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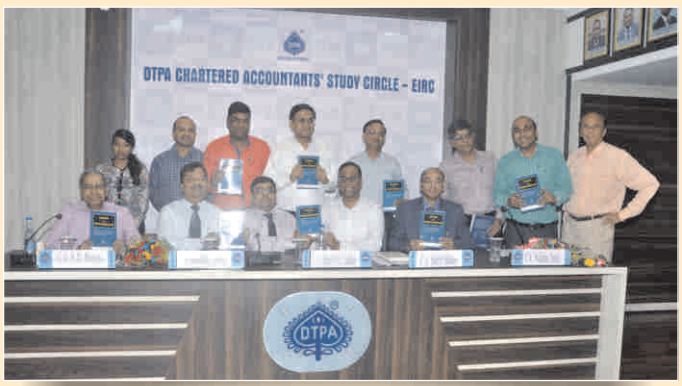
DTPA-J

Direct Taxes Professionals' Association Journal

Volume 1 - 2017-18 | December 2017

KNOWLEDGE EMPOWERMENT

DTPA ACTIVITIES 2017



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INDEX

EDITORIAL

Dear Friends

It gives me immense pleasure to bring you the 1st edition of DTPA Journal, 2017- 18.

At the very outset I thank President, Vice-President & Secretary for imposing faith on me for this role of Chairman, DTPA Journal Committee, 2017-18.

2017 has been watershed year for Indian Economy. With so many events happening throughout the year, Indian economy has seen some major ups and downs. From the demonetisation shock to the landmark GST passage, 2017 witnessed it all. Railway Budget was merged with General Budget from the current year. The year also saw introduction of RERA to safeguard the interests of the consumers of the real estate segment. An amendment to the Insolvency & Bankruptcy Code was brought in through an Ordinance in November, 2017 to prevent misuse of the statute.

Friends you would all agree that demonetisation of highest demonition banknotes, which accounted for 86% of notes in circulation met with mixed success. The aim was to curb parallel economy of black-money. However nearly all of the bank-notes were deposited, thus beating the basic purpose of the effort. Disruption caused as the outcome of the policy dampened GDP growth, huge job-losses, uncertainty leading to delayed investment and purchase decision apart from the fact that reprinting of notes itself cost the exchequer around Rs. 8000 Cr. There are however some long-term gains expected through the process like expanded tax-collection base, increased digitalisation & compliance.

The 2nd biggest reform, introduction of GST, the biggest tax-reform ever in India, was a very welcome move but was also marred because of hastiness of implementation, without having the right infrastructure in place. Complications are galore causing utter confusion in the economy. MSME sector & small traders were the most to suffer. GST Council also had to make at least 5 major amendments apart from innumerable small amendments & postponing of dates of compliance to address the shortcomings. In short GST is yet to settle down & the positive impacts of GST are expected only after the issues get resolved.

Real Estate one of the major employers of workforce & contributory to GDP had to bear the largest brunt of the uncertainty in the economy because of Demonetization, GST & RERA leading to prices and off-takes taking hit, which had a negative impact on GDP.

On November 24, the Indian rupee fell to a fresh life-time low of 68.86 against the dollar over sustained foreign capital outflows.

Gross NPAs have climbed to almost 12% of gross advances for public sector banks at end-September 2016. At this level, India's NPA ratio is higher than that of any other major emerging market, with the exception of Russia." Survey believes such a situation has led to a slowdown in credit growth which has hit sectors, especially the medium and small scale enterprises. Steps needs to be taken to look into resolution aspects for solving the problem. IBC is definitely an welcome step in this regard.

However all is not negative. The Indian market has had a healthy year, returning over 25 percent between Sensex and the Nifty on a year to date basis. The year also saw the indices clocking fresh milestones, as the Nifty reached 10,000-mark in the month of July. Despite a few consolidation phases, the index has largely traded above that mark, while the Sensex also traded above 33800-mark. Disruption caused by the policies may have dampened GDP growth in the short-term, but it could also prove to have long-term benefits. It increased the number of digital transactions being conducted within India's economy, which are easier to track and to tax: since April, over twice as many Indians have filed tax returns than in the same period last year.

In the coming year India will remain the fastest-growing major economy in the world. India's real GDP growth will remain between 6.75% and 7.5%. Even under this forecast, India would remain the fastest growing major economy in the world. What is needed that Growth needs to be more inclusive. Tax base needs to be broadened to enable India to make much-needed progress. Controlling corruption would also be very essential steps in this regard.

The Journal Committee promises to publish enlightning well researched articles on Tax-reforms & other Economic issues so that we contnue to subscribe to Indias' continuing growth.

CA. Mahendra K. Agarwal
Chairman DTPA Journal Committee
31st December, 2017

FROM THE DESK OF THE PRESIDENT

My Dear Professional Colleagues,

I am really happy and honored to address you all through my first message through this journal. I am thankful to the past presidents and grateful for their leadership and outstanding contributions during their respective years as president. I am inspired by their commitment and their achievements with regard to the Association. Our Association is continuing its remarkable journey by enriching professional knowledge of its members.

Our Association has been functioning very hard for uplifting its image through various modes of its presence. Since the month of Septembertill date, various study circle meetings, Seminars and Conferences have been held by our Association which witnessed a huge participation. Moreover, a two days workshop on GST had been organized and Further, DTPA in association with Bombay Chartered Accountants Society (BCAS) has recently organized a joint seminar on IndAs, ICDS and Penalty u/s 270A and also a very interactive chat show on GST with eminent speakers from Mumbai & Bengaluru.

An interactive session with Shri K. L. Maheshwari, Pr. CCIT, West Bengal & Sikkim, was held on the 6thday of December, 2017 at DTPA Conference hall , 3 Government Place(w), Kolkata and was been enlightening for all the members present there.

Our association also met with Shri A.K.Shrivastava, Revenue Member, CBDT, on the 11th day of December, 2017 at Aayakar Bhawan, Kolkata.

Our Association has submitted the Pre-Budget Memorandum on GST to the authorities concerned.

Our association has also sent a representation to the Chairman of CBDT, Mr. Sushil Chandra on 16th of October, 2017 regarding draft notification for insertion of new rules 39A and Form No. 28AA in Income Tax Rules, 1962 along with comments and suggestions.

Our association has also given representation to Shri K L Maheshwari, Pr. CCIT of West Bengal & Sikkim, regarding difficulties faced by assesses in relation to additional demand of 5% against the stay of demand on 20th of September, 2017 and various other matters from time to time for the benefit of our members.

This year DTPA has taken a new initiative to issue Life Membership cards to the members which was appreciated by many of our members. Renovation of DTPA conference hall has also been done and the same was inaugurated on 17th of November, 2017.

Our association has also participated in Diwali get-together organized by EIRC of ICAI on 22nd October, 2017.

Our Association is further actively engaged in organizing such other programs which are having interest to the members.

I am motivated by the idea of our Prime Minister ShriNarendra Modi "Sabka Saath, Sabka Vikas". The initiative of JAM(Jan Dhan-Aadhaar -Mobile) taken by our prime minister is to be appreciated. This is indeed going to integrate the nation towards a more developed nation.

Goods and Service Tax

India is transforming rapidly. Many initiatives have been taken by our Government and one such initiative is GST Act. According to the GST Act, all the complex and multiple indirect taxes have been subsumed in one single tax called the Goods & Service Tax. GST will surely increase the number of taxpayers which will in turn help to reduce the tax rates as more people would be paying taxes. Removal of the Cascading Tax effect is another advantage of GST. Though GST has its own flaws and controversies, GST will surely help to boost up our economy.

Insolvency and Bankruptcy Code 2016

The Insolvency and Bankruptcy Code provides a comprehensive, modern and robust insolvency and bankruptcy regime at par with global standards and even better in some aspects. It provides an advisory opportunity to the young professionals. The field has already opened up and is showing huge opportunities to the Insolvency Professionals(IP) to play a momentous role.

Demonetization

One year ago, Prime Minister Shri Narendra Modi addressed the nation suddenly at 8 P.M on 8th November and attacked the hoarders of black money with a deadly weapon of "Demonetization of Bigger currency notes of Rs. 1000 and Rs. 500". This step of our Prime Minister is appreciated which will definitely succeed but it's a long run process and it will take time.

Striking Off Companies and Disqualification of Directors

Directors of the companies that have not been carrying out business for a long time are set to be disqualified from holding directorship in any registered company for upto five years as part of the Government's intensified efforts against the black money menace. The Government is preparing to initiate stringent steps against the erring entities, including striking off their names and taking action against directors concerned. The Government has cancelled the registration of 1,75,000 companies out of 3,00,000 shell companies identified during the demonetization process.

Benami Property

In an attempt to curb black money in July 2016, Modi Government decided to amend the original Benami Property Act, 1988. Thereafter the Government notified the provisions of the act to come into force from 1st November 2016. On 15th August 2017 as per speech delivered by our PM Shri Narendra Modi in a very short time, over Rs. 800 crore of Benami Property has been confiscated.

December being the last month of the year, brings joy in our lives by taking stock of activities of past one year and celebrating Christmas and welcoming the new year as well. We will very soon enter the year 2018 and I pray the almighty to fill our life with growth, happiness and achievements in the coming year.

With these words, I now solicit your valuable suggestions and feedback @rkchokhani@yahoo.com, to take the association to a new height.

We from DTPA wish you an Enjoyable and Successful 2018!

With warm regards,

CA Ramesh Kumar Chokhani
President-DTPA
31st December, 2017

Certain Issues on section 14A disallowance

P. R. Kothari, FCA

Introductory

Section 14A of Income tax Act, 1961 provides for disallowance of expenditure incurred in relation to exempt income. Rule 8D of Income tax Rules 1962 provides formula for such disallowance in certain circumstances. This disallowance has become one of the highly litigated issue of direct taxes. By now, judicial guidelines are available in respect of most of the issues and in this article, an attempt has been made to narrate the judicial views on various issues relating to disallowance u/s 14A/Rule 8D. All the sections hereinafter referred in this article are sections of Income tax Act, 1961.

When no exempt income is earned during the year under consideration, no disallowance u/s 14A

Section 14A provides for disallowance of expenditure incurred in relation to exempt income. But what happens if no exempt income is earned during for the year under consideration. The issue has become more complicated in view of CBDT circular no. 5/2014 dated 11.02.2014 which clarifies that section 14A disallowance shall be triggered even if no exempted income is earned during the year under consideration. ITAT's special Bench judgement in the case of Cheminvest Ltd. Vs. ITO(2009) 121 ITD 318 (Delhi) was also of the same view. But that special bench decision has been reversed by Hon'ble Delhi High Court in **Cheminvest Ltd. Vs. CIT (2015) 378 ITR 33 (Delhi)** holding that section 14A will not apply if no exempt income is received or receivable during the relevant previous year. By now, the view that section 14A disallowance will not be triggered in absence of any exempt income, has been endorsed widely by Hon'ble High Courts/ Tribunal of various parts of country. Some of which are cited below :

Redington (India) Ltd. Vs. Addl. CIT
(2017) 392 ITR 633 (Madras)
(2016) 97 CCH 0219 Chen HC

CIT Vs. Corrtech Energy P.Ltd.
(2015) 372 ITR 97 (Gujarat)
(2014) 45 taxmann.com 116 (Gujarat)

Pr. CIT Vs. IL & FS Energy Development Company Ltd.
(2017) 84 taxmann.com 186 (Delhi)

CIT Vs. Shivam Motors P. Ltd.
(2015) 55 taxmann.com 262 (Allahabad)
(2014) 272 CTR (Allahabad) 277

CIT Vs. Lakhani Marketing Inc.
(2014) 49 taxmann.com 257 (Punj. & Har.)

CIT Vs. Winsome Textile Industries
(2009) 319 ITR 204 (Puj. & Har.)

Raniganj Co-operative Bank Ltd. Vs. DCIT
(2016) 73 taxmann.com 90 (Kolkata -Trib,)

Karvy Stock Broking Ltd. & Anr. Vs. DCIT & Anr.
(2017) 50 CCH 0017 Hyd Trib

Bharat Serums & Vaccines Ltd. & Anr. Vs. ACIT & Anr.
(2017) 49 CCH 0050 Mum Trib

It may also be noted that the aforesaid CBDT circular was also considered in the judgements of Redington (India) Ltd. (Madras High Court), IL & FS Energy Development Company Ltd. (Delhi High Court) and Karvy Stock Broking Limited & Anr. (Hyderabad Tribunal) referred above.

'Depreciation cannot be disallowed u/s 14A

Depreciation is an 'allowance' and not 'expenditure'. Hon'ble Supreme Court in the case of **Nectar Beverages P. Ltd. Vs. DCIT (2009) 314 ITR 314 (SC)** held that depreciation is neither loss nor an expenditure.

As section 14A provides for disallowance of 'expenditure' only, 'depreciation', being an 'allowance' and not 'expenditure', is not liable for disallowance under that section. Refer ITAT's special bench judgement in **Vishnu Anant Mahajan Vs. ACIT (2012) 137 ITD 189 (Ahd.) (SB)**

Disallowance u/s 14A cannot exceed the amount of exempt income earned during the year

Even if calculation of amount disallowable u/s 14A as per formula of Rule 8D comes at a higher figure than total exempt income for the year, the disallowance has to be restricted to the extent of exempt income only. Please see

West Bengal Infrastructure Development Finance Corpn. Vs. ACIT
(2016) 45 ITR (Trib.) 285 (Kol.)

K. Ratanchand and Co. Vs. ITO
(2016) 45 ITR (Trib.) 608 (Ahd.)

It appears that expenses directly relatable to exempt income may have to be disallowed u/s 14A in toto even if exempt income is lesser than such direct expenses on the analogy that expenses related to exempt income cannot be claimed against taxable income.

No disallowance u/s 14A if income is computed under special provisions :

When a particular income is computed as per special presumptive provisions applicable to specified assessees like shipping or insurance companies, no separate disallowance u/s 14A is justified out of expenditure incurred to earn that particular income. It was held in **ACIT Vs. Four M. Maritime (P) Ltd. (2015) 152 ITD 557 (Chennai)** that when a shipping company's income was to be computed as per Tonnage Tax Scheme under Chapter XIIG, a separate disallowance u/s 14A is not warranted . See also **Oriental Insurance Co. Ltd. Vs. ACIT (2010) 40 SOT 19 (Delhi) (URO)**

Taking the above analogy, it can be argued that when a business/profession entity is assessable on presumptive income basis u/s 44AD/44ADA, there is no need of any separate disallowance u/s 14A out of the expenditure related to that business/profession even if there are some expenses in that business/ profession which are related to exempted income. However, if some expenses are claimed against income under other heads of income and there is some nexus of any such expenses with exempted income for the year, disallowance u/s 14A shall have to be made out of those other head expenses.

Disallowance under Rule 8D cannot be added back for computation of 'Book profit' u/s 115JB

Presumptive disallowance u/s 14A by invoking Rule 8D is not to be added to 'book profit' computed u/s 115JB. Refer ITAT's special bench judgement in **ACIT Vs. Vireet Investment P. Ltd. (2017) 58 ITR (Trib.) 313 (Delhi) (SB)**.

It appears that direct expenses related to exempt income or expenses accepted by assessee to have been incurred in relation to exempt income without resorting to Rule 8D, which are obviously debited to Statement of Profit & Loss, may have to be added back to 'book profit' in view of clause (f) of Explanation -1 to Section 115JB(2).

Disallowance where securities are held as stock in trade

When shares held by assessee were kept as stock in trade, disallowance as per Rule 8D is not applicable. See **CIT Vs. GKK Capital Markets P. Ltd. (2017) 392 ITR 196 (Calcutta)**

The investments made by assessee bank were part of its banking business and constituted its stock in trade. The dividend or interest earned on those investments were incidental to or by- product of business of banking. Hence, such dividend or interest would not be subject to provisions of section 14A. See **Pr. CIT Vs. State Bank of Patiala(2017) 391 ITR 218 (Punjab & Hariyana)**

In view of above High Court decisions, the contrary view taken by ITAT in D.H. Securities (P) Ltd. (2014) 41 taxmann.com 352 (Mumbai- Trib.) (TM), Kalyani Barter (P) Ltd. Vs. ITO (2017) 163 ITD 671 (Kol), JCIT Vs. American Express Bank Ltd. (2012) 24 taxmann.com 50 (Mum-Trib), DCIT Vs. Damani Estates & Finance (P) Ltd. (2014) 41 taxmann. Com 462 (Mum- Trib) and other similar cases, is impliedly overruled.

Disallowance in respect of partner's share of profit from firm

If any expenditure is incurred in relation to exempted share of profit from firm, the same shall have to be disallowed. See ITAT special bench decision in **Vishnu Anant Mahajan Vs. ACIT (2012) 137 ITD 189 (Ahd.) (SB)**

However, where partnership deed nowhere stipulated that sharing of profit of firm was dependent on contribution of funds by the partner, interest paid by partner on capital borrowed for giving interest bearing loan to firm cannot be disallowed u/s 14A on the plea that interest expenditure is partly related to tax free income in the form of share of profit. See **ACIT Vs. Novel Enterprises (2012) 22 taxmann.com 116 (Mum.Trib.)**. But where borrowed funds are utilised to invest, as per stipulation in partnership deed, in capital of partnership firm from which interest on capital and exempted share of profit both are earned, it can be

claimed that interest paid relates to taxable interest on capital and exempted share of profit both and disallowance of interest paid as such is not called for in view of amended Rule 8D(2) effective from 02.06.2016 by which only direct expenses including interest is disallowable. However, 1% of average of monthly averages of opening and closing balances of the capital investment in firm may be disallowed in such cases as per amended Rule 8D(2)(ii).

It appears that after the introduction of amended Rule 8D(2) w.e.f. 02.06.2016, theory of proportionate disallowance of interest paid in relation to share of profit from firm, as upheld by certain ITAT decisions, is no more relevant.

Application of Rule 8D is not automatic or mandatory

Rule 8D(2) cannot be applied automatically or mandatorily and only after an objective satisfaction of Assessing Officer about non correctness of assessee's claim regarding disallowance u/s 14A, Rule 8D(2) can be invoked by him and such invocation can be only as a measure of last resort. Before resorting to Rule 8D, A/O is not required to simply reject the assessee's computation or claim but shall have to show why he is rejecting the same. See **Godrej & Boyce Manufacture Co. Ltd. Vs. DCIT (2017) 394 ITR 449 (SC)** and **Raniganj Co.-operative Bank Ltd. Vs. ACIT (2016) 73 taxmann.com 90 (Kolkata -Trib.)**

How average value of investments is computed under Rule 8D

Average value of only those investments, which yielded exempted income during the year under consideration are to be considered for purpose of Rule 8D(2).

ACB India Ltd. Vs. ACIT
(2015) 374 ITR 108 (Delhi)

ACIT Vs. Vireet Investment P. Ltd.
(2017) 165 ITD 27 (Delhi) (SB)

REI Agro Ltd. Vs. DCIT
(2013) 144 ITD 141 (Kol.)

ACIT Vs. Bisserlal Pannalal & Sons & Anr.
(2017) 51 CCH 0087 Kol Trib

Suo motu erroneous or excess disallowance, made u/s 14A while filing return of income, can be withdrawn at appellate stage though no revised return was filed

As said earlier, section 14A is one of the highly litigated sections and law on this section is still in evolution stage. In view of this, under wrong impression, the assessee might have made excess disallowance u/s 14A while filing return of income. No revised return was filed and assessment proceedings are also over. But matter is pending before appellate authorities. A question may arise whether assessee can withdraw such excess disallowance u/s 14A at appellate stage. It has been held that the appellate authorities like CIT(A) and ITAT can entertain a claim of the assessee withdrawing erroneous concession given by him in original return of income by way of erroneous or excess disallowance of expenses made u/s 14A though no revised return of income was filed for this purpose. The courts have held that there is no estoppel by conduct against law. Revenue is not empowered to assess an assessee on amount which is not legally taxable and tax can be levied on correct income only. The bar on the Assessing Officer to consider the assessee's claim in absence of a revised return, as held in Goetze (India) Ltd. Vs. CIT (2006) 284 ITR 323 (SC), would not extend to the appellate authorities under the Act. See

CIT Vs. Bhaskar Mitter
(1994) 73 taxmann.com 437 (Cal.)

CIT Vs. Bharat General Reinsurance Co. Ltd.
(1971) 81 ITR 303 (Delhi)

West Bengal Infrastructure Development Finance Corpn. Vs. ACIT
(2016) 45 ITR (Trib) 285 (Kolkata)

Rupee Finance & Management P. Ltd. Vs. DCIT
(2017) 57 ITR (Trib) 205 (Mumbai)

Conclusion

The above discussion gives a broad idea of the law which is evolving in respect of section 14A disallowance. Amendment to Rule 8D(2) w.e.f. 02.06.2016 has stopped litigation w.e.f. asst. yr. 2017-18 in respect of various issues of disallowance of common interest paid like own funds more than investments, interest received is more than interest paid, interest paid in respect of securities held as stock in trade, computation of average value of assets or consideration of total investment or exempt income yielding investments and one has to simply see that there is no direct nexus of investments yielding exempt income with borrowed fund and this will save lot of litigation about disallowance of interest paid u/s 14A. These issues, therefore, had not been discussed in this article.

Art of Representation and Pleading

Narayan Jain
LL.M, Advocate

1. Representation and Pleading :

The art of effective representation is very important, particularly for a professional to succeed. There are no separate approaches in the art of representation before the I.T. authorities or Tribunal or any other forum. The methodology is more or less the same in appeals but a little different in assessments. Broadly we feel that the art of representation is not confined only to the IT authorities or the Court, but anywhere in life, in any discussion forum. Wherever you are, it is the same quality, it is the same approach, which can bring you success. So here are some suggestions.

The person making the representation before the A.O. or other Appellate Authorities should keep in mind the following aspects which may help in making an effective representation :

2. Give due importance to FACTS, furnish Paper Book in appeals :

The first suggestion, is to work hard on your brief. There is no substitute for hard work. The stakes involved in tax disputes are normally very large and in many cases, very intricate facts are involved. One must **master the facts**.

We have seen some professionals who while making representation do not narrate the facts first, but straightaway jump to law to show their legal acumen. This is a mistake, because the **importance of facts in the case can never be under-estimated**. Facts are lifeline of the case and the entire edifice is built on the facts of a case. Therefore, one must study the facts extremely well and narrate relevant facts chronologically before the authorities in the first instance. As pointed by Bertrand Russell **"The degree of one's emotion varies inversely with one's knowledge of the facts – the less you know, the hotter you get."**

Statement of facts : It should also be kept in mind that the Statement of facts furnished in first appeal i.e. before the CIT (Appeals) have to be enclosed with the appeal before the ITAT. Therefore one need to be very careful in preparing the Statement of facts at the time of first appeal itself. Sometimes while filing the first appeal, the professionals commit blunder by not preparing and submitting the statement of facts or mentioning the same "as per Assessment Order".

In Statement of facts, one is supposed to mention as to what papers/ documents/ books of account were submitted or produced or explained or what points were argued ; or whether compliance was properly made on all occasions. One must properly go through the text of the assessment order and point out if it contains some observations, which are factually erroneous according to you or your client.

While making compliance of the requisitions made in a **scrutiny assessment** also, it is advisable to make written submission and enclose with it the requisite documents and evidences.

It is advisable to submit the documents in the form of **a paper book even before the CIT (Appeals)** so that it is easier to prepare a paper book to be filed before the ITAT.

For narrating the facts, it is always convenient to take the assistance of the Paper Book.

3. File affidavit, wherever necessary :

Wherever supporting evidence is not possible or not available, an affidavit should be furnished before the authorities. The same is usually accepted unless the authority has any material to controvert the statements contained in such affidavit. Where a fact is alleged, which cannot be borne out by, or is contrary to the record, it should be stated clearly and concisely and supported by a duly sworn affidavit. In this context following decisions are also relevant:

Mehta Parakh & Co. v. CIT 30ITR 181, 187 (SC) - The importance and relevance of the averments made in the affidavit cannot be brushed aside

without really having any material to contradict the same. It is matter of common knowledge that even in Courts the affidavits are furnished and relied upon. It was held that rejection of an affidavit filed by an assessee was not justified unless the assessee had either been cross examined or called upon to produce documentary evidence in support of the affidavit sworn by him.

L. Sohanlal Gupta v. CIT [1958] 33 ITR 786 (All.) - The Tribunal was not entitled to reject the Affidavit filed by the assessee on the mere ground that he had produced no documentary evidence; if it was not accepted as sufficient proof, the assessee should have been called upon to produce documentary evidence or he should have been cross examined to find out how far his assertions in the affidavit were correct. [also refer - **Malwa Knitting Works v. CIT [1977] 107 ITR 379** at page **381 (MP)**].

CIT v. Lunar Diamonds Ltd. [2006] 281 ITR 1 (Del.) - The assessee had filed an affidavit stating that it had not received the notice and the High Court sustained the order of the Tribunal, which had held that under these circumstances, the burden was upon the Department to prove that notice was served upon the assessee within the prescribed time. The Department had failed to prove its case in this regard. The Tribunal was right in setting aside the order of assessment. No substantial question of law arose from its order.

Baban Singh v. Jagdish Singh AIR 1967 SC 68 – Where a false affidavit is shown, the offence would fall u/s 191and 192 of the Indian Penal Code 1860. Hence an affidavit has to be considered as a piece of evidence.

4. Get acquainted with the latest law and decisions :

It is also vital for succeeding in a case to **get acquainted with the latest law and decisions**. The decisions on tax matters are now abundant and for reading and mastering these, hard work is imperative. It is advisable that in addition to tax magazines like ITR, Taxman, CTR, ITR (Trib.), ITD, SOT, TTJ, Corporate Professionals Today (CPT) etc., one should also take benefit of the case laws or gist of case laws, available on Compact Discs (CDs) as well as relevant websites. Compact Discs (CDs) are updated periodically i.e. every month/ quarter. It is very convenient to search decisions or circulars or notifications on any issue or any section or a specific decision by using the search facility offered by websites and CDs. **For representing the case properly, it is advisable that** –

- The **decisions proposed to be referred to should be read fully** and not only the head note.
- **Refer the decisions in favour as also those against and try to distinguish** as to how a case which is against you, can be distinguished from the facts of your case. Remember, in ITAT you have to face the departmental representative (D.R.), who would obviously like to refer to the case in favour of the department. So get prepared for all possible cases which may be cited by the ld. D.R. It may be mentioned that even in appeal before the CIT (Appeals), the A.O. is also called to attend the hearing and raise objections, if any.
- In addition to the book containing case law, you will do well if you can also provide a copy of the relevant decisions mentioning the citation. It is further advisable to provide to the appellate authorities **the gist of the portions of the decisions, which you are relying upon,** otherwise it is really difficult for the appellate authorities to remember the para which is relevant in your case.
- **Don't forget to mention if the case is covered by decision of ITAT or a Court** in the **case of appellant himself**. Provide a copy of such decision, which is likely to be followed by the appellate authority. Even if your case is fully covered by some other decision of the Supreme Court, jurisdictional High Court or any other High Court or ITAT , categorically refer the same. That makes the hearing shorter and helps in succeeding on the issue.
- **If an identical matter is pending on the same issue on a question of law in the Supreme Court or in the High Court** in case of the appellant, this should be pointed out to the A.O., CIT (Appeals) or ITAT giving particulars of the same then the assessee may furnish a declaration u/s 158A that if the A.O. or the appellate authority, as the case may be, agrees to apply in the relevant case the final decision on the question of law in the other case, he shall not raise such question of law in the relevant case in appeal before any appellate authority or in appeal before High Court or the Supreme Court. This provision of section 158A has been enacted for avoiding repetitive appeals in the same case for different assessment years and it should be used for reducing litigation expenses.

5. Don't make haste, proceed carefully observing the mood of the authority :

We have noticed that some enthusiastic new professionals, proceed in the ITAT as well as before other authorities with great haste. It does not serve the purpose, because unless the authority is listening to you carefully and following your arguments, the fast pace only satisfies yourself, but does not take you anywhere. There is a story about a young enthusiastic lawyer who was going very fast and when the **Judge remarked that because of the speed what goes in one ear immediately comes out from the other ear**. The witty lawyer tried a little humour by saying "Is there nothing in between the two ears to stop the speed ?", but **such remarks can never help one in the Tribunal/Court.**

6. Use Tact :

In one of his speeches, famous lawyer Mr. Y.P. Trivedi told about the three important criteria for winning a case in Court, which he listed as **"Tact the first, Tact the second and Tact the third"**.

When you are in Tribunal or Court or even an I.T. authority, you are arguing before a human being and not before a robot. **You must know how the Judge reacts to your argument.** You are just not entering a debating Hall and you are not trying to impress the audience but you have to win over the mind of the concerned I.T. authority.

We often witness **busy lawyers rushing to the Tribunal at the last moment**, which should be avoided. There is a story about a lawyer who rushed to the Court and started arguing for the opponent of his client. After about half an hour when his Junior whispered to him that he was arguing with a wrong brief, he immediately turned around and said **this is the case of the opponent at its best and I will now proceed to demolish it.** This shows the degree of tact, which the lawyer had.

