outside the State?

Applicant's submissions

As the branches are distinct persons, applicant are required to discharge the GST while supplying the goods to their branches outside the State. Rule 28 of GST rules, 2017, provides three options for determining the value in respect of supplies to distinct/related persons. These options governed by two provisos. Applicant is of the view that the second proviso is applicable to their case, i.e., where the recipient is eligible for full input tax credit, the value declared in the invoice shall deemed to be the open market value of the goods or services. Hence, in their view if the second proviso is applied it is sufficient that they pay tax at the time of supply of goods from the state of Tamil Nadu on the value declared by taking into account the cost price in the tax invoice while dispatching the supplies to other states. The goods received by the recipient are further sold or supplied to the consumers/customers based on the market price. Applicant submitted orders of West Bengal AAR and AAAR in a similar issue in case of M/s. GKB Lens Private Limited.

Discussions by and observations of AAR

Applicant claims that by applying the second proviso to Rule 28 of CST Rules, it is sufficient to pay tax on supply of goods from Tamil Nadu on the value arrived by taking into account the cost price while dispatching the supplies to other States. The claim is that the value need not be as per first proviso to Rule 28, even though such price be available.

As per section 25 of CGST Act, applicant and its branches are distinct persons and should have separate registrations. Supply between applicant and its branches is considered as supply between distinct persons. Branches and applicant are related person as defined u/s 15 of CGST Act and hence valuation needs to be adopted as per Valuation Rules.

As per Rule 28(a), open market value needs to be adopted for transaction between related parties. In the instant case, applicant supplies the same goods i.e. Lenses, Frames, Sun Glasses, Contact Lenses, etc. to recipients in Tamil Nadu as well as its branches outside Tamil Nadu. As per applicant, there are supplies being made to such unrelated recipients within Tamil Nadu for which price is the sole consideration. Thus, there exists an 'open market value' for such supplies being made to distinct recipients who are branches of the applicant in different states/ Union territories. Thus, there is no necessity to go further down to Rule 28(b) or (c) as they are to be read sequentially and are also applicable only when 'open market value' is not available. Once Rule 28(a) is applicable, Rule 28(b) or (c) cannot be used by the applicant for determining the value of the supply of goods between distinct persons.

Applicant states that their recipients in other states (branches) further supply such goods to their customers without any further value addition, re-packaging, labelling etc. i.e. they are supplied as such. In such a scenario, Rule 28 gives an option to the supplier, i.e. the applicant, to adopt an amount equivalent to 90% of the price charged for the supply of goods of like kind and quality by the recipient to his customer not being a related person as the value at which the supplier i.e. the applicant supplies to his distinct/related branch in another state. If the applicant does not use this option for supplies to the recipient who further supplies to their customers as such, he has to supply at 'open market value' which is available as per Rule 28(a).

There is a further proviso to Rule 28 which states that where the recipient is eligible for full input tax credit, the value declared in the invoice shall be deemed to be the open market value of the goods or services. This further proviso has to be read along with the first proviso above. In the event the applicant chooses the option in the first proviso, the value of his supplies to distinct recipients outside state will not be at open market value. In such a case, if the recipient is eligible for full input tax credit, the value in the invoice, i.e. the value after exercising the option in the first proviso, will now be deemed to be the open market value.

Applicant states that he may include any value while invoicing to the recipient as the recipient is eligible for full input tax credit as per second proviso to Rule 28. If that were the case, the applicant may use a value much higher than the open market value to pass on input tax credit to his branch office outside the state or he may use a much lower value than even his cost price, which will lead to accumulation of input tax credit for the applicant, which is not the intention of a taxation based on value addition.

Further, if a taxpayer can skip all the provisions under Rule 28(a) to (c), in spite of them being specifically mentioned as the value which "shall" be adopted, then in no scenario will any taxpayer ever use Rule 28(a) to (c). Both provisos are to be read together and not independently, i.e. the applicant cannot choose whichever proviso is favorable to them.

Ruling of AAR

The value in respect of supply of goods i.e. lenses, frames, sun glasses, etc. by the applicant to distinct persons being branches outside the state of Tamil Nadu shall be the open market value of such supplies that is available as per of Rule 28(a). Where the goods are intended for further supply as such by the recipient, the applicant has the option to adopt an amount equivalent to 90% of the price charged for the supply of goods of like kind and quality by the recipient to his customer not being a related person as the value of such supplies to the distinct recipient.

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CA Rajiv Luthia & CA Keval Shah

INDIRECT TAXES

Service Tax – Case Law Update

1 *M/s Bestech India Pvt Ltd. vs. Commissioner of Central Excise, New Delhi*

2019-TIOL-2442-CESTAT-DEL

Facts of the case

The appellant is a real estate developer engaged in the business of development of land by constructing residential & commercial projects. They are registered with the service tax department under the category of "works contract service" and "construction of complex services". They received administration charges/transfer charges from customers intending to change their name in the ownership records on transfer of property in the name of the prospective buyers. The appellant believed that this amount is charged for meeting the documentation expenses for changing the name in ownership records.

The Revenue contended that such charges were received towards the "Real estate agent's service" provided by the appellants and since no service tax was discharged on the same, SCN was issued demanding tax on this transaction for the period 1st April, 2006 to 31st March, 2011. The adjudicating authority and the appellate authority confirmed the demand. Hence, the appellant is before CESTAT.

Arguments put forth

The Appellants submitted as under:

a) These charges are not liable to service tax under the category of "Real estate agent's service" as the amount is not received in relation to sale, purchase, rental or leasing of real estate, it is in fact used to meet the documentation expenses.

b) They also relied upon the decision of the Hon'ble Delhi Tribunal in the case of Ansal Properties Infrastructure Ltd. , Ansal Housing & Construction Ltd. & in the case of MGF Developments Ltd.

The Respondent (Ld.AR) re-iterated the submissions made in the earlier appeals.

Decision

a) Section 65(88) of the Finance Act,1994 defines "Real estate agent service" and section 65(89) defines "real estate consultant", the relevant excerpt is reproduced below;

"Real estate agent" means a person who is engaged in rendering any service in relation to sale, purchase, leasing or renting, of real estate and includes a real estate consultant."

"Real estate consultant" means a person who renders in any manner, either directly or indirectly, advice consultancy or technical assistants, in relation to evaluation, conception, design, development, construction, implementation, supervision, maintenance, marketing, acquisition or management of real estate."

b) In Ansal Properties Infrastructure Ltd. the tribunal has specifically held that the transfer charges received by the appellant for transfer of land from one person to another cannot be taxed as "Real estate agent service". To levy service tax, the provider of service should be a real estate agent and secondly while acting as such agent, the person concerned should provide service in relation to sale, purchase, leasing or renting of real estate.

c) There is nothing in the SCN or relied upon documents to show that the appellant has acted in the capacity of "real estate agent" between the earlier owner and new buyer of the flat. The changes in the records of the respondent are not causative factors for such sale or purchase.

d) The tribunal held that such transfer charges cannot be taxed as real estate agent service as the appellant were custodians of land and dealt with the allottee on principal to principal basis.

e) Same view was upheld in Ansal Housing & Construction Ltd. & MGF Developments Ltd. Accordingly, the order of the appellate authority is set aside and the appeal is allowed.

2 ***M/s Corner Point Infrastructure Pvt Ltd. vs. Commissioner Of Central Excise& Service Tax, Vadodra-I***

2019-TIOL-2441-CESTAT-AHM

Background Facts of the case

The appellant is engaged in developing residential and commercial projects. They received advances for sale of property on which service tax was paid by them. They also received unsecured loans on which they did not pay tax. Further, in some cases the advances received, were followed by cancellation of flats, hence the amounts had to be returned to them or transferred to creditors account for returning in future. Service tax was not paid on such amounts. SCN was issued to the appellants demanding tax on such amounts and also CENVAT was denied to them.

Decision

a) The appellants have paid service tax as and when advances are received against provision of construction services. However, when such amount is shown against creditors/refund account since the bookings are cancelled, no service is effectively provided so no tax can be charged on the same. In fact, there is a specific provision under Rule 6(3) of the Service Tax rules, 1994 for this purpose. Also, the amount received as loans and advances and which is eventually repaid cannot be held liable to service tax.

b) Further, the service tax paid through CENVAT, Though not reflected in the ST-3 returns it is sufficient even if such credit is availed in the books and debited towards the liability. This view is fortified in the case of ONGC Ltd. and Ad vision given by the Hon'ble Ahmadabad CESTAT.

c) Also, there is a demand of service tax on the presumed amount received by the appellant which was presumed due to certain scribbling as made by the accountant. In such case, the onus to prove that the case is beyond scribbling and there is actual receipt is on the revenue. The matter is remanded to that extent.

d) Further, there is demand of service tax on cash income purportedly received by the assessee and not taken in the books of accounts, there is no independent corroborative evidence except some loose entries in the computer of the accountant has been adduced by the revenue authorities to substantiate such a serious charge. These loose entries cannot form the sole basis for demanding service tax on the same. The appellants relied on the decision taken by the CESTAT in the case of Gupta Synthetics Ltd.

e) As regards the CENVAT denied on the grounds of cancellation of flats where the tax amount was also refunded to the customers. At the same time, the revenue alleges that since the tax was not paid originally there is no question of allowing credit thereof. The SCN demands tax on the same. Since tax is demanded there is no question of denying credit simultaneously on the same. The appeals are thus disposed-off by remand to the adjudicating authority.

3 ***Environment Protection & Training Institute vs. Commissioner of CCE. & St, Hyderabad-IV***

2019-TIOL-2375-CESTAT-HYD

Background Facts of the case

The appellants are engaged in providing services of scientific, technical research, consultancy and training in environment related matters to various regulatory bodies, government departments, NGO's etc. The main objective of the institute is to provide technical assistance, consultancy in research in the area of environment protection, water & waste treatment, pollution control, environmental impact assessment (EIA) etc.

The appellants had neither registered themselves with the department and nor paid service tax on the amount received on provision of these services. SCN was issued to the appellants to show cause as to why the services rendered by them were not taxable as "commercial training and coaching service" and "scientific and technical consultancy service". The Ld. CEO vide O-I-O dropped the demand in respect to training holding that the training was in-service training and not commercial coaching. The department has not disputed this decision and thus this part attained finality.

As regards the demand relating to scientific and technical consultancy some amount pertains to testing and rest pertains to preparation of report. Thus, the demand was vivisected into two parts out of which the part as relating to testing charges is exempted under the head "technical inspection and certification services". Only the part relating to preparation of report was confirmed by the adjudicating authority.

The order of the Ld. CEO was modified by the Commissioner and he held that the demand cannot be dissected into two parts as the agreement entered into by the appellants with the clients are for comprehensive service of testing and reporting and providing consultancy. All the activities like testing, inspection etc. form integral part and cannot be bifurcated. It does not matter how the appellant accounts for the income in the books of accounts but the entire amount must be taxed as technical consultancy services. The amount already paid by the appellant was appropriated and balance was demanded.

Arguments put forth

The Appellants submitted as under:

a) Their organisation is a society registered and created by the Government of Andhra Pradesh and hence should be considered as "state" as held by the Apex Court in *Ajay Hasia vs. Halib Mujeeb*. Since they are created by the state they are considered as statutory organisation and their activities

should be termed as statutory functions and should not be taxed.

b) Most of their activities relate to preparation of reports of environmental impact and management plans for projects which is a pre-requisite to obtain clearance from the ministry of environment. Accordingly, their activity should be considered as statutory function and should not be taxed.

The Respondent (Ld.AR) submitted as follows:

a) A copy of the sample report prepared by the appellant for obtaining clearance on one of the projects was submitted and it was stated that such report was presented in relation to environment impact assessment. In the management part of the report there were specific recommendations as to what steps should be taken to manage such impact.

b) Such kinds of report is required for anyone to obtain clearance from environmental ministry and the pollution control boards as per the Environment Protection Act,1986.

c) Any organisation which is certified for this purpose can prepare such report. The appellant is one such certified agency. Drawing analogy of the same with a CA who is required to certify accounts of the company for the purpose of filing tax returns. Such function of CA is required under the IT Act,1961 but that does not make the services of CA as a statutory function.

d) As far as the question whether the appellant would form part of the "State", he states that as per the decision of the Apex Court in Ajay Hasia's case and part –III of the Constitution the definition of state is wide and includes various organisations. Hence, the appellant could be considered as part of state but that does not mean they are rendering any serving functions. The appellant is merely a consultancy firm.

Decision

a) On the first issue, whether the appellant is performing a statutory function, it is observed that the appellant though registered as a society but is an autonomous body. There is no statutory obligation as placed by the state on the appellant. Therefore, the job of the appellant is similar to that of a CA with respect to Income Tax Act, hence not a statutory function.

b) The issue of whether the appellant is liable to pay service tax is decided by referring to the definition of scientific and technical consultancy. The appellant provides services of technical and scientific consultancy in relation to environment and are squarely covered under the same and thus liable to tax.

c) The Ld.. CEO had erred in dividing the transaction into two parts vis. Testing charges and report preparation charges. As per section 65A of the FA, 1994 where service is rendered as a composite service it shall be classified as if they consist of a service which gives them their essential character.

d) The services of the appellant as mainly of scientific and technical consultancy and are thus chargeable to service tax. The order is upheld and the appeal is rejected.

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Janak C. Pandya,
Company Secretary

CORPORATE LAWS

Company Law Update

1 ***Shiv Kumar Jatia vs. State of NCT of Delhi.***

Crl. A@SLP (Crl.) No. 8008/18 decided on August 23, 2019 – In the Supreme Court of India

With Criminal Appeal No. 1264 of 2019 (Arising out of S.L.P. (Crl.) No. 7969 of 2018) and Criminal Appeal No. 1265 of 2019 (Arising out of S.L.P. (Crl.) Nos 10054 – 10056 of 2018)

The Penal Code does not contain any provisions for attaching vicarious liability on the part of managing director or director of the company, when accused is a company. Statutes indisputable must provide fixing vicarious liability on director and managing director

Brief

Three criminal appeals are filed under section 482 of the Indian penal code ("IPC") for against the common judgment and order dated 18.05.2018 passed by the High Court of Delhi ("HC"). In the said order, HC has refused to provide any relief to the applicant for the criminal

The facts of case are as follows.

1. M/s Asian Hotels (North) Ltd ("Asian") has been managing the Hotel Hyatt Regency at new Delhi. Mr. Shiv Jatia was a Managing Director ("MD") and only non-independent director of the Company.
2. One Mr. Gaurav Rishi ("GR") joined two resident guests of the hotel for dinner at Executive Lounge situated on 6th floor of hotel.
3. They were going out for smoking to the adjacent terrace, the terrace was dark and no lighting and that no hotel staff stopped them for going to terrace.
4. G.R climbed over and came at the roof of stair case and fell from terrace of 6th floor to 4th floor of the Hotel and got injured.
5. G.R admitted to hospital and police was informed.
6. No health trade licence was granted for the terrace area adjourning floor.
7. Police after investigation has filed criminal complaint against eight employees of the

Company including MD, who was a a executive Director of the Asian.

8. The complaint was filed under certain sections of the Indian Penal Code, 1860 ("IPC") and Cigarettes and Other Tobacco Products (Prohibition of Trade and Commerce, Production, Supply and Distribution) Act, 2003 ("COTPA").

9. The reason for naming MD as accused and consider him as overall responsibility for all omission and commission of violations are as follows.

   a. He is the only non-independent director and executive director of the Asian.

   b. He is present in all the board meeting as the chair person and all the decisions are taken under his signature.

   c. He authorized another General Manager of the Hotel to apply for lodging licenses.

   d. Thus, he is responsible for violation of lodging licences / health trade license about safety of its guest.