7. Don't lose temper, keep calm even in difficult situations :

One must never lose the temper while representing before the Court, Tribunal or any IT authority. **If one becomes angry, then the case is half lost.** Some ITAT Member or Appellate Authority or A.O. may like to interrupt time and again and may not permit a lawyer or Chartered Accountant to put his submissions in his own way. This may be unfair on the part of the authority, but it does not help the case. If one gets angry, or sarcastic in the Court or before any other authority , they may feel annoyed. Anger is always a precursor of assured defeat in all intellectual conflicts. There is a story of an overbearing Judge who tried to belittle an Advocate who was short in stature by telling him that **"I can put you in my pocket"**. The Advocate replied **"My Lord then there will be more law in your pocket than in your Lordship's mind".** This is good as a story, but not beneficial while making representation before authorities or Tribunal or Court.

Again, when the Member of the ITAT or an appellate authority or the A.O.is making a point, it is always advisable to **listen carefully without interrupting**, because if you interrupt repeatedly, his ego may hurt and the most important thing is to understand the psychology of the authority. It is not advisable to rub his psychology. One has to be fair to the authority, and must try to understand his viewpoint and to meet his doubts. It is important that one has to be fair to the authority and the other side as well. **Winning the case may be important, because very often for a professional winning the case is winning the fees**, but **in the long run, the reputation of a lawyer or a Chartered Accountant will depend largely upon his behaviour in the Tribunal which should be impeccable.** One must remember that primarily duty of a professional in the Tribunal is to assist the Court.

8. Keeping cool :

A person who keeps cool is in a better position to command the situation. **The best in lawyer comes out when he does not act on impulsive and emotion, but solely on reason.**

One may find on some of the occasions that some Members or authorities can at times become very difficult or may try to go out of their way to run down lawyers or chartered accountants. One may feel disgruntled, but one should not lose one's cool. **One should be polite to the Tribunal as well as I.T. authorities**. Of course **you may be firm in your expression**. In such situations, one should keep in mind the psychological aspect. As Edward Carson mentioned " A much talking Judge can become like an ill-tuned cymbal (**i.e. producing a ringing or clashing sound**). **Even in those circumstances, one should use one's utmost skill, use simple language without being bombastic and slowly try to put one's viewpoints without entering into any confrontation.**

If you feel like **passing remarks**, preserve them when you retire to the Bar Room/ Library. It is a

trite saying that even though the Judge gives his judgment everyday, the final judgment on him is passed at the time of his retirement. But it is only half-truth. **Everyday when the lawyers and chartered accountants assemble in the Bar Room/ Library, judgments are passed on the quality and behaviour of the ITAT Member/ I.T. authorities.**

One should not get upset if one loses a case, because advocacy ultimately is the art of possible. **You cannot win all the cases** and one should not get over-identified with the client or the case. One should be little philosophical on this issue and after all, if one loses a case , there is always an appeal provided in law.

When Justice Holmes went to take his oath of office in Supreme Court, his driver told him "**Sir do justice**". Justice Holmes turned around and told him "My dear fellow, **I am not here to do justice, I am here to administer law**". There is some difference between **justice according to law** and **abstract justice**. In the Court, justice has to be administered as per law. Hence, **one need not get bewildered if sometimes justice as anticipated by one is not done**. One should not behave like a young enthusiastic lawyer who when he received a judgment against him shouted in the Court **"I am shocked to see this judgment"**. The Judge threatened him with **contempt** proceedings. It was at that stage that a senior lawyer came to his rescue by apologising for the young lawyer by saying that he is inexperienced and if he had been practising for a longer period in the Court, then he would not have been half as shocked as he was.

9. Be Courteous :

The person making the representation must be persuasive and not aggressive. The utmost courtesy to the ITAT Members , CIT (Appeals) and other I.T. authorities must be shown. There is an ancient proverb that **all doors are open to courtesy**. In some cases it is seen that the appellate authorities sometimes require unnecessary information which provokes the representative to question such requirement. In such cases, the representative should try to overcome that situation by pandering such irrelevant inquiries as the first appellate authority is bound to realize his mistake sooner or later on his own. However, even the Indian Evidence Act,1872 provides that judge can ask irrelevant questions. **Section 165 of the Indian Evidence Act,1872, recognizes power of the presiding judge to "ask any question as he pleases, in any form, at any time of witness or of the parties, about any fact, relevant or irrelevant"** (emphasis supplied). **Any attempt to decline any information on the ground that it is irrelevant even otherwise, is bound to create resistance, which is unnecessary.**

The person representing must remember that **Departmental Representative (D.R.) or Counsel for the opposite party or the A.O. is not an enemy** and in any judicial forum certain norms of behaviour are expected. While arguing the case, the person must show respect for the law and the adjudicator of such law. **It is not merely a question of adjudicating but one of innate sincerity, which provides a better chance of success than browbeating.** It is an accepted precept that **a lawyer should bear self control as a court of mail.**

10. It pays to have good sense of humour :

One of the important ingredients for success in Tribunal and before other appellate authorities as well as AOs is to have a good sense of humour. We spend considerable part of our active life dealing with I.T. authorities and in Tribunal and a little smile can always make your stay in the department and Tribunal more enjoyable. Humour can add spice to life. Therefore, **one should be humorous in Court, but only to certain extent**. One should **not persist on making jokes, but a little wit here and there can enliven the Tribunal or departmental offices** and make the boring proceedings lively. Once Mr. C. K. Daftary, while arguing the famous prohibition case in Bombay High Court had said **"We are now a Republic and what is a Republic without a pub?,** it is only a relic". That was a good example of sense of humour.

11. Be fair :

One should always be transparent and never be unfair to the opponent. There is a difference between business and profession. In business, one can make much more money, but in profession, you earn far greater respect. One has to be fair to the other side and one has to be fair also to the Court and authorities, because once your credibility is lost, it might affect you adversely in many other cases. Primarily, you are in the Court to help in the process of justice according to law and **not engage in unfair practices.**

12. Have sense of time, be reasonably brief :

While arguing, **one should not try to be everlasting**. It does not pay to be repetitive when a point is properly cleared. Very often, over-pitching one's case, one may lose the sympathy

of the Tribunal or the I.T. authority. **The moment you find that you have been able to persuade the ITAT Member or the I.T. authority reasonably well, one should encash on that atmosphere without over-emphasising and unnecessarily ridiculing the opponent's case.** Never repeat when the ITAT Member is already with you and indicates so openly in the Court. **Just as it is very important how to open your case, it is also very important to know when to stop.** One should not insist on displaying his **oratorical skill or the vast knowledge**, which would not be relevant for the Tribunal or the I.T. authority.

13. Summarized arguments :

The representative must make the arguments in summarized manner. In the book The Problem of Proof by Albert S. Osborn it is mentioned that the great **trial lawyer, though not necessarily a great orator, must be able to use language to produce results as a skilled craftsman uses a delicate and complicated tool.** He must have **sympathy, tact and courtesy, and must know men and their ways**. By study, experience and a trained intution, he will also have acquired an instant appreciation of the significance and force of evidence and will have learned its correct order of presentation.

14. Show importance to the ITAT members and authorities :

One should remember to show utmost respect and importance to the Members of the ITAT as also other I.T. authorities. A mistake which many beginners make is to ignore one of the ITAT Members in a Division Bench. If out of the two or three Members, one feels slighted, he might become hostile to such a Lawyer or Chartered Accountant. Hence, never ignore any sitting Judge on the Bench even if the other Judge is very much in your favour. You must remember that every man has his ego and when one is sitting on the judicial chair, the ego becomes still more important and that has to be respected. Many professionals sometimes address the Bench by looking only at one Member of the ITAT without trying to make any eye contact with the other Member, but it should be avoided as such a situation can be fatal to the case.

15. Ensure to be in Proper Dress :

It is very important for the person making the representation to be properly dressed before the appellate authorities. As per Rule 17A of the Appellate Tribunal Rules,1963 the dress regulations for the authorised representatives of the parties (other than a relative or regular employee of the assessee) appearing before the Tribunal is as follows :

(a) **In case of male**, a suit with a tie or buttoned-up coat over a pant or national dress, i.e. a long buttoned-up coat on dhoti or churidar pyjama. The colour of the coat shall preferably be black.

(b) **In case of female**, black coat over white or any other sober coloured saree.

It is further mentioned in case where the authorised representative belong to a **profession like that of Lawyers or Chartered Accountants** and they have been prescribed a dress for appearing in their professional capacity before any Court, Tribunal or other such authority, they may at their option appear in that dress in lieu of dress mentioned above.

16. Filing of Vakalatnama or authorization :

As per section 288 (1), any assessee who is entitled or required to attend before any income-tax authority or the Appellate Tribunal in connection with any proceeding under the Income tax Act (otherwise than when required under section 131 to attend personally for examination on oath or affirmation), may, attend by an authorised representative.

But the I.T. authority or the Tribunal will entertain such representative only if a proper Vakalatnama (in case of Advocate) or a Power of Attorney or authorization in writing, duly stamped and executed, is filed.

Authority in writing is necessary :

In the case of **CIT v. Chemmeens (Regd.) [1991] 188 ITR 634,638 (Ker)**. it was held that for representating an assesee as an authorised representatives, a proper authority in writing is essential.

Rule 43 of the Draft Appellate Tribunal Rules, 2017 provides that in any appeal by any assessee, where the memorandum of appeal is also signed by his authorised representative, the assessee shall append to the memorandum of appeal, a document authorising the representative to appear for him. **Rule 44 of the Draft Appellate Tribunal Rules, 2017** provides that an authorised representative appearing for the assessee at the hearing of an appeal shall, unless the document referred to in rule 43 has been appended, file such a document before the commencement of the hearing. Similar rule is also provided in Rule 17 of Appellate Tribunal Rules, 1963.

For exercising the powers of acting on behalf of his client, the lawyer is to be guided by the powers given by the client in his Vakaltnama - **S.N.Sudalaimuthu Chettiar v. ACED, [1974] 94 ITR 192 (Mad.).**

Who can act as an "authorised representatives" :

As per section 288(2), **"authorised representative"** means **a person authorised** by the assessee **in writing** to appear on his behalf, which includes - **any legal practitioner, Chartered accountant,** a **person related to the assessee** in any manner, or a person regularly employed by the assessee; or **person who has passed any recognised accountancy examination**; or **who has acquired prescribed educational qualifications etc. u/s 288.**

However, if any person who is a legal practitioner or a chartered accountant is **found guilty of misconduct in his professional capacity** by any authority entitled to institute disciplinary proceedings against him, an order passed by that authority **shall have effect in relation to his right to attend before an income-tax authority as it has in relation to his right to practise as a legal practitioner or accountant**, as the case may be. Similar disqualification may arise in case of other representatives also.

Specific powers are generally reserved under the usual Vakalatnama filed on behalf of the clients. Unless service of notices and assessment orders is specifically mentioned in vakalatnama, service of notices and orders must be done on the assessee and not on the lawyer – **Nandram Hunatram v. CIT [1959] 37 ITR 500 (Ori.).**

- also see **chapter 97**

17. If necessary, avoid closing the matter :

The representative should try to keep the matter open, wherever necessary. There may be need for keeping the matter open or requesting an adjournment for better presentation of the case in the light of the comments made by the ITAT Members or IT authority. It is generally seen that ITAT Members and many a times CIT (Appeals) feel that their **reaction to the arguments should be kept close to their chest**. It is unfortunate situation, as the counsel does not know where to stop. But such a situation has to be faced. Probably more time would bring out the reaction of the authority and enable the counsel to satisfy them/him about his case by better appreciation of the facts and the law behind it.

Search & Seizure Under The Income-Tax Act.

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1. Introduction :

Search and seizure are serious invasion on the fundamental rights of citizens of India, but on account of flagrant evasion of taxes and proliferation of black money causing economic imbalances, have been held to be constitutionally valid and in public interest. Vast powers have been conferred on tax authorities so as to effectively check the menace of tax evasion. During the last few years, the investigation wing has been strengthened and searches are on an increase. Economic Directorate and other governmental regulatory bodies are also conducting searches to expose unlawful and nefarious activities and indulgence in corruption and amassing illegal wealth, primarily in benami names. It is a major surgery and hence is conducted after investigation and with full force and sometimes as police authorities.

2. Meaning of 'Search' and 'Seizure' :

A 'Search' means a through inspection of the building, place, vehicle, vessel and aircraft and of the person. The concise Oxford Dictionary says that it means 'look for' or 'seek out' for what can be found, or to find something of which presence is suspected, probe, look for, seek out. A search is not mere looking for something which is produced or open but which is hidden, concealed or not obvious. It is 'looking for' in the sense of seeking out that which is suspected or concealed. 'Seizure' in its natural sense means forcible taking of possession from the owner or occupier or possessor whereby such person cannot exercise his power of ownership and transfer. The word 'seizure' means taking possession under authority of law. Seizure is thus an expression which implies a forcible exaction or taking possession from either the owner or one who has the possession and who is unwilling to part with possession. Seizure, therefore, is not mere taking but taking with force.

3. SCOPE OF SECTION 132 ETC. OF I.T. ACT. :

Section 132 is intended to achieve the twin objectives, namely (i) to get hold of evidence bearing on the tax liability of a person which the said person is seeking to withhold from the assessing authority and (ii) to get hold of assets representing income believed to be undisclosed income and applying so much of them as may be necessary in dfischarge of the existing and anticipated tax liability of the person searched. The provisions relating to search and seizure are contained in sections 132, 132A, 132B and rules 112, 112A, 112B, 112C and 112D. These provisions are self-contained code by themselves. The provisions are directed against three types of persons, namely - (1) those who have omitted or failed to produce books of account or documents as required by any summons under section 131 of the Act or notice issued under section 142(1) of the Act; (2) those who whether so summoned to produce documents will not or would not produce books of account or documents, and (3) those who are believed to be in possession of money, bullion or jewellery or other valuable articles or things representing, either wholly or in part, income of property which has not been disclosed, or would not be disclosed, for purposes of taxation.

4. Essentials :

Search can be authorized by the Director General, Principal Director General or Principal Director or Director, or the Principal Chief Commissioner or Chief Commissioner, or Principal Commissioner or Commissioner or Additional Director or Additional Commissioner or Joint Director or Joint Commissioner, in consequence of definite information in his possession and after recording the reasons (not reasons to suspect) for the reasons detailed hereinbefore in para 3. The authorization would be in Form No. 45 and it shall be in writing under the signature of the officer issuing the authorization and shall bear his seal. He can authorize any Additional Director or Additional Commissioner or Joint Director, Joint Commissioner, Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income Tax Officer, as "Authorized Officer". Authorized Officer may be assisted by specified officers and inspectors.

4.1. Reasons to believe are foundation and sacrosanct. Reasons to believe would mean that there are grounds for necessary belief. It is the belief of the authorizing officer. It is only when the grounds on which the belief is based are non-existent or irrelevant or such that no reasonable man can come to a belief that the exercise of the power to issue warrant of authorization would be put off, if there exist some reasons, though not adequate, the exercise of the power shall be justified. The existence of reasonable belief is a condition precedent for a valid search and the section does not

permit indiscriminate search and seizure. The belief must be honest and based on cogent material and not on anonymouse calls and letters. (Pawan Solvent & Chemicals & Anr. Vs CIT (1987) 63-CTR-(Pat.) 209; (1987) 166-ITR-67 (Pat.). Same is the view of the Allahabad High Court in Shyam Jewellers and Another Vs. Chief Commissioner (Administration (U.P. and Others) (1992) 196-ITR-243, and Dr. Sushil Rastogi (2003) 260-ITR-249. The Punjab & Haryana High Court in (Harmal Singh and Another Vs. Union of India & Others (1993) 204-ITR-334, The Delhi High Court in L. R. Gupta and Others Vs. Union of India & Others, (1992) 194-ITR-32 and of the Supreme Court in CIT Vs. Vindhya Metal Corp. (1997) 224-ITR-614 & in Union of India Vs. Ajit Jain (2003) 260-ITR-80. UOI v. Agarwal Iron Industries (2015) 370-ITR-180, I.T.O. v. Seth Brothers (1969) 74-ITR-836 (S.C.).

4.2. The search party while entering the place or vehicle or vessal etc. to be searched, would show the Search Warrant to the person on spot, disclose identity and obtain his signatures. Earlier an assessee could demand copy of search warrant as well as reasons recorded, but an Explanation has been inserted by the Finance Act, 2017 w.e.f. 01.04.1962, whereby such reasons would not be disclosed to any person or any authority or the Appellate Tribunal. This Explanation has been inserted to nullify the judgment of the Supreme Court in DGIT v. Spacewood Furnishers Pvt. Ltd. (2016) 374-ITR-595. However, on challenge to validity of the search, reasons can be called by the High Court and disclosed, if deemed, proper. The reasons are justifiable by the High Court and a Challenge can be made as to whether reasons exist or it is only a pretense or doubts or suspicions or surmises. The Calcutta High Court in Mahesh Kumar Agarwal v. D.I. (2003) 260-ITR-67 held that likelihood of finding undisclosed assets is not sufficient. In big cases it is advisable to challenge the validity by way of writ and to know the reasons. The search can be quashed.

4.3. The principles as regard to search and seizure which can be deduced from the decisions of the Supreme Court may be summarized as follows : (i) The authority must have information in its possession on the basis of which a reasonable belief can be founded that (a) the concerned persons has omitted or failed to produce books of account or other documents for production of which summons or notice had been issued or such person will not produce such books of account or other documents even if summons or notice is issued to him, or (b) Such person is in possession of any money, bullion, jewellery or other valuable article which represents either wholly or partly income or property which has not been or would not be disclosed; (ii) Such information must be in the possession of the authorized official before the opinion is formed; (iii) There must be application of mind to the material and the formation of opinion must be honest and bona fide. Consideration of any extraneous or irrelevant material will vitiate the belief or satisfaction; (iv) Though rule 112(2) of the income-tax Rules, 1962, which specifically prescribed the necessity of recording of reasons before issuing a warrant of authorization had been repealed on and from October 1, 1975, the reasons for the belief should be recorded; (v) The reasons, however, need not be communicated to the person against whom the warrant is issued at that stage; (vi) Such reasons, however, may have to be placed before the court in the event of a challenge to the formation of the belief of the authorized official in which event the court exercising jurisdiction under article 226 would be entitled to examine the relevance of the reasons for the formation of the belief though not the sufficiency or adequacy thereof. DIRECTOR GENERAL OF INCOME-TAX (INVESTIGATION) SPACEWOOD FURNISHERS PVT. LTD. (2015) 374-ITR-595 (S.C.).

5. Powers of the Authorized Officer :

The powers of the authorized officer in a search are very wide. The authorized officer has power of entry, power to break open any door, locker, safe, almirah where the keys are not available, power to search the person, who has got out of or about to get into any place, to seize any books of account, other documents, money, bullion, jewellery or other valuable articles or things (other than stock-in-trade) found at the time of search', to make a note or inventory of money, stock, articles, goods, etc. The police officers and other officers are duly bound to assist the authorized officer. In many a searches large number of police personnels assist to maintain peace and to avoid confrontation. There have been violence at some places.

5.1. Where it is not practicable to seize any such books of account, other documents, money, bullion, jewellery or other valuable articles or thing the authorized officer may serve an order on the owner or the person, who is in immediate possession or control thereof, prohibiting him from moving, parting with or otherwise dealing with it, except with the previous permission of such officer. Serving of such an order is commonly known as an attachment order and it does not amount to seizure. It is necessary to record reasons before issuance of such an order. The order u/s. 132(3) shall be in force for a period of 60 days from the date of the order and on expiry it would be deemed to be withdrawn u/s. 132(8A).

5.2. Sub-section 9B, 9C and 9D to Section 132 have been inserted with effect from 1.4.2017 i.e. applicable for assessment year 2017-18 and subsequent years, to provide that in a search case, where the authorized officer is satisfied that for the purpose of protecting the interest of revenue and for reasons to be recorded in writing it is necessary so to do he may, by order in writing, attach provisionally any property belonging to the assessee with the prior approval of Principal Director General or Director General or Principal Director or Director, that such provisional attachment shall cease to have effect after the expiry of six months from the date of order of attachment, and that in a search case, the authorized officer for estimation of the market value of a property, may make a reference to a

Valuation Officer referred to in section 142A, for valuation in the manner provided under the sub-section. The Valuation Officer shall furnish the valuation report within sixty days of receipt of such reference. Explanation 1 to section 132, was substituted with effect from the same date, to provide that for the purposes of sub-sections (9A), (9B) and (9D), with respect to 'execution of an authorization for search' the provisions of sub-section (2) of section 153B shall apply. Consequent to the introduction of three sub-sections (9B), (9C) and (9D) in section 132, with effect from April 1, 2017, i.e. application for assessment year 2017-18 and subsequent years. Explanation 1 to section 132, was substituted with effect from the same date, to provide that for the purposes of sub-sections (9A), (9B) and (9D), with respect to 'execution of an authorization for search' the provisions of sub-section (2) of section 153B shall apply.

6. Recording of Statements u/s. 132(4) :

When statements are recorded, it is desirable that an oath is properly administered, questions are put in simple language and in the language, which is properly understandable by the person, whose statements are recorded, answers are recorded fully and properly, statement is read over and explained and accepted by the deponent. The authorized officer should mention the words 'R.O. & A.C.'. The independent witnesses should also witness the statements. Copy of such statement is usually not provided spontaneously. The person may take hyis notes or may request his colleague or assistant or any other person sitting by him for his satisfaction, to make a verbatim note of the statement so recorded. As per the ground rules copy of the statement is provided as and when it is used by the Department. Copy of the statement can be obtained on payment of copying fees.

6.1. If a statement is not recorded in normal manner, or if any coercion, undje influence or pressure is exercised, the deponent should inform the higher authority without further loss of time. In Pyare Lal Bhargava Vs. State of Rajasthan, AIR 1963 SC 1094 the Supreme Court has held it is unsafe to reply upon a confusion, much loss on a retracted confession, unless the Court is satisfied that the retracted confession is true and voluntarily made and has been corroborated in the material particulars. Formal rules of the evidence Act are inapplicable to tax proceedings. One should be very careful and candid while retracting from a statement. A retraction to have any evidentiary value must be in a statement, not only denying the facts earlier stated but explaining the reasons for making a statement earlier and giving substituted facts in support of a retraction. Many a times person simply deny the statements earlier recorded. There is much difference between a denial and a retracted statement. A total and bald denial of what has been stated in previous statement cannot be said to be a statement or retraction, it shall be deemed merely a plea of denial. A plea of denial may not be much helpful to the deponent. A letter of retraction must be sent to the higher authorities including Chief Commissioner, Commissioner, Deputy Director or Inspection and the concerned Assessing Officer, its copy should be provided in the assessment proceedings. As a practice after such retraction, statements are again recorded on oath. At the time of re-recording of such statements, the deponent must corroborate and confirm what he has stated in the letter of retraction. If conveniently possible affidavits of independent witness to the search proceedings be submitted corroborating the claim of the deponent. It should be done as early as possible and with care and caution.

6.3. There lay instructions of the Central Board of Direct Taxes, not to pressurize for surrender for undisclosed income, but it should be voluntary and the search party should concentrate on collecting incriminating material. However, it is noticed that invariably authorized officer gives threats and compels, extracting quantum of highly excreted undisclosed income. Such tendency has been deprecated by the courts, but continues.

7. Presumption with regard to the books of accounts, jewellery, etc.

Sub-section (4A) of section 132 enacts a rule of evidence whereby it may be presumed that books of account, other documents, money, bullion, jewellery or other valuable article or thing found in the possession or control of any person in the course of a search, may be presumed to belong to the person who is found to be in possession or control. It may, further, be presumed that the contents of such books of accounts and other documents are true and that the signatures and every other part of such books of account and other documents, which support to be in the handwriting of any particular person or which may reasonable be assumed to have been signed by, or to be in the handwriting of any particular person, are in that person's handwriting, and in the case of document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested. What section 132(4A) contemplates is the presumption regarding ownership. If control or possession has been established, the Assessing Officer can proceed to presume its ownership. What happens in practice is control possession, ownership are all taken in one sweep. The fact that an article or a document is found at a particular place is taken as proof of control or possession and consequently the ownership.

7.1. It is to be noticed that the words used in section 132(4A) of the Act are 'may presume'. It is well understood that these words give liberty to the Court either to make or not to make a presumption on the facts of the case. There is no obligation cast on the court to definitely presume the existence of a fact. Even when such a presumption is made, it is rebuttable. Where the statute uses the words 'shall presume the Court necessarily has to make a presumption but, even there it is rebuttable. It is evidence in rebuttal is allowed.

Even when it is a case of presumption an opportunity to rebut has to be provided before drawing an adverse conclusion.

7.2. Ornaments belonging to different members of the family deserves to be kept separately. However, as per customs and conventions in the country, out of respect and regard and as a matter of safety and security ornaments of different members of the family are kept in the same place or in one or more lockers or left in the custody of a particular member. In such cases it is advisable to keep lists of the ornaments of each person, where the ornaments are kept. Where all the ornaments in possession shall be liable to explain. When there is joint possession between wife and husband, or father and son, and if some members of the family was involved in amassing illegal wealth, unless there is categorical evidence to believe that this could be read in the hands of the husband or as the case may be the head of the family, it cannot be fastened on the husband or the head of the family. District Superintendent of Police, Chennai v. K. Inbasagaran (2006) 282-ITR-435 (S.C.).

8. Retention of books of account or documents :

Sub-section (8) of section 132 prohibits retention of books of accounts and other documents beyond 30 days from the date of the assessment u/s. 153A or 158BC(C) seizure without recording reasons and obtaining the approval of the Principal Chief Commissioner or Chief Commissioner, Principal Commissioner or Commissioner, Principal Director-General or Director General for such retention. The approving authority is not authorized to permit retention for a period exceeding 30 days after the completion of all proceedings under the Act in respect of years for which the books of account or other documents are relevant. It is a normal feature to retain books for indefinite period. The period prescribed by the sub-section is mandatory. If the dead line is crossed, the books can not be retained . If the period is required to be extended (a) reasons in writing must be recorded by the Assessing Officer concerned seeking the Commissioner's approval and (b) the Commissioner's approval for such extended retention must be obtained. The twin conditions as aforesaid must be complied with before the period expires. If either of these conditions is not fulfilled, such extended retention will become unlawful and he person acquires a right to their return forthwith. Ex-post facto approval by the Commissioner is not permissible. The order of the Commissioner for giving the approval is an administrative order and the assessee is not entitled to a show cause notice or to an opportunity of being heard by the Commissioner. The Assessing Officer or the authorized officer is under statutory obligation to communicate to the person concerned not merely the commissioner's approval but also recorded reasons on which the same have been obtained and this should be done expeditiously. In the absence of such expeditious communication, only retention of the seize books or documents would become invalid and unlawful as held by the Supreme Court in CIT Vs. Oriental Rubber Works (1984) 38-CTR-154, (1984) 145-ITR-477 (SC) and the Kerala High Court in Dr. George Philip Modayil Vs. A. C. (1999) 238-ITR-517. An Authorised Officer can not moot a proposal for further retention of the documents beyond 180 days as held by the Supreme Court in CIT Vs. K.V. Krishnaswami Naidu & Co. (2001) 249-itr-794 (S,C,). The W.B. TT in Ruchi infrastructure Ltd. v. ACCT (2002) 128-STC-408 held that opportunity to be heard to be given before extension of time sanctioned. Application again retention can be made to the Central Board of Direct Taxes u/s. 132(10).

9. Making copies and taking extracts from the seized records :

The person from whose custody any books of account or other documents have been seized, is statutorily entitled to make copies thereof, to take extracts therefrom in the presence of the authorized officer or any other person empowered by him in this behalf at the appointed place and time. As held in the case of Manik Chand Gupta Vs. CIT (1988) 72-CTR-12 (All.), (1988) 179-ITR-662 (All.) right for copies and taking extracts from the account books is available only to the person from whose custody the books are seized. Others shall be entitled to the copies as and when same are used by the tax authority against him. It is advisable to take Photostat copies of entire seized records and books of account because the seized records are retained of indefinite period. It is also advisable to reconstitute the books of account on the basis of photo-stat copies and to get such accounts audited. If required in law. If an assessment is made without allowing an opportunity to inspect records, make copies or take extracts from the seized books of account or documents, such assessment cannot be sustained in law, inspection of the seized records is permissible and one should avail the opportunity. The person is entitled to make objections to the approval for retention. The Board will have to give so opportunity of being heard being passing any order and the objections shall have to be decided on merits.

10. Power to requisition books of account, assets etc. :

Section 132A of the Act provides that where any books of account, other documents or assets have been taken into custody by an officer or authority under any other law, as for instance, by Collector of Customs, Sales Tax Commissioner, etc, the Principal Director General or Director General or Principal Director or Director or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner may, in the circumstances covered by section 132 authorize any Additional Director, Additional Commissioner, Joint Director, Joint Commissioner, Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income-tax Officer to require such officer or authority to deliver to him such books of account, other documents

or assets. On such a requisition being made, the officer or authority concerned will be required to deliver the books of account, other documents and assets to the requisitioning officer either forthwith or when such officer or authority is of the opinion that it is no longer necessary to retain the same in his or its custody. The Commissioner will pass no orders under this section which may conflict with orders passed by any authority regarding the goods. The expression 'an officer or authority' has been held not wide enough to cover 'Court' by the Punjab and Haryana High Court in CIT vs. Balbir Singh (1993) 203-ITR-650. In a very large number of clandestine dealings cash is seized by the police, customs and other authorities. The seized amount is left with court and on petition the magistrate shall be entitled to pass an order under section 451 of the Code of Criminal Procedure, 1973 read with Sec. 132 and 132A of the Act to hand over such cash to the income-tax authorities. The reasons have to be recorded before issuance of authorization and can be challenged. Compliance of such authorization is obligatory.