The above eight accused have filed an application under section 482 of the IPC before the HC seeking quashing of the impugned proceedings including the summoning order passed by the Metropolitan Magistrate. The HC rejects the application.

The arguments placed by MD's and other accused counsels are as follows.

1. Based on the final report / charge sheet submitted by the police, no case if made out against SJ.

2. SJ was overseas during that period.

3. HC has considered the case as if "Investigating is pending" however, for prosecuting SJ, ingredients like of grievous hurt should be alleged and proved.

4. MD is neither the occupier nor the owner nor the licnesee of the Hotel.

5. No individual can be made accused along with the company, unless there is sufficient evidence of his active role with criminal intent.

6. HC has wrongly placed reliance on the supreme court judgement in the case of *Sushil Ansal vs. State through CBI (2014 6 SCC 173).*

7. The reliance was placed on judgments of Supreme Court in (a) *Sunil Bharti Mittal vs. Central Bureau of investigation (2015 4 SCC 609)*; (b) *Maksud Saiyed vs. State of Gujarat (2008 5 SCC 668);* (c) *Sharad Kumar Sanghi vs. Sangita Rane (2015 12 SCC 781)*; (d) *Pooja Ravinder Devidasani vs. State of Maharashtra (AIR 2015 SC 675).*

8. For accused no 4 who was the General Manager of the Hotel besides other arguments, it was stated that that the incident occurred only due to sheer negligence of the GR, who walked out to the terrace for smoking and climbed on the parapet wall. It was also submitted that accused was out of country at that time.

To counter the above, the following arguments were placed by the GR's Counsel stating that the MD and General Manager cannot escpae their responsibility for their negligence and other incharge person of the hotel. He also pointed out that HC has committed an error in

issuing directions in unreasoned manner in granting exemption for personal appearance of the accused. He relied on the decision in case of (a) *TGN Kumar vs. State of Kerala & Ors. (2011 2 SCC 772)* and (b) *Madan Mohan vs. State of Rajasthan (2018 12 SCC 30).*

Judgment

SC has agreed that the Complaint against MD is a fit case for quashing the criminal proceedings to invoke inheritance power under section 482 of Cr. P.C by referring to the judgment in *State of Haryana vs. Bhajan Lal (1992 Supp. (1) SCC 335)* . The following are some of the observation of the above decision.

a. No allegation is made directly against the MD attributing negligence with the criminal intent and which attracts various sections of IPC.

b. Only because MD chairs the meeting of the company and taking decisions by itself can not directly link the allegations of negligence with the criminal intent.

c. The ratio laid down in the case of Sunil Bharti Mittal case, an individual either as a director ort managing director can be made accused only if there is sufficient material to provide his active role with criminal intent and same must have direct nexus.

d. In case of vicarious liability of a director as decided in *Maksud Saiyed vs State of Gujarat & Ors*. the court has observed that the Penal Code does not contain any provisions for attaching vicarious liability on the part of managing director or director of the company, when accused is a company. Statutes indisputable must provide fixing vicarious liability on director and managing director.

e. In case of *Sharad Kumar Sanghi vs. Sangita Rane*, it was observed that when a company is not a party and vague allegation is made against the managing director, then same can be ground for quashing the proceedings under section 482 of the Cr. P.C.

f. For violation of section 4 of COTPA, it is about the prohibition of smoking on public place and hotel above 30 rooms must provide for separate smoking area. In this case, hotel has separate smoking area and in absence of any specific allegations that hotel has not provided the separate smoking area in the entire area, no reason to prosecute the accused under COTPA and it is to be quashed.

g. HC has mainly relied on the judgement in the case of *Sushil Ansal vs. State through CBI for Uphaar Cinema*, where in the accused where themselves the occupier and that there were gross statutory violations which had a direct nexus with the death of victims.

SC has also noted that for negligence and alleged violation of licence conditions by the general manager and other staff members, who are in charge of day to day affairs of the hotel, it is to be examined during trial.

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Live as if you were to die tomorrow. Learn as if you were to live forever.

– Mahatma Gandhi

OTHER LAWS

FEMA – Update and Analysis

CA Mayur Nayak, CA Natwar Thakrar & CA Pankaj Bhuta

In this article, we have discussed recent amendments to FEMA through Circulars issued by RBI and Press Release by the Government of India and also updation through Master Direction issued by RBI. In addition few selected recent compounding orders issued by RBI are also discussed:-

A. Updated Through AP Dir Circulars

1. Foreign Exchange Management (Deposit) (Amendment) Regulations, 2019 – Acceptance of Deposits by issue of Commercial Papers

RBI through this circular has provided reasons for deletion of sub-regulation (3) of Regulation 6 of FEMA 5(R)/2016-RB relating to issuance of Commercial Papers (CPs).

RBI has clarified that it was necessary to review provisions relating to issuance of CP vis-à-vis other Statutes/Regulations – notably Section 45U(b) of RBI Act, 1934 describing CP as one of the Money Market Instruments and Section 2(c) of Companies (Acceptance of Deposits), Rules, 2014 which excludes any amount received against issue of, *inter alia*, CPs from definition of deposits. RBI has also considered the fact that Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017 – FEMA 20(R)-Schedule 5 - Purchase and sale of securities other than capital instruments by a person resident outside India, already allow investments in CPs issued by the Indian Companies. Therefore, the deletion of sub-regulation (3) of Regulation 6 of FEMA 5(R)/2016-RB is with a view to bring in consistency in statutory provisions/regulations relating to Commercial Papers (CPs).

(Source: AP Dir. Series Circular No. 6 dated 16th August, 2019/ Notification No. 5(R) dated 16th July, 2019)

(Comment: Commercial Paper (CP) is a short term unsecured money market instrument enabling borrowers to diversify their source of short-term funding. It also offers opportunities in the form of short term financial instruments for investors. All in all, this is a great instrument for generating the required liquidity in the system. This timely clarification by RBI for removal of confusions is therefore most welcome)

B. Press release issued by the GOI

1. Review of FDI policy on various sectors by the Union Cabinet

As a part of continuing reforms, the Union Cabinet chaired by the Prime Minister Shri Narendra Modi has approved major changes of the policy as follows:-

Sector	*Existing Policy*	*Revised Policy approved by the Cabinet*
Coal Mining	• 100% FDI under automatic route is allowed in coal & lignite mining for captive consumption by power projects, iron & steel and cement units and other eligible activities permitted under and subject to applicable laws and regulations. • Further, 100% FDI under automatic route is permitted for setting up coal processing plants like washeries subject to the condition that the company shall not do coal mining and shall not sell washed coal or sized coal from its coal processing plants in the open market and shall supply the washed or sized coal to those parties who are supplying raw coal to coal processing plants for washing or sizing.	• In addition, 100% FDI under automatic route for sale of coal, for coal mining activities including associated processing infrastructure subject to provisions of Coal Mines (special provisions) Act, 2015 and the Mines and Minerals (development and regulation) Act, 1957 as amended from time to time, and other relevant acts on the subject. • "Associated Processing Infrastructure" would include coal washery, crushing, coal handling, and separation (magnetic and non-magnetic)
Contract Manufacturing	• 100% FDI is allowed under the automatic route in manufacturing sector. However, there was no specific provision forContract Manufacturing.	• In order to provide clarity, 100% FDI under automatic route is allowed under a separate entry /category “Contract Manufacturing” subject to the extant FDI policyguidelines in 'manufacturing' sector.