10.1. Sub-section (2) gives a discretion to the officer seizing the assets either to deliver them to the requisitioning officer forthwith or to retain them as long as they are needed by him. Once seized assets are delivered in the requisitioning officer, later has to proceed as if these assets had been seized under sec. 132(1) by an authorized officer. He should go through the procedure contained in Chapter XIVB. All the provisions of sec. 132(4A) to (14) will, thereafter, apply, Rule 112(11) to (14), 112A, 112B, 112C and 112D are applicable in cases covered by this section. Authorization should be in Form No. 45C, which should bear the signature and seal of the requisitioning officer. Explanation to section 132A(1) introduced with retrospective effect from the date of enactment of the section, October 1, 1975 i.e. applicable to assessment year 1975-76 and subsequent years, provides that the reasons to believe recorded by the income-tax authority specified under the said sub-section shall not be disclosed to any person or any authority or the Appellate Tribunal. It is similar to Section 132(1) discussed earlier.

11. Application for seized or requisitioned assets :

Section 132B provides for procedure for dealing with the assets seized or requisitioned under sections 132 and 132A respectively. The amount of existing liability under the specified acts and the liability of tax, interest etc. payable, determined on compilation of assessments u/s. 153A and the year of the search may be recovered out of such assets. The person from whose custody the assets were seized must make an application to the Assessing Officer within 30 days from the end of the month in which asset was seized, for release of the asset and explains the nature and source of acquisition of any such asset to his satisfaction, the amount of existing liability be recovered and the remaining portion, if any, be released with the prior approval of the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner. Such release has to be made in 120 days from the date of execution of last authorizations for search or requisition, as the case may be.

11.2. In order to overcome the judicial view that the term 'existing liability' includes advance tax liability of the assessee, which is not in consonance with the intention of the Legislature which is to ensure the recovery of outstanding tax, interest or penalty and also to provide for recovery of taxes, interest and penalty, which may arise subsequent to the assessment pursuant to search, a second Explanation was inserted in section 132B so as to clarify that 'existing liability' does not include advance tax payable in accordance with the provisions of Part C of Chapter XVII of the Act. The amendment took effect from June 1, 2013.

11.3. Section 132B(4)(b) deals with pre-assessment period and there is no conflict between the provision and section 240 or for that matter section 244A. The former deals with pre-assessment period in the matters of search and seizure and the later deals will post-assessment period as per the order in appeal. Where in the regular assessment done by the Assessing Officer, the tax liability for the relevant period was found to be higher and accordingly, the seized cash under section 132 of the Act was appropriated against the assessee's tax liability but the order of the Assessing Officer was over-turned by the Tribunal and the assessee was entitled to simple interest at the rate of fifteen per cent per annum under section 132B(4)(b) of the Act for the pre-assessment period : CHIRONJILAL SHARMA HUF v. UNION OF INDIA (2014) 360-ITR-237 (S.C.). Cash in bank is conceptually different from cash on hand and it is not permissible for the Department to convert assets, such as bank accounts of assessee which have been seized to cash and thereafter impound it. K.C.C. SOFTWARE LTD. v. DIRECTOR OF INCOME-TAX (INVESTIGATION) (2008) 298-ITR-1 (SC).

12. Conclusion :

Vast, wide and varied powers have been conferred under the Act in income-tax authorities, to check unaccounted for income/wealth/assets with liability for tax, interest, penalty which in some eventualities may exceed the amount of undisclosed income with hanging sword of prosecution. Though average rate of tax is moderate around 22% but with larger section of the tax payers / non-tax payers, there is no culture to discharge civil liability with smile, suomotu and voluntarily. Enormous powers vests in the tax department, but there appearts lack of efficient, willing, honest and smart officers to collect and recover due and legitimate taxes. It is hoped, both would be on right path and act in the interest of the Nation. Let tax consultants / advisers / planners to guide errant tax payers to act inaccordance with law and eliminate evasion from Great India. Tax evasion and associating therewith is a crime against Society.

Recent Decisions Relating to Income Tax

Subash Agarwal
Advocate

1) ACIT vs. Af-taab Investment Company Limited (ITAT Mumbai)

[I.T.A. No.1807/Mum/2011 & 1812/Mum/2011]

(source : itatonline.org)

Disallowance u/s 14A r.w Rule 8D

Important principles regarding :-

(i) disallowance for single segment companies being investors and dealers in shares and having to incur all business expenses under normal circumstances;

(ii) strategic investments;

(iii) securities held as stock-in-trade;

(iv) inclusion of securities which have not yielded any exempt income; and

(v) whether diminution in value of securities constitutes "expenditure" for disallowance

FINDINGS : (i) Strategic investments/stock in trade have to be excluded for computing disallowance under 14A;

(ii) The AO should keep in mind that the assessee is a single segment company being an investor and dealer in shares & securities and consequently all the business expenses ought to have been incurred towards this segment under normal circumstances unless otherwise shown;

(iii) Only those investments which have yielded exempt income shall be considered for computing average value of investment for the purposes of Rule 8D(2)(iii) keeping in view ratio of decision of Special Bench of the tribunal in the case of **ACIT v. Vireet Investment P Ltd. reported in (2017) 82 taxmann.com 415 (Delhi-trib.)(SB);**

(iv) Shares and securities held as stock-in-trade cannot be included for the purposes of disallowance u/s. 14A as the same are held as business asset for trading purposes and not for earning of exempt income **[Pr. CIT v. State Bank of Patiala (2017) 78 taxmann.com 3 (P&H HC) followed]**

(v) Diminution in the value of investments is not expenditure incurred for earning of exempt income for the purposes of disallowance under Section 14A.

Cases referred to :

United Breweries Ltd. v DCIT (2016) 72 Taxmann.com102(Kar HC)

Godrej and Boyce Manufacturing Company Limited v. DCIT reported in (2017) 81 taxmann.com 111(SC)

CIT v. Reliance Capital Asset Management Ltd. in ITA no. 487 of 2015

2) Amira Pure Foods Pvt. Ltd vs. Pr CIT (ITAT Delhi) [SA No. 451/DEL/2017] & [ITA No. 3205/DEL/2017]

(source : itatonline.org)

S. 263 r.w explanation 2: Revision

FACTS : The CIT cannot treat the AO's order as being erroneous and prejudicial to the interest of revenue without conducting an enquiry and recording a finding. If the recently introduced explanation 2 is interpreted in the manner dept wants, the CIT will be empowered to find fault with each and every assessment order and also to force the AO to conduct enquiries in the manner preferred by the CIT, thus prejudicing the mind of the AO. This will lead to unending litigation and no finality in the legal proceedings which cannot be the intention of the legislature in inserting the Explanation.

FINDINGS : The assessee had filed various replies to the ld. PCIT in response to notice u/s 263 of the Act stating that all the issues raised by the ld. PCIT have been examined by the AO during the course of assessment. The ld. PCIT has ignored the replies of the assessee. He merely states that the reply has been filed by the assessee but he nowhere discusses the contentions raised by the assessee and why he does not agree with the contentions of the assessee. The ld. PCIT has merely remitted the matter back to the AO without making any enquiry himself. The ld. PCIT has mentioned that the fresh loans have not been examined by the AO. The ld. PCIT has not considered the contentions of the assessee that there is no fresh loan. Similarly, the other replies of the assessee filed during the course of assessment and in response to notice u/s 263 of the Act have been totally ignored. No enquiry has been made by the ld. PCIT. It was incumbent for the ld. PCIT to make some minimum independent enquiry to reach to the conclusion that the order of the AO is erroneous and prejudicial to the interest of revenue.

The ld PCIT has not referred to Explanation 2 of section 263 of the Act which has been inserted with effect from 01.06.2015.

Reliance have been placed on this cases :

(i) Delhi High Court in ld. PCIT v. Delhi Airport Metro Express Pvt. Ltd.

(ii) Income Tax Officer v. DG Housing Projects Limited [343 ITR 329]

(iii) Narayan Tatu Rane v. Income Tax Officer[(2016) 70 taxmann.com 227]

3) CIT vs. M/S. CHAPHALKAR BROTHERS (Supreme Court)

[CIVIL APPEAL NOS. 6513-6514 OF 2012]

(source : itatonline.org)

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

Finding:

(i) Applying the aforesaid test contained in both **Sahney Steel & Press Works Ltd.,** Hyderabad Vs. Commissioner of Income-Tax, A.P.-I, Hyderabad 1997 (7) SCC 765 and Commissioner of Income Tax, Madras Vs**. Ponni Sugars and Chemicals Limited** 2008 (9) SCC 337, we are of the view that the object, as stated in the statement of objects and reasons, of the amendment ordinance was that since the average occupancy in cinema theatres has fallen considerably and hardly any new theatres have been started in the recent past, the concept of a Complete Family Entertainment Centre, more popularly known as Multiplex Theatre Complex, has emerged. These complexes offer various entertainment facilities for the entire family as a whole. It was noticed that these complexes are highly capital intensive and their gestation period is quite long and therefore, they need Government support in the form of incentives qua entertainment duty. It was also added that government with a view to commemorate the birth centenary of late Shri V. Shantaram decided to grant concession in entertainment duty to Multiplex Theatre Complexes to promote construction of new cinema houses in the State.

(ii) The aforesaid object is clear and unequivocal. The object of the grant of the subsidy was in order that persons come forward to construct Multiplex Theatre Complexes, the idea being that exemption from entertainment duty for a period of three years and partial remission for a period of two years should go towards helping the industry to set up such highly capital intensive entertainment centers. This being the case, it is difficult to accept Mr. Narasimha's argument that it is only the immediate object and not the larger object which must be kept in mind in that the subsidy scheme kicks in only post construction, that is when cinema tickets are actually sold. We hasten to add that the object of the scheme is only one -there is no larger or immediate object. That the object is carried out in a particular manner is irrelevant, as has been held in both Ponni Sugar and Sahney Steel.

(iii) Mr. Ganesh, learned Senior Counsel, also sought to rely upon a judgment of the **Jammu and Kashmir High Court in Shri Balaji Alloys vs. C.I.T. (2011) 333 I.T.R. 335**. While considering the scheme of refund of excise duty and interest subsidy in that case, it was held that the scheme was capital in nature, despite the fact that the incentives were not available unless and until commercial production has started, and that the incentives in the form of excise duty or interest subsidy were not given to the assessee expressly for the purpose of purchasing capital assets or for the purpose of purchasing machinery. After setting out both the Supreme Court judgments referred to hereinabove, the High Court found that the concessions were issued in order to achieve the twin objects of acceleration of industrial development in the State of Jammu and Kashmir and generation of employment in the said State. Thus considered, it was obvious that the incentives would have to be held capital and not revenue.

(iv) Mr. Ganesh, learned Senior Counsel, pointed out that by an order dated 19.04.2016, this Court stated that the issue raised in those appeals was covered, inter alia, by the judgment in Ponni Sugars, and the appeals were, therefore, dismissed. We have no hesitation in holding that the finding of the Jammu and Kashmir High Court on the facts of the incentive subsidy contained in that case is absolutely correct. In that once the object of the subsidy was to industrialize the State and to generate employment in the State, the fact that the subsidy took a particular form and the fact that it was granted only after commencement of production would make no difference.

4) ITO vs. Gymkhana Club (ITAT Chandigarh)

[ITA No. 1084/Chd/2009] [ITA No. 364/Chd / 2003] [ITA No. 777/Chd/2007] [ITA No. 778/Chd/2007] [ITA No. 252/Chd/2007] [ITA No. 535/Chd/2014]

(source : itatonline.org)

ISSUE: **The question is whether the 'Principe of Mutuality' applies to the Club or not?**

FACTS : Originally the higher rank officials of the Haryana Urban Development Authority (HUDA) have created an Association in the name of assessee Society i.e. Gymkhana Club, Panchkula. It was resolved by them that certain high rank officials of the HUDA will be only look after the management of the Society. The membership was also open to the persons from public subject to the approval by the Executive Committee. It is also an admitted fact that only the members of the Club are entitled to enjoy the facilities of the Club. It is also an admitted fact that surplus is to be expended for the common benefit of the Club members or for carrying out the objectives of the Club. All the members of the Club enjoy the equal right so far as the utilization of the facilities of the Club or the common benefits of the members are concerned.

FINDINGS : In every mutual concern the members must be entitled to a share in the surplus. In the relevant case of Hon'ble Supreme Court**, Banglore Club Vs. CIT (2013) 350 ITR 509 (SC)**, if the scheme or the mechanism of functioning of a mutual organization is so devised that a taint of commerciality is involved, the income of the organization can be subjected to tax.

As observed by the hon'ble supreme court, it is difficult and vexed question as to at what point of time the relationship of mutually ends and that of trading begins. Since the

affairs of the assessee trust are controlled by the serving officers of HUDA, hence it has to pass through greater scrutiny as the chances of it crossing the thin line between the mutuality and commerciality are very high. However, at this stage, so far the Assessment Years under consideration are concerned, the revenue could not point out the taint of commerciality in the contribution, management and application of the surplus collected through contributions and subscriptions from the members and for price of the facilities availed by its members, hence, the same cannot be said to be taxable income of the society.

5) Hindustan Coca Cola Beverages Pvt. Ltd vs. CIT (Rajasthan High Court)

[ITA No. 205 / 2005]

(source : itatonline.org)

ISSUE: TDS U/S 194H FOR SALES TO DISTRIBUTORS

The High Court had to consider the following questions of law in appeals filed by the assessee:

"(i) Whether in the facts and circumstances of the case the learned Tribunal was right and justified in holding that assessee was liable to withhold tax at source under S.194H of the Income Tax Act, 1961 amounting to Rs.19,74,842/- (including interest) in respect of sales to its distributors, which are on a principal to principal basis and wherein property in the goods is transferred to the distributors?

(ii) Whether the Tribunal was justified in ignoring the statutory books of accounts, the auditors report and the certificate issued by the auditors and merely relying on the internal Management Information System records in coming to the conclusion on the nature of the dealings with the distributors?

(iii) Whether on the facts and in the circumstances of the case the Tribunal erred in law in holding that interest under Ss.201 (1A) and 220 (2) of the Income Tax Act, 1961 should be levied on the appellant when the taxes due had already been paid by the distributor(s)/ when a valid stay of recovery has been obtained?

HELD by the High Court allowing the appeals:

(a) Now, the first question which has come up for our consideration is, 'whether in the facts and circumstances of the case the learned Tribunal was right and justified in holding that assessee was liable to withhold tax at source under S. 194H of the Income Tax Act, 1961 amounting to Rs.19,74,842/- (including interest) in respect of sales to its distributors, which are on principal to principal basis and wherein property in the goods is transferred to the distributor'.

(b) Taking into account the provisions of Section 182 of the Contract Act and the arrangement which has been entered into between the company and the distributor and taking into account the provisions of Section 194H, the Tribunal while considering the evidence on record, in our considered opinion, has misdirected itself in considering the case from an angle other than the angle which was required to be considered by the Tribunal under the Income Tax Act. The Tribunal has travelled beyond the provisions of Section 194H where the condition precedent is that the payment is to be made by the assessee. In spite of our specific query to the counsel for the department, it was not pointed out that any amount was paid by the assessee company. It was only the arrangement by which the amount which was to be received was reduced and no amount was paid as commission.

(c) In that view of the matter, if we look at the provisions of Section 194H and even if explanation is taken into consideration, there is no occasion of invoking provisions of Section 194H, since the amount is not paid by the assessee.

(d) Taking into account the conclusion which has been arrived at by the Tribunal is misdirected in view of the arrangement which has been arrived at between the company and the Distributor. Assuming without admitting, if the contention which has been raised before the Tribunal is accepted, the same can be at the most expenses which are not allowable under the Income Tax Act, if at all claimed without proper basis but to conclude that they are covered under Section 194H and the income tax or the TDS is required to be deducted is not correct and accordingly disallowance on that basis is not correct.

(e) In our considered opinion, from which amount of tax is to be deducted is a doubtful proposition inasmuch as the Management Information System which has been sought to be relied upon for alleging that expenditure has been claimed could not have been relied upon by the Tribunal or the authorities under the Income Tax Act.

(i) The findings which are given by the Tribunal regarding Distributor being Agent in view of the discussion made here-inabove, the arrangement which has been made between the Company and the Distributor is on Principal to Principal basis and the responsibility is on the basis of agreement entered into between the parties.

(ii) Regarding MRP, the findings which are arrived at is a price which has been fixed by the assessee company and other expenses, namely; commission given to the retailer and everything is to be managed by the Distributor. In that view of the matter, the restrictions which are put forward will not decide the relation-ship of Principal and Agent.

(iii) The Distributor has all rights to reduce his margin. He can increase the margin of retailer and will reduce the margin from 10% to anything between 1% to 10%. There is no restriction by the assessee to give commission amount to the retailer.

(iv) Regarding area of operation, it is the business policy of the assessee to give Distributor-ship for a particular area. Only on that basis, it will be erroneous to held that it is on Principal to Principal basis. For deciding the relation-ship on Principal to Principal basis, the criteria will not be of area of operation but agreement entered into between the parties.

(v) Regarding the change in price it is always between the assessee or the company and the Distributor to decide who will absorb the loss. In that view of the matter, the findings arrived at by the Tribunal is erroneous.

(vi) Regarding the return of goods after expiry date, it is always the understanding between the manufacturer and company that the product is not for preparation or consumed before expiry date, the consumed items cannot be allowed otherwise manufacturer will invite criminal liability. To avoid any criminal liability or any criminal act is done for taking back the goods, will not deter the relation-ship of Principal to Principal basis.

(vii) Regarding supervision, it is always for the manufacturer and the company to look into the matter that his Distributor or Sub- Distributor or Retailer will not induct in malpractice.

(viii) Regarding goods sold to the Distributor, it is always a matter of contract how further goods will be distributed. Restriction on sub-distributor will not change the transaction from Principal to Principal.

(ix) Regarding expenses reimbursement , it is always for the assessee to allow any special allowance or expenses to promote the sale. In a competitive world to promote the sale, if the Distributor is not given any encouragement, the business will not grow.

In that view of the matter, in view of the observations of the Supreme Court, the Income Tax Officer cannot enter into the shoes of the assessee. **(S.A. Builders Vs. Commissioner of Income Tax- (2007) 288 ITR 1 (SC).**

(x) Regarding providing a vehicle, it was very clear that by providing vehicle and getting list of expenses will not decide the relation-ship of Principal and Agent.

(f) In our considered opinion, Section 194H pre-supposes the payment to be made to the third party namely, Distributor or the Agency and if on a close scrutiny of Section 182, Distributor is not an agent, therefore, in our considered opinion, the provisions of Section 194H have wrongly been invoked, and therefore, the first issue is answered in favour of assessee and against the Department.

(g) The second issue which has been raised for our consideration, as discussed hereinabove, the Management Information System was not a part of their books of accounts nor could have been relied upon by the Income Tax Authorities. The basis on which the proceedings were initiated, in our considered opinion, the Statutory Audit Report is final conclusion over the authorities under the Income Tax Act, therefore, the second issue is required to be answered in favour of the assessee.

(h) Regarding third issue whether 201A or 201(1A), in view of the decisions of different High Courts, the argument canvassed by counsel for the appellant pre-supposes deduction out of the payment. In our conclusion in issue No.1, the amount was not required to be deducted since they have not made any payment. In that view of the matter any proceedings under Section 201 or 201(1A) are misconceived. In that view of the matter, this issue is also answered in favour of assessee.

6) Nilesh Janardan Thakur vs. ITO (ITAT Mumbai)

[I.T.A No.3738/Mum/2013 - AY : 2008-09]

[I.T.A No.3739/Mum/2013 - AY : 2009-10]

(source : itatonline.org)

ISSUE: RECEIPT OF MONEY AS ADVANCE – CAN IT BE TAXED AS GIFT U/S 56(2)(VI)

FACTS : As per AO, the assessee has received money without any consideration which is taxable under the provisions of section 56(2)(vi). Though the assessee as well as the creditor has accepted that money is received towards advance for procurement of land, conduct of the assessee as well as the company goes to prove undoubted fact that this amount is received without any consideration. The AO further stated that the company has failed to take any action for recovery of money even after lapse of three years, hence he opined that the impugned amount is taxable u/s 56(2)(vi).

FINDINGS : The AO has treated amount received by the assessee from SPCL on the ground that the transactions give rise to suspicion because of the conduct of both the parties. Except this, the AO has not brought out any cogent materials to treat the particular receipt as income of the assessee which is taxable u/s 56(2)(vi) of the Act. To tax a particular receipt u/s 56(2)(vi), which should be in the nature of income as referred under the said provisions. A receipt cannot be taxed merely on conjecture or surmises. The AO needs to bring on record evidence which proves that the particular receipt is taxable under the provisions of the Act.

The assessee as well as the creditor has filed enough materials to prove that it is advance amount and the same has been treated as advance in their respective books of account. Hence, the Ld. Tribunal is of the considered view that the AO was incorrect in bringing to tax the amount u/s. 56(2)(vi).

The company also filed a petition before Bombay High Court vide suit No.2576 of 2011 for recovery of money advanced to the assessee. As per the petition before the Hon'ble Bombay High Court, both the parties agreed to settle the dispute as per which the assessee has agreed to refund the money along with interest which is evident from the order of decree passed by Hon'ble Bombay High Court. We further notice that SPCL has filed an execution petition before Raigad Court for recovery of dues from the assessee. All these facts go to prove an undisputed fact that SPCL has paid advance to the assessee for procurement of land on certain terms and conditions. Therefore, we are of the considered view that the AO has erred in bringing to tax the impugned advance received from SPCL under the provisions of section 56(2)(vi).

7) Paradigm Geophysical Pty Ltd vs. DCIT (Delhi High Court)

W.P.(C) 6052/2017

(source : itatonline.org)

ISSUE: **Revision petition filed u/s 264**

FACTS : The Commissioner rejected the petition filed u/s 264 with the reasoning and observation that the petitioner, for some unexplained reasons, deliberately did not file an appeal against the assessment order for Assessment Year

2012-13, though it had filed appeals for other years. He held that this was an attempt to invoke Section 264 of the Act as a backdoor entry to file an appeal. Hence, the Revision petition should be dismissed.

FINDINGS : It is the case for time of filing appeal against the assessment order for AY 2012-13 had expired. The assessee had waived his right to file appeal. Clause (a) and (b) of Section 264(4) is not attracted in the present case and it is not the case of the Revenue that the petitioner has filed an appeal for 2012-13 before Commissioner (Appeals). The petitioner has also not filed any appeal against the said order before the Commissioner (Appeals) or the Tribunal to attract the negative stipulation in clause (c) of Section 264 (4). The present case therefore, does not fall under clauses (a) to (c) of Section 264 (4) of the Act.

Commissioner cannot refuse to entertain a revision petition filed by the assessee under Section 264 of the Act if it is maintainable on the ground that a similar issue has arisen for consideration in another year and is pending adjudication in appeal or another forum.

Learned counsel for the petitioner has submitted that the petitioner had filed an appeal for AY 2011-12 on this issue and vide order dated 28th April, 2017, the Tribunal has ruled in favour of the Assessee. In view of that, the writ petition is allowed and the impugned order dated 6th March, 2017 is set aside and quashed. The matter is remanded to the Commissioner to decide the Revision Petition afresh and in accordance with law.

8) M/s Sainath Enterprises vs. ACIT (ITAT Mumbai) (Third Member)

[ITA No. 189/Mum/2011]

(source : itatonline.org)

ISSUE: Whether withdrawal of appeal can be denied by ITAT ?

FACTS : Assessee prayed for withdrawal of appeal filed by him, which was declined by the Ld. Accountant Member on the ground that it should be listed together with the appeal filed by the Department.

FINDINGS : The Petitioner/ Plaintiff is the 'dominus litis' and it is open to him to pursue or abandon his case. Withdrawal cannot be denied except when the person making the prayer has obtained some advantage/ benefit which he seeks to retain

9) ITO vs. Shreedham Construction Pvt Ltd (ITAT Mumbai)

[ITA No.3754/Mum/2017] [ITA No.3755/Mum/2017] [ITA No.3756/Mum/2017]

(source : itatonline.org)

ISSUE: Addition on account of share capital

FACTS : The assessee received share application money from thirteen parties during the relevant financial year. All the details of the share applicants were given to the AO. The assessee proved the identity, capacity of the parties and the genuineness of the transaction. All the share applicants were responded to the notices issued by AO u/s. 133(6). The AO relied upon the third-party information and the statement recorded at the back of the assessee. The copy of statement of Praveen Kumar Jain allegedly recorded by the investigation party was not supplied to the assessee. The assessing officer not provided opportunity to the assessee for cross examination of Praveen Kumar Jain. The assessing officer not refereed a single document in his order while passing the assessment order.

The Ld. CIT(A) considered the documentary evidence and the written submission furnished by assessee. On the submission of assessee, Ld. CIT(A) referred the submission of assessee to the Ld. AO for his comment in writing. The Ld. AO furnished his submission/ report before the Ld. CIT(A). After considering the remand report of the Ld. AO the Ld. CIT(A) granted relief to the assessee.

The CIT(A) allowed the appeal on the basis that:

(i) Section 68 casts the initial burden of proof on the assessee to show prima facie and to explain the nature and source of credit found in its books. When the statute places the burden of proof in income tax cases on the tax payer, it is understood to be only the initial burden. When the tax payer explains the credit by providing evidence of identity, confirmation and credit worthiness, the burden shifts on the revenue to show that the explanation is not satisfactory or incorrect. In the case of credit as share capital by corporate entity, whose existence is shown by its registration with Registrar of companies and its filing of tax returns, adverse conclusion is not justified merely because its directors are not produced personally before the assessing officer by the tax payer.

(ii) In the remand proceedings only the legal requirement was indicated that if any statements of third parties are to be relied upon, opportunity for cross examination must be provided. Further, instead of and other than generalities, the assessing officer was given an opportunity to put together appellant specific evidence justifying the addition.

(iii) It can be seen from the observation of the Assessing Officer that he has only referred to the information related to the outcome of search in the case of Shri Pravin Kumar Jain Group who were allegedly providing accommodation entries but the Ld. Assessing Officer has failed to demonstrate any such specific evidence that the appellant has in reality obtained any accommodation entries. There is no direct specific mention of the appellant by the director or key persons of the investor companies. There is no evidence of cash deposits linked to the investors. The assessing officer did not bring specific incriminating evidence linking the investor to the appellant. The only link is that the investors have invested in appellant company. That the appellant has given cash to the investors in lieu of entry is merely alleged but not demonstrated. Layering of transactions is alleged but not demonstrated. Opportunity for cross examination is not provided to the appellant. Papers/evidence found in the search action raises presumption but the same is available in the case of person searched but not in the case of third parties unless proved and corroborated. Similarly, retraction may be rejected as motivated, but the same can be considered only against the person who has retracted in his

assessment. Such statement in the case of another person loses its sanctity unless opportunity of cross examination is granted and / or is corroborated with other evidences. When the investor company is filing regular return of income and there is a transaction through banking channel, no addition can be made without having any contrary or cogent evidences in possession.

FINDINGS : In view of the above factual and legal discussion and considering the latest decision of Hon'ble Jurisdictional High Court in Pr CIT vs. Paradise Inland Shipping Pvt. Ltd (Bombay High Court), the Ld. Tribunal has noted that the ld Commissioner (Appeals) passed the order after considering the entire material available before him. The Ld. Tribunal has seen that the order passed by ld. Commissioner (Appeals) is reasoned one and does not require any further interference at our end. The facts of various decision relied by ld. DR in Rajmandir Estate Pvt Ltd (supra), in CIT Vs Jansamparak Advertising and Marketing (P) Ltd (supra) in CIT Vs N.R. Portfolio (supra), though is at variance on facts and is of non jurisdictional High Court. The decision of jurisdictional High Court in PCIT Vs Paradise Inland Shipping (P) Ltd (supra) is binding precedent on this Tribunal. In the result the grounds of appeal raised by the revenue is dismissed.

Cases referred to :

(a) On the issue of cross examination;

(i) Kishin Chand Chellaram Vs CIT 125 ITR 713(SC)

(ii) Anand Ram Timber Industries Vs CCE ,Civil Appeal No.4228 of 2006 (SC)

(iii) H.R. Mehta Vs ACIT 378 ITR 561(Bom)

(iv) Sunil Prakash Vs ACIT ITA No. 6494/M/2014

(b) On addition under section 68 of Act

(i) CIT Vs Gagandeep Infrastructure (P) Ltd 349 ITR 680(Bombay),

(ii) CIT Vs Orchard industries Private Ltd ITA 1433 of 2014(Bom),

(iii) CIT Vs Laxman Industrial Resources Ltd ITA No. 169 of 2017(Del),

(iv) CIT Vs Supertech Diamonds Tools (P) limited 44 taxman.com 460 (Raj)

(v) CIT Vs Ashish International ITA No 4299 of 2009 (Bombay)

(vi) ACIT Vs Paradise Inland Shipping Private Ltd ITA No. 327/PNJ/2015

(vii) PCIT Vs Paradise Inland Shipping Private Ltd 84 taxman.com 58 (Bombay),

(viii) Anil C. Jain Vs ACIT ITA No. 369&370/M/2017,

(ix) Maruti Impex Vs JCIT ITA 3823/M/2014,

(x) Nathuram Premchand Vs CIT 49 ITR 561(All).