Sector	*Existing Policy*	*Revised Policy approved by the Cabinet*
		• Manufacturing activities are allowed to be conducted either by the investee entity or through contract manufacturing in India under a legally tenable contract, whether on Principal to Principal or Principal to Agent basis.
Single Brand Retail Trading (SBRT)	• The extant FDI Policy provides that 30% of value of goods has to be procured from India if SBRT entity has FDI of more than 51%. Further, local sourcing requirement are required to be met as an average during the first 5 years, and thereafter annually towards its India operations.	• With a view to provide greater flexibility and ease of operations to SBRT entities, it has been decided as follows- - All procurements made from India by the SBRT entity for that single brand shall be counted towards local sourcing, irrespective of whether the goods procured are sold in India or exported. - Current cap of considering exports for 5 years is removed. - Incremental sourcing for global operations by the non-resident entities undertaking SBRT, either directly or through their group companies will also be counted towards local sourcing requirement for the first 5 years. - Sourcing of goods from India for global operations can be done directly by the entity undertaking SBRT or its group companies (resident or non-resident}or indirectly by them through

Sector	*Existing Policy*	*Revised Policy approved by the Cabinet*
		a third party under a legally tenable agreement. - Entire sourcing from India (instead of incremental sourcing) for global operations shall be considered towards local sourcing requirement. - Retail trading through online trade is now allowed to be undertaken prior to opening of brick and mortar stores, subject to the condition that the entity opens brick and mortar stores within 2 years from date of start of online retail.
Digital Media	The extant FDI policy provides for 49% FDI under approval route in Up-linking of 'News & Current Affairs' TV Channels	In addition, 26% FDI under government route is allowed for uploading/ streaming of News & Current Affairs through Digital Media, on the lines of print media.
(Source: GOI Press Release dated 28th August, 2019)		

(Comment: India has opened its doors for FDI with the intention of making India a more attractive destination in the atmosphere of international trade wars when several multinationals overseas are considering shifting of their production bases to different jurisdictions. New policy for retail trade dilutes stringent conditions of local sourcing and allows online trade for two years prior to opening of brick and mortar stores. Online stores are expected to lead to creation of jobs in logistics, digital payments, customer care, training and product skilling. A new category of Contract Manufacturing is created to remove any ambiguity in the policy. FDI in Coal Mining could end monopoly enjoyed so far by Coal India Ltd (CIL), which is often considered lacking capability to mine the coalfields. Opening of FDI up to 26% under approval route in News and Current Affairs TV Channels will also attract foreign Investment. All in all, the policy changes/ clarification are designed to attract increased foreign investments, employment and growth.)

C. Updated through Master Direction

- FED Master Direction No.5/2018-19- Master Direction– External Commercial Borrowings, Trade Credits and Structured Obligations. (Updated as on 08th August, 2019)

1) Sr. No. v (MAMP) of Para 2.1 (ECB Framework) & Note to this Para has been updated as under:

<table>
<tr><th>Sr. No.</th><th>Parameters</th><th>FCY denominated ECB</th><th>INR denominated ECB</th></tr>
<tr><td>v</td><td>Minimum Average Maturity Period (MAMP)</td><td colspan="2">MAMP for ECB will be 3 years. Call and put options, if any, shall not be exercisable prior to completion of minimum average maturity. However, for the specific categories mentioned below, the MAMP will be as prescribed therein:
<table>
<tr><th>Sr. No.</th><th>Category</th><th>MAMP</th></tr>
<tr><td>(a)</td><td>ECB raised by manufacturing companies up to USD 50 million or its equivalent per financial year.</td><td>1 year</td></tr>
<tr><td>(c)</td><td>ECB raised for
(i) working capital purposes or general corporate purposes
(ii) on-lending by NBFCs for working capital purposes or general corporate purposes</td><td>10 years</td></tr>
<tr><td>(d)</td><td>ECB raised for
(i) repayment of Rupee loans availed domestically for capital expenditure
(ii) on-lending by NBFCs for the same purpose</td><td>7 years</td></tr>
<tr><td>(e)</td><td>ECB raised for
(i) repayment of Rupee loans availed domestically for purposes other than capital expenditure
(ii) on-lending by NBFCs for the same purpose</td><td>10 years</td></tr>
</table>
for the categories mentioned at (b) to (e) –
(i) ECB cannot be raised from foreign branches /subsidiaries of Indian banks;</td></tr>
</table>

Sr. No.	*Parameters*	*FCY denominated ECB*	*INR denominated ECB*
		(ii) the prescribed MAMP will have to be strictly complied with under all circumstances.	
Note: *The ECB framework is not applicable in respect of investments in Non-Convertible Debentures in India made by Registered Foreign Portfolio Investors. Lending and borrowing under the ECB framework by Indian banks and their branches/subsidiaries outside India will be subject to prudential guidelines issued by the Department of Banking Regulation of the Reserve Bank. Further, other entities raising ECB are required to follow the guidelines issued, if any, by the concerned sectoral or prudential regulator.*			

2) Sr. No. viii (Negative End-uses list) of Para 2.1 (ECB Framework) has been updated as under:

Sr. No.	*Parameters*	*FCY denominated ECB*	*INR denominated ECB*
viii	End-uses (Negative List)	The negative list, for which the ECB proceeds cannot be utilised, would include the following: a) Real estate activities. b) Investment in capital market. c) Equity investment. d) Working capital purposes, except in case of ECB mentioned at v(b) and v(c) above. e) General corporate purposes, except in case of ECB mentioned at v(b) and v(c) above. f) Repayment of Rupee loans, except in case of ECB mentioned at v(d) and v(e) above. g) On-lending to entities for the above activities, except in case of ECB raised by NBFCs as given at v(c), v(d) and v(e) above.	

3) Para 10.2 under Para 10 (ECB by entities under restructuring/ ECB facility for refinancing stressed assets) has been inserted as under:

Para 10.2: Eligible corporate borrowers who have availed Rupee loans domestically for capital expenditure in manufacturing and infrastructure sector and which have been classified as SMA-2 or NPA can avail ECB for repayment of these loans under any one time settlement with lenders. Lender banks are also permitted to sell, through assignment, such loans to eligible ECB lenders, provided, the resultant external commercial borrowing complies with all-in-cost, minimum average maturity period and other relevant norms of the ECB framework. Foreign branches/ overseas subsidiaries of Indian

banks are not eligible to lend for the above purposes. The applicable MAMP will have to be strictly complied with under all circumstances.

D. 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 20/2000-RB)

Delay in reporting the transfer of shares from Resident to Non-Resident investors

Applicant	Bisazza India Private Limited
Compounding Application Number	C.A. No. AHM 131/2018-19
Compounding Authority Name	Foreign Exchange Department, Ahmedabad
Amount imposed under Compounding Order	₹ 85,000/-
Date of order	26th July, 2019
Facts of the case	The applicant made foreign outward remittance on 25th May, 2017 to a person resident outside India viz. Bisazza SPA, Italy towards buyback of shares and reported the same by filing Form FC-TRS on 03rd April 2018.
Contravention	***Delay in submission of form FC-TRS on transfer of shares from Resident to Non-Resident:*** Regulation 10B(2) of Notification No. FEMA 20/2000-RB states that a "person resident outside India" may transfer share or convertible debenture of an Indian company without the prior permission of the Reserve Bank, by way of sale, to a "person resident in India" subject to the adherence to pricing guidelines, documentation and reporting requirements for such transfers as may be specified by Reserve Bank from time to time. Further, in terms of Paragraph 10(i) of Schedule 1 of the said Notification, in case of transfer of shares or convertible debentures or warrants 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 as specified by Reserve Bank from time to time within 60 days from the date of 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	Though 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 10(i) of erstwhile FEMA 20/2000-RB dated May 3, 2000.

2) **Transfer or Issue of any Foreign Security (Outbound Investment) (FEMA 120/2004-RB)**

Method of Funding of ODI through debit card which is not a permitted method of funding

Applicant	Krishna Super Specialty Optical Clinics Pvt Ltd
Compounding Application Number	C.A. No. 4887/2019
Compounding Authority Name	Foreign Exchange Department, Mumbai
Amount imposed under Compounding Order	₹ 62,317/-
Date of order	09th July, 2019
Facts of the case	The applicant had set-up a wholly owned subsidiary (WOS), Krishna Corporation limited, a newly incorporated company located at Hong Kong in the year 2014. The official of the applicant who was in Hong Kong deposited HKD 10,000 towards the issue of shares to the applicant company on July 14, 2014. However, the abovementioned remittance was made by way of direct deposit to the overseas WOS's bank account from the company official's debit card.
Selected Contravention	Method of Funding of ODI through debit card which is not a permitted method of funding: Regulation 6(3) of Notification No. FEMA 120/2004-RB states that, an Indian party is not permitted to make overseas direct investment in a JV/WOS outside India subject to a condition that Investment under this regulation should be funded out of the prescribed sources mentioned in this regulation.