10) Bank of Baroda *vs.* Deputy Commissioner of Income-tax

[2017] 88 taxmann.com 103 (Ahmedabad - Trib.)

ISSUE: HOW TO COMPUTE PERIOD OF DELAY FOR COMPUTING INTT. U/S 201(1A)

HELD

The time limit for depositing the tax deducted at source under section 194A, as set out in rule 30(2)(b) – which applies in the present context, is "*on or before seven days from the end of the month in which the deduction is made*". In the case before us, the TDS is deposited on 8th of October 2014. There is thus clearly delay in depositing tax at source. Learned counsel does not even dispute that. All that he prays for is that the levy of interest should be reduced to actual period of delay in depositing the tax at source, i.e. from the date on which tax was deducted and till the date on which tax was deposited. It is only if such a period exceeds one month, then the question of levy of interest will arise. However, what has been done in the present case is that the interest has been charged for two calendar months, i.e. September and October. This plea of the assessee indeed meets our approval in the sense that the question of levy of interest for the second month can arise only if the period of time between the date on which tax was deducted and the date on which tax was paid to the Government exceeds one month. We, therefore, direct the Assessing Officer to recompute the levy of interest under section 201(1A) accordingly.

11) Upendra Singh Raghav *vs.* Commissioner of Income-tax

[2017] 88 taxmann.com 95 (Allahabad)

ISSUE: Absence of prayer / application to adduce additional evidence before CIT(A) – consequences

HELD

Having considered the arguments made by the counsel for the assessee, we find that in the first place the onus was on the assessee to establish the genuineness of cash credit entries found recorded in his account books. It was for the assessee to have led evidence before the assessing officer in that regard. Admittedly, the assessee did not lead such evidence and the assessing officer, therefore, proceeded to make the additions under Section 68 of the Act. Then, in appeal also the assessee did not file any additional evidence, which was the duty of the assessee alone. The assessee did not file any application to adduce any additional evidence. Muchless, no prayer was made by the assessee with regard to the powers of the Commissioner (Appeals) under Section 250(4) read with Section 250(5) of the Act. All the pleas taken here by the assessee seem to be an after thought. No benefit can be drawn from the judgement of the Bombay High Court, inasmuch as, the assessee has not raised this ground even before the Tribunal.

In view of the above, the questions of law are answered against the assessee and in favour of the department.

12) Bhagwati Oxygen Ltd. *vs.* Assistant Commissioner of Income-tax, Kolkata

[2017] 88 taxmann.com 28 (Kolkata - Trib.)

ISSUE: Whether payment of entire taxes (including surcharge and cess) is eligible for MAT credit u/s 115JAA while calculating interest on 'assessed tax' u/s 234B ?

Held

We find that the issue under dispute has been addressed against the assessee by the decision of Delhi Tribunal in the case of *Richa Global Exports (P.) Ltd.* v. *Asstt. CIT* [2012] 25 taxmann.com 1/54 SOT 185. We find that the issue under dispute is covered in favour of the assessee by the Co-ordinate Bench of Hyderabad Tribunal relied upon by the Ld. AR (supra). We find that Hyderabad Tribunal after considering the decision of Delhi Tribunal (supra) and after considering the decision of the Apex Court in the case of *K. Srinivasan* (*supra*) had held that tax includes surcharge and cess and accordingly the entire component of taxes including surcharge and cess shall have to be reckoned for calculating the MAT credit u/s 115JAA of the Act. We also find that the Hon'ble Apex Court had in the case referred to supra, had held that meaning of word 'surcharge' is nothing but an 'additional tax'. In our considered opinion, this understanding of surcharge and cess being included as part of the tax gets further sanctified by the amendment which has been brought in Section 234B of the Act in Explanation 1 Clause 5 while defining the expression 'assessed tax'. For the sake of convenience, the said explanation 1 to Section 234B is reproduced hereunder:

> "In this Section, "assessed tax" means the tax on the total income determined under sub-section (1) of Section 143 and where a regular assessment is made, the tax on the total income determined under such regular assessment as reduced by the amount of—

(*i*) Any tax deducted or collected at source in accordance with the provisions of Chapter XVII on any income which is subject to such deduction or collection and which is taken into account in computing such total income;

(*ii*) Any relief of tax allowed under section 90 on account of tax paid in a country outside India;

(*iii*) Any relief of tax allowed under section 90A on account of tax paid in a specified territory outside India referred to in that section;

(*iv*) Any deduction, from the Indian income tax payable, allowed under section 91, on account of tax paid in a country outside India; and

(*v*) Any tax credit allowed to be set of in accordance with the provisions of section 115JAA [or section 115JD]."

From the aforesaid provisions it could be inferred that the legislature wanted to treat the payment of entire taxes (including surcharge and cess) eligible for MAT credit u/s 115JAA while calculating the interest on 'assessed tax' u/s 234B of the Act, meaning thereby, the assessed tax shall be determined after reducing the entire MAT credit u/s 115JAA of the Act for the purpose of calculating interest u/s 234B of the Act. We find that this is clinching evidence of the intention of the legislature not to deprive any credit of any payment of surcharge and cess made by the assessee either in the MAT or under the normal provisions of the Act. It is not in dispute that the surcharge and cess portion was not paid by the assessee along with the tax portion. The bifurcation of the total payment of taxes by way of tax, surcharge and cess is only for the administrative convenience of the Union of India in order to know the purpose for which the said portion of amounts are to be utilized for their intended purposes. Hence the bifurcation is only for utilization aspect and does not change the character of payment in the form of taxes from the angle of the assessee. As far as assessee is concerned, it had simply discharged the statutory dues comprising of tax, surcharge and cess to the Union of India and hence if paid in excess, would be eligible for either refund or adjustment as contemplated u/s 115JAA of the Act. If the version of the ld CITA is to be accepted, then it would result in an situation wherein if the assessee is entitled for refund, he would not be entitled for refund on the surcharge and cess portion. This cannot be the intention of the legislature and it is already well settled that the tax is to be collected only to the extent as authorized by law in terms of Article 265 of the Constitution and the department cannot be unjustly enriched with the surcharge and cess portion of the amounts actually paid by the assessee. With these observations, we hold that the reliance placed by the Ld. AR on the decision of Hyderabad Tribunal is well founded and squarely applies to resolve the dispute under appeal before us. Accordingly, the grounds raised by the assessee are allowed.

In the result, the appeal of the assessee is allowed.

Benami Property (prohibition) Amendment Act, 2016 – Some Sailent Features

Paras Kochar
Advocate

Introduction:

The Benami Transactions (Prohibitions) Amendment Act, 2016, (hereinafter referred to as the "Act") received the President's assent on August 10, 2016 and has come into force from November 1, 2016. The Act will be effective in washing off and unearthing black money from the country. The Income tax department is regularly collecting data from its various sources such as Statement of Financial Transaction or Reportable Account (SFTRA) previously known as AIR, FIU, Registration authorities. The assessing officers are also sending information of Benami properties or Benami transactions to the concerned officers dealing in such cases.

The Amendment Act seeks to cover comprehensively all aspects of transactions or arrangements where the source of funding for acquisition of a benami property has no permissible links to the ownership structure. In other words, a benami transaction encompasses all such transactions in which the real beneficiary of a property is a different entity from the entity who has made the payment for such property, as a result of which, the owner of such property is a mere 'front' for the actual beneficiary/ funding entity.

Important Terms:

Certain terms such as 'benami property', 'benamidar', 'beneficial owner', 'transfer' and 'fair market value' are explained below:-

'Benami property' has been defined as a property which is the subject matter of a benamidar. If any property has been disposed off, proceeds of such property will be held to be banami and all consequences will follow.

A 'Benamidar' is a person or a fictitious person, as the case may be, in whose name the benami property is transferred or held and includes a person who lends his name.

'Beneficial owner' means a person, whether his identity is known or not, for whose benefit the benami property is held by a benamidar.

'Transfer' includes sale, purchase or any other form of transfer of right, title, possession or lien.

'Fair market value' means the price that the property would fetch, if sold in the open market on the date of transaction. For determining the price of unquoted equity shares, Central Government have framed Rule 3 of the Prohibition of Benami Property Transactions Rules, 2016, which is almost similar to Sub Rule 1 of Rule 11UA of the Income Tax Rules, 1962, notified on 12.07.2017.

Movable and Immovable Property under this Act:

Many people are of view that this Act applies only for immovable properties but this Act applies to properties (assets) whether movable or immovable, tangible or intangible, corporeal or incorporeal. Therefore, this Act applies to jewellery, valuables, etc. as movable property and buildings, flats, plot of land etc. as immovable property. As per law dictionary, corporeal and incorporeal property mean the property which affects the senses, and may be seen and handled by the body, as opposed to incorporeal property, which cannot be seen or handled, and exists only in contemplation. Thus a house is corporeal, but the annual rent payable for its occupation is incorporeal. Corporeal property is, if movable, callable of manual transfer; if immovable, possession of it may be delivered up. But incorporeal property cannot be so transferred, but some other means must be adopted for its transfer, of which the most usual is an instrument in writing. Tangible property means Property that has physical substance and can be touched; Anything other than real estate or money, including furniture, cars, jewellery etc. are tangible property. A property which cannot be touched such as cheque amount etc. are called intangible property.

Benami Transactions:

A benami transaction, as defined under Section 2(9) of the Act is a transaction in which:

a. the property is held by one person and paid for by another; or

b. it is held in a fictitious name; or

c. the owner of such property is unaware of or denies having knowledge of such ownership; or

d. the person financing such transaction is not traceable.

However, the Act prescribes certain exceptions to benami transactions, under

Section 2(9). These exceptions include property held by:

a. Karta for his or his family member's benefit; or

b. a person standing in fiduciary capacity for the benefit of another, including a trustee, an executor, a partner, a company director or a depository participant or agent; or

c. a person for the benefit of his spouse or child; or

d. a brother or sister or lineal ascendant or descendent.

Provided the consideration paid for such transactions comes from known and traceable resources. Also, the Central Government may, by notification, exempt any property relating to charitable or religious trusts from the operation of this Act. A Benami transaction applies to properties (assets) whether movable or immovable, tangible or intangible, corporeal or incorporeal. All transactions which were carried out even before 1988 are covered under this Act.

Authority under the Act–

The Initiating Officer, the Approving Authority, the Administrator and the Adjudicating Authority are the four major authorities which have been appointed by the Central Government. The office of the Initiating Officer will be held by an officer who is the Assistant Commissioner or a Deputy Commissioner as required by section 2 of the Income Tax Act, 1961. The authorities will have the same powers as those of the Civil Courts under Civil Procedure Code, 1908.

The Initiating Officer–

Such officer shall have reason to believe on the basis of material available to him and shall record the reasons in writing. Thereafter, he shall issue a notice to the parties and after obtaining the replies, if he thinks so, he may provisionally attach the property with prior permission of the approving authority for a period not exceeding 90 days and he may also revoke the provisional attachment with prior permission of the approving authority. He shall have power to conduct enquiry in regard to person, place, property, document, bank etc. He shall pass order for attachment or non attachment of the property within 90 days of issue of notice. If an order for continuing provisional attachment of the property is passed then he shall within 15 days from the date of the attachment, draw up a statement of the case and refer it to the adjudicating authority.

The Approving Authority–

The approving authority means an Additional Commissioner or a Joint Commissioner as defined in section 2 of the Income Tax Act, 1961. It shall have powers to give approval for retention of books of accounts and documents impounded within 15 days and will give permission to the initiating officer. He will also give permission or approval to the approving authority for his various actions like continuation of attachment, revocation of attachment, enquiry, investigation, etc.

The Adjudicating Authority–

This authority consisting of at least two members and one chairman will issue notice to the parties with 30 days from the date on which a reference has been received from the initiating officer. The authority may pass an order revoking or confirming attachment after holding that the property is Benami or not. Such order shall be passed within expiry of one year from the end of the month in which reference under this Act was received. This authority shall make an order for confiscation of the property after giving an opportunity of being heard to the person concerned.

The Administrator–

He shall have the power to receive and manage the property, in relation to which an order of confiscation has been made. He is empowered to take such measures as are necessary for managing such property. He also has the powers to enforce possession by giving reasonable notice to the occupier of such property.

Powers of Authorities–

The authorities shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit in respect of the following matters, namely–

a) discovery and inspection;

b) enforcing attendance of any person, including any official of a banking company or a public financial institution or any other intermediary or reporting entity, and examining him on oath;

c) compelling the production of books of account and other documents;

d) issuing commissions;

e) receiving evidence on affidavits; and

f) any other matter which may be prescribed.

The above proceedings shall be deemed to be a judicial proceedings within the meaning of section 193 and 228 of IPC. The authorities may requisition the service of any police officer or of any officer of the Central Government or State Government or of both to assist him in above matters.

Appeal–

An appeal can be filed before the Tribunal against order of the adjudicating authority within 45 days of passing of order and against order of Tribunal an appeal can also be filed before the Hon'ble High Court within 60 days of service of

Tribunal order. The Appellate Tribunal is expected to decide the appeal within one year from the last date of the month in which appeal is filed.

Rectification of Order–

In order to rectify any mistake apparent from record, the Appellate Tribunal or the Adjudicating Authority may amend its order passed within a period of 1 year from the end of the month in which the order was passed.

Penalty and prosecution–

The Act prescribes that whoever is found guilty of the offence of a benami transaction shall be punishable with rigorous imprisonment for a term which shall not be less than 1 year, but which may extend to 7 years and shall also be liable to fine which may extend to 25 % of the fair market value of the property. Further, if any person knowingly

provides false information to any authority or furnishes any false document he/she shall be punishable with rigorous imprisonment for a term which shall not be less than 6 months but which may extend to 5 years and shall also be liable to fine which may extend to 10% of the fair market value of the property.

Retrospective or prospective -

The expanded scope of benami transaction, which came into effect from 01.11.2016, should not be applicable to property purchase made in 2009.

Sub-section (3) clearly states that benami transactions entered into on and after commencement of the Amendment Act, 2016, shall attract penal provisions contained in Chapter VII. It should be noted that prior to the amendment, the punishment provided under the earlier law, was much less rigorous. So also the ingredients of offence described in the Act as benami transaction.

Whether certain provisions of the original Act, i.e Benami Transactions (Prohibition) Act, 1988, were prospective or retrospective came to be considered by the Hon'ble Supreme Court in ***R. Rajagopal Reddy (Dead) by LRs vs. Padmini Chandrasekharan (Dead) by LRs, (1995) 2 SCC 630***. The controversy in this case centres around applicability of the Act to pending suits already filed and entertained prior to coming into force of section 4 (of the Original Act).

Hon'ble Supreme Court held that section 4(1) was not retrospective in operation, as it provides that only from the date of its coming into operation, no suit, claim or action preferred by the real owner, to enforce any right in respect of any property held benami, would lie in any court. The word 'lie' in the context means "admissible".

More importantly, Hon'ble Supreme Court explained that a law prescribing a prohibition and punishment for its violation cannot apply to transactions entered into during the period the prohibition was not in force.

Section 2(9)(D) has introduced a new ingredient in the office described as "benami transaction". The corresponding penal provision is in section 3(3) read with Chapter-VII of the Act. When a new offence has been brought in the statute book w.e.f. 01.11.2016, the same cannot be invoked against the Defendant for a transaction effected in 2009.

Applying the ratio of the above ruling to the present case, it is amply clear that the provisions of amended Benami Property Transactions Act, effective from 01.11.2016, should not be applicable to the property transaction made in 2009.

Accommodation entries and Benami transactions–

There are various types of accommodation entries for conversion of black money into white money, such as share capital, long term capital gain in penny stock, loans etc. Such accommodation entries are also considered as Benami transactions by the authorities. Everyone is aware that a large number of companies have been formed in India in which share capital money has been raised and the amount received has been invested in shares of other such companies either by buying the same or by subscribing the same. Such transactions are made on paper only. These transactions are called accommodation transactions. Now a days accommodation entries are provided mainly through shell companies. The Income tax department is issuing notices to all such companies which have taken accommodation entries from shell companies and have invested the said fund in immovable properties. Large number of notices have been sent to such companies. The shell company, beneficiary company and the middleman all are covered under this Act.

Factors to determine Benami Transaction –

The apex court as well as the high courts have laid down following factors to determine whether a transaction was Benami –

i) The source from which purchase money came

ii) The nature and possession of the property, after the purchase

iii) Motive, if any, for giving the transaction a Benami colour

iv) Position of the parties and relationship, if any, between the claimant and the alleged benamidar

v) The custody of the title deed after sale

vi) Conduct of the parties concerned in dealing with the property after sale

Conclusion–

The Act is being applied on politicians of repute too. Confiscation of property of Satyendra Jain (AAP Minister) and family members of Lalu Prasad Yadav are recent examples. The Government may further crack down on bureaucrats and other Government servants soon. It is expected that all matters related to confiscation of property will go up to higher court and Supreme Court, so there will be huge litigation. The income tax department may also issue notices on parties who are involved in accommodation transactions subject to certain evidences under their possession. The tax consultants should advise their clients well in advance about the scope of Benami transactions and Benami property. Proceeding under The Benami Transactions (Prohibition) Amendment Act, 2016 is more painful than action under search and seizure u/s 132 of the Income Tax Act.

Highlights of Report of Committee on Corporate Governance

Aditi Jhunjhunwala
Company Secretary

The SEBI Committee on Corporate Governance was formed on June 2, 2017 under the Chairmanship of Mr. Uday Kotak (hereinafter referred to as the "Committee") with the aim of improving standards of corporate governance of listed companies in India. The Committee comprised of 24 members. The Committee was requested to submit its report to Securities Exchange Board of India (hereinafter referred to as "SEBI") within four months. The Committee came up with its recommendation report dated 5th October, 2017 on the various issues towards enhancing Corporate Governance (hereinafter referred to as the "Report").

Recognising the need of running a company in either the *"Raja" (Monarch) model or the "Custodian" (Trusteeship) model, the Committee recognized that the indian entities need to work on Custodian model which works on Gandhian principles and accordingly, t*he aim of forming the committee was to highlight issues which may lead to improved corporate governance of *equity listed companies* and the Committee was to accordingly make recommendations. The major terms of reference of the Committee were:

1. Ensuring independence in spirit of Independent Directors and their active participation in functioning of the company;

2. Improving safeguards and disclosures pertaining to Related Party Transactions;

3. Issues in accounting and auditing practices by listed companies;

4. Improving effectiveness of Board Evaluation practices;

5. Addressing issues faced by investors on voting and participation in general meetings;

6. Disclosure and transparency related issues, if any;

7. Any other matter, as the Committee deems fit pertaining to corporate governance in India.

The Committee also received comments from the Ministry of Corporate Affairs and the Ministry of Finance. The Report further suggests some recommendations vide amendment to existing provisions as also insertion of new provisions in order to implement the provisions. The recommendations of the Committee are such that may require implementation by relevant authorities/regulators in aim to enhance corporate governance practices by equity listed companies. The amendments are proposed to be made effective on piecemeal basis based on the nature and complexity in order to provide smooth transition time, i.e. some from 1st April, 2018[1] while some from 1st October, 2018 and thereafter.

Need for review of Corporate Governance now

The focus of the companies is primarily to create long term value for protection of its stakeholders at large. This however seems is not being achieved in spirit given the recent event on boards of corporate not only in the nation but also internationally. Some of the issues recognised by the Committee are:

a) pace in change of market conditions requiring companies and boards to quickly adapt to the technological and demographical changes

b) increasingly complex regulatory environment

c) focus of the board on short-term quarterly performance rather than long-term performance of the company wherein the board is not far sighted but is inclined on meeting short-term objectives than long-term strategies

d) increase in number of passive institutional owners

e) outperformance of private equity owned companies than the publicly listed ones because of the belief that directors in PE-owned companies are believed to spend far more time on strategy and risk management, have deeper functional and industry expertise and engage more actively in talent management.

f) significant value erosion in several Public Sector Enterprises (PSEs)

The above factors therefore call for need to review the Corporate Governance measures in the country by way of better board structures, rigorous checks and balances and striking a balance between devotion of time to quarterly reviews, audit reports, budgets and matters crucial to the future direction of the business.

Highlights of recommendations

In order to meet the objectives of:

a) **Shaping governance for long-term value creation**

b) **Shaping governance to protect shareholder interests**

c) **Building regulatory capacity for enhancing governance of listed entities**

the following aspects have been discussed by the Committee alongwith necessary recommendations with respect to amendments/insertions for implementation in the relevant laws *inter-alia*, Companies Act, 2013 (hereinafter referred to as the "Act") and the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 *(hereinafter referred to as the "Listing Regulations").*

A) Board structures

This comprises of the review of composition and role of the boards so as to achieve the desired objective.

Particulars	Current provision	Recommendation	Rationale
Minimum number of directors on Board (Regulation 17 of the Listing Regulations)	Act read with rules issued there under requires a minimum of three directors on the board of a public limited company. There is no similar requirement in the Listing Regulations.	Insert Regulation for a *minimum number of 6 directors* in all the listed entities.	In view of the additional functions and obligations of the board of a listed entity, relative to unlisted entities, it is crucial that a sufficient number of directors with diverse backgrounds and skill sets are available on the boards of listed entities to fulfill these functions and obligations.
Gender Diversity on the Board (Regulation 17 of the Listing Regulations)	The Act and the Listing Regulations require atleast one woman director on the board of the listed entity	The Committee recommends amendment to the Listing Regulations by providing that every listed entity have *at least one independent woman director* on its board of directors.	The provision was originally inserted for gender diversity and to have a positive impact. To further improve gender diversity on corporate boards, the Committee recommends that every listed entity have at least one independent woman director on its board of directors.
Directors' attendance (Regulation 17 of the Listing Regulations)	The Act provides for the automatic vacation of the office of director if a director is absent from all meetings of the board of directors held during a 12-month period. There is no requirement for minimum attendance of directors in meetings of the board of directors under the Listing Regulations.	Insertion of a new sub-regulation providing that if a director does not attend atleast half of the total number of board meetings over two financial years on a rolling basis, his/her continuance on the board should be ratified by the shareholders at the next annual general meeting.	In order to carry out the fiduciary duties effectively, it is important for all directors to attend a minimum number of meetings in order to enhance their contribution of skill, time and value towards serving the long term interests of all stakeholders.

Disclosure of Expertise/Skills of Directors (Disclosure under Schedule V of the Listing Regulations)	Companies Act and SEBI LODR Regulations require the disclosure of a brief profile of a director on his/her appointment, including expertise in specific functional areas. However, there is no specific requirement under the Companies Act or SEBI LODR Regulations for listed entities to disclose the required and available expertise of the board on a regular basis.	It is recommended to insert a new clause in Schedule V to the effect that the board of directors of every listed entity should be required to list the competencies/expertise that it believes its directors should possess and actually possess and disclose competencies of its board members against every identified competency/expertise without disclosing names in the annual report for financial year ending March 31, 2019. However, detailed disclosures of competencies of every board member, along with their names, should be required w.e.f. March 31, 2020	The Committee acknowledged that while a board of directors may seek external expert advice on various matters, given the collective responsibility and the need for the board to make informed business judgment, a balanced wholesome board with complementary skill-sets amongst the directors is imperative.
Approval for Non-executive Directors on Attaining a Certain Age (Regulation 17 of the Listing Regulations)	The Act provides that a person may be appointed/continue as Managing Director (*hereinafter referred to as "MD"*), whole-time director or manager on attaining the age of 70 years by passing a special resolution. However, no such provision exists for non-executive directors.	Insertion of new Regulation recommending provision requiring a special resolution on a similar basis should be inserted for listed entities for the appointment/continuation of NEDs on attaining the age of 75 years for the relevant term. All shareholders should be permitted to vote on such a resolution.	The Committee recognizes that while age itself may not be a determinant of efficiency or capability of a person or the basis for disqualification of a director, a higher level of shareholder endorsement may be required for directors to continue in their position beyond a certain age. The Committee further noted that non-executive roles on a board also require significant commitment of time.
Minimum number of board meetings	The Act and the Listing Regulations require at least four meetings of the board every year with a maximum gap of one hundred and twenty days between any two meetings.	It is recommended to amend the existing Regulation to increase the minimum number to five meetings wherein atleast once the board shall discuss strategy, budgets, board evaluation, risk management, environment, sustainability, governance and succession planning.	Considering that the boards should also focus on other strategy areas apart from financials, it is recommended to bring the change for focusing on other critical aspects
Quorum for board meetings	Act requires a quorum of one-third of the total strength of the board of directors or two directors, whichever is higher, for every board meeting. SEBI LODR Regulations do not prescribe any quorum.	To insert a new sub-regulation under Regulation 17 to provide that quorum for every board meeting of the listed entity should be a minimum of three directors or one-third of the total strength of the board of directors, whichever is higher, including at least one independent director.	In view of the increased obligations of the boards and in the interest of all stakeholders, especially minority shareholders, a higher quorum alongwith the presence of at least one independent director is required for every board meeting.

Separation of the Roles of Non-executive Chairperson and Managing Director/CEO	Act states that an individual shall not be appointed/reappointed as the chairperson of a company as well as its MD/CEO at the same time unless the articles of such company provide otherwise or the company does not undertake multiple businesses. The Listing Regulations do not mandate separation of the posts of chairperson and chief executive officer	It is proposed to amend and insert Regulation 17 and Schedule II that in case of all listed entities which have public shareholding of forty percent or more at the beginning of a financial year shall ensure that the Chairperson of the board of such listed entity shall be a non executive director, on and from that financial year. The recommendation is to also extend this to all listed companies wef the year 2022.	Several corporate governance codes for best practices recommend this, a few jurisdictions require it, and many companies are actively debating whether to undertake it to ensure *inter-alia* that board tasks are not neglected by a combined chairperson/MD. Such separation, at least at the stage of introduction of the construct, may be more relevant where public shareholders constitute a large portion of the shareholding of a company.
Maximum number of directorships	The Act provides that the maximum number of public companies in which a person can be appointed as a director shall not exceed ten and Listing Regulations provide for cap on directorship for independent directors	Recommendation for insertion of a new regulation for restricting the number of directorships in listed entities to overall being 8 and thereafter reducing it further to 7 wef April 01, 2020.	In light of increased responsibility of corporate boards, multiple directorships beyond a reasonable limit may lead to a director not being able to allocate sufficient time to a particular company, thus hindering their ability to play an effective role.

A) Controlling Shareholders and Related Party Transactions

A majority of Indian listed entities continue to be promoter driven, with significant shareholding held by promoter/promoter group. Therefore, protection of the interests of minority shareholders, especially those of retail shareholders assumes even greater importance. In this context, checks and balances on interactions and relationships between listed entities and the promoters/significant shareholders is crucial for good governance. Changes have been proposed in line with provisions of SEBI (Prohibition of Insider Trading) Regulations, 2015 (hereinafter referred to as the "PIT Regulations") as well.

Particulars	Current provision	Recommendation	Rationale
Sharing of information with the controlling promoters/shareholders with nominee directors	The PIT Regulations restrict communication/procurement of information of Unpublished Price Sensitive Information (UPSI) except for legitimate purpose etc. However, there is no provision enabling sharing information with select group of shareholders either under the PIT Regulations or the Listing Regulations.	A new chapter (IV-A) is recommended to be inserted as *"Information Rights of certain Promoters and Significant Shareholders"* provide an enabling transparent framework regulating the information rights of certain promoters and significant shareholders to reduce subjectivity and provide clarity for ease of business. Amendments are also proposed by way of insertion of new regulation in the PIT Regulations.	The Committee has highlighted the need of flow of information to the ultimate controlling stakeholders being the promoters wherein the information flows from formal/informal channels and that while there is substantive law for restriction on flow of UPSI except for purposes mentioned, the ground reality is different from the legal framework.

Re-classification of Promoters/Classification of Entities as Professionally Managed	The Act is silent on reclassification of promoters, while the SEBI LODR Regulations permit reclassification of promoters in limited circumstances.	Proposes recommendation to existing Regulation 31A as also insertion of new sub-regulation.	Where there is no identifiable promoter/promoter group, the 1% threshold to be able to classify the entity as professionally managed is too low and merits an increase to 10%. Also, the Listing Regulations do not deal with a situation where there are multiple and distinct parties classified as promoters, and one of them wishes to be reclassified.
Disclosure of Related Party Transactions	The Act and the Listing Regulations contains provisions on approval and disclosure of Related Party Transactions (RPTs) in the board's report. approval of the shareholders in certain cases, etc.	Insertion of new regulations u/s 33, 34 as: A) Half yearly disclosure of RPTs on a consolidated basis, in the disclosure format required for RPT in the annual accounts as per the accounting standards, on the website of the listed entity within 30 days of publication of the half yearly financial results. Copy of the same to also be submitted to the stock exchanges. Penalty to be imposed for non-compliance in terms of penalty as applicable u/r 33. B) All promoters/promoter group entities that hold 20% or above in a listed company to be considered *"related parties"* for the purposes of the Listing Regulations. C) Disclosures of transactions with promoters/promoter group entities holding 10% or more shareholding be made annually and on a half yearly basis (even if not classified as related parties).	In order to strengthen transparency on related party transactions and to cover all transactions with promoters, as because certain promoters/promoter group entities were not getting categorised as related parties under SEBI LODR Regulations on account of not strictly falling under the definition of "related parties" under the relevant accounting standards and thereby transactions with such persons were not getting categorised as RPTs under the SEBI LODR Regulations.