	In the present case, remittance for share capital was made by the applicant company's official from the debit card which was not the permitted mode of funding as per regulation 6(3) and thus, the applicant had contravened the provision of Regulation 6(3).
Comments	Direct payment from debit card in foreign exchange is not a permissible mode of remittance for making remittance for overseas direct investment (ODI).

3) **Borrowing or Lending in Foreign Exchange (FEMA 3/2000-RB)**

Availing of foreign currency loan overseas for the purpose of purchasing property abroad

Applicant	Dharmpal Agarwal (for self and on behalf of Vineet Agarwal, Chander Agarwal, Urmila Agarwal, Priyanka Agarwal & Chandrima Agarwal)
Compounding Application Number	C.A. No. 4931/2019
Compounding Authority Name	Foreign Exchange Department, Mumbai
Amount imposed under Compounding Order	₹ 5,58,702/-
Date of order	19th July, 2019
Facts of the case	The applicant and the others, all resident individuals jointly acquired a residential property in Singapore at a total cost of SG$ 3,032,320. While a portion of the cost i.e. SG$ 606,464 was met through remittances under LRS, remaining amount of SG$ 2,425,856 was paid by availing a loan from OCBC Bank, Singapore. The loan was availed on 13th April 2007. The applicant and the others have sold the property and repaid the loan on 11th October 2016. Applicant further submitted that the installments for repayment of loan and payment of interest (EMIs) with respect to the loan were met out of the proceeds of lease rental received from lease of the property. In the initial years of loan repayment, reduction in principal amount of loan was small and the interest component made a large part of the EMI. Therefore, considering the total

	amount paid under EMIs on the loan, over the years, the applicant ended up effectively re-paying more than the amount of loan. The representatives of the applicant (and others) submitted that the applicant (and others) had not made any gains through availing loans overseas for acquisition of the property abroad.
Contravention	Availing of foreign currency loan overseas for the purpose of purchasing property abroad:Regulation 3 of Notification No. FEMA 3/2000-RB states that "Save as otherwise provided in the Act, Rules or Regulations made thereunder, no person resident in India shall borrow or lend in foreign exchange from or to a person resident in or outside India…." While remitting money under LRS for purchase of property is permitted, availing of foreign currency loan overseas for this purpose was not permitted.
Comments	Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000 has been replaced by revised regulations; Regulation 3 of extant FEMA 3(R)/2018-RB dated 17/12/2018 corresponds to Regulation 3 of erstwhile FEMA 3/2000-RB dated 03/05/2000. Contravention of Regulation 3 of Notification 3 is a common contravention observed repeatedly committed by residents borrowing abroad towards various purposes such as contribution to the capital of an overseas entity, purchase of property, opening of bank account, etc.

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All power is within you. You can do anything and everything. Believe in that. Do not believe that you are weak; do ot believe that you are half-crazy lunatics, as most of us do nowadays. Stand up and express the divinity within you."

– Swami Vivekananda

God sometimes does try to the uttermost those whom he wishes to bless.

– Mahatma Gandhi

CA Prashant Daftary & CA Jiten Jataniya

Not mere Arithmetical Addition - Challenges & Unique Issues in Consolidation of Financial Statements

The Companies Act 2013 recognized the importance of consolidated financial statements ('CFS') and made it mandatory even for private limited companies and unlisted public companies. Earlier it was only required for listed companies due to SEBI guidelines. CFS is especially relevant in sectors like real estate, infrastructure etc., where there is a practice of forming special purpose vehicle or separate entities for each project.

Challenges to the companies and their auditors arises on account of various factors like:

- lack of experience in preparation,
- bandwidth,
- unique issues related to inter-company transactions,
- acquisition/dilution of stake during the year etc.

ICAI has issued revised guidance note on CFS to provide guidance on the issues faced during preparation of CFS by the companies and while auditing by the members.

The focus of this article is to understand the practical challenges, unique issues, common errors and methodology to address these challenges from the perspective of Accounting Standard 21 'Consolidated Financial Statements'.

Snapshot of unique accounting issues/challenges

Determining parents portion of equity as on the date of investment	Two or more investment eventually leading to control	Segmental reporting & discontinuing operations

Change in percentage completion due to inter-company eliminations	Treatment & disclosure of goodwill	Dilution of stake without sale leading to loss of control
Foreign subsidiaries - determination of integral vs. non-integral	Unaudited accounts of subsidiary companies	Evaluation of going concern at group level

Practical Insights

- **Determining parents portion of equity: difficulty in availability of financial statements on the date of acquisition**
  - o The calculation though on paper appears simple, there are various practical challenges as regards lack of credible information as regards the financial position as on the date of acquisition. This is especially true in case of private limited companies/ unlisted companies where there is no requirement to prepare quarterly accounts.
  - o As a practical measure, the companies use the nearest audited accounts or accounts prepared for management information. Care needs to be taken to ensure material adjustments which are made to the latest audited accounts (in case it is used) or to ensure that year-end/period-end accruals are made in the management accounts so as to ensure correctness in computation of goodwill or capital reserve.
  - o Errors in goodwill calculation may occur because transactions/ events post balance sheet date is not considered or reliance on MIS amounts without ensuring proper accruals. In case of large acquisitions, the option of audited accounts as on the date of transaction should also be explored..
- **Step-up acquisitions**
  - o In many situations, entities make multiple acquisitions to eventually acquire control. The standard requires calculation of goodwill at each such acquisition date however it also permits as a practical expedient to compute goodwill on the date on which the entity eventually obtains control if intermittent acquisitions are of small value.
  - o In practical scenario, it has been observed that there are cases where an entity is an associate for part of a year and it became a subsidiary for balance part of a year. In such a case, only share of profit/loss would be accounted for part of a year and line by line consolidation would have to be done post obtaining control. Care needs to be taken as regards the sequence of events to facilitate correct accounting and disclosure.

- **Dilution in stake of holding company without sale**
  - Imagine a situation where the stake of holding company reduces from 55% to 25% due to additional acquisition of shares by the other shareholders or introduction of a new shareholder. AS 21 talks about accounting for gain/ loss on sale of subsidiary, but question arises in this case that whether gains/ loss on dilution should be debited/ credited to profit and loss account or should be added/reduced from reserves as there is no sale transaction which took place.
  - Under Ind AS gain/loss on dilution are required to be credited/debited to profit and loss account. IGAAP is silent on the treatment, but generally it has been debited/credited to reserve account.
- **Segmental reporting & discontinuing operations**
  - Care needs to be taken while identifying reporting segments as it is likely that subsidiaries are carrying out different activities.
  - It may be possible that one of the subsidiary which was carrying out different business activities discontinues its operations leading to requirement of additional disclosures as regards discontinuing operations in CFS.
- **Accounting treatment of goodwill on consolidation & disclosure**
  - Goodwill usually represents the premium paid on acquisition of the subsidiary. The premium could be on account of multiple commercial reasons, such as considering an intangible asset which is not recognized in the balance sheet of the seller.
  - Different views and practices have been observed with respect to treatment of goodwill on consolidation under Indian GAAP i.e. whether it is amortized or only tested for impairment. Further, multiple practices have been observed for disclosure of the same i.e. disclosure as a separate line item in fixed assets schedule and disclosure in intangible assets schedule. Under Ind AS, goodwill is disclosed as a separate line item and is not amortized but tested for impairment.
- **Impact of inter-company eliminations on percentage completion (POCM) in case of real estate companies**
  - Take an example, a holding company, who recognizes revenue as per POCM, sells one parcel of land to the subsidiary over and above cost, in this situation POCM of the project undertaken by the subsidiary would be different at a standalone level as against consolidated level on account of elimination of inter-company profit. In such a case a question arises whether revenue recognition also needs to be changed or not.

    There are two schools of thought on this, one which says that POCM need not be recomputed as books of the subsidiary are not re-written and there is another view which says that revenue recognition should also undergo a change.
  - Another situation which arises is in case where holding company has taken a loan at a higher rate of interest and lent money to subsidiary at lower interest rate. The inter-

company interest gets eliminated and actual cost incurred by the holding company would have to be loaded on the project leading to change in the project budget and POCM.

- **GAAP differences**

  There are cases where the consolidation is required to be prepared under Indian GAAP but the JV was required to comply with Ind AS. This leads to a situation where separate accounts are required only for the purpose of consolidation.

- **Unaudited accounts of subsidiary – role of holding company auditor**

  Based on the guidelines issued by ICAI, disclosure required in Auditor's Report on Consolidated Accounts, where accounts of component are either unaudited or audited by another auditor are tabulated below:

Component audit status	***Component is Material to financial statement (Yes/No)***	***Disclosure in Principal Auditor's Report***
Unaudited	No	Optional disclosure [if reported, 'Other Matters']
Audited by another auditor	No	Optional disclosure [if disclosed, 'Other Matters']
Unaudited	Yes	Report to be modified
Audited by another auditor	Yes	Disclosure to be made in 'Other Matters'

It is essential that the holding company auditors have an overall understanding about the components and in case where required, additional information and explanations can be sought from the management.

- **Evaluation of going concern at group level**

  This is one aspect which needs to be focused on while finalizing the consolidated financial statements. There may be a situation where the holding company individually may be financially healthy but there could be issues as regards going concern post consolidation. Some of the red flags which should be considered are as under:

  - o Liquidity mismatch at group level
  - o Subsidiaries with significant losses
  - o Audit comments/notes in subsidiary financials
  - o Current liabilities exceeding current assets in CFS

  At times it may also happen that there is a note as regards to going concern at the standalone subsidiary level however this may not have any impact on the group as a whole, based on the strong financial position of the holding company and/or other components in such cases the going concern note included in components financial statements may be ignored/ deleted at CFS level.

- **Other issues**

  - o If a subsidiary has outstanding cumulative preference shares which are held outside the group, the holding company computes its share of profit or loss after adjusting for the subsidiary's preference dividends irrespective of declaration of dividends.
  - o Allocation of profit / loss in case of differential profit rights. This issue is relevant mainly in case of

private companies with private equity investments. Care must be taken to carefully read and understand the investment agreements and ensure that the allocation of profit is in line with the investment agreement. Appropriate notes should also be inserted for the users benefits.

- o Tracking of losses not allocated to minority – This is relevant as the subsequent profit would first be allocated to majority till the said losses have not exhausted.
- o Note on contingent liabilities - care needs to be taken to ensure that proportionate share of the contingent liabilities of associates are also considered.
- o In cases where the standalone financials and consolidated financials are finalized on separate dates, additionally care needs to be taken with respect to events subsequent to balance sheet date. Additional audit steps/inquiries would be required for the period between the closing of standalone financial statements and consolidated financial statements.
- o Another common issue is as regards goods sold from subsidiary to holding company with profit margins has been capitalized to fixed assets in holding company books. On consolidated level, the sale from the subsidiary needs to be eliminated against the purchase of fixed assets and the material sold would be part of the fixed asset block at cost. This would lead to re-computation of depreciation also.
- o Preparation of consolidated cash flow
  - – Difficulties are faced while preparing consolidated cash flow in the year of acquisition of a new entity on account of movement in current assets and liabilities.
  - – Elimination of inter-company cash flows are a must and care should be taken to eliminate such items while preparing the consolidated cash flow
  - – It is advisable to prepare a fresh cash flow based on consolidated financials as against merging of all cash flows and then making adjustments.

Common Errors

Common errors	Direct addition of multiple balance sheets in excel sheets and manual adjustments for consolidation leading to difficulty in audit trail
	Incomplete notes to accounts and accounting policies - Relevant notes/accounting policies from subsidiary/associate/JV accounts not incorporated
	Differences in groupings/ classification by subsidiaries/entities
	Errors in inter-company eliminations, computation of goodwill etc.
	Tracking of permanent consolidation adjustments
	Audit report - Errors in calculation of figures of revenue, assets of entities which are not audited or audited by other auditors

Tips to facilitate consolidation

- **Profit and reserve reconciliation** – One of the most critical controls to ensure completeness of consolidation is to do an overall profit and reserve reconciliation.

The nature of items in reconciliation needs to critically analyzed and understood. This can be a good means to identify potential errors in preparation of CFS.

- **Use of consolidation software** - in case of large CFS, the option of using a consolidation software should explored. This facilitates tracking on permanent consolidation adjustments, margin eliminations and also reduces the time required.
- **Working paper file**
  - o Document the process followed for consolidation of accounts including inquires made in cases where component accounts are not audited by the holding company auditors. This is also relevant for IFC reporting.
  - o Capturing of Permanent adjustments – this should include maker-checker approvals from the management and its back-up
  - o Process followed to ensure completeness
  - o Checklist/checkpoints used for the purpose of audit
  - o Signed accounts of component entities
  - o Summary of key views taken and its rationale
- Group audit instructions – The holding company auditor should issue group audit instructions containing the following:
  - o Critical due dates – this includes communication of key timelines and early warning signal in case due dates are not expected to be met.
  - o Key matters to be covered in group audit instructions:
    - – Instructions of KAM reporting wherever relevant
    - – Audit findings and how they were resolved – this helps the holding company auditor make an informed judgment on the component accounts while forming an opinion on the consolidated financial statements. This usually includes management letter along with response from the management.
    - – Audit documentation – this helps the group auditor in ensuring compliance with auditing standards and documentation requirements at a group level. Some of the important aspects which can be covered are independence confirmation, management representation letter, risk assessment etc.
    - – Early warning reporting and subsequent event reporting
    - – Communication as regards group accounting policies
- Consolidation at trial balance level – This facilitates better control over the consolidation procedures and journal entries can be passed for inter-company elimination and consolidation adjustment. These entries should be signed-off and preserved for future reference and audit trail.
- Training and awareness – Continuous training on the issues faced during the consolidation should be given to the preparers and the auditors of CFS. This is essential considering the widespread impact on account of requirement for CFS in case of private limited companies and also SEBI requirement of quarterly consolidation.

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BEST OF THE REST

Rahul Sarda,
Advocate

Whether the High Court that does not have jurisdiction over 'Venue' of Arbitration can entertain petition seeking appointment of Arbitrator?

The Appellant entered into an agreement with the Respondent for sale of Iron Ore Pellets on FOB terms and payment was to be made by Letter of Credit in Bhubaneswar. The agreement contained an arbitration clause in order to resolve any dispute/s that may arise between the parties in future. The arbitration clause provided that the "venue" of arbitration shall be Bhubaneswar. The loading port was Dhamra Port, Bhadrak, Odisha and destination was Chennai/Ennore Ports, Tamil Nadu.

Thereafter, certain disputes arose between the parties. The Respondent invoked the arbitration. The Appellant did not agree for appointment of the Arbitrator and hence the Respondent filed a petition under section 11(6) of the Arbitration and Conciliation Act, 1996 before the Madras High Court.

The Appellant challenged the Petition by contending that Madras High Court does not have jurisdiction to entertain the petition on the ground that the parties have agreed that the "seat" of arbitration be Bhubaneswar and therefore the High Court of Orissa has jurisdiction to appoint the arbitrator. The Madras High Court vide its impugned order not only appointed an arbitrator but also held that in the absence of any express clause excluding jurisdiction of other courts, both High Courts have jurisdiction. Being aggrieved by the said order, the Appellant filed the appeal before the Apex Court.