Approval of Related Party Transactions	Unlike the Act, the Listing Regulations provide for a blanket restriction on voting by related parties in case of material RPTs	The recommendation seeks to align the provision with the Act, however, seems to be more confusing and conflicting with the intended change. It is proposed to amend exiting Regulation 23 so as to allow the related parties to vote but not to approve the relevant transaction. Either the recommendation seeks to provide that the related parties may vote even negative and not necessarily affirmative but the proposed language of the Regulation suggests otherwise. ***This is proposed to be implemented with immediate effect.***	Similar to the Act, the Listing Regulations may be amended to allow related parties to cast a negative vote, as such voting cannot be considered to be in conflict of interest.
Royalty and Brand Payments to Related Parties	No specific provisions in the SEBI LODR Regulations pertaining to payments made pertaining to brand and royalty to related parties	Insertion of a new sub-regulation for providing that payments made by listed entities with respect to brands usage/royalty amounting to more than 5% of consolidated turnover of the listed entity may require prior approval from the shareholders on a "majority of minority" basis. This sub-limit of 5% will be considered within the overall 10% limit to determine material related party transactions	Keeping in mind that companies make payment towards brand/royalty usage, in order to ensure better disclosures by the Company, on the value a company derives from a brand or technology for which it has agreed to pay royalty, brand, or technical fees to the parent company/promoters
Remuneration to Executive Promoter Directors	Act prescribes a ceiling on the compensation that can be paid to directors, there are no specific provisions in the SEBI LODR Regulations on the maximum remuneration.	Insertion of a new clause under Regulation 17 for providing remuneration payable to executive directors with approval of members. shareholder approval by special resolution should be required if the total remuneration paid : a) to a single executive promoter-director exceeds Rs. 5 crore or 2.5% of the net profit, whichever is higher; or b) to all executive promoter-directors exceeds 5% of the net profits. Net profits should be calculated under section 198 of the Act.	In order to take care of the disproportionate payments made to executive promoter directors as compared to other executive directors, recommendation has been made that this issue should be subjected to greater shareholder scrutiny.

Remuneration of Non-executive Directors	The Act requires the approval of shareholders for any remuneration payable to such directors exceeding 1% of the net profits in case there is a managing director or whole time director or manager and 3% in other cases. As per SEBI LODR Regulations, the board is required to recommend all fees and compensation to be paid to non-executive directors.	Insertion of a new sub-clause under Regulation 17 to provide that where the remuneration of a single non-executive director exceeds 50% of the pool being distributed to the non-executive directors as a whole, shareholder approval should be required. Voting by promoters will be however allowed.	Based on available data vide disclosures, it was noted that certain non-executive directors, generally promoter directors, were receiving disproportionate remuneration from the total pool available *vis-à-vis* all other non-executive directors.
Materiality Policy	Regulations require listed entities to formulate a policy on materiality of related party transactions and on dealing with related party transactions	Amendment is proposed to amend and insert new sub-regulation in Regulation 23 necessitating laying of clear threshold limits and also reviewing the policy in every 3 years	It is noted that while the companies have formulated policy but have not spelt out any threshold limits for determining materiality and therefore, enforcement in such cases becomes difficult.

A) Other important recommendations

Minimum number of board of directors

It is recommended to substitute the existing Regulation on requirement of minimum number of independent directors to atleast 50% of the board members irrespective of the Chairperson being executive or non-executive. It is recommended to be implemented in a phased manner, making it mandatory for top 500 listed companies w.e.f. April 01, 2019 and thereafter for all the companies from April 01, 2020 to provide transition time.

Eligibility criteria for independent directors

It is also recommended to amend the regulation wrt eligibility of an independent director wherein it is being mandated that the ID should not be a member of the promoter group either, which currently is not provided.

Submission and serving of annual reports

It is recommended that Regulation 36 and 36 be amended to provide sending of annual reports to shareholders in soft copy whose email address is registered not only with the listed entity but also with the depository, w.e.f. 1st April, 2018.

For such purpose, it is proposed to link the Aadhar with the demat account of the shareholder so as to also register their mobile numbers and email address.

Disclosure of credit rating on website

It is recommended to amend Regulation 46 to provide that listed entity may be required to disclose all credit ratings obtained by the entity for all its outstanding instruments annually to stock exchanges and also on its website which shall be updated on a regular basis as and when there is any change, w.e.f. 1st April, 2018.

Utilisation of Proceeds of Preferential Issue and Qualified Institutional Placement

Apart from disclosure on proceeds utilization of public issues, it is proposed to insert a new clause under Schedule V, for better transparency, appropriate disclosures may be required on utilisation of proceeds of preferential issues and QIPs till the time such proceeds are utilised.

Prior Intimation of Board Meeting to Discuss Bonus Issue

in view of the price sensitive nature of bonus issues, advance notice for consideration of bonus issue by the board should be required to be submitted to stock exchanges. Accordingly, it is recommended that the proviso to Regulation 29 in the SEBI LODR Regulations may be dropped.

Timeline for Annual General Meetings of Listed Entities

Initially, the top 100 listed entities by market capitalization (as at the end of the previous financial year) may be required to hold AGMs by August 31, 2018, i.e. within five months from the end of the next financial year. The same may be extended to other entities in a phased manner based on the experience gained, by way of insertion on new Regulation 43A.

Changes have also been suggested in provisions for institution of independent directors, audit and account procedures, disclosures as also certain recommendations have also been made for public sector enterprises.

Conclusion

The changes have been proposed to be made effective on and from April 01, 2018, while the provision with respect to approval of related party transactions is proposed to be made effective with immediate effect. Considering that few recommendations make us believe that their enforcement will lead to greater participation, transparency and serious business on the company's board, one needs to set on job and do detailed homework to be done by the management and the professionals, if made effective sooner, we need to be on our toes and look forward to the enforcement of these recommendations.

However, what is to be seen is that the MCA and the other fraternities such as the Institute of Chartered Accountants of India have expressed their dissent on some of the recommendations by the Committee based on either jurisdictional grounds of that the provisions are inconsistent with the Act. The issues were also addressed to the Committee vide MCA's letter dated 3rd October, 2017 appended to the Committee Report.

(Footnotes)

[1] The report can be seen at : http://www.sebi.gov.in/reports/reports/oct-2017/report-of-the-committee-on-corporate-governance_36177.html

[2] The Listing Regulations can be viewed at : http://www.sebi.gov.in/sebi_data/attachdocs/1441284401427.pdf

[3] The news can be read at : http://www.livemint.com/Companies/gKoGH2kWxLwRdKFI11s1nL/MCA-regulatory-bodies-express-dissent-on-Uday-Kotak-panel-p.html

Salient features regarding Statutory Auditors (under the Companies Act, 2013):

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Company Secretary

- Companies' fulfilling the following criteria will fall under the provisions of Section 139(2) for the appointment of Auditors:
  - Listed – all
  - Public Limited Companies – Paid-up : Rs. 10 Crore or more

    Or

    Borrowings : Rs. 50 Crore or more
  - Private Limited Companies – Paid-up : Rs. 20 Crore or more

    Or

    Borrowings : Rs. 50 Crore or more
- Other Companies will fall under the provisions of Section 139(1) for the appointment of Auditors.
- Companies falling under Section 139(1) :
  - appointment need to be done for a period till the conclusion of every sixth meeting : whether new Company or the existing one;
  - appointment to be ratified at every annual general meeting;

    (have been proposed to be deleted vide the Companies (Amendment) Bill, 2017)
  - written consent of the auditor alongwith a certificate from the auditor is required;
  - the Company shall inform the auditor after appointment;
  - the Company shall file form (ADT-1) for appointment of the auditors within 15 days of the appointment of the auditors at the AGM;
  - Form is not required to be filed for subsequent ratification;
  - Form is also not required to be filed for first appointment by the Board, in case of a newly incorporated company.
- Companies falling under Section 139(2) :
  - Individual auditor cannot be appointed for more than one term of five consecutive years;
  - Audit Firm as auditor cannot be appointed for more than two terms of five consecutive years;
  - There is a cooling period of five years for both the classes before being getting re-appointed again;
  - Further, there was an initial cooling period of three years irrespective of the tenure of appointment of the present / current auditors with the introduction of the Act (w.e.f. 01.04.2014).
- The first auditors of the Company shall be appointed by the Board within 30 days of the incorporation of the Company, failing which the shareholders of the Company shall appoint the auditors within 90 days of the incorporation of the Company and in both the cases the auditors will hold the office till the conclusion of the first AGM.
- In case of the Company having Audit Committee, the appointment need to be recommended by the Audit Committee too before the approval by the Board.
- In case of casual vacancy, the appointment need to be done by the Board within 30 days of the vacancy. However, in case of casual vacancy due to resignation, the appointment also need to be approved by the shareholders within three months of the date of the Board Meeting.
- If the Auditors is not appointment or re-appointed at AGM, the existing auditor shall continue to be the auditor of the Company.
- In case of removal of the Auditor, the proposal of the Board and the shareholders passed resolution need to be approved by the Regional Director too.

- Auditor can do audit for not more than twenty companies, excluding :
  - (a) OPC
  - (b) Dormant company
  - (c) Small Company
  - (d) Private Company having paid-up capital less than Rs. 100 Crore.
- The Auditor has to report fraud in compliances with the provisions of Section 143 read with rules related thereto.
- The Auditor is required to attend the AGM unless specifically exempted by the Company.
- Auditors cannot render certain services in terms of Section 144 of the Act.
- *Certain salient features of the proposed Companies (Amendment) Bill, 2017 :*

a) Proposed to reduce the fine in case of failure to file resignation by auditor in form ADT-3 to fifty thousand or the remuneration of auditor whichever is less.

b) Auditors will be having the right to access to accounts and records of the associate companies alongwith subsidiary companies for their audit work.

c) Proposed that a person who, directly or indirectly, renders any service referred to in Section 144 to the Company or its holding company or its subsidiary company will not be eligible for appointment as Auditor. Currently the restriction is only on the person, whose subsidiary, associate company or any other form of entity is engaged as on the date of appointment is consulting and specialized services as provided in Section 144.

Impact of GST on Export of Services

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Levy of GST and Supply

Section 5 of the Integrated Goods and Services Tax Act, 2017 states that a tax called as Integrated Goods and Services Tax is levied on all inter-state supplies of goods or services. To qualify as a supply, the transaction should be covered within the definition of supply as per Section 7 of the Central Goods and Services Tax Act, 2017.

Inter-state supply

For the applicability of Integrated Goods and Services tax, there should be an inter-state supply of goods or services. The fact that the said transaction is a supply has already been discussed above. Next, it needs to be tested whether the supply can be considered as inter-state or not. Now, section 7(5) of the Integrated Goods and Services Tax Act, 2017 states that when the supplier is located in India and the place of supply is outside India, the supply of goods or services or both will be treated to be in the course of inter-state trade or commerce.

Example: X Ltd provides IT enabled services to a person Y Ltd in Germany. The consideration payable by Y Ltd will be $1,00,000.

Let us analyse the example above if it amounts to export of service.

As per the extract of Section 2(15) of the Integrated Goods and Services Tax Act, 2017,

"location of supplier of services means -

(a) where supply is made from a place of business for which the registration has been obtained, then the location of the said place of business."

Since, X Ltd will be making IT related services from Kolkata, then the location of supplier will be within India i.e West Bengal.

(iii) Section 13 of the Integrated Goods and Services Tax Act depicts the place of supply wherein the location of the supplier or recipient is outside India. In the case of IT enabled services in the form of assurance, audit and tax, Section 13(2) of the IGST Act, 2017 should be reviewed to find the place of supply. As per this Section, the place of supply as described above will be the location of recipient of service.

As per the extract of Section 2(14) of the Integrated Goods and Services Tax Act, 2017:

"location of recipient of services means:

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

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

"Fixed establishment means a place (other than the registered place of business) which is characterised by a sufficient degree of permanence and suitable structure in terms of human and technical resources to supply services or to receive and use services for its own needs"

Since, the location of recipient of servicei.e Y Ltdis in Germany, place of supply will also be outside India as per Section 13(2) of the IGST Act, 2017.As the location of the supplier will be considered as West Bengaland the place of supply outside India, the provisions of Integrated Goods and Services tax will be applicable in the given supply.

Zero rated supply and Export of Services

Section 16(1) of the Integrated Goods and Services Tax, 2017 purports to cover export of goods or services or both within the ambit of Zero rated supply. The test to determine whether a supply is an export of service, one needs to refer to Section 2(6) of the Integrated Goods and Services Tax Act, 2017:

"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"

(i) As per the definition of location of supplier of service discussed above, it can be inferred that the location of supplier will bein West Bengal i.e. within India.

(ii) As already explained above, X Ltd will be considered to be located outside India as per the definition of location of recipient of service and fixed establishment given above.

Also, the extract of the definition of recipient is given below:

"recipient of supply of goods or services or both means–

(a) Where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration;"

In the example of X Ltd, the consideration is liable to be paid by Y Ltd from Germany. So, the recipient will be considered as outside India.

(iii) Section 13 of the Integrated Goods and Services Tax Act depicts the place of supply wherein the location of the supplier or recipient is outside India. As already stated above, the place of supply will be the location of recipient of servicein respect of the given IT enabled services. As the location of recipient of service will be outside India, the place of supply will also be outside India.

(iv) The consideration to be received should be in convertible foreign exchange. In the example above, the consideration is $1,00,000 to be paid by Y Ltd. Since, the payment is in convertible foreign exchange, this condition gets fulfilled.

(v) The supplier and recipient of service should not be merely establishments of a distinct person. This basically means that the supplier and recipient should be separate legal persons altogether. The supplier and recipient should not be merely two branches/ establishments of the same legal person. In the instantaneous case, X Ltd and Y Ltd are two separate legal persons and have distinct identities in the eyes of law. Hence, these establishments cannot be considered merely as establishments of a distinct person.

From the above, it can be inferred that the supply falls perfectly within the definition of export of service. Since, export of service is covered within zero rated supply, the given supply is also considered to be a zero-rated supply.

Input Tax Credit and Zero rated supply

Section 16(2) of the IGST Act, 2017 states that credit of input tax can be availed for making zero rated supply. It may be noted that the treatment of input tax credit is different from that of an exempt supply. As per Section 17(2) of the CGST Act, 2017, input tax credit attributable to making exempt supplies will not be allowed whereas input tax credit will be allowed for making taxable supplies including zero rated supplies. So, as per the given sub-section, zero rated supplies are treated as part of taxable supplies and not exempt supplies for the purpose of allowing the benefit of Input Tax Credit.

Compliance alternatives for zero rated supplies

In case of a zero rated supply, no tax is required to be paid. However, to ensure compliance, GST law has prescribed two alternatives when making a zerorated supply. As per Section 16(3) of the Integrated Goods and Services Tax Act, 2017:

"A registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely: -

(a) he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilised input tax credit or

(b) he may supply goods or services or both subject to such conditions, safeguards as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied

in accordance with the provision of section 54 of the Central Goods and Services Tax Act or the rules made thereunder"

So as per the above, there are two options available

with the exporter in making export of services:

(a) Export on payment of Integrated tax and refund under Section 54 of CGST Act, 2017

(b) Export without payment of tax on furnishing of bond/Letter of Undertaking

As per point (a) above, one can make the payment of output taxes on the export of services after utilising the input tax credit and then claim a refund of the complete tax amount. This will be a complete revenue neutral exercise but it will involve a working capital blockage and any administrative delays in discharge of refunds may further compound the problem.

Under point (b) above, one needs to only furnish a bond/letter of undertaking with the Department. Once that happens, no output taxes are required to be paid. Also, the entire amount of unutilised input tax credit is available as a refund. Though this option may involve a few compliances but it is usually preferred because the working capital blockage can be avoided.

Also, among the two options of furnishing bond and Letter of Undertaking, usually the Letter of Undertaking is preferred. As per Notification no. 37/2017-Central Tax dated 4th October, 2017, all registered persons who intend to supply goods or services for export without payment of integrated tax are eligible to furnish a Letter of Undertaking instead of a bond except those who have been prosecuted for any offence under the CGST Act, IGST Act or any of the existing law where the amount evaded is Rs. 250,000. For persons who have been prosecuted under these laws for more than Rs. 250,000, furnishing of bond is mandatory. Also, it has been stated vide Circular no. 8/8/2017-GST dated 4th October, 2017 that a bank guarantee of 15% is required in all cases wherein a bond is furnished in respect of a zero rated supply. Assuming that there has been no prosecution in the given case, a Letter of Undertaking may be furnished by the client and avoid payment of Integrated tax altogether on export of services.

Summarizing the above analysis, it can be safely opined that the services provided by X Ltd is an export of service under the GST law. Being an export of service, such supplies fall within the ambit of zero rated supplies. Such zero rated supplies are eligible for the purpose of claiming of input tax credit. Being zero rated supplies, no output taxes are leviable on such supplies. For the purposes of compliance, there are two alternatives –either export upon making of the payment of IGST and then claiming the refund of taxes paid or export without making the payment of IGST and claim the refund of unutilized Input Tax Credit.

Impact on Prices of Restaurants Post GST Rate Reduction – The Hidden Essence

Gagan Kedia
Chartered Accountant

As per recent amendments by goods and service tax council, GST Rates have been radically reduced providing great relief to the buyers or the common man. Major rate reductions have been done to goods falling in the tax bracket of 28% and the same have been trimmed to 18%. The council proposed the changes on 10the November, 2017 which became effective from 15th November, 2017.

In the following paragraphs, **we shall discuss some issues in the restaurant sector** and try to understand the real impact on the pricing of restaurants.

On a plain reading, the GST rate on restaurant services have been reduced from 18% (AC Restaurants) or 12%(Non-AC Restaurants) to 5% for both AC as well as Non-AC Restaurants (detailed below).

5% GST	18% GST
All standalone restaurants AC or non-AC.	Restaurants in hotels with rooms at or over Rs.7,500
Restaurants in hotels with room tariff less than Rs.7,500	Outdoor Catering
No input credit allowed.	**Input tax credit can be availed** in such cases.

One important point to note here is the fact that the reduced rate of *5% with NO ITC* is mandatory and not optional for the assessee.

Post the rate change, those of us who have visited a restaurant have inevitably checked the restaurant bill to figure out whether the net price have been reduced as compared to the reduction in the GST rates.

Analysis of impact on Restaurant Business:
The removal of input tax credit is a big problem as costs for the restaurants which includes rents etc will go up. We have to pay GST for all this but we won't get it back. The margins could get significantly constrained. For a business, it remains to be seen if the volumes will offset the lack of input tax credit.

Let us consider an example for understanding the concept more clearly:

Below is an estimated cost sheet for an AC-Restaurant**:**

PARTICULARS	Rs.	Input GST Approximate (Rs.)
Materials Cost	25	1.25
Labour Cost	15	-
Other services *(such as rent, marketing, selling expenses)*	40	7.2
Cost of Sales	**80**	**8.45**
Add: 25% Profit	20	
Sale Price	**100**	
Add: 18% GST	18	
Cost to Customer	**118**	

Now, post the rate change, **the cost of sales** for the restaurant will become **Rs. 88.45 (80+8.45);** because the credit of GST paid by the restaurant on its various purchases (ITC), is now restricted or not allowed. Hence the cost of sales increases.

Now the restaurant would like to maintain its level of profit (in terms of %) i.e. 25% of Cost of Sales in our above example.

Below is the revised calculation:

PARTICULARS	Rs.	Remarks
Materials Cost	26.25	25 + 1.25
Labour Cost	15.00	-
Other services *(such as rent, marketing, selling expenses)*	47.20	40 + 7.2
Cost of Sales	**88.45**	**80+8.45**
Add: 25% Profit	22.11	
Sale Price	**110.56**	
Add: 5% GST	5.53	
Cost to Customer	**116.09**	

As we can see, the sale price to the customer has increased from Rs. 100 to Rs. 110 (approx) and the net price to the customer has reduced from Rs. 118 to (approx) Rs. 116 only.

Some may see it as reduction of only Rs. 2 and may feel that the restaurant has pocketed the extra savings due to GST rate reduction.

However, that's not true as we can clearly see from the example above that the restaurant is have the same profit margin and is adversely affected due to restriction on availing Input Credit.

Therefore, consumers should keep in mind that the major cause of higher bill amount in spite of low GST rates is the restriction on availing ITC.

Now let us consider one more example of a chain of restaurants *(say Pizza Hut or Dominoes or Mc Donald's)* which has a base kitchen in say New Delhi and its outlets spread across New Delhi, Gurgaon (Haryana) & Noida (Uttar Pradesh).

Now, in order to maintain the quality of food and similarity in taste, they prepare the basic food in their base kitchen in New Delhi and then send it across to its various nearby outlets.

Earlier *(prior to the changes in rates)* the supply between Delhi kitchen and Gurgaon outlet *(Inter-state Branch transfer)* was subjected to tax without any hustle because the receiving entity (Haryana outlet) was eligible for its Input Tax Credit.

Now, since benefit of ITC has been removed, their will a case of cascading of taxes leading to further increase in cost by 5%.

Thereby, to mitigate the cascading effect of 5%, the restaurant will be forced to open a new kitchen in the state of Haryana & Uttar Pradesh each.

Now GST was supposed to remove all barriers to trade between states and create a single nation-wide market. However, the above seems contrary to the propaganda of the GST Council.

Now these nitty-gritty's are generally not observed or examined by the common man and he feels that the restaurants or the big fish is enjoying all the bait.

Unless the government looks into this aspect of branch transfer between restaurants *versus* restriction on ITC, the cost of chain restaurants would be increasing and the entire burden would eventually fall on the common man.

Input Tax Credit under GST

P. D. Rungta, FCA

❖ Goods and Service Tax (GST) in India provides for seamless and continuous flow of input tax credit (ITC). In the existing scenario, cascading of tax is significant due to non-availability of ITC at various stages. Credit of taxes like CST, Entry Tax, and Luxury Tax was not available which becomes cost of the goods/services. Credit of VAT was not available to manufacturers and service providers and CENVAT credit and credit of Additional Duty of Customs/Countervailing Duty is unavailable to VAT dealers unless registered as First/Second stage dealers.

❖ The tax not available as credit became part of the cost which added to the price of goods/service. Ultimate burden of taxes not available as credit fell on the end consumer.

❖ Under GST, ITC will be available for tax paid at all the stages of supply paid in course or furtherance of business. ITC will flow uninterruptedly not only for intra-State transactions but also for inter-State transactions. Moreover, credit of GST paid on import of goods/services would also be available.

1. Eligibility of Input Tax Credit

❖ The credit availability under GST is thus more liberal as compared to the existing indirect system. A registered person can avail the credit of input tax charged on supplies of goods/services made to him if the underlying supplies are used **or intended in course or furtherance of business.**

❖ ITC to be credited to his **electronic credit ledger**.

❖ **ITC can be availed for** CGST/SGST/IGST/ UTGST charged on **any supply of goods or services or both made to** him and **includes-**

(a) IGST on import of goods;

(b) CGST/ SGST/ UTGST/ IGST payable under reverse charge.

2. Manner of taking credit

❖ Amount available in electronic credit ledger (ECRL) can be used **only for payment of output tax liability.**

ITC in ECRL	Can be adjusted with output liability of
IGST	➢ IGST ➢ CGST ➢ SGST ➢ UTGST
CGST	➢ CGST ➢ IGST
SGST	➢ SGST ➢ IGST
UTGST	➢ UTGST ➢ IGST

❖ ITC can be utilized in the following manner **sequentially** :

3. Conditions for claiming ITC

❖ ITC can be claimed by the registered person (RP) if all the following conditions are satisfied:-

a. (RP) possesses tax invoice/debit note/other taxpaying document, issued by a registered supplier;

b. Goods/services shall have been **received by him.**

If goods are delivered on his direction [Bill to ship to scenario] to a third person it would be deemed to have been received by him.

Where the goods are received in lots or instalments, the registered taxable person shall be entitled to the credit upon receipt of the last lot or instalment.

c. The **tax charged** on supply has been **actually paid** to the government either in cash or through utilization of input tax credit;

The recipient of supply to pay to the supplier the value of supply along with the tax **within 180 day**s for date of invoice. If paid after 180 days than such ITC claimed along with interest will be added to the output liability of the recipient. The recipient will be entitled to ITC when payment is made by him.

d. GSTR-3 shall be by the RP furnished.

e. ITC on capital goods or plant machinery can be claimed only if depreciation on the tax component has not been claimed under the Income Tax Act, 1961.

4. Timeline for claiming ITC:

- ITC shall be claimed at anytime earlier of the following:
  a. 20th of October of the following financial year(FY) to which the tax invoice pertains to (due date for filing GSTR 3 for month of September of the following FY); or
  b. Date of filing of Annual return (GSTR-9) to which the invoice pertains to.
- The reason for this restriction is that no change in return is permitted after September of next FY that is after the finalisation of the accounts and completion of audit for the relevant FY to which the tax invoice related to. If GSTR-9 is filed before the month of September then no ITC can be claimed for the invoice relating to such FY after filing of GSTR-9.

5. Restriction on claiming ITC

- ITC to the extent of taxes paid on goods and / or services used partly for the purpose of any business for other purposes shall be permitted to the extent of ITC attributable to purpose of business.
- ITC to the extent of taxes paid on goods and / or services is used for taxable supplies including zero rated supplies and partly for exempted[1] supplies shall be permitted only to the extent they are used in taxable supplies and zero-rated supplies only.
- Banking company or financial institution engaged in supply of service by way of accepting deposits, extending loans or advances may claim ITC in respect of taxes paid partly for taxable supply and partly for non taxable supplies in either of the following manner:
  a. to the extent attributable to taxable supplies; or
  b. 50% of eligible ITC on inputs, capital goods and input services in that month and the rest shall lapse. Such restriction not applicable to supplies made between RP having same PAN.

The option exercised in one month will be applicable throughout the financial year.

6. Comparative View

Particulars	Existing Tax Laws	GST Regime
Time limit for claiming ITC	Up to **1 year** from the date of issue of Invoice.	**Earlier of** Return of September of the following F.Y. Filing of Annual Return.
Time Limit for payment	Input service – Within **3 months** from the date of Invoice. Failure will attract reversal of ITC. Inputs / Capital Goods – None.	Input service/goods – Within **180 days** from the date of Invoice. Failure will result in ITC claimed to be added to output GST and interest also payable.
Capital goods	50% of credit can be claimed in the F.Y. and balance 50% in subsequent F.Y.	**100% ITC** can be claimed if not relevant taxes not claimed as depreciation under IT Act, 1961.

Particulars	Existing Tax Laws	GST Regime
Electronic Credit Ledger	**No such concept**	**ECRL** required to be maintained for crediting and utilizing ITC.
Reversal of Credit	Reversal of ITC provided for in certain circumstances.	No such concept. Cases demanding reversal to be added to the output GST.
Payment to Appropriate Government	Credit claim and utilization not dependent upon payment of tax by the supplier.	ITC claim dependent upon payment of tax by the supplier. Failure to do so disentitles ITC claim to the recipient.

7. Negative list of ITC

❖ ITC on following items cannot be availed:

i. motor vehicles and other conveyances except when they are used—

(a) for making the following taxable supplies, namely:—

1. further supply of such vehicles or conveyances ; or
2. transportation of passengers; or
3. imparting training on driving, flying, navigating such vehicles or conveyances;

(b) Transportation of goods;

ii. the following supply of goods or services or both—

(a) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery except where an inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(b) membership of a club, health and fitness centre;

(c) rent-a-cab, life insurance and health insurance except where—

1. the Government notifies the services which are obligatory for an employer to provide to its employees under any law for the time being in force; or
2. such inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as part of a taxable composite or mixed supply; and

(d) travel benefits extended to employees on vacation such as leave or home travel concession

iii. Works contract services when supplied for construction[2] of an immovable property (other than plantand machinery) except where it is an input service for further supply of works contract service;

iv. Goods/services or both received for construction[3] of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.

v. Tax paid under Composition levy;

vi. Supply made by a non-resident taxable person except on goods imported by him;

vii. Supply of goods/service for personal consumption;

viii. Goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples;

ix. Any tax paid in accordance with the provisions of sections 74, 129 and 130.

8. Matching of ITC:

❖ The matching, claim, reversal and reclaim of ITC a fool proof mechanism to tap revenue leakage in hands of the Government.

❖ Supplier to furnish details in GSTR-1 by 10th of the subsequent month. Details of the same to be communicated by GSTN to the recipient in GSTR-2A.

❖ On the basis of GSTR-2A the recipient shall verify, validate, modify, delete or include the details of inward supply in GSTR-2 by 15th of the

next month. The details of the same to be communicated by GSTN in GSTR-1A to the supplier.

- ❖ On the basis of the self assessed return, the Input Tax Credit will be credited to the ECRL.
- ❖ By 20th of the next month a GST-3 of inward and outward supplies, ITC availed, tax payable, tax paid shall be filed.
- ❖ Details of every inward supply furnished by the recipient in GSTR – 2 shall be matched with GSTR – 1 of outward supply filed by the supplier.
- ❖ In case of any discrepancy the same will be communicated by GSTN. The discrepancy shall be rectified in the subsequent Return.
- ❖ If not rectified than the ITC claimed by the recipient will be added to the output tax of the recipient.