The Appellant argued that the Madras High Court erred in assuming the jurisdiction under section 11(6) of the Act despite the seat being at Bhubaneswar. The Appellant further submitted that when the parties have agreed for a place/ "venue" for arbitration, it gets the status of "seat" which is the juridical Seat and therefore only, the Orissa High Court will have the jurisdiction. Whereas, the submission of the Respondent was that the cause of action arose at both the places and therefore both the Courts will have supervisory jurisdiction. Further, mere mention of venue as place of arbitration will not confer exclusive jurisdiction upon that court. Besides, there should be concomitant circumstances like use of words 'alone', 'exclusive', 'only' etc. to confer exclusive jurisdiction upon that court.

The Apex Court observed the definition of 'Court' as defined under section 2(2) of the Act. The Court referred to its decision in BALCO case. In the said case, the Court highlighted distinction between the seat and venue in the context of Section 20(3) of the Act. Further, the provisions in section 2(1)(e) of the Act has to be read in conjunction with Section 20 of the Act which give recognition to the autonomy of the parties as to 'place of arbitration'.

It was held in one of the case that as per Section 20 of the Act, parties are free to agree on the place of arbitration. Party autonomy has to be construed in the context of the parties choosing

a court which has jurisdiction out of two or more competent courts having jurisdiction.

Further held that where the contract specifies the jurisdiction of the court at a particular place, only such court will have the jurisdiction to deal with the matter and parties intended to exclude all other courts. In the present case the parties have agreed that the venue of arbitration shall be at Bhubaneswar. The Court observed that the intention of the parties was to exclude the jurisdiction of all other courts. Therefore, Apex Court held that Madras High Court has erred in assuming jurisdiction under section 11(6) of the Act. The impugned order was set aside by the Apex Court.

Brahmani River Pellets Limited v. Kamachi Industries Ltd., Civil Appeal No.5850 of 2019, dated 25th July 2019, Supreme Court.

Whether it is necessary that the attesting witnesses should actually see the testator signing the Will?

The appellant had filed a suit claiming share in the suit properties asserting them to be joint family properties. The Trial Court held that the suit property was self-acquired property of the deceased who died intestate and the genuineness of the will had not been established in accordance with law, hence entitling the Appellant to 1/5th share in the suit property.

The Respondent filed an appeal which was allowed holding that the signature of the testator was not in dispute and the testator was of sound mind. The second appeal filed by the Appellant was dismissed.

Being aggrieved by the said dismissal, the Appellant challenged the same before the Apex Court. The Appellant argued that the Will was not signed by the testator in presence of the two attesting witnesses. Further, the attesting witnesses had also not signed in the presence of the testator. Hence, the genuineness of the Will was not established in accordance with provisions of Section 63 (c) of the Act.

The Respondent contended that the attesting witnesses had received from the testator a personal acknowledgement of his signature on the Will. The Will was duly registered and the attesting witnesses had signed simultaneously in presence of the Sub-Registrar after the testator had signed.

Therefore, the question before the Court was with regard to the interpretation of Section 63(c) of the Act. Held, Section 63 (c) requires an acknowledgment of execution by the testator followed by the attestation of the Will in their presence. The Court observed that the acknowledgement may assume the form of express words or conduct or both, provided they unequivocally prove an acknowledgement on part of the testator. Where a testator asks a person to attest his Will, it is a reasonable inference that he was admitting that the Will had been executed by him. There is no express prescription in the statute that the testator must necessarily sign the Will in presence of the attesting witnesses only or that the two attesting witnesses must put their signatures on the Will simultaneously at the same time in presence of each other and the testator.

In the present case, both the attesting witnesses deposed that the testator came to them individually with his own signed Will, read it out to them after which they attested the Will.

Therefore, the Court held that the Will could not be disputed and hence the appeal was dismissed.

Ganesan (D) Through LRS v. Kalanjiam & Ors., Civil Appeal No(s).5901-5902 of 2009, dated 11th July 2019, Supreme Court.

Whether a person claiming title by adverse possession can maintain a suit under Article 65 of the Limitation Act?

The question of law before the Apex Court was whether a person claiming title by virtue of adverse possession can maintain suit under the provisions of the Limitation Act for declaration of title and for a permanent injunction seeking possession thereby restraining the defendant from interfering in the possession or for restoration of

possession in case of illegal dispossession by a defendant whose title has been extinguished by virtue of the plaintiff remaining in the adverse possession or in case of dispossession by some other person. In other words, whether Article 54 of the Limitation Act only enables a person to set up a plea of adverse possession as a shield as a defendant and such plea cannot be used a a sword by a plaintiff to protect his possession of immovable property.

The Court observed that in case a person in adverse possession has perfected title by adverse possession and after extinguishment of title of the true owner, he cannot be successfully dispossessed by true owner as the owner had lost his right, title and interest. There is an acquisition of title by adverse possession; and such an acquirer can, in the capacity of a plaintiff, always use the plea in case any of his rights are infringed including in case of dispossession.

The Court observed the wordings of Article 65 of the Act the limitation of 12 years runs from the date when the possession of the defendant becomes adverse to the plaintiff. The schedule of the Act nowhere suggests that suit cannot be filed by the plaintiff for possession of immovable property or any interest therein based on title acquired by way of adverse possession. There is absolutely no bar for the perfection of title by way of adverse possession whether a person is suing as the plaintiff or being sued as a defendant. The large number of decisions of the Apex Court and various other decisions of Privy Council, High Courts and of English courts and observations made in Halsbury Laws based on various decisions indicate that suit can be filed by plaintiff on the basis of title acquired by way of adverse possession or on the basis of possession under Articles 64 and 65 of the Limitation Act.

The statute does not define adverse possession; it is a common law concept, the period of which has been prescribed statutorily under the law of limitation Article 65 as 12 years. Law of limitation does not define the concept of adverse possession nor does it anywhere contain a provision that the plaintiff cannot sue based on adverse possession. It only deals with limitation to sue and extinguishment of rights.

There may be a case where a person who has perfected his title by virtue of adverse possession is sought to be ousted or has been dispossessed by a forceful entry by the owner or by some other person, his right to obtain possession can be resisted only when the person who is seeking to protect his possession, is able to show that he has also perfected his title by adverse possession for requisite period against such a plaintiff.

Law never intends a person who has perfected title to be deprived of filing suit under Article 65 to recover possession and to render him remediless. Law of adverse possession does not qualify only a defendant for the acquisition of title by way of adverse possession, it may be perfected by a person who is filing a suit. Once right is extinguished another person acquires prescriptive right which cannot be defeated by re-entry by the owner or subsequent acknowledgment of his rights.

In Article 65, in the opening part a suit "for possession of immovable property or any interest therein based on title" has been used. The expression "title" would include the title acquired by the plaintiff by way of adverse possession. The title is perfected by adverse possession, as has been held in a catena of decisions. Therefore, a suit can be filed by a person whose right is sought to be defeated.

The Court held that a person in possession cannot be ousted by another person except by due process of law and once 12 years' period of adverse is over, even owner's right to eject him is lost the possessory owner acquires right, title and interest possessed by the outgoing owner. And, once the right, title or interest is acquired, it can be used as a sword by the plaintiff as well as shield by the defendant.

Ravinder Kaur Grewal & Ors. v. Manjit Kaur & Ors., Civil Appeal No.7764 of 2014, dated 7th August 2019, Supreme Court.

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THE CHAMBER NEWS

CA Ketan L. Vajani & CA Haresh P. Kenia,
Hon. Jt. Secretaries

Important events and happenings that took place between 13th August, 2019 to 13th September, 2019 are being reported as under:

I. ADMISSION OF NEW MEMBERS

1) The details of new members which were admitted in the Managing Council Meeting held on 12th August, 2019 are as under:-

Type of Membership	No. of Members
Life Member	11
Ordinary Member	17
Student Member	5
Associate Member	2

II. PAST PROGRAMMES

1. DIRECT TAXES COMMITTEE

Half Day Workshop on Practical & Legal Issues in Tax Audit was held on 17th August, 2019 at Walchand Hirachand Hall, 4th Floor, IMC, Churchgate. The workshop was addressed by CA Anil Sathe & CA Mahendra Sanghvi.

2. MEMBERSHIP & PR COMMITTEE

Half Day Seminar on Audit and FEMA at Nashik was held on 7th September, 2019 at The Institute of Engineers Hall, Nashik. The seminar was addressed by CA Ashok Mehta, CA Prashant Daftary & CA Rajesh P. Shah

3. STUDENT COMMITTEE

- 5th CTC Football Cup was held on 10th August, 2019 at Dr. Antonio Da Silva Turf, Dadar. The tournament had 20 teams participating out of which 2 were girls team. Mr. Pratik Chaudhary, Indian Super League Player was the Chief Guest of the tournament

  The winners were as follows:

  Winning team - KPMG

  1st Runner up Team - E&Y

  2nd Runner up Team - BDO

  Best Goal Keeper – Mr. Advait Ajit Kumar (KPMG)

  Maximum Goals – Mr. Bevan D'souza (BDO)

  Winning Team (Girls) - Hinesh R. Doshi & Co. LLP

  1st Runner up Team (Girls) - N. A. Shah & Co.

  Best Goal Keeper (Female) – Ms. Trusha Lathiya (Hinesh R. Doshi & Co. LLP)

  Maximum Goals (Female) – Ms. Richa (Hinesh R. Doshi & Co. LLP)

- Interactive Workshop for Students on GST Annual returns and GST Audit was held on 13th August, 2019 at The Mysore Association Auditorium, Conference Room, Matunga. The workshop was addressed by CA Raj Khona & CA Keval Shah
- Workshop on Tax Audit for Students was held on 5th September, 2019 at Babubhai Chinai Hall, 2nd Floor, IMC, Churchgate. The workshop was addressed by CA Chintan Gandhi & CA Ashok Mehta

(For details of the future programs, kindly visit www.ctconline.org or refer The CTC News of September, 2019)

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Throw away all weakness. tell your body that it is strong. Tell your mind that it is strong and have unbound faith and hope in yourself.

– Swami Vivekananda

A man who was completely innocent, offered himself as a sacrifice for the good of others, including his enemies, and became the ransom of the world. It was a perfect act.

– Mahatma Gandhi

Indirect Taxes Committee

IDT SC on Issues in Refunds under GST Law was held on 6th August, 2019 at AV Room, 4th Floor, Jai Hind College, Churchgate

CA Jignesh Kansara (Group Leader) addressing the delegates

CA Samir Kapadia (Chairman) addressing the delegates

Study Circle & Study Group Committee

SG on Recent Judgments under Direct Taxes was held on 9th August, 2019 at Babubhai Chinai Hall, 2nd Floor, IMC, Churchgate

Mr. Ajay R. Singh, Advocate addressing the delegates

SC on Penalty provisions u/s 270A, Immunity Provisions u/s 270AA of I.T. Act and Issues therein was held on 16th August, 2019 at Babubhai Chinai Hall, 2nd Floor, IMC, Churchgate

CA Bhadresh Doshi addressing the delegates

International Taxation Committee

FEMA SC on Regulatory framework – International Financial Service Centre (IFSC) – Gift City and Amendments as per Budget 2019 was held on 14th August, 2019 at CTC Conference Room

CA Shital Gharge addressing the delegates

Direct Taxes Committee

ISG on Recent Case Laws under Direct Tax Laws was held on 13th August, 2019 at CTC Conference Room.

CA Shailesh Bandi addressing the delegates

Webinar on Filing of Trust Returns with Income Tax and Charity Commissioners was held on 22nd August, 2019

CA Apurva Shah addressing the delegates

Bengaluru Study Group

Bengaluru SG on Case Study on Interplay on Section10(38) and MAT calculation, DTAA under Tax Treaties and DTAA and MLI in context of Splitting up of contract was held on 22nd August, 2019 at FKCCI, Hall No. 4, Bengaluru

CA Shivanand Nayak addressing the delegates

CA Bibhuti Ram Krishna addressing the delegates

Residential Refresher Course Committee

Capital Market SC on Essence of Mutual Funds was held on 20th August, 2019 at CTC Conference Room

Mr. Nikhil Mehta addressing the delegates

Student Committee

5th CTC Football Cup was held on 10th August, 2019 at Dr. Antonio Da Silva High School, Dadar (West)



Felicitating the Chief Guest Mr. Pratik Chaudhari, Indian Super League Football player by CA Vipul Choksi (President), Mr. Kishor Vanjara (Past President) and CA Varsha Galvankar (Chairperson)

Winning team KPMG

1st Runner up Team E&Y

2nd Runner up Team BDO

Best Goal Keeper – Mr. Advait Ajit Kumar (KPMG)

Maximum Goals – Mr. Bevan D'souza (BDO)

Winning Team (Girls) Hinesh R. Doshi & Co. LLP

Student Committee

5th CTC Football Cup was held on 10th August, 2019 at Dr. Antonio Da Silva High School, Dadar (West)

1st Runner up Team (Girls) N. A. Shah & Co.

Best Goal Keeper (Female) – Ms. Trusha Lathiya
(Hinesh R. Doshi & Co. LLP)

Maximum Goals (Female) – Ms. Richa Haldankar
(Hinesh R. Doshi & Co. LLP)

Direct Taxes Committee

Half Day Workshop on Practical & Legal Issues in Tax Audit was held on 17th August, 2019 at Babubhai Chinai Hall, 2nd Floor, IMC, Churchgate

CA Vipul Choksi (President) giving his opening remarks Seen from L to R: CA Nimesh Chothani (Convenor), CA Anil Sathe (Speaker), Mr. Devendra Jain, Advocate (Chairman) and CA Haresh Kenia (Hon. Jt. Secretary)

Faculties:

Mr. Devendra Jain (Chairman) welcoming the speakers

CA Anil Sathe addressing the delegates

CA Mahendra Sanghvi addressing the delegates

Membership & PR Committee

4th Narayan Varma Memorial Lecture on The Future of Audit (Jointly with Bombay Chartered Accountants' Society Trust, Dharma Bharathi Mision and Public Concern for Governance Trust) was held on 23rd August, 2019 at Walchand Hirachand Hall, 4th Floor, IMC, Churchgate

CA Anish Thacker (Vice-President) lighting the lamp. Seen in the picture: Mr. Paramjeet Singh (President – DBM), CA Manish Sampat (President – BCAS), Mr. Y. H. Malegam (Guest Speaker) and Mrs. Ursula Varma

Mr. Julio Riberio (Chairman – PCGT) delivering his remarks. Seen from L to R: CA Anish Thacker (Vice-President), Mr. Paramjeet Singh (President – DBM), Mr. Y. H. Malegam (Guest Speaker), CA Manish Sampat (President – BCAS) and Mrs. Ursula Varma

Mr. Y. H. Malegam addressing the guests. Seen from L to R: CA Anish Thacker (Vice-President), Mr. Paramjeet Singh (President – DBM), Mr. Julio Riberio (Chairman – PCGT), CA Manish Sampat (President – BCAS) and Mrs. Ursula Varma

Commercial & Allied Laws Committee

Lecture Meeting on Companies (Amendments) Act, 2019 was held on 22nd August, 2019 at AV Room, 4th Floor, Jai Hind College, Churchgate

Mr. Rahul Hakani, Advocate (Chairman) welcoming the speaker. Seen from L to R: Mr. Paras S. Savla, Advocate (Co-Chairman), CA Vipul K. Choksi (President), CS Savithri Parekh (Speaker) and Mr. Pravin Veera, Advocate (Advisor)

CS Savithri Parekh addressing the delegates

Student Committee

Interactive Workshop for Students on GST Annual Returns and GST Audit was held on 13th August, 2019 at Mysore Association Auditorium, Matunga

CA Vipul Choksi (President) giving his opening remarks.

Faculties:

CA Raj Khona addressing the delegates

CA Varsha Galvankar (Chairperson) welcoming the speakers

CA Keval Shah addressing the delegates

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