9. Basic criteria for matching:

- ❖ Supplier should have filed valid returns for the tax period and / or IGST should have been paid by the importer.
- ❖ Resulting in the recipient establishing that tax has been deposited by the supplier.
- ❖ Failure to do so may lead to denial of ITC in hands of the recipient.
- ❖ If the discrepancy is not rectified the excess claim of ITC shall be added to the output liability of the recipient.
- ❖ The person claiming excess credit has to bear interest.
- ❖ Cases give rise to discrepancy
  - · Reversal / Mismatch of ITC;
  - · Excess claim of ITC by recipient;
  - · Outward supply not declared by the supplier;
  - · Duplication of claim of ITC by recipient.
- ❖ A person who has not furnished a valid return shall not be allowed to utilize ITC.
- ❖ The recipient can avail the ITC by filing a return but he cannot utilize the same unless he has filed the valid return. The recipient can re-claim the reversed ITC after the supplier has paid the taxes due from him.

4. Conclusion:

- ❖ ITC allowed in GST is quite liberal and elaborate as compared to earlier indirect tax laws. An effort has been made to permit ITC in respect of all taxes paid in relation to business expenses except those of personal nature. The ITC self assessed in the return would be allowed on provisional basis.

[1] Exempt supplies to include supplies on which recipient pays tax under reverse charge, transactions in securities, sale of land/building.

[2] "construction" includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property.

[3] "plant and machinery" means apparatus, equipment, and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods or services or both and includes such foundation and structural supports but excludes— (i) land, building or any other civil structures; (ii) telecommunication towers; and (iii) pipelines laid outside the factory premises.

Half Year Journey of GST Till Date

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Chartered Accountant

GST has completed its half year journey on 31st day of December. Now let us analyze the changes that have taken place in the GST during this period. We will go through only those provisions of the Act in which a change have been effected by the Central Government by way of issue of a notification. Since identical notifications are issued for SGST/UTGST, it is of no use in making any reference to these Acts. Similarly, most of the notifications are also applicable to the IGST Act also. The sections (Provisions) of the Act, which have undergone changes during this period are listed below:

Section: 1 (3): Commencement of the Act

22nd June 2017 was notified as the appointed day for Sections 1 to 5, 10, 22 to 30, 139, 146 and 164 of the Central Goods and Services Act, 2017(here in referred to as CGST Act) vide notification no. 01/2017-CT dated 19.06.2017. Similarly 1st day of July, 2017 was notified as the appointed day for sections 6 to 9, 11 to 21, 31 to 41, 42 except the proviso to sub-section (9) of section 42, 43 except the proviso to sub-section (9) of section 43, 44 to 50, 53 to 138, 140 to 145, 147 to 163, 165 to 174 vide notification no. 28/2017-CT dated 28th June, 2017. Proviso to sections 42(9) and Proviso to section 43(9) have not yet been notified.

Section 23(2) : Persons not liable for registration

Vide notification no. 02/2017-CT dated 19th June, 2017, the Central Government have exempted the persons, who are only engaged in making supplies of taxable goods or services or both, the total tax on which is liable to be paid on reverse charge basis by the recipient of such goods or services or both under sub-section (3) of section 9 of the said Act, from obtaining registration under the aforesaid Act. Even suppliers of goods or services which have been exempted from levy of tax, under section 11 of the Act, are not liable to obtain registration.

Section 10(1): Composition levy

Initially, the threshold limit for opting to pay tax under the composition levy, i.e. section 10 of the Act, was 50 (fifty) lacs. Vide notification no. 8/2017-CT, the Central Government has increased this limit to 75 (seventy five) lacs. But for persons registered in the special category states, the limit has been kept unchanged at 50 (fifty) lacs only. Again vide notification no. 46/2017-CT dated 13th October, 2017, the limit was increased from 75 (seventy five) lacs to 1(one) Crore and for persons registered in special category states, the limit was increased from 50 (fifty) lacs to 75 (seventy five) lacs.

Supply of goods or services for export without payment of tax

Initially, the provisions were made for furnishing of a bond by persons who intended to supply goods or services for export without payment of tax. There after, vide notification no. 16/2017-CT dated 7th July, 2017, the Central Government allowed such persons to furnish a 'letter of undertaking' instead of a bond if such person was able to fulfill the following conditions:

(a) a status holder as specified in paragraph 5 of the Foreign Trade Policy 2015- 2020; or

(b) who has received the due foreign inward remittances amounting to a minimum of 10% of the export turnover, which should not be less than one crore rupees, in the preceding financial year,

and he has not been prosecuted for any offence under the Central Goods and Services Tax Act, 2017 (12 of 2017) or under any of the existing laws in case where the amount of tax evaded exceeds two hundred and fifty lakh rupees.

But the Central Government has, vide notification no. 37/2017-CT dated 4th October, 2017, extended the facility of furnishing a 'letter of undertaking' to all the exporters. In other words, the condition of being a 'status holder' and the condition relating to minimum inward remittance has been withdrawn. But this facility is not available to a person who has been prosecuted for any offence under the Central Goods and Services Tax Act, 2017 (12 of 2017) or under any of the existing laws in case where the amount of tax evaded exceeds two hundred and fifty lakh rupees.

Rate of Interest

Vide Notification no. 13/2017-CT, the Central Government has notified the following rates for various sections of the Act.

Table

Serial Number (1)	Section (2)	Rate of interest (in per cent) (3)
1.	Sub-section (1) of section 50	18
2.	sub-section (3) of section 50	24
3.	sub-section (12) of section 54	6
4.	section 56	6
5.	proviso to section 56	9

Furnishing of HSN code

To remove the difficulties of the registered persons, the Central Government has, vide notification no. 12/2017-CT dated 28th June, 2017, exempted suppliers with an annual turnover, in the preceding financial year, up to rupees one hundred and fifty lacs from mentioning the HSN codes, either in the invoice or in the returns or the details to be filed. Similarly, suppliers, with turnover up to rupees five hundred lacs, have to mention only the last two digits of the HSN code, and those with turnover exceeding five hundred lacs, only the last four digits of the HSN code have to be mentioned.

Section 47: Levy of late fees

This section levies a late fee of one hundred rupees per day for late filing of return. This provision exists both in the CGST Act and SGST/UTGST Act. As such, a registered person has to pay a late fee of two hundred rupees per day. If we go through the Proviso to section 37 (1), we will find that the registered person shall not be allowed to file the statement of outward supply in GSTR-1 from the eleventh day to the fifteenth day of the succeeding month. It means, the minimum late fee is one thousand rupees for late filing of the statement of outward supply in GSTR-1. But in the case of GSTR-2 and GSTR-3, there is no such restriction and as such the minimum late fee remains two hundred rupees per day.

Taking cognizance of the difficulties being faced by the registered persons in filing the returns due to technical glitches, the Central Government has, vide notification no. 28/2017-CT dated 1st September, 2017, waived off the late fee payable under section 47 of the Act for the month of July 2017 for all persons. Similarly, vide notification no. 50/2017-CT dated 24th October, 2017, the Central Government has waived off the late fee payable for the months of August and September, 2017. But vide notification no. 64/2017-CT dated 15th November, 2017, the Central Government has re introduced the levy of late fees to a certain extent. The late fee is fifty rupees per day (twenty five rupees for CGST and twenty five rupees for SGST/UTGST). But if the tax payable is nil, then the late fee is restricted to ten rupees per day instead of fifty rupees per day.

Casual Taxable person engaged in supply of handicraft goods

The central Government, has vide notification no. 32/2017-CT dated 15th day of September, 2017, given a major relief to the casual taxable persons making taxable supplies of handicraft goods, by exempting them from taking registration provided they are not covered by the provision of Section 22 of the CGST Act.

Tax payment on receipt of advance

As per section 12(1) of the Act, the liability to pay tax shall arise at the time of supply, as determined in accordance with the provisions of this section. And section 12(2) states that the time of supply shall be the earlier of the following dates, namely,

(a) the date of issue of invoice by the supplier or the last date on which he is required, under sub-section (1) of section 31, to issue the invoice with respect to the supply; or

(b) the date on which the supplier receives the payment with respect to the supply:

It means that if the supplier receives any advance from the recipient, the date of receipt of advance shall be deemed to be the time of supply and the liability to pay tax arises immediately. The Central Government has, vide notification no. 40/2017-CT dated 13th day of October, 2017, exempted persons, having turnover below one crore and fifty lacs, from paying tax at the time of receiving advance. As such, the time of supply shall be determined as per the provisions of section 12(2)(a) of the Act. Again, vide notification no. 66/2017-CT dated 15th day of November, 2017, this facility has been extended to all the persons, irrespective of their aggregate turnover, except those who have opted to pay tax under section 10 of the Act.

Deemed Exports under section 147

Vide notification no. 48/2017-CT dated 18th day of October, 2017, the Central Government has notified the following supplies as deemed exports under section 147 of the Act.

S.No.	Description of supply
1.	Supply of goods by a registered person against Advance Authorisation
2.	Supply of capital goods by a registered person against Export Promotion Capital Goods Authorisation
3.	Supply of goods by a registered person to Export Oriented Unit
4.	Supply of gold by a bank or Public Sector Undertaking specified in the notification No. 50/2017-Customs, dated the 30th June, 2017 (as amended) against Advance Authorisation.

Section 24 (ix) of the Act prescribes that persons making supplies, other than supplies specified under section 9(5) of the Act, through an E-Commerce Operator, shall have to obtain registration, irrespective of the aggregate turnover, i.e. the threshold exemption limit shall not be available.

But, vide notification no. 65/2017-CT date 15th day of November, 2017, the Central Government has exempted such persons from obtaining registration provided they are not covered by the provisions of section 22 of the Act.

Central Goods and services Tax Rules, 2017

The rules were issued vide notification no. 03/2017-CT dated 19th June, 2017 made effective from 22nd June, 2017. There after these rules have been amended 12(twelve) times till date vide the following notifications:

Notification No.	Date	Amendment No.
07/2017-CT	27.06.2017	First Amendment
10/2017-CT	28.06.2017	Second Amendment
15/2017-CT	01.07.2017	Third Amendment
17/2017-CT	27.07.2017	Fourth Amendment
22/2017-CT	17.08.2017	Fifth Amendment
27/2017-CT	30.08.2017	Sixth Amendment
34/2017-CT	15.09.2017	Seventh Amendment
36/2017-CT	29.09.2017	Eighth Amendment
45/2017-CT	13.10.2017	Ninth Amendment
47/2017-CT	18.10.2017	Tenth Amendment
51/2017-CT	28.10.2017	Eleventh Amendment
55/2017-CT	15.11.2017	Twelfth Amendment

Filing of Returns

If we go through the notifications issued in Central Tax, maximum number of notifications relates to changes made in due dates of returns or the levy of late fees and waiver/ reduction thereof. To study the full impact of these changes, we have prepared the following chart:

Annexure-'A'

S N	DETAIL/ RETURN	MONTH	ORIGINAL DUE DATE	DUE DATES
1	GSTR-1	July 2017	10.08.2017	1. Extended up to 1-5 Sept 2017 vide notification no. 18/2017-CT dated 08.08.2017 2. Further extended up to 10.09. 2017 vide notification no. 29/2017-CT dated 05.09.2017 3. Further extended up to 03.10.2017 for registered person having turnover > 100 crore and 10.10.2017 for registered person having turnover up to 100 crore.
2	GSTR-1	August 2017	10.09.2017	1. Extended up to 16-20 Sept 2017 vide notification no. 18/2017-CT dated 08.08.2017 2. Further extended up to 05.10. 2017 vide notification no. 29/2017-CT dated 05.09.2017
3	GSTR-1	For the months of July 2017 to October 2017	10th day of next month	Date extended up to 31.12.2017 for registered persons having turnover exceeding 1.50 crore vide notification no. 58/2017-CT dated 15.11.2017
4	GSTR-1	For the month of November 2017	10th day of next month	Date extended up to 10.01.2018 for registered persons having turnover exceeding 1.50 crore vide notification no. 58/2017-CT dated 15.11.2017
5	GSTR-1	For the month of December 2017	10th day of next month	Date extended up to 10.02.2018 for registered persons having turnover exceeding 1.50 crore vide notification no. 58/2017-CT dated 15.11.2017
6	GSTR-1	For the month of January 2018	10th day of next month	Date extended up to 10.03.2018 for registered persons having turnover exceeding 1.50 crore vide notification no. 58/2017-CT dated 15.11.2017

7	GSTR-1	For the month of February 2018	10th day of next month	Date extended up to 10.04.2018 for registered persons having turnover exceeding 1.50 crore vide notification no. 58/2017-CT dated 15.11.2017
8	GSTR-1	For the months of March 2018	10th day of next month	Date extended up to 10.05.2018 for registered persons having turnover exceeding 1.50 crore vide notification no. 58/2017-CT dated 15.11.2017
9	GSTR-1	Quarter from July to Sept 2017	----	31.12.2017 specified, vide notification no. 57/2017-CT dated 15.11.2017, as due date for filing return by registered person with turnover up to 1.50 crore in the preceding FY or in the current FY
10	GSTR-1	Quarter from October to December 2017	----	15.02.2018 specified, vide notification no. 57/2017-CT dated 15.11.2017, as due date for filing return by registered person with turnover up to 1.50 crore in the preceding FY or in the current FY
11	GSTR-1	Quarter from January to March 2018	----	30.04.2018 specified as due date for filing return by registered person with turnover up to 1.50 crore in the preceding FY or in the current FY vide notification no. 57/2017-CT dated 15.11.2017
12	GSTR-2	July 2017	15.08.2017	1. Extended up to 6-10 Sept 2017 vide notification no. 19/2017-CT dated 08.08.2017 2. Further extended up to 11-15.09. 2017 vide notification no. 29/2017-CT dated 05.09.2017 3. Further extended up to 31.10.2017 for all registered persons vide notification no. 30/2017-CT dated 11.09.2017 4. Further extended up to 30.11.2017 for all registered persons vide notification no. 54/2017-CT dated 30.10.2017 5. As per notification no. 58/2017-CT dated 15.11.2017, the due dates for filing GSTR-2 shall be notified subsequently.
13	GSTR-2	August 2017	15.9.2017	1. Extended up to 21-25 Sept 2017 vide notification no. 19/2017-CT dated 08.08.2017 2. Further extended up to 6-10.10. 2017 vide notification no. 29/2017-CT dated 05.09.2017

				3. 5. As per notification no. 58/2017-CT dated , the due dates for filing GSTR-2 shall be notified subsequently.
14	GSTR-3	July 2017	20.08.2017	1. Extended up to 11-15 Sep 2017 vide notification no. 20/2017-CT dated 08.08.2017 2. Further extended up to 30.09. 2017 vide notification no. 29/2017-CT dated 05.09.2017 3. Further extended up to 10.11.2017 for all registered persons vide notification no. 30/2017-CT dated 11.09.2017. 4. Further extended up to 11.12.2017 for all registered persons vide notification no. 54/2017-CT dated 30.10.2017 5. As per notification no. 58/2017-CT dated 15.11.2017, the due dates for filing GSTR-2 shall be notified subsequently.
15	GSTR-3	August 2017	20.09.2017	1. Extended up to 26-30 Sep 2017 vide notification no. 20/2017-CT dated 08.08.2017 2. Further extended up to 15.10. 2017 vide notification no. 29/2017-CT dated 05.09.2017. 3. As per notification no. 58/2017-CT dated 15.11.2017, the due dates for filing GSTR-2 shall be notified subsequently.
16	GSTR-3B	July 2017	---	Due date of filing is 20.08.2017 vide notification no. 21/2017-CT dated 08.08.2017. Notification no. 23/2017-CT dated 17.08.2017 specifies as follows: 1.In case of registered person entitled to avail ITC in terms of section140 of the Act but opting not to file TRAN-1 on or before 28.08.2017, the due date of filing is 20.08.2017 without any conditions 2. In case of registered persons entitled to avail ITC in terms of section 140 of the said Act, and opting to file TRAN-1 on or before 28.08.2017, the due date of filing is 28.08.2017 with the following conditions: a) deposit tax on or before 20.08.2017 b) file TRAN-1 before filing GSTR-3B c) pay interest for delayed payment of tax for the period from 21.08.2017 till payment of tax. For any other person, the due date is 20.08.2017

				Further extended to 25.08.2017 vide notification no. 24/2017-CT dated 21.08.2017
17	GSTR-3B	August 2017	----	Due date of filing is 20.09.2017 vide notification. no. 21/2017-CT dated 08.08.2017 and notification no. 35/2017-CT dated 15.09.2017
18	GSTR-3B	September 2017	----	Notifies 20.10.2017 as due date of filing GSTR-3B vide notification no. 35/2017-CT dated 15.09.2017
19	GSTR-3B	October 2017	----	Notifies 20.11.2017 as due date of filing GSTR-3B vide notification no. 35/2017-CT dated 15.09.2017
20	GSTR-3B	November 2017	----	Notifies 20.12.2017 as due date of filing GSTR-3B vide notification no. 35/2017-CT dated 15.09.2017
21	GSTR-3B	December 2017	----	Notifies 20.01.2018 as due date of filing GSTR-3B vide notification no. 35/2017-CT dated 15.09.2017
22	GSTR-3B	January 2017	----	Notifies 20.02.2018 as due date of filing vide notification no. 56/2017-CT dated 15.11.2017
23	GSTR-3B	February 2017		Notifies 20.03.2018 as due date of filing vide notification no. 56/2017-CT dated 15.11.2017
24	GSTR-3B	March 2017		Notifies 20.04.2018 as due date of filing vide notification no. 56/2017-CT dated 15.11.2017
25	GSTR-4	Quarter from July -Sep 2017	18.10.2017	1.Extended up to 15.11.2017 vide notification no. 41/2017 dated 13.10.2017 2. Further Extended up to 24.12.2017 vide notification no. 59/2017-CT dated 15.11.2017
26	ITC-01	July 2017	60 days from the appointed day	1.Extended up to 90 days from the appointed day vide notification no. 22/2017-CT dated 17.08.2017 2. Further Extended up to 31.10.2017 vide notification no. 44/2017-CT dated 13.10.2017 3. Further Extended up to 30.11.2017 vide notification no. 52/2017-CT dated 28.10.2017
27	ITC-01	August 2017	30 days from the appointed	1. Extended up to 31.10.2017 vide notification no. 44/2017-CT dated 13.10.2017

			day	2. Further Extended up to 30.11.2017 vide notification no. 52/2017-CT dated 28.10.2017
28	ITC-01	September 2017	30 days from the appointed day	1. Extended up to 31.10.2017 vide notification no. 44/2017-CT dated 13.10.2017 2. Further Extended up to 30.11.2017 vide notification no. 52/2017-CT dated 28.10.2017
29	ITC-04	Quarter from July -Sept 2017	25.10.2017	1. Extended up to 30.11.2017 vide notification no. 53/2017-CT dated 28.10.2017 2. Further extended up to 31.12.2017 vide notification no. 63/2017-CT dated 15.11.2017
30	GSTR-5	For the months from July 2017 to October 2017	20th of Next month	1. Due date extended up to 11.12.2017 for filing return by a non resident taxable person vide notification no. 60/2017-CT dated 15.11.2017
31	GSTR-5A	July 2017	20.08.2017	1. Due date extended up to 15.09.2017 vide notification no. 25/2017-CT dated 28.08.2017 2. Due date further extended up to 20.11.2017 vide notification no. 42/2017-CT dated 13.10.2017 3. Due date further extended up to 15.12.2017 vide notification no.61/2017-CT dated 15.11.2017
32	GSTR-5A	August 2017	20.09.2017	1.Due date extended up to 20.11.2017 vide notification no. 42/2017-CT dated 13.10.2017 2. Due date further extended up to 15.12.2017 vide notification no.61/2017-CT dated 15.11.2017
33	GSTR-5A	September 2017	20.10.2017	1.Due date extended up to 20.11.2017 vide notification no. 42/2017-CT dated 13.10.2017 2. Due date further extended upto 15.12.2017 vide notification no.61/2017-CT dated 15.11.2017
34	GSTR-5A	October 2017	20.11.2017	1. Due date further extended up to 15.12.2017 vide notification no.61/2017-CT dated 15.11.2017
35	GSTR-6	July 2017	13.08.2017	1.Extended up to 08.09.2017 vide notification no. 26/2017-CT dated 28.08.2017

				2. Further Extended up to 13.10.2017 vide notification no. 31/2017-CT dated 11.09.2017 3. Further Extended up to 15.11.2017 vide notification no. 43/2017-CT dated 13.10.2017 4. Further Extended up to 31.12.2017 vide notification no. 62/2017-CT dated 15.11.2017
36	GSTR-6	August 2017	13.09.2017	1. Extended up to 23.09.2017 vide notification no. 26/2017-CT dated 28.08.2017 2. Further Extended up to 15.11.2017 vide notification no. 43/2017-CT dated 13.10.2017 3. As per notification no. 62/2017-CT dated 15.11.2017 date of filing to be notified subsequently
37	GSTR-6	September 2017		1. Extended up to 15.11.2017 vide notification no. 43/2017-CT dated 13.10.2017 2. Date of filing to be notified subsequently as mentioned in notification no. 62/2017-CT dated 15.11.2017
38	GSTR-6	October 2017		1.Date of filing to be notified subsequently as mentioned in notification no. 62/2017-CT dated 15.11.2017

Now, we analyse the changes made vide notifications issued in the Central Tax (Rate)

Schedule of rates

The Central Government has classified the goods in six schedules with rates of 5%, 12 %, 18%, 28%, 3%, and 0.25% and notified them vide notification no. 01/2017-CT(R) dated 28th June, 2017 w.e.f 1st July, 2017. In fact, the rates are 2.5%, 6%, 9%, 14%, 1.5% and 0.125% for Central Tax and same for State/Union Territory Tax. Similarly, tax rates for supply of service has been notified vide notification no. 11/2017-CT(R) dated 28th June, 2017.

Goods and services exempted under section 11 (1) of the Act

In exercise of the powers conferred by section 11(1) of the CGST Act, the Government has exempted some 150 categories of goods from payment of tax vide notification no. 02/2017-CT(R). Similarly, 81 categories of services have been exempted from payment of tax vide notification no. 12/2017-CT(R) dated 28th June, 2017. Some more categories of goods and services have been added to the exempted list by way of notifications issued during this period. Vide notification no. 21/2017-CT (R), dated 21st August, 2017, services provided by a Fair Price shop to a Government and those provided by FIFA were also exempted.

Payment of tax under reverse charge under section 9(3) and 9(4)

The recipient shall have to pay tax on reverse charge if goods like cashew nuts, bidi wrapper, tendu leaves have been purchased from an agriculturist or if silk yarn is purchased from a manufacturer and on lottery if purchased from Government or Local Authority. In the same way, vide notification no. 13/2017-CT(R), reverse charge have been made applicable on 9(nine) services, some of which have been given below:

1) Transport of goods by road provided by a Goods Transport Agency
2) Legal services provided by an Individual lawyer or a firm of lawyer
3) Sponsorship services

4) Services provided by a Director to a body corporate

Vide notification no. 17/2017-CT(R), the electronic commerce operator have been made liable to pay tax on reverse charge basis on the services of transportation of passengers provided by a radio taxi, maxi cab etc. and on service of accommodation in hotels, guest house, inns etc. This notification was further amended by notification no. 23/2017-CT(R) dated 22nd August, 2017 and housekeeping services provided by a plumber, carpenter etc. were also included.

A major relief was given to the tax payers by way of notification no. 08/2017-CT(R) dated 28th June, 2017. Tax on reverse charge basis under section 9(4) was exempted on inward supplies if the aggregate value of supplies from all suppliers does not exceed five thousand rupees in a day. And vide notification no. 38/2017-CT(R) dated 13th October, 2017, the threshold limit of five thousand rupees per day was also removed and as such no tax is payable on reverse charge basis under section 9(4) of the Act till 31st March, 2018.

Refund of unutilised input tax credit

The Government has notified vide notification no. 5/2017-CT(R) dated 28th June, 2017,that refund of unutilised input tax credit shall not be allowed on supply of woven fabrics of cotton, wool, silk etc. and goods related to railway locomotives and tramways. Similarly, vide notification no. 15/2017-CT(R) dated 28th June, 2017, refund of unutilised credit has been blocked on supply of service referred to in item 5(b) of schedule II, i.e. construction of complex etc. intended for sale to a buyer.

Happy Ending

Various notifications have been issued to give effect to change in rates of taxes for goods and services and it is not worth to mention about all the notifications issued for reducing the rates of tax payable on supply on goods or services. But I would like to make a mention of Notification no. 46/2017-CT (R) dated 14th November, 2017 because it gave reason to smile to all the Indians who enjoy having food in restaurants, by reducing the rate from 18% to 5% on services provided by restaurants, other those located in hotels with declared tariff or 7500/- or more per day.

GST on Real Estate

Abhisek Tibrewal
Chartered Accountant

The real estate sector is the most sensitive section so far as tax impacts are concerned, especially the Indirect Taxes. Moreover, the impressions of the parallel economy over this industry have been deep and dark since ever. As also the real estate sector is vast and largely remunerative, it has been a target for revenue collections by the various Governments. Already under the State and Local Authority revenue hits, a large part of the exempted real estate sector was brought under the ambit of the then Service Tax levy with effect from the year 2010. Furthermore, a lot of States levied State VAT too on sale of under construction flats.

The implementation plans of Goods and Services Tax in India were seen with lot from apprehensions from the Real Estate players and there were expectations of a complete turnaround in this highly volatile sector. Are the expectations taken care of pretty well? Let's try and find the answers going through this article.

What is Taxable?

Real Estate Sector is mostly conceived to be sale and purchase of immovable properties in the common parlance. As we know Sale of Immovable Property is out of the ambit of GST levy, what exactly could attract taxation?

Goods and Services Tax is applicable on construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier. Construction also includes additions, alterations, replacements or remodelling of any existing civil structure.

It means that the service of construction is what is taxable. The taxability is limited to instances where a part of the sale consideration against the property to be sold is paid before or during the period of construction. To be precise, in cases where the entire sale value is received by the developer (i.e. seller), after the issuance of completion certification (by the competent authority), this would be a sale of immovable property and shall not be subject to GST. However, receipt of even a single penny before issuance of the completion certificate would make the total sale value leviable to GST. Tax is not applicable also in cases where the total value is received after any of the units in the constructed complex is occupied by the occupant.

This is however only one leg of the taxable transactions. The development models are quite varied and complex with multiple transactions accumulated into one principal leg. We need to understand the various models commonly in practice and thereafter ascertain the taxability effects.

Who is the Competent Authority?

For the purposes of issuance of completion certificate for the aforesaid provisions, the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:

(i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972; or

(ii) a chartered engineer registered with the Institution of Engineers(India); or

(iii) a licensed surveyor of the respective local body of the city ortown or village or development or planning authority.

It here becomes pertinent to understand that wherever the land laws mandate issuance of a Completion Certificate, the Competent Authority is only the Government or the authorised authority in this regards. The other specified persons can be considered as the Competent Authority only where the land laws do not need issuance of any completion certificate for projects in those areas.

Models of Development

There are various models prevalent for development of projects in the real estate sector. Each agreement and each project brings along with it a different and unique development model. A development model depends on various contexts such as the parties involved,

consideration criteria, intent of the parties involved etc. With each different model, taxation complexities are inbuilt and keep on growing. Some prominent development models and the taxability entailments on the same are discussed hereunder.

Development on Acquired Land

A highly capital intensive, it is a model of development practised mostly by land owners who are developers in themselves. As such the two major parts of this development model are that the Land is acquired by the developer and property is developed on this land with intention to sale the project. The land acquisition here is a transfer of immovable property and as such the said transfer is not subject to applicability of GST. The developed property is the only part which entails GST liability in the standard model.

Joint Development Models

Joint Development arrangement has emerged as the most popular model in the real estate sector. There are again various types of Joint Development Agreements wherein land owner and developer combine their resources and efforts. Under a typical joint development agreement, land owner contributes his land and enters into an arrangement with the developer to develop and construct a real estate project at the developer's cost. Thus, land is contributed by the land owner and the cost of development and construction is incurred by the developer. The land owner may get consideration in the form of either lump sum consideration or percentage of sales revenue or certain percentage of constructed area in the project, depending upon the terms and conditions agreed upon between them. In this manner, the resources and efforts of land owner and developer are pooled together so as to bring out the maximum productive result.

As the developer enters into a development agreement with land owner, the developer acquires the development rights with respect to the land.The agreement for transfer of development rights executed between developers and landowners involve payment of consideration by the developers to the landowners for transfer/acquisition of development rights. This being the first leg of the agreement, the agreement between the developer and ultimate purchaser of the developed units entails further tax liabilities. Such multiple involvements make a tripartite agreement and GST applicability can be discussed on a stage wise basis as follows:

- Transfer of Development Rights (TDRs) against monetary consideration
- Transfer of some flats to the landowner as a consideration for the development rights

TDR against monetary consideration

Where the Transfer of Development Rights is made by the Land Owner in hands of the Developer for certain monetary consideration, this can be regarded as a straight and simple provision of service by the land owner to the developer and the same shall be taxable under the GST laws without any abatement or exclusion or exemption for that matter. This service of procuring development rights in turn becomes an input service for the developer and the tax paid on the same becomes an eligible input tax credit.

However, there also is a contrary view on this point as to non-taxability of the transfer of development rights. The said interpretation is on the basis that all the activities specified in Schedule III under Section 7 shall be treated neither as supply of goods nor supply of services. Entry No. 5 of Schedule III covers sale of land. Further, according to various judgements passed by the Apex Court, the word 'sale' denotes transfer of title which is irrevocable and permanent. Hence 'sale of land' denotes 'transfer of title in land'. The word 'land' not just includes full title in land but also rights which gives benefits associated with it. Land development right is a right to carry out development or to develop the land or building or both. It is thus a benefit arising out of land included within the word 'land'. Hence, the expression 'sale of land' connotes 'transfer (irrevocably and permanently) of title in land including rights in the form of benefits arising from it'.

TDR against Constructed Units

Typically, in such a model, the land owner enters into an agreement with the builder, whereby, the land owner gives either land/development rights (to construct/develop a residential complex and sell flats/houses of such complex to buyers) to the builder. The builder/developer, in turn, agrees to assign a portion of the constructed area, in the form of flats in favour of the land owner. The remaining flats are sold by the builder/developer to various buyers. The builder/developer receives consideration for the construction service provided by him, from two categories of service receivers:

i. from landowner, in the form of land /development rights; and
ii. from other buyers, normally in the form of money.

Now the first leg of the transaction, i.e. service of the Transfer of Development Right from land owner to developer becomes seemingly difficult to be identified. In terms of value, there does not seem to be any fair and simple method of valuation and as the practice is being followed from the service tax regime itself, the said transfer relieves untaxed in general.

The prominent leg of transaction, i.e. the allocation of constructed units by the developer to the land owner, against the TDR brings along with it the most important

question of taxability and valuation. In the service tax regime, the value of such flats were determinable as per the prescribed guidelines and would be equal to the value of similar flats charged by the builder/developer from the ultimate purchasers of the other units. In case the prices of flats/houses underwent a change over the period of sale (from the first sale of flat/house in the residential complex to the last sale of the flat/house), the value of similar flats as were sold nearer to the date on which land is made available for construction would be used for arriving at the value for the purpose of tax. The same principle shall apply in the GST Regime also.

GST is liable to be paid by the builder/developer on the 'construction service' involved in the flats to be given to the land owner, at the time when the possession or right in the property of the said flats are transferred to the land owner by entering into a conveyance deed or similar instrument (e.g. allotment letter).

Joint Venture Model

Under this model, land owner and builder/developer join hands and may either create a new entity or otherwise operate as an unincorporated association, on partnership /joint / collaboration basis, with mutuality of interest and to share common risks and profits together.

Further, on the basis of the Supreme Court's judgment as to the meaning of joint venture, it was held that "the expression 'joint venture' connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses"

Accordingly, it may be construed that two or more entities undertaking a particular activity for mutual benefit would be treated as joint venture only when they are sharing risks and rewards. In other words, where no risks and rewards are shared, it cannot be called as joint venture. In such case, the transactions between the parties would constitute as transactions taking place between two different persons.

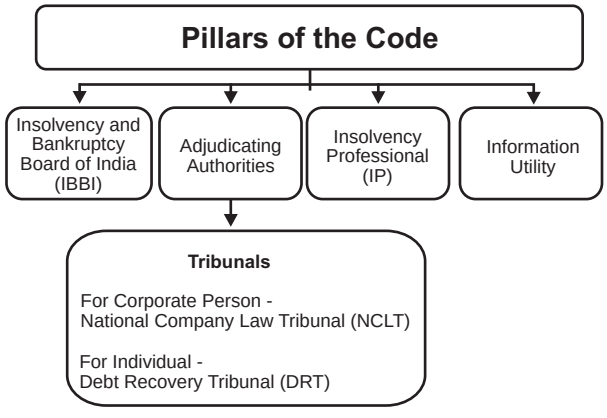
On a whole, here, the new entity undertakes construction on behalf of landowner and builder/developer. In such cases, the complete GST Implications are drawn upon the new emerged entity.

Pillars of Insolvency Code, 2016

Binay Kumar Singhania, FCA

The Insolvency and Bankruptcy Code, 2016 (IBC) is an important financial reform forIndia. This code helps revival of defaulting corporates and also protects creditors against defaulting borrowers. Section 6 of the Code empowers *all kinds of creditors* - financial and operational, bank and non-banktoinitiate corporate insolvency resolution process under Section 7 to 9 of Insolvency Bankruptcy Code, 2016.

A key innovation in the Insolvency and Bankruptcy Code, 2016 is the four pillars of institutional infrastructure.



First Pillar :

Insolvency and Bankruptcy Board of India (IBBI)

Insolvency and Bankruptcy Board of India is a regulator. This body has the regulatory over-sight over the Insolvency Professional, Insolvency Professional agencies and information utilities.

Insolvency and Bankruptcy Board of India (IBBI) was established by Central Government under Section 188(1) of the Insolvency Code, 2016 on 01-10-2016. CS Madhusudhan Sahoo being the first Chairperson.

CONSTITUTION OF THE BOARD

As per Section 189 the Board should consist of the following members:-

1. A Chairperson
2. Three members being officers of the Central Government (Joint Secretary rank or equivalent) to represent the Ministry of Finance, the Ministry of Corporate Affairs and Ministry of Law
3. One member nominated by the Reserve Bank of India;
4. Five other members as nominated by the Central Government, of whom at least three being the whole-time members.

POWERS AND FUNCTIONS OF THE BOARD

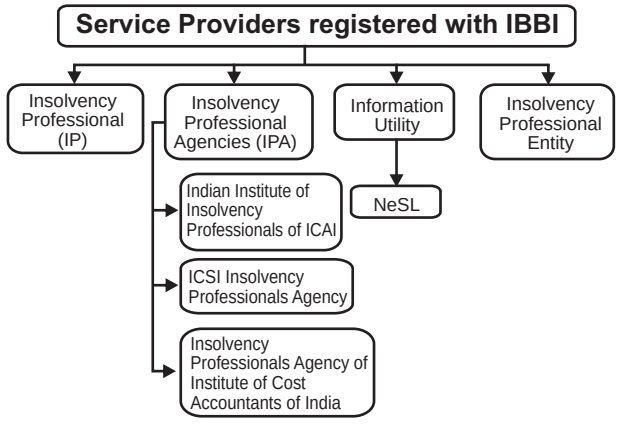
FUNCTIONS

1. **Register** Insolvency Professional Agencies (IPA), Insolvency Professionals (IP) and Information Utilities (IU) and renew, withdraw, suspend or cancel their registrations.
2. Carry out **inspections, investigations and monito**r the performance on IPA, IP or IU and pass orders as may be required for compliance of the provisions of the Code.
3. **Publish information**, data, research studies and other information as specified by regulations.
4. **Collect and maintain records** relating to insolvency and bankruptcy cases and disseminate information.
5. **Promote transparency** and best practices in its governance.
6. **Maintain websites** and universally accessible repositories of electronic information.
7. Conduct **periodic study, research** and audit the functioning and performance of to the IPA, IP and IU at intervals as specified by the Board

POWERS

1. **Specify the eligibility requirements** for registration of IPA, IP and IU.
2. **Levy fee or other charges**.
3. **Specify by regulations**, standards for the functioning of IPA, IP, IU.

4. **Lay down curriculum for the examination** of the insolvency professionals for their enrolment as members of the insolvency professional agencies;
5. **Call for any information and records** from the insolvency professional agencies,insolvency professionals and information utilities;
6. **Specify the mannerof collecting and storing** data by the information utilities and for providing access to such data;
7. **Enter into memorandum of understanding** with any other statutory authorities;
8. **Issue necessary guidelines** to the insolvency professional agencies, insolvency professionals and information utilities;
9. **Specify mechanism for redressal** of grievances against its members and pass orders relating to complaints filed against the aforesaid.



Second Pillar :

Adjudicating Authority

The National Company Law Tribunal (NCLT) will be the forum where Corpoarte insolvency will be heard and Debt Recovery Tribunal (DRT) will be the forum where individual insolvencies will be heard.

These institutions, along with their Appellate bodies, viz., National Company Law Appellate Tribunal (NCLAT) and Debt Recovery Appellate Tribunal (DRAT)adequately strengthen the institution to achieve world class functioning of the Insolvency and Bankruptcy process.

Third Pillar:

Insolvency Professional (IP)

The class of regulated persons, the 'Insolvency Professionals'play a key role in the efficient working of the Insolvency and Bankruptcy process.

Insolvency Professional means a person enrolled Insolvency Professional Agency (IPA) as its member and registered with the Board (IBBI) as insolvency professional.

WHO CAN BE AN IP?

An individual is eligible for registration, if he/she-

(a) has passed the **National Insolvency Examination**; or

(b) has passed **the Limited Insolvency Examination**,

Individual who has passed **Limited Insolvency Examination** should:-

a) have *fifteen years* of experience in management, after he/she has received a Bachelor's degree from a university established or recognized by law, or,

b) have *ten years* of experience as -

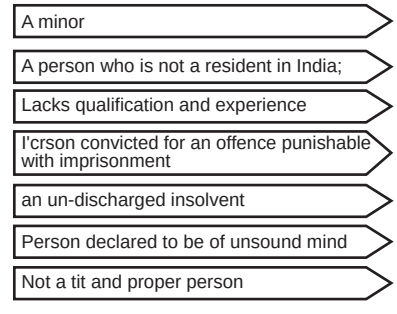
i. Chartered Accountant enrolled as a member of the ICAI,

ii. Company Secretary enrolled as a member of the ICSI,

iii. Cost Accountant enrolled as a member of the ICMAI,

iv. Advocate enrolled with a Bar Council.

Individuals not eligible to be registered as IP



PROCESS OF REGISTRATION OF IP

Person eligible to become an IP requires fulfilling the following criteria for registration with the IPA:-

1. has passed the National Insolvency Examination;
2. has passed the Limited Insolvency Examination, and has fifteen years of experience in management, after he received a Bachelor's degree from a university established or recognized by law
3. has passed the Limited Insolvency

Examination and has ten years of experience as

i. a chartered accountant enrolled as a member of the Institute of Chartered Accountants of India,

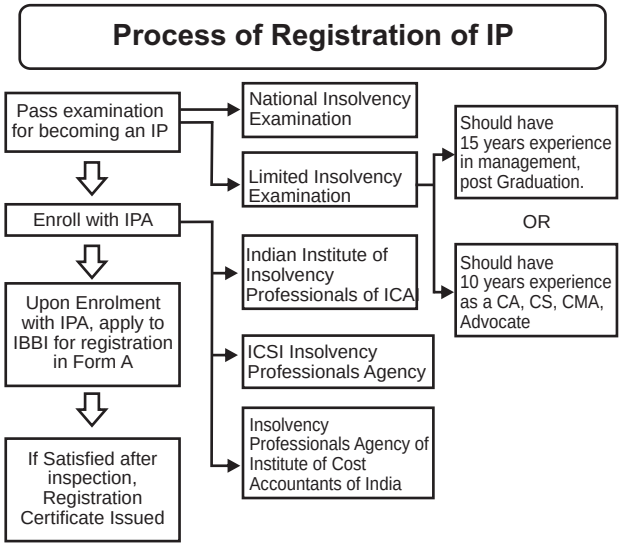
ii. a company secretary enrolled as a member of the Institute of Company Secretaries of India,

iii. a cost accountant enrolled as a member of the Institute of Cost Accountants of India, or

iv. An advocate enrolled with a Bar Council.

An individual enrolled with an insolvency professional agency as a professional member may make an application to the Board in Form A of the Second Schedule to these Regulations, along with a non-refundable application fee of ten thousand rupees to the Board.

The Board shall acknowledge an application made within seven days of its receipt. If the Board is satisfied after such inspection or inquiry as it deems necessary that the applicant is eligible, it may grant a certificate of registration to the applicant to carry on the activities of an insolvency professional in Form B, within sixty days of receipt of the application.



INDEPENDENT STATUS OF IP

As per Insolvency Professionals to act as Interim Resolution Professionals (Recommendation) Guidelines, 2017 dated 25th May, 2017. An IP may be recommended to act as an IRP if the following criteria are met.

1. not a related party of the corporate debtor
2. not an employee or proprietor or a partner of debtor
3. Is eligible to be appointed as an independent director
4. he has not been convicted at any time in the last three years
5. there is no disciplinary proceeding pending against him

INSOLVENCY PROFESSIONAL ENTITY (IPE)

A limited liability partnership (LLP), a registered partnership firm or a company may be recognised as an Insolvency Professional Entity (IPE) if:-

a) a majority of the partners of the LLP or registered partnership firm are registered as IP; or

b) a majority of the whole-time directors of the company are registered as IP.

CONDITIONS SUBJECTING THE RECOGNITION OF IPE

1. Continue to satisfy the requirements under Regulation 12, namely:-

   a) a majority of the partners of the LLP or registered partnership firm are registered as IP; or

   b) a majority of the whole-time directors of the company are registered as IP.

2. inform the Board, within seven days, when an insolvency professional ceases to be its director or partner
3. inform the Board, within seven days, when an insolvency professional joins as its director or partner

An insolvency professional entity is be jointly and severally liable for all acts or omissions of its partners or directors as insolvency professionals committed during such partnership or directorship.

INSOLVENCY PROFESSIONAL AGENCIES (IPA)

IPA is organizations enrolled with IBBI to perform the following functions:-

1. grant membership to persons
2. lay down standards of professional conduct for its members;
3. monitor the performance of its members;
4. safeguard the rights, privileges and interests of insolvency professionals who are its members;

5. suspend or cancel the membership of insolvency professionals who are its members on the grounds set out in its bye-laws;
6. redress the grievances of consumers against insolvency professionals who are its members; and
7. publish information about its functions, list of its members, performance of its members and such other information.

Fourth Pillar:

Information Utility (IU)

The code introduces a new institution, that is, `Information Utilities'.

The Information Utility, store facts about lenders and terms of lending in an electronically secured manner. They help in eliminating delays and disputes about facts when default takes place.

Information Utility means a person who is registered with the Board under section 210 of the Insolvency and Bankruptcy Code, 2016. Information Utilities is the institution that receives and store financial information in a universally accessible format which is authenticated by borrowers or creditors.

Therefore, in other words we can say that, ***Information Utility*** **is expected to provide the facility of information storage** for insolvency professionals (IP), DRT and NCLT to proceed with their roles in time bound manner in the matter of the financial contracts by storing facts of borrowing, default, dispute and security interest with required safeguards like:-

a) Authentication of the terms of contract,
b) Digital storage of information in a central server
c) Proper information security policies along with effective retrieval facilities

WHO IS ELIGIBLE TO BE AN INFORMATION UTILITY

Only a public company fulfilling the following criteria is eligible to an Information Utility:

1. Incorporated with an objective to provide core services and/or any other services as per Information Utilities Regulations.
2. Its shareholding and governance is in accordance with Chapter III of the code.
3. Its bye-laws are in accordance with Chapter IV of the code
4. It has a minimum net worth of Rs.50 crore
5. Promoters, its Directors, its Key Managerial personnel, and persons holding more than 5%, directly or indirectly of its paid-up equity share capital or its total voting power, are fit and proper.

COMPANY REGISTERED AS INFORMATION UTILITY

NeSL (*National E-Governance Services Limited)* is the first public company registered as Information Utility with IU Registration No. IBBI/IU/01.

NeSL got in principal approval from IBBI as information utility and finally on 25th of September, 2017.

This registration is valid for **five years** from the date of registration. **NeSL** has its registered office in Mumbai and its administrative Office in Bengaluru. It was incorporated as a Union Government company and owned by leading public financial institutions (PFIs). It is an information infrastructure institution dealing with critical financial information projects that aim at better serving the financial sector and its stakeholders, besides citizen-centric projects.

The Insolvency and Bankruptcy Code, 2016 - An analysis and Opportunities for Professionals under the Code

Deepak Jain
LL.M., Advocate

1.0 **Brief Introduction**: The Insolvency and Bankruptcy Code, 2016 (in short 'Code') is a landmark legislation consolidating SICA, 1985 and Companies Act, 2013. It is viewed as a 'Game Changer' and would have a long term impact on all stakeholders be it Banks, FIs, PSUs, Borrowers, Foreign Investors etc. The passing of the Code is an important milestone and paves the way for economic and banking reforms in the country. The Code has been fully implemented on and from 1st December, 2016 as most the Regulations governing Corporate Insolvency Processes, Insolvency Professionals (IPs), Insolvency Professional Agencies (IPAs) and the Liquidation Process have come into force. The Code offers a lot of challenges and opportunities to the professionals be it CAs, CS, lawyers and others.

2.0 **Historical Background**: The Code received Presidential Asset on 28th May, 2016 when the landmark Bill introduced in the Lok Sabha in November 2015 finally became an Act. The Code was enacted in the midst of soaring NPAs, falling GDP, bad credit perspective in the country and last but not the least the Mallya Saga. After issuance of the draft legislation various changes were made incorporating recommendations by the Joint Parliamentary Committee (in short 'JPC') in April 2016 after which the Code was passed in Lok Sabha on 9th May, 2016 and by the Rajya Sabha on 11th May, 2016. The approach towards passage of Bill together with efforts of JPC are praiseworthy and reflects the intent of Government to streamline the locked credits of Banks and resolve the NPA issue in our country. Most praiseworthy is the work by the Bankruptcy Reforms Law Reforms Committee who made the draft law with utmost precision which not only has clarity but also has a forward vision.

3.0 **Why this law and other legislative changes have been made?** Corporate insolvency related issues have assumed greater significance in light of the 'Mallya Saga'. The events clearly exposed the legal framework which could not arrest the misdemeanour. India is opening up internationally and concepts like '*Make in India*', '*Ease of doing business*' and others have been implemented to achieve popularity and for a favoured investment destination. Further, to meet international standards radical changes were made in October, 2015 in Indian Arbitration Law. Bankruptcy Code was also brought in December, 2015 in line with international laws. Further, key legislations like SARFAESI and RDDBFI Acts have been amended in June, 2016 to be more lender specific.

4.0 **Existing legal framework before IBC and Challenges**: Existing laws governing Revival, Rehabilitation, Restructuring are covered under Sick Industrial Companies Act (SICA) and Companies Act (Winding Up). The Code consolidates and amend laws relating to revival, restructuring and winding up of the sick or debt oriented industries and companies as well as time bound resolution of corporate and individual bankruptcy. In short it is mother of all laws.

Before the implementation of Code, the legal system and remedies were available under SICA, SARFAESI, Companies Act and other laws i.e. provisions relating to Winding Up, Suits, Arbitration and JLF/CDR. These often turned out to be inadequate, fully effective, non-implementable, costly and cause undue delays in recovery and resolution process. The parties involved took shelter under either of these laws as a result of which remedy pursued becomes unachievable. Four different forums i.e. High Courts, CLB (now NCLT, effective from 1.6.2016), BIFR and the DRTs, with overlapping jurisdiction gave rise to the systemic delays and complexities in the process of recovery.

5.0 **How Code overcomes the existing Challenges?**

- The Code seeks to overcome the existing challenges by restricting the choice of forum to National Company Law Tribunal (NCLT);
- Once a case is filed under the Code, all avenues under other legislations in force are closed during moratorium period.
- Code brings all the stakeholders to one platform to complete a resolution process within a definite time frame, failing which liquidation process initiates.
- NCLT / NCLAT as a focussed forum would deal with cases under the Bankruptcy Code as well as the Companies Act, 2013.
- With Code coming into effect SICA repeal was proposed and w.e.f. 1.12.2016, the SICA Act has been repealed; as a result both forums BIFR and AAIFR stand dissolved.

6.0 **What Code seeks to achieve**?

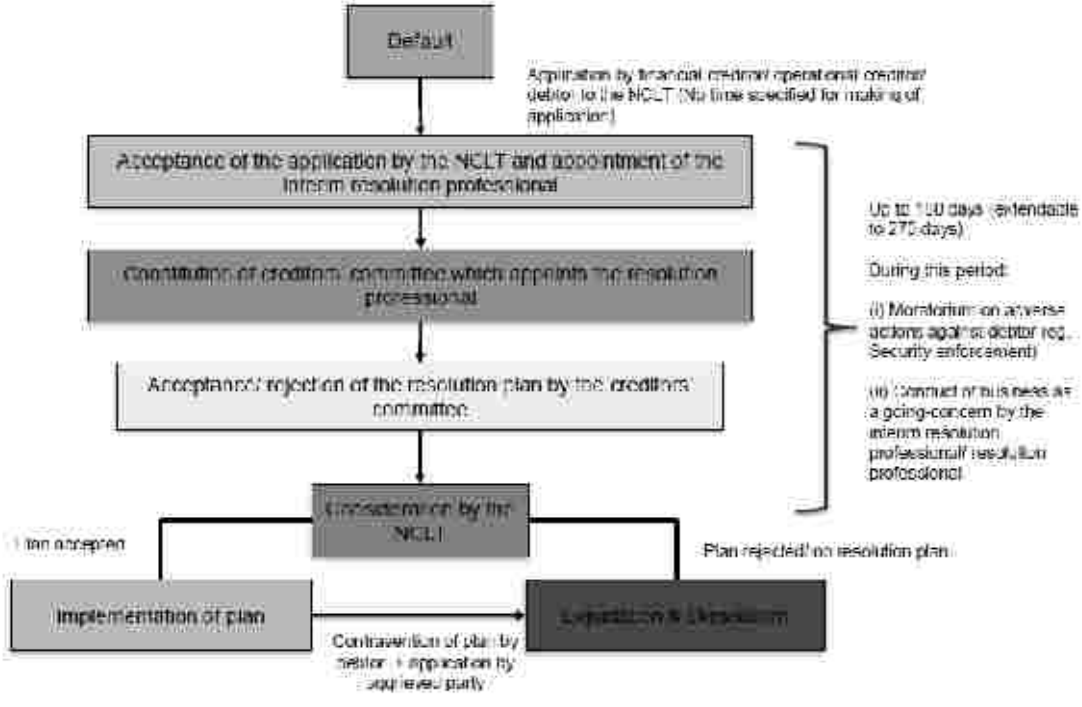
- ❖ Code refurbishes prevailing bankruptcy laws and it is expected to:
- improve ease of doing business in India;
- change the negative perception of recovery and litigation in India;
- facilitate better & faster debt recovery process for maximizing asset value;
- facilitate stress-free and time-bound closure of businesses;
- improve foreign investment and credit perspective;
- facilitate investment leading to higher economic growth and development.
- ❖ Average time to resolve insolvency process in India is more than 4 years - Code seeks to cut down the time to less than a year

7.0 **Some key features in the Code**:

➢ **Applicability**: The provisions of the Code are applicable to companies, limited liability entities, firms and individuals (i.e. all entities other than financial service providers). Corporate Insolvency includes two processes within its ambit, (i) Insolvency Resolution and (ii) Liquidation.

➢ **Who can initiate a corporate insolvency case under the Code**: The corporate insolvency resolution process ("CIRP") can be initiated by the corporate debtor itself, the financial creditors or operational creditors. For the purpose of the Code, financial creditors and operational creditors include persons resident outside India. A case can be filed if there is a default of Rs. 1 Lakh (minimum value prescribed can be increased to Rs. 1 crore by notification) for any debt.

➢ **Corporate Insolvency Resolution Process:**



During this process, an IP in his capacity as a resolution professional is required to manage the affairs of the corporate debtor and to drive the resolution process, while the powers of the board of directors of a company and/or managers of a LLP remain suspended.

➢ **Committee of Creditors (CC)**: The Committee shall include the financial creditors and their voting rights shall be proportionate to the debts owed to them. All decisions of the Committee shall be taken by a vote of not less than 75% of voting share of Financial creditors. Operational creditors will have no decision making authority but have a right to be present in the Committee meetings. CC will have a dominant position for all actions under the Code including passing or rejecting a resolution plan. They can resolve to liquidate the corporate debtor during the insolvency resolution process [sec. 33(2)].

➢ **Timelines**: Section 12 of the Code provides that Corporate insolvency applications are to be decided within 180 days from date of admission or the insolvency commencement date. This can be extendable only once by additional 90 days and

possible only when the committee of creditors pass a resolution by a vote of 75% of voting shares and when NCLT is satisfied with reasons for such extension. Strict timelines have been provided with a view to provide certainty to the process. [refer sec. 12 read with sec. 5(14) read with sec. 5(12)]. To maintain timelines it is imperative that NCLT/NCLAT are sufficiently equipped with sufficient number of Members, administrative support and infrastructure.

➢ **Moratorium and its effect**: Section 14 of the Code provides that from date of admission or the insolvency commencement date, NCLT shall grant moratorium during which any creditor action will be stayed. Hence:

(i) all civil proceedings i.e. Arbitration, Suits, Execution, Sarfaesi, DRT action will stand dissolved including the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(ii) Debtor is prevented for transferring / alienating assets / properties.

(iii) Sarfaesi action had priority over winding up and other insolvency action; but with the moratorium chipping in Banks and FIs, loose the Sarfaesi advantage.

A creditor can realise its security interest u/s 52(1)(b) after initiation of liquidation process i.e. after completion of resolution process (may be 180 days or max 270 days), however, for such time assets will be idle.

➢ **Corporate Liquidation kick starts on**

a) no resolution plan is received by NCLT [sec. 33(1)(a)];

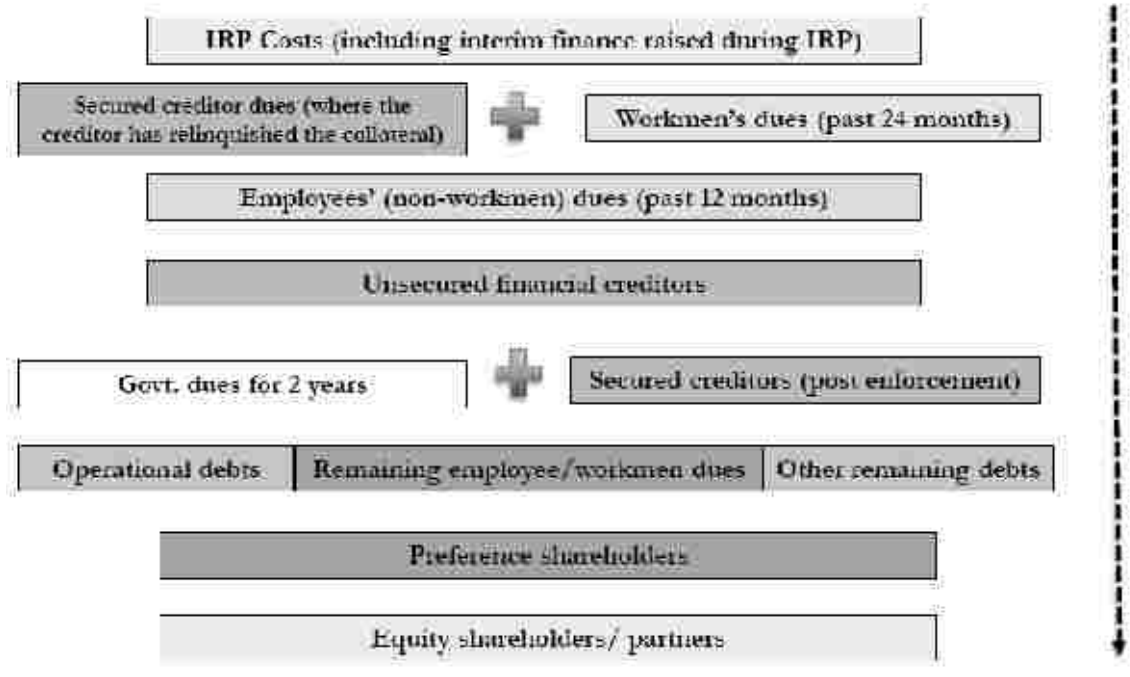
b) resolution plan is rejected by NCLT [sec. 33(1)(b)];

c) there is a contravention of the resolution plan [sec. 33(3)]; and

d) Based on vote of majority of the creditors [sec. 33(2)].

For the purpose of the liquidation process, a Liquidation estate will be formed after liquidation order u/s 33 of the Code which shall include assets of the debtor.

➢ **Liquidation Estate and Scheme of Distribution**: Assets of Debtor will form part of the liquidation estate and distribution will take place as per Scheme of Distribution as follows:



In liquidation, the secured creditor can relinquish its security u/s 52 of the Code.

➢ **NCLT / NCLAT:** National Company Law Tribunal (NCLT) shall be the Adjudicating Authority for companies, LLPs. Appeals shall lie to National Company Law Appellate Tribunal (NCLAT). NCLAT would also deal with orders passed by the Regulator with respect to IRPs/ RPs. Ministry of Corporate Affairs vide notification dated 1st June, 2016 has constituted the NCLT / NCLAT as a result of which Company Law Board (CLB) stands dissolved [sec. 466 of CA 2013]. NCLT has been constituted with eleven Benches, two at New Delhi and one each at Ahmedabad, Allahabad, Bengaluru, Chandigarh, Chennai, Guwahati, Hyderabad, Kolkata and Mumbai. Timely and speedy justice with a focussed approach is expected in time to come.

➢ **DRT / DRAT :** The Debt Recovery Tribunal (DRT) shall be the adjudicating authority with jurisdiction over individuals and partnership firms other than LLPs.

Appeals therefrom would lie before Debt Recovery Appellate Tribunal (DRAT).

- **Insolvency and Bankruptcy Board of India**: The Board has been set up as the Regulator to regulate the Insolvency professionals and insolvency professional agencies.
- **Insolvency Professionals :** Insolvency professionals and insolvency professional agencies shall play leading role in the implementing the Code.
- **Insolvency Information Utilities** would collect, collate, authenticate and disseminate financial information from listed companies, financial and operational creditors of companies. Individual insolvency database will also be set up to prevent serial defaulters from misusing the system through information utilities.
- **Cross border insolvency**: Considering various corporate transactions including foreign investments and collaborations as well protecting country's interest in view of the Mallya Saga, the Code attempts to address this by including provisions for cross border insolvency.
  - ✓ Definition of 'property' under the Code includes '*money, goods, actionable claims, land and every description of property situated in or outside India'*.
  - ✓ Central Government can enter into agreements with any country outside India for enforcing Code.
  - ✓ Assets of the debtor located outside India (in countries with whom India has reciprocal arrangements) may also be included in the Insolvency Resolution Process and/or liquidation.
- **Some important concepts / definitions**:

"Default" means non-payment of **debt** in whole or part / instalment of the amount of debt which has become due and payable and is not repaid [refer sec. 2(*12*)]

"Debt" means a liability or obligation in respect of a claim and includes a financial debt and operational debt [refer sec. 2(*11*)]

"Claim" means a right to payment or a right to remedy for breach of contract, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured [refer sec. 2(*6*)];

'Dispute' includes a suit or arbitration proceedings [refer sec. 5(6)]

Personal Guarantor means an individual who is surety in a contract of guarantee to a corporate debtor [refer sec. 5(22)]

'Related party' means and includes director, partner, their relatives, key managerial persons (KMP), covers parallels and all levels to a corporate structure be it holding, subsidiary, associate company or a subsidiary of holding company, control through conduct, voting rights, 20% control over voting rights in or by a CD, amongst others. [refer sec. 5(24)]

"Financial Creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to [sec. 5(7)]

"Financial Debt" [sec. 5(8)] means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes-

(*a*) money borrowed against the payment of interest; …..

(*d*) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease;

(*h*) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit etc. issued by a bank or FI;

(*i*) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (*a*) to (*h*) of this clause;

8.0 **Code expected to improve propel Foreign Investments**: The Code with the avowed objectives of time bound corporate insolvency process and recovery, will gain foreign investments and attract the international investors to grow their investments in India. While enactment of Code will be a window opener for foreign investments, on ground and proven results of effective functioning of processes envisaged under the Code coupled with active and speedy functioning of NCLT/NCLAT will be a key factor to attract and sustain foreign investments in India.

9.0 **Individual Bankruptcy:** Part III of the Code sets out the legal regime dealing with the insolvency mechanism for individuals and partnership firms and includes within its ambit, 3 processes, namely, the 'fresh start process', 'the insolvency resolution process' and 'bankruptcy'. A case can be filed if there is a default of Rs. 1,000 (minimum value prescribed can be increased to Rs. 1 Lakh) for any debt (other than secured debt and 'excluded debt').

The process of resolving insolvency is similar for firms and for individuals as it is for Corporate Insolvency. In the case of individuals, however, the final resolution plan must have the consent of the debtor. As a new concept, an application for a fresh start process, can be made for any debt (other than secured debt, debt which has been incurred 3 months prior to the date of application for fresh start process and any 'excluded debt'). This is for small debtors whose gross annual income is less than Rs. 60,000/- and aggregate value of assets does not exceed Rs. 20,000/-.

Post declaration as Bankrupt, an individual shall not become director of any company, or take part in any affairs of the company, shall not create any charge on

any asset and shall not be allowed to travel overseas [refer sec. 141 of the Code]; Restriction on overseas travel of bankrupt person, may require consequential provision in the Passport Act.

10.0 **Whether Personal Guarantee or Corporate Guarantee can be invoked under the Code in case where application is filed against the Corporate Debtor?** As per section 60 read with sec. 5(8) and sec. 79(14), in case of default by a Corporate Debtor (Borrower), both Corporate Guarantee and Personal Guarantee can be invoked as there is no restriction or prohibition for such invocation. U/s 5(8)(h) and 5(8)(i) definition of the term "Financial Debt" includes amount of any liability in respect of any of the guarantee or indemnity for any items u/s 5(8) – Hence, Corporate Guarantee can be invoked and is covered in case of CIRP.

U/s 79(14) excluded debt includes (a) Liability to pay damages for negligence or breach of statutory or contractual legal obligation and (b) Liability as a Surety in a contract of guarantee to a CD. Excluded debts are not included in the qualifying debts. Hence, Personal Guarantee can be invoked and covered under CIRP. It is also relevant to note that Discharge order in relation to a Bankrupt does not discharge the Bankrupt from the excluded debts i.e. where such debtor is a Surety or a Guarantor. [Refer Proviso (c) to sec. 139(1)(b) and sec. 94(3)]

11.0 **Opportunity for Professionals**: Advocates / lawyers, Chartered Accountants (CA), Company Secretary (CS), Cost Accountants or Valuers, shall have a lot of opportunities under the Code. Professionals dealing with winding up, restructuring, rehabilitation and revival of companies, can gear up to become Insolvency Professionals (IPs) and practice under the Code as IPs i.e. to manage the affairs of the company / LLP. The IPs can also do ancillary work arising out of the Code which include:

(i) Working out voting share or voting rights of the lenders / creditors;

(ii) Valuation of securities held by the lenders / creditors. This is required at the time of making application under the Code;

(iii) Valuation of assets including properties, stock, securities at the time of making of resolution plan, liquidation etc [refer sec 247 of CA, 2013];

(iv) Drawing the information memorandum and resolution plan [sec. 29 and 30];

(v) Advisory, Due Diligence and others to IPs or Creditors reg whether any transaction is a Preferential transaction u/s 43 and 44 of the Code. Corporate Debtor / Borrower shall be deemed to have given a preference, if (*a*) there is a transfer of property or an interest thereof of the borrower for the benefit of a creditor or a surety or a guarantor to square up its debt; and (*b*) such transfer puts the such creditor or a surety or a guarantor in a beneficial position than it would have been in case of distribution of assets made u/s 53.

(vi) Advisory, Due Diligence and others to IPs or Creditors reg whether any transaction is an undervalued transactions by way of gift [Sec 45 to 48].

(vii) Advisory, Due Diligence and others to IPs or Creditors reg whether any transaction is a Fraudulent and Extortionate transaction [Sec 49 and 50]

(viii) Professionals are likely to have an opportunity to run as Information Utility centres, just like TIN-NSDL facilities, in order to facilitate uploading of data relating to contracts, invoices / Bills, agreements and others.

12.0 **Registration as IPAs, IPs and Regulations governing them**: To act and practice as an IP, professionals shall have to register themselves with the Insolvency Professional Agencies (IPAs) and get themselves registered with the Insolvency and bankruptcy Board of India (Board). IPs and IPAs shall be governed by the notified Regulations issued with respect to IPAs and IPs. An IP has key responsibilities in various processes such as corporate insolvency resolution process, individual insolvency resolution process, liquidation of a corporate debtor, individual bankruptcy process under the Code. The IPs or professionals desirous of becoming IPs should go through the Code and the following Regulations:

Regulation	Notification Date	Effective Date
IBBI (Insolvency Professional Agencies) Regulations, 2016	21.11.2016	21.11.2016
IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016	21.11.2016	21.11.2016
IBBI (Insolvency Professionals) Regulations, 2016	23.11.2016	29.11.2016
IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016	30.11.2016	01.12.2016
Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016	30.11.2016	01.12.2016
IBBI (Liquidation Process) Regulations, 2016	15.12.2016	16.12.2016

The two regulations i.e. IPAs and its Model Bye Laws inter alia provide for the eligibility norms to be a Professional Member of an Insolvency Professional Agency and also for eligibility norms to be registered with the IBBI as an Insolvency Professional Agency.

A company registered under section 8 of the Companies Act, 2013 with a minimum net worth of Rs. 10 crore shall be eligible to be an IPA. More than half of the directors of its Board shall be independent directors and not more than one fourth of the directors shall be insolvency professionals. It shall have Membership Committee(s), Monitoring Committee, Grievance Redressal Committee(s), and Disciplinary Committee(s) for regulation and oversight of professional members.

13.0 **Eligibility of professionals to become IPs**: The following categories of individuals are eligible for registration as an insolvency professionals:

(a) Advocates, CAs, CS and Cost Accountants with 10 years' of post-membership experience (practice or employment) or a Graduate with 15 years' of post-qualification managerial experience, on passing the Limited Insolvency Examination.

(b) Any other individual on passing the National Insolvency Examination.

However, Advocates, CAs, CS and Cost Accountants with more than 15 years' of practice experience have sought registration for the limited time period of 6 months, without any examination, with applications made before 31.12.2016.

There shall be a 'National Insolvency Examination' the details of which will be specified through regulations. There shall also be 'Limited Insolvency Examination'. The syllabus, format and frequency of the 'Limited Insolvency Examination', including qualifying marks, shall be published on the website of the Board at least one month before the examination.

A limited liability partnership, a registered partnership firm and a company may be recognised as an insolvency professional entity if a majority of the partners of the limited liability partnership or registered partnership firm or a majority of the whole-time directors of the company are registered as insolvency professionals under the Code. An insolvency professional may use the organisational resources of a recognised insolvency professional entity subject to the condition that the entity as well as the insolvency professional shall be jointly and severally liable for all acts of omission or commission of its partners or directors as insolvency professionals.

Further, the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 prohibit an insolvency professional from acting as a resolution professional for CIRP of a corporate debtor if he is not independent of the corporate debtor. These prohibit partners or directors of an insolvency professional entity of which the insolvency professional is a partner or director from representing other stakeholders in the same CIRP. These oblige the IP to make disclosures - initial and continuing - if he has any pecuniary or personal relationship with any of the stakeholders entitled to distribution of assets.

15.0 **Conclusion**: While rest of the world already have unified insolvency laws, a good insolvency regime was missing in India. Para materia to SICA, the Code prevents premature liquidation of sustainable businesses. A firm suffering from bad management choices or a temporary economic downturn may still be turned around, and hence this Code and the provision relating to moratorium. The legislation is a pathbreaking step and viewed as a 'Game Changer', however, it will be able to change the negative perception of NPAs, recovery and litigation associated with India only when truly implemented in letter and spirit. At present, we see that even after judgment or orders or Arbitration awards, execution and implementation is a challenge and actual recovery cannot be achieved. SARFAESI to a certain extent provides a scope to realise value of the securitised assets, however, there are issues relating to possession of immovable property u/s 14 of SARFAESI. Role of professionals, be it lawyers, CAs, CS, cost accountants or valuers, shall have to play a major role in making the turn around possible. The Code is the right step towards the much awaited economic and banking reforms in the country.

Law is the mirror image of the society which we have built...Let's look at IBC

Dr. (h.c) Mamta Binani
Immediate Past President of ICSI

India lacked a robust and comprehensive insolvency & bankruptcy framework for many years. The law relating to individual insolvency was developed by the courts under the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 whereas the law relating to corporate insolvency was governed by the Companies Act.Due to the unsatisfactory state of affairs, few other legislations like the Sick Industrial Companies (Special Provisions) Act, 1985 the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 were added to the statute book to address the loopholes which existed in the bankruptcy framework which were exploited by the vested interests.

Payable when able concept is no more the guiding force. Some of the corporates had made it a practice that more than half of its working capital was met within by not making timely payments to the trade/operational creditors. Not anymore. For such creditors, who were moving towards hopeless end are now in the era of endless hope. In almost every 2 applications filed with the National Company Law Tribunals, 1 is filed by an operational creditor.

The Code is already a year old and has celebrated its first birthday on 01.12.2017. As on this day, more than 450 cases are undergoing processes under this Code. There have been various issues settled through different judgements, made by the Hon'ble Supreme Court, the National Company Law Appellate Tribunal and the different benches of National Company Law Tribunals. In this article, some of the decisions are being highlighted to act as a ready reckoner.

The Hon'ble Supreme Court by the judgement of *Kirusa Software*, gave 'dispute' a much wider connotation.

The issue of repugnancy of laws was settled by the judgement delivered in the case of Innoventive Industries where the non-obstante clause vide section 238 of the Code gave powers to the Code to have overriding effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

The case decided in the matter of Hotel Gaudavan made it amply clear that institution of suits after moratorium on the Corporate Debtor is not allowed.

The matter decided by the Hon'ble Supreme Court in the case of Shilpi Cables made it clear that the demand notice under section 8 of the Code can be issued by the Advocates/professionals if authorised and that the certificate from Banks is not a pre-requisite for filing of applications under section 9 of the Code.

In the matter of Sree Metaliks Limited, the Hon'ble High Court observed that even though NCLT is not bound to follow the code of civil procedure, it can regulate its procedure subject to the provisions of section 424 of the Companies Act, 2013, which requires adherence to the principles of natural justice.

There has been a major sprout in the Code when we witnessed the Order of Neelkanth Township, Speculum Plast and that of Black Pearl, which delved into the issue of the applicability of Limitation Act, 1968. The understanding that flowed was, inter-alia, this Code is not a recovery law and that the limitation act will therefore be not applicable. In the case of Black Pearl, it also mentioned that the clock starts ticking from 01.12.2016 (the date on which the Code became applicable) for the cases which are old. To make it simple, let an example be given. If a trade creditor had supplied goods in 2010 and has not been able to realise its money and that the law of limitation is now stopping him to do so, in the civil courts, it can take the help of this Code.

When the loan has been availed by a Company under a consortium and if one lender from that consortium would like to invoke the provisions of IBC by filing an application singly, there is no need to take a nod or a no-objection from the other lenders of the consortium. This came out amply clear from the judgement of Innovative Industries.

The law explicitly allows joint application in the case of financial creditors, be it secured or unsecured but in the case of operational creditors, there cannot be joint applications. The matter of Uttam Galva was the one which brought out this clarification. The case of Era Infra Engineering made it amply clear that issuance of demand notice is a must under section 8 of the Code and straight away an application cannot be made under section 9 of the Code.

There have been situations when applications have been made by financial creditors and the application has been admitted by the Adjudicating Authorities, after which the Corporate Debtor has made good the default of the financial creditor(s) in question. The said Corporate Debtor have knocked the doors of the Adjudicating Authorities to reverse and rescind the CIRP process, praying for reversal of the process of CIRP. There are no provisions in IBC which gives the said power of reversal to the Adjudicating Authorities. In few such situations, the aggrieved made an appeal to the Apex Court and the said Court has in a first of its kind in the matter of Lokhandwala Kataria case, invoked the provisions of Article 142 of the Constitution of India and granted the asked relief to the Corporate Debtor. The Supreme Court explicitly mentioned that each case is different and the NCLT's and NCLAT's cannot draw parallels from this judgement and they due to the absence of explicit powers in the Code, cannot, give this relief. However, in the matter of Uttara Foods & Feeds Private Limited, the Supreme Court while granting a similar relief made a mention that instead of such matters coming to Supreme Court, the relevant rules be amended by the Competent Authority so as to include such inherent powers for the Adjudicating Authority.

There have been several discussions going on with regard to the applicability of the protective umbrella of moratorium vide section 14 of the Code. In the credit scenario, it is seen that the assets of other companies and promoters are also mortgaged by way of a corporate guarantee and personal guarantee. In the matter of Alpha & Omega Diagnostics matter, it was adjudged that the moratorium is only on the assets of the Corporate Debtor.

The very concept of time value of money was reverberated by the judgement made in the case of AMR Infrastructure, which helped to settle many differences arising out of complex instruments of raising money and whether those instruments were in the manner and nature of being investments or were in the nature of loan.

The judgement of Neeta Chemicals showed to the world that section 10 cannot be held for abusive purposes and if a company files it to abuse the process of law, the Adjudicating Authority will come in its way to block the ill thought plan.

And if the readers of the IBC thought that the Adjudicating Authority shall give its approval for an extension beyond 180 days for another 90 days because the Committee of Creditors have passed an unanimous approval towards the need of extension, the readers are being made aware that it is not mandatory for the Adjudicating Authority to do so. In the case of REI Agro, the NCLT did not give an extension on grounds laid out in the judgement, even if the CoC had sought for extension.

There have been various changes brought in by different notifications and clarifications. The insolvency Ordinance dated 23.11.2017 has been a game changer for the Insolvency & Bankruptcy Code, 2016.

1) if a promoter has not been designated wilful defaulter, he should be allowed to bid for his company, which is the basic spirit of the IBC code. But a clause which mentions that promoters who have given their enforceable guarantees cannot put in their bid stops even the non-wilful defaulters to bid. There have been several such cases prior to the embarking of the Ordinance, where the Bankers in the Committee of Creditors have mentioned categorically that they would like the corporate debtor only to bring the resolution plan because they know the business well and as the bankers knew firmly that the reasons for failure has been totally out of control of the promoters. As because section 25(2)(h) of the IBC, 2016 mandated the Resolution Professionals to invite for plans, the process of opening it for bidding was compulsory.

The Ordinance somewhere has blurred the line between wilful and non-wilful defaulters. Since the Code allows the creditors to initiate IBC even if there is a single day's default, the cases of debarment of 1 year plus NPA may be a breather but due to the guarantee clause, the corporate debtor and the promoter and connected persons are all stuck. The Banks now need not even wait for the account to become an NPA. The Ordinance also mentions that the full amount be repaid before the plan is to be brought in by the corporate debtor. This needs more clarity. The Banks recall the whole amount after the account is declared as an NPA. How will it be possible to pay up the full recalled amount as the cash-flows are in distressed situation. The reason for getting the IBC triggered is insufficient cash

flows. This should probably be the pending interest amount to be paid up before bringing in the resolution plan.

Many NPA's have been caused by external factors as there has languishing demand for goods and services, delays in statutory clearances, coal mine cancellations, cheap imports from China etc. and the brunt should not be falling on the genuine promoters for this.

Another pertinent aspect is can during the insolvency process, some of the creditors be paid and the others remain to be unpaid. Resolution process, be it triggered by anyone, after it comes into being becomes a representative action and no particular creditor should be allowed to be paid over the others.

2) any business venture is a risk venture and the promoter and the bank equally take the risk together. If external factors have caused a business to fail, the promoter should not be blamed. Before the Ordinance, there was this notification dated 07.11.2017 of The Insolvency & Bankruptcy Board of India after which literally all cases were getting subjected to Forensic or Investigative Audit. These reports were showing whether there has been systematic flaws, misfeasance and fraudulent leakage/ transfer of funds or not and the CoC were getting enough ammunition in its armour to take a call on such cases.

The concept mooted by this Code was failure is also a part of entrepreneurship and if such a failure is a genuine one, the said failure should be given a second chance to uplift itself and be a part of the society. This concept could be truly upheld by the Ordinance if this part of genuine failures is given a suitable place.

3) we are talking about start up india, almost 95 per start ups fail, if we start to invoke personal guarantees of promoters and entrepreneurs, no one will dare to take business risks and we will kill entrepreneurship.

4) almost 70% companies don't have any bidders except the promoter himself, all will go to liquidation causing mass scale loss of jobs. If at all there is an apprehension in the minds of the stakeholders/creditors that the promoters is trying to get the company at a relatively lower price by using this mechanism, the CoC may like to put in a firm word that it will not allow any haircuts. The CoC then will have to restructure the term of the loan and allow a wider spread for repayment. But to put all the promoters in one common line of firing may not be an appropriate manner to deal with the situation.

It has also been seen in several cases that the promoters had been struggling hard to get their accounts restructured, but in vain. The IBC could help the Bankers to finally restructure these accounts, by way of a resolution plan.

5) the creditors in the CoC should also be looking into the interests of the other stakeholders like the operational creditors and the Government Dues in the resolution plans and should be giving preference to such plans which aptly covers all stakeholders rather than just going by the waterfall mechanism.

The Ordinance is well intentioned and it needs a more horizontal and vertical thinking into it. There could be carve-outs and sieving between the genuine failures with the ingenuine ones which is absolutely necessary. Or else, the entrepreneurship stint and the risk taking ability of the businesses will be turning into a cave of fear.

While on the subject, let me delve on few more points:

a. Because of IBC, the debt market will get a boost and will emerge strong. The money stuck into the system is getting released and becoming a part of the ecosystem by coming back to circulation. In times to come, the money will become cheaper and its availability at better rates will help flourish entrepreneurship.

b. There are the recovery laws still available in the system. The stakeholders are at free will to still choose those. IBC is based on the concept of resolution and not recovery.

c. In the U.S laws, group insolvency concept is there, for example, in the matter of Enron. In the Indian Law, that is still to be brought into the framework.

d. There are major concerns hovering around the 'liquidation value'. The Committee of Creditors have been witnessing that the bids have been sticking around the liquidation value, whereas the company in CIRP is being taken over or bought by the bidder as a going concern and hence the bidder should be offering close to 'enterprise value'. The purpose of ascertainment of liquidation value is to find out the share of dissenting creditors and that of the money available for the operational creditors, but somehow this has been considered as the benchmark by the bidders. To break from this, the lenders have now started to give a mandate to the same valuers to also ascertain the 'enterprise value' and make that valuation known to the bidders as a part of the 'Information Memorandum'.

e. The crucial part of the Code is to keep the corporate debtor/company as a going concern. Availability of interim finance inspite of the Code mentioning it as a priority payment is a huge concern. The Government is working on the same and this is going to help the said companies to protect its valuations and will also enable it to do normal business.

f. The liability under the head of MAT is a very vital discussion point which has grabbed the attention of the policy makers and it is expected to get some clarity very soon, as the big 12 cases is moving towards resolution and everywhere this issue is in prime focus.

g. The other issue which is taking the attention is that of the requirement of various regulatory approvals, e.g. mining approvals, licensing approvals, CCI approvals etc. in cases of takeover in such distressed situations. With change in management and control, there would be these approvals which needs to come in. How will that be facilitated and the process and timelines involved in it has been a point of discussion in the industrial corridors.

h. Last but not the least, this Code has forced a change in the mindset of various stakeholders in a company. That the purchasers cannot just vanish once the supply is made. The suppliers will also have to keep a strong vigil on its various rights and remedies available. The concept of reasonableness has been in use like never before. If there is a defect in the goods or services supplied, the purchaser cannot just sleep over it for days and months together and revert on it on fine morning. The work orders/invoices/agreements etc. should have explicit timelines and each side have to be careful with it. Canards can no more be the norm.

This Code has unleashed lot of its wisdom and with more and more usage, the Code is going to settle many issues. Justice Benjamin Cardozo's said, 'It is when the colours donot match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins.' In such a situation, according to Cardozo the Judge has to draw inspiration from the reading of life.

Scampering will no more be accepted by the system and it will be either a do or die position. It seems that we are all in one race….But each one's direction and finishing line looks like being uniquely different.

Kudos to the Government of India for enactment of this law. The debt market and the credit culture of the citizenry is surely showing visible signs of improvement. Though the Code is not a recovery law but it is serving as a boon to operational creditors whose money had got stuck with the companies for whatever reasons. The Code is surely going to bring down the price of debt which will be biggest gift to the entrepreneurs of the Nation.

FROM THE DESK OF CA P.D. RUNGTA GENERAL SECRETARY - ACTIVITIES SINCE 01.09.2017

SL. No.	Date	Name of Programme	Speaker
1	05.09.2017	SCM on GST input Tax Credit & Trans 1	CA Jayesh Gupta
2	14.09.2017	SCM on "Tax Audit vis a vis ICDS" at DTPA Conference Hall	CA. Sanjay Bhattacharya
3	19.09.2017	SCM on "Current Trends in Assessment of Capital Gains" at DTPA Conference Hall	CA. Anand Tibrewal
4	22.09.2017	SCM on Reverse Charge Mechanism including GTA and Registration at DTPA Conference Hall	CA. Arun Agarwal
5	09.10.2017	Workshop on practical aspects of Filing GST Transition Forms & Impact of GST on Textiles and Trading Industry at DTPA Conference Hall	CA. P. D. Rungta & CA. Abhishek Tibrewal,
6	10.10.2017	Workshop on Practical aspects of filing GST Return Forms & Impact of GST on Services Industry at DTPA Conference Hall	CA. Subham Khaitan & CA. Gagan Kedia
7	13.10.2017	SCM on "Benami Transactions(Prohibition)"Amendment Act 2016 And Prevention of Money Laundering Act 2002 with Amendment Rules 2016, and Recent Developments & actions by Regulatory authorities And Remedial measures thereof with special emphasis on Striked off Companies and Restoration Procedures at BCCI	Adv. N. K. Poddar & CS. Vinod Kothari
8	22.10.2017	Fellowship Prog "Diwali Meet" organised jointly with EIRC ICAI at Williams Court, 40, Shakespeare Sarani, Kolkata	
9	11.11.2017	SCM on "Practical Issues on Striked off Companies Disqualification of Directors and Restoration Procedures" at Rotary Sadan	CS. Manoj Banthia
10	17.11.2017	SCM on Advisory opportunity for young professional under Insolvency & Bankruptcy Code(IBC) & Critical aspects of current case laws related Insolvency & Bankruptcy Code(IBC) at DTPA Conference Hall	CA. Sumit Binani & CA Subodh Agarwal
11	22.11.2017	Organised Diwali Gettogether jointly with EIRC ICAI at Williams Court, 40, Shakeseare Sarani, Kolkata	CA Subodh Agarwal
12	22.11.2017	Group Discussion Meeting on "GST On Real Estate" at DTPA Conference Hall	CA. Vikash Parakh
13	24.11.2017	SCM on "Accounting aspects under GST" at DTPA Conference Hall	CA. Subham Khaitan & Mr. Siddhartha Haldar & Team from Tally Software
14	29.11.2017	SCM on "Recent landmark Direct Tax decision and shell companies Practical and legal issues" at DTPA Conference Hall	CA. Paras Kochar & CA. Subash Agarwal
15	01.12.2017	SCM Group Discussion Meeting on "GST On JDA" at DTPA Conference Hall	CA. Gagan Kedia
16	06.12.2017	An Interactive Session With Sri K L Maheshwary Pr CCIT WB & Sikkim at DTPA Conference Hall	Sri K L Maheshwary Pr CCIT WB & Sikkim
17	06.12.2017	SCM on "Section 68-Penny Stock-Share Capital-Assessment and Reassessment" at DTPA conference Hall	CA. Anand Kr. Tibrewal
18	08.12.2017	SCM Seminar jointly with BCAS On Overview & Important Aspects in IndAS Implementation for Phase II Companies, ICDS Impact post Delhi HC Judgement & Penalty Provisions u/s 270A, Expert Chat on Latest Developments & Issues in GST at Rotary Sadan	CA. Abhay Mehta, CA. Bhadresh Doshi, CA. Naresh Sheth, CA. Samir Kapadia, CA. Jayesh Gupta
19	27.12.2017	SCM on Practical Issues & Recent Changes in GST Laws at DTPA Conference Hall	CA Sushil Goyal
20	11.1.2018	SCM on Stress Management & Transhumanism at DTPA Conference Hall	Ms Saroj Agarwal & Mr Ayush Poddar
Forthcoming Programme			
1	13.01.2018	Cricket Match with IRS Association at SambaranBanerjee Cricket Academy, Kolkata	
2	14.01.2018	Inter CA Study Circle Indoor Cricket Tournament at Space Circle Club, Kolkata	
3	19.01.2018	SCM on Updates & GST Council decision held on 18th Jan at DTPA Conference Hall	CA Abhishek Tibrewal & CA Subham Khetan
4	24.01.2018	SCM on Companies Amendment Act at DTPA Conference Hall	CA Sumit Binani & other eminent speaker
5	31.01.2018	SCM on Industrial Act viz. ESI, PF, Gratuity etc.and ICAI Code of Conduct & Ethics at DTPA Conference Hall	CA Ranjeet Agarwal & CA Vivek Agarwal
7	01.02.2018	Live Union Budget Telecast at DTPA Conference Hall	
8	02.02.2018	Seminar on Union Budget 2018 at Mahajati Sadan	ADV. N. K. Poddar & others
9	03.02.2018 to 06.02.2018	Residential Seminar at Shilong	

LIST OF NEW LIFE MEMBERS ADMITTED SINCE 01.09.2017

Sl. No.	NAME	PROPOSED BY	QUALIFICATION	E. MAIL ID
01	Ms. Vinita Kejriwal	Mr. Ramesh Kr. Chokhani	CA.	vinita@vinsanconsultants.com
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03	Mr. Aditya Nath Mishra	Mr. Pankaj Kr. Verma	CA.	caaditya22@gmail.com
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05	Mr. Jayesh Kr. Dholakia	Mr. Pankaj Kr. Verma	FCA	
06	Mr. Rishabh Jain	Mr. P. D. Rungta	CA.	rishabh1990@gmail.com
07	Mr. Ashok Kr. Sarkar	Mr. D. N. Agrawal	B.SC, CAIIB, LL.B	sarkarashokk13@gmail.com
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19	Mr. Niraj Raj Kr. Lahoti	Mr. Madav Lall Lahoti	B.Com, CS, C.A. DISA	cacsnirajlahoti@gmail.com

